



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 131 OF 2015**

**DR. ATHMANI CHIGUZO.....PLAINTIFF**

**VERSUS**

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

**JUDGMENT**

1. The plaintiff on 6<sup>th</sup> October, 2015 filed a suit against the defendant alleging the tort of defamation. On 18<sup>th</sup> December, 2015 the defendant filed its statement of defence. On 7th January, 2016 the plaintiff filed a reply to the defence and on 2nd August, 2016 it filed an amended plaint. The allegations contained in the amended plaint are that on or about the 14<sup>th</sup> March, 2015 the defendant under a false and misleading publication titled ***“official collapses at Governor’s meeting”***, in the Daily Nation, published and/or caused to be published defamatory statements of and about the plaintiff. The said words are captured in the amended plaint.

2. It was also alleged that on the 14<sup>th</sup> March, 2015 the defendant maliciously and spitefully further published and/or caused to be published, in the Taifa Leo Newspaper under a false and misleading news report titled ***“Waziri wa kaunti azirai akihutubia mkutano”*** translated in English to read as ***“County Minister collapses while addressing a meeting”***, defamatory statements of and about the plaintiff. Further particulars of the said article are captured in the amended plaint.

3. The plaintiff prays for (a) general damages for libel, (b) aggravated and/or exemplary damages, (c) Interest thereon on (a) and (b) at court rates from the date of filing suit until payment in full, (d) Costs of the suit and (e) any other relief the court deems fit to grant.

4. The defendant through its statement of defence denied having published defamatory articles and averred that the words were reported as factual events of what took place on the grounds of Katangini Primary School in Matuga sub-county. It further averred that if the words were capable of any defamatory meaning which was denied, the said words were published innocently and completely without malice against the plaintiff.

5. The defendant further stated in its defence that in the alternative, the words complained of in so far as they consist of expressions of opinions are true and fair comment on a matter of public interest and reporting and were made in good faith without negligence.

6. The defendant denied having received a demand notice and stated that the plaint did not disclose a reasonable cause of action against it.

**The plaintiff’s case**

7. The plaintiff, Dr. Athman Chiguzo, testified as PW1. At the time the incident in issue happened, he was the County Executive Member for Medical Services and Public Health in Kwale County. He testified that on 14th March, 2015 he received several telephone calls from friends and relatives, some from as far as Garissa and Nairobi. He also received phone calls from people in Kwale. He stated that the said people asked him how he was as they had read in the Newspapers that he had collapsed. His Uncle from Nairobi told him that he had read in the Newspapers that he had collapsed. His Father called him from Kwale and told him that he had read in the Taifa Leo that he had collapsed.

8. PW1 gave evidence that he bought the Daily Nation Newspaper of 14<sup>th</sup> March, 2015. On page 17, there was an article which had a heading that read - ***“official collapses at Governor’s meeting”***. The plaintiff explained that the article stated that Kwale County Health Executive Athman Chiguzo had collapsed the day before as Governor Salim Mvurya addressed a public meeting. He further stated the Taifa Leo of 14<sup>th</sup> March, 2015 carried a similar version. It had a heading that read ***“Waziri wa kaunti azirai akihutubia mkutano”***. The plaintiff stated that the said article did not carry the correct facts.

9. The plaintiff recounted that after attending a series of meetings with other members of the County Executive and the Governor, they went to Katangini Early Childhood Education Centre where there was an official opening. He testified that he, 2 County Executives and 6 MCAs

who were seated on the podium stood up when the Governor stood up to give his speech. The plaintiff stated that as he was sitting down, the plastic seat he had been sitting on broke on the left side. He testified that an MCA who was seated next to him supported him and he did not fall down. His evidence was that they added another plastic seat on top of the one which had broken and the seats became stable. The plaintiff expressed the view that the issue of his being unwell as published in the Taifa Leo Newspapers was malicious. He denied that he was sleeping as had been published in the said Newspaper. He denied that there was commotion and that First Aiders went to assist him. He denied having been the one who was addressing the meeting as per the heading of the article in the Taifa Leo Newspapers.

10. In making reference to the publication in the Daily Nation Newspapers, the plaintiff denied he was dozing off as reported and that no First Aiders went to assist him. He stated that there was no laughter from members of the public and the Governor continued with his speech. It was PW1's evidence that as a result of the publication, his friends perceived him as a sick person. They asked him if he was unwell and if he was able to discharge his duties. He said that the publication affected his integrity as it appeared as if he was not in control of himself.

