



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbarire & another v Lumumba & another (Civil Case 355 of 2011)  
[2024] KEHC 12650 (KLR) (Civ) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12650 (KLR)

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

**CIVIL  
CIVIL CASE 355 OF 2011**

**AN ONGERI, J**

**SEPTEMBER 24, 2024**

**BETWEEN**

**CECILY MBARIRE ..... 1<sup>ST</sup> PLAINTIFF**

**DENNIS APAA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PATRICK LUMUMBA ..... 1<sup>ST</sup> DEFENDANT**

**KENYA ANTI-CORRUPTION COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The two plaintiffs herein Cecily Mbarire And Dennis Apaa (hereafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively) filed HCC no. 355 and 362 of 2011 which were consolidated against Patrick Lumumba & Kenya Anti-corruption Commission seeking the following remedies;
  - i. General damages for the tort of defamation (compensatory and exemplary)
  - ii. An injunction to restrain the defendants whether by themselves their servants or agents to otherwise from further publishing the said libel upon the plaintiffs.
  - iii. A withdrawal by way of broadcast and publication to all news outlets invited to the press conference.
  - iv. Interest and costs.
2. The plaintiffs averred as follows in their complaints dated 24/8/2011;
3. That the 1<sup>st</sup> Defendant is a male adult who was at the material time the Director of the Kenya Anti Corruption Commission.



4. The 2<sup>nd</sup> Defendant is a body corporate established by an Act of Parliament.
5. The functions of the 2<sup>nd</sup> Defendant include inter alia, investigating corruption, economic crimes, persons conducive to corruption or economic crimes, loss and damage to public property. The 1<sup>st</sup> Defendant is the Chief Executive Officer of the 2<sup>nd</sup> Defendant and is responsible for the direction and management of the 2<sup>nd</sup> Defendant.
6. That the Plaintiff is married to Dennis Apaa, a Director of Broad Vision Utilities Limited, a company that is under investigation by the 2<sup>nd</sup> Defendant, for alleged corruption involving the Ministry of Water.
7. On the 22<sup>nd</sup> August 2011, the Defendants called a media conference inviting all the major media houses and television stations where the 1<sup>st</sup> Defendant promised to issue a statement on ongoing investigations and alleged corruption at the Ministry of Water.
8. That in the media briefing, the 1<sup>st</sup> Defendants sensationally stated that the 1<sup>st</sup> plaintiff's husband and the 1<sup>st</sup> plaintiff had tried to bribe him and falsely and maliciously caused to be broadcast concerning the Plaintiffs the following defamatory words;

I. as per the Broadcast by Citizen Television at their 9 pm broadcast;

“..In fact, this is the very first time that the Director has been approached personally. We have received approaches to our Officers and they have declined. But in this particular case, the Officers who were approached did make me aware and because of the seriousness of this matter and the caliber of people involved, it was decided that I provide the lead in getting these individuals...”

“...The reason why this particular individual's name is being revealed is because the offence committed was not one that was being investigated. This is an attempt to lie and compromise and blackmail the Director of the KACC and I believe it is the best interest of the country that such individuals whose intention is to bribe the Officers including the Director of the Commission and to blackmail the Director of the commission are exposed. This is the way to protect ourselves...”

We were given a cheque of Kshs,100,000.00 and today were supposed to be given a further consideration katika jina la kampuni linaloitwa Broad Visions”.

II. An as per the broadcast by The Kenya Television Network (KTN) also in their 9 pm Broadcast;

“...We were given a cheque of Kshs.100, 000.00 and today, were supposed to be given a further consideration katika jina la kampuni linaloitwa Broad Visions...”

“...The director can confirm to you that he received an sms message from the Hon. Cecily Mbarire that she could not attend and has subsequently in the last 30 minutes received sms messages from Mr. Dennis Apaa of Apaa in hIs attempt to meet the Director with a view to compromise him, the Director...”

“...No, we are investigating the husband of the Assistant Minister, in other words, we are investigating a company in which the husband of the Assistant Minister is a Director...”



III. The defamatory words as broadcast by Nation Television (NTV) being;

“...At 4.30 this morning, the Director had received information that this individual, namely Dennis Apaa who is the husband of the Assistant Minister for Tourism, Cecily Mbarire wanted to visit the director and the Director last night informed critical officials of the commission and a sting operation was organized...”

