Rutto v Langat & another (Civil Appeal 51 & 52 of 2020 (Consolidated)) [2025] KECA 1276 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1276 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 51 & 52 OF 2020 (CONSOLIDATED)

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

JULY 11, 2025

BETWEEN

ISAAC RUTTO ..... APPELLANT

AND

ELIZABETH C. LANGAT ..... 1ST RESPONDENT

STANDARD LIMITED ..... 2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Bomet (A. N. Ongeri J.) delivered on 1st July 2020 in HCCC No 3 of 2017)

JUDGMENT

1. This judgment is in respect of two appeals: Civil Appeal No. 51 of 2020 filed by the appellant herein against the respondents and Civil Appeal No. 52 of 2020 filed by the 2nd respondent against the 1st respondent and the appellant. The two appeals were consolidated on 9th April 2025 and it was ordered that the lead file in which the proceedings would be undertaken be Civil Appeal No. 51 of 2020.

2. The 1st respondent, Elizabeth C. Langat, a member of the County Executive Committee in Bomet County instituted proceedings before Bomet High Court in Civil Case No. 3 of 2017 against the appellant and the 2nd respondent as 1st and 2nd defendants respectively. In those proceedings, the 1st respondent claimed that on 30th March 2016, she was defamed by the appellant, the then Governor of Bomet County, at a press conference where the appellant termed her as being incompetent and a non-performing. On the other hand, the 2nd respondent was blamed for publishing the contents of the said defamatory pronouncements in an article in The Standard newspaper where it read inter alia;

> "In the letter, Ruto accused Langat of poor performance, failure to attend to duties, misconduct in handling staff matters and misuse of a county government vehicle."

3. On 11th April 2017 and 31st May, 2017 respectively, the appellant and 2nd respondent filed their statements of defence denying each and every allegation made by the 1st respondent. The 1st respondent on 17th May 2017, filed a rejoinder to the two defences insisting that the appellant's words were libellous, malicious and defamatory in the eyes of the right thinking members of the society and most importantly, were false.

4. The matter proceeded to hearing during which the 1strespondent testified and called two [2] witnesses. The 1strespondent testified that on 30th March 2016, the appellant called a press conference at which he announced that the 1st respondent had been sacked for incompetence, non- performance and absenteeism from duties. In her evidence, those allegations were not true as she is academically qualified for her position as the County Executive member in charge of Public Health and Environment and produced her credentials to back up her testimony. It was her evidence that the 2nd respondent published the offending article without seeking clarification or without getting the 1st respondent's side. In support of her case, the 1st respondent exhibited the termination letter and the article from The Standard newspaper of 31st March 2016 reflecting the same.

5. It was the 1st respondent's evidence that since the press conference and the publication thereafter, she was called for various job interviews all in which she was not been successful. She believed that her reputation was damaged as a result of the said publication.

6. The 1st respondent disclosed that she challenged her dismissal and was successful and was awarded a sum of Kshs. 4.56 million as damages. She exhibited a copy of the judgment delivered on 23rd September 2016 at the Employment and Labour Relations Court at Nakuru in Petition No. 17 of 2016.

7. The 1st respondent called two witnesses: Benard Kipkemoi Kitur [PW2] and Richard Kalya [PW3] who supported the 1st respondent's case and testified that they knew her. They read the 1st respondent's dismissal from the newspaper and saw the said defamatory material which they knew were untrue.

8. Neither the appellant nor the 2nd respondent adduced evidence in support of their defence.

9. In her judgement, the learned Judge distilled the issues for determination as: whether the 1st respondent proved the tort of defamation to the required standards; and whether the 1st respondent was entitled to the damages.

10. On issue whether the 1st respondent proved the tort of defamation against the defendants, the learned Judge set out what constitutes defamation and the necessary ingredients of defamation and held: that for words to be defamatory, they must tend to lower the 1st respondent's reputation in the estimation of a right minded person in the society or, must tend to cause the 1st respondent to be shunned or avoided by other persons; and that the test as to whether a statement is defamatory is an objective one and is not dependent on the intention of the publisher but, is dependent on what a reasonable person reading the statement would perceive of it.

11. The learned Judge noted the evidence of the two witnesses called by the 1st respondent in who stated that they read about the 1st respondent's termination in the newspaper and they believed it to be untrue because they knew the 1st respondent as competent and a performer in her duties. The learned Judge also noted the 1st respondent's unchallenged evidence that she had all qualifications for the position she held and that since the publication, she had attended many job interviews in which she had been unsuccessful. She relied on the ELC decision in Naqvi Syed Qmar v Paramount Bank Limited & another [2015] eKLR in which it was held that in employment law, defamation takes place when the employer publicizes or causes to be publicized, statements which stigmatize the employee leading to

the employee's injured or damaged employability as opposed to mere personal stigmatization, both of which must be compensated.

