REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KISII

CORAM: A. K. NDUNG'U J.

CIVIL APPEAL NO. 52 OF 2020

ROYAL MEDIA SERVICES LIMITED T/A CITIZEN TV .....1ST APPELLANT

SAMUEL OWINO MESO .....2ND APPELLANT

VERSUS

ALFRED AMAYIO MAIKO.....RESPONDENT

(Being an appeal against the judgment and decree of the Chief Magistrate's Court at Kisii by Hon. S.K. Onjoro, SRM in Civil Case No. 407 of 2019 delivered on 28th August 2020)

JUDGEMENT

1. The suit before the trial court was instituted by the respondent against the appellants seeking damages for defamation. He claimed that on 31st March 2019, the 1st appellant, which is the proprietor of the television station known as Citizen TV and its employee the 2nd appellant, broadcast a documentary claiming that he was part of a cartel that had duped hundreds of unsuspecting, jobless, teachers in Nyanza into parting with tens of shillings to get appointment letters from the Teachers Service Commission ("T.S.C.").

2. According to the broadcast, the 2nd appellant had called one Yassion Ombado on Monday the 25thof March, 2019, claiming to be a P1 teacher desperate for a TSC job. He met Mr. Ombado the following day at restaurant in Rongo town within Migori County to submit his documents and managed to convince Mr. Ombado to accept Kshs. 30,000/= before filling in some forms that resembled those of the T.S.C.

3. The 2ndappellant reported that an informant had told him that Mr. Ombado, who was a cook at Kameji Secondary School worked with Andrew Amara, a grounds man at the same institution both of whom received orders from the Principal of Kameji Secondary School. He reported that;

> "*The two receive orders from Kameji School principal a man our informer claims is the boss of the cartel, but at this stage the only [l]ink to the principal is a trail of parcel records bearing his name. parcels are sent between 21st and 23rd of March, 2019 names of all three are present ...with all this information we decide to call the school principal who remains dodgy throughout our phone call…"*

4. The 2ndappellant reported that the cartel had given him a TSC number and an offer of employment letter with his salary per year and his reporting' date which turned out to be fake.

5. According to the respondent, one Elphas Langat ran a follow up story on 1st April, 2019, claiming that fresh details had emerged after their investigative piece over the countrywide racket that defrauded unemployed teachers. It was stated that after the broadcast, thousands of victims had come forward narrating their ordeal at the hands of the racket. The appellants reported that in Rongo, Alfred Omaiyo, the principal of Kameji School had gone underground following the exposé and Yassion Ombado who had been caught on camera using a fake TSC appointment letter could not be reached on phone. The appellants explained that there were 312,000 teachers in the country with another 290,000 trained but still unemployed which explained the desperation.

6. The respondent averred that the words broadcast by the appellants were understood by those who heard them or watched them to mean that he, being the school principal of Kameji Mixed Secondary School, was conspiring with a cook and a grounds man at the school to fraudulently receive money from qualified unemployed teachers with the promise of offering them employment. And that after receiving the money, he issued fake T.S.C. numbers and posted them to schools of their choice.

7. He averred that the words were also understood to mean that he was a dishonest person and a fraud; he was a criminal and untrustworthy

not befitting employment and/or to hold office as a school principal; that he lacked and integrity and lived against Christian ethics and was unfit to serve in the church.

8. The respondent asserted that the words spoken against him were false and unless the appellants were restrained, they would publish similar words against him.

9. He further claimed that the 1st appellant had a custom of repeating its various news editions and had uploaded the offending broadcast on its social media platforms including YouTube and Facebook which was being viewed all over the world each day. The respondent claimed that the day after the broadcast, unknown people had gathered outside his compound threatening to lynch him. On 1st and 4th April 2019, the T.S.C. investigation team from Migori County and the T.S.C. director's office went to him to investigate the issue which had affected his future job progression with his employer.

10. The respondent further averred that as a consequence of the broadcast, he had suffered ridicule and loss of trust as a family man and a church member. The documentary had also ruined the stable and happy relationship he used to enjoy. He stated that he had been a teacher since 1st May 1988 and had lost his reputation amongst his professional peers, colleagues, teachers, parents and subordinate staff and his former students.

11. He therefore sought the following prayers against the appellants:

a) General damages for defamation

b) Aggravated damages;

c) Punitive damages;

d) A prohibitory injunction restraining the Defendants and each of them, whether by themselves their servants, employees and/or agents or otherwise, from further reporting, publishing and/or broadcasting or causing to be reported, published or broadcast, the documentary christened "cheating teachers - cartel dupes hundreds of jobless teachers in Nyanza" or any word and images similarly defamatory of the Plaintiff;

e) A mandatory injunction compelling the Defendants to pull down and/or withdraw the documentary christened "cheating teachers - cartel dupes hundreds of jobless teachers in Nyanza" from all its social media platforms;

f) An order for the 1st Defendant to broadcast an apology as prominent in the manner in which the Defendants reported, published or broadcast, the documentary christened "cheating teachers of jobless teachers in Nyanza";

g) Costs and interest at court rate from the date of filing this suit; and

h) Any other or further relief that this Honorable Court deems fit to grant.

