



Oduory v National Council for Law Reporting & 2 others (Civil Suit E211 of 2020) [2021] KEHC 4931 (KLR) (Civ) (15 July 2021) (Judgment)

Emmanuel Mambo Oduory v National Council For Law Reporting & 2 others [2021] eKLR

Neutral citation: [2021] KEHC 4931 (KLR)

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

CIVIL

CIVIL SUIT E211 OF 2020

SJ CHITEMBWE, J

JULY 15, 2021

BETWEEN

EMMANUEL MAMBO ODUORY PLAINTIFF

AND

NATIONAL COUNCIL FOR LAW REPORTING 1ST DEFENDANT

JUDICIAL SERVICE COMMISSION 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The Plaintiff sued the defendants herein, vide a statement of claim and an application both dated 8th December, 2020. In the statement of Claim the Plaintiff is seeking for inter alia;
 - a. General damages of Kshs. 9,000,000
 - b. General aggravated, exemplary and special damages for sexual assault and sexual harassment defamation at Kshs. 99,000,000
 - c. Costs with interest at court's rates until payment in full.
2. While in the Application, brought under Under Orders 1A, 1B, 3A, Order 2 Rules 7, 11(3), 15(1), Order 7 Rule 1, Order 8 Rule 1(2) (b), Order 10 Rule 3, Order 10 Rule 3, Order 11 Rule 3(2)(b) (o), Order 51 Rule 11 (2) of the Civil Procedure Rules, 2010 and other enabling provisions of the law; supported by the affidavit of Emmanuel Mambo Oduory dated 8th December, 2020 the following prayers are sought;



1. That this application be certified urgent and heard ex parte and service thereof be dispensed with in the first instance.
 2. That this Honourable Court be pleased to declare that the publication of the legal eReport which contains sexual assault and sexual harassment contents did not conceal Claimant's identity in protection of his Constitutional Rights against discrimination and defamation.
 3. That this Honourable Court be pleased to declare that Claimant was discriminated from standard practice of concealment of Claimant's identity from the public in such reports with sexual improprieties contents.
 4. That this Honourable Court be pleased to declare that the published legal e-Report was an unfair and inaccurate report of ELRC Court proceedings and pleaded facts That this Honourable Court be pleased to declare that the publication of sexual assault and sexual harassment information was malicious, unfair, inaccurate and defamatory against the Claimant.
 5. That this Honourable Court be pleased to order for the report to be pulled down from Respondents' websites with immediate effect and Respondents to permanently refrain from publishing the inaccurate report on the websites or in whatever forms at all.
 6. That this Honourable Court be pleased to allow this application and the main suit by written submissions.
 7. That the cost of this application be provided for.
3. The 1st Defendant through the Attorney General filed its statement of defence dated 25th January 2021 and the 2nd Defendant entered appearance through Isaac J.M. Wamaasa, Advocate and equally filed a statement of defence dated 12th January, 2021. The Plaintiff filed a Reply to the defence dated 11th February, 2021 and the suit set down for hearing. When this suit came up for hearing on 24th February, 2021 the Plaintiff and the Defendants agreed to have the matter dispensed with by way of written submissions. The Plaintiff filed his submissions dated 27th February, 2021, Supplementary submissions dated 8th March, 2021 and a 2nd Supplementary submissions dated 16th April, 2021. The 1st Defendant and the 2nd Defendant filed their submissions dated 8th March, 2021 and 19th March, 2021 respectively. On 6th May, 2021 parties highlighted their submissions before court.

The Plaintiff's Case;

4. The Plaintiff's case is that by a publication of a legal report of Hon. Lady Justice Maureen Atieno Onyango dated 7th August 2020 by the 1st Respondent on its website <http://kenyalaw.org/caselaw/cases/view/1999891>, the Respondent's infringed on his rights and freedom from discrimination and gravely defamed him as a sexual assault predator, rapist, arrogant and cruel professional thus irreparably ruining, damaging, maiming and denting his reputation, character, social standing as a preacher and trained professional. The Plaintiff maintains that the failure by the 1st Respondent to verify, ascertain and validate the correctness and accuracy of the legal information in the impugned legal report prior to publication was detrimental to him as his personal identity was never concealed. That further his efforts to file an appeal at the Court of Appeal (COACA/E386/2020) and/or have his complaints against Lady Justice Maureen Atieno addressed by the 2nd Respondent has been unfruitful.
5. In his submissions dated 27th February, 2021 the Plaintiff has identified the following issues for determination;
 - a) Whether the suit is unchallenged by the defendants



