



Ndegwa v Nation Media Group Limited & another (Civil Case 40 of 2014) [2024] KEHC 3328 (KLR) (Civ) (5 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3328 (KLR)

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

CIVIL

CIVIL CASE 40 OF 2014

AN ONGERI, J

APRIL 5, 2024

BETWEEN

DUNCAN NDEGWA PLAINTIFF

AND

NATION MEDIA GROUP LIMITED 1ST DEFENDANT

VICTOR JUMA 2ND DEFENDANT

JUDGMENT

1. The plaintiff in this case, Duncan Ndegwa (hereafter referred to as the plaintiff only) has sued the two defendants Nation Media and Victor Juma (hereafter referred to as 1st and 2nd defendants respectively) *vide* plaint dated 24/2/2014 seeking general damages and exemplary damages for the tort of defamation and specifically libel by innuendo.
2. The defendants filed a statement of defence dated 28/11/2014 raising the defence of fair comment and fair information on matters of public interest.
3. The plaintiff who was 89 years old at the time of filing this suit is now 98 years old and was not able to testify in this case.
4. The plaintiff in his plaint dated 24/2/2014 averred as follows;
5. The Plaintiff, an eminent retired public servant in the Republic of Kenya, is an eminent business man and farmer.
6. He served in the Boards of directors of many companies which include some of the country's largest companies.



7. He held very high offices both in the Republic of Kenya and in International institutions. Between 1956 and 1959, he served as a statistician with East African High Commission, the forerunner of the current East African Community.
8. That between 1959 and 1963 he served as Deputy Secretary, Treasury in Kenya. Between 1963 and 1967, he served the Permanent Secretary Office of President, Head of Civil Service and Secretary of the Cabinet and President. Between 1967 and 1983 he served as the Governor Central bank of Kenya.
9. Between 1970 and 1971 he served as the Chairman of the Commission of Inquiry into the Public Service Structure and Remuneration, popularly known as the Ndegwa Commission.
10. That Commission published a Report on how the Public Service might be reformed. Between 1967 and 2008, he served in the Interim Committee of the World Bank and the International Monetary Fund (IMF).
11. The Plaintiff further averred that he is and has, for many years, been involved in philanthropic activities. He is a founder member of Giakanja Secondary School and Kimathi Institute of Technology (now Dedan Kimathi University).
12. He was a patron of Chorong Primary school and Ngangarithi High School in Nyeri County. He was involved in the establishment of both Chania Primary School, in Nyeri County and Duncan Ndegwa Primary School in Msambweni in Kwale County, in Kenya's South Coast.
13. That philanthropic entails among others raising funds from the public and for one to be successful one must be known to be a person of integrity.
14. As pleaded above, the Defendant is the proprietor/ publisher of the ~~Business~~ Business Daily Newspaper carrying on business at Nairobi within the jurisdiction of this court and has a wide coverage in the country and in the members of the East African Community.
15. In its 30th January, 2014 issue of the Business Daily, the Defendants published at pages 1 and 4 an article titled "Moi-era Political Elite Transfer of Sh 4 Billion CFC Stanbic Shares". The second Defendant was the author of the said article. He wrote and published the said article in the course of his employment with the first Defendant. The Plaintiff contends that first Defendant is therefore vicariously liable for the libel he has committed through that publication.
16. The Plaintiff further averred that on page 1 of the article pleaded in paragraph 7 above, the photograph and name of the Plaintiff appeared among those of other persons whom it was claimed constituted the Moi-era political elite.
17. There also appeared on the same page 1 two photographs of two other persons namely, Mr. Charles Njonjo, independent Kenya's first Kenyan Attorney-General who served in that between 1963 and 1980 when he was appointed Minister of Justice and Constitutional Affairs, and Mr. Jeremiah Kiereini, a former Head of Public Service and Secretary to the Cabinet during the administration of former President Daniel Arap Moi.
18. The latter served as the country's President between late August 1978 and December 2002. The Plaintiff avers that when the said former President Moi was sworn as President in August 1978, the Plaintiff was serving as the Governor of the Central Bank of Kenya. He retired as governor in 1983.
19. The Plaintiff averred that the article's contents published at page 1, right below the photographs of the Plaintiff and said Mr. Charles Njonjo and Mr. Jeremiah Kiereini, and continued at page 4, were blatantly defamatory to the Plaintiff generally and also by innuendo.



20. At page 4 of the said article pleaded above, the 2nd Defendant referred to Charles Hornsby's Political Science book titled Kenya: A History Since Independence I. B. Tauris, London, 2012 as the purported authoritative work which identified the purported traits of Moi-era Political Elite of whom the Defendants falsely claimed the Plaintiff was one.
21. At pages 1 and 4 of the said issue of the Business Daily, the Defendants falsely and maliciously published the following:

“A group of politically connected businessmen has quietly exited the top shareholders' list at CFC Stanbic Holdings, the company that owns most of Kenya's sixth largest bank CFC Stanbic.

The latest regulatory filings show that the businessmen associated with former presidents Daniel Moi and Mwai Kibaki have recently transferred shares worth Sh4 billion that placed them among the top 10 owners in the financial services company.

Former Attorney-General Charles Njonjo tops the list of Alicos owners that also includes: Jeremiah Kiereini (former head of public service), Julius Gecau (former Kenya Power CEO) and the late Asian businessman P. K. Jani.

The late Ben Gethi who served as Kenya's police Chief, former Cabinet Minister Bruce McKenzie, and spy master in the Moi government James Kanyotu also held large shares in the company.

Other shareholders including Alico that held a 30% stake in CFC Bank were offered diluted shares

Since the merger was completed six years ago, CFC Stanbic have grown significantly more than tripling its profits ...CFC Stanbic Holdings 'profit stood at shs. 3 billion in the ended December 2012. This view is supported by chroniclers of Kenya's capitalist history who explored the extent to which indigenous businessmen went to keep their wealth under the radar.

Claims of nominee accounts and private companies were used to obfuscate ownerships but it is clear that their business interests were closely aligned and blossomed in this period, author Charles Hornsby wrote of Moi and Njonjo in early 1970s in the book Kenya: A History Since Independence Mr. Kiereini holds 5.1 million shares or 1.32 % stake in CFC Stanbic Holdings through his personal investment vehicle Kingsway Nominees....Mr. Njonjo's investment path closely mirrors that Mr. Kiereini's —the former AG has a 1.32⁰⁰ stake in CMC through Feneast Nominee account

Mr. Njonjo recruited Mr. Kiereini and the late Mr. P .K Jani into Alico in 1970s.....Mr. Moi also took part in these businesses through close aides following his to the presidency in 1978

The late Kanyotu, Moi's long time, spy chief held significant stakes in multiple firms including Firestone, Sheraton Holdings ,and Sameers Investments —flagship business of the tycoon Naushad Merali.

"In Kenya, Alico is seen as the clearest example of how the political elite and top bureaucrats have over the years teamed up to build vast business empires...

Most of the politically connected business empires have their roots in the indigenisation policy that was established in the 1970s and whose objective was to loosen European and



Asian Businessmen's grip on economic power. "... The Moi era political and business elite included the powerful cabinet minister Nichols Biwott with whom they teamed in 1970s"

22. The Plaintiff avers that he has never been a shareholder in CFC Stanbic along with Mr. Charles Njonjo and Mr. Jeremiah Kiereini. Neither has been a member of Moi era political elite with purported trait described in both article and by Charles Hornsby in is said Kenya: A History Since Independence.
23. The Plaintiff averred that at page 184 of the book titled Kenya: A History Since Independence Charles Hornsby has said this of the public servants who worked in the Moi Administration;

