



**Gitonga v Kenya Broadcasting Corporation & another (Civil Suit
325 of 2010) [2023] KEHC 17355 (KLR) (Civ) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17355 (KLR)

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

CIVIL

CIVIL SUIT 325 OF 2010

CW MEOLI, J

MAY 4, 2023

BETWEEN

REV. BENEDICT KIAMBI GITONGA PLAINTIFF

AND

KENYA BROADCASTING CORPORATION 1ST DEFENDANT

WAMBUI MWANGI 2ND DEFENDANT

JUDGMENT

1. The suit filed on 24.06.2010 by Rev. Benedict Kiambi Gitonga, (hereafter the Plaintiff) against the Kenya Broadcasting Corporation and Wambui Mwangi (hereafter the 1st and 2nd Defendant(s)) is founded on the tort of defamation. The Plaintiff seeks inter alia general damages and costs of the suit.
2. The Plaintiff averred that at all material times, he was an ordained priest with the Anglican Church of Kenya (ACK) and based at ACK Mioro Church in the Diocese of Mount Kenya. That on 07.07.2009 at 9.00pm, during a programme known as “Coro Maturaini”, the 2nd Defendant in the course of her employment with the 1st Defendant published or caused to be broadcast through the 1st Defendant’s vernacular radio station, words defamatory of the Plaintiff to the effect that: “Vicar wa ACK Mioro Church niari na ndugu na kairitu ga cukuru”, that is, “the Vicar of ACK Mioro Church is having a sexual affair with a school girl”.
3. He averred that in their natural and ordinary meaning the said words meant and were understood to mean that the Plaintiff was an immoral person and not fit to serve in the esteemed and high office of priesthood as a consequence of which his reputation has been seriously damaged. That on 08.07.2009 the Defendants purported to air a retraction of the broadcast of 07.07.2009, which retraction left doubts in the minds of many parishioners concerning the Plaintiff’s integrity as a priest.



4. On 20.08.2010 the Defendants filed a joint statement of defence denying the key averments in the plaint. In his reply to the defence, the Plaintiff joined issue with the Defendants and reiterated the contents of his plaint. The foregoing was the state of pleadings prior to hearing of the suit.
5. During the trial, the Plaintiff testified as PW1. Having identified himself as a clergyman in the ACK, he proceeded to adopt his witness statement as his evidence-in-chief and thereafter produced the bundle of documents in the list of documents dated 18.11.2011 as PExh.1-4, list of documents dated 16.03.2016 as PExh.5 and list of documents dated 04.03.2022 as PExh.6 respectively, all in support of his pleadings. In cross-examination, he confirmed that he did not produce the recording of 07.07.2009 but the retraction on 08.07.2009.
6. He further affirmed that he did not hear the statements published on the former date but received information in that regard from other people. That the translation that he produced in his evidence related to the statement aired on 08.07.2009. He went on to state that following the offending publications, he was transferred to Koimbi Parish in the same capacity and has since been promoted. That the statements published by the Defendants so cast aspersions on his character that it was untenable for him to remain a priest at Mioro Parish. In re-examination, he reiterated that the publication of 08.07.2009 was a follow up of the one aired on 07.07.2009.
7. Anthony Maina Wambugu testified as PW2. He adopted his witness statement dated 21.04.2011 as part of his evidence-in-chief. During cross-examination, he admitted to enjoying a good relationship with PW1, which however changed after the publication in question. That his trust in PW1 was reduced. He admitted that he did not hear the news clip aired on 08.07.2009 regarding the material aired on 07.07.2009.
8. Samuel Gatitu Kioria testified as PW3. He stated that he is originally from Mioro, Muranga County and is a farmer by profession. He too adopted his witness statement dated 21.04.2011 as his evidence in chief. Under cross-examination he admitted that he never heard the subject publication of 07.07.2009 but that fellow Christians called to inform him about it. Confirming that he heard the clip aired on 08.07.2009, and contacted the 2nd Defendant who informed him that she had been misled by her source and was apologetic. That she further promised a retraction of the story aired on 07.07.2009 which was published on 8.07.2009. In re-examination, he reiterated having spoken to the 2nd Defendant who confirmed that she would retract the story of 07.07.2009 on 08.07.2009.
9. The Plaintiff's final witness Josephine J. N Kimani testified as PW4. She began by adopting her witness statement dated 25.03.2022 as her evidence in chief and produced a copy of the delivery book attached to the list of documents dated 16.03.2016 and earlier marked as PExh.5. In cross-examination she stated the extract copy of the delivery book showed that one Daisy received the letter on behalf of the first Defendant, the Kenya Broadcasting Corporation, (KBC).
10. On the part of the Defendants, Serah Wambui Mwangi testified as DW1. Identifying herself as a journalist in Murang'a County, she adopted her witness statement dated 15.08.2014 as her evidence-in-chief. During cross-examination, she stated that on 07.07.2009 she was on duty and presenting a program called "Coro Maturaini" which loosely translates as "Local events by Coro FM". She asserted that the report giving rise to the instant suit relates to residents' complaints concerning an incident that had allegedly occurred on the said date at Mioro. That she had spoken to the Assistant Chief of Mioro Area, who stated that a young girl had recorded a statement to the effect that she was found in compromising circumstances with a clergyman; that although DW1 was given the name and church in which the clergyman served, she did not include the detail or the clergyman's actual place of work in the publication.



