Krijger v Owiti (Civil Case 419 of 2010)
[2023] KEHC 19230 (KLR) (Civ) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 419 OF 2010

CW MEOLI, J

JUNE 15, 2023

BETWEEN

PETER CORNELIUS JACOB KRIJGER ..... PLAINTIFF

AND

DR FREDRICK OWITI ..... DEFENDANT

JUDGMENT

1. The present suit was filed on 09.09.2010 by Peter Cornelius Jacob Krijger (hereafter the Plaintiff) against Dr. Fredrick Owiti (hereafter the Defendant) and is founded on the torts of defamation and breach of doctor-patient confidentiality. The Plaintiff seeks general damages, costs of the suit and interest thereon.

2. The Plaintiff averred that at all material times, the Defendant was the doctor to the Plaintiff's former wife, SOO (hereafter the former wife) and that the Plaintiff had on one occasion consulted the Defendant. That vide the letter dated 14.04.2010 and addressed to Philip Ocharo Esq, the Defendant authored or caused to be published the following words defamatory of the Plaintiff:

> " He too developed an Acute psychotic Episode with a mixture of personality disorder that necessitated his admission to avenue Hospital in April, 2006. He damaged a lot of property and has threatened to kill his wife (SOO)... Since then, his progress has not been known to me because he delinked after separation with (SOO)...".

3. The Plaintiff averred that in their natural and ordinary meaning the said words meant and were understood to mean that the Plaintiff was inter alia, a person with acute mental problems and a criminal disposition, and that he did not take medical treatment seriously. The Plaintiff further averred that the

said defamatory words caused him to suffer ridicule, shame and humiliation and affected his position in a child custody case involving him, the former wife, and their child.

4. From the record, it remains unclear whether the Defendant put in a statement of defence to challenge the averments made in the plaint. At the time of writing this decision, no statement of defence could be traced on the court record.

5. During the trial, the Plaintiff who was the sole witness testified as PW1. He began by adopting his executed witness statement as his evidence -in-chief and produced his bundle of documents as P. Exhibits 1-8. The Plaintiff stated that he worked as a self-employed contractor and further reiterated that the Defendant published the defamatory letter without his consent and in total violation of doctor-patient confidentiality principles. He testified that because of the defamatory letter, he has been unable to fully trust professionals with his personal information for fear of such information being disclosed to third parties.

6. It was his further testimony that at the time the impugned publication was made, he was embroiled in a child custody dispute before the Children's Court with the former wife and that the Defendant's letter was authored with the aim of discrediting his character in the case and to ensure he was denied custody of the child. The Plaintiff stated that the impugned letter was annexed to a replying affidavit which was sworn by the former wife in the Children's case. He averred that the contents of the letter were false since he had never been admitted to Avenue Hospital under the care of the Defendant on the dates indicated in the said letter.

7. The Plaintiff testified that although eventually granted custody of the child by the Children's Court, he faulted the Defendant for breach of his trust and confidence, as the Defendant had at all material times been treating the former wife (now deceased) for the condition known as schizophrenia. He further testified that upon confronting the Defendant, the latter claimed that he had been ordered to author the impugned letter by the court.

8. During cross-examination, the Plaintiff admitted that the Defendant was his doctor for a period of 2-3 weeks and that at one point, he too was admitted at Avenue Hospital under his care. He stated that the letter was initially published to Philip Ocharo, Esq. and then to the court, in a manner contrary to the Code of Ethics for doctors but agreed that one of the exceptions to confidentiality is the public interest.

9. In re-examination, the Plaintiff restated that he would consult the Defendant on occasion but that the impugned letter was used against him in the Children's case.

10. The Defendant's counsel chose to close the defence case without summoning any witnesses.

11. At the close of the trial, parties filed written submissions. Submitting on the consequence of not adducing evidence to controvert the case, the Plaintiff's counsel relied on Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR and Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR to argue that upon the failure by the Defendant to call any evidence or tender any documents to counter the suit, the Plaintiff's case remains uncontroverted.

12. Concerning the merits of the case, the Plaintiff's counsel argued that the claim for defamation is established because the impugned letter which contained inaccuracies, was addressed to a third party namely advocate Philip Ocharo, Esq. According to the counsel, while it is true that the Plaintiff was at all material times a patient of the Defendant, he never suffered from acute schizophrenia as alleged in the impugned letter and that no evidence was tendered to support the allegation.