- b) Whether the Plaintiff was discriminated on ground of social origin or caste
 - c) Whether Plaintiff was defamed over sexual assault and sexual harassment improprieties
 - d) Whether Plaintiff is entitled to the reliefs and prayers in the consolidated suit and its application dated 8th December 2020?
6. On the first issue, the Plaintiff argues that the Attorney General is a stranger to this case therefore the defence on record is not proper. In the alternative, the Plaintiff contends that the defence filed by the parties have not raised triable defence of either fair comment, justification, absolute privilege, qualified privilege, nor public interest and urges this court to award him the consolidated prayers. The Plaintiff argues that the 1st Defendant is a State Corporation capable of suing and being sued in its corporate name. Reference was made to the case of *Katiba Institute & another v Attorney General & another* [2020] eKLR where the court held that State Corporations & parastatals are not offices in public service, State organs or under the Constitution. Further in *Okiya Omtatah & another v Attorney General & 7 Others* [2013] eKLR the court opined that the Attorney General's institution of a suit for and on behalf of the National Irrigation Board which is a body corporate with power to sue and be sued in its own name was a legal misadventure. Similarly, in *Monica Mellan Achode & another vs National Council for Law Reporting & another* [2018] eKLR the Plaintiff argues that the A.G did not act as a legal representative of the 1st defendant neither can it purport to represent the same in this suit.
 7. The Plaintiff maintains that failure by the Defendants to conceal his name in the production and publication of the impugned legal report to the global audience violated and infringed his constitutional rights and freedoms from non-discrimination. He further submit that the identity of the alleged accusers and/or victims was not revealed in the reported case and that failure to anonymize his personal identifiers was unfair, unlawful and harmful as it subjected him to defamation then and in future. The Plaintiff confirms that the ingredients of defamation have been established in that the statements in the reported authority relating to sexual assault and sexual harrassment are defamatory and actionable. Secondly, that the statement in the legal report are false as none of the defendants have pleaded justification and that the defendants have admitted to global publication of the report that relates to him. Further that, the report was maliciously published as the Defendants failed to inquire into facts of sexual assault and sexual harassment charges prior to publication and failed to anonymize him thus entitling him to the reliefs and prayers in the consolidated suit and its application dated 8th December 2020.
 8. In the supplementary submissions dated 8th March, 2021 and in response to the 1st Defendant's submissions, the Plaintiff maintains that the present suit arises from new causes of action of discrimination by the defendants who failed to anonymize his identity in the case report published on the 1st Defendant's website. He has distinguished the present case from the case filed at the Employment and Labour Court from the present one which relates to the publication of unsubstantiated sexual assault and sexual harrassment charges online to the global world. The Plaintiff has faulted the defendants for failing to prove that parties to a suit are required to request the court to have their information anonymized and that the failure to do so was contrary to the defendants' established practice of anonymization of sensitive cases.
 9. In a 2nd supplementary submission dated 16th April, 2021 and in response to whether the 2nd Defendant is vicariously liable for the causes of action in this suit submit that it is the employer of the judicial officer who authored, produced and submitted the report for publication, thus, its joinder herein is justified. It is the Plaintiff's contention that the judgment by Lady Justice M.A. Onyango should not be considered as a legal authority due to its incompetency.



1st Defendant's Case;

