



**Kantai v Royal Media Services Limited (Civil Case E280 of 2021)
[2024] KEHC 1035 (KLR) (Civ) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE E280 OF 2021**

AN ONGERI, J

FEBRUARY 9, 2024

BETWEEN

JUSTICE SANKALE OLE KANTAI PLAINTIFF

AND

ROYAL MEDIA SERVICES LIMITED DEFENDANT

JUDGMENT

1. The plaintiff in this case sued the defendant in the plaint dated 10/11/2021 seeking the following remedies;
 - i. Unqualified apology with equal prominence aired on Citizen TV news bulleting at 7 p.m and 9p.m and uploaded on the defendant’s online media platforms.
 - ii. A permanent injunction restraining the defendant, its agents or servants or otherwise from broadcasting, printing, distributing or otherwise publishing any such libels of and concerning the plaintiff with regards to the alleged murder of Tob Cohen.
 - iii. General damages for defamation
 - iv. General damages for breach of the plaintiff’s right to privacy.
 - v. Aggravated and exemplary damages for defamation.
 - vi. Costs of and incidental to this suit and
 - vii. Interest on (iii), (iv) and (v) above at court rates until payment in full.



2. The plaintiff avers in the said plaint that on 27th September 2021, the defendant's Television Station known as Citizen TV aired the story of Tob Cohen in the 7.00pm and 9.00pm news on television and their online media platforms.
3. That in airing the story about Tob Cohen, Citizen TV made an analysis of a replying affidavit by John Gachomo, which the Directorate of Criminal Investigations filed in court in Nairobi Constitutional Petition No. E334 of 2021: Justice Sankale Ole Kantai versus Inspector General of Police and Directorate of Criminal Investigations.
4. Further, that in the course of airing the story, Citizen TV made a subjective analysis of the Affidavit of John Gachomo and portrayed the Plaintiff in bad light in the eyes of the members of the public by linking the Plaintiff to the-murder of Tob Cohen.
5. That in the course of airing the story, the TV station violated the Plaintiff's right to privacy by publishing his phone number on national television and all their online media platforms without the express consent of the Plaintiff. Consequently, the Defendant exposed the Plaintiff's number which led to unwanted calls and messages from members of the public who are unknown to the Plaintiff.
6. That on 28th September 2021, the Defendant through Citizen Tv repeated the story of Tob Cohen on television and all their online media platforms linking the Plaintiff to the murder of Tob Cohen.
7. That the Plaintiff is well known to members of the public as a reputable, competent Court of Appeal judge with integrity. Thus, the Defendant's action tarnished the reputable name the Plaintiff had created for himself until rising to the status of a Court of Appeal judge; which status is only acquired by persons Who have fulfilled values such as integrity enshrined in *the Constitution*.
8. Further, that as a result of exposing the Plaintiff's telephone number on live TV, the Plaintiff has received numerous unwanted calls and messages from unknown people from 27th September 2021 to date. As such, Citizen TV has immensely violated the Plaintiff's privacy rights and caused him enormous loss. In its ordinary and natural meaning and/or by innuendo the story published by Citizen TV denotes that:
 - a. The Plaintiff is a criminal and/ or has committed a criminal offence.
 - b. The Plaintiff was involved in planning the murder of Tob Cohen.
 - c. The plaintiff has used his public office to interfere and influence decisions in the justice system with regards to the murder of Tob Cohen.
 - d. The plaintiff is unqualified in his professional capacity.
 - e. The plaintiff is unethical, and unfit to hold public office as a judicial officer.
 - f. The plaintiff is unworthy of his standing in the society.
 - g. The plaintiff does not deserve to hold a public office.
9. The plaintiff further averred that the defendant further uploaded the story linking the plaintiff to the murder of Tob Cohen in their Youtube channel "Kenya Citizen TV" <<https://www.youtue.com/watch?v=A17vmzeL6CQ>> which has 2.91 million subscribers, 42,593 subscribers viewed the story and it received 166 comments.
10. That the comments demonstrate the negative impact the defendant's action has caused on the name, reputation and the career of the plaintiff by exposing him to public ridicule and insults as a person and his capacity as a judge.



11. That the story as published by the defendant, which overly highlighted the plaintiff in bad light, is false and surpassingly defamatory.

Particulars Of Defamation

- a. The defendant intentionally aired the story at 7 p.m and 9 p.m news bulleting to give maximum coverage and attract viewers.
 - b. The defendant without identifying the truth fabricated the said allegations.
 - c. The defendant failed to contact the plaintiff to confirm the veracity of the factual matters breaching the code of conduct for the practice of journalism. Normal journalistic practice of due diligence and professionalism by the defendant would have established that the said allegation were false.
 - d. The defendant made no attempt to either investigate the matter or facts but chose to rely on a replying affidavit by John Gachomo, which the Directorate of Criminal Investigations filed in court in Nairobi Constitutional Petition no. E334 of 2021: Justice Sankale Ole Kantai versus Inspector General of Police and Directorate of Criminal Investigations.
 - e. The Defendant never bothered to contact the Plaintiff for Comment before causing the publication and airing of the story.
 - f. The Defendant caused the airing of the story for malicious purposes.
 1. Further, that the name and the reputation of the Plaintiff will continue to be ruined by the Defendant if the court does not prohibit the Defendant from publishing, posting, commenting or broadcasting defamatory information against the Plaintiff.
 2. That since the airing of the story, the plaintiff said he has been asked by numerous people to explain the reason why Citizen TV aired the story. He has been forced to defend himself in professional and social standings against the published story that he participated in the murder of Tob Cohen.
14. That the timing and publishing of the story during prime time, its prominence as well as the allegations made concerning the Plaintiff indicate that the Defendant's TV station maliciously caused it to be published. The Plaintiff's sense of public responsibility, unmatched integrity and competence in public office have all been questioned.
15. The plaintiff also averred that the published story has also inflicted great damage to his reputation and has exposed him to public ridicule, odium, suspicion, opprobrium and contempt.
16. Further, that the said allegations against the Plaintiff are untrue and false meant to taint his name and reputation.
17. That the airing of the story intentionally imputes directly and/or indirectly on the conduct and intrinsic worth on the Plaintiff and has had the sole purpose of degrading the Plaintiff and lowering him in the eyes of the reasonable right-thinking members of th^e public. The import of the story has caused the Plaintiff's reputation to be disparaged both professionally and socially.
18. That due to the airing of the story, the Plaintiff has not only suffered humiliation, but has also endured degradation of his hard earned reputation, goodwill and stature in the eyes of the public which he had worked hard to earn for over 20 years that he has been in the public eye and enjoyed reputation until the airing of the story.



19. Further, that since the airing of the story, the Plaintiff has to contend with defending himself in professional and social standings against the allegation that he participated in the murder of Tob Cohen. The Plaintiff has therefore suffered considerable embarrassment amongst right thinking members of society, friends, family and colleagues.
20. Finally, that despite Demand for apology, the Defendant has declined and/or refused to pull down the upload on its YouTube channel "Kenya Citizen TV" or refrain from commenting on the story.
21. The defendant filed a defence on 23/11/2021 denying the plaintiff's claim. The defendant raised the defences of absolute privilege under Section 6 of the Defamation Act, public interest, justification and truth and also the Constitutional defence under Article 33 and 34 of the Constitution of Kenya on the freedom of expression and freedom of the media to import information to the public.
22. The plaintiff called four witnesses as follows; The plaintiff testified as PW 1, Goerge Gefwa (pw 2), Paul Nganga Mbugua (PW 3) and Victor Mule (PW 4).
23. PW 1, the plaintiff adopted his written statement dated 10/11/2021 as his evidence in chief. He also produced a list of documents and a supplementary list of documents.
24. He stated in his statement that on Monday, 27th September 2021, while he was watching the 7pm news on Citizen TV Station, the case of a tycoon who is deceased was aired. In airing the story, the Defendant published and analyzed a Replying Affidavit by one John Gachomo which the Director of Criminal Investigation filed in court in Nairobi Constitutional Petition No. E334 of 2021: Justice Sankale Ole Kantai Versus Inspector General of Police & Directorate of Criminal Investigations.
25. The plaintiff stated that he was utterly shocked when for 15 minutes, the Defendant made a subjective analysis of the Affidavit sworn by John Gachomo which the Directorate of Criminal Investigation filed in response to a case the plaintiff had filed seeking declaratory orders that that his rights under the Constitution had been infringed.
26. The plaintiff stated in the written statement that he was still stunned on the analysis the Defendant was making when he saw his telephone number being published conspicuously on the TV screen without even erasing some of the digits to protect his privacy.
27. Later on, the plaintiff said that he watched the 9p.m. bulletin where the same story together with the analysis was aired but in English version.
28. Thereafter, on Tuesday, 25th September 2021, the Defendant aired the same story in the 7pm news in Swahili and in the 9pm news bulletin in English.
29. The emphasis on this story for two consecutive days portrays the plaintiff in bad light to the members of the public as and he has been termed as a cold blood murderer.
30. Soon thereafter, the story was published in all online media platform tainting his name more. He said the story has inflicted great damage on his reputation as a Judicial Officer. He has also been exposed to public ridicule, odium, suspicion, opprobrium and contempt.
31. The effect of all that being that he has suffered damage, lost public respect and as a result suffered enormous loss.
32. He further said the story linking him to the murder of Tob Cohen has been uploaded by the Defendant on their YouTube channel "Kenya Citizen TV" which has 2.91 million subscribers. The story was viewed by 42, 593 viewers and received 166 comments. The comments demonstrate the negative



- impact the Defendant's action has caused on the name, reputation and the career of the Plaintiff by exposing him to public ridicule and insults as a person and in his capacity as a judge.
33. Consequently, the exposure of his personal telephone number on Citizen TV live coverage has disrupted his peace as he has received numerous unwarranted calls and text messages from unknown people from Monday 27th September 2021 to date.
 34. The plaintiff stated that before the Defendant published the said story, he enjoyed quiet peace without any disturbance on his phone from anonymous callers and texts.
 35. The plaintiff said he has since suffered considerable embarrassment amongst right thinking members of society, family, friends and colleagues.
 36. He said that it is uncomfortable for him to keep explaining and defending himself against something he did not do. He is a Judicial Officer and if the Defendant is not restrained from defaming him, the story will erode public confidence in him and the entire Judicial system without any justifiable reason.
 37. The plaintiff stated that the timing and publishing of the story during prime time, its prominence as well as allegations made concerning him indicate that the Defendant maliciously caused it to be published.
 38. As a consequence, the plaintiff has suffered considerable embarrassment amongst right thinking members of the society and his character put to question.
 39. In cross examination the plaintiff who testified as PW 1 stated that he watched the publication on 27/9/2021 at 7 p.m. and 9p.m. and also on 28/9/2021 both at 7 p.m and 9 p.m. on Citizen TV.
 40. He said the contents of the publications touched on the affidavit filed by JOHN GACHOMO in Constitutional Petition No. E334 of 2021 sworn on 20/9/2021 which was 7 days before the publication.
 41. In the said affidavit, Mr. Gachomo said he was one of the syndicated teams of detectives tasked with the investigation of the murder of Tob Cohen.
 42. He said Mr. Gachomo said in para 7 of the affidavit that he obtained orders to investigate the telephone numbers of the plaintiff.
 43. The plaintiff said he was summoned to the DCI on 21/2/2020.
 44. The plaintiff said his telephone number was aired by the defendant and that exposed him to calls from unknown people.
 45. The plaintiff said he was linked to the death of Tob Cohen in the channel which has 2.9m subscribers and he received 166 comments.
 46. The plaintiff said at the time of the publication, a letter dated 10/8/2021 had been filed stating there was no case against him and the file had been closed.
 47. The plaintiff further said he had known Serah Wairimu since 1991 and he considered her a friend. He said he proposed lawyers who would represent her.
 48. He said the defendant did not call him to get his side of the story before they published it. He said Mr. Gachomo retracted the affidavit which the defendant relied on to publish the story.



49. PW 2 George Jefwa said he is currently a teacher at the University of Nairobi (UON). He said he has known the plaintiff for over 20 years. He produced his witness statement dated 28/11/2022 as his evidence in chief.
50. PW 2 stated in the said witness statement that he is a Senior lecturer at Department of Kiswahili at the University of Nairobi and also a Director at Kenyan Sign Language Research Project.
51. He said that he met the Plaintiff over 20 years ago at the University of Nairobi and they have remained good friends since then and that they visit each other's homes.
52. He said that the Plaintiff had from time to time visited his homes at Nairobi and Kilifi and he also visited the plaintiff's homes in Nairobi and Kajiado.
53. PW2 said that on 27th September 2021, while watching Citizen Tv news at 7.00pm and the primetime news at 9.00pm, the defendant aired the story about the murder of Tob Cohen. In the course of airing the story, the defendant dissected the Replying Affidavit sworn by John Gachomo linking the Plaintiff to the aforementioned murder.
54. PW2 said the news portrayed the Plaintiff in bad light as a murderer. In addition, the Defendant maliciously published the Plaintiffs phone number in the course of airing the news with an intention of exposing him to harassment knowing well that he was a public figure.
55. PW2 said he has known the Plaintiff for a very long time as a decent man with a great strength of character.
56. He said that the news aired by Citizen Tv is extremely defamatory to the Plaintiff not only in his social sphere but also his professional standing.
57. PW 2 said the publication tarnished the plaintiff's reputation and made people to question his suitability as a Judge.
58. PW 3, Paul Nganga Mbugua said he has known the plaintiff since 1982 when he was waiting to join University.
59. PW 3 adopted his witness statement dated 28/11/2022 as his evidence in chief. He said in the said statement that he has known the Plaintiff since 1982 when they met as recruited teachers at Oloolopon Secondary School, presently known as Kimana Secondary School.
60. In 1983, PW3 joined the University of Nairobi with the plaintiff where he studied mechanical engineering whilst the Plaintiff enrolled at the faculty of law.
61. The Plaintiff and PW3 have remained close friends since 1982 and they visit each other's homes from time to time.
62. PW3 said that on 27th September 2021, he watched Citizen Tv news at 7.00pm and the primetime news at 9.00pm whereby they aired the story about the murder of Tob Cohen.
63. In the course of airing the story, Citizen TV dissected the Replying Affidavit sworn by John Gachomo linking the Plaintiff to the aforementioned murder with an intention of damaging the Plaintiffs reputation, portrayed him as a murderer and corrupt member of the judiciary.
64. In addition, the station maliciously published the passport and phone number of the Plaintiff on Tv knowing well that it would expose him to harassment, disturbance, insults and ridicule because he is a public figure.



65. Despite airing the news on tv, the defendant went ahead to publish the same allegations against the Plaintiff on their YouTube Channel which exposed the Plaintiff to public ridicule and all manner of insults on his character and professional standing.
66. He said that the news was defamatory to the Plaintiff whom PW3 has known for over 40 years as a man of great character and would not engage in any activities as portrayed of him by Citizen Tv.
67. He said the attack on the Plaintiffs character through the news aired by Citizen TV has not only damaged his reputation in his social spheres but also, the professional name he has created for himself overtime as a Court of Appeal judge.
68. PW3 further said that the news aired by Citizen Tv was so injurious to the Plaintiffs standing in the society to the extent that members of the public began to doubt his suitability to hold office as a Court of Appeal judge.
69. That what Citizen Tv did on the Plaintiff is unforgivable keeping in mind that reputation is the most important thing in a person's life.
70. PW3 also said that the news aired by Citizen Tv about the Plaintiff were for all intents and purposes malicious, derogative in nature with an intention to embarrass the Plaintiff in the eye of the members of the public and under his professional capacity as a judge of high standing in the Courts of justice.
71. PW 3 said he watched the publication on 27th and 28th September 2021 at 7 p.m and 9 p.m on Citizen T.V.
72. PW 3 said the plaintiff had been depicted as a bad person who had committed murder.
73. PW 4, Victor Mule who was the Acting Deputy Director of Public Prosecutions at the Office of the Director of Public Prosecutions(ODPP), produced his statement dated 10/8/2021 as his evidence in chief.
74. He said in the written statement that following the investigations done by the Director of Criminal Investigations on whether Justice Sankale Ole Kantai was involved in the murder of the late Tob Cohen, the inquiry file was forwarded to the Director of Public Prosecutions(DPP) to consider the evidence presented and make a determination on whether to charge Justice Sankale- the Plaintiff in this case with the murder of Tob Cohen.
75. PW4 said that upon consideration all the evidence collected and pursuant to the powers bestowed under Article 157(6) of *the Constitution* of Kenya, the Director of Public Prosecutions made the decision not to charge Justice Sankale for lack of sufficient evidence at the time and therefore advised that the inquiry file be closed.
76. He said that earlier on the Plaintiff through his advocates Manvonge Wanyama & Associates LLP had written a letter dated July 2021 to the DPP inquiring on the status of the investigation and whether a decision to charge him had been made.
77. PW4 said that he was then instructed by the Director of Public Prosecutions to inform Justice Sankale Ole Kantai of the decision not to charge him for lack of sufficient evidence.
78. Consequently, PW4 wrote the letter dated 10th August 2021 in response to the plaintiff's letter relating the decision of the Director of Public Prosecutions not to charge him for lack of sufficient evidence at that time.



79. PW 4 confirmed he wrote a letter dated 10/8/2021 in which he communicated the findings of investigations against the plaintiff.
80. PW 4 said he was not aware of the petition no. E334 of 2021. He said there is no criminal case pending in court in relation with the murder of Tob Cohen.
81. The defendant called one witness, DW 1 Nimrod Taabu who is a journalist with the defendant. DW 1 adopted his witness statement dated 24/11/2021 as his evidence in chief.
82. DW1 stated in the said statement that he has the authority of the defendant to make the statement and he also adopted the contents of his replying affidavit sworn herein on 24th November, 2021.
83. DW1 said that he is a journalist by profession and a holder of Diploma in Mass Communication from Job Institute of Management.
84. He said he has practiced journalism since 2002 and he has worked for the defendant for three years. His main duties were gathering information to be published by the defendant on its platforms to the general public.
85. DW1 said that he is conversant with the facts and the story in this suit and that it is true that the alleged broadcasts were made, and that the stories were factual/privileged as they were contained in the plaintiff's own words and the pleadings filed in court.
86. He said that the publications were true/privileged and that they were of public concern and they did not aim at defaming the plaintiff.
87. DW1 said that the alleged publications related to an affidavit filed in Nairobi Constitutional and High Court Division, Petition No. E334 of 2021 Justice Sankale Ole Kantai –v- Inspector General of the National Police Service and Anor. by one, Mr. John Gachomo, Senior Assistant Inspector General of Police and the Director Investigations Bureau, sworn on 20th September, 2021.
88. He said that it is clear from the pleadings above, their contents and the alleged publications as stated in the plaint, are identical.
89. As is clear from the above, the contents of that alleged publication were entirely based on the pleadings filed in the said Nairobi Constitutional and High Court Division, Petition No. E334 of 2021: Justice Sankale Ole Kantai –v- Inspector General of the National Police Service and Anor. At the time of the alleged publications, that suit was pending before the Constitutional and Human Rights Division.
90. DW1 said that he conducted his duties competently and ensured that he captured information to be imparted very accurately. He confirmed that he did indeed look at the said pleadings to confirm their authenticity and accuracy.
91. DW1 also said that the plaintiff was not defamed as he has claimed and that the plaintiff is not entitled to the prayers sought in his plaint.
92. In cross examination DW 1 said the story of the murder of Tob Cohen was aired for about 7 minutes.
93. DW 1 admitted he aired the story relying on the affidavit of Mr. John Gachomo dated 20/9/2021. DW 1 said he consulted the editor before running the story.
94. DW 1 said since the story was contained in an affidavit and that he did not find it necessary to contact the plaintiff.



95. DW 1 said that since the document had been filed in court, he did not find it necessary to inquire from the plaintiff about the allegations.
96. DW 1 further said in cross examination that the affidavit was given to him both in soft copy and hard copy from the editor. He said Yussuf Ali who was the editor gave him the story to run.
97. DW 1 said the affidavit which recorded the affidavits dated 20th and 20th September were not given to him.
98. The parties filed written submissions as follows; the plaintiff submitted that reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation.
99. In deciding cases of defamation, the plaintiff submitted that the Court of Appeal observed in *Wycliffe A. Swanya v Toyota East Africa Ltd & another* [2009] eKLR that:
- “For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-
- “(i) That the matter of which the plaintiff complains is defamatory in character.
- (ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- (iii) That it was published maliciously.”
100. The plaintiff submitted that during the hearing it was demonstrated vide evidence that the publication was false and defamatory because the allegations in the published story were deemed not factual. The director of public prosecution further wrote a letter dated 10/8/2021 where he noted there was no sufficient evidence to charge the plaintiff with the murder of Tob Cohen.
101. The story linking the Plaintiff to the murder of Tob Cohen was published by the Defendant on Citizen TV during the 7p.m and 9 p.m news on 27/9/2021. This story was also aired on 28/9/2021. The publication mentioned the Plaintiff by name and the position he holds as a Judge of the Court of Appeal which identified him throughout the news briefing.
102. Further, that the published story was deemed not factual by the deponent of the affidavit later on through another affidavit sworn on 10th March 2022. That notwithstanding, the Director of Public Prosecutions had written a letter dated 10th August 2021 where he noted there was no sufficient evidence to charge the Plaintiff with murder of Tob Cohen.
103. The Plaintiff called two of his friends who have known him for many years that watched the story of the murder of Tob Cohen on the 7pm and 9pm news where the Plaintiff's name was adversely mentioned. PW2 and PW3 corroborated the Plaintiff's testimony. They told the court they were shocked by the news, and they even called the Plaintiff to ask what was going on. There is therefore no doubt that his standing in society was lowered by the publishing of the story by the Defendant.
104. The plaintiff submitted that the allegations against the Plaintiff were egregious and airing a story of such magnitude linking the Plaintiff to the death of Tob Cohen required strict verification of the facts. By not inquiring into the truth of the facts of the case and ascertaining the veracity of the contents of the replying affidavit before publishing the story on prime news which was watched by a large national



- and international audience considering that the story was also posted on their social media platforms-YouTube, Facebook and X platforms, the Defendants acted with malice.
105. The guiding principle of accuracy and fairness as provided in the Code of Conduct for the Practice of Journalism in Kenya in the second schedule of the *Media Council Act*, 2013 under Section 1(2) states that all sides of the story shall be reported wherever possible. Further Section 1(3) of the Code states that comments shall be sought from anyone who is mentioned in an unfavorable context and evidence of such attempts to seek the comments shall be kept.
 106. Despite all these developments, the Defendant did not offer a qualified apology to the Plaintiff or publish a similar story of the same magnitude to clarify the facts. Indeed, the plaintiff submitted that the Defendant hurriedly and recklessly published this story on prime news at 7p.m and 9p.m to get a wide viewership and even huge commercial gain without any due care to the reputational damage that it caused the Plaintiff.
 107. On the defence of absolute privilege, truth and public interest the plaintiff argued that the said privilege was developed after the House of Lords decision in Reynolds v Times Newspapers Limited which introduced the duty interest test in publication of matters of public concern. In the case of Chirau Ali Makwere v Nation Media Group Ltd & Another [2009] eKLR, the court defined qualified privilege as: “An occasion is privileged where the person who makes a communication has interest or a duty, legal, social or moral to make it to the person to whom it was made and the person to whom it is so made had a corresponding interest to receive it”.
 108. That in Charles Katiambo Musungu v Dorine Lusweti [2021] eKLR, Justice Riechi in the High Court at Bungoma opined that:

“for a statement of qualified privilege to be available the defendant must show that the statement was made (a) in good faith and (b) without any improper motive. Where the Plaintiff establishes that the Defendant acted in bad faith and was given improper motives then the defence of qualified privilege would have been demolished.”
 109. It was thus the plaintiff’s contention that the Defendant did not bother contacting the Plaintiff to get his side of the story knowing too well the seriousness of the allegations in the story they published, and this shows the Defendant’s improper motive and lack of good faith.
 110. The Defendant’s action of airing a story linking the Plaintiff to the death of Tob Cohen, and targeting him, a distinguished Court of Appeal judge, during prime time broadcasting caused substantial and irreparable harm to the Plaintiff’s character and professional standing. In light of the above the plaintiff proposed general damages of Kshs. 50,000,000, Exemplary damages of Kshs. 10,000,000 and aggravated damages of Kshs. 10,000,000.
 111. The defendant alternatively submitted that the aforementioned publications were in relation an affidavit by Mr John Gachomo sworn on 20/9/2021. The merits of the case were not discussed by the defendant and if that were the case the plaintiff was at liberty to file a contempt of court application and make his allegations but he did not do so. The defendant further argued that there was no particular portion which the plaintiff pointed out a discussion containing the merits of the pending petition. The irresistible inference that can be drawn from this failure is that there was no discussion of the said case.
 112. The defendant submitted that the alleged publication complained of touched on serious issues touching on the death of a prominent business man Tob Cohen. Both local and international media reported on the same. thus, the issues reported on the alleged publication were of immense public



interest and importance. The DCI investigated the matter and filed its very detailed affidavit of Mr. John Gachomo which included its annexures.

113. It was the defendant's argument that the law is that it is defence to defamation/libel for the defendant to show that the publication is substantially true. It is the imputation contained in the words which has to be justified and not the literal truth of the words nor some other similar charge not contained in the words. There was no malice when the contents of the broadcast complained against are true. At trial the defendant demonstrated the same.
114. On the injunction sought the defendant submitted that it was too broad to be granted. If granted it would be a complete impairment of the defendant's freedom of expression.
115. On damages the defendant indicated that it has demonstrated that it not liable in defamation and hence the plaintiff is entitled to nil damages. That since the plaintiff did not offer any evidence of damages, were his case to succeed, he is entitled to only a small amount or nominal damages. However, in the event that the court finds in the alternative the defendant proposed Kshs. 1,000,000 as general damages.
116. As far as aggravated and exemplary damages are concerned the defendant submitted that the plaintiff is not entitled to the same.
117. I have carefully considered the evidence adduced in this case together with the rival submissions by the parties.
118. It is the duty of the plaintiff to prove his case to the required standard in Civil Cases which on a balance of probabilities.
119. The issues for determination in this case are as follows;
 - i. Whether the publication by the defendant was defamatory against the plaintiff.
 - ii. Whether the defendant admitted publishing the material.
 - iii. Whether the defendant has a valid defence against the plaintiff's claim.
 - iv. Whether the plaintiff is entitled to the remedies he is seeking.
120. On the issue as to whether the publication by the defendant against the plaintiff was defamatory, the following elements of defamation must exist;
 - (a) That the statement was defamatory.
 - (b) That the statement referred to the plaintiff.
 - (c) That the statement was published by the defendants and,
 - (d) That the statement was false.
121. There is evidence that is not disputed that the publications were aired on 27th and 28th September 2021 on National T.V which linked the plaintiff to the murder of Tob Cohen.
122. The story was aired for 7 minutes at 7 p.m and 7 minutes at 9 p.m and it was also published in the defendant's YouTube channel watched by millions of people locally and internationally.
123. The defendant admitted having published the material and stated that they relied on an affidavit sworn by one John Gachomo dated 20/9/2021 filed in Nairobi Constitutional Petition no. E334 of 2021.
124. Having admitted publishing the material this court must consider whether the defendant has a valid defence against the plaintiff's case.



