



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 14 OF 2017

IBRAHIM MUKHTAR ABASHEIKH PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES1ST DEFENDANT

AGNES OLOO 2ND DEFENDANT

CORAM: Hon. Justice R. Nyakundi

Waziri Omollo Advocates for the Plaintiff

Kamau Kuria Advocates for Defendants

JUDGMENT

Introduction

The plaintiff **Ibrahim Mukhtar Abasheikh** in a plaint filed in court on 12.5.2017 prayed for:

- (a). Mandatory injunction compelling the defendants to pull down the defamatory statement from the website.***
- (b). A permanent injunction restraining the defendant from continuing to publish any material that is defamatory of the plaintiff.***
- (c). A full and unequivocal apology.***
- (d). General damages for libel***
- (e). Exemplary and/or aggravated damages***
- (f). Costs of the suit.***
- (g). Interest on (d), (e) , (f) and at court rates***

The dispute is based on brief alleged facts that on or about the 3rd day of May 2017, the 1st and 2nd defendants jointly, falsely and maliciously printed and published an article titled:

“Two charged with harvesting body parts concerning the plaintiff, the article reads. “The two Ali Hassan and Ibrahim Mukhtar Abasheikh are believed to be business associates who recently started a human smuggling company by the name Abasheikh Limited Farm registered with the registrar of companies.”

The plaintiff contends that the said words directly referred to the plaintiff and in their plain and ordinary meaning were understood to mean:

- (a). That the plaintiff is a criminal.***
- (b). That the plaintiff is a murderer.***
- (c). That the plaintiff is negligent.***
- (d). That the plaintiff endorses and engages in criminal activities.***
- (e). That the plaintiff is guilty of a crime under the Penal Code.***
- (f). That the plaintiff is guilty of a crime under the Proceeds of Crime and Anti- money Laundering Act.***
- (g). That the plaintiff is not fit to conduct business in Kenya.***
- (h). That the plaintiff caused the death of the alleged maims.***
- (i). That the plaintiff runs a human smuggling company.***
- (j). The plaintiff runs a company with a human trafficking network.***
- (k). The plaintiff is a heartless and inhuman.***
- (l). That the plaintiff deliberately violated provisions of the Penal Code and Proceeds of Crime and Anti- money laundering Act.***
- (m). That the plaintiff works with the outlawed Magafe network group.***

The defendants in their statement of defence filed in court on 13.6.2017 specifically pleaded that:

- (a). The defendants avers that on 3.5.2017 the 2nd defendant published an article in the 1st defendant’s digital platform which concerned the charging of two suspects in the Nairobi Law Courts in who had allegedly been in the business of harvesting body parts.***
- (b). The defendants further aver that the article was based on the contents of the court file in respect of the said charges which were made against the plaintiff and his co-accused – Ali Hussein Ali – which included a charge sheet and the police covering report of the charges under Section 4 as read together with Section 1 (a) of the Proceeds of Crime and Anti-money Laundering Act.***
- (c). The defendants contend that if, which is denied in any event, the said story or any words to the offence pleaded at paragraph 4 & 8 of the Plaint, was so published about the plaintiff by it, the same were published in good faith, in public interest and without malice and not intended to injure the character of the plaintiff.***

In this regard, the defendants contend, that the publication is privileged and a fair comment on a matter of public interest heard before a court exercising judicial authority within Kenya and will rely on the defence of qualified and absolute privilege as provided for by Section (6) of the Defamatory Act Cap 36 of the

Laws of Kenya and fair comment on a matter of public interest under Section 15 of the Act.

Further, if, what is denied the said words under Article 33 and 34 of the Constitution, the public is entitled to know and to have information that shocks and disturbs their conscience about major events and occurrences in our country and the defendants are entitled to the Freedom to impart such information to the public.

Evidence at the trial

The plaintiff on oath testified that he is a responsible business man dealing in real estate and farming in Mombasa and Kilifi counties. He further told the court that he is also a director of **Abasheikh Farm Limited** duly incorporated to invest in goat rearing at a farm located in Malindi. It was in his evidence that he happened to be charged with the offence of acquisition and use of Proceeds of Crime contrary to Section 4 as read with Section 61 (a) of the Proceeds of Crime and Anti-money Laundering Act, which charge sheet does not relate to the defamatory article which was written by the defendants.

That after some time the charge was dropped and substituted with the offence of harboring a foreigner without a work permit. In that charge he pleaded guilty and was fined Kshs.100,000/=. In his further testimony the plaintiff explained that nowhere did the prosecution allege that he was involved with harvesting human body parts.

On cross-examination by **Mr. Karanja**, the plaintiff denied that he has ever been charged with harvesting human parts as portrayed by the malicious article Act he can remember initially there was a charge of acquisition and use of Proceeds of Crime from trafficking of persons and not harvesting of human parts as reported by the defendants.

He went further to confirm to the court that the initial charge was later dropped with that of harboring a foreigner. The defence did not call any evidence in rebuttal.

Submissions by the plaintiff

Mr. Waziri, Learned counsel for the plaintiff relied on his written submissions in support of the claim on the ingredients for proving the tort of defamation **Mr. Waziri** cited the principles stated in the cases of **Wycliffe A. Swanya v Toyota East Africa Ltd & Another Civil Appeal No. 70 of 2008 {2009} eKLR**, **Kudwoli v Eureka Educational And Training Consultants & 2 Others HCCC 126 of 1990**.

Further, submissions by **Mr. Waziri** was made with regard to what amounts to malice in defamation. He placed reliance on the case of **Phinehas Nyagah v Gitobu Imanyara Civil Suit No. 697 of 2009 {2013} eKLR**.

In summary, **Mr. Waziri** submitted that the publication was defamatory and cannot qualify as fair comment as alleged by the defendant. That the words on harvesting human parts were in the ordinary sense malicious and do constitute the tort of a defamatory statement.

Based on this, **Mr. Waziri** argued and submitted that as the evidence confirms as shown from the publication that the defendant was defamed. In the plaintiffs favour **Mr. Waziri** prayed for award of damages for loss of reputation occasioned by the tort of lesit. **Mr. Waziri** sought to invite the court to be persuaded and guided with the principles in **C. A.M. v Royal Media Services Limited Civil Appeal No. 283 of 2005 {2013} eKLR**, **Ken Odondi & 2 Others v James Okoth Omburah t/a Okoth Omburah & Company Advocates {2013} eKLR**, **Hon. Uhuru Muigai Kenyatta v Baraza Limited {2011} eKLR**, **Patrick Nyoike v People Limited {2013} eKLR**. On these stated principles **Mr. Waziri** proposed an award of Kshs.8,000,000/= in favour of the plaintiff.

On the other hand, **Mr. Karanja** for the defendant opposed the submissions by the plaintiff counsel. That any tort of defamation has been committed against the plaintiff to attract any loss or damage.

According to **Mr. Karanja**, the contention that the words and or publication complained of did not fit what the Law recognizes as defamatory to the extent stipulated in **Veronica Wambui v Michael Wanjohi Mathenge {2015} eKLR**, **Lucas Ndungu Munyua v Royal Media Services Ltd, Ondonkara v Astles {1970} EA 374**, **Swanya v Toyota East Africa Ltd & Another {2009} eKLR**, **Selina Patani & Another v Dhiranji V. Patani {2019} eKLR**, **Registered Trustees of The Sisters of Mercy T/A Mater Misericordiae Hospital v Jacinta W. Maina & Another {2014} eKLR**

Mr. Karanja further submitted that the words being complained of were justified in substance as fair comment available to the defendants as illustrated in **Carter Ruck on Libel & Schender 10th Edition**. **Mr. Karanja** was further to demonstrate that in case of defamation, the court has a duty to do a balancing act between the right to reputation and the right of the media to impart information under Article 33 of the Constitution.

As far as the contention of this submission is concerned, **Mr. Karanja** cited the case of **Mwanto Wangora v Hezron Mwando Kiroria {2017} eKLR**. To this **Mr. Karanja** further argued and contended that the tort of defamation is far from being proved by the plaintiff. The arguments advanced by **Mr. Karanja** for the defendants emphasized that the defamatory statement must be read as a whole and in context but not to be segmented for purposes of filing the claim.

Another question which **Mr. Karanja** submitted on was whether the plaintiff laid any basis for loss and damage capable of being awarded damages either general or exemplary for that matter. With regards to this, it was **Mr. Karanja's** contention that the interpretation by the plaintiff on the tort of defamation is not harmonious with the well settled principles.

While answering in the negative **Mr. Karanja** submitted the complaints and importance of the question connotes a fair comment which can properly be balanced between the freedom guaranteed in the constitution. According to **Mr. Karanja**, the defamatory libel acts are wanting in that quality to invite for assessment of damages of the various citations leveled against the plaintiff's claim. In this regard, **Mr. Karanja** pushed for the dismissal of the suit for non-proof of the elements of defamation.

Analysis and determination

The Law of defamation seeks to protect individual reputation. Its central problem is how to reconcile this purpose with the competing demands of free speech since both these interests are highly valued in constitutional democracy a country that believes in the rule of Law. No man worth's being, rich or poor, learned or unlearned, strong or weak, knowledgeable or not who does not value his reputation.

In **Black's Law Dictionary 3rd Edition** defamation means:

“Injuring a person's character, fame or reputation by false and malicious statements.”

In several judicial decisions, intervention by the courts is recognizable presumably leaning towards support of freedom of expression, speech and fundamental pillars which go with it. In the case of **Nation case {2002} the Supreme Court of Pakistan** no doubt bearing in mind their own past and chequered history of abuse of fundamental rights including free speech, the Court held:

“In the wrong of defamation, the Law presumes malice in the sense of wrongful act done intentionally by publishing defamatory matter, but there is a lawful excuse for the publication of such matters as in the ordinary case of privileged communication or of fair comments report a matter of public interest, the onus is upon the plaintiff to establish the fact of malice in order to maintain the action. It means, that malice must be proved as a fact irrespective of the mere inference arising from the libelous character of the publication. When the plaintiff fails to prove malice by cogent evidence, then he be non-suited on this ground. The burden of proving express both extrinsic and intrinsic evidence lies on the plaintiff to show that the publications were actuated by some indirect or improper motive.”

It is therefore well settled in our legal system that it's the obligations of the plaintiff to avail himself or herself evidence in support of his or her case on defamation.

This principle although it arose in situations of thousands miles away resonates very well with our jurisprudence on this branch of Law as I would be demonstrating shortly. The message therefore must be brought home to litigants and their legal counsel to satisfy the court that the decision to publish a defamatory article was actuated with malice outside. Privileged communication or of fair comment upon a matter of public interest. In actual fact a litigation on defamation is hinged under the provisions of Article 33 on the freedom of expression read in conjunction with Article 34 on the freedom of the media.

The controversy on defamation is textually a constitutional question of interpretation to ensure courts do not unreasonably intrude to a decision which renders itself as a non-protectionist of these rights.

Further, being a matter of great constitutional importance an excellent exposition of Judges task is as contained in the case of **Attorney General v Momodoa Jube {1984} AC 689** in which **Lord Diplock** said:

“A constitution and in particular that part of it which protects and entrenches rights and freedoms to which all persons in the state are to be entitled is to be given generous and purposeful construction.”

In the case of **Institute of Social Accountability & Another v National Assembly & 4 others {2015} eKLR** it was stated that:

“The court is enjoined under Article 259 of the Constitution to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of Law, human rights and fundamental freedoms in the Bill of rights and that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 259 (2) of the Constitution to protect and promote the purpose and principles of the Constitution.” (These remarks were also echoed in **Njoya & Others v Attorney General & Another {2004} eKLR**.)

An interesting aspect of the tort of defamation is its causal nexus with the provisions of Article 33 and 34 of the constitution. The permissibility of the tort of defamation ought to be tested, on account of these articles on the right to free speech and freedom of the media.

In ascertaining the requirements of the claim as pleaded by the plaintiff and the test whether on account of it there are such classifications of malice which ousts the defence of privileged fair comment and justification multiple authorities have spoken to this issue as follows: In the case of **Swanya v Toyota East Africa & Another {2009} eKLR** the court inferred and held as follows:

“For the purpose of deciding a case of defamation, the court is called upon to consider essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:

(i). That the matter of which the plaintiff complains is defamatory in character.

(ii). That defamatory statement or utterances 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 a slander, subject to certain exceptions, that the plaintiff has suffered special damages.”

See also **Kenya Tea Development Authority Ltd v B. O. Masese & Co. Advocates**. It is also further

crystal clear from **Kudwohi v Eureka Educational and Training Consultants & 2 Others** 126 of 1990 where the court held:

“The publication must be about the plaintiff, false statement, must be to the plaintiffs discredit, must find to hinder the plaintiff in the estimation of right making members of the society generally or the statement should tend to expose the plaintiff to hatred, contempt and ridicule to be defamatory, the statement does not depend upon the intention of the defendant but upon the natural tendencies of the publication and the surrounding circumstances.”

From its definition and elements, defamation has its own gravity as it deals with the hurt of reputation hence the need to keep in view the language employed in Section 14 and 24 of the defamation Act on the defence of justification and fair comment.

The criteria and principles on the issue of qualified privilege as submitted by the defendants the court had this to state in **Reynolds v Times Newspaper Ltd** {2001} 2 AC 127 – {204 – 205}

“The elasticity of the Common Law principles interference with Freedom of speech to be confined to what is necessary in the circumstances of the case, this elasticity enables the court to give appropriate weight, in today’s conditions, to the importance of expression by the media on all matters of public concern. Depending on the circumstances, the matter to be taken into account include the following: the comments are illustrative only:

- (1). The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.***
- (2). The nature of the information and the extent to which the subject matter is a matter of public concern.***
- (3). The source of the information – some informants have no direct knowledge of the events.***
- (4). The steps taken to verify the information.***
- (5). The status of the information, the allegation may have already been the subject of an investigations which commands respect.***
- (6). The urgency of the matter – news is often perishable commodity.***
- (7). Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.***
- (8). Whether the article contained the gist of the plaintiff’s side of the story.***
- (9). The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.***
- (10). The circumstances of the publication, including the having. (This test is not exhaustive)***

The weight to be given to these and any other relevant factors will vary from case to case). The **Supreme Court in the case of Uhuru M. Kenyatta v Baraza Leonard** {2011} eKLR held on this issue on qualified privilege as follows:

“While taking defence of justification or qualified privilege in the defamation case, the defendant was required by Law to establish the true facts and the plaintiff has no burden to

prove the defence raised by the defendant. Once verified, the justification or qualified privilege does not insert the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication.” (See also Grant v Torstar {2009} 3SCR 640 SCC 61)

In Learned counsel for the defendants’ submissions, the impugned article was an accurate reporting of the proceedings before the Criminal Court and the essentials of truth, justification or qualified privilege provide a shield against the plaintiff claim.

This was contested by Learned Counsel for the plaintiff who buttressed his arguments on the actual charge of acquisition and use of proceeds of crime contrary to Section 4 as reads with 1(a) of the Proceeds of Crime and Anti-money Laundering Act. That the charge there and particulars thereof never contained any of the offending words published in the article by the defendants. Therefore, submitted counsel all those defences being rooted around by the defendants’ counsel on fair comment, justification and qualified privilege cannot be availed in order to escape liability. Learned counsel did invite the court to place reliance on the case of **Abdi Mohamed Farah v Nairobi Star Publications Limited {2015} eKLR**. More importantly the defendant stated that in publishing such matters as this before court, it was not only critical that the public be informed its also enough considerable effort went to verify the information from the court record and statements in support of the charge.

In determining this question of source of information by the 2nd defendant and her publication of it in the digital platform, she appears to comply with the court decision in **Jameel Mohammed & Another v Wall street Journal Europe SPRL {2007} 1AC 359 & Edward Seaga v Lesile Harper {2008} UKPC 9** where **Lord Hoffman** in **Jameel A.** adumbrated that:

“The fact that the defamatory statement is not established at the trial to have been true is not relevant to the Reynolds defence. It is a neutral circumstance. The elements of that defence are the public interest, of the material and the conduct of the journalist at the time. In most cases the Reynolds defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true but there are cases (reportage) in which the public interest lies simply in the fact that the statement was made, which it may be clear that the publisher does not subscribe to any belief in its truth. In either case, the defence is not affected by the newspapers’ ability to prove the truth of the statement at the trial.”

Applying the above principles in their length and width to the facts of this case, several points have been raised by both counsels. As this matter is governed by the Defamation Act of Kenya has the plaintiff established on a balance of probabilities that the statement was defamatory.

From the pleadings and evidence by the plaintiff and the defendants statement of defence the following ancillary matters do apply. It is not disputed that the plaintiff was under investigations for the offence of acquisition and use of Proceeds of Crime Contrary to Section 4 as read with Section 1 (a) of the Proceeds of Crime and Anti-money Laundering Act. The prosecution particularized the charge committed being of diverse dates between 12.11.2016 and 27.4.2017 at Dahabshil money transfer Mombasa jointly acquitted proceeds of crime namely trafficking of persons. Trafficking in persons is a victim centered crime, complex by its nature and requiring a constellation of circumstances in order to establish. Thus for the plaintiff to pick the specific aspect as relevant to the extent of proving defamation is to blur the many factors of human trafficking.

The words which made to the digital publication was titled ***“two charged with harvesting human body parts.”*** Taken into context together in the charge sheet and any other information the 2nd defendant might have sourced from the investigating agency prima facie they are not capable of bearing a defamatory meaning. These statements complained of were made from the on-giving and indictment of the plaintiffs on particular circumstances relating to proceeds of crime and human trafficking.

In considering whether or not the defendants met sheer obligations under Section 14 and 24 of the Defamation Act, I take the view that the circumstances of reporting and publication by the 2nd defendant was a communication in the public interest.

The recipients bring the public entitled to know about a ring of international human traffickers and take reasonable preventive measures not fall prey to such persons. The inclusion of the screaming elements with harvesting human body parts.” Is not enough to make that bare statement defamatory without seriously addressing oneself to the manner in which the human trafficking has been violated by the plaintiffs. The view taken by the plaintiff that the charge of human trafficking was later dropped and a lesser offence was preferred by the state does not clearly bring out the parameters of a defamatory statement.

According to **Lord Diplock in Horrocks v Lowe 1974 1 ALL ER 662** The anchorage on qualified privilege may be defined where the plaintiff proves that the published or uttered words by the defendant were maliciously motivated. The principles underlying these was stated in the following words:

“Express malice is the terms of art descriptive of such a motive. Broadly speaking it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication, knowledge that it will have that effect is not enough, if the defendant is nevertheless acting in accordance with a sense of duty or in a bonafide protection of his own legitimate interest. The motive with which a person published defamatory matter can only be inferred from what he did or said or knew if it be proved that he did not believe that what he published was true, this is generally conclusive conduct of express, malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injuries falsehood about another, save in exceptional case, where a person may be under a duty to pass on, without endorsing defamatory reports made by some other person. What is required on the part of the defamer to entitle to the protection of the privilege, is positive belief in the truth of what he published or as it is generally though that to termed, honest belief. If he publishes, untrue defamatory matter, recklessly, without considering or caring whether it be true or not, he is in this as in other branches of the Law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or inordinately in arriving at a positive belief that is true.”

Giving support to these principles the propensity of the evidence that the defendants were motivated with malice in the aforesaid publication has not been discharged on the preponderance of evidence by the plaintiff.

In my view, it is a matter of public interest and importance for human trafficking is global menace and any conspiracy places a duty to professional journalist publish such information for the public to know. Following the filing of the indictment in Court against the plaintiff, the proceedings and statements of the case can be accessed under Article 35 to access of information held by the state.

The facts of this case show the position taken by **Lord Atkinson in Adam v Ward {1917} AC 309:**

“A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or record, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.”

It will be noted that under our system of Law, an accused person is presumed innocent until the contrary is proved. The use of the words charged therefore remained an allegation and do not denote defamatory. On the basis of the investigations and indictment it remains a report and the 2nd defendant would not be forced to disclose all the sources of information is for the plaintiff had been charged in a court of Law with respect to the crime. The information in the words complained basically with regard to human trafficking. What the words would convey to the ordinary man in my view, is that the plaintiff has been charged with the offence of human trafficking with an element of ***“harvesting human parts.”*** Those to me are details to be proven by the state.

At the plaintiff's charge sheet an ingredient of human trafficking constituted one of the key ingredients of acquisition and use of proceeds of crime. It may well be that the state had sufficient evidence referred to in the alleged defamatory article to demonstrate the crime of human trafficking. The specifics of the offence cannot form the subject matter of this civil court exploring whether the defendants can be held liable in tort. However, strongly enough that is the jurisdiction of a criminal court.

In the instant case, I take the view that the 2nd defendant had a duty to file the statement as contained in the investigations report or court record about the plaintiff. What has not been proved by the plaintiff is the aspect of the terms of the statement being fraudulent or malicious to the knowledge of the person making it.

In **Salmond on the Law of Torts 10th Edition 1945 at 580** the Learned author in this statement does address in one way or another the issues raised by the plaintiff when he stated that:

“Mere negligence in the making of false statements is not actionable either as direct or as any other Law of Tort. Although in almost all other forms of human action a man is bound to take reasonable care not to do harm to others, this duty does not extend to the making of statements on which other persons are intended to act.”

The publication referred to by the plaintiff found in the digital platform of the defendants was meant to be read by the public capable of accessing such portal. However, in the absence of evidence that the 2nd defendant in publishing the text did so intentionally and maliciously to pursue a course of conduct to injure the reputation of the defendant is a misstatement of the claim. Looked at it in general terms, due regard on libelous publication ought to be construed within the statement in **Wilkison v Damton 1897 2 Q.B 57, Janvier v Sweeney {1919} 2KB – 316** where the courts observed that:

“Newspapers gather and publish news in a manner that, having regard to the nature of their business, even if due care be used, errors and mistakes will occur. These errors and mistakes are so common that the natural impulse is, upon reading such an item, that it may not be true and to commence appropriate inquiry. Moreover, the question of liability for physical injuries consequent upon shock and or reputation thereto does not appear to be settled.

I see no reason for divergence in the set facts of this case. The plaintiff has acknowledged that he was wholly under investigations for an offence of money laundering and human trafficking. Whether an application was made later to drop the charge and substitute it with another may not be one of the criteria to apply in determining the claim on defamation. What the plaintiff urges this court to find is liability, loss and damage against the defendants arising out of the false publication.

Relying on the pursuant Judgment of **Angus v Clifford 1891C 2 Ch D 449**:

“It is of relevance to the pursuit case as can be seen from the below passage “If a person who makes a false statement entertains a bonafide belief that the statement is true, an action of deceit cannot be maintained against him on the ground that he formed his belief carelessly or on insufficient reasons. If he had formed no belief whether the statement was true or false, and made it recklessly without caring whether it was true or false, an action of deceit will lie against him but not so if he carelessly made the statement without appreciating the importance and significance of the words used, unless indifference to the truth is proved.”

My keen observation in this case clearly show that the plaintiff has not been able to demonstrate that the defendants jointly and severally made a false and defamatory statement against him to third parties knowing it to be false. That in publishing the statement they did act negligently to a level of correctness one can apply the tort of defamation to entitle the plaintiff award of damages. Further, regarding the impugness of the publication which is a subject matter of this case indeed the plaintiffs move must show evidentially that he was exposed to ridicule, secondly by virtue of the statement as a businessman in real estate and goat rearing entrepreneurship his financial position and wellbeing has been ruined. Thirdly, the degree of his character, morality, integrity and opinion held by people who know him before the

publication has been diminished. (**In Slim v Stretch {1936} 2 ALL ER 1237**):

“A statement should be taken to be defamatory if it would tend to hinder the plaintiff in the estimation of right – thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.”

In my understanding something which smacks malice is not essentially malicious. **Lord Devlin** in **Lewis v Daily Telegraph Ltd {1964} AC 234 – 285** reiterated that Common Law approach a limiting liability in defamation cases when he stated as follows:

“The meaning of words in libel cases “it must depend on whether the impression conveyed by the speaker is one of frankness or one of insinuation. A man who wants to talk at large about smoke may have to pick his words very carefully, if he wants to exclude the suggestion that there is also a fire, but it can be done. One always gets back to the fundamental question, what is the meaning that the words convey to the ordinary man. You cannot make a rule about that: they can convey a meaning of suspicion short of guilt, but loose talk about suspicion can very easily convey the impression that it is suspicion that is well founded.”

From the facts and circumstances of the case as pleaded and prosecuted by the plaintiff it is simply impossible to believe that a reader who reached the words charged with harvesting body parts concerning the plaintiff would not have understood exactly what was meant.

No reader could have thought the per cented reporting to be rhetorical given the fact that it was an indictment before a court of Law. The very fact that the words imply a double meaning first of procuring the human beings in order to harvest the parts all in all it implies a crime of human trafficking as alleged against the plaintiff.

The view of this court in this matter is to recognize that an erroneous statement in a publication is inevitable in constitutional democracy like ours where free speech and freedom of the media must be protected if those freedoms are to have the breathing space to operate and keep their oversight role to inform the public of the happenings in society. The prime test courts must require the plaintiff to establish is actual malice.

On the basis of the evidence as earlier analyzed, the defendants have stood their ground of the defence on fair comment. In addition to the principles reflected elsewhere in this Judgment, the five ingredients in **Tsewai Chun Paul {2001} E.M.L. R 31, 777** provides the correctness of the threshold to be met.

- (1). Thus the comment must be recognizable as comment, as distinct from an imputation of fact.***
- (2). The comment must be based on facts which were true or protected.***
- (3). The comment must explicitly or implicitly indicate, at least in general terms, what were the facts on which the comment was made.***
- (4). The reader or hearer should be in a position to judge for himself how far the comment was well founded.***
- (5). The comment must be one which could have been made by an honest person, however prejudicial he ought to be, and however exaggerated or obstinate his views. Furthermore, it must be germane to the subject matter criticized.....”*** (See also **Hon Uhuru Kenyatta (supra)**)

In **Hunt v Star Newspapers Co. Ltd {1908} 2KB 309** **Fletcher Moulton L.J.** stated:

“Comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader or hearer, cannot distinguish between what is report and what is comment,... But if fact and comment be interrupted so that it is not, reasonably

clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessary set out by him.”

The plaintiff gave evidence that the permitted publication was false as it portrayed him as a criminal involved in harvesting human parts. However, as seen from the above guideline principle, the journalist would be exonerated from liability if it is established that she took all the necessary measures to ascribe to the source of information and the honest belief she held that the allegation as pleaded in the investigation diary and the charge sheet were true at that particular instance. Sometimes it is not possible to sever a few words of innuendo from the good text of the publication so as to manifest defamation.

It is with the above in mind that the claimed complaint did not go far enough to put a cross a prima facie to call for an answer. There was therefore a disconnect between the alleged ‘words’ and the evidence to show the extent of the defamation.

With regard to rights in Article 33 and 34 of the constitution and by reason of the professional work carried out by journalists Section 14 and 24 provides for the defence of justification and qualified privilege. In the persuasive case of **Bonnick v Morris & Others {2003} AC 300 (PC)** the court held as follows:

“The single meaning rule adopted in the Law of defamation is in one sense highly artificial, given the range of meanings the impugned words simultaneously bear” (See the familiar exposition by Diplock L. J. in Slim v Daily Telegraph Ltd {1968} 2 QB 157 – 171 – 172) The Law attributes to the words only one meaning, although different readers are likely to read the words in different senses. In that respect the rule is artificial. Nevertheless, given the ambiguity of language, the rule does represent a fair and workable method of deciding whether the words under consideration should be treated as defamatory. To determine liability by reference to the meaning an ordinary reader would give the words unexceptionable. At first, it might seem appropriate to apply the same principle when Reynolds’ privilege affords a defence. This right appears to have the merit of consistency. But that would be to apply the single meaning principle for a purpose for which it was not designed and for which it was not suitable. It is one matter to apply this principle when deciding whether an article should be regarded as defamatory. Then the question being considered is one of meaning. It would be an altogether different matter to apply the principle when deciding whether a journalist or newspaper acted responsibly. That the question being considered is one of conduct. Stated shortly the Reynolds privilege is concerned to provide a proper degree of protection or for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of publication and the reputation of individuals. Maintenance of this standard is in the public interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for privilege. If they can have the benefit of the privilege journalists must exercise due professional skill and care The court must have regard to practical qualities It would be to introduce unnecessary and undesirable legalism and rigidity of this objective standard, of responsible journalism, had to be applied in all cases exclusively by reference to the single meaning, of the words. Rather a journalist should not be penalized for making a wrong decision on a question of meaning on which different people might reasonably take different views. If the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, a court may properly take this other meaning into account when considering whether Reynolds privilege is available as a defence. In doing so, the court will attribute to this feature of the case whatever weight it considers appropriate in all the circumstances. This should not be pressed too far. When questions of defamation may arise, ambiguity is best avoided as much as possible. It should not be a screen behind which a journalist is willing to wound and yet afraid to strike.” In the normal course a responsible journalist can be expected to perceive the meaning an ordinary, reasonable reader is likely to give to his article. Moreover, even if the words are highly susceptible of another meaning, a responsible journalist will not disregard adjutory meaning of the article in

question. Questions of degree arise here. The more obvious the defamatory meaning, the less weight will a court attach to other possible meaning when considering a responsible journalist in the circumstances.”

Applying the above principles to the facts of this case, bearing in mind the contested issues by both counsels it is not disputed that the imputation such as those carried in the digital platform of the defendants did exist as supported by the charge sheet. The alleged crime was already a subject matter before a Court of Law in **Nairobi Criminal Case No. 807 of 2017**. There was no evidence that the journalist for that matter, 2nd defendant expressed an opinion actuated by malice. The provisions of Section 14 and 24 of the Defamation Act conforms to the facts and circumstances of this case that brings the defendants action within the immunity of not being held liable for defamation as stated by the plaintiff. It will be noticed that the plaintiff shyed away from producing before this court the summarized brief of the alleged criminal trial record as to distinguish the impugned words as to the rest of statements of facts which formed the basis of his indictment.

It is therefore within the proper nature of the judicial process that cases filtered through the courts are as a matter of practice reported by the media for the interest of the public. The defendants action to publish the story is not actionable in tort of defamation.

Thus in my view, is the tenor of the case in **Campbell v Spottis Woode (1863 3 B85) 3 B 83 (769)**

“Nothing is more important than fair and full latitude of discussion should be alluded to writes upon any public matter whether it be the conduct of public men, the proceedings in courts of justice, or parliament or the publication of a scheme or of a literary work.”

That is to say the court will without fear find their conduct actionable if the publication complained of goes beyond the limits of a fair comment and justification on the subject matter in issue between the disputants.

In this matter therefore, I strongly agree with the submissions made by the defendants and the cautioned approach in these kind of cases. The result therefore is that the plaintiff has failed to discharge on a balance of probabilities the element on liability against the defendants jointly and severally.

In the above circumstances, I do not find it necessary to decide whether or not the plaintiff is entitled to a measure of damages or the principles necessary for grant of a permanent injunction as prayed in the suit. By virtue of these findings, other reliefs remain non-suited. True to this, the suit is hereby dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF APRIL 2020

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Emukule holding brief for Waziri Omollo for the plaintiff
2. Ms. Mulwa holding brief for Kamau Kuria for the defendants