



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 384 OF 2013**

**HON. YUSUF HAJI.....PLAINTIFF**

**VERSUS**

**THE STANDARD GROUP LIMITED.....DEFENDANT**

**JUDGMENT**

The plaintiff herein filed the suit vide a plaint dated the 13<sup>th</sup> day of September, 2013 claiming general, aggravated and exemplary damages and a permanent injunction to restrain further writing, printing and publication of allegations concerning him. He has also sought the costs of the suit and interest on the damages sought.

It is pleaded that, in its issue the “Sunday Standard” published on 16<sup>th</sup> September, 2011 the defendant herein, falsely and maliciously, wrote, printed, and/or caused to be written, printed, published of the plaintiff and of him in the way of his office the following words;

***“A tainted history a pointer to failed leadership and bleak future.”***

***Critical views are now emerging over the integrity of key figures in the Internal Security docket and their competence to quell bloody violence.***

***The concern is based on the fact that the officials, among them acting Internal Security Minister Mohamed Yusuf Haji, have been indicted in official Government reports for possible collusion in past ethnic clashes in the Rift Valley.....***

***.....yet the minister is among powerful officials who the Akilano Akiwumi report on tribal clashes recommended to be investigated further regarding their role in the ethnic clashes that rocked the Rift Valley in 1997.***

**Human rights violations**

***The report accuses Haji of gross human rights violations when he failed to respond effectively to the politically instigated violence in Nakuru District in 1989, 1992 and 1997. It even accuses Haji of possible connivance in the clashes.***

***The report notes that while serving as the Rift Valley PC in 1989, the minister ordered the eviction of Non-Maasais from Lolgorian Division, Transmarine.”***

The plaintiff avers that the said words and/or publications are entirely false in that, the Akiwumi Commission of inquiry was an investigating body charged with the responsibility of receiving evidence which included inter alia complaints and accusations against parties and assessing the said evidence in order to make findings of fact and/or recommendations or further actions from the facts established.

The plaintiff avers that the words in their natural and ordinary meaning and by way of innuendo are defamatory and they have seriously injured his character, credit and his reputation has been brought into public scandal, odium and contempt, adding that the defendants published the said statements maliciously.

The defendant has denied the claim vide its defence filed on 28<sup>th</sup> October, 2013. In the said defence, the defendant admitted having published the statement complained of but denied that the same is false and that it was written with malice.

The defendant contends that the publication was a fair comment made in good faith and without malice on matters of great public interest. In addition, they claim that the words complained of were not defamatory as they were an expression of the view that the plaintiff lacked integrity, colluded and connived in the past ethnic clashes and that his acts/omissions led to gross rights violations. They further averred that the alleged publications were true in substance and fact in so far as they consisted of an occurrence report as captured and made in good faith and without malice on a matter of great public interest. They have asked the court to dismiss the plaintiff's claim with costs.

At the hearing, the plaintiff testified as the only witness in support of his case. The defendant did not call any witness.

The plaintiff adopted his witness statement dated the 13<sup>th</sup> day of September, 2013, and filed in court the same day. It was his evidence that on the 16<sup>th</sup> September, 2012, the defendant published an article of and concerning him as pleaded in paragraph 5 of the plaint which allegations were entirely false and malicious.

He stated that the object and purpose of the publication was to warn and inform the country that people with faint history lacked the integrity to solve the tribal clashes that were being experienced in the Tana Delta region. That the publication singled him as an example of this group of people and in order to prove that he belong to that group, the defendant relied on the report by the Akiwumi Commission on tribal clashes.

It was his evidence that the defendant herein published the above report knowing very well that a similar accusation was made against him by the Nation Newspaper on the 19<sup>th</sup> October, 2002, and pursuant to the publication, he commenced legal action in court against the Nation Newspaper which published an apology. That in the circumstances, the defendant's publication is not only defamatory but also malicious and the accusations made against him have ruined his reputation and integrity and yet the defendant is not remorseful or apologetic and has deliberately declined to publish an apology.

At the end of the trial, the parties filed submissions in support of their respective positions.

In his submissions, the plaintiff averred that in determining liability, the burden of proof was and is upon the defendant to adduce evidence to prove that the publications made against him were true.

The plaintiff further submitted that the defendant bore the burden to prove that its views of the plaintiff to the effect that he lacked integrity, colluded and connived in the past ethnic clashes and that his acts/omissions led to gross human rights violations were correct and true.

The Plaintiff submitted that the defendant failed to offer any evidence to challenge the plaintiff's case that the said allegations were false having failed to call any witness in the case. He contended that based on the above, he has proved and established his case on a balance of probability and urged the court to find

the defendant liable for defamation.

On the part of the defendant, it was submitted that the plaintiff has failed to prove his case on a balance of probabilities in that he has failed to establish the existence of a defamatory statement. A number of authorities were cited among them, the cases of SMW VS. ZWM (2015) eKLR and that of Phineas Nyagah Vs. Gitobu Imanyara (2013) eKLR

The defendant also argued that the plaintiff did not adduce any evidence to prove that the words complained of tendered to lower his estimation in the eyes of the right thinking members of the society. The defendant contended that it did not have to call a witness as the burden of prove lay on the plaintiff to prove his case as required Under Section 107(1) and 109 of the Evidence Act.

On the defendant's defence of fair comment, it was submitted that the publication was based on facts that are substantially true in that; there was a report by the Akilano Akiwumi Commission where the plaintiff was adversely mentioned by hearsay by witnesses. That the plaintiff admitted he was summoned by the Akiwumi Commission to give his side of facts concerning allegations against him. The defendant further submitted that the publication was therefore substantially true to the extent that it referred to the Akiwumi Commission report which report the plaintiff himself produced in court. Reference was made to the case of Grace Wangui Ngenye Vs. Chris Kirubi & Another (2015) eKLR and that of London Artists Limited Vs. Little (1969) 2 ALL ER 193.

The court has considered the pleadings filed herein, the evidence on record, the submissions of the respective parties and the authorities relied on.

From the pleadings, the court indentifies the following issues for determination;

- i. ***Whether the publication was defamatory of the plaintiff as alleged.***
- ii. ***Whether the publication was published by the defendant***
- iii. ***Whether the publication was false and malicious.***
- iv. ***Whether the defence of justification is available to the defendant.***
- v. ***Whether the plaintiff suffered any loss or damage as a result of the publication and if so, whether he is entitled to the reliefs sought.***
- vi. ***Who should bear the costs of the suit?***

In Kenya, the law of defamation is now well settled and it's governed primarily by the Defamation Act Cap 36 Laws of Kenya which has its foundation in the constitution and in particular Article 33 (3) which states:

***“In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”***

It is trite law that in a defamation suit, the plaintiff must prove the following elements in order to succeed;

- a. The statement was defamatory
- b. It must have been published by the defendant
- c. The published words must refer to the plaintiff
- d. The statement must be false
- e. The publication was published with malice.

The foregoing position has been restated in numerous judicial precedents to wit; Gideon Mose Onchwati Vs. Kenya Oil Co. Ltd & Another Civil Suit No. 140/2008 and that of J. Kudwoli Vs. Eureka Educational and Training Consultant & 2 others Civil Suit No. 120/1990 as well as the case of Wycliffe

**A. Swaya & Another Civil Appeal No. 70/2008.**

The tort of Defamation is defined variously with not one agreed single definition that fits all. The English case of **Scott Vs. Simpson (1882) QBD 491 at page 503 Dare J.** defined the word as follows: ***“a false statement about a man to his discredit”***.

In the well known work of Winfield, the definition is given as follows;

***“It is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally or which tends to make them shun or avoid that person”***.

Another authority often cited as definitive on defamation is that of **Thomas Vs. CBC (1981) 4 WWR 289 as follow:**

***“The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation to a man’s discredit or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit. The standard of opinion is that of right thinking persons generally.***

***To be defamatory an imputation need not have actual effect on a person’s reputation; the law looks only to its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory.’***

The law of defamation protects a person’s reputation that is, the estimation in which he is held by others. It does not protect a person’s opinion of himself or his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit and it affords redress against those who speak such defamatory falsehoods. (See the case of **Musikari Kombo Vs. Royal Media Services Limited Civil Appeal no. 156/2017.**

The test as to whether a statement is defamatory is an objective test. It is not dependant on the intention of the publisher but on what a reasonable person reading the statement would perceive.

In **Halsbury’s Laws of England 4<sup>th</sup> Edition**, the author opines that;

***“In deciding whether or not a statement is defamatory, the court must consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense”***

In the case herein, the plaintiff has complained of an article that was published in the “Sunday Standard” newspaper dated 16<sup>th</sup> September, 2012, the full contents whereof have been set out elsewhere in this judgment. The plaintiff contends that the allegations contained in the said Article are false and were done with malice and that by reason of the publication of the said article, he has been seriously injured in his character, credit, and his reputation has been brought into public scandal, odium and contempt.

In its defence, the defendant mainly relied on the defence of justification and fair comment made in good faith and without malice on a matter of great public interest. The defendant contends that the publications were true in substance and fact in so far as they consisted of an accurate report as captured by the defendant and were made in good faith and without malice.

I now proceed to consider the issues for determination as set out hereinabove.

On whether the defendant published the article, it is not in dispute that, it did. Indeed the defendant has

admitted having published the same. The article also referred to the plaintiff by name.

In a cause of action in defamation, the plaintiff has to prove that the statement was false and that in publishing the same there was malice on the part of the defendant. He also has to prove that the statement was defamatory of him.

In the case of *Muriuki Vs. Waruru & Another (2005) eKLR* Justice Kimaru observed;

***“Whether a statement is defamatory or not, depends not..... upon the intention of the defendant but upon the probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances whether the article was false and malicious”.***

On his part, the plaintiff averred that the said words were entirely false and there was malice on the part of the defendant in that the said commission of inquiry did not recommend that he be investigated further regarding his alleged role in ethnic clashes that rocked Rift Valley in the year 1997. He also contended that the commission of inquiry did not accuse him of gross human rights violations or possible connivance in the clashes.

For the plaintiff to succeed, he also has to prove malice. On the other hand, malice can be inferred and for it to be inferred, the language of the Article ought to have altered the facts and the meaning and there ought to be animosity. From the record, there is no evidence led by the plaintiff to prove that there was animosity between him and the defendant. However, it is trite that malice can be inferred from the circumstances. In the case of *Phineas Nyagah vs. Gitobu Imanyara (2013) eKLR*, the court stated;

***“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may also be found in the publication itself if the language used is utterly beyond or disproportionate to the facts..... Malice may also be inferred from the relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Courts should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he does not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. See the case of Horrocks Vs. Lowe (1974) 1A11ER. 662.***

In countering the defendant’s defences of justification, fair comment and qualified privilege, the plaintiff quoted a portion of the report on hearsay evidence as follows;

***“With respect to hearsay evidence, we decided that it was consistent with the duty of the judicial commission to inquire into and ascertain facts concerning the Terms of Reference of the Judicial Commission and matters appertaining thereto, to receive such evidence. The generally accepted principle in inquiries such as the one on which we were embarked, is for hearsay evidence to be received and considered for what it is worth, and as a means of securing further evidence.***

***“We accepted certain hearsay evidence on the basis explained above and acted upon it only when it became authenticated by other evidence.” (Emphasis added)***

In this regard, the plaintiff testified that upon hearing evidence or allegations made against him in the Akiwumi Report, the Commission did not accuse him of gross human rights violation or possible connivance in the clashes. It was also his evidence that the commission did not recommend that he be investigated further regarding his alleged role in the ethnic clashes that rocked Rift Valley in 1997.

As already stated, it was the duty of the defendant to prove that the facts are true as pleaded in the defence. The defendant did not call any witness to support or to prove that the facts were true and that there was no malice on their part in publishing the article. In order for the defendant to succeed in their defence of justification and fair comment, it was necessary for it to tender evidence to show that the

plaintiff was investigated for his alleged role in the ethnic clashes, gross human rights violations or possible connivance.

It is clear from the evidence on record that the defendant did not bother to read the whole report before they published the article and if they did they were selective in their reporting by failing to point out that hearsay evidence would only be acted upon only after it had been authenticated by other evidence.

As judge Aburili stated in the case of **Samuel Ndung'u Mukunya Vs. Nation Media Group Limited & Another, (2015) eKLR.**

***“It is a fundamental principle of Ethics and Advocacy in Kenya and elsewhere that counsel must have a proper basis for stating from the bar a fact in any pleadings and practice of the court is based upon an expectation that the said principle is respected. In my view, the principle applied to an averment that a defamatory statement is true, is a fair comment, is of public interest, applies with no less force than it applies to other averments such as qualified privilege. The occasion of qualified privilege is a question of law.”***

With regard to the defence of fair comment, **Gatley on Libel and Slander, 9<sup>th</sup> Edition** states thus;

***The right to a fair comment is one of the fundamental rights of free speech and writing.... there are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters, it is desirable that all should be able to comment freely and even harshly, so long as they do so honestly and without malice”.***

Also in the case of **Grace Wangui Ngenye Vs. Chris Kirubi & Another, (2015) eKLR** in which the court of appeal stated;

***..... a fair comment must be based on facts that are true or substantially true”***

On what constitutes a matter of public interest, lord Denning in the case of **London Artists Limited Vs. Little (1969) 2All ER 193** stated thus;

***“ ....such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others and a matter “on which everyone is entitled to make a fair comment.”***

The defence of fair comment is usually closely related to that of qualified privilege. In this regard, an extract from Salmond on the Law of Torts may be helpful thus;

***“When an occasion of qualified privilege exists, a person is entitled to make defamatory statements about another. The right of freedom of speech prevails over the right of reputation but only to a limited extent-----the principle is that, that statement is protected if fairly made by a person in discharge of some public or private duty whether legal or moral or in the conduct of his own affairs in matters where his interest is concerned..... no complete list of each occasion is possible or desirable but it is generally agreed that the chief instances of qualified privilege are the following;***

- a. Statements made in the performance of a duty
- b. Statement made in the protection of an interest.

See **Carter - Ruck on Libel and Slander 5<sup>th</sup> edition** at page 54.

Quoting again from **Carter - Ruck on Libel** on the defence of justification, the writer has this to say

***“The defence of justification cannot succeed unless the defendant proves that the expression of***

***opinion was based upon the facts..... if the facts upon which the comment purports to be based does not exist, the comment cannot be fair..... there are two qualifications to the general rule in the first place, where the facts commented upon are contained in a privileged document such as a parliamentary paper or a report of judicial proceedings, the defendants comments upon the fact set out in such reports is entitled to protection as fair comment even though the facts contained in the privileged document or referred to in the judicial proceedings, turns out to be untrue”.***

In view of the foregoing, the court finds that the plaintiff proved his case on a balance of probability and that the defendant’s defences are not available to it.

Finally, defendant in his submissions contended that the plaintiff did not prove his case on a balance of probability as he failed to call an independent witness in support of his case. They relied on the case of **George Mukuru Muchai vs. The Standard (2001) KLR** in which the court stated;

***“-----in my view the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of the third parties about the complainant and not how he/she himself/herself feels the words portray about him/her.”***

They also relied on the case of **Hezekiel Oira Vs. Standard Limited & Another (2016) eKLR** where the court stated;

***“In addition, in order for the plaintiff to prove that he was defamed, he must tender evidence to prove that the published words tended to cause other people to shun or avoid or treat him/her with contempt following the defamation.”***

In that regard, the court is guided by the judgment of the court of appeal in the case of **Miguna Miguna Vs. the Standard Group Limited (Civil Appeal Number 164/2016)** wherein the court stated;

***“by holding that the appellant needed to call witnesses to prove that the story was viewed and read as published, the Learned Judge placed too high a standard on the part of the appellant whose duty did not extend beyond the usual standard in a civil case such as the one that was before her to prove the case on a balance of probabilities.....”***

***A reasonable man watching television telecast on that day or reading the report that was published by the 2<sup>nd</sup> respondent the next day would have understood that the appellant had assaulted his house help-----***

The court further stated that the appellant’s profession or standing should have been questioned by the respondents.

Going by that decision and in the circumstances of this case, the defendants did not question the plaintiff’s standing in the society.

In view of the foregoing, I find that the plaintiff has proved his case on a balance of probability. I now proceed to address the quantum of damages that is appropriate in this case.

He has claimed general, aggravated and exemplary damages and a permanent injunction to restrain further printing and publication of the allegations complained of, in paragraphs 5 and 6 of the plaint.

As was held in the case **Nation Media Group Limited & 2 others vs. Joseph Kamotho & 3 others.**

***“In actions of defamation or in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily or even more highly subjective element, such action involved a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the***

***estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges (emphasis ours).***

In awarding damages, the court has an absolute and wide discretion in assessing damages to award. The court in the case of ***Jones vs. Poland*** set out some guidelines in what should guide the court in arriving at a fair and reasonable award which are;

- a. The Objective features of the libel itself, such as its gravity, its prominence, the circulation of the medium in which it is published and any repetition.***
- b. The effect of the plaintiff's feelings not only from the prominence itself, but from the defendants conduct thereafter both up to and including the trial itself.***
- c. Matters tending to mitigate damages, such as the publication of an apology.***
- d. Matters tending to reduce damages.***
- e. Vindication of the plaintiff's reputation past and future.***

In this case, there is no doubt that the plaintiff has been a long serving civil servant and is now a senator. No doubt, the allegations made against him were serious, and were widely circulated considering that the defendant has a wide circulation not only in Kenya but also in East Africa and worldwide on internet. The plaintiff has urged the court to award general damages of Kshs. 7 million and aggravated damages of 11.5 million and has relied on the case ***of Rtd Justice Aaron Ringera Vs. Nation Media Group Limited Hccc No. 94/2011*** where similar sums were awarded.

On the part of the defendant kshs. 1 million and 500,000/= were suggested as general and exemplary damages respectively. The cases of ***CAM vs. Royal Media Services Limited (2013) eKLR and that of Mwangi Kiunjuri Vs. Wangethi Mwangi & 2 others (2016) eKLR*** were cited.

The court has considered the submissions with regard to the general and exemplary damages. Being guided by the cases of ***Hon. Ibrahim Kipsang Kiptanui Vs. Francis Mwaniki & 4 others HCCC. No. 42 of 1987*** (unreported) and that of ***Gideon Mose Onchwati vs. Kenya Oil Company Limited & Another Civil suit No. 140/2008***, I hereby award the plaintiff Kshs. 5,000,000/- as general damages considering that the cases I have cited were decided a while ago.

The court finds that the plaintiff did not tender evidence in support of his claim of aggravated and exemplary damages. I make no award on that but an order on permanent injunction is hereby issued as prayed in the plaint.

The general damages awarded shall earn interest from the date of this judgment.

The plaintiff is also awarded the costs of the suit.

**Dated, Signed and Delivered at Nairobi this 14<sup>TH</sup> Day of NOVEMBER, 2019.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....For the Plaintiff

..... For the Defendant