Onyango v Standard Group Limited & 4 others (Civil Appeal 214 of 2018) [2024] KECA 118 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 118 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 214 OF 2018

SG KAIRU, F TUIYOTT & JW LESSIT, JJA

FEBRUARY 9, 2024

BETWEEN

JOHN ORIRI ONYANGO ..... APPELLANT

AND

STANDARD GROUP LIMITED ..... 1ST RESPONDENT

STANDARD LIMITED ..... 2ND RESPONDENT

KTN BARAZA LIMITED ..... 3RD RESPONDENT

DENNIS ONSARIGO ..... 4TH RESPONDENT

MOHAMMED ALI ..... 5TH RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya (Sergon, J.) dated 6th April, 2018 in Nairobi Civil Case No. 503 of 2011)

JUDGMENT

1. This appeal arises out of a claim of libel and slander by John Oriri Onyango (the appellant) against the Standard Group Limited (1st respondent), Standard Limited (2nd respondent), KTN Baraza Limited (3rd respondent), Dennis Onsarigo (4th respondent) and Mohammed Ali (5th respondent).

2. In a plaint dated 22nd November, 2011 and filed a day after, the appellant pleaded that the defamation was contained in six publications and broadcasts set out in detail in the pleading. For convenience only we shall, from time to time, also refer to the publications and broadcasts as documentaries. As a forerunner, some sort of teaser, an advertisement was published on the whole of page 30 of the Standard Newspaper of 5th November, 2012. It is important to reproduce that publication in verbatim

as it is an accurate synopsis of the theme and content of the documentaries alleged by the appellant to be defamatory:

> " This is the story of an international cocaine deal worth tens of billions of shillings. The story of the largest narcotic seizure in Kenya's history as well as most brazen criminal acts by rogue state officers....
>
> In 2004, a group of drug dealers planned the shipment of several tonnes of cocaine from South America into the Country... one tonne was seized by chance...
>
> A massive cover-up ensued in which the small players in the intricate drug trafficking ring ended up in prison as the real masters went scot-free. Those who stood in the way or investigated them were executed...
>
> The KTN investigations team has taken nine months to unravel the faces and players of the drug underworld.
>
> This Saturday and Sunday, join KTN's investigation team of Mohammed Ali and Dennis Onsarigo as they go undercover to unmask the key players in the scandal."

3. The controversial publications and broadcasts were contained in investigative reports, "The Inside Story and Jicho Pevu" aired in the English and Kiswahili News bulletins of KTN respectively, under the catchy titles "The untouchables" and "Paruwanja La Mihadarati" respectively. The words of the publications and broadcasts are set out in the lengthy thirty-eight-page plaint. It was the case for the appellant that, in addition to the television broadcasts, the defamatory publications and broadcasts were on the websites of the 2nd respondent and of the 3rd Respondent being www.standardmedia.co.ke and www.ktn.co.ke respectively and on electronic media including Facebook, Twitter and YouTube, all said to be of local and international reach.

4. It was alleged that by innuendo, the pictures, images, statements, and words complained of in the publications and broadcasts were understood to refer to the appellant and defamatory of him. The appellant contended that pictures, images, statements and words in their natural and ordinary meaning meant and were understood to mean that he was a corrupt public servant, obtained and retained gains from proceeds of drug trafficking; an unethical rogue public servant; a stooge and puppet of law breakers; a law breaker, conspirator to break the law and saboteur; a mobster; a murderer; a member of a drug syndicate, drug peddler, baron and trafficker; unfit to hold public office; international criminal; incompetent to conduct criminal proceedings; deliberately mishandled and suppressed evidence in the case concerning the largest narcotic seizure for the benefit of cartels, Government officers and drug barons; is in office illegally as a reward for mishandling and suppressing evidence in the case concerning the largest narcotic seizure for the benefit of certain Government officers and drug barons guilty of dishonest and dishonourable conduct; a person of dissolute and profligate character, unfit to associate with respectable persons; and not fit to hold any public office in his professional calling or otherwise.

5. Ultimately, the appellant sought judgment against the respondents jointly and severally for the following orders:

    a. General damages for libel.

    b. General damages for slander.

    c. Damages on the footing of aggravated or exemplary damages.

    d. A permanent injunction restraining the Defendants and each of them, whether by themselves, agents, servants or otherwise howsoever from further publishing in their newspapers "The

Standard, The Standard on Saturday and The Standard on Sunday", on their website www.standardmedia.co.ke, in the electronic media including Facebook™, Twitter™ and YouTube™, or causing to be published any pictures, images, statements and words linking and/or associating the Plaintiff with drug trafficking, sabotaging of investigations and prosecution of drug related crimes, the killing of suspects, witnesses and police officers connected with investigations and prosecution of drug related crimes, or any pictures, images, statements and words similarly defamatory or the Plaintiff.

e. A permanent injunction restraining the Defendants and each of them, whether by themselves, agents, servants or otherwise howsoever from further publishing, broadcasting and televising in their television "KTN", on their website www.ktn.co.ke, in the electronic media including Facebook™, Twitter™ and YouTube™, or causing to be published, broadcasted and televised any pictures, images, statements and words linking and/or associating the Plaintiff with drug trafficking, sabotaging or investigations and prosecution of drug related crimes, the killing of suspects, witnesses and police officers connected with investigations and prosecution of drug related crimes or any pictures, images, statements and words similarly defamatory of the Plaintiff.

f. The Defendants be ordered to pay the Plaintiff costs of this suit together with interest thereon at court rates from the date of filing of the suit until payment in full.

g. Interest on a, b, c, and f above.

h. Any such other or further relief as this Honourable Court may deem appropriate."

6. While admitting the contents of the publications and broadcasts, the respondents stated that the pleadings of the appellant did not disclose a cause of action in that, the parts of the story said to be defamatory of the appellant had not been pleaded; and that the entire story was a fair comment on a matter of public interest namely that the drug issue was a matter of National and International concern, and Kenya had been identified as a conduit for drug trafficking and as a result of the drug trade and trafficking, several lives were lost and the courts in Kenya were critical of the manner that prosecutions in relation to the drug trade were conducted.

7. Justifying, further, why the publications and broadcasts were fair comment on a matter of public interest, the respondents asserted that; in the year 2004, a massive consignment of cocaine was shipped to Kenya from Venezuela for repackaging and re-export to Europe; police investigations and State prosecution of suspects arrested in connection with the haul generated controversy and elicited sharp rebuke from the trial courts, even within the State Law Office; there was conflict between senior officers in respect to the prosecution leading to exchange of several letters and memo; there were allegations of massive cover-up; some of the suspects alleged that they were merely sacrificial lambs in the entire episode; and, several lives were lost and there were allegations that the loss of lives was connected to the cocaine haul.

8. After taking the evidence of the appellant and his two character witnesses Jeremiah Okoth (PW2) and Esther Akoth Soti (PW3), for the plaintiff and that of the 4th respondent and Philip Murgor (DW2) on behalf of the entire defence, and, further, on receiving submissions of the parties, the trial court (Sergon, J.) dismissed the appellant's claim but made an order that each party meets its own costs. In reaching the conclusion that the tort of defamation had not been established against the respondents, the learned trial Judge held:

> "I am persuaded by the defendants' argument. I have come to the conclusion that the plaintiff has not tendered plausible evidence to show that the publications were false,

wrongful and defamatory. I am also not convinced that as a result of the publications, the plaintiff was exposed to public scandal, ridicule, contempt and embarrassment. In the end, I find that on a balance of probabilities, the tort of defamation was not established against the defendants."

9. The appellant is before us on a first appeal asking that we set aside the judgment of the High Court and hold the respondents liable for the alleged tort and they be directed to pay to him a sum of KShs.30,000,000 as general, aggravated and exemplary damages. Further, we are asked to issue orders of injunction in terms of those sought in the plaint and costs, both here and at the trial.

10. This plea by the appellant is based on fifteen grounds of appeal but which we collapse to four. It is contended that the learned Judge of the High Court erred in fact and law in:

    a. Failing to appraise and examine the evidence of libel and/or repetition of the libel and slander in the publications and broadcast.

    b. Failing to find that the appellant had made out a case of libel and slander.

    c. Finding that the respondents had established the defence of fair comment.

    d. Failing to assess the quantum of damages payable to the appellant.

11. The parties to the appeal filed written submissions through counsel but while Mr. Chacha Odera, learned counsel for the respondents appeared at the plenary hearing of the appeal ready to highlight his submissions, Mr. Havi, learned counsel for the appellant was absent, though served. Learned counsel, Mr. Odera asked us to consider the appeal on the basis of the filed written submissions, as we now do.

12. It is submitted for the appellant that he established falsity in each of the six publications/broadcasts. Specifically, it is contended that the publication titled "The Untouchables Part I" which is said to have claimed that the appellant had bungled up the prosecution of the biggest cocaine case; that the appellant was put in charge of the prosecution of the case in place of Dorcas Oduor in total disregard of the authority of the then Director of Public Prosecution, Philip Murgor; and that the appellant colluded with the police, concealed evidence from Netherlands and destroyed the drugs before trial was false. The evidence said to establish the alleged falsity is set out in the submissions and shall be evaluated by us.

13. Turning to the defence set up by the respondents, the appellant asserts that the only defence was that of fair comment. We were referred to Gatley on Libel and Slander 12th Edition for the five elements of the defence: the comment must be on a matter of public interest; the comment must be recognizable as a 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 lastly, 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. Counsel for the appellant highlighted evidence which, he argued, is inconsistent with the defence of fair comment. The decision of this Court in Mong'are t/a Gekong'a & Momanyi Advocates vs. Standard Limited [2002] eKLR is cited for the proposition that "a comment which is based on lies or falsehood cannot be designated as fair."

