



REPUBLIC OF KENYA



KENYA LAW
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**Kigunda v Royal Media Services Limited (Civil Case 818 of 2007)
[2023] KEHC 18102 (KLR) (Civ) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18102 (KLR)

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

CIVIL

CIVIL CASE 818 OF 2007

JN NJAGI, J

MAY 18, 2023

BETWEEN

JOSEPH KIGUNDA PLAINTIFF

AND

ROYAL MEDIA SERVICES LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff vide an amended plaint dated the 7th June 2016, averred that the Defendant herein in its news bulletin of the 9th December 2006 at 10 pm falsely and maliciously broadcast some defamatory words of the Plaintiff that the plaintiff had married another wife, words which the Plaintiff contends were injurious to his reputation. The Plaintiff consequently instituted this suit in claim of general damages for defamation.
2. The claim was denied by the Defendant vide its Amended defence dated 20th January 2020.

Plaintiff's case

3. The Plaintiff testified that he is a retired civil servant and runs a school at Kiserian called Tania Integrated School. He is married with children.
4. That on the material day he had allowed his neighbour, John Toimasi PW2, to host a wedding party at his school grounds. That he arrived at the venue at around midday. Some people then started to film him without telling him the reason for it. That in the evening of that day he and his wife were watching news broadcast when they saw a clip in the Citizen Television saying that he, the Plaintiff, had been caught red handed marrying a second wife while he had neglected his family. He said that he is not the one who was holding the function on the material day. He said that his reputation was damaged as a



result of the airing of the false news clip. During the hearing of the case in court he produced a video clip of what he contended was the broadcast made by the defendant.

5. It was the evidence of the plaintiff that he is a farmer and a businessman. That he has one wife called Jenifer Kigunda to whom he has been married to for the last 42 years. That he is a respectable person in the country. He was working with the Ministry of Education and is the one who founded the sign language at the Ministry of Education. That he was a trainee for teachers in special education and was the founder principal of the current Technical Institute for the Deaf at Karen in Nairobi. That after he retired he was recruited as a trainee of trainers with the defunct Electoral Commission of Kenya. That the enrollment of his school went down as a result of the publication.
6. The Plaintiff called two witnesses, John Tomaisi PW2 and Stanley Kiogora PW3. It was the evidence of John Tomaisi that the Plaintiff is his friend and a neighbour at Kiserian. That he, Pw2, had held a wedding on the 3rd December 2006. That on the 9th December 2006 he was throwing a party for his friends to celebrate the wedding. He had borrowed the school grounds for the Plaintiff to hold the function. Before the function started he heard that his former wife, Mary Nyariara, had stormed the venue and caused a fracas. That in the evening of that day he saw the Plaintiff on Citizen TV 7 pm news with a bulletin referring to him as the groom with allegations that he had neglected his 1st wife and her children and went ahead to try and marry a second wife secretly.

Stanley Kiogora Imathiu PW3 told the court that the Plaintiff has been his friend for more than 40 years. That he, PW3, was the best man in the wedding between John Toimasi and Lydia Mukami on the 3rd December 2006. That on 9th December 2006, John Toimasi invited him to attend a party to commemorate the wedding. The function was being held at Tania Integrated school that is owned by the Plaintiff. That as the party progressed some unruly people interrupted it claiming that it was a wedding ceremony involving the Plaintiff. They were accompanied by other people who were filming the event. Some chaos ensued for some time before the people left. On the same day at 10 pm PW3 saw a news item on Citizen Television News covering the said function and depicting the Plaintiff as the groom who had neglected his 1st wife and children and went ahead to marry a second wife secretly. The story was repeated on the following day at 1 pm and 10 pm.

7. It was further evidence of PW3 that it was not correct as stated in the story that the Plaintiff was marrying a second wife and that he had abandoned his wife. He said that the plaintiff had been a senior person in government and was known all over. That the story damaged his reputation.
8. The Plaintiff's claim as contained in paragraph 4 of the amended plaint is as follows:

4. On or about 9th day of December, 2006 in its news bulletin of 10p.m. the defendant, through its said television Channel, falsely and maliciously broadcast the following words and images defamatory of the plaintiff:

Commentator: "Preparations were in high gear as relatives and friends arrived for the wedding."

(scene of young man in a suit handling a mobile phone with people behind him followed by a scene of people walking towards and through a gate).

COM Commentator: "The venue, had been set and the mouth watering food a sure sign of the feasting the couple had in store for their guests."

(Scene of a ceremonial tent with empty seats and a few occupied by people followed by pictures of meat cooking in a sufuria).



COM Commentator: “But it was not to be. Someone somewhere had every reason to stop the wedding.

(Scene of a 4 Wheel Drive Saloon decorated with flowers and driving into a compound).

COM Commentator: “Mary Nyariara stomped the venue and it was then that all hell broke loose.”

