

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 385 OF 2014

WANJA GICHURA WAMBUGU T/A

W.G WAMBUGU & CO. ADVOCATES.....
.....**PLAINTIFF**

-VERSUS-

KANZE DENA.....1ST DEFENDANT

LULU HASSAN.....2ND DEFENDANT

ANNE MAWATHE.....3RD DEFENDANT

LILIAN MULI KANENE.....4TH
DEFENDANT

SYLVIA CHEBET.....5TH
DEFENDANT

WILLIS RABURU.....6TH DEFENDANT

ROYAL MEDIA SERVICES LTD.....7TH DEFENDANT

JUDGMENT

Pleadings

1. By a **Plaint** dated **12/11/2014**, **Wanja Gichura Wambugu t/a W.G. Wambugu & Co. Advocates** (*hereafter the Plaintiff*) sued **Kanze Dena, Lulu Hassan, Anne Mawathe, Lillian Muli Kanene, Sylvia Chebet, Willis Raburu** and **Royal Media Services Ltd** (*hereafter the 1st, 2nd, 3rd, 4th, 5th, 6th & 7th Defendant/Defendants*) for alleged defamation and sought judgment against Defendants for-;

a) General damages

- b) *Damages on the footing of aggravated or exemplary damages*
- c) *A permanent injunction to restrain the Defendants by themselves, its respective servants or agents or howsoever from publishing, printing, circulating or distributing allegations that the Plaintiff is corrupt or has abused his office as a government officer to confer benefits to himself or others has flouted the procuring law and rules in the processing or award of the tenders or a tender by the Department of Defence.*
- d) *Costs.*
- e) *Interest on (a), (b) and (d).*
- f) *Any other relief or reliefs that this honorable Court may deem just to grant.*

2. The Plaintiff states that on **14/11/2013, 15/11/2013** and **16/11/2013**, the Defendants for their financial benefit or greed, falsely and maliciously broadcast or caused to be broadcast and published of and concerning the Plaintiff, her business and picture on television the following **words in Kiswahili-**;

“ Naamu karibu tena mtazamaji,wenyewe wasema mnyonge hana haki,na mbuzi hapati,tuanzie sasa swala la kisikitishala mtoto wa miaka tisa aliyepata ajali mbaya baada ya kugongwa na gari la moshi lakini alibahatika kulipwa fidia na shirika la reli lakini Duncan Murigi ambaye hii leo ako na miaka ishirini naminne hana chochote cha kuonyeshwa kwamba alilipwa karibu shilingi milioni kumi.

Ingawaje baadhi ya pesa hizo baadaye zilipotea kupitia malipo kwa mawakili na inadaiwa pia kuwa zingine zilitoweka kupitia kwa mikono ya babake.

Ann Mawathe amekuwa mbioni kutafuta ninani haswa wa kuwajibika kuhusiana na malipo hayo.

Tulikuwa tunakaanga huko nini Thika Railway Station saa mimi nilikuwanga na nini nataka kuvuka kwa reli time ilikuwa inarudi nyuma nilikuwa naogopa zile container,saa venye mimi nilivuka nikaanguka naye ilikuwa inarudi nyuma ndio sasa ikanikanyanga.

Sasa mimi ni Mungu tu naombanga tu Mungu,nikimwambia Mungu.....salama.

Nataka kuwa nini computer engineer.

Jamii yake Duncan ilijitahidi na kumpeleka hospitalini kupata matibabu kila neno analoliandika ni hakikisho kwa nafsi yake kwamba yote yanawezekana na kweli amejihidhirishia hayo kwani alifanya mtihani wake wa kidato cha nne mwaka wa elfu mbili na kumi na moja na kupata alama ya C- akitumia mdomo tu kuandika .

Hakika chake kimekuwa ni kilio cha haki ambacho kimefika hadi kwenye mahakama ya nchi.

Venye kwanza tulishtakingi walikuwa wanasema wanilipe 18 million lakini Kenya Railways ikalipanga 7 million.Sasa venye sisi tulianza kufuatilia hizo 7 million ndio sasa ati nini,venye sasa zililipangwa hizo 7.3 ndio huyo lawyer aliachanga hata kuongea na sisi akasema ati hizo pesa ndizo anajilipa ati sisi tufuatilie hizi zingine.

Kulingana na ile maandishi walikuwa wamekubaliana (instruction note) ilikuwa imesema 20% ya pesa zenye

atapata.Kwa hivyo 20% haiwezi ikakuwa 20% ya zile pesa zote zenye Court iliamua itaweza ikakuwa 20% zile pesa yenye alipata. Na huyu Wanja Wambugu aliweza akapata milioni saba na alikuwa anatakikana achukue 20% ya hizo pesa zenye alikuwa amecollect .Lakini yeye mwenyewe anasema ile 20% inatakikana ikuwe 18 million hata kama hakuipata.