10. The 1st Defendant filed its statement of defence dated 25th January, 2021 on 9th February 2021 and submission dated 8th March, 2021 in opposition to the Plaintiff's claim. The 2nd Defendant argues that its mandate under the law involves the provision of universal access to public legal information through monitoring and reporting on the development of jurisprudence. Further that, a claim for defamation cannot stand as the Plaintiff failed to request the court to have their personal information anonymized on the court records and that the raw information received from the judiciary was processed in a lawfully, fairly and transparent manner.
11. Miss Chibole, counsel for the 1st Defendant, submitted that its representation by the Attorney General is proper therefore the Statement of Defence filed is properly on record and should be admitted. Miss Chibole opposed the Plaintiff's assertion that he was discriminated because he is not an advocate arguing that this was not the first case a party appears in person. In its written submissions, the 1st Defendant admits that its a state corporation that draws its funding from the tax-payer and that it is not stopped by law from seeking legal advice and/or representation from the Office of the Attorney General at no cost and that being sued and suing in one's corporate name is different from representation as was held by Lenaola J. (as he then was) in the case of *Okiya Omtatah Okoiti & Another v Attorney General & 7 Others* [2013]eKLR. The 1st Defendant has also argued that in pursuant to Article 156(4) (c) of the Constitution, Parliament enacted the Office of the Attorney General Act , 2012 which provides for the functions of the Attorney General under Section 5 to include advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters. The 1st Defendant also state that the Attorney General has not shown any interest of being enjoined as an interested party in these proceedings.
12. The allegation of discrimination is denied by the 1st Defendant who contends that the Plaintiff has failed to plead with precision the precise provision that has been violated and the extent of the violation, infringement and or contravention. Reliance has been placed on the case of *Annarita Karimi Njeru vs Republic* [1979]KLR 154 pg 156 as cited in *James Muchene Ngei vs Republic* [2008] eKLR, H.C at Nairobi Misc. Application No. 562 of 2008 where *Wendoh J.* held that when seeking redress from the High Court or an order invoking a reference to the Constitution, one should set out with reasonable degree of precision his complaint, the provision infringed and the manner of the alledged infringement.
13. The 1st Defendant contends that the Kenya Law Anonymization Guidelines(KAG) revolves around protecting the victim and not the alleged perpetrators. That pursuant to Section 52(1) (b) of the Data Protection Act No. 24 of 2019 which provides for the processing of personal data, the Kenya Law Anonymization Guidelines allows for the redaction and or pulling down of information under certain circumstances. These circumstances are in compliance with an order banning publication of specific information received together with a specific document, in response to a user's request for anonymisation, in compliance with statutory provisions on publication, when inventorising sensitive cases and lastly when a document contains personal identifiers.
14. In the present case, the 1st Defendant submit that the request for anonymization is not automatic as each request is reviewed separately on its own merits and its sensitivity. That cases involving sexual offence, domestic violence, adoption, divorce, custody and maintenance, succession, child offenders and disclosure of HIV/AIDS status qualify for consideration. The 1st Defendant has distinguished the authorities cited by the Plaintiff in justification for anonymization and submit that the case did not involve any minor and that the Plaintiff was not a victim. Reliance has been placed on the case of *Mohammed Abduba Dida v Debate Media Limited & Another*[2017]eKLR where *Mativo J.* held that not all differentiation amount to discrimination.



15. The 1st Defendant admits that judgments and rulings are publications afforded absolute privilege excused from being defamatory and since the letter in question was quoted by Lady Justice Maureen Onyango in her judgment the same formed part of the judgment. Further submission is that, the words published by the 1st Defendant did not contain any defamatory meaning as alleged and that the court ordered the he be compensated for unlawful termination from employment. The Employment and Labour court also held that the defamation allegation was not proved. The 1st Defendant relied on the case of *Wycliffe A Swanya v Toyota East Africa Ltd & Another* Civil Appeal No. 70 of 2008[2009]eKLR where the Court of Appeal outlined the essentials of the tort of defamation that must be proved to include;
- “(i) That the matter of which the plaintiff complains is defamatory in character.
 - (ii) That 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 damage.”
16. Citing *Gatley on Libel and Slander*, 6th Edition at pg 6, the 1st Defendant submit that the Plaintiff failed to prove the falsity of the publication as he has not disputed that he filed a case against One Acre Fund which was heard and determined in his favour by Hon. Lady Justice Maureen Onyango. The 1st Defendant further submit that since it did not author the contents of the letters referred to by the Judge, it can therefore not submit on the veracity of the same. It is the 1st Defendant’s contention that since the publication was just picked as indicated in the court records, there was no malice on its part. To buttress this position, reference is made to the case of *Phineas Nyagah V Gitobu Imanyara* [2013]eKLR, where Odunga J. held that Malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts.
17. The 1st Defendant submit that the Plaintiff is not entitled to the prayers sought as he has failed to prove that his rights were violated through discrimination and that the claim for defamation should be dismissed. Further that, the Plaintiff’s assertion that he has filed an Appeal at the Court of Appeal is an indication of forum shopping on his part.

2nd Defendant’s Case;

18. The 2nd Defendant filed a Statement of Defence dated 12th January, 2021 in opposition to the Plaintiff’s claim, denied all the averments therein and sought to have the suit struck out for not raising sufficient cause of action. Miss Munyige , Counsel for the 2nd Defendant, maintains that the suit does not disclose any sufficient cause of action against it on the ground that it’s mandate under Article 172 of the Constitution does not include legal reporting or publication of legal information. According to Chapter IV of the Evidence Act, the burden of proof in suits or proceedings lies on that person who desires any court to give judgment as to any legal right or liability. Reliance has been placed on the case of *Pinnacle Tours and Travel Limited & 3 Others v Pauline Ngigi t/a Safari Market Tours*[2019]eKLR ,where the Court of Appeal cited the case of *Muriungi Kanoru Jeremiah v Stephen Ungu M’warabua*[2016]eKLR, where the court reiterated that the appellant was obliged in law to prove that allegation after the legal adage that he who asserts or alleges must prove.



19. It is the 2nd Defendant's submission that its only by virtue of Paragraph 6 of the Statement of Claim that it has been enjoined in this suit and that no evidence has been adduced to prove that it was responsible for the impugned publication. Paragraph 6 of the statement of Claim states that; "All Claimant's mitigation efforts including e-filing of urgent appeal in the Court of Appeal(COACA/E386/2020) Nairobi and complaints on the ongoing adverse sexual assault and sexual harrassment defamation registered with the 2nd Respondent have been unfruitful due to inactions of both 2nd Respondent and Registrars of the Court of Appeal Nairobi."
20. Reliance has been place on Joseph Njogu Kamuge v Charles Muriuki Gacheri [2016]eKLR the court quoted with approval excerpts from the case of John Edward v Standard Limited where the court held that a statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The Court went further to highlight the ingredients of defamation as i) the Statements must be defamatory; ii) the statement must refer to the plaintiff; iii) the statement must be published by the defendant; and iv) the statement must be false.
21. Miss Munyinge further stated that the 2nd Supplementary Submission by the Plaintiff introduces new matters that were not pleaded and urged the court ignore the same.

Analysis/ Determination;

22. Having gone through the parties pleadings and submissions, the issues for this court's determination are;
 - i. Whether the 1st Defendant had proper representation before court;
 - ii. Whether the proceedings reported about by the 1st Defendant were court proceedings in terms of section 6 of the Defamation Act, and whether privilege attaches to them;
 - iii. Whether the Plaintiff has established a case as against the 2nd Defendant;
 - iv. Whether the publications by the defendants were false, malicious, spiteful and defamatory of the plaintiff;
 - v. What damages, if any, are awardable and who should pay costs?

Whether the 1st Defendant had proper representation before court

23. It is undisputed that the 1st Defendant, the National Council for Law Reporting, is a semi-autonomous state corporation established under the National Council for Law Reporting Act, No. 11 of 1994. Further, the Attorney General in Legal Notice No. 29 of 2009 delegated the powers of law revision conferred by Section 7 and 8 of the Revision of Laws Act, Cap 1 to the National Law Reporting Council. Its mandate under Section 3 of the National Council for Law Reporting Act, No. 11 of 1994 include;
 - i) preparation and publication of the reports to be known as the Kenya Law Reports, which shall contain judgments, rulings and opinions of the superior courts of record;
 - ii) undertaking such other publications as in the opinion of the Council are reasonably related to or connected with the preparation and publication of the Kenya Law Reports; and
 - iii) performing any other functions conferred on the Council by or under the provisions of any other written law.



24. Being a state corporation and by virtue of Section 2(2) of the National Council for Law Reporting Act, No. 11 of 1999 and Section 3 of the State Corporations Act, Cap 446, the 1st Defendant has functional independence and may among other things sue and be sued in its corporate name. However, Section 18 of the National Council for Law Reporting provides for annual reporting to the Attorney General by the Council who then forwards the report to the National Assembly. Having established the nexus between the two offices, this court will address the main issue of whether the Attorney General can properly defend the 1st Defendant in the present suit. The office of the Attorney General is established under Article 156 of the Constitution with the following functions inter-alia;

“ 1) ...

2) ...

3) ...

4) The Attorney-General-

a) is the principal legal adviser to the Government;

b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.

7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

25. Additionally, Section 5(1) of the Office of the Attorney General Act, No. 49 of 2012 states the functions of the office to include;

a) advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;

b) advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid;

c) negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies;

d) coordinating reporting obligations to international human rights treaty bodies to which Kenya is a member or on any matter which member States are required to report;

e) drafting legislative proposals for the Government and advising the Government and its agencies on legislative and other legal matters;