“... The director can confirm to you that he received an sms message from the Hon. Cecily Mbarire that she could not attend and has subsequently in the last 30 minutes received sms messages from Mr. Dennis Apaa of Apaa in his attempt to meet the Director with a view to compromising....”

“..We were given a cheque of Kshs.100,000.00 and today, were supposed to be given a further consideration.....”.

“.....That because they did not know we were conducting an under cover investigations, they thought they were nailing the commission that an affidavit was being sworn with a view of indicating that the commission had been compromised and that the information would then be communicated to the DPP and the general Kenyan public...”

IV. The defamatory words as per the 9 PM broadcast by KISS Television being;

“..the Director had received information that this individual, for Tourism, Cecily Mbarire, wanted to visit the director and the Director last night informed critical officials of the commission and a sting operation was organized it has not succeeded because the individuals were tipped off...”

V. The defamatory words as per the 9PM broadcast by Kenya Broadcasting Corporation (KBC TV) being

“...in the last 30 minutes received sms messages from Mr. Dennis Apaa of Apaa in his attempt to meet the Director with a view to compromising...”

“...Dennis Apaa who is the husband of the Assistant Minister for Tourism, Cecily Mbarire, wanted to visit the director and the Director last night informed critical officials of the commission and a sting operation was organized it has not succeeded because the individuals were tipped off...”

“.....those who are under investigation will always try new methods to compromise officials and the head of the organization, the beauty in this particular case in the water case is that we learnt about it very early...”

VI. The defamatory words as per the 4PM broadcast by K24 being;

“...We had been conducting investigations of individuals who are being investigated but who are trying to compromise officers of the commission and even the director of the commissions and that this attempt at compromising the director of the commission was mounted as early as the month of June through the wife of the individual who we were investigating and that the director was at all times guided by the officers to entice these individuals to get them in public places so that they could be identified by other persons, and that this did happen, in the months of July



on the 25<sup>th</sup> and 6<sup>th</sup> of August at a public fundraising function which is evidenced by way of photographs and by way of human testimony and that therefore the commission decided today upon receiving requests by these individuals to meet the commissioner to mount a sting operation and that the Director called the senior officers in the rapid response department to mount such equipment as was necessary, the individuals seemed to have been tipped and sent a message which is available to the Director indicating that they were unavailable, once they made that indication we received further indication from an informer in a law firm which they are working with that they are in the process, unknown to them that we were ourselves investigating them to use these contacts for purpose of blackmail, I can confirm to you that even before I walked here we had tried to entice the individual Denis Apaa. Initially I had told them that I was travelling to Uganda to ensure that they come, and they then sent us a message that they would want to see us another date and we informed them that we had cancelled the trip and they have sent us a message asking us when can...."

9. The plaintiffs further averred that the said words in the natural and ordinary meaning meant and were intended to mean:-
  - I. That the Plaintiff is dishonest.
  - II. That the Plaintiff is a dishonorable Member of Parliament.
  - III. That the Plaintiff bribes public officers.
  - IV. That the Plaintiff connived with her husband to bribe the 1<sup>st</sup> Defendant with Kshs.100,000.00.
  - V. That the Plaintiff is corrupt and unfit to hold public office.
  - VI. That the Plaintiff has attempted to avert the course of justice with a view of having criminal proceedings against her husband stopped.
  - VII. That the Plaintiff is unpatriotic, without any sense of objection, propriety or morality.
  - VIII. That the Plaintiff was a hypocrite and without any sense of obligation and propriety to the people of Kenya.
10. By reason of the publication of the said words, the 1<sup>st</sup> plaintiff has been seriously injured in her character and reputation as a person, Member of Parliament, Assistant Minister and Politician and has been brought into public scandal odium and contempt and has been lowered in the estimation of right-thinking persons generally.
11. That the 1<sup>st</sup> Plaintiff has further been lowered in the estimate of right-thinking persons in society both in Kenya and worldwide as the publication has been widely disseminated through the internet.
12. The 1<sup>st</sup> Plaintiff further averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants conspired to defame the Plaintiff and without due regard to the truth:-

Particulars Of Conspiracy

  - I. The 2<sup>nd</sup> Defendant invited the media to the Press Conference.
  - II. The 2<sup>nd</sup> Defendant was aware that no attempts had ever been made to bribe either the 1<sup>st</sup> Defendant or 2<sup>nd</sup> Defendant by the Plaintiff.



- III. The 2<sup>nd</sup> Defendant was aware that no investigations towards the alleged acts of bribery had been commenced.
  - IV. The 2<sup>nd</sup> Defendant was well aware that the sensational statement that its offices had photographic and audio evidence of the Plaintiff attempting to bribe the 1<sup>st</sup> Defendant does not exist.
  - V. The 2<sup>nd</sup> Defendant's facilities and offices were used to defame the Plaintiff.
  - VI. The 2<sup>nd</sup> Defendant was aware that the Statement read by the 1<sup>st</sup> Defendant was malicious, full of falsehoods and defamatory of the Plaintiff.
13. The Plaintiff relied on the following facts and matters to support her claim for exemplary damages.
- I. The article was broadcast in a sensational manner.
  - II. The Defendants knew or ought to have known, that the allegation that the Plaintiff had attempted to bribe the 1<sup>st</sup> Defendant were untrue.
  - III. The news conference was called to pre-empt a suit to be filed by the Plaintiff's husband, in which suit, it would have been shown that the 1<sup>st</sup> Defendant is unfit to hold public office and in particular the position of Director of the 2<sup>nd</sup> Defendant for the following reasons:-
    - i. Having invited the Plaintiff and her husband, who was a person under investigation, for a private party at the 1<sup>st</sup> Defendant's residence in Runda contrary to provisions of Public Ethics Act and Constitution.
    - ii. Having invited the Plaintiff's husband to a harambee hosted by the PLO Foundation and accepting cash and a cheque from him contrary to the provisions of the Public Ethics Act and Constitution.
    - iii. Requesting the Plaintiff to marshal support from Members of Parliament to ensure that he was re-appointed as Secretary to the new institution that was to replace Kenya Anti Corruption Authority contrary to the provisions of *the Constitution*.
    - iv. Requesting the Plaintiff's husband to substitute a cheque for Kshs.100,000.00 issued by Broad Vision Utilities Limited and accepting cash thereof contrary to the provisions of both *the constitution* and Public Ethics Act.
    - v. Failing to surrender the cash donation to the state as required under the Public Ethics Act.
    - vi. Using his position to solicit support for his private foundation contrary to the Public Ethics Act.
14. The 1<sup>st</sup> defendant filed a statement of defence dated 19/10/2011 denying the plaintiff's claim.
15. The 1<sup>st</sup> defendant pleaded further as follows in the said defence;
- i. That the 1<sup>st</sup> defendant is absolutely privileged under The Anti-corruption & Economic Crimes Act, 2003 in the course of his duties.
  - ii. That the media conference was held in the course of public duty and was without malice being a matter of public interest.



- iii. That the words uttered by the 1<sup>st</sup> defendant in the media conference were true in substance and in fact.
  - iv. That the 2<sup>nd</sup> defendant had partially completed its material investigations and charged the plaintiff's husband and his company in Nairobi anti-Corruption Case No. 37 of 2011 with ten (10) counts of various acts of corruption and the case was on-going. The 1<sup>st</sup> defendant intended to refer to it for full import and effect.
16. The 2<sup>nd</sup> defendant also filed a statement of defence dated 26/10/2011 also denying the plaintiffs claim. The 2<sup>nd</sup> defendant stated as follows in the said statement of defence;
    - i. That the 2<sup>nd</sup> defendant was absolutely privileged under The anti-Corruption & Economic Crimes Act, 2003 in the course of its duties.
    - ii. That the media conference was held in the course of public duty and was without malice being a matter of public interest.
    - iii. That the 2<sup>nd</sup> defendant had partially completed its material investigations and charged the plaintiff's husband and his company in Nairobi anti-Corruption Case no. 37 of 2011 with ten (10) counts of various acts of corruption and the case was on-going. The 2<sup>nd</sup> defendant was intent to refer to it for full import and effect.
  17. The case proceeded by viva voce evidence. Five witnesses testified for the plaintiffs including the two plaintiffs.
  18. A summary of the plaintiffs' evidence was that the 1<sup>st</sup> plaintiff who is the current governor of Embu County is married to the 2<sup>nd</sup> plaintiff.
  19. The 2<sup>nd</sup> plaintiff is the Director of Broad Vision Utilities Limited and the said company was under investigations by the 2<sup>nd</sup> defendant.
  20. At the material time of this incident, the 1<sup>st</sup> defendant was the director of the 2<sup>nd</sup> defendant.
  21. The 1<sup>st</sup> defendant called a press conference on 22/8/2011 on Citizen, Nation and KTN and the said information was reported in the Daily newspapers that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs attempted to bribe the 1<sup>st</sup> defendant with kshs.100,000 with a view of having the criminal investigations against Broad Vision Limited withdrawn.
  22. The 1<sup>st</sup> plaintiff adopted her statement dated 16/9/2013 as her evidence in chief.
  23. The 1<sup>st</sup> plaintiff who testified as PW 3 stated in the said statement as follows;
  24. That she has never attempted to bribe anyone, much less the Director of Kenya Anti Corruption Authority.
  25. That the correct position in the matter was as follows hereinbelow
  26. That she worked with Mr. Patrick Lumumba at CKRC from 2003 to 2004 as the Convener, Bill of Rights Committee, and Patrick Lumumba was the Secretary.
  27. That on 25<sup>th</sup> June 2011, she met Mr. Patrick Lumumba at Runyenjes at a prize giving ceremony at Sacred Girls High School, Kieni where Mr. Patrick Lumumba had been invited as guest of honour.
  28. That at the function, Patrick Lumumba informed her that he would like to meet her and her husband and requested that she facilitate a meeting.