12. In her judgement, the learned Judge held that in addition, for a publication to be defamatory, there should be evidence of malice which is generally founded if the language used is utterly beyond or disproportionate to the facts. She appreciated that the appellant and 2nd respondent denied malice and insisted that the statement and publication was done as a matter of public interest and that the words were true. It was however, noted that for one to rely on the defence of public interest, the maker of the statement must demonstrate that the statement in question was one of opinion, not of fact, and that it was made on a matter of "public interest." The learned Judge found that the appellant and 2nd respondent, in alluding public interest, relied on the letter dated 30th March 2016 which letter contained the factual statement as to reasons why the 1st respondent was terminated from her employment but did not give the details as to the opinion. As a result, the learned Judge dismissed the defence of public interest.

13. It was further noted by the learned Judge that the appellant and the 2nd respondents raised the defence of qualified privilege and held that it is well settled that the onus lies on the defendants to prove the truth of the words in their ordinary and natural meaning and that information causing the defamation will be assumed to be untrue unless proved otherwise. The learned Judge cited in support, the case of Reynolds v Times Newspapers [2001] 2 AC 127 [HL] on the guidelines to be observed if a defendant wishes to rely on the defence of qualified privilege but was unable to pinpoint any of the set out guidelines in the 2nd respondent's defence to bring their allegation within the ambit of qualified privilege. In addition, no attempt was made to show that the 2nd respondent took steps to verify the truth of the allegations or seek any comment from the 1st respondent prior to publishing the offending material.

14. In the end, the learned Judge found that 1st respondent proved that the defendants [the appellant and the 2nd respondent] committed the tort of libel against her to the required standards. She appreciated that compensation for damage to reputation by damages operates in two ways; one as a vindication of the 1st respondent to the public and secondly, as a consolation to him for a wrong done and cited the case of Uren v John Fairax & Sons Pty Ltd [1966] HCA 40 for the position that compensation is here a solarium rather than a monetary recompense for harm measurable in money.

15. It was noted by the learned Judge that in assessing damages, the court has to consider the particular circumstances of each case, the 1st respondent's position and standing in society, the mode and extent of publication, the apology, if offered and at what time of the proceedings, the conduct of the defendants from the time when libel was published up to the time of judgment. The learned Judge found that the 1st respondent was entitled to damages but found that no aggravating circumstances were proved to justify an award for exemplary damages. Although the 1st respondent sought retraction of the offending statement, the learned Judge noted that the appellant was no longer the Governor of Bomet County hence that relief was untenable. She therefore awarded the 1st respondent Ksh.5,000,000 plus costs and interest at court rates from the date of this judgment until payment in full.

16. Dissatisfied with this judgement, both the appellant and the 2nd respondent lodged appeals seeking to have the decision set aside. At the plenary hearing learned counsel, Mr Echesa, who appeared for the 2nd respondent also held brief for Mr Mugumya, for the appellant while learned counsel, Mr Kipkoech, appeared for the 1st respondent. Counsel entirely relied on their written submissions.

17. On behalf of the appellant, although 15 grounds of appeal were identified, the submissions fleshed out the issues for determination as: whether the 1st respondent proved her case for defamation against the

appellant to the required standards; whether the appellant was liable for publication of the article dated 31st March 2016; whether the appellant was protected by the defence of fair comment on a matter of public interest; whether the damages awarded was proportionate; and who should bear the costs of the appeal.

18. It was submitted on behalf of the appellant: that the 1st respondent did not prove her case to the required standards; that the learned Judge shifted the burden of proof to the appellant; that no audio or video recordings were adduced in evidence to support the claim and no independent witness was called to testify as to what they heard and whether the appellant's esteem was thereby lowered; that therefore the elements of defamation were not proved; that the witnesses called by the 1st respondent did not state that the 1st respondent's reputation was diminished in their eyes as a result; that, on the basis of the authority of Wycliffe A. Swanya v Toyota East Africa Limited & Another Civil Appeal No. 70 of 2008 and Selina Patani & Another v Dhiranji V. Patani Civil Appeal No. 114 of 2017, without evidence of publication, the 1st respondent's case was not proven; and that the words allegedly uttered, in their ordinary meaning, do not amount to defamatory utterances.

19. On whether the appellant was liable for the publication of the article dated 31st March 2016, it was submitted: that the said article was solely published by the 2nd respondent and the appellant was not an employee of the 2nd respondent; and that on the authority of the case of Clifford Okello Rachuonyo T/A Rachuonyo & Rachuonyo Advocates v Mohamed Yusuf Soroya Civil Appeal No. 224 of 2018, there was no evidence that the appellant authorised or published the said article and the 2nd respondent did not deny publishing it.

20. On whether the defence of fair comment protected the appellant, it was submitted: that the letter of dismissal of the 1st respondent outlined the reasons for her termination and the same were simply reiterate by the appellant at the press conference of 30th March 2016 and the 2nd respondent's article dated 31st March 2016; that, on the basis of the holding in Nation Media Group v Honourable Jakoyo Midiwo Civil Appeal No. 130 of 2018 and Bernard Kiarie v Thuku Njoroge Civil Appeal No. 76 of 1986, the words uttered were purely fair comment and true as the appellant's honest opinion for the reasons for termination, a right exercised by the appellant in his capacity as then then Governor, Bomet County; that since the 1st respondent's professionalism at work had declined and no malice was proven by the 1st respondent, the appellant's replication of the words during the press conference constituted fair comment in line with the authority in Slim v Daily Telegraph [1968] 1 All ER 497 as enshrined in sections 14 and 15 of the *Defamation Act*.

21. As to whether the damages awarded was proportionate, it was submitted: that on the authority of the case of Johnson Evan Gicheru v Andrew Morton & Another Civil Appeal No. 314 of 2000, the learned Judge fell into great error when assessing general damages for libel at Kshs 5,000,000 with costs; that the award was founded on wrong principles and was not even reasoned out and was not supported by recent decisions of a similar nature; that the said award sought to unjustifiably enrich the 1st respondent since there was no finding that the utterances were maliciously made; and that the learned Judge ought to have been guided by the awards in Nation Media Group & Another v George Mugambi Gituma and Another Meru HCCA No. 28A of 2020 in which an award of Kshs 6,000,000 was reduced to Kshs 1,000,00 and Baraza Limited & Another v George Onyango Oloo Civil Appeal No. 113 of 2010 in which it was noted that the learned Judge did not consider whether there were any matters mitigating or reducing damages such as lack of malice; that the learned Judge based the award on the fact that the 1st respondent had been unable to secure employment yet no evidence was produced to support this fact. It was urged that the award ought to be reduced from Kshs 5,000,000 to Kshs 1,000,000.

22. Regarding costs, it was urged that costs follow event based on the authority of *Supermarine Handling Services v Kenya Revenue Authority Civil Appeal No. 85 of 2006*.

23. We were therefore urged to allow the appeal.

24. In support of its appeal, the 2nd respondent identified 15 grounds of appeal which we need not reproduce in this judgement. It was submitted: that the learned Judge did not set out the factual basis that led her to conclude that the defence of public interest was not available to the 2nd respondent; that it was clear from the pleadings and the evidence led that the matter involved a publication of what was happening in a public entity concerning public officials in which the appellant's publication was reproduced by the 2nd respondent; that the public element in the publication cannot be denied; and that there was no evidence that the publication by the 2nd respondent was inaccurate.

25. It was further submitted: that there was no objective analysis of the words alleged to have been defamatory; that the 2nd respondent did not report that what was disseminated was true but simply reported what the appellant said; that the words accurately reflected what the appellant stated; that there was no plea of innuendo hence Order 2 rule 7 of the Civil Procedure Rules was not complied with; and that in that event, the words pleaded in the plaint were to be objectively analysed to determine their ordinary and natural meaning.

26. In addition, it was submitted: that the prayer set out in the plaint did not seek judgement 'jointly and severally' yet the learned Judge entered judgement jointly and severally, contrary to the rules of pleadings; and that the learned Judge should have specifically apportioned damages as against each defendant.

27. It was the 2nd respondent's submission: that to dislodge the defence of qualified privilege, the 1st respondent was obliged to adduce evidence that she requested the appellant to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction and that the 2nd respondent refused or neglected to do so or did so in a manner not adequate or not reasonable having regard to all the circumstances; that the 1st respondent admitted that there was no evidence that the demand letter was sent, received and acknowledged by the 2nd respondent; that the context and tenor of the letter did not constitute an explanation or contradiction as required under section 7[2] of the *Defamation Act*; that there was no evidence that the words complained of were defamatory in the sense of what is stated in Gatley on Libel and Slander 8th Ed. Para 31; and that none of the two witnesses called stated that the publication caused them to think less of the 1st respondent.

28. On the issue of public interest, it was submitted: that the press conference was convened by a public officer; that the people of Bomet County and the general public would have a direct interest in matters relating to counties within Kenya; that it was not irresponsible for the 2nd respondent to report on matters of public interest as was done since the 1st respondent was herself a public officer; that this Court gave guidance with regard to qualified privilege of newspapers as well as publications made in public interest matters in Kagwiria M. Kioga & Another v Standard Limited & 3 Others [2015] eKLR and Ndungu Njoroge & Kwach Advocates & Another v The Standard Limited & 8 Others [2018] eKLR.

29. On award of damages, it was submitted: that on the authority of Johnson Evan Gicheru v Andrew Morton & Another [supra] there was no rationalisation of how the award of Kshs 5,000,000 was arrived at; that there was no evidence for concluding that the 1st respondent was unable to secure a job; that the assessment of general damages is judicial mandate that ought to be carried out fairly,

rationally, openly and clearly and the judgement on its own must be self-explanatory as to how the general damages were assessed and its basis; that in arriving at the award no mitigating factors were considered by the learned Judge; that there was no juridical guidelines that were properly and judicially applied by the learned Judge in reckoning of the damages resulting in an erroneous estimate of both heads of damages, general and aggravated; that the learned Judge did not consider the fact that the report appeared on the page reporting various happenings in the Kenya and not on the front page; that the learned Judge also did not consider section 7A of the *Defamation Act* which avails one a right of reply and we were urged to consider this Court's decision in The Standard Limited v Joseph Leo Ochieng & Others Civil Appeal No. 189 of 2004 on the need for consideration of mitigating factors in libel cases.

