



**Madanji v Nairobi Star Publication Limited (Civil Case 16 of 2019)
[2023] KEHC 24320 (KLR) (23 October 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE 16 OF 2019
RE ABURILI, J
OCTOBER 23, 2023**

BETWEEN

BOB PATRICK MADANJI PLAINTIFF

AND

THE NAIROBI STAR PUBLICATION LIMITED DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff in this case is Bob Patrick Madanji. He commenced this suit vide Plaintiff dated 12th September 2019 and filed on the 18th September 2019 against the defendant seeking the following reliefs:
 - a. General damages
 - b. Exemplary damages
 - c. Aggravated damages
 - d. Permanent injunction to restrain the defendant from ever publishing the impugned words contained in the article
 - e. Costs of the suit.
2. The plaintiff pleaded and reproduced the published article which he claimed was injurious of him and his character in the estimation of right thinking members of the society, which words, according to the plaintiff, were also published online at <https://kenyadigest.com/corridorsof-power-the-star-kenya-41>, <https://kenya.shafagna.com/EN/AL/395120>, [https://extranet.kengen.co.ke/wp-content/uploads/2019/03/7th March 2019 The Star.pdf](https://extranet.kengen.co.ke/wp-content/uploads/2019/03/7th-March-2019-The-Star.pdf).



3. The plaintiff claimed that the impugned article referred to and was directed at the plaintiff and that the article the defendant knew to be false, malicious and injurious to the plaintiff's character as published on 7th March 2019 as follows:

“A protocol director with one of Nyanza Counties is on the spot over corruption allegations. The man, better known as “photogenic”, colludes with two hotel managers to ensure county VIPs are accommodated at the facilities for kickbacks. Hoteliers said the man blocked them from getting business fairly as he demands kickbacks after quoting high booking rates.

They say that for him to refer guests to a hotel, one must accept his own quotation to enable him get his share. Sources at the county said the man is notorious of dubious deals in every government department he has worked with. The officer has been accused of secretly recording a deputy governor's conversations in bars to set him up against the governor. This has caused animosity between the governor and his deputy.”

4. The plaintiff claimed that following the impugned publication, he received numerous sympathy messages and calls from his friends, family members, colleagues and well-wishers who read the said publication.
5. The plaintiff further pleaded and asserted that the said publication was with malice because they were published deliberately and recklessly or negligently without inquiring into and ignoring the facts, failure to take any precautions or steps to establish the truthfulness or correctness of the article, using language that was utterly beyond or disproportionate to the facts, publishing the article knowing the same was false, reckless disregard as to whether or not the article was false, defamatory or injurious to the plaintiff's reputation, republishing the impugned article online.
6. According to the plaintiff, he was not given any notice of intention to publish the said article by the defendant and that in their natural and ordinary meaning, the words in the article mean and are meant to be understood to mean that the plaintiff:- engages in county Government's procurement processes; determines the prices for hotel services; clandestinely enters into contracts with two hotels for hotel services; is a corrupt person; demands bribes from hoteliers; blocks hoteliers from getting awarded tenders for hotel services unless they bribe him; determines which hotel the guests would be referred to; proposes to hoteliers the tender prices and which process are above the market prices; career in the public service is characterised by corruption; does not respect the Deputy Governor's right to privacy and expression; antagonizes the Governor and his Deputy; was conferred illegal benefits by hoteliers/ tenderers; is unethical, unprofessional, unscrupulous and condones corrupt practices; violated Article 10 of *the Constitution*, Chapter 6 and Article 227(1) of *the Constitution* of Kenya and the *public procurement and asset disposal act* and the *bribery act*, 2016; has no regard to the rule of law and is unfit to hold public office.
7. The plaintiff further claimed that his character, reputation, occupation was defamed and that he was exposed to public odium, ridicule, gossip, contempt and avoidance and exposed him to possible investigations and removal from public office.
8. Further, that the publication had a sinister motive of hate speech and advocating hatred by vilifying and inciting to cause the plaintiff personal harm or real or perceived differences between the Governor and his Deputy.
9. That despite demand for an apology, retraction or removal of the offending publication and compensation thereof, with intention to sue, the defendant had refused to abide by the demands hence



