



REPUBLIC OF KENYA



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**Munene v Gisesa & another (Civil Appeal 369 of 2019)
[2025] KECA 2115 (KLR) (5 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2115 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 369 OF 2019
W KARANJA, SG KAIRU & WK KORIR, JJA
DECEMBER 5, 2025**

BETWEEN

DICKSON MWANGI MUNENE APPELLANT

AND

NYAMBEGA GISESA 1ST RESPONDENT

NATION MEDIA GROUP 2ND RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi
(Njuguna J.) delivered on 7th March 2019 in Nairobi HCCC No 224 of 2016)*

JUDGMENT

1. The case by Dickson Mwangi Munene, (the appellant), giving rise to this appeal, is that on 25th May 2016, Nation Media Group Limited (the 2nd respondent), published a story on page 3 of its Daily Nation newspaper under the heading “Notorious Police Squad Blamed for the Shooting”, with various banners, including “the story of Kwekwe squad the most notorious crack unit to ever have been formed in Kenya is back in the spotlight after allegations that its officers shot dead businessman Jacob Juma”, and reproduced the alleged defamatory statements made under the said banners.
2. Further, that in the story the respondents at paragraph 4 wrote “In its heyday the squad was said to have been as good as other crack units of its kind in other countries including the Bope of Brazil, Grupo Especial De operations of Spain, Juglas of Colombia and the US Marshals Service.” The article continued at paragraph 13 to publish a clear and distinguishable name of the appellant to wit “those involved in its formation or who were part of it include Dickson Munene Mwangi”.
3. The appellant contended that the story and the mention of his name was malicious, defamatory, libellous and was based on falsehoods, as the publication in its ordinary meaning was understood to mean that he was the founder/co-founder of an allegedly outlawed crack unit named Kwekwe Squad; that he was a member of an alleged outlawed crack unit named Kwekwe Squad; that he was associated



- with the activities of an allegedly outlawed crack unit named Kwekwe Squad; that he was involved in the murder of the late Jacob Juma; that he is a thief and thrives on unlawful ways and means; that he was a rogue and dishonourable officer of the police force; that he is unethical in his dealings; that he is shrewd and sly and that he should be shunned and avoided by all right thinking members of the society.
4. According to the appellant, the publication had seriously injured his character, standing, reputation and credit and exposed him to public and family scandal, contempt and odium in the eyes of the right-thinking members of the society, who then shunned and avoided him, causing him mental anguish and torture with the attendant injury and damage.
 5. The appellant, thereupon made a demand for an apology, retraction and admission of liability, which the respondents ignored and failed to respond to prompting the suit. These averments were detailed in a plaint dated 27th August, 2016 that the appellant filed in the High Court at Nairobi in Nairobi HCCC No 224 of 2016. In the plaint, the appellant sought a declaration that the said publication was false, malicious, defamatory and libellous of the appellant; general damages for defamation and libel, exemplary and aggravated damages, an order directing the respondent to publish an unqualified apology, a permanent injunction restraining the respondents from publishing or causing to be published any words defamatory of the appellant and costs. The appellant also availed a copy of the said publication which he sought to rely on.
 6. Opposing the suit, the respondents in their statement of defence dated 29th September 2016, admitted publishing the article in the Nation Newspaper but denied that the words published and complained of were malicious and libellous and capable of bearing the meanings pleaded in the plaint. The respondents further denied being bent on injuring the appellant's character and standing, reputation and credit, exposing him to the public and family scandal, odium, contempt, spite or malice as alleged in the plaint. Additionally, the respondents contended that the said words published were fair comment on matters of public interest and consisted allegations of fact and were true in substance and consisted of expression of opinion.
 7. At the hearing before the High Court the appellant reiterated the contents of his plaint and witness statement and called two witnesses. It was his evidence that on the date of the publication, he was woken up by Senior Sergeant Too, the officer in charge of the prison where the appellant was serving a life sentence since 2009. He testified that Senior Sergeant Too told him that there was a story concerning him in the Daily Nation Newspaper of 25th May 2016 with the title "notorious police officer blamed for shooting" and that it made serious allegations about him.
 8. He testified that the article stated that he was involved in the formation of Kwekwe squad and that he was a member of it and that they had killed many people. He stated that the article bore his name and further that it stated that they harassed Kenyans and he was involved in killing more than 500 Kenyans.
 9. He stated that the article alleged that when the squad fell out, the officers were killed and that one of them was charged with murder. He testified that the article stated that he was involved in the murder of Jacob Juma, yet he was in prison at the time, he testified that the statement meant that he was a murderer, was dishonest and that it also affected his case that was pending at the Supreme Court. He maintained that this affected his character and prejudiced his position as a person in prison.
 10. Further he testified that the article portrayed him as a rogue officer, which he was not, and that it also portrayed him as a person who used unethical means to survive. He stated that he was a married man with a daughter and that he was affected as a family man. Finally, he testified that he was aggrieved because he is not a member of the Kwekwe Squad and that he was not contacted before the article was published. He stated that he had been in prison for 10 years and that in the demand letter he asked



the 1st respondent to apologize, which they declined to do and his prayers in court were for an apology and compensation.

11. In cross-examination the appellant stated that he was charged with murder in 2009 and he was convicted and that he was an inspector of police then. He stated that he appealed to the Court of Appeal and that the conviction was upheld in February 2014 while the article was published on 25th May 2016. He told the court that he was waiting for certification from the Court of Appeal for him to challenge his incarceration before the Supreme Court.
12. He maintained that his reputation had been besmirched and that his friends still believe that the article was true. He said that the matter of the death of Jacob Juma was a matter of public importance and that it was not true that he killed him. He said that it was not true that he had no reputation to protect.
13. PW2, Byron Maina Wachira testified that he read the article published by the 2nd respondent on 25th May 2016 and that he met the appellant three months later, and that the appellant told him that the article was not true. He stated that after reading the article his relationship with the appellant changed, but after the appellant clarified he continued visiting him. He stated that he was in a supplies business with the appellant whom he had known since they were young.
14. In cross-examination he stated that he did not believe that the appellant committed murder and neither did he believe the article and that it shocked him and that was the reason he went to seek clarification from the appellant. He stated that he came to court to give evidence in support of his childhood friend who he did business with up to the time he was arrested after which the business collapsed. He, nonetheless, conceded that the business collapsed before the article was written.
15. PW3 - Gerald Munene testified that he did not read the article but that he was called by his boss who brought it to his attention. He stated that he read the article later in the Nation Newspaper dated 25th May 2016. He testified that he did not agree with the article because he knew his brother had never been a member of that squad. He stated that at the time his brother was in jail and he could not have been involved in the killing of Jacob Juma.
16. He testified that after he read the article he got annoyed with his brother and it took him time before he went to visit him and that later he went to visit his brother, he told him that the article was not true and that he was not a member of Kwekwe squad and he was not involved in the murder of Jacob Juma. He testified that a joint business they had closed down because people did not want to associate with them.
17. On cross-examination he stated that what he understood from the article was that Kwekwe squad was a deadly unit and that the article said that it was officers of Kwekwe squad that killed Jacob Juma. He stated that his brother could not have killed Jacob Juma because he was in jail and that the article stated that he was involved in the formation of Kwekwe squad. He admitted that he did not believe that his brother was a murderer and that he did not know anything about the Kwekwe squad.
18. He stated that he and his brother had a small hotel in Murang'a Town which they started in 1998 and had run the same for 4-5 years and closed the same in 2017. That the business was being ran by his wife and his brother's wife and that he did not have details of the business.
19. In re-examination he stated that the business went down after people read the article and that they refused to come to their hotel.
20. On their part the respondents called one witness, the 1st respondent, Nyabega Gisesa, who testified that he authored the article dated 25th May 2016 and that he worked as a correspondent with the 2nd respondent. He stated that at paragraph 13 of the article he named the appellant and that the article was titled "Notorious police squad blamed for the shooting". He testified that according to the article



it was Mr. Raila Odinga who blamed them. That it was his view and he was not his spokesman as he did not work for Raila Odinga. He testified that he relied on an opinion by Raila Odinga in relation to the death of Jacob Juma.

21. On cross-examination he stated that the response by the police spokesman was that the squad was non-existent. He stated that he wrote in the article that the squad had been disbanded. He testified that Mr. Juma was killed either in 2015 or 2016, and added that it was not entirely true that the squad had been disbanded, that it was back. He stated that he knew the appellant was a police officer working at Capital Hill and he had that information when he wrote the article.
22. He stated that he went to Kamiti a number of times and that it was after writing the article that he met the appellant but he could not remember the date or year, but it was after the story had been published. He stated that he never met the appellant over the article but that he had made efforts but the appellant declined to meet him when he was granted permission by the prison authorities and said that he was not interested in the matter. He conceded that he did not seek out the appellant for his side of the story before writing the article.
23. Further, he testified that other than being mentioned by various sources, Mr. Muiruri the former MP for Gatundu claimed that the appellant was a member of the Kwekwe squad and that during the mention of a case when the matter was also mentioned he brought it to the attention of the Judge that the appellant belonged to a crack unit. He stated that by the time Juma was killed the appellant was in Kamiti and that some people were arrested as suspects for killing Jacob Juma. That the appellant was not one of them. He testified that according to the article he did not state that the appellant was a criminal but that the squad was involved in criminal activities, he stated that the article did not condemn anyone.
24. In re-examination he stated that he was not a policeman but an investigative journalist. He stated that in the article he did not say that the appellant killed Jacob Juma. He stated that at paragraph 12 of the article he did not say that the appellant was involved in the formation of the squad and that he did not create his own list but stated that he got the names from Kenya Human Rights Commission.
25. The learned trial Judge after consideration of the pleadings filed, the evidence led and submissions offered, identified the issues before her as follows:
 - i. Whether the article was published by the defendant.
 - ii. Whether the article was false and malicious.
 - iii. Whether the article was defamatory of the plaintiff.
 - iv. Whether the plaintiff is entitled to damages and if so the quantum thereof.
 - v. Whether the defence of fair comment on a matter of public interest is available for the defendants.
 - vi. Who should meet the costs of the suit.
26. On whether the article was published by the defendant, the learned trial Judge found that it was not in dispute that the article was published by the defendant. That in fact the 1st defendant in his evidence admitted that fact but denied that the same was defamatory and or malicious.
27. As to whether the article was defamatory, false and malicious, the trial Judge while noting the appellant's submissions to the effect that malice can be inferred from the kind of language and words



- used in the article, particularly if such words are disproportionate to the facts, nonetheless, held that it does not follow that merely because the words are excessive malice must be inferred.
28. On whether there is substance in the defence of opinion, fair comment on a matter of public interest in a claim for defamation, the Judge held that the incidence and onus of proof is always upon a plaintiff to prove that the words indeed referred to and concerned him, and nobody else, and the words tended to lower his standing in the eyes of right-thinking members of the society. The trial Judge held that the contents of the article implied that the Kwekwe squad, which the appellant was alleged to have been a founding member of was said to have been involved in criminal activities, including murder.
 29. The court went on to find that one of such allegations is the shooting of businessman, Jacob Juma. According to the learned Judge, as regards that allegation, the article stated that the claims of murder of Jacob Juma were made by Raila Odinga in response to the claims by the National Police Service spokesperson which denied the existence of the squad. Further, that the article named the source of the information as the Kenya National Commission on Human Rights (KNCHR) who connected the Kwekwe squad with killing of 500 persons between June and October 2007.
 30. The learned Judge held that the court was fully satisfied that there was nothing to remove the article complained of from protection of the rolled-up defence of fair comment without malice on a matter of public interest mounted by the defendants. The trial Judge held that the appellant did not prove that there was malice on the part of the respondents and none could be inferred, and that as such the claim for defamation failed on that critical point. The appellant's case was accordingly dismissed with no orders as to costs.
 31. The appellant being aggrieved by the judgment filed this appeal, relying on eleven (11) grounds of appeal in his memorandum of appeal dated and lodged on August 7, 2019.
 32. He faults the learned Judge for, inter alia, incorrectly applying the principles of the law of defamation and legal test on the case and issues before her and thereby arriving at an erroneous finding of facts; concluding that the appellant never proved his case to the required standard despite an admission by the respondent that the article defamed the appellant; failing to find that the publication was actuated by malice; failing to find that there was no defence of expression of opinion, fair comment and in the matter of public interest adduced by the respondents; erroneously relying on the defendants' submissions as evidence and hearsay evidence which was inadmissible; failing to find that under *the Constitution*, 2010 and under the *Persons Deprived of Liberty Act*, 2014 the appellant had constitutional rights and freedoms to protect and enforce and not to be defamed.
 33. The appellant, therefore, prays that the appeal be allowed and the judgement of the High Court be quashed and be set aside.
 34. We heard the appeal on this Court's virtual platform on 16th December 2024 where learned counsel Mr. Amutallah appeared for the appellant while learned counsel Ms. Jan Mohammed (SC) appeared for the respondent. Both counsel adopted their written submissions and made brief oral highlights. Mr. Amutallah reiterated that the appellant proved his case to the required standard. It was submitted that the appellant pleaded at paragraphs 5 (a-i) and 6 (i-v) of the plaint the natural and ordinary meaning of the defamatory publication. Further that the appellant led evidence in the witness statement dated 30th October 2017 adopted by the trial court as evidence.
 35. Learned counsel maintained that through his 2 witnesses, the appellant proved the meaning a reasonable person would deduce from reading the impugned article. That there was no doubt that the article was widely circulated and read nationwide and globally through the online edition. The appellant submitted that he was expressly named in the said article by the 1st respondent using his real



name, Dickson Munene Mwangi, as one of “those involved in its formation or who were part of it include Dickson Munene Mwangi...”

36. It was submitted that the 1st respondent admitted that he was the author of the defamatory publication and that the said article was circulated by the 2nd respondent. It was submitted that the appellant proved his case on the limb to the required standard before the trial court.
37. It was submitted that the 1st respondent in his written statement admitted that it was only after writing the publication that he embarked on a journey to Kamiti to meet the appellant. Learned counsel emphasised that this was done without a factual background check of his source of information which was despite the government officials denying him any information about the purported Kwekwe squad.
38. According to the appellant, the offensive article alleged that the appellant was part of the said Kwekwe squad and was involved in criminal activities which meant that the appellant was a criminal, dishonest and a person of questionable character. Reliance was placed in *Miguna Miguna -vs- Standard Group Limited & 4 others* [2017] eKLR. It was submitted that in applying the test as held in this case the appellant has established that there was an article by the respondents and that the said article was published by the respondent and that the said article refers to the appellant.
39. On honest opinion it was submitted that the respondent did not state his honest personal opinion on who was to be blamed for the death of Jacob Juma and that the respondent simply relied on other people’s opinion, which is defamation in itself and that it cannot be said that it was the 1st respondent’s honest opinion that was expressed in the article he wrote.
40. As to whether the respondents tendered any evidence in the defence of expression of honest opinion, fair comment and in the matter of public interest as had been pleaded in the defence filed in court, it was submitted that there was nothing on record that shows that the 1st respondent led a defence of honest opinion, truth, fair information and fair comment and was in the matter of public interest, it was submitted that it is trite that a party is bound by his or her pleadings.
41. It was submitted that the manner in which the High Court dealt with this matter was erroneous as there was no iota of evidence in the testimony of the 1st respondent where he claimed that the article was honest opinion, truth, fair information and fair comment and in the matter of public interest. According to the appellant, the alleged defence of expression of opinion on a matter of public interest could not stand without evidence being led to prove the same and as such that defence had no limb to stand on.

Reliance was placed on *Independent Electoral and Boundaries Commission & Another -vs- Stephen Mutinda Mule & 3 others* [2014] eKLR for the proposition that a party is bound by its pleadings and that a party cannot travel beyond its pleadings. Thus, it was submitted that the trial Judge erred in entering into the litigation arena at the behest of the respondent and filling gaps on behalf of the respondents.

42. As to whether the appellant bore the evidentiary burden to prove malice, it was submitted that the trial court grossly erred on this aspect for the reason that the burden to prove malice never shifted to the appellant and could not be shifted on him as it could be read from the article itself.
43. It was submitted that the 1st respondent never availed any evidence of his alleged source of information and that the trial court relied on hearsay evidence and that the strong language in the article was malicious, and that all this was contained in his statement before court where he admitted that he relied on unverified information.



44. On quantum of damages, it was submitted that the trial Judge analyzed the issue of quantum and gave a sum of Kshs.200,000 as the amount she would have awarded to the appellant. It was contended that this amount is unjustifiably low and that no recent decisions were quoted forming the basis of such a low sum. Counsel contended that the 2nd respondent is a giant media operator with massive nationwide following and that the circulation of the article was received both locally and globally via its electronic channel and the respondent gained enormously in profits from the sale of the said publication to the detriment of the appellant.
45. Finally, learned counsel posited that Kshs.200,000 was below the economic realities of the current economy and submitted that Kshs.10,000,000 would suffice. We were urged to allow the appeal as prayed.
46. In opposition Ms. Jan Mohammed (SC) highlighted the respondent's written submissions dated 31st May 2021. In regard to the 1st ground counsel submitted that the trial Judge correctly applied the principles of the law of defamation in the matter and arrived at the correct position as laid out in *Nation Media Group & Another vs Hon Chirau Mwakwere*; Civil Appeal No. 224 of 2010 (unreported). It was submitted that it is not in dispute that the article in question was published by the respondent as pleaded and that what is in issue is whether the offending words in that broadcast were defamatory of the appellant.
47. It was submitted that a statement is said to be defamatory only if it tends to lower a person in the estimation of right-thinking members of the society or if a statement causes him to be shunned or avoided. It was contended that without proof of damage to the claimant's reputation or any proof that as a result of a publication the plaintiff was shunned or avoided then an action for defamation cannot be sustained. Learned counsel went on to say that it was not in dispute that the appellant was incarcerated for an unrelated charge of murder and was convicted in the year 2009 and sentenced to life imprisonment which sentence he is still serving.
48. According to learned counsel, the appellant having been removed from the general public in lieu of his incarceration for life, his reputation was not capable of being destroyed by the publication as he was not in society going about his business and/or gainful employment. It was submitted that the appellant did not suffer any public ridicule or shunning by society as a result of the publication as there was no general public available to him and that in addition there was no evidence of any public ridicule, hatred or even shunning experienced by the appellant. Further, that the appellant appears to have had an apprehension of defamation on himself ostensibly based on how he considered his standing in the society. Reliance was placed in *SMW -vs- ZWM [2015] eKLR*.
49. It was further submitted that the appellant did not present any evidence to court or proof that the natural effects of the words meant to destroy, demean, degrade and diminish his esteem which was ordinarily and generally held. It was submitted that at the time the publication was made the appellant had been incarcerated and as such he was not allowed to freely mingle with the public and as such could not be shunned and/or ridiculed by members of the public, it was also contended that there were no reasonable men who could reasonably shun/or avoid the appellant as a result of the effect of the publication in the words complained of.
50. Counsel asserted that the appellant and his witnesses only testified as to the veracity of the statements made by the respondents and not the appellant's character and as such the appellant adduced no evidence that the article published was defamatory and that it ridiculed, shunned or otherwise that he was avoided by right thinking members of the society generally. It was contended that the right-thinking members of society could not be availed in view of the incarceration of the appellant. Reliance was placed in *Godwin Wanjuki Wachira -vs- P.G. Okoth [1977] eKLR*.



51. The respondents submitted that the article dated 25th May 2016 were comments on expressions of opinion and are fair comments and fair information and on a privileged occasion on the issue of the death of Jacob Juma and the Kwekwe squad which was a notorious police squad and which are matters of public interest and matters in the public domain. The respondents maintained that they mounted this defence and proved the same before the trial court and that the same was not contested by the appellant.
52. The respondents maintained that no adverse inference could be inflicted upon the appellant's reputation as a result of the publication as caution was exercised in the reporting so as not to report that these were established facts but allegations that had been made but brought into the public domain. It was submitted that the appellant failed to show that the publication was false and or that it tended to lower the estimation of right-thinking members of the society generally or that it exposed him to hatred, contempt or ridicule. It was contended that the publication was a report on events that were said to have happened and that it is not a report that conclusively set out matters as though they had been proved or that they are conclusions, it was submitted that the same was not controverted.
53. According to learned counsel, the publication was a protected publication which is fair comment and the same is privileged. Reliance was placed on *Royal Media Services Limited & Another -vs- Jakoyo Midiwo* [2018] eKLR and *Slim -vs- Daily Telegraph* [1968]1 ALL ER 497.
54. There was no proof of actual or intrinsic malice by the respondents in publishing the said article and that the appellant had the onus to prove actual malice, ill will or spite or any direct or improper motive in the mind of the publisher at the time of the publication. Counsel insisted that the article was published under the sense of public duty and without malice and in the honest belief that the information contained therein was true and was further published on matters of public interest on the issue of the death of Jacob Juma and Kwekwe squad which were matters of public interest. Reliance was placed on *Nation Newspapers Limited -vs- Gibendi* [2002] eKLR.
55. On the issue of damages and the appellant's claim that he should have been awarded Kshs.10,000,000 it was submitted that this is inordinately high and punitive as it is trite that an award of damages should not enrich a party but restore the party to the position he was in before the alleged injury. The respondents submitted that should this Court find it fit to award any amount, then Kshs.200,000 as nominal damages should suffice as the appellant is serving a life imprisonment sentence at Kamiti Maximum Prison and as such cannot conduct any business to benefit himself and that in addition the appellant's reputation had been long been tainted with the conviction and cannot be reinstated by this Court. Reliance was placed on *Jacob Kipngetich Katonon -vs- Nation Media Group Limited* [2017] eKLR.
56. In conclusion learned senior counsel maintained that the appeal by the appellant has no merit and we were urged to dismiss the same with costs to the respondents.
57. This being a first appeal, the duty of this Court is reiterated as was set out in the decision of *Selle & another -vs- Associated Motor Boat Co Ltd & others* (1968) EA 123 which is to reconsider the evidence, re-evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings of the trial court if they were not based on evidence on record; where the said court is shown to have acted on the wrong principles of law as was held in *Jabane v Olenja* (1986) KLR 661, or where its discretion was exercised injudiciously as was held in *Mbogo & another -vs- Shah* (1968) EA.



58. The law on the elements and proof of defamation is settled. In this respect, a defamatory statement is defined in Halsburys Laws of England, fourth edition, volume 28 (Reissue) at paragraph 10 as:

“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 disparage him in his office, profession, calling, trade or business”.

A distinction is in this respect made between two forms of defamatory statements, libel and slander, with libel being a defamatory statement that is made in writing, printing or some other permanent form, and in which damage is presumed; while slander is where the defamation is in oral form, which requires proof of damage. Lastly for libel to be actionable, the defamatory statement that is made or conveyed by written or printed words or some other permanent form, is required to be published of, and concerning the plaintiff, and to a person other than the plaintiff.

59. This position was reiterated by this Court (Tunoi, O’Kubasu &Waki JJA) in Nation Media Group Ltd & 2 others -vs- John Joseph Kamotho & 3 others [2010] eKLR as follows:

“For the tort of defamation to succeed, the following elements must be proved by the claimant:-

1. the statement must be defamatory;
2. it must refer to the claimant, i.e. identify him;
3. it must be published i.e communicated to at least one person other than the claimant.”

60. Publication occurs when a defamatory statement is communicated to at least one person other than the person defamed. It is not contested that the subject publication was made by the 1st respondent and published by the 2nd respondent in the Nation Newspaper of 25th May 2016. Publication was, therefore, proved. It is a foundational element of defamation that without publication, no actionable defamation arises. In my view, the main issues in this appeal revolve around:

- a. Whether the statement in question was defamatory of the appellant; and if so,
- b. Whether the trial Judge erred in failing to award damages to the appellant.

61. With regard to the question whether the appellant was defamed by the publication of the story, I must emphasize that the law of defamation, or more accurately, the law of libel and slander is concerned with the protection of reputation. 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 that injure his reputation. (See Patrick O’Callaghan in the common law series: The Law of Tort at paragraph 25.1)

62. This Court in Selina Patel & another -vs- Dhiranji V. Patel [2019] eKLR, cited the case of John Ward -vs- Standard Ltd HCCC 1062 of 2005 which summarized the ingredients of defamation as follows: -

- a. The statement must be defamatory.
- b. The statement must refer to the plaintiff.
- c. The statement must be published by the defendant.



d. The statement must be false.

See this court's decision in *Nation Media Group & another v Hon. Chirau Mwakwere* (supra).

63. It is not in dispute that the publication was done by the respondents as pleaded. What is in issue is whether the same was defamatory of the appellant. This Court stated in *S.M.W. -vs- Z.W.M.* [2015] eKLR:

“A statement is defamatory of the person of whom it was 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.”

64. The test for whether a statement is defamatory is objective as it is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In *Halbury's Laws of England* 4th Edition Vol. 28 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.”

65. I have reproduced the relevant excerpts of the impugned article earlier and I see no need to repeat the same save for reiterating that at paragraph 13 the article stated; “Those involved in its formation or were part of it include Dickson Munene Mwangi.”

66. It is noteworthy that the respondents did not deny the contents of the publication but just maintained that the same was picked from an article that was in the public domain as reported and published by Kenya Human Rights Commission, which is an official government report. Further the respondents submitted that the information on the Kwekwe squad being involved in the shooting of Jacob Juma was made by Raila Odinga in his press statements concerning the issue. The 1st respondent further submitted that his other source of information was the Oscar Foundation, an NGO which had documented forced disappearances, arbitrary arrests and extra-judicial executions all linked to Kwekwe squad.

67. I, nonetheless, note that the law in this area is clear. The law of defamation in Kenya, as in other common law jurisdictions, holds that every publication of a defamatory statement gives rise to a distinct cause of action, irrespective of the author's identity. Accordingly, a person who republishes or disseminates a defamatory article assumes full responsibility for its contents as if it were their own publication. A defendant who republishes such material without verifying its truthfulness acts recklessly and is deemed to have published it with malice or without reasonable care, thereby forfeiting the statutory or common law defences available under the tort of defamation.

68. This Court in *Nation Media Group Ltd -vs Alfred N. Mutua* [2017] eKLR held that a publisher must exercise due diligence to verify the accuracy of information prior to publication and failure to do so amounts to malice. See also *Phineas Nyagah -vs- Gitobu Imanyara* [2013] eKLR. In *Kiplagat Kotut -vs- Rose Jebor Kipngok* [2019] eKLR, this Court reaffirmed that each republication of defamatory material is actionable, and liability attaches to one who repeats or adopts such statements as their own. Accordingly, a person who republishes or disseminates a defamatory article assumes full responsibility for its contents as if it were their own publication.



69. In my view, it matters not that the 1st respondent got the article from a document authored by the KNHRC or from an astute politician. A defendant who republishes such material without verifying its truthfulness acts recklessly and is deemed to have published it with malice or without reasonable care, thereby forfeiting the statutory or common law defences available under the tort of defamation.
70. Indeed, the 1st respondent admitted that he never sought to establish the truthfulness of the story from the appellant, who would have been readily available in prison. The law imputes malice where publication is reckless, careless, or made without due diligence. In this case I find the 1st respondent's conduct in this matter was not only careless, but also reckless and shrouded with a don't care attitude as to what impact the article would have on the person named therein. The law dictates that the defences of justification, fair comment, or qualified privilege are unavailable where the defendant failed to ascertain the accuracy of the information before dissemination. I am not persuaded that the 1st respondent acted honestly in the matter when he deliberately failed to seek the appellant's comments or side of the story before publishing the appellant's name in the impugned article. See also this Court's decision in *J.P. Machira t/a Machira & Co. Advocates -vs- Wangethi Mwangi & Another* [1998] eKLR.
71. The next germane point which arises from this matter is whether the appellant having been convicted of a totally unrelated offence and sentenced to Life imprisonment was capable of being defamed.
72. Article 28 of *the Constitution* of Kenya provides: Human dignity:
 “Every person has inherent dignity and the right to have that dignity respected and protected”.
- Article 51 provides: Rights of persons detained, held in custody or imprisoned;
 “(1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.”
- Article 33(3) on the other hand provides:
 “In exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”
73. All these Articles read together lead to the inevitable conclusion that prisoners and other detained persons are entitled to have their rights and reputation protected. The right to their reputation is not one of the rights excluded under the *Persons Deprived of Liberty Act*, 2014. Indeed, the right endures even while within prison walls.
74. This leads me to the question whether the appellant's reputation could be lowered in the eyes of reasonable, right thinking members of the society. As held by the High Court in *Musikari Kombo -vs- Royal Media Services Ltd* [2018] eKLR defamation protects “the intrinsic dignity and reputation of every person” under Article 28 of *the Constitution*. See also *Miguna Miguna -vs- Standard Group Ltd & 4 Others* [2017] eKLR where the Court observed that the law protects the reputation of all individuals, irrespective of social status or political persuasion. The fact that the appellant was a prisoner as at the time the defamatory article was published does not absolve the respondents of culpability. All it does is to impact the amount of damages awardable to him, in the event defamation is proved. One may ask why reputation could be important to a person serving life sentence. One of the main reasons is because prisoners are assessed for good behavior while in prison, and a good reputation may lead to



some privileges in prison and also impact on remission of the sentence, or commutation of the sentence when the President's power of mercy is exercised.

75. Before I get to the issue of damages, it is imperative that I discuss whether the words in question reduced the appellant's standing in the eyes of right-thinking members of society generally. The test for determining whether words are defamatory is objective and depends on how the words would be understood by "right-thinking members of society", meaning decent, and reasonable persons of fair mind and good sense. I do not think prisoners would fit that category as their moral or social outlook may not reflect that of the general public. I note that in this case, no prisoner testified in the matter, and I will not, therefore, consider that perspective.
76. The "reasonable man" was described 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."
77. An argument was advanced before the trial court that the article was not defamatory of the appellant because it spoke of the killing of Jacob Juma, who to everybody's knowledge was killed when the appellant was in prison, and the appellant could not, therefore, have been implicated in the death. That could be so, but it would also mean that the article was false in as far as it related to the appellant. On the other hand, the complaint was that the appellant was named, by his real name, as a founder member of the unlawful unit that was said to be responsible for Jacob Juma's death, and that was the appellant's complaint. I am satisfied that the article in question was on its face defamatory of the appellant.
78. The appellant called two witnesses; a close friend/business partner and his brother to show that indeed his reputation had been besmirched. When it comes to witnesses to attest to reputational damage, one cannot call people who did not know him before. It is difficult to call strangers who can be deemed to be impartial and objective. The appellant's witnesses told the court that the impugned article shocked them as they believed it and this caused them to re-examine the nature of their interaction with the appellant. His own brother said he had to go to the prison to confirm the truthfulness of the matter. It was only after explaining to them the true position, on different occasions that the two became comfortable in their relationship with the appellant.
79. Ultimately, my finding is that for the reasons given above, the article in question ticked all the necessary boxes to make it defamatory of the appellant.
80. This brings me to the question of damages. The learned Judge held that she would have awarded the appellant Ksh.200,000 as general damages had she found defamation proved. That was the sum proffered by the respondents herein citing the High Court decision in Jacob Kipnetich -vs- Nation Media Group (2017) eKLR. The appellant has contested that sum saying that it was too small, arbitrary and unsupported by legal precedents. I note that the sum was awarded as a nominal sum because although the plaintiff therein had proved defamation, there was no evidence to prove that he had suffered any loss.
81. In this case, my finding is that although the tort of defamation was proved, there was only minimal damage suffered by the appellant, and from the evidence adduced through his witnesses, after the appellant explained the true position to them, they believed him and their relationship reverted to what it was before publication of the impugned article. As stated earlier, there was no witness called from



within the prison walls to confirm if the prisoners and their bosses started viewing the appellant in a different light after publication of the said article. Also, given that the appellant is in prison and his interaction with the world of the “reasonable men” is restricted, I agree with the learned Judge that he only deserves nominal damages. I find no justification to interfere with the figure proposed by the trial court.

82. Ultimately, my finding is that this appeal partially succeeds. I set aside the judgment of the High Court dated 7th March 2019 and substitute therefor an order allowing the appellant’s suit to the extent that I issue a declaration that the article in question was defamatory of the appellant, and he is awarded Ksh.200,000.00 as general damages for defamation. The appellant is also awarded costs of this appeal and those before the High Court with interest at court rates. Interest on the decretal amount to accrue from the date of the High Court judgment until payment in full.
83. As my brother, W. Korir, J.A. is in concurrence, this will be the judgment of the Court.

Concurring Judgment of Korir, J.A

84. I have had the advantage of reading the judgment in draft of my sister W. Karanja, J.A. and I wholly agree with the reasoning and conclusion therein.
85. I therefore have nothing useful to add.

Judgement of Gatembu , JA

1. The background to this appeal, the facts, the evidence and the rival arguments presented before the trial court and before this Court are fully set out in the judgment of the Hon. Lady Justice Wanjiru Karanja, JA. which I have had the benefit of reading in draft.
2. In dismissing the appellant’s defamation suit against the respondents, the learned trial Judge stated as follows:

“The court is fully satisfied that there was nothing to remove the article complained of from the protection of the rolled up defence the defendants mounted of fair comment without malice on a matter of public interest. The plaintiff did not prove that there was malice on the part of the defendants and none could be inferred. That being so, the claim for defamation fails on that critical point.”
3. The critical question in this appeal, in my view, is whether the trial judge erred in reaching that conclusion bearing in mind that there is no dispute that the respondents did publish the material the appellant complained of.
4. Fair comment or honest comment is a defence to a defamation action that the words complained of are honest comment on a matter of public interest. As the editors of *Gatley on Libel and Slander*, 12 edition note in Chapter 12 the defence of fair comment is intended to promote vigorous free speech because, “there are matters on which the public has a legitimate interest or with which it is legitimately concerned” and that “on such matters any person should be able to comment freely, and even harshly, as long as he does so honestly and without malice.”
5. In reference to the defence of fair comment, this Court in the case of *Mshindi & Another v Ngenye* (Civil Appeal 603 of 2019) [2024] KECA 1332 (KLR) stated:

“The Supreme Court of Canada succinctly set out the requirements for a statement to be regarded as fair comment in the case of *Wilradeolia v Simpson* (2008) SCC 40, as follows:



- a. The comment must be on a matter of public interest.
- a. The comment must be based on fact.
- b. The comment though it can include inferences of fact must be recognizable as a comment.
- c. The comment must satisfy the following objective test: could any person honestly express that the opinion on the proved facts.
- d. Even though the comment satisfies the objective test, the defence can be deflated if the plaintiff proves that the defendant was actuated by express malice”

The defence of fair comment will therefore, avail where comments are made and not statements of fact. The comments so made must be on matters that are of public interest and the facts upon which the comments are based must be true, or substantially true.”

6. Similarly, the Supreme Court of England in the case of *Spiller vs. Joseph* [2010] UKSC 53; [2011] 1 A.C.852 summarized the elements that a person relying on the defence of fair comment needs to establish thus: the comment must be on a matter of public interest; the comment must be recognizable as comment, as distinct from an imputation of fact; the comment must be based on facts which are true or protected by privilege; the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based; and the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views.
7. The article published by the respondents that offended the appellant was titled “Notorious police squad blamed for the shooting.” It told “the story of Kwekwe Squad” described as

“the most notorious crack unit” that was implicated in forced disappearances, arbitrary arrests, extra judicial executions or elimination of persons. The author cited as source of information, the Kenya National Commission on Human Rights (KNCHR) as having connected Kwekwe Squad to almost 500 bodies deposited in various mortuaries and the Oscar Foundation, an NGO that “documented over 3,000 forced disappearances...”
8. It was reported in the article that before its disbandment, the squad left a legacy of murders, scared businessmen and intimidated police officers; that when the squad was no longer useful, its “spectacular fall from grace started” and one of its members was “charged with murder and sentenced to hang” and others “were suspended from the police force and left disgraced.” The article went on to state that the names of the squad’s officers and their exact numbers was never officially known and that “those involved in its formation or who were part of it include Dickson Munene Mwangi...” The Article concluded with a statement that “after a public outcry in November 2009, the then Minister of State for Provincial Administration and Internal Security...told Parliament that the Kwekwe Squad had been disbanded.”
9. I am persuaded that the article, viewed objectively, related to matters of public interest. Undoubtedly, matters of forced disappearances, arbitrary arrests, and extra judicial executions that were primarily the focus of the impugned publication are matters of grave concern and of great public interest in a constitutional democracy such as ours that is underpinned by the rule of law.
10. There is then the question of malice. It is trite that the essence of the tort of defamation, is damage to reputation as a result of malicious publication to third parties of matter that is false. The respondents



in their statement of defence, denied the assertion by the appellant that they maliciously published the article, asserting, as already indicated, that the words complained of consisted of expressions of opinion, were fair information upon facts which are matters of public interest.

11. Black's Law Dictionary, 8th edition defines malice as "the intent, without justification or excuse, to commit a wrongful act. Reckless disregard of the law or of a person's legal rights. Ill will; wickedness of the heart" and goes on to expound that malice in the legal sense imports the absence of all elements of justification, excuse or recognized mitigation and the presence of either an actual intent to cause the particular harm which is produced or harm of the same general nature or the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result.
12. The appellant attributed malice to the respondents in publishing the article on the basis that they were reckless in not reaching out to the appellant to verify the accuracy of the contents prior to the publication. There is sound principle underpinning that argument, namely that responsible journalism requires fact checking and publication of correct information.
13. In *Royal Media Services Limited & Another v Jakoyo Midiwo* [2018] KECA 421 (KLR), the Court noted that:

"One of the hallmarks of journalism is publishing accurate information. In the instant case, the record shows that what was published was a non-factual and erroneous information. There can never be public interest to air or broadcast incorrect or defamatory information. A caveat should be given that true and accurate information is not defamatory.

19. In *Godwin Wanjuki Wachira -v- Okoth* [1977] KLR 24, the High Court had this to say:

"I may go further and hold that failure to check records to ascertain the true position may very well be negligence on their part... the defendants must be deemed to have acted recklessly in publishing the distorted story... I hold that the author published the defamatory statement complained of... with reckless indifference as to whether it was just or unjust."

14. Failure to fact check may therefore amount to recklessness and malice can be inferred.
15. In the present case, the 1st respondent testified that he is an investigative journalist and that the 2nd respondent published his article in the Daily Nation of 25th May 2016 in which he wrote about "the notorious crack unit"; that the article was based on years of investigations in which he "interacted with sources within the police force and intelligence services" and that throughout the years he had been collecting "a list of former Kwekwe Squad officers, the men involved in its formation and other cops who closely worked with the unit"; that after compiling the list he set to meet "the mentioned. One of them was Dickson Munene Mwangi" and that he was motivated to look for him and wrote to the Inspector General of Police seeking more information; that the Inspector General never replied to those requests; that he "subsequently traced Mr. Mwangi to Kamiti Maximum Prison where he was serving a sentence for the murder of Dr. James Muiruri in cold blood on January 24, 2009." He stated that he made "several trips to Kamiti Maximum Prison seeking to talk to Mr. Mwangi" about his involvement with the Kwekwe Squad and that upon being granted permission by prison authorities "Mr. Mwangi declined to meet" him. The 1st respondent's testimony in that regard was not shaken on cross examination.
16. On his part, the appellant in his testimony readily stated that he was convicted for the offence of murder and imprisoned at Kamiti Maximum Prison. He stated in his witness statement of 30th October 2017 that "I have always been in custody of the Prison at Kamiti since 2011."



17. In effect, there was evidence before the trial court that the 1st respondent made efforts to fact check with appellant who, based on the record, declined to meet with the 1st respondent.
18. In the foregoing circumstances, I do not think that malice can be imputed on the part of the respondents. As this Court stated in *Kagwiria Mutwiri Kioga & Another vs. Standard Limited & 3 Others* [2015] KECA 349 (KLR): “The test to be applied ... is one of honesty. If the opinions were honestly held by the respondents, culpability does not attach.”
19. In the same vein, I would echo the words of Lord Denning in *Slim vs. Daily Telegraph* [1968] 1 All E R 497 on which the learned trial judge relied, that:

“If [the writer] is an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong or exaggerated or prejudiced, and no matter that it was badly expressed so that other people read all sorts of innuendos into it, nevertheless he has a good defence of fair comment.”

20. I would therefore dismiss the appeal.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2025.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED DEPUTY REGISTRAR .

