Techbiz Limited & another v Nation Media Group Limited (Civil Suit 46 of 2018) [2024] KEHC 10815 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10815 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 46 OF 2018

OA SEWE, J

JULY 25, 2024

BETWEEN

TECHBIZ LIMITED ..... 1ST PLAINTIFF

FARAJ MANSUR ..... 2ND PLAINTIFF

AND

NATION MEDIA GROUP LIMITED ..... DEFENDANT

JUDGMENT

1. The 1st plaintiff, Techbiz Limited, is a limited liability company incorporated in Kenya under the *Companies Act*, Chapter 486 of the Laws of Kenya. The 2nd plaintiff, Faraj Mansur, is one of the directors of the 1st plaintiff. The two plaintiffs filed this suit against the defendant, Nation Media Group Limited, which is publisher and distributor of the daily newspaper known as "the Daily Nation".

2. The plaintiffs' cause of action was that on 18th May 2018, their names were printed and published in the Daily Nation newspaper edition by the defendant under the banner headlines: "Exposed: who was paid what by NYS" and "Revealed: Firms that gained from Sh 9 bn NYS scandal".They further averred that the said news article was also published in the Daily Nation online edition on the same date, and was available to the whole world on the URL:https://www.nation.co.ke/news/Firms-that-gained-from-sh9*bn-NYS-scandal/1056*-4567436-159wbhnz/index.html.

3. The plaintiffs averred that the said articles contained the following defamatory words, sentences and phrases in direct reference to them:

> " Faraj Mansur"
>
> ...

Mombasa based Techbiz Limited, which was ranked 72 on the Business Daily's Top 100 list in 2009, is listed as having received 767million.

On his Facebook page and Twitter handle, Mr. Faraj Mansur claims to be the co-founder of the company.

"We have not been transacting with NYS" a woman who only identified herself as Swabrina Yahya and who we were told is the company's chief accountant, said after "consulting the owner".

4. It was the contention of the plaintiffs that, as a consequence of the said publications, their reputation, credit and status as honest and competent business entity and businessman respectively, have been greatly injured; and that they have been exposed to hatred, ridicule, contempt, humiliation, agony and odium and continue to be so injured in their daily affairs, including their business relationships which they had cultivated for many years within and outside Kenya.

5. The plaintiffs further complained that, as a result of the false and malicious publication of the articles complained of, the Asset Recovery Agency proceeded to freeze their assets, thereby crippling their ability to trade and conduct business. They consequently lost business and relationships which they have painstakingly cultivated over the years.

6. In the premises, the plaintiffs prayed for judgment against the defendant as follows:

   (a) An order for publication of an apology, retraction and correction of the defamatory article.

   (b) An order directing that the apology, retraction and correction be given as prominent coverage as the article complained.

   (c) An order that the apology, correction and retraction be published in the defendant's website for a period of seven (7) days.

   (d) A permanent injunction restraining the defendant from publishing similar articles linking the plaintiffs with the NYS scandal.

   (e) General damages for libel.

   (f) Exemplary damages.

   (g) Aggravated damages.

   (h) Costs of the suit.

   (i) Interest on [e], [f], [g] and [h] above until payment in full.

7. The action was resisted by the defendants vide its Defence dated 25th July 2018. The defendant denied that the words complained of had the meaning or innuendo alleged by the plaintiffs and put them to strict proof thereof. The defendant asserted that the article published on 18th May 2018 was by way of information received from a credible source and was published in line with the its constitutional duty to impart information to members of the public in honest belief and with no malice.

8. The defendant further averred that, as a media house, it has a constitutional duty to inform members of the public about what is going on in the society; and that the said report was published pursuant to this duty. It therefore contended that to ascribe defamation to the article is to attempt to muzzle and hush the press; and thereby deny members of the public the right to information over a matter in which the Kenyan tax payers' money had been lost.

9. Accordingly, the defendant averred that the suit, as filed, is bad in law and is an abuse of the court process. It denied that the plaintiffs sought retraction of the article and explained that, instead, the 1st plaintiff bought space in the Daily Nation edition of 22nd May 2018 where a Statement of Clarification was prominently displayed to explain their position.

10. In proof of their case, the plaintiffs called 4 witnesses, namely, Faraj Mansur as PW1, Harish Shah as PW2, Ketan Doshi as PW3 and Nelson Kinyua Kimathi as PW4. PW1 testified on 17th June 2019 and confirmed that he is a director of the 1st plaintiff and the 2nd plaintiff in this suit. He adopted his witness statement dated 27th July 2018 and produced the Plaintiffs' Consolidated List and Bundle of Documents as Exhibits P1 to P15.

11. PW1 explained that the 1st plaintiff is a local IT solutions firm with its head office in Mombasa. He stated that, on 18th May 2018, his co-director, Ketan Doshi, drew his attention to an article that was published in the Daily Nation newspaper of that date. He testified that the article was also published in the Daily Nation Website online edition on the same date and is available on the URL:https://www.nation.co.ke/news/Firms-that-gained-from-sh9*bn-NYS-scandal/1056*-4567436-159wbhnz/index.html.

12. PW1 explained that the article brought to light a corruption scandal that involved fictitious and fraudulent payments allegedly made to suppliers of the National Youth Service (NYS). He further stated that he was shocked to read that his name, and the name of the 1st plaintiff, were mentioned in the article as being joint beneficiaries of Kshs. 767 million of the funds allegedly paid out by the NYS for fictitious transactions.

13. PW1 contended that the words as printed and published in their ordinary and natural meaning and/or innuendo meant and were understood to mean:

    (a) That the plaintiffs were beneficiaries of the Kshs. 767 million from the NYS being part of the Kshs. 9 million alleged to have been illegally or fraudulently squandered from the NYS.

    (b) That the plaintiffs heartlessly caused massive financial losses of public resources through corrupt schemes and fraudulent dealings.

    (c) That the plaintiffs were part of corrupt networks that compromised public officers and the IFMIS system to loot public funds.

    (d) That the plaintiffs participated in underhand and/or corrupt dealings.

    (e) That the plaintiffs covered up corruption dealings.

    (f) That the plaintiffs benefited directly from the NYS scandal.

    (g) That the plaintiffs have no integrity at all; and

    (h) That the plaintiffs earned money without working for it.

14. PW1 further testified that neither himself nor the 1st plaintiff have ever dealt with or received any monies from NYS and therefore have no relationship whatsoever with NYS. He added that neither himself nor the 1st plaintiff have ever been charged with or for any offence relating to the NYS scandal. PW1 pointed out that that the defendant did not seek any clarification from him or from his co-director, Mr. Ketan Doshi, before making the defamatory publications.

15. It was further the evidence of PW1 that the last statement in the article was deliberately skewed to give the readers the impression that when contacted, Swabrina Yahya acted on his instructions to

deny involvement with NYS. He accordingly testified that the articles published in the Daily Nation Newspaper and the Daily Nation website by the defendant are false and were published with a malicious intent to tarnish and malign the plaintiffs and their standing and reputation as respectable business entity and businessman, respectively.

16. PW1 further stated that, on the 6th June 2018, his co-director, Ketan Doshi, received a phone call from Mr. Phillip Ochola, the Branch Manager of Standard Chartered Bank, Treasury Square, Mombasa, informing the 1st plaintiff that its three bank accounts domiciled with the Bank, namely, Kshs. A/C 0102444940100, USD A/C 8702444940100 and EURO A/C 9302444940100 had been frozen by the Bank pursuant to a court order.

17. He was to later learn that Asset Recovery Agency had filed an application, namely, CMCC Misc. Applicati*on No. 2001 of 2018*: Asset Recovery Agency v Standard Chartered Bank seeking orders to, inter alia, freeze the 1st plaintiff's bank account numbers 0102010268200; 8702010268200; 9302444940100; 0102444940100 and 8702444940100 and inspect them. PW1 testified that in the said application it was alleged that information had been received from undisclosed sources that the staff at the NYS and the listed suppliers had colluded to defraud the NYS; and that monies from NYS suspected to be proceeds of crime, had allegedly passed into the accounts of the listed suppliers, one of them being the 1st Plaintiff.

18. PW1 added that, on the 21st June 2018 they were contacted by the Asset Recovery Agency for a discussion on the allegations; and that after investigations were concluded, the Asset Recovery Agency confirmed that the funds paid to the plaintiffs were legitimate and had nothing to do with the NYS. PW1 added that based on this information, the Agency caused the freeze order to be vacated by the Court on 25th June 2018 by way of a consent order.

19. PW1 conceded in cross-examination that corruption is endemic in the country, and that it is a matter of national importance that the public is entitled to information on such issues. He conceded that he was aware of the NYS scandal that involved loss of over Kshs. 9 billion. He however denied knowledge of any investigations into the scandal. In particular, PW1 denied knowledge of the involvement of EACC and NIS in the investigation of the matter. He nevertheless stated that he was aware that arrests had been made in connection with the NYS scandal and that the suspects had been arraigned before a court of law.

20. PW1 also conceded that he did not know where S/Sgt Fredrick Musyoki of ARA got information to freeze their accounts; and that, according to his affidavit before the court, he stated that he had received the information on the 20th April 2018 from the NYS. PW1 pointed out that although the information was said to have been received on the 20th April 2018 from NYS, their accounts were only frozen after the article was published. While conceding that the article made reference to a lady named Swabrina as having been contracted for comment on the allegations, he denied that he was personally called to confirm or deny the story.

21. PW1 concluded his statement by reiterating that as a result of Defendant's publications, they lost business, and gave the example of an LPO from HFC Group which was cancelled vide a letter dated 28th May 2018. According to him, the cancellation was done for no particular reason other than after the offending words were published and printed by the defendant.

22. PW1 made a Supplementary Witness Statement dated 10th June 2019 to confirm that, subsequent to the publication of the article complained of, the 1st plaintiff approached the defendant and paid the sum of Kshs. 155,788/= for a commercial publication in the Daily Nation newspaper for the purpose of correcting what the plaintiffs considered to be falsehoods published by the defendant. Copies of

the article and a bankers cheque were exhibited at pages 42 to 44 of the Plaintiff's Consolidated List and Bundle of Documents. He testified that, despite the plaintiffs' efforts to mitigate the effects of the defamatory publication, they still lost business and relationships which they had cultivated over the years.

23. PW1 further testified that the 1st plaintiff's name has continued to be ridiculed on social media and mentioned a particular twitter account holder, Steve Biko, as having repeatedly posted comments on the issue under the tagline *"@wakoramustgo"*. He mentioned that, in addition to alleging that the plaintiffs had supplied air to the NYS, the said twitter account holder alleged that he was the son of the founder of Doshi Group of Companies, which allegations are outright lies.

24. PW2, a director of Sai Properties Ltd, testified on 21st February 2022. He adopted his witness statement filed on 7th January 2021 in which he stated that he did business with the plaintiffs and had entered into contracts with the 1st plaintiff for the supply of IT equipment. He further stated that due to the 1st plaintiff's reputation as the supplier of authentic international brand of computer accessories and products he recommended the company to several other close friends who took up his recommendation and got into business with the 1st plaintiff.

25. In particular, PW2 mentioned that he had known one of the directors of the 1st plaintiff, Mr. Ketan Doshi (PW3), for over ten years, and was therefore shocked to read an article which was published in the Daily Nation newspaper on the 18th May 2018 in which the plaintiffs were mentioned as some of the entities/individuals that allegedly received money fraudulently from NYS. In particular, the 1st plaintiff was alleged to have fraudulently received Kshs. 767 million from NYS. He stated that he called both the 2nd plaintiff (PW1) and PW3 who explained that the story was false and fabricated and that the Plaintiffs had no relationship with NYS.

26. PW2 indicated that due to the national outcry on the NYS scandal and the vice that is corruption, his company decided to stop its business dealings with the plaintiffs. He also distanced himself at a personal level from PW3 for fear of being associated with persons who had been mentioned in the NYS corruption scandal. PW2 pointed out that due to the authoritative manner in which the story had been presented, he believed it to be true and therefore doubted the plaintiffs' assertions to the contrary.

27. PW2 further stated that he later got to learn from PW3 that their accounts which had been frozen by the Asset Recovery Agency had been unfrozen after investigations confirmed that the funds were legitimately received. Nevertheless, he was yet to resume his dealings with the plaintiffs due to fear of being associated with the vice of corruption.

28. PW3 also adopted his witness statement dated 13th July 2018 as well as his Supplementary Statement dated 10th June 2019. He stated that he was one of the founders of the 1st plaintiff and they have been in business since 2005. His two witness statements are, in essence, a reiteration of the evidence of PW1. In his Supplementary Statement PW3 likewise stated that after the publication of the article on 18th May 2018, the 1st plaintiff was constrained to pay a sum of KES 155,788 to the defendant for a commercial publication on the Daily Newspaper to correct the falsehoods that were conveyed by the offending article.

29. PW3 stated that despite their efforts, the plaintiffs still lost business and relationships, and have faced hatred, contempt and humiliation in the community and among friends. He stated that they have suffered loss of business as some clients terminated existing contracts with them. PW3 reiterated the evidence of PW1 and stated that an LPO by the Housing Finance Corporation was cancelled as a result of the article written by the Defendant. PW3 also testified that the 1st plaintiff's name has been ridiculed several times on social media.

30. The plaintiff's last witness, Nelson Kimathi Kinyua (PW4), testified on 21st June 2022. He is the IT Manager for M/s Anjarwalla & Khanna Advocates. He produced the Certificate dated 10th June 2019 to confirm that the screen shots forming part of the Plaintiffs' Consolidated Bundle of Documents at pages 59 to 62 were taken by him using machines and equipment belonging to the firm. He also testified that the machines were in good working condition at the material time.

31. In their defence, the defendant relied on the testimony of the Head of its Legal Department, Mr. Sekou Owino (DW1). He adopted his witness statement dated 23rd May 2023 and produced the defendant's List and Bundle of Documents as Defence Exhibits 1, 2 and 3. DW1 confirmed that the article in issue was indeed published by the defendant and that it was written by Mr. John Kamau who was away in Canada for further studies at the time of his testimony. DW1 further stated that, when the story was published in May 2018, there was a big issue about NYS and irregular tenders issued by it.

32. DW1 was emphatic that the plaintiffs were given an opportunity to give their side of the story before the article was published. It was his evidence that Mr. Kamau called the office of the 1st plaintiff and spoke to a lady called Swabrina, the Chief Accountant; and that Swabrina denied that their company ever had any dealings with NYS. He singled out the document marked Defence Exhibit 1 as the document that formed the basis of the publication. It contains a list of the companies in respect of which the Asset Recovery Agency moved to court for freeze orders.

33. DW1 pointed out that the 1st plaintiff was therein listed at paragraph *1*(vii). He also mentioned that at paragraph 4 on page 6 of the Notice of Motion, the Asset Recovery Agency stated that it got information on 26th April 2018 that funds had been stolen from NYS, well before the article complained of was published. On account of the foregoing, DW1 prayed for the dismissal of the suit.

34. Upon the close of the defence case, the parties were given an opportunity to file their closing submissions. To that end, the plaintiffs filed written submissions dated 6th October 2023 and proposed the following issues for determination:

    (a) Whether the words complained of were published by the defendant of and concerning the plaintiffs.

    (b) Whether the publication is false and defamatory of the plaintiffs.

    (c) Whether the defence raised by the defendant is available to it.

    (d) Whether general and aggravated damages are payable in the circumstances of this case, and if so, how much.

    (e) What is the appropriate order regarding the costs of the suit?

35. The plaintiffs' written submissions were accordingly fashioned in accordance with the foregoing issues, which I will revert to shortly in greater detail.

36. On its part, the defendant filed written submissions dated 17th October 2023. In the defendant's view, the issues for determination are:

    (a) Whether the reporting on the investigations by the Asset Recovery Authority in the NYS scandal constitute defamation.

    (b) Whether the defendant has a defence to the claim.

    (c) Whether the plaintiffs are entitled to the orders sought in the Plaint.

37. The defendant submitted that the circumstances of the case entitle it to the defence of qualified privilege. It accordingly made reference to several authorities on the subject, including Reynolds v Times Newspapers Ltd & another [1999] 4 All ER 609 and Francis Cherono Ngeny & 11 othrs v Sammy Kiprop Kilach [2017] eKLR. Thus, the defendant submitted that the NYS scandal was a matter of general public interest and the media had a duty to inform the general public about it. It pointed out that this is a constitutional tenet under Articles 33 and 34 of the Constitution.

38. The defendant then addressed the guiding principles for assessing damages in defamation cases and placed reliance on Nation Newspapers Limited v Peter Baraza Rabando [2016] eKLR in urging the Court to find that the authorities relied on by the plaintiffs are not a good guide in this matter because the plaintiffs' reputation is not comparable to the reputation of the plaintiffs in those matters. Hence, the defendant proposed a global award of Kshs. 1,000,000/= as general damages, should the Court find in favour of the plaintiffs. The defendant further urged the Court to find that no justification has been made for any award of either aggravated or punitive damages.

39. I have given due consideration to the pleadings filed herein, the evidence adduced by the parties and the written submissions filed by their counsel. The parties are in agreement that on the 18th May 2018, the defendant printed and published an article in its Daily Nation newspaper edition the banner headlines: "Exposed: who was paid what by NYS" and "Revealed: Firms that gained from Sh 9 bn NYS scandal". The said news article was also published in the Daily Nation online edition on the defendant's website available worldwide on the URL:https://www.nation.co.ke/news/Firms-that-gained-from-sh9*bn-NYS-scandal/1056*-4567436-159wbhnz/index.html. It is also common ground that impugned publication contained words, sentences and phrases that were in direct reference to the two plaintiffs.

40. Accordingly, the key issues for determination in this suit are as follows:

    (a) Whether the publication made on 18th May 2018 was defamatory of the plaintiffs, and

    (b) Whether the plaintiff is entitled to the reliefs sought.

A. On whether the publication made on 18th May 2018 was defamatory of the plaintiffs:

41. According to the Black's Law Dictionary defamation is defined as:

    1.The act of harming the reputation of another by making a false statement to a third person. If the alleged defamation involves a matter of public concern, the plaintiff is constitutionally required to prove both the statement's falsity and the defendant's fault.

    2. A false written or oral statement that damages another's reputation.

42. A similar definition appears in Winfield on Tort, 8th Edition at page 254, in which defamation is defined to mean:

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

43. The object of the law of defamation was summed up by the Court of Appeal in the case of Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR, as hereunder:

    > "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 neighbor. 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."

44. Hence, a defamatory statement is one which tends to disparage a person in the eyes of sensible members of society to the extent of exposing the person to hatred, contempt or ridicule.The test for determining whether or not a statement is defamatory is an objective one and is based on the perception of an ordinary reasonable person reading the statement.

45. In the light of the foregoing, what were the plaintiffs obliged to prove? In the case of Wycliffe A. Swanya v Toyota East Africa Ltd & Another [2009] eKLR, the Court of Appeal held that:

> " For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:
>
> (i) that the matter of which the plaintiff complains is defamatory in character.
>
> (ii) That the defamatory statement or utterance was published by the defendants. The publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
>
> (iii) That it was published maliciously..."

46. Similarly, in J. Kudwoli & Another v Eureka Educational Training Consultants & 2 Others [1993] eKLR, after an exposition of the relevant law and authorities on the subject, Kuloba, J. concluded thus:

> " To summarize the legal position in Kenya, in so far as it relates to the instant cases before me, ... I have found the law of defamation in this country to be that for a defendant to be tortuously liable in a suit for defamation the plaintiff must prove on a balance of probability that the matter complained of:
>
> (a) is defamatory
>
> (b) refers to him
>
> (c) was intentionally, recklessly or negligently published of and concerning him
>
> (d) was so published by the defendant, and
>
> (e) was published without lawful justification on an unprivileged occasion.

47. This being a civil matter the standard of proof is on a balance of probabilities. In this regard, the Court of Appeal restated the position in Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR, as hereunder:

> " The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller v Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say: -
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities

are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

48. With the foregoing in mind, I have considered the evidence presented herein; and as has been pointed out herein above, there is no dispute that the impugned article was published with reference to the two plaintiffs. There is uncontroverted evidence that the article was published to third parties in a newspaper of nationwide circulation. In addition, the article was uploaded on the defendant's website for access worldwide. Indeed, as was pointed out by the Court of Appeal in Royal Media Services Ltd v Valentine Mugure Maina & another [2019] eKLR:

> "...what is alleged to be libelous or slanderous only assumes that description, upon the defendant relaying the words complained of to a party other than the party to whom they refer; only then can it be said that there is publication. It follows that publication, of itself, is an essential and a necessary element in proof of defamation."

49. It bears repeating the article complained of for its full tenor and effect:

> " Faraj Mansur"
>
> ...
>
> Mombasa based Techbiz Limited, which was ranked 72 on the Business Daily's Top 100 list in 2009, is listed as having received 767 million.
>
> On his Facebook page and Twitter handle, Mr. Faraj Mansur claims to be the co-founder of the company.
>
> "We have not been transacting with NYS" a woman who only identified herself as Swabrina Yahya and who we were told is the company's chief accountant, said after "consulting the owner".

50. The plaintiffs contended that, in their ordinary and natural meaning and/or by way of innuendo, the words were understood to mean:

(a) that the plaintiffs were beneficiaries of Kshs. 767 million from the National Youth Service being part of the Kshs. 9 Billion alleged to have been illegally or fraudulently obtained from the National Youth Service.

(b) That the plaintiffs heartlessly caused massive financial losses of public resources through corrupt schemes and fraudulent dealings.

(c) That the plaintiffs were part of the corrupt networks that compromised public officers and the IFMIS system to loot public funds.

(d) That the plaintiffs participated in underhand and/or corrupt dealings.

(e) That the plaintiffs covered up corruption dealings.

(f) That the plaintiffs benefitted directly from the NYS scandal.

(g) That the plaintiffs have no integrity at all; and

(h) That the plaintiffs earned money without working for it.

51. It was therefore the contention of the plaintiffs that the publication was not only false, but was also published with a malicious intent to tarnish and malign the plaintiffs standing and reputation as honest and competent persons. They accordingly supplied the particulars of falsehood and malice at paragraph 8 of the Plaint as follows:

(a) That the defendant knew or ought to have known that the plaintiffs have never received any money from the National Youth Service.

(b) The defendants knew or ought to have known that the plaintiffs have never dealt with, contracted or transacted with NYS in any manner whatsoever.

(c) The defendants falsely misrepresented the plaintiffs' agent by skewing the news article to read that the plaintiff falsely denied transacting with the NYS.

(d) The defendant knew that other than informing the defendant that the 1st plaintiff had never dealt with the NYS, the rest of the words attributed to Ms. Swabrina Yahya, the plaintiff's agent, were never uttered by Ms. Swabrina Yahya.

(e) The last statement of the article "consulting the owner" was deliberately skewed to give the impression to the readers that the 1st plaintiff's employee, Ms. Swabrina Yahya, acted on instructions from the plaintiffs to falsely and unjustifiably deny involvement with the National Youth Service.

(f) The defendants knew or ought to have known that its conduct of failing to contact the 2nd plaintiff was a blatant breach of Section 2(2) and 2(3) of the Code of Conduct for the Practice of Journalism.

(g) The headline "FARAJ MANSUR" was calculated and designed to highlight the 2nd plaintiff's name maliciously and with the intent to defame, taint and tarnish his reputation distinctly from the 1st plaintiff, a corporate body whose legal existence is separate from that of the 2nd plaintiff.

(h) The defendant negligently and deliberately failed to contact the 2nd plaintiff for him to give his side of the story and/or respond to the fabrications contained in its news articles.

52. The plaintiffs adduced evidence through PW2, PW3 and PW4 to demonstrate that they read the article and concluded that it portrayed the plaintiffs as having received Kshs. 767 million from NYS. On the other hand, the defendant contended that the article was published by way of information received from credible sources and as a way of the defendant performing its constitutional duty to inform members of the public in honest belief and with no intention to defame the plaintiffs.

53. The test of whether a statement is defamatory is hinged, not on the subjective test of individual clients, but on what a reasonable person reading the statement would perceive it to mean. In Miguna Miguna v Standard Group Ltd & 4 Others [2017] eKLR the Court of Appeal adopted the definition of a reasonable man as presented in Winfield & Jolowicz on Tort, 8th Edition at p. 255, as follows:

> " This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they are true) as lowering another's

reputation or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard."

54. Looking at the impugned publication objectively, it cannot be understood to mean an affirmative assertion that the plaintiffs had fraudulently received Kshs. 767 million from the National Youth Service. What was reported was that the 1st plaintiff "...is listed as having received 767 million".

55. The defendant has demonstrated that it relied on information received from a credible source and disclosed through DW1 that the list had been obtained from the Directorate of Criminal Investigations. The defendant also produced documents to demonstrate that the Asset Recovery Agency was also involved in the investigation of the NYS scandal and that it made an application to court seeking freeze orders. At paragraph *2*(vii) on page 6 of the Notice of Motion filed by the Asset Recovery Agency, the name of the 1st plaintiff appears as one of the companies against whom freeze orders were sought.

56. The defendant also demonstrated that an Order dated 6th June 2018 was issued in response to the Notice of Motion aforementioned. Again, the 1st plaintiff is listed in that Order at paragraph vii. The Order authorized the Asset Recovery Agency to, inter alia freeze and preserve all the funds in the 1st plaintiff's bank accounts for a period of 6 months.

57. It is therefore instructive that the Supporting Affidavit of the Asset Recovery Agency, sworn by S/Sgt Musyoki shows that the Asset Recovery Agency received information implicating the 1st plaintiff on 26th April 2018; and that before filing the application, the Agency carried out preliminary inquiries before seeking the intervention of the Court. It is therefore significant that the article was published thereafter on 18th May 2018. Indeed, this aspect of the case was conceded to by plaintiffs, as confirmed at paragraph 2.1.5 and 2.1.6 of their written submissions. There is therefore indubitable evidence to prove the truth of the publication in so far as it stated that the 1st plaintiff was one of the companies then under investigation in connection with the NYS scandal.

