

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 74 OF 2016

AMB. ZACHARY MUBURI-MUITA.....PLAINTIFF

-VERSUS-

THE STANDARD GROUP LTD.....1ST
DEFENDANT

IAN WAFULA.....2ND
DEFENDANT

BEN KITILI.....3RD DEFENDANT

LINDA OGUTU.....4TH
DEFENDANT

JOHN ALLAN NAMU.....5TH
DEFENDANT

BETTY KYALO.....6TH DEFENDANT

NAJMA ISMAEL.....7TH DEFENDANT

JUDGMENT

Pleadings

1. By a **Plaint** dated **18/11/2015** and amended on **14/10/2022** **Amb. Zachary Muburi-Muita** (*hereafter the Plaintiff*) sued **The Standard Group Ltd, Ian Wafula, Ben Kitili, Linda Ogutu, John Allan Nyamu, Betty Kyalo** and **Najma Ismael** (*hereafter the 1st, 2nd, 3rd, 4th, 5th, 6th & 7th Defendant/Defendants*) for alleged defamation and sought judgment against them jointly and severally for-;

- a) *A permanent injunction restraining the Defendants and each of them by themselves, their servants, agents' employees or otherwise howsoever from further broadcasting, publishing or causing to be broadcasted or published any defamatory statement against the Plaintiff in any form or manner whatsoever.*
- b) *A permanent injunction compelling the Defendants and each of them to erase and remove from their various posts, website, blogs or their other forms of electronic and social media of any form or nature whatsoever the publication or any similar words or statements or content of like effect relating to the Plaintiff.*
- c) *An apology of similar prominence as the publications.*
- d) *General damages.*
- e) *Aggravated damages.*
- f) *Exemplary and or punitive damages.*
- g) *Such orders as will assuage, to the extent possible, the grave loss of reputation, esteem and standing that the Plaintiff has suffered on account of the publications.*
- h) *Costs of and incidentals to the suit.*
- i) *Interest on (d) and (f).*
- j) *Any other remedy that this honorable Court may deem fit to award.*

2. The Plaintiff avers that on **19/03/2015, 20/03/2015, and 21/03/2015** the Defendants broadcasted and published or caused to be broadcasted and published in the prime-time television news broadcast of the station under the station's feature series on corruption "**Graft Diaries**" various statements of and concerning the Plaintiff which were reported

by the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants. That the broadcast was further repeated and emphatically publicized on the station's social media pages on the internet, specifically, Twitter and YouTube.

3. It was the Plaintiff's averment that the impugned broadcast of 19/03/2015 stated in part as follows-:

Ben Kitili;

Speaking of the fight against corruption, let's now go to part two of the Graft Diaries, Our special focus on corruption as revealed by the Public Accounts Committee. How would you picture a complete petrol station with its pumps and fuel tanks converted into office suites? Well, this was the case according to State House. The Public Accounts Committee did find that State House officials claimed to have paid 85% of the cost of constructing a petrol station that never, was never even completed in the first place. In tonight's episode of Graft Diaries, KTN's Ian Wafula looks at the State House Petrol Station that never was.

Ian Wafula;

Its sole purpose was perhaps to fuel and maintain vehicles attached to the President and his staff. But we may never know, as the intended workshop and petrol station meant to be put up within the confines of State facility was never to be.

In May 2011, a Contractor was entrusted with the project at a price 105 Million Shillings for a period of 1 year; A report by the Parliamentary Public Accounts Committee reveals a rather disturbing finding that not only had the project stalled just one month after it started but also about

89 Million Shillings had been paid by the 30th of June, 2013, two years and a month after the project stalled. That was 85% of the contract value for close to nothing in return. Assuming that the project went on and 85% of it was put up as per the payment, according to Rura, a development Company, it would mean that at this point, some of the crucial elements for a standard Petrol Station would be up. For instance, one underground storage tank for each Petroleum product provided at the station, dispensing pumps which should essentially be covered, a service bay, washing bay and offices for the station's staff would be up in place, The Public Accounts Committee found that none of these had been put up, but there is more.

Neither had the Contractor been issued with a default notice nor had the process of recovering the settled payments commenced, Further, the report says that there was no evidence to show that the Contractor had submitted a Performance Guarantee as required under the General Conditions of Contract nor had the Guarantee been recalled and discharged against uncompleted works.

However, in a twist events of the Committee says that State House on its part claims to have opted to convert the 85% of the construction of the Petrol Station into offices for the increased number of staff begging a number of questions. How were payments of 89 Million Shillings made without the mandatory certification by the Ministry of Public Works as required? And how exactly would a Petrol Station one month into its construction be turned into offices?

At the time the of payments between the year 2011 to 2013, three individuals had occupied the office the of State House Comptroller from which State House budgets are approved. The Committee recommended that the Accounting Officer responsible for accounting the irregular payments to the Contractor without proof of work done be surcharged for the full sum of the public funds lost and further disciplinary action be considered by appointing authority and/or with the Director of Public Prosecutions. Further, the Ethics & Anti-Corruption Commission was invited to investigate the unclear circumstances of the construction of the project.

As to whether the close to 89 Million Shillings would be accounted for, or whether investigations into the mysterious circumstances under which this money was paid will be investigated is still a matter of great concern. However, Graft Diaries continue to inform you just how your money is working for you. Ian Wafula, KTN, Nairobi.

Linda Ogutu:

Mmmm, how your money is working for you. That story by Ian Wafula forms the basis of our Big Question tonight where we are asking you, should the former State House officials refund the public money lost in that scandal?

Ben Kitili:

And to keep the conversation going SMS or Tweet your Yes or No response plus a brief comment to the number 22155, The twitter hashtag is #GraftDiaries. You can also tweet @lindaogutu and @benkitili.

Linda Ogutu:

Right, so remember we started this yesterday Graft Diaries. Tonight, we are focusing on State House. Like I said the amount we are looking at is 105 Million shillings. Let's look at the men who are being accused in this particular project.

Aaah, we are looking at Dr. Nelson Githinji, we are looking at Dr. Nelson Githinji, Zachary Muburi-Muita and Lawrence Lenayapa. I will tell you why these 3 men are the accused in this particular project and part of the thing that you need to know is that the Comptroller of State House is also the accounting officer and the authorizing officer of all Presidential expenditure,

So, if you've heard the story by Ian Wafula, let's give the context of that particular story. This is a project that commenced on the 23rd of May, 2011. It was supposed to end on the 23rd May, 2012. However, a review of contract details in January, 2014 indicated that the contract stalled in June, 2011 just a month after commencement. Here is where there is a problem. In June 30th 2013, the contractor was paid 88,826,396/-, Put in mind that this project stalled a month after it was meant to commence. Now there is a twist, funny twist really to this particular project.

In 2013, apparently State House claims to have decided to convert 85% of the completed Petrol Station to create space for increased number of staff. Well, of course we are looking at this putting in mind the report by the Parliamentary Public Accounts Committee and that Committee if I may quote, asks, how exactly were works customized for a Petrol Station and a work station at 85

completion level meaning that elements like fuel stations and pumps would already have been installed so easily converted to office suites.

So, let's look at the accusations the three men are facing. Failing to issue a default notice. Not initiating the process to recover the money lost. Not ensuring the contractor submitted a performance guarantee as would be expected, and paying 88,826,396 Shillings without certification of works.

So, these are the accusations of course facing the three men,

Let's look at the recommendations of the Parliamentary Accounts Committee. That Accounting Officer involved in all this, should be surcharged for public funds lost. There should be disciplinary action from the appointing authority and the Ethics and Anti-Corruption Commission should commence investigations into all this,

So, remember, we started this whole process with you yesterday so of course let's now take a look at our wall of suspects, wall of accused.

Now, yesterday we looked at the Ministry of Internal Security and Provincial Administration, the amount we were looking at was 2.8 Billion. So, yesterday we had Mutea Iringo and of course putting in mind that Mutea Iringo served as Permanent Secretary in the Ministry of Internal Security and Provincial Administration then we had an Accounting Officer, Ben Kihia. However, tonight, we are adding one more man to this list, Francis Kimemia. He is now the Secretary to the Cabinet. Remember Kimemia

left the Ministry of Internal Security and Provincial Administration in late January, 2012, If you remember the table that we had yesterday, the table that had some of the withdrawals that came to 2.8 Billion, some of the withdrawals were made during Kimemia's tenure that is why we are including him in this particular list. So, from the Ministry of Internal Security and Provincial Administration we have Mutea Iringo, we have Francis Kimemia and of course we have Ben Kihia. So we are looking at State House tonight and of course we are adding Dr. Nelson Githinji, we are adding Zachary Muburi-Muita and Lawrence Lenayapa the man who stills serves at the State House Comptroller as we speak. And of course, remember that Graft Diaries continues on KTN and it is the basis of our Big Question tonight. We are asking you, if you think these particular men, these three men should take responsibility for what happened in State House.

And of course, this is bringing a lot of question on really how the Country is handling corruption, how the executive is handling corruption, is the executive really serious on handling corruption in the Country?

Ben you wanna take it from there?

Ben Kitili:

Indeed, Linda thank you very much. Remember to keep that conversation going, The Twitter hashtag is #GraftDiaries."

4. Whereas the broadcast of 20/03/2015, next to an image of the Plaintiff and his name appearing in the caption **“Wall of the Accused”** stated in part that-;

Betty Kyalo:

Now those figures that we have been releasing since Wednesday are quite mind-boggling and I want to bring in my colleague John Allan Namu. John, the first day we spoke of 2.9 Billion, yesterday we spoke of 100 million, 105 million actually, today we're talking about 5.7 billion.

John Allan Namu:

And if the public keeps this tally running they'll understand just how it is that 30 to 40 percent of Kenya's GDP can just go missing, And it's in all of these different pockets, but as you can see the figure is every day, it's breath taking and it gets worse. Let me just get into why this money went, is unaccounted for. And the figure like Betty said is Five Billion, Seven Hundred and Ninety-Five Million, Twenty-Three Thousand, Nine Hundred and Eighty Shillings unaccounted for by the Independent Electoral and Boundaries Commission. Keep in mind that this is including the amount of money that was spent and accounted for but challenged by the Public Accounts Committee with respect to the procurement of BVR kits, of evids?, of ERT's for the election. Remember there were issues with that procurement, so if you add that to that figure it is absolutely staggering. But let's get into why this figure adds up to this amount. And the first figure that we need to look to is the majority of this Four Billion, Six Hundred and Ninety Million, One Hundred and Sixty-Eight Thousand, Nine Hundred and Eight Shillings and that is for irregular hire of transport by the regional officers of the IEBC during the voter registration period. Now, the

accounting officer, who was James Oswago at the time the C.E.O, explained this a way as being the fact that they needed this travel to be done by the regional officers in order for the voter registration drive to take place but nonetheless there was no audit trail in terms of the paper trail accounting for almost the entire Amount for that Five Billion, Nine Hundred and Seventy Five Million and there are the recommendations.

The Accounting Officer should submit vouchers by December 2014 or be personally held liable. Now this is the story with all of the amounts that we have been seeing missing right from the Internal Security Budget to the petrol station that wasn't built, in State House yesterday. Lots of money going in but no paper trail, no audit. The second figure that we need to look to is Ninety-Six Million, One Hundred and Fifty-Two Thousand, Three Hundred and Eighty-Nine shillings and this, again, irregular foreign travel expenditure. Now what happened was, the IEBC dipped into the domestic travel expenditure budget and used it for foreign travel. Again, the accounting officer tried to explain this away but again, where is the audit trail? And the recommendation, appointing auditor, no, appointing authority should be held accountable, (sic) should hold accountable the Accounting Officer, who was James Oswago at the time, for the amount, if he cannot prove where this amount was spent. Now the amount of money that's been going missing, the third figure that we have today is 8,015,063,53 and that was in excessive basic salaries. Again, reason being we don't really have

credible reasons according to the Public Accounts Committee with respect as to why these amounts have been spent. Again, the accounting officer should be held liable for these amounts, I can assure you that there are figures in here which we haven't been able to include including 1,380,000 for entertainment allowances for 17 officers that was irregular, so there also are amounts running to the smaller millions and not just the billions.

Now, who are we adding to the wall of the accused today? Let's take a look. We started with Mutea Iringo, we went to Francis Kimemia and Ben Kihia that's the Senior Accountant in the Ministry of Internal Security. We have Dr. Nelson Githinji as well as Zachary Muburi-Mita and Lawrence Lenayapa, all of them having been State House Comptrollers and today the few face on the list, James Oswago- Someone who has charged with at least being the accounting officer at a time when 5,795,000,000 of your money, tax payers' money went missing during 2012 to 2013 during those audited accounts and we still don't have that money Betty. It's really the most shocking story to come out since the Goldenbergs and the Anglo-leasing's and it helps you understand that it isn't just the one scandal that takes money away from Kenya, it is in these pockets in various government ministries and as you saw with civil society today, the thing keeps on rolling, the gravy train is still moving and nobody's trying to stop it Betty,

Betty Kyalo:

Do you know Namu, our Big Question tonight is, should this be declared a national disaster? From those figures and what we have been covering throughout the week, I think that the answer is yes.

John Allan Namu:

Most definitely. 'Taking off my hat as a journalist and putting on mine as a Kenyan, definitely! We need to be worried as to how our money is being spent. The 5,795,000,000 could pay for the salary doctors of almost twice over. The annual budget for doctors' salaries is 3.2 Billion. Keep in mind in Lamu, there isn't a single doctor, right now as we speak,

Betty Kyalo:

Sickening,

John Allan Namu:

It is exactly that.

Betty Kyalo:

Quite sickening and tomorrow we have a continuing coverage of the same.

John Allan Namu:

Alright.

Betty Kyalo:

Alright. Thank you very much John Allan Namu there of course breaking down for us how IEBC cannot account for 5.7 Billion shillings. The hashtag on Twitter is #GraftDiaries or Friday Briefing where you can tweet us or share your thoughts."

5. It was further averred that the broadcast in its entirety, in the natural and ordinary meaning created by imputation

innuendos of and or concerning the Plaintiff, of which, had no basis of truth or in fact. That the broadcasts were malicious and calculated to injure, disparage and lower the esteem with which right-thinking members of society in general regarded and held the Plaintiff.

6. That the Defendants intended to make money by publishing the sensational article to maliciously discredit his good name and reputation, thus causing him to suffer loss, embarrassment, discomfort and damage with the risk of criminal prosecution or investigation. It was equally averred that despite demand, the Defendants failed, refused and neglected to make good or address any of his demands.
7. **In their statement of defence dated 16/05/2016**, the Defendants admitted to the publication to the extent that the same related to quoting what was broadcasted however denied the other key averments in the plaint. The Defendants went on to aver that in so far as the words and in the natural or ordinary meaning or otherwise consisted of expressions of opinion, were fair comment and fair information upon facts, which were matters of public interest.
8. The suit proceeded to full hearing during which only the Plaintiff called evidence in support of the averments in his pleadings.

Plaintiffs Case and Evidence

9. **Amb. Zacahry Muburi**, testified as **PW1**. He began by stating that he has been the Executive Secretary of the International Conference Great Lakes Region (ICGLR) for four (4) years and

at the time was the Director of the Directorate of the Great Lakes Region at the Ministry of Foreign Affairs, in Nairobi. He proceeded to adopt his witness statement dated 18/11/2015 as his evidence in chief meanwhile adduced the documents appearing in his list of documents of even date, supplementary list of documents and video clip as **PExh. 1, 2 & 3** respectively.

10. It was his evidence that he has never been the State House Comptroller or served in any related capacity as stated in the clip whereas at the time he was serving in Addis Ababa, Ethiopia as the special representative of the UN Secretary General. He stated that the publication was false and none of what was stated therein related to him.

11. Under cross-examination, he confirmed that misuse of public funds is a matter of public interest however, he had no knowledge of the report or its contents thereof. He iterated that at publication he was serving as the Director of the Great lakes Region at the Ministry of Foreign Affairs whereas the falsity of the publication greatly affected his career however did not have evidence of the same.

