



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL CASE NO.19 OF 2016**

**EZEKIEL ODUK.....PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED.....DEFENDANT**

**JUDGMENT**

**THE PLAINTIFF'S CASE**

1. The plaintiff is an advocate of the High Court of Kenya practicing under the name and style of Oduk & Company Advocates. He sued the defendant, a media house, vide a plaint dated 28<sup>th</sup> November 2016 for publishing defamatory statements about him.

2. The plaintiff claimed that on the 18<sup>th</sup> day of November 2016 at 9.00pm, the defendant caused to be broadcast and published in its prime time news bulletin an item under the heading "*Lawyer defies orders by LSK to pay old man's money. JUSTICE FOR MZEE OWALO.*" The words published by the defendant that evening were as follows;

*Owalo: Mimi nalia sana*

*Mimi nalia sana. Oduk amenifanyia mambo mbaya.*

*Ken: Tears shed by a desperate, dejected old man. A man on the verge of giving up hope. Hope of realizing returns made on investments made 20 years ago.*

*Owalo Nyaugu, like many inhabitants of the Southern part of Nyanza was a large-scale sugarcane farmer.*

*Owalo: Nodongo, Nodongo mochiegnichopo...{Inaudible} ...*

*Otuomonindo pinykama.*

*Ken: In 1992, Mzee Nyaugu entered into an agreement with the South Nyanza Sugar Company, also known as SONY Sugar Company, to plant sugarcane on his vast land. And they did. Years later, the cane remained unharvested and withered away in the field.*

*Nyaugu would then hire the services of Ezekiel Oduk, who duly filled a suit on his behalf in court against SONY.*

*Owalo: Kukuja kukatwa mwaka elufu nne na moja, ilikua imekauka. Nikampa advocate kesi hiyo. Ashtaki SONY. SONY ikalipa. Yeye akakataa kwa pesa yangu.*

*Ken: After a protracted court battle that went all the way to the apex court at that time, the matter was settled when SONY admitted liability and an amount, according to Mr. Nyaugu, of 1.675 Kshs. was paid. This claim is supported by documents and copies of a cheque. Nyaugu claims that he only received 82,000 shs. from the lawyer.*

*Owalo: Mtu mwenye alikua na kazi mzuri. Tena anaibia watu. Mimi nalia sana. Mimi nalia sana. Oduk amenifanyia mambo mbaya. Ndio mimi namwingilia.*

*Ken: That was back in 2004. To-date, Mzee Nyaugu claims he has not received any more payment.*

*The lawyer, Oduk, who provided us with some documents, but declined to be interviewed on camera confirms this and states that he*

settled Mzee Nyaugus dues hence was discharged from any more liabilities.

Owalo: Bibi yangu mmoja alikufa, pesa zake hakuziona. Bibi yangu yuko, pesa zake hajazona. Mimi nilikua na kesi mbili. Pesa zao sijazona. Hizo pesa zote zilikuwa million moja mia sita. Advocate alikuwa amezichukua. Mimi nikamuomba anipe pesa akakataa. Nikamshtaki kwa law society. Yeye alikuwa ameshaagana na hao. Hawakunipa hiyo pesa. Ndio mimi nalia.

Ken: In 2005 Nyaugu through one Antipas Nyanjwa, lodged a complaint before the advocates' disciplinary committee which looked into the allegations against lawyer Oduk.

In 2006, the disciplinary committee found Oduk to have failed to show or account for the monies received on behalf of Mr. Nyaugu and rejected some of the documents he filed to support his case, having settled the matter with the farmer. In conclusion the disciplinary committee stated that the accused advocate is still withholding the 1.6 Million Shillings belonging to Mr. Nyaugu.

Owalo: Million moja, miaka kumi kama mimi ningekua napiga biashara, pesa yangu ingekua ngapi? Si ingekua rundo? Ingekua mingi. Ingekua hata milioni kumi.

Ken: The most disturbing part of the findings made by the disciplinary committee, is that Oduk took advantage of the farmers illiteracy by presenting plain or blank papers for the farmer to sign. He was compelled to pay the amount of 1.6 Million Shillings and admonished by the Committee.

In response to our questions, lawyer Oduk, who practices in Nairobi, claims he fully settled the amount owed to the farmer while faulting the findings of the disciplinary committee.

In Awendo however, Nyaugu continues to blame Oduk for his poverty and the death of his wife who he says could have been saved had he been paid the money in time.

Unidentified Man: Mimi kama kijana wa huyu mzee mkubwa nasema kwamba akikataa kulipa mzee pesa yake basi ajitayarishe atazika huyu mzee kwake.

Ken: NTV spoke to the SONY sugar Company management and they confirmed that they settled the claims and availed documents that support their position. Oduk does not deny receiving the settlement but says the amount released by SONY was to settle several cases and not only mzee Owalo Nyaugu.

Ken Mijungu

3. The plaintiff claimed that the words in their natural and ordinary meaning were understood to mean;

- a. That the plaintiff was a thief and a scoundrel who had stolen from his client a sum of Ksh. 1,675,000/ =
- b. That the plaintiff deceitfully paid to Owalo a sum of Ksh. 82,000/= whereas Owalo was entitled to Ksh. 1,675,000/ =
- c. That the plaintiff deceitfully paid to Mr. Owalo a sum of Kshs. 82,000/ = whereas Mr. Owalo was entitled to Kshs. 1.8M.
- d. That the plaintiff was ordered by the Disciplinary Committee of the Law Society of Kenya to pay to Mr. Owalo, Ksh. 1.6M a fact it knew or ought to have known was not true.
- e. That the plaintiff habitually steals from people.
- f. That the plaintiff is a corrupt person who was guilty of manipulating the Law Society of Kenya into denying Mr. Owalo, money.
- g. That the plaintiff was defiant of authority in that he failed to pay Mr. Owalo Kshs. 1.6M as he was ordered by the Law Society of Kenya a fact or statement which it knew to be untrue or ought to have known to be untrue.
- h. That the Disciplinary Committee of Law Society of Kenya made a finding that the plaintiff was holding a sum of Kshs. 1.6M belonging to Mr. Owalo a fact which it knew or ought to have known was untrue.
- i. That the plaintiff practiced trickery on Mr. Owalo by making him sign blank papers and was therefore a dishonest person which fact it knew to be untrue and was unsupported.
- j. That the plaintiff was an immoral person and person of a depraved character.
- k. That the plaintiff was not fit to practice the profession of law.
- l. That the plaintiff has withheld Owalo's money and therefore condemned him to poverty and destitution.

4. The plaintiff claimed that on 18<sup>th</sup> November 2016, the defendant published a news item on social media and on the internet containing the

following words;

"Peasant farmer conned Kshs 1.8 million by lawyer

Kenya NTV

42,811

2,466 views

Published on Nov 18, 2016

*A 77 year old man is tonight crying for justice. Owalo Nyaugu from Migori County is seeking the help of the advocates complaints commission after his lawyer allegedly took off with his compensation of 1.6 million shillings 15 years ago... Now a peasant farmer, Nyaugu has been pursuing the Nairobi based lawyer for the better part of the last decade and a half without success. NTV found Nyaugu at his Awendo home, a home that paints a picture of destitution and raises questions of morality among advocates.*

5. According to the plaintiff, the above words were understood in their natural and ordinary meaning to mean;

- i. That the plaintiff was a thief and a conman who stole from his client a sum of Kshs. 1.8M.*
- ii. That the plaintiff practiced trickery on Mr. Owalo by making him sign blank papers and was therefore a dishonest person which fact it knew to be untrue and was unsupported.*
- iii. That the plaintiff was an immoral person and of a depraved character.*
- iv. That the plaintiff was not fit to practice the profession of law.*
- v. That the plaintiff has withheld Owalo's money and therefore condemned him to poverty and destitution*

6. The plaintiff claimed that on 23<sup>rd</sup> November 2016, the defendant ferried Owalo Nyaugu to his rural home in Kamreri sub-location, Migori County, where it organized a sit-in drawing large crowds of people and rebroadcast the words complained of.

7. The defendant was accused of publishing the words despite being supplied with various documents showing that the awards in Kisii CMCC 444/2000, 437/2000, 434/2000 and 431/2000 had been compromised award in an out of court settlement and other documents showing that Mr. Owalo and his wife Consolata Anyango had acknowledged payment for the respective claims. The plaintiff also claimed that he had furnished the defendant with a copy of the finding of the Disciplinary Committee in Case No. 59 of 2006 which found that Mr. Owalo's due had been paid.

8. The plaintiff claimed that the defendant had broadcast the words having calculated to benefit in terms of increased viewership, circulation or hits that would outweigh any compensation payable to him. He averred that his reputation had been seriously damaged and injured. And he had, as a result, suffered considerable distress and anxiety. He also claimed that his business as a legal practitioner had been greatly dented. He complained that the defendant made no reference to the documents he sent and falsely claimed that he had declined to comment on the allegation, whereas they had had conversations over the matter on phone.

9. The plaintiff therefore sought the following orders;

- a. Damages for libel including exemplary damages;
- b. A permanent injunction restraining the defendant and whether by itself, its servants or agent or otherwise from further publishing or broadcasting or causing to be published or broadcast the said words and images or any words and images similarly defamatory of the plaintiff;
- c. Costs of this suit;
- d. Any other relief this court may deem just and fit to grant.

#### **THE DEFENDANT'S CASE**

10. Although the defendant admitted, in its amended statement of defence, that it had broadcast the words complained of on 18<sup>th</sup> November 2016 in the news at 9:00 p.m. and on the internet it denied that the words were defamatory. The defendant claimed that it merely aired what had been said by Mzee Owalo without taking or adding anything and denied the meaning ascribed to its publications by the plaintiff.

11. The defendant further averred that the words were true in substance and denied receiving any documents to prove payment to Mr. Owalo. The defendant claimed that it had sought information from the plaintiff and given him an opportunity to deny or correct the facts but he denied to do so. It also denied that it had organized a sit-in at the plaintiff's rural home on 23<sup>rd</sup> November 2016 as claimed by the plaintiff.

The defendant averred that in the event that the words published consisted of a misrepresentation in any aspect, the misrepresentation was made without malice.

12. The plaintiff filed a reply to defence reiterating the averments made in his plaint. He insisted that the publications were made deliberately, recklessly and with malice. He averred that the defendant had failed to publish an explanation or apology despite being requested to do so.

### **THE EVIDENCE**

13. The matter proceeded for hearing before this court between 11<sup>th</sup> March 2020 and 14<sup>th</sup> December 2020. Six witnesses testified in support of the plaintiff's case whereas the defendant called one witness.

14. The plaintiff, Ezekiel Oduk (PW1) adopted his statement and listed documents as his evidence. He added that he had been practicing as an advocate since 22<sup>nd</sup> October 1985. Regarding the defendant's publication, PW1 testified that the defendant's report did not reflect what had arisen out of the disciplinary proceedings. He testified he ran a joint interest account with the advocate of Sony Sugar at KCB which had a deposit of Kshs. 6 million. Any farmer who wanted to be paid would approach and settlement would be done. He denied retaining a sum of Kshs. 1.6 million as alleged. He testified that the sum of Kshs. 1.6 million was paid to them by cheque in 2005 as advocate's costs. He insisted that all farmers had been paid out of the deposit of 6 million held at the bank.

15. PW1 testified that the reporter had lied when he said that the farmer got only 82,000/=. He stated that they had given Ken Mijungu a document showing that the farmer had been paid Kshs. 111,319/= in CMCC 434 of 2000 and an additional a sum of Kshs. 93,876/= for CMCC No.444 of 2000 in August of 2003 and September of 2003 respectively. However, the media had ignored that information.

16. PW1 insisted that he had not declined to give his version of the story. He testified that he had talked with the media on phone and sent them the relevant information when he got it. He also testified that the defendant had claimed that he had failed to pay the wife called Consolata Anyango in Case No. 434 of 2010 but the documents they sent had the information that Consolata had sworn that she had been paid Kshs. 64,703/80 after she compromised her suit. They also sent a copy of the grant, a general power of attorney and identity form showing the person paid on account of Jane but the defendants reported that because PW1 had not paid her, she died.

17. PW1 stated that the defendants had aired a false caption that he had defied the LSK Disciplinary committee to pay peasant farmer. He testified that they sent a copy of the findings of the disciplinary proceedings and told Mr. Ken Mijungu that he did not agree with the finding of the Disciplinary Committee. PW1 pointed out that the Chairman of the committee had refused to sign the decision. On the complaint by Antipus, PW1 testified that the complainant had not understood the indemnity hence the claim that PW1 had overcharged him. PW1 was adamant that there had been no allegation and finding by the Disciplinary Committee that he was withholding 1.6 million as reported by Mr. Mijungu.

18. PW1 told the court that he had suffered a lot of damage as a result of the publication. He recalled that he had pioneered SONY cases in the region whilst many advocates did running down matters but he had since lost ground and various firms had taken up the cases. He testified that he no longer had the cases he used to have then because of loss of reputation. PW1 testified that being shunned felt like death. He testified that on 23<sup>rd</sup> November 2016 they asked Nation Media to correct the impression they had created and pull down the publication from the internet but they refused to do so and the news was still trending.

19. The court was informed that a crew from Nation T.V had ferried Nyaugo and one of his wives to PW1's rural home and staged a sitting. PW1 had to call the police. He testified that they had done that to embarrass and defame him further. The defendant's agents were accused of taking videos of his home causing the whole village to go to his home as if there was death. PW1 testified that what the defendants published was not a fair and accurate report of what had transpired before the Disciplinary committee. He therefore urged the court to disregard the defendant's defence and grant him the prayers sought in his Plaint.

20. During cross- examination, PW1 confirmed that he had represented Mr. Omolo in 2 cases where awards were given. He testified that for in case No. 434 the award was reduced to Kshs. 324,879/= and they paid Kshs. 111,319/= in case no.444 of 2000 the claimant was paid Kshs. 67,000/=. PW1 testified that after the Court of Appeal stopped execution against SONY, the company approached them to settle the awards at reduced figures.

21. He testified that Mr. Owalo and the wives had agreed to reduce the amounts based on a formula indicated in the indemnity. He stated that he had paid Owalo twice in 2003. He paid Jane through an agent empowered by Mr. Owalo as she had died.

22. On being referred to the proceedings before the Disciplinary Committee, PW1 testified admitted that the Disciplinary Committee had found that no proper accounts were given. He also admitted that he had been convicted for withholding money for over a year. He testified that they had filed a Judicial Review Application No. 288 of 2007 on the decision but it got caught up and was not determined. Therefore, the judgment of the Committee had not been overturned.

23. PW1 testified that a year later, he was paid a sum of Kshs. 1.6 million as costs since he had done over 30 cases accumulatively. He testified that Mr. Owalo had been misguided or misled into thinking the money was all his. He testified that he had sued Mr. Owalo for the utterances he had made against him.

24. He further testified that he had done similar cases for 25 years and his first case was instituted in 1998. He asserted that Nation media had a duty to verify information before reporting. That there was need for diligence and fairness in reporting the story and that although the judgment had not been overturned that did not justify false reporting. He also testified his being called by Nation Media did not amount to fairness. He testified that he got a missed call and after calling back he learnt that it was Nation Media.

25. Andrew Ogola Magana (PW2) adopted his statement as his evidence. In it he indicated that he was among the farmers represented by PW1 in cases against the South Nyanza (SONY) Sugar Co. Ltd for breach of sugar cane growing contracts between 1999 and 2000. He recalled that SONY had refused to pay and the case had gone up to the Court of Appeal where he was the lead respondent. SONY deposited Kshs. 6,000,000/= as a condition for the appeal. PW2 indicated that in 2003, their advocate informed them that SONY's advocate had proposed a settlement rather than go through protracted litigation. He recalled that Mr. Owalo Nyauga was in the forefront of the idea of settlement. PW2 stated that he had gone to Nairobi with Mr. Owalo in August 2003 where he witnessed him being paid for one of the cases. In September 2003 Mr. Owalo was paid for the second case at the lawyer's rural home at Kamreri. He stated that also witnessed his wife, Consolata Anyango being paid in Kisii. He stated that they were paid out of the deposit of Kshs. 6,000,000/= and a further Kshs. 1,675,380/= was paid to cover any shortfall. According to him, the amount could not have been meant for Owalo's dues as he had been paid fully. PW2 stated that he too was paid in full. During cross examination, PW2 stated that the only people he heard talking ill of the lawyer were Owalo and his wife Consolata.

26. Rispar Atieno Kohot (PW3) testified that she was a student and had been working with the firm of Oduk & Company advocates since 2015. She told the court that she had delivered documents relating to the matter to Mr. Ken Mijungu. She stated that she had read the judgment by the Disciplinary Committee but the position of her employer was that they had made an error.

27. Lawrence Nyangacha (PW4) testified that he resided at Kamwere in Migori County and the plaintiff, Mr. Ezekiel Oduk was his neighbour. In his statement which he adopted as his evidence, PW4 had indicated that on 23<sup>rd</sup> November 2016, at about 8:00 a.m. a motor vehicle came and stopped at Mr. Oduk's gate. PW4 noticed that among the 4 visitors, 2 of them were carrying a camera. One of the camera man told him that he was Mr. Ojwang from NTV and his co- worker. They were accompanied by an old woman and an old man. The old man told him that he was Owalo Nyauga and the old woman was his wife. The two gentlemen started taking photos. The old man started screaming saying that Oduk had stolen Kshs. 1.6 million from him and only gave him Kshs. 85,000/=. The old man also accused Mr. Oduk of using his money to build a storied house. He kept on hitting the gate with his walking stick as he talked. Mr. Ojwang purported to interview the old man and instructed him not to leave the gate until he was paid.

28. PW4 stated that he called Mr. Oduk and informed him what was going since he was in Nairobi. Mr. Oduk called the D.C.I.O. and the area chief who went to the scene with the police. PW4 recounted how he together with the old couple, the chief, Mr. Ojwang and his co-workers were put in a Land Cruiser and driven to Kamagambo police station. The couple gave the OCS a letter from the LSK and upon going through it, the OCS stated the lawyer had been cleared. Mr. Ojwang was advised to go to court for further assistance. PW4 stated that many people had heard and seen the commotion and viewed Mr. Oduk as a thief.

29. The plaintiff's brother, Gideon Magak Oduk (PW5) adopted his statement as his evidence. PW5 wrote in his statement that on Friday 18<sup>th</sup> November 2016 at 7:00 p.m., he was watching NTV news. About 15 minutes in, he heard them air a piece captioned "Justice for Mzee Owalo." When he heard the *mzee* mention the name "Oduk" he became more attentive. Three minutes or so later, a picture of the plaintiff appeared on the screen. PW5 stated that he was shocked beyond words. He called the plaintiff and when he failed to pick, he called his other brother Eric Oduk. He asked his brother to switch to NTV and his brother was able to catch some of the story as it was long.

30. The *mzee* was crying in a homestead claiming that money paid to him through the plaintiff to the tune of 1.5 million had not reached him. PW4 claimed that the *mzee* kept on mentioning the name Oduk in the manner a dirge was sung. PW5 stated that as he watched the news he felt as though he was seeing someone kill the plaintiff. At about 10 p.m. PW5 received a picture of a TV set with the plaintiff's image asking whether the caption was true and he responded that he was not sure. PW5 stated that the damage done to the plaintiff's image and their surname was enormous. During cross-examination PW5 stated that he did not believe the report. He stated that from then on the plaintiff did not remain the person they knew him.

31. Florence Oduk (PW6) produced a certificate on information she had downloaded from YouTube. She stated that the story had not been pulled down from You Tube yet. During cross-examination, PW6 testified that the plaintiff was her brother. She stated that she had made the statement from what she got on 19<sup>th</sup> November 2016. She stated that when a content developer uploaded an item on YouTube, anyone could view it from the platform. She could not tell whether what was in the Plaintiff was similar to what was in the video but stated that she had watched the video the following day after it had been aired.

32. On behalf of the defendant, Sekor Owino (DW1) adopted his statement and list of documents as his evidence. He proceeded to insist that the broadcast was not false. He testified that the complainant had complained that he had issues with his advocate and had documents to prove it. DW1 testified that the story was done by Ken Mijungu who called the plaintiff for comment and also called the sugar company. DW1 told the court that the words uttered on the broadcast were an interview of Mr. Nyangu himself. He testified that in addition to being called, Ken had gone to Mr. Oduk who refused to appear on camera. He explained that he was a witness as the story was aired when Ken was on training.

33. DW1 stated that the story broadcast online and was not trending. Unless one was looking for it, they could not get it. He also testified that they archived stories within one year. He admitted that they had received a demand for an apology but since they had given Mr. Oduk a fair hearing they were of the view that there was no need to remove the story.

34. During cross examination, DW1 admitted that there was a likelihood that there was a mistake on the figures broadcast. He could not tell where the figure 1.8 million had come from. He testified that he did not know where Mr. Owalo met Ken who was on sabbatical at the time. He also stated that they had not found it necessary to call Ken as a witness.

35. DW1 was not sure whether the article could still appear if one went looking for it. He maintained that he believed the information aired was true in substance and fact and was not an exaggeration. He however admitted that they had said something beyond what was in the judgment yet they had a copy of it when the story was aired as the plaintiff had sent documents to Nation media.

## **SUBMISSIONS**

36. At the close of the case, both parties filed written submissions and made oral submissions before this court. For the plaintiff, it was argued that through the testimony of the 6 witnesses, which was not shaken on cross examination, the plaintiff had proved that the defamatory publication had been made. On DW1's testimony, counsel pointed out that the witness was a secondary witness and may have imputed his own perceptions which may have been different from what the reporter had when he aired the offending words.

37. Counsel submitted that the witness could not tell where the figures that had been broadcast came from. He submitted that the defendant's actions of looking for Owalo at his home demonstrated that the defendant was motivated by malice.

38. It was submitted that the onus of proving that the report was fair and accurate rest upon the defendant. In this case, the defendant did not know the source of the information reported and could not purport to have given a fair report of the proceedings. He urged that reporting of proceedings should be accurate which had not been the case here.

39. Counsel submitted that for a comment to suffice as a fair comment, it was not to be so mixed up with the facts that the reader could not distinguish between the report and the comment. Counsel submitted that the defence of fair comment could not hold as Ken Mijungu had not testified so as to show that he genuinely held the view he expressed.

40. It was the plaintiff's submissions that the inaccurate publication had infringed upon his inherent right to dignity as protected under Article 28 and was a violation of Article 33 (3) of the Constitution which called for the respect of the rights and reputations of others. The case of *Nairobi Star Publications and Vincent Agoya vs Ambrose Otieno Weda* was cited in support of the position that inaccurate reporting dented the reputation of an advocate yet advocates were in the service industry where reputation and image were critical. He also cited the case of *Dorcas Florence Kombo vs Royal Media Services Limited and Daniel Musinga & Co. Advocates vs Nation Newspaper Ltd [2005] eKLR* in support of the submissions that malice could be inferred from deliberate recklessness or negligence. In this case, the defendant had deliberately ignored the verdict of the Tribunal and added its own things to make the news saleable.

41. The respondent on the other hand urged that the words that had been published were substantially true and formed part of an interview with the plaintiff's client, Owalo Nyaugu who was the one that should have been sued. They were also based on facts which were the subject of a disciplinary case and the decision of the Disciplinary Committee which had not been appealed against.

42. The defendant's learned counsel relied on the defence of qualified privilege as defined at **section 6** of the **Defamation Act** and the case of *Julius Vana Muthungya vs Katuuni Mbila Nzai (Garissa HCCA No. 1 of 2019)*. It was submitted that the effect of the defence was to balance two competing interests of an individual's rights to protect his reputation and the public's right to be informed. It also guaranteed the media's freedom under Article 33 of the Constitution. It was argued that the article in this case unlike the cases cited by the plaintiff was substantially based on facts.

43. Counsel justified the word of the use "con" by the defendant. She argued that the word was not farfetched as it smacked of "failing to account" which is what the plaintiff had been convicted of. Counsel further submitted that the matter was of public interest and the defendant was therefore under a duty to publish the words to the public. She cited the case of *MM vs The Nairobi Star Publications Ltd HCCC No. 234 of 2010*, where the court dismissed the suit on the grounds that the defendant was merely reporting court proceedings. She also relied on the case of *Halkano Molu vs Kenya Broadcasting Corporation HCC No. 833 of 2007* where the court held that journalism was not devoid of mistakes and what had to be proved was that the defendant acted with malice.

44. In this case, the plaintiff had been given an opportunity to explain his position on camera but denied the opportunity. The defendant had also concluded stating the plaintiff's side of the story. She maintained that the comments made by the reporter were made in good faith, honestly and without malice.

45. The defendant's counsel also argued that the plaintiff had failed to prove the elements of the tort of defamation. She submitted that the disciplinary committee had found that the plaintiff had failed to account. A reasonable person would know that the plaintiff needed to account or pay his client more money. The plaintiff had failed to do so which resulted in Owalo being hopeful that he would be paid more money. She submitted that the claim that the plaintiff had taken advantage of the farmer's illiteracy by presenting them with blank papers were words captured in the submissions of the state counsel before the Disciplinary Committee.

46. According to counsel, there was no evidence that the plaintiff had been shunned or suffered in any way as a result of the publication. The plaintiff had claimed that he had suffered a loss of work but that was not supported by any proof. She argued that if at all the plaintiff's reputation had suffered as a result of the publication, then it was due to his being charged before the disciplinary committee or the assertions by Owalo that he had failed to pay his money.

#### **ISSUES, ANALYSIS AND DETERMINATION**

47. The issues that for determination from the evidence and the submissions are;

- a. Whether the defendant published the words complained of;**
- b. Whether the statements published by the defendant concerning the plaintiff were defamatory;**
- c. Whether the defences of qualified privilege and fair comment were available to the defendants;**
- d. Whether the plaintiff is entitled to the reliefs sought; and**
- e. Who should meet the costs of the suit.**

48. Every person is legally entitled to a good name and has a right to claim that his reputation has been disparaged by defamatory statements. To succeed in a claim for defamation one must prove that;

(i) *The statement was defamatory.*

(ii) *The defamatory utterances or statement was published or communicated to someone other than the person defamed.*

(iii) *The statement was published maliciously.*

*(See Wycliffe A. Swanya v Toyota East Africa Ltd & another CIVIL APPEAL 70 OF 2008 [2009] eKLR)*

49. Defamatory statements can be made in a permanent and visible form which is referred to as libel or an oral, temporary form referred to as slander. **Section 8** of the **Defamation Act** provides that wireless broadcasting should be treated as publication in a permanent form. In actions for defamation, the plaintiff is required to prove that the defendant published or caused to be published the words complained of to a third party.

50. The plaintiff claims that the defendant published defamatory statements on 3 occasions. The first statements were broadcast by the defendant in its news bulletin on 18<sup>th</sup> November 2016 at 9:00 p.m. On the same day, the defendant posted the second publication on social media and on YouTube. The defendant was also accused of defaming the plaintiff at his rural home on 23<sup>rd</sup> November 2016. The defendant admitted that it had publicized the statements complained of on 18<sup>th</sup> November 2016 but denied the plaintiff's averments concerning the words publicized on 23<sup>rd</sup> November 2016.

51. The plaintiff claimed that on 23<sup>rd</sup> November 2016, the defendant ferried Owalo Nyaugu to his rural home, where they organized a sit-in which drew crowds of people. He claimed that the defendants continued to utter defamatory words about him which were republished and rebroadcast on that day.

52. These averments were supported by the evidence of PW4 who claimed that he was present when two people who identified themselves as the defendant's employees arrived at the plaintiff's rural home with Owalo and his wife. He testified that the old man had told the crowd that had gathered that the plaintiff had stolen his Kshs. 1.6 million and given him only Kshs. 85,000/= and that he had used his money to build a storied house. The plaintiff testified that he received calls informing him that the NTV crew had gone to his home and were at his gate making disparaging remarks. He testified that he had to involve the police to disperse the crowd and the media crew.

53. The plaintiff was required to set out in his pleadings, the defamatory statements he complained of. This requirement is provided under **Order 2 Rule 7 (1)** of the **Civil Procedure Rules** which provides;

*(1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.*

54. The court in **Fullam -vs- Newcastle Chronicle and Journal Limited & Another [1977] AII ER 32**, held;

*“Justice requires in this case that the Plaintiff should fully particularize the publication relied on so that the Defendants may understand the nature of the case they have to meet. The Defendants are entitled to know so that they know generally what course they ought to follow”.*

55. Parties are required to disclose the facts in support of their case to put the other party on notice of the matters they are required to respond to. The Supreme Court in **Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR** held that in the absence of pleadings, evidence if any, produced by the parties, cannot be considered.

56. In this case, the plaintiff did not outline in his pleadings, the defamatory words that had allegedly been uttered by the defendant on 23<sup>rd</sup> November 2016. There was in fact no evidence that the defendant had published defamatory words on 23<sup>rd</sup> November 2016. The only statements made on that day, if at all, were made by Owalo Nyaugu. The plaintiff's claim that the defendant publicized defamatory words about him on 23<sup>rd</sup> November 2016 is therefore dismissed. That leaves us with the publications made on 18<sup>th</sup> November 2016.

57. It is agreed that the statements made on 18<sup>th</sup> November 2016 were published by the defendant as pleaded by the plaintiff in his plaint and referred to the plaintiff. The question that follows is whether the words complained of were defamatory.

58. A defamatory statement is defined as a statement that tends to injure the reputation of another person. A defamatory statement must be false and must contain a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts not contained in the statement, as the reader must reasonably be expected to possess. (See **Gatley on Libel and Slander** at page 21 para 41)

59. The Black's Law Dictionary 9<sup>th</sup> Edition defines defamation as;

*“The Act of harming the reputation of another by making a false statement to a third person.”*

60. Going back to the facts of this case, the defendant's commentator, Ken Mijungu, in the news bulletin broadcast on 18<sup>th</sup> November 2016 at 9:00 p.m., reported on an item of the news titled, "**Lawyer defies orders by LSK to pay old man's money. JUSTICE FOR MZEE OWALO.**" The reporter claimed that Mzee Owalo had sought the services of the plaintiff to sue South Nyanza Sugar Company (SONY) who had not harvested his cane in accordance with an agreement. The reporter claimed that SONY paid a sum of Kshs. 1.675 million but Owalo only received Kshs. 82,000/= from the plaintiff in 2004 and never received any additional payment.

61. The reporter also claimed that the plaintiff had supplied them with some documents but declined to be interviewed on camera. He further reported that Owalo lodged a complaint before the advocate's disciplinary committee which looked into the allegations against the plaintiff and found that he had failed to show or account for monies received on behalf of Owalo. The reporter claimed that the disciplinary committee had stated that the plaintiff was still withholding the 1.6 million shillings belonging to Owalo and had found that the plaintiff took advantage of farmers' illiteracy by presenting plain or blank papers for them to sign. He reported that the plaintiff had been compelled to pay the amount of 1.6 million shillings and was admonished by the Committee.

62. Ken Mijungu reported that although the plaintiff claimed that he had settled the amount owed to the farmer, Owalo continued to blame the plaintiff for his poverty and the death of his wife whom he believed could have been saved had he been paid the money in time. He reported that he had spoken to the sugar company's management and they had confirmed settling the claims and that the plaintiff did not deny receiving the settlement but stated that the amount released by SONY was to settle several claims and not only Owalo's.

63. The same day, the defendant published on its social media platforms and on YouTube an item captioned "**Peasant farmer conned Kshs. 1.8 million by lawyer.**" The defendant reported that a 77-year-old peasant farmer known as Owalo Nyauga from Migori County was seeking the help of the advocates complaints commission after his lawyer allegedly took off with his compensation of 1.6 million shillings 15 years prior. It claimed that Owalo had been pursuing the lawyer for a decade and a half without success.

64. The defendant argument was that the statements were based on tribunal proceedings initiated against the plaintiff by the said Owalo. Both parties produced the proceedings and judgment of the Disciplinary Committee in cause number 59 of 2006. That matter had been instituted by Antipas Nyanjwa on behalf of Jane Owalo, Owalo Nyaungu and Consolata Owalo.

65. Upon considering the testimonies from both sides, the Tribunal found as follows;

*"It is admitted that money was received by the Respondent and it is also evident from his evidence that he withheld the same for a whole year without an explanation. When they received it a year later they received a much lesser amount. They were not given a proper account as to how the figures paid to them were arrived at. In an attempt to demonstrate that he accounted, the Respondent has introduced into the record a schedule of his fees and disbursements. As pointed out correctly by Mr. Gathirwa for the Commission, the schedule which is undated, unreferenced and unsupported by any other evidence cannot be accepted or considered as accounts. We for the reasons stated reject it. It would have been much safer and easier for the Respondent to justify his fees through the Advocates Remuneration Order.*

*In view of the foregoing and the evidence on record, it is clear the Respondent withheld monies due to the complainants for more than a year and when finally paid, no proper accounts were rendered. In the premises we find that on the first count, the case against the Respondent has been proved to the required standards. We do therefore find the Respondent guilty as charged and convict him accordingly. ..."*

66. Through his evidence and the evidence of PW 3, the plaintiff proved that he had sent a copy of the tribunal's decision which was received by the reporter Ken Mijungu. DW1 admitted that when the story was aired the Committee's decision was in their possession. The plaintiff proved that he sent decrees and consent orders relating to Kisii CMCC No. 444 of 2000, 437 of 2000, 434 of 2000 and 431 of 2000 to the defendant. He also proved that he had sent indemnity and discharge notes executed by Owalo accepting Kshs. 93,876/= and Kshs. 111,319/= as renegotiated awards in CMCC No. 444 of 2000 and in CMCC No. 434 of 2000 respectively. The plaintiff also sent the defendant a copy of an affidavit sworn by Consolata Anyango acknowledging that she had received Kshs. 64,703.80 as damages having compromised the award in CMCC No. 437 of 2000. A comparison of the Tribunal's findings and the words published by the defendant on 18<sup>th</sup> November 2016 shows that despite being supplied with these documents, the defendant distorted the facts and misrepresented the tribunal's findings.

67. The reporter's claim that the Disciplinary Committee had found that the plaintiff had withheld a sum of Kshs. 1.6 million belonging to Owalo was a clear departure from the findings of the committee. There was also no finding by the Disciplinary Committee that the plaintiff took advantage of farmer's illiteracy by presenting blank papers for the farmer to sign. The claim by the reporter that the Disciplinary Committee had compelled the plaintiff to pay Kshs. 1.6 million was also a misrepresentation of the findings of the Disciplinary Committee.

68. The reporter went on to insinuate that the plaintiff had caused the death of Owalo's wife who would have been saved had the plaintiff paid him on time. This was reported without referring to the plaintiff's position that Consolata Anyango had been paid. On its online platform the defendant reported that the plaintiff had taken off with Owalo's Kshs. 1.6 million despite having a copy of the judgment.

69. The defendant asserted that it was merely reporting the words of Owalo and that he was the right person to sue. Legal position however is that every person who participates in the publication is liable. The defendant broadcast the words of Owalo to its large audience and cannot distance itself from the words complained of.

70. The defendant's claim that it had relied on the submissions of the State Counsel in the matter before the Disciplinary Committee that the plaintiff had taken advantage of illiterate peasant farmers by presenting them with plain papers for them to append their signatures is also untenable. This is because in its broadcast, the defendant's reporter stated that this was the finding of the Disciplinary Committee thereby distorting the facts.

71. The words broadcast by the defendant in their ordinary meaning would be understood to mean that the plaintiff was a con man who had

no qualms about manipulating his client's into signing documents for his personal gain. It would also be understood that the plaintiff had caused the poverty of his client and hastened his wife's death. The words broadcast by the defendant also implied that the plaintiff was defiant of the orders of the Disciplinary Committee of the Law Society of Kenya which was not factual. It is therefore the finding of this court that the words injured the plaintiff's reputation and brought odium and contempt in the estimation of right thinking members of society.

72. The defendant relied on the defence of qualified privilege which is defined in the **Halsbury's Laws of England Fourth Edition Vol 28** as follows:

*On grounds of public policy the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege.*

73. Where there are proceedings before a judicial tribunal exercising its jurisdiction, such as in this case, the publication without malice of a fair and accurate report of what takes place before the tribunal is privileged. Every person has the protection of privilege if he publishes the report merely to inform the public. (See **Gatley on Libel and Slander 9<sup>th</sup> Edition, page 327 para 14.2 page 328, 14.4, page 402 para 14.88** and **Halsbury's Laws of England Fourth Edition Vol 28 pg 61 para 119**)

74. Qualified privilege is founded on the public policy that people should be allowed to speak freely. The defence states that although an individual's reputation may be damaged by untrue statements, the general interest is that people should not be hampered in the discharge of their duty to speak for the fear of actions for defamation. The defence of qualified privilege is however not available to a defendant who has acted maliciously.

75. The defendant also relied on the defence of fair comment. Whereas the defence of privilege is only available to a defendant who has a duty to make the communication to a person who has legitimate interest in receiving it, the defence of fair comment is general and enables any member of the public to comment on matters of public interest. For a comment to qualify as a fair comment, it must be on a matter of public interest; it must be based on facts that are truly stated and it must be a fair comment which any man could honestly make however prejudicial or obstinate he may be. (See **Halsbury's Laws of England Fourth Edition Vol 28 page 69, 74**)

76. The plaintiff position was that the defence of qualified privilege was not available to the defendant since it had distorted facts which went to prove the element of malice. He relied on the case of **Dorcus Florence Kombo v Royal Media Services Limited [2014] eKLR** where GV Odunga held;

*Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement, was false or did not care whether it be true or false will be evidence of malice. See **Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mangi (supra)**.*

77. In the **Halsbury's Laws of England Fourth Edition Vol 28 pg 45 para 145**, the authors similarly state;

*The defences of both fair comment and qualified privilege are defeated by proof that the defendant published the words complained of maliciously. In both cases proof that the defendant's sole or dominant motive in publishing the words was improper will establish malice. The fact that the defendant did not believe that what he said was true is usually conclusive evidence of malice to rebut the defence of qualified privilege; and in fair comment it is usually conclusive evidence of malice to show that the defendant did not honestly hold the opinion expressed. If a defendant publishes untrue defamatory matter recklessly, without considering or caring whether it is true or not, he is treated as if he knew it to be false.*

78. This court agrees with the defendant that the publication on proceedings before the Disciplinary Committee was a matter of public interest. In this case there is proof that the defendant had copies of pleadings and the Tribunal's decision in its possession but proceeded to publish false statements that notwithstanding. Malice can therefore be inferred from the defendant's distortion of facts which defeats the defences of qualified privilege and fair comment.

79. **Article 33 (3)** of the Constitution provides that in exercising one's right to freedom of expression, the rights and reputations of others should be respected. The Constitution also guarantees the freedom of the media under **Article 34** of the Constitution but that right should be exercised responsibly. In **Ndung'u Njoroge & Kwach Advocates & another v Standard Limited & 8 others Civil Appeal No. 193 of 2013 [2018] eKLR** the Court of Appeal held as follows;

*"In The Standard Limited & 2 Others v. Dr Christopher Ndarathi Murungaru, CA No. 187 of 2014, this Court rejected the argument that the distinct protection of freedoms of the media under Article 34 had the effect of proscribing defamation actions in courts. It cited, among other decisions, the Supreme Court of the USA in Gitlow v. New York (1924) 69 L Ed 1138, where it was stated:*

*"It is a fundamental principle, long established, that the **freedom of speech** and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."*

80. The plaintiff has demonstrated to the satisfaction of this court that the words broadcast by the defendant were false and defamatory to his character; that the defendant published the words to its audience; and that the publication of the words was actuated by malice. He was therefore entitled to compensation in damages for vindication to the public and for the wrong done to him.

81. The plaintiff sought damages including exemplary damages as compensation. The factors for consideration in assessing quantum in defamation cases include the gravity of the libel and whether it touches on the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality; the extent of publication; whether the publisher was reckless or negligent among other factors. (See **Raphael Lukale v Elizabeth Mayabi & Another [2018] eKLR**; **Standard Limited V G.N Kagia T/A Kagia & Company Advocates, Civil Appeal No.115 of 2003**; **John v MGM Ltd (1997) Q.B 586**)

82. The plaintiff's counsel proposed an award of Kshs. 5,000,000/= for general damages, Kshs. 1,500,000/= in aggravated damages and Kshs. 500,000/= for failure to make an apology. He referred to the cases of **Honorable Muskari Kombo and Royal Media Services Ltd and John Ritho Kanago & 2 Others vs Joseph Nguji & another [2017] eKLR** in support of his proposal.

83. In the case of **Honorable Muskari Kombo (supra)** the Court of Appeal awarded the plaintiff a sum of Kshs. 5,000,000/= where the respondent had claimed that a woman accused of corruption was the appellant's wife. The appellant in that case was a nominated Member of Parliament and had served in the government in various ministerial positions.

84. The plaintiffs in the case of **John Ritho Kanago (supra)** were awarded between Kshs. 8,000,000/= and Kshs. 6,000,000/= in general damages, Kshs. 1,000,000/= each in aggravated damages and Kshs. 1,000,000/= each for damages in lieu of an apology. The defendants in that case had claimed that the plaintiffs wanted the court to compel a London hospital to release their father who had allegedly been taken into care without the family's consent. The court found that the words complained of concerned the ailment of a private citizen which was not a matter of public concern. The victim's family had also not been contacted for comment before the publication.

85. The respondent's counsel on the other hand submitted that since the plaintiff had been convicted for failure to account, the damage to his reputation was only nominal. He proposed damages of between Kshs. 400,000/= and Kshs. 1,000,000/= based on the cases of **Nation Newspapers Limited v Lydia Chesire NRB CA No. 26 of 1982 [1984] eKLR**, **Jacob Kipnetich Katonon v Nation Media Group Limited HCCC No. 31 of 2015 [2017] eKLR** and **Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others (Nairobi Civil Appeal No. 140 of 2008**

86. The Court of Appeal in **Lydia Chesire(supra)** set aside an award of Kshs 15,000/= and substituted it with an award of Kshs 1,000/=.

87. The defendant in the case of **Jacob Kipnetich Katonon (supra)** had claimed that the plaintiff was dead. In awarding an amount of Kshs. 200,000/=, the court found that the plaintiff did not lead evidence to show that he suffered a lowering of his reputation in the minds of right thinking individuals.

88. The appellant in the case of **Kenneth Nyaga Mwige (supra)** was an Advocate of the High Court Kenya then holding the office of Legal Officer in the Kenya Anti-Corruption Authority. The respondent had reported that the appellant had an arrest warrant issued against him for assaulting a woman and he had failed to attend court. The respondent did not produce documents in support of its publication. The Court of Appeal awarded the appellant a sum of Kshs. 1,500,000/=.

89. In the case of **Kenya Tea Development Agency Ltd v Benson Ondimu Masese T/A B. O. Masese & Co. Advocates CIVIL APPEAL 95 OF 2006 [2008] eKLR** the Court of Appeal set aside general damages of Kshs. 7,000,000/= and exemplary damages of Kshs. 3,000,000/= and substituted the awards with a global award of Kshs. 1,500,000/=. The appellant in that case had written a letter to the Advocates Complaints Commission claiming that the respondent was one of the unscrupulous lawyers who appointed agents among factory workers with the promise of handsome court awards. The Court considered that the respondent had been practicing as an advocate for 8 years.

90. The plaintiff in **J.P. Machira t/a Machira & Co. Advocates v Wangethi Mwangi & another HCCC NO 1338 OF 2000 [2018] eKLR** was an advocate. He claimed that the defendant had published defamatory statements about him on 3 occasions statements. The court held that two of the reports were inaccurate and exaggerated accounts of court proceedings. The last report was however privileged and therefore watered down the effect of the earlier defamatory reports. The court assessed damages to the plaintiff at an all-inclusive sum of Kshs 5,000,000/=.

91. Having analyzed the awards in the cases cited by the plaintiff, I found them to be on the higher side as the publication by the defendant in this case was based on a matter of public interest on proceedings before a tribunal. The defamatory statements comprised of inaccurate reporting as opposed to an complete distortion of facts. The plaintiff had also been found liable by the Disciplinary Committee for withholding monies for more than a year and failing to render proper accounts.

92. One of the authorities referred to by the respondent was outdated and not reflective of the current trend of awards in similar cases. The rest related to nominal damages. The plaintiff demonstrated that he had made efforts to set the records straight but the defendant still went ahead to publicize the defamatory statements. He was therefore entitled to damages higher than nominal damages.

93. Guided by the foregoing authorities and taking into account the fact that the plaintiff was an advocate of more than 30 years standing; the defendant's extensive coverage of the defamatory statements; and the defendant's failure to retract its statements or offer an apology, I find that the plaintiff is entitled to a sum of Kshs. three million (Kshs. **3,000,000/=**) in general damages.

94. The plaintiff sought exemplary damages which are awarded in the following instances (1) oppressive, arbitrary or unconstitutional action by servants of the government; (2) conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or (3) cases in which the payment of exemplary damages is authorized by statute. (See **Bank of Baroda (K) Ltd vs. Timwood Products Ltd [2008] 236**) The plaintiff has not shown the specific profit that the defendant intended to gain by publishing the defamatory statements and is therefore not entitled to exemplary damages.

95. He is however entitled to injunctive reliefs to restrain the defendant from publishing similar words against him.

96. In the end, I allow the plaintiff's case and issue the following final reliefs;

a. The plaintiff is awarded Kshs. 3,000,000/= as damages for libel

b. A permanent injunction is hereby issued restraining the defendant and whether by itself, its servants or agent or otherwise from further publishing or broadcasting or causing to be published or broadcast the defamatory words and images or any words and images published on 18<sup>th</sup> November 2016 against the plaintiff;

c. The plaintiff is awarded costs of this suit.

**DATED, SIGNED AND DELIVERED AT KISII THIS 1<sup>ST</sup> DAY OF JULY 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Mr. Awandu h/b Mr. Were For the Plaintiff**

**Miss Assunah For the Defendant**

**Ms. Rael Court Assistant**