11. He testified that they wrote a demand letter on 30th March, 2015 to the Managing Editor Nation Media Group but he never received an apology. He prayed for compensation and for the defendant to retract the article. He further said that the article affected his reputation and could be used as a basis for denying him re-appointment to the same position during vetting after the general elections, as the publication showed he was not suitable for the position he held. He testified that the publication was in bad taste and it affected his reputation.

12. PW2 was Omar Mohamed Mwangao, the Officer in charge of communications at the County Government of Kwale. He recounted that on the 12<sup>th</sup> March, 2015, the Governor of Kwale County was officially opening a Nursery School at Kisangani in Matuga sub-county in Kwale County. He testified that when the Governor stood up to speak, the members of the public stood up as well. He stated that the plaintiff's seat broke as he was sitting down and before he fell down, a second seat was added to the broken one for stability. The plaintiff then sat down. PW2 explained that the seats were plastic and white in colour. He further testified that there was no commotion as the Governor continued with his speech and told PW1 that he was sorry for what had befallen him. PW2 stated that no First Aiders went to assist PW1.

13. When shown the Taifa Leo publication, PW2 indicated that the said version said that PW1 collapsed as he addressed a meeting. PW2 indicated that the heading and the contents of the publication were not similar as the contents stated that the Governor was the one who was addressing the public. PW2 gave evidence that PW1 was not dozing off as reported in the publication and indicated that his seat broke as he sat down. He stated that the publication was incorrect for not capturing the true state of affairs. In regard to the publication in the Daily Nation Newspapers, PW2 stated that it was not true that PW1 was dozing off. He asserted that PW1's seat broke when he sat down.

14. PW2 said that no member of the media went to make inquiries from them about the incident. He indicated that the publication made him wonder if PW1 was sick yet they had attended 4 meetings together and he had not seen any problem with him. In his view, PW1 appeared to be in good health as there had been no report of him having been admitted to hospital because of illness. He indicated that he and the plaintiff had worked together for 4 years.

15. PW3 was Mwerupheh Jackson Ngoro, a Member of the County Assembly of Mkongani Ward, Matuga Constituency. He stated that he knew the plaintiff as a County Executive in the County Government of Kwale. It was his evidence that on 13<sup>th</sup> March, 2015 they attended a series of functions which the Governor was presiding over and that PW1 was in attendance. The following morning he was told to read the Daily Nation and Taifa Leo Newspapers. In the latter publication, it was reported that the plaintiff (PW1) fainted when he was giving a speech. The Daily Nation Newspapers reported he dozed off. PW3 was taken aback and wondered why PW1 had dozed off. He recalled that on the day of the meeting, he was seated next to PW1 with their shoulders touching as they faced the front. When the Governor of Kwale stood up to address the gathering, PW1 stood up and shortly thereafter, sat down with the rest of them. PW3 said that as such, PW1 could not have dozed off.

16. PW3 gave evidence that as they were sitting down, the plaintiff's chair which was on sloppy ground broke and he and his colleague held him and he did not fall. They then placed another seat on top of the broken one to stabilize it. He further testified that after the incident, an impeachment motion was almost filed against PW1 due to the report that he was dozing during the Governor's meeting, which gave the impression he was lazy.

17. PW3 explained that during the second term of the County Government of Kwale, when County Executives were being picked in the year 2017, the Civil Society picked up the issue of the incident reported about PW1 in the Newspapers. PW1 was therefore not appointed for a second term.

### **The defence case**

18. The defendant did not call any witness to testify on its behalf.

### **Submissions**

19. The plaintiff's Counsel filed detailed submissions on 3<sup>rd</sup> July, 2019. The said Counsel stated that it was not in dispute that the defendant published in their Daily Nation Newspapers of 14<sup>th</sup> March, 2015 and Taifa Leo Newspaper of similar date, publications referring to the plaintiff under the headings "**official collapses at Governor's meeting**" and **Waziri wa kaunti azirai akihutubia mkutano**", respectively. It was submitted that what was in issue was whether the words complained of were defamatory in character in their natural and ordinary meaning or by innuendo and tended to lower the plaintiff's reputation in the estimation of ordinary, just and reasonable men. The plaintiff's Counsel referred to the case of **SMKU vs ZWM** [2015] eKLR as cited in the decision in **Musikari Kombo vs Royal Media Services Limited** [2018] eKLR on the definition of what constitutes a defamatory statement.

20. It was submitted that the evidence of PW1 was corroborated by that of PW2 and PW3 who maintained that the publications by the defendant were aimed at defaming and tainting the image of PW1 whom they said did not fall from a chair as a result of dozing off but on account of a broken chair. It was pointed out that no rebuttal was offered by the defendant as to the defamatory nature of the publications. It

was argued that it was not hard for a right thinking or reasonable man to construe the words in their ordinary and natural meaning to mean that the plaintiff:-

- (i) was incapable of maintaining focus or concentrating during meetings addressed by the Governor of Kwale County,
- (ii) was susceptible to falling asleep/dozing off during official public functions,
- (iii) has no regard or respect to the institution of the office of the County Governor of Kwale as he could afford to doze off when the Governor was addressing a public meeting; and
- (iv) he was incapable of following proceedings of public functions addressed by the Governor of Kwale County. PW1 urged the court to conclude the words complained of were defamatory in nature.

21. As to the recklessness and malice of the publications complained of, Counsel for the plaintiff submitted that they were disproportionate to the actual facts and did not present an accurate report as to what actually happened during the function. It was stated that no attempt was made by the defendant or its reporters to verify what actually led to the fall in order to present an accurate account of what happened on the material day. The case of **Phinehas Nyaga vs Gitobu Imanyara** [2013] eKLR was cited to demonstrate the different instances where malice can be inferred. It was submitted that publications were actuated by malice.

22. It was submitted that the defamatory words were published to the entire public as the two newspapers enjoy national and international readership both in hard copy and digital print. It was stated that the foregoing was supported by the evidence of PW1 who testified that he received phone calls from friends and relatives in Garissa and Nairobi, who alerted him of the publication.

23. The plaintiff's Counsel argued that the defence of qualified privilege was not available to the defendant as PW1 was entitled to have his character and reputation protected and safeguarded from false, unwarranted and malicious or scurrilous attacks. Further, that no reporter from either newspaper sought PW1's side of the story before the two articles were published. Counsel also said that the accuracy of the information was not verified from PW1 before the publications were done, yet they were unfair and inaccurate. Counsel posited that the defendant failed to demonstrate how the PW1's fall from a chair was a public interest issue that warranted publishing without verifying the facts.

24. The case of **Reynolds vs Times Newspapers** [1999] 4 ALL ER 609 as cited in **Musikari Kombo vs Royal Media Services Limited** (supra) was relied on to show the criteria for determining whether a publication is subject to qualified privilege.

25. On the issue of damages, PW1 prayed for an award of general damages in the sum of Kshs. 9,000,000/= and aggravated damages in the sum of Kshs. 1,500,000/=. He also prayed for costs. Decisions such as **Chirau Ali Mwakwere vs Nation Media Group Ltd & Another** [2009] eKLR, **Richard Otieno Kwach vs The Standard Ltd and Another** [2007] eKLR and **Musikari Kombo vs Royal Media Services Limited** (supra), were relied on, where awards were made for general damages for libel in the sum of Kshs. 8,000,000/=: Kshs. 5,500,000/= and Kshs. 6,000,000/=: respectively.

26. The defendant's Counsel filed submissions on 3<sup>rd</sup> July, 2019. He submitted that there was no evidence at hand to show that PW1's reputation was disparaged in the eyes of right thinking members of society. He stated that PW2 and PW3 testified that they still had respect for PW1 even after reading the publications. It was argued that PW1 had failed to discharge the burden of proof on the claim that publications had lowered his estimation in the eyes of right thinking members of the society. The case of **Daniel Onchieko vs the Standard Limited and Another** [2018] was relied on to support the said submission.

27. It was submitted that PW1 failed to call witnesses to testify on the effect the published words had in the minds of others. The case of **George Mukuru Muchai vs The Standard Limited**, HCC 2539/97 cited in the case of **Hezekiah Oira vs Standard Limited & Another** [2016] eKLR was relied on to demonstrate that the most important ingredient in a defamation case was the effect the spoken or written word had on the minds of third parties about the complainant and not how the complainant feels the words portray him/her.

28. As to whether the published words were false, reckless or malicious, it was submitted that they were not as they were factual events of what took place at Kitangani Primary School in Matuga Sub-County. Several discrepancies were highlighted to show that the evidence of PW1 and his witnesses was unreliable.

29. The defendant's Counsel asserted that although the evidence of PW1, PW2 and PW3 was to the effect that PW1's fall was due to his chair breaking and not because of dozing off, no evidence was tendered before the court to ascertain that the seat actually broke. The defendant's Counsel submitted that the evidence of PW2 and PW3 confirmed that PW1 fell, was assisted by others and that the Governor noticed and interrupted his speech. Counsel argued that the foregoing corroborated the contents of the Newspaper reports and demonstrates lack of malice against the plaintiff. It was further submitted that the defendants had a social responsibility to report on events that happened in a public meeting.

30. The defendant's Counsel was of the view that the words that were alleged to be defamatory were not published to the entire public as the relatives and friends whom the PW1 said had called him to alert him about the publications did not testify. It was stated that the publications covered only a limited category of leaders.

31. On the issue of the defence of fair comment and absolute privilege, the defendant's Counsel relied on the Sections 7 and 14 of the Defamation Act. Article 34 of the Constitution which guarantees freedom of the media was also cited.

32. It was submitted that the reporting by the defendant was done in due exercise of its freedom of the media as well as the observance of the

general public's right to access information concerning public occasions. It was argued that the information published by the defendants was privileged information and was fair comment. The defendant relied on the decision in **Andrew Mukite Musangi and Another vs Standard Group Ltd** [2012] eKLR and **Dorcas Florence Kombo vs Royal Media Services** [2014] eKLR cited in the case of **Alnashir Visram vs Standard Limited** [2016] eKLR, on instances where the defence of fair comment is available to a defendant.

33. On the issue of damages, the defendant's Counsel submitted that in a case based on the tort of defamation, the court is under an obligation to balance the public interest and individual rights. Further, that quantum depends on the evidence adduced on record to prove that PW1 suffered loss as a result of defamation. It was submitted that PW1 had failed to prove that he suffered any loss as a result of the publications because no other evidence was adduced before this court other than his evidence and that of PW2 and PW3 who were attending the meeting on 13<sup>th</sup> March, 2015. The case of **Nation Newspapers Ltd vs Gilbert Gibendi** [2002] eKLR was cited to support the said argument. This court was urged to dismiss the case.

#### **Agreed Issues**

34. The parties hereto filed a list of agreed issues on 3rd October, 2016. These are:-

- (i) Whether the remarks as pleaded published on 14<sup>th</sup> day of March, 2015 in the Daily Nation Newspaper and on 14<sup>th</sup> March in the Taifa Leo Newspaper by the defendant concerning the plaintiff were construed as being defamatory of the plaintiff in their natural and ordinary meaning or by innuendo;
- (ii) Whether the words in the said articles referred to the plaintiff, and were false, reckless and malicious and the plaintiff's credibility, character, reputation and professional standing has been injured and therefore whether he is entitled to damages and if so, how much?
- (iii) That the said words were published to the entire public;
- (iv) Whether the defence of fair comment and absolute privilege was available to the defendants;
- (v) Whether the plaintiff is entitled to aggravated and general damages for defamation; and
- (vi) Who meets the costs of the suit?

#### **Issue No. 1**

35. In **Gatley on Libel and Slander** 10<sup>th</sup> Edition at p.8, the authors state as follows on what constitutes a defamatory statement –

***“There is no wholly satisfactory definition of defamatory imputation. Three formulae have been particularly influential;***

- (i) Would the imputation tend to “lower the plaintiff in the estimation of right thinking members of society generally;***
- (ii) Would the imputation tend to cause others to shun or avoid the claimant; and***
- (iii) Would the words tend to expose the claimant to ‘hatred’, contempt or ridicule.”***

***The question what is defamation relates to the nature of the statement made by the defendant; words may be defamatory even if they are believed by no one and even if they are true, though in the latter case they are not, of course, actionable.”***

36. In this case, the plaintiff produced copies of the Newspaper articles in issue. The Daily Nation newspapers of 14<sup>th</sup> March, 2015 on page 17 contained an article bearing the following sub-heading-

***“Official collapses at Governor’s meeting”***. The said article read as follows-

***“Kwale County Health Executive Athman Chiguzo yesterday collapsed as Governor Salim Mvurya addressed a public meeting. Mr. Mvurya was giving a speech during the opening of Katangini Nursery school Shimba Hills, Matuga sub-County, when Dr. Chiguzo fell off a chair on the podium. The Governor temporarily stopped his speech as First Aiders rushed to assist the official back to his seat. Dr. Chiguzo had been seen dozing off, only to suddenly fall off the chair. Some people could not help breaking into laughter on realizing he was asleep when he fell down.”***

37. Evidence adduced by PW1 was that the Taifa Leo Newspapers of 14<sup>th</sup> March, 2015 had a publication which was at variance with the one published in the Daily Nation Newspapers of the same date. He produced a copy of the article published in the Taifa Leo Newspapers. It read as follows-

***“Waziri wa Afya katika kaunti ya Kwale DKt Athman Chiguzo, jana alizirai katika hali ya kutatanisha, hali iliyozua wasiwasi katika mkutano uliokuwa ukihutubiwa na Gavana Salim Mvurya.***

*Kisa hicho kilifanyika baada ya Kiongozi huyo kuanza kuhutubu katika hafla ya kufungua rasmi shule ya chekechea ya katangini katika eneo la Shimba Hills katika Kaunti Ndogo ya Matuga.*

*Gavana huyo alilazimika kukatiza hotuba yake huku watoaji huduma ya kwanza wakikimbia alipokuwa ameketi ili kumhudumia.*

*Haikubainika mara moja kilichompelekea kuzirai ingawa awali alikuwa ameonekana akiwa mwenye usingizi.*

*Baadaye alianguka kutoka kiti chake, hali iliyopelekea baadhi ya watu kuamini kuwa alikuwa mgonjwa.”*

38. In the amended plaint, the above words were translated from Kiswahili to English language as follows:-

**Heading -**

***“Minister of County collapses while addressing a meeting.”***

**The body of the article**

***“Minister of Health in County of Kwale Dr. Athman Chiguzo yesterday collapsed in mysterious circumstances, a situation that caused panic in a meeting addressed by the Governor Salim Mvurya.***

***The incident occurred when the said leader started to address a ceremony to officially open Chekechea School in the area of shimba Hills in Matuga sub-County.***

***The said Governor was forced to stop his speech while first aiders running (sic) to where he was seated to attend to him. It was not immediately established what caused him to collapse but earlier on he was seen to be sleepy. Afterwards he fell from his chair, a situation that causes (sic) a Section of people to believe he was sick.”***

39. The above translation was not the best and I do not agree with the plaintiff's interpretation that the article in the Taifa Leo Newspaper was misleading because it portrayed him to have been addressing the gathering when he collapsed. In my view, when the article is read as a whole and if well translated, it clearly shows that the Governor of Kwale County is the one who was addressing the gathering and not the plaintiff.

40. PW2 and PW3 were empathic that the plaintiff neither dozed off nor fell on the 13<sup>th</sup> March, 2019 as was captured in the publication by the Daily Nation Newspapers. They also refuted the allegation that the plaintiff collapsed as reported in the Taifa Leo Newspapers. The plaintiff too denied that he collapsed on the date in issue or that he was sick.

41. I do agree with the submissions by the defence Counsel that there were discrepancies in the plaintiff's case. It is however this court's view that they do not affect the veracity of the evidence of whether the plaintiff was defamed or not. It was not necessary for the plaintiff to bring the broken chair in court as evidence as was suggested by Counsel for the defendant. This being a civil case, the burden of proof is on a balance of probabilities. The provisions of Section 107 and 109 of the Evidence Act apply. This court therefore has to be satisfied that the plaintiff has proved his case on a balance of probabilities.

42. In the case of **Wycliffe A. Swanya vs Toyota East Africa Ltd and Another** [2009] eKLR, the Court of Appeal stated thus;

***“For the purpose of deciding a case of defamation, the court is called upon to consider the essentials of the tort generally and to see whether these essentials have been 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 utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed;***

***(iii) That it was published maliciously;***

***(iv) in slander, subject to certain exceptions, that the plaintiff has suffered special damage”.***

43. Articles 33 and 34 of the Constitution of Kenya provide for the freedom of expression and the media, respectively. Article 35 thereof provides for the right of the public to access information. All the foregoing rights must

co-exist and be well balanced so that the right to inherent dignity of an individual is respected and protected as per the provisions of Article 28 of the Constitution.

44. The evidence adduced by the plaintiff and his witness is that they had been given plastic chairs to sit on during the official function at Katangini in Matuga Sub-County, in Kwale County. The event was presided by the Kwale Governor, Salim Mvurya. When he stood up to

speak to the gathering, the people who were seated at the podium stood up as well. When the plaintiff sat on his seat, it broke on the left side. PW3 testified that he supported him to stop him from falling. The plaintiff, PW2 and PW3 were categorical that the plaintiff was not dozing off. According to PW2, the plaintiff did not appear to be sick as they had all attended a series of functions on that day. It was therefore his view that it was not possible for the plaintiff to have been dozing off, yet he stood up with the other members of the public when the Governor stood to address the gathering. Given the evidence adduced in court, it is this court's finding that the plaintiff was alert and did not doze and fall off his seat at the meeting held at Katangini as reported in the Daily Nation Newspapers of 14<sup>th</sup> March, 2015.

45. In similar vein, it is my finding that the plaintiff neither collapsed nor did First Aiders go to assist him during the said event, as published in the Taifa Leo Newspapers. The plaintiff denied that he was sick or that he collapsed as was reported in the Taifa Leo Newspapers. It is this court's finding that it has been proved by the plaintiff and his witnesses that he could not have been dozing off as alleged in the said Newspapers, as he stood up when the Governor arose to address the gathering.

46. In view of the foregoing analysis, this court holds that the words published by the defendants were in their natural and ordinary meaning defamatory to the plaintiff. The said words were reckless in nature and going by the evidence adduced for the plaintiff, they damaged his credibility, character, reputation and professional standing in the eyes of right thinking members of the society. The plaintiff was the County Executive Member for Medical Services and Public Health in Kwale County as at the time the 2 articles were published. The said articles were not only read by people who knew him in Kwale but also in Nairobi and Garissa who called the plaintiff and told him about the articles. The said persons also sought to find out if all was well with him as the article in the Taifa Leo Newspapers portrayed him as a sick person.

47. It was submitted by the defendant's counsel that the plaintiff failed to call the said persons who alerted him about the said articles. This court's view is that the plaintiff did not have to call the said persons as it was sufficient for him to call any persons who had read the said articles. The witnesses he called who were PW2 and PW3, were more relevant to his case as they were present with him at the function at Katangini where the plaintiff was said to have "fallen down" as per the publications in the Nation Newspapers or to have "collapsed" as per the Taifa Leo Newspapers.

48. As was submitted by the plaintiff's Counsel in their written submissions, the Daily Nation Newspapers not only has national but international readership as well. It is available online and an article such as the one published in the Daily Nation Newspapers had the reach of millions of people. The Taifa Leo being a national newspaper had a wide readership as well.

49. I am in concurrence with the submissions by the plaintiff's Counsel that in their natural and ordinary meaning, the 2 articles, by way of insinuation and innuendo could only mean and were meant to mean and were understood to mean that the plaintiff had no respect for the office he occupied in the County Government of Kwale and he was not worth the appointment he held in the said County Government. Paragraph 8 of the amended plaint particularized the manner in which right thinking members of the public were likely to interpret and understand the publications in issue.

#### **Issue No. 4**

50. The defence of fair comment and absolute privilege was raised by the defendant in this case. On this issue I refer to the authority of the Supreme Court of Appeal of Canada in **Wilradeolia vs Simpson** [2008] SCC 40 which set out the requirements for a defence of fair comment in the following terms:-

***“(a) The comment must be on a matter of public interest;***

***(a) The comment must be based on fact;***

***(b) The comment though it can include inference of a fact must be recognizable as a comment;***

***(c) The comment must satisfy the following objective test – could any person honestly express that the opinion on the proved facts.***

***(d) Even though the comments satisfies the objective test, the defence can be deflated if the plaintiff proves that the defendant was actuated by express malice.”***

51. The plaintiff herein was a man whose salary was being paid from public coffers. His conduct at official meetings was therefore a matter of public interest and more so to the people of the County of Kwale as he had been entrusted with health docket in the said County. The defence raised of fair comment is not available to the defendant as it published articles that did not reflect the true state of affairs at the event held at Katangini.

52. On the defence of qualified privilege, the Court in the decision in **Uhuru M. Kenyatta vs Baraza Leonard** [2011] eKLR held as follows:-

***“While taking the 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 a fair publication.”***

53. In this case, the defendant averred that the plaintiff fell off his seat as he was dozing off. From the evidence of PW2, it was clear that there was some distance between the place where the plaintiff was seating at the podium and where the journalists were, as they were said to have been in the section where the members of the public were. Owing to the said distance between the journalists who wrote the publication

and the plaintiff, it would have been prudent for them to establish what had actually happened to the plaintiff before publishing articles that were not factual.

54. In the case of **Phinehas Nyaga vs Gitobu Imanyara** [2013] eKLR ,Odunga J held thus:-

*“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice ..... malice may also be inferred from the relations between the parties .....*

*The failure to inquire in the facts is a fact from which malice may properly be drawn.”*

55. It is the finding of this court that malice in this on the part of the defendant can be imputed from the publication of the 2 articles.

#### Issues 5 and 6

56. Going by the facts of this case, I find that the plaintiff has proved his case on a balance of probabilities and is entitled to general and aggravated damages. The amount sought by the plaintiff is however way too high as compared to the gravity of the articles that were published. This court's view on the damages to be awarded is that they should be commensurate with the extent of circulation of the defamatory article, the degree of damage that was caused to a person's reputation, the number of times the defamatory article was published and if an apology was offered by the offending party. An award of damages is also a matter that rests on the discretion of the Trial court after taking into account that all the necessary parameters in a case of defamation have been proved. The Court of Appeal in **CAM vs Royal Media Services Limited** [2013] eKLR stated as follows:-

*“No case is like the other. In the exercise of discretion toward damages for defamation, the Court has wide latitude. The factors for consideration in the exercise of that discretion is enumerated in many decisions including guidelines in Jones vs Poland [1997] EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition, subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology, matters tending to reduce damages, vindication of the plaintiff's reputation past and future.”*

55. In this case bearing in mind that the plaintiff was a Doctor by profession who had been appointed as the County Executive in charge of Medical Services and Public Health in Kwale County, he was known to a section of his professional colleagues in Kenya and some of the residents of Kwale County. He testified that he received a call from someone in Garissa and 2 people from Nairobi, one of them was his uncle. They alerted him about the publications. His father also called him about the publication in the Taifa Leo Newspapers and told him that he had read that the plaintiff had collapsed.

56. PW3 was the Member of the County Assembly for Mkongani ward in Matuga Constituency in Kwale. He was also the Leader of Government Business at Kwale County Assembly. This court holds that due to the position he held, he spoke from a point of knowledge when he testified that the plaintiff applied for re-appointment to the post he held at the County Government of Kwale but he was not re-appointed because the civil society picked up the issue that had been published on 14<sup>th</sup> March, 2015 and it was apparently used to deny him re-appointment. PW3 also testified that after the publications by the defendant were made, the plaintiff was almost impeached.

57. In coming up with an award of damages, this court has considered the cases cited below and also the devaluation of the Kenya Shilling since they were decided. In the case of **Arthur Papa Odera vs Peter O. Ekisa alias Shujaa Peter O. Ekisa** [2016] eKLR, an award of Kshs. 2 Million in general damages was made, Kshs. 1.5 Million as exemplary damages and Kshs. 1.5 as aggravated damages. In **Kimani Ngunjiri vs Standard Group Limited & 3 Others** [2019] eKLR, the plaintiff was awarded all inclusive damages in the sum of Kshs. 4,000,000/=. The plaintiff therein was a member of parliament. In **Raphael Kitur vs The People Media Group Limited T/a The People** [2017] eKLR, the plaintiff who was a former member of parliament and an Assistant Minister was awarded Kshs. 3,000,000/= general damages and no exemplary damages.

58. I have considered the authorities that were relied on by Counsel for the plaintiff in their attempt to persuade this court to award general damages in the sum of Kshs. 9,000,000/=. In the authorities they cited, the court notes that the allegations that had been made against Chirau Ali Makwere, Richard Otieno Kwach, Judge of Appeal (as he then was) and Musikari Kombo were more damaging to the character of the said litigants, as compared to the defamatory statements made in this case.

59. In the said circumstances, it is this court's considered view that general damages in the sum of Kshs. 4,000,000/= will suffice. I hereby award the said sum to the plaintiff. Bearing in mind that the defendant published 2 articles in different newspapers and no apology was offered after a demand letter was sent by the plaintiff's Advocate to the defendant, I hereby award the plaintiff Kshs. 1,500,000/= as aggravated damages. I also award interest to the plaintiff at court rates. Costs follow the event and therefore the plaintiff is entitled to costs of this suit, which I hereby award.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of October, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Anangwe holding brief for Ms Kaguri for the plaintiff

Mr. Sitonik for the defendant

Mr. Oliver Musundi - Court Assistant