



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 89 OF 2011

HON. MUSIKARI KOMBO.....PLAINTIFF
VERSUS
ROYAL MEDIA SERVICES LTD.....DEFENDANT

JUDGEMENT

Introduction

1. By a plaint dated 14th March, 2011 and filed in this court the same day, the plaintiff sued the defendant seeking an unconditional apology, General Damages, Costs and Interests arising from the publication on 2nd March 2011 by the Defendant of words in the Defendant's news channel *Citizen Nipashe* and *Citizen Live at 9* respectively which publication the plaintiff deemed defamatory of him.

Plaintiff's Case

2. According to the plaintiff on the said day, under news item caption, "Kosgey in the Dock/Kombo's wife also charged over graft" the Defendant in its Swahili broadcast at 7.00 pm published the following words:

Janet Chapia – Citizen Nipashe

“Na katika Mahakama nyingine ya kupambana na ufisadi, mkewe was waziri wa zamani Musikari Kombo alishtakiwa kwa ufujaji wa zaidi wa shilingi milioni tisa. Elizabeth Kaloki Kombo aliyekuwa naibu wa mkurugenzi wa elimu, anadaiwa kujipatia kwa njia ya ulaghai shilingi milioni mbili nukta mbili huku shilingi milioni saba nukta sita akizitoa kwa mkurugenzi wa elimu kwa jina Onesmus Mutinda. Fedha hizo zinasemekana zilikiwa za kugaramia warsha kuhusu ugonjwa wa ukimwi katika chuo cha mafunzo ya ualimu cha Shanzu. Kombo alikanusha kutekeleza vitendo hivyo kati ya Aprili mwaka wa 2009 na mwezi wa Mei mwaka huo huo. Kesi hio itaskizwa tarehe tisa mwezi ujao.”

3. The said words according to the plaintiff in their English translation mean:

And in another anti-corruption court today, the wife of a former Minister, Musikari Kombo was charged with fraudulently acquiring more than nine Million shillings. Elizabeth Kaloki Kombo, who was an assistant director of education, is alleged to have requested for money purporting that it was needed to pay participants at an HIV/AIDS workshop held at Shanzu Teachers Training College in Mombasa. Kombo denied the charges that alleged that she committed the acts between April 2009 and May that year. The case will be heard on 9th next month.

4. In the English language news broadcast at 9.00 pm it was pleaded that the following words were published:

Michael Njenga- Citizen at 9

“At the same time the wife of FORD Kenya Chairman and Nominated Member of Parliament Musikari Kombo, Elizabeth Kaloki, was charged with misappropriating over 9 Million Shillings in the course of her duty as an Assistant Director of Education.”

Hussein Mohammed – citizen at 9

“Still from the courts, Nominated MP Musikari Kombo’s wife Elizabeth Kaloki has been charged with fraudulently acquiring about 9 Million Shillings. While working as an Assistant Director of Education, she is alleged to have requested for money purporting that it was needed to pay participants at an HIV/AIDS workshop held at Shanzu Teachers Training College in Mombasa.

Elizabeth Kaloki Kombo is accused of acquiring 2.2 Million Shillings fraudulently while acquiring another 7 Million on behalf of a senior director of education, Onesmus Mutinda. She denied the charges. The alleged offences are said to have been committed between April and May 2009 with Lady Justice Nyambura ordering her to pay a 1 Million Shilling bond pending the hearing of the case on the 9th of April this year.”

5. It was pleaded further that during the news the said defamatory story was carried on the News Sticker Tape running throughout the news. In the plaintiff’s view the said words were not only false and malicious but were also calculated to disparage the Plaintiff’s character and were meant to mean that the plaintiff is married to **Elizabeth Kaloki Kombo**; that the plaintiff is an unfaithful husband and dishonest family man; that the plaintiff is a dishonest person and is involved in a conspiracy to defraud the public of money; that the plaintiff has committed or is involved in fraud against a public company through the instrumentality of his wife; that the Plaintiff engages in corruption and corrupt practices; the Plaintiff is an evasive character who lives a life of hypocrisy; and that the Plaintiff cannot be trusted to hold office.
6. It was pleaded that the said words were published with the knowledge that the allegations concerning the plaintiff were false and as a result the same caused the plaintiff, a Nominated Member of Parliament, the Chairman of FORD Kenya Party, to suffer loss and damages to his reputation especially since the Plaintiff is currently Nominated Member of Parliament, the Chairman of FORD Kenya Party, the Chairman of the African Parliamentarian Network against Corruption (APNAC)- Kenya Chapter and a member of the Executive Board of Global Organisations of Parliamentarians against Corruption (GOPAC), loss and damage to his reputation.
7. It was pleaded that despite the plaintiff having sent a demand notice seeking retraction and apology and threatening to sue, the same never elicited any response.
8. In his evidence the plaintiff who testified as PW1, apart from relying on his statement filed herein told the Court that he was a nominated Member of Parliament (MP) on a PNU ticket to which his party Ford Kenya was affiliated having lost his elective post as a Member of Parliament in the year 1997 and hailed from Webuye in Bungoma District. According to the plaintiff, he served the Government at various Ministerial levels having been an Assistant Minister in the Ministry of Planning, Minister for Regional Development and also the Minister for Local Government. Apart from that he actively participated in governance issues in Parliament including anti-corruption

- crusades, enactment of Anti-Corruption Legislation as well as the Political Parties Legislation whose enactment he spearheaded. He testified that he held a Bachelor Arts in Economics from the University of Nairobi. At the time of his testimony he said he was the President of the African Caribbean Pacific European Union Joint Parliamentary Assembly.
9. According to the plaintiff he had no knowledge of **Elizabeth Kaloki Kombo** and that his only wife was **Dorcas Florence Munoko**, a professional financial person who for many years was a consultant with Price Waterhouse and also worked with Non-Governmental Organisations on matters relating to HIV/AIDS. According to the plaintiff on 2nd March, 2011 at about 7.30pm he received a tearful telephone call from his daughter, **Namlisa Kombo** who told him to watch the television. Upon going to the tail end of the news item he discovered news about his wife who was said by one **Janet Chapia** to have been involved corruption. He confirmed that the words pleaded in the plaint were the words which were uttered. According to him **Kosgey** was his colleague in politics and in parliament and at that time was facing abuse of office charges. Upon hearing the news the plaintiff called *Citizen* and spoke to a person called **Opondo** who promised to look into the matter. However the same news item was repeated in the 7.00pm news broadcast after the **Kosgey** item by one Hussein Mohammed. According to the plaintiff, the news continued running at the bottom of the screen even after the same had been read. Later after 9.00pm the plaintiff received a call from **Mr Opondo** informing him that they had made a mistake.
 10. It was stated by the plaintiff that the news was not well received by his large members of his family and his children were in anguish. Soon thereafter the plaintiff applied for a visa to the American Embassy through GOPAC whose board he was serving in to go for a conference in Mexico and he was called to the Embassy and asked about the said Elizabeth. According to him, to be a member of GOPAC one has to be a parliamentarian committed to the fight against corruption since the organisation deals with the fight against corruption. Due to the wide publication the first question he was asked at the conference was whether the publication was true though he denied that it had nothing to do with him though by that time no response had been received from the Defendant. He further testified that less than three weeks to the date of his testimony someone asked him about the issue. The plaintiff reiterated that he had not seen a publication by the Defendant apologising for the impression created.
 11. According to the plaintiff HIV and AIDS is one of the serious issues in this country and the same has been elevated to a national disaster. In the plaintiff's view his wife has never been a civil servant and the closest she has been to working for the Government was as a Director with KENGEN. His wife, he added was a Certified Accountant and has been in private sector all her life.
 12. The plaintiff testified that a copy of the charge sheet was displayed during the newscast and what struck him was that the name "Kombo" did not feature therein. However, the newscast started with "the wife of nominated MP and former Minister" and then proceeds to identify him. He however said that he never received any calls from **Janet Chapia**, **Peter Opondo** or **Michael Njenga** to verify the information. According to the plaintiff the accused in the case covered her face when she was leaving the courtroom hence no one would have been able to tell whether she was the plaintiff's wife or not and he did not know who the lady was.
 13. The plaintiff therefore sought orders for unconditional apology in the same manner it was published in order to clear his name.
 14. In cross-examination by **Mr Gacheru**, learned counsel for the Defendant, the plaintiff conceded that he was a politician and had been in politics for quite some time and that politicians are public figures and are as such open to scrutiny about their conduct. According to him the story referred to the wife of a former nominated MP one **Musikari Kombo** and the person charged was **Elizabeth Kaloki Kombo** who was not his wife although according to the broadcast she was his wife. According to the plaintiff the reputation of his wife affected him in his work. He insisted that he did see the broadcast and that people called him inquiring whether he was seeing what was happening.. According to him the news caused damage to though he was still a nominated MP and a member of the GOPAC. He confirmed that the American Embassy nearly cancelled his visa and he was recalled to the Embassy and the issue raised though he was unable to tell the name of the officer who called him. Three weeks before his testimony a fellow golfer by the name **Mary Maingi** asked him about the matter and he could still feel that it was a blot on his name and a burden to carry.

15. He affirmed that **Mr Opondo** assured him that he was going to look into the matter and to him that was not an apology. After the 9.00 o'clock news he called though he was not aware whether the news was repeated in the morning. He however said he did not see the apology in the morning as he did not watch the breakfast news. Referred to the letter dated 3rd March, 2011, he admitted that it was indicated therein that an apology was made though in the demand letter the advocate did not give the time frame for the apology before filing the suit. On 11th March, 2011, 11 days after the letter. In his view 7 days was sufficient. Referred to the letter dated 17th March, 2011 he said that the same talked of the format and whether the letter was answered can only be answered by his lawyers. He however denied any knowledge that the Defendant had been willing to make any apology in the format requested. While admitting that he was worried about his reputation the plaintiff denied that he was in a hurry to file the suit.
16. In re-examination, the plaintiff the plaintiff said that the key words in the original demand letter was unconditional apology and prominence. He clarified that the prime news times are the evening news and not the 7.00 am one and that he did not watch the latter. He however reiterated that he had never watched an apology with the same prominence that he expected. According to him he expected someone to pick the phone and call him.
17. Referred to the defence, the plaintiff said the Defendant's position was that he was not defamed. According to him it was a fact that **Kosgey** was charged while it was also a fact that his wife was not charged. According to him the visa was issued the same day he was recalled and an inquiry was made by the embassy on account of the publication. He testified that the response form the Defendant was received on 22nd March 2011 and the suit was filed on 14th March 2011 and there was no letter asking for time within which to reconcile. In his evidence he valued his family and his children were hurt.
18. The plaintiff called **Namulisa Navalayo Kombo**, his daughter who testified as PW2. Apart from confirming the contents of her statement filed in this suit, she confirmed that **Dorcac Kombo** was her mother and on 2nd March 2011 there was a mention of her mother being in court charged with fraud that she had embezzled funds for HIV/AIDS. According to her the news talked of the wife of a former Minister and Nominated MP, **Hon. Musikari Kombo** who was charged. According to her they are 10 children and received the information in shock and disbelief since they were sure that it was impossible.
19. She then contacted her mother first then her father and inquired what was going on since she did not recognise the person mentioned. According to her she got most of the inquiries from her colleagues at work and her friends at Deloitte and Touché in Nairobi where she was a management consultant. She disclosed that she had a degree in psychology and marketing for USIU-Africa and share the same profession with her mother who is regarded highly in the profession.
20. She testified that her father abhors corruption and would not be held highly if the mother was involved in corruption. Although they did not expect the story to run again at 9.00pm it did despite the fact that her father informed her he had called the Defendant. According to PW2 she has never seen any apology published by the Defendant.
21. It was the testimony of the witness that Deloitte was her mother's first employer and there were inquiries from everybody since ethical issues were involved. According to her, the plaintiff would like to see the impression corrected. Having watched the segment of the DVD of the newscast, she testified that the charge sheet was shown repeatedly and the story opened with "the nominated MP and former Minister". Although she was married to **William Odongo Majale**, she testified that she retained the **Kombo** name as she related and believed in to the same. In her view the publication was an attempt to discredit the plaintiff' personality yet the plaintiff has never been involved in any corrupt practice known to her.
22. In cross-examination by **Mr Gacheru**, the witness admitted that the plaintiff being a politician is subject to close public scrutiny. She said that she watched the whole broadcast at home and that there were highlights before the newscast begun. According to her *Citizen* is widely watched in Kenya because of accessibility. She however was not sure whether she watched the whole bulletin the next morning though she never saw the apology and has never seen any.
23. The next witness to be called was **Dorcac Florence Kombo** who testified as PW3. According to her she was a Chartered Accountant Fellow and a Certified Secretary as well as certified Public Accountant and at the time of the testimony was on the Board of KENGEN as a non-executive

- director. She was also a trustee of Kenya Women Medical Association advising on finance and a director in family business of **Namenge Brothers Co. Ltd** and **Menana Development Co. Ltd**. She also testified that she consulted for various entities, organisations and the Government of Kenya, Malawi, Tanzania, Sierra Leone and Rwanda.
24. Apart from relying on her statement filed in this suit, she testified that she got married to the plaintiff in September, 1982 who at the time was in the private sector but later became an MP, an Assistant Minister and Cabinet Minister as well as the Chairman of political party.
25. On 2nd March, 2011, she testified that there was a news item that was running on *Citizen Nipashe* and she received information about it. Referred to the plaint she confirmed that what was contained therein was what was published. According to her reference was made to the wife of **Musikari Kombo** and she was called **Mrs Kombo**. According to her, her name is **Dorcas Kombo** and she is referred to as **Mrs Kombo** and the plaintiff is a former Minister. To her the name was mentioned in full before the word “wife”. To her the plaintiff is a public figure and there is no other **Musikari Kombo**. She added that the plaintiff has been in the public domain for a long time and most people know her as **Mrs Kombo**.
26. She however said that she was not charged with the offence on 2nd March 2011 and was not in Court. She asserted that she never received any phone call from the Defendant on an apology. According to her the publication caused her loss and damage though they were still married. However the publication had a negative effect on the plaintiff as he was being asked about the case which case was not hers. She further testified that she did not know **Elizabeth Kaloki Kombo** and that the person was not married to her husband. According to her she got married to the plaintiff out of love and that the plaintiff is not corrupt and that they do not subscribe to corruption. To her to say that she was corrupt hurt the plaintiff.
27. It was her evidence that though she saw the charge sheet, the same did not mention the name **Kombo** and did not indicate whether she was. According to her she watched both news items and whereas she could not say how long the news item continued, the item continued in the line below until the time for sports. According to her what was shown was “Musikari Kombo. Former Cabinet Minister. Chairman of Ford Kenya”. According to her she has never met anyone with the name **Musikari Kombo** and has never been employed in the civil service that she had worked for the civil service by virtue of international assignments. In her view, since the matter had landed in the public domain it could not be removed. She testified that what came after the item was the corruption case against **Kosgey**.
28. In cross-examination by **Mr Gacheru**, PW3 testified that she was testifying as a witness in the plaintiff’s case to help bring truth to the matter. Whereas the plaintiff was seeking damages, that was not the only reason for filing the case. She admitted that the plaintiff was a public figure and was amenable to public scrutiny and that include the family members. However, in this case it was not the wife of the public figure. She testified that the plaintiff informed her that there was a telephone conversation during the 7.00 o’clock news and when she watched the news the following morning there was a one sentence clarification which to her was not an apology to the effect that the previous day they referred to **Kaloki** who was not the wife of **Musikari Kombo**. In her evidence it was just a sentence and was not of the same length and time.
29. She said that whereas a letter of apology may have been written she was unaware of the same. She however denied that the plaintiff was more interested in obtaining money and not vindicating his name. Referred to the plaintiff she said that she did not know whether what was reported was true and that she did not know the lady and was not even aware whether she was married. Further she was unaware that she had a husband known as **Kombo** though the name was combined with Cabinet Minister and Chairman of FORD Kenya. She however admitted that the plaintiff had no monopoly of the name. The witness said that the lady referred to was not covered while at the dock and that there are people who know her and others who don’t.
30. She however confessed that she loved the plaintiff and though other people’s perception was changed, hers did not since she still believed that the plaintiff was not corrupt.
31. In re-examination, PW3 largely reiterated the contents of her examination in chief.

Defendant’s Case

32. At the close of the plaintiff’s case, the Defendant called **Janet Odari Chapia** who testified as

DW1.

33. According to her, she was a journalist with the Defendant as a news reporter entailing news gathering detailed with court reporting within Nairobi. After disclosing that she was relying on her statement filed herein, she said that on 2nd March, 2011 she was at the Nairobi Law Courts at the Anti-corruption Court where there was a lady charged with. According to her they were many journalists trying to get the story and they were asked by the orderlies why they were taking the photographs of the wife of the Honourable and informed them that the lady's name was **Florence Kombo**. According to her most of the journalists assumed that the lady was the wife of the former MP and after going back to the station she prepared her story for the 7.00 o'clock and the same went on air at 7.00pm in the bulletin known as *Nipashe*. Later the witness received a call from her boss **Peter Opondo** inquiring how she obtained her story and that **Florence Kombo** was Honourable **Kombo's** wife. She then explained what had transpired and her boss informed her that the plaintiff had called to complain about the story and informed her that they were going to apologise. She however never saw the apology though she was made to understand it was made the following day and power breakfast.
34. The witness admitted that she did not know **Mrs Kombo** before and had no reason to be malicious.
35. In cross-examination by **Mr Luseno**, learned counsel for the plaintiff DW1 said that it was her 4th year as a Court reporter and that she knew what stories to report and which ones not to report and that sometimes she asks for the good story and ordinarily reports the best story. She admitted that the story on anti-corruption would be appealing and that they bring news that attract viewers' interest in the media house. According to her they try to be the best media house though she was unable to say which was the leading media house.
36. DW1 admitted that there was anti-corruption case against the Industrialisation Minister who was charged and his story was run together with the subject one. She confirmed that she was in court when the charge was read and she heard the name **Florence Kaluki Kombo**. She also confirmed that she was in Court when the plaintiff's witness gave evidence and watched the video clip of the news cast. According to her the name **Kombo** was in the charge sheet. However, the Court orderlies did not identify the name of the *Mheshimiwa*. However it is then that she concluded that it was the plaintiff's wife and ran the story at 7.00pm which news story constituted 9 lines. The witness admitted that they used the name **Musikari Kombo** and the Court in question was dealing with anti-corruption. She also admitted that they used the words "wife of **Musikari Kombo** a former Minister though those were not the words she had been told. She also conceded that "**Musikari Kombo**" and "former nominated MP" were not in the charge sheet and that she used them because she concluded that the accused was the plaintiff's wife. According to her, the news would not have reached the audience had the words been omitted and that the inclusion was meant to catch attention of many people.
37. DW1 further testified that she was enjoined to brief her editors before running a story and that she had more than 2 stories. According to her what determines the airing of the story is the duration and the prominence of the story. According to her the **Kosgey** story was a new story while the story of the plaintiff's wife was also top range as it had to do with the theft of AID's money and as such would sell hence the perfect story for the news item.
38. She however denied that there was a segment allotted for Court news though she confirmed that *Citizen Nipashe* is a Swahili bulletin for 7.00pm which was her speciality. According to her she did not run an apology the following day in the same programme and could not recall whether an apology was discussed in the meeting since they were only discussing what was coming in *Nipashe* as the issue of an apology was not considered to be news. The witness confirmed that the story was ran on the television on 2nd though she did not know the extent of the coverage of the *Citizen*. She however admitted that *Citizen* is on Dstv and can be watched online.
39. According to her she studied Communication and Journalism at the University of Nairobi and Kenya Polytechnic and was aware of the Code of Conduct which requires them to report accurately and exhibit fairness. She however admitted that she did not call the Plaintiff before the meeting or after and did not see the plaintiff in Court. She admitted that she went against the good conduct of journalism. Referred to the Code she however said that she was not conversant with the requirement that she ought not to disclose the identity of relatives of people charged though in this case they identified the plaintiff with the lady charged though she neither spoke to the said lady

- nor the investigating officer or prosecutor. She also did not read the Court file though she read the charge sheet and the names **Kombo** and **Elizabeth** were there.
40. The witness admitted that she knew the plaintiff and he was someone she respected. According to her, **Michael Njenga** was not in Court but simply translated her story and ran it at the 9.00 o'clock. The witness however did not attend further hearings and was not aware of what happened to the case. In conclusion the witness admitted that the story was not factually correct.
41. In re-examination, DW1 reiterated that she got the name **Elizabeth Kaloki Kombo** from the charge sheet though the name **Kombo** she got from the orderlies and her conclusion was "Musikari Kombo" since she only knew one *Mheshimiwa* called **Kombo**.

Plaintiff' Submissions

42. On behalf of the plaintiff, after setting out the law relating to the tort of defamation, the pleadings and the evidence the case of **Mikidadi vs. Khalfan & Another [2004] 2 KLR 496** was relied upon in contending that the defences by the Defendant could not hold since the Defendant did not check whether the publication was factual. It was further submitted that the publication contravened the *Code of Conduct for the Practice of Journalism*. It was submitted that it is no defence to libel to say that the libel was originated elsewhere and that the defendant merely repeated it and reliance was shown in *Gatley on Libel and Slander*. According to the plaintiff no step whatsoever was taken towards the verification of the story hence the Defendant was motivated by sensationalism.
43. On damages, it was submitted on the authority of **Oyaro vs. Alwaka T/A Weekly Citizen & 2 Others [2003] KLR 574** that an action for defamation is essentially an action to compensate for harm done to his reputation and the Court will therefore take into account the Plaintiff's profile vis-à-vis what is published against him. It was submitted that Courts have been known to award exemplary damages where it is established that the Defendant's motive was purely financial and that the financial prospects of broadcasting a story which it knows to be false exceed the potential financial costs in the event that they are found liable. Further the Court has discretion to award general and aggravated damages when circumstances permit and the plaintiff relied on **Machira vs. Mwangi & Another [2001] 1 KLR 532**, **Ochieng & 8 Others vs. Standard Limited [2004] 1 KLR 225**, **Kalya & Another vs. Standard Limited [2002] 2 KLR 665** and **Mikidadi vs. Khalfan** (supra).
44. It was submitted that in libel damages are at large and the discretion as to what to award is left to the Court. However in conserving the amount to award the Court takes into account the reputation of the plaintiff, the severity of the defamatory imputation, the extent of the publication and any aggravating/mitigating factors. Relying on **Daniel Musinga vs. Nation Media Group Civil Appeal No. 120 of 2008**, **Machira vs. Mwangi & Another (supra)**, **Lucy Njiru vs. Nation Media Group HCCC No. 835 of 2007**, **Hon. Christopher M. Obure vs. Tom Oscar Alwaka & 3 Others HCCC No. 956 of 2003**, the plaintiff submitted that he ought to be awarded Kshs 20,000,000 under the head of general and exemplary damages. Based on **Ochieng & 8 Others vs. Standard Limited** (supra) it was submitted that in lieu of apology the Court may award damages and an award of Kshs 2,000,000.00 was suggested under this head.

Defendant's submissions

45. On behalf of the Defendant it was submitted that though **Peter Opondo** did not testify since his statement is on record the same cannot be ignored by the Court. It was submitted that though the story was published as alleged, the journalist who covered the story was misled by court orderly that the accused was the plaintiff's wife. It was contended that by the time the plaintiff's concern reached **Mr Opondo** the news editor the story had already been run. Although the plaintiff's advocates wrote a demand letter seeking an apology, it was submitted that no time frame was given within which the apology was to be done before recourse would be had to the court and on 17th March 2013 the defendant clarified that an apology had been made but no format of the apology was furnished by the plaintiff.
46. It was submitted that the story did not refer to the plaintiff but to the wife and therefore there was no defamation of the plaintiff as defamation is personal. It was therefore submitted that the

plaintiff cannot sustain a cause of action for defamation involving his wife and the defendant is not liable. In support of this submission reliance was placed on ***Gatley on Libel and Slander, 10th Ed*** hence even where a person suffers damage from defamation of another person related to him he cannot sue for defamation.

47. It was further submitted that the story was published without malice since the defendant's journalist was misled by the court orderly as the name **Kombo** was mentioned by mistake. It was further submitted that being a politician the plaintiff's character, conduct and activities are under scrutiny and discussion and reliance was placed on **New York Times vs. Sullivan**.
48. While distinguishing the decision relied upon by the plaintiff the defendant relied on **Hon. Amb. Chirau Ali Makwere vs. RM's Court of Appeal Civil Appeal No. 283 of 2005** where the Court awarded Kshs 3,000,000.00 and that as it was not the plaintiff who was dismissed the plaintiff is entitled to lesser amount than the wife and that an award of Kshs 350,000.00 would have been reasonable.

Determinations

49. I have considered the pleadings, the evidence and the submissions on record and in my view the following are the issues which fall for determination;

1. **Whether the plaint is fatally defective.**
2. **What is the legal status of witness statements in civil proceedings?**
3. **Whether the Defendant published the words complained of.**
4. **Whether the words published referred to the plaintiff and whether a cause of action exists and whether the plaintiff's credibility and reputation has been injured.**
5. **Whether the publication bore the meaning attributed to them in the plaint.**
6. **Whether the words were published in good faith, in public interest without malice and whether the defence of qualified privilege applies.**
7. **Whether there was a notice of intention to sue or demand for an apology.**
8. **Whether the plaintiff is entitled to damages.**
9. **Who should bear the costs of the suit?**

50. Before dealing with the aforesaid issues, it is important to emphasise that, the law of defamation is underpinned in our Constitution. Under Article 32(1) of the Constitution every person has the right to freedom of conscience, religion, thought, belief and opinion. This Article makes it clear that the freedom to express one's opinion is a fundamental freedom enshrined in the Constitution. Article 33(1)(a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has a constitutional underpinning.

51. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him/her in the estimation of the right thinking members of society generally and in particular to cause him/her to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him/her any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a person and not his/her own opinion of himself/herself. An action for defamation is essentially an action to compensate a person for the harm done to his/her reputation. Since defamation is not about publication of falsehoods against a person, it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him/her in the estimation of right thinking members of society generally hence an injurious falsehood may not necessarily be

- an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See **J P Machira vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**
52. There are two kinds of defamation; slander and libel. Libel consists of a defamatory statement or representation in permanent form. As opposed to slander, libel is punishable *per se* without proof of damage and the actual sum to be awarded is "at large" and although a person's reputation has no actual cash value, the Court is free to form its own estimate of the harm taking into account all the circumstances.
53. The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. However, in libel the words cannot be protected as mere abuse since it is presumed that the defendant had time for reflection before he wrote them. Secondly, the words must refer to the plaintiff. Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. 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 but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement, was false or did not care whether it be true or false will be evidence of malice. See **Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mwangi** (supra).
54. The law of course recognises certain defences that may be invoked by a person sued with the tort of defamation I shall only deal with the ones relevant to the present case. The law recognizes that there may be occasions on which freedom of communication without fear of an action for defamation is more important than the protection of a person's reputation and such occasions are said to be "privileged" and the privilege may be either absolute or qualified. Absolute privilege covers cases in which complete freedom of communication is regarded as of such paramount importance that actions for defamation cannot be entertained at all: a person defamed on an occasion of absolute privilege has no legal redress, however outrageous the untrue statement which has been made about him and however malicious the motive of the maker of it. Qualified privilege, though it also protects the maker of an untrue defamatory statement, does so only if the maker of the statement acted honestly and without malice. If the plaintiff can prove "express malice" the privilege is displaced and he may recover damages, but it is for him to prove malice, once the privilege has been made out, not for the defendant to disprove it.
55. For the purposes of this judgement it includes -Statements made by A to B about C which A is under a legal, moral or social duty to communicate to B and which B has a corresponding interest in receiving. The protection of such statements is justified for the common convenience and welfare of society. With respect to newspaper reports, the matter which is reported may be of very wide public interest, but the protection of privilege is not thrown about it unless its publication is in the public interest and the newspaper can be said to be fulfilling a duty in revealing it. There is no defence of "fair information on a matter of public interest. The defence of fair comment is available if facts are true and the matter is of public interest and the opinion is honestly held.
56. 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 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 must 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 the 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 wider than is 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.

57. We now come back to the issues in this case. The first issue is whether the plaint is fatally defective. Although this issue was raised in the defence, it seems that the same was abandoned since in the course of the trial and even in the submissions it was never pursued. On my part I have no reason to find that the plaint is defective. According the answer to this issue is in the negative.
58. The next issue is the legal status of witness statements in civil proceedings. On this issue the Court was urged not to ignore the witness statement of **Peter Opondo** though he was not called to testify in this case. **Makhandia, J** (as he then was) in **Consolata Hospital Mathari vs. Dr. Bianka Matens Nyeri HCCA No. 17 of 2004** expressed himself as follows:

“From the record there is no indication that witnesses testified on oath. It is possible they may have testified on oath but the learned magistrate inadvertently failed to record. However, this is a court of record and there is no room for speculation and or conjecture. Going by the record it can be held that perhaps the witnesses testified without being sworn. The effect of the evidence not given on oath is that it amounts to no more than a mere statement of no probative value to the case...The fact that this was not an issue canvassed before the court did not occasion any injustice and prejudice to any of the parties since the law is settled that evidence must be taken on oath unless for children of tender years as well as those who choose to be affirmed. Submissions on this issue by counsel would not have made any difference. In any event the issue in focus goes to the jurisdiction and the court has jurisdiction to address the same *suo moto*. On this issue alone the appeal ought to succeed.”

59. The statements filed by parties together with their pleadings are not required to be on oath. Consequently they are not evidence in the case and can only acquire the status of evidence when adopted by the witness after being sworn. Otherwise they remain mere statements without any probative value. It follows that the statement made by **Peter Opondo** in this suit not having been made on oath and the author of the said statement having not been called to testify on the reasons that he had left the Defendant's employment which reason in my view does not justify the failure to call him cannot be considered in this case as part of the evidence on record.
60. The next issue for determination is whether the Defendant published the words complained of. From the evidence on record and the submissions of the partes it is clear beyond peradventure that the words complained of were published by the Defendant.
61. The next issue is whether the words published referred to the plaintiff and whether a cause of action exists and whether the plaintiff's credibility and reputation has been injured. That the words published directly referred to the plaintiff's wife as the person who was allegedly charged is not in dispute. The publication did not allege that it was the plaintiff who was charged. The question that arises is whether a person related to the person against whom defamatory words have been published can maintain a cause of action for defamation even if in the publication it is indicated that the person referred to in the publication is related to the plaintiff. According to ***Gatley on Libel and Slander*** 11th Edition at page 211 para 7.1:

“To succeed in an action of defamation the claimant must not only prove that the defendant published the words and that they are defamatory: he must also identify himself as the person defamed. No writing whatsoever is to be esteemed a libel unless it reflects upon some particular person. It is an essential element of the cause of action for defamation that the words complained of should be published of the plaintiff. There is no cause of action, for instance, if words are defamatory of the claimant's relatives, unless they reflect on the claimant.”

62. With respect to the last part of the aforesaid sentence, that is reflection on the claimant, the learned authors at page 225 para 713 states:

“There are cases in which a statement which is directly defamatory of A may be regarded as also carrying a defamatory reference to B because of B’s connection with A. So to say that A is a brothel keeper is also defamatory of A’s spouse, who lives in the same premises.”

63. At page 227 of the said work, it is stated:

“An action for defamation is a purely personal action. The proper person to sue as claimant is the person defamed, and the proper person to be sued as defendant is the person who published the defamatory words or caused them to be published (though this may include a person vicariously liable for another). A cannot bring an action of libel or slander against B for words defamatory of C, even though C has purported to assign to him his right of action; a right for damages for libel or slander cannot be assigned. If A suffers damages as a result of a defamatory statement maliciously made about C, who is associated with A’s business, A may have an action for malicious falsehood, but that is not the same thing as an action for defamation.”

64. My understanding of the foregoing is that a relative of a person cannot, as a general rule, successfully sustain a claim in defamation unless the publication of the defamatory material also necessarily imputes that the claimant is in some way connected to the defamatory matter. Therefore *Gatley on Libel and Slander* is clear that even where the person defamed is said to keep a brothel, it is only the spouse who lives or resides with him who can sustain an action in defamation. Whereas, it is true that people who are related to a defamed person may have their reputation affected by that fact, it would in my view amount to overstretching the tort of defamation to permit all the people related to the defamed person to successfully maintain an action for defamation. They can only do so where the publication is meant to impute that the claimant is in some way connected to the defamatory matter in question such as by contributing to it and not by the mere fact that he/she is related to the person defamed. Where for example it is published that a person is a brothel keeper, the imputation would be that the spouse living with him is a prostitute and that would reflect directly on the reputation of the claimant/spouse.

65. In this case what was published according to the plaintiff was that ***the wife of a former Minister, Musikari Kombo was charged with fraudulently acquiring more than nine Million shillings; that the wife of FORD Kenya Chairman and Nominated Member of Parliament Musikari Kombo, Elizabeth Kaloki, was charged with misappropriating over 9 Million Shillings in the course of her duty as an Assistant Director of Education; and that Nominated MP Musikari Kombo’s wife Elizabeth Kaloki has been charged with fraudulently acquiring about 9 Million Shillings.*** Clearly this was not a case where there was any imputation on the reputation of the plaintiff. Whereas certain people may have arrived at the conclusion that the plaintiff, a crusader against corruption was not after all without blemish based on the alleged conduct of his wife, that alone in my view would not meet the threshold of the defamation in order to attach liability on the Defendant for injury caused to the plaintiff. As stated hereinabove, defamation is not about publication of falsehoods against a person hence it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower the person in the estimation of right thinking members of society generally. Therefore an injurious falsehood, though actionable may not necessarily be an attack on the plaintiff’s reputation so as to elevate it to the tort of defamation. To do so would in my view open floodgates for other members of the family and relatives of the defamed person to similarly lodge claims for damages in respect of the same defamation.

66. It was pleaded that the publication portrayed the impression that the plaintiff had another wife apart from his wife. However, that impression would have only been peculiarly known to the people who knew the plaintiff’s wife. Unfortunately only the plaintiff’s members of the family gave evidence and none of them testified that they formed such impression. As is stated in *Gatley on Libel and Slander* (supra) at page 177, “the court should reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation and that it

is not enough to say by some person or another the words might be understood in a defamatory sense. Mere conjectures which some person might possibly though unreasonably, form are not enough.” In my view to allege that a person’s wife was charged in Court with a criminal offence when it was in fact another totally different person does not necessarily lead to the imputation that the claimant was married to the person charged unless there is evidence of special knowledge of who the actual spouse is and in the circumstances of this case I am not prepared to make such conclusion especially in light of lack of evidence to support that line of argument.

67. Therefore whereas I am satisfied that the **Musikari Kombo** that was mentioned in the subject news bulleting was the Plaintiff herein, it is my view that the Plaintiff had no cause of action.

68. Having so found it is my view that it would be unnecessary to make findings on the other issues save for damages which the plaintiff would have been entitled to had he succeeded. It is true that politicians are public figures and are as such open to scrutiny about their conduct. As was held in **John Kiarie Waweru vs. Beth Wambui Mugo & 2 Others Nairobi HCEP No. 13 of 2008:**

“In the muck and ruck that is politics, it is expected that politicians would have thick skins to withstand adverse comments made on their characters and personal traits. Some of the comments made may be unfair but competitive politics being what it is, such comments are part and parcel of the political terrain. When one aspires to a public leadership position, especially in competitive politics, such a person should be prepared to have statements which may not be necessarily flattering be made about them.”

69. It is however my view that the said scrutiny must be viewed in relation to their status as politicians and that the mere fact that they are politicians does not give people a blanket cheque to publish material which has nothing to do with their calling as politicians.

70. The Court of Appeal in **Johnson Evan Gicheru –vs- Andrew Morton and Michael O’mara Books Ltd [2005] 2 KLR 332,** held:

“In actions of defamation and in any other actions where damages for loss of reputation are involved the principle of restitution in integrum has necessarily in even marvel highly subjective element, such actions involve a money award which may put the plaintiff in a purely financial sense in a much strange 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 looking 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 best sellers loss of the charges”.

71. It must however be remembered that in cases of defamation, award of damages measure something so intrinsic to human dignity as a person’s reputation and honour as these are not marketplace commodities. Unlike businesses, honour is not quoted on Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur. There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of as reputation, on the one hand, and determining as sum of money as compensation, on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award, and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank. This is not to underrate the part monetary awards play in our society. The threat of damages will continue to be needed as a deterrent as long as the world we live in remains as money oriented as it is. Moreover, it is well established that damage to one’s reputation may not fully be cured by counter-publication or apology; the harmful statement often lingers on in people’s minds. So even if damages do not cure the defamation, they may deter promiscuous slander, and constitutes a real solace for irreparable harm done to one’s reputation. See **Albie Sachs, J in Dikoko vs. Mokhatla 2006 (6) SA 235 (CC); 2007 (I) BCLR I (CC).**

72. Similar sentiments were expressed by the Court of Appeal in **Nation Media Group Ltd & 2 Others vs. John Joseph Kamotho & 3 Others Civil Appeal No. 284 of 2005** where it was held:

“In actions for defamation and in any other action where damages for loss of reputation are involved, the principle of *restitution in integrum* has necessarily an even more highly subjective element. Such actions involve 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 of 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 by-stander of the baselessness of the charges. Properly speaking, a man defamed does not get compensated for his damaged 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 *solatium* rather than a monetary recompense for harm measurable in money.”

73. The plaintiff in this case has sought an award of Kshs 20,000,000.00 in general damages for defamation. In assessing damages in an action for libel one has to consider the particular circumstances of each case, the plaintiff’s position and standing in society, the mode and extent of publication, the apology, if offered and at what time of the proceedings, the conduct of the defendants from the time when libel was published up to the time of judgement. Whereas the freedom of expression enjoyed by the press is recognised, that freedom must be exercised with maturity and it should not be used as a weapon to destroy the names of those they hate; the freedom should not be used to injure the reputation of others unless the one exercising such action is ready to substantiate the injurious allegations.
74. In this case the publication was in an electronic media which obviously had wide coverage.
75. In **Patrick Nyoike vs. People Limited [2013] eKLR**, the plaintiff was on 19th April, 2013 awarded Kshs 4,000,000.00 general damages and Kshs 100,000.00 aggravated damages. In **Ken Odondi & 2 Others vs. James Okoth Omburah T/A Okoth Omburah & Company Advocates [2013] EKLR**, an award of Kshs. 7,500,000.00 in general damages was reduced by the Court of Appeal to Kshs 4,000,000.00 on 19th July 2013 while an award of Kshs 500,000.00 aggravated damages was upheld.
76. I have considered the quantum of damages awarded by the Courts and apart from the ones cited hereinabove the following cases come to mind.
1. **Abraham Kiptanui Vs Francis Mwaniki & 4 others HCC No 42 of 1997 Juma J in March 1998 awarded a former state house comptroller the sum of Kshs 3.5 million as general damages and Kshs 1.5 million in aggravated damages for publications/injurious statements published by ‘Target’.**
 2. **Honourable Christopher M. Obure vs Tom Alakwa & Others HCCC No. 956 of 2003, I Lenaola Ag. J as he then was in January 2004 awarded the honourable Obure a former minister the sum of Kshs 15 million as general damages and Kshs 2 million as exemplary damages for statements published in ‘the weekly citizen.’**
 3. **Nation Media Group Ltd & 2 Others vs. John Joseph Kamotho & 3 Others Civil Appeal No. 284 of 2005 where the Court of Appeal upheld the award to the 1st respondent, a prominent politician with a substantial reputation, of Kshs 6,000,000.00 general damages and Kshs 1,000,000.00 aggravated damages.**
 4. **Honourable Martha Karua Vs the Standard Group Limited HCC No. 295 of 2004 wherein Justice Kihara Kariuki awarded (in May 2006) the plaintiffs a learned advocate and member of parliament the sum of Kshs 4 million as general damages and the sum of Kshs 500,000 as aggravated damages this arising out of the defendants publication of defamatory articles in their paper under the banner ‘politicians just want a license to behave.’**
77. **Martha Karua** was also an MP and a former Minister apart from being a senior member of the Bar.
78. Exemplary damages are awarded where compensatory damages are not sufficient and when the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless whether his action was tortious or not and decided to publish it because the prospects of material advantages outweighed the prospects of material loss; i.e. the tortious act

must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty. I am not satisfied that the publication of the article complained of was done with such a motive though obviously the inclusion of his name would definitely have attracted viewers' interest. Aggravated damages, on the other hand, are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances and will be ordered against a defendant who acts out of improper motive e.g. where is actuated by malice; insistence on a flimsy defence of justification or failure to apologise. In this case there is evidence which was not controverted that despite the Defendant having been notified of the fact that the story was untrue did nothing about it, at least not immediately. In an action for 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 is given. It may consider what his conduct has been before action, and in court during the trial. See **Gicheru vs. Morton & Another [2005] 2 KLR 332.**

79. As was held in **Nation Media Group Ltd & 2 Others vs. John Joseph Kamotho & 3 Others** (supra) where it was held:

“The successful plaintiff in a defamation action is entitled to recover as damages compensatory damages, such sum as will compensate him for the damage to his reputation; vindicate his good name; take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the Plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful litigant may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the Defendant assert the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place.”

80. Whereas the plaintiff herein is a senior politician with no mean reputation not only in this country but worldwide, this Court must take into account the fact that the defamatory material was not directly referable to the plaintiff but that the plaintiff was only brought into the publication by the virtue of his relation to the subject of the defamation. I am therefore of the view that the plaintiff in this case would have been entitled to an award of Kshs 5,000,000.00 in general damages with Kshs 1,000,000.00 aggravated damages which I would have awarded him had I found in his favour.

81. However, in light of my finding on the non-existence of a cause of action, the plaintiff’s suit is dismissed with costs to the Defendant.

Judgement read, signed and delivered in Court this 7th day of November 2014.

G V ODUNGA

JUDGE

In the presence of:

Mr Luseno for the plaintiff

Mr Ndungu for the Defendant

Cc Patricia