Baba mtoto akalalamika kwetu na tuko na hukumu tuko na jurisdiction ya kuchukua malalamishi tunafungua kesi alafu tunafanya upelelezi.Tulipofanya upelelezi tukaona kwamba hizi pesa ambazo zilikuwa zimekubalianwa hii 20% zilikuwa pesa mingi na ndipo tukakata hizo pesa kidogo tukasema kwamba unapaswa urudishie mtoto pesa Fulani lakini sasa wakili naye akakata rufaa akaenda High Court kufanya Appeal na juzi Court ikasema kwamba sisi tulikuwa tumekosea kama kana chama cha wanasheria hatutengeguza hiyo pesa ya wakili.

Juhudi za kumpata wakili W.G. Wambugu katika afisi zake hapa jijini Nairobi hazikufua dafu,lakini kiu cha kupata haki hakikukatika,jamii ya Duncan ilienda kwa wakili mwingine Naikuni Ng'aa ambaye pia aliingia katika juhudi za kuhakikisha Duncan analipwa fidia yake yote kama ilivyo kubaliwa na Mahakama ya shilingi million kumi na nane nukta tano.

Tuliweza kufikisha malalamishi ama kesi kotini.Na baadaye baada ya mzozo ama mda mrefu tulikuja tukakubaliana kati ya sisi na Railway,mawakili wa Railway wakasema basi wanilipe shilingi milioni tisa kati

ya hizo shilingi milioni tisa niliweza kuwalipa milioni nane na hiyo ingine basi tukatumia kaa vile tulikuwa tumeskizana kama ada ama fees yetu ya kazi ile ambaye tulikuwa tukiwafanyia

Kwa ufupi babake Duncan alipokea karibu shilingi milioni kumi kutoka kwa mawakili wake. Juhudi za kumpata mzee huyu Ngovi Mwasa hazikufua dafu katu.

Tunateseka sana miaka hii ni mingi hiyo kitu ni kama ilitoka ha ha ha kwa akili yangu ndio nangonjea nangonjea si nitakufa tu nikingonjea.

Mi hizo pesa ningepatiwa ningesoma mpaka penye naweza halafu tena zingine zingenunulia artificial zingine juu hizi sasa hata zimeshakuwa ndogo. Na wheelchair ingine juu hii hata imeshaharibika.

Siku, majuma, miezi na sasa miaka kumi na mitatu imepita tangu ajali kutokea mwana makosa yake makubwa ni kutojua, kutojua kwamba kiwango cha mwisho cha pesa alizotarajia kutoka kwa wakili wake kililipwa mwezi March mwaka huu katika akaunti ya pamoja ambaye imekuwa ikitumika kulipa fidia yake. Kwa upande wa mawakili kesi yake imefungwa.

Katika kijiji cha Ithiani eneo la Matuu Kaunti ya Machakos Duncan Murigi anazidi kurutubisha ndoto yake kwamba siku moja huenda akawa mhandisi masikitiko makuu ni kuona jinsi anavyo mhandisi masikitiko makuu ni kuona jinsi anavyo papatika ingawaje tabasamu lake linaficha ukweli wa mambo. Uchungu wa maskini millionaire.

ANNE MAWATHE CITIZEN NIPASHE.”

3. That the English fabrication made on **15/11/2013** at 9 o'clock in the three days stated as follows-;

“And Duncan Murigi was nine years old and in class 2 when a train run over him cutting off booth his arms and legs

He successfully sued the Kenya Railways and a Court awarded him 18 million in compensation but Duncan only received 840,000/= shillings of the amount and his lawyer and father took the rest of the money in legal fees and custodial trust.

Today Duncan who is 24 years old lives in abject poverty in a Matuu Village his Dad reportedly having deserted the family for a new wife while the lawyer who claimed 7 million of the compensation as legal fees secured a Court Order allowing her to keep the money.

Silvia Chebet traces the paper trail of Murigi's stolen compensation.

Mimi nilikuwanga na nini nataka kuvuka kwa reli saa venye mimi nilivuka nikaanguka naye ilikuwa inarundi nyuma ndio sasa ikanikanyanga.

It would take 2 years and a million shillings pending treatment to bring him to this shape and legal battle ensued.

On filing the case the matter was negotiated it was an out of court settlement whereby he was awarded 18,542,756/= shillings as general damages.

Tulisikia mzuri sana tukaona sasa huyo mototo atasoma apate kila kitu na akae mzuri maisha yake saa tukangonjea wapi hakuna.

He was nine years old and in class two when the train crushed him changing the course of his life. Even then he never thought of quitting school.

Venye nilitibiwangwa after miaka mbili ndio nikaenda class 3 nini huko Joy Town Thika. Sasa hapo ndio nilianza kuteseka juu nilikuwanga na kaa peke yangu na sikuwanga na mtu wakunisaidia juu wazazi wangu hawakuwa na pesa za kuajili mtu. Saa hapo ndio nilikuwanga nateseka sana lakini Secondary ndio tuliendanga na brother-angu.

With no limbs to hold a pen he beats all odds to not only write again but with speed and with his mouth. He competed against his able peers in the National Kenya Certificate of Secondary Examination and scored a C- that was in 2011.

He scribbles a note on my notebook a sentence that describes his frustrating journey through the corridors of justice.

2003 ndio tuliendanga kwa court na ndio kulikuwanga na nini ruling sasa ndio Judge ali rule akasema nipatiwe 18 million na Kenya Railways halafu ndio sasa Kenya Railways wakapatiana 7.3 million sasa venye huyo mama alipatanga hizo pesa akasema ati hizo ndio anajilipa.

The 1st installment was paid to the law firm of W. G. Wambugu & Co. Advocates the amount which was paid was 7,048,860/= shillings.

Wanjiku Warui first met Duncan at a street in Thika about 5 months ago she felt pity on him and took responsibility for his food, clothing and shelter.

..... even before he met them here I don't know what they were eating.

At the time Duncan's father had hired another lawyer to pursue the 7 million that Wanja Wambugu's law firm had secured.

Venye sasa ruling ili nini ilitoka ndio sasa nini huyo lawyer venye alipataiangwa pesa ndio aliitanga mamangu na babangu wakaenda huko kwake aka sasa ndio akawaambia nini kuna pesa zimetoka lakini hata hizo pesa kwanza yeye ndiye anajilipa saa ati sisi tungojee pesa zetu.

Siku moja tukaenda mbila kutuita tukaenda wakati ile alituona hapo akatuma hiyo watu wake wakuandika makarani akwaambia watuambie tuende hataki kutuona hapo.

Our argument were that as much as 18 million was awarded she only collected 7 million and therefore her fee was supposed to be based on the amount she collected and as much as there was an instruction note on how much percentage of how much she was supposed to collect as her fee she needed not to go and tax for the whole amount.

Law Society Disciplinary Committee we made a determination and said no you have overcharged and we taxed the bill downwards until we indicated that the amount she is supposed to be entitled to was 1.5 about 1.3.

It had been made an order that you need now to pay the balance but of course she exercised her right to go to the

High Court and the High Court disagreed with The Law Society and the High Court said that we ought not have taxed the bill.

Wanja Wambugu is legally off the hook. She owes nothing to Duncan anymore but the family still cannot comprehend this.

Vile naona yeye anateseka mini nasikia uchungu an hiyo wakili anakuranga pesa ya watu afikirie sana habari ya watoto yake vile anatesa huyu hata watoto wake wataweza teswa na mungu.

We sought Wanja Wambugu's comment on the matter but she ignored our calls and we never found her in her office.

The next lawyer Louise Wahome who had embarked on recovering the 7 million from Wanja's law firm managed to secure a fraction of the award but he would deduct 555,000/= shillings from the amount for his legal fee.

But he only managed to collect 489,000/= but these amount equally were never released to the victim that's Duncan Mwasa.

On the stand Duncan' concentration was on the 7 million shillings forgetting that Kenya Railways still owed him nearly 13 million shillings.

Of Course, the amount did attract interest by the time we were pursuing the balance the amount was now coming to 24 million.

We visited several law firms that dealt with Duncan' Murigi's matter seeking to trail the lost compensation award. When we spoke to lawyer Naikuni Ng'aa we got part of the puzzle solved

What I decided is that I settle for the balance of 18 million minus now the 7 million and that's now what we grappled with in court and eventually we succeeded although after upon succeeding it Railway really bargained we negotiated and we had to come down now from 12 to 9 million, which the family was involved all the time.

How was this money remitted to Duncan?

I insisted that this amount of money has to be deposited in a joint account.

This notwithstanding some Bank transaction documents in our possession indicate deposits made to the account of one Ngovi Mwasu.

It is by this time of course Duncan had lost all his limbs, his legs and hands and I knew that he would not get any other meaningful source of income I advised them that the best way is to invest the amount of money in an economic income generating venture and they informed me that they bought a property in Thika which would be generating monthly rent for them. At the same time, I insisted that it would be important that they bought a suitable motor vehicle to be ferrying Duncan from one place to the other by this time he was studying in Mombasa.

And I upon agreeing with them we went with them from showroom to showroom looking for a suitable motor vehicle eventually they bought a van.

You did see the car that was bought from Duncan?

Yes, I did , I saw the vehicle it was Voxy van very suitable for Duncan because of the use of the wheelchair we

needed a vehicle that had more space folding the wheelchair movement.....the vehicle I did see it.

But Duncan has no car to show nor any money to sustain himself he claims his father Ngovi Mwasa has since cut communication with him and the rest of the family, the father reportedly acquired a new family and is thought to live in Kitale. Duncan remains hopeful that he will still get his compensation, the reality is the case is now closed and all the money Kenya Railways owed has been fully settled.

Of course despite the dynamics of that case we still hope that something can be done, at least to help Duncan's situation."

4. It was further averred that each broadcast lasted a minimum of fifteen minutes whereas the words and pictures referred to and were intended to and did in fact expressly refer to the Plaintiff. That by the natural and ordinary meaning of the words published on the forestated dates, injured the Plaintiff's character, credit, reputation and brought her into public scandal, odium and contempt. The Plaintiff goes on to aver that the Defendants printed the said statement intentionally and maliciously in order to ruin the Plaintiff's reputation her career and source of livelihood
5. **In their statement of defence dated 18/12/2014**, the Defendants aver that save for the fact that the 7th Defendant broadcast news through its "**Citizen TV**" denied publishing the story, words or broadcast as pleaded and the other key averments in the plaint. The Defendants went on to aver that,

in any event, publishing of the story, words or broadcast was aired in good faith, without malice, in public interest and not intended to injure the character of the Plaintiff whereas the publication was privileged and a fair comment on a matter of public interest.

6. It was further averred that pursuant to **Article 33** and **34** of the **Constitution**, the public is entitled to know and to have information that shocks and disturbs their conscience about public figures in position of the Plaintiff. The Defendants are also entitled to the freedom to impart such information to the public therefore the plaint discloses no reasonable cause of action against them.
7. The suit proceeded to full hearing during which both parties called evidence in support of the averments in their respective pleadings.

Plaintiffs Case and Evidence

8. **Alice Wanja Wambugu**, testified as **PW1**. She began by identifying herself as the proprietor of W.G. Wambugu & Co. Advocates and being an advocate of 39 years standing meanwhile proceeded to adopt her witness statement dated 12/11/2014 as her evidence in chief.
9. The gist of the Plaintiff's evidence was that she was counsel for the claimant in a matter where judgment was delivered in favour of the claimant as against Kenya Railways Corporation in the sum of Kshs. 18 million. She proceeded to file a Judicial

Review proceedings towards commencing execution and recovered Kshs. 7 million. That the matter was eventually taken away from her law firm, to wit, the claimant filed a claim against her firm before the Law Society Disciplinary Committee, upon hearing the complaint, it was eventually dismissed for lack of substance, before the High Court, as the parties had already agreed on legal fees and concluded the matter.

10. She went on to state on 15/11/2013 and 16/11/2013, the Defendants aired a story of a claimant, whose money had been stolen by the legal representative who had filed a case on his behalf. That the story was malicious and untruthful given that the alleged money had not been stolen on the premise of the fact that the decretal sum had not been fully recovered. It was her evidence that the Defendants did not seek any clarification from her whereas the information was equally available from Court records.
11. That as a legal practitioner, honesty is key, whereas the publication portrayed her as involved in criminal activity. It was her evidence that at time publication she was a mother with children and member of church where she offered her services. That the accusations in the broadcast were damaging, to wit, she has since not recovered from the same. She adduced into evidence the documents appearing in her **trial bundle documents dated 01/11/2023 as PExh.1.**
12. **On cross examination**, she confirmed that the impugned publications were aired on 15/11/2013 and 16/11/2013 whereas all the Defendants participated. She confirmed having

acted for one **Duncan Ngovi Mwasa in HCCC. No. 2441 of 1999**, which vide a judgment delivered on 22/05/2003 an award of Kshs. 18,542,756/- plus costs and interest was granted. That her fees were taxed however she was to retain 20% of the judgment sum. She iterated that the Defendants did not contact her prior to publication of the broadcast. In the video clip, the Chair of the Law Society of Kenya, at the time, commented in respect of the publication. She stated that the disciplinary committee proceedings were quashed. That as a result of the publication she was humiliated and demeaned as an advocate whereas the latter rely on their reputation.

- 13. In re-examination**, she maintained that the publication condemned her for misappropriating client's money, however the same was unfair, malicious as she did not steal and has never stolen any money from a client.
- 14. Jane Njeri Onyango**, identifying herself as an Advocate of the High Court with more than 38 years of practice, testified as **PW2**. She proceeded to adopt her witness statement dated 28/10/2023 as her evidence in chief. It was her evidence that she had known the Plaintiff, at a personal level, for more than 40 years. That upon hearing the broadcast of 14/11/2013, she walked into the Plaintiff's chamber, as they were neighbors, whereupon the Plaintiff told her that the publication was false and malicious. It was her testimony that after watching the broadcast she was skeptical of their friendship.
- 15.** It was her further evidence that at the time, the Plaintiff as a lawyer was representing her husband in a matter and upon

watching the broadcast they were worried as to what would transpire with her husband's matter. She added that in their professional circle, Mrs. Kambuni Advocate, called asking about the broadcast whereas young advocates equally inquired, if senior lawyers could do what was broadcasted, what would be expected of them. She further stated her associates in her firm also inquired of the issue alongside some Magistrates.

- 16. On cross examination,** she iterated having known the Plaintiff for more than 40 years and that they are still friends. She confirmed having watched the video clip after which she contacted the Plaintiff, who gave her, her side of the story. Upon the explanation she believed the Plaintiff's side of the story.
- 17. In re-examination,** the Plaintiff stated that since airing of the clip her husband had doubts about the Plaintiff who represents them in a legal matter.

Defendants Case and Evidence

- 18. Duncan Ngovi Mwasu** testified as **DW1**. He adopted his witness statement dated 01/04/2016 as his evidence in chief. The gist of his evidence was that he was involved in an accident involving a train in 1998, and as a consequence lost both his hands and legs. He sued Kenya Railways Corporation and was awarded Kshs. 18 million however his advocate on record in the matter did not remit the proceeds of the judgment to him. He confirmed to have seen a video of the broadcast on TV on 14/11/2013, 15/11/2013 and 16/11/2013.

- 19. On cross-examination,** he confirmed that on 14/11/2013 “Citizen TV” asked viewers to see a story that would be aired on 15/11/2013 and 16/11/2013. It was his evidence that he wanted his advocate in the matter to give him the balance of the proceeds in respect of the award he received in compensation. That the headline was “Stolen Compensation”. He stated that at the time of his accident he was 9 years old, to wit, his father instructed the Plaintiff to act on his behalf. He stated that when compensation was made, his father received the money whereas the advocate received Kshs. 7.3 million.
- 20.** He went on to state that there was agreement between his father and the Plaintiff that 18% of the award would go to the advocate as legal fees however he was not in possession of the said agreement. His father lodged a complaint at the Advocates Disciplinary Committee over the award. Later, his father instructed another advocate to act in the matter whereas there is a balance of Kshs. 1.4 million that he has never been paid. He stated that his father now deceased, was alive at time of publication of the broadcast.
- 21. In re-examination,** he stated that the total cheques from Kenya Railways was Kshs. 7,048, 806.40/- whereas there is a balance of Kshs. 1.4 million that remains unpaid by the Plaintiff.

Defendants case and evidence

- 22. Ann Mawathe** testified as **DW2**. She identified herself as a journalist by profession and working with Defrontera Media Ltd. She proceeded to adopt her witness statement dated

03/03/2016 as her evidence in chief, meanwhile confirmed working for the 7th Defendant at the time of the impugned publication. She adduced the documents appearing in Defendants **bundle of documents dated 06/04/2016** as **DExh.1-9**.

- 23. On cross-examination**, she confirmed that on 14/11/2013, she invited viewers to watch a story that would be aired on 15/11/2013 and 16/11/2013. That she gathered information on the broadcast from all relevant people. She confirmed having not interviewed the **DW1**'s father as she was informed that he had disappeared from the home a year before the interview. That in the absence of information from **DW1**'s father, the Defendants used the documents availed by the family to prepare and air the broadcast.
- 24.** She stated that they never got to hear the Plaintiff's side of the story despite visiting her chambers and leaving their contract. That they were unable to reach the Plaintiff on her mobile number or landline meanwhile equally got information from the Law Society of Kenya. She confirmed that the broadcast was titled "Stolen Compensation", to wit, the story was about the trouble **DW1** underwent. That the purport of the broadcast was not about the Plaintiff but rather about **DW1**'s struggle whereas part of the story was about how the Plaintiff received compensation from Kenya Railways Corporation.
- 25.** It was her further testimony that they spoke to the Chair of The Law Society, then, who told them that the fees that had been agreed upon were legal. She stated that the disciplinary committee taxed the Plaintiff's fees at Kshs. 1.3 million

however the High Court held that the latter ought not to have taxed the fees, and proceeded to absolve the Plaintiff from the complaint. She stated that prior to the interview she did not find out the content of the case before airing the same on television. It was her evidence further that the people interviewed in the broadcast were family to **DW1**.

- 26. In re-examination**, she iterated having interviewed the chair of The Law Society of Kenya, and that the publication was true. She equally reiterated that the broadcast title "*Kilio cha Mnyonge*" was hers whereas the one titled "*Poor Millionaire*" was done by 6th Defendant.
- 27.** At the close of the trial, directions were taken on filing of submissions. The parties duly complied with the said directions.

Plaintiff's Submissions

- 28.** Counsel for the Plaintiff restating the history of the matter, pleadings and evidence by the respective parties meanwhile condensed his submissions into six (6) cogent issues.
- 29.** On whether the words referred to the Plaintiff, counsel submitted that the impugned broadcast clearly identified the Plaintiff and therefore satisfied the identification requirement in defamation. That the broadcast specifically referenced the Plaintiff's name, her law firm and allegations that she stole compensation from a client.
- 30.** Concerning whether the words were defamatory, counsel posited that the broadcast portrayed the Plaintiff as a thief, corrupt advocate, lawyer who breached fiduciary duties, a

person unfit to practice law which had the effect of lowering her reputation before other clients, colleagues in the legal profession, members of her church and community. That evidence of reputational harm was shored up by **PW2** who stated that her husband stopped giving the Plaintiff work whereas she lost clients, her family faced stigma and was sidelined within her church and professional circles.

- 31.** As to whether the broadcast bore the defamatory meaning pleaded, while calling to aid the English decisions in **Jones v Skelton [1963] 1WLR 1362** and **Lewis v Daily Telegraph Ltd [1964] AC 234** counsel argued that the broadcast implied that she fraudulently converted client's funds, committed a criminal offence whereas the manner in which the broadcast was presented enhanced the defamatory aspects of the publication. The decision in **Wanja Gichura Wambugu t/a Wambugu & Company Advocates v Nation Media Group [2017] KEHC 5313 (KLR)** was cited in the latter regard.
- 32.** Submitting on whether the Defendants can rely on the defence of fair comment or qualified privilege, counsel posited that the defences fail both procedurally and substantively. While citing **Order 2 Rule 7(2)** of the **CPR**, counsel stated that the defendants in urging the defence of fair comment failed to specify which words are statement of facts, which was comment and the facts supporting the said comment. Counsel called to aid the decision in **Nation Media Group Limited v Njuru alias Joseph Muya [2023] KEHC 26363 (KLR)** to posit that the defences are inadmissible given that the Defendants failed to provide verified factual foundation for the broadcast. It was further posited that the Defendants acted with malice

which negates both the defence of privilege and fair comment. That malice on part of the Defendants was manifested by the fact that they failed to verify Court records showing the Plaintiff had been cleared, conducted selective interviews designed to discredit the Plaintiff, sensationalized the broadcast and failed to contact the Plaintiff before publication. The Zambian decision in **Moving Unit Video Television (t/a Muvi TV Ltd) v Francis Mwiinga Maingaila (Appeal No. 140 of 2016) [2019] ZMSC 247** was equally cited in the latter regard.

- 33.** On whether the Plaintiff suffered damages warranting compensation by this Court, counsel submitted that the 3rd Defendant failed to verify the Court judgment, no attempt was made to contact the Plaintiff, witnesses who were interviewed created a hostile narrative whereas the story was heavily promoted towards attracting maximum viewership all of which was evidence of malice. That in considering the above issue, the Court ought to be cognizant of the gravity of the allegation, the professional status of the Plaintiff, the extent of the publication, conduct of the defendant and the Defendants failure to apologize.
- 34.** Penultimately, it was submitted that considering the totality of the above, damages in the **sum of Kshs. 40,000,000/-** comprising Kshs. 30,000,000/- in general damages, Kshs. 6,000,000/- as aggravated damages and Kshs. 4,000,000/- as exemplary damages was sufficient as compensation. The English decision in **John v MG Ltd (1996) 1 ALL E.R.**, the decisions in **Musikari Kombo v Royal Media Services Ltd [2018] eKLR**, **Gatonye v Nation Media Group Ltd [2022]**

eKLR, Ngatia v Nation Media Group Ltd [2022] eKLR and **Nzibo v Nation Media Group Ltd [2024] eKLR** were cited in the forestated regard. In conclusion, the Court was urged to allow claims as prayed.

Defendants Submissions

- 35.** On the part of the Defendants, counsel equally began his by restating the evidence before the trial Court. As concerns whether the Plaintiff has proved his case on a balance of probabilities, the decision in **Ondokara v Astles [1970] EA 374, Wycliffe A Swanya v Toyota East Africa Ltd & Another [2009] eKLR, Selina Patani & Another v Dhiranji V. Patani [2019] eKLR, Onchieku v Kwayera & Another [2025] KECA (KLR), Ruth Ruguru Nyagah v Kariuki Chege & Another [2020] eKLR** and **George Mukru Muchai v The Standard Ltd [2001] eKLR** to called to aid to submit that although the Plaintiff called an independent witness, the latter's evidence was too weak to assist the Court to make a finding on the existence of defamation as she confirmed that she did not see any of the publications complained of. That in view of the latter admission, the Plaintiff was not lowered in the estimation of any known ordinary, just and reasonable man.
- 36.** Submitting on whether the defence of qualified privilege could sustain, counsel relied on the decision in **Rutto v Langat & Another [2025] KECA 1276, Ndungu Njoroge Kwach Advocates & Another v Standard Limited & 8 Others [2018] KECA 584 (KLR)** and **Kagwiria Mutwiri Kioga & Another v Standard Limited & 3 Others [2015] eKLR** to submit that the Defendants defence of qualified privilege, on

the premise that the impugned broadcast, was made in performance of a duty and the broadcast was made in the protection of public interest.

- 37.** As to whether the defence of fair comment on a matter of public interest, truth or justification and the constitutional defence under **Article 33 & 34** of the Constitution were tenable, counsel submitted that the broadcast was a commentary on a matter of public interest; the truthfulness of the publication was proved through evidence; and that in balancing the rights of the parties, the Court ought to be cognisant of the Defendant's media rights to impart information. The decisions in **Nation Media Group & Another v Alfred N. Mutua [2017] eKLR**, **Jeff Otieno & 2 Others v Martin Nganga [2019] eKLR**, **Jacob Mwanto Wangora v Herzon Mwando Kirorio [2017] eKLR** and **Techbiz Limited v Royal Media Services Limited [2023] eKLR** were called to aid in the forestated regard.
- 38.** Concerning awardable damages, the Defendants maintained that premised on their earlier submissions, the Plaintiff is not entitled to any award on damages. However, if the Court is inclined to award damages, a sum of **Kshs. 500,000/- was sufficient in the circumstance**. Counsel relied on the decisions in **Nation Newspaper Ltd v Peter Baraza Rabando [2016] eKLR**, **Peter Ngethe Ngari t/a PNN Funeral Services v Standard Group Limited & Another [2022] eKLR**, **Muchemi v Kuria KEHC 3853 (KLR)** and **Mogeni & Another v Nation Media Group Limited & Another [2025] KEHC 13377 (KLR)**.

39. Penultimately, with respect to the award of aggravated and or exemplary damages, counsel cited the decisions in **Livingstone Mwangi v Sheria Co-operative Society [2016] eKLR** and **Matumbi v Tanui [2026] KECA 253 (KLR)** to submit that no evidence was led to show that the publication was made to intentionally make a specific profit. In summation the Court was urged to dismiss the suit with costs however in the alternative if the Court finds in favour of the Plaintiff, it ought to only award general damages in the **sum of Kshs. 500,000/-**.

Analysis and Determination

40. The Court has carefully considered the respective parties' pleadings, the evidence adduced by respective witness, and the parties' written submissions as well as authorities relied in support thereof 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 privilege and fair comment on a matter of public interest 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 privilege and fair comment on a matter of public interest are available to the Defendants?

41. Pertinent to the determination of the said issue(s), at fore, are the pleadings, which form the basis of the respective parties' case before this Court. See-; **Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91.** Akin to pleadings, is evidence in support of the pleadings. Further, the applicable law as to the burden of proof is found in **Section 107, 108 and 109** of the **Evidence Act.**

42. In **Karugi & Another v Kabiya & 3 Others (1987) KLR 347** the Court of Appeal stated that-:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof...The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

43. That said, 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..."

44. Meanwhile, 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."

45. As aptly observed by the Defendants, 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.”

46. 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.*

47. 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.*”

- 48.** 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 on a claim premised on defamation. In this case, ingredients (ii) & (iii) above have not been contested, as the Defendants readily admit 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 alongside the defence advanced by the Defendants of privilege and fair comment on a matter of public interest, are available to the Defendants
- 49.** It is not in dispute that the 3rd and 7th Defendant ran a broadcast on “Citizen TV” titled, “*Kilio cha Mnyonge*”, “*Poor Millionaire*” and “*Stolen Compensation*” the former which mentioned the Plaintiff by name. Further, despite the contents of the broadcast, it is equally not contested that the Plaintiff was an advocate of the High Court of Kenya and the proprietor of **W. G. Wambugu & Co. Advocates**.
- 50.** That said, the gist of the impugned broadcast 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 Plaintiff’s case is that the impugned broadcast in its natural and ordinary meaning meant -; that compensation to **DW1** was lost through the hands of his lawyers; that the Plaintiff defrauded **DW1**; that the Plaintiff is corrupt; that the Plaintiff is a criminal having committed several criminal offences including betrayal of trust under the

Advocate Act by obtaining money by false pretense under the Penal Code; and that the Plaintiff is unfit to be an advocate of the High Court of Kenya.

51. It can equally be heard from the broadcast, that was played before this Court, it employed varied choices of words and phrases stating with the title that captioned “Stolen Compensation”. The broadcast further went on to state in part that “installment paid to the firm of W.G. Wambugu & Co. Advocates”, and “another lawyer to pursue the 7 million that Wnaja Wambugu’s law firm had secured” among other others.
52. My understanding of the publication as particularly relates to the Plaintiff is that the news report alleges that the latter represented **DW1** in his compensation claim against Kenya Railways Corporation after the train accident that caused him to lose both his arms and legs. Following an out-of-court settlement in which **DW1** was awarded approximately Kshs. 18 million, the first installment of about KSh 7 million was paid directly to the Plaintiff. That the latter reportedly treated this amount as legal fees.
53. I equally garner from the broadcast that **DW1**’s family challenged the fee before the Law Society of Kenya Disciplinary Committee, which initially found that the advocate had overcharged and reduced the recoverable fees to roughly Kshs. 1.3–1.5 million. However, the Plaintiff successfully challenged that determination in the High Court of Kenya, which set aside the disciplinary committee’s decision and effectively allowed the firm to retain the fees claimed. As a result, the report states that Plaintiff was legally cleared of wrongdoing and

owed no further money to **DW1**, although the family remained dissatisfied with the outcome.

- 54.** With the above in reserve, concerning defamation, **Gatley on Libel and Slander 6th Edn.** states that -;

“A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another”.

- 55.** In **Musikari Kombo** (supra) the Court of Appeal stated that:-

“The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury’s Laws of England 4th Edition Vol. 28 at page 23 the authors opined:

“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.”

- 56.** Lastly, 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”.

- 57. PW1** was categorical that the broadcast was malicious and untruthful given that the alleged money had not been stolen premised on the fact that decretal sum had not been fully recovered. That further, the Defendants did not seek any clarification whereas the information was equally available from the Court documents. She was thus of the view that the broadcast was defamatory of her person and or profession.
- 58. PW2**, on her part, who is a senior advocate despite stating that upon viewing the broadcast was skeptical of her friendship with the Plaintiff did not clearly delineate the effect the article had with respect to her relationship with the Plaintiff. She only alluded to her husband having doubts as to the Plaintiff’s ability, given that the latter was handling a brief on their behalf. Notably, the said husband did not offer his evidence before this Court. In any event, it was **PW2**’s evidence that she failed to believe the broadcast and or was “assured” after she spoke to the Plaintiff.
- 59.** By their pleadings, the Defendants stance is that the words and in the natural or ordinary meaning or otherwise was privilege and fair comment upon a matter of public interest. In support of the said averments, the same was shored by **DW1**’s evidence who confirmed the Court proceedings in respect of his claim as against Kenya Railways Corporation and having engaged the Plaintiff as an advocate. Whereas **DW2**, through **DExh. 1-9** evinced Court documents, cheques from Kenya Railways Corporation and correspondences from advocates

acting in the matter between **DW1** and Kenya Railways Corporation.

- 60.** At this juncture concerning defamatory tendency and falsity of the publication as juxtaposed alongside the defence of fair comment on a matter of 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.:“

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.”

61. 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.

62. Here, it is discernible that the 3rd Defendant’s reporting was premised on facts gathered from Court proceedings and correspondences obtained from advocates acting in the matter as between **DW1** and Kenya Railways Corporation. In any event, **DW2** in her report, particularly on the facts in issue therein, qualified her report by exonerating the Plaintiff of any wrong doing when she stated that *“Wanja Wambugu is legally off the hook. She owes nothing to Duncan anymore”*
63. Nevertheless, keeping in mind the above, with respect to the defence of qualified privilege under **Section 6** of the **Defamation Act**, it was held in **Adam v Ward (1917) AC 309** that-:

“A privileged occasion is, in reference to qualified privilege an occasion where the person who makes the communication has an interest or duty, legal, social or to make it to the persons to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.”

- 64.** Here, no doubt, the proceedings arising from the **DW1**'s Court case in HCCC. No. 2441 of 1999 and the Law Society Disciplinary Committee would be of great public interest. Particularly, concerning advocates conduct towards compensation proceeds received on behalf of a client. Therefore, the Defendant had a duty to report on the issue in the interest of the public. However, as stated in **Dorcas Florence Kombo v Royal Media Services [2014] eKLR**:

“--- qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or the use of the privileged information for an improper purpose. “

- 65.** Meanwhile, in **Uhuru Muigai Kenyatta v Baraza Leonard [2011] eKLR** the Supreme Court observed that:-

“While taking the defence of justification, or qualified privilege in a defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification or qualified privilege does not inure the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication.”

66. Applying my mind to the above dicta, firstly-; the report was premised on facts gathered by the 3rd Defendant, to wit, concerned a matter of public interest; secondly, **PW2's** evidence was inconclusive as to defamatory aspect of the broadcast after she watched the same. In any event, by her own admission it was her husband's perception of Plaintiff that changed after viewing the broadcast and not hers in particular; thirdly, no other evidence was called in respect of other advocate, junior associates or Magistrates whom after viewing the broadcast, being reasonable persons were likely to understand it in a defamatory sense; fourthly, the 3rd Defendant's report was qualified by exonerating the Plaintiff from any wrong doing, to wit, any reasonable person whom viewed it would not discern the imputed innuendo, pleaded by the Plaintiff; and fifthly, the Plaintiff did not advance any evidence of malice towards deflecting the defences of privilege and fair comment advanced by the Defendants.
67. Thus, 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 was not defamatory. And compounded by the Defence advanced by the Defendants, the Court is inclined to concede that the broadcast was privileged and fair comment on a matter of public interest.
68. Consequently, as held in the case of Wareham t/a A.F. Wareham & Others (supra), if the evidence tendered by a Plaintiff does not support the pleaded facts, the Plaintiff being the party bearing the burden of proof should fail. **In the result, the Court finds that the Plaintiff has failed to prove**

all the necessary ingredients of defamation to the required standard, in light of the defence advanced by the Defendants

69. Finally, on costs, applying my mind to the provision of Section 27 of the Civil Procedure Act, and the proviso thereto, and having considered the circumstances in respect of the case, entirety of the complaint by the accident victim, and the impugned broadcast, upon my exercise of my judicial discretion, what comments to me is that each party shall bear own costs of the suit.

Orders accordingly.

Delivered Dated and Signed at Nairobi this 19th March, 2026.

.....
JANET MULWA.

JUDGE