“Everyone would expect a person in authority to make use of the office to enrich themselves....Corruption allegations are rarely proven. However it is widely accepted that by the late 1980s conflicts of interest were open at every level of government. Politicians and civil servants were players in the game they were refereeing without effective scrutiny....many allegations were made that Mr. Moi and his family had stolen billions of shillings and salted them away abroad. There is little doubt that he and his allies received tens if not millions of dollars in inducements, gifts and commissions”.
24. The words used in the said article and Charles Hornsby, Kenya: A History Since Independence were published by the Defendants sufficiently induce the ordinary and reasonable persons to think ill of the Plaintiff and make him appear to be a corrupt man which subjected him to ridicule.
25. In the natural and ordinary meaning, the contents of the article published, mean and were understood to mean that:
 - a. the Plaintiff, a retired Governor of the Central Bank of Kenya, and former Head of Public Service, who now carries on business and farming, and undertakes philanthropic work is a corrupt man;
 - b. the Plaintiff worked in Public Service during the Moi-era when Mr. Charles Njonjo, Mr. Kiereini, Mr. Bruce Mckenzie, Mr. Ben Gethi, Mr. Kanyotu and Mr. Nicholas Biwott also served the same government;
 - c. during that period, the Plaintiff and the other persons mentioned (b) above abused their respective offices and received bribes and commissions;
 - d. the Plaintiff, as allegedly did Mr. Charles Njonjo and Mr. Kiereini, bought shares in CFC Stanbic Holdings and other companies with the alleged bribes and commissions;
 - e. to conceal his identity, the Plaintiff, like other two, bought those shares in CFC Stanbic Holdings through nominee accounts;
 - f. recently the Plaintiff, Mr. Charles Njonjo and Mr. Kiereini quietly sold their shares in CFC Stanbic Holdings worth Ksh. 4 billion;
 - g. the Plaintiff is dishonest and extremely untrustworthy;
 - h. the Plaintiff is unworthy of his standing in society;
 - i. the Plaintiff is a sleazy character; and
 - j. the Plaintiff has committed a criminal offence.
26. Further, in publishing the defamatory article the Defendants herein were driven by malice, malevolence and spite against the Plaintiff and the same actuated all its actions and calculating that they would,



- through the said publication make more money than they would called upon to pay to him after libel proceedings were instituted against them.
27. The Plaintiff averred that the 1st Defendant in publishing the defamatory article, the Plaintiff was actuated by ill will, spite and improper motive, the Defendant knew despite the publication that the contents were not true and indeed false.
 28. The Plaintiff averred that the publication of the defamatory article by the Defendants could not have been made by a fair person no matter how prejudiced unless the same was actuated by malice.
 29. The Plaintiff averred that at all material times prior to the publication of the said defamatory article by the Defendants, the Plaintiff enjoyed an excellent and priceless reputation, a clean and honest man and a respected and a well regarded former Head of the Public Service and retired Governor of Central Bank of Kenya.
 30. However, by publishing the said defamatory, false, misleading and malicious article by the Defendant, the Plaintiff has been exposed to ridicule, hatred, odium and contempt in order to lower him in estimation of right thinking members of society, and as a consequence thereof suffered and continue to suffer, massive injury to his credit, name and reputation and the Plaintiff has suffered damages.
 31. The Plaintiff further averred that on 3rd February, 2014 the Plaintiff demanded, in writing, inter alia that the Defendants publish a retraction of the defamatory statement published and an apology failing which he would institute libel proceedings against them. The Plaintiff also demanded that the Defendants admit liability for libel and make to the Plaintiff an offer on the quantum of damages.
 32. The Plaintiff averred that instead of publishing a retraction and apology and offering to pay the Plaintiff damages they published in the issue of 4th February, 2014 of the Business Daily a purported small correction.
 33. The hearing proceeded on 31/10/2023. PW1, Robin Muriuki Ndegwawho is a son of the plaintiff who has a power of attorney donated by the plaintiff produced the plaintiff witness statement dated 24/2/2014.
 34. The plaintiff's evidence as contained in the said statement was that the plaintiff was a business man and a farmer. He is a retired public servant who served as the country's first Kenyan head of public service, permanent secretary, office of the president and secretary to the cabinet.
 35. As one would see upon reading his book titled "walking in Kenyatta Struggles", he participated in the making of Independent Kenya and was the first governor of the central bank of Kenya. Between 1967 and 1983 he served in the interim committee of the word bank and the International Monetary Fund. He served in various boards such as ICEA Lion and Mitchell Cotts among others.
 36. On 30/1/2014 the 1st defendant in its newspaper the business daily published an article titled "Moi Era Political Elite Transfer of SH 4 Billion CFC Stanbic Shares". The said article ruined his reputation and standing both internationally and in Kenya.
 37. Through a reference to "Charles Hornsby's a political science book titled "Kenya: A history since Independence Charles Hornsby", the defendants have described what they consider to be the bad traits of some of the Kenyans who served in the Moi administration between 1978 and December 2001.
 38. He stated that he was greatly hurt by the article his investments are based on his earnings and not what was implied by the article. On 3/2/2014 he demanded in writing that the defendants publish a retraction of the defamatory statements published and an apology but the defendants published in the issue of 4/2/2014 of the business daily a purported small correction.