11. It was her evidence further that she resolved to produce the story that aired on 08.07.2009 after the Plaintiff and another individual called to give their side of their story. She affirmed that the subject publication neither gave the Plaintiff's name nor stated that he was the person found with the girl in the publication. She further stated that the subsequent report aired on 8.07.2009 was prepared after she spoke to the Plaintiff and that the Assistant Chief Mioro Area was the source of the initial report. She admitted that despite providing the Occurrence Book (OB) number of the alleged girl's report cited by the chief, she did not produce the extract thereof before court.
12. DW1 further stated that prior to airing the report on 07.07.2009 she did not conduct her own independent inquiry because the Assistant Chief Mioro Area was considered a reliable source regarding the allegation in question. She asserted that the allegation that a clergyman had been caught in compromising circumstances with a schoolgirl was reported as such upon verification and that the Plaintiff was accorded an opportunity to comment on the allegation. In re-examination, she reiterated that the recording of the publication of 07.07.2009 ought to have been produced by the Plaintiff in addition to the publication of 08.07.200.
13. Teresia Wahi Wainaina testified as DW2. On her part she identified herself as a producer of "Coro Maturaini" program and also a news editor Coro FM at KBC. Having adopted her witness statement dated 21.03.2022 as her evidence-in-chief, she stated during cross-examination that in the material period she was away on maternity leave, and therefore she did not personally handle the story published on 07.07.2009, although she heard it. That she had verified and approved the story of 08.07.2009 having listened to it and found nothing defamatory of it. She disputed as inaccurate the translation thereof in the transcript produced by Plaintiff.
14. She further confirmed having spoken to DW1, who said the story emanated from a credible source, namely, the Assistant Chief Mioro Area. That in the early days of the program, reports were received without recorders, so that reporters merely used word of mouth. Hence, there was no verifiable recording in existence concerning the account given by the Assistant Chief Mioro Area concerning the publication of 07.07.2009. In re-examination, she reiterated that the publication of 08.07.2009 was not a correction of the earlier publication but a report of the Plaintiff's comments thereon.
15. At the close of the trial, parties filed written submissions which by and large rehashed the evidence at the trial. Submitting on whether the words set out in the plaint were uttered by the 2nd Defendant, it was argued by the Plaintiff's counsel that the Plaintiff has produced credible evidence to confirm the defamatory publication made by the Defendants. Counsel asserted that beyond mere denials, the Defendants failed to produce the record of the actual words uttered by the 2nd Defendant who had admitted in her evidence that the publication in contention was on 07.07.2009. Concerning the natural and ordinary meaning of the uttered words, counsel submitted that the initial publication and clarification aired by the Defendants on 08.07.2009 were understood by those who heard them to convey that the Plaintiff was involved in a sexual relationship with a schoolgirl.
16. Addressing the competency of the suit, counsel submitted that in compliance with Section 46 of the Kenya Broadcasting Act, the Plaintiff served the Defendants with a demand letter pointing out that the Act does not prescribe a specific format of the notice. That a court ought to interpret statutory provisions in a liberal manner that does not limited access to justice. The decision in *Telkom Kenya Ltd v Kenya Railways Corporation* [2018] eKLR was called to aid in that regard.
17. On quantum counsel reiterated the Plaintiff's evidence and emphasized that the publication of 07.07.2009 was made in a reckless manner and in complete disregard as to the truthfulness of the words uttered; that the words disparaged the Plaintiff's reputation and tended to lower it in the estimation of right thinking members of society. The decision in *John Joseph Kamotho & 3 Others v Nation*



- Media Group Limited [2005] eKLR was cited in supporting the proposed award of Kshs. 5,000,000/- as general damages and Kshs. 1,000,000/- as aggravated damages. The court was urged to allow the suit as prayed.
18. On the part of the Defendants, counsel cited the decisions in Clement Muturi Kigano v Hon. Joseph Nyagah [2010] eKLR and Odero O. Alfred v Royal Media Group Ltd [2015] eKLR, and submitted that in the absence of tapes or witnesses in proof of the alleged publication, the Plaintiff had failed to establish that the Defendants published the defamatory statement concerning him. He asserted that the report aired by the Defendants on 08.07.2009, was not a retraction but a report concerning outrage expressed by residents of ACK Mioro regarding certain leaders who were allegedly spreading reports concerning their priest. That nowhere in the said publication did the 2nd Defendant indicate that it was a correction of the story aired on 07.07.2009 and the Plaintiff failed to demonstrate anything in the certified translation indicating that the 2nd Defendant was thereby retracting or clarifying the story aired on 07.07.2009.
 19. Addressing liability for defamation, counsel relied on Section 62, 63(1) & (2) and 109 of the Evidence Act, the decisions in Muritu Kinyanjui v Jane Muthoni Njiru & 2 Others [2020] eKLR and Musikari Kombo v Royal Media Services Limited [2018] eKLR to submit that the Plaintiff failed to prove his case on a balance of probabilities, as the bulk of his evidence was comprised of inadmissible hearsay evidence. In the alternative and without prejudice to the foregoing, it was submitted that the statements amounted to fair comment on an issue of public interest and that the Defendants were within their rights pursuant to Article 33 and 34 of the Constitution to disseminate the subject material through radio for the good of the public who have a right to be informed.
 20. Concerning damages, counsel anchored his submissions on the decision in Simeon Nyachae v Lazarus Ratemu Musa & Another [2007] eKLR and Kagwira Mutwiri Kioga v The Standard Limited & 4 Others [2010] eKLR to assert that the Plaintiff is not entitled to any damages, having failed to demonstrate how his reputation in society was lowered. That his purported transfer from Mioro ACK parish did not constitute a demotion and indeed he was later promoted. Thus, he did not suffer any loss as purported.
 21. Attacking the competency of the suit, counsel cited Section 46 of the Kenya Broadcasting Act and contended that suit the 1st Defendant was not served with the requisite demand letter. In conclusion he asserted that the Plaintiff had failed to discharge the burden of proof and the suit ought to be dismissed with costs.
 22. The Court has considered the pleadings, the evidence on record and the parties' respective submissions. Before delving into the merits, the court has to determine the defence challenge to the competence of the Plaintiff's suit. The Defendants take the view that the suit is incompetent and bad in law for failure to comply with Section 46 of the Kenya Broadcasting Act. The said Section provides that;-

“Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

- (a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim and of the intention to commence the action or legal proceedings, has been served upon the Managing Director by the plaintiff or his agent;



- (b) the action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.

