



Mogeni & another v Nation Media Group Limited & another (Civil Suit E192 of 2022) [2025] KEHC 13377 (KLR) (Civ) (25 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13377 (KLR)

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

**CIVIL
CIVIL SUIT E192 OF 2022**

JN MULWA, J

SEPTEMBER 25, 2025

BETWEEN

HON ERICK OKONG'O MOGENI 1ST PLAINTIFF

HON LADY JUSTICE JACQUELINE MOGENI 2ND PLAINTIFF

AND

NATION MEDIA GROUP LIMITED 1ST DEFENDANT

MUTUMA MATHIU 2ND DEFENDANT

JUDGMENT

Pleading

1. By a Plaint dated 15/09/2022, Hon. Erick Okong'o Mogeni and Hon. Lady Justice Jacqueline Mogeni (hereafter the 1st & 2nd Plaintiffs) sued Nation Media Group Limited and Mutuma Mathiu (hereafter the 1st & 2nd Defendants) for alleged defamation and sought judgment against them for-;
 - a. An order directing the Defendants to publish an unqualified apology of equal prominence to the Plaintiffs through the same medium and in the same page and in similar manner as the offending article
 - b. A permanent injunction restraining the Defendants and each of them by themselves, their servants or agents or otherwise howsoever from further publishing or causing to be published words defamatory of the Plaintiff.
 - c. General Damages for defamation.
 - d. Aggravated and exemplary damages.



- e. Costs of and incidental to the suit.
 - f. Interest at Court rates on (c), (d) & (e) above from the date of judgment until payment in full
 - g. Any other relief the Court may deem fit to grant.
2. The Plaintiffs aver that on or about 07/11/2021, the Defendants under false defamatory and misleading publication caused to be published a defamatory article on page 12 of the Sunday Nation titled “Lawmaker pushes wife’s hiring as judge” without due regard to the effect which such statement would have against the Plaintiffs. That the impugned article read in part as follows:-
- “A lawyer and member of the Justice and Legal Affairs Committee in one of the two houses of Parliament is the talk of town after it emerged that he used his position and connections to have his wife appointed a judge recently. It is being whispered that the new judge, who has never practiced law, also got access to the interview questions way before her date with the hiring panel. She was also coached by the husband and other lawyers on how to tackle the interview questions. The end game is to have a cabal of friendly judges in Nairobi for both commercial and political purposes”
3. It was further averred that the words as published by the Defendants and released to the public as a whole were accessible to a wide audience both the general public and professional circles and were by all means and intent meant to refer to the Plaintiff, to wit, in their natural and ordinary meaning, the words in the article were construed by right thinking members of society or a reasonable bystanders to impute innuendo, malice recklessness and falsehood as against the Plaintiffs. That by reason of the said publication the Defendants have jeopardized the Plaintiffs image and reputation as Senator and Judge respectively and in addition caused extensive damage, disparaged their reputation, credibility & honor, causing them embarrassment and distress. It was further averred that despite demand, the Defendants failed to publish a clear apology of equal prominence as the article, acknowledging the failings or fault of the 1st Defendant in recklessly publishing the article.
4. In their statement of defence dated 03/02/2023, the Defendants admitted to the publication of the impugned article however denied the other key averments in the plaint; that the words were defamatory or capable of bearing a defamatory meaning. It was further averred that the words complained of did not refer to any of the Plaintiffs, to wit, the latter have no cause of action against the Defendants. That the Defendants were exercising their freedom of expression and media as protected under Article 33 and 34 of *the Constitution*, as at when the impugned article was established therefore the Plaintiffs are not entitled to general, aggravated or exemplary damages as pleaded in the plaint.
5. The suit proceeded to full hearing during which both parties called evidence in support of the averments in their respective pleadings.

Plaintiffs Case and Evidence

6. On behalf of the Plaintiffs, Hon. Erick Okong’o Mogeni, testified as PW1. He began by identifying himself as the Senator of the County of Nyamira and proceeded to adopt his witness statement dated 15/09/2022 as his evidence in chief. It was his evidence that as at publication of the article he was serving as the Chairperson of the Senate’s Justice and Legal Affairs Committee (JLAC), practices law, a member of the Law Society of Kenya (LSK) and holder of the title Senior Counsel (SC). The gist of his evidence was that the 2nd Plaintiff is his wife, currently serving as Judge of the Environment and Land Court (ELC) and previously served as a Chief Executive Officer (CEO) and Head of Secretariat of the Council of Governors. He stated that the impugned article as published by the Defendants was untrue,



- disparaging, without basis, injurious to his reputation, occasioned him scorn & ridicule, scandalous and defamatory whereas prior to publication the Defendants did not consult or contact him for any comments. That he received several telephone calls from persons in shock and disappointed by the shameful article published by the Defendants and that despite demand the Defendants have failed and refused to retract the defamatory statement or make an apology. He concluded by adducing into evidence the documents appearing in the Plaintiffs list of documents as PExh.1-3.
7. On cross-examination, PW1 confirmed that the article does not mention him by name or say the person captured therein represents the County of Nyamira as Senator. He confirmed there being two Houses of Parliament, being The National Assembly and The Senate whereas in the latter there is a Legal Committee. That the article does not speak of the committee in the Senate however, it applied to both. He further affirmed that the article does not mention his wife by name however maintained that, by reference, it referred to his wife.
 8. PW1 further testified that none of the members of JLAC had a wife being interviewed for the position of judge and that Senators Irungu, Orengo, Wako were equally lawyers. He went on to confirm that the article does not mention The Senate but references one of the two Houses of Parliament. It was his evidence that he was the only lawyer who sat in the legal committee whose wife applied to be a judge of the Environment and Land Court in 2021. He maintained that he was not consulted prior to publication of the article however, the inference gathered therefrom is clear that the same referred to him and no other person in The Senate. In summation he stated that a demand was issued to the Defendants however the same is missing from his bundle of documents.
 9. In re-examination, PW1 reiterated that in 2021 he knew the members of the legal committee and at the time none had a wife who was appointed as a Judge of the High Court of Kenya or had a wife or spouse who had applied to be appointed as a Judge.
 10. Hon. Lady Justice Jacqueline Mogeni, testified as PW2. She stated that she currently serves as a Judge of the High Court of Kenya and thereafter proceeded to adopt her witness statement dated 15/09/2022. The gist of her evidence was that she previously served as the CEO and Head of Secretariat at the Council of Governors, also served a Member of the Transitional Authority that coordinated transition to the devolved government system and that she equally is an Advocate of the High Court of Kenya of more than 25 years standing.
 11. PW2 testified that she is married to PW1 and confirmed that the impugned article as published by the Defendants was untrue, disparaging, without basis, injurious to her reputation, occasioned her scorn & ridicule, scandalous and defamatory of her person as a Judge; that the article meant to convey to the general public that she was not appointed as Judge on merit but rather through influence of her husband whereas prior to publication the Defendants did not consult or contact her for any comments. She too confirmed receiving several telephone calls from persons in shock and disappointed by the shameful article published by the Defendants and that despite demand, the Defendants have failed and refused to retract the defamatory statement or make an apology.
 12. Under cross-examination, she confirmed that the article does not mention either her or her husband by name. She further stated that she did not avail any documentation to demonstrate that she served as the CEO and Head of Secretariat at the Council of Governors or Member of the Transitional Authority. It was her evidence that JLAC had other members who were lawyers meanwhile stated that she did not avail the list of the legal committee in respect of the National Assembly.
 13. She re-affirmed that the Defendants did not reach out prior to publication given that she was the only Judge appointed at the time who was married to a Senator. That despite the forestated the Defendants refused to render an apology notwithstanding service of the demand notice.



14. Kiogora Mutai testified as PW3. On his part he identified himself as an Advocate of 30 years standing and managing partner of Messrs. Kiogora Mutai & Co. Advocates. It was his evidence that he had known the Plaintiffs for over 20 years whereafter he proceeded to adopt his witness statement dated 15/09/2022 as his evidence in chief. The kernel of his evidence was that he had known PW1 as a proficient officer of the Court, meticulous litigator and now a skillful debater before The Senate as a representative of the people of Nyamira County.
15. PW3 further testified that at the time of publication, the story was widely circulated on social media platforms, especially “Twitter” now “X” and was aware then that PW1 served as the Chairperson of JLAC. Upon reading of the article, he stated that it was clear therefrom that the only people who could fit the description in the story were the Plaintiffs; adding that he was shocked by the article given PW1’s acumen as an advocate and consummate parliamentarian.
16. On further testimony, he testified that the article was untrue, scandalous and defamatory with the intention to convey to the general public that PW1 influenced the appointment of PW2 as a Judge, thus questioning his reputation and character. That as a result of the publication, PW1’s reputation was injured causing him hatred, contempt, scorn, mockery and ridicule both in his profession as a lawyer and politician.
17. Under cross examination, PW3 stated that he had not adduced into evidence the publication as circulated on “Twitter” now “X” meanwhile confirmed that the article does not mention the Plaintiffs by name. It was his evidence further that there are two Houses of Parliament and that the article does not mention that the member in question serves in the Senate.
18. In conclusion PW3 affirmed that at the time, PW1 was not the only lawyer serving in JLAC.
19. In re-examination, PW3 iterated that PW1 is an advocate of the High Court of Kenya and that at the time he did not know of any other senator who was married to a lawyer save for PW1 at the material time.
20. Hon. Mutula Kilonzo Junior, testified as PW4. He identified himself as an Advocate of the High Court of Kenya, and currently serving as the Governor of Makueni County, and that at time of publication of the impugned article, he was serving as the Senator of Makueni County as well as a Senate committee member of JLAC. He proceeded to adopt his witness statement 25/09/2022 as his evidence in chief.
21. PW4 further testified that upon reading the impugned article, he queried the matter before JLAC of the Senate concerning the article wherein he was serving together with PW1 as Senate committee member.
22. The nucleus of his evidence is that he had equally known PW1 as a proficient officer of the Court, meticulous litigator and now a skillful debater before The Senate as a representative of the people of Nyamira County.
23. He further testified that the story was widely circulated on social media platforms, especially “Twitter” now “X” and was aware then that PW1 served as the Chairperson of JLAC. That upon reading of the article, it was clear to him that the only people who could fit the description in the story were the Plaintiffs.
24. It was his further evidence that he was shocked by the article given PW1’s acumen as an advocate and consummate parliamentarian, to wit, the article was untrue, scandalous and defamatory with the intention to convey to the general public that PW1 influenced the appointment of PW2 as a Judge, thus questioning his reputation and character. That as a result of the publication, PW1’s reputation



was injured causing him hatred, contempt, scorn, mockery and ridicule both in his professional and political careers.

25. Under cross-examination, he stated that a report was tabled by PW1 however cannot confirm whether the same was adduced into evidence or the publication as circulated on “Twitter” now “X”. He too confirmed that the article does not mention the Plaintiffs by name however asserted that it was only PW1’s wife who was appointed as a Judge. In re-examination, he stated that members of the legal committee are ordinarily lawyers especially in The Senate. To his knowledge no other member of the JLAC, whose wife was appointed as a Judge of the High Court.

Defendants Case and Evidence

26. On behalf of the Defendants, Michael Owour, testified as DW1. He identified himself as an employee of the 1st Defendant. He proceeded to adopt his witness statement dated 12/06/2023 as his evidence in chief and adduced into evidence the document appearing in the Defendants list of documents dated 12/04/2023 as DExh.1. The kernel of his evidence was that the impugned article did not refer to the Plaintiffs by name.
27. He further testified that PW1 called to inform him that he had an important article to publish, wherein he accorded him the opportunity to do so. He went on to state that PW1 had earlier published other articles over the years, and his relationship with PW1 had always been cordial and respectful. As an editor, he stated that his work entails reviewing and approving articles published by the 1st Defendant and that the impugned article touched on a public interest issue and was not defamatory of the Plaintiffs. At the time there were a number of Members of Parliament serving in JLAC in both houses whose spouses were not known to the public.
28. On cross-examination, DW1 stated that a cordial relationship cannot absolve the Defendants of defamation; and that he was the one who approved the article as editor and proceeded to state that the lawyer or judge the article was referring to were not parties to the suit.

At the close of the trial, both parties filed written submissions.

Plaintiffs Submissions

29. Counsel for the Plaintiffs began his submissions by restating history of the matter, pleadings and evidence by the respective parties meanwhile proceeded to condense his submissions into three (3) cogent issues.
30. On whether the impugned article was defamatory, while calling to aid the decisions in *SMW v ZWM* [2015] eKLR, *John Ward v Standard Ltd*, HCCC 1062 of 2005 and *Graham v Standard Group Ltd* KECA 649, counsel submitted that from the evidence tendered before this Court, the Plaintiffs have successfully demonstrated the connection between the impugned article and the Plaintiffs. That despite the Plaintiffs evidence, the Defendants failed to clarify their claim by identifying the lawyer referenced in their article. That the Defendants failure to provide evidence or vindicate their publication further leads to the logical conclusion that the defamatory article targeted the Plaintiffs.
31. As concerns publication counsel relied on the decision in *Mogaka & 3 Others v Munene* [2023] KEHC 18194 (KLR) to summarily submit that the Defendants did not dispute publishing the impugned article.
32. On whether the article was defamatory, counsel placed reliance on the decision in *Mogaka* (supra) and *Phineas Nyagah v Gitobu Imanyara* [2013] eKLR to contend that the insinuation portrayed by the article regarding the Plaintiffs was unsubstantiated but also grossly disproportionate to any facts