(Scene of a woman standing arms akimbo looking agitated and pacing up and down surrounded by some people followed by a picture of some people involved in a confrontation with Administration police officers (APS) with the plaintiff in the background) more scenes of people shouting).

COM Commentator: “The bride to be was quick to take off.”

(Scene of the plaintiff throwing stones while some people try to restrain him. More pictures of young people shouting).

(Scene of the said woman sobbing and saying, “Sasa anataka kuo a bibi ya pili ambaye hata sijui vile nitaweza sema mimi kwa sababu huyu mzee amenisumbua sana, si watoto asomeshe sio nini nikuniharibia tu maisha yangu kutoka nikiwa mtoto... .. sasa niko na miaka kumi tangu nitoke kwake. Sasa anakuja kunionyesha hii aibu na watoto wake wamekuwa wakubwa... ..ndio wangeoa kuliko yeye aoe.”

Translation: Now he wants to marry a second wife whoI don’t even know what to say because this old man has put me in a lot of distress; he doesn’t educate the children or do anything. All he does is spoil my life since I was a child... .. it’s now ten years since I left his home. Now he comes to embarrass me and his children have no w grown up ... they are the ones who should have married instead of him).”

COM Commentator: “It took the intervention of the area chiefs to restore sanity albeit amid the confusion.”

(Scene of a man, presumably the area Chief, pacing up and down inside a gate surrounded by some people followed by pictures of plastic chairs stacked together in front of a tent with 4 people including 2 Policemen standing in front of the same).

9. It was the Case for the Plaintiff that the natural and ordinary meaning of the said words and images were understood to mean that:
- (i) The plaintiff is a dishonest man who had abandoned his family thereby exposing them to a lot of suffering;
 - (ii) The plaintiff had abandoned his family and was secretly marrying another woman;
 - (iii) The plaintiff is a very irresponsible person;
 - (iv) The plaintiff is an unreliable person;
 - (v) The plaintiff is a person of lose morals and that
 - (vi) The plaintiff is a person with a violent disposition.

Defendant’s Case –

10. The defendant in its amended statement of defence denied having broadcast or published the story or words as pleaded in the amended plaint. That even if they were, the same were published in good faith,



in public interest and without malice and not intended to injure the character of the plaintiff. That the publication is privileged and a fair comment on a matter of public interest. The Defendant also claimed that it was its constitutional duty to let the public know and have information that shocks and disturbs their conscience about major events and occurrences in the country. Further that the defendant was not served with summons to enter appearance.

11. The defendant called one witness in the case, Mr. Njenga Njihia, DW1, the legal officer of the Respondent. The witness in his written statement stated that the defendant did not broadcast the alleged defamatory words on the 9th December 2007. That even if it was true that the defendant did broadcast the words, then the story is factual as even from the Plaintiff's own words, the TV camera captured exactly what transpired on the material day.
12. In his evidence in court, DW1 stated that the clip that was played in court is not the one that was played on Citizen TV.

Submissions –

13. The parties in the case filed written submissions. The Plaintiff was represented by the firm of Mwangi, Mwangi & Associates while the Defendant was represented by the firm of Kamau Kuria & Co. Advocates.

Plaintiff's submissions –

14. The advocates for the Plaintiff submitted that it is not disputed that the Defendant on the 9/12/2006 in its 7 pm and 10 pm news bulletin falsely and maliciously broadcast the images and words contained in a video tape played in this court during the hearing. That the Plaintiff and his witnesses adduced evidence that the broadcast portrayed the Plaintiff as having participated in a wedding ceremony with a certain lady when he was already married to another woman and that he had abandoned his family. That the evidence of the Plaintiff that he is not the one who was hosting the ceremony on that day was confirmed by his two witnesses, PW2 and PW3. The Defendant did not offer any explanation as to why they did not take steps to verify the story before airing it. That by falsely depicting the Plaintiff as having married another wife, the Defendant exposed the Plaintiff to ridicule by viewers who were not aware of the truth.
15. The Plaintiff referred to the definition of the term 'defamation' as stated in *Winfield & Jolowicz on Tort*, 7th Edition at Page 515 as

“Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of the society generally or tends to make them shun or avoid him”
16. The Plaintiff quoted what the writers in the said book state to be the 3 things that must be proved in a defamation suit, thus:
 - (1) The statement must be defamatory.
 - (2) It must refer to the plaintiff.
 - (3) It must be published, i.e, communicated to at least one person other than the claimant.
17. The Plaintiff submitted that the three ingredients were present in the instant case. That the broadcast was watched by millions of people across the country some of whom who knew the Plaintiff called him on telephone after watching the news to inquire whether he had actually married another woman.



18. The Plaintiff submitted that the publication was within the definition of libel. He referred to the book cited above where it is stated that the test for libel is whether the publication is in a permanent form. The Plaintiff cited the case of *Yousoupoff v Metro Goldwyn Mayer Pictures Limited* (1933-1934) Times Law Reports, Vol. 1 at page 587, where it was stated that:

“in my view this action as I have said, was properly framed for libel. There can be no doubt that, so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye, and is the proper subject of an action for libel, if defamatory. In regard the speech which is synchronized with the photographic reproduction and forms part of one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen.”

19. It was submitted that coverage on screen by cinema, television or video presentation in photographic reproduction and words explaining the same as in this case constitute libel.
20. The Plaintiff submitted that the position of the law is that it matters not the intention of the defendant as long as the words published are understood to be defamatory. Reliance on that proposition was made on the statement by the authors of the book earlier mentioned at page 536 that the ultimate question is not what the defendant intended but what the words can reasonably be understood as conveying. So, it did not matter that the intention of the Defendant as stated in their defence was to “let the public know and have information that shocks and disturbs their conscience about major events and occurrences in the country” as long as the words published are understood to be defamatory.
21. It was submitted that the news bulletin had the meaning that the plaintiff is a dishonest man who had abandoned his family thereby exposing them to a lot of suffering; that the plaintiff had abandoned his wife and was secretly marrying another woman; that the plaintiff was a very irresponsible person; that the plaintiff is an unreliable person; that the plaintiff is a person of loose morals and that the plaintiff is a person with a violent disposition.
22. The Plaintiff submitted that the coverage was actuated by malice and cited the case of *Phinehas Nyagah v Hon. Gitobu Imanyara* HCCC No. 697 of 2009 where the court stated that:

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

23. In the instant case it was submitted that the defendant’s cameraman failed to inquire and establish the accuracy of whether the plaintiff is the one who was wedding when covering the function and failed to pay heed to the plaintiff’s protests as he tried to inquire why they were filming him. Further that the defendant aired the incident without making inquiries to establish the accuracy or at all as it was supposed to do as a news disseminator whether indeed the plaintiff was involved in a wedding ceremony to formalize his marriage to the woman in question and that he had abandoned his family. Further that the defendant was reckless as to whether it was true that the plaintiff was indeed getting married



to another woman and that he had abandoned his family. In addition that the language used in the coverage was beyond the facts constituting the truth about the plaintiff's total lack of involvement as a groom in the said function, which was not a wedding ceremony as depicted by the defendant in the first place. That all this meant that in televising the fake news the defendant was actuated by malice. That in depicting the Plaintiff as having married another wife, the Defendant exposed the Plaintiff to the conclusion by viewers who were unaware of the truth to the conclusion set out in paragraph 5 of the amended plaint. Therefore, that the plaintiff has proved liability on a balance of probabilities.

24. On quantum the Plaintiff submitted that the news bulletin was aired twice, at 7 pm and 10 pm in Swahili and English bulletins respectively. That defamation comprises a single publication of equally single statement. That it follows that each of the publications constitutes a separate cause of action for which damages are recoverable separately.
25. The plaintiff relied the case of *Machira v Mwangi & another* HCCC No. 1709 of 19196 NAG where the court after finding that the quantum of damages in defamation cases is governed by the extent of circulation of the defamatory material and that in that case the same was circulated widely due to the newspapers' wide readership, awarded the plaintiff general damages of Ksh.8 million and aggravated damages of Ksh.2 million.
26. The Plaintiff also relied on the case of *Daniel Musinga t/a Musinga & Co. Advocates v Nation Newspapers Ltd*, HCCC No. 102 of 2000, where it was held that in assessing general damages for libel, the court has to consider, inter alia, the weight of the injury the plaintiff has suffered. That the principles governing the award of damages in libel cases are compensation to the plaintiff for injury to his reputation and the injury to his feelings. The court in that matter cited with approval the case of *John v MGN Ltd* (1996) 2 All ER 35 where it was held that:

“ the successful plaintiff in a defamation action is entitled to recover, as general compensatory damages such sum as will compensate him for the wrong he has suffered. That sum must compensate him for damage to his reputation, vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused”.

Based on that principle the court in the Daniel Musinga case proceeded to award the plaintiff general damages in the sum of Ksh.10 million.
27. The Plaintiff further cited the case of *Samuel Ndung'u v Nation Media Group & another*, HCCC No.420 of 2017 where a sum of Ksh.15 million was awarded together with aggravated damages of Ksh.350,000/= for the defendant's failure or refusal to offer an apology and instead proceeding to publish more words without any reference to some material which exonerated the plaintiff.
28. The Plaintiff referred to the awards made to him by the courts in his cases over the same news item albeit with different wording against Kenya Broadcasting Corporation Ltd and The Standard Group Ltd where sums of Ksh.3 million and 6 million were made respectively. That in the instant case the media coverage was wider than in the other two cases. That the Plaintiff is entitled to both general damages and aggravated damages to vindicate his good name and also due to the defendant's obstinacy.
29. It was submitted that the Plaintiff adduced evidence that he is a man of repute who had worked in various senior positions and portfolios in the Government of Kenya for a period of 30 years and also worked in the private sector as a farmer and running a school. That the libelous news item must have been viewed by millions of people countrywide, many of whom knew the plaintiff. That the damage to his reputation and feelings was therefore immense. The plaintiff urged the court to award him Ksh.20,000,000/= in general damages for the 7 pm publication, Ksh.20,000,000/= in general damages for the 10 pm publication and Ksh.500,000/= in aggravated damages.



Defendant's Submissions –

30. The advocates for the Defendant on the other hand submitted that the Plaintiff did not call the evidence of any persons who called him after the alleged publication. That he did not have evidence to show that students withdrew from his school after the alleged fabrication and neither did he have any evidence of business damage after the alleged publication. That he did not have evidence of service of demand letter. That the particulars of the computer used to produce the said video clip were not stated in the certificate of electronic evidence which was filed with the court.
31. It was submitted that the evidence of the witnesses for the Plaintiff, PW2 and PW3 were not credible as there were discrepancies in their evidence. That one of them said that the incident happened at the school whilst the other claimed that that the incident happened at the home of the Plaintiff. That the Plaintiff and Imathiu claimed to be a friend to John Tomaisi for many years yet they did not know his first wife.
32. The Defendant submitted that the amended plaint is fatally defective for lack of a verifying affidavit as required by Order 4 Rule 1 (2) of the Civil Procedure Rules. That the rule is couched in mandatory terms and lack of the same renders ta plaint and/or suit incurably defective and liable for striking out. The Defendant made reliance on the case of Kulima v Royal Media Services Ltd & another (Civil Case No. EOO1 of 2021) (2022) KEHC 596 (KLR) where the suit was verified by a false affidavit and Musyoka J. held that the suit was incompetent and consequently dismissed it. It was submitted that the issue is not a technicality as it goes to the root of the matter. That the suit should therefore be struck out with costs to the Defendant.
33. The Defendant submitted that the Plaintiff said in his evidence in court that he obtained the video clip produced in court from an unnamed employee of the Defendant. That the same was therefore illegally obtained evidence which by law is inadmissible. That the Plaintiff stated that he did not know where the clip was downloaded from. That the particulars of the device which was used to do the same have not been set out. That the certificate that was produced by PW1 does not comply with the provisions of section 106 B (2) of the Evidence Act on the production of electronic evidence. Therefore, that the clip is inadmissible and there is nothing before the court upon which it can be held that the alleged publication was made and whether it was defamatory or not. That for that reason the suit is for dismissal.
34. The Defendant submitted that in cases of defamation, it is crucial to call the evidence of independent witnesses. Reliance was made on the case of Mercy T/A Mater Misericordiae Hospital v Jacinta W. Maina & another (2014). In this respect, it was submitted that the evidence of PW2 and PW3 did not meet this criteria as they were not credible witnesses.
35. The Defendant relied on the essentials of the tort of defamation as set out in the case of Wycliffe A Swanya v Toyota East Africa Ltd & another (2009) eKLR where it was held that the plaintiff must prove:

For the purpose of deciding a case of defamation, the court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-

- (i) That the matter of which the plaintiff complains is defamatory in character.



- (ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
 - (iii) That it was published maliciously.
 - (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damages.
36. On their defence of fair comment, the Defendant submitted that the court is called upon to do a balancing act between the right to reputation and the right of the media to impart information under Article 33 of the Constitution. The defendant relied on the Court of Appeal decision in Nation Media Group & another v Alfred N. Mutua (2017) eKLR where it was stated as follows:
28. To sustain the defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is on a matter of public interest. [See *Gatley on Libel and Slander*, 8th edition, 1981 (*Sweet & Maxwell*) at paragraph 692 at page 291].
37. The Defendant also cited the case of Jeff Otieno & 2 others v Martin Ng'ang'a (2019) eKLR where the Court of Appeal held that:
- “whenever a matter is such as affect people at large, so that they may be legitimately interested in or concerned at, what is going or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment... where the fact relied on to justify the comment are contained only in the particulars. It is not incumbent on the defendant to prove the truth of every fact so stated in order to establish his plea of faire comment..”
- We cannot emphasis more the general obligation on the media to communicate important information on matters of general public interest and the public has a right to receive such information. See Ndung'u Njoroge & Kwach Advocates & another v standard Limited & 8 others (2018)eKLR
38. On damages, the Defendant submitted that had the Plaintiff proved his case, he would have been entitled to general damages of Ksh.500,000/= for libel. Reliance was made on the case of Clement Muturi Kigano v Joseph Nyagab [2010] eKLR where the court found that it would have awarded a sum of Ksh.1.1 million had the plaintiff proved the libel.
39. Further reliance was made on Muthui Mwai & another v Gilbert Gibendi (2002)eKLR where the High Court awarded some journalists a sum of Ksh.400,000/= each in general damages for libel.
40. The Defendant also relied on the case of Nation Newspapers Limited v Peter Barasa Rabando (2016) eKLR where the Court of Appeal stated that in awarding general damages for defamation the court has to have regard to the status, standing and character of the persons defamed. Said the Court:
- We reiterate that all persons are equal before the law but it would be a Utopian fallacy to assume that a defamatory publication calls for an equal compensation regardless of the status, standing and character of the persons defamed. We dare say that for a person who is not known beyond the local limits of his immediate family, residential and work environment calls for less damages than a person of prominence whose station, position, profession, fame and notoriety may spread beyond county and country. We therefore



reiterate as correct what this Court has stated before that the status of a particular person affects the extent of the injury suffered.

