Ogola v Nation Media Group Limited & another (Civil Suit 96 of 2019) [2024] KEHC 16922 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 16922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 96 OF 2019

F WANGARI, J

FEBRUARY 7, 2024

BETWEEN

ERIC KENNEDY OKUMU OGOLA ..... PLAINTIFF

AND

NATION MEDIA GROUP LIMITED ..... 1ST DEFENDANT

PHILIP MUYANGA ..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit by way of the Plaint dated 17th December 2019 and Amended on 16th August 2021, seeking the following reliefs against the Defendants:
   i. General Damages for Libel
   ii. Aggravated or Exemplary Damages for Libel.
   iii. An Order for an unequivocal retraction of the story and apology to the Plaintiff with equivalent publicity.
   iv. Interest at court rates
   v. Costs of the suit
2. The Plaintiff averred that on 1st February 2019, in an article entitled Court lets Trader sell 10M Kilos of Kebs-barred rice authored by the 2nd Defendant. The 1st and 2nd Defendants falsely and maliciously printed and published or caused to be printed and published, an article captioned in the Plaintiff's photograph and accompanied by the following words:

   COURT LETS TRADER SELL 10M KILOS OF KEBS-BARRED RICE

   Tax payers will also have to pay importer Sh. 15M compensation for commodity's detention.

By Philip Muyanga

Kenyans might have to consume 10 million kilos of rice the Kenya Bureau of Standards (Kebs) had condemned for destruction after a Mombasa Court ordered that the consignment be released.

The tax payers will also have to pay the importer sh. 15 million in general damages for Kebs unlawful and illegal detention of the 10,327 tonnes of rice.

Delivering the Ruling, Mombasa High Court Judge Eric Ogola also directed Phoenix Global Kenya Ltd's rice valued at more than Sh. 250 million and which is being held at a warehouse in Mombasa by a multi-agency team to be released immediately.

...

The rice was part of part of the consignments of sugar and rice netted out as part of the ongoing crackdown on corruption, and which has recently put the judiciary on the spot.

...

Kebs failed to recognize the results of the verification of the rice from its on contacted agents. It has not sacked or complained of these agents...but while he said Kebs had not behaved professionally, he also allowed the rice to be released for sale.

3. The Plaintiff averred that the contents of the article elicited negative comments about the Plaintiff from the general public and was widely circulated through films and videos on social media and other platforms.

4. It was further averred that subsequently on 4th February 2019, the 1st Defendant through an article authored by one Brian Ocharo in perpetrating the malicious intention to cause libel reported (informing Kenyans) about how the world had reacted to their false and malicious report of 1st February 2019 as follows:

" Kenyans criticize Order on condemned rice" by Brian Ocharo

The Judiciary has yet again come under sharp criticism after the High Court in Mombasa last week ordered the release of 10 Million Kilogrammes of imported rice the Kenya Bureau of Standards (Kebs) had condemned for destruction.

Justice Eric Ogola ordered the release of 10,327 tonnes of rice valued for more than Sh. 250 Million which is being held at a warehouse in Mombasa by a multi-agency team.

The Judge's Order for the release if rice to Phoenix Global Kenya Ltd means that the commodity can be distributed for sale despite the quality issues the multi-agency team raised.

And Kenyans have taken to the social media to criticize the decision accusing the Judiciary of issuing Orders that could see the public consume bad rice detrimental to their health.

The social media users accused the court of disregarding findings of a government agency charged with ensuring quality and termed the Judiciary as the enemy within in the war on graft.

In a tweet, Dr. Auma Obama, sister of former US President Barack Obama, appeared not to believe that the court ordered the release of goods not fit for human consumption despite protests from Kebs.

> "If you are a Kenyan and even if you are not, please spread the word. Is it possible that a judge can defeat justice? Hopefully fake news". She posted on her tweeter account.
>
> MulaGeoffrey@mula_geoffrey said, "May be he (Judge) meant to be sold for nonhuman consumption purposes such as fodder, manure and energy production", in a reply to Dr. Obama.
>
> Mr. Gerald Wambua, another neitizen said in tweet, " Kebs, KRA, Directorate if Criminal Investigations, AG, and the Anti-Counterfeit Agency should have just destroyed the rice after failing to meet the required standards."

5. It was the Plaintiff's averment that the above words portrayed the Plaintiff as Judge to have allowed the release of condemned rice to the public and so had no regard for the life and safety of millions of the Kenyans who would consume the bad rice.

6. Further, that the Plaintiff would be perceived to be, among others, part of the members of the Judiciary who were corrupt or frustrated the government's effort to fight corruption, lacked morals and ethics and was unprofessional and unbefitting for the office of a Judge.

7. It was pleaded that the High Court Constitutional Petition No. 205 of 2018, Phoenix Global Kenya Limited v Kenya Revenue Authority & Others was filed and came up before the Plaintiff for determination, where the issue in contention and for determination was the grading parameters involving broken rice and not whether the rice was contraband, poisonous and/or harmful for human consumption. Therefore, the Defendants' publication was malicious and out of the context.