29. That on 3<sup>rd</sup> July 2011, he requested that together with her husband, they visit him at his house at 212, Mimosa Vale, Runda.
30. That she informed him that she was engaged on that day and a visit to his house was scheduled for 17<sup>th</sup> July 2011.
31. That on that day at 3.00pm, whilst accompanied by her husband, they went to his house where he led them to a banda to the side of his house, where they found his wife with Mr. Gor Semelango and a couple from West Africa. That during the visit, Patrick Lumumba requested that she marshal political support from the Members of Parliament to ensure that he was reappointed as Secretary to the new institution that was to replace the Kenya Anti Corruption Commission.
32. That Mr. Lumumba entertained them until 7.00 pm when they left but not before he had invited them to attend a harambee that was to be held at Bondo. He then handed her an invitation from the PLO Foundation and Lucy Onono Memorial Foundation, personally addressed to "Dennis and Cecilly" for 6<sup>th</sup> August 2011.
33. That she was unable to attend the Harambee but on 6<sup>th</sup> August 2011, her husband travelled to Bondo for the Harambee. He personally gave a donation of Kshs.50,000.00 in cash and a further cheque for Kshs.100,000.00 issued by Broad Vision Utilities Limited. She has the original cheque.
34. That at the Harambee, Mr. Patrick Lumumba introduced her husband Apaa, whilst handing over the donation as "Mr. Dennis Apaa, husband of Cecily Mbarire, Assistant Minister for Tourism". She said to have photographs of her husband handing over the donation and also evidence of the Harambee's itinerary.
35. That on 9<sup>th</sup> August 2011, Mr. Patrick Lumumba telephoned her and angrily complained that the cheque handed to him at the Harambee was issued by Broad Vision Utilities which she was aware was being investigated by the Kenya Anti Corruption Commission.
36. That he then requested for her husband's contacts and on 9<sup>th</sup> August 2011, Mr. Patrick Lumumba telephoned her husband and requested that they meet at his offices at Integrity House.
37. That on 10<sup>th</sup> August 2011, her husband visited Mr. Patrick Lumumba at his offices where Mr. Patrick Lumumba returned the cheque once again claiming that the issuer of the cheque, Broad Vision Utilities Limited, was under investigation and it should be replaced. Her husband gave him a cash payment of Kshs.100,000.00 in replacement thereof.
38. That this payment was obviously never intended as a bribe as Mr. Patrick Lumumba would have arranged for the arrest of her husband then. It is also telling that Mr. Patrick Lumumba has never returned the Kshs.150,000.00 given to him even though the source of the cash is Broad Vision Utilities Limited.
39. That on 12<sup>th</sup> August 2011, aware that Mr. Lumumba had sounded upset about the cheque, she sent a short text message to him on his telephone number 0722 747368 and apologized. Her text in verbatim read:-

“Morning Prof. I only learnt about what Denis did last night. I just want you to know that I was not in the picture coz he never mentioned it. I have v. high regard and respect for you and would never have allowed it to happen. This was ill advised, regrettable and most unfortunate. I want to sincerely apologize on behalf of my family and especially so on my



own behalf. Please accept my apologies and hope this does not dent our relationship. Good day. Cecily.”

40. That in response thereto, Mr. Lumumba texted:-

“ You are my very valued friend. Be blessed.”
41. That after the cheque was returned by Mr. Patrick Lumumba, her husband had it cancelled.
42. That on 18<sup>th</sup> August 2011, her husband telephoned her and informed her that Kenya Anti Corruption Authority had forwarded the Broad Vision Utilities Limited file to the Director of Public Prosecutions for further action.
43. That in the belief that everyone has a right to know charges being preferred against them and their family, she tried to contact Mr. Patrick Lumumba, with a view of ascertaining the charges but they did not talk. He however telephoned her at about 11.00pm and apologized for not having reverted earlier. He, however, requested that they meet on Sunday 21<sup>st</sup> August 2011 at 5.00pm when he would have returned from a visit upcountry.
44. That at 5.00pm, on 21<sup>st</sup> August 2011, she spoke to Mr. Patrick Lumumba and he requested they meet at his offices at 6.00am on 22<sup>nd</sup> August 2011. Later, at about 11.00pm, he telephoned her and suggested they reschedule the meeting to 6.30am, the next morning and that she should attend the meeting with her husband.
45. That the meeting did not take place as her daughter was unwell.
46. That she was shocked when she watched the 1.00 o'clock news on 22<sup>nd</sup> August 2011 that Mr. Patrick Lumumba had issued a public statement stating that she had attempted to bribe him with Kshs.100,000.00
47. That the following are the pertinent issues that arise:-
  - a. Why would Mr. Patrick Lumumba invite her and her husband, a person his organization was investigating, to his house for a social event?
  - b. Why would Mr. Patrick Lumumba ask for her political support, even though he was aware that her husband was under investigation?
  - c. That by inviting her husband and her to his Harambee whilst aware of the investigations against Broad Vision Utilities Limited, Mr. Lumumba was acting in direct contravention of *the Constitution* which specifically precludes public officers from putting themselves in a situation he might be found conflicted.
  - d. Why would Mr. Patrick Lumumba agree to take cash in replacement of a cheque from a company that he was investigating?
  - e. That under *the Constitution*, any donation to a State Officer's office to a public officer on a public or private occasion is a public gift which must be surrendered to the State unless exempted. Mr. Patrick Lumumba is still holding onto the cash.
  - f. That a public officer shall not use his offices to solicit for contributions, to collect Harambees or to pressure the public. This is contrary to Section 13(1) of the Public Officers' Ethics Act.
  - g. That by being a founder of the PLO Foundation and using his Position to solicit support for the Foundation put him to conflict with Section 12(1) and (2) of the Public Offices Ethics Act.



48. That she is aware that her husband intended to file an application to stay criminal proceedings against him arising from investigations by the Kenya Anti Corruption Authority and she was to swear an affidavit in support of what she believes was abuse of office by Mr. Patrick Lumumba. The instances of abuse included:-
- a. Why Mr. Patrick Lumumba would invite her and her husband, a person his organization was investigating, to his house for a social event?
  - b. Why Mr. Patrick Lumumba would ask for her political support, even though he was aware that her husband was under investigation?
  - c. That by inviting her husband and her to his Harambee whilst aware of the investigations against Broad Vision Utilities Limited, Mr. Lumumba was acting in direct contravention of *the Constitution* which specifically precludes public officers from putting themselves in a situation he might be found conflicted.
  - d. Why Mr. Patrick Lumumba would agree to take cash in replacement of a cheque from a company that he was investigating?
  - e. That under *the Constitution*, any donation to a State Officer's office to a public officer on a public or private occasion is a public gift which must be surrendered to the State unless exempted. Mr. Patrick Lumumba is still holding onto the cash.
  - f. That a public officer shall not use his offices to solicit for contributions, to collect Harambees or to pressure to the public. Thus is contrary to Section 13(1) of the Public Officers' Ethics Act
49. That she verily believes that holding a press conference was clearly calculated to pre-empt what was to come out in media after the application by her husband was filed. It had absolutely nothing to do with bribery or inducement of any sort.
50. That she has written complaints to both the Criminal Investigation Department and Director of Public Prosecutions with a view of carrying out investigations to ascertain who is telling the truth and to carry out investigations against Mr. Patrick Lumumba for abuse of office.
51. That she has also instructed her lawyers to take out these defamation proceedings against Mr. Patrick Lumumba.
52. That she demands that Mr. Patrick Lumumba issue a public apology in the same sensational manner he issued his public statement.
53. The 2<sup>nd</sup> plaintiff testified as PW 1. His evidence was similar to that of PW 3.
54. PW 2 adopted his written statement dated 25/8/2011 as his evidence in chief.
55. In cross-examination, PW 1 said he downloaded the videos on the press conference in the office of his lawyer after he watched the press conference which was broadcasted on all the television networks and reported on all the local daily newspapers.
56. PW 1 said he first met the 1<sup>st</sup> defendant at Kieni High School and subsequently at his house at Runda.
57. PW 1 said that the 1<sup>st</sup> defendant solicited the political support of the 2<sup>nd</sup> plaintiff to be re-appointed as director of the successor of the KACC. PW 1 said the 1<sup>st</sup> defendant invited him to a fund raiser in support of Lucy Onono Foundation and PW 1 travelled to Bondo to attend the same.



