Gitonga v Farah & 4 others (Civil Suit 298 of 2011)
[2024] KEHC 8896 (KLR) (Civ) (8 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8896 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 298 OF 2011

CW MEOLI, J

JULY 8, 2024

BETWEEN

EUSTACE GITONGA ..... PLAINTIFF

AND

DR IDLE FARAH ..... 1ST DEFENDANT

NATIONAL MUSEUMS OF KENYA ..... 2ND DEFENDANT

RITA TININA ..... 3RD DEFENDANT

JOE AGEYO ..... 4TH DEFENDANT

NATION MEDIA GROUP LTD ..... 5TH DEFENDANT

JUDGMENT

1. This suit was filed on 28.07.2011 by Eustace Gitonga, (hereafter the Plaintiff) against the Dr. Idle Farah, National Museums of Kenya, Rita Tinina, Joe Ageyo and Nation Media Group Limited (hereafter the 1st, 2nd, 3rd, 4th, & 5th Defendant/Defendants), and is founded on the tort of defamation. The Plaintiff seeks several reliefs including a permanent injunction restraining the Defendants either by themselves, their directors, editors and or their authorised agents, servants, employees, distributors or otherwise whomsoever from publishing, circulating, distributing, selling, offering for sale, repeating or continuing the publication of the statements words and articles as at Pg. 9 of the Daily Nation Newspaper publication dated 20.05.2009 and or repeating or publishing photographs, statements, words and articles to the like effect that are defamatory of and concerning the Plaintiff; a permanent injunction restraining the Defendants either by themselves, their directors, editors and or their authorised agents, servants, employees, or otherwise whomsoever from broadcasting, circulating, disseminating, repeating or continuing to broadcast the statements, stories and words as in the 5th

Defendant's news bulletin of 05.02.2011 at 9.00PM Prime Time News in its NTV station and or repeating or publishing statements, words and stories to the like effect that are defamatory of and concerning the Plaintiff; and general ,exemplary, punitive and aggravated damages.

2. The Plaintiff avers that the 2nd, 5th and other Defendants conspired to falsely and maliciously publish, to write and or print and or caused to be published, written and or printed to the public at Pg. 9 of the Daily Nation Newspaper publication of 20.05.2009 a story titled "Whereabouts of fossil treasure sparks row". That the 5th Defendant in a subsequent news bulletin on 05.02.2011 in the 9:00PM Prime Time News on NTV station hosted and presented by the 3rd Defendant, facilitated the airing by the 1st Defendant of a story featuring the County of Baringo under the station's County Edition, and caused to be broadcast of and concerning the Plaintiff defamatory matter.

3. The Plaintiff further avers that the words, phrases, captions and statements uttered by the 1st and 3rd Defendants in their natural and ordinary meaning or by innuendo or otherwise were fabricated, malicious and intended to defame and shame the Plaintiff before his family, friends, colleagues or staff and was written with the sole intent of ruining the Plaintiff's reputation. He went on to aver that the broadcast was full of falsehoods and was written in a sensational and reckless manner with the aim of attracting as much attention as possible.

4. The Plaintiff also avers that his comments were not sought by the Defendants on all the issues raised in their broadcast, publication, statement and stories aforesaid and further that any comment sought from him were distorted and concocted by the Defendants to achieve their ulterior motives. That by reason of the foregoing, the Plaintiff has seriously been injured in his character, reputation as a CEO of Community Museums of Kenya, as a renowned artist, as a museums exhibition designer and exhibit maker, as an author, lecturer, film producer, citizen and father. Resulting in public scandal, odium and contempt and lowering of his estimation in the eyes of the right-thinking members of the society in Kenya and internationally, the publication having been widely disseminated through a 'YouTube' channel.

5. On 01.09.2011 the 3rd, 4th & 5th Defendants filed a statement of defence admitting the publication but denying the key averments in the plaint as and especially conspiracy to publish and or that the words were published falsely or maliciously. They further denied that the words complained about in the broadcast in their natural and ordinary meaning were defamatory of the Plaintiff, and asserting that they were published on a privileged occasion.

6. On 07.09.2011 the 1st & 2nd Defendants filed a statement of defence denying the key averments in the plaint. They further denied that the words complained about in the broadcast were in their natural and ordinary meaning defamatory of the Plaintiff and asserting that the same comprised fair comment on a matter of public interest and were made without malice. In his reply to the respective Defendants' statements of defence, the Plaintiff traversed the averments in his reply to defence and reiterated the averments in his plaint.