8. The Defendants filed their joint statement of Defence dated 5th February 2020 on the same date. They admitted to publishing the article but denied other averments by the Plaintiff. They averred that the words were a fair comment on the issues relating to Court proceedings.

9. Is was further pleaded that the words were published in public interest under public duty and without malice, in honest believe that the information was true. It was averred that the information was published on a privileged occasion and so was protected by absolute privilege.

Evidence

10. At the hearing, the Plaintiff relied on his statement dated 17th December 2019. The Plaintiff relied on the documents in his Bundle of Documents dated 20th March 2023 which were produced therein as exhibits.

11. It was his case that he was the Presiding Judge of the Mombasa High Court with duties including supervising Kwale, Voi, and Taita Taveta Law Courts and was now the Principal Judge of the High Kenya of Kenya.

12. The Plaintiff testifies that in the court proceedings subject to the published articles, there was no single word on what the Defendants described as substandard or poisonous rice and it was never an issue even in the Court of Appeal.

13. It was his case that the publication had widespread circulation reaching millions of people. One Dr. Auma Obama in her tweet, confirmed that the article had both national and international circulation. The witness testified that the publication was intended to damage his reputation and image as a High Court Judge, by portraying him to have ordered the release of rice that was unfit for human consumption.

14. Further, that there was a statement in the video which was clear that as Judge, he had authorized poisonous rice to be sold to Kenyans hence the purpose of the video was to tarnish his reputation. The witness proceeded that the issue in contention was on the grading parameters involving broken rice and not whether the rice was contraband, poisonous and/or harmful for human consumption.

15. Further, that on the clip produced, it was stated how mercury causes diseases. The witness also testified that the publication was followed up by another publication and cannot be said to be a fair comment. It destroyed his reputation as a family leader, church elder and so on.

16. On cross examination, it was his case that the multi-agency had recommended that the rice be destroyed but the article stated that he ordered release of poisonous rice and the information was circulated as seen in the tweets to the effect that his as Judge had released poisonous rice.

17. The witness also confirmed that he had not sued anybody due to publications in the tweeter and could not tell if the publication was tampered with. He also confirmed that the 2nd Defendant followed the impugned proceedings of the court and ought to have sought clarification before publishing untrue story.

18. On their part the Defendants closed their case without calling any witness.

Submission

19. Plaintiff filed submissions dated 23rd August 2023. Counsel submitted that words in the two publications referred to the Plaintiff and were defamatory. It was thus submitted in this regard that the words were libellous as supported the reactions from the social media.

20. Reliance was placed on the cases of Berkoff v Burchill (1996) 4 ALL ER 1008 to buttress the point that the libel action is determined by the reaction of the ordinary reader and not by the intention of the publisher and the words were capable of lowering the estimation of the Plaintiff as Judge.

21. Further, the Plaintiff submitted that the Defendants had not proven their defence of justification. It was also submitted in this regard that the words were untrue representation of the Judgement and created sensation among the general members of the public.

22. On privilege and malice, counsel submitted that absolute privilege as defence was not available for the Defendants. Reliance was placed on Section 6 of the *Defamation Act* that this defence was not available for blasphemous, seditious and indecent matters.

23. Similarly, it was submitted on behalf of the Plaintiff that the defence of qualified privilege was equally not available for the Defendants as their publication was malicious, in bad faith and without proper motive. Counsel relied on the case of Phinehas Nyaga v Gitobu Imanyara (2013) eKLR.

24. The Plaintiff also submitted that the Defendants would not seek protection under Article 33 of *the Constitution* because the same limited the enjoyment of free media subject to rights and reputation of others. Counsel also cited National Media Group Ltd v George Nthenge (2017) eKLR to assert the point that a good name is all that a person has.

25. It was also submitted that the publication could not be said to be a fair comment on a matter of general public interest due to malice on the part of the Defendants. Counsel relied on the case of National Media Group v Alfred Mutua (2017) eKLR to buttress the submission that the publication had no basis as to amount to a fair comment.

26. Finally, it was submitted for the Plaintiff that the viral video was accompanied by a certificate of electronic evidence as required under Section 106B (4) of the *Evidence Act*.

27. On reliefs, it was submitted that the gravity of the libel was the utmost consideration. Counsel relied on the case of John v MGM Ltd 91977) Q.B 586 to submit that the more closely the publication touched the Plaintiff's integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality and the reach of the publication we considerations for the award of damages.

28. It was also submitted that an award of Kshs. 10,000,000 would be adequate to the Plaintiff then as Presiding Judge at Mombasa Law Courts. Reliance was placed on three cases thus: National Media Group Limited v George Nthenge (supra), The Nairobi Star Publication Ltd v Elizabeth Atieno Oyoo, Civil Appeal No. 52 of 2017 and Eric Gor Sungu v George Oraro Odinga (2014) eKLR. In all the cited cases, the court awarded Kshs. 5,000,000 in general damages.

29. On the part of the Defendants, they filed submissions dated 19th September 2023. Counsel submitted that the publication did not meet the threshold for defamation as there was no malice. Reliance was placed on the case of Wycliffe A. Swanya -vs- Toyota East Africa Ltd & Another civil Appeal 70 of 2008 [2009] the Court stated as follows:

> " 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
>
> (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage.