13. The Plaintiff's counsel further argued that this being a libel claim, the Plaintiff need not prove actual damage to justify the award of damages, citing Phinehas Nyagah v Gitobu Imanyara [2013] eKLR. It

was equally submitted that by publishing the impugned letter without the consent of the Plaintiff, the Defendant acted in breach of the Code of Conduct for doctors and medical professionals, and further breached the Plaintiff's right to privacy and confidentiality. He cited decisions in David Lawrence Kigera Gichuki v Aga Khan University Hospital [2014] eKLR and Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others [2016] eKLR.

14. On quantum, counsel urged the court to consider the authority of GSN v Nairobi Hospital & 2 others [2020] eKLR where general damages were awarded in the sum of Kshs. 2,000,000/- to a petitioner on account of disclosure of HIV status without consent the knowledge of the claimant therein. The court was urged to allow the suit as prayed.

15. On the part of the Defendant, counsel contended that the present suit is in violation of Order 4, Rule 1(2) of the Civil Procedure Rules, 2010 (CPR) which provides that a plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the averments made therein. It was also argued that the verifying affidavit purportedly sworn by the Plaintiff is incompetent by virtue of not being attested by a Commissioner for Oaths and on that basis, the plaint and suit ought to be struck out. To buttress his arguments, counsel cited Miriam Wanja Muchiri v Emmah Wangechi Macharia & another [2016] eKLR.

16. Counsel further contended that the present suit is res judicata as the letter which forms the subject matter of the dispute was also relied on in the children's case, namely, Nairobi Children's Case No. 608 of 2007. He supported the argument by invoking the doctrine of res judicata as codified in Section 7 of the *Civil Procedure Act* (CPA) and enunciated in In Re Estate of James Karanja Alias James Kioi (Deceased) [2014] eKLR and Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others [2020] eKLR. Counsel contended that the matters raised in the present suit were also the subject of a complaint previously lodged before the Medical Practitioners and Dentists Board (the Board) which was dismissed and was followed by Petition No. 511 of 2013 filed in the Constitutional Division of the High Court, which was similarly dismissed.

17. In rejoinder, the Plaintiff's counsel submitted that whereas the original verifying affidavit to the plaint was not commissioned, leave was sought and granted to remedy the defect and that a duly commissioned verifying affidavit was subsequently filed. Counsel therefore urged the court to exercise substantive justice in allowing the plaint to stand, citing Coast Development Authority v Adam Kazungu Mzamba & 49 others [2016] eKLR and Microsoft Corporation v Mitsumi Computer Garage (2001) 2.E.A. 460.

18. Concerning earlier disputes between the parties, counsel asserted that these had no bearing on the present suit premised as they were on distinct causes of action. Additionally, the question of whether the suit is res judicata was already raised and determined vide the ruling delivered on 24th March 2017.

19. The Defendant's counsel also made supplementary submissions wherein echoed the arguments in the original submissions. Save to add that irrespective of whether the Plaintiff's suit is controverted or not, the burden rests with the Plaintiff to prove his case on a balance of probabilities, echoing the decision in Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR. The court was therefore urged to strike out the plaint.

20. The Court has considered the pleadings, the evidence on record and the parties' respective submissions. Before delving into the merits, the court deems it necessary to first determine the preliminary issues raised by the Defendant regarding the competency of the suit. Starting with the question whether the

suit is res judicata under Section 7 of the CPA for raising similar issues as those before the court in Nairobi Children's Case No. 608 of 2007, the section provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

21. Upon its perusal of the record, the court notes that a similar objection was previously raised by the Defendant through its application dated 5th March 2014 seeking to strike out of the plaint on grounds related to previous litigation, namely, the complaint before the Board and Constitutional Petition No. 511 of 2013. Upon hearing the parties thereon, the High Court in the ruling delivered on 24th March 2017 found that the earlier litigation related to matters that were distinct from those raised in the present suit and therefore proceeded to dismiss the application with costs.

22. It is therefore clear that the plea of res judicata having earlier been considered and determined by this Court cannot be re-agitated before the same court. Moreover, regarding the children's case, neither of the parties tendered the substantive pleadings therein, save for a replying affidavit sworn by the Plaintiff's former wife. That notwithstanding, it is apparent that the children's case was between the Plaintiff and the former wife and was essentially a custody dispute, plainly distinct from the present suit which is primarily founded on defamation and is between the Plaintiff and the Defendant. Consequently, the court is not convinced that the res judicata plea is well taken.

23. The second preliminary point concerns the competency of the verifying affidavit to the plaint. On his part, the Plaintiff does not dispute that the original verifying affidavit was not commissioned. He however, clarified through his counsel that this omission was remedied with leave of the court which is confirmed by the record that contains a duly commissioned verifying affidavit to the plaint. On that basis alone, the court is of the view that the objection raised by the Defendant on this score does not hold any water and cannot stand.

24. Moving on to the substantive issues for determination, as earlier mentioned, the Defendant did not call any evidence to counter the evidence tendered by the Plaintiff. Suffice to say that the law is clear as to who bears the burden of proof in civil claims pursuant to the provisions of Sections 107, 108 and 109 of the *Evidence Act*. The mere absence of evidence tendered by a defendant does not automatically mean that the plaintiff's evidence, however weak is taken as proof of his case. The Court is obligated to examine such evidence, though uncontroverted, to satisfy itself whether it does pass muster the standard of proof in civil cases.

25. 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:
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> "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. From a reading of the pleadings and consideration of the evidence, it is apparent that the Plaintiff's case is founded on defamation and breach of doctor-patient confidentiality. The court will first address the claim based on defamation.

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

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

29. In Selina Patani & Another v Dhiranji V. Patani [2019] eKLR 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 held thus:

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

i. The statement must be defamatory.

ii. The statement must refer to the plaintiff.

iii. The statement must be published by the defendant.

iv. The statement must be false."

30. In order to succeed, the Plaintiff is required to establish the above ingredients collectively and on a balance of probabilities. Upon the court's consideration of the evidence and study of the record, it is not in dispute that the impugned letter was published by the Defendant and that it referred to both the Plaintiff and his former wife by name. The court is therefore satisfied that the publications refer to the Plaintiff herein and were authored by the Defendant.

31. On whether the words referring to the Plaintiff were false, the court recalls the testimony by the Plaintiff that the impugned letter dated 14.04.2010 and produced as P. Exh 1 contained inaccuracies in terms of the dates during which the Plaintiff was admitted at Avenue Hospital and the nature of his illness. The Plaintiff also denied the allegations of violence which were set out in the said letter. On his part, the Defendant did not bring any evidence to clarify the impugned allegations. Suffice it to say that the Plaintiff did not deny the existence of a doctor-patient relationship between himself and the Defendant who is mentioned as being a psychiatrist by specialty.

32. Nevertheless, the Plaintiff did not shed light on the nature of this relationship including disclosing the mode and nature of treatment, if any, that he received from the Defendant to ascertain whether the contents of the impugned letter contained falsehoods. The court further observes that according to a letter dated 22.07.2010 from the Managing Director of Avenue Hospital and addressed to the Plaintiff's advocate and produced as P. Exh 4, the Plaintiff was said to have been admitted at the said facility in April 2007 and not April 2006 as stated in the Defendant's impugned letter. However, the nature of admission and treatment received were not disclosed in the letter from Avenue Hospital.

33. From the court's examination of the pleadings and evidence, it is of the view that notwithstanding the absence of any evidence by the Defendant, the Plaintiff did not bring any credible evidence to enable this court to arrive at a conclusive finding that the contents of the publication were, beyond containing what appear to be mere errors, false in substance.

34. Was the impugned letter shown to be defamatory of the Plaintiff? 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".
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> See also the Court of Appeal definition of a defamatory statement in SMW v ZWM (2015) eKLR.

35. 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."

36. 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:
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> "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."

37. The Plaintiff pleaded in his plaint and testified that the words in the publication were defamatory in their natural and ordinary meaning. That the contents of the publication are manifestly defamatory and impute that the Plaintiff is a person with acute mental problems and of a criminal disposition, and who does not take medical treatment seriously.

38. The Plaintiff testified that the impugned letter was used in the children's case involving him and his former late wife, to reduce his chances of obtaining custody of their child having been annexed to her replying affidavit in the custody case. However, it was also the testimony by the Plaintiff that he was eventually granted custody of the minor. Moreover, beyond the Plaintiff's own apprehensions as to how the contents of the letter damaged his reputation, he did not call any witness to whom the letter was published or tender any credible evidence to demonstrate the manner in which the impugned letter lowered his reputation in the eyes of right-thinking members of society. A plaintiff's own view about his/her reputation is not material in a claim for defamation.

39. In SMW v ZWM (2015) eKLR, the Court of Appeal observed:

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> > " 15. Black's Law Dictionary 8th Edition defines defamation as the act of harming the reputation of another by making a false statement to a third person. (Emphasis added). 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: see Gatley on Libel and Slander (10th edition). A plaintiff in a defamation case must prove that the words were spoken /written; that those words refer to him/her; that those words are false; that the words are defamatory or libelous and that he/she suffered injury to reputation as a result. ...
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> > 19. The trial judge had considered the testimony of witnesses with a view to assessing their credibility and at no point did any of the Appellant's witnesses at trial consider the appellant to have been defamed by the contents of the letter. The witnesses who testified at trial constitute and pass the ordinary reasonable man test as they were not only neighbours but also people known to the disputants. There was no evidence of any public ridicule, hatred or even shunning experienced by the appellant.
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> > The appellant had only testified at the trial court that he felt shy to interact with some of his friends in tea farming. The appellant appears to have had an apprehension of defamation on himself ostensibly based on how he himself considered his standing in the society. That is

