



**Tipper v Rosborg (Civil Suit E002 of 2022)  
[2024] KEHC 14010 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14010 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT E002 OF 2022  
SM MOHOCHI, J  
NOVEMBER 8, 2024**

**BETWEEN**

**ANNE MARIE TIPPER ..... PLAINTIFF**

**AND**

**SARAH ROSBORG ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit through the Complaint dated 27<sup>th</sup> January, 2022 seeking judgment against the Defendant. The cause of action according to the plaintiff arose from a publication of material on 22<sup>nd</sup> November 2012 attributed by the Defendant and shared correspondences addressed to third parties, “Play Kenya Managers’ without ascertaining the veracity of the information.
2. The words published that according to the Plaintiff were libelous and defamatory are: -

“...and we certainly cannot send funds when the said directors resigned from our organization but in the same breath try to take over the land that was gifted to Rafiki Mwema’s Children.

‘... Anne Marie has refused to answer questions in regard to huge amounts of money spent, about what its been spent on, when questioned by donors.

... have worked so hard for the past few years on making sure Rafiki Mwema is an organization of the highest international standard. Anne Marie Worked against this.

...let our children be free from stress and further trauma.



..would like to continue receiving thousands of dollars and spending it as she wishes with no questions at all so Peter and her can continue to live like royalty with holidays and purchases while others work so hard for very little.”

3. The Plaintiff contends that the said publication is marred with malice, falsehood, reckless and spiteful. That it disparaged her reputation and was intended to convey her as inter alia a dishonest corrupt person, of dubious character, that she misuses authority, is unaccountable and unreliable.
4. The Plaintiff therefore prayed for judgement against the Defendant for:-
  - a. A permanent injunction restraining the Defendant either by herself, her servants, agents and or proxies from publishing, printing and or circulating defamatory material about the Plaintiff or injurious to her reputation.
  - b. General damages for libel and or defamation.
  - c. Exemplary and aggravated damages for Libel and/or Defamation.
  - d. Order for retraction of and suitable public apology for the said defamatory materials or publication.
  - e. Costs of this suit.
  - f. Interests on (b) and (c) above.
  - g. Any other further relief that this Honourable Court may deem fit and just to grant in the circumstances.
5. The claim is denied by the Defendant through a Statement of Defence filed on 18<sup>th</sup> February, 2022 and denied the claim in toto.
6. The hearing proceeded viva voce with each party calling witness in support of their respective cases. Following the hearing the parties filed written submissions in support of their respective positions.

#### **Plaintiff Submissions**

7. On whether the publication was defamatory, the Plaintiff submitted that from the natural and ordinary meaning the statement did not convey the Plaintiff in a positive manner. Counsel listed essentials precedent for tort of defamation and relied on the Court’ interpretation on defamation in *SMW v ZWM* [2015] eKLR and similarly in *J Kudwoli & another v Eureka Educational and Training Consultants & 2 Others* [1993] eKLR.
8. It was submitted that the Defendant was a person in authority and the words have weight and used her position to make insights into the character of the Plaintiff.
9. It was argued that the Plaintiff was put to task to answer to questions by the donors on finances but no direct questions by the donors were produced in Court, that there was no evidence that the Plaintiff refused to answer donor queries despite being accused of that, no evidence as placed to show the luxury trips and holidays taken at the expense of those who work hard for little pay.
10. It was submitted that the Plaintiff is indeed entitled to the orders sought. That the Defendant had the opportunity to recant and apologize but refused and continued making allegations. In assessing the award to give the Court’s attention was drawn to the decision in *Standard Limited v G.N Kagia T/A kagia & Company Advocates* [2010] eKLR that cited the English Court of Appeal decision in



John MGM Ltd. And Aharub Ebrahim Kahatri v Nelson Marwa & Another: Director of Public Prosecutions (Interested Party).

