



**Oduol v Nation Media Group Limited (Civil Suit 71 of 2017)
[2023] KEHC 1207 (KLR) (Civ) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1207 (KLR)

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

CIVIL

CIVIL SUIT 71 OF 2017

CW MEOLI, J

FEBRUARY 16, 2023

BETWEEN

JAMES OCHIENG ODUOL PLAINTIFF

AND

NATION MEDIA GROUP LIMITED DEFENDANT

JUDGMENT

1. The suit by James Ochieng Oduol, (hereafter the Plaintiff) against the Nation Media Group Limited (hereafter the Defendant) is founded on defamation. The Plaintiff seeks inter alia general damages; aggravated damages; a permanent injunction to restrain the Defendant whether by itself, its affiliates, associates and or agents or otherwise from further publishing or causing to be published the libelous article or similar articles and words defamatory of the Plaintiff whether in print or electronic media; and a mandatory injunction requiring the Defendant within seven days to delete the statements concerning the Plaintiff from the article posted on the Defendant’s website that continue to defame the Plaintiff.
2. The Plaintiff averred that on March 15, 2017 the Defendant falsely and maliciously published a statement in its “The Daily Nation” print newspaper concerning the Plaintiff in an article entitled

“MPs to defy court on Ouko probe”

and earlier on its website on March 14, 2017 using the link <http://www.nation.co.ke/news/MPs-proceed-Ouko-probe-despite-court-order/1056-3848988-cd213b/index.html> had published an article headlined

“House committee suspends Ouko probe”.



It was averred that the offensive statements that were purportedly published as established fact were false in that the Plaintiff is not professionally, personally or in any other manner whatsoever connected to the entity OSI Kenya, named therein.

3. That the Plaintiff who is a senior advocate and family man had suffered adverse and irreversible damage to his reputation and has been brought into public scandal, ridicule, odium, and contempt. That in the subsequent article published on March 21, 2017 the Defendant, despite being aware that the Plaintiff was not in any way connected to OSI Kenya, deliberately failed to either publish a correction, clarification or render an apology thus maintaining the libel against the Plaintiff, which action was malicious and aggravating further the damage to the Plaintiff's reputation.
4. On April 27, 2017 the Defendant filed a statement of defence denying the key averments in the plaint and averred that the publications were made in good faith without malice, that the words complained of constitute fair comment on a matter of public interest were made on a privileged occasion and were not defamatory. In his reply to the defence the Plaintiff contended that the words published were neither protected under fair comment nor qualified privilege. The Plaintiff further reiterated the contents of his Plaint.
5. During the trial, the Plaintiff testified as PW1. Having identified himself as an Advocate of the High Court of Kenya he proceeded to adopt his witness statement dated March 27, 2017 as his evidence-in-chief. He produced the bundle of documents in the list of documents dated March 27, 2017 as PExh.1-7 being Certificate of Admission, Practicing Certificate for the year 2016 with relevant receipt, curriculum vitae, copy of newspaper article dated March 15, 2017, copy of online article in dated 14.03.2017, demand letter dated March 15, 2017 and copy of newspaper article dated March 15, 2017, respectively.
6. Under cross-examination, he maintained that the article referred to him and connected him to OSI Kenya , that his name as appearing in PExh.1 and PExh.2 reads James Ochieng Oduol a matter of notoriety, even though the name used for purposes of admission as an advocate was James Oduol Ochieng as per his academic certificates. He asserted that both names refer to him as an advocate and that subsequent to the offensive article, he fielded many inquiries. It was his evidence that he did not know any other individual by the name James Ochieng Oduol. He confirmed the article marked PEXh. 5 did not include the word advocate after the name James Ochieng Oduol, nor indicate that the individual named therein was a senior partner at the law firm of Triple OKLaw or member of any professional organization.
7. That the Defendant's insertion of the name William Oduol in PExh.7 came subsequent to his demand letter to the said Defendant and was an attempt on their part to alter the story. It was his evidence further that the Defendant did not apologize or correct the initial false article. That the story in question was in relation to the Office of the Auditor General and OSI Kenya concerning allegations of bribery and corruption that were the subject of a parliamentary pursuant to a petition by one Emmanuel Mwagonah.
8. The Plaintiff asserted that the newspaper article did not report anything about the said petition or the schedule of the said parliamentary committee of 14.03.2017 showing his alleged scheduled appearance before the committee. That he wrote a letter to the National Assembly denying the allegations contained in the petition before it and no summons were ever served upon him to appear before the parliamentary committee.
9. In re-examination, he reiterated that he did not know any other individual going by the name James Ochieng Oduol or James Oduol Ochieng which names are used interchangeably, in reference to him.



That the article stated as a matter of fact that he was connected to OSI Kenya through the Auditor General one Mr Ouko and therefore was involved in the subject dubious deal.

10. Chacha Odera testified as PW2. He identified himself as an Advocate of the High Court of Kenya and adopted his witness statement dated March 27, 2017 as his evidence-in-chief. He stated during cross-examination that prior to publication of the article a rumor had circulated concerning the alleged acquisition of software by the Auditor General at an inflated price, which was a matter of public interest. That he was shocked to read in the article allegations of the Plaintiff's involvement in the scandal, admitting however that the article itself did not describe the professional particulars or affiliations of the person James Oduol Ochieng.
11. He asserted that Plaintiff was his colleague and a friend well known to him and had talked to the Plaintiff who denied involvement in the scandal. In re-examination he reiterated that he was aware of the Plaintiff's professional memberships but did not expect them to be included in the newspaper article.
12. The Defendant called one witness James Kuru Ngirachu (DW1). Identifying himself as a reporter working for the Defendant, he adopted his witness statement dated January 24, 2017 as his evidence-in-chief. He produced the documents in the list of documents dated February 13, 2018 as DExh.1-4, namely copy of petition dated February 13, 2017 by Emmanuel Mwagonah, memorandum by Speaker of the National Assembly to Members of Parliament dated February 16, 2017, schedule of Parliamentary Committee Sittings commencing March 13, 2017 and flow chart of funds the Ethics and Anti-Corruption Authority, respectively.
13. Cross-examined by the Plaintiff's counsel, he confirmed that the Defendant did publish and that he relied on the petition (Dexh.1) and particularly paragraph 18 therein stating that Ochieng Oduol was associated with OSI Kenya. That in his understanding of the paragraph there was a connection between the Auditor General, Ochieng Oduol and OSI Kenya. He admitted while the petition referred to a person known as Ochieng Oduol his article added the name James hence read, the name James Ochieng Oduol. That he did not consider it necessary to contact the person named therein to confirm the allegations in the petition or to establish the identity of Ochieng Oduol. He confirmed that he spoke to one William Oduol prior to publication of the article marked PExh.7 but did not question him about James Ochieng Oduol. That it was William Oduol he had associated with OSI Kenya and that prior to the publications in question he only had the petition (DExh.1.) He however defended the contents of his article asserting that it was based on material before parliament.
14. During re-examination he reiterated that he had reported about the court order stopping the parliamentary probe, and relied on the petition and schedule (DExh.1 and DExh.3) to obtain the names of witnesses appearing before the parliamentary committee. That upon reading paragraph 18 of the former, he concluded that Ochieng Oduol was associated with OSI Kenya, Westcon Africa UK and the Auditor General.
15. At the close of the trial, parties filed written submissions. The Plaintiff's submissions addressed the issues of liability and damages. On the first issue counsel argued that the Defendant had expressly admitted the publication of the defamatory article of March 15, 2017. That from the plain reading of the published words in the article, it was reported as a fact that the Plaintiff was connected to OSI Kenya Limited. That while the article was purported to be based on information derived from the petition to parliament, the petition itself referred to 'Ochieng Oduol' and not 'James Ochieng Oduol' as stated in the article. It was therefore counsel's argument that the Defendant failed to demonstrate the source of his information that James Ochieng Oduol was connected to OSI Kenya Limited.



16. Citing the *Media Council Act*, *The Code of Conduct for the Practice of Journalism* the Plaintiff asserted that the Defendant breached its duty to take steps to ensure accurate or factual reporting in failing to seek a the Plaintiff's comment before publication of the article, a courtesy extended to one William Oduol before publication of the article dated March 21, 2017.
17. It was the Plaintiff's position that the Defendant's plea of fair comment and qualified privilege was unsustainable as the Defendant inaccurately stated as a fact that James Ochieng Oduol was linked to OSI Kenya. For this proposition, counsel called to aid the decision in *Nation Media Group Limited v Alfred N. Mutua* [2017] eKLR. Further, citing Section 7 of the *Defamation Act*, counsel asserted that the petition relied on by the Defendant was not a proceeding and in the absence of proceedings from the National Assembly, the defence of qualified privilege could not stand. Concerning the Defendant's denials that James Ochieng Oduol referred to in the article was not the Plaintiff herein, it was pointed out that the Defendant failed to lead any evidence to that effect. That freedom of expression as protected under Article 33 of the *Constitution* has its limitation of which this court ought to uphold.
18. On quantum counsel reiterated the Plaintiff's evidence on his as an advocate of 34 years standing with various academic, professional credentials, international acclamations and membership to professional bodies and the imputations in the articles in question. Counsel highlighted that the publication was prominent in a newspaper with nationwide circulation and that despite the gravity of the criminal imputations in the article, the Defendant had refused to publicly issue any clarification or apology upon receiving a demand from the Plaintiff. The decisions in *Lucy M. Kambuni v Nation Media Group* [2020] eKLR and *Nelson Havi v Headlink Publishers Ltd* [2018] eKLR were cited in supporting the award of Kshs 25,000,000/- as general damages.
19. In urging an award of aggravated damages, counsel submitted that the Defendant failure to conduct any due diligence before publishing the article and its conduct prior to and during the proceedings evidenced malice. Hence, the court was urged to award of Kshs 4,500,000/- as aggravated damages. The decision in *Ken Odondi & 2 Others v James Okoth t/a Okoth Omburah & Co. Advocates* [2013] eKLR was cited in that regard. The court was thus urged to grant the prayers in the plaint with interest and costs.
20. On the part of the Defendant, counsel argued that it was evident that the Plaintiff rushed to conclude, without basis, that the article referred to him. That having failed to demonstrate that he was the subject of the article he had failed to discharge the burden of proof. Moreover that the words in the article constituted a fair comment on a matter of public interest arising from the proceedings of the committee of the National Assembly pursuant to the Petition, the memorandum by the speaker of the National Assembly and schedule of hearings obtained from the National Assembly notice board.
21. While placing reliance on *Gatley on Libel and Slander*, 11th Edition Pg 577 it was submitted that the article was published on an occasion of qualified privilege and that the Defendant accurately reported on the individual set to appear before the National Assembly committee. And that a minor inaccuracy regarding the name of the person scheduled to appear before the committee of parliament cannot dislodge the said defence. That there was no proof that the publication was actuated by malice. He urged the court to find that the Plaintiff had failed to prove his case and to dismiss the suit.
22. Concerning damages counsel anchored his submissions on the decision in *JMM v Headlink Publishers Limited* [2015] eKLR on the principles that ought to guide a court on the award of damages on a cause of action founded on defamation. Counsel reiterated that the name in the article did not positively identify the Plaintiff who is an advocate of the High Court of Kenya; that the article did not identify his law firm; that other than for PW2 who is an Advocate of the High Court of Kenya the Plaintiff did not tender any evidence that the article was construed as alleged by the general public; and that



the Plaintiff did not tender evidence to show the effect of the publication on his business or profession or loss he suffered.

23. It was further submitted that by dint of Section 7A (7) of the Defamation Act the Plaintiff was entitled to a right of reply of which he did not exercise hence damages to be awarded ought to be substantially reduced. Counsel was at pains to distinguish the decisions relied on by the Plaintiff from the present and urged the court to be guided by the decisions in Johnson Evans Gicheru v Andrew Morton & another [2005] eKLR, Amrital Bhagwanji Shah v Standard Limited & another [2008] eKLR, Eric Gor Sungu v George Odinga Oraro [2014] eKLR and Nelson Havi v Headlink Publishers Limited [2018] eKLR in determining quantum. In conclusion it was submitted that there was no justification for awarding aggravated damages.
24. The Court has considered the evidence on record and the parties' respective submissions. The court must determine whether the Plaintiff has proved his case on a balance of probabilities and if so, the appropriate quantum of damages to be awarded. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act which provides that:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.... 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
25. The Court of Appeal stated in Wareham t/a A.F. Wareham & 2 others v Kenya Post Office Savings Bank [2004] 2 KLR 91, that: -
- "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."
26. In Karugi & another v Kabiya & 3 others [1987] KLR 347 the Court of Appeal stated that:
- "[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."



27. As concerns the rationale behind the law of defamation the Court of Appeal had this to say in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR:

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

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...’ Defamation protects a person’s reputation that is the estimation in which he is held by others; it does not protect a person’s opinion of himself nor his character. ‘The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’ and it affords redress against those who speak such defamatory falsehoods...”

28. Actions founded on the tort of defamation surface the tension between private interest and public interest. Article 33(1) of the *Constitution* guarantees every person’s right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-Article (3) states that

“In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”.

Article 34 guarantees the freedom of the media while Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions of the *Defamation Act*. Contemplating these competing rights Lord Denning MR stated in *Fraser v Evans & others* [1969] 1 All ER 8:-

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

29. In *Selina Patani & another v Dhiranji V Patani* (2019) eKLR’s the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that: -

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

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

30. In this case, there is no dispute regarding ingredient (iii) above as the Defendant readily admits to publishing the articles in question. The issues in dispute are; whether the statements in the article referred to the Plaintiff; whether the articles as published are defamatory and false; or whether they consist of a fair and accurate report of committee proceedings regarding matters of public interest



hence covered by qualified privilege pursuant to section 7 of the Defamation Act. This court proposes to deal with the issues concurrently.

31. The undisputed background to this suit can be briefly stated as follows. The Plaintiff is an advocate of the High Court of Kenya having been admitted to the bar in 1987. He has been a legal practitioner since then and is currently and senior partner in TripleOKLaw.
32. In February 2017, a petition was filed in the National Assembly by one Emmanuel Mwagambo Mwagonah, seeking the removal from office of then Auditor General Edward Ouko, on several grounds. The allegations pertinent to this case stated inter alia that the Auditor General had violated the provisions of the Public Procurement and Disposal Act by single-sourcing audit software from a company known as OSI Kenya, at an alleged inflated price of KES 100,000,000/-. In demonstrating that the Auditor-General's decision was motivated by personal benefit, it was alleged that out of the monies paid to the said supplier, a substantial amount (about KES 40,000,000/-) was paid by OSI Kenya to a company known as Westcon Africa UK, which was associated with the Auditor General

‘through one Ochieng Odoul who was acting on behalf of the Auditor-General for the transaction’.
33. The petition detailed further alleged payments made by OSI to other third parties apparently on the gravy train. Through a communication by the Speaker of the National Assembly dated February 16, 2017, the petition was conveyed to the Departmental Committee on Finance, Planning & Trade (hereafter the committee) for consideration, and it appears that the committee sittings were scheduled to take place from 14th to March 16, 2017. However, before the sittings could commence, the High Court issued orders barring the intended committee proceedings in respect of the petition.
34. The two articles giving rise to this case were published by the Defendant on 14th and 15th March 2017. In determining the issues in dispute, it is useful to set out in some detail the contents of the articles complained of. The first article admittedly written by DW1 and published by the Defendant on March 15, 2017, a day after the aborted sittings read in part as follows:

“MPs to defy court on Ouko Probe”

“National Assembly Speaker Justin Muturi last evening indicated he would lead MPs in defying orders by two judges to stop scrutiny of a petition for removal of Auditor General Edward Ouko.

....His decision means that Mr Ouko will get a two-day reprieve as the finance committee has suspended work on the petition by advocate Emmanuel Mwagambo Mwagonah until after the Muturi ruling.

....Yesterday the committee was scheduled to meet audit firm Baker Tilly Merali's and the Kenya Human Rights Commission.

It was also to meet Mr James Ochieng Oduol, who is connected to OSI Kenya, the company that sold software to the auditor-general's office in a deal overseen by Ouko.

....Meanwhile the Ethic & Anti-Corruption commission has begun a fresh round of investigations in the award of a 160 million contract by Auditor-general's office increasing pressure on Mr Ouko.” (sic)



35. Earlier on March 14, 2017 the Defendant had published on the Defendant’s website an article which reads:-

“The National Assembly’s Finance, Trade and Planning Committee National has suspended meetings to consider a petition for the removal of Auditor-General Edward Ouko.

The committee put off the hearings after they were served with a court order stopping the investigations and said they will seek Speaker Justin Muturi’s advice.

The committee was set to meet three witness in the petition seeking the removal of the Auditor-General.

The finance committee Scheduled to meet three sets of witnesses Tuesday morning – audit firm Baker Tilly Merali’s, Kenya Human Rights Commission (KHRC) and James Ochieng Oduol.

KHRCH was expected to stand by Mr Ouko while it Mr Oduol was linked to OSI Kenya, the company from who, the office of the Auditor-General bought software at the reportedly inflated price.” (sic)

36. As a start the court must first determine whether the articles in question were in respect of the Plaintiff herein. The Plaintiff by his evidence has vehemently affirmed that the publications in issue were of and concerning him. It was the Plaintiff’s evidence that to the best of his knowledge there was no other individual going by the name James Ochieng Oduol hence the publications were undoubtedly about him. The Defendants claim that the Plaintiff rushed to conclude that the articles referred to him without any basis, as the articles did not describe the profession of the subject as an advocate or his place of work.
37. The existence of another person by the names claimed by the Plaintiff is a matter of fact. The Plaintiff identified himself orally and through personal documentation which evidence was corroborated by PW2, to be James Ochieng Oduol. He asserted that he did not know of any person who goes by the same name. He acquitted himself well during cross-examination on that aspect of his evidence. In the circumstances, the onus fell on the Defendant to controvert the Plaintiff’s evidence by tendering evidence regarding the other person or persons who bear the same name as the Plaintiff. The Defendant did not pick up the gauntlet and it is of no avail to assert that the articles did not describe the subject in finer details such as his profession and place of work hence could not be taken to refer solely to the Plaintiff. The court is therefore satisfied that the publications refer to the Plaintiff herein.
38. On whether the words referring to the Plaintiff were false, the articles variously stated that the Plaintiff was “linked” and “connected” to OSI Kenya, the company at the heart of the allegations in the petition regarding procurement done in violation of the Public Procurement and Disposal Act, the beneficiary of the alleged single-sourcing of software by the Auditor General. The Plaintiff has similarly disputed any relationship to the said company. The Defendant appeared to attribute this connection to the petition before the committee. However, paragraph 18 of the petition cited by DW1 stated that OSI Kenya paid monies derived from the alleged irregular procurement to the
- “company known as Westcon Africa UK a firm associated with the Auditor General through one Ochieng Odoul who was acting on behalf of the Auditor General for the transaction”.
39. From this statement, two things stand out. First, it seems that the person named as Ochieng Odoul therein was a go-between associated with Westcon Africa UK and the Auditor General and was transacting with OSI Kenya on behalf of the Auditor General. Secondly, the person named in the article



is not James Ochieng Oduol but Ochieng Odoul. DW1 claimed that he relied on the petition and parliamentary committee schedule (D.Exh.3) in preparing his article. The latter did not contain any allegations against James Ochieng Oduol and merely indicated that the subject was expected to appear before the committee. During his testimony, DW1 was hard-pressed to explain the linking of James Ochieng Oduol with the allegations in the petition, and specifically with OSI Kenya.

40. However, in my view, it is the Defendant's article dated March 21, 2017 (PExh.7) that makes DW1's defence of his articles appear spurious. The article reported rebuttals by one William Oduol, described as the MD of Westcon Africa against the allegation that a bribe was paid by OSI Kenya to the Auditor General through the former company. By that date, the Defendant had already received the demand letter from the Plaintiff in connection with the earlier articles, and seemingly identified and the person known as William Oduol. Where is the truth? For all its wriggling, the Defendant is unable to convincingly demonstrate the factual position regarding identity of the subject of the article and his link or connection with OSI. The inescapable fact is that the alleged linkage of James Ochieng Oduol to OSI Kenya is patently false as the Plaintiff has asserted in his evidence.

41. *Gatley on Libel and Slander* 6th Edn. states that; -

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

42. Were the Defendant's publications defamatory? A defamatory statement is defined in *Halsbury's Laws of England* 4th Edition Vol 28 paragraph 10 as:

“...a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business”.

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

43. The Court stated in *Elizabeth Wanjiku Muchira v Standard Ltd* [2011] eKLR that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the

“probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published.”-Clerks & Lindsell on Tort 17th Edition 1995-page 1018.”

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

“The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined:

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”



See also *Onama v Uganda Argus Ltd* (1969) EA where the East African Court of Appeal stated as follows:

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

45. The Plaintiff pleaded in his plaint and testified that the words in the article of March 14, 2017 and March 15, 2017 were defamatory in the natural and ordinary meaning in that it was imputed therein that he was inter alia guilty of criminal activity attracting penal sanctions including the offences of bribery, embezzlement of public funds, contravention of the laws of public procurement and one deficient of integrity. PW2 testified that this too was the understanding conveyed to him when he read the article of March 15, 2017, explaining that in the material period, the subject “scandal” was a matter of public record. PW2 stated that as a person who knew the Plaintiff well, he was shocked by the article and contacted the Plaintiff who denied involvement in the matter.
46. Looking at the statements made by the Defendant and as a matter of fact in the two articles about the Plaintiff’s involvement with OSI Kenya, in the obtaining circumstances, it is clear that in their plain meaning, the statements had, to use the words in Elizabeth Muchira’s case, a defamatory tendency, whether or not they were believed by the people to whom they were published.
47. Are the publications covered by fair comment and qualified privilege? I do not think so. First, the statements referring to the Plaintiff were passed off as factual and therefore the defence of fair comment is unsustainable because that the basic facts upon which such comment could have been based were false. A comment based on falsehood cannot qualify as fair. See *Nation Media Group Ltd. v Alfred N. Mutua* (2017) eKLR. As regards, the defence of qualified privilege under section 6 of the *Defamation Act*, it was held in *Adam v Ward* (1917) AC 309 that:
- “A privileged occasion is, in reference to qualified privilege an occasion where the person who makes the communication has an interest or duty, legal, social or to make it to the persons to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.”
48. No doubt, the matters arising from the petition before the committee were of great public interest and the Defendant had a duty to report them for the interest of the public. However, as stated in *Dorcas Florence Kombo v Royal Media Services* [2014] eKLR:
- “--- qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or the use of the privileged information for an improper purpose.”
49. The Plaintiff asserts that the Plaintiff was acted maliciously inter alia by failing to contact him to verify the statements before publication, inserting the Plaintiff’s name therein when the petition before the committee referred to a different person and refusing to correct the initial false report or to apologise to the Plaintiff after his demand letter. Despite the evident discrepancy in the name of go-between as stated in the petition and the alleged committee schedule, DW1 admitted during the trial he did not deem it necessary to contact the Plaintiff in order to verify the contents of his article or subsequently to correct his initial report even when the Plaintiff raised his protestation.



50. Equally, as earlier observed, the contents of the publication regarding the relationship between the person named and OSI Kenya did not tally with the actual contents of the petition in that regard. The [Code of Conduct for the Practice of Journalism](#) made under the [Media Council Act](#) provides that; -
- “ Accuracy and fairness
- (1) A person subject to this Act shall write a fair, accurate and an unbiased story on matters of public interest.
 - (2) All sides of the story shall be reported, wherever possible.
 - (3) Comments shall be sought from anyone who is mentioned in an unfavourable context and evidence of such attempts to seek the comments shall be kept”.
51. The Defendant indeed subsequently purported to clarify the matter by publishing a report in the article dated March 21, 2017 in which one William Oduol is stated to be the person connected to Westcon Africa UK as the MD, and involved in the procurement giving rise to the petition against the Auditor General. Even so, the Defendant did not deem it appropriate to make amends with regard to the Plaintiff who had clearly been wrongly implicated in the matter. One wonders whether considering the later publication, the Defendants still believed in the truth of the first two articles.
52. In [Phineas Nyagah v Gilbert Imanyara](#) [2013] eKLR the court held that :
- “ Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice maybe found in the publication itself if the language used is utterly beyond or disproportionate to the facts.
- malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely.”
53. In [Uburu Muigai Kenyatta v Baraza Leonard](#) [2011] eKLR the Supreme Court stated:
- “ While taking the defence of justification, or qualified privilege in a defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification or qualified privilege does not inure the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication.”
54. Reviewing all the material before it, the court is of the view that the Defendant acted in a reckless manner by failing to verify the statements against the Plaintiff before publication, and even when there was presented material to put to doubt the veracity of the said statements, failed to retract the statements or to tender an apology to the Plaintiff. Instead, the Defendants opted to publish a statement on 21.03.2017 that added a new twist by naming one William Oduol (who in any event had not been named in earlier publications) as the person linked to Westcon Africa UK, in relation to the procurement which was the subject of the petition by Emmanuel Mwangambo Mwangonah. The Defendant is liable for defamation.



55. Turning now to damages, the purpose of awarding general damages in a libel action is to compensate the plaintiff for the damage done to his reputation and the court has wide discretion, depending on the peculiar circumstances of the case before it. See *CAM v Royal Media Services* (2013) eKLR. In the oft-quoted case of *John v MGM LTD* (1997) QB 586 it was held that:

“In assessing damages for injury to reputation, the most important factor is the gravity of the libel, the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of personality the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has greater potential than a libel published to a handful of people.”

56. Superior courts in this country have adopted and applied the principles spelt out in *Jones v Polland* (1997) EMLR 233-234, to the effect that:

“In relation to a claim for libel the court should take into account the objective features of the libel itself, such as its gravity, its prominence, 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 examples publication of an apology, matters tending to reduce damages, vindication of the plaintiff’s reputation past and future. In situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages.”

57. In this case, the Defendant’s publication of the offending statements had a wide reach both through the online platform and print medium. Moreover, the publication was repeated, and the Defendant failed to verify the contents thereof even after it became evident that they “had the wrong man”. And instead of retracting the publication and offering an apology to the Plaintiff, the Defendant sought to give anew twist to the publication by purporting to substitute a new identity of the person who was supposedly the subject of the offending articles.

58. No doubt the offending articles closely touched on the plaintiff’s personal integrity, professional reputation, and honour in an adverse manner. An advocate of relatively high professional repute and experience, the Plaintiff was cast as a wheeler-dealer ready to jump on the gravy train of corrupt procurement involving public funds, contrary to the procurement law. That said, the award of KES 25,000,000/- in general damages as urged by the Plaintiff is too high notwithstanding the prominence of the offending publications. The case of *Nelson Havi*, cited by the two sides, rather than *Lucy Kambuni’s* case appears more applicable to this case.

59. The case of *Ken Odondi* too cited by the Plaintiff, and the list of authorities cited by the Defendant, the latter which contains some dated cases, all offer useful jurisprudence and guidance in the assessment of damages. Nevertheless, in my considered view, the duration of the Plaintiff’s professional practice while relevant, should not be the sole yardstick of comparison with other cases involving similar professionals and should be not be applied as an isolated consideration. Besides, the award of damages in libel claims ought to be balanced against the need to keep damages at a reasonable level so as not to stymie the exercise of the right to freedom of expression in society. See *Nation Media Group Ltd and 2 Others v John Joseph Kamotho and 3 others* [2010] eKLR.

60. Considering all the foregoing matters , the court is persuaded to award damages as follows:

- a. General damages: KES 5,600,000/-



b. Aggravated damages: KES 1,400,000/-

Total: KES 7,000,000/- (Seven Million Shillings).

Prayers (c) and (d) in the plaint are granted. The Plaintiff is awarded costs of the suit and interest at court rates. Judgment is accordingly entered for the Plaintiff against the Defendant in the terms herein.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 2023.

C.MEOLI

JUDGE

In the presence of:

Mr Echessa for the Plaintiff

Mr Ochieng for the Defendant

C/A: Carol

HCCC No. 71 of 2017 Page 7.