30. We were urged to allow the appeal.

31. On behalf of the 1st respondent, it was submitted: that the courts should examine the thin line between justified fair comment and blatant instances of defamation with the strong threshold of objectivity and transparency as the distinction of the two; that in Raphael Lukale v Elizabeth Mayabi & Another [2018] eKLR the Court stated that fair comment is proved if the statement complained of is an expression of opinion made as fair comment; that a purported fair comment must be both a matter of public concern and fact-based, that is devoid of corruption or dishonourable motives, described more aptly as malice and that on the basis of the decision of Phinehas Nyaga v Gitobu Imanyara [2013] eKLR, the failure to inquire into the facts from which inference or malice may properly be drawn; that allegations made against the 1st respondent were reckless and severely disproportionate to the facts which are in themselves unfounded; that contrary to the holding in Nation Media Group & Another v Alfred N. Mutua [2017] eKLR, the appellant failed to demonstrate a level of care in trying to establish whether the assertions made were true or false thereby qualifying his utterances as malicious claims that cannot attain the ambit of fair comment; that since the appellant failed to present a modicum of effort at inquiring into the facts which precipitated its utterances, which as demonstrated above, are a basis for a malicious conclusion that the words were defamatory, the ground of fair comment is out of reach of the appellant; that the defence of qualified privilege does not avail the appellant because, as per Reynolds v Times Newspapers [2001] 2 AC 27 [HL], that defence will only hold if it meets that guidelines including the likely harm to an individual if the allegation is untrue, whether suitable steps have been taken to verify the information and whether the allegation has already been the subject of an investigation which commands respect; and that the appellant did not meet this threshold.

32. It was submitted: that there is an apparent admission of liability for the tort of defamation on the part of the appellant as against the 1st respondent in failing to oppose the finding of the trial court instead of opposing only the apportionment of liability; that the court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published to the time the verdict was given; that the appellant did not show remorse and never attempted to recant his words; that on the authority of CAM v Royal Media Services Limited Civil Appeal No. 283 of 2005 [2013] eKLR, the court has wide latitude in terms of discretion in defamation cases; that this decision fell within the ambit of discretionary powers, as long as the same took into consideration the magnitude of the libel and the appellant failed to demonstrate that the learned Judge took into account irrelevant factors thus leading to an erroneous decision; and that in appreciating the fact that the appellant was no longer capable of retracting the statement, the quantum of damages assessed cannot adequately cover the harm occasioned.

33. Regarding the issue of public interest, it was submitted that in line with the decision in the case of Janto Construction Company Ltd v Enock Sikolia & 2 Others [2020] KLR in which the decision of Raphael Lukale v Elizabeth Mayabi & Another [2018] eKLR was cited, the failure to establish the veracity of

the allegations made by the appellant makes the 2nd respondent's decision to publish an irresponsible, unprocedural, malicious, devoid of bona fide protection of the public and thus, incapable of becoming a public interest publication.

34. We were urged to dismiss the appeal.

35. We have considered the submissions made by the parties in this appeal. This being a first appeal, the duty of this Court as set out in the decision of Selle & another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the finding by the trial court if they were not based on evidence on record; where the said Court is shown to have acted on the wrong principles of law as was held in Jabane v Olenja [1986] KLR 661, or where its discretion was exercised injudiciously as was held in Mbogo & another vs Shah [1968] EA.

36. The law on the elements and proof of defamation is settled.

In this respect, a defamatory statement is defined in Halsburys Laws of England, Fourth Edition, Volume 28 [Reissue] at paragraph *10* as "a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided, or to expose him to hatred, contempt or ridicule, or to disparage him in his office, profession, calling, trade or business".

37. A distinction is in this respect made between two forms of defamatory statements, libel and slander, with libel being a defamatory statement that is made in writing, printing or some other permanent form, and in which damage is presumed, while slander is where the defamation is in oral form, which requires proof of damage. For libel to be actionable, the defamatory statement must be made or conveyed by written or printed words or some other permanent form, which is published of, and concerning the plaintiff, to a person other than the plaintiff. This is because defamation is about reputation and reputation is what other people think of the plaintiff and not what the plaintiff thinks of himself. This position was reiterated by the Court of Appeal [Tunoi, O'Kubasu &Waki JJA] in Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others [2010] eKLR as follows:

> "For the tort of defamation to succeed, the following elements must be proved by the Claimant:
>
> 1. the statement must be defamatory
> 2. it must refer to the Claimant, i.e. identify him
> 3. It must be published i. e. communicated to at least one person other than the Claimant."

38. The ingredients of the tort of defamation were restated in AlnashirVisram v Standard Limited [2016] eKLR, as follows:

> "Defamation is the publication of a statement which tends to lower a person's reputation or character in the estimation of right thinking members generally and which makes them shun and avoid him. The burden of proof lies on the claimant to establish that the published words or statements as published of and concerning the plaintiff are defamatory of him or her. The claimant must prove, on a balance of probabilities, that the words complained of were published of and concerning him; that they were published by the defendant; that they were false; and that they were defamatory in character of the claimant tending to lower him in the estimation of

right thinking members of the society generally, making them shun or avoid him. Finally, the claimant must prove that the publication was done with malice."