not what defamation is in law. The appellant himself further testified before the trial court that nothing had changed in his dairy farming business. Moreover, despite being a tea farmer in Gatundu, he had since relocated to his Karen home at the time of these proceedings where the chances of any possible defamation of him became slimmer based on the existing solitary and liberal lifestyle adopted by urbanites. As elucidated earlier, the test to be applied is that of the reasonable ordinary man, not the appellant or the respondent..." (Emphasis added).

40. The foregoing was reiterated in Selina Patani's case (supra), where the same Court stated:

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> "26. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation.
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> 27. The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellant's character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third-party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation. (Emphasis added)
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> See also Daniel N. Ngunia v K.G.G.C.U. Limited (2000) eKLR and Hezekiel Oira v Standard Limited & Another (2016) eKLR.

41. Reviewing all the material therefore, the court is of the view that the Plaintiff did not establish all the requisite ingredients of the tort of defamation to the required standard. Consequently, the court dismisses the said claim with costs.

42. Regarding the Plaintiff's claim founded on breach of patient-client confidentiality, he argued that the impugned letter was authored by the Defendant without his consent and in breach of his confidence. The Plaintiff tendered as P. Exh 8 a copy of the Code of Professional Conduct for Medical Practitioners (5th edition). Of relevance to the present suit is Chapter IV, Clause 4 on confidentiality, which states that:

> " A practitioner shall not disclose to third party information which he obtained in confidence from a patient. The following are possible exceptions:
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> a. The patient or his legal advisor may give a valid consent.

b. The information may be required by law (see part C @4)

c. Public interest may persuade a practitioner that his duty to the community overrides the one to his patient.

d. Information may be given to a relative or appropriate person if in his opinion it is undesirable on medical grounds to seek the patient's consent.

e. In the interest of research and medical education, information may be divulged, but at all material times the patient's names shall not be revealed.

A practitioner shall always be prepared to justify his action whenever he discloses confidential information. He should, whenever possible, except in the public interest, keep secret the identity of the patient."

43. Chapter V of the Code of Conduct further sets out in clause 2 that a doctor ought to ensure confidentiality is not compromised but may breach confidentiality in the interest of law and order. The impugned letter was evidently relied on by the Plaintiff's former wife in the child custody case. It is also clear from the record that the impugned letter was specifically addressed to the former wife's advocate, Philip Ocharo, Esq. and not to the court. There is nothing to indicate that a court order had been issued to the Defendant, compelling him to write the letter particularly as pertains to the Plaintiff, or that his disclosure was covered under the exceptions set out in the Code of Conduct.

44. Moreover, the Plaintiff in his testimony stated that prior to authoring and publishing the impugned letter, the Defendant did not seek his consent, which constituted a breach of confidentiality and trust. In the absence of any evidence to the contrary therefore, the court is satisfied that the Plaintiff has reasonably demonstrated the manner in which the Defendant acted in breach of doctor-patient confidentiality and in violation of the Professional Code of Conduct for Medical Practitioners.

45. Upon its finding that the Plaintiff established a case for breach of doctor-patient confidentiality, the court is satisfied that the Plaintiff is entitled to an award in general damages for the breach. However, the Court also bears in mind the peculiar circumstances in which the breach occurred and the relationship between the parties herein and related third parties as well as the context of the authorship and contents of the impugned letter.

46. Having considered the case of RAO v Mediheal Group of Hospitals & 2 others [2021] eKLR where the High Court sitting on appeal enhanced an award of Kshs. 900,000/- to that of Kshs. 2,000,000/- for breach of confidentiality and undertaking a test on a patient without consent, and the case of similar nature, namely, Karen Hospital Ltd v C N M [2018] eKLR where High Court also sitting on appeal awarded the sum of Kshs. 1,000,000/-, the court is of the view that the circumstances herein are somewhat distinguishable, and that the award urged by the Plaintiff's advocate is too high. All considered, the Court is satisfied that an award of damages in the sum of Kshs. 400,000/- would suffice in the present instance.

47. In the result, judgment is hereby entered for the Plaintiff against the Defendant in the sum of Kshs. 400,000/- (Four Hundred Thousand) with costs and interest, for breach of doctor-patient confidentiality. The claim founded on defamation is hereby dismissed with costs to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Wendo h/b for Mr. Lubullelah

For the Defendant: N/A

C/A: Carol