- this suit. Further, that the plaintiff exercised the right of reply but the defendant refused to publish the rebuttal or clarification hence this claim.
10. In support of his case, the plaintiff testified as PW1 and adopted his witness statement dated 12th September 2019. He stated that he was the Director of Protocol in the Office of the Governor, at the County Government of Kisumu.
 11. It was the plaintiff's case that in a publication dated 7th March 2019, the defendant herein The Nairobi Star Publication Limited defamed him by publishing in "the Corridors of Power Political Gossip" Column of The Star the above pleaded words, which publication was also made on the website of the defendant and online hence the said publication was read widely in Kenya and worldwide and that any reasonable person of ordinary intelligence reading understood the words to defame the plaintiff and that the plaintiff subsequently received numerous enquiries and messages of sympathy from family members, colleagues, friends and well-wishers. He stated that he was nicknamed 'photogenic' because of his work.
 12. It was the plaintiff's case that the defendant did not give him any notice of its intention to publish the article and that the article was published with a sinister motive of hate speech and advocating hatred by vilifying and inciting to cause the plaintiff personal harm for the real or perceived differences between the Governor, Kisumu County Government and his Deputy.
 13. The plaintiff further averred that he demanded an apology, retraction, removal of the offending article and compensation and even gave the defendant intention to sue but the defendant failed, neglected and refused to apologise.
 14. In cross-examination, the plaintiff stated that the name "photogenic" was associated with him and that he acquired it when he joined the County Government of Kisumu four years ago. He admitted that the published article did not contain his name nor his photograph and that neither did it specify the County in which the said Protocol Director worked. The plaintiff stated that he assumed that the article referred to him.
 15. In re-examination, the plaintiff testified that the name "photogenic" was as old as his job as a protocol Director. He further testified that he assumed that the article referred to him as he was the only person who was referred to as "photogenic" by journalists and further because the other counties in Nyanza did not have protocol directors but protocol officers.
 16. PW2 Lennox Onyango Omondi testified and adopted his witness statement dated 12th September 2019 wherein he stated that he worked with the plaintiff in the County Government of Kisumu and that the plaintiff was known as "photogenic" in Kisumu parlance.
 17. It was his testimony that he read the article published by the defendant on the 7th March 2019 and was shocked by the accusations therein so he called the plaintiff who denied the allegations.
 18. PW2 testified that the impugned article was still a subject of discussion on the various County WhatsApp groups. It was his testimony that since the publication, he had limited his social contact with the plaintiff to work so as not to be identified with him.
 19. In cross-examination, PW2 stated that he first read the article in a WhatsApp group though the same was not forwarded by the defendant. He further admitted that the plaintiff's name was not in the article. PW2 further the plaintiff usually appears in many photos with the Governor and other dignitaries and that's how he acquired his name "photogenic".
 20. In re-examination PW2 testified that he identified the plaintiff by the name "photogenic" which was a unique name to the Kisumu region.



21. PW3 Tobias O. See testified that he knew the plaintiff as they both previously served as Secretary General and Chairman respectively of the Nyanza Club. It was his testimony that he read the impugned article in the star on the 7th March 2019 and had no doubt that it referred to the plaintiff.
22. PW3 testified that he thereafter called the plaintiff to express his shock but the plaintiff denied the contents of the article and expressed that the same were false and malicious. It was his testimony that as a result of the article, he had changed his perception of the plaintiff and minimized contact with him.
23. In cross-examination, PW3 stated that he had known the plaintiff for 27 years. He stated that the plaintiff was not mentioned by name in the article neither was his photo present. He further stated that the only Protocol Director based in Nyanza was based in Kisumu County and further that he was sure that the article referred to the plaintiff as he was the only Protocol Director and also as the name 'potogenic' was his nickname.
24. PW4 George Stephen Omondi Onduu adopted his witness statement dated 12th September 2019 in which he stated that he knew the plaintiff as "photogenic" as the plaintiff graced almost every governor's photographs with his presence. It was his testimony that he read the impugned article in the Star, on the internet and on various WhatsApp groups. In cross-examination, PW4 stated that the article did not mention the plaintiff by name but even so, it still referred to him as he was the only Protocol Director in Nyanza.
25. The defendant filed its statement of defence dated the 22nd of April 2021 on the 30th April 2021 in which it denied the allegations levelled against it in the plaint and put the plaintiff to strict proof. It however did not tender any evidence in defence to rebut the plaintiff's testimony and that of his witnesses.
26. The parties filed submissions to support their respective positions.