58. Even assuming that the publication was false, the plaintiffs would still be under duty to prove that the article was published maliciously. In this regard, I find instructive the expressions by Odunga, J. in Phinehas Nyaga v Gitobu Imanyara [2013] eKLR that:

> "...the words must be malicious. 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. That may lead to an inference of malice but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice."

59. The defendant denied malice and insisted that the article was written in the public interest, and that the information was obtained from credible sources. The defendant also relied on Articles 33 and 34 of the Constitution, contending that article was published in the interest of the public. The defendant accordingly raised the defence of qualified privilege positing that the NYS scandal was a matter of public importance and that the media had a duty to inform the general public about it.

60. As has been pointed out herein above, DW1 testified that the story was based on information and list obtained from the DCI and, they produced an application made by the Asset Recovery Agency that showed the 1st plaintiff was listed as a company under investigation. More importantly, DW1 testified that the defendant made an effort to verify the truthfulness of the story by contacting the 1st plaintiff. The article itself reveals that the defendant reached out to the 1st plaintiff and spoke to Ms. Swabrina Yahya. It reads:

> " We have not been transacting with NYS" a woman who only identified herself as Swabrina Yahya and who we were told is the company's chief accountant, said after "consulting the owner".

61. It is not in dispute that Swabrina Yahya, who was also mentioned in the impugned article, was then an employee of the 1st plaintiff. PW3 admitted in cross-examination that:

> " It is true that before the article was published the defendant's agents called us to verify the information. I told them that we were not involved in the NYS scandal. The article at page 2 quoted my co-founder Mr. Faraj Mansur. Swabrina used to work for my company..."

62. In addition, the plaintiffs produced a copy of their own paid advert at page 19 of the Consolidated Bundle of Documents which confirms the truthfulness of what was attributed to Swabrina Yahya in the article. It states in part:

> " ...We refer to the story in the Daily Nation of 18th May 2018 where we are alleged to be associated with NYS. We categorically deny the allegation that Techbiz Ltd has either dealt, conducted business or received monies from NYS..."

63. Article 34 of *the Constitution*, which is one of the provisions that the defendant relied on, states in part that:

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

(2) The State shall not –

a. exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

b. penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—

(a) are necessary to regulate the airwaves and other forms of signal distribution; and

(b) are independent of control by the government, political interests or commercial interests.

64. In the case of Phineas Nyagah v. Gitobu Imanyara [2013] eKLR Hon. Odunga, J. (as he then was) considered the implications of Articles 32, 33 and 34 of *the Constitution* vis-à-vis the law of defamation and held:

15. ... Under Article 32(1) of *the Constitution*, it is clear that every person has the right to freedom of conscience, religion, thought, belief and opinion and further provides that the freedom to express one's opinion is a fundamental freedom. Under Article 33(1)(a) every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment under the Law of *Defamation Act* but has been given a constitutional underpinning as well. In a claim predicated on the tort of defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which public affairs are being administered with the right to protect the dignity and reputation of individuals.

65. Likewise, in Gideon Mose Onchwati v. Kenya Oil Company Ltd & Another (supra) Hon. Aburili, J. stated:

> " ...the court in deciding defamation cases must balance the provisions of Articles 33, 34 and 35 of *the Constitution*, dealing with the freedoms of expression and media freedom and the individual's right to access information on one hand and Article 28 in respect of the inherent dignity must be respected and protected..."

66. It is therefore instructive that, in the case of Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR, the Court of Appeal pointed out that:

> " Allowable defences are justification (i.e. the truth of the statement), fair comment (i.e., whether the statement was a view that a reasonable person could have held), and privilege (i.e., whether the statements were made in Parliament or in court, or whether they were fair reports of allegations in the public interest). An offer of amends is a barrier to litigation. A defamatory statement is presumed to be false, unless the defendant can prove its truth. Defamation law puts the burden of proving the truth of allegedly defamatory statements on the defendant, rather than the plaintiff...
>
> ... As pointed out above, there is a wide range of defences that may be pleaded in defamation, but the one that is most famously associated with the public interest is "qualified privilege". The essence of this defence is that the person making a statement has a duty to do so and that the person who hears, or reads, the statement has a corresponding interest in doing so. The defence is by no means limited to the publication of stories by the media, but it is in that context that the idea of publication in the public interest is at its most pronounced."

67. The rationale for the defence of publication in public interest is to be found in Halsbury's Law of England, 4th Edition Vol. 28 at paragraph 109 thus:

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

3. Fair and accurate reports published generally or proceedings of specified persons or bodies."

68. Hence, in Reynolds v Times Newspapers Ltd & another (supra) it was held:

The common law has long recognized the 'chilling' effect of this rigorous, reputation-protective principle. There must be exceptions. At times people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. In the wider public interest, protection of reputation must then give way to a higher priority.

69. The Court proceeded to propose a number of guidelines that a defendant should observe if it wishes to rely on the defence of publication in the public interest.

(a) The seriousness of the allegation, i.e. if the allegation is not true what will be the level of misinformation to the public and what will be the corresponding harm to the individual.

(b) The nature of the information and the extent to which the subject-matter is a matter of public concern.

(c) The source of the information and whether it is reliable or motivated by malice and/or avarice.

(d) Whether suitable steps have been taken to verify the information.

(e) Whether the allegation in a story has already been the subject of an investigation which commands respect.

(f) Whether it is important that the story be published quickly.

(g) Whether comment was sought from the claimant, or whether that was not necessary in the context of the story.

(h) If the article or story includes the gist of the claimant's version of events.

(i) Whether the article or story is written in such a way as to amount to statements of fact, or whether it raises questions and is suggestive of the need for further investigation.

(k) The timing of the publication.

70. That the NYS scandal was of immense public interest cannot be gainsaid. The Court takes judicial notice of this owing to the notoriety of the scandal. It is true that PW1, PW2, PW3 and DW1 all acknowledged that the NYS Scandal was a matter of notoriety, great public importance, and interest to the people of Kenya. Hence, PW1 conceded in cross-examination that:

> " As a person living in this country, I am aware that there was a scandal NYS Scandal...I am aware that the NYS Scandal is about the corruption that was going on there...I am aware that corruption is high in this country, for any country, corruption is something of national importance. This being the case, the public is entitled to information on the truth about it... I agree that 9 billion is huge/colossal amount...I am aware that people have been arrested in connection with the NYS scandal."

71. In the same vein, PW2 stated:

> " I live in Kenya and I know there was a scandal involving procurement at NYS about the loss of billions of shillings...I agree there was public interest for the Defendant to publish the scandal. This was a public interest matter."

72. On his part, PW3 stated:

> " I am aware that there was a scandal known as the NYS scandal. I got to hear of it through the media. I am aware a lot of tax payers' money was lost in excess of 10 billion. I was concerned about the loss as any other Kenyan. I agree the authorities were in order to investigate the loss. I am also aware that the Asset Recovery Agency was involved in the investigations.

73. Thus, having taken all the foregoing factors into account, I am convinced that the publication was not only true as published, but was also made in public interest. As was pointed out in Reynolds v Times Newspapers Ltd & another:

...At times people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. In the wider public interest, protection of reputation must then give way to a higher priority."

74. The plaintiffs made an attempt to compound this cause of action with certain online publications attributed to the account of Steve Biko. They conceded in cross-examination that the said Steve Biko is not a party to this suit. Those allegations are therefore of no relevance to the plaintiffs' claim against the respondent, there being no connection between the said Steve Biko and the defendant.

75. The foregoing being my view and findings, it follows that the suit must fail and that the plaintiffs are not entitled to any of the reliefs sought.

76. The next question to pose is what quantum of damages would the Court have awarded had the plaintiffs' suit succeeded. In *James v Ndirangu & 3 others (Civil Appeal 282 of 2016)* [2022] KECA 82 (KLR) (4 February 2022) (Judgment), the Court of Appeal stated:

> 40. On an appropriate award for damages, the guiding principle is that the rationale behind an award of damages in defamation actions is to restore or give back to the injured party what he lost, save in exceptional circumstances where punitive or exemplary damages may be awarded. In its assessment, the trial court's duty was to look at the whole conduct of the respondents from the time the libel was said to be published to the time the matter was heard in court...See Johnson Evan Gicheru v Andrew Morton & Another [2005] eKLR...
>
> 42. We are alive to the principle that an award of damages should be fairly compensatory in light of the nature of the injury to reputation and that an award must appear realistic in the circumstances. In the English Court of Appeal decision in the case of John v MG Ltd [1996] 1 ALL E.R. 35 the Court held that;
>
> "The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and take account of the distress, hurt and humiliation which the defamatory publication caused."

77. Similarly, in Uren v John Fairfax & Sons Pty Ltd (supra) it was held that:

...a man defamed does not get compensated for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

78. Similarly, in C A M v Royal Media Services Ltd [2013] eKLR, the Court of Appeal pointed out that:

> " No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones v Pollard [1997] EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future."

79. In their written submissions, the plaintiffs urged the Court to consider the following factors:

(a) that the defamatory publication closely touches the plaintiffs' integrity, reputation, honour and that the accusations against them are of a serious nature.

(b) That the defamatory article was published via the Daily Nation newspaper edition and the Daily Nation website online edition which is accessible to viewers globally.

(c) The prominence given to the publications considering the size of the Daily Nation newspaper edition covering 3 pages.

(d) that to date the defendant is yet to make any offer of amends o the plaintiffs in respect of the defamatory articles.

80. The plaintiffs urged the Court to rely on the following authorities as useful guide on general damages:

(a) Kipyator Nicholas Kiprono Biwott v George Mbuguss and Kalamka Ltd [2002] eKLR where the plaintiff was awarded Kshs. 10 million as general damages.

(b) Machira v Mwangi & another [2001] eKLR where an award of Kshs. 8 million was made for defamation.

(c) Daniel Musinga t/a Musinga & Company Advocates v Nation Newspapers Limited [2006] eKLR in which Kshs. 10 million ws awarded as general damages for defamation.

(d) Chirau Ali Mwakwere v Nation Media Group Limited & Another [2009] eKLR where the Court awarded Kshs. 8 million as general damages.

81. On aggravated damages, the plaintiffs relied on Miguna Miguna v Standard Group Limited & 4 others (supra), and Chirau Ali Mwakwere v Nation Media Group Ltd & another (supra) in which Kshs. 1 million was awarded under this head in each case.

82. There is no denying that the article was prominently displayed on the front page of the Daily Nation of 18th May 2018; and at page 4 of the same newspaper as part of the National News segment. There is also no dispute that the article was posted in the defendant's website and was therefore available worldwide. It is noteworthy however that although the 1st plaintiff claimed that it has a reputation built nationally

and internationally, there was no proof in this regard. This is important, for, in Nation Newspapers Limited v Peter Baraza Rabando [2016] eKLR the Court of Appeal pointed out that:

> " Whereas we think that on the whole the learned Judge properly undertook the process of assessment of damages and had in mind the applicable principles, thereby arriving at a figure much lower that the Kshs 40 million sought by the respondent who placed reliance on the case of KNK Biwott v Clays Limited NairobiHCCC 1067 of1999; we are of the view that there is one aspect that he did not take into account. It is not clear from the learned Judge's judgment that in arriving at the figure of Kshs 2 million, he considered the fact that the respondent, though clearly defamed, did not stand in the same place in terms of status, fame, recognition, credit and reputation as the plaintiffs in some of the awards made by this Court and the High Court. It is unfortunate that the respondent's counsel in his written submissions before the High Court cited only the NICHOLAS BIWOTT case (supra) which, with respect, could not serve as a guide for the damages the respondent could hope to obtain given the vastly different personal and professional circumstances between the respective plaintiffs.
>
> We reiterate that all persons are equal before the law but it would be a Utopian fallacy to assume that a defamatory publication calls for an equal compensation regardless of the status, standing and character of the persons defamed. We dare say that for a person who is not known beyond the local limits of his immediate family, residential and work environment calls for less damages than a person of prominence whose station, position, profession, fame and notoriety may spread beyond county and country. We therefore reiterate as correct what this Court has stated before that the status of a particular person affects the extent of the injury suffered..."

83. Accordingly, I would have awarded each of the plaintiffs general damages Kshs. 2,000,000/= based on the comparable award made in the case of Nation Newspapers Limited v Peter Baraza Rabando (supra). I have also taken into account that a limited liability company is a separate juridical entity. This was reiterated as follows in Janto Construction Company Ltd v Enock Sikolia & 2 others [2020] KLR in which the plaintiff in a suit for defamation was a limited liability company:

112. Unlike the natural claimants in Wycliffe A. Swanya v Toyota East Africa Ltd & Another (supra) and Selina Patani & Another v Dhiranji V. Patel (supra) the Plaintiff in this suit is a limited liability company.

113. As is settled in law a limited liability company is a distinct legal entity from its shareholders or directors. This legal principle was well encapsulated in the much-celebrated case of Salmon v A. Salmon & Company Ltd [1896] UKHL1, [1897] AC 22.

84. It is trite that aggravated damages are only awardable in limited instances. For instance, where the defendant's subsequent conduct, such as failure to apologize, warrants such an award. Hence, in John v MGM Limited [1997] QB 586 which was relied on in Miguna Miguna v Standard Group Limited (supra), it was held:

> " Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry of justification or failure to apologize."

85. In the same vein, exemplary damages would be due where there is oppressive or arbitrary action by servants of the government. Other instances are whether the defendant sets out to make profit and

where payment of exemplary damages is authorized by statute. Hence, in C A M v Royal Media Services Limited [2013] eKLR the Court of Appeal quoted with approval the following passage from John v MGM (supra):

> " 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 tortuous 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."

86. For instance, in Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others[2000] eKLR the Court observed that:

> " the conduct of the UK defendants since the publication has not helped matters - in fact they have deliberately and arrogantly announced that they will neither apologize nor withdraw the book. They have even had the audacity to say that the offending words in the book are true, and that they have witnesses to swear to the truth of these words. Of course, no such witnesses have been produced. Although they have made public announcement that they will vigorously defend any action, they have not bothered to do so. They have simply continued to enjoy the media attention. As the exhibits in this case show, this subject has been headline and/or front page news of many publications in this country. Clearly, this is of great benefit to the defendants who, because of this high media attention, continue to sell more books and make huge profits. They need not advertise the book. It is being done for them free of charge."

87. And, in Johnson Evan Gicheru v Andrew Morton & Another [2005] eKLR, it was proved as a fact that the passages complained of in the offending publication were untrue in every material respect and had been published maliciously; and that when invited by the appellant's Counsel to publish an apology correcting the offending paragraphs, the respondent's solicitors replied that the respondents were a highly respected international publishers and that they do not publish books which contain untrue and defamatory statements. It was also evident from the record that the respondents, during the trial, justified their stance and wanted certain paragraphs of the Plaint struck out for disclosing no reasonable cause of action contending the words complained of were not capable of bearing the meanings attributed to them by the appellant.

88. No such aggravating factors were proved in this case to warrant the award of either aggravated or exemplary damages. Had I found otherwise, I would have awarded exemplary damages of Kshs. 500,000/= and aggravated damages of Kshs 500,000/=, respectively, to each of the plaintiffs.

89. In the result, having found no merit in the plaintiffs' suit, the same is hereby dismissed with an order that each party shall bear own costs thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JULY 2024

OLGA SEWE

JUDGE