



REPUBLIC OF KENYA



KENYA LAW
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**Kiarie v Kanyira & 2 others (Civil Case 100 of 2016)
[2024] KEHC 5554 (KLR) (Civ) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5554 (KLR)

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

CIVIL

CIVIL CASE 100 OF 2016

LM NJUGUNA, J

MAY 8, 2024

BETWEEN

HON KIARIE WAWERU KIARIE PLAINTIFF

AND

MOSES KANYIRA 1ST DEFENDANT

HON JOHN MUTUTHO 2ND DEFENDANT

MEDIAMAX NETWORK LIMITED 3RD DEFENDANT

JUDGMENT

1. The suit herein was instituted vide plaint dated 19th March 2016 and amended on 18th October 2019. The plaintiff sought judgment against the defendants jointly and severally for:
 - a. An unconditional apology to the plaintiff in a manner and form to be approved by the plaintiff prior to the release to the general public;
 - b. General damages for defamation and character assassination and special damages in the sum of Kshs.162,400/=;
 - c. Aggravated and exemplary damages for the malicious broadcasting of false and unverified information;
 - d. Costs and interests of the suit; and
 - e. Any other relief that this honourable court may deem fit and just to grant.
2. Through the said amended plaint, the plaintiff averred that the 1st Defendant, being a radio presenter with the 3rd respondent's Kameme FM, on 12th July 2015, made serious defamatory allegations against



him. That the defamatory statements were made during an interview with the 2nd defendant in regards to strategies to be put in place by the board chaired by the 2nd defendant in a bid to rid the country of hazardous second generation alcoholic drinks. Particulars of the defamation were that the plaintiff, who is a Judge of the High Court of Kenya was one of the owners and proprietors of Tembo Industries located at Gatwanyaga Area located between Muranga and Thika Towns. That the said industry is involved in manufacturing, brewing and distilling of the hazardous 'KAANA' Brand of Alcohol which had been causing havoc in the central Kenya and its surroundings.

3. It was his case that the 1st defendant stated thus:

“I was told that this company is owned by several people and one of them is Judge Kiarie Waweru, am just reading what is on the SMS and I don't fear. I am saying things as they are, and the information that I was given, I was not told who the other members are but I have been told that there are other people...yes, Kiarie Waweru, I was not able to know the other members but I heard the president saying that it does not matter who it is and I ask myself, since I was told Kaana alcohol is still being sold, is alcohol being sold Honourable Mututho....I have been told that Kiarie Waweru is a Judge of the High Court, he was among the 14 judges sworn in recently. I wonder if it is true what I was told and if it is not, he should come and tell me that its not true. If it is true, should the person continue being a Judge?...let me tell you something about Chief Justice Mutunga and it is good to say if a person is good or bad, Justice Mutunga is a no nonsense person. If he is given the facts and told that this is how it is, Justice Mutunga doesn't back down and he is not a coward. I never used to know him well but I have seen what kind of person he is. So if it is true that Judge owns the company and the alcohol brewed there and many people have died, we will first get his salary and we will go to the same court if it is true....”

4. The 1st and 3rd defendants filed their joint statement of defense dated 13th May 2016 through which they denied the averments made in the plaint. They stated that the live interview conducted with the 2nd defendant was on a matter of public interest and was not meant to injure the plaintiff's character or lower his standing in society. That the statements were made innocently without the intention to defame the plaintiff. They stated that the plaintiff was repeatedly accorded a chance to reply to the alleged defamatory statements in the subsequent airings on Kameme FM on Tuesday July 14th 2015 during the 12PM, 1PM, 3PM and 4PM news bulletins. They stated that in accordance with section 12 of the *Defamation Act*, they would make a payment of Kshs.300,000/= by way of amends.