39. The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons or must tend to cause him to be shunned or avoided. One must therefore prove that his reputation has been lowered in the estimation of right-minded persons or that the publication has tended to cause him to be shunned or avoided. Accordingly, it is necessary to call, as witnesses, right thinking members of the society to testify as to that fact. This is because reputation is not what one thinks about oneself but what others think of him. As Thomas Paine aphoristically puts it:

> "Reputation is what men and women think of us; character is what God and angels know of us."

40. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. However, in libel, the words cannot be protected as mere abuse since it is presumed that the defendant had time for reflection before he wrote them. Secondly, the words must refer to the plaintiff. Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow that merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded where there is a failure to inquire into the facts. Any evidence, which shows that the defendant knows that the statement was false or did not care whether it be true or false will be evidence of malice. See Godwin Wachira v Okoth [1977] KLR 24; and J P Machira v Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.

41. The appellant's grievances in this appeal may be summarised as follows: that the 1st respondent did not prove her case to the required standards because there was no evidence of the press conference and nobody was called to support the said press conference and to testify as to the reputation damage caused as a result thereof; that the letter of dismissal of the 1st respondent outlined the reasons for her termination and the same were simply reiterate by the appellant at the press conference of 30th March 2016 and the 2nd respondent's article dated 31st March 2016; that, therefore, the words uttered were purely fair comment and true as the appellant's honest opinion for the reasons for termination; and that the award was founded on wrong principles and was not even reasoned out an supported by recent decisions of a similar nature.

42. It is not in doubt that the 2nd respondent in its newspaper for 31st March 2016 carried out an article to the effect that:

> "in the letter, Ruto accused Langat of poor performance, failure to attend to duties, misconduct in handling staff matters and misuse of a county government vehicle."

43. There is no doubt that those allegations referred to the 1st respondent and accused her of incompetence, derogation of duty and abuse of office. The allegations, if not true, would clearly be libellous of the 1st respondent. The appellant did not testify or call any witness before the trial court. Accordingly, the 1st respondent's case that the said allegations were untrue was not challenged. The fact that the

Employment and Labour Relations Court found in favour of the 1st respondent, though not in substance, but on the failure to follow the due process, was evidence of lack of diligence in following the process leading to the 1st respondent's termination.

44. The next issue is whether there was publication. Again, the appellant did not challenge the fact that he called for a press conference at which he announced both the 1st respondent's termination but also divulged the reasons therefor. Although no witness testified that he was present at the press conference, his statement to the press was published. The said statement stated that the appellant announced the axing of the 1st respondent. In our view, the announcement itself amounted to publication because it was intended that the announcement be made to the public. Our view is supported by Winfield & Jolowicz on Tort 12th Ed. Page 315-316 where it is stated that:

> " But there is, of course, publication to the typist or printer by the author when he hands the document over...If the author intends further publication, as where he writes a letter to the editor of a newspaper, the author is liable in respect of that publication also. Indeed, the author is probably liable for any repetition he has reason to expect."

45. The appellant has also alluded to the fact that no witness was called to testify as to the effect of the said publication. However, in torts for defamation, no special damage needs to be proved before damages can be awarded. In this case, the statement clearly alluded to the incompetence of the 1st respondent hence was actionable per se. We therefore find that the ingredients of the tort of defamation were proved as against the appellant.

46. As regards the defence of fair comment, in order for it to be upheld, it must be shown that the matter commented on was a matter of public interest in the sense that the public is legitimately interested and that they are matters in which it is legitimately concerned. Secondly, it must be an expression of opinion and not an assertion of fact. Thirdly, the comment must be fair in the sense that it must first of all be based upon true facts in existence when the comment was made. That defence only avails a person where it is proved that the facts are true and the matter is of public interest and the opinion is honestly held. In other words, one cannot invent a non-existent state of affairs and purport to fairly comment on them. As Winfield & Jolowicz [supra] states at pages 326 and 327:

> " It is impossible for a defendant to succeed in a plea of fair comment unless he is commenting on facts, i.e. on what is true...No comment can be fair if it is based on something which the defendant has invented or distorted, and if the alleged facts relied upon as the basis for fair comment turn out to be untrue, a plea of fair comment avails the defendant nothing, even though they expressed his honest view. Where the fats on which the comment is made are fully set out in the alleged libel, then...each fact must be shown to be true to enable the defence of fair comment to succeed in relation to the comment...however the defence of fair comment does not fail by reason only that the truth of every allegation of fact contained in the alleged libel is not proved. It is enough if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

47. The last sentence above is a reflection of section 15 of the*Defamation Act* which provides that:

> In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair

comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

48. In other words, whereas not every assertion in a statement claimed to contain defamatory material is to be proved, it must be proved that the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained. In this case, no evidence was led by the appellant to support the prima facie defamatory allegations made by him. In the premises, the defence was not available to him.