30. It was submitted for the Defendants that the publication arose from court proceedings and the articles constituted fair and accurate news report published in good faith about the quality of the rice and without intent to damage the Plaintiff's reputation.

31. The Defendants also relied on the reasoning of Kuloba. J (as he was then) in Kudwoli & Another v Eureka Educational and Training Consultants & 2 others [1993] eKLR to submit that a reasonable man would not understand the publication to be defamatory.

32. Further, it was submitted that the words in their ordinary meaning or by way of innuendo were not meant to tarnish the reputation of the Plaintiff. Counsel submitted and referred to the impugned Judgement that it was not in dispute that Kenya Bureau of Standards had through its affidavit filed in court claimed that the rice was unfit for human consumption and should be destroyed.

33. Counsel relied on the *Defamation Act* to canvas the submission that the publication was subject to qualified privilege as it pertained reporting before a court exercising jurisdiction and without malice.

34. Further, it was submitted that comments from the public do not lead evidence that a publication is defamatory but rather proves that a matter is of public interest and the Plaintiff must prove knowledge of special circumstances by the readers which the Plaintiff failed. Reliance was placed on the case of Nation Newspapers Limited vs Lydia Chesire [1984] eKLR.

35. Counsel also submitted that the publication was a fair comment on a matter in the interest of the public and was without malice. A number of authorities including Makone –vs- Kahos & Another [2004] eKLR and K L –vs- Standard Limited [2014] eKLR were cited to anchor this argument.

36. It was also submitted that the Plaintiff had not proved defamation since he never called a witness to corroborate his testimony. Counsel relied inter alia on the case of Daniel N. Ngunia vs K.G.G.C.U. Limited [2000] eKLR.

37. On the damages, the Defendants submitted that damages be denied as defamation was not proved. Conversely, that if inclined, the Defendants relied on the case of Jacob Kipngetich Katonon –vs- Nation Media Group Limited (2017) eKLR where the court held that Kshs 200,000 as general damages is sufficient for a defamation claim and further on the case of Kennedy Bitange Mageto & 4 other – vs- Macloud Malonza & another (2011) eKLR where the court equally found Kshs. 200,000 to be sufficient as general damages. It was submitted that Kshs. 200,000 would be adequate compensation for the Plaintiff.

Analysis

38. I have considered the pleadings and evidence as well as the submissions and authorities in support and opposition of the respective cases.

39. The issue before me for determination is whether the impugned publication by the Defendants, in the circumstances of this case, was defamatory as to entitle the Plaintiff to the reliefs sought.

40. To this court, the fundamental rationale of the protection against defamation is of constitutional and human rights imperative. I therefore inevitably proceeded with a rider to balance the provisions of Articles 33, 34 and 35 of *the Constitution*. The said provisions respectively deal with the fundamental right to the freedoms of expression, media and access to information. Consideration also is to be inevitably granted to Article 28 in respect of the inherent dignity of every person which dignity must be respected and protected.

41. The freedom of the media is guaranteed by Article 34 of *the Constitution* as follows;

> " Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2)."

42. Consequently, under Article 33(2)&33(3) of *the Constitution*, every person has the right to freedom of expression which does not extend to, among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred that- constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4) and that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

43. On the right to access information and the freedom of expression, Lord Denning MR stated in Fraser v Evans &others (1969) All ER 6:

> " There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be whistled away."
>
> Lord Coleridge, CJ in Bernard & another v Perriman (1891-4) ALL E.R 965had previously stated that:

"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; and unless an alleged libel is untrue there is no wrong committed."

44. What then is defamation? As succinctly put by this Court in S M W vs. Z W M [2015] eKLR: -

> " A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."

45. Similarly, Windeyer J. In Uren John Fair Fax & Sons Pty Ltd 117 CLC 115 at 115 stated.

> " Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tend to make them shun or avoid that person."

46. On the other hand, Halsbury's Laws of England defines a defamatory statement as:

> " A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

47. It was held in the case of John Patrick Machira Vs Wangethi Mwangi & Another Nairobi HCCC No. 1709 of 1996 that: -

> " A defamatory publication is the publication of a statement about a person that tends to lower his reputation in the opinion of right thinking members of the community or to make them shun or avoid him"

48. It follows that the common thread in the definition for a defamatory statement or utterance is one that if published tends to lower the estimation of the person it refers to in the opinion of the right-thinking members of the community and may cause them to shun the person away.

49. I note from the Amended Plaint that the Plaintiff alleged and particularized the words pleaded to constitute defamation. Under Order 2 Rule 7 of the Civil Procedure Rules, particulars in defamation actions are to be laid as follows:

> 1. Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

50. The court's duty is to establish whether the Plaintiff has proved his case on a balance of probabilities within the meaning of Section 107 of the *Evidence Act* as read with Order 2 Rule 7 (1) of the Civil Procedure Rules.