39. In cross examination, PW 1 said the power of attorney donated by the plaintiff enabled him to prosecute this matter.
40. He said it was distasteful for the plaintiff to be associated with certain personalities. He said the plaintiff was a civil servant and not a politician.
41. PW 2, Engineer Sammy Muiya produced his witness statement dated 12/7/2019 as his evidence in chief.
42. He stated that he has known the plaintiff since he was a student in alliance high school between 1978 and 1979 when he was chairman of the board of governors. They became close friends in 2016 when he appointed him as a trustee of DNN trust which he created the benefit of the member of his family.
43. He stated that on 30/1/2014 the 1st Defendant's newspaper known as Business Daily published on the front page and page 4 an article and photographs touching the Plaintiff. The title of the article was Moi Era Political Elites Transfer Ksh. 4Billion CFC Stanbic shares. The plaintiff was serving as the governor the central Bank of Kenya between 1978 when President Moi took office to 1983. He therefore fitted into the description of Moi Era Political Elite.
44. He observed that although the name of the plaintiff did not appear in the article it could be deduced that the plaintiff was among the people who held shares in the said bank.
45. He understood that all those who fitted the description Moi Era Political Elite as the people who had invested the bribes they had received in CFC Stanbic among other enterprises.
46. The author wanted his readers to be outraged by the fact that bribes had enabled the plaintiff to become very wealthy through the sale and transfer of his alleged shares in CFC Stanbic.
47. On the front page was the photograph of the plaintiff, the later Jeremiah Kiereini and Mr Charles Njonjo. His name was spelt in capital letters as Mr. Duncan Ndegwa. The whole page was offensive.
48. The author claimed that those who served during the period received tens if not millions of dollars in inducements, gifts and commissions. The picture that was created was that what the plaintiff owns is largely a fruit of corruption and not hard work and sound investing skills.
49. In cross examination, PW 2 said he had read Charles Hulbury's book. He said the name of the plaintiff was not mentioned in the Article but his picture was contained in the Article.
50. PW 2 said the book was written in 2011 and the article published in 2013. He said in 2016 he was appointed trustee.
51. The defendants called one witness (DW 1) Mr. Sekou Owino who produced his written statement filed on 18/9/2019 as his evidence in chief.
52. DW 1 the legal officer of the 1st defendant stated that the publication of 30/1/2014 was done in fair comment and under a public duty and without malice on the plaintiff and in the honest belief that the information contained therein was true and was a fair comment on matters of public interest on Kenya history since independence and the history makers.
53. In addition, the publication of 30/1/2014 was published elsewhere and the author of the original publication authorized the defendants to publish the words complained of and the said words were a natural and probable result of the original publication.