49. We shall deal with the issue of quantum of damages later in this judgement.

50. Regarding the appeal by the 2nd respondent, its case was: that the learned Judge did not establish a basis for finding that the defence of public interest was not available to the 2nd respondent; that there was no objective analysis of the words alleged to have been defamatory since the 2nd respondent did not report that what was disseminated was true but simply reported what the appellant said; that the prayer set out in the plaint did not seek judgement 'jointly and severally' yet the learned Judge entered judgement jointly and severally, contrary to the rules of pleadings; that the learned Judge should have specifically apportioned damages as against each defendant; that to dislodge the defence of qualified privilege, the 1st respondent was obliged to adduce evidence that she requested the appellant to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction and has refused or neglected to do so or has done so in a manner not adequate or not reasonable having regard to all the circumstances; that the press conference was convened by a public officer; that the people of Bomet County and the general public would have a direct interest in matters relating to counties within Kenya; and that there was no rationalisation of how the award of Kshs 5,000,000 was arrived at.

51. The defence of fair comment, as we have stated above only applies where an opinion is given. In this case, it is not alleged that the 2nd respondent was giving an opinion and we are unable to find any in the report by the 2nd respondent. According to the 2nd respondent, it was simply reporting the announcement as relayed by the appellant.

52. The law recognizes that there may be occasions on which freedom of communication without fear of an action for defamation is more important than the protection of a person's reputation and such occasions are said to be "privileged". Privilege may be either absolute or qualified. Absolute privilege covers cases in which complete freedom of communication is regarded as of such paramount importance that actions for defamation cannot be entertained at all: a person defamed on an occasion of absolute privilege has no legal redress, however outrageous the untrue statement which has been made about him and however malicious the motive of the maker of it. Qualified privilege, though it also protects the maker of an untrue defamatory statement, does so only if the maker of the statement acted honestly and without malice. If the plaintiff can prove "express malice" the privilege is displaced and he may recover damages, but it is for him to prove malice, once the privilege has been made out, not for the defendant to disprove it. This includes -Statements made by A to B about C which A is under a legal, moral or social duty to communicate to B and which B has a corresponding interest in receiving.

53. The protection of such statements is justified for the common convenience and welfare of society. With respect to newspaper reports, the matter which is reported may be of very wide public interest, but the protection of privilege is not thrown about it unless its publication is in the public interest and the newspaper can be said to be fulfilling a duty in revealing it.

54. 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 use of the privileged occasion for an improper

purpose. Lack of belief in the truth of the statement is generally conclusive as to malice, except in cases where a person is under a duty to pass on defamatory reports by some other person. Mere carelessness, however, or even honest belief produced by irrational prejudices, does not amount to malice. But an honest belief will not protect the defendant if he uses the privileged occasion for some other purpose other than that for which the privilege is accorded by law: if his dominant motive is spite or if he acts for some private advantage, he will be liable. Existence of malice can be evinced by language; if the language used is utterly beyond or disproportionate to the facts. However, it does not follow that merely because the words are excessive malice must be inferred. It can also appear from the relations between the parties before or after publication or from the conduct of the defendant in the course of the proceedings themselves, as, for example insisting on the defence of justification while nevertheless making no attempt to prove it. However mere pleading of justification is not itself evidence of malice even though the plea ultimately fails. It may be deduced from the mode of publication where the dissemination of the statement is wider than is necessary. When a defamatory communication is made by several persons on an occasion of qualified privilege, only those against whom express malice is actually proved are liable.

55. In this case, the appellant was a public officer who was communicating to the public the fact that the 1st respondent, also a public officer was no longer retained in her duties. In those circumstances, the 2nd respondent was under a duty to communicate such information to the public which on its part had a corresponding interest to receive it. Nevertheless, as we have stated above, malice can be inferred where there is a failure to inquire into the facts. In this case, the 1st respondent's case was that the 2nd respondent did not contact her before the said publication was made. The object of contacting the person against whom patently defamatory allegations are made is not to bar the privileged publication but to present to the public both sides of the story so that the public is not fed on only one side. It is only then that the public is able to make an informed view regarding the allegations. Failure by the 2nd respondent to get the 1st respondent's view was, in our view, a manifestation of malice.

56. In these circumstances, the 2nd respondent was liable.

57. The 2nd respondent, however contended that their liability ought not to have been jointly and several since no such relief was sought. The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendants cannot be recovered from the other defendant[s]. The predecessor to this Court in V D Chandaria and Another v T D Ghadially [1962] EA 500 dealt with the two types of liabilities and held that:

> " Persons whose respective shares in the commission of a tort are done in furtherance of a common design are joint tortfeasors...From the authorities it is clear that as the appellants were joint tortfeasors the court could not legally award damages against them separately. Only a single judgement for damages may be entered against joint wrong- doers sued together, the award being the whole damage suffered by the plaintiff. This rule applies to joint contractors and joint tortfeasors, despite the difference that, while joint contractors are jointly liable and the plaintiff must sue all together, joint tortfeasors are jointly and severally liable and the plaintiff in one action may sue one, some or all. Difficulties arise as to the amount of the award to be made in this single judgement where the existence of malicious conduct aggravates the damage by way of increased injury to the plaintiff's feelings, or lets in the possibility of an award of exemplary damages, and only some of the joint wrong-doers have acted maliciously or some have acted more maliciously than others... The rule at common law is that where joint tortfeasors are sued together not more than a single

judgement can be rendered against those who are held liable. It is a consequence of the single-judgement rule that the court has no power to sever the plaintiff's total damages and enter judgements for different amounts against the different defendants. This is even though the issues against the different defendants are tried separately. The plaintiff is forbidden to take several judgements for apportioned parts of his damages even if he wishes to do so. There must be one judgement and one assessment of damages. Whereas assessment of the rate of contribution is now competent in certain circumstances under the provisions of the Law Reform [Miscellaneous Provisions] Ordinance, 1956, those provisions do not alter the rule that there must initially be one assessment of damages."

58. It is clear that the 1st respondent did not expressly seek judgement against the appellant and the 2nd respondent jointly and severally. We appreciate that the court after hearing the matter may on its own enter judgement jointly and severally where appropriate. In this case, the cause of action arose from different actions. The cause of actions against the appellant arose from the press conference on 30th March 2016 which in itself was a different publication from the publication by the 2nd respondent which took place the following day on 31st March 2016. From our analysis above, the 2nd respondent's liability only stemmed from the fact that it did not take the precaution of seeking the 1st respondent's views before publishing the material, which would otherwise have been privileged. The appellant was the initiator of the said material and none of the defences availed him.

59. In those circumstances we hold the view that the learned Judge erred in entering judgement jointly and severally against the appellant and the 2nd respondent. Taking into account the distinct roles played by the appellant and the 2nd respondent in disseminating the material and their culpability, we are of the view that liability ought to have been apportioned. In our view and finding the liability of the appellant and the 2nd respondent should have been apportioned in the ratio of 70:30 against the appellant and the 2nd respondent respectively.

60. As regards general damages, the learned Judge in assessing the same took into account the fact that the avenue of retraction of the defamatory statement was not available since the appellant was no longer in office. It must always be remembered that award of damages in defamation cases measures something so intrinsic to human dignity as a person's reputation and honour as these are not marketplace commodities. Unlike businesses, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur. There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of a reputation, on the one hand, and determining a sum of money as compensation, on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award, and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank. This is not to underrate the part monetary awards play in our society. The threat of damages will continue to be needed as a deterrent as long as the world we live in remains as money oriented as it is. Moreover, it is well established that damage to one's reputation may not fully be cured by counter-publication or apology; the harmful statement often lingers on in people's minds. So even if damages do not cure the defamation, they may deter promiscuous slander and constitute a real solace for irreparable harm done to one's reputation. See Albie Sachs, J in Dikoko v Mokhatla 2006 [6] SA 235 [CC]; 2007 [I] BCLR I [CC].

61. In determining the amount of damages to award in libel, the court considers an array of factors including, the particular circumstances of each case, the plaintiff's position and standing in society, the

mode and extent of publication, the geographical area within which the distribution takes place and the nature of the audience as well as the extent of publication and the apology, if offered and at what time of the proceedings, the conduct of the defendants from the time when libel was published up to the time of judgement. See Kipyator Nicholas Kiprono Biwott v Clays Limited & 3 Others Nairobi HCCC No. 1067 of 1999 [2000] 2 EA 334 and Registered Trustees of Catholic Archdiocese of Nyeri and Another v Standard Ltd and Others [2003] 1 EA 257.

62. As was held in V D Chandaria and Another v T D Ghadially [supra], the Court of Appeal has not infrequently interfered with an assessment of damages on appeal where a trial Judge has followed a wrong principle. However, that power will not be exercised merely because the appellate court feels that the amount is "too much". This was the position in Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR, where this Court held that:

> "...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297."

63. Similarly, in Jane Chelagat Bor v Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, this Court stated that:

> "In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

64. As was held in Mariga v Musila [1984] KLR 251:

> "The assessment of damages is more like an exercise of discretion and the appellate court is slow to reverse a lower court's decision on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for this or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court judge acted on wrong principles."

65. The 2nd respondent raised, in their submissions the applicability of section 7A of the *Defamation Act* [the Act] as disentitling the appellant to an award of damages. The section provides that:

1. Any person or body of persons shall be entitled to a right of reply to any factual inaccuracy affecting them which has been published in a newspaper and which is damaging to the character, reputation or good standing of that person or body of persons.

2. Where a person or body of persons is entitled to a right of reply under subsection [1] a correction shall be printed in the next possible edition of the newspaper.

3. The correction shall be printed free of charge and be given similar prominence as the item complained of and shall appear at a similar place in the newspaper.

4. The correction must be of such length as is necessary to identify the original item.

5. Any person or body of persons seeking to exercise the right of reply under the provisions of this section shall do so in writing to the editor or publisher of the newspaper within a period of fourteen days from the date of publication of the damaging material: Provided that the right of reply shall not be exercisable after a period of six months from the publication of the relevant damaging material.

6. In any civil proceedings for libel, the court, unless it is of the opinion that any reply under this section is either irrelevant or unreasonable in all the circumstances of the case, shall be at liberty to award an additional amount of damages together with the damages for defamation where the publisher has failed or refused to publish a correction or failed to give it the prominence required by this section.

7. In any civil proceedings for libel instituted by a person or body of persons entitled to a right of reply who or which has failed to exercise such right in accordance with this section the court shall, in the event of it having found in favour of the plaintiff, be at liberty to reduce the amount of damages which it would have otherwise awarded by such sum as the court considers appropriate having regard to all circumstances of the case.

66. Our statute, as opposed to other jurisdictions provide for the right of reply and provides that "a person or body of persons shall be entitled to a right of reply to any factual inaccuracy affecting them which has been published in a newspaper and which is damaging to the character, reputation or good standing of that person or body of persons." In order to exercise that right, the person is required, pursuant to section 7A[5] of the Act to "do so in writing to the editor or publisher of the newspaper within a period of fourteen days from the date of publication of the damaging material". We take it that the said provision only applies to the act of

> " seeking" to exercise the right of reply since the exercise of the right itself is required, pursuant to the proviso to the section, to be exercise within a period of six months from the date of publication. The 14 days in our view is for the notification of the publisher of the intention to exercise the right of reply. The newspaper concerned is then expected to give the person an opportunity to exercise that right in the manner provided under the said section. Once the opportunity is availed the right of reply is exercisable within 6 months from the date of the publication of the offending material. The Act, unfortunately, does not prescribe the time within which the publisher is to inform the person alleging injury of the opportunity to exercise the said right. The consequences of the failure to publish the reply after the right has been exercised are additional damages against the publisher while the consequences of failure to exercise the right of reply is the diminution of damages although the Act does not prescribe the amount with which the damages awardable are to be reduced."

67. It is clear to us that what our section 7A of the *Defamation Act* prescribes is different from the right to request for a correction, clarification, or retraction from the defendant as provided in other jurisdictions. Whereas under the Act, it is the person injured who takes the initiative to reply to the allegations made and replies to the allegations, in jurisdictions where the right to request for a correction, clarification, or retraction from the defendant is provided, it is the publisher, upon being notified of the defamatory matter, to retract the same.

68. The role of the retraction in defamation claims was explained by John C. Martin writing in University of Chicago Legal Forum in an article entitled "The Role of Retraction in Defamation Suits" in which he opines that:

> " Traditionally, the retraction of a defamatory statement has served to mitigate damages. This general principle, although sometimes manifested in case law, is more frequently found in "retraction statutes" that expressly provide that the retraction of an alleged libel will limit the damages available to plaintiffs."

69. Our research has, for example, revealed that on 14th June 2013, the State of Texas passed Defamation Mitigation Act which provides at section 73.055 entitled "Request for Correction, Clarification or Retraction" that:

a. A person may maintain an action for defamation only if:

1. The person has made a timely and sufficient request for a correction, clarification, or retraction from the defendant; or

2. The defendant has made a correction, clarification, or retraction.

b. A request for a correction, clarification, or retraction is timely if made during the period of limitation for commencement of an action for defamation.

c. If not later than the 90th day after receiving knowledge of the publication, the person does not request a correction, clarification, or retraction, the person may not recover exemplary damages.

d. A request for a correction, clarification, or retraction is sufficient if it:

1. is served on the publisher;

2. is made in writing, reasonably identifies the person making the request, and is signed by the individual claiming to have been defamed or by the person 's authorized attorney or agent;

3. states with particularity the statement alleged to be false and defamatory and, to the extent known, the time and place of publication;

4. alleges the defamatory meaning of the statement; and

5. specifies the circumstances causing a defamatory meaning of the statement if it arises from something other than the express language of the publication.

70. We are of the view that the particulars to be contained in the letter seeking to exercise the right of reply ought to be similar to those set out in the Texas Statute. Therefore, a letter exercising the right of reply should clearly identify the person defamed, the defamatory statement and specify why it is false.

71. In this case although the 2nd respondent pleaded that the demand and notice of intention to sue was not issued, Order 2 rule 4[1] of the Civil Procedure Rules provides that:

A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

a. which he alleges makes any claim or defence of the opposite party not maintainable;

b. which, if not specifically pleaded, might take the opposite party by surprise; or

c. which raises issues of fact not arising out of the preceding pleading.

72. In our view, an allegation that, pursuant to section 7A of the Act, the damages awardable to the 1st respondent should have been reduced due to the failure to exercise the right of reply, is a matter that would take a party by surprise if not pleaded and ought to have been pleaded expressly. In the premises, we have no reason to fault the learned Judge for not taking the said section into account in assessing the damages awardable to the 1st respondent pursuant to the said section.

73. Accordingly, we allow the appeal to the extent herein below:

a. We set aside the judgement on liability against the appellant and the 2nd respondent jointly and severally and substitute therefor a judgement against them severally in the ratio of 70:30 respectively.

b. Save for the foregoing the appeal is dismissed.

c. We award the costs of the appeal to the 1st respondent to be paid by the appellant and the 2nd respondent according to their respective liabilities.

74. Judgement accordingly.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb.

.....

JUDGE OF APPEAL*

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR