



REPUBLIC OF KENYA



**Munya v Nation Media Group Ltd & another (Civil Suit 415 of 2011)
[2024] KEHC 6989 (KLR) (Civ) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6989 (KLR)

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

**CIVIL
CIVIL SUIT 415 OF 2011**

CW MEOLI, J

JUNE 13, 2024

BETWEEN

HON. PETER GATIRAU MUNYA PLAINTIFF

AND

NATION MEDIA GROUP LTD 1ST DEFENDANT

MAINA MUIRURI 2ND DEFENDANT

JUDGMENT

1. This suit was instituted via a plaint dated 01.09.2011, by Hon.Peter Gatirau Munya, (hereafter the Plaintiff) against the Nation Media Group Limited and Maina Muiruri (hereafter the 1st and 2nd Defendant/Defendants, respectively). The suit is founded on the tort of defamation. The Plaintiff seeks several reliefs including general damages for libel and defamation, aggravated and exemplary damages. He also seeks a permanent injunction restraining the Defendants whether by themselves, their agents and or employees from publishing defamatory words or innuendo similar in effect and or substance.
2. The Plaintiff averred that on 27.06.2011, the Defendants falsely and maliciously published or caused to be written, printed, and published on page four (4) of the daily newspaper, Taifa Leo, Edition No. 17375, a defamatory article, report and or story against the Plaintiff entitled “Wamshtaki Mbunge kwa “Uchochezi”, which publication was highly defamatory of the Plaintiff. That the contents of the said article are grossly incorrect, factually untrue, and defamatory. In addition, the publication ridiculed the Plaintiff by portraying him as contemptible and an inciter. He further averred that the said article was negligently published and actuated by a malicious desire to injure his reputation and standing in society. That despite the Plaintiff’s demand for apology and notice of intention to sue, the Defendants have declined to retract the said words or render an apology thereby necessitating the suit.



3. On 18.01.2012 the Defendants filed a statement of defence denying the key averments in the plaint and averred that the words in the article in their natural and ordinary meaning, or otherwise consist of expression of opinion as a fair comment and fair information upon the facts which are a matter of public interest. Further that the words in their natural and ordinary meaning or otherwise were published under a sense of public duty and without malice to the Plaintiff and in the honest belief that the information contained therein was true and was further published as fair information on matters of public interest. The Defendants went on to aver that they took all reasonable care regarding the said publication which did not consist of defamatory statements, whereas the words therein were published on a privileged occasion.
4. The Plaintiff thereafter filed a reply to defence wherein he joined issues with the defence, denied and or objected to the averments therein and reiterated the averments in his plaint.
5. During the trial, the Plaintiff testified as PW1. He began by adopting his witness statement filed on 01.09.2011 as his evidence-in-chief. The gist of his evidence was that on 27.06.2011 the Defendants published an article which was brought to his attention by members of the public and upon reading it was shocked by the contents which were untrue. He stated that the National Commission on Cohesion and Integration (the Commission) denied the purported letter cited in the article, and hence there was no basis for the article. He reiterated that the article was malicious and an attempt to influence voters given its timing during election season. It was his evidence further that Dr. Mzalendo Kibunjia of the Commission confirmed to him that no such meeting as purported in the article took place and the allegation was false and malicious.
6. He stated that the newspaper never sought his comments prior to the publication depicting him as a violent criminal, and war monger. Further that his demand for an apology from the Defendants elicited no response. He produced the documents appearing in his list of documents dated 01.09.2011 as PExh.1 and translation of the subject article attached to list of documents dated 23.11.2021 as PExh.2.
7. Under cross-examination, he confirmed that he was the Member of Parliament (MP), Tigania East Constituency from 2002 to 2012. And subsequently appointed to the Ministry of East African Community. Maintaining however that the article in “Taifa Leo” was widely read and injured his reputation and his political career. He further stated that at the time of publication, the 2013 General Elections in which he intended to vie for the Meru County Gubernatorial seat were imminent and that he won the seat under difficult circumstances.
8. Kobia Andrew M’Ekeringo testified as PW2. He identified himself as a farmer, a Member of the County Assembly (MCA) and previously a councilor, Muthaara Ward in Tigania East Constituency. He confirmed that the Plaintiff was known to him as an MP since 2007 and lecturer. Adopting his witness statement dated 30.04.2013 as his evidence-in-chief, he added that the article in the newspaper was brought to his attention by his constituents and on reading it, called the Plaintiff. That they were in shock because the incident asserted in the article had not occurred in the said constituency or in Muthaara Ward. He testified that he was unhappy because his Ward was mentioned in the article and yet no such incident, as published, had occurred therein. He further stated that the Plaintiff is a peaceful person of integrity and the said publication was costly to his political career.
9. During cross-examination, he confirmed having known the Plaintiff prior to publication of the article. And that after reading the article, he informed the Plaintiff even though he did not believe the contents therein. It was his evidence further that despite the article he maintained his relationship with the Plaintiff and that the latter did successfully vie for the Meru County Gubernatorial seat in 2013.
10. The Defendant opted not to call any evidence at the trial.