58. PW 1 also said at the time PW 3 was the MP for Runyenjes and further that his company Broad Vision Utilities Ltd was being investigated by KACC (the 2<sup>nd</sup> defendant)
59. PW 1 said he was subsequently charged in Milimani Anti-corruption case no. 37 of 2011 together with Broad Vision Utilities Ltd as 8<sup>th</sup> and 9<sup>th</sup> defendants but they were acquitted under Section 210 of the Criminal Procedure Code.
60. PW 2 Louis Iteba Pamba said the 1<sup>st</sup> plaintiff was his best man at his wedding and a relative. He said he watched the news and he stopped associating with the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs after the press conference was broadcasted.
61. PW 4, Grace Rwamba Mbarire, a sister to the 1<sup>st</sup> plaintiff and PW 5 Mathias Ondanyiro Wamukoya a friend to the 1<sup>st</sup> plaintiff, also gave evidence in support of the plaintiff.
62. They said the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were avoided by friends after the press conference was published in the media.
63. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not call any witnesses.
64. The parties filed written submissions as follows; the plaintiff submitted that they were able to play the videos of the press conference in court and produced newspaper articles proving their allegations of utterances of the defamatory statements.
65. Further, that the defendants in their defence stated that the words uttered by the 1<sup>st</sup> defendant were true in substance and in fact. The plaintiff indicated that it is not in dispute that the defamatory utterances were broadcast live before the entire nation and that subsequently the statements were published in the local dailies. The publications and/or broadcast were false as none of the plaintiffs were ever summoned to record statements or charged with the offence of attempted bribery or blackmail.
66. The plaintiff submitted that the defendants sensationally stated that the plaintiff tried to bribe the 1<sup>st</sup> defendant and falsely and maliciously caused to be broadcast defamatory words about the plaintiff. In ordinary meaning they were understood by the plaintiff and the general public to mean that; the plaintiffs were corrupt, frauds and had attempted to bribe the director of the 2<sup>nd</sup> defendant.
67. That the Plaintiff was unfit to be MP or to hold office as they tried to bribe the 1<sup>st</sup> defendant with Kshs. 100,000. This was confirmed by the defence where it was expressly pleaded the words were true in substance and in fact and also that Dennis Apaa had been charged with 10 counts of corruption.
68. On malice and bad faith on the part of the defendants the plaintiff argued that the defendants summoned all the media houses and published the defamatory statements on live coverage with the knowledge and intention that it would tarnish the reputation of the plaintiffs in the eyes of the entire country.
69. As a law professor and an experienced advocate, the 1<sup>st</sup> defendant was well aware that the defamatory allegations were intended solely to maliciously dramatize a non-existent allegation and that such press briefing would neither be useful for the investigations or obtaining a conviction. That despite the dramatic press briefing and the damaging allegations of corruption and attempted bribery, there have never been investigations, charges or convictions against the plaintiffs.
70. The plaintiff further indicated that the 1<sup>st</sup> defendant personally received Kshs. 100,000 cash in place of the cheque and kept the cash. PW1 and PW3 testified that the cash was from the exact same account that the cheque was issued from.



71. The Kshs. 100,000 donation was made in public, in broad daylight and, at the invitation of the 1<sup>st</sup> defendant who by virtue of the public office he held was constitutionally precluded from hosting harambees. That the defendant failed to surrender the cash donation to the state as required under *the constitution* of Kenya and the Public Ethics Act.
72. The plaintiff argued on the defendants defence of absolute privilege, that it only applies to certain statements and speeches made on recognized occasion. The privilege attaches to the occasion and not the statement. Absolute privilege is only applicable to communications by participants in judicial proceedings or parliamentary proceedings. the defendants herein are thus not entitled to rely on this defence as the defamatory statements were not subject of a judicial or parliamentary proceeding. By summoning the media for briefing and making the defamatory statements on live coverage, the defendants were not engaged in the administration of justice.
73. The plaintiff further submitted that the 2<sup>nd</sup> defendant cannot rely on the *Anti-corruption and Economic Crimes Act* 2003 that provides for privilege under section 7 of the second schedule. The 1<sup>st</sup> defendant did not plead qualified privilege and it is trite law that parties are bound by their pleadings. The plaintiff further argued on the defence of public interest that the defendants ought to have proved the same by way of evidence. However, the defendants did not call any witnesses or adduce any evidence to back their defence
74. On general damages the plaintiffs proposed an award of Kshs. 19,999,000 and in support cited the following cases among others;
- a. Christopher Ndarathi Murungaru v John Githongo [2019] eKLR where the Plaintiff, a former Member of Parliament and Cabinet Minister, was awarded KES 20,000,000 in general damages.
  - b. Henry Obwocha v Head Link Publishes Ltd (2014) eKLR where the Claimant, a politician, was awarded KES 15,000,000/ as general damages.
  - c. Alnashir Visram v Standard Limited [2016] eKLR where the Plaintiff, a serving Judge of the Court of Appeal, was awarded KES 18,000,000 as general damages for defamation.
75. On exemplary damages the plaintiffs submitted that in this case they have demonstrated that the publication and/or airing of the defamatory statements were actuated by recklessness, bad faith and malice. In light of this they proposed an award on Kshs. 5,500,000 under this head. The plaintiff additionally argued that the defamatory publications are still available online and that they are not only entitled to a retraction of the articles and newscast but also an apology for the same.
76. The 1<sup>st</sup> defendant submitted that the plaintiff's claim must fail because without joining the publishers; the media houses and outlets there is no libel without publication there is no defamation. The office of the director of KACC as it then was like all other public offices in Kenya have absolute privilege when undertaking their duty and this covers acts of omission and commission.
77. The 1<sup>st</sup> defendant further argued that a litigant cannot vouch his own documents pursuant to section 106B of the *Evidence Act*. For a plaintiff to authenticate his own documents will violate the established doctrine of nemo iudex in causa sua. The plaintiff has further not demonstrated any injury to their reputations as there was no evidence that their business or political careers were affected in any way and in any event, it seems that their careers have prospered.
78. The 2<sup>nd</sup> defendant submitted that the words complained of were not defamatory as they neither brought the plaintiffs to hatred ridicule or contempt nor injury in their offices, profession or calling



- and neither have they been shunned. The 2<sup>nd</sup> defendant also indicated that the statement complained of was not false. During cross examination Dennis Apaa confirmed that at the time of meeting the 1<sup>st</sup> defendant, he was aware that his company was under investigation by the 2<sup>nd</sup> defendant. The cheque to a reasonable person was a clear scheme to bribe the 1<sup>st</sup> defendant and compromise the investigation.
79. The 2<sup>nd</sup> defendant submitted that it is absolutely privileged and that the statement was made in the course of public duty and in the public interest. Public interest having been pleaded, the defence of qualified privilege was pleaded as qualified privilege applies where the matter is of public interest or concern. That notwithstanding in *G. B. M. Kariuki v Fred Kwasi Apaloo* [1994] eKLR Civil Appeal No. 122 of 1994 it was held that absolute/qualified privilege or public interest as a point of law need not be pleaded.
80. The 2<sup>nd</sup> defendant argued that the fight against corruption is a matter of public concern, public interest and public benefit. The statement complained of was made in the course of the fight against corruption which is a matter of immense public concern and interest. The public needed to be aware that the people who were expected to protect their resources were incorruptible and working in their best interest.
81. The 2<sup>nd</sup> defendant submitted that the statement was not published maliciously as the 2<sup>nd</sup> defendant as an investigative agency then seized of the investigation against Broad Vision Utilities Ltd, had reason to believe that the cheque issued to the 1<sup>st</sup> Defendant by a company under investigation had the sole intention of bribing and corrupting the judgment of the 1<sup>st</sup> Defendant. The statement was factual and was based on an existing investigation and the actual cheque drawn to the 1<sup>st</sup> Defendant's foundation by a company under investigation by the 2<sup>nd</sup> Defendant.
82. I have carefully considered the evidence adduced by the 5 witnesses including the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs.
83. It is the duty of the two plaintiffs to prove their cases to the required standard in civil cases which is on a balance of probabilities.
84. The issues for determination in this case are as follows;
- i. Whether the plaintiffs have proved their cases to the required standard in civil cases.
  - ii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants have a valid defence against the plaintiffs' claim.
  - iii. Whether the plaintiffs are entitled to the remedies they are seeking against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
85. On the issue as to whether the plaintiffs have proved the tort of defamation, the following are the elements of defamation
- a. That the defendant made a defamatory statement to a third person.
  - b. That the statement was false.
  - c. That the defendant was legally at fault in making the statement; and
  - d. That the plaintiff suffered harm.
86. The defendants in their defences did not deny that they published the impugned press conference.
87. The defendants having admitted that they held the alleged press conferences and invited all the major media houses and television stations to the conference, this court must now consider whether the



defendants defamed the plaintiff and whether the defendants have a valid defence against the plaintiffs' claim.

88. The defendants raised the defence of qualified privilege.
89. In the case of Francis Cheron Ngeny & 11 others v Sammy Kiprop Kilach [2017] eKLR, the High Court considered the defence of qualified privilege in defamation proceedings and affirmed Gatley on Libel and Slander 8th Edition page 441 paragraph 442 where the statements to which the defence of qualified privilege should apply are stated to include the following;
- a. Statements made in the discharge of a public or private duty
  - b. Statements made on a subject-matter in which the defendant has a legitimate interest.
  - c. Statements made by the defendant to obtain redress for a grievance.
  - d. Reports of parliamentary proceedings.
  - e. Extracts from, or abstracts of, parliamentary reports, papers, votes, or proceedings published by the authority of parliament.
90. In Hulsbury's Law of England 4th Edition Vol. 28 at Paragraph 109 the rationale for the defence of qualified privilege is explained as follows.
- “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.
91. I find that the plaintiffs admitted that the 2<sup>nd</sup> defendant was at the material time in the process investigating Broad Vision Utilities Ltd, a company where the 2<sup>nd</sup> plaintiff was a director.
92. The 2<sup>nd</sup> plaintiff confirmed that at the time of meeting the 1<sup>st</sup> defendant, he was aware that his company was under investigation by the 2<sup>nd</sup> defendant.
93. It was improper for the 2<sup>nd</sup> plaintiff to accept invitation to a function held by 1<sup>st</sup> defendant in the circumstances.
94. The 1<sup>st</sup> plaintiff also said she was aware that the 2<sup>nd</sup> plaintiff intended to file an application to stay criminal proceedings against him arising from investigations by the Kenya Anti Corruption Authority.
95. The 2<sup>nd</sup> plaintiff was subsequently charged in Milimani Anti-corruption case no. 37 of 2011 together with Broad Vision Utilities Ltd as 8<sup>th</sup> and 9<sup>th</sup> defendants but they were acquitted under Section 210 of the Criminal Procedure Code.
96. There is undisputed evidence that at the material time, the 1<sup>st</sup> defendant was the director of the 2<sup>nd</sup> defendant.



97. I find that the plaintiffs have not proved that they were defamed in view of the circumstances of this case.
98. I find that the defendants had a responsibility to speak out on the issue.
99. The media conference was held in the course of public duty and was without malice being a matter of public interest.
100. The defence of qualified privilege, just like the other statutory defences of absolute privilege, justification and fair comment on a matter of public interest are complete defences to an action founded on defamation.
101. I dismiss the plaintiff's case at this stage.
102. On the issue of costs, I direct that each party bears its own costs of this case.
103. Had the plaintiffs proved their case this court would have awarded them general damages of ksh. 5 million each.
104. No exemplary damages would have been awarded.
105. However, this suit is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