12. The appellants filed a joint statement of defence denying that they had published the story as claimed by the respondent. They averred that if at all the story was published, it was published in good faith, in the public interest and without intent to injure the character of the respondent. They stated that they would rely on the defences of qualified privilege and a fair comment on a matter of public interest.

13. The appellants averred that under Article 33 and 34 of the Constitution the public was entitled to have information that shocked and disturbed their conscience about major events in the country. They therefore stated that they would rely on those Articles of the Constitution and the rule in ***New York Times vs Sullivan 376 US 254 (1964)*** in their defence. They also sought to rely on the common law and statutory defence of truth or justification.

14. The respondent further asserted that if the story had been published it had been published after thorough investigations had been done, in accordance with principles of responsible journalism. They claimed that they had published the news, in the course of discussing the performance of duty by a public official and as part of the 1st defendant's duty to report instances of abuse of office by public officers. Further, that the publication had not been actuated by malice and was reasonable in the circumstances. They also claimed that the story was published not without an honest belief in the truth of the words or made with reckless disregard for the truth or untruth of the words. The trial court was thus urged to dismiss the suit with costs to the appellants.

15. 3 witnesses testified when the matter came up for hearing before the trial court. In support of his case, the respondent, Alfred Omaiyo Maiko, testified that he had been a teacher by profession and the principal of Kameji School in Migori since 27th April 2018 until he was interdicted on 11th October 2019. He stated that he had sued the appellants due to an incident that occurred on 31st March 2019. On that day, the 2nd appellant had called from Radio Citizen saying that he was conducting investigations on cheating teachers. He told the 2nd appellant that he would not be able to answer him and requested him to come and interview him face to face. That very day in the 7p.m. news, it was aired that there was a cartel of cheating teachers and he was the head of the cartel. The call between him and the 2nd respondent was broadcast in the news.

16. The respondent recalled that the exposé was the first item on the news that day. He told court that he received calls from across the world including calls from students he had taught over 31 years prior and he had to switch off his phone.

17. The following day, the news was repeated. The broadcast claimed that he had gone underground but the respondent told the trial court that he was in school that day. He testified that he was summoned by the CID Rongo but no criminal action was taken against him. He complained that after the broadcast, peers viewed him as a conman and his name had also been tarnished in his church.

18. The respondent informed the court that before he joined Kameji Secondary School he was rejected the first time he was sent to the school. He surmised that the story was part of a scheme to remove him from the school. He testified that on 30th June 2017, it was reported that he wanted to kill 2 workers and the reporters questioned why TSC was not taking any action. After that, the TSC interdicted him and accused him of giving false letters, recruiting 6 people to sign the letters in Nyanza and recruiting agents to hire people all over Nyanza.

19. The respondent denied the stories broadcast about him. He stated that he had not been shown any of the parcels with his name as claimed by the 2nd appellant. He also testified that he did not have a good relationship with the 2nd appellant's informer, James Kobil who was one of his teachers. He told the court that James had gone to him two weeks after he had joined the school demanding payment on some supplies but he had told him that his was not among the debts the school owed. After that, their relationship had soured.

20. In addition to his oral testimony, the respondent relied on his written statement and produced as his evidence a demand letter, a DVD, an email, supplementary list and consignment note.

21. During cross examination, the respondent stated that Ombado had been one of his workers but he had deserted his duties and gone underground. Amara had retired before the broadcast.

22. The respondent stated that his lawyer had downloaded the clips that were played from YouTube but admitted that there was no certificate to show where the clip was downloaded from or by whom. He also conceded that he did not have the Swahili publication of 1st March 2020 and that there was no certificate of translation in court for the part in Dholuo language. He had also not placed the remarks made on Facebook before the court and he had not checked to see if the clip was on twitter.

23. Douglas Okemwa (PW2) testified that he was a principal at Mokubo Secondary School and the head of Kenya Secondary Schools Association. He recalled that the day after the broadcast, he met people at Keroka discussing the story that had aired on 31st March 2019. The people were saying that the respondent had been hired to con people and were insinuating that that was what principals did.

24. PW2 testified that he had watched the clip on YouTube. He was shocked by the news as he had never known the respondent to be of such character. He stated that the respondent was a well-known person in Keroka. He testified that the news created doubt in his mind as to the integrity of the respondent as it portrayed him as a corrupt person not worthy to hold public office.

25. For his part, the 2nd appellant, Samwel Owino Meso, testified that he was a journalist at Royal Media Services on Citizen television. He adopted his written statement and the listed documents as his evidence.

26. When cross examined, PW2 admitted that he had done the story about the cheating teachers. He insisted that he tried to speak the truth at all times. PW2 told the court that his source had mentioned the respondent but did not give him any documents or M-pesa messages to show that the respondent was involved. He also stated that one of his informers, James Kobil, had mentioned that Yassin Ombado was working with the respondent. He however admitted that there was no direct information linking the respondent to the scheme. He stated that he had written to the TSC to find out what they had done concerning the respondent although he had not presented evidence against the respondent to the TSC. He also admitted that in the course of his investigations he had not visited Kameji Mixed Secondary School.

27. PW2 further admitted that when he called the respondent on 31st March 2019, he had asked him to send someone with whom he could have a face to face interview but no one was sent. He testified that he travelled to Migori from Nairobi to see Ombado but did not travel to see the respondent. DW1 added that they he had received the allegations against the respondent two weeks prior. He also told the court that he had no apologies to make.

28. On considering the evidence placed before it, the trial court found that the respondent had proved his case. The court awarded him Kshs. 4,000,000/= in damages and Kshs. 500,000/= as punitive damages as it found that the appellants' actions were actuated by malice. The court also awarded the respondent Kshs. 1,000,000/= in aggravated damages because the respondent had been interdicted from work and no apology or withdrawal had been made by the appellant. It further granted the prayers sought to restrain the appellants from broadcasting the story and awarded costs to the respondent.

29. The parties canvassed their appeal by way of written submissions which I have duly considered. From the submissions, the memorandum of appeal and the evidence summarized above, I find that the issues that crystalize for determination are:

a. **Whether the electronic evidence produced by the respondent was admissible;**

b. **Whether the appellants proved the defence of justification, qualified privilege, fair comment and freedom of expression;**

c. **Whether the damages awarded by the trial court were excessive**

d. **Whether the respondent was entitled to exemplary and aggravated damages**

e. **Whether the trial court erred in issuing mandatory injunctions against the appellants.**

30. Before I embark on an analysis of the issues above, I must remind myself of the duty of a first appellate court which is to analyze the

evidence afresh and reach its own conclusion bearing in mind that it did not hear or see the witnesses testify as the trial court did.

a. Admissibility of evidence

31. The first issue raised by the appellants concerns the admissibility of the evidence produced by the respondent. The appellants' counsel argued that the respondent did not comply with the mandatory requirement to produce electronic records accompanied by a certificate pursuant to **Section 106(A)** and **106 (B)** of the **Evidence Act.** He faulted the trial court for relying on the electronic evidence produced as P Exh. 2 as it had not been accompanied by a certificate to show how the evidence was produced.

32. In response, counsel for the respondent argued that the respondent had produced and played the recording of the broadcast without challenge. He submitted that whilst the appellants conceded to have made the broadcast, they never produced their version of the broadcast. Since they had exclusive possession of the original clips, the appellants could not be heard to raise the issue of admissibility which was a technicality curable under Article 159.

33. Counsel pointed out that there had been no allegation that the clip had been tampered with. He also argued that the respondent had relied on the direct evidence of witnesses who heard the broadcast by the 1st appellant.

34. The admissibility of electronic records is provided for under **Part VII** of the **Evidence Act**. **Section 106A** of the Act provides that the contents of electronic records may be proved in accordance with the provisions of Section 106B. **Section 106 B (4)** provides that electronic records relied on as evidence are to be accompanied by a certificate.

35. The Court of Appeal in ***County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others Civil Appeal Nos 17 and 18 of 2015 [2015] eKLR***, held that the conditions under section 106B of the Evidence Act are mandatory as they vouchsafe the authenticity and integrity of the electronic record sought to be produced.

36. It is agreed in this case that the respondent did not produce a certificate along with P. Exh. 2. Accordingly, his DVD evidence was inadmissible as he had failed to comply with the mandatory requirements under Section 106 B (4).

37. Be that as it may, there were admissions made by the 2nd appellant which affirm the respondent's case. According to the respondent's pleadings, the appellants broadcast two defamatory publications against him. The first was broadcast on 31st March 2019 and the second was broadcast on 1st April 2019. He averred that the earlier publication had been reported by the 2nd appellant but the second broadcast was reported by one Elphas Langat.

38. For his part, the 2nd appellant averred that he was the 1st appellant's employee at the material time but denied both in his Defence and witness statement that the alleged defamatory broadcast concerning the respondent had been published. At paragraph 9 of his written statement, PW2 indicated;

> *"9. There is no evidence that the 1st Defendant did broadcast those words."*

39. However, when probed about the above statement during cross examination, PW2 responded as follows;

> *"I did the story about the cheating teachers. I try to speak the truth at all times. I do not occasionally lie. (witness referred to paragraph 9 of the defence). I don't need any evidence to know I broadcasted the story."*

40. Based on his admissions during trial, it was established that the 2nd appellant had reported the words complained of by the respondent on 31st March 2019. There was however no evidence that the words reported by Elphas Langat were broadcast on 1st April 2019 as claimed.

b. The defence of justification;

41. The appellants raised several defences against the respondent's claim. The first was the defence of justification which is defined as follows at **para. 81.page 42** of the **Halsbury's Laws of England Fourth Edition Vol 28**;

> *"The defence of justification is that the words complained of were true in substance in fact.*
>
> *Since the law presumes that every man is of good repute until the contrary is proved, it is for the defendant to plead and prove affirmatively that the defamatory words are true or substantially true."*

42. The appellants' counsel argued that the truthfulness of the alleged defamatory words was proved through the evidence given. He relied on the fact that the Respondent had since been interdicted to show that the statements made by the appellants were true. Counsel referred this court to an excerpt at **page 275 para. 11.9** in **Gatley on Libel and Slander, 10th edition** where the author states that in the defence of justification, if the defendant proves that "*the main charge, or gist, of the libel"* is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable.

43. Section 14 of the **Defence Act** similarly provides;

14. Justification

In any action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges.

44. In the broadcast dated31st March 2016 dubbed ***"Cheating teachers- cartel dupes hundreds of jobless teachers in Nyanza"*** the appellants claimed that the respondent, who was the principal of Kameji Secondary School, gave instructions to a cook known as Yassion Ombado and grounds man known as Andrew Amara, to dupe jobless teachers into parting with money to get appointment letters from the T.S.C. According to the broadcast, the only link between the respondent, Mr. Yassion and Mr. Amara was a trail of parcel records sent between 21st and 23rd March 2019 bearing the names of all three. The 2nd appellant claimed that he had tried to call the respondent but he remained dodgy throughout the phone call.

45. The 2nd appellant reported that he convinced Mr. Yassion to take Kshs. 30,000/= before filling some forms that resembled those of the Teachers Service Commission. He claimed that Mr. Yassion issued him with a TSC number and an employment letter. When he checked with the TSC to ascertain whether the TSC number was genuine, it turned out to be fake.

46. The 2nd appellant produced documents during the trial including copies of a fake Primary teacher's certificate, KRA PIN certificates, a handwritten notebook containing payments made, screenshots of Mpesa messages sent to Mr. Yassion, the fake employment letter and correspondence with the TSC and the DCI.

47. He further testified that one of his informants known as James Kobil, had mentioned that Mr. Yassion was working with the respondent. He produced a letter by the said James Kobil addressed to, among other individuals, the secretary of the T.S.C., claiming that the respondent had threatened to kill him following the broadcast. The 2nd appellant also produced a letter written by Mr. Yassion to the TSC detailing the involvement of the respondent in the racket.

48. Mr. James Kobil and Mr. Yassion who informed the 2nd appellant of the cartel and seemed to have a lot of damning information linking the respondent to the scandal were not called to testify. The 2nd appellant's testimony therefore amounted to inadmissible hearsay evidence which was defined by the Court of Appeal in ***Kinyatti v Republic [1984] eKLR*** thus;

The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact.

49. The letters produced by the 2nd appellant that were purportedly authored by the informants were also of no probative value. The respondent also failed to produce the parcels that allegedly had the respondent's name on them and linked him to the scheme to defraud teachers.

50. The respondent testified that on the very day the story was broadcast, he received a call from the 2nd appellant informing him that he was conducting investigations on cheating teachers. The respondent told him that he was not able to answer him and asked him to send someone for a face to face interview. That evening in the news, his phone conversation with the 2nd appellant was broadcast claiming that he had been dodgy.

51. The 2nd appellant admitted that while he had travelled to Migori from Nairobi to see Ombado, he had not extended the same courtesy to the respondent by travelling to see him. He also admitted that he had not visited Kameji Mixed Secondary School in the course of his investigations. Despite receiving the allegations against the respondent two weeks' prior, the respondent waiteduntil the very last minute to contact the respondent.

52. The appellants relied on the fact that the respondent had been interdicted by his employer the T.S.C. to support its claim that the broadcast was truthful. The respondent had admitted that he had been interdicted by the T.S.C. as a result of the broadcast but indicated that the T.S.C. had not concluded the case against him. The appellants did not produce the results of any investigation conducted by the TSC or call evidence from the commission to support their claim that the allegations made against the respondent were true.

53. Other than the unsubstantiated claims made by informants who were not called to testify, the 2nd appellant had no concrete evidence to pin the appellant to the alleged scandal. He admitted during cross examination that he did not have any documents or M-pesa messages or video clips linking the respondent to the scheme.

54. The truthfulness of the words published about the respondent was not proved to any degree and the defence of justification was properly dismissed by the trial court.

c. Defence of qualified privilege

55. The appellants' counsel also argued that the appellants enjoyed qualified privilege as they had published the broadcast in the public interest without malice and without intent to injure the character of the respondent.

56. The respondent's counsel countered that qualified privilege was not applicable to stories initiated and published by a media house. He further submitted that the defence of qualified privilege and public interest could not suffice in the circumstances as there was no evidence linking the Plaintiff to any of the allegations made and no effort had been made to verify the information or seek clarification from the respondent.

57. Counsel also submitted that the respondent had demonstrated malice which vitiated the defence of public interest. To demonstrate the

appellants' malicious intent, he pointed to the 2nd appellant's refusal to have a physical meeting with the respondent, the appellants' correspondence with the respondent's employer and the appellants' failure to investigate and find out that there was bad blood between the informant Mr. Kobil and the respondent.

58. Qualified Privilege is defined at **page 54**of the **Halsbury's Laws of England Fourth Edition Vol 28**thus:

Defence of qualified privilege. *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.*

59. The authors go on to state that there may be occasions when a communication to the public at large is protected by qualified privilege, provided the public at large has a legitimate interest in the subject matter of communication.

60. In **Gatley on Libel and Slander 9th Edition page 327** the authors similarly state:

> *It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speakin the protection of some (self or) common interest. In such cases no matter how harsh, hasty, untrue or libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far out-balance that arising from the infliction of a private injury.*

61. What can be drawn from the above texts is that the defence of qualified privilege at common law was available to a defendant notwithstanding the defamatory nature of statements published as it would be contrary to public policy to hamper freedom of communication. The defence would not however shield a defendant actuated by malice in the publication of the words complained of.

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

(See also ***Dorcas Florence Kombo v Royal Media Services Limited [2014] eKLR and Godwin Wachira vs. Okoth [1977] KLR 24****)*

63. While the appellants may be right in their assertion that the public had a right to be informed of the alleged scandal, the manner in which they went about collecting and dispensing the information did not make them eligible for the defence of qualified privilege.

64. **Section 112** of the **Evidence Act** provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. The court is entitled to make an inference that if such evidence is not produced, it would be adverse to such a party. The failure by the appellants to call their informants to testify or produce any evidence to substantiate their claims against the respondent shows that their sources for the information published were unreliable.

65. It was evident from the evidence that the appellants barely made an effort to verify the information published. The 2nd appellant's testimony showed that the appellants were hasty in their publication of the story and barely gave the respondent an opportunity to respond and give his side of the story. These omissions by the appellants are proof of malice. Consequently, the defence of qualified privilege was not available to the appellants.

d. Freedom of expression

66. Closely related to the defence of qualified privilege was the appellant's contention that they were exercising their freedom of expression as protected under **Article 33** when they made the broadcast complained of. The appellants' argued that in other jurisdictions, the courts had placed more weight on the freedom of expression. He referred to the cases of ***New York Times v Sullivan 376 US 254 (1964)*** and the English case of ***Fraser v Evans & Another [1969] 1AL ER 8***in support of his position.

67. In ***New York Times v Sullivan (supra)*** the court held as follows;

> *"The First Amendment requires that debate on public issues should be uninhibited, robust and wide open, and such, debate may well include vehement, caustic and sometimes unpleasant sharp attacks on government and public officials....*
>
> *The constitutional guaranty of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" that is, with knowledge that is false or with reckless regard of whether it was false or not; such a qualified privilege of honest mistake of fact is required by the First and Fourteenth Amendments"*

68. It was argued that teachers hold a position in society equitable to that of public officials and as such their conduct was amendable to

public debate which was protected under Article 33. The appellants' counsel also submitted that no recklessness or malice had been proved.

69. For his part, the respondent's counsel submitted that **Article 33(3)** of the **Constitution** demanded that in the exercise of the freedom of expression, every person had to respect the rights and reputation of others.

70. **Article 33** of the Constitution provides that every person has the right to freedom of expression, which includes the freedom to seek, receive or impart information or idea. The right to freedom of expression is however not unrestricted. **Article 33 (3)**provides;

> *(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.*

71. In the case of ***Nation Media Group Limited v George NthengeCIVIL APPEAL NO. 64 OF 2013 [2017] eKLR*** the Court of Appeal aptly held;

> *Much as we acknowledge the intrinsic value of freedom of the press, we do not subscribe to the notion that the pen is a passport to experimentation and the taking of liberties with people's reputations. Indeed, in some instances, a good name is all that a person has when much else is lost or gone, as was so poignantly the case with the respondent in this case who had had more than his fair shares of personal tragedy as the record shows.*

72. In as much as the appellants were entitled to seek and impart information to the public, they were required to do so in a manner that respected the reputation of others. In this case, the appellants paid little regard to the respondent's reputation when they broadcast the words complained of. Thus, they were not entitled to seek refuge under Article 33.

e. Fair comment

73. The appellants also faulted the trial court for failing to find that they defence of fair comment was applicable in this case. They relied on the case of ***Nation Media Group & Another v Alfred N. Mutua [2017] eKLR*** where the court defined the scope of the defence of fair comment thus;

> *"To sustain the defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is on a matter of public interest [see Gately on Libel and Slander, 8th edition, 1981 (Sweet & Maxwell) at paragraph 692 at page 291)*

74. **Section 15** of the **Defamation Act** provides;

> *In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.*

75. The story broadcast by the appellants in this case comprised largely of statement of facts. According to the evidence presented before the trial court, it is apparent that the broadcast was wholly authored by the appellants. They gathered information on their investigative piece on the scandal and aired it.

76. If part of the broadcast could be classified as a comment, the defence of fair comment would still not avail to the appellants as they did not demonstrate that the facts upon which the comments were based were true. Moreover, the publication was motivated by malice as held above, which vitiates the defence of fair comment.

77. This court agrees with the trial court that the defences advanced by the appellants were not available to them. To succeed in his claim for defamation the respondent was required to prove that (i) The statement was defamatory; (ii) The defamatory utterances or statement was published or communicated to someone other than the person defamed and (iii) The statement was published maliciously. (See ***Wycliffe A. Swanya v Toyota East Africa Ltd & another CIVIL APPEAL 70 OF 2008 [2009] eKLR***)

78. The story published by the appellants specifically referred to the Principal of Kameji Secondary School. There is no doubt that at the material time, the respondent held that position. The respondent also proved that the story was published by the appellants through Citizen TV on 31st March 2019. The exposé broadcast by the appellants put the respondent as the head of the cartel that had been defrauding jobless teachers yet there was no tangible evidence linking the respondent to the scandal. This proved that the appellants were actuated by malice.

79. Taken in their ordinary meaning, the words publicized by the appellants would mean that the plaintiff was a fraud, of criminal character and not befitting of employment as a school principal. These words injured the plaintiff's reputation and brought odium and contempt to him in the estimation of right thinking members of society.He was therefore entitled to compensation in damages to vindicate him to the public and is a suitable solatium for the wrong done to him.

f. General damages awarded

80. On damages, the appellants' counsel argued that the courts had moved from the previous trend of awarding hefty damages in what was termed Biwott cases, towards awarding lower damages as held in the case of ***Nation Newspapers Limited v Peter Baraza Rabando [2016] eKLR***.

81. Counsel proposed a sum of Kshs. 500,000/= as adequate compensation for the respondent. He relied on the case of ***Clement Muturi Kigano vs Hon. Joseph Nyagah HCCC No. 509 of 2008,*** where the court had held that the plaintiff, who was a senior advocate, would have been entitled to Kshs. 1.1 million had he proved libel. He also cited the case of ***Muthui Mwai & Anor v Standard Newspaper & Others [2012] eKLR*** where the court awarded journalists Kshs. 400,000/= each for libel. The case of ***Eric Gor Sungu v George Oraro Odinga [2014] eKLR*** where the advocate of over 35 years standing was awarded Kshs. 5 million was also cited.

82. It was further argued that since malice had not been proved, the general damages awardable was substantially mitigated and there was nothing in the conduct of the appellants to aggravate the defamation.

83. Counsel for the respondent submitted in favour of the trial court's assessment of damages. He urged that in coming to its decision, the trial court had considered the fact that the broadcast reached a wide audience as it was delivered by television and on YouTube channels. He submitted that the evidence given by the 2nd appellant portrayed extreme malice and lack of remorse. The damages awarded by the trial court was therefore not inordinately high and was within acceptable margin.

84. The award of damages by a trial court is an exercise in its discretionary power. An appellate court will not interfere with an award of damages unless it can be shown that the trial court's award was based on a wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred.

85. The court in the case of ***Raphael Lukale v Elizabeth Mayabi & Another [2018]eKLR***, held as follows on the factors that ought to be taken into consideration in awarding damages in defamation cases;

> *In defamation cases, the Court of Appeal, in Standard Limited V G.N Kagia T/A Kagia & Company Advocates , Civil Appeal No.115 of 2003, set out the following principles to be applied in awarding damages:-*
>
> > *"1) In situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages.*
> >
> > *2) The level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and publishers of libel. Personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers."*

In the case of John v MGM Ltd (1997) Q.B 586 the English Court of Appeal said in part at page 607 paragraph F:-

> *"In assessing damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people."*

86. The trial court awarded the respondent a sum of Kshs. 4,000,000/= in general damages, Kshs. 500,000/= as punitive/ exemplary damages and Kshs. 1,000,000/= in aggravated damages.

87. The respondent had proposed a sum of Kshs. 7,000,000/= in general damages. He relied on the case of ***The Nairobi Star Publication Limited vs Elizabeth Atieno Oyoo Civil Appeal No. 52 of 2017*** where the court awarded the plaintiff a sum of Kshs. 5,000,000/= in general damages.

88. The appellants proposed an award of Kshs. 300,000/= based on the cases of ***Clement Muturi Kigano (supra), Muthui Mwai (supra)***and ***Eric Gor Sungu (supra)***.

89. The respondent testified that he had been a teacher for a period of 31 years. He testified that after the broadcast, he received calls from all over the world including from students he had taught over the years. PW2 confirmed that the respondent was well known within his community.

90. The trial court held that it had considered the respondent's reputation, the wide coverage of the publication and the authorities cited by the parties in awarding a sum of Kshs. 4,000,000/=. The trial court appeared to have been guided by the of ***Elizabeth Atieno Oyoo (supra)*** and the case of ***Eric Gor Sungu v George Oraro Odinga (supra)***in awarding general damages.

91. It is notable that the trial court failed to take into account the respondent's standing in terms of status, fame, recognition, credit and reputation as compared to the claimants in the case of ***George Oraro Odinga (supra)***.

92. In ***Raphael Lukale v Elizabeth Mayabi & Royal Media Services Ltd Civil Appeal No. 286 of 2016 [2018] eKLR***, the Court of Appeal awarded the appellant who was a head teacher a sum of Kshs. 1,500,000/= for defamatory statements aired by an FM station with wide listenership among the Luhya community.

93. In the case of ***Nation Media Group Limited v George Nthenge Civil Appeal No. 64 of 2013 [2017] eKLR***, the Court of Appeal, the Court of Appeal upheld an award of Kshs. 5 million as compensation for defamatory words published against the respondent who was 80 years old and had had an illustrious political career in his heydays.

94. Taking all the above into account and the respondent's standing in society, the fact that the publication touched on the appellant's long professional reputation, the nature of the publication, the wide coverage of the publication, the fact that with due diligence the appellants could have established the truth and the need for deterrence and to instill responsibility on potential tortfeasors , am persuaded that the respondent was entitled to substantial damages, Am quick to add, however, that given the authorities availed to the trial court, the court's assessment of general damages was excessive in the circumstances even with the incidence of inflation. This court finds that an award of Kshs. 2,500,000/= in general damages is apposite in the circumstances.

g. Punitive damages and aggravated damages

95. The trial court also awarded the respondent a sum of Kshs. 500,000/= for the reason that the 2nd appellant's actions showed that it had been actuated by malice. It also awarded the respondent a sum of Kshs. 1,000,000/= in aggravated damages on the grounds that the respondent had been interdicted from work as a result of the broadcast. The appellants had also refused to apologize or withdraw the defamatory statements.

96. The appellants' counsel submitted that the respondent was not entitled to aggravated damages as there was no proof that a demand letter was ever received by the Appellants neither was there any proof that the publication was ever repeated. There was also no proof that the publication was made intentionally to make a specific profit. Counsel further submitted that since the respondent had not sent a demand letter before instituting the suit, he was not entitled to costs of the suit.

97. The respondent's counsel countered that the award of Kshs. 1,000,000/= in exemplary damages was reasonable and ought to be sustained. He submitted that the respondent had produced a demand letter, the email forwarding the demand and a consignment note sending the demand letter by courier as exhibits contrary to the appellants' assertion. These proved on a balance of probabilities that the demand letter had been sent.

98. He further submitted that there was evidence that the publication was repeated on 1st April, 2019 and 30th June 2019. He was of the view that the manner in which the story was rushed demonstrated that it was calculated to increase the appellants' ratings to the respondent's detriment. Therefore, the award of aggravated damages was justified.

99. Counsel submitted that in the case of ***Abdi Mohamed Farah -Vs- Nairobi Star Publication Ltd & Another [2015] eKLR*** the Plaintiff was awarded Kshs. 1,000,000/= as aggravated damages therefore the sum awarded in this case was reasonable and ought to be upheld.

100. Punitive or exemplary damages 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 ***Halsbury's Laws of England, 4th edition, 1979 (Sweet & Maxwell) at paragraph 243 at page 120***and***Bank of Baroda (K) Ltd vs. Timwood Products Ltd[2008] 236***)

101. Since the appellants were a media house, they would fall under the second category of. In ***Halsbury's Laws of England, 4th edition, 1979 (Sweet & Maxwell) at paragraph 243 at page 120*** the learned authors state as follows on publications that are aimed at making a profit;

> *"In demonstrating the defendant's calculation as to profit, it is not sufficient to show merely that the words were published in the ordinary course of business run with a view to profit; the publication must be intended to make a specific profit."*

102. The respondent did not prove that the appellants aimed at maximizing their profits to a specific degree. As such, I find that the award of Kshs. 500,000/= in punitive or exemplary damages was unmerited.

103. Regarding aggravated damages, the authors in ***Halsbury's Laws of England, 4th edition, 1979 (Sweet & Maxwell) at paragraph 237 at page 118*** state that the manner and extent of publication, the defendant's actual malice, the defendant's subsequent conduct, the failure to apologize, the failure to prove the plea of justification and the conduct of the defendant's case may increase or aggravate the damages.

104. There were several factors in the evidence before the trial court that demonstrated that the respondent was entitled to aggravated damages. The first was the fact that there was hardly any evidence linking the respondent to the scandal at the time the story was broadcast but that notwithstanding, the appellants went ahead to publish the story. The trial court was right in its observation that the 2nd appellant failed to uphold the highest standards of journalism in carrying out his duties.

105. Although the plaintiff did not prove that the offending publication had been repeated on 1st April, 2019 and 30th June 2019 the effect of the broadcast of 31st March 2019 as told by the respondent and his witness PW2 was quite detrimental to the respondent's reputation as it reached a global audience and caused a stir in Keroka where the respondent resided.

106. The 2nd respondent admitted that he had contacted the respondent's employer the TSC to find out whether they had taken any steps against the appellant following the exposé and as a result, the respondent was interdicted by his employer. He further admitted during trial that he had not presented any evidence to the TSC on the respondent. Despite his admission that he had no evidence against the respondent, the 2nd appellant failed to apologize and defiantly stated that he would do the story again if given chance.

107. The appellants also relied on the defence of justification which they failed to establish.

108. The appeal against the award of aggravated damages is therefore without basis.

h. Granting permanent injunction

109. The trial court's decision to issue an injunction against any or all persons from saying anything about the respondent was challenged on the grounds that it impaired freedom of expression and public interest that the truth should be told. This court was referred to the case of ***John Ntoiti Mugambi alias Kamukuru v Moses Kithinji alias Hon. Musa [2016] eKLR*** where the court held;

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

Despite the foregoing misgivings, in the interest of justice, I think this case calls for appropriate orders to be made. First, I note that the Respondent submitted that there is no remote possibility that the Defendant will give another interview about the plaintiff."

110. On the other hand, the respondent's counsel urged this court to uphold the injunctive orders issued against the appellants. He relied on the case of ***CFC Stanbic Bank Limited -vs- Consumer Federation of Kenya (Cofek) being sued through its officials namely Stephen Mutoro & 2 Others [2014] eKLR*** where the Honourable court held that a mandatory injunction could be granted in special circumstances. He submitted that there existed special circumstances to warrant the issuance of injunctive orders in this case as the respondent's 30-year profession as a teacher had been injured and continued to be injured by the publication on the world wide web and the appellants' social media platforms.

111. The respondent's counsel also urged the court to issue an order compelling the 1st appellant to broadcast an apology as prominent and in the manner in which the appellants reported the documentary. He complained that the documentary had not been pulled down and was still being watched by people all over the world on the 1st appellant's social media platforms such as YouTube.

112. Having analyzed the injunctions granted under orders d, e, and f of the plaint, I find that contrary to the appellants' assertion, the injunctions sought and granted by the trial court were specific to the exposé broadcast by the appellants concerning the respondent's involvement in the cartel to defraud jobless teachers on the guise that he would help them get employment. This court has upheld the trial court's finding that the publication by the appellants was defamatory to the respondent. The injunctions were drawn precisely and were not so broadly coached as to curtail the appellants' freedom of expression.

113. The respondent was also entitled to an apology in equal magnitude and prominence as the defamatory publication. This would go a long way in vindicating the respondent to the public

114. In the end, this court finds that the appeal on quantum is merited. The judgment of the trial court is hereby set aside and is substituted with a judgment of this court as follows;

a. General damages Kshs. 2,500,000/=

b. Aggravated damages Kshs. 1,000,000/=

115. For the avoidance of doubt, the appeal against prayers (d) (e) (f) and (g) in the plaint dated 17th May 2019 are dismissed.

116. The appellants shall bear 2/3 of the costs of this appeal.

Dated, Signed and **Delivered** at **Kisii** this **7th day** of **July, 2021.**

A.K. NDUNG'U

JUDGE