51. In the case of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party

the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

52. Further, in Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

53. Consequently, the words leading to the controversy in this case were stated as follows:

> 1st February 2019
>
> Court Lets Trader Sell 10m Kilos Of Kebs-barred Rice
>
> Tax payers will also have to pay importer Sh. 15M compensation for commodity's detention.
>
> By Philip Muyanga
>
> Kenyans might have to consume 10 million kilos of rice the Kenya Bureau of Standards (Kebs) had condemned for destruction after a Mombasa Court ordered that the consignment be released.
>
> The tax payers will also have to pay the importer Ksh. 15 million in general damages for Kebs unlawful and illegal detention of the 10,327 tonnes of rice.
>
> Delivering the Ruling, Mombasa High Court Judge Eric Ogola also directed Phoenix Global Kenya Ltd's rice valued at more than Sh. 250 million and which is being held at a warehouse in Mombasa by a multi-agency team to be released immediately.
>
> ...
>
> The rice was part of the consignments of sugar and rice netted out as part of the ongoing crackdown on corruption, and which has recently put the judiciary on the spot.
>
> ...
>
> Kebs failed to recognize the results of the verification of the rice from its on contacted agents. It has not sacked or complained of these agents...but while he said Kebs had not behaved professionally, he also allowed the rice to be released for sale.
>
> ....
>
> 4th February 2019
>
> "Kenyans criticize Order on condemned rice" by Brian Ocharo
>
> The Judiciary has yet again come under sharp criticism after the High Court in Mombasa last week ordered the release of 10 Million Kilogrammes of imported rice the Kenya Bureau of Standards (Kebs) had condemned for destruction.
>
> Justice Eric Ogola ordered the release of 10,327 tonnes of rice valued for more than Sh. 250 Million which is being held at a warehouse in Mombasa by a multi-agency team.

The Judge's Order for the release if rice to Phoenix Global Kenya Ltd means that the commodity can be distributed for sale despite the quality issues the multi-agency team raised.

And Kenyans have taken to the social media to criticize the decision accusing the Judiciary of issuing Orders that could see the public consume bad rice detrimental to their health.

The social media users accused the court of disregarding findings of a government agency charged with ensuring quality and termed the Judiciary as the enemy within in the war on graft.

In a tweet, Dr. Auma Obama, sister of former US President Barack Obama, appeared not to believe that the court ordered the release of goods not fit for human consumption despite protests from Kebs.

"If you are a Kenyan and even if you are not, please spread the word. Is it possible that a judge can defeat justice? Hopefully fake news". She posted on her tweeter account.

MulaGeoffrey@mula_geoffrey said, "May be he (Judge) meant to be sold for nonhuman consumption purposes such as fodder, manure and energy production", in a reply to Dr. Obama.

Mr. Gerald Wambua, another neitizen said in tweet, " Kebs, KRA, Directorate if Criminal Investigations, AG, and the Anti-Counterfeit Agency should have just destroyed the rice after failing to meet the required standards."

54. In his pleadings, the Plaintiff averred in material that the publication would, in its ordinary sense, mean that the Plaintiff as Judge:

    a. Released harmful rice for consumption in disregard to the safety of the general public;

    b. Is part of the members of the Judiciary who are corrupt and are frustrating the war on corruption,

    c. Is lacking in, among others, integrity and honesty

    d. Has no regard for the laws of Kenya and the rule of law.

55. There is no dispute that the alleged defamatory content was published. I consequently start by establishing whether the content was defamatory.

56. In the case of John Ward v Standard Limited [2006] eKLR the court stated as follows: -

> " A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -
>
> The statement must be defamatory.
>
> The statement must refer to the plaintiff.
>
> The statement must be published by the defendant.
>
> The statement must be false."

57. The Court of Appeal in Nation Media Group & Another vs. Hon. Chirau Mwakwere –Civil Appeal No. 224 of 2010 stated that a Claimant in a defamation suit ought to principally establish in no particular order:

i. The existence of a Defamatory Statement;

ii. The Defendant has published or caused the publication of the defamatory statement;

iii. The Publication refers to the Claimant.

iv. The statement refers to the Plaintiff.

58. In the Halsbury's Laws of England 4th Edition Vol. 28 at page 23 it was opined as follows:

> " In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense."

59. I have consequently perused the words side by side with the Judgement of the impugned High Court Constitutional Petition No. 205 of 2018 – Phoenix Global Kenya Limited v Kenya Revenue Authority & Others, and the Judgement in Mombasa Court of Appeal Civil Appeal No. 63 of 2019 arising therefrom. I note that the words replicated in the headline to the publication dated 1st February 2019 were that "Court Lets Trader Sell 10M Kilos of Kebs-Barred Rice"

60. The story under the headline further proceeded thus:

> Kenyans might have to consume 10 million kilos of rice the Kenya Bureau of Standards (Kebs) had condemned for destruction after a Mombasa Court ordered that the consignment be released.
>
> Delivering the Ruling, Mombasa High Court Judge Eric Ogola also directed Phoenix Global Kenya Ltd's rice valued at more than Sh. 250 million and which is being held at a warehouse in Mombasa by a multi-agency team to be released immediately.
>
> ...
>
> The rice was part of part of the consignments of sugar and rice netted out as part of the ongoing crackdown on corruption, and which has recently put the judiciary on the spot.