7. During the trial, Mimmie S.J. Dunaiski testified as PW1. Identifying herself as the Deputy Director in the private office of the Vice President of the Republic of Namibia she adopted her witness statement as part of her evidence- in- chief. It was her evidence that the then Vice President of Namibia at the time requested the Plaintiff's patronship, of several projects, including helping to set up a community museum in Namibia similar to the community museums in Kenya. She went on to state that because of matters published by the Defendants, the community museum in Namibia was delayed, the Vice President being uncertain of the Plaintiff's credibility.

8. Under cross-examination, it was her evidence that she was not an expert on matters relating to archeology but had worked at the Geological Survey of Namibia with a French Paleontology team that also worked in Kenya. That she came across the offending broadcast on "YouTube". She however did not have the clip in question before Court. She further stated that the broadcast in question was in respect of a stolen prehistoric fossil that had been smuggled out of Kenya in the year 2000 but did not state that the Plaintiff stole the said fossil. She asserted that the publication created doubt in her mind despite having known the Plaintiff for close to seventeen (17) years as a man of integrity.

9. She further stated that she was working with the Plaintiff and particularly overseeing the printing and publication of a book he was writing entitled "Master of Deceit". That she could not recall if in addition to the video clip, an article was published and admitted that the former which she had watched did not specifically state that the Plaintiff stole the fossil. She also admitted associating with the Plaintiff in an unsuccessful effort to set up an export and import business in Kenya, all because she did not trust the Plaintiff. That upon viewing the video she called the Plaintiff who expressed shock and that she had mixed feelings concerning his explanation. And that although she still desired to continue doing business with the Plaintiff, it would take some time to recover her trust because of the video clip.

10. During re-examination, she reiterated that the words uttered in the video clearly referred to the Plaintiff and asserted that if he did not return the fossils he would be jailed for ten (10) years because the lost fossils were in the custody of the community museum where he was a director. That the imputation in the video was of the effect that the Plaintiff had stolen the fossils. Finally, she confirmed that the Plaintiff's book was printed in Namibia but maintained that as a consequence of the offensive publication, she did not trust the Plaintiff regarding any business venture.

11. Samuel Chetalam testified as PW2. He identified himself as having worked in archeology and adopting his witness statement dated 23.12.2012 as his evidence -in -chief. He stated during cross-examination that the fossil in question was discovered in 2000 by a team of researchers of which he was a member, under the permission of the Community Museum of Kenya (CMK) pursuant to the license issued by Ministry of Science & Technology to search for the fossil. It was his evidence further that the discovery was widely publicized, and a report was prepared for the benefit of the National Museum in that regard. Admitting however that the report in question and or license authorizing excavation and discovery was not before Court.

12. He went on to state that upon discovery, the fossil was taken for safekeeping in a bank, which he didn't know, before it was taken to Europe in 2001 for dating, and was due for return on 16.02.2001. He insisted that indeed the fossil was returned although he did not have any documentation to that effect. He concluded by stating that he last saw the fossil in question in 2016. On re-examination he reiterated that the research team he was a part of had authority to conduct excavations. That the thieves he alluded to in his witness statement referred to himself and the Plaintiff.

13. The Plaintiff testified as PW3. He proceeded to adopt his witness statement dated 17.07.2019 as part of his evidence -in -chief and produced the bundle of documents appearing at pg. 38-65 and para. 75-105 as PExh.1. He asserted that that the words in the clip, created the impression that he was a thief who had obtained the fossil in question illegally and would thus be jailed for ten (10) years or fined Kshs. 10,000,000/- for his actions. That the 1st Defendant who was the Chief Executive of the 2nd Defendant was aware of his activities for more than ten (10) years. He insisted that he did not smuggle the fossil named "Orrorin Tugenesis" (orrorin) out of the country and the story published was a hoax created by the 2nd Defendant.

14. It was his further evidence that the CMK had greatly suffered, lost friends and colleagues, as foreign partner institutions withdrew their support. That he was yet to come to terms with the devastation

that followed the Defendants' story. Referring to PExh.1, he insisted that there was written authority by the Ministry of Science and Technology to send the fossil in question to France for two (2) weeks for purposes of scientific dating. He further insisted that the discovery was published by international magazines. That he fielded phone calls from colleagues questioning his conduct following the publication and that the Defendants had never offered an apology for the publication. He affirmed being the author of the book known as "Richard E. Leakey Master of Deceit" and asserted that it was relevant to the proceedings. In conclusion it was his evidence that he had a permit for the research and excavation and thereafter produced his further list of documents dated 27.11.2019 as PExh.2.

15. Under cross examination, he asserted that upon the discovery of "ororin" fossil , it was kept in the community museum stores at Baringo and it was not true that in 2000 "ororrin" was stored in a secret bank vault in Nairobi. That the story in the news paper was false given that "ororin" was owned by the Government and people of Baringo and not by any museum. It was his evidence further that "ororrin" was removed from Kenya twice with the approval of the Cabinet Secretary of Ministry of Education and Research. That there was a letter authorizing him to move the fossil to France, that he removed the fossil and returned it before the deadline. It was his evidence that he did not need a letter from the National Museums acknowledging return of the fossil which was duly returned to Kenya. He asserted that the National Museums conspired to maliciously publish the false story in question in the Daily Nation. He went on to testify that the article in question was published on 20.05.2009 and the instant claim filed on 28.07.2011, hence his cause of action was not time barred.

16. He however clarified that the instant claim was not about the publication of 20.05.2009 but rather the subsequent broadcast. That archeological research had to be carried out in compliance with the Antiques and Monuments Act and that he was the authorized custodian of the fossil. He reiterated that the then MP of Baringo accompanied him to France and together they returned the fossil to the people of Baringo, although he did not have any documentation concerning the travel and or return of the fossil. He contended that the publications in question called him a thief, a smuggler and dishonest person. He asserted receiving calls from France, Canada, and elsewhere concerning his alleged theft of the fossil as exemplified in PW1's evidence. Moreover that, contrary to the publication he was a protector of the fossils and not a thief.

17. It was his evidence that after publication he confronted the 4th Defendant but got no comment. That he was obligated to make reports under the Antiques and Monuments Act regarding his research activities to the Ministry of Education and not to the National Museums. During re-examination, he reiterated that the story published by the Defendants was incorrect and that the letter dated 05.12.2000 permitted him to carry out research under the Ministry of Science and Technology.

18. Benjamin Motui testified as PW4. It was his evidence that in 2011 he went to the Nation Media Group to obtain footage of a news item. That he paid for the footage and received an invoice and receipt dated 02.03.2011 which he produced as PExh.2a and PExh.2b respectively.

19. On behalf of the 1st and 2nd Defendant Idle Farah testified as DW1. He adopted as part of his evidence-in- chief his witness statement dated 06.09.2011, stating that at the material time, he was the Director General of the 2nd Defendant. He thereafter produced the letter dated 07.06.2000 as DExh.1. During cross-examination, he admitted that DExh.1 did not bear a signature of the author, but referring to a letter dated 05.12.2000 regarding authority for research in the areas stated therein. He confirmed that on 05.02.2011 there was a live broadcast relating to Baringo County from the National Museums in relation to the fossil in question, which was not in their custody then or to date. That the fossil was never in the custody of the 2nd Defendant right from the start and on 07.06.2000 the then Director General was looking for it. He admitted he had not reported the issue to the police or raised the issue

with Plaintiff even though the fossil remains missing. Nor discuss the question of the stolen fossil or the latter not being in the custody of the National Museums.

20. He further stated that DExh.1 acknowledges existence of the fossil and inquires if the Museum had it in its possession, as the repository of all such fossils. That the Community Museum is a Non-Governmental Organization (NGO) and asserted that certain functions of the Museum, excluding research and custody of fossils are not delegated to the County Government under *the Constitution*. That the issue in question had arisen prior to his appointment as Director General of the National Museum. He reiterated that the National Council of Science and Technology is responsible for issuing permits for research work, but where research relates to fossils, the matter would be referred to the National Museum.