11. Counsel relied on following decisions on the assessment of damages to wit Ernest Omondi Owino & another v Felix Olick & 2 Others [2021] eKLR, Samuel Ndung'u Mukunya v Nation Media Group Limited & another [2015] eKLR and Kalya & Co. Advocates v standard Limited [2002] eKLR. In that regard the Plaintiff thus proposed damages as below: -

General damages Kshs. 15,000,000

Aggravated damages Kshs. 2,000,000

Exemplary damages Kshs. 2,000,000

Damages in Lieu of Apology Kshs. 1,000,000

Total Kshs. 28,000,000

Defendant's Submissions

12. The Defendant on the other hand submitted that the Plaintiff has not established defamation and relied on the Patrick O'Callgham Common Law Series: The Law of Tort paragraph 25:1 and the decision in John Edward vs Standard Ltd where the Court laid down the ingredients for defamation.
13. It was submitted that the burden of proof is on the Plaintiff to prove defamation as was expounded in Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR. Counsel argued that the Plaintiff has not shown falsehood or how they brought disrepute or any form of hatred. Reliance was also placed in Phiness Nyaga Vs. Gitobu Imanyara [2013] eKLR to submit that it was not the publication of falsehoods must the Plaintiff had to demonstrate that the falsehood disparaged her reputation.
14. It was argued that the texts were sent to a social group of people who had worked with both of them and knew their behaviour. That no stranger was informed and they were not malicious. The Reasonable Man test was relied on as was explained in Winfiel & Jolowiez on Tort 8<sup>th</sup> Edition.
15. That by pleading justification, the Defendant submitted that the same was published in good faith in public interest and without malice. That the Plaintiff was given an opportunity to refute the allegations and failed to and that the text was a fair comment.
16. The Defendant further submitted that the claim is a non-starter as the defamatory text was not set out in verbatim in the Plaintiff.
17. The Defendant submitted that the Plaintiff is not entitled to the reliefs sought. That as part of her public role, she needed to welcome the repercussions. Counsel relied on the case of John Ntoiti Mugambi alias Kamukuru vs Moses Kithinji alias Hon. Musa [2016] eKLR to submit that the prayer for permanent injunction amounts impairment to freedom of expressions and public interests.

### **Analysis and Determination**

18. I have considered the pleadings filed and the arguments propounded in support, the evidence adduced during the trial, the written submissions, the authorities relied on and the applicable law. The issues for determination are thus: -
- a. Whether the entire suit is a non-starter for want of pleading verbatim the publication?
  - b. Whether the publication made was defamatory in its natural and ordinary meaning?
  - c. Whether the defence of justification is applicable?



- d. Whether the Plaintiff is entitled to the reliefs sought and to what extent?
19. The crux of the matter is that a publication was made on a WhatsApp group titled “Play Kenya Managers” by the Defendant. The Defendant made several allegations and even mentioned the Plaintiff by name as being involved in expending money unjustifiably. According to the Plaintiff, the publication was false, full of malice and out of spite.

**Whether the entire suit is a non-starter for want of pleading verbatim the publication?**

20. The Defendant submitted that there was no way for the Court to ascertain the veracity of the words in the publication since the Plaintiff only provided excerpts. The Plaintiff on the other hand submitted that the larger text should be considered and not just the extract in Paragraph 4 of the Plaintiff.
21. The Court of Appeal in Raphael Lukale v Elizabeth Mayabi & Another [2018] eKLR held: -
- “...All the law requires is that the Plaintiff must try as much as possible to reproduce the words used in a defamation claim. See Gatley on Libel and Slander, 11<sup>th</sup> Edition at 28.17 page 973 “...If the exact words cannot be pleaded, the words must at least be set out with reasonable precision.”
22. In an action for defamation the actual words, or the part complained of, must be pleaded and clearly set out. Paragraph 4 of the Plaintiff highlights statements where the Plaintiff felt were injurious to her character or reputation. The Plaintiff’s name was disclosed the excerpt in the Plaintiff.
23. Although the Plaintiff did not quote the whole publication which from the look of it was quite lengthy she pleaded words in the publication with reasonable precision which she felt injured her reputation or put her to ridicule or questioned her character.
24. The Plaintiff isolated the specific words in the publication that carried the defamatory remarks. I have no doubt that the Plaintiff pleaded and reproduced the words to the satisfaction of this Court therefore the purport or effect of the defamatory words was set out verbatim.

**Whether the publication made was defamatory in its natural and ordinary meaning?**

25. To prove the elements of the tort of defamation the Plaintiff has to demonstrate that publication tended to lower her reputation in the estimation of right-minded persons in the society or caused her to be shunned or avoided by other persons. see James Njagi Joel v Junius Nyaga Joel [2020] eKLR.
26. The Court of Appeal in case of Wycliffe A. Swanya v Toyota East Africa Limited & Another (2009) eKLR outlined the elements of defamation as follows: -

“It is common ground that in a suit founded on defamation the plaintiff must prove: -

- i. That the matter of which the plaintiff complains is defamatory in character.
- ii. That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- iii. That it was published maliciously.
- iv. In slander subject to certain exceptions that the plaintiff has suffered special damages.”



27. The ingredients of defamation are that the statement must be defamatory, it must refer to the Plaintiff, it must be published by the defendant and it must be false. It is not in dispute that the publication was made in a WhatsApp group of “Play Kenya Managers” by the Defendant. It is also not in dispute that it referred to the Plaintiff. The question to be answered therefore is whether the publication was defamatory and done out of malice.
28. The Court of Appeal in *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR stated that: -
- “The common law protects every person from harm to their reputation by false and derogatory remarks about their person, known as defamation. It is a tricky and slippery field of law, based on statutes, English common law and many defences. No wonder it has been called a “peculiar tort” ...”
29. From what is pleaded as was published reflects the Plaintiff: -
- a. plans take over the land that was gifted to Rafiki Mwema’s children.
  - b. has refused to answer questions in regard to money spent when questioned by donors.
  - c. has worked against making sure Rafiki Mwema is an organization of the highest international standard.
  - d. Plaintiff and one Peter continue to live like royalty with holidays and purchases while others work so hard for very little.
30. The duty of proving the averments contained in the Plaintiff lay with the Plaintiff. PW1, PW2 PW4 and PW5 testified that they were all shocked by what they saw in the publication in the WhatsApp group. The witnesses were known to both the disputants and passed the reasonable man’s test.
31. PW5 testified that she got the impression that the Plaintiff was greedy, difficult, has something to hide has a different lifestyle which she shares with Peter. PW4 testified that he considered Peter as their son and the allegations were horrific.
32. From the testimony of DW1 and DW2 there was no direct evidence of financial impropriety. She however admitted that there had been no audit and what they could proof according to DW1 was Kshs. 1.2 Million could not account for.
33. The questions asked in the emails on finances were responded to by PW4 and the Defendant admitted in cross examination that she had no evidence of takeover of the land. There is also no evidence of living like royalty presented as alleged and further DW1 confirmed that the Plaintiff was not getting paid. What has also not been presented is the queries from these donors that the Plaintiff failed to answer to.
34. Publishing the statements in the WhatsApp group by the Defendant appeared personal, was unethical and quite reckless. It subjected the Plaintiff to public ridicule to people she worked with. In my considered view, the publication lowered her estimation in her professional life and even her family life.
35. I have no doubt that, the publication caused the Plaintiff embarrassment. I am further not doubtful that the words referring to the Plaintiff caused her damage and injury. I accordingly find that the publication was defamatory in nature as it went into the conduct, integrity, and character of the Plaintiff.
36. On whether there was malice in the publication, actual malice is proved on a balance of probabilities and recklessness in itself is evidence of malice. DW1 admitted that the queries are yet to be resolved



and the issue of title was yet to be resolved. So why was she making that publication and making those allegations if the jury was still on duty?

37. One Natasha even asked whether the same was a personal message from the Defendant or she was representing the EC. Failure to tender reasonable justification is evident that the publication was malicious.

38. 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.”

39. The record shows that there were prior correspondences that were done on email. Why the conversation moved to a social group to third parties is what is improper. Suffice to say that there was no justifiable cause to utter the words. Malice was properly drawn.

#### **Whether the defence of justification is applicable?**

40. The Defendant’s statement of defence only comprises of mostly denials. The Defence of justification and fair comment was brought out in the submissions. Nevertheless, at paragraph 6 of the Statement of Defence, the Defendant pleaded that the words paint the true picture of the Plaintiff’s character. The Defendant insisted that information published was in good faith and called DW2 to prove that the same was a fair comment.

41. Justification in defamation means the truth. In Hon. Uhuru Muigai Kenyatta v Baraza Limited (2011) eKLR the Court observed thus.

“...While taking defence of justification or qualified privilege in the 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.....”

42. The Defendant is put to task to prove the information was true. The Court in the preceding authority observed that the information that causes the defamation, will be assumed to be untrue until the Defendant proves that it is the truth for the defence of justification to be applicable.

43. The Defendant was put to task to prove the truthfulness of the words published about with respect to the Plaintiff. It is my considered view that the Defendant failed to prove that what was published in length was the truth, further there was no justifiable reason to post that in the WhatsApp group at all.

44. The Defendant submitted that under Article 33 and 34 of *the Constitution* the public is entitled to know and have information about events and occurrences in the country and a public duty was in the organization to be open with the public.

45. Article 33 of *the Constitution* guarantees every person freedom of expression. That freedom is however not absolute. It most specifically as it does not extend to, hate speech or advocacy of hatred that



constitutes vilification of others. Article 28 of *the Constitution* provides that every person has inherent dignity and the right to have that dignity respected and protected.

46. There were better ways of dealing with the issues raised in the publication. If the Defendant felt the explanation given in the email correspondences was not satisfactorily, I believe the institution had better channels of dealing with the issue other than parading the differences in a social group. I therefore dismiss the defence of justification and fair comment as it is far-fetched and unsupported.
47. On whether the plaintiff is entitled to the reliefs sought, a successful plaintiff in a defamation action is entitled to recover the general compensatory damages of such sum as will compensate him for the wrong he has suffered. See *Elisha Ochieng Odhiambo v Booker Ngesa Omole* [2021] eKLR.
48. I draw reference in the following decisions where awards for defamation and libel were given:
  - a. In *Madanji v Nairobi Star Publication Limited* [2023] KEHC 24320 (KLR) the Plaintiff was awarded General damages Kshs. 2,500,000 and exemplary and aggravated damages Kshs. 200,000.
  - b. In *Waweru v Chege* [2024] KEHC 3378 (KLR) the Plaintiff was awarded Kshs. 2,000,00 as general damages for libel and Kshs. 500,000 in lieu of tendering an apology
  - c. In *Ambe v Onyango* [2024] KEHC 6138 (KLR) the Court assessed damages for defamation at Kshs.2,000,000.
49. It is to be noted that each case is different and damages are awarded depending on the circumstances and the injury occasions. The Court of Appeal in *CAM v Royal Media Services Limited* [2013] eKLR stated that:

“No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in *Jones V Pollard* (1997) EMLR 233-243 include 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; 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; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff’s reputation past and future.”
50. From the foregoing, I find that the Plaintiff is entitled to general damages for defamation and consequently an award of Kshs. 2,500,000 would be sufficient in the circumstances. The Plaintiff is also entitled to apology sent in the same manner the publication was made. I further find that the award for general damages is sufficient and the Plaintiff is not entitled to prayers of exemplary and aggravated damages.
51. Pertaining to the permanent injunction sought, having found that the Defendant acted with malice and defamed the Plaintiff without justifiable reasons, I find that the permanent injunction sought is deserved.
52. The upshot of the foregoing is Judgment is hereby entered for the Plaintiff against the Defendants as follows:



- a. An Order of Permanent Injunction is hereby issued restraining the Defendant either by herself, her servants, agents and or proxies from printing, publishing and or circulating materials defamatory of the Plaintiff or injurious of her reputation;
- b. Order is hereby issued for retraction of an apology for the said defamatory publication to be issued by the Defendants within 30 days from this judgement;
- c. General damages for defamation of Kshs. 2,500,000/-
- d. Cost of this suit;
- e. Interest at Court rates from the date of this judgement.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024**

.....

**MOHOCHI SM**

**JUDGE**

