



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 331 OF 2007**

**REVEREND CRISPUS NDEGWA.....PLAINTIFF**

**VERSUS**

**BEDAN MBUGUA.....1<sup>ST</sup> DEFENDANT**

**ROYAL MEDIA SERVICES LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

In his plaint dated and filed on 2<sup>nd</sup> April, 2007, the plaintiff sued the defendants for recovery of damages following the words that he alleged were published in the 2<sup>nd</sup> defendant's weekly column at page 13 on the February 16<sup>th</sup> to 22<sup>nd</sup>, 2007 issue. The words alleged to have been published were as follows:-

*“The Presbyterian Church of East Africa (PCEA) has sacked three clergymen on allegations of gross misconduct...The priests are alleged to have attempted to encourage followers to join a new denomination.*

*According to the circular sent to all the PCEA assemblies in larger Kiambu District, the clergy wanted the followers to defect with them to a newly registered Pentecostal churches affiliated to a new Presbyterian Community with roots in the United States.*

*According to the letter signed by the Limuru PCEA Clerk Peter Kamweru, those sacked included Chrispus Ndegwa, Ndeiya Parish.*

*The letter said the sacking of the priests came after a meeting of the church Kirk session (Elders Committee), which accused them of gross misconduct.*

*Two years ago Reverend Ndegwa had a splinter group in Limuru that saw one of its branches cede and over 40 members expelled. Efforts to reach the priests over allegations were futile.”*

It was pleaded that the above publication was widely known among those who resided in and around Limuru and most members of PCEA. He pleaded that the publication was defamatory to his reputation and the said article made him suffer considerable distress and embarrassment.

The defendants filed a statement of defence in which they denied the plaintiff's claim. They particularly contended that the said words were so published in good faith, in public interest and without malice and were not intended to injure the plaintiff's character. That it is public interest that the members of public know the activities and discharge of duties by the individuals in the position of the plaintiff. In that regard, they contended that the publication is privileged and a fair comment on matters of public interest.

It was further contended that under section 79 of the Constitution, the public is entitled to know and to have information that shocks and disturbs their conscience about the conduct of the public affairs by individuals in the position of the plaintiff and the defendants are entitled to the freedom to impart such information to the public in a democracy like ours. It was contended that the amount of public convenience from the restriction of the freedom of speech would far out-balance that arising from infliction of a private injury, which injury is denied in any event in this case. That the said words were so published after thorough investigations had been done, in accordance with principles of responsible journalism to confirm their authenticity and that they are true in substance as they were published. The defendants pleaded the defence of truth or justification.

It was further stated that the article was published pursuant to the freedom guaranteed under section 79 of the Constitution, in the course of discussing a matter of public interest, concerning an officer serving in a church leadership whose conduct is a matter of public interest, concerning their duties, without malice, reasonably in the circumstances and with an honest belief in the truth of the words and was not made with reckless disregard for the truth or untruth of the words.

At the hearing, the plaintiff (PW1) testified that he was a retired church minister. He confirmed the publication and stated that it referred to him. That the said words as they referred to him are malicious and false and they assassinated his name and character. That it damaged his career as a long serving Church Minister who was about to retire. He stated that the publication made him suffer since the year 2007. That furthermore he was transferred from Limuru on 1<sup>st</sup> January, 2004 to Njumbi parish Kikuyu Presbytery and not Ndeya as alleged. That as at the time of publication, he was not at Limuru. He denied having started a splinter group as published or registered any new Pentecostal Church affiliated to any church in America.

He lamented that the said words meant that he had been sacked and was no longer a Minister in the church. That he had grossly misconducted himself in his pastoral duties and had encouraged followers of the church to join new denominations which had been formed. He stated that the said allegations were untrue. That he on the other hand retired from the church after refusing a renewal of his contract. That he declined the renewal because of the damage that had already been caused by the publication. He lamented that after the publication, every congregation he went to serve walked out on him. He stated that some members shouted at him as they knew he had been sacked. That some church members held demonstrations against him and wanted to assassinate him and had to seek police security. That despite writing a demand letter to the defendants, there was no apology or correction offered. He stated that the church published a letter to confirm that he had been posted to Kikuyu on 1<sup>st</sup> January, 2004 and that there was no complaint against him.

On cross examination, the plaintiff denied having seen the letter dated 1<sup>st</sup> October, 2003, (Kamandura issues of the splinter group). He however acknowledged having received the suspension letter dated 4<sup>th</sup> October, 2003 and stated that he appealed against the said suspension which was later lifted. The plaintiff stated that he did not read the article on the newspaper but was called and informed about it by one Kigathe. That he sued royal media for the reason that it was mentioned as the publisher at the back page of the newspaper. He denied leading the splinter group by the time the publication was made. He stated that there had been earlier complaints about him but that the complaints were made in Njumbi and not Kamandura. He stated that he did not know whether or not there was a commission formed to investigate his case. He told the court that there was bad blood between the management of PCEA and presbytery but acknowledged that he was suspended in November, 2003 from Kamandura. He however denied forming any splinter group after the suspension.

Samuel Kigathi Gachara (PW2) testified that he has known the plaintiff since April, 2004. He stated that he was aware of the publication but he was not aware the plaintiff was forming a splinter church. He stated that despite the plaintiff's explanation, he did not believe him rather he thought the publication was true. He stated that the publication changed his view about the plaintiff. That he now saw him as a dishonest PCEA member. He further stated that the story was very sensational and every member of the parish wanted to know the truth. That the story occasioned the splitting of the congregation into two and it caused members to demonstrate causing the plaintiff to abscond duty. According to him the publication

was not true and though members calmed down, the plaintiff's reputation was tainted.

On cross examination, he stated that he did not know of the plaintiff's suspension. He further stated that he did not know the reason why the plaintiff had been transferred from Limuru parish. Upon being shown the letter of suspension, that of appeal by the plaintiff and the one to the General Secretary from the interim presbytery clerk and moderator, PW2 stated that he was no longer disturbed by the publication.

Evanson Gitau Muturi (PW3) testified that he worked with the plaintiff in Njumbi parish but that the plaintiff was transferred in the year 2004. It was his evidence that the article caused a lot of trouble in the church that the minister was unable to run the office because there were a lot of threats that he should leave the parish. That there was a rift between those that believed him and those that did not. He stated that he was not aware of any gross misconduct that was leveled against the plaintiff. That he knew for a fact that the plaintiff had not served in Ndeiya parish rather he had come from a parish called Kabuku. He averred that the allegations injured the plaintiff's reputation and that of the church and he was made to retire prematurely. He denied that the plaintiff committed gross misconduct and contended that the article contained falsehoods. He later stated that he knew the plaintiff when he had been transferred from Njumbi in the year 2004 from Limuru Presbytery and he thought it was a normal transfer. He confirmed that the plaintiff continued as a minister even after the publication but he faced demonstrations against him and his life was threatened. That he reported the threats to the police.

Bedan Nga'ng'a Mbugua (DW1) gave evidence on behalf of the defendants. He told the court that the motive behind the publication was not to defame the plaintiff but to merely present facts to members of the public. He stated that whenever an article can reflect on one negatively, it is upon the publisher to confirm if it is factual. He denied that the article referred to the plaintiff and stated that it talked of a number of clergymen. He told the court that the circulation was majorly in Limuru and Kiambu and that the plaintiff was contacted for clarification. He denied defaming the plaintiff for the reason that the letters indicate that he conducted marriages without authority and that the plaintiff had actually been suspended.

On cross examination, DW1 confirmed that the 2<sup>nd</sup> defendant published the article and that he was the editor. That it targeted members of the public but majorly circulated in Kiambu. He confirmed that the article mentioned the plaintiff's name and that it stated that he was sacked. He however contended that the fact that the article talks of sacking does not affect its credibility.

After the hearing, parties filed written submission. On the part of the plaintiff, it was submitted that, it is not contested that the words were published and that the Newspaper was produced by the plaintiff. That the article referred to those involved and they include the plaintiff herein.

It was further submitted that according to the plaintiff, the natural and ordinary meaning of the words published in the article meant and were understood to mean that the plaintiff's services as a PCEA minister and Reverend had been terminated, that the plaintiff had grossly misconducted himself and had opened another church where he was encouraging followers to join and lastly that the plaintiff was dishonest and could not be trusted and had actually been degazetted as a church minister and was committing criminal offences by purporting to minister in PCEA.

That the publication caused sharp divisions in the church and some pamphlets were distributed and his Pastoral work became impossible and had to send his juniors to represent him. That according to PW3 the publication incited violence which deteriorated to fist fights among the members of the congregation.