61. Whereas the position of the Plaintiff is that the words were defamatory, the Defendants' case is that the words constituted a fair comment and are protected by privilege. The Defendants also submitted that the impugned Judgement referred to the fact that the Kenya Bureau of Standards had claimed that the impugned rice was unfit for human consumption and should be destroyed.

62. What is clear is that the source of the information was a Judgement of the court of law. It was not proceedings of the court. Whereas court proceedings and Judgements are both documented, the recorded court proceedings lead to but are not Judgement. Judgment is what determines the rights of the parties in the proceedings. A publication about proceedings of the court in my view is an opinion of what parties or the judicial officers state about the case that may be considered during the preparation of the Judgement in this regard, but a publication about the Judgement of Court is a publication about the final finding of the court on the issues in controversy.

63. On the face of the words, it is clear that anyone who read the caption, and also considering that the Plaintiff's image was captioned, would definitely understand that the Kenya Bureau of Standards had barred some rice from being released to the market and recommended that the said rice be destroyed, but after the owner of the barred rice consignment filed a court case that came for determination before the Plaintiff, the Plaintiff as Judge directed that the barred rice be released immediately.

64. It would also be inextricable from the published words that there was an ongoing operation or crackdown on corruption and the judiciary was on the spot. It stipulated thus 'the rice was part of the consignments of sugar and rice netted out as part of the ongoing crackdown on corruption, and which has recently put the judiciary on the spot'.

65. It was thus an imputation to suggest that the judiciary was on the spot over ongoing concerns of corruption and this particular court case was one of such scandals that could have been revealed now that a Judge of the High Court was imputed.

66. Upon perusal of the facts, issues and findings as they appear from the Judgements filed and produced as exhibits in this case, it is noted that the Judgement dated 1st February 2019 was by the Plaintiff as Trial Judge. The issues therein are stated in material as follows;

    i. The legal status of the multiagency team referred to herein

    ii. Whether the quality of the rice herein was already verified pre-import and whether inspection after import was necessary.

    iii. Whether the deviation in the sizes of the subject rice should lead to its destruction, reclassification of should be accepted as it is.

67. The second and third issues apply to this suit. Therein, the Plaintiff as Judge found, in the second issue that there was no need for post verification after import. On the third issue, the court also analysed the deviations in the grain sizes in respect to the consignments of rice and found that deviations were marginal and negligent and directed the released of the rice as a result.

68. The publication is this case was out of doubt on a matter of public interest and must also be read as a whole. In Grant v Torstar [2009] 3 SCR 640 SCC 61, it provided the following guiding principles which I find applicable to this case:

    (1) The defamatory statement must be read in context of the publication as a whole.

    (2) Public interest is not synonymous with what interests the public.

    (3) An individual's reasonable expectation of privacy must be respected in this determination.

    (4) It is enough that some segment of the community would have a genuine interest in recovering the information on the subject.

    (5) The subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public no notoriety or controversy has attached.

    (6) The public has a genuine stake in knowing about many matters ranging from science and the arts to the environment, religion and morality."

69. The Defendants referred to paragraph 65 of the High Court judgement to the effect that the Kenya Bureau of Standards had claimed vide their Affidavit that the rice was unfit for human consumption and should be destroyed. However, these averments were not the issue before court. By the Defendants

publishing that rice recommended for destruction would be released to the public, this, to the right-thinking members of public must have meant that the cause of the bar against the release of the impugned rice, was that the rice would not be consumed at all say due to the presence of factors such like harmful toxins that would, upon consumption, harm any life. This was a distorted conclusion rushed into without ascertaining the context of the Judgement as a whole.

70. In Godwin Wanjuki Wachira V Okoth [1977] KLR 24, Muli J (as he then was) held that:

> " I may go further and hold that failure to check court records to ascertain the true position may very well be negligence on their part.... the defendants must be deemed to have acted recklessly in publishing the distorted story..... I hold that the author published the defamatory statement complained of...with reckless indifference as to whether it was just or unjust."

71. Subsequently, the Court of Appeal in its Judgment dated 19th December 2019 in Mombasa Court of Appeal Civil Appeal No. 63 of 2019 faulted the Judgment of the High Court for allowing rice that was of lower grade to pass to the public as grade one since the rice had indisputably been found to have failed on the basis of broken percentage of maximum 5%.

72. The issue was clearly on the grades of rice. By publishing that 10 Million kilos of rice that had been condemned for destruction would be released for consumption after the Plaintiff as Judge so ordered, the Defendants were extremist and negligent or otherwise published without due verification of the tenure of the Judgement of Court.

73. The Defendants as author or publisher of matters that imputed the findings of the court of law were under a duty to conduct due diligence and verify the libellous story before publication. The Judgement of the Court was available and the Defendants did not show to the court the steps taken to verify the contents thereof before publication. In the Court of Appeal for Eastern Africa case of Daily Nation V Mukundi & Another [1975] EA 311, the Court propounded itself thus: -

> "When the defendant publisher accepted an item for publication, it had the right and indeed the duty to see whether such item contains seditious or libelous matters, and if it fails in that duty, it always publishes at its own risk and that suggests recklessness on the defendant's part".

74. The matters as published had the effect of lowering the Plaintiff in the estimation of right-thinking members of society generally as one of the corrupt persons working for the judiciary who negated a specific directed by the scandalization bodies to destroy harmful rice consignment by instead ordering its release to the public. The evidence produced by the Plaintiff showed that the publication caused him hatred, contempt or ridicule or conveyed an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business. This was nothing but defamation.

75. The publication was admitted and the reputation of the Plaintiff as Judge of the High Court was not the sole point of injury. The Plaintiff testified and it was uncontested that he was also a family member, church elder and a head of station where he supervised a number of Court stations under him. As was held in the case of Onama v Uganda Argus Ltd [1969] EA 92, the E.A Court of Appeal set out inter alia that:

> " In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to general public, but also to all those who have greater or special knowledge of the subject matter....."

76. Similarly, in Musikari Kombo v Royal Media Services Limited [2018] eKLR where the court stated as follows:

> 25. Looking at the broadcasts in question the ordinary meaning of the words uttered therein is that the appellant was polygamous and his wife was involved in corruption. In our view, the appellant tendered uncontroverted evidence of how that story affected him and his family who received inquiries on the issue far and wide. In light of the foregoing coupled with the appellant's political standing, the defamatory nature of the broadcasts are quite clear.

77. From the submission by the Defendants, they stated that the Plaintiff moved to higher, better and more roles in his profession and so the publication cannot be said to have injured his reputation. The Law on defamation does not concern itself with the effects of the publication on the afterlife of the Plaintiff. Its concern is the reputation that has already been tarnished. The effects may only matter in the case of reparations where the Defendant has subsequent to the publication placed measures such like apology and correction, or clarification of the libellous content in the publication. Again, the fact that the Plaintiff nourished in his profession after the publication could mean that the false publication about him was recognised as such upon objective considerations.

78. The Defendants submitted that the publication was a fair comment on matters in the public interest. Reading the publications as a whole, it is to be noted that the 2nd Defendant in the publication left it clear that the rice that had been recommended for destruction would be released to the public for the treaded human consumption. It was also clear in the publication that the case was one of the many in which the Judiciary was on spot for corruption.

79. This is not the kind of publication that would be said to have been published as a fair comment and in good faith. The general members of the public would, without doubt, understand the publication to mean that the rice would be released to the market for human consumption when it should have been naturally destroyed as recommended by the standardization body. This was clearly not the issue before the High Court and even the Court of Appeal.

80. In Dorcas Florence Kombo V Royal Media Services (2014) eKLR, the court was clear that:

> " The defence of fair comment is available if facts are true and the matter is of public interest and the opinion is honestly held." In the same decision, the court found that "qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or used of the privileged occasion for an improper purpose."

81. Therefore, I am well guided that as the Defendants also proceeded to publish in the same caption that there was ongoing crackdown on corruption, and which had put the judiciary on the spot, this would similarly leave the recipient of the publication with no doubt that in ordering the release of the impugned rice otherwise recommended by the standardization body for destruction, the Plaintiff, like other judiciary employees, would be exercising corruption.

82. Whereas this was the case, the issue of corruption was equally not an issue in the Judgement. The Defendants thus distorted the contents of the impugned judgement and ended up publishing information to tarnish the reputation of the Plaintiff.

83. The irresistible conclusion is that the words as published (which is not in dispute that they referred to the Plaintiff herein), were defamatory to the Plaintiff.

84. The Defendants did not call any witness to testify in Court. Even without the Defendant's testimony, the Plaintiff is obliged to prove his case on a balance of probabilities. In the case of Kerai Ghanshyam v James Wambua Muendo [2021] eKLR, the court stated as doth: -

> 14. I am alive to the Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR that espouses the correct legal position that:
>
> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."
>
> In the above case, the court held that submissions alone does not amount to evidence. The appellant in the lower court failed to tender evidence and hence the respondent's evidence remained uncontroverted.

85. Also in the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga through *Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."
>
> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

86. The Defence filed by the Defendants in this case consequently contains mere allegations that were not substantiated in evidence and I so find. The Defendants' averments in the Defence thus pointed to the defence of fair comment and privilege but evidence was not lead to support the pleadings and only left the court to discern what fair comment is from the submissions by their advocates.

87. The court could not discern fair comment from the submissions of counsel from the bar as submissions were not evidence. In legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

88. The same Judge in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly

establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

89. Similarly, the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

90. It is immaterial the expression and feeling of the Defendants about the defamatory effect of the alleged publication. It consequently does not matter whether the Defendants knew or intended the statement to be defamatory or not. The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. As was held in the case of Berkoff v Burchill (1996) 4 ALL ER 1008, the libel action is determined by the reaction of the ordinary reader and not by the intention of the publisher and the words were capable of lowering the estimation of the Plaintiff as Judge.

91. I now turn to determine whether the Defence of privilege is available to the Defendants. The Defence of absolute privilege is espoused under Section 6 of the *Defamation Act* which states as follows:

> Newspaper reports of judicial proceedings
>
> A fair and accurate report in any newspaper or 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.

92. Qualified privilege is on the other hand protected under Section 7 (1) of the *Defamation Act* as follows:

> Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice.

93. As was stated in the case of Kagwiria Mutwiri Kioga & another vs. Standard Limited & 3 others [2015] eKLR, the essence of the defence of qualified privilege is an attempt to balance two competing but vital interests in society; the individual's right to have their character and reputation protected and safeguarded from false, unwarranted and malicious or scurrilous attacks on the one hand, and the public's right to know as exercised and fed by freedom of expression, which is an indispensable feature of a free and democratic society as well as a major tool for public accountability.

94. The Defendants averred that the impugned publication was privileged and was a fair comment on a matter of public interest. I venture to state that it is a defence to a tort of defamation where the Defendant claims that the statement was made in a context generally deserving of protection for policy reasons. That is the essence of Sections 6 and 7 of the *Defamation Act*.

95. In Halsbury's Law of England 4th Edition Vol. 28 at Paragraph *109* the rationale for the defence of qualified privilege is explained as follows.

> "On grounds of Public policy the law affords Protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person even when that statement is in-fact untrue and defamatory. Such occasions are called occasions of qualified privilege. The principal categories of qualified privilege are;
>
> 1. Limited communication between persons having a common and corresponding duty or interest to make and receive the communication.
> 2. Communication to the public at large or to a Section of the Public made pursuant to a legal, social or moral duty to do so in reply to a public attack.
> 3. Fair and accurate reports published generally or proceedings of specified persons or bodies.

96. Further, in Reynolds vs. Times Newspapers [1999] 4 ALL ER 609, criteria for determining whether a publication is subject to qualified privileged was set out as herein under:

> "Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.
>
> (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
>
> (2) The nature of the information, and the extent to which the subject matter is a matter of public concern.
>
> (3) The source of the information. Some informants have direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
>
> (4) The steps taken to verify the information.
>
> (5) The status of the information. The allegation may already have been the subject of an investigation which commands respect.
>
> (6) The urgency of the matter. News is often a perishable commodity.
>
> (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed.
>
> (8) Whether the article contained the gist of the plaintiff's side of the story.
>
> (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
>
> (10) The circumstances of the publication including the timing."

97. The source and truthfulness of the information is at the heart of protection under the defence of absolute privilege. It also matters whether comments were sought from the Plaintiff in advance of the publication.

98. For the Defendants to plead and submit extensively that the publication was not in any way malicious and remained a fair comment in the public domain involving a matter of public interest. The principle

expressed in the case of Phineas Nyagah v Gilbert Imanyara [2013] eKLR is relevant where the court held:

> " Malice here does not necessary mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice maybe found in the publication itself if the language used is utterly beyond or disproportionate to the facts.
>
> ....malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely."

99. As already indicated, the Defendants published information that was distorted and added an extraneous content to the effect that the matters before the court were part of the ongoing crackdown on corruption and that the judiciary was on the spot. The Judiciary in this case clearly meant the Plaintiff since it was published that the case was part of others in which corruption in the judiciary has been spotted. It would be pertinent for the Defendant to lead evidence to justify how this matter involved matters relating to corruption syndicate because no such content constituted the impugned Judgment of Court.

100. The matters also related to a final decision of the Court whose findings were not based on the allegations of rice condemned for destruction and corruption. In Uhuru Muigai Kenyatta V Baraza Limited [2011] e KLR where Rawal J (as she then was) it was observed that:

> " While taking defence of justification or qualified privilege in the defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant.... once not verified, the justification or qualified privilege does not inure the defendant and in any event, the onus that the same is true, rests on the defendant to make it a fair publication."

101. Whereas this court has a duty to uphold the fundamental rights and freedoms enshrined in *the Constitution* as applicable to parties, the court must also consider the limitations applicable to such entitlements. It is thus beyond doubt that the published information was sourced from the Judgement of Court and spoke of what the court was perceived to have pronounced itself on.

102. In this case therefore, the 2nd Defendant had the duty to exercise professionalism by ensuring he had the correct facts before broadcasting to the reach of the general public. It was pertinent upon the Defendants to either await the full copy of the Judgement, verify an accurate case brief or only publish what was accurate as opposed to distorted information with massive consequences.

103. I am unable to agree with Defendants that the publication was a fair comment. In Adams v. Guardian Newspapers [2003] Scot CS 131 Lord Reed stated that:

> " In London Artists Ltd v Littler, Edmund Davies L.J. (as he then was) said (at page 395): "It behooves a writer to indicate clearly what portions of his work are fact and what are comment, for, in the words of Fletcher-Moulton L.J. in Hunt v Star Newspaper Co Ltd [1908] 2 K.B.309, 319:'.... comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see Andrews v Chapman (1853) 3 C & K

> 286.'Failure to exhibit clarity in this respect carries its own risks, for, as Fletcher-Moulton L.J went on to say, at page 320:'Any matter,...which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment.'
>
> 'The same point was made more recently by Lord Nicholls of Birkenhead in Reynolds v Times Newspapers Ltd [2001] 2 A.C.127 at page 193: "[T]o be within this defence the comment must be recognizable as comment, as distinct from an imputation of fact. The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made."