The Plaintiff's Submissions

27. On behalf of the plaintiff, it was submitted that the defendant did not adduce any evidence to demonstrate that it had verified the facts before publishing the article nor did it seek to notify the plaintiff that it would publish the same and thus breached the plaintiff's right to fair administrative action guaranteed under Article 47 (1) of *the Constitution* as well as Section 35 (2) of the Media Act and Clauses 1 and 5 of the Code of Conduct and Practice of Journalism in Kenya.
28. It was further submitted that as a result of the above, he was entitled to general damages as was held in the case of *John v MG Ltd* [1996] 1 ALL E.R. 35 and further upheld by the Court of Appeal in the case of *Johnson Evan Gicheru v Andrew Morton & Another* [2005] eKLR.
29. The plaintiff submitted that an award of Kshs. 15,000,000 in general damages would be adequate compensation. Reliance was placed on the cases of *Alinashir Visram v Standard Limited* [2016] eKLR where the court awarded 18 million in general damages for defamation, *Henry Obwocha v Head Link Publishes Ltd* [2014] eKLR, *Samuel Ndungu Mukunya v Nation Media Group Ltd & Another* [2015] eKLR and *Christopher Obure v Tom Oscar Olwaka & 3 Others Nairobi H.C.C.C. No. 956 of 2006* where the court in all the instances awarded 15 million in general damages for defamation.
30. The plaintiff submitted that he was entitled to exemplary damages as the impugned article was intended to shore up the defendant's sales and make a profit that may have exceeded the compensation payable to the plaintiff.



31. It was submitted that an award of Kshs. 2,000,000 as exemplary damages was sufficient punishment against the defendant in order to deter it from conduct that negates the constitutional essence and duty of the media and further deters the media from profiteering from libellous publications.
32. The plaintiff relied on the cases of Christopher Ndarathi Murungaru v John Githongo [2019] eKLR where the Court awarded exemplary damages of Kshs. 2,000,000 and that of Samuel Ndungu Mukunya supra where this Court awarded exemplary damages of Kshs. 1,500,000.
33. The plaintiff further submitted that he was entitled to aggravated damages of Kshs. 3,000,000 to assuage his foul feelings occasioned by the defendant's unremorseful and unapologetic conduct following the publication of the impugned story. Reliance was placed on the case of Kalya & Company Advocates v Standard Ltd [2002] eKLR, Wangethi M& Another v J.P. Machira Advocate [2013] eKLR where the court awarded Kshs. 2,000,000 in aggravated damages and the case of Nation Media Group Ltd & 2 Others v John Joseph Kamotho & 3 Others [2010] eKLR where the Court of Appeal upheld an award of Kshs. 1,000,000 in aggravated damages.
34. It was submitted that the plaintiff was entitled to a permanent injunction to restrain the defendant from publishing the impugned words as the said words serve no purpose when viewed against Article 33 (3) of *the Constitution*, the Media Act and the Code of Conduct and Practice of Journalism in Kenya.
35. The plaintiff further submitted that he was entitled to costs of the suit as he did all that was humanly possible to avoid the suit and as such, he ought to be compensated for the trouble he took to prosecute the case.

The Defendant's Submissions

36. On behalf of the defendant, it was submitted that the impugned article did not refer to the plaintiff and was not capable of referring to the plaintiff and further that the plaintiff did not plead innuendo in his plaint and did not demonstrate that a reasonable man reading the star newspaper would be aware that only Kisumu County has a Director of Protocol among the counties in Nyanza.
37. The defendant relied on the case of Knuaffer v London Express Newspaper Ltd [1944] 1 ALL ER where the court held inter alia that it is an essential element of the cause of action for defamation that the words complained of should be published "of the plaintiff" and if the words are not so published, the plaintiff is not defamed and cannot have any right to ask the defendant to be held responsible in respect of them.
38. The defendant further relied on the case of Morgan v Odhams Press Ltd [1972] 2 All ER 1178 where the court stated inter alia that where the plaintiff is not named, he must show that there are people who could interpret the article as referring to him in a defamatory way because of the knowledge they possessed, which knowledge they could deduce that the defamatory matter implicated the plaintiff.
39. It was submitted that the plaintiff had not discharged the burden placed on him to prove that the words complained of were words published of, and concerning him as discussed in the above cases.
40. The defendant further submitted that the award of damages sought by the plaintiff were manifestly excessive and went beyond solatium and further that if the court finds in favour of the plaintiff, a fair assessment of general damages would not go beyond Kshs. 100,000.
41. It was further submitted that the plaintiff was not entitled to exemplary and aggravated damages as the same goes beyond solatium as held in the cases of Nation Media Group Limited v George Nthenge



[2017] eKLR and that of Royal Media Services Limited t/a Citizen TV & Another v Alfred Amaiya Maiko [2021] eKLR.

Analysis and Determination

42. I have considered the pleadings herein by both parties, the evidence adduced during the hearing and submissions filed by both parties' counsel as well as the authorities relied on. It is my opinion that the issues for determination are as follows:
- i. Whether the article published by the defendant was defamatory of the plaintiff
 - ii. Whether the court should award general damages and if so how much
 - iii. Whether the plaintiff is entitled to aggravated and exemplary damages and if so, how much
 - iv. Whether the plaintiff is entitled to the permanent injunction sought
 - v. Who should be awarded costs

Whether The Article Published By The Defendant Was Defamatory Of The Plaintiff

43. The law of defamation is concerned with the protection of a person's reputation. Patrick 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...”

44. From the above statements, it follows that a claimant in a defamation suit ought to principally establish in no particular order:
- i. The existence of a defamatory statement;
 - ii. The defendant has published or caused the publication of the defamatory statement;
 - iii. The publication refers to the claimant.
45. This is also what was stated by the court of Appeal in the case of Nation Media Group & Another v Hon. Chirau Mwakwere –Civil Appeal No. 224 of 2010 (unreported).
46. It is not in dispute that the impugned article in question was published by the defendant as pleaded. What is in issue is whether the offending words in those broadcasts were concerning the plaintiff and whether they were defamatory of him.
47. In the case of Phinehas Nyaga v Gitobu Imanyara [2013] eKLR it was held that defamation was not about publication of falsehoods against a plaintiff but rather, he must show that the published falsehood disparaged his reputation and lowered him in the estimation of right thinking members of society generally. Further, in the case of Ann Wairimu Njogu v Radio Africa Limited [2017] eKLR, it was held that malice also had to be inferred from the alleged defamatory statement.



48. A defamatory statement was as was succinctly put by the Court of Appeal in *S M W v Z W M* [2015] eKLR 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.”

49. 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 that:

“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.”

50. Examining the impugned article, the ordinary meaning of the words published therein was that a protocol director in one of Nyanza Counties and who was better known as “photogenic”, was involved in corruption by colluding with hotels to inflate the residing prices when VIPs visited for a kickback and further secretly recorded the deputy governor to set him up against the governor.

51. The plaintiff’s case is that he was the only protocol director in the Nyanza Counties as the other counties in Nyanza had protocol officers. He further testified and called PW2 and PW3, witnesses who corroborated his testimony that he was known as “photogenic”, a nickname he had acquired in the course of his duty with County Government of Kisumu because of ever being present in photographs with the Governor of the County of Kisumu.

52. Further, the aforementioned witnesses testified that as a result of the impugned publication, they formed a negative opinion of the plaintiff and in the cases of PW2 and PW3, they started avoiding the plaintiff so as not to be associated with him.

53. It was the plaintiff’s case that the allegations in the impugned article maligned his character and lowered his reputation in the eyes of other members of the society.

54. On its part, the defendant filed a statement of defence denying the allegations made by the plaintiff and further stated that it did not specifically name the plaintiff in the impugned article.

55. In the case of *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377 [1939] 4 ALL ER 319, it was held as follows: -

“Where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff, they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him.”

56. This court noted that the impugned article by the Defendant herein showed that the Plaintiff had not been referred to by name. The question of his identity is a pertinent issue in determining whether or not the publication complained of was defamatory.



57. The uncontroverted evidence adduced herein by the plaintiff shows that he is the only Protocol Director within the Nyanza Counties and further that he was known by the nickname “photogenic”.
58. The plaintiff’s testimony was corroborated by the witnesses called by the plaintiff and they all were firm under cross-examination that; firstly, they knew the plaintiff as “photogenic” and as the only protocol director within Nyanza Counties, secondly, that they understood the impugned article referred to the plaintiff and thirdly, that as a result of the impugned article they avoided interactions with the plaintiff.
59. The defendant did not adduce any evidence to substantiate the allegations made in their impugned article or to tell the court the person whom the article referred to if not the plaintiff.
60. Section 112 of the *Evidence Act* provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. The court is entitled to make an inference that if such evidence is not produced, it would be adverse to such a party.
61. The failure by the defendant to call their informants to testify or adduce any evidence to substantiate its claims against the respondent shows that its sources of the information published were unreliable and the failure by the defendant to retract or apologize to the plaintiff who issued a demand Notice is evidence of malice.
62. There was no evidence presented by the defendant to show that they made any effort prior to publishing the impugned article to ascertain whether the contents of the article were true.
63. Article 33 of *the Constitution* guarantees every person the right to freedom of expression, which includes the freedom to seek, receive or impart information or idea. The right to freedom of expression is however not unrestricted. Article 33 (3) provides that:
- “(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”
64. In addition, the right to freedom of expression shall not extend to: (b) incitement to violence; (c) hate speech; or (d) advocacy of hatred that— (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or propaganda for war or vilification of others. In the case of *Nation Media Group Limited v George Nthenge Civil Appeal No. 64 of 2013 [2017] eKLR* the Court of Appeal held that:
- “Much as we acknowledge the intrinsic value of freedom of the press, we do not subscribe to the notion that the pen is a passport to experimentation and the taking of liberties with people’s reputations. Indeed, in some instances, a good name is all that a person has when much else is lost or gone, as was so poignantly the case with the respondent in this case who had had more than his fair shares of personal tragedy as the record shows”.
65. In this case, although the defendant was entitled to seek and impart information to the public, it was required to do so in a manner that respected the reputation of others, the plaintiff herein included. In the instant case, I find that the defendant paid little regard to the plaintiff’s reputation when it published the words complained of, which words referred to him albeit his name was not mentioned therein. The plaintiff adduced evidence to show that there was no other person who was the Protocol Director in one of the Nyanza Counties who went by the name photogenic, except him.
66. In addition, although the defendant contended that there was no innuendo pleaded, iam satisfied that paragraph 12 of the plaintiff’s plaint provides sufficient innuendo of the published article.



67. I hasten to add that the defendant's failure to call any evidence to rebut the evidence adduced by the plaintiff and his witnesses is a clear indication that it had no defence against the claim as pleadings and submissions do not amount to evidence. This position was appreciated in Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989 where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in Mohammed & Another vs. Haidara [1972] E.A 166 where that the contents of a plaint are only allegations, not evidence. Further in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulner Civil Appeal No. 23 of 1997, it was stated that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

68. On the consequences of a party failing to adduce evidence, in the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 it was appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

69. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

70. For the foregoing reasons, I find and hold that the plaintiff proved his case to the standard that is required in civil cases, being, on a balance of probability that the publication in question referred to him and was defamatory of him.

Whether The Court Should Award General Damages To The Plaintiff And If So, How Much

71. Having established that the defendant in publishing the impugned article defamed the plaintiff, what follows is whether general damages are awardable to the plaintiff and how much to award. Section 16A of the [Defamation Act](#) Cap 36 Laws of Kenya provides:

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:



Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”

72. A Protocol Director working in the County Government is a public Officer and subscribes to the Code of Conduct for public Officers. He is also bound by the National Values and Principles of Governance espoused in Article 10 of *the Constitution*. In addition, such an officer is bound by Chapter Six of *the Constitution* on Leadership and Integrity. He must not be found to cut deals as that is conduct that is inconsistent with the purposes and objects of this Constitution; (ii) does not demonstrate respect for the people; (iii) does not bring honour to the nation and dignity to the office; and (iv) does not promote public confidence in the integrity of the office; and goes against the principle of personal integrity, competence and suitability.
73. In this regard, the imputation of corruption and bribery was evident. these offences carry hefty fines and imprisonment terms of more than twelve months if found guilty hence the proposed general damages by the defendant is an understatement and offensive to section 16A of the Law of *Defamation Act*.
74. In the case of Raphael Lukale v Elizabeth Mayabi & Another [2018] eKLR, the Court of Appeal held as follows on the factors that ought to be taken into consideration in awarding damages in defamation cases;
- “In defamation cases, the Court of Appeal, in Standard Limited V G.N Kagia T/A Kagia & Company Advocates, Civil Appeal No.115 of 2003, set out the following principles to be applied in awarding damages: -
- 1) In situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages.
 - 2) The level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and publishers of libel. Personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.”
75. In the case of John v MGM Ltd (1997) Q.B 586 the English Court of Appeal said in part at page 607 paragraph F that:
- “In assessing damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.”
76. The plaintiff herein argued that his reputation was destroyed as a result of the impugned article. The testimony of PW2,3 and 4 was that as a result of the impugned article, they were initially shocked and called the plaintiff to ascertain the veracity of the claims of the impugned article and further that they started avoiding association with the plaintiff.



77. The plaintiff submitted that an award of Kshs. 15,000,000 as general damages and relied on the cases of Alinashir Visram supra, Henry Obwocha supra, Samuel Ndungu Mukunya supra and Christopher Obure supra.
78. On its part the defendant submitted that the award of damages sought by the plaintiff were manifestly excessive and went beyond solatium and that a fair assessment of general damages would not go beyond Kshs. 100,000.
79. In the case of Musikari Kombo v Royal Media Services Limited [2018] eKLR, the Court of Appeal upheld the award of Kshs. 5,000,000 as general damages to the appellant who was a former Minister and Member of Parliament.
80. In the case of Nation Media Group Limited v George Nthenge Civil Appeal No. 64 of 2013 [2017] eKLR, the Court of Appeal, the Court of Appeal upheld an award of Kshs. 5 million as compensation for defamatory words published against the respondent who was 80 years old and had had an illustrious political career in his heydays.
81. In this case, unlike in the above cited cases where the plaintiffs were either Judges of superior courts of political leaders of repute, I find that an award of Kshs. 2, 500,000 as general damages would be reasonable.

Whether The Plaintiff Is Entitled To Aggravated & Exemplary Damages

82. The Plaintiff also prayed for aggravated or exemplary damages. The law on exemplary damages was as stated by the predecessor of the Court of Appeal in *Obongo v Municipal Council of Kisumu* [1971] E.A. 91 to be as authoritatively declared by the former English House of Lords in *Rookes v Barnard & Others* [1964] AC 1129. The Court understood that English decision, per Law JA at P. 96-98;

“To be to the effect that exemplary damages are appropriate in two classes of case; oppressive, arbitrary and unconstitutional action by the servants of government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, and these classes should not be extended.”
83. The Court of Appeal endorsed the above position to be the law in this country in *Bank of Baroda (K) Ltd v Timwood Products Ltd* [2008] 236, among others.
84. As was stated by the Court of Appeal in the case of *Miguna Miguna v The Standard Group Ltd & 4 others* [2017] eKLR while quoting the case of *John v GM Limited* [1993] QB 586

“Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurried defence of justification or failure to apologize.”
85. Exemplary damages go beyond compensation. They are meant to punish the wrongdoer and act as a deterrent from similar conduct in future (See for example *Ken Odondi & 2 others v James Okoth Omburah T/a Omburah & Co. advocates* [2013] eKLR and *Standard Ltd v G. N. Kagia T/a Kagia & Co. Advocates* [2010] eKLR.
86. In *Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa* [2004] eKLR the court held that:

“Aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved.



They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copy right. Such damages are part of, or included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief.”

87. In the case herein, the plaintiff pleaded and submitted that he made demand to the Defendant to pull down the publication, apologize and pay damages for the defamation and the same was not responded to.
88. On exemplary/aggravated damages, the plaintiff proposed the respective sums of Kshs. 2,000,000 and Kshs. 3,000,000 whilst relying on the cases of Christopher Ndarathi Murungaru supra, Kalya & Company Advocates supra and Nation Media Group Ltd & 2 Others v John Joseph Kamotho & 3 Others where the court awarded exemplary and aggravated damages of upwards of Kshs. 1,000,000.
89. The defendant on its part suggested that the plaintiff was not entitled to exemplary and aggravated damages as the same goes beyond solatium as held in the cases of Nation Media Group Limited v George Nthenge supra and that of Royal Media Services Limited t/a Citizen TV & Another v Alfred Amaiya Maiko supra.
90. The authorities cited by the plaintiff are in respect to persons of different status from that of the plaintiff who indicated that he was a protocol director in the County Government of Kisumu.
91. In Halsbury’s Laws of England, 4th edition, 1979 (Sweet & Maxwell) at paragraph 243 at page 120 the learned authors state as follows on publications that are aimed at making a profit:

“In demonstrating the defendant’s calculation as to profit, it is not sufficient to show merely that the words were published in the ordinary course of business run with a view to profit; the publication must be intended to make a specific profit.”
92. The plaintiff herein argued that the defendant’s publication had a nationwide circulation and that in publishing the impugned article on its website, the defendant intended to maximize its profits.
93. Regarding aggravated damages, the authors in Halsbury’s Laws of England, 4th edition, 1979 (Sweet & Maxwell) at paragraph 237 at page 118 state that the manner and extent of publication, the defendant’s actual malice, the defendant’s subsequent conduct, the failure to apologize, the failure to prove the plea of justification and the conduct of the defendant’s case may increase or aggravate the damages.
94. There were several factors in the evidence before this court that demonstrated that the plaintiff was entitled to aggravated damages. The first was the fact that there was hardly any evidence linking the plaintiff to the alleged instances of corruption or whether the said instances occurred at the time the story was published. That notwithstanding, the defendant went ahead to publish the story.
95. In the circumstances, I find that exemplary and aggravated damages are merited and I proceed to award the plaintiff Kshs. 200,000. I rely on the case of Penthouse Group Limited & Aggrey Muhambi v Gloria Adisa Diffu [2021] eKLR, where the plaintiff owner of a construction company was falsely accused of not paying his sub- contractors and the court awarded him a similar amount for exemplary and aggravated damages combined.



Whether The Plaintiff Is Entitled To The Permanent Injunction Sought

96. There was also a prayer for a permanent injunction. It was prayer (d) of the Plaint. It stated as follows: -

Permanent injunction to restrain the defendant from ever publishing the impugned words contained in the article

97. The case of John Ntoiti Mugambi alias Kamukuru v Moses Kithinji alias Hon. Musa [2016] eKLR dealt with how Courts ought to deal with requests for permanent injunctions in defamation claims. This is what the Court stated:

“The way the orders sought are styled - borrowing from the words of Justice Ringera - is a net cast too wide over a large body of water, and out of all the lake or sea, it will catch all manner of creatures. In defamation cases, it is not possible to issue such boundless injunction which restrain any and all persons from saying anything about the Applicant; that will be a complete impairment of freedom of expression and public interest that truth should be out. An injunction in such cases must be specific in order to prevent such impairment or impediment of freedom of free speech and expression. Care should be taken, therefore, not to issue injunctions which will rapture the law and the Constitution.

If this order is granted as prayed, what yardstick will a person confronted with the order use to know or discern which interviews, articles, comments and or words are libelous or injurious falsehood or are similar words defamatory of the Plaintiff? On this subject, see what Mabeya J said in the case of Francis Atwoli & 5 Others =v=azungu Kambi & 3 Others Nairobi High Court Civil Duty No. 666 OF 2015,..”

98. An injunction order must be directed on specific acts complained of. In this case, the injunctive order sought by the Plaintiff referred to the specific impugned article that was published by the defendant and the injunction sought seeks to avert current and future contemplated defamations.

99. Accordingly, I am persuaded that the plaintiff merits grant of a permanent injunction restraining the defendant from publishing the impugned article. The prayer for injunction is therefore allowed as prayed.

Who Should Be Awarded Costs

100. Finally, as for costs, costs are in the discretion of the court, follow the event and to the successful litigant save where there is reason to deny such successful litigant costs. In Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 Mativo J. (as he was then) held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR

101. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party. I find no reason to deny the plaintiff costs of this suit.

102. Accordingly, the plaintiff is awarded costs of this suit.

103. The upshot of the above is that this court issues the following orders:

- a. General damages Kshs. 2,500,000



- b. Exemplary and aggravated damages Kshs. 200,000
- c. Permanent Injunction against the defendant restraining it from publishing the impugned article of and concerning the plaintiff
- d. Costs of the suit and interest on general damages from date of filing suit until payment in full.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF OCTOBER, 2023

R.E. ABURILI

JUDGE