54. He indicated that the 1st defendant received a demand from the plaintiff on the appearance of his photograph on the article and printed a correction on the 5th February 2014 clarifying that the plaintiff has no association with the article and the appearance of his photo was a mistake.
55. DW1 said in cross examination that the inclusion of the plaintiff's picture was a mistake.
56. DW 1 said the Article was a fair comment in matters of public interest.
57. The parties filed written submissions as follows; the plaintiff submitted that the article complained of was published in the Business Daily on 30/1/2014 that is printed by the 1st defendant and that the same was not in dispute. The plaintiff admitted that there was no express mention of the plaintiff in name, in the article however his picture and his name were placed among those of persons claimed to be the Moi-era Political Elite on the front page of the business daily.
58. The Article was written by the 2nd defendant and it referred to Charles Hornsby's Political Science Book titled 'A History Since Independence' I. B Tauris London 2012 as the authoritative work which identified the purported traits of Moi-Era Political Elite who the defendants claimed that Plaintiff was one.
59. The plaintiff argued that his reputation was injured as he received many calls from his friends and business people who believed that the article was factual. PW2 testified that he was disturbed by the same and in the end the plaintiff's personal life suffered as he was shunned by his friends and the business people who believed the article to be true.
60. The plaintiff argued that contested article was not published in good faith and in the public interest without malice. This was because the article was published without seeking the comments of the plaintiff.
61. Further, that the defendants did not obtain a CR12 in respect of CFC Stanbic Holdings to confirm that truly the plaintiff was a shareholder that goes to show the sheer recklessness that was involved. Despite, the plaintiff pointing out the error and demanding an apology vide a letter dated 3/2/2014 the defendants purported to publish a correction on 4/2/2014 which failed to comply with the terms of Section 13 (3) or 16 of the Defamation Act.
62. The plaintiff therefore argued he was entitled to general damages for libel and proposed Kshs. 15,000,000 under this head. In support the plaintiff argued that an award of damages is a matter of judicial discretion by the court as stated in Johnson Evan Gicheru v Andrew Morton & Another [2005] eKLR where it was held:

“In action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial: *Praud v Graham* 24 Q.B.D.53, 55. In *Broom v Cassel & Co* [1972] A. C. 1027 the House of Lords stated that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily and even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses. but. in case the libel. driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges.”



63. On Exemplary damages the plaintiff proposed the sum of Kshs. 3,000,000 under this head. It was argued that the Defendants acted recklessly or negligently in the publication of the said defamatory article and purported correction. In view of the seriousness of the allegations against the distinguished reputation of the Plaintiff and the failure to tender a retraction and apology and lowering his standing in society to be deemed as a corrupt former government official, he is entitled to very substantial damages to deter the Defendants from damaging careers of citizens. This case fits the criterion formulated in *Obongo v Municipal Council of Kisumu* 1971 E.A 91 on whether or not exemplary damages will be paid. The court followed the House of Lords decision in *Rooks v Bernard* [1964] AC 1129 that held

“...exemplary damages may only be awarded where there is oppressive, arbitrary or unconstitutional actions by servants of the government or where the Defendant's conduct was calculated to produce him some benefit not necessarily financial at the expense of the Plaintiff...”

64. The plaintiff further argued that he is entitled to aggravated damages as the defendants caused additional injury by declining to apologize as they claimed that they were entitled to publish what they did as Charles Hornsby authorized the to do so and used the words he had used without calling witnesses to support the publication. The plaintiff proposed Kshs. 1,500,000 under his head and in support cited *Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa* [2004] eKLR, where the Court described aggravated damages as follows,

“Aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copy right. Such damages are part of, or included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief.”

65. The defendants on their part submitted that the plaintiff failed to prove its case for defamation as no proper evidence was produced by the plaintiff himself. PW1, the plaintiff's attorney gave evidence on behalf of the plaintiff by virtue of the power of attorney. The defendant argued that PW1 could only act as the witness in support of the plaintiff but not act in his place as though he was the one defamed. That in the case of *Musikari Kombo v Royal Media Services Limited* [2018] eKLR, the Court of Appeal held that:

“The general rule as to who can sue in a claim of defamation was succinctly discussed in *Gatley & Lindsell on Slander and Libel (supra) at page 197*: -

“An action for defamation is a purely personal action. The proper person to sue as a claimant is the person defamed, and the proper person to be sued as defendant is the person who published the defamatory words or caused them to be published (though this may include a person vicariously liable for another). A cannot bring an action of libel or slander against B for words defamatory of C, even though C has purported to assign to him his right of action; a right for damages for libel or slander cannot be assigned. If A suffers damages as a result of a defamatory statement maliciously made about C, who is associated with A's business, A may have an action for malicious falsehood, but that is not the same thing as an action



for defamation.” Therefore, the learned Judge rightly found that the appellant had no cause of action against the respondent.”

66. The defendant submitted that it is on record by both PW1 and PW2 that that the impugned article did not mention the Plaintiff at all. There was no reference to the Plaintiff by name or title, the only link to the Plaintiff was a photograph which was published by mistake and the same corrected vide a correction and apology published on 5/2/2014.
67. Further, that no evidence was ever adduced to show whether the Plaintiff was shunned and/or avoided by anyone. In fact, PW2 testified that he was appointed and he accepted the appointment to act as trustee in the Plaintiff’s trust, two years after the impugned publication. Therefore, there is no evidence of any injury caused or sustained as a result of the impugned publication. Accordingly, there is no proof that the impugned publication was defamatory.
68. On general damages the defendant submitted that the plaintiff has not proved his case on balance of probability. However, in the event that this court is inclined to award the plaintiff damages that the award ought to be fair and a restrained hand is desirable to maintain a stable bearing. The defendant proposed Kshs. 200,000 and in support cited Jacob Kipngetich Katonon v Nation Media Group Limited [2017] eKLR where the court held that Kshs 200,000 as general damages is sufficient for a defamation claim.
69. On aggravated damages the defendant argued that aggravated damages are awarded where the conduct of the defendant increased the injury caused and in this case no evidence has been presented to show that the defendants acted oppressively or arbitrarily towards the plaintiff before filing of this suit. In support the defendant cited the case of Hezekiel Oira v Standard Limited & another [2016] eKLR where Justice Aburili held as follows;

“I would not award punitive and exemplary damages as there was no evidence of the conduct of the defendants before, during and after the trial of the suit herein that the defendants republished the alleged defamatory words of and concerning the plaintiff and with a sinister motive.”
70. The defendants further argued that there has been no proof of actual or intrinsic malice by the Defendants in publishing the impugned article. The Plaintiff had the onus to prove actual malice, ill will or spite or any direct or improper motive in the mind of the publisher at the time of the publication.
71. Further, that the Plaintiff has not included particulars of malice to its pleadings, for the reason that, there was no malice to the publication. The Defendants published a correction and apology as soon as they noted that the publication of the Plaintiff’s photograph was mistakenly done.
72. It is the duty of the plaintiff to prove his case to the required standard which is on a balance of probabilities.
73. The issues for determination in this case are as follows;
 - i. Whether the plaintiff proved his case to the required standard.
 - ii. Whether the defendants have a valid defence against the plaintiff’s claim.
 - iii. Whether the plaintiff is entitled to the remedies he is seeking against the defendants.
 - iv. Who pays the costs of this suit?



74. On the issue as to whether the plaintiff proved his case to the required standard, the plaintiff is duty bound to prove the ingredients of defamation. The said ingredients of defamation are as follows;
- “ that the statement must be defamatory and must refer to the plaintiff. The statement must be published by the defendant and it must be false.”
75. In the case of *Samuel Ndung’u Mukunya v Nation Media Group Limited & another* [2015] eKLR the elements of libel were set out as follows;
- That the libel must be published by the defendant.
 - That the published words must refer to the claimant.
 - That the statement as published must be false and defamatory of the plaintiff.
 - That the publication was malicious.
76. I find that the defendants did not deny that they published the impugned articles. Their defence was that they did not mention the plaintiff by name and that the plaintiff’s picture appeared by mistake and that they made a correction.
77. By admitting that the picture of the plaintiff appeared on the impugned articles, the defendants have admitted libel by innuendo.
78. The Court of Appeal in the case of *SMW v ZWM* [2015] eKLR described a defamatory statement using the following words;
- “...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.”
79. The defendants did not deny that they published the impugned articles and that the picture of the plaintiff appeared in the articles which portrayed the plaintiff as being part of the Moi political elite that embezzled CFC Stanbic shares.
80. The title of the article was Moi Era Political Elites Transfer Ksh. 4Billion CFC Stanbic shares.
81. The plaintiff called a witness, PW2, who saw the article and the picture of the plaintiff and said that although the name of the plaintiff did not appear in the article it could be deduced from the plaintiff’s photograph that the plaintiff was among the people who held shares in the said bank.
82. I find that although the name of the plaintiff did not appear, in the 1st Defendant’s newspaper known as Business Daily did published on the front page and page 4 an article and photographs touching the Plaintiff.
83. The title of the article was Moi Era Political Elites Transfer Ksh. 4Billion CFC Stanbic shares.
84. It is not in dispute that on the front page was the photograph of the plaintiff, the late Jeremiah Kiereini and Mr Charles Njonjo and that the name of the plaintiff was spelt in capital letters as Mr. Duncan Ndegwa.



85. The plaintiff's evidence was that that words used in the said article and Charles Hornsby, Kenya: A History Since Independence were published by the Defendants sufficiently induced the ordinary and reasonable persons to think ill of the Plaintiff and make him appear to be a corrupt man.
86. The plaintiff was not a politician but a civil servant who served as Governor of the Central Bank of Kenya, and former Head of Public Service.
87. There is evidence that the Plaintiff was not a shareholder in CFC Stanbic along with Mr. Charles Njonjo and Mr. Jeremiah Kiereini and neither was he a member of the Moi era political elite with purported trait described in both article and by Charles Hornsby in the said Kenya: A History Since Independence.
88. The defendant did not bring any credible evidence to show the truthfulness of the publications, which therefore leads to the conclusion that the plaintiff has reasonably demonstrated that the impugned publications were not only false but defamatory.
89. By publishing the photograph of the plaintiff on the impugned publications, the defendants maliciously made the Plaintiff to be numbered among those of other persons whom it was claimed constituted the Moi-era political elite.
90. On the subject of malice which constitutes the fourth element of libel, the court in the case of *Phinebas Nyagah v Gitobu Imanyara* [2013] eKLR stated as follows;

“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice”.
91. The defendants said that the plaintiff was not mentioned by name in the impugned articles and that the only link to the Plaintiff was a photograph which was published by mistake and the same was corrected vide a correction and apology published on 5/2/2014.
92. The defendants were reckless in the manner they published the plaintiff's photograph and I find that the plaintiff has proved the elements of the tort of libel.
93. On the issue as to whether the defendants have a valid defence against the plaintiff's claim, I find that the answer is in the negative.
94. The defendants said they published the picture by mistake
95. In their defence they said the article was a fair comment and fair information on matters of public interest.
96. I find that the article injured the reputation of the plaintiff in the eyes of right thinking members of society.
97. On the issue as to whether the plaintiff is entitled to damages he is seeking against the defendants, I find that the answer is in the affirmative.
98. In the case of *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 233-243 include 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."

99. The defendants said they published the plaintiff's photograph by mistake and the same was corrected vide a correction and apology published on 5/2/2014.
100. I find that the said apology did not vindicate the plaintiff's reputation and the same amounts to an admission that the defendants were reckless in putting the photograph of the Plaintiff among those of other persons whom it was claimed perpetrated corruption and enriched themselves through bribery in the Moi-era political era.
101. I award the plaintiff general damages of ksh.10,000,000/=.
102. I find that the exemplary damages are not payable. In the case of *Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates* [2013] eKLR the court cited the English Court of Appeal decision in the case of *John v MG Ltd.* [1996] I ALL E.R. 35 the Court held:

"The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....

Exemplary damages on the other hand had gone beyond compensation and are meant to "punish" the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize".

103. I enter judgment in favor of the plaintiff against the defendants jointly and severally in the sum of ksh.10,000,000/=.
104. On the issue of costs, I find that they follow the cause.
105. I award costs to the plaintiff together with interest at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5TH DAY OF APRIL, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**

