



REPUBLIC OF KENYA



**Azelwa v Standard Group Limited & 2 others (Civil Suit 82 of 2013)
[2023] KEHC 20018 (KLR) (Civ) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20018 (KLR)

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

CIVIL

CIVIL SUIT 82 OF 2013

CW MEOLI, J

JULY 6, 2023

BETWEEN

AGGREY AZELWA PLAINTIFF

AND

STANDARD GROUP LIMITED 1ST DEFENDANT

JOHN BUNDOTICH 2ND DEFENDANT

GEOFFREY MOSOKU 3RD DEFENDANT

JUDGMENT

1. The suit by Aggrey Azelwa, (hereafter the Plaintiff) against the The Standard Group Limited, John Bundotich and Geoffrey Mosoku (hereafter the 1st, 2nd and 3rd Defendant/Defendants) is founded on the tort of defamation. The Plaintiff seeks inter alia that the Defendants be compelled do render a full and unqualified apology and to withdraw the statements published against the Plaintiff; a permanent injunction to restrain the Defendants either by themselves, servants, agents or otherwise howsoever from further making or publishing the defamatory allegations against the Plaintiff; general and exemplary/aggravated damages; costs of the suit and interest.
2. The Plaintiff averred that the 1st Defendant with the sanction of the 2nd Defendant, by its article published on 24.01.2013 and authored by the 3rd Defendant, published defamatory statements against the Plaintiff, under the headline “ODM official arrested over certificate scam”. That the article was also posted online, enhancing its circulation. The Plaintiff pleaded that the contents of the article was false, malicious, and defamatory of the Plaintiff and the Defendants motivated by malice and spite , all calculated to injure the Plaintiff in his business, work, reputation and standing in society.



3. It was further averred that prior to the publication of the defamatory article the Plaintiff, a senior staff member of the ODM party enjoyed high esteem and respect from his friends and colleagues in the ODM party (hereafter ODM) , its supporters and public both locally and internationally. That the publication of the article has injured his character and reputation because of which the Plaintiff has been brought into public ridicule, scandal, odium and contempt in the eyes of the right-thinking members of the society.
4. On 03.05.2013 the Defendants filed a joint statement of defence denying the key averments in the plaint and averred that the article as published was justified and was true in substance and fact. In his reply to the Defendants defence, the Plaintiff contended that the words published were actuated by express malice.
5. During the trial, the Plaintiff testified as PW1. Having identified himself as a businessman, he proceeded to adopt his witness statement dated 11.03.2013 as his evidence-in-chief. He equally produced the documents in the list of documents of even date as PExh.1-3 being a copy of the newspaper article dated 24.01.2013, a copy of the online article dated 23.01.2013 and demand letter dated 25.01.2013, respectively. It was his evidence that at the material time he was working for the ODM Party in Western Kenya reiterating his grievance in respect of the Defendants' article that the same was false and malicious as he neither sold fake nomination certificates nor was he arrested as alleged in the article. He stated that the Defendants did not obtain any comments from him prior to publication of the impugned article.
6. Under cross-examination, he stated that he was dismissed from his position in ODM following publication of the article. That the then chairman of the ODM National Election Board (NEB) communicated what effectively was a suspension of the Plaintiff because of the publication by the Defendants. He asserted that he was not arrested but rather abducted by goons, who demanded that he takes them to Kitengela where certificates were being printed. He admitted that ODM gave direct nominations to certain candidates however was not aware that the chair of the NEB invalidated some of the certificates issued.
7. It was his evidence that the Defendants' article on fake certificates painted him as a corrupt person. And pointed to the inclusion of his name in the 2nd paragraph of the article. He said he had not taken any action against the alleged goons or ODM officials who gave statements to the media. While reiterating that he was dismissed on account of the article in January 2013, he admitted that he did not produce any letter in that regard. That ODM is a national political party whose activities are a matter of public interest.
8. In re-examination, he reiterated that paragraph 3 of the article refers to him by name while paragraph 4 stated that ODM officials had been selling nomination certificates. That the allegations made in the article to the effect that the said officials thereby obtained millions of shillings or that he had been arrested were untrue.
9. Daniel Kosgei testified as PW2. He identified himself as a businessman and politician before adopting his witness statement dated 2.12.2017 as his evidence-in-chief. He stated during cross-examination that the allegations in the article lowered his estimation of the Plaintiff. That he had contacted the Plaintiff who denied the allegations. That he was unaware of internal wrangles within ODM but knew that the chairman of the NEB at the time dismissed the Plaintiff summarily due to the article.
10. PW2 further stated that he did not discuss the matter with any ODM official at the time nor witness the Plaintiff's abduction, the latter which he learned of at the hearing of the instant suit. It was evidence further that despite the publication he the Plaintiff remained friends, but he was cautious in business



dealings with the Plaintiff. On re-examination he reiterated that due to the article, his view of the Plaintiff was that he was a corrupt, dubious, and untrustworthy person.

11. The Defendants opted not to call any evidence at the trial.
12. At the close of the trial, parties filed written submissions. The Plaintiff's submissions addressed the twin issues of liability and damages. Restating the pleadings and evidence before the trial court, counsel cited the decision in *Musikari Kombo v Royal Media Services Ltd* [2018] eKLR to argue that the Plaintiff's evidence was uncontroverted and established all the necessary ingredients in respect of the tort of defamation.
13. On quantum, counsel calling to aid the decisions in *Francis Xavier Ole Kaparo v Standard Limited & 3 Others* [2010] eKLR, *Kipyator Nicholas Biwott v Clays Limited and 5 Others* [2000] eKLR and *Henry Obwocha v Head Link Publishers Limited* [2014] eKLR submitted that despite demand, the Defendants had not offered an apology; that the publication had a wide reach and effect, hence, the court ought to award general damages in the sum of Kshs. 15,000,000/- and aggravated/exemplary damages in the sum of Kshs. 15,000,000/-. The court was thus urged to grant the reliefs sought in the plaint with costs and interest.
14. On the part of the Defendant, counsel equally restated the pleadings and evidence before the court. Addressing the question whether the article was defamatory, counsel placed reliance on the decision in *J Kudwoli & Another v Eureka Educational and Training Consultants & 2 Others* [1993] eKLR, the English decision in *Hiranandani-Vandrevala v Times Newspaper Ltd* [2016] EWHC 250 (QB) and the South Africa decision in *Hall v Welz & Others* (4960/94) [1996] ZAWCHC 2 in urging the court to find that the full tenor of the article can only be deduced from a wholesome rather than selective reading of parts of the article. That taken as a whole the article could not have the effect of lowering the Plaintiff's reputation in the eyes of right-thinking members of society and therefore did not qualify as defamatory. It was pointed out that the Plaintiff did not produce a termination letter or even proof of disciplinary proceedings instituted against him on account of the article.
15. As to whether the publication was actuated by malice, counsel argued that no malice is discernible from the article which comprised a balanced report that included the Plaintiff's side of the story; that the author of the article took the trouble to explain wrangles within the ODM party, also confirmed by the Plaintiff. Hence it was submitted that the Plaintiff failed to prove malice on a balance of probabilities. The decisions in *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* [2009] eKLR and *Crown Bus v Kwaro & Another* (Civil Appeal 139 of 2019) KEHC 10262 (KLR) were called to aid.
16. Concerning the defence of truth and justification as pleaded, counsel relying on the decision in *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR and the treatise *Carter-Ruck on Libel and Slander*, 5th Edition, submitted that the specific averments in the statement of defence were not disputed by the Plaintiff and therefore it was unnecessary to call a witness in that regard. Further, the evidence before the court, revealed several facts including that the Plaintiff and his colleagues were arrested; the invalidation of nominations supervised by the Plaintiff; and that the chair of the ODM NEB gave a related statement regarding the actions taken as a consequence. The court was thus invited to find that the defence of truth as pleaded for by the Defendants was available and the suit ought to be fail on that ground.
17. Concerning damages, counsel anchored his submissions on the decision in *Cecil Guyana Miller v Nation Media Group Limited & Another* [2016] eKLR on the guiding principles in a cause of action founded on defamation. The court was further urged to disregard assertions regarding the Plaintiff as a prominent businessman, the effect of reputational damage on the performance of his business and or evidence of his reputation in the society. In urging an award of Kshs. 500,000/- as general



damages, counsel relied on the decisions in *Mary Koli Kitonga v Ghetto Radio Limited* [2020] eKLR, *Jacob Kipngetich Katonon v Nation Media Group Limited* [2017] eKLR and *Benaiah Sisungu v Tom Alwaka t/a Weekly Citizen & Another* [2007] eKLR.

18. Addressing the claim for exemplary and aggravated damages, it was submitted that these would only be awarded by the court to show disapproval of the Defendants' upon the court being satisfied that the publication was oppressive or arbitrary and propelled by a desire for financial benefit. That the Plaintiff failed to tender evidence to warrant an award of punitive damages as sought under the said heads. In conclusion, the court was urged to dismiss the suit with costs.
19. The court has considered the evidence on record and the parties' respective submissions. The key issue for determination is whether the Plaintiff has proved his case on a balance of probabilities and if so, the appropriate awardable damages. In that regard, the respective parties' pleadings before court are pertinent. The Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, addressed itself as follows as concerns the foregoing:-

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

20. To that end, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

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

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

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



others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..."

22. 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."

23. In *Selina Patani & Another vs Dhiranji V. Patani* [2019] eKLR the Court of Appeal held that the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that:

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

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

24. There is no dispute in this case regarding ingredient (iii) above as the Defendants readily admits to publishing the articles in question. The issues in dispute are whether the statements in the article referred to the Plaintiff; whether the articles as published are defamatory and false; or whether the defence of justification is available to the Defendants. The court proposes to deal with the issues concurrently.

25. The undisputed facts can be briefly stated as follows. In the material period, the Plaintiff was serving as an ODM Party Primary Nominations Commissioner for Western Region. On 23.01.2013 and 24.01.2013 the Defendant published an article regarding ODM official(s) purportedly arrested over a corrupt scheme involving the issuance of nomination certificates to aspirants for a fee.

26. It is apposite to set out in extenso the contents of the articles complained about. The printed article published by Defendants on 24.01.2013 in "The Standard Newspaper" and read as follows:

"ODM official arrested over certificate scam.

Elections board members are alleged to have made millions selling the papers to the highest bidders.

By Geoffrey Mosoku



“A member of the Orange Democratic Movement (ODM) polls board has been arrested after the party uncovered a massive scam involving the sale of nomination certificates to desperate aspirants.

ODM has unearthed that some members of the National Elections Board (NEB) and its secretariat have been minting millions of shillings selling the documents to aspirants. Commissioner for Western Region Aggrey Azelwa and a staff Maxmilla Wafula were arrested yesterday at Orange House for questioning while James Ogundo, who is in charge of Nyanza and his son Valentine Ogundo, an IT expert, had gone into hiding and police are looking for them.

By last evening, the two were at Kilimani Police Station in Nairobi, where they were being questioned as the search for Ogundo and his son intensified. The officials were said to be selling certificates to the highest bidder in Nyanza region where holding an ODM ticket was equated to having already won an election.

Sources at Orange House said the officials had raked in millions of shillings targeting county representatives who were paying between Sh100,000 to Sh200,000 and some MP aspirants who were paying between Sh1 million to Sh2 million.

Some governor and senate aspirants were also said to be paying between the Sh1 million and Sh2 million. The officials took advantage of the board's declaration that most parties in Nyanza region did not hold polls and thus were creating their own list from those who had paid them.

INVALIDATED

Consequently, ODM NEB Chairman Franklin Bett (pictured top) yesterday invalidated all nomination certificates issued to candidates in Nyanza and parts of Western. Bett revealed he had suspended one of his members, Commissioner Ogundo, in charge of Nyanza region, who had issued the certificates.

“In view of irregularities in issuance and distribution of nomination certificates for our candidates, particularly the county representatives from Nyanza region, I have disallowed James Ogundo from further handling of nomination certificates from that region on behalf of the National Elections Board,” Bett said in a statement.

The Chairman said after annulling the nomination certificates, he will personally begin issuing fresh ones starting from Today. “I want to underscore that all certificates from ODM are free of charge and have authentic and original signatures,” he added.

Meanwhile, ODM has moved fast to explain why it was forced to hand some party members direct nomination. Bett said direct nominations were necessary after some constituencies failed to elect candidates by the close of the nominations deadline. He said the nominees risked being locked out by the Independent Elections and Boundaries Commission.” (sic)

27. Earlier on 23.01.2013 the Defendants had published on the 1st Defendant's website an article which read: -

“ODM election board member arrested over certificates scam.

Last updated on 23 Jan 23 2013 18:24

By Geoffrey Mosoku



Nairobi, Kenya: A member of the ODM National Elections Board has been arrested while his colleague has gone into hiding after the party uncovered a massive scam of minting millions of shillings from desperate aspirants by selling them nomination certificates.

The party uncovered the syndicate involving members of the elections board and its secretariat of selling nomination certificates to aspirants.

Commissioner for Western region Aggrey Azelwa and a staff Maxmilla Wafula were arrested on Wednesday at Orange house for questioning while James Ogundo, who is in charge of Nyanza and his son Valentine Ogundo, an IT expert, have gone into hiding and police are looking for them.

By Wednesday evening, the two were at Kilimani police station in Nairobi, where they were being questioned by sleuths as the search for Ogundo and his son intensified.

The officials were said to be selling certificates to the highest bidder in Nyanza region, a region where holding an ODM nomination is equal to an election.

Sources at Orange House said the officials had raked in millions of shillings targeting county representatives where they were paying between 100,000 to 200,000 shillings and some MP aspirants who were paying between one million to two million shillings. Some governor and senate aspirants were also said to be paying between one million to two million shillings.

The officials took advantage of the board's declaration that most parties of Nyanza region did not hold polls and thus were creating their own list from those who have paid the millions.

Most of those who were paying the money were from Nyanza and some parts of Western." (sic)

28. First, the court must first determine whether the alleged defamatory statements in the articles were stated of the Plaintiff. The Plaintiff by his evidence has vehemently affirmed that the publications in issue were of and concerning him. Pointing out that the questioned publications mentioned him by name and were undoubtedly about him. This fact was not controverted by the Defendants whose Defendants entire defence rested on justification. Reviewing the evidence by the Plaintiff, the court is satisfied that the articles and alleged offending statements therein referred to the Plaintiff.
29. On whether the words referring to the Plaintiff were defamatory and or false, the articles employed words such as "certificate scam" "arrested" "unearthed" "minting" and "selling". The court reading the articles in the wholesome manner urged by the Defendants finds that the gist of the articles was that some ODM party officials and/or members of the party NEB were engaged in a fraudulent scheme from which they obtained millions of shillings through the sale of nomination certificates to the highest bidder among desperate political aspirants.
30. Further that the Plaintiff and another individual had been arrested at Orange House for questioning while other officers purportedly involved in the "scam" were at large and the investigative authorities were on the lookout for them. The article specifically stated that the Plaintiff having been arrested was detained at Kilimani Police station for questioning on the allegations. At the time, the Plaintiff was serving as a commissioner for ODM Western region, and the articles stated that the ODM NEB chair had invalidated all nomination certificates issued to candidates in Nyanza and parts of Western Region where he served as an elections board commissioner.
31. From the foregoing articles, it can be deduced that the Plaintiff was most possibly arrested as a suspect in respect of the criminal scam involving issuance of nomination certificates, rather than as a



witness. The Plaintiff assiduously disputed the truth of these facts and imputations. The Defendants, despite pleading justification, failed to call evidence to demonstrate the truth of the contents of the publications made in the 1st Defendants newspaper and website, leading to an inference that the statements were indeed false.

32. Regarding what comprises defamation, *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”.

33. 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.

34. 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.”

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

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

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

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

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

36. As pleaded in his plaint at paragraph 7, the Plaintiff testified that the words in the articles of 23.01.2013 and 24.01.2013 were defamatory in their natural and ordinary meaning, in that, it was imputed therein that he was inter alia corrupt, an immoral person, lacking integrity, a criminal, of dubious character, a thief and ready to go to any lengths to unjustly enrich himself. While PW2 testified that the allegations in the article lowered his estimation of the Plaintiff, and as a result was cautious in business dealings with the Plaintiff. PW2 further stated that as a person who had regarded



the Plaintiff in high esteem and inquired with him on the allegations, which the Plaintiff denied. The above evidence, viewed in light of PExh.1 and PExh. 2, constitute sufficient demonstration that the statements therein concerning the Plaintiff had, in their plain meaning, a defamatory tendency, whether or not they were believed by the people to whom they were published.

37. The said statements were not covered by fair comment and qualified privilege. First, the statements referring to the Plaintiff were passed off as factual and therefore 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. See *Nation Media Group Ltd. v Alfred N. Mutua* (2017) eKLR.

38. As regards the defence of justification under Section 14 of the *Defamation Act*, it was held by the Court in *Uhuru Muigai Kenyatta V Baraza Leonard* [2011] eKLR that: -

“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.”

39. As earlier, noted the Defendants opted not to call any evidence to support their defence of justification, instead submitting that it was unnecessary to do so as that the averments in the statement of defence were not disputed by the Plaintiff. Evidently, the averments of justification were disputed by the Plaintiff in his reply to defence. The burden of proving justification fell at all material times upon the Defendants. Simply put, while the evidentiary burden of justification fell on the Defendants, they failed to discharge the same.

40. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR while discerning the question of legal and evidential burden held inter alia.

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

41. The Plaintiff further asserted that the Defendants acted maliciously inter alia by failing to contact him to verify the matters reported in the article before publication and refusing to offer a retraction and apology for the said publication despite demand. The Code of Conduct for the Practice of Journalism made under the *Media Council Act* provides that; -

“Accuracy and fairness

- (1) A person subject to this Act shall write a fair, accurate and an unbiased story on matters of public interest.
- (2) All sides of the story shall be reported, wherever possible.



(3) Comments shall be sought from anyone who is mentioned in an unfavourable context and evidence of such attempts to seek the comments shall be kept”.

42. No evidence was offered by the Defendants demonstrating their compliance in this instance with the Code of Conduct for the Practice of Journalism and or that the publication was made without any malice and or bias. In *Phineas Nyagah v Gilbert Imanyara* [2013] eKLR the court held that:

“Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice maybe found in the publication itself if the language used is utterly beyond or disproportionate to the facts.

.... malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely.”

43. Reviewing all the material, this court is of the view that the Defendants acted in a reckless and malicious manner. The court finds that the Plaintiff has proved his case on a balance of probabilities and that the Defendants are therefore liable for defamation.

44. 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 vs 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.

45. No doubt the libel in this case was grave and touched on the Plaintiff’s personal integrity, honour, and reputation. The publication had potentially a wide reach among readers of the “Standard Newspaper”. As a former official of the ODM party and businessman, the Plaintiff was understandably injured by the libel and the Defendants’ subsequent conduct. It appears that the Defendants have to date not retracted the publication or tendered an apology to the Plaintiff.

46. That said, the proposed figure by the Plaintiff of Kshs. 15,000,000/- in general damages appears excessive in comparison with awards in the decisions relied on, which other than being dated are distinguishable in material facts. The decisions cited by the Defendants while not on all fours in respect of the circumstances of the instant case were however more relatable to suit herein save for the decision in *Mary Koli Kitonga* (supra). In the court’s view, an award of Kes.1,200,000/- in general damages is adequate compensation for the Plaintiff’s injury.



47. 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 tortious 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.”

48. 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.”

49. The gravity of the publication herein called for prior verification of facts by the Defendants. After all, it was alleged that the police were investigating the matter and the Defendants could have easily verified from investigative authorities the information relevant to the article, and especially, whether the Plaintiff had been arrested and whether police were treating him as a suspect in the investigations. The Plaintiff is therefore entitled to exemplary damages assessed at Kes. 300,000/-.

50. In the result, judgment will be entered for the Plaintiff against the Defendants jointly and severally in the sum of Kes.1,500,000/- (One Million Five Hundred Thousand) with costs and interest. The Court doubts whether ten years since the publications, orders to restrain the Defendants or to compel them to render apology or for retraction of the articles as sought in the plaint would be efficacious or necessary. These reliefs are declined.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6th DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Kabue

For the Defendants: Mr. Pamba

C/A: Carol