125. Section 6 of the *Defamation Act* provides as follows;
- “A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged; provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter.”
126. The defendant called the journalist who did the publication and he testified as DW1. He admitted having published the material and he maintained that the publications were true/privileged and that they were of public concern and they did not aim at defaming the plaintiff.
127. DW1 said that the alleged publications related to an affidavit filed in Nairobi Constitutional and High Court Division, Petition No. E334 of 2021 Justice Sankale Ole Kantai –v- Inspector General of the National Police Service and Anor. by one, Mr. John Gachomo, Senior Assistant Inspector General of Police and the Director Investigations Bureau, sworn on 20th September, 2021.
128. There is evidence that the said affidavit which was filed in Petition no. E334 of 2021 was sworn after PW 4, Victor Mule had written a letter dated 10/8/2021 stating that the plaintiff had been cleared of any criminal charges in connection with the murder of Tob Cohen.
129. In Gatley on Libel and Slander 9th Ed pg 319 para 13.44, it is stated that;
- “Privilege will, of course attach to the publication in a newspaper of a document read out in open court and filed as an exhibit in an action or to a fair and accurate statement of the contents of such document, but privilege will not attach to the publication in a newspaper of the contents of pleadings, affidavits, or other papers filed in civil proceedings and not brought up in open court.” (emphasis added)
130. I find that the affidavit relied on was contained in pleadings filed in Nairobi Constitutional NO. Petition No. E334 of 2021 and the same was not brought up in open court.
131. The affidavit sworn by one John Gachomo dated 20/9/2021 came after PW4 did a letter dated 10/8/2021 clearing the plaintiff of any wrong doing.
132. PW4 who was the Acting Deputy Director of Public Prosecutions at the Office of the Director of Public Prosecutions, said that following the investigations done by the Director of Criminal Investigations on whether Justice Sankale Ole Kantai was involved in the murder of the late Tob Cohen, the inquiry file was forwarded to the Director of Public Prosecutions to consider the evidence presented and to make a determination whether to charge the Plaintiff in this case with the murder of Tob Cohen.
133. PW4 said that upon consideration of the all the evidence collected and pursuant to the powers bestowed under Article 157(6) of *the Constitution* of Kenya, the Director of Public Prosecutions made the decision not to charge Justice Sankale for lack of sufficient evidence at the time and therefore advised that the inquiry file be closed.
134. PW 4 confirmed he wrote the letter dated 10/8/2021 in which he communicated the findings of investigations against the plaintiff.
135. I find that the defendant has no valid defence against the plaintiff’s claim since it is not true that the publications were true/privileged and that they were of public concern.
136. The fact that the plaintiff had been cleared has not been denied.



137. The defendant's publication of the plaintiff's telephone number violated his right to privacy and the same smacks malice.
138. In the circumstances, I find that the publications against the plaintiff were defamatory and were made recklessly without the defendant finding out the plaintiff's side of the story.
139. In Halsbury's Law of England 3rd edition at page 19 it is stated as follows;
- “A statement is defamatory of a person of whom it is published, if broadly speaking, it is calculated to lower him in the estimation of right thinking members of the community or to cause him to be shunned or avoided or expose him to hatred, contempt or ridicule; or to disparage him in his office, profession or calling...It is enough that it tends to hold him up to contempt or ridicule.”
140. I find that the publication was actuated by malice and it exposed the plaintiff to ridicule and the publication of his telephone number exposed the plaintiff to unwarranted attacks by members of the public.
141. There is evidence that the plaintiff received insulting messages after his telephone number was published by the defendant.
142. The fact that DW1 published the plaintiff's telephone number but he did not attempt to use it to reach out to the plaintiff to find out his side of the story is evidence that the publication was actuated by malice.
143. In the case of Phiness Nyaga Vs. Gitobu Imanyara [2013 eKLR] Odunga J (as he then was), said as follows;
- “Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice..... malice may also be inferred from the relations between parties. The failure to inquire into the facts is a fact from which malice, may be properly be drawn.”
144. I find that DW1 violated the guiding principle of accuracy and fairness as provided in the Code of Conduct for the Practice of Journalism in Kenya in the second schedule of the [Media Council Act, 2013](#) under Section 1(2) which states that all sides of the story shall be reported wherever possible.
145. Further Section 1(3) of the Code states that comments shall be sought from anyone who is mentioned in an unfavorable context and evidence of such attempts to seek the comments shall be kept.
146. The defendant did not make any attempt to find out the plaintiff's side of the story before purporting to exercise its right of freedom of expression and freedom of the media to import information to the public.
147. The plaintiff called PW2 and PW3 who said that they watched the news aired by Citizen Tv and they found it extremely defamatory to the Plaintiff not only in his social sphere but also his professional standing.
148. The material aired by the defendant was false in view of the letter dated 10/8/2021 which cleared the plaintiff of any wrong doing.



149. I find that the plaintiff has proved that the statement was defamatory, that it referred to him and that it was published by the defendant and the same was false since the plaintiff had been cleared by the Director of Public Prosecutions at the time of the publication.
150. The defendant admitted that they published the material and raised the defences of absolute privilege under Section 6 of the *Defamation Act*, public interest, justification and truth and also the Constitutional defence under Article 33 and 34 of *the Constitution* of Kenya on the freedom of expression and freedom of the media to import information to the public.
151. I find that the defendant did not prove that they have a valid defence against the plaintiff's claim.
152. In the case of *Fraser v Evans* [1969] I Q B. 349 the court stated as follows;
- “The right of speech is one which it is for the public interest that individuals should possess and indeed, that they should exercise without impediment. So long as no wrongful act is done. There is no wrong done if it is true or it is fair comment on a matter of public interest.”
153. The defendant did not bother to contact the plaintiff to know his side of the story and there is evidence that what they published was defamatory and was done to disparage the plaintiff and does not qualify as a fair comment on a matter of public interest.
154. I find that the plaintiff has proved his case against the defendant to the required standard in civil cases.
155. On the issue as to whether the plaintiff is entitled to the remedies he is seeking I find it in the affirmative.
156. The plaintiff is seeking the following remedies;
- i. Unqualified apology with equal prominence aired on Citizen TV news bulleting at 7 p.m and 9p.m and uploaded on the defendant's online media platforms.
 - ii. A permanent injunction restraining the defendant, its agents or servants or otherwise from broadcasting, printing, distributing or otherwise publishing any such libels of and concerning the plaintiff with regards to the alleged murder of Tob Cohen.
 - iii. General damages for defamation
 - iv. General damages for breach of the plaintiff's right to privacy.
 - v. Aggravated and exemplary damages for defamation.
 - vi. Costs of and incidental to this suit and
 - vii. Interest on (iii), (iv) and (v) above at court rates until payment in full.
157. The plaintiff is awarded damages as follows;
- i. The defendant be and is hereby ordered to give an unqualified apology with equal prominence aired on Citizen TV news bulleting at 7 p.m and 9p.m and uploaded on the defendant's online media platforms within 30 days of this date.
 - ii. A permanent injunction be and is hereby issued restraining the defendant, its agents or servants or otherwise from broadcasting, printing, distributing or otherwise publishing any such libels of and concerning the plaintiff with regards to the alleged murder of Tob Cohen.
 - iii. The defendant to pay the plaintiff General damages of Kshs 8,000,000 for defamation.



- iv. The defendant to pay the plaintiff further General damages of Kshs. 2,000,000 for breach of the plaintiff's right to privacy.
 - v. The plaintiff is also awarded Costs of the suit and interest at court rates from the date of this judgment until payment in full.
158. In respect of Aggravated and exemplary damages for defamation, I find that the same are not payable as the general damages awarded are sufficient.
159. In the case of *Obonyo & Another v Municipal Council of Kisumu* [1971] EA 91 the court held that that;
- “...exemplary damages are appropriate in two classes of case: oppressive, arbitrary and unconstitutional action by the servants of government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, and these classes should not be extended”.
160. I agree with the finding of the court in the case of *Obonyo & Another v Municipal Council of Kisumu* (supra) that the two classes should not be extended. This case does not fall within the two classes stated in that case.
161. Judgment be and is hereby entered in favor of the plaintiff against the defendant in the sum of Kshs. 10,000,000 plus costs of the suit and interest at court rates from the date of this judgment until payment in full.

Orders to issue accordingly.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