In re-examination, he maintained that the effect of the publication was that it damaged his reputation and was viewed negatively by many people.

12. Dr. Francis Okuthe-Oyugi, testified as **PW2**. He identified himself as the Executive Director and Head of Mission at the Levy Mwanawasa Regional Center for Democracy and Good Governance, a regional think tank under International Conference Great Lakes Region (ICGLR). He too proceeded to

adopt his witness statement filed in Court on 06/05/2019 as his evidence in chief.

13. The gist of his evidence was that he had known the Plaintiff since 2003 and that on 19/03/2015 he happened to watch a news article on corruption titled “**Graft Diaries**” broadcast on KTN News. That the article insinuated that at some point between 2011 – 2013, the Plaintiff was the State House Comptroller and that as a result of certain payments made by the Plaintiff in the sum of Kshs. 88,826,396/- there had been a corruption scandal and the latter acting in concert with others was responsible for the said scandal.
14. He stated that prior to the broadcast, he held the Plaintiff in extremely high esteem, and having known him as a career diplomat, his impression of the Plaintiff changed after watching the broadcast, to wit, he viewed him as grossly incompetent and shamelessly corrupt. That he contacted the Plaintiff, a few days after the broadcast, to find out when he had been appointed as State House Comptroller, wherein the Plaintiff informed him that the broadcast had been fabricated and had never been appointed or served in the capacity as reported therefore he could not be involved in the scandal.

Under cross-examination, he confirmed having watched the broadcast on YouTube.

15. At the close of the trial, directions were taken on filing of submissions. Neither of the parties complied with the said directions.

Analysis and Determination

16. The Court has carefully considered the respective parties' pleadings, the evidence adduced and deductively crystallizes the following **issues for determination-**:

- a. Whether the Plaintiff has made out a case for defamation against the Defendants;**
- b. Whether the defence of fair comment are available to the Defendants; and**
- c. Whether the Plaintiff is entitled to an award of damages, and if so, the quantum.**

Whether the Plaintiff has made out a case for defamation against the Defendants and whether the defence of fair comment is available to the Defendants?

17. 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..."

18. 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."

19. 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)** 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. 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."

20. The Court of Appeal in the case of **Swanya v Toyota East Africa Ltd & another [2009] KECA 379 (KLR)** 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.*

21. Later, the Court of Appeal in **Patani & another v Patani [2019] KECA 480 (KLR)** 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.”*

22. 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. In this case, ingredients (ii) & (iii) above have not been contested, as the Defendants readily admitted to publishing the words in question in their statement of defence. The two (2) questions in dispute and to be considered contemporaneously are whether the publications were defamatory and or false. Ordinarily,

alongside the above, the Court would equally consider the defence advanced by the Defendants however as earlier noted the Defendants failed to call any evidence in support of the averments in their pleadings despite being accorded the opportunity.

- 23.** It is not in dispute that the Defendants ran a broadcast on “**KTN**” titled “**Graft Diaries**” which mentioned the Plaintiff by name. Further, despite the contents of the broadcast, at the time, **PW1** had been a long serving and internationally respected diplomat widely recognized in the East African region and globally. In particular he maintained that he had never served as State House Comptroller or in any related capacity as stated therein whereas at the time he was serving in Addis Ababa, Ethiopia as the special representative of the United Nations, Secretary General.
- 24.** That said, the gist of the impugned article was captured earlier in this judgment, to wit, the same does not require restatement at this juncture. However, what this Court garners to be the Plaintiffs case is that the impugned publication tacitly by innuendo referred to him-; *that he was an incompetent person with no regard for the law; a callous person without integrity; a public officer devoid of any ethics; a member of a cabal of persons who are self-focused and disregard the right and interest of Kenyans at large; dishonest and corrupt; and an unscrupulous and unconscionable public officer.*
- 25.** The broadcasts employed varied choices of words and phrases starting with the title that was captioned “**Graft Diaries**”. The broadcast further captured in part the words and phrases

“fight against corruption”, “construction of a petrol station that never was”, “89 Million Shillings would be accounted for”, “should the former State House officials refund the public money lost in that scandal”, “I will tell you why these 3 men are the accused in this particular project” “contractor was paid 88,826,396/-, Put in mind that this project stalled a month after it was meant to commence” “Now there is a twist, funny twist really to this particular project” “let's look at the accusations the three men are facing. Failing to issue a default notice. Not initiating the process to recover the money lost. Not ensuring the contractor submitted a performance guarantee as would be expected, and paying 88,826,396 Shillings without certification of works” “who are we adding to the wall of accused” “Zachary Muburi-Muita ..., all of them having been State House Comptrollers”.

- 26.** My understanding of the publication as particularly relates to the Plaintiff is that the Defendants were reporting on a finding of the Parliamentary Public Accounts Committee concerning a stalled State House Petrol State Project initially contracted in May 2011 for Kshs. 105 Million. According to the broadcast, the project stalled a month after it began despite approximately 85% of the contract value having been paid in June of 2013; no key infrastructure in respect of the project had been set up. Whereas despite payment of Kshs. 88,826,396/-, there was allegedly no evidence of a default notice issued to the contractor; recovery proceedings for payments made; submission or enforcement of a performance guarantee; proper certification of works by the Ministry of Public Works before Payment. Further, while the broadcast did not state that the

Plaintiff had been arraigned or convicted of any offence, it did associate him with the committee's adverse findings for further action and possible recovery of funds, given that he had served at the time as State House Comptroller.

- 27. PW1** was categorical that he had never served in the position purported in the broadcast and went to great lengths to demonstrate the above vide **PExh.2** which contained among other a copy of his *Curriculum Vitae* and *Letter dated 06/08/2010 from the Sec. Gen of the United Nations* appointing the Plaintiff to the United Nations Office to the African Union, among other documents relating to his diplomatic career.
- 28.** With the above in reserve, concerning defamation, 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”.*
- 29.** By their pleadings, the Defendants stance is that the words and in the natural or ordinary meaning or otherwise consisted of expressions of opinion, were fair comment and fair information upon facts which were matters of public interest. However, no evidence was offered in support of the averment in their defence.
- 30. PW2**, on his part was of the view that the Plaintiff was a stellar career-serving diplomat having known him since 2003. That

prior to the publication he held the Plaintiff in extreme high esteem, and having known him as a career diplomat, his impression of the Plaintiff changed after watching the broadcast, to wit, he viewed him as grossly incompetent and shamelessly corrupt. He called the Plaintiff after the broadcast to find out when he had been appointed as State House Comptroller, wherein the Plaintiff informed him that the broadcast had been fabricated and had never been appointed or served in the capacity as reported.

- 31.** It necessitates address at this juncture, that concerning the defence of fair comment on a matter of public interest, the **Court of Appeal in Mshindi & another v Ngenye [2024] KECA 1332 (KLR)**, referenced the decision emanating from the Supreme Court of Canada in **Wilradeolia v Simpson (2008) SCC 40** wherein the Court succinctly set out the requirements for a statement to be regarded as fair comment, as follows, that-;

“39.:”

- i. The comment must be on a matter of public interest.*
- ii. The comment must be based on fact.*
- iii. The comment though it can include inferences of fact must be recognizable as a comment.*
- iv. The comment must satisfy the following objective test: could any person honestly express the opinion on the proved facts.*
- v. 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.”

32. Subsequently, **Gatembu, JA in Munene v Gisesa & another [2025] KECA 2115 (KLR)** while equally addressing himself to the defence of fair comment, cited the Supreme Court of England decision of **Spiller vs. Joseph [2010] UKSC 53; [2011] 1 A.C.852** where it was observed that-;

“6the 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.

2. Applying my mind to the above dicta, firstly-; the Defendants failed to call any evidence to shore up their defence; secondly, the broadcast seemed to impute the fact that the Plaintiff has served as State House Comptroller whereas there was no evidence to the same; and thirdly, I am inclined to agree that the imputation created by the broadcast was that the Plaintiff was involved in the scandal of corrupt and or the imputation as pleaded in

Paragraph 8 and 9 of the Plaintiff's plaint therein. The latter was fortified by PW2's evidence in the face of the fact that the defence offered to call no evidence.

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 earlier set out herein in reference to the Plaintiff appeared to sensationalize or dramatize the broadcast. 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 broadcast falsely imputed against the Plaintiff serious and or criminal conduct that ordinarily would invite penal sanctions, all without first verifying and or justifying the true facts.

33. As is, there are identifiable queries with respect to the accuracy of the reporting, the Parliamentary Public Accounts Committee Report was never tendered as evidence before this Court meanwhile and at the risk of repetition, the broadcast appears to have exceeded its factual basis.

34. 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 Plaintiff. The Defendants are therefore found to be liable for the tort of defamation against the defendants jointly and severally.

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

35. 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.”*

- 36.** In the case of **Kamunge v Gachari [2016] KEHC 5119 (KLR) , 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.”

37. Here, it is not in doubt that the publication touched on the Plaintiff's integrity, honour and reputation by demeaning him before right thinking members of the society, going by **PW2's** evidence. Further, the impugned broadcast potentially had the effect of wide reach among viewers of "KTN". It would equally seem that the Defendants have to date not retracted the broadcast or tendered an apology to the Plaintiff yet the imputation created by the article must have affected the Plaintiff's reputation nevertheless.
38. As earlier, neither party filed submissions despite being accorded ample opportunity to do so.
39. 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."
40. 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.”

- 41.** Here, it is not in dispute that the Plaintiff having served as Ambassador, was a Career Diplomat engaged in public service for Country and equally accorded state accolades such as Moran of the Order of the Burning Spear (MBS) for his service to Country.
- 42.** Therefore, taking guidance from decisions in **Muthaura v Nation Media Group Limited & another [2025] KEHC 2386 (KLR)** wherein the claimant (held various respectable positions in the public service, including but not limited to ambassadorial positions had also received and was conferred with various medals and honors, such as Elder of the Golden Heart (EGH) and Moran of the Burning Spear (MBS) was awarded Kshs. 6,000,000/-, **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/-, **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/- is justified in the circumstance.**
- 43. 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.”

- 44.** The gravitas of the contents of the publication herein called for prior verification of facts by the Defendants, or comment by the Plaintiff, if any. The failure by the Defendants to verify and or justify the facts resulted in injury to the Plaintiff’s reputation. The Plaintiff is thus **entitled to exemplary damages** assessed at **Kshs. 1,000,000/- (One Million)**.
- 45.** Having awarded exemplary damages, the Court will decline to award aggravated and punitive damages, there being no basis laid to warrant such an award. In any event, any humiliation, distress, injury to reputation, insult, outrage or malice of the publication, that would be the purport of an award of aggravated damages, in my view, has sufficiently been compensated in the earlier award of general damages.
- 46.** The Plaintiff also seeks a permanent injunction restraining the Defendants and each of them by themselves, their servants, agents’ employees or otherwise however from further broadcasting, publishing or causing to be broadcasted or published any defamatory statement against the Plaintiff in any form or manner whatsoever. However, the Court notes that the alleged defamatory statements were broadcasted close to ten (10) 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 the said permanent injunction is denied.

- 47.** Meanwhile, as may concern a permanent injunction compelling the Defendant and each of them to erase and remove from their various posts, website, blogs or their other forms of electronic and social media of any form or nature whatsoever the publication or any similar words or statements or content of like effect relating to the Plaintiff, the same appears justified in the circumstance, in light of this Court's earlier finding. Therefore, the prayer is accordingly allowed.
- 48.** Lastly, with respect to the relief seeking an apology of similar prominence as the publications, 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 [1] BCLR I [CC].”***

Final Disposition

- 49. Accordingly, the Court finds and holds the Defendants jointly and severally liable for the tort of defamation against the Plaintiff and enters judgment accordingly as hereunder -:**

a) General damages	Kshs. 5,000,000/-
b) Exemplary damages	Kshs. 1,000,000/-
Total	Kshs. 6,000,000/-

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

50. Finally, 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 Plaintiff to be borne by the Defendants

Orders accordingly.

Delivered Dated and Signed at Nairobi this 19th day of February, 2026.

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JANET MULWA.
JUDGE