11. At the close of the trial, the parties filed written submissions. The Plaintiff's lengthy submissions addressed the twin issues of liability and damages. At the outset, counsel for the Plaintiff reiterated the pleadings and evidence before the Court. He contended that Defendant never objected to the production and admission as evidence, of the witness statement by Dr. Mzalendo Kibunjia dated 20.06.2013, who had left the commission and could not be procured to testify. Further calling to aid the provisions of Article 7(2) of *the Constitution* of Kenya and Section 34 of the *High Court (Organization and Administration) Act*, he submitted that the defamatory words complained of were in Kiswahili, which was an official language of the Court. Further pointing to the translation certificate tendered in evidence without objection from the Defendants.
12. He cited in regard to liability the English decisions in *Wisniewski v Central Manchester Health Authority* 1997 PIQR 324 & *Gordon James Ramsay v Gary Love* [2015] EWHC 65 (Ch), the decisions in *Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 others* [2013] eKLR, *Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 3 others* [2013] eKLR, *Ayiera v Kimwomi & 3 others (Election Petition E002 of 2022)* [2023] KEHC 816 (KLR) and *Sumra Irshadali Mohammed v IEBC & another*, Election Petition Appeal 22 of 2018 (unreported). Counsel submitted that the Defendants failure to call evidence was a deliberate strategy to evade cross-examination on the defamatory words they published, and hence their pleadings and material being untested were of no probative value. Counsel further asserted that in the circumstances, the Court ought to ignore or expunge the Defendant's documents from the record.
13. On whether the Defendants' article was defamatory of the Plaintiff, counsel anchored his submissions on several authorities including *John Ward v Standard Ltd*, HCCC No. 1062 of 2005, *Gatley on Libel & Slander* 8th Edition, Para. 4, Pg. 5, Winfield in J.A. Jolowicz and *T. Ellis Winfield on Tort* 8th Edition, Pg. 254, *Halsbury's Laws of England* 4th Edition Vol 28 Para. 10, the decision in *J.M Mutwii v Nation Media Group Limited*, HCCC No. 130 of 2009, the English decisions in *Berkoff v Burchill & Anor* [1996] 4 All ER 1008 [1997] EMLR 139 [1996] EWCA Civ 564, and the Australian decision in *Potts v Moran* (1976) 16 Sasr 284 (At 302). Counsel reiterated that the totality of Plaintiff's evidence was to the effect that his win in the 2013 general elections was narrow, arising from the defamatory article depicting him as incapable of performing his duties. Applying the 'reasonable/ordinary man test' the literal and ordinary meaning of the words published by the Defendants, counsel asserted that the same were defamatory, lowered the Plaintiff's reputation and were meant to disparage his good character and moral standing in society.
14. He further argued that it was evident that the publication specifically referred to the Plaintiff and not any other person and the Defendants did not dispute this. Moreover, the Defendants did not deny the publication in the Taifa Leo Newspaper, on 27.06.2011 and contents therein. Counsel citing the English decision in *Knupffer v London Express Newspaper Ltd* [1944] 1 All ER 495, *Pullman -v- Walter Hill & Co* (1891) 1 Qb 524 and the decision in *Royal Media Services Ltd v Valentine Mugure Maina & another*, Civil Appeal No.19 Of 2018 in that regard.
15. On the question whether the publication was false, counsel contended that the Defendants failed to tender evidence to the contrary. That if the words were defamatory, the law presumes them to be false and casting the burden on the Defendants to plead and prove the truth of words published, hence justify publication. Reiterating the Defendants' duty to act in good faith and to render accurate reporting, counsel asserted that the right to inform the public is not a licence allowing the Defendants to purvey misinformation. That the publication concerning the Plaintiff of demonstrated false allegations on the loss of lives and incitement occasioned by the Plaintiff could not be said to be in the public interest. Counsel here relying on the provisions of Article 33(3) of *the Constitution*, Section 3(2) of the *Media Council Act*, the English decisions in *Belts v Lawes* (1882)51LJQB 359 at



361, *Reynold v Times Newspaper* UKHL 45, 4 All ER 609, 2 AC 127 and the New Zealand decision in *Vickery v McLean* (2000) NZCA 338 paragraph 27.

16. Regarding malice, it was posited that the failure by the Defendants to adduce evidence in support of the allegations published against the Plaintiff was evidence of recklessness and malice. That the publication was not justified and did not fall within the purview of qualified privilege. Leading to the inference of malice on the part of the Defendants. The provisions of Section 7(2) of the *Defamation Act* and the decisions in *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR, Paul Mwaniki Gachoka & another v Nation Media Group Limited & another, HCCC No. 46 of 2019 and *KL v Standard Limited* [2014] eKLR were called to aid.
17. On the issue of damages, counsel anchored his submissions on the English decision in *Elton Hercules John v Mgn Limited* [1995] EWCA Civ 23, to submit that the Defendants did not attempt to mitigate the damage done to the Plaintiff's reputation. That as held in *Ken Odondi & 2 Others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* [2013] eKLR where a party declines to retract and apologize for a defamatory publication, exemplary damages will issue. The Court was thus urged to award Kshs. 30,000,000/- as general damages, aggravated damages, exemplary damages and damages in lieu of an apology. In this regard, the Court was urged to consider that the Plaintiff was entitled to equal benefit and protection of law pursuant to Article 27(1)(2) of *the Constitution*, as a politician, cabinet secretary and an advocate of the High Court.
18. In support of the proposed quantum of damages, counsel relied on the decisions in *Hon. Christopher Ndarathi Murungaru v John Githongo* [2019] eKLR, *Hon. Henry Obwocha v Head Link Publishes Ltd* [2014] eKLR, *Alnasbir Visram V Standard Limited [2016] eKLR* and *Samuel Ndung'u Mukunya v Nation Media Group Limited & Another* [2017] eKLR. In conclusion, counsel urged the Court to allow the suit with costs.
19. The Defendants' counsel opened his submissions by contending that the Plaintiff's submissions were misleading. Pointing out regarding the witness statement dated 20.06.2013 by Dr. Mzalendo Kibunjia, that no directions were taken on production and admissibility of the said witness statement. Responding to the submissions that the Plaintiff's evidence was uncontroverted, it was asserted that the fact does not in any way lessen the burden on part of the Plaintiff to prove his case on a balance of probabilities. That in the absence of proof on a balance of probabilities regarding the ingredients of defamation, the Plaintiff's suit must fail. The decisions in *Bwire v Wayo & Sailoki (Civil Appeal E032 of 2021)* [2022] KEHC 7 (KLR), *Mary Wanjiku v Lucy Njeri Munyua & Another* [2020] eKLR, *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR and *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* [2009] eKLR were cited.
20. On whether the published words were defamatory of the Plaintiff, counsel contended that article comprised an expression of opinion and constituted fair comment and fair information upon facts which were a matter of public interest. While placing reliance on the decision in *SMW v ZWM* [2015] eKLR, it was submitted that a statement is only defamatory if it conveys a defamatory imputation to a reasonable person. Counsel submitted that malice is a subjective element that must be established as a fact by way of admissible evidence, lacking in this instance. That the article was simply an expression of opinion on a public interest issue and therefore no malice may be read into the publication pursuant to the defence of fair comment and qualified privilege. Here, counsel relied on the cases of *Helen Makone v Francis Kahos & Another* HCCC No. 2869 of 1997 [2004] eKLR and *Kagwiria Mutwiri Kioga & Another v Standard Limited & 3 Others* [2015] eKLR.
21. Regarding alleged damage to the Plaintiff's reputation, counsel reiterated the fact, confirmed in the Plaintiff's testimony that despite the publication of the subject article by the Defendants, the Plaintiff



participated in the 2013 General Elections and won the Meru County Gubernatorial Seat, and served in the said position between 2013 to 2017. And in addition, served as the 2nd Chairperson of the Council of Governors between 2015 to 2016, and despite his loss in 2017, he subsequently served in various cabinet secretary positions.

22. Counsel also highlighted evidence by PW2 that he did not believe the subject article and maintained a cordial relationship with the Plaintiff notwithstanding. All demonstrating that no grave public ridicule, scandal, odium, or contempt was visited upon the Plaintiff in the eyes of right-thinking members of society. Counsel therefore submitting that the subject article was not defamatory of the Plaintiff either as alleged or at all and relying on the case of *Hezekiel Oira v Standard Limited & Another* [2016] eKLR. He urged that the suit ought to be dismissed with costs.
23. In the alternative, and without prejudice to the above submission, counsel for the Defendants argued that the award of damages is not intended to enrich a party but to restore the said party to the position he/she was in prior to the injury. Further the award ought to be fair and commensurate with the damage the article complained of had on the Plaintiff's reputation. The decisions in *John v MGN Limited* [1996] 2 All ER 35 and that in *Jones v Pollard* (1997) EMLR as cited in *Margaret Wanjiku Kariuki v Nairobi Star Publication Limited* [2016] eKLR were cited in that regard.
24. In proposing the award Kshs. 500,000/- as general damages, counsel relied on a raft of decisions. These include *Jakoyo Midiwo v Nation Media Group & Another* [2018] eKLR, *Royal Media Services Limited & Another v Jakoyo Midiwo* [2018] eKLR, *Musikari Kombo v Royal Media Services Limited* [2018] eKLR, *Nation Media Group Ltd & Another v Hon. Martha Karua* [2020] eKLR, *Hon. Bishop Margaret Wanjiru Kariuki v Nairobi Star Publications* [2016] eKLR, *Hon. Bishop Margaret Wanjiru Kariuki v Nation Media Group Limited* [2021] eKLR and *Balala v Nation Media Group Limited* (Civil Suit 368 of 2011) [2022] KEHC 13961 (KLR).
25. Finally, placing reliance on *Gatley on Libel and Slander* tenth Edition at Pg. 246-250 and the English decision in *Manson v Associates Newspaper Ltd* (1965) 2 ALL E.R 945 at Pg. 960, counsel asserted that the purpose of awards in exemplary and aggravated damages was to punish a defendant whose conduct exacerbated the injury caused to the Plaintiff, which was not demonstrated in this case. Moreover, it was not proved that the Defendants expressed hostility or malice to the Plaintiff before or during the trial. The Defendant thus took the position that this is not a suitable case for the award of both exemplary and aggravated damages. In summation the Court was urged to dismiss the suit with costs and in the alternative award damages as proposed by the Defendants.
26. The Court has considered the evidence on record and the parties' respective submissions. The key issue for determination is whether the Plaintiff has proved his case on a balance of probabilities and if so, the appropriate damages to be awarded. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”



27. So far as the tort of defamation is concerned, the rationale behind the law of defamation was spelt out by the Court of Appeal in *Musikari Kombo* (*supra*):

“The law of defamation is concerned with the protection of a person’s reputation. Patrick O’Callaghan in the *Common Law Series: The Law of Tort* at paragraph 25.1 expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...’

Defamation protects a person’s reputation that is the estimation in which he is held by others; it does not protect a person’s opinion of himself nor his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’ and it affords redress against those who speak such defamatory falsehoods...”

28. Actions founded on the tort of defamation often bring out the tension between private interest and public interest. While Article 33(1) of *the Constitution* guarantees every person’s right to freedom of expression including the freedom to seek, receive or impart information or ideas, sub-Article (3) states that “In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”. Article 34 guarantees the freedom of the media while Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions of the *Defamation Act*. Contemplating these competing rights Lord Denning MR stated in English Case of *Fraser v Evans & Others* [1969] 1 ALL ER 8; -

“The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed.”

29. Within our jurisdiction, the Court of Appeal in *Selina Patani & Another v Dhiranji v Patani* [2019] eKLR held that the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that:

“In rehashing, we note the ingredients of defamation were summarized in the case of *John Ward v Standard Ltd.* HCC 1062 of 2005 as follows:

- i. The statement must be defamatory.
- ii. The statement must refer to the plaintiff.
- iii. The statement must be published by the defendant.
- iv. The statement must be false.”

30. There is no dispute in this case regarding ingredient (iii) above ; the Defendants readily admit to publishing the article in question in the first limb of paragraph 7 of their joint statement of defence. The Defendants appear to indirectly admit element (ii) above. However, the Defendants expressly disputed the remaining ingredients, namely, (i) & (iv) above . Thus, the issues expressly in dispute are whether the statements in the article as published were defamatory and false; and or whether the



defence of privilege, fair comment, and justification as pleaded are available to the Defendants. The Court proposes to deal concurrently with these issues.

31. The undisputed facts can be briefly stated as follows. At the time of filing the suit, the Plaintiff was the sitting MP for Tigania East Constituency in Meru County and serving as the Assistant Minister in the Ministry of East African Community in Government of Kenya (the Government). It is further undisputed that during the 2013 General Elections, the Plaintiff successfully vied as the Governor of Meru County, which position he held between 2013 to 2017. However, in the 2017 General Elections, he failed to recapture his gubernatorial seat, but subsequently served in various posts as Cabinet Secretary in the Government between 2017 to 2022.

32. Further it is not in dispute that on 27.06.2011, the Defendants Newspaper 'Taifa Leo' published an article entitled, "Wamshtaki mbunge kwa "uchochezi" which the Plaintiff asserts to be defamatory of him. It is apposite to set out in extenso the contents of the article complained of. The print article produced as PExh.1, as published by Defendants in the Swahili language read as follows:

“Wakazi wa Kijiji kilichopo kaunti ya Tharaka wamemshtaki Mbunge wa Tigania Mashariki, Bw Peter Munya kwa tume ya Uwiano na Maridhiano kwa madai ya uchochezi uliozua mauaji.

Katika barua ambayo ilitumwa kwa Mwenyekiti wa tume hiyo, Dkt. Mzalendo Kibunja, wenyeji hao wa Kijiji cha Kiira walidai mbunge huyo amekuwa akitoa matamshi ya uchochezi ambayo yamesababisha vifo vya watu 12.

Bw Munya pia ni waziri msaidizi wa Wizara ya Masuala ya Afrika Mashariki

Kwa mujibu wa barua hiyo ambayo imetiwa sahihi na watu 400 na ambao msemaji wao ni Bw Patrick Kamanja, wamesema mauaji hayo yametekelezwa katika Kijiji cha Matambithi.

Wanadai kuwa mbunge huyo amekuwa akiingiza siasa katika masuala ya mashamba katika eneobunge la Tigania Magharibi.

Barua hiyo inasema: “Haya ni mauaji ya kikatili ambayo yanafaa yazimwe kufuatia kuchukuliwa hatua kwa Bw Peter Munya. Amekuwa akiandaa mikutano katika maeneo mbalimbali na kutoa matamshi ya uchochezi.”

Dkt Kibunja aliambia Taifa Leo “Ni kweli kuwa barua hiyo tulipokea wiki iliyopita ikiandamana na nakala za video za mikutano ya Bw Munya.” (sic)

33. At this point, it is necessary to first address the question of Dr. Mzalendo Kibunja's witness statement dated 20.06.2013 which the Plaintiff asserts was admitted as evidence in the absence of objection by the Defendants, a matter disputed by the Defendants. As rightly argued by the Defendants, the record of proceedings reveals that the Plaintiff called two (2) witnesses. While PW1 testified on 16.11.2021 and 26.06.2023, PW2 gave his evidence on 26.07.2023. At the close PW2's evidence, counsel for the Plaintiff informed the Court that he would be closing his case as his next witness, presumably Dr. Mzalendo Kibunja had left his position at the Commission. Beyond this statement by counsel, and to which the Defendants chose not to respond, there is no application or order on the record of proceedings of the day for the admission of Dr. Mzalendo Kibunja's witness statement dated 20.06.2013 as part of the Plaintiff's evidence, without calling the witness. The disputed statement is therefore not part of the Plaintiff's evidence as asserted by counsel.

34. On another preliminary issue, the record shows that when the Plaintiff initially took the witness stand to testify, he was stood down after his counsel sought leave to put in a translation of the impugned article. On 26.06.2023, counsel for the Plaintiff intimated that he had since filed the translation of the



article, which was eventually produced as PExh.2 at the subsequent hearing. The Defendants had prior to that demanded that the said translation be produced by the maker. The Court, upon hearing rival arguments by the parties directed that “the translation and certificate to be produced by the Plaintiff to obviate any further delay in the matter. In any event the two languages in the translation are recognized as official languages of the Court”. Pursuant to Section 86 of the *Civil Procedure Act*, and Section 34 of the *High Court (Organization and Administration) Act*, the official language of the Court is English and Swahili.

35. Now moving to briefly address ingredient (ii) of defamation as prescribed in *Selina Pattani (supra)*, there appeared to be a tacit and indirect admission by the Defendants on that score. As earlier observed, the Defendants in their joint statement of defence did not expressly deny that the article in question was and or concerned the Plaintiff. On its face, the article (PExh.1) and the resultant translation (P.Exh. 2), described and mentioned the Plaintiff by name as follows: - “Mbunge wa Tigania Mashariki, Bw Peter Munya...” . Undisputedly, at the material time the Plaintiff was serving as the MP for Tigania East. Therefore, the article was undoubtedly about him. This fact was not controverted by the Defendants whose defence rested on privilege, fair comment, and justification. The Court is therefore satisfied that the article and alleged offending statements therein referred to the Plaintiff.
36. Were the statements in the publication referring to the Plaintiff false?
- The article employed words and phrases such as “kwa madai ya uchochezi ulizua mauaji” “uchochezi ambao umesababisha vifo vya watu 12” “mauaji hayo yametekelezwa katika Kijiji cha Matambithi” and “amekuwa akingiiza siasa katika masuala ya mashamba”. The article was brief. The gist thereof being that a report had been made to the Commission concerning the Plaintiff, who at the time was serving as the MP for Tigania East, via a letter allegedly authored by a section of Constituents of Tharaka, regarding his acts of incitement to violence leading to the violent murders of 12 people; that the Plaintiff as MP had been politicizing issues relating to land in Tigania West Constituency hence the inhumane killings which ought to be stopped through action against the Plaintiff; that he had been organizing meetings in several places incite locals; and that Dr. Kibunja of the Commission had confirmed receipt of the said letter. See - PExh.2.
37. The Plaintiff in his evidence dismissed the statements as false and stated that the article was published without prior seeking of his comment. That although he subsequently instructed counsel to seek retraction of the said article and an appropriate apology from the Defendants, none was forthcoming. He further described his frantic efforts to defend himself to several of his colleagues in parliament, legal fraternity and heads of parastatals who viewed him as an inciter to violence. He tendered a copy of the demand letter to the Defendants and the impugned article in PExh.1.
38. The Plaintiff read a malicious intent in the publication aimed at influencing voters given the timing of the publication in the campaign season and imminent General Elections, in which he narrowly won the Meru County Gubernatorial seat. On his part, PW2 disputed the truth of the statements in the publication citing the fact that he hailed from the area where the violent deaths had allegedly occurred and dismissing the claims as false. Like PW1, he termed the alleged complaint letter regarding the Plaintiff’s alleged conduct to the Commission as fictitious. The foregoing evidence was hardly shaken during cross-examination.
39. The Defendants, despite pleading defences of privilege, fair comment, and justification, did not adduce any evidence to demonstrate the truth of the contents of the said statements as published in the Defendants’ newspaper. Or even tender the alleged letter to the Commission which the article purported to be the source of the statements. Lending credence to the Plaintiff’s assertions that the statements in the publication concerning the letter to the Commission and alleged contents were



indeed false in so far as they associated the Plaintiff with criminal conduct of incitement to violence, leading to several murders.

40. In view of the foregoing, the Court finds that the statements in the offending publication were false. Gatley on Libel and Slander 6th Edn. states that; -

“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”.

41. Were the statements in the offending article defamatory? A defamatory statement is defined in Halsbury's Laws of England 4th Edition Vol. 28 paragraph 10 as:

“... 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”.

See also the Court of Appeal definition of a defamatory statement in SMW v ZWM (2015) eKLR.

42. The Court stated in Elizabeth Wanjiku Muchira v Standard Ltd [2011] eKLR that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the “probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published.”-Clerks & Lindsell on Tort 17th Edition 1995-page 1018.”

43. In Musikari Kombo (*supra*) the Court of Appeal stated that:

“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. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined:

“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.”

44. Also, in Onama v Uganda Argus Ltd (1969) EA the East African Court of Appeal stated as follows:

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

See also SMW v ZWM (2015) eKLR

45. The Plaintiff asserted that the statements in the subject article of 27.06.2011 were defamatory in their natural and ordinary meaning, by imputing that, he was inter alia a war monger, an inciter, with little or no regard for human life, unworthy of being elected as an MP and guilty of hate speech. (See Para. 12 of the plaint). PW2 testified that he was shocked upon reading the article, as no such incidents alleged therein had occurred in the said constituency or in Muthaara Ward. PW2 further stated that he did not believe the statements in the said publication showing the Plaintiff in poor light and continued to relate with the Plaintiff who went on to vie for and win the Meru County Gubernatorial seat in 2013.



46. The Defendants in their submissions highlighted the fact that PW2 did not believe the contents of the article and asserted that in the absence of other evidence on how the Plaintiff's reputation was affected by the article in the eyes of right-thinking members of society, the claim should fail. Moreover, the Plaintiff subsequently successfully vied for the Meru County Gubernatorial seat and remained in active politics and public service. In *Elizabeth Wanjiku Muchira (supra)* the Court of Appeal citing *Clerks & Lindsell on Tort* 17th Edition 1995-page 1018 held that if the words published have a defamatory tendency, it will suffice even though the imputation is not believed by the person to whom they are published.
47. From the testimony of PW2, while he did not believe the contents of the article, he evidently perceived the article as having a defamatory tendency on the Plaintiff's reputation. He expressed shock at the contents of the article and stated that despite the purport, he continued to relate with the Plaintiff, whom he viewed as a man of character. That is sufficient; there is no requirement to prove actual damage in a suit for defamation. In *Selina Pattani (supra)*, the Court of Appeal stated that :
- “In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered”.
48. And certainly, given the dynamics involved in politics and elections, any test of loss of, or lowered reputation based on whether a plaintiff won or lost a seat after a defamatory publication, would be as fickle as the electorate itself. Suffice to say that in its plain meaning, and as clearly understood by PW2, as an ordinary man, the article had a defamatory tendency, whether it was believed by him or other people to whom it was published.
49. Additionally, the said publication was not covered by fair comment and qualified privilege. First, the publication referring to the Plaintiff was passed off as factual, the Defendants citing as authority an alleged letter to the Commission. Here, the defence of fair comment is unsustainable because the basic facts upon which such comment could have been premised were evidently false, going by PW2's evidence. The alleged letter to the Commission was not produced by the Defendants who cited it in their article. Whether such a letter existed appears doubtful, whereas the allegations arising therein have been demonstrated to be false.
50. A comment based on falsehood cannot qualify as fair comment. See *Nation Media Group Ltd. v Alfred N. Mutua* [2017] eKLR. As regards the defence of justification by dint of Section 14 of the *Defamation Act*, it was held in *Uhuru Muigai Kenyatta V Baraza Leonard* [2011] eKLR that: -
- “While taking the defence of justification, or qualified privilege in a 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 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 defendants to make it a fair publication.”
51. As earlier noted, the Defendants opted not to call any evidence to support their defence of justification, instead submitting that the impugned article was simply an expression of opinion on a public interest issue and therefore no malice may be read into the publication which is covered by the defences of fair comment and qualified privilege. The averments raising the defence of justification were disputed by the Plaintiff in his reply to defence. The evidential burden of proving the defence of justification lay with the Defendants but they failed to discharge the same.



52. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR while considering the twin concept of legal and evidential burden held inter alia that:

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

53. The Plaintiff testified that the Defendants acted maliciously inter alia by failing to seek his comments prior to publication of the article and refusing to make a retraction and apology for the publication. The Code of Conduct for the Practice of Journalism made under the *Media Council Act* provides that;

“Accuracy and fairness

- (1) A person subject to this Act shall write a fair, accurate and an unbiased story on matters of public interest.
- (2) All sides of the story shall be reported, wherever possible.
- (3) Comments shall be sought from anyone who is mentioned in an unfavorable context and evidence of such attempts to seek the comments shall be kept”.

54. No evidence was offered by the Defendants demonstrating their compliance in this instance with the above requirement in the Code of Conduct for the Practice of Journalism and or that the publication was made without any malice and or bias. In *Phineas Nyagah v Gilbert Imanyara* [2013] eKLR the Court held that:

“Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice may be 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.”

55. Reviewing all the available material, this Court is of the view that the language used in the publication, especially regarding alleged brutal killings of 12 people, was itself likely to inflame passions, untampered, and disproportionate. Thus, the Defendants actions were clearly reckless and malicious in so far as the publication falsely imputed against the Plaintiff serious criminal conduct that ordinarily invite penal sanctions, all without first verifying the true facts. Or obtaining a comment from the Plaintiff prior to publication, suggesting indifference as to whether the allegations in the publication were true. The Court finds that the Plaintiff has proved his case on a balance of probabilities and that the Defendants are therefore liable for defamation.



56. Concerning damages, the Court has considered the parties' respective submissions. The purpose of awarding general damages in a libel action is to compensate the plaintiff for the damage done to his reputation, and the Court has wide discretion, depending on the peculiar circumstances of the case before it. See *CAM v Royal Media Services* [2013] eKLR. The Court of Appeal in *Evans Gicheru v Andrew Morton & Another* [2005] eKLR adopted factors to guide assessment of damages for defamation from *Jones v. Pollard* [1997] EMLR 233 as follows: -

“(i) The 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. (ii) The 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. (iii) Matters tending to mitigate damages, such as the publication of an apology. (iv) Matters tending to reduce damages, and (v) Vindication of the plaintiff's reputation past and future.”

See also *John v MGM LTD* (1997) QB 586.

57. No doubt the libel in this case touched on the Plaintiff's personal integrity, honour, and reputation at the time when he was an MP for Tigania East Constituency and Assistant Minister in the Ministry of East African Community. The publication had potentially a wide reach among readers of the 'Taifa Leo'. However, the Plaintiff's claim that the publication adversely affected his performance in the race for the Meru County Gubernatorial seat in the circumstances appears to be based on conjecture. In any event he won the seat. That said, it appears that the Defendants have to date not retracted the publication or tendered an apology to the Plaintiff. Equally, while a politician may, depending on the season, be loved or loathed by voters and general populace in equal measure, or be more loved than loathed or vice versa, it is not an irrelevant consideration here that the Plaintiff is an advocate of the High Court, and previously served as a cabinet secretary. And that the imputations against him involved alleged criminal actions on his part that had allegedly resulted in brutal killings of 12 people.

58. All considered, however, the proposed sum of Kshs. 30,000,000/- as general damages, aggravated damages, exemplary damages is not justifiable on the facts of this case. The sum proposed is manifestly excessive, especially in comparison with awards made in the persuasive decisions cited by the Plaintiff, some of which are distinguishable on material facts. On the other hand, decisions cited by the Defendants were not readily comparable with the instant case and the proposed sum of Kshs. 500,000/- as general damages appears too low on the facts before the Court. Upon considering all the relevant matters, the Court is persuaded that an award of Kshs. 3,500,000/- (Three Million Five Hundred Thousand) in general damages would be adequate compensation for the Plaintiff's injury.

59. Regarding exemplary damages, these are awarded as deterrent to the wrong doer and potential like-minded tortfeasors. It was held in the case of *John v MGM LTD (supra)* that: -

“Exemplary damages can only be awarded if the Plaintiff proves that the Defendant when he made the publication knew that he was committing a tort or was reckless whether his action is tortious or not, and decided to publish because the prospects of material advantage outweighed the prospects of material loss...if the case is one where exemplary damages can be awarded the court or jury should consider whether the sum which it proposes to award by way of compensatory damages is sufficient not only for the purposes of compensating the Plaintiff but also for the purpose of punishing the Defendant.”



60. In *Mansion V Associated Newspapers LTD* (1965) 2 ALL ER 954 at 957 the English court stated that exemplary damages may be awarded:

“In a case in which a newspaper quite deliberately published a statement which it either knows to be false or which it publishes recklessly, carelessly, whether it be true or false.”

61. The gravity of the contents of the publication herein called for prior verification of facts by the Defendants. The failure by the Defendants to verify facts resulted in injury to the Plaintiff's reputation. The Plaintiff is thus entitled to exemplary damages assessed at Kshs. 1,500,000/-. The Court declines to award aggravated damages, there being no basis laid to warrant such award.

62. In the result, judgment will be entered for the Plaintiff against the Defendants jointly and severally in the total sum of sum of Kes.5,000,000/- (Five Million Only). The Plaintiff is also awarded the costs of the suit and interest from the date of judgment.

63. Concerning the prayer seeking prohibitory injunctions against the Defendants, the Court doubts whether, more than a decade since the impugned publication, orders to restrain the Defendant from publishing the defamatory statements would be efficacious or appropriate. This prayer is declined, together with any other relief sought in the plaint and not specifically granted in this judgment.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF JUNE 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Mbithi h/b for Mr. Omogeni

For the Defendants: Ms Ndunge

C/A: Erick