- presented. That the Defendants failure to prove truthfulness or justification combined with their reckless disregard for the facts underscores the malice inherent in the publication.
33. Submitting on whether the Plaintiffs suffered disrepute and injury as a result of the publication, counsel posited that the Plaintiffs called witnesses while also demonstrating that the article exposed them to public humiliation, disdain, derision and reproach among those who read the newspaper or accessed the information online. The decision in *Selina Patani & another v Dhiranji V. Patani* [2019] KECA 480 (KLR) was relied on in the forestated regard.
 34. Concerning the award on general damages, while calling to aid the decision in *C.A.M v Royal Media Services Ltd* [2013] eKLR, *Jones v Pollard* (1997) EMLR 233-243 and *Nation Newspaper Ltd v Daniel Musinga t/a Musinga & Co. Advocates*, it was argued that the defamatory article gravely impugned the Plaintiffs personal and professional integrity as Senator and Judge respectively. That despite demand to the Defendants they did not retract or apologize for the publication. Therefore, an award of Kshs. 5,000,000/- in general damages was urged by the Plaintiffs.
 35. On aggravated and exemplary damages, it was submitted that the publication was reckless and malicious therefore proposed an award award of Kshs. 1,000,000/- under the said header to serve as a strong deterrence to the Defendants.
 36. In conclusion, it was submitted that Article 28 of *the Constitution* guarantees the Plaintiffs the right to dignity therefore alongside the above awards the Court ought to order that an apology be published and consequently allow the suit as lodged.

Defendants Submissions

37. On the part of the Defendants, counsel anchored his submissions on the principles espoused in *Wycliffe A Swanya v Toyota East Africa Ltd & another* [2009] KECA 379 (KLR) meanwhile crystallized four (4) cogent issues for the Court's consideration.
38. As to whether the publication referred to the Plaintiffs, while citing the authors in *Gatley on Libel and Slander*, 13th Edition, pg. 263, counsel emphasized that the Plaintiffs alongside their witnesses confirmed that the impugned article did not mention the Plaintiffs by name and that reliance on innuendo to suggest the article referred to the Plaintiffs is misguided. That by trying to shift the burden of proof to the Defendants at the hearing to specifically state whom the article referred to evidently manifests that the Plaintiffs failed to discharge their burden of proof that the article complained of referred to them.
39. Submitting on whether the article was actuated by malice, counsel summarily submitted that the continuous interaction and dealing between the 1st Plaintiff and the 1st Defendant goes to show that the Defendants were not in any way malicious by publishing the impugned article. The decisions in *Nation Newspapers Ltd v Gilbert Gibendi* [2002] eKLR and *Dorcas Florence Kombo v Royal Media Services Limited* [2014] eKLR were cited in the forestated regard.
40. On whether the article was defamatory of the Plaintiffs, counsel relied on *SMW v ZWM* (supra) and *Clerk and Lindsell on Torts*, 22nd Ed. at Pg. 1609 Para. 22-168 to state that having demonstrated that the publication was not actuated by malice it can therefore be purposefully stated that the publication complained of was not defamatory of the Plaintiffs. That PW3 and PW4 failed to demonstrate if and how they perceived the Plaintiffs differently upon reading the impugned articles, to wit, their evidence did not corroborate the injury to the Plaintiffs reputation as pleaded and submitted by the Plaintiffs. It was further argued that, in any event, and without prejudice to the above, the impugned article was on a matter of public importance owing to then ongoing interviews by the Judicial Service Commission



(JSC) therefore the public had a right to know that interviews were being conducted in an independent and transparent manner.

41. Concerning whether the Court ought to grant an injunction, counsel placed reliance on the decision in *Nzibo v Nation Media Group Ltd & Another* KEHC 12720 (KLR) to contend that this Court ought to consider the competing interest between the Defendants freedom of expression and the freedom of the media as well as the right of the public to information to arrive at the determination that there is no basis for granting the monetary damages sought by the Plaintiffs.
42. With respect to the award on general damages counsel summarily posited that the Plaintiffs did not present any evidence of actual damages to their reputation or character however if the Court is minded to award the same it ought to be guided by the principles championed in the decision in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* [1992] KLR 177 and *Daniel Waweru Njoroge & 17 Others v Attorney General* [2015] KEHC 1154 (KLR).
43. Counsel further took issue with the fact that the demand letter was not formally produced into evidence by way of marking and identification as such the same does not form part of the record, and therefore the plaintiffs lacked basis for seeking costs citing the cases *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR, and *Kajuna Idd Noor v Rapid Kate Services Ltd & 4 Others* [2013] KEHC 4536 (KLR), counsel maintaining that that by failing to demonstrate service of the demand letter, the Plaintiffs are not entitled to an award on costs.
44. Regarding the award on exemplary and aggravated damages, counsel cited the decisions in *Royal Media Services Ltd t/a Citizen TV & Another v Alfred Amayio Maiko* [2021] KEHC 5318 (KLR) and *Miguna Miguna v Standard Group Limited & 4 Others* [2017] eKLR to argue that the Plaintiffs did not establish improper motive, malice or that a demand was served to warrant an award under the said heads. In summation, the Court was urged to dismiss the Plaintiffs suit with costs.

Analysis and Determination

45. The Court has carefully considered the respective parties' pleadings, the evidence adduced by respective witnesses, and the parties' written submissions.

Issues for determination:-

- a. Whether the Plaintiffs have made out a case for defamation against the Defendants;
- b. Whether the Plaintiffs are entitled to an award of damages, and if so, the quantum.

Whether the Plaintiffs have made out a case for defamation against the Defendants?

46. In so far as the tort of defamation is concerned, the rationale behind the law of defamation was spelt out by the Court of Appeal in *Musikari Kombo v Royal Media Services Limited* [2018] KECA 801 (KLR), wherein it was stated that;

“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 temporary 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..."

47. Further, according to Black's Law Dictionary, 9th Edition at Pg. 479 defamation is defined as:

"The act of harming the reputation of another by making a false statement to a third person."

48. It must also be remembered that when it concerns the tort of defamation, there exists competition between the private and public interest. The current constitutional dispensation at Article 33(1) of *the Constitution* guarantees the freedom of expression by way of seeking, receiving or imparting information. Corollary of the forestated, is sub-Article (3) which provides that in exercise of the right of freedom of expression, every person shall respect the rights and reputation of others.

49. Considering these competing rights Lord Denning MR stated in English Case of Fraser v Evans & Others [1969] 1 ALL ER 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."

50. The Court of Appeal in the case of Wycliffe A Swanya (supra) rendered that in a suit founded on defamation the plaintiff must prove the following elements -:

- i. That the matter of which the plaintiff complains is defamatory in character.
- ii. That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- iii. That it was published maliciously.
- iv. In slander, subject to certain exceptions, the plaintiff has suffered special damage.

51. Later, the Court of Appeal in Selina Patani (supra) while addressing itself to the purport of the law of defamation stated that: -

"In rehashing, we note the ingredients of defamation were summarized in the case of John Ward v Standard Ltd. HCC 1062 of 2005 as follows:

- i. The statement must be defamatory.
- ii. The statement must refer to the plaintiff.
- iii. The statement must be published by the defendant.
- iv. The statement must be false."

52. In the instant case, it is undisputed that the 1st Defendant published the impugned article in question on 07/11/2021 on its print platform. However, the Defendants vehemently contest that the impugned article did not in particularity refer to the Plaintiffs by innuendo or otherwise. It is trite the ingredients set out in Selina Patani (supra) are sequential hurdles, to wit, all must successively be met in order



for one to succeed in a claim premised on defamation. Consequently, given that ingredient (iii) is uncontested, the key issue falling for determination is whether the Plaintiffs have equally established ingredients (i), (ii) & (iv). The Court proposes to concomitantly address the above.

53. It is common grounds that as at date of publication PW1 was an Advocate of the High Court of Kenya, a member of the LSK, serving as the Senator of the County of Nyamira, a member of The Senate JLAC and holder of the title Senior Counsel; while PW2 was an Advocate of the High Court of Kenya and at the time serving as Judge of the High Court of Kenya in the Environment and Lands Court.
54. The gist of the impugned article was captured earlier in this judgment and as such the same does not require restatement at this juncture. That said, as to whether the impugned article referred to the Plaintiffs, notably PW1 to PW4 all acquiesced that the impugned article did not in fact refer to the Plaintiffs by name.
55. However, what this Court garners to be the Plaintiffs case is that the impugned publication tacitly by innuendo referred to them given that firstly-; at the time none of the members of the JLAC had a wife being interviewed for the position of judge and later appointed as Judge; secondly PW2 was the only Judge appointed at the time who was married to a Senator; and thirdly by PW4's evidence at the time of publication, PW1 was serving as a member of the JLAC and to the best of his knowledge, it was only PW2 who was appointed as a Judge.
56. The article itself employed a varied choice of words and phrases stating with the title that captioned "Lawmaker pushes wife's hiring as Judge". The article further went on to state in part that "a lawyer and member of the legal affairs committee in one of the two houses of parliament is the talk of town after it emerged that he used his position and connections to have his wife appointed a judge recently". By PW1's own evidence he conceded to the fact that both Houses of Parliament had a legal affairs committee with lawyers sitting in the said committees. He particularly confirmed that The Senate JLAC had lawyers such Senator Irungu, Orengo and Wako. Meanwhile, PW4 who was serving as a Senator at the time, equally confirmed serving in the said committee.
57. Notably, juxtaposing the article to the Plaintiffs evidence, the former did not employ any descriptive information concerning the lawyer and or member of the legal affairs committee, being the Senator of the Nyamira County, Chairperson of JLAC in The Senate or holding a title of senior counsel thus implicitly by innuendo referring to PW1.
58. Similarly, with respect to PW2, the article merely captured the person concerned was appointed as a Judge meanwhile it did not employ any descriptive information concerning the fact that she previously served as the CEO and Head of Secretariat at the Council of Governors, also served a Member of the Transitional Authority thus implicitly by innuendo referring to PW1.
59. At the risk of repetition, by the Plaintiffs own evidence, there were at the time of publication existence of JLAC's in both houses; The National Assembly and The Senate. The article merely referred to a lawyer and member of the JLAC however did not specify The Senate. Even for argument's sake, PW1 admitted that the JLAC before The Senate had lawyers within it as evidenced by PExh 3. The article referred to a class of persons serving in a committee and by PW1's own admission there were other lawyers serving in the said Committee nevertheless the Plaintiffs still pleaded particulars of innuendo, malice, recklessness and falsehood as against Defendants in respect of the said article.



60. The Court of Appeal in *Jakoyo Midiwo v Nation Media Group Limited & another* [2018] KECA 248 (KLR) while equally addressing itself to a somewhat similar situation to the instant suit observed that;

“ 21. The contestation revolves around two issues. First, the appellant contends that he was defamed by the article published on 14th December 2003. Second, the respondents contend that the impugned article neither referred to the appellant by name nor by innuendo and if at all, it referred to a class of persons and the appellant cannot identify and isolate himself from the class of persons and maintain a suit in defamation. The contestation between the appellant and respondent boils down to the issue of liability.

22. It is not contested that the impugned article neither expressly mentioned nor referred to the appellant by name. The appellant contends he was referred to and mentioned by innuendo. He bears the legal and evidential burden to prove this.

23. A class of persons is considered defamed only if the publication refers to all its members—particularly if the class is very small—or if particular members are specially imputed. There is no dispute that the appellant was at all material times a Member of Parliament and thus a member of that class or group known as Members of Parliament. A member of a defamed group, however, lacks the means to vindicate his good name and redress his injury. Under current defamation law, a group member has no cause of action against the publisher of the defamation unless the group is very small or the defamatory statement applies specifically to the member. This rule follows from the requirement that, in order to establish a prima facie case of defamation, a person must demonstrate that a “reasonable person” could perceive the defendant’s statement to be “of and concerning” the plaintiff. Unless the defamation designates the plaintiff so that those reading or hearing the publication understand that the plaintiff is implicated, the plaintiff’s reputation cannot be tarnished. An exception to this general rule arises when the defamation, though made in group terms, is really a veiled reference to a specific group member.

61. The court continued to state at par. 29 that;

Black’s Law Dictionary, 9th Ed. at page 860 defines innuendo as an oblique remark or indirect suggestion usually of a derogatory nature. In defamation law, an innuendo is the plaintiff’s explanation of a statements’ defamatory meaning when that meaning is not apparent from the statement. The issue for our determination is whether the publication by the respondent in the Sunday Nation had an indirect or implicit reference to the appellant. Would any person reading the Sunday Nation Newspaper article of 14th December 2003 identify the appellant as the Member of Parliament referred to? Is there any material in the article that implicitly or indirectly identify or refer to the appellant? We do not think so..

62. With above in reserve, can it purposefully be stated that the impugned article as may be read by a “reasonable person” walking along the streets of Nairobi and elsewhere would not outrightly deduce that the same had a veiled reference to the Plaintiffs? Case law within our jurisdiction on the reasonable person test has since conclusively settled the same as being objective which is not based on how a



claimant in defamation proceedings perceives the statement but on how a hypothetical reasonable member of society would interpret it.

63. Further, this Court draws guidance from the applicable test on defamation as spelt out in *Onama v Uganda Argus Ltd (1969) EA* by the East African Court of Appeal, that:-

“In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those “who have a greater or special knowledge of the subject matter”.

64. By their pleadings, the Defendants stance is that the impugned article did not refer to any of the Plaintiffs as such there was no basis to conclude that the article referred to them. The position was fortified by DW1's evidence and even under cross examination his assessment of the article was that he knew whom the same referred to however fell short of saying the same in Court.

65. Applying my mind to the dicta in *Onama (supra)*, it can reasonably be concluded that both Plaintiffs belonged to a small class of persons, to wit, any person with greater or special knowledge of the subject matter would positively identify whom the article was referring to. To place the latter into context, at the time the 1st Plaintiff was a Senator and member of the JLAC committee in the Senate, of no more than 10 members.

66. Meanwhile, factoring in the JLAC National Assembly members, there would be an addition of another 10 – 15 members thus totaling an average of 20-25 persons. With respect to the 2nd Plaintiff, it would reasonably appear that she was the only judicial officer at the time married to a serving Senator, with PW3 and PW4's among other constituting persons who had a greater or special knowledge of the subject matter.

67. Therefore, it is difficult not to see the imputation the article portrayed with respect to the Plaintiffs person and character as particularized in their plaint, by persons who had a special understanding of the matter. The latter was fortified by PW3 and PW4's notwithstanding the Defendants ardent defence that the article was non-specific thus the Plaintiffs could not purport it was defamatory of them.

68. Reviewing the material on record, this Court is of the view that the language used in the publication, especially regarding the use of the words and phrases such as “used his position and connections” “got access to the interview questions” “coached by the husband and other lawyers” and “cabal of friendly judges” in reference to the Plaintiffs to mean they were somewhat racketeers, wheeler-dealers, conspirators, corrupt, influence peddlers, dishonest and incompetent appeared to sensationalize or dramatize the article.

69. And compounded by falsity of the publication, it can be stated that the Defendants actions were clearly reckless and malicious in so far as the publication falsely imputed against the Plaintiffs serious and or criminal conduct that ordinarily would invite penal sanctions, all without first verifying and or justifying the true facts.

70. Consequently, in view of the above, the Court justifiably believes that the Plaintiff's grievance is merited and that the impugned article was indeed defamatory of and concerning the plaintiffs. The 1st Defendant is therefore found liable for the tort of defamation against the defendants. No liability is found to attach on the 2nd Defendant.

Whether the Plaintiff is entitled to an award of damages and if so, the quantum?



71. It is well settled that an award of damages is a matter of judicial discretion. In *C A M v Royal Media Services Limited* [2013] KECA 178 (KLR), the Court of Appeal stated that:-
- “No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in *Jones v Pollard* (1997) EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff’s feelings not only from the prominence itself but from the Defendant’s conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff’s reputation past and future.”
72. In the case of *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR, Mativo J. (as he then was) cited the case of *John v MG Ltd* (1996) 1 ALL E.R. the English Court of Appeal 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.”
73. Here, it is not in doubt that the publication touched on both the Plaintiffs integrity, honour and reputation by demeaning them before right thinking members of the society, going by PW3 and PW4’s evidence. Notably, as at the date of publication, the 1st Plaintiff was serving as a Senator within the Republic of Kenya whereas the 2nd Plaintiff was serving as Judge of the High Court of Kenya. Further, the impugned publication potentially had the effect of wide reach among readers of the “Sunday Nation”. Further, it would seem that the Defendants have to date not retracted the publication or tendered an apology to the Plaintiffs yet the imputation created by the article must have affected the Plaintiff’s reputation nevertheless.
74. In the instant case, each Plaintiff sought Kshs. 5,000,000/-, as general damages and in support of the proposed award relied on the decisions in *C.A.M v Royal Media Services Ltd* [2013] eKLR, *Jones v Pollard* (1997) EMLR 233-243 *Nation Newspapers Limited vs. Daniel Musinga T/A Musinga & Co Advocates Civil Appeal No. 120 of 2008*.
75. The Defendants retort was that the Plaintiffs did not present any evidence of actual damage to their reputation or character, but proposed that should the court find in favour of the Plaintiffs, it should be guided by the principles championed in the decision in *Jogoo Kimakia Bus Services Ltd Electrocom International Ltd* [1992] KLR 177 and *Daniel Waweru Njoroge & 17 Others v Attorney General* [2015] KEHC 1154 (KLR).
76. With above in reserve, in *Nation Media Group v Chiguzo* [2022] KECA 765 (KLR), the Court of Appeal cited with approval the decision in *Nation Newspapers Limited vs. Daniel Musinga T/A Musinga & Co Advocates Civil Appeal No. 120 of 2008*, wherein the Court appreciated that while all people are equal before the law, injury suffered in the case of defamation is not the same for all persons and “the status of a particular person affects the extent of the injury suffered.”



77. It went on to quote the English case of *John vs. MGM LTD (1997) QB 586* wherein it was stated that-

“In assessing 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.”

78. With respect to the 1st Plaintiff the proposal on general damages appears justifiable on the facts of this case. The sum proposed does not appear manifestly excessive, especially in comparison with awards made in other decisions, some of which are distinguishable on material facts.

79. Therefore, taking guidance from decisions in *Daniel Musinga T/A Musinga (supra)*, *Musikari Kombo v Royal Media Services Limited [2018] KECA 801 (KLR)* – wherein the claimant (a member of the National Assembly) was awarded Kshs. 5,000,000/-, *Royal Media Services Limited & another v Jakoyo Midiwo [2018] KECA 421 (KLR)* - wherein the claimant (a member of the National Assembly) was awarded Kshs. 4,000,000/-, *Standard Newspapers Limited v Joseph Konzollo Munyao [2018] KECA 131 (KLR)* - wherein the claimant (a member of the National Assembly) was awarded Kshs. 5,000,000/-, *Agnes Zani v Standard Group Limited [2019] KECA 66 (KLR)* - wherein the claimant (a Senator) was awarded Kshs. 5,000,000/- and *Ongwen & 5 others v Omollo & 6 others [2023] KECA 1444 (KLR)* - wherein the claimant (a Judge) was awarded Kshs. 6,000,000/-, the court believes that an award of Kshs. 5,000,000/- as proposed for the 1st Plaintiff is justified in the circumstance.

80. With respect to the 2nd Plaintiff, the proposal on general damages does not appear justifiable, for the following reasons;

Given this Court earlier finding that the defamatory article was of and or concerned both Plaintiffs the witnesses called to shore up the defamatory aspect of the impugned article and or demonstrate reputational injury (PW3 & PW4) were specific to the 1st Plaintiff.

81. It was imperative of the 2nd Plaintiff to call evidence from a third party who knew her and had read the article, to wit, the effect of reading that article was that her standing and reputation had been lowered, as person or in her profession, as a result of the defamatory publication. Here I draw guidance from the decision in *Selina Patani & another v Dhiranji V. Patani [2019] KECA 480 (KLR)* wherein it was observed that-;

26. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation.

27. The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellants character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person’s own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party



to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation.

82. As earlier noted neither PW1's, PW3's nor PW4's evidence was instructive towards reputational damage suffered by PW2 (2nd Plaintiff) on accord of the impugned publication. Therefore, in light of the above dicta, the finding of fact that the impugned article was indeed defamatory of the 2nd Plaintiff and given her status as a Judge of the High Court, this Court is only inclined to award nominal damages in the sum of Kshs. 500,000/- as being justified for the 2nd Plaintiff, in the circumstance.
83. On exemplary damages, in the case of *Mansion V Associated Newspapers LTD (1965) 2 ALL ER 954 at 957* the English court stated that exemplary damages may be awarded: -
- “In a case in which a newspaper quite deliberately published a statement which it either knows to be false or which it publishes recklessly, carelessly, whether it be true or false.”
84. The gravitas of the contents of the publication herein called for prior verification of facts by the Defendants, or comment by the Plaintiffs, if any. The failure by the Defendants to verify and or justify the facts resulted in injury to the Plaintiff's reputation. The Plaintiffs are thus jointly entitled to exemplary damages assessed at Kshs. 1,000,000/- (One Million). Having awarded exemplary damages, the Court will decline to award aggravated damages, there being no basis laid to warrant such an award.
85. The Plaintiffs also seek a permanent injunction restraining the Defendants and each of them by themselves, their servants or agents or otherwise howsoever from further publishing or causing to be published words defamatory of the Plaintiffs. However, the Court notes that the alleged defamatory statements were published close to four (4) years ago, and it is unlikely that the defamation will be repeated. Furthermore, granting such an injunction would unjustifiably infringe on the Defendants' constitutional right to freedom of expression. Therefore, the request for a permanent injunction is denied.
86. Meanwhile, it would be remiss not to mention that the article in question was undisputedly published by the 1st Defendant. Ex facie the author of the article cannot be garnered from said publication as evinced before this Court. While the 2nd Defendant has been sued as working for gain as the 1st Defendant's editorial director, it is DW1 who testified on behalf of the Defendants and stated on oath as having been employed by the 1st Defendant as an editor of the “Sunday Nation.”
87. By the Defendants statement of defence, it was averred that the 2nd Defendant has no role in the matter and his name ought to be struck out. I am inclined to agree and find that the Court does not see any sustainable cause of action as against the 2nd Defendant despite his description as captured in the Plaintiff. Consequently, the Plaintiffs cause of action as against the 2nd Defendant cannot be sustained in the circumstance and is accordingly dismissed with no orders on costs.
88. Lastly, with respect to the relief seeking an order directing the Defendants to publish an unqualified apology of equal prominence to the Plaintiffs through the same medium and in the same page and in similar manner as the offending article, I wholly adopt without adding more, the rendition recently taken by the Court of Appeal in *Rutto v Langat & another [2025] KECA 1276 (KLR)* wherein it was wittily observed that-;

“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 constitute a real solace for irreparable harm done to one's reputation. See Albie Sachs, J in *Dikoko v Mokhatla* 2006 [6] SA 235 [CC]; 2007 [I] BCLR I [CC].”

Final Disposition

89. Accordingly, the Court finds and holds the 1st Defendant wholly liable for tort of defamation against the Plaintiffs and enters judgment accordingly as hereunder -:

a. General damages 1st Plaintiff Kshs. 5,000,000/-

2nd Plaintiff Kshs. 500,000/-

b. Exemplary damages jointly to both Plaintiffs Kshs. 1,000,000/-

Total Kshs. 6,500,000/-

The above amount shall attract interest at court rates from the date of this judgment until full settlement.

90. Finally, notwithstanding the 1st Defendant's fervent submission on costs, applying my mind to the provision of Section 27 of the *Civil Procedure Act*, I award costs of the suit in favour of the Plaintiffs to be borne by the 1st Defendant.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 25TH SEPTEMBER, 2025.

.....

JANET MULWA.

JUDGE