5. The 2nd defendant filed his statement of defense dated 09th May 2016 in which he denied the averments made in the plaint. He stated that if any liability is to attach, the same should be directed to the 1st and 3rd defendants who made the defamatory statements and published them. That the plaintiff has not disclosed a cause of action against him since it is clear that he did not make the defamatory statements. That he participated in the interview in his capacity as the Chairperson of NACADA and that he stated that any person found culpable would face the full force of the law. That there is no need for an apology since the statements made by the 2nd defendant are not defamatory. He urged the court to dismiss the case against the 2nd defendant.

6. The 2nd defendant moved the court vide application dated 13th March 2017 seeking that his name be struck out of the proceedings since no cause of action had been disclosed against him. The court determined the said application through its ruling delivered on 10th May 2018 dismissing the same and finding that the 2nd defendant had not been wrongly enjoined in the suit.



7. The case proceeded to full hearing. PW1 was the plaintiff who stated that he wishes to adopt his statement dated 19th March 2016 wherein he reiterated the averments he made in the plaint. He stated that on the 12th July 2015 between 5-6PM, he was driving from a church function in Nyamira heading towards Nakuru when he noticed that he was getting more phone calls than usual but he couldn't pick the calls because he was driving. That he asked his wife to pick one of the calls and she was told to tune in to Kameme FM. He recalled that at the time, there was a fight against illicit brew and when he switched on the radio, he heard the 2nd defendant saying that he (PW1), the plaintiff herein, was the owner of Tembo Industries which manufactures illicit brew and that he was not fit to be a judge.
8. That they said if the Chief Justice were to hear that information, the Judge would be removed from office and be held liable for the deaths arising from consumption of the illicit brew. He stated that the broadcast was in Kikuyu language which is his first language and at the end of the show, the 2nd defendant left his contacts. That he called the 2nd defendant and asked him why he did the interview before contacting him to verify the information he had but he referred him to the 1st defendant who came up with the plaintiff's name. That he asked the 1st defendant why he did not call him to verify the information before going on air but he realized that the damage had already been done.
9. It was his testimony that later that day, he received numerous phone calls from relatives and friends seeking to know his position with regards to the allegations since the broadcast seemed to allege that he involves himself in criminal activities which raises the question of his integrity as a Judge and having served the Judiciary for 28 years. That he obtained transcripts of the recording in Kikuyu language and a translated version in English as a cost of Kshs.40,600/= . He stated that he was not given a right to reply to the defamatory statements made against him but instead they sent a reporter to interview him in Nakuru and no apology was offered. That the 2nd defendant admitted that they published the words but denied that the same were defamatory.
10. Upon cross-examination, the plaintiff stated that he did not have evidence of the damage caused by the defamatory statements to his career/ profession but he stated that his reputation as a Judge is very important. That when the statements were made, he was stationed in Marsabit and that he was lucky that most people in the area did not understand the Kikuyu language. He stated that he did not know the number of listeners of the program aired by Kameme FM on that day. That he knows that the sum of Kshs.300,000/= was deposited in court but there was no apology offered. That the 2nd respondent had no control over the broadcast but he is liable because of his contribution to the interview. That he does not know the company or where it is located.
11. PW2 was John Nderitu, a businessman from Karatina who stated that the plaintiff is a family friend and a respected member of the community. He testified that on the said day, he was at home listening to Kameme FM when he heard the 1st defendant interviewing the 2nd defendant in a live show on the subject of illicit second-generation alcoholic beverages. That in the course of the interview, the 1st defendant said that the plaintiff was one of the owners or proprietors of Tembo Industries located at Gatunyaaga Area located between Muranga and Thika Towns which is involved in manufacturing, brewing and distilling of the hazardous 'KAANA' Brand of Alcohol which had been causing havoc in the central Kenya and its surroundings.
12. In his witness statement, PW2 stated that the 1st defendant said that he was reading a text message which implicated the Judge as such and that he did not now who the other owners were. That the 2nd defendant added to the conversation by stating that the Judge would be held accountable if it is true that he owns the said company and that his salary would be taken away. It was his argument that what he heard on the radio that day shook the respect he had for the Judge since he had previously held



- him in high repute. That the allegations against the Judge were widely discussed by members of the community in hushed tones and many people after that still hold the notion that the Judge owns the said company which manufactures illicit alcohol. That he has engaged the Judge over the allegations and he seems distraught by the broadcast yet the defendants have not offered any apology. On cross-examination, he stated that the plaintiff was his customer and that he does not know any other Judge who goes by the plaintiff's name. That he called the plaintiff and told him about the broadcast since he had listened to it from the beginning to the end.
13. PW3, Rhoda Wambui Mathare stated that she listened to the show during which the defamatory words were spoken. That as soon as she heard the words, she called the plaintiff but did not discuss the issue with anyone else. On cross-examination, she stated that the plaintiff was well known to her and that he was not a consumer of alcohol, much less a manufacturer of the same. That she called the plaintiff to tell him to tune into the broadcast and listen in.
 14. PW4 was John Abuoro, a client Service Executive at IPSOS who relied on the certificate relating to production of electronic evidence. He stated that the program in question was recorded and transcribed using credible equipment and upon request by the plaintiff, printouts of the same were produced in both Kikuyu and English Languages. He produced the CD containing the recording and the transcripts in Kikuyu and English. He also produced payment receipts for the services his company offered the plaintiff. On cross-examination, he stated that he was not the one who did the recording or the transcription. That the translation was done by one Edward Karanja and that he had no way of verifying that the information translated was accurate.
 15. On cross examination he stated that he participated in the recording and therefore he could verify that their systems were working well. He could not testify to the efficiency of the microphones at the 3rd defendant's broadcasting station and the quality of the gadgets they used. He said that the information was stored in their servers after the recordings were made on the computer and he gave the credentials of the computer that was used to record the broadcast. He stated that the information is stored on a temporary or permanent basis depending on the need. That Mr. Karanja, the person who translated the broadcast from Kikuyu to English is not an employee of the 3rd defendant. It was his testimony that recordings are frequently sourced from their company and their credibility is never in question.
 16. DW1 was the 1st defendant who stated that he was an employee of the 3rd defendant and he hosted the show in question. He stated that he interviewed the 2nd defendant in the same show which was broadcasted live. That during the show, he clarified that the name mentioned did not refer to the honourable Judge and much less, him being involved in the illicit brew manufacturing industry. Upon cross examination he denied mentioning the name of the Honourable judge during the show. That the plaintiff called him during the show but he could not pick the phone and he spoke to him afterwards. That he gave the plaintiff a chance to reply but the judge did not appear in the studio. He stated that the information used in the broadcast was gotten from Muranga area and that he did not know that the plaintiff was a judge at the time. That when he got a chance to talk to the plaintiff, he clarified in the broadcast that he was not referring to the plaintiff as being involved in illicit alcohol business.
 17. DW2 was the 2nd defendant who stated that Indeed he was interviewed at the 3rd defendant's radio station on the said date. That during the show he was laying the basis for the discussion on alcohol consumption in the country and one of the callers named the plaintiff as being involved in manufacturing and selling illicit brew. That the call caught him by surprise as he did not know that a judge could be involved in such a business. That he was aware that the show was live but with a time lag. He stated that in the course of the discussion he mentioned Chief Justice Mutunga, as he then was, and complemented him for his sound leadership style. Upon cross examination he stated that the caller



- clarified that the judge he had mentioned was recently appointed by the president thus impugning the plaintiff. He clarified that the information came from a member of the public.
18. After the hearing, the court directed the parties to file written submissions, and they all complied.
 19. The 1st and 3rd defendants submitted that indeed, they broadcasted the information but denied the fact that the information was meant to defame the plaintiff. It was their submission that they are alive to the fact that alcohol is a menace and the issue need to be discussed. They relied on the Court of Appeal decision in the case of Selina Patani & Another vs Dhiranji V. Patani (2019) eKLR where the ingredients of the tort of defamation were laid out. They relied on the text book Gatley on Libel & Slander, 9th edition at Pg. 161 and stated that the plaintiff was offered a chance to respond and clarify whether it was him being referred to. That the offer was made in further airings of the said station but the plaintiff was not forthcoming and the 3rd defendant sent a correspondent to the plaintiff in Nakuru.
 20. That the name referred to another member of the bench known as Honorable Kiarie who was a Magistrate but the confusion occurred due to the constraints of the Kikuyu language which does not distinguish between a judge and a magistrate. That the plaintiff sent a letter dated 22nd September 2015 demanding for an apology and that the clarification of the information does not amount to an apology. They referred to the text by Gatley on Libel & Slander, 9th edition at Pg. 161 and stated that the amount paid by them as statutory offer of amends should offer them the defense intended under section 12 of the Defamation Act. As to whether the words said were defamatory, they relied on the definition of defamation on Halsbury's Laws of England, 3rd Edition Vol. 24 Page 6 and the provisions of Order 2 Rule 7 of the Civil Procedure Rules as applied in the case of Harrison Kariuki Muru v. National Bank of Kenya Limited & Another (2019) eKLR.
 21. That the plaintiff did not set out the particular defamatory words and therefore could not prove the same. It was their argument that there is bound to be confusion where word "Judge" might have been used in place of the word "Magistrate" and reference was made to the case of Ibrahim Mukhtar Abasheikh v. Royal Media Services & Another (2020) eKLR where the court cited with approval, the cases of Wilkison v. Damton 18972 QB 57 and Janvier v. Sweeney (1919) 2KB- 316. They argued that the defense of fair comment was available to them under section 15 of the Defamation Act which provides that the said defense shall not fail because the information was not verified.
 22. Reliance was placed on the cases of London Artists v. Litter (1969) 2 QB 375 at 291, CA, Kenya Anti-Corruption Commission v. Deepak Chamanlal Kamni & 4 others (2014) eKLR and Grant v. Torstar (2009) 3 SCR 640 SCC 61. They argued that the discussion where the alleged defamatory words were spoken was in furtherance of a national agenda by the National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA). That the words spoken should be analysed alongside the whole discussion and should not be taken out of context and they relied on the case of Stephen Foley & Independent News & Media Limited v. Lord Ashcroft KCMG (2012) EWCA Civ. 423 where the court relied on the case of Cunningham-Howie v. Dimbley (1951) 1KB 361 at 364.
 23. As to whether the plaintiff should be awarded damages, they relied on the cases of Francis Cheron Ngeny & 11 others v. Samuel Kiprop Kilach (2017) eKLR, Nation Newspapers Ltd v. Gilbert Gibendi (2002) eKLR, Koigi Wamwere v. Standard Limited & Another (2011) eKLR, Jakoyo Midiwo v. Nation Media Group (2018) eKLR, Anne Omollo v. Oduor Ongwen & 5 Others (2017) eKLR and Ahmednassir Maalim Abdullahi v Star Publications Limited (2019) eKLR. They urged the court to dismiss the suit.
 24. The plaintiff filed submissions in reply to the 1st and 3rd defendant's submissions, stating that it is too late in the day to contend against production of the transcripts in the Kikuyu and English languages in



- their submissions, yet they did not object at the point of production. That the defamatory words were not targeted at the plaintiff, whose identity as a judge was clearly stated in the transcription. That even if the plaintiff's name is similar to that of a Magistrate, the Magistrate also needs to be protected from such defamatory words. That the defamatory words were not made by way of fair comment since the allegations were not true and the truthfulness of the comments were never verified.
25. In his written submissions, the plaintiff relied on the definition of defamation as given in the book Clerk and Lindsell on Torts 20th Edition, Sweet & Maxwell 1998 at page 1093 and as cited in the case of Anashir Visram v. Standard Limited (2016) eKLR. He further submitted that it is not in question that defamatory statements were indeed published and that the words are injurious to the character and reputation of the plaintiff as a Judge. That the words were malicious and insensitive and no effort was made by the defendants to verify the facts before broadcasting the words. Reliance was placed on the cases of Daily Nation v. Mukundi (1975) EA 311 and Godwin Wanjuki Wachira v. Okoth (1977) KLR 24. It was his submission that when the defendants alleged that the name of the Judge was mistaken for that of a certain Magistrate, the court gave them a chance to prove this but the proof was not forthcoming.
 26. He submitted that even if the initial allegations were made by a caller, the defendants re-published the same words, thus making them liable as was held in Safaricom Limited v. Porting Access Kenya Ltd (2011) eKLR. That since the publication, no apology has been offered to the plaintiff but instead, the show was repeatedly aired on the same radio station. He relied on the cases of Johnson Evan Gicheru v. Andrew Morton & Another (2005) eKLR, Ruth Njiri James v. Njoroge Ndirangu & Others Nrb Civ. Appeal no. 282 of 2016, Phineas Nyaga v. Gitobu Imanyara (2013) eKLR and Samuel Ndung'u Mukunya v. Nation Media Group Limited & Another Civil Case No. 420 of 2011 and argued that he is entitled to damages and the costs he incurred to acquire transcribed and recorded copies of the broadcast. He urged the court to award a cumulative award of Kshs.32,162,400/= with reference to previous awards in decided cases.
 27. The 2nd defendant, in his submissions, relied on the provisions of section 107 of the *Evidence Act* and the cases of Miller v. Minister of Pensions 1947 ALLER 372, James Muniu Mucheru v. National Bank of Kenya Ltd (2019) eKLR and CMC Aviation Ltd v. Crusair Ltd No. 1 1978 KLR 103 (1976-80) 1KLR 835. He argued that he was invited as a guest by the 3rd defendant in his capacity as the then chairperson of NACADA and that one of the listeners sent an SMS making the impugned statements to which he added that if the allegations were true, there would be consequences involving loss of the plaintiff's job and litigation.
 28. As to whether the statement itself was defamatory, he relied on the text by Gatley on Libel & Slander, 9th edition and the case of Musikari Kombo v. Royal Media Services Limited (2018) eKLR. He stated that his words were not defamatory and that once translated, there is the risk of words losing their original meaning, given that the original broadcast was done in the Kikuyu language. He relied on the cases of Janto Construction Company Ltd v. Enock Sikolia & 2 others (2020) eKLR and SMW v. ZWM (2015) eKLR where the court held that the defamatory statements must be proved to have exposed the plaintiff to public hatred, contempt or ridicule. He submitted that the certificate of production of electronic evidence produced by PW4 did not meet the required standard of production of electronic evidence as provided under sections 65 and 106B of the *Evidence Act*. In support of his arguments to that end, further reliance was placed on the cases of Levi Simiyu Mahakali v. Koyi John Waluke (2018) eKLR, County Assembly of Kisumu & 2 others v. Kisumu County Assembly Service Board & 6 Others (2015) eKLR, Republic v. Mark Lloyd Stevenson (2016) eKLR and George Onyango & Another v. Republic (2012) eKLR. He stated that his culpability, if any, has not been proved and he urged the court to dismiss the suit.



29. From all the foregoing, the issues for determination are the following:
- a. Whether the defendants are liable for the tort of defamation against the plaintiff;
 - b. Whether the plaintiff should be awarded damages.
30. Article 33 of *the Constitution* provides for the freedom of expression which may be curtailed under certain circumstances. It states:

- “(1) Every person has the right to freedom of expression, which includes—
- (a) freedom to seek, receive or impart information or ideas;
 - (b) freedom of artistic creativity; and
 - (c) academic freedom and freedom of scientific research.
- (2) The right to freedom of expression does not extend to—
- (a) propaganda for war;
 - (b) incitement to violence;
 - (c) hate speech; or
 - (d) advocacy of hatred that—
 - (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
 - (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).
- (3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”

31. Defamation, according to the 9th Edition Black’s Law Dictionary, means

“The act of harming the reputation of another by making a false statement to a third person. If the alleged defamation involves a matter of public concern, the plaintiff is constitutionally required to prove both the statement’s falsity and the defendant’s fault. A false written or oral statement that damages another’s reputation”

32. In *Gatley on Libel and Slander* 6th Edition the legal meaning of defamation is stated as follows:

“A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another.”

The elements of defamation are as follows:

- a. That the defamatory statements are made to a third party;
- b. The statements are made against the plaintiff;
- c. The statements are false; and
- d. The plaintiff suffered as a result of the statements.



1. The plaintiff alleged that the 1st and 2nd defendants, while discussing on illicit brew at the 3rd defendant's radio station, made statements that were defamatory of him. The alleged defamatory statements are stated in 3rd paragraph of this judgment and they were originally made in Kikuyu language, the essence of which are that the plaintiff, being a judge of the High Court, is one of the owners of Tembo Industries which manufactures and sells illicit brew. PW2 and PW3 attested to the character of the plaintiff and stated that as soon as they heard his name being mentioned in the show, they reached out to him to ask about the allegations. PW1 stated that the allegations were defamatory of him since the same were false. That he called the 1st and 2nd defendants to find out why they discussed an issue like that about him without first asking him for his position but their responses were not forthcoming. That the defendants did not offer any apology but instead, sent their correspondent to him in Nakuru to get his position on the issues discussed.
2. There is no doubt that the said discussion happened on the 3rd defendant's Kameme FM but DW1 stated that during the interview, the name Kiarie Waweru was not to mean the plaintiff but rather a Judicial Officer going by the same name and not a Judge. DW2 stated that he was an interviewee in the said show and that a listener sent an SMS in which he named the plaintiff as one of the owners of the company which was involved in illicit brew manufacturing and circulation. The identity of the plaintiff as a Judge of the High Court is clear because from the evidence, the plaintiff herein was among the 14 judges who had recently been appointed as judges as at the time of the interview. Therefore, the 1st and 3rd defendant's argument that the name refers to a magistrate, does not hold water.
3. In my view, the fact that the 1st and 2nd defendants furthered the conversation on a show that was being aired live, amounts to statements reaching 3rd parties and the same were false and/or unverified. The statements made are claimed to have caused the plaintiff injury to his reputation since he is a Judge of the High Court, whose reputation is demanded by *the constitution* to be beyond reproach. The plaintiff stated that after the program was broadcasted, he received numerous calls from family and friends seeking to know his position on the allegations made.
4. Injury to reputation is not different from other forms of injury as was stated in the text by T. Sharkie, A Treatise on the Law of Slander, Libel Scandalim Magnatum and False Rumours where the concept of reputation was described thus:

“Reputation itself, considered as the object of injury, owes its being and importance chiefly to the various artificial relations which are created as society advances. The numerous gradations of rank and authority, the honours and distinctions extended to the exertion of talent in the learned professions, the emoluments acquired by the mechanical skill and ingenuity, under the numerous subdivisions of labour, the increase of commerce and particularly, the substitution of symbols for property in commercial intercourse all in different digress, connect themselves with credit and character, affixing to them a value, not merely ideal but capable of pecuniary lad measurement, and consequently recommending them as the proper objects of legal protection.”



37. In order to determine whether or not words are defamatory, the East African Court of Appeal in the case of *Onama v Uganda Argus Ltd* [1969] EA 92 stated that the meaning of the words should be able to be regarded by the general public as well as people who are knowledgeable on the subject. PW1 did testify that following the broadcast, he received numerous calls from family and friends who sought to know his position on the allegations. PW2 and PW3 testified that the allegations were unlike the plaintiff as they know him as a man of high moral standing and would not involve himself in such a business. That the statements took them by surprise and they were concerned that the reputation of the Judge has been put to question, hence they called him to listen in too. This, to me, is damage to the reputation of the plaintiff.
38. The 2nd defendant stated that the statement that the plaintiff was one of the owners of the company arose from a listener who sent an SMS and the 1st defendant merely repeated the information which led to the discussion. In their submissions, the 1st and 3rd defendants raised the defense of fair comment and stated that the facts should be deduced from the full context of the conversation so long as the same cannot be separated from the defamatory content (see *Gatley on Libel and Slander* 10th Edition pages 692-693). They urged the court to consider the whole conversation in order to establish context and they relied on the decision in the case of *Stephen Foley & Independent News & Media Limited v. Lord Ashcroft KCMG* (2012) EWCA Civ. 423 where the court relied on the case of *Cunningham-Howie v. Dimbley* (1951) 1KB 361 at 364. From a reading of the transcript, I do agree that the topic being discussed on the broadcast was very progressive and important for the community. However, even then, mentioning the plaintiff's name as an alleged owner of the illicit brew company seemed not to have added value to that conversation. Therefore, the defamatory statements cannot be said to be tied within the full context of the discussion, thereby amounting to fair comment.
39. If this court is to go by the 2nd defendant's argument that the allegation was first made by an unknown listener who sent an SMS which the 1st defendant willingly read, the defendants are still liable in light of common law for re-publishing the allegations. In other words, liability does not stop at the person who said the defamatory words first, rather, it follows any other person who continues publishing the defamatory information. In *Gatley on Libel and Slander* 9th Edition Sweet & Maxwell 1998 at pages 150 – 152 the author observed that:-
- “At common law every republication of a libel is a new libel and, if committed by different persons, each one is liable as if the defamatory statement had originated with him.....To say that a person who repeats a defamatory allegation originated by another is liable is not to say that nature and extent of his liability is the same as that of the originator. The nature and quality of the defamatory publication may vary, dependent upon whether it is a report of what another has said and whether it is adopted, repudiated or discounted. The purpose of the republication will also have a significant bearing.....When a defamatory publication purports to repeat or report the defamatory statement of another it is an essentially different libel from one where the same imputation is conveyed directly. It may require to be charged or defended differently..... it may also be relevant on damages.”
40. The court in the case of *CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFEK)* Being sued through its officials namely *Stephen Mutoro & 2 others* [2014] eKLR relied on this reasoning and stated thus:
- “In the present case, the Defendant could block from its Website undesirable material. It could have deleted or had removed the article from its Website. However, the Defendant did not only decline to remove the article after being requested to do so by the Plaintiff,



but it insisted that it was soliciting for comments on the same. Accordingly, I import in this case the holding in the Wishart and Murray case and apply the same accordingly. I hold that prima facie, it has been established that the Defendant had published the article at its website as contended by the Plaintiff. In any event, as held in *Safaricom Limited v. Porting Access Kenya Ltd* (2011) eKLR, repetition of a rumour is libel itself. By republishing what is libelous, the Defendant is taken to have assumed responsibility in respect hereof.”

41. It was the 1st and 3rd respondent’s duty to manage the information they received from their audience, especially considering that the broadcast was being aired live. The 2nd defendant stated that the broadcast was aired live but with a time lag, which, in my view, should have allowed the 1st and 3rd defendants time to vet their responses to the external feedback in the process of interviewing the 2nd defendant. In fact, from the transcript of the show, the 1st defendant stated:

“I was told that this company is owned by several people and one of them is Judge Kiarie Waweru, am just reading what is on the SMS and I don’t fear. I am saying things as they are, and the information that I was given, I was not told who the other members are but I have been told that there are other people...yes, Kiarie Waweru, I was not able to know the other members.....”

The 1st defendant seemed to be reading from an SMS that was received during the broadcast and he ‘fearlessly’ read it and republished its contents on the live broadcast. The 2nd defendant joined the conversation and asked whether the, Kiarie Waweru was a judge or a magistrate and he proceeded to make his comments about the consequences the plaintiff would face if the Chief Justice heard what the plaintiff was involving himself with. I believe I have said enough regarding the defendants’ liability in this matter.

42. As to whether the plaintiff should be awarded damages, I am sufficiently guided by previously decided cases. The plaintiff pleaded the sum of Kshs.162,400/= for special damages which he has sufficiently proved using receipts. He has also submitted that a cumulative award of Kshs.32,162,400/= would suffice, given the exigencies of economic inflation and he urged the court to consider other court’s awards in similar matters as follows, to name but a few:
- a. *Alnashir Visram v Standard Ltd* 2016 eKLR where an award of Ksh.18,000,000/= was made to a judge as general damages for defamation and Ksh.8,000,000/= as aggravated damages
 - b. *Samuel Ndung’u Mukunya v Nation Media group Ltd & another* [2015] eKLR where an award of Ksh.15,000,000/= was made as general damages and Ksh3,500,000/= as aggravated damages to an advocate;
 - c. *Daniel Musinga t/a Musinga & Co. Advocates v National Nation Newspapers Ltd* [2005] eKLR where the court awarded damages in the sum of Kshs.10,000,000/=;
 - d. *Hon. Uhuru Muigai Kenyatta v Baraza Limited T/A Kenya Television Network (KTN)* [2011] eKLR where the court awarded Kshs.7,000,000/=;
 - e. *Phineas Nyagah v Gitobu Imanyara* 2013 eKLR where the court would have awarded Kshs.3,000,000/=
43. In their pleadings and submissions, the defendants remained adamant in their defenses and especially on the fact that they offered the plaintiff a chance to set the record straight. From the onset, the plaintiff wanted an apology from the defendants but none was forthcoming and he stated that instead, they sent a correspondent to him for purposes of clarifying the information that was aired. Based on this,



I find the need to award the plaintiff aggravated damages. In the case of John v MG Limited [1997] QB 586 the court held:

“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”.

44. In determining damages to be awarded, I am further guided by the following cases:
- a. Miguna Miguna v Standard Group Ltd & 4 others [2017] eKLR where an award of ksh.5,000,000/= was made as general damages and Ksh.1,000,000/= aggravated damages.
 - b. Kenya Tea Development Agency Ltd v Benson Ondimu Masese [2008] eKLR where an award of Ksh.7,000,000/= general damages and ksh.3,000,000/= exemplary damages were reduced by the court of Appeal to a composite figure of Ksh.1.500,000/=.
 - c. Johnson Evans Gicheru v Andrew Morton & another Civil Appeal No. 314 of 2000 where a sum of Ksh.6,000,000/= was made to the then Chief Justice.
45. Finally, noting the age of this case and the changes in media forms, it is likely that this judgment will flare up in social and mainstream media spaces and the defamation found herein might be brought to remembrance, causing further suffering to the plaintiff. As was held in the case of Samuel Ndung'u Mukunya v Nation Media group Ltd & another [2015] eKLR where the Judge relied on the Court of Appeal decision in the case of J.P Machira T/A Machira & Company Advocates v Wangethi Mwangi & another [1998] eKLR, an apology would have no effect to the plaintiff's reputation especially in this age of social media. The judge found it prudent to award damages in lieu of an apology, but since the plaintiff in this case has sought an apology as one of the prayers, the court will grant the same.
46. In the end, having considered the pleadings, arguments by the parties and the relevant laws, judgment is hereby entered in favour of the plaintiff against the defendants jointly and severally. The following orders shall issue:
- a. The defendants, jointly and severally, are hereby ordered to issue and unconditional apology to the plaintiff in a manner and form to be approved by the plaintiff prior to the release to the general public, within 90 days of this judgment, failing which damages in lieu of an apology will become due;
 - b. The plaintiff is hereby awarded damages against the defendants, jointly and severally, as follows:
 - i. General damages: Kshs.10,000,000/= plus interest at court rates from the date of this judgment until payment in full;
 - ii. Special damages: Kshs.162,400/= plus interest at court rates from the date of filing the plaint until payment in full; and
 - iii. Aggravated damages: Kshs.1,000,000/= plus interest at court rates from the date of this judgment until payment in full.
 - iv. Damages in lieu of an apology: Kshs.2,000,000/= plus interest at court rates from the date of this judgment until payment in full
 - c. The plaintiff is awarded costs of the suit.
47. It is so ordered.



DELIVERED, DATED AND SIGNED AT EMBU THIS 08TH DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

.....for the Plaintiff

.....for the 1st & 3rd Defendants

.....for the 2nd Defendant