104. The publication was even exasperated through the publication of 4th February 2019 with similar intonation. On the said date, and in order to further expound on the matter with the consequent of giving feedback after the first publication. The words were stated inter alia as follows:

> The Judiciary has yet again come under sharp criticism after the High Court in Mombasa last week ordered the release of 10 Million Kilogrammes of imported rice the Kenya Bureau of Standards (Kebs) had condemned for destruction.
>
> ...
>
> And Kenyans have taken to the social media to criticize the decision accusing the Judiciary of issuing Orders that could see the public consume bad rice detrimental to their health.
>
> The social media users accused the court of disregarding findings of a government agency charged with ensuring quality and termed the Judiciary as the enemy within in the war on graft.
>
> In a tweet, Dr. Auma Obama, sister of former US President Barack Obama, appeared not to believe that the court ordered the release of goods not fit for human consumption despite protests from Kebs.
>
> "If you are a Kenyan and even if you are not, please spread the word. Is it possible that a judge can defeat justice? Hopefully fake news". She posted on her tweeter account.
>
> MulaGeoffrey@mula_geoffrey said, "May be he (Judge) meant to be sold for nonhuman consumption purposes such as fodder, manure and energy production", in a reply to Dr. Obama.
>
> Mr. Gerald Wambua, another neitizen said in tweet, " Kebs, KRA, Directorate if Criminal Investigations, AG, and the Anti-Counterfeit Agency should have just destroyed the rice after failing to meet the required standards."

105. The publication of 4th February 2019 came barely 3 days after the publication of 1st February 2019 that was done on the date of the Judgement. As was held in the case of John Patrick Wachira (supra); Malice can be inferred from deliberate or reckless or even negligent ignoring of facts as can be deliberate lies.

106. It is thus difficult to find no malice on the part of the Defendants who ought to have familiarized themselves with the Judgement of court or seek verification to the extent that the matters disposed particularly related to the grades of rice and not whether the rice was fit for human consumption or recommended for destruction.

107. Consequently, on a balance of probabilities, I find that the Plaintiff has established his case against the Defendants and is entitled to compensation.

108. As to the General Damages, the Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> ...General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it...

109. The Plaintiff submitted for Kshs. 10,000,000 as appropriate General Damages for defamation. The Defendants on the other hand submitted for Kshs. 200,000. Award of damages is a matter of judicial discretion by the court. The Court of Appeal in C A M v Royal Media Services Limited Civil Appeal No. 283 of 2005 [2013] eKLR stated that:

> " No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones V Pollard (1997) EMLR 233-243include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future.
>
> In the case of Standard Media V Kagia and Co. Advocates (supra) the court took the view that in situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages. The court also stated that the level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and the publishers of libel and that personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers."

110. In the case of Samuel Ndung'u Mukunya v Nation Media Group Limited & another [2015] eKLR, the court awarded the Plaintiff who was also a Judge a compensation of Kshs. 15,000,000 in General Damages for defamation. In the case of, Alnashir Visram v Standard Limited [2016] eKLR the court awarded Kshs. 26,000,000 in General Damages to the Plaintiff who was then a Judge.

111. The amount of Kshs. 200,000 proposed by the Defendants is inordinately low and is an inadequate proposal which is hereby declined. The Plaintiff submitted for Kshs. 10,000,000 as General Damages. I find this to be a commensurate award of damages in the circumstances of this case considering the Defendants' conduct up to and including the trial itself and failure of matters tending to mitigate damages for example, publication of an apology.

112. As for the exemplary damages, as stated in the case of Godfrey Julius Ndumba Mbogori & another V. Nairobi City County [2018] eKLR

> " Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes v Barnard [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a

profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute".

113. In the circumstances of this case, the award of Kshs. 1,000,000 in exemplary damages as proposed by the Plaintiff is in my view inordinately low. I assess exemplary damages at Kshs. 3,000,000 as reasonable and adequate compensation in the circumstances.

114. The Plaintiff also prayed for an order for retraction of the publication with an apology. I find it inappropriate to issue and order for retraction and apology considering the lapse of time and the bulk of the impugned matters that are now in situ. I decline this prayer.

115. In the circumstances, the Plaintiff has proved, on a balance of probabilities that the Defendants jointly defamed him by their publications of 1st February 2019 and 4th February 2019 and I find them liable for defaming the Plaintiff.

116. The Plaintiff also sought for costs and interest. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. I find no reason to deny the Plaintiff the costs of this suit.

Determination

117. Flowing from the above discourse, I proceed to make the following orders: in favour of the Plaintiff: -

a. General Damages, Kshs. 10,000,000.

b. Aggravated Damages Kshs. 3,000,000.

c. Interest of (a) and (b) above from date of judgment.

d. Costs of the suit to the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024.

.....

F. WANGARI

JUDGE

In the presence of:

M/S Osewe Advocate for the Plaintiff

M/S Olunga Advocate for the Defendant

Barile Court Assistant