14. On damages, the counsel for the appellant submits that it was incumbent upon a trial court to assess damages irrespective of the outcome of the case (Rodgers Abisai t/a Abisai & Company Advocates vs. Wachira Waruru & Another [2006] eKLR). Surprising, however, before us, the appellant does not lay down a basis for an award of Kshs.30,000.000.00 which he prays for in the memorandum of appeal.

15. For the respondents, it is submitted that for a claim in defamation to succeed, three questions would have to be answered in the positive; would the imputation in the publication tend to lower the plaintiff in the estimation of right-thinking members of the society generally, would the imputation tend to cause others to shun or avoid the claimant and would the words tend to expose the claimant to hatred, contempt or ridicule (Gatley (supra)). In addition, citing the decision of this Court in Musikari Kombo vs. Royal Media Services Limited [2018] eKLR the respondents assert that a claimant ought to establish the existence of a defamatory statement; the defendant has published or caused the publication of the defamatory statement; and the publication refers to the claimant.

16. Counsel for the respondents argues that the written and oral testimonies of the witnesses of the appellant show that they did not believe the documentaries and did not avoid and or shun the appellant. No evidence was brought forth to show that the appellant has been shunned and neither has evidence been presented to show how the documentaries has negatively affected the appellant's career or reputation.

17. It is contended that the falsity of facts in the documentaries does not amount to or prove defamation. One has to show malice through recklessness or negligence. We are invited to find that although some allegations in the documentaries were unauthenticated, the documentaries were not maliciously made to destroy the reputation of the appellant.

18. The respondents assert that the pleadings of the appellant run afoul the requirement that when defamatory words form part of a longer article, then the plaintiff has to set out in his plaint only the particulars passages he/she claims to be defaming (DDSA Pharmaceuticals Limited vs. Times Newspaper [1973] ALL ER 417). Here the appellant is said to have reiterated the entire contents of the documentaries without separating what he considers to be defamatory.

19. As to whether they had established the defence of fair comment, it is contended that to rely on the defence, one has to prove that the words are a comment, the comment is on a matter of public interest, that there is a basis for the fact of the comment and that basis refers to the matter complained of (Gatley supra, Nation Media Group Limited & Another vs. Alfred N. Mutua [2017] eKLR). The respondents made the argument that the subject of the documentaries was a matter of great public interest and the comments made were opinions of the respondents based on what they believed had happened following their investigations and the documents they perused on them. Further, the information relied upon to make the comments were mainly informed by court documents (including Rulings and Judgments), public documents, and investigations.

20. We were then referred to section 15 of the *Defamation Act* (Cap 36 of the Laws of Kenya). Pressing on with this provision and relying, further, on the decision of this Court in Jeff Otieno & 2 Others Group vs. Martin Ng'ang'a [2019] eKLR, the respondents assert that they did not need to prove that all documents they made in the documentaries were true. In addition, that there is a difference between the defence of justification and fair comment. For justification, the defendant is to prove the truthfulness of every fact alleged while for fair comment, the defendant is to show that the facts in which the comment is based is true and fair.

21. Regarding what is fair comment, we were referred to the famous decision of the House of Lords in Reynolds vs. Times Newspapers Ltd and Others [1999] 4 All ER 609 in which it was held that "the true test is whether the opinion, however exaggerated, obstinate or prejudiced was honestly held by the person expressing it." We are asked to find that any reasonable person presented with the evidence from the sources used by the respondents would form the same opinions and make the same comments that were made by the respondents.

22. Appearing to concede, as they would want to, the argument by the appellant that the trial court erred in not assessing damages, the respondents propose that the remedy lies in this Court employing provisions of Rule 31 of the Court of Appeal Rules 2010, (now Rule 33 in the 2022 Rules).

23. This is a first appeal in which our remit is to re-evaluate, re- analyze, and re-consider the evidence and draw our own conclusions, of course bearing in mind that we did not see and hear the witnesses testifying and therefore give due allowance for that. See Selle & Another vs. Associated Motor Boat Company Ltd. & Others [1968] EA 123.

24. Having read the entire record of the trial, the memorandum of appeal, and submissions in support and against the appeal, we see the following as issues that emerge for resolution:

    a. Were some or all of the contents of the publications and broadcasts false?

    b. If the answer to (a) is that some of the contents were true, did the opinion of the publisher nevertheless amount to fair comment?

    c. If (a) and (b) above yields an answer that the defence of fair comment was established by the respondents, was the appellant shunned or his career or reputation negatively affected by the documentaries?

    d. What is the proper order to make in view of the failure of