41. On the two authorities that were cited by the Plaintiff on quantum of damages, i.e, the Daniel Musinga and Samuel Ndung'u cases, the Defendant submitted that the facts in the two cases were different and that the gravity and publication of the matters in the two cases were wide. That unlike in this case, no evidence was adduced by the Plaintiff on how the publication affected his reputation in the eyes of third parties.

Analysis and Determination –

42. This being a civil matter the standard of proof is on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was stated by Kimaru J. (as he then was) in *William Kabogo Gitau v. George Thuo & 2 Others* [2010] 1 KLR 526 to be as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

43. In *Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the Court of Appeal held that:

“Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

44. I have duly considered the pleadings in the case, the evidence presented before the court and the submissions by the respective advocates for the parties. The issues for determination are:

- (1) Whether the suit is fatally defective for lack of verifying affidavit.
- (2) Whether the evidence on the clip produced in court is credible.
- (3) Whether the defendant made the broadcast complained of.
- (4) If so, whether the words contained in the broadcast were defamatory to the Plaintiff.
- (4) Whether the Plaintiff is entitled to an award of general damages and if so, how much.

Whether the suit is fatally defective for want of verifying affidavit –

45. Order 4 Rule 2 of the *Civil Procedure Rules*, 2010 provides that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) of that Order. Rule 6 further provides that the court may of its own motion or on the application by the



plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.

46. It is now settled law that striking out a suit is a draconian measure that ought to be exercised with great caution. In *DT Dobie & Company (Kenya) Limited –v- Joseph Mbaria Muchina & another* [1980] KLR it was held that:

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

47. That should be the case even where the plaint is accompanied by a defective affidavit. In *Benel Development Limited v First Community Bank Limited* [2021] eKLR where Justice Odero was considering the fate of an affidavit that was not commissioned had the following to say:

In my view the failure to commission the Verifying Affidavit though indeed rendering the Plaint defective does not render it fatally so. Order 4 Rule 2(6) uses the word “may” giving the Court the discretion on whether or not to strike out a Plaint which is non-compliant. In deciding upon a similar issue in *Agricultural Finance Corporation & another v Drive-in Estate Development Ltd* [2006] eKLR Hon. Justice Azangalala (as he then was) held as follows:-

“So the only issue for determination is whether or not failure to file the compliant verifying affidavit within the period allowed by the Court is fatal and should result in the striking out of the Plaint. The requirement for a Verifying Affidavit is contained in Order VII rule 1(2) of the *Civil procedure Rules*. Sub-rule (3) of the same rule reads:-

“The Court may of its own motion or on the application of the Defendant order to be struck out any Plaint which does not comply with subrule (2) of this rule.”

In my view the use of the work “may” shows that the Court has a discretion as to whether or not to strike out a Plaint which is not accompanied by an affidavit verifying the correctness of the averments contained in the Plaint.”

48. I am in agreement with the above statement. I am not persuaded by the submission that the suit herein should be dismissed for lack of a verifying affidavit. The court is obligated to sustain the suit as dictated by Article 159 of the *Constitution* of Kenya, 2010 that courts of law should administer justice without undue regard to procedural technicalities. Lack of a verifying affidavit does not go to the merit of the case and therefore the argument is not tenable.

Whether the evidence on the clip produced in court is reliable –

49. The Plaintiff in his evidence stated that he secured the subject video clip from the Citizen TV studios in a disc form through the assistance of a person who is unknown to him. That through the assistance of his son he transferred the video clip to his laptop. He later on copied the video clip to a CD disk. He prepared a certificate of electronic evidence pursuant to section 106 B of the *Evidence Act* stating that the video was authentic and the devices used to record it were in good condition and were not in



any way tampered with. He produced the CD and the certificate in court as exhibits, Exhibits 1 and 3 respectively. He said in cross-examination that it is his son who uses the laptop and believes that he still has it.

50. Section 106 B of the [Evidence Act](#) provides for the admissibility of electronic records. Section 106 B (1) provides that:

“Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”

51. The conditions to be satisfied are provided in sub-section (2) as follows:

- a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
- b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- c) throughout the material part of the said period the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
- d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

52. Section 106B (4) requires the production of a certificate of authenticity of electronic evidence and provides that:

“In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
- (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of



this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

53. This has to be read in conjunction with Section 78A of the [Evidence Act](#) which provides that:

78A. Admissibility of electronic and digital evidence

- 1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
- 2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
- 3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
 - a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - c) the manner in which the originator of the electronic and digital evidence was identified; and
 - d) any other relevant factor.....

54. The courts have made various pronouncements relating to the law and admissibility of electronic evidence. In [Bhavna Patel Mandaliya v Chetan Aroon Solanki](#) [2021] eKLR Meoli J. cited the Court of Appeal decision in [County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others](#) [2015] eKLR where the court discussed the application of Section 106 (B) of the [Evidence Act](#) and observed that:

“Section 106B of the [Evidence Act](#) states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”

In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced”.

55. Similarly, in [John Lokitare Lodinyo –v- I.E.B.C and 2 Others](#) [2018] eKLR the same court stated that:

“Essentially, the sections provide that electronic evidence which is printed out shall be treated like documentary evidence and will be admissible without production of the computer used to generate the information. The appellant claimed that his technical team downloaded the forms and had them printed. He admitted that the forms were from the IEBC public portal. Ordinarily, this would have meant accessing the IEBC portal, which one could only do if they had access to the internet, proceeding to log onto the IEBC portal page, clicking on the Forms 35A uploaded on Kacheliba Constituency, downloading the Forms 35A onto the computer’s hard disk and finally printing the documents via a printer connected to the computer... It is at this juncture that the provisions of Section 106B of the [Evidence Act](#) come



into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do.”

56. In *Millitonic Mwendwa Kimanzi Kitute v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR Nyamweya J. (as she then was) observed that:

.....it is evident that the provisions of section 106 B of the Evidence Act are intended to ensure the reliability and authenticity of an electronically-produced document, and the procedure set out therein is aimed at preventing printed copies of the electronic records adduced as evidence in court being manipulated altered or tampered with. Furthermore, since the Evidence Act in section 78A provides that all forms of computer outputs are admissible as evidence, the requirement for authentication in section 106(B) of the *Evidence Act* is thus mandatory to ensure that the credibility and evidentiary value of electronic evidence.

57. It is clear from the above that before the court relies on the evidence of an electronic document, it has to be satisfied that the same is authentic and the process through which it was generated was credible and reliable. A history of how the document was made ought to be given so as to ascertain that the computer which made the document was operating normally and the content of the document is accurate. This is because the process can easily be manipulated and the original document altered. In *William Odhiambo Oduol v Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR, it was explained that the reason why such an elaborate process has to be followed is so that if it becomes necessary, one can trace the devices for audit purposes.

58. The Defendant in the instant case pleaded in their amended defence that;

“..the defendant denies having broadcast or published the story/words/broadcast set out in paragraph 4 of the said amended plaint and puts the plaintiff to strict proof thereof.”

59. The Plaintiff in his evidence in court indicated that he obtained a recording of the news item from Citizen TV studios. He did not disclose the person who produced the video clip from Citizen TV studios. He at the same time stated in cross-examination that he did not know where the person downloaded the clip from. That being the case, it is clear that it is the undisclosed person who knows where the video clip originated from. He is therefore the one who should have prepared a certificate of authenticity of the video clip pursuant to Section 106B of the *Evidence Act*. In the absence of such a certificate from the said person, there is no compliance with the mandatory provisions of section 106B of the *Evidence Act*.

60. In the circumstances, it is clear that the CD disk that was produced in court was made from another CD disk whose source is not known and which was not produced in court. The certificate of electronic evidence produced by the plaintiff in respect to the second CD disk is therefore of no probative value when the original CD disk is not before court. Besides, it was clear that the plaintiff is not the one who made the second CD disk that he produced in court. The same was prepared by his son who did not testify in the case. The plaintiff stated that it is his son who was keeping the laptop that made the video disk and that he is the one who transferred the information from the first CD disk to the second CD disk. He was therefore the one better placed to prepare the certificate. That notwithstanding, the particulars of the computer that was used to make the video clip was not stated in the certificate as required by the provisions of Section 106B (4) of the *Evidence Act*. The said certificate is therefore not



credible. The court cannot rely on it to hold that the contents of the video disk are authentic. The Plaintiff has therefore not proved that the defendant published the words as contained in the video clip that was produced in court.

Whether the defendant made the Broadcast Complained of -

61. The above notwithstanding, the question is whether the Defendant made a broadcast concerning the plaintiff as testified by the plaintiff and his two witnesses, John Toimasi PW2 and Stanley Kiogora PW3. It was the evidence of the Plaintiff that on the 9th December 2006 some people stormed a function organized by PW2 at the Plaintiff's school grounds and started to film him, the Plaintiff. That later in the evening he saw a broadcast over Citizen Television with a story that he was caught red handed while holding a wedding to marry another woman after neglecting his wife and her children. John Toimasi PW2 and Stanley Kiogora PW3 testified that they heard and saw the said broadcast over the Defendant's TV station.
62. From the evidence adduced before the court, I am convinced that the Defendant made a broadcast as testified by the Plaintiff and his two witnesses. In the initial statement of defence dated 3rd April 2008, the Defendant admitted to have made the broadcast that was pleaded in paragraph 4 of the plaint and only denied the meaning that was being attributed to the story. However, in their amended defence dated 16th January 2020 they denied broadcasting or publishing the story as set out in paragraph 4 of the amended plaint.
63. I have looked at the pleadings about the story in both the initial plaint and in the amended plaint. The gist of the story was the same that the Plaintiff was caught holding a wedding to marry another woman after neglecting his wife and children. Why then would the Defendant have admitted publishing the story in the initial statement of defence and deny publishing the story in the amended defence? It can only mean that the defendant published the story but that the exact words used in the amended plaint are not the ones used in the broadcast. If there was a variance in the exact words used in the broadcast, the duty to prove so was on the defendant. They did not discharge that duty. It is the defendant who was in possession of the original video clip and is the one who was bound to produce it. The fact that they failed to produce it leads to the inference that had the evidence on the same been produced it would have been adverse to their case – see *Bukenya v Uganda* [1972] EA 549.
64. In my view there was no requirement that the plaintiff could only prove the case by production of the video clip of the broadcast. He could still do so by way of oral evidence of those who heard and saw the broadcast. That was proved by the plaintiff and his two witnesses. It is therefore my finding that the Defendant made a broadcast concerning the plaintiff that he had organized a wedding ceremony to marry another wife and that he had neglected his wife and children.

Whether the words complained of were defamatory to the Plaintiff -

65. The meaning and essentials of the tort of defamation have clearly been brought out in the submissions of the advocates for the parties. They cited authorities to bring their point home. To these I may add the case of *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, where the Court of Appeal stated the following regarding defamation:

“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being



construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See *Gatley on Libel and Slander* (8th edition para. 31).

The ingredients of defamation were summarized in the case of *John Ward v Standard Ltd*, HCCC 1062 of 2005 as follows:-

".....The ingredients of defamation are:

The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false."

66. The same court in *SMW v ZWM* [2015] eKLR held that:

"A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."

67. Defamatory words thus have the effect of disparaging the character of a person in the eyes of right-thinking members of the society. The defendant in this case broadcasted a false story that the Plaintiff had organized a wedding ceremony to marry another woman and that he had neglected his wife and children. In my considered view, the words had the tendency not only of bringing the plaintiff into ridicule and contempt but also lowering his estimation in the eyes of reasonable members of the society. The words clearly meant that the plaintiff was a dishonest, irresponsible and unreliable person of loose morals. Nothing could be more defamatory to the character of a person than that. The words complained of were therefore Defamatory to the Plaintiff.

68. In a suit concerning defamation, the plaintiff has to prove that the defamatory words were published by the defendant. In the case of *Wycliffe A Swanya v Toyota East Africa ltd & another* (2009) eKLR publication was defined to mean -

"....publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed."

69. In this case the defamatory words were published by way of a broadcast over the defendant's television channel to a wide audience of listeners and viewers. The plaintiff's witnesses PW2 and PW3 are some of the viewers who saw and heard the broadcast. The issue of publication of a defamatory statement was therefore proved.

70. The defendant in their defence in the alternative stated that the publication was done in good faith and without malice. Malice in a case of defamation may be inferred from recklessness and failure to inquire into the facts – see the case of *Phinehas Nyagah v Hon. Gitobu Imanyara* (*supra*). In this case the defendant published the story without making enquiries and establishing whether the plaintiff was indeed holding a wedding ceremony to get married to another woman. They did not inquire as to whether it was true that the plaintiff had abandoned his wife and children. It needs no gain saying that a responsible news disseminator would have confirmed the accuracy of such a story before publishing it. The defendant was therefore reckless in its reporting of the story which is evidence of malice. In the



premises, failure by the defendant to confirm the accuracy of the story leads to an inference that the story was published out of malice. Malice on the part of the defendant was therefore proved.

71. The defendant raised a defence of fair comment on a matter of public interest. For the statement to qualify as such it was incumbent upon the defendant to demonstrate that the Words Complained of were :

- (i) just a comment and not statement of fact;
- (ii) that there was a basis of fact for the comment contained in the article complained of, and
- (iii) that the comment was on a matter of public interest –

see *Nation Media Group & another v Alfred N. Mutua* (*supra*).

72. The *Black's Law Dictionary* at page 713, defines 'fair comment' as follows: -

A statement based on the writer's or speaker's honest opinion about a matter of public concern.

Fair comment is a common law defence on the tort of libel or slander. For a statement to be considered a fair comment, it must be based on facts truly stated, it must be free from the imputation of corrupt or dishonourable motives on the part of the person whose conduct is criticized, and it must be the honest statement of the writer's or speaker's real opinion.

73. In *Ibrahim Mukhtar Abasbeikh v Royal Media Services & another* [2020] eKLR Nyakundi J. had the following to say on the defence of fair comment:

In addition to the principles reflected elsewhere in this Judgment, the five ingredients in *Tsewai Chun Paul* {2001} E.M.L. R 31, 777 provides the correctness of the threshold to be met.

- (1). Thus the comment must be recognizable as comment, as distinct from an imputation of fact.
- (2). The comment must be based on facts which were true or protected.
- (3). The comment must explicitly or implicitly indicate, at least in general terms, what were the facts on which the comment was made.
- (4). The reader or hearer should be in a position to judge for himself how far the comment was well founded.
- (5). The comment must be one which could have been made by an honest person, however prejudicial he ought to be, and however exaggerated or obstinate his views. Furthermore, it must be germane to the subject matter criticized.....” (See also Hon Uhuru Kenyatta (*supra*))

74. In this case the defendant reported that the plaintiff was caught holding a wedding to marry another woman as a matter of fact. There was no suggestion in the broadcast that this was made as a comment but only as a matter of fact. The story was false. In the circumstances, the defence of fair comment has no basis.

75. The defendant further raised a defence that the public is entitled to know and to have information that shocks and disturbs their conscience about major events and occurrences in our country. Whereas that could be the case, it has to be done within the bounds of the law. The public cannot be said to have a



right to information to matters that are based on falsehood. In the present case the story was based on falsehood. This defence therefore does not stand.

76. In the final end I hold that the defendant published defamatory words about the plaintiff. The Plaintiff is thus entitled to compensation by way of damages.

Damages –

77. The plaintiff in the amended complaint only sought for general damages.

78. The general principles in award of damages for defamation were stated by the Court of Appeal in [*James v Ndirangu & 3 others*](#) (Civil Appeal 282 of 2016) [2022] KECA 82 (KLR) to be as follows:

On an appropriate award for damages, the guiding principle is that the rationale behind an award of damages in defamation actions is to restore or give back to the injured party what he lost, save in exceptional circumstances where punitive or exemplary damages may be awarded. In its assessment, the trial court's duty was to look at the whole conduct of the respondents from the time the libel was said to be published to the time the matter was heard in court.....

We are alive to the principle that an award of damages should be fairly compensatory in light of the nature of the injury to reputation and that an award must appear realistic in the circumstances. In the English Court of Appeal decision in the case of *John v MG Ltd* [1996] 1 ALL ER 35 the Court held that;

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and take account of the distress, hurt and humiliation which the defamatory publication caused.”

79. In [*Johnson Evan Gicheru v Andrew Morton & Another*](#) Civil. Appeal No. Nai 314 of 2000, the Court of Appeal listed factors courts should consider in assessing compensation in defamation cases to include 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, the subjective effect on the plaintiff's feeling 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, such as the publication of an apology, matters tending to reduce damages and vindication of the plaintiff's reputation past and future.
80. The court is also required to consider the status and standing of the person defamed - see [*Nation Newspapers Limited v Peter Barasa Rabando*](#) (supra).
81. The plaintiff urged the court to award him general damages to the sum of Ksh.40,000,000/=. The defendant on the other hand submitted that an award of Kshs.500,000/= would be sufficient. I find the authorities relied on by the plaintiff in support of quantum not to be appropriate for being on the higher side while those cited by the defendant were similarly not appropriate for the awards being on the lower side.
82. I have considered the awards in general damages for defamation in the following cases. In [*Miguna Miguna v The Standard Newspapers Ltd and Another*](#), the Court of Appeal upheld an award of Ksh. 5,000,000/=. In [*Mwangi Kiunjuri v Wangethi Mwangi & 2 others*](#) [2016] eKLR, the Court affirmed an award of Ksh. 4,000,000/=. In [*Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates*](#) [2013] eKLR, where the respondent was an advocate, the Court of



Appeal reduced an award of Ksh.7,000,000/= to Ksh.4,000,000/=. In *Andrew Mukite Musangi & another v Standard Group Ltd* [2012] eKLR where the plaintiff who was an advocate was awarded Ksh.3,000,000/=. In *Wanja Gichura Wambugu t/a Wambugu & Company Advocates v Nation Media Group* [2017] eKLR the court awarded Ksh.3,000,000/=. In *Royal Media Services Limited t/a Citizen TV & another v Alfred Amayio Maiko* [2021] eKLR Ksh.2,500,000/= was awarded.

83. I have considered that the plaintiff herein is a retired civil servant and a businessman. His reputation was injured by the reckless broadcast made by the defendant. I am of the view that a sum of Ksh.3,000,000/= is sufficient compensation in general damages.
84. In the final end, judgment is entered for the plaintiff in the sum of Ksh.3,000,000/= in general damages with costs of the suit and interest at court rates.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY 2023

J.N. NJAGI

JUDGE

In the presence

Mr. Mwangi for Plaintiff

Mr. Munyori for Defendant

Court Assistant – Amina

30 days R/A.