- f) reviewing and overseeing legal matters pertaining to the registration of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire Functions of the purchase and coat of arms;
 - g) reviewing and overseeing legal matters pertaining to the administration of estates and trusts;
 - h) in consultation with the Law Society of Kenya, advising the Government on the regulation of the legal profession;
 - i) representing the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act;
 - j) representing the Government in matters before foreign courts and tribunals; and
 - k) performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney-General.
26. The plaintiff has argued that the Attorney General does not have the legal capacity to represent the 1st Defendant, a state corporate with capacity to sue and be sued in its own name. The Plaintiff citing Lenaola J. (as he then was) in *Okiya Omtatah & another v Attorney General & 7 Others* [2013] eKLR contends that the Attorney General representation is a legal misadventure. The 1st Defendant however argues that the representation can be distinguished from being sued or suing in one's corporate name and that since its funded by tax payer, Article 156 (4) (b) the Constitution empowers the office of Attorney General to offer such representation so as to protect public interest.
27. In the case of *Joseph Nathaniel Kipruto Arap Ng'ok v Attorney General (On Behalf of the Permanent Secretary Ministry of Trade & Industry) & another* [2010] eKLR, the Court of Appeal held that;
- “Suffice it to say that the decision of Chief Nehemia which was decided when the Government Proceedings Act (Cap 40) was still in force is persuasive enough and in the absence of any specific legislation or any other decision of a court of the last resort limiting the power of the Attorney General to represent a public officer or a State Corporation or any other party in civil proceedings as deemed necessary, the decision is good law and should be followed. In this case, the superior court confused the power of the Attorney General to institute civil proceedings and the discretion of the Attorney General to appear as a counsel for a party in civil proceeding.”
28. Further in *Okiya Omtatah Okoiti & another v Attorney General & 7 others* [2013] eKLR, Lenaola J. (as he was then) while addressing the same issue stated that;
- “It is also my view that the Constitution 2010 has, created a structure of governance that has many institutions that draw their funds from the tax-payer and the law has not stopped them from seeking legal advise and representation by the Attorney General at no cost.”
29. Without belabouring further, I am in agreement with the reasoning and the finding of the court above and opine that the Attorney general can properly represent and/ or offer legal advice to any organ of the national Government that is sued in its official capacity. I therefore find that the Attorney General has the legal capacity to represent and file pleadings on behalf of the 1st Defendant.
30. The Attorney General's office normally represent Government officials, Institutions and commissions in civil litigation. Instead of giving instructions to external advocates who end up charging legal fees as per the Advocates Remuneration scale, the in-house advocates working in the A.G.'s office take



monthly salary. There is no prejudice to a litigant when a commission opt to use the services of the A.G.'s office. Whenever the Attorney General decides to defend a government institution in civil proceedings, such decision cannot be held as discriminatory or unconstitutional. In fact it is part of cost cutting measure if government institution call for the services of the A.G. in civil litigation.

ii) Whether the proceedings reported by the 1st Defendant were court proceedings in terms of section 6 Defamation Act, and whether privilege attaches to them;

31. The Constitution of Kenya provides for rights and freedoms which have a bearing on the law of defamation under Articles 33,34 and 35. However, these rights are not absolute and are subject to limitation. This limitation was highlighted by Aburili, J. in Gideon Mose Onchwati v Kenya Oil Company Ltd & Another [2015] eKLR where she rightly stated that: -

“...the court in deciding defamation cases must balance the provisions of Articles 33, 34 and 35 of the Constitution, dealing with the freedoms of expression and media freedom and the individual's right to access information on one hand and Article 28 in respect of the inherent dignity must be respected and protected...”

Gatley on Libel and Slander 10th Edition at page 8 states:-

“There is no wholly satisfactory definition of defamatory imputation. Three formulae have been particularly influential: (1) would the imputation tend to ‘lower the plaintiff in the estimation of right-thinking members of society generally?’(2) would the imputation tend to cause others to shun or avoid the claimant? (3) would the words tend to expose the claimant to ‘hatred’ contempt or ridicule? The question what is defamation relates to the nature of the statement made by the defendant: words may be defamatory even if they are believed by no one and even if they are true, though in the letter case they are not, of course, actionable.”

32. In Selina Patani & another v Dhiranji V. Patani [2019] eKLR the Court of Appeal cited with authority the case of John Ward -v- Standard Ltd, HCCC 1062 of 2005 where the ingredients of defamation were summarized as follows: -

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

33. In the present case, the bone of contention is the publication of the judgment by Hon. Lady Justice Maureen Atieno Onyango dated 7th August, 2020 by the 1st Defendant on their webiste <http://kenyalaw.org/caselaw/cases/view/1999891/> that allegedly defamed and discriminated him over matters of sexual assault and sexual harrassment reports contained in the judgment. The Plaintiff contended that the publication has made him be seen as a sexual assualt predator, rapist, arrogant and cruel professional hence ruining his reputation as a preacher and trained professional. Having perused the judgment by the Hon. Lady Justice Maureen Atieno Onyango, it is evident that the plaintiff approached the court and produced the letters in support of his claim against his former employer. It is evident from the proceeding before the Nairobi Employment and Labour Court(Cause No. 93 of 2020) that the allegation of sexual assault and harassment was replaced by abuse of office,



gross negligence, harassment and intimidation, misappropriation of resources and interfering with investigation process. In its determination, the court held that;

“Having found the termination unfair, the claimant is entitled to payment of one month’s salary in lieu of notice. I award him the same at Kshs. 152,775.

The Claimant prayed for maximum compensation in the sum of Kshs. 1,833,000. Taking into account all circumstances of his case, especially the length of service, the manner in which his employment was terminated as well as the grounds thereof, I award the claimant 7 month’s gross salary as compensation.”

Section 6 of the Defamation Act provides as follows:

A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged; provided that nothing in this section shall authorise the publication of any blasphemous, seditious or indecent matter.

34. From the above, it is evident that the defence of absolute privilege raised by the 1st Defendant is applicable in this case. However, to qualify for the protection of absolute privilege under Section 6 above, a report must have the following characteristics:

1. it must be a report of proceedings heard before a court exercising judicial authority;
2. it must be a fair report of those proceedings;
3. it must be an accurate report of those proceedings and
4. it must not contain any blasphemous, seditious or indecent matter.

35. In *Gatley on Libel & Slander* 9th Ed. pg 321 para 13.45 the learned author states as follows:

“The onus of proving that the report is fair and accurate lies on the defendant, but it is sufficient if this appears from the plaintiff’s own evidence. If the defendant fails to prove that the report is fair and accurate, the plaintiff is entitled to succeed, however honestly it may have been published. Whether the report is fair and accurate is a question of fact for the jury, provided always that there is some evidence of unfairness or inaccuracy to go to the jury. This is a question for the judge to determine. It is for the judge to decide whether the matter complained of can fairly be said to be a report of judicial proceedings”

36. Section 3 of the National Council for Law Reporting Act, No. 11 of 1994 provides for the functions of the 1st Defendant which include;

The Council shall—

- (a) be responsible for the preparation and publication of the reports to be known as the Kenya Law Reports, which shall contain judgments, rulings and opinions of the superior courts of record;
- (b) undertake such other publications as in the opinion of the Council are reasonably related to or connected with the preparation and publication of the Kenya Law Reports; and
- (c) perform any other functions conferred on the Council by or under the provisions of any other written law.

37. Further Section 19 of the National Council for Law Reporting provides that “Every judge of the superior court of record shall as soon as practicable after delivering a judgment, ruling or an opinion cause to be furnished to the Editor a certified copy of the judgment, ruling or opinion delivered by



him.” While Section 20 thereof provides that “the registrar of the High Court or the registrar of the Court of Appeal shall at the end of each month furnish the Editor with a list of all judgments, rulings or opinions delivered by the High Court or the Court of Appeal as the case may be.”

38. Accordingly, the answer to this issue is that the proceedings which the 1st defendant reported on were court proceedings in line with their legal mandate and a fair representation of the proceedings that occurred in court, as forwarded by the Judicial Officer. What was reported by the first respondent is a judgment of the Employment and Labour Relations Court (ELR) in cause number 93 of 2020. The case is reported as Emmanuel Mambo Oduoy v One Acre Fund [2020] eKLR. This is a court decision. The applicant is the one who filed that civil suit before the labour court. The case was initially filed in 2017 in Bungoma and was determined on 7th August, 2020, vide judgment of Justice Maureen Onyango. The Plaintiff has not made any complaint in relation to any other document other than the judgment of the court. There are court proceedings which ended with a judgment in favour of the plaintiff.
39. Whether the Plaintiff has established a case as against the 2nd Defendant
- 40.. The case against the 2nd Defendant is that being the employer of the Judicial Officer who authored and forwarded the impugned legal report to the 1st Defendant, it is vicariously liable. Further, the Plaintiff argues that his efforts at mitigating the effects of the published report have been unsuccessful due to the inaction of the 2nd Respondent and the Registrar.
41. Article 172 of the Constitution provides for the functions of the 2nd Defendant which include: (1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall — (a) recommend to the President persons for appointment as judges; (b) review and make recommendations on the conditions of service of— (i) judges and judicial officers, other than their remuneration; and (ii) the staff of the Judiciary; (c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament; (d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and (e) advise the national government on improving the efficiency of the administration of justice. (2) In the performance of its functions, the Commission shall be guided by the following— (a) competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and (b) the promotion of gender equality.
42. From the above, it is evident that the Plaintiff has failed to disclose any reasonable cause of action against the 2nd Defendant. There is no evidence supplied to this court to support its claim against the 2nd Defendant. Being aggrieved by the decision of Lady Justice M.A. Onyango, he has already preferred an appeal and as such the matter is now before the superior court. A notice of appeal dated 20th August, 2020 was filed before the ELRC on 21st August 2020. The 2nd defendant has not stopped the plaintiff from pursuing his appeal.
43. Whether the publications by the defendants were false, malicious, spiteful, ill- motivated and defamatory of the plaintiff
44. Odunga J. held in *Phineas Nyagah v Gitobu Imanyara* [2013] eKLR that: -
“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.Malice



may also be inferred from the relations between the parties.... The failure to inquire in the facts is a fact from which inference of malice may properly be drawn.”

45. The 1st Defendant submitted that the Plaintiff did not request the Court to anonymise his personal information on the court records hence the publication of the judicial decision was done as received. The exception to this rule is however found in the Kenya Law Anonymization Guidelines(KLAG), 2009 which allows for redaction and or pulling down information under specific circumstances. The circumstances include;
- a) In compliance with an order banning publication of specific information received together with a specific document;
 - b) In response to a user’s request for anonymisation;
 - c) In compliance with statutory provisions on publication;
 - d) When inventorising sensitive cases;
 - e) When a document contains personal identifiers.
46. With regards to the Plaintiff’s case and the submission of the 1st Defendant that the request for anonymisation is not automatic and it depends on whether it can be classified as a sensitive case. According to the Anonymization Guidelines, in sexual offences cases, the names of the victim; the names of the parents, relative witnesses; the victim’s place of residence (e.g., village, estate but not including the district or province if mentioned.); and Any other personal information should be anonymized. The Plaintiff’s case does not fall in any of the categories identified and as such it is obvious that the report as published was the factual proceedings of the case before the court void of malice or spite.
47. The claimant’s suit is grounded on the contention that the defendants used the claimant’s full name while reporting the judgment of the ELRC in cause number 93 of 2020. That cause was initially filed, as cause number 17 of 2018 before the Bungoma ELRC Court and later cause number 79 of 2017 at the Kisumu Court. It is the plaintiff in this case who sued his former employer, One-acre Fund. The plaintiff contends that the contents of the judgment can be interpreted to defame him as it contains allegations of sexual harassment yet those allegations were dropped by his former employer. According to the plaintiff, the defendants ought to have anonymize his name when reporting the case. Further, the judgment of the court ought not to have included the allegations of sexual harassment since those allegations were not the reasons for his employment termination.
48. The plaintiff’s 2nd supplementary written submissions dated 16th April 2021 seems to be complaining against the judgment of the ELRC.
- Part of those submissions states as follows: -
- a. I humbly submit that the 2nd defendant JSC is the employer of the judicial officer, who authored, produced and submitted the impugned report for co-publication, with the 1st defendant.
 - b. I humbly submit that it is trivial fact and knowledge that 2nd defendant employed the judicial author of the impugned report who produced it in bad faith and partial manner while regarding Plaintiff’s social origin/caste of non-legal litigant acting in person, against Regulation 12 and 13 of Part III of Code of Conduct and Ethics of Judicial Officers as provided for by the employer the 2nd defendant.



- c. The judicial officer failed to acknowledge that the Respondent's defence against the cause of action of sexual assault defamation was a sham defence, without triable defence issues, contained mere denials and had no rebuttal evidences.
 - d. The judicial officer failed to acknowledge that claimant was suspended on November 2016 over sexual assault allegations immediately after his meritorious promotion and salary increment (dated 9th November 2016) occasioned by three excellent performance reviews of April, October and November 2016 which factored in views from claimant's direct reports working under him in the Soil Laboratory.
 - e. The judicial officer was unfair to entirely discard Claimant's Reply to Amended Memorandum of Defence containing the 24 points on inferences of malice, extent of publications and damages arising from the defamatory words that stated that Dear Emmanuel Mambo! Following concerns brought to our attention over allegations of sexual assault by you in your area of work as the Soil Lab Manager, CO EMO L published by Beatrice Macksallah out of malice.
 - f. The judicial officer was biased to hold that the sexual harassment charges were abandoned or clarified to the claimant by the respondent by dint of the following statement made during second and final disciplinary hearing: " Beatrice said that when investigations started it was determined that they were now dealing with harassment and intimidation which Mambo was later served with show cause letter on intimidation and harassment"
 - g. The judicial officer failed to inquire into the principal reasons for the alleged abandonment or retraction of the alleged sexual harassment charges in addition to Respondent's failure to reinstate the claimant to his office back from the indefinite suspension maliciously imputed on him.
49. Counsel for the defendants urged the court to ignore some of the plaintiff's submissions as they raise issues that were not pleaded. The plaintiff should differentiate between an appeal to the Court of Appeal and Civil suit seeking damages. This case is not an appeal against the decision of Justice Maureen Onyango. This is a separate claim. The plaintiff seems to justify his inclusion of the 2nd defendant since it's the one which recruited the Judge. I do find the above submissions to be misplaced and of no assistance to the plaintiff's claim. The ELRC court found in favour of the plaintiff. What was before that court had nothing to do with defamation.
- 50 I have read the judgment of Justice Maureen Onyango in ELRC 93 of 2020. All what the court did was to reproduce some of the documents produced by the parties in the dispute including the plaintiff herein. Part of the judgment reads as follows:-`

“He avers that on 30 November 2016, the Respondent suspended him over allegations of sexual harassment against him and the pension letter set a hearing date on 7th December 2016. That he consequently surrendered his work items to his supervisor and temporarily closed the soil laboratory. That on the day set for hearing he was grilled in the presence of one Human Resource witness. That the Respondent served him with a Show Cause letter on 15 December 2016 while he was still on suspension and he was further required to attend another bearing session on 10th January 2017 over new allegations of harassment and intimidation. That he responded to the show cause on 16th December 2016 denying involvement in the new allegations and requested for details of the same. On the said 10 January 2017 at the hearing, the Respondent refused to itemise the allegations and demanded his response to a series of questions. The Claimant avers that in both hearing



sessions, the Human Resource witness Grace Odongo refused to sign against the hearing notes.

51. Justice Maureen Onyango reproduced some of the letters that were exchanged between the plaintiff and his former employer. The dismissal letter dated 24th January 2017 contains the following paragraph:-

“Harassment and intimidation: You have continually harassed your subordinates through vulgar language, unprofessional conduct threats and sackings.”

52. A judicial officer uses the evidence in form of materials placed before the court to write a judgment. The court is not limited to picking certain documents while evaluating a case and cannot be faulted for reproducing some of the documents which contained the allegations of sexual harassment. Part of the judgment contains the plaintiff’s averments that he was accused of sexual harassment. The plaintiff approached the ELRC court seeking damages for unlawful termination of his employment. Part of his pleadings stated that he was accused of sexual harassment but subsequently dismissed for other reasons. I do find that there is no defamation on the plaintiff by the defendants. These are court proceedings that were properly reported by the 1st defendant.

53. The plaintiff’s witness statement dated 22nd February, 2021 narrates how he was dismissed by his former employer in 2016. He was later employed by the Crop Nutrition Laboratory Services (Croprints) and was declared redundant in march, 2019. The plaintiff has not proved that his second dismissal was due to the sexual harassment allegations made against him by his first employer (One Acre Fund). Further, the 1st defendant reported the ELRC case in 2020 after the judgment was delivered on 7th August, 2020. The dismissal in March, 2019 came before the case was reported and therefore cannot be blamed on the defendants.

54. There is no evidence that the plaintiff has been declined employment because of the reported ELRC case. In any case, if one reads the judgment, there is no evidence that a prospective employer would conclude that the plaintiff is a person who sexually harasses fellow employees. There is no letter from an employer who declined to employ the plaintiff due to his alleged behavior. The law reporting cannot be adjusted to suit the plaintiff’s interest. I see no good reasons as to why the reporting should anonymize the plaintiff. The plaintiff was not charged with any sexual offence and his name is not included in the register of sexual offenders.

55. I am satisfied that the plaintiff’s claim for Kshs.9 million as damages for discrimination and Kshs.99,000,000 as damages for sexual assault and sexual harassment defamation has not been proved on a balance of probabilities.

56. The upshot is that the plaintiff’s suit lacks merit and is hereby dismissed with costs.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF JULY 2021

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S. CHITEMBWE

JUDGE