21. It was his evidence that "orrorin" was discovered by a team of international scientists and the discovery attributed to Brigid Senut and Martin Pickford who were authorized under the same permit while the Plaintiff's name was not listed among the authors in the published research. That where archeological and paleontology research is concerned, the NMK is the repository; that he has never seen the lost fossil and does not know whether it was taken to Europe for verification. He asserted that he could not verify the letter dated 01.02.2000, as authority did not rest with the Minister as purported therein but with the National Heritage or Minister responsible for NMK. That in the publication dated 05.02.2011, he discussed the question of the fossil, its movement and or whereabouts. He reiterated that he did not use the word stolen but that the fossil which ought to have been with the NMK was not with them. He maintained that the Plaintiff worked as an exhibition designer until 1997 and was not an archeologist or paleontologist. That only the minister responsible for National Heritage or NMK could authorize movement of fossils

22. On re-examination he reiterated that research is broad as it involves all social pursuits and that the National Council of Science and Technology issues permits for research in Kenya through the Minister. However, where research related to fossils, the Antiquities and Monuments Act (now repealed) and the NMK Act regulate such research. That the Minister for Education had no authority to issue permits under the Antiquities and Monuments Act (now repealed). He maintained that there were several stages in research, all requiring permission of the Minister for Heritage or the Minister responsible for the National Museum of Kenya.

23. The 3rd to 5th Defendants did not call any evidence.

24. At the close of the trial, the parties filed written submissions. The Plaintiff's advocate identified eleven (11) issues for the Court's consideration, all addressing the twin issues of liability and damages. The Plaintiff submitted that the defence of fair comment as advanced by the Defendants was unavailable because the statement was a fabrication and false. That the defence of fair comment cannot cover a statement actuated or motivated by malice. He argued that the 1st and 2nd Defendant's defence is a sham as firstly they acknowledge that they uttered and published the offending words; secondly that the 1st Defendant was categorical during cross-examination that he had no evidence by way of reports to police to show that "orrorin" an archeological and paleontological discovery was stolen, displaced or smuggled. Moreover, the 3rd to 5th Defendant never presented any evidence because the fact that of the publication of the story in question was not in dispute.

25. Citing the provisions of Article 33 (1) & (2) of *the Constitution*, Section 7 & 7A of the *Defamation Act*, Halsbury Laws of England Pg. 23, Patrick O'Callaghan in the Common Law Series; The Law of Tort at para. 25.1, the decisions in Civil Case No. 3 of 2020 Ernest Omondi Owino & Anor v Felix Olick & Others, SMW v ZWM [2015] eKLR, Musikari Kombo v Royal Media Services Ltd [2018] eKLR, Uhuru Muigai Kenyatta v Baraza Limited [2011] eKLR and Nation Media Group Ltd & 2 Others v

John Joseph Kamotho & 3 Others [2010] eKLR counsel submitted that is was a grave thing to call a person a thief and that the Plaintiff was therefore entitled to damages in the sum of Kshs. 12,000,000/-.

26. It was further contended that the Plaintiff had proved his case against the Defendants individually and severally regarding the Defendants' malicious damage to the Plaintiff's character and reputation. Moreover, the Court has discretion to determine the level of compensation for a person maligned through defamation for which the Defendants had not made an apology. Counsel for the Plaintiff went on to submit that the publication made on 05.02.2011 in its natural and ordinary meaning meant and was understood to mean inter alia that the Plaintiff was a thief, was dishonest, had no professional ethics, committed a criminal offence, had no respect for national heritage, is involved in underhand activities, is untrustworthy and has no regard and respect for the rule of law. In conclusion the Court was urged to allow the suit as prayed.

27. Submissions by the 1st and 2nd Defendants equally addressed the twin issues of liability and damages. Submitting on the question whether the published words were defamatory of the Plaintiff, counsel contended that the words spoken by the 1st Defendant cannot be construed by any reasonable person in their natural and ordinary meaning or by innuendo to convey the meaning alleged in paragraph 21 of the Plaint. Counsel argued that the statement made by the 1st Defendant was a fair comment on a matter of public interest and made without malice. Citing the decisions in Jacob Mwamto Wangora v Hezron Mwando Kirorio [2017] eKLR and Nation Media Group v Jakoyo Midiwo [2018] eKLR counsel asserted that the foregoing defence must be considered against the background of the legislation in force at the material time relating to excavation and custody of fossils found in Kenya. Further relying on Section 2, 5, 8, 9, 24, 25 and 30 of the Antiquities and Monuments Act (now repealed), Section 3 of The National Museums Act and Section 4, 27, 30, 31, 46 and 52 of The *National Museums and Heritage Act* he contended that the 2nd Defendant and its predecessor the National Museums Board had never received any report regarding the discovery of "orrorin" or request for the movement or its export. That the fossil was an extremely valuable discovery and the property of the Government of Kenya.

28. Concerning the publication made on 20.05.2009 being time barred, counsel reiterated that during cross-examination the Plaintiff conceded the fact that the claim relating thereto was time barred and related averments irrelevant to the instant proceedings. The decisions in Wycliffe A. Swanya v Toyota East Africa Ltd & Another [2019] eKLR and Wilson Kiarie Njoroge v Family Bank Limited & Another [2017] eKLR were relied on in the that regard. It was further submitted that the Plaintiff has not provided proof of the defamatory words spoken by the 1st Defendant and that the plaint does not distinguish between what was uttered by the 3rd to 5th Defendant and by the 1st Defendant.

29. While challenging the award of general damages proposed by the Plaintiff, counsel relied on the decision in Nation Newspapers Limited v Gilbert Gibendi [2002] eKLR to assert that there must be some basis upon which a trial Court will award a particular sum, which is lacking here. In the alternative and without prejudice to the earlier submissions, citing the decision in Co-operative Bank of Kenya Limited v Peter Ochieng [2018] eKLR counsel urged an award of Kshs. 200,000/-. In summation counsel submitted the Plaintiff is not entitled to aggravated or exemplary damages as he has not laid any basis therefor and having failed to demonstrate that the Defendants were motivated by profit when making the publication. The Court was urged to find the Plaintiff's claim to be without merit and dismiss the it with costs.

30. On the part of the 3rd, 4th and 5th Defendants, counsel equally began by restating the respective parties' evidence and addressed the twin issues of liability and damages. Submitting on whether the words used during the broadcast were defamatory, counsel asserted that it is trite law that in a claim for

defamation the Court must determine whether the essential elements of defamation have been proven. That the interview by the 1st Defendant was based on the fact that the National Museums being the sole repository of fossils in the Country had neither been in possession of the fossil nor had knowledge of its whereabouts, that being a matter of public interest. And the 3rd, 4th and 5th Defendants' published the interview in the belief that the words uttered were true. Accordingly, the contents of the broadcast were an expression of opinion and are fair comment and fair information upon facts of which are matters of public interest and published under a sense of public duty, and without malice towards the Plaintiff. That the words were equally published on a privileged occasion and hence cannot be defamatory of the Plaintiff.

31. It was further submitted that in considering whether the words were defamatory, the Court must deliberate on whether the whole publication, taken together, is injurious to the reputation of the Plaintiff and statements said to be defamatory of the Plaintiff should not be taken in isolation of the rest of other contents of the publication. That it is worth noting that the words broadcast were uttered in the context of the provisions of the Antiquities and Monuments Act (now repealed) which provided that a license for excavation or to move any fossil or archaeological discovery must be obtained from the then Minister for Heritage and Sports (sections 5 and 9 of the Antiquities and Monuments Act (now repealed)). Thus comprised fair comment and based on the applicable law then. The decisions in Wycliffe A. Swanya v Toyota East Africa Ltd & Another [2009] eKLR, Kudwoli & Another v Eureka Educational & Training Consultants & 2 Others Civil Case No, 126 & 135 of 1990 [1993] eKLR and Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR were relied on.

32. As to whether malice has been established by the Plaintiff, counsel citing the decisions in Helen Makone v Francis Kahos & Another [2004] eKLR, K L v Standard Limited [2014] eKLR and Simeon Nyachae v Lazarus Ratemo Musa & Another [2007] eKLR. And contended that there was no proof of actual or intrinsic malice against the 3rd, 4th & 5th Defendants in publishing the broadcast of 05.01.2011 . That the onus was on the Plaintiff 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. Regarding whether the 3rd, 4th and 5th Defendant are to blame for any defamatory statement published, counsel emphasized that there is no indication that the 3rd, 4th and 5th Defendant did in fact utter any defamatory statements against the Plaintiff save for being the broadcasters. That to attach liability based on a broadcast would be to go beyond the constitutional freedom of the media and freedom of expression.

33. Further that, although every freedom comes with responsibility, the Plaintiff admitted that the 3rd, 4th and 5th Defendants did not mention him by name or refer to him in the broadcast. Counsel equally asserted that the 3rd, 4th and 5th Defendants cannot be penalized for the publication in 2009 as the related claim is statute barred. It was further asserted that the fact that the 3rd, 4th and 5th Defendants did not call any witness, did not diminish its defence of privilege. Further that the publication was of public importance, as admitted by the Plaintiff and DW1 in elation to the discovery of the Millennium Man (orrorin).

34. Submitting on whether the Plaintiff is entitled to the injunctive remedies sought, it was argued that, the Plaintiff had neither submitted thereon nor satisfied the pre-requisite conditions to justify the grant of injunctive orders in a defamation matter. On general damages counsel asserted that damages in defamation suits should not be for enrichment but should be awarded as compensation for injury. Hence awards must be fair and restrained and taking into consideration the damage the article complained of had on the Plaintiff's reputation. Counsel contended that the award proposed by the Plaintiff was inordinately high as the broadcast by the 3rd, 4th & 5th Defendants did not cause reputational damage to the Plaintiff.

35. Concerning exemplary, punitive and aggravated damages, counsel submitted that the Plaintiff has not proved that the conduct of the 3rd, 4th & 5th Defendants aggravated the injury to the Plaintiff and acted oppressively or arbitrarily towards the Plaintiff before the filing of the suit and during the hearing of the suit and had no honest belief in the truth of what was published. Counsel relied on Gatley on Libel and Slander tenth Edition at Pg. 246-250, Heziekiel Oira v Standard Ltd & Another [2016] eKLR, the English decision in Manson v Associates Newspaper Ltd (1965) 2 ALL E.R 945 at Pg. 960 as cited in Michael O. Weche v Fredric N. Mvumbi O.P & 3 Others [2015] eKLR.

36. Moreover, that to justify an award of exemplary damages , the Court must be certain that firstly, the article complained of was made with cynical disregard of the consequences that would flow therefrom and with the belief that the contents of the article were not true; secondly that the publication was made with a contemptuous calculation of profiting from the same. Which has not been proven here. In urging the Court to award Kshs. 200,000/- as general damages, counsel relied on the decisions in Jacob Kipnetich Katonom v Nation Media Group Limited [2017] eKLR and Kennedy Bitange Mageto & 4 Others v Macloud Malonza & Another [2011] eKLR. In conclusion the Court was urged to dismiss the suit and in the alternative to award damages in the sum of Kshs. 200,000/-

37. In a rejoinder to the Defendants' submissions, counsel for the Plaintiff submitted that the Defendants are responsible for all the words spoken, published and broadcast. That DW1 was not honest during cross examination since the National Museums has never had the fossil in their possession at any one time and the witness knew that it was in custody of Community Museums of Kenya. That the Plaintiff is seeking punitive damages because the defamation was continuous for over 12 years. That the book "Master of Deceit" has amply demonstrated the deceitful ways by which the 2nd Defendant raised research funding and donations. The Court was urged to allow the suit as prayed.

38. The Court has considered the evidence on record and the parties' respective submissions. The overarching question for determination is whether the Plaintiff has proved his case on a balance of probabilities and if so, the appropriate awardable damages. 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."

39. Before going into the merits of the matter, the court is obligated to consider a preliminary issue of limitation raised by the Defendants regarding purported defamatory statement published on 20.05.2009. Section 4(2) of the *Limitation of Actions Act* as read together with Section 20 of the *Defamation Act* Cap 36 Laws of Kenya are relevant to that determination. The former provision states that; -

> "(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
>
> Provided that an action for libel or slander may not be brought after the end of twelve months from such date..."

40. The latter section provides that; -

> " Subsection (2) of Section 4 of the *Limitation of Actions Act* (Cap. 22) is hereby amended by the addition thereto of the following:
>
> Provided that an action for libel or slander may not be brought after the end of twelve months from such date."

41. It is true that a Court has no jurisdiction to hear a claim that is time-barred. The Court of Appeal in Thuranira Karauri v Agnes Ncheche [1997] eKLR held that:

> " We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit".

42. In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:

> " I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

43. The Plaintiff's suit is founded on the tort of defamation. It is averred that the purported defamatory articles complained about were published and broadcast by the Defendants on 20.05.2009 and 05.02.2011 respectively. Evidently, these publications were separately published in as much as they all related to the Plaintiff herein. Patently, each publication herein was a cause of action unto itself and the later one could not be construed as a continuation of any earlier publication. As to computation of time under section 4 (2) of the *Limitation of Actions Act*, the Court of Appeal in Wycliffe A Swanya v Toyota East Africa Ltd & another [2009] eKLR addressed the question of when time starts to run as follows; -

> " Moreover, under Section 4(2) of the *Limitation of Actions Act* an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued:
>
> "Provided that an action for libel or slander may not be brought after the end of twelve months from such date."
>
> When does the cause of action in the case of slander accrue? The appellant submitted through counsel that, in his view, it accrued after he started feeling the impact of the respondents' remarks at his place of work in May 2006; then he filed the suit the subject to this appeal. The pleadings did not disclose where his place of work was apart from what was disclosed in paragraph 4 of the plaint. The counsel submitted further that this was within the limitation period. Unfortunately, the *Limitation of Actions Act* (Chapter 22 Laws of Kenya) does not say so. It says in case of libel or slander no action may be filed"after the end of 12 months from the date the cause of action accrued"

And we understand this to mean from the date the slanderous remarks are made. (see proviso to section 4 (2) – of the *Limitation of Actions Act* and section 20 of the *Defamation Act*). It would be absurd for slanderous remarks to be made about a person and then he/she waits until he/she feels the effects thereof to file an action in court. If this be the case then there would be no need for any limitation period to be specified. In the appeal before us the slanderous remarks were made on 12th November, 2005 and the latest the suit should have been filed would have been 11th or 12th November, 2006." (sic)

44. This pronouncement is together with the provisions of Section 4(2) of the Limitations of Actions Act and Section 20 of the *Defamation Act* when applied to the claim in respect of the publication done on 20.05.2009 leads to the conclusion that the claim ought to have been filed on or before 20.05.2010. Whereas the claim in respect of the publication done on 05.02.2011 ought to have been filed on or before 05.02.2012. The instant suit was filed on 28.07.2011 in respect of both publications. Having earlier found that each publication was a distinct cause of action, the Court finds that the cause of action in respect of the publication done on 20.05.2009 is statute barred, while the claim in respect of the later publication was lodged well within the statutory period. Consequently, for avoidance of doubt, the claim in respect of the publication of 20.05.2009 as pleaded in paragraph 18 of the plaint, is accordingly struck out.

45. Moving on to the second publication, 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..."

46. Actions founded on the tort of defamation very 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*.

47. Contemplating these competing rights Lord Denning MR stated in 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."

48. In Selina Patani & Another vs Dhiranji V. Patani [2019] eKLR the Court of Appeal 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 spelt out the ingredients of defamation as follows:

> "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:
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> 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."

49. With respect to the 3rd, 4th & 5th Defendant, there is no dispute in this case regarding ingredient (ii) and by extension (iii) above, given that they readily admit to airing the broadcast. The said Defendants however dispute the remaining ingredients (i) & (iv) and assert that the publications were made on a privileged occasion. The 1st and 2nd Defendants while admitting that the material statements issued by the former related to the Plaintiff, however, dispute responsibility in respect to ingredients (i), (iii) and (iv) above. Hence the issues falling for determination are (a) whether the impugned statements were published by the 1st and 2nd Defendant; (b) whether the impugned statements in the article as published are defamatory and false as against the Plaintiffs; (c) and or whether the defence of privilege and fair comment as pleaded are available to the 3rd, 4th & 5th Defendant. The Court proposes to deal with the foregoing questions concurrently.

50. The undisputed facts can be briefly stated as follows. The Plaintiff was at all material times relevant to the suit the Chief Executive Officer of the Community Museums of Kenya, a research coordinator, museum exhibition designer/maker and a showcase artist who had worked with 2nd Defendant among other organizations. That the 1st Defendant who at all material times relevant to this suit, was the Director General of the 2nd Defendant appeared in news bulletin of 05.02.2011 facilitated by the 3rd, 4th and 5th Defendant wherein the impugned broadcast and alleged defamatory matters were published.

51. The Court would ordinarily set out in verbatim the alleged defamatory statements complained of by the Plaintiff. That however is not possible in this case where no transcript or recording was produced by the Plaintiff, beyond the isolated discrete phrases and sentences in the pleadings. The suit was at the outset partly heard by Kamau, J. on 28.11.2019, when the Plaintiff took the witness stand. However, the impugned video/audio clip (broadcast) was not produced despite being marked as "MFI 1", on account of ardent objections and contestation by defence counsel. While he did not produce any transcript of video/audio clip in question, the Plaintiff set out snippets of the impugned broadcast and or broadcast at Para. 19 and 20 of his plaint as follows:-

> "....the most important fossil belongs to Kenya is not in the National Museums of Kenya"
>
> "....we believe this fossil has altered between Kenya and France...."
>
> ".....they went and did the exploration without getting permission from the minister"
>
> ".....Martin Pickford, Brigette Senut and Eustace Gitonga to return this without fail"
>
> ".....and residents are appealing for the return of a pre-historic fossil that was stolen from here 10 years ago"

"…..our fossil which archeologists belief is one of the oldest ancestors of man was smuggled out of Kenya by foreign explorers"

"……the fossil was spirited away by scientist involved and it remains unclear where this much celebrated find is being"…

"….indeed the National Museums of Kenya says the scientists made the exploration behind the Government's back"…

"…..Kenya is now moving to repatriate the fossil that has featured in countless scientific journals around the world…"

"…the stolen ancestor" "Fossil smuggled out of Kenya in 2000"

"…it is now more than 10 years since discovery of the Millennium and government says it has beefed up efforts to get custody of the piece of evolutionary history……Orrorin may have roamed this land more than 6 million years ago, but the batter over the creature is now said to move to court…"

"..the government says that the researchers behind the discovery have been banned from any exploration work in Kenya"….

52. Despite intimation on 28.11.2019 by Plaintiff's counsel that the impugned video/audio clip or publication would be subsequently produced, this was not done even when the last witness, PW4, testified. His evidence was limited to the production of PExh.2a and PExh.2b, being an invoice and receipt in respect of the impugned broadcast clip.

53. Pleadings cannot be relied on as a substitute for evidence. In this case the core of the Plaintiff's suit is the impugned broadcast and the onus was on the Plaintiff to produce evidence in support of his pleadings. In this case the impugned broadcast and or publication ought to have formed part of the Plaintiff evidence alongside PExh.1, PExh.2, PExh.2a and PExh.2B to enable this Court to determine the issues in controversy between the parties. It is surprising that the Plaintiff while relying on a raft of other material evidence failed to produce the material most crucial for his case. Moreover, the Plaintiff's star witness PW1 appeared to admit that the clip did not refer to the Plaintiff as the person who stole the fossil in question, but she seemed to waver under re-examination, which is unsurprising as she allegedly watched the clip some eight years earlier.

54. The Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR wherein while discerning the question of legal and evidential burden, it was held inter alia.

> " 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".

55. The Court of Appeal in Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR while addressing the distinction between an exhibit and a document marked for identification during a trial observed that;-

> " 18. The mere marking of a document for identification does not dispense with the formal proof thereof.....
>
> 19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.
>
> 20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.
>
> 21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.
>
> 22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.
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> 23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondents' case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa -

v- The State (1994) 7-8 SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

56. Is the omission in this case fatal? The Court is alive to the dicta of the Court of Appeal in Baraza Limited & Another v George Onyango Oloo [2018] eKLR that there is no particular requirement under the *Evidence Act* or the *Defamation Act* that publications via wireless broadcasting be proved through recording, tapes or transcripts. Here, PW1's evidence did not aid the Plaintiff's cause, more so in view of the imputations and innuendo pleaded in the plaint. PW1 was categorical in her evidence that despite viewing the impugned clip on "YouTube" the broadcast in question did not state that the Plaintiff stole the pre-historical fossil, but later prevaricating during re-examination. Consequently, it is the Court's view that PW1's evidence did not aid in demonstrating whole purport of the publication, despite asserting that her trust in the Plaintiff had diminished.

57. For their part, the Defendants while admitting the airing of the item complained of did not produce a transcript or other proof of what was said, even while asserting their own version of the substance and purport thereof. Indeed, the complaint was raised to the effect that there was no distinction demonstrated concerning words attributed to the 1and 2nd Defendant, on one part, and the 3rd to 4th Defendants on the other part. The basic question of who said what loomed large, therefore.

58. Thus, at the end of the trial, the question of the actual contents of the vide/audio clip remained unclear, making it difficult to establish whether the words in the clip complained of had the tendency to cause injury to the Plaintiff's reputation and to lower his esteem in the eyes of right-thinking members of society as asserted. This is adequate to dispose of the matter, as the court cannot base its findings on mere averments in pleadings, guess work and surmises. In the absence of clear evidence, it is difficult to see how the claim founded on defamation could be maintained. The Plaintiff has not established his case on a balance of probabilities.

59. Pursuant to section 107 of the *Evidence Act*, the burden of proof lay with the Plaintiff and if his evidence did not support the facts pleaded, he failed as the party with the burden of proof. This was the holding by the Court of Appeal in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91. Accordingly, the Plaintiff's suit must fail and is hereby dismissed with costs to the Defendants.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8TH DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Ondieki

For the 1st and 2nd Defendants: Ms. Alosa

For the 3rd, 4th and 5th Defendants: Ms. Wanjiku

C/A: Erick