

**IN THE COURT OF APPEAL
AT NAIROBI**
(CORAM: TUIYOTT, MUCHELULE & JOEL NGUGI, JJ.A)
CIVIL APPEAL NO. 67 OF 2020

BETWEEN

PAUL K. MATUMBI.....APPELLANT

AND

HENRY K. TANUI.....RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya
at Nairobi (Sergon, J.) dated 13th December, 2019*

in

HCCC. No. 157 of 2008)

JUDGMENT OF THE COURT

1. This appeal arises from the judgment of the High Court of Kenya at Nairobi (*J.K. Sergon, J.*) delivered on 13th December, 2019 in ***Nairobi High Court Civil Case No. 157 of 2008***, in which the learned Judge entered judgment for the plaintiff, Henry K. Tanui (now the respondent), against the defendant, Paul K. Matumbi (now the appellant), in a claim for defamation. The learned Judge awarded the respondent Kshs 6,000,000 as general damages and Kshs 1,500,000 as exemplary damages, together with costs.
2. The dispute has its genesis in a letter dated 26th February, 2008 authored by the appellant and addressed to the Managing Director of Consolidated Bank of Kenya Limited, with a copy to the Chairman of the Board. At the material time, the respondent was employed by Consolidated Bank of Kenya as Head of Credit. The letter made

allegations impugning the respondent's academic qualifications as inauthentic; questioning his professional integrity; and accusing him of soliciting "handouts" under the guise of lunches and *harambees*. The respondent considered the contents of the letter false and defamatory and instituted proceedings in the High Court seeking damages.

3. The matter before the High Court followed a long and somewhat chequered procedural path, which it is necessary to recount in order to properly situate the issues that now fall for determination on appeal. The suit was filed in April, 2008. Interlocutory judgment was initially entered against the appellant upon failure to enter appearance, and the matter proceeded to formal proof. Subsequently, the suit was dismissed for want of prosecution. Upon application by the respondent, the dismissal was set aside on 9th February, 2016, the court being satisfied that the delay was not deliberate. The interlocutory judgment was also subsequently set aside, and the suit was ordered to proceed to full hearing on the merits.
4. The hearing took place on 16th September, 2019. The respondent testified as PW1 and adopted his written witness statement and documentary exhibits. He described himself as a professional banker, employed as Head of Credit at Consolidated Bank, holding a Bachelor's degree in Financial Services, a Master's degree, and various professional qualifications. He testified that he was recruited through a competitive process, that his position required vetting and approval by the Central Bank of Kenya, and that he enjoyed a reputation for professionalism and integrity.

5. The respondent testified that upon receipt of the impugned letter, he was summoned by the Managing Director and the disciplinary committee of the Bank to respond to the allegations. He denied ever soliciting bribes or handouts; denied that his academic qualifications were doubtful; and stated that he was cleared of any wrongdoing. He testified that the episode caused him embarrassment and distress, and that as a result he later left Consolidated Bank and joined Eco Bank (K) Limited at a lower salary.
6. The appellant testified as DW1. He admitted authoring and dispatching the letter. He explained that he was the proprietor of Prudential Valuers Limited, a firm empanelled by Consolidated Bank, and that he had become aggrieved by what he perceived as an unfair reduction in valuation work allocated to his firm. He testified that he had previously complained verbally to the Managing Director and was advised to put his concerns in writing. He maintained that the contents of the letter were true; denied malice; and asserted that the letter was written in good faith.
7. In a judgment delivered on 13th December, 2019, the learned Judge framed two issues: whether the respondent had established defamation, and whether he was entitled to damages. The court found that the letter was published to third parties; that the allegations concerning the respondent's academic qualifications and alleged solicitation of handouts were false; and that the appellant was actuated by malice, which could be inferred from the tone and contents of the letter and the circumstances under which it was written. Having established liability, the court awarded general damages of Kshs 6,000,000 and exemplary damages of Kshs

1,500,000.

8. Aggrieved by that decision, the appellant lodged the present appeal. This being a first appeal, our duty is to reconsider and re-evaluate the evidence and draw our own conclusions, while bearing in mind that we did not see or hear the witnesses. We will not interfere with findings of fact unless they are based on no evidence, on a misapprehension of the evidence, or on wrong principles. See ***Selle v Associated Motor Boat Co. Ltd [1968] EA 123*** and ***Jabane v Olenja [1986] KLR 661***.
9. The parties filed written submissions in support of their respective positions. At the plenary hearing held on 27th January 2026, Ms. Chepkurui, learned counsel, appeared holding brief for Mr. Khayega for the appellants, while Mr. Willy Enock, learned counsel, appeared for the respondent. Both counsel relied fully on their written submissions and indicated that they did not wish to make oral highlights.
10. In his submissions, the appellant contended that the learned Judge erred in finding that the respondent had proved defamation. He argued that the letter amounted to a complaint made to persons with a corresponding interest and was, therefore, protected by qualified privilege; that the respondent failed to prove falsity; and, critically, that no actual damage to reputation was demonstrated. On damages, the appellant submitted that the award of Kshs 6,000,000 was excessive, particularly given the limited publication, and that exemplary damages were wholly unwarranted.
11. The respondent opposed the appeal and supported the judgment of the High Court. He submitted that the allegations in the letter accused him of corruption, dishonesty, and professional

incompetence, all of which are defamatory *per se*. He argued that justification was not proved; that

qualified privilege was defeated by malice; and that the damages awarded were justified given his senior professional standing, the seriousness of the allegations, and the absence of any apology or retraction.

12. From the memorandum of appeal, the record, and the submissions, the following issues arise for determination:

- i. Whether the respondent proved the tort of defamation;
- ii. Whether the defences of justification and qualified privilege were available;
- iii. Whether the award of general damages was excessive; and
- iv. Whether exemplary damages were properly awarded.

13. We begin with the question of liability. In Kenya, the tort of defamation is now well settled, both as a matter of common law and as informed by the Constitution. In an action for defamation, a claimant must establish that the defendant published to a third party a statement of fact which referred to the claimant, was defamatory in nature in that it tended to lower the claimant's reputation in the estimation of right-thinking members of society, was false, and was published with the requisite degree of fault. Once liability is established, the court must assess damages with due regard to the nature and gravity of the defamation, the reach and mode of publication, the conduct of the defendant before and after publication, and the need to vindicate reputation while, at the same time, respecting the constitutional guarantee of freedom of expression under Article 33 of the Constitution.

14. Flowing from this formulation, a plaintiff in a defamation action must establish the following five elements.

- i. **First, defamatory meaning.** A statement is defamatory if it tends to lower the claimant in the estimation of right-thinking members of society generally, causes the claimant to be shunned or avoided, or exposes the claimant to hatred, contempt, or ridicule. This formulation, drawn from ***Gatley on Libel and Slander***, has been repeatedly cited with approval by various courts. For example, in ***Musikari Kombo v Royal Media Services Ltd [2018] eKLR***, this reaffirmed that the test is an objective one, to be applied from the standpoint of ordinary, reasonable members of society, and not from the subjective sensitivities of the claimant. Kenyan courts have further emphasized that the impugned words must be assessed as a whole, in their full context, and according to their natural and ordinary meaning as understood by reasonable readers or listeners, rather than through strained or technical interpretation. See also ***Miguna Miguna v Standard Group Ltd & 4 Others [2017] eKLR (HC)***.
- ii. **Secondly, reference to the plaintiff.** The claimant need not be expressly named in the publication. It suffices if reasonable persons acquainted with the claimant would understand the words complained of to refer to him or her. The governing consideration is identifiability, not universality of recognition. In ***SMW v ZWM [2015] eKLR***, the High Court held that defamation is established where those who know the plaintiff can, on a reasonable reading of the publication, identify him or her as the person referred

to. What matters is that the publication points, directly or by implication, to the claimant.

iii. **Thirdly, publication to a third party.** To succeed in a defamation claim, the plaintiff must demonstrate that the defamatory words were published, in the sense that they were communicated to at least one person other than the plaintiff, since defamation is concerned with injury to reputation in the eyes of others and not with private insult or affront. In ***Nation Media Group Ltd v Alfred Mutua [2017] eKLR***, this Court underscored that publication through mass media substantially aggravates defamation because of its reach, repetition, and permanence, particularly in the digital age. Kenyan courts have also recognised that each publication, including online republication, may constitute a distinct cause of action, subject to limitation principles.

Closely related to publication is the question of actionability and proof of injury, and here Kenyan law retains the classical common-law distinction between libel and slander. Libel, being defamation in permanent form — whether written, printed, broadcast, or digitally published — is actionable *per se*. In cases of libel, once the plaintiff establishes the other elements of defamation, injury to reputation is presumed, and the plaintiff is not required to prove actual damage in order to be entitled to general damages. This position has been affirmed in Kenyan jurisprudence, including in ***Selina Patani & Another v Dhiranji V. Patani [2019] eKLR*** (Court of Appeal) and ***Miguna Miguna v Standard Group Ltd & 4 Others***

[2017] eKLR (High Court). By contrast, slander — being defamation in transient form — is generally not

actionable without proof of special damage, unless it falls within recognised exceptions, such as imputations of criminal conduct, professional incompetence, or unchastity. The rationale for this distinction lies in the presumed permanence and wider reach of libel, as opposed to the typically fleeting nature of slander. This presumption of injury in libel reflects the law's recognition that reputational harm may be real yet difficult to quantify, and must be balanced, at the remedial stage, against the constitutional imperative under Article 33 to avoid disproportionate restriction of freedom of expression.

- iv. **Fourthly, falsity and the burden of proof.** To succeed in a defamation claim, the plaintiff must demonstrate that the defamatory statement was false, or at least not shown to be substantially true, since truth constitutes a complete defence to defamation and the law does not protect reputation founded on falsehood. While the claimant bears the overall burden of proving defamation, once the defendant pleads justification, the burden shifts to the defendant to prove the truth of the defamatory imputations. Truth is a complete defence, but it must be strictly proved. ***Phineas Nyagah v Gitobu Imanyara [2013] eKLR***, this Court held that defamatory allegations must be justified by cogent evidence, failing which liability attaches. Kenyan courts have consistently held that allegations of criminal, corrupt, or immoral conduct demand a high standard of proof; and that suspicion,

opinion, rumor, or unverified belief does not suffice. See ***George Mukuru Muchai v Standard Limited [2001] eKLR.***

- v. ***Finally, fault and malice.*** The law further requires proof of fault on the part of the defendant, in the sense that the defamatory statement must have been published with knowledge of its falsity, with reckless disregard for the truth, or without the exercise of reasonable care to verify its accuracy, depending on the circumstances of the publication and the availability of any recognised defences such as qualified privilege or fair comment.

Malice, while not an essential element of the tort of defamation, assumes legal significance where it may be inferred from the circumstances of publication and operates either to defeat defences such as qualified privilege or fair comment or in the assessment of damages.

Malice may be inferred from the circumstances of publication, including recklessness, failure to verify facts, knowledge of falsity, persistence in publication, or refusal to retract or apologise. In ***John Ward v Standard Ltd [2006] eKLR***, the High Court held that malice may be inferred where a defendant acts with indifference to the truth or publishes defamatory matter without reasonable inquiry. Where malice is established, it defeats qualified privilege and operates as an aggravating factor in the award of damages.

15. Applying the foregoing principles to the facts of the case on appeal, the impugned letter expressly named the respondent and accused him of having doubtful academic qualifications and of soliciting handouts in exchange for professional favours. Allegations of

corruption, dishonesty,
and lack of qualifications strike at the heart of a banker's professional

standing. Assessed objectively and in context, the words were plainly defamatory and referred to the respondent by name.

16. Publication was not in dispute. The letter was addressed to the Managing Director of the respondent's employer and copied to the Chairman of the Board. Communication of defamatory matter to even a single third party suffices, and publication to senior officers of an employer carries obvious reputational consequences.
17. On falsity, the respondent produced documentary proof of his academic qualifications. The appellant relied on an old curriculum vitae whose authenticity was disputed and which did not displace the evidence tendered by the respondent. The learned Judge was entitled to make a finding that the respondent's academic and professional qualifications were established. On the allegation of solicitation of handouts, the appellant's evidence stood uncorroborated. The defence of justification, therefore, failed: falsity had been established.
18. The defence of qualified privilege was similarly unavailable. While grievances may, in appropriate cases, be communicated to persons with a corresponding interest, such privilege is, in this case, defeated by malice. The appellant admitted writing the letter in anger, and, as the learned Judge correctly found, the tone and content of the letter went well beyond what was reasonably necessary to ventilate a grievance.
19. We also bear in mind the constitutional context. Article 33 of the Constitution protects freedom of expression but expressly excludes expression that violates the rights and reputation of others. The

impugned letter did not concern a matter of public interest but consisted

of unproven allegations communicated to the respondent's employer. The balance, therefore, tilts in favour of protection of reputation.

20. The appellant placed considerable emphasis on the submission that the respondent failed to prove actual harm to his reputation. That submission is doctrinally misplaced. Where, as here, the cause of action is founded on libel, the law presumes injury to reputation, and the plaintiff is not required to prove actual damage in order to be entitled to general damages. In any event, this is not a case where harm was merely presumed. The evidence shows that the respondent was summoned before his employer's Managing Director and disciplinary committee to respond to allegations of corruption and professional impropriety, subjected to a formal disciplinary process, and experienced distress and reputational anxiety that ultimately led him to leave his employment for a lower-paying position. On both doctrine and fact, the submission that no harm was proved cannot stand.

21. Consequently, applying the principles we detailed above to the facts before us, we are satisfied that the respondent established each of the constituent elements of the tort of defamation. The impugned letter was published to third parties, namely the Managing Director and Chairman of the respondent's employer, thereby meeting the publication requirement. The letter expressly identified the respondent and made allegations that, assessed objectively and in context, were plainly defamatory, as they impugned his academic qualifications, integrity, and honesty in the discharge of his professional duties. The allegations were shown to be false: the

respondent produced documentary proof of his qualifications, and the accusation of soliciting “handouts” was unsupported by any corroborative evidence. The publication was made

with the requisite degree of fault, the appellant having acted at least recklessly as to the truth of the allegations and without reasonable verification, and malice was properly inferred from the tone, content, and circumstances of the publication, thereby defeating any claim to qualified privilege. Taken together, these findings inexorably lead to the conclusion that liability for defamation was fully established.

22. We, therefore, find no basis to interfere with the High Court's finding on liability.

23. Having affirmed liability, we turn to the question of remedies. The principles governing damages in defamation are now well settled. An award of damages in defamation serves three related but distinct purposes: *firstly*, to compensate the claimant for injury to reputation; *secondly*, to console the claimant for the distress, anxiety, humiliation, and hurt to feelings occasioned by the defamation; and *thirdly*, to vindicate the claimant's reputation in the eyes of the public. This tripartite purpose finds expression, among others, in ***John v MGN Ltd [1997] QB 586***, a formulation repeatedly cited with approval by Kenyan courts, including in ***Miguna Miguna v Standard Group Ltd & 4 Others [2017] eKLR***.

24. In assessing damages, the trial court exercises judicial discretion, but that discretion must be exercised in accordance with established principles and is, therefore, amenable to appellate review. As the Court of Appeal stated in ***Kemfro Africa Ltd t/a Meru Express Services v A.M. Lubia (No. 2) [1982-88] 1 KAR 727***, an appellate court will interfere with an award of damages where the trial court took into account an irrelevant factor, failed to consider a relevant factor, or

where

the award is so inordinately high or low as to represent an erroneous estimate. Relevant considerations in defamation include the gravity of the defamatory imputations; the extent, mode, and duration of publication; the standing, profession, and public profile of the claimant; the conduct of the defendant before and after publication, including apology or retraction; and the need for proportionality so as not to unduly chill lawful expression protected under Article 33 of the Constitution. See ***Nation Media Group Ltd v Alfred Mutua [2017] eKLR (CA)***.

25. With respect to general damages, Kenyan law recognises that, particularly in cases of libel, injury to reputation is presumed and need not be specifically proved. Once liability is established, the claimant is entitled to an award of general damages to compensate for reputational harm and emotional distress. However, the quantum must remain proportionate and comparable, bearing in mind that limited publication ordinarily attracts lower awards than widespread or sensational publication, even where the allegations are serious. See ***Selina Patani & Another v Dhiranji V. Patani [2019] eKLR*** and ***Samuel Ndungu Mukunya v Nation Media Group Ltd [2015] eKLR***.

26. Aggravated damages may be awarded where the defendant's conduct has increased the injury to the claimant's reputation or feelings beyond that which would ordinarily flow from the defamatory publication itself. Such conduct may include malice, recklessness, persistence in the defamation, refusal to apologise or retract, or conduct at trial that humiliates or further injures the claimant. Aggravated damages are compensatory, not punitive, and

are intended to reflect the enhanced

harm suffered. See ***Phineas Nyagah v Gitobu Imanyara [2013] eKLR*** and ***John Ward v Standard Ltd [2006] eKLR***).

27. Exemplary damages, by contrast, are punitive in nature and are awarded only in exceptional and narrowly circumscribed circumstances. ***Rookes v Barnard [1964] AC 1129*** and have been consistently adopted in Kenyan jurisprudence. They include cases where the defendant's conduct was oppressive, arbitrary, or unconstitutional; where the defendant calculated that the defamatory publication would yield profit exceeding any compensation payable; or where exemplary damages are expressly authorised by statute. See ***Nairobi Star Publication Ltd v Elizabeth Atieno Oyo [2018] eKLR*** and ***Standard Ltd v G.N. Kagia t/a Kagia & Co. Advocates [2010] eKLR***.

28. Finally, in all cases, the assessment of damages in defamation must be undertaken with due sensitivity to the constitutional context. While reputation is a value deserving of strong protection, remedies must be proportionate and carefully calibrated so as not to impose an unjustified chilling effect on freedom of expression guaranteed under Article 33. The law of defamation does not exist to punish speech as such, but to provide redress where speech unjustifiably injures reputation. This balancing imperative informs both the availability and the quantum of damages.

29. Before turning to the facts of this appeal, it is necessary to restate the applicable principles governing the award of damages in defamation, which this Court now affirms. *First*, damages in defamation are primarily compensatory and vindicatory, not punitive.

Second, aggravated damages are awardable only where the defendant's conduct has demonstrably increased the injury to reputation or feelings beyond

the ordinary consequences of defamation. *Third*, exemplary damages are exceptional and may only be awarded where the case falls within the narrowly defined categories recognised in law; malice, without more, is insufficient. *Finally*, all awards of damages in defamation must be proportionate and carefully calibrated so as to vindicate reputation without imposing an unjustified inhibitory effect on freedom of expression under Article 33 of the Constitution. Trial courts are enjoined to give explicit reasons when departing from these principles.

30. Turning to the present appeal, there can be no serious dispute that the respondent was entitled to an award of general damages. This was a case of libel, actionable *per se*, involving allegations that struck directly at the respondent's professional integrity as a senior banker. As we have already observed, the respondent was summoned before his employer's Managing Director and disciplinary committee to respond to allegations of corruption and professional impropriety. He testified, without contradiction, that the episode caused him embarrassment, distress, and reputational anxiety. The evidence further shows that he subsequently left his employment and took up a lower-paying position elsewhere. This was, therefore, not a case of purely presumed harm; there was tangible evidence of actual injury and distress.

31. That said, the assessment of general damages must also be guided by the principles of proportionality and comparability. The defamatory publication in this case, though serious in content, was limited in scope. It was communicated to two senior officers of the respondent's employer and did not enter the public domain. There

was no evidence of republication, media circulation, or wider dissemination. Kenyan jurisprudence has consistently drawn a distinction between cases of

limited publication and those involving widespread or sensational publication, with the latter attracting higher awards. In light of the confined reach of the publication, an award at the higher end of the spectrum called for careful justification, and we have not found any on the record.

32. We are also mindful that while the respondent experienced distress and career disruption, the evidence shows that he continued his professional career in the banking sector. The evidence did not establish permanent professional ruin or complete loss of livelihood. In these circumstances, while a substantial award of general damages was justified to vindicate reputation and compensate for distress, the award of Kshs 6,000,000 fell outside the range of proportionate and comparable awards for cases involving limited publication.

33. Applying the consolidated principles set out earlier, and bearing in mind the seriousness of the allegations, the respondent's professional standing, the limited extent of publication, and the need to avoid disproportionate awards that may unduly chill lawful expression, we are satisfied that an award of Kshs 3,000,000 as general damages strikes the appropriate balance. It sufficiently vindicates the respondent's reputation, compensates for the distress suffered, and reflects the gravity of the libel, while remaining proportionate to the scope of publication.

34. We now turn to the award of exemplary damages. The High Court awarded exemplary damages primarily on the basis that the appellant acted maliciously and failed to apologise. While those factors may be relevant in considering aggravated damages, they do

not, without more,

justify an award of exemplary damages. As we have explained, exemplary damages are punitive in nature and are reserved for exceptional cases falling within narrowly defined categories, such as where the defendant's conduct was calculated to yield profit exceeding any compensatory award, or where the conduct was oppressive, arbitrary, or unconstitutional.

35. In the present case, there was no evidence that the appellant stood to gain financially from the defamatory publication, nor that the publication was part of a calculated scheme to profit from the respondent's injury. Equally, the case does not fall within any category of oppressive or arbitrary abuse of power that would warrant punitive sanction. The appellant was a private individual airing a grievance, albeit in an improper and malicious manner. The threshold for exemplary damages was, therefore, not met.

36. In our view, the learned Judge erred in principle by treating malice, without more, as sufficient to ground an award of exemplary damages. That approach risks collapsing the carefully maintained distinction between aggravated and exemplary damages and expands the latter beyond its proper doctrinal limits. Consistent with Kenyan and comparative authority, the award of exemplary damages in this case cannot be sustained.

37. We accordingly set aside the award of exemplary damages in its entirety.

38. In closing, we underscore that the law of defamation occupies a delicate but indispensable place in our constitutional order. Reputation is not a mere private interest; it is a constituent element of human dignity and social standing, and its unjustified injury calls

for judicial redress. At

the same time, the protection of reputation must be balanced against the equally vital value of freedom of expression, which sustains democratic dialogue and accountability. The task of the court is, therefore, not to punish speech as such, but to calibrate remedies that vindicate dignity without chilling legitimate expression. Properly understood and applied, the law of defamation serves this dual function: it affirms that words matter, that reputational harm is real, and that justice lies not in excess, but in proportion.

39. In the result, the appeal partially succeeds. The finding on liability is affirmed. The award of general damages is reduced to Kshs 3,000,000. That amount shall attract interest as awarded by the High Court. The award of exemplary damages is set aside. Costs of the suit in the High Court shall be borne by the appellant. Each party shall bear its own costs of this appeal.

40. Orders accordingly.

Dated and delivered at Nairobi this 13th day of February, 2026.

F. TUIYOTT

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**..... JUDGE
OF APPEAL**

A. O. MUCHELULE

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**. JUDGE OF
APPEAL**

JOEL NGUGI

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR.