



REPUBLIC OF KENYA



Monga v HB (Civil Appeal E877 of 2024)
[2025] KEHC 13592 (KLR) (Civ) (29 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13592 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E877 OF 2024

DKN MAGARE, J

SEPTEMBER 29, 2025

BETWEEN

YASH PAL MONGA APPELLANT

AND

HB RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the lower court dated and delivered on 5.7.2024 by Rawlings Liluma, SRM in Nairobi CMCC No. 29 of 2023. The Appellant was the plaintiff in the lower court.
2. The Memorandum of Appeal dated 1.8.2024 raised the following grounds of appeal:
 - a. The learned magistrate erred in law and in fact by dismissing the Appellant’s suit against the Respondent with costs and arriving at a decision that was wholly against the weight of evidence adduced by the Appellant.
 - b. The learned magistrate erred in law and in fact by applying the wrong principles of law and holding that the defense of Justification was available to the Respondent.
 - c. The learned magistrate erred in law and in fact by holding that the Employment Court in ELRC Petition No. E057 Of 2021 HB –vs- Arya Samaj Nairobi, Arya Prantinidhi Sabha Eastern Africa, Dr.yash Pal Bansal & Yash Pal Monga held that the Respondent was sexually harassed at workplace by the Appellant and she was awarded general damages thereto when in fact the Appellant was exonerated from any wrong doing by the said Court.
 - d. The learned magistrate erred in law and in fact by not being able to appreciate the holding in ELRC PEtition No. E057 Of 2021 HB –vs- Arya Samaj Nairobi, Arya Prantinidhi Sabha



Eastern Africa, Dr.yash Pal Bansal & Yash Pal Monga and further not being able to draw a distinction between the Appellant Yash Pal Monga and Dr. Yash Pal Bansal who were both Respondents in the Petition before Employment Court.

- e. The learned magistrate erred in law and in fact by misdirecting himself on the evidence placed before him by the Appellant and holding that Appellant had not proved that the allegations made against him in the impugned letter by the Respondent were false and malicious.
 - f. The learned magistrate erred in law and in fact in failing to be guided by law and procedure in determining the matter and therefore arriving at a wrong conclusion.
3. In short, the Appellant argued that the learned magistrate erred both in law and fact by dismissing the suit despite the weight of evidence that had been presented. It was contended that the magistrate wrongly relied on a finding of the Employment and Labour Court that the Respondent had been sexually harassed by the Appellant, even though the Appellant had already been cleared of any wrongdoing. The magistrate was said to have further erred in holding that the defence of justification was available, and in concluding that the Appellant had not proved the allegations of defamation to be false and malicious. Lastly, the magistrate failed to give due consideration to the Appellant's submissions.

Pleadings

4. The lower court suit arose from an alleged defamatory publication caused by the Respondent at the work place contained in the letter dated 9.8.2020 in the following words:

After Dr. Bansal travelled, he came to my office on 13th February 2020 at around 11.30 am and immediately started discussing me being a problem in the office as he sipped his tea and ate biscuits. He said that the board of management and the members of Arya Samaj despise me for reasons that I do not know but he stated that I am an unfriendly person that lacks courtesy and that his case I should rush to the door when he arrives and should welcome him with tea and biscuits which I felt wrong in my case as it would portray me as a brothel like lady.

I am not able to send out any emails from the office without seeking his permission. The staff is my witness that I have been belittled, degraded, demeaned, ridiculed, patronized and have been subject to disparaging remarks and being a victim of unwanted sexual attention.

Unwanted Sexual Attention

Whenever he would come to the office, he would sit opposite me in the office for more than one hour. He would normally come at lunch time and hence for this reason, I would stay in at lunch time and rather than appreciating this, he went on to tell Dr. Bansal that I never attend to him at lunch time and never pay attention to him. I wonder what kind of attention he was seeking from me. In all instances, he would pull up his pants in front of me in the office giving a gesture of sexual invitation. Personally, this made me very uncomfortable working in his presence and I totally disregarded his gestures. He at one point told me to sit next to him in the board meeting which I felt uncomfortable doing so.

This resulted in constantly enhanced demeaning interactions in front of the staff by saying remarks such as I am incompetent in my work and that I should resign or he would sack me and he would say this often which made me to believe that he was seeking sexual favour.

It was also noted by other staff and I that he would gaze at me with ill intent. I also worked seven days a week and when I asked for an afternoon off via email, nor did Dr. Bansal or



Monga respond. I have not done anything wrong in the office to be treated in such a manner as an administrator/CEO.

5. The Respondent was said to have disseminated a letter by way of email to numerous persons who were members of Arya Samaj Nairobi knowing the contents of the letter to be defamatory. It was also stated that the publication was meant to and indeed defamed the Appellant as it imputed to the right-thinking members of the society that the Appellant was:
 - a. Immoral man preying on women at the work place
 - b. Unfaithful to his lawful wedded wife of 44 years.
 - c. Perpetrator of work place abuse
 - d. Not diligent in his roles as vice chairperson
6. The Respondent entered appearance and filed Defence dated 26.7.2021 and amended on 26.10.2023 denying the particulars of defamation as pleaded in the plaint. She defended herself that a judgment of the employment and labour relations court found all Respondents in the Petition to have committed acts of sexual harassment against the Appellant.

Evidence

7. PW1, the Appellant, relied on his witness statement dated 22.08.2017 and a supplementary witness statement dated 10.06.2021. He produced a list of documents in support of his case. He testified that he was 71 years old and had been accused of acts he did not commit. He explained that the accusations seriously injured his character and caused him great embarrassment.
8. In cross examination, he stated that the Respondent was working with Dr. Bansal and himself. He stated that he started working with the Respondent when Dr. Bansal traveled out of the county. He adjusted his trouser while in the Respondent's office and told her he was losing weight. The court in the ELRAC Petition found that the Respondent had committed acts of sexual harassment against the Petitioner.
9. PW2 was Paramjeet Kwatra who adopted her witness statement dated 9.6.2021. It was her case on cross examination that she was the Principal of Arya Girls since 2004. She did not believe the allegation. There was no adverse finding by the committee or court against the Appellant.
10. The Respondent testified as DW1. She stated that she was sexually harassed by the Appellant as pleaded in the defence. On cross examination it was her case that judgment in the ELRC was entered against Arya Samaj and Dr. Bansal. It was her further case that the committee found that there was no sexual harassment.

Submissions

11. The Appellant filed submissions dated 11.3.2025. It was submitted that the Appellant proved defamation to the required standard and the court erred in dismissing the claim. He relied on the case of Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] KEHC 5119 (KLR), to submit that the letter was published and lowered his estimation in the eyes of the right-thinking members. In that case, Mativo J Posited as forth:

Defamation was well described in a 1970 British Columbia Court of Appeal decision of Murphy v. LaMarsh where a Member of Parliament, Judy LaMarsh wrote about the plaintiff as follows:



"A brash young radio reporter, named Ed Murphy (heartily detested by most of the Press Gallery and the members), had somehow learned that Maurice Lamontagne (then 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 (appeal dismissed) wrote:-

"(Defamation is where) a shameful action is attributed to a man (he stole my 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 smallpox). 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 right-thinking members of society generally."

Another authority often cited as definitive on defamation is *Gatley on Libel and Slander* who wrote this, as was adopted in *Thomas v CBC* 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 have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory."

The common law protects every person from harm to their reputation by false and derogatory remarks about their person, known as defamation. It is a tricky and slippery field of law, based on statutes, English common law and many defences. No wonder it has been called a "peculiar tort" and, from *Broadway Approvals, Ltd. v. Odhams Press, Ltd.*

"The law of libel seems to have characteristics of such complication and subtlety that I wonder whether a jury on retiring can readily distinguish their heads from their heels."

In determining damages, I am alive to the principle that the sums should be fairly compensatory in the light of the nature of the injury to reputation and that a restrained hand in the award of damages is desirable since the court must maintain stable bearing. The award should also appear realistic in all the circumstances.

In the English Court of Appeal decision in the case of *John v MG Ltd* the Court held:-

"The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....

Exemplary damages on the other hand had gone beyond compensation and are meant to "punish" the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.



12. Further, the Appellant submitted that a reasonable man would have objectively found the letter defamatory. Reliance was based on *Miguna Miguna v Standard Group Limited, Standard Limited, James Smart, Cyrus Ombati & Kenya Television Network (KTN)* [2017] KECA 365 (KLR), where the court stated as follows:

This Court while dealing with an appeal in a defamation case held in *SMW v ZWM* [2015] eKLR:

"A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided". (emphasis added).

It has been held in various cases in Kenya and elsewhere that the test whether a statement is defamatory is an objective one and is not dependent on the intention of the publisher but is dependent on what a reasonable person reading the statement would perceive of it - See the English case of *Mortgage & Investment Society Limited v Odhams Press Limited* [1941] KB 440.

In the 4th Edition Vol. 28 of Halsbury's Laws of England, the following statement appears at page 23:

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

The "reasonable man" was explained in *Winfield & Jolowicz on Tort* 8th Edition at P. 255 as:

"The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard".

Tunoi, J.A., in *Johnson Evan Gicheru v Andrew Morton & Another* [2005] eKLR held that in an action.

13. The Appellant also submitted that the defence of justification was not available to the Respondent and the lower court wrongly interpreted the judgment of the ELRC which exonerated the Appellant from allegations of sexual harassment.
14. He submitted that the learned magistrate made three key errors. First, he cited the Employment Petition incorrectly; the correct citation is ELRC Petition No. E057 of 2021, *HB v Registrar of Societies & Others* (unreported). Second, he confused the Appellant, Yash Pal Monga (then Vice Chairperson and 4th Respondent), with Dr. Yash Pal Bansal (then Chairperson and 3rd Respondent), even referring to the Appellant as "Dr. Yash Pal Monga," though he holds no such title. Third, this confusion led to the mistaken finding that the Appellant was liable for sexual harassment, whereas the actual finding of liability in the Employment Petition was against Dr. Yash Pal Bansal. Had the Magistrate properly read the judgment as urged in submissions, these errors would not have occurred.



15. On the issue of damages, the Appellant submitted that an award of Ksh. 10,000,000/= in general damages and Ksh. 5,000,000/= in aggravated damages would constitute adequate compensation. In support of this, he relied on the case of Ernest Omondi Owino & another v Felix Olick & 2 others [2021] KEHC 4920 (KLR), where Kiarie Waweru Kiarie J awarded Ksh. 10 million in general damages to each plaintiff and Ksh. 1 million in exemplary damages to each plaintiff. In that case, defamatory allegations had been published in a newspaper of wide circulation, claiming that Obado and his associates had registered about 30 companies and used them to fraudulently acquire approximately Ksh. 2.5 billion in fictitious contracts, according to EACC investigators.
16. The Respondent filed submissions dated 28.3.2025. It was the submission of the Respondent that the tort of defamation was discussed in the case of Jacob Mwanto Wangora v Hezron Mwando Kirorio [2017] eKLR where Justice R Nyakundi presiding over an appeal filed in the High Court at Kajjado held that:
- “In Kenya our jurisprudence is underpinned in the common law tort of defamation where the Appellant must establish the following elements:
- (1) That the Respondent made a defamatory statement to a third person.
 - (2) That the statement was false.
 - (3) That the Respondent was legally at fault in making the statement; and
 - (4) That the Appellant suffered harm.
17. It was also submitted that the words were not defamatory, and were true. Reliance was placed on the case of Hayward v Thompson & Others [1981] 3 ALLER where Lord Denning stated thus:
- “One thing is of essence in law of libel. It is that the words should be defamatory and untrue and should be published if and concerning the Appellant.”
18. It was further submitted that the Respondent was not malicious and was justified in writing the letter of 9.8.2020 as she merely wanted to bring to the attention of the members of Arya Samaj Nairobi the various kinds of harassment she was facing in the office and seek their assistance.
19. That the Respondent was justified in writing the letter dated 9.8.2020 because when she first lodged a complaint with the Chairperson of Arya Samaj, Dr. Bansal, he failed and/or ignored to take any further action.
20. It was also submitted that the subject matter compelling the publication of the letter was also one to be described to fall within the realm of public interest.
21. The Respondent submitted further that in such defamation cases, the context and circumstances of the publication must be taken into account and that the Appellant cannot pick and choose parts of the publication which, standing alone would be defamatory. Reliance was placed on Jacob Mwanto Wangora V Hezron Mwando Kirorio [supra] where R Nyakundi J held as follows: -

I want to determine this appeal by relying on the passage from the book Gatley on libel and Slander, 9th Edition at paragraph 3.28 where the author stated as follows:

“It follows from the fact that the context and circumstances of the publication must be taken into account that the Appellant cannot pick and choose parts of the publication which, standing alone would be defamatory. This or that sentence may be considered defamatory



but there may be other passages that take away the sting. If in one part of the publication something disreputable to the Appellant is stated, but that is removed by the conclusion the bane and antidote must be taken together.

Analysis

22. The issue before me for determination is whether the impugned words contained in the letter dated 9.8.2020 by the Respondent, in the circumstances of this case, were defamatory and published as to entitle the Appellant to the reliefs.
23. The court understands the summary of the complaint to be that on 13.02.2020, the Appellant visited the office of the Respondent and immediately began criticizing her, claiming that the board and members of Arya Samaj held her in contempt for reasons unknown. He described her as unfriendly and discourteous and insisted that she should greet him with tea and biscuits upon his arrival, a demand the Respondent found inappropriate and demeaning. The Respondent has also been restricted from sending emails without the Appellant's permission, and the staff can attest that she has been belittled, ridiculed, and subjected to disparaging remarks and unwanted sexual attention.
24. The Appellant frequently lingered in the office for extended periods, often during lunch, and engaged in gestures of a sexual nature, including pulling up his pants in the Respondent's presence. He pressured her to sit next to him during board meetings and repeatedly made demeaning remarks in front of staff, questioning her competence and threatening her employment. He expressed dissatisfaction when she did not provide him personal attention, creating an environment that was both hostile and intimidating. Despite working seven days a week, the Respondent's requests for time off were ignored. She had committed no misconduct that could justify such treatment in her capacity as administrator and CEO.
25. My further understanding of the defence case was that the words were not defamatory. According to them the words were true in fact and justified. It was the Respondent's further case that the Appellant was cherry picking facts to justify defamation instead of looking at the global picture.
26. Findings of fact by courts of equal status are generally binding and must be accorded due respect, whereas conclusions of law are only persuasive. The parties' cases are further complicated by the existence of a decision of a court of equal status on the question of fact, as enunciated by Monicah Mnaru J in ELRC Petition No. E057 of 2021, *HB v Arya Samaj & Others* (unreported). In the circumstances, factual determinations made by a competent court must be considered in subsequent proceedings to ensure consistency and fairness in the administration of justice. Accordingly, while this Court retains the authority to independently assess legal principles, it is obliged to give due regard to the factual findings of the aforementioned petition in evaluating the present matter.
27. The findings of fact in that court are binding on this Court, as there is no evidence of the same having been overturned on appeal. There can be no difference even when there is a decision of the lower court, since facts judicially determined are binding until set aside by a higher court. In this instance, the decision was made by a court of the same status as this Court. This Court cannot interrogate those findings but must defer to them, pursuant to Articles 165(5) and 165(6) of *the Constitution*, which provide as follows:

The High Court shall not have jurisdiction in respect of matters—

- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- (b) falling within the jurisdiction of the courts contemplated in Article 162(2).



- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
28. The protection against defamation is grounded in constitutional and human rights imperatives. While the Appellant is entitled to safeguard his reputation, the Respondent's rights to freedom of expression, access to information, and privacy, and right to labour rights as guaranteed under Articles 33, 34, 35 and 41 of *the Constitution*, must also be respected. This Court must therefore balance these competing rights, ensuring that the Respondent's dignity is protected without unduly restricting the Appellant's constitutional freedoms, thereby achieving a fair and just resolution.
29. Consequently, under Article 33(2)&33(3) of *the Constitution*, every person has the right to freedom of expression which does not extend to, among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred that, constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4) and that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.
30. The freedom of expression is also enhanced by the right of access to information for without the arm of information one may not adequately express their gesture to protect their rights and freedoms. On the right to access information and the freedom of expression, Lord Denning MR stated in *Fraser v Evans & others* (1969) All ER 6:

“There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be whistled away.”

Lord Coleridge, CJ in *Bernard & another v Perriman* (1891-4) ALL E.R 965 had previously stated that:

“The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed.”

31. What then is defamation? As succinctly put by this Court in *S M W vs. Z W M* [2015] eKLR:-

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

32. The publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tend to make them shun or avoid that person is what is said to be defamation. Windeyer J. In *Uren John Fair Fax & Sons Pty Ltd* 117 CLC 115 at 115 stated:

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



33. The right-thinking members of the society constitute the test of what a defamatory statement means and the standard is that of a reasonable man. The Halsbury's Laws of England defines a defamatory statement as:

“A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.”

34. The court assessing defamatory statement will thus fundamentally assess the effect of the alleged statement on the Plaintiff, however with a rider that everyone has the dignity to protect. However, no one has a right to protect a rotten dignity. It was held in the case of John Patrick Machira Vs Wangethi Mwangi & Another Nairobi HCCC No. 1709 of 1996 that: -

A defamatory publication is the publication of a statement about a person that tends to lower his reputation in the opinion of right thinking members of the community or to make them shun or avoid him.

35. It follows that the common thread in the definition for a defamatory statement or utterance is one that if published tends to lower the estimation of the person it refers to in the opinion of the right-thinking members of the community and may cause them to shun the person away. Opinions of people who are overly sensitive or insensitive are not relied upon. It follows that where true information is given and false information is included, the court must have regard to the false information.

36. Nevertheless, the court has a simple but onerous task, forgive my tautology and the apparent oxymoronic expression. The court below had a task to establish whether the Respondent defamed the appellant. This is done by having regard to the ingredients of defamation. The duty to do this was on the Appellant under Section 107-109 of the *Evidence Act*, which provides as follows:

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

37. It must be noted that Order 2 Rule 7 (1) of the Civil Procedure Rules lays the ground rules as follows:

1. Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.
2. Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest,



or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

3. Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.
 4. N/a
38. In this case, the Respondent's defence was that the words consisted of statements of fact, they were true in substance and in fact. Therefore, the Respondent was thus under duty, by dint of Order 2 Rule 7(2) to give particulars and prove that the words complained of are statements of fact and that the words are true. If for any reason the particulars of fact as pleaded are not proved, in full or in part, the court is obligated to find for the appellant. It is therefore not enough to plead that the words complained of consist of statements of fact, they are true in substance and in fact, and then leave the Appellant to disprove them. This is based on the truism set out in section 112 of the Evidence Act as follows:
- In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
39. The combined effect of the foregoing sections was addressed in the cases of Anne Wambui Ndiritu – vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the Court of Appeal held that:
- As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
40. The legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. This is in line with the principle of common law, set out in the maxim, *semper necessitas probandi incumbit ei qui agi*, that is, the necessity of proof always lies with the person who lays charges. In the case of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] KEHC 8440 (KLR), DAS Majanja, posited that:
- As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), which provides:
- 107.
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
17. The Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013]eKLR* considered the applicability of these provisions as follows;

We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.

41. In effect, if one says an issue is true and another that it is false, it shall remain false until the party with a duty to prove that it is true discharges that burden. There can be no burden to prove a negative. This is encapsulated in the common maxim of *ei qui affirmat non ei qui negat incumbit probatio*, that is, the necessity of proof lies with the person who affirms, not the person who denies. The duty on the appellant was to prove that the words referred to him, were defamatory and were published by the Respondent. It was the duty of the Respondent to prove that the words were true.
42. Consequently, the words leading to the controversy in this case were stated as to be contained in the Respondent’s email dated 9.8.2020. The first part of the complaining paragraph was found by a court of competent jurisdiction to be proper. The words do not appear to impute improper motive on the part of the appellant. The words, were addressed to the Respondent’s feelings. Therefore the truth of those words, is irrelevant in a defamation case. The ELRC court held as follows, in regard to those words in respect of the appellant who was the 4th Respondent:

The 4th Respondent [Yash Pal Monga] was a supervisor to the petitioner [HB] by all standards. The petitioner was bound to take directions and instructions from the supervisor even where the 3rd Respondent as chairman was away. The vice-chairperson took charge. What would appear most probable is that upon employment, the petitioner enjoyed a wide latitude with the 3rd Respondent and she progressed through to be the CEO without any due process. Upon the departure of the 3rd Respondent to the United Kingdom, the 4th Respondent took over and he noted obvious skills gaps and instead of administratively dealing with what the 3rd Respondent had created for the petitioner, he commenced aggressive efforts towards her. The matters of sexual harassment addressed above did not only have a bearing on the petitioner but has had ripple effects with the other employees. Lack of a regulatory framework or policy is a gap that the Respondents should address as otherwise, the entire society of the 1st Respondent shall remain exposed. It is apparent that the other employees at the shop floor observed these events having been in the employment of the 1st Respondent longer than the petitioner. She was however their supervisor. She was also supervised by the 4th Respondent and she did not take his style of leadership well. These are internal matters the 1st Respondent ought and should address. With the Page 29



of 33 petitioner's case, other employee's consciousness is awakened. From the records, the letters and warnings issued by the 4th Respondent to the petitioner, these are management events not outside normal and work-related matters. The petitioner cannot take a stand that her supervisor cannot correct her work since the 3rd Respondent allowed her to be. Proper management is as done by the 4th Respondent in streamlining the workplace for productivity. The issue of the petitioner's absence from work addressed above, such only stands to demonstrate that she frustrated her own employment. The 4th Respondent cannot be held liable. The leadership style can only be addressed by the 1st Respondent.

43. On the other hand, there were words starting from:

The staff is my witness that I have been belittled, degraded, demeaned, ridiculed, patronized and have been subject to disparaging remarks and being a victim of unwanted sexual attention....

Unwanted Sexual Attention

Whenever he would come to the office, he would sit opposite me in the office for more than one hour. ...This resulted in constantly enhanced demeaning interactions in front of the staff by saying remarks such as I am incompetent in my work and that I should resign or he would sack me and he would say this often which made me to believe that he was seeking sexual favour.

... I have not done anything wrong in the office to be treated in such a manner as an administrator/CEO.

44. It is not lost that the words, "Unwanted Sexual Attention" are in bold letters, showing emphasis and attention. However, the evidence before the court showed no sexual violence or harassment. The court below mixed the actions of the Appellant with Yash Pal Bansal who made sexual advances to the Respondent.

45. The Employment and Labour Relations Court found that the actions in question were carried out by Dr. Yash Pal Bansal. The conduct complained of before the Court, as it relates to the Appellant, involved a pattern of behaviour that included belittling, demeaning, ridiculing the Respondent and creating a hostile work environment. They did not include the conduct of subjecting her to unwanted sexual attention. The court did not find any evidence of the foregoing. All parties were in agreement that sexual advances were not part of what the Appellant did. In other words, the words set out relating to sexual advances were false.

46. A higher court, the Employment and Labour Relations Court had already exonerated the appellant while the lower court, in spite of a decision of a higher court on the same fact, dismissed the suit. The net effect is that the lower court misdirected itself by finding that the words complained of were true and justified.

47. The court finds that the words complained of in the second lead of the letter show that Appellant's conduct exhibits both moral and professional deficiencies of a serious nature. He is depicted as being engaged in immoral behavior by preying on female employees within the workplace, thereby creating an environment of harassment and intimidation. He is shown to be unfaithful to his lawful wedded wife of forty-four years, reflecting a pattern of personal misconduct.

48. Further the appellant is shown on a professional front to be scoundrel that has perpetrated abuse in the workplace, undermining the dignity and well-being of staff. Moreover, he demonstrated a lack of diligence and competence in performing his duties as Vice Chairperson, failing to discharge his



responsibilities with the attention and care required by his office. These words show that the appellant by his deeds and conduct has taken a course of conduct that is incompatible with the standards expected of a person in his position.

49. Unfortunately for the Respondent, these words are false. The words were sent to many other recipients who have no interest in the case. It is true that the Respondent had a legitimate cause against the chairman. However, she mixed them in a way that aggravated the situation. The appellant had endured and continues to endure ridicule from the members of society. He may have had a very peculiar management style but was not a sex pest.
50. In this case, the said defamatory content is said to have been published by sending the letter by email to the members of the Respondent's employer, Arya Samaj. In the case of *John Ward v Standard Limited* [2006] eKLR the court stated as follows:

“A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -

The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false.”

51. Subsequently, the Court of Appeal in *Nation Media Group & Another vs. Hon. Chirau Mwakwere – Civil Appeal No. 224 of 2010* stated that a Claimant in a defamation suit ought to principally establish in no particular order:
- i. The existence of a Defamatory Statement;
 - ii. The Defendant has published or caused the publication of the defamatory statement;
 - iii. The Publication refers to the Claimant.

52. In the *Halsbury's Laws of England* 4th Edition Vol. 28 at page 23 the authors opined as follows:

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

53. Was there malice on the part of the Respondent? The Respondent had maintained the stance in the letter even in spite of a superior court making contrary findings. There was no adjustment on the stance taken. This stance continues up to the appellate level. The Respondent was under duty to continuously verify the words and make amends as soon as they learnt that the words were false or not justified. In *Hon. Uhuru Muigai Kenyatta V Baraza Limited* [2011] KEHC 1885 (KLR), KH Rawal, posited as follows:

While taking defence of justification of qualified privilege in the Defamation Case, the Defendant was required by law to establish the true facts and the Plaintiff has no burden to prove the defence raised by the Defendant. However, it was contended that the defence of qualified justification, in any event, does not avail to the Defendant because it refused to



accede to the request from the Plaintiff to publish a correction, specifically in the face of the fact that the Defendant's crew were present during the visit of the mortuary, and that both the statement of the visit and the Speaker were recorded on camera.

See 7 (2) of the *Defamation Act* was relied upon which stipulates:-

“In an action for libel in respect of the publication of any such report of matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the Defendant has been requested by the Plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.”

Moreover, Sec. 35 (11) of the Media Act stipulates:-

“The media shall, in a free and independent manner and style inform the public on issues of public interest and importance in a fair, accurate and unbiased manner whilst distinctly isolating opinion from fact and avoiding offensive coverage of nudity, violence and ethnic biases....

Once not verified, the justification or qualified privilege does not enure the Defendant and in any event, the onus that the same is true, rests on the Defendant to make it a fair publication. The production of ICC Ruling does not help the Defendant as has been observed hereinbefore, so far as the publication in question is concerned. The Plaintiff on the other hand has proved, under required standard of proof, that the publication is false and defamatory.

In the case of Machira t/a Machira & Co. Advocates –vs- East African Standard (2001) KLR 638, it observed at page 644:

“...A Defendant is permitted to plead justification only where it is clear that the allegations he made and are complained of are true in fact or substantially so. He cannot be allowed to set out a version ----- For him to rely on justification, he must accept the Plaintiff's version of the statement or a statement which is in sum identical with the Plaintiff's version.”

54. A defence of justification is a defence of a fair and true comment. The email said to be defamatory was published to several people in Arya Samaj. The email concerned sexual harassment. The management of Arya Samaj Nairobi investigated the allegation by the Respondent and exonerated the Appellant from sexual misconduct allegations against the Respondent for lack of merit.
55. The Employment and Labour Relations Court came to the same conclusion as regards the Appellant. The court below seems to confuse the Appellant and Dr. Bansal. The true position is that the facts upon which the complaint was based, on the aspect of sexual harassment were false. In the case of Mong'are t/a Gekong'a & Momanyi Advocates v Standard Ltd [2002] KECA 20 (KLR) KLR the Court of Appeal [Kwach, Omolo & Bosire, JJ.A] stated,

The Respondent could not plead justification as a defence. The basic facts were false and one cannot justify what is false. Even if we were to accept Mr. Majanja's contention that the issue was one of public interest in the sense that the public is entitled to know how advocates deal with their clients, yet it is trite law that comment can only be fair if the basic facts upon which the comment is premised are correct. A comment which is based on lies or falsehood cannot be designated as fair.

Having considered the facts and the law, Rimita, J. concluded that:



“From the foregoing it can be rightly said that the words complained of are defamatory on the face of it”.

Having so held the only way the Respondent could escape the consequences of that finding was to establish any of the defences known to the law, like justification, or fair comment on a matter of public interest, and such like defences available under the *Defamation Act*, Cap 36 Laws of Kenya. With the greatest respect to the learned Judge, the Respondent totally failed to establish any such defence. That the appellant failed to co-operate with the Respondent or that the Respondent was merely reporting the complaints of the former employees could not afford the Respondent a valid defence in law. If the advocates refused to co-operate the Respondent could have gone and read the court file or even checked with Elliots Bakery Ltd, in liquidation, to see if any money had been released to the appellant.

56. Therefore, a fair comment as alleged by the Respondent must be based on true facts based on an expression of opinion based on true or substantially true facts. In the case of *Grace Wangui Ngenye v Chris Kirubi & another* [2015] KECA 152 (KLR), the court of appeal, [Githinji, Koome & Azangalala, JJ.A.] reiterated that a fair comment must be based on facts that are true or substantially true and that a fair comment is a commentary, an expression of opinion based on true or substantially true facts. It stated as follows:

(25) The plea of fair comment has no substance. Firstly, a fair comment must be based on facts that are true or substantially true. In the absence of plea of justification, the 2nd Respondent would not be entitled to give evidence at the trial to prove that transfer of the appellant was associated with the death of the 50 people.

Indeed that's not the 2nd Respondent's case. Secondly, a fair comment is a commentary, an expression of opinion based on true or substantially true facts. The words complained of are not by their very nature an expression of opinion but rather, are a misstatement of true facts. The defence of fair comment is thus not available to the 2nd Respondent in law at the trial.

57. In the circumstances, I find that the defences raised by the Respondent were otiose. The words complained of were false, and there was malice in failing to correct the publication at an early stage. Given that the allegations of sexual harassment were untrue, the defences of fair comment and justification fails. Accordingly, the appeal succeeds, and the order dismissing the case in the subordinate court is set aside. In lieu thereof, I find that the appellant proved that the Respondent is liable for the tort of defamation of the Appellant as pleaded in the plaint.

58. The court now delves into the question of damages. The Appellant sought the following prayers:

- a. A written, clear and unqualified apology by the defendant (Respondent) to the Plaintiff (appellant) and retraction of the defamatory statements contained in the letter dated 9.08.2020, to be circulated in two dailies of national repute.
- b. General damages for defamation.
- c. Aggravated damages.
- d. Interests on (b) and (c) at court rates.
- e. Costs and interest thereon.

59. The court below must be guided by precedent. The court of appeal and this court has guided on assessment of damages. The court below, whereas knowing that it is not the last court, decided, it its



wisdom or otherwise not to assess damages. In *Lei Masaku versus Kalpama Builders Ltd* [2014] eKLR, the court noted as follows:-

It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.

60. Further in *Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates* [2013] KECA 252 (KLR), the court of appeal [Onyango Otieno, Azangalala & Kantai, JJ. A] held as follows in regard to aggravated damages:

We note that in the demand letter dated 30th November, 2011 the Advocates acting for the plaintiff required the defendants to retract the offending article and to tender an apology. That letter was met by a reply by the Legal /Human Resources Manager of the appellants which denied liability and stated the appellants position that they would strenuously defend the intended suit. That position was adopted in the appellants defence, submissions and at the trial. In any event the Respondent established through evidence that not only had he lost clientele but a prospective partnership with another lawyer did not materialize as a direct result of the defamatory article. So the Respondent was not only entitled to general damages for defamation but was also entitled to exemplary damages to punish the appellants who had defamed him and refused to retract the offending article or apologise. In the English Court of Appeal decision in the case of *John v MG Ltd*. [1996] I ALL E.R. 35 the Court held:

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....

Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.

In the matter before us all essential elements for award of aggravated damages which are well set out in the said English case existed and the award of Kshs. 500,000/= was founded on a proper appreciation of the law. We cannot interfere with this aspect of the judgement.

61. In other words, an award of exemplary damages, goes beyond mere compensation and are intended to punish the defendant for egregious conduct. Aggravated damages may be awarded against a defendant who acts with improper motive, for example, where the conduct is driven by malice, where there is insistence on a frivolous or groundless defence of justification, or where the defendant fails to make a timely apology. Such damages serve both a punitive and a deterrent purpose, reinforcing the principle that wrongful conduct, particularly that which is malicious or deliberate, will not be tolerated by the courts. In this case a defence of justification was given. A letter requiring retraction of the defamatory words was met with a letter justifying the defamation in the following terms:



- a. That the complaint by our client was investigated by panel of Arya Samaj and a concluding report was issued affirming your client's inability to respond to the allegation and satisfactorily affirmed their risk of being sued by our client as a result of your client's conduct.
 - b. Our client has endured harassment and unwanted sexual attention from your client and the facts we reiterate are true and your client outsees his mandate and his intent is well depicted in the letter of Arya Samaj and hence our client neither retracts the said allegation, her letter of 9.08.20220, nor shall she issue any apologies in respect thereof (sic).
 - c. Our client neither suffer (sic) from any delusion nor are her allegations unfounded. It is utter disgust, your client a married man abused his high standing position and stooped to this despicable level and violated our client's rights as an administrator and CEO and proceeded to not only harassing, demeaning but also striving on several occasions to imposing her to avail her self during working hours at the office with the pretext of work all in an attempt for unwanted sexual attention well-articulated in our client's letter.
62. In the circumstances, I find that the Appellant is entitled to exemplary damages in the sum of Kshs. 500,000/=, which I accordingly award.
 63. The other issue is a prayer for a clear and unqualified apology by the Respondent to the Appellant, together with a retraction of the defamatory statements contained in the letter dated 09.08.2020, to be published in two daily newspapers of national repute. In *Apology Ltd v Standard Newspapers* [2001] eKLR, the Court emphasized that where a defamatory publication has been widely disseminated, an appropriate remedy includes not only damages but also a retraction and an apology in equally prominent media, so as to mitigate the injury to reputation. Likewise, in *Nation Media Group Ltd v Alfred N. Mutua* [2017] eKLR, the Court held that an apology and retraction serve the dual purpose of vindicating the aggrieved party's reputation and ensuring that the public is corrected as to the falsehoods earlier circulated.
 64. English common law is in accord. In *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670, the Court of Appeal stressed that damages and corrective measures, such as apologies, must be proportionate to the injury caused and serve the purpose of vindicating reputation in the eyes of right-thinking members of society. In the case of *Timothy Shongwe v The Swazi Observer (PTY) LTD* (847/2015)[11th November, 2021] SZHC 212 the court posited as follows:

I have extensively reproduced the judgment of Boqwana J in the *Marion Smith v Mountain Oaks Winery (Pty) Ltd & another* (1171/18) [2019] ZASCA 123 (26 September 2019) at paragraphs 48-60, to demonstrate the importance of a retraction and apology in defamation cases. The judgment of Boqwana J makes it clear that an apology and retraction by a defendant in certain circumstances of a case is a sufficient and appropriate remedy in its own right. In fact the judgment deals with a retraction and an apology which is demanded by a plaintiff or applicant pursuant to publication of defamatory material where a demand for the apology and retraction was made by the aggrieved party and not tendered by the party who caused the publication.
 65. The purpose of retraction and apology is to repair damage in a matter where the same was broadcasted or sent to parties who may not again be assembled together. As an example, in this matter the defamation was to a large group of members who may or may not still be with Arya Samaj.
 66. The court must have regard to the conduct of the Respondent from the time of publication all the way to the day of delivery of the judgment. This matter is more confounded by the related verdict in



the employment court which exonerated the appellant. The Respondent thereafter persisted up to the appeal level. Recently in the case of *Dasani V Ochieng* [2025] KEHC 3776 (KLR), D. Kemei stated as follows:

In the case of *Wangeti Mwangi & Another v. J.P. Machira t/a Machira & Company Advocate* [2012] eKLR in setting out additional guidelines the court stated as follows:

In addition, the award should also be geared where circumstances permit to act as deterrence so as to safeguard and protect societal values of human dignity, decency, privacy, free press and other fundamental rights and freedoms, including rights of others and personal responsibility without which life might not be worth living. The category of considerations will no doubt change as our societal needs change from time to time. In this regard, we think that courts must strive to strike a proper balance between the competing needs in the special circumstances of each case.

The Court of Appeal in the case of *Johnson Evans Gichesru Vs. Andrew Morton & Another* (2005) eKLR stated that, in action of libel, the trial court in assessing damages is entitled to look at the whole conduct of the Defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action and in court during the trial.

It is noted that the Defendant upon being issued with a Demand Notice, failed to render an apology and to take out of publication the defamatory words. The Plaintiff was therefore entitled to approach the court for redress. The Defendant's conduct was malicious as he has injured the reputation of the Plaintiff who is a member of the County Assembly of Siaya and a leader.

67. In *John v MGN Ltd* [1997] QB 586, the Court underscored that retraction and apology are integral to restoring the claimant's standing, given that damages alone may not suffice to counteract the lingering harm of a defamatory publication.
68. The Court of Appeal in *Nation Media Group Ltd, Mutegei Njau & Bob Kioko v John Joseph Kamotho, Charles Githii Kamotho, James Kamotho & David Kamotho* [2010] KECA 360 (KLR) stated as follows regarding principles for award of damages for defamation as follows:

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 libel was published down to the time the verdict is given. It may consider what this conduct has been before action, after action, and in court during the trial: *Praud v Graham* 24 Q.B.D. 53, 55.

In *Broom v Cassel & Co.* [1972] A.C. 1027 the House of Lords stated that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of *restitutio 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 the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charges. As *Windeyer J.* well said in *Uren v. John Fairfax & Sons PTY. Ltd.* 117 C.L.R 115, 150:

“It seems to me that, properly speaking, a man defamed does not get compensated for his damaged reputation. He gets damages because he was injured in his



reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a 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.”

69. In the case of *Chemno v Nation Media Group Limited* [2022] KEHC 17156 (KLR), C Meoli, J stated as follows in regard to the background of defamation and damages:

The Court has considered the evidence on record and the parties’ respective submissions. The Court of Appeal had this to say in *Musikari Kombo v Royal Media Services Limited* (2018) eKLR:

The law of defamation is concerned with the protection of a person’s reputation. Patrick O’Callaghan in the Common Law Series: *The Law of Tort* at paragraph 25.1 expressed himself in the following manner:

The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...’ Defamation protects a person’s reputation that is the estimation in which he is held by others; it does not protect a person’s opinion of himself nor his character. ‘The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’ and it affords redress against those who speak such defamatory falsehoods...

22. Actions founded on the tort of defamation bring out the conflict between private interest and public interest. Article 33(1) of *the Constitution* guarantees every person’s right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-Article (3) states that “In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”.

Article 34 guarantees the freedom of the media while Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions of the *Defamation Act*. In contemplating these competing rights Lord Denning MR stated in *Fraser v Evans & Others* [1969] 1 ALLER 8 “The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed.”

23. In *Halsbury’s Laws of England* 4th Edition Vol. 28 paragraph 10- a defamatory statement is defined as follows: “...a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business”. See also the Court of Appeal definition of a defamatory statement in *SMW v ZWM* (2015) eKLR.

70. The cases referred to had a much wider circulation. The appellant relied on the cases of *Ernest Omondi Owino & another v Felix Olick & 2 others* [2021] eKLR, *Samuel Ndung’u Mukunya v Nation Media Group Limited & another* [2015] eKLR, *Abdi Mohamed Farah v Nairobi Star Publication*



Ltd & another [2015] eKLR, and Alnashir Visram v Standard Limited [2016] eKLR and MK & another v Standard Digital & another [2020] eKLR, where awards were made between 1,000,000/= to 18,000,000/=.

71. The Respondent relied on the cases of Fraser v Evans & Another [1969] 1ALL ER 8, Jacob Mwanto Wangora v Hezron Mwando Kirorio [2017] KEHC 3154 (KLR), Alinashir Popat & 7 others v Consumer Federation of Kenya 2016 KEHC 1102 (KLR), Hayward v Thompson & Others [1981] 3 ALL ER. The Respondent did not submit on damages.
72. The Appellant submitted for a sum of Ksh.10,000,000/=. However, though the words were very serious and touched on sexual harassment and the appellant's moral standing, they were of limited circulation. The judgment of the Employment and Labour Court did not edify the appellant. He admitted to being high handed. However, the publication showed him as an immoral and a sexual predator who abuses his high position to prey on ladies working under him.
73. However, the non-defamatory part also showed that he is not a paragon of virtue. His ruthlessness did not lower his standing in society whether true or not. His standing however, as a moral person took a beating. For this, an award of Ksh. 1,000,000/= will suffice as general damages for defamation.
74. The next aspect is costs. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:
 - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
75. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
76. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
 - “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating



the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

77. In the circumstances, the Appellant is entitled to costs both in this court and the court below.

Determination

78. The consequence of the foregoing is that I allow the appeal in the following terms:

- a. The appeal is allowed. Judgment of the lower court is set aside.
- b. I find that the Respondent is liable for the tort of defamation against the Appellant and enter judgment accordingly.
- c. I award general damages for defamation of Ksh. 1,000,000/=.
- d. I award exemplary damages for Ksh. 500,000/=.
- e. The Appellant is entitled to an unqualified apology from the Respondent and retraction of the defamatory statements contained in the letter dated 9.08.2020. The retraction and apology shall be published in one of the two major dailies of widespread circulation within 30 days.
- f. The Appellant shall have costs of Ksh 95,000/= for the appeal.
- g. Costs to the Appellant in the lower court.
- h. 30 days stay of execution on the money decree. This does not apply to retraction and publication of an apology.
- i. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF SEPTEMBER, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Gaitho for the Appellant

Mr. Ouma for the Respondent

Court Assistant – Michael