23. The Plaintiff's answer was that the Defendants were served with a demand letter and that the above Act does not prescribe the specific format of the notice envisaged in the provision. Further urging an expansive interpretation of the provision that does not limit access to justice. The cause of action herein arose on or around 07.07.2009 when it is alleged that the Defendants broadcast defamatory material in respect of the Plaintiff. The Plaintiff's suit is therefore premised on the tort of defamation.
24. This suit was filed on 24.06.2010. During the hearing PW1 and PW4 testified and tendered in evidence a demand letter dated 16.10.2009 and delivery note marked as PExh.5. The demand letter was addressed to the Defendants and was hand delivered on 05.02.2010 as indicated on the face thereof. The copy of the delivery note, indicates that the demand letter was received by one Daisy. The Defendants did not controvert this evidence. Undisputedly, the 2nd Defendant was in the employment of the 1st Defendant in the material period and was sued in that capacity. The court agrees with the Plaintiff's submission that the provision cited by the Defendant does not prescribe the format of the notice envisaged. Thus, the Defendants objection is without a basis. Nothing therefore turns on the objection.
25. Moving on to the substantive issues for determination, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“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.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“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.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that



the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

26. Further, the same court in *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 noted 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. Regarding the rationale behind the law of defamation the Court of Appeal had this to say in *Musikari Kombo* (supra):-

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

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

28. Actions founded on the tort of defamation 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 ALLER 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 a person’s reputation, 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. To succeed, the Plaintiff was required to establish the above ingredients on a balance of probabilities. The Defendants all but admitted the publication of the broadcast on 07.07.2009 save for asserting that the publication neither named the Plaintiff nor his place of work. Thus, the key matters for determination are whether the publication was defamatory, concerning the Plaintiff, and false. In compliance with Order 2 Rule 7 of the Civil Procedure Rules, the Plaintiff set out in his plaint the words contained in the broadcast complained of. However, his evidence in that regard was through PW2 and no recording, tapes and or transcript in relation to the broadcast of 07.07.2009 was tendered as evidence before the court. The defence submitted that in the absence of such recordings, tapes, or transcripts PW2’s evidence regarding the publication complained of amounted to no more than inadmissible hearsay.
31. With respect, this argument does not lie. PW2 testified that he heard the 1st Defendant’s broadcast in question, and it was to the effect that the Plaintiff had been caught in the vicarage while having intercourse with a female student. True, PW2 was the only witness who testified to have heard the broadcast of 7.07.2009. Sections 62 and 63 of the Evidence Act provide that all facts may be proved by direct oral evidence and where it relates to facts which could be heard, through the witness who says he heard it.
32. There is no requirement under the Evidence Act or the Defamation Act that publications via wireless broadcasting be proved through recording, tapes or transcripts. An argument similar to the one raised in this case by the Defendants’ counsel was dismissed by the Court of Appeal in the case of *Baraza Limited & Another v George Onyango Oloo* (2018) eKLR. In that case, the plaintiff had relied on an oral account given by witnesses at the trial concerning a television broadcast in which defamatory statements were made concerning the plaintiff. The Court observing that the trial court had believed the testimony of the plaintiff stated that “transcript of the broadcast is not the only means of proving publication”.
33. In this case PW2 testified to having heard the broadcast in question and the contents thereof. It is not in dispute that the Plaintiff is a Reverend with the Anglican Church of Kenya and served in the said capacity at ACK Mioro Parish. The statement that the Plaintiff was purportedly caught in a sexual encounter with a schoolgirl at the Vicarage in Mioro Parish was directly heard by PW2, while the Plaintiff’s other witnesses heard of the said broadcast from third parties. This was followed on the next day by the broadcast of 08.07.2009. The Defendants however dispute that the broadcast of 08.07.2009 was a retraction of the former publication asserting that it was a report in respect of residents of ACK Mioro being outraged that certain leaders were spreading false reports concerning their priest.
34. It is useful to set out in some detail the contents of the broadcast aired on 08.07.2009. The Plaintiff produced the transcript (PExh.6.) of the broadcast of 08.07.2009 as translated by the Kenya Translation Services. The broadcast was to the effect that;-

“.....now even a school girl, Christians from ACK Mioro are against a report that their priest had his way with a school girl, our reporter Wambui Mwangi is in the area and has more information regarding this.

...As they openly speak, this Christians say they are agitated by a plan of two leaders of the area.....school going child with the vicar, since all things have an origin, it is known that the vicar has tussle with the councilor and the assistant chief of the over Mioro Hospital land which they recently acquired. The vicar who has stood his ground and declared that the



hospital land will not be subdivided, with that he has attracted hate from people who eye other people's property and gain bravery.

Assistant chairman of the church Samuel Gatito Kiora and Chief Wajogei Gateka Kihara said an altercation was witnessed by young men where a school girl was in the house of that vicar which it is not very clear, the issue (inaudible) will be arrested.....” (sic)

35. PW2's oral account of the publication of 7.07.2009 was not shaken in cross-examination and if anything, the supposed news report of 8.07.2009 aired by the Defendants after being contacted by PW3 and the Plaintiff tends to corroborate the evidence of PW2. While the Defendants disputed PW2's version of the contents of the broadcast aired on 7.07.2009, they did not tender any transcript or recording of the broadcast which must be in their possession. Undisputedly, the Plaintiff was not only a clergyman in the Anglican Church of Kenya at the time of the broadcast but also the vicar ACK Mioro Parish. The inescapable conclusion is that the publications were about him. The court is therefore satisfied that the publications refer to the Plaintiff herein.

36. On whether the words referring to the Plaintiff were false, the broadcast of 07.07.2009 as heard by PW2 was of the effect that the Plaintiff had been purportedly caught in the vicarage having sexual intercourse with a female student. DW1 was at pains to attribute the source of the publication to the assistant chief Mioro who was not called as a witness. Neither was evidence tendered in respect of the report allegedly made to police in connection with the alleged incident involving alleged defilement of a schoolgirl despite the Defendants' claim to have obtained the OB No. of the incident from the Assistant Chief Mioro Area.

37. From her testimony, it appeared that DW1 prior to airing the story did not seek the Plaintiff's comment or conduct her own independent inquiry supposedly because the Assistant Chief Mioro Area was a reliable source. To my mind the broadcast of 08.07.2009 was a desperate but futile attempt by the Defendants to distance themselves from their own broadcast a day earlier. The court is persuaded that the alleged broadcast concerning the Plaintiff is patently false. Gatley on Libel and Slander 6th Edn. states that; -

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

38. Was the Defendants broadcast 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 .

39. 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.”



40. 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.”

41. The Plaintiff pleaded in his plaint and testified that the words in broadcast were defamatory in the natural and ordinary meaning. The contents of the publication are manifestly defamatory and impute that the Plaintiff had committed a criminal act, namely, defilement of a school going female in the vicarage of Mioro Parish. PW2 and PW3 testified that they were disheartened upon hearing the broadcast and contacted the Plaintiff who denied involvement in the matter. The broadcast by the Defendants appeared to state as a matter of fact the Plaintiff’s sexual involvement with a schoolgirl. The statements published, to use the words in Elizabeth Muchira’s (supra), had a defamatory tendency, whether believed by the people to whom they were published.

42. 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. The defence of fair comment is unsustainable because the basic facts upon which such comment could have been based were false. A comment based on falsehood cannot qualify as fair comment. See *Nation Media Group Ltd. v Alfred N. Mutua* (2017) eKLR. As regards, the defence of 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.”

43. No doubt, the matters concerning Mioro Parish and particularly the vicar were of great public interest and the Defendant had a duty to inform the public. However, as stated in *Dorcas Florence Kombo V. Royal Media Services* [2014] eKLR the defence of qualified privilege can be negated by evidence of reckless conduct as appears to be the case with DW1. The allegations complained of were serious and imputed not just immorality but also criminal conduct on the part of the Plaintiff, a well-known cleric in ACK Mioro Parish. DW1 admittedly failed to carry out her own independent verification of facts and entirely relied on information allegedly obtained from the Assistant Chief, only according to the Plaintiff an opportunity for comment after the offending broadcast had already been aired.

44. The Code of Conduct for the Practice of Journalism 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”.

45. In *Uhuru 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.”

46. Reviewing all the material, the court is of the view that the Defendants acted in a reckless and therefore malicious manner by failing to verify the information received by them concerning the Plaintiff before broadcast, and, failing to retract the statements or to tender an apology to the Plaintiff. Instead, the Defendants broadcast a statement on 08.07.2009 that only compounded matters. The Defendant is therefore liable for defamation and the Court finds that the Plaintiff has proved his case on a balance of probabilities.

47. Concerning damages, the court has considered the parties’ submissions. The purpose of awarding general damages in a libel action is to compensate the plaintiff for the damage done to his reputation and the court has wide discretion, depending on the peculiar circumstances of the case before it. See *CAM v Royal Media Services* [2013] eKLR. The Court of Appeal in *Evans Gicheru v Andrew Morton & Another* [2005] eKLR adopted factors to guide assessment of damages for defamation from *Jones v. Pollard* [1997] EMLR 233, as follows:- “(i) The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition. (ii) The subjective effect on the plaintiff’s feelings not only from the prominence itself but from the defendant’s conduct thereafter both up to and including the trial itself. (iii) Matters tending to mitigate damages, such as the publication of an apology. (iv) Matters tending to reduce damages, and (v) Vindication of the plaintiff’s reputation past and future.”

See also *John v MGM LTD* [1997] QB 586.

48. No doubt the libel in this case was grave and touched on the Plaintiff’s personal integrity, honour, and professional reputation. The publication had potentially a wide reach among listeners of the vernacular radio service, Coro FM. In addition, the Defendants, in a clumsy attempt to deflect responsibility effectively repeated the libel a day later, compounding matters. As an ordained priest of the ACK, the Plaintiff was understandably injured by the libel and the Defendant’s subsequent conduct. It appears that the Defendants have to date not retracted the publication or tendered an apology to the Plaintiff.

49. That said, the facts of this case are distinguishable from those in *John Joseph Kamotho & 3 Others v Nation Media Group Limited*, mainly due to the relatively limited reach of the Defendant’s broadcast. In my view, an award of Kes.3000,000/- in general damages is adequate compensation for the Plaintiff’s injury .

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

“Exemplary damages can only be awarded if the Plaintiff proves that the Defendant when he made the publication knew that he was committing a tort or was reckless whether his action is 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.”

51. In *Mansion v Associated Newspapers LTD* [1965] 2 ALL ER 954 at 957 the English court stated that exemplary damages may be awarded:-

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

52. On her own admission, DW1 was reckless in rashly proceeding to publish defamatory statements for the obvious financial advantage of her employer. The gravity of the publication herein called for prudent verification and not merely reliance upon an alleged trusted source. After all, it was alleged that the police had received a report concerning the reported incident involving the schoolgirl, which fact could easily be verified from police by DW1 as a journalist based in the area in question.

53. The Plaintiff is therefore entitled to exemplary damages assessed at Kes. 500,000/-. Judgment is therefore entered for the Plaintiff against the Defendants jointly and severally in the total sum of Kes.3,500,000/- (Three Million Five Hundred Thousand) with costs and interest.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF MAY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Kimani

For the Defendants: Mr. Ojonga

C/A: Carol