It was further submitted that the plaintiff was not sacked but had been suspended which decision was later rescinded by the Business Committee vide its letter dated 13<sup>th</sup> October, 2003 and for that reason, the publication was malicious and untrue. That the documents were at all material times in possession of the defendants but through ulterior motives chose to give facts that were untrue and completely disparaging of the plaintiff's character. That the plaintiff was never involved in the issues of splinter group.

It was submitted that there was no justification whatsoever for the defendant to publish such defamatory

words and the sole reason of doing so was to occasion prejudice and injury to the plaintiff. The court was asked to take judicial notice of the fact that the leader was meant to target leaders in the country and was being published every week and advertised in electronic media houses in the country and that the same has a wide circulation given that the Royal Media Services is one of the biggest media houses in the country.

That according to the evidence on record, PW2 and PW3 changed the way they viewed the plaintiff as a church Reverend as they thought he was the most dishonest person. PW2 is said to have been bothered by that issue and had to use his wife to confirm as he could not understand how the plaintiff continued to preach in their Njumbi Parish yet he had been sacked. The court was referred to the case of ***Samwel Ndung'u Mukunya Vs. Nation Media Group Limited & Another (2015) eKLR*** where the court observed;

“If the words complained of contain allegations of facts the defendant must prove such allegations of facts to be true. It is not sufficient to plead that he bona fide believed them to be true. The defence of fair comment does not extend to cover misstatement of facts, however bona fide.

The court was also referred to the case of ***J.P. Machira Vs. Wangethi Mwangi & Another***, where the court held;

***“Any evidence which shows that the defendants knew the statement was false but did not care whether it be true or false will be “evidence of malice”***

The plaintiff also made reference to the case of ***Kitto Vs. Chadwicks & Another (1975) E.A. 141*** where it was held;

***“Where the allegations made are false and the same are not disputed by correspondence or evidence and in the absence of any attempt to show some believe in the truth of the allegations, the malice is established and there is no sustainable defence”.***

Lastly, the case of ***Daniel Musinga Vs. Nation Newspapers Ltd CA 179/199*** was cited by the plaintiff in which the court observed that;

***“Malice can be inferred from reckless and deliberate or even negligence, ignorance of facts”.***

The plaintiff further submitted that according to DW1, all the exhibits they had produced were in their possession and by virtue of that fact, it can only be inferred that the publication of the defamatory story was malicious. That, while testifying in court, he said that he could not offer an apology even in the light of the evidence that the allegations in the publication were untrue.

Submitting on the freedom of expression under Article 33 of the constitution, the court was told that the right is guaranteed but does not extend to

- a. Propaganda for war;
- b. Incitement to violence;
- c. Hate speech; or
- d. Advocacy for hatred;-
  - i. ic incitement, vilification of others or incitement to cause harm”.

The court was told that rather than injuring the plaintiff’s reputation, the publication incited the members of the church to violence, hatred towards the plaintiff and he had to be given additional security. That as a result of the publication and the damage it caused to his reputation, he was unable to take an offer after

retirement from PCEA to serve the church on contract.

On their part, the defendants submitted that the publication contains the truth about the plaintiff which facts were brought out by the plaintiff's evidence and that of his two witnesses and the defendant's bundle of documents filed on the 10<sup>th</sup> January, 2014.

Submitting on the defence of qualified privilege, the defendants relied on an extract from pages 165 to 166 of Salmond on the Law of Torts which states as follows;

“ 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 the discharge of some public or private duty whether legal or moral or in the conduct of his own affairs in matters whether 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. Statements made in the protection of an interest;

It is further submitted that the publication enjoys a qualified privilege because it is in public interest that the members of public know about the conduct of the individuals in the position of the plaintiff. In this regard, the defendant contends that the said publication was an accurate and fair comment of the conduct of a public figure and is therefore privileged and a fair comment on a matter of public interest and qualified privilege and a fair comment on a matter of public interest and to that extent, the defendants have brought themselves within the legal context described by professor Salmond, (above).

The defendants while submitting on the provisions of section 24 of the Defamation Act had this to say;

***“In any action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges”.*** In this regard, it was submitted that, in the case before the court, the charges which the defendants made against the plaintiff are;

- a. Publicly ridiculing the elders before church members.
- b. Disregarding the Presbyterian Church's way of handling church services;
- c. Taking advantage of the pulpit to send messages that incited church members against the elders;
- d. Conducting six impromptu weddings without banns or consent from the Kirk Session in disregard to the practice and procedure and the laws of Kenya;
- e. Adamantly refusing to meet with elders even when they pleaded with him to have formal or informal meeting with them.

It was submitted that out of these, the defendants were able to establish the following;

1. The plaintiff appealed against the suspension which was lifted by the Secretary General of the church contrary to the church procedures, a decision that angered the Limuru Presbytery where he was working;
2. The plaintiff further caused division of the Kamandura Church resulting to a splinter group that

formed Joshua Matenjwa Memorial Church;

3. The Limuru Presbytery continued to oppose this splinter group which has support of the PCEA Moderator;

4. From the plaintiff's file and records in the church, it is clear that the plaintiff continued to serve as a minister of the church despite the grave charges of misconduct solely by support of the church's Secretary General and the moderator who were his godfathers who insulated him from disciplinary process of his Presbytery;

5. Because of the support that the Plaintiff was getting from these senior church officials, a division persisted in the Limuru Presbytery which had been set on collision path with the Secretary General and the moderator; at one time, the presbytery was forced to file a court case against the splinter group. This suit was initially opposed to the Plaintiff's godfathers in the church who subsequently bowed to pressure and supported it.

The court was also told that evidence of independent witness was crucial for the plaintiff to prove his case in the eyes of 3<sup>rd</sup> parties. In support of this proposition, the defendant cited the case of Registered Trustees of **the Sisters of Mercy t/a Mater Misericordiae Hospital Vs Jacinta W. Maina & Anor (2014) eKLR**. They urged the court to disregard the evidence by the Plaintiff's witnesses as it did not meet the criteria set out in above quoted case.

On whether there was malice on the part of the defendants in publishing the article, it was submitted that there was no malice whatsoever as the publication was true. In support of this contention the defendants relied on the case of **Musikari Kombo Vs Royal Media Services HCCC No. 89/2011** where the law was stated as follows:-

*“Qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or use of the privileged occasion for an improper purpose. Lack of belief in the truth of the statement is generally conclusive as to malice, except in cases where a person is under a duty to pass on defamatory reports by some other person. Mere carelessness, however, or even honest belief produced by irrational prejudices, does not amount to malice. But an honest belief will not protect the defendant if he uses the privileged occasion for some other purpose other than that for which the privilege is accorded by the law; if his dominant motive is spite or if he acts for some private advantage he will be liable. Existence of malice can be evinced by language; if the language used is utterly beyond or disproportionate to the facts; however, it does not follow that merely because the words are excessive malice won't be inferred. It can also appear from the relations between the parties before or after publication or from the conduct of the defendant in the course of proceedings themselves, as, for example insisting on the defence of justification while nevertheless making no attempt to prove it. However mere pleading of justification is not itself evidence of malice even though the plea ultimately fails. It may be deduced from the mode of publication where the dissemination of the statement is wide than necessary. When a defamatory communication is made by several persons on an occasion of qualified privilege, only those against whom express malice is actually proved are liable.”*

Quoting the provisions of **Section 4** of the **Defamation Act** as hereunder:

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

It was submitted that this section codifies the essentials of the common law defence of truth or justification that the defendant does not have to prove the truth of all the words complained of as long as it can be shown that he has proved the substantial part of it.

Still on the defence of justification, the defendants relied on an extract from **Carter – RUCK** on libel and slander 5<sup>th</sup> edition at page 94 where the writer has noted the following:-

***“In order to succeed upon a plea of justification, the onus lies upon the defendant to prove that the whole of the defamatory matter complained of, that is to say, the words themselves, and any reasonable inference to be drawn, from them, are substantially true..... on the other hand, for the defence to be successful, it is not necessary that every ‘t’ should be crossed and every ‘I’ dotted; it is sufficient if the substance of the libelious statement is justified. As much must be justified as meets the sting of the charge, and if anything be contained in the charge which does not add to its sting, that need not be justified.”***

The same position is advanced in **Gatley on Libel and Slander, 10<sup>th</sup> Edition** where the writer states as follows:-

***“..... some leeway for exaggeration and error is given by the defences of fair comment and qualified privilege. However, for the purposes of justification, if the defendant proves that “the main charge or gist of the libel” is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable.....”***

Submitting further on the defence of justification, the defendants relied on an extract from Carter Ruck on libel and slander page 111 as follows:-

***“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 defendant’s 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 his submissions on Article 33 of the Constitution, counsel for the defendants told the court that the clergy hold a position in society that makes them stand in the same position as public officials and therefore their conduct is amenable to public debate and scrutiny which is protected by Article 33 of the Constitution.

The court was told that there is no evidence that the defendants were reckless in the broadcast and they indeed had honest belief that the broadcast was true and they took steps to verify from the Plaintiff who was not co-operative at all/unavailable.

This court has carefully and meticulously perused through the pleadings filed in this matter, the evidence on record and the detailed submissions by the very able learned counsels who have done an excellent job. Having set out the positions by the respective parties, I now proceed to set out the issues for determination by this honourable court which in my humble view are as hereunder.

1. Whether the words in the impugned Article in their natural and ordinary meaning are defamatory of the Plaintiff.
2. Whether the article published by the defendants on February 16 to 22, 2007 in the leader concerning the plaintiff was false and malicious.
3. Whether the article and the words refer to the plaintiff
4. Whether the plaintiff is entitled to general damages for libel and if so, how much?
5. Who should meet the cost of the suit?

I now proceed to consider the issues,

Defamation as a tort does not fit one definition, it depends on the circumstances of each case. In the 7<sup>th</sup> edition of Salmond on the law of Torts, defamation is defined as follows;

***“The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification”.***

In *Ondonkara vs Astles (1970) EA 374*, a defamatory statement was described as follows;

***“... A statement is defamatory of a person of whom it is published if it is calculated to lower him in the estimation of ordinary just and reasonable men”***

The tort of defamation was well described in 1970 in British Columbia Court of Appeal decision of *Murphy Vs. Ha March (13DLR sd 484)* where a member of parliament Judy La March wrote about the plaintiff as follows;

***“ A brash young radio presenter, named Ed Murphy heartily detested by most of the press gallery and the members had somehow learnt that Maurice Lamontagne (the Secretary of state and a long-time friend and adviser of the prime minister had purchased furniture but had not paid for it.”***

In finding that there was actionable libel, the British Columbia Supreme court in dismissing the appeal wrote;

***“Defamation is where a shameful action is attributed to a man (he stole a purse) , a shameful character (he is dishonest) , a shameful course of action (he lives on the avails of prostitution) or a shameful condition.(he has small pox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule. The more modern definition of defamation is words tending to lower the plaintiff in the estimation of the right thinking members of the society generally”.***

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

***“ The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one 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; conveying untruth alone does not render an imputation defamatory”.***

The common law of defamation protects every person from harm to their reputation by false and derogatory remarks about their person known as defamation.

The elements of the tort of defamation are well set out in the case of *J. Kudwoli Vs. Eureka Educational and Teaching Consultants & 2 others HCCC No. 126/1990* which are;

1. The matter of which the plaintiff complains was published by the defendant.
2. The publication concerned or referred to the plaintiff.
3. That it was defamatory in character;

4. That it was published maliciously and;

5. That in slander, subject to certain exceptions, that the plaintiff has suffered special damage.

The same principles were repeated in the case of ***Wycliffe A. Swanya Vs. Toyota East Africa Limited and Francis Massai Nairobi CA No. 70/2008***

Applying the above principles to our case, it is not in dispute that the defendants published the article complained of and that it refers to the plaintiff. Infact, the plaintiff is mentioned by name among the other Clergymen.

The defendants have also not denied publishing the article but they have raised various defences that I will revisit later in this judgment.

Was the article defamatory and was it malicious? The plaintiff in his evidence told the court that the article was defamatory and that his reputation was injured. That it caused a sharp division in the church as people believed that he had been sacked. That some pamphlets started being distributed which disparaged his character, his security was threatened and his Pastoral work became impossible. The publication is also alleged to have incited violence and fights among the members of the congregation. According to him, this caused him a lot of mental torture and anguish. The bone of contention in the article is that the plaintiff was never sacked and that he was not involved in the issues of a splinter group. From the evidence on record, it is true that the plaintiff was never sacked but he had been suspended vide a letter dated 4/10/2003 which was produced as DWE3. In the said letter, the plaintiff was suspended for two months starting 4<sup>th</sup> October, 2003 in order to facilitate the Presbytery to investigate the matter which related to a letter of accusation against him from Elders of PCEA Kamandura Kirk session. The letter that led to his suspension is dated 1/10/2003 and it was signed by 22 elders of Kamandura Church and it was produced and marked as exhibit 2. In the said letter the plaintiff was accused of refusing to meet the elders, conducting six marriages without written banns and consent from the Kirk Session, contrary to practice and procedure Rules of the Church.

It is, however, on record that he appealed against the said suspension vide a letter dated 8<sup>th</sup> October, 2004. The appeal was done to the Secretary General on the basis that the suspension was unconstitutional. It was discussed by the Business Committee and it was resolved that the process that was followed to take the allegations to the Presbytery was flawed and the decision to suspend him was very abrupt and not in line with the practice and procedure and in view of the above, the business committee decided that the suspension be lifted and he went back to work.

Though the plaintiff alleges that the publication caused division in the church which led to physical fight, no evidence was tendered before the court to prove that there were physical fights and that the matter was reported to the police, this being a criminal matter. He also told the court that there were pamphlets that were distributed by some of the church members but the court was not told what was contained in those pamphlets and the effect they had on his reputation.

The defendants produced several exhibits some of which the plaintiff was cross-examined on. It appears that the PCEA church where the plaintiff was administering had a dispute which had persisted for quite a long time and in particular there was bad blood between the church and the Presbytery and this may have explained the divisions that were witnessed after the publication of the article, the subject matter of this case. The division may not necessarily have been caused by the publication of the article complained of. It is further noted that in his evidence, he told the court that he continued with his Pastoral work and at no time was he completely unable to perform his duties.

On the issue of the splinter group, the plaintiff was cross-examined on DWEXH. 37 and the contents therein strongly points to the fact that the plaintiff may not have been as innocent as he claims. There is a high probability that he belonged to the splinter group.

It is also noted that the lifting of his suspension was purely on the procedure that was followed and not on

the substance of the allegations that were levelled against him and his reinstatement was done with the help of the Secretary General and the Moderator who were protecting him. This would therefore mean that he is a man of questionable moral character viewed from his engagement as a senior church minister from whom very high moral standards were expected as he discharged his pastoral duties.

Samuel Kigathi Gachara PW2 was plaintiff's friend since 2004. When the article was brought to his attention he sought to know the truth from the plaintiff and also from his own wife who was a deacon in the same church. It was his further evidence that the publication caused divisions in the church and it affected the plaintiff's reputation in a negative way. He told the court that he did not know that the plaintiff had been suspended. On being shown the suspension letter, he is on record as having told the court that he is no longer disturbed by the article. This therefore means that the witness did not know the plaintiff well and could not vouch for his character.

Evanson Gitau Muturi PW3 gave evidence on how he knew the plaintiff and how the publication affected his reputation. He however told the court that he was not aware that the plaintiff had been suspended.

The defendant denied having any malice in publishing the article and have averred that the contents of the article are true. For the plaintiff to succeed in a claim for defamation, he has to prove malice. On the other hand, malice can be inferred and for malice to be inferred the language of the published article ought to have altered the facts and their meaning and there ought to be animosity. No evidence was led by the plaintiff to prove that there was animosity between him and the defendants. In the persuasive case of *Phineas Nyagah Vs. Gitobu Imanyara (2013) eKLR*, Odunga J. held that;

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

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

In his evidence, DW1 admitted to having seen the documents before the article was published.

I have carefully gone through those documents and its clear that the plaintiff was not sacked by the PCEA church.

Turning to the defendants' defences, their case is mainly on the documents that were produced at the hearing. The plaintiff did not object to the production of any of the documents and some of them touched on the Plaintiff and have shed some light on his moral character.

The defendants have relied on the defences of justification, qualified privilege and fair comment. I concur with the defendant that it is in the public interest that the members of the public are made to know about the conduct of the individuals in the position of the Plaintiff but the reporting has to be fair and accurate.

The provisions of **Section 24** of the **Defamation Act** have expanded the common law defence of justification in that libel or slander in respect of words containing two or more distinct charges against the Plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved.

It is noted that the defendants used the word “sacking” instead of “suspension” but the words themselves and any reasonable inference to be drawn from them are substantially true and for the defence of justification to be successful it is not necessary that every “t” should be crossed and every “I” dotted. What is important is the substance in the article and the inference that can be drawn.

On Article 33 of the Constitution, it is important to admit that the court has to do a balancing act between the right to reputation and the right of the media to impart information, but on the other hand, where a defendant raises the defences of justification, absolute privilege and fair comment on a matter of public

interest and establishes some reasonable facts in some of those defences, then the issue of balancing interests cannot arise but the defence has to prevail

Having made the above observations and findings, I find and hold that the Plaintiff did not prove his case on a balance of probability but in the event that I am found to be wrong in the finding that I have made, the law obliges me to assess damages I would have awarded the plaintiff had I entered a verdict in his favour.

I have considered the submissions by the plaintiff and the defendant's counsel on quantum of damages and the authorities relied on. On the issue of damages, I find the following passage by Winderyer J in the case of **Vein Vs John Rairax & Sons Property Ltd, 177 C.L.R 115, 150** useful:-

*“It seems to me, properly speaking; a man defamed does not get compensation for his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as vindication of the Plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solation rather than a monetary recompense for harm measurable in money.”*

The same position was held by the court in the case of **Brigadier Arthur Ndong Owuor Vs The Standard Limited, Nairobi HCCC No. 511 of 2011:-**

*“Once a reputation is lost in my view, monetary damages might not be adequate compensation. Monetary damages might be a consolation yes, but they will never be an adequate compensation for a lost reputation. In the eyes of the public, once a person's reputation has been damaged it will remain in memory possibly throughout his life.”*

In awarding damages, the court draws considerable support in the guidelines in the case of **Jones Vs Pollard (1997) EMLR 233-243** where a checklist of compensable factors in libel actions were enumerated as follows:-

1. The 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.
2. The 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.
3. Matters tending to mitigate damages, such as the publication of an apology.
4. Matters tending to reduce damages.
5. Vindication of the Plaintiff's reputation past and future.

Still on assessment of damages, Tunoi JA (as he then was) in **Civil Appeal No. 314 of 2000 (Johnson Evans Gicheru Vs Andrew Morton & Another (2005) eKLR** had this to say:-

*“In an action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict was given. It may consider what the conduct has been before action and in court during the trial.”*

On damages, the Plaintiff has suggested a figure of Kshs. 23, 000,000/- made up as follows:-

- a. Damages for libel – Kshs.15,000,000
- b. Aggravated damages – Kshs.5,000,000
- c. Damages in lieu of apology - Kshs.3,000,000

He has relied on the case of **Samuel Ndungu Mukunya Vs Nation Media Group Limited & Another EKLR, (2015)** where a sum of Ksh. 20 million was awarded and that of **Daniel Musinga Vs Nation Newspapers Limited HCCC No 102/2000** where a sum of Kshs.10million was awarded and lastly on the case of **Johnson Evans Gicheru Vs Andrew Morton & Another** where an award of 6 million was awarded.

On their part, the defendants have suggested a sum of Kshs.300,000/- and have relied on the case of **Muthui Wiwau & Another Vs Standard Newspapers & Another (2012) eKLR** where an award of kshs.400,000 was awarded to a journalist. The case of **Eric Gor Sungu Vs George Orara Ondinga (2014) eKLR** was also relied on and that of the **Standard Limited Vs Joseph Leo Ochieng & Another Civil Appeal No. 189/2004**.

The defendants also relied on the cases of **Jared Omonde Kisera t/a Omonde Kisera & CO. Advocates Vs Ken Omondi; Wachira Waruru & The standard Limited HCCC No. 160 of 2001** (unreported) where a sum of Kshs.800,000 was awarded. They also cited the case of **Mongare Gekong'a t/a Gekong'a & Momanyi advocates Vs The Standard Ltd HCC No. 518/1998** where a sum of Kshs. 1million was awarded.

Having considered the submissions on quantum, the fact that the publication was not conspicuous, that the paper had few readers as it was mainly circulated in Kiambu and Nairobi, a sum of Kshs.500,000 would have been reasonable as general damages. The Plaintiff has not claimed aggravated/exemplary damages and therefore the court would not have made any award under this sub-head.

On the claim for permanent injunction, the evidence on record is that the leader newspapers is no longer being published and in the circumstances there is no likelihood that the defendant will continue to publish.

All said and done, the Plaintiff did not prove his case against the defendants, the suit is dismissed with costs to the defendants.

Dated, Delivered and Signed at Nairobi this 2<sup>nd</sup> day of March, 2017.

**L. NJUGUNA**

**JUDGE**

***In the presence of***

..... ***For the Plaintiff.***

.....***For 1<sup>st</sup> Defendant***

.....***For 2<sup>nd</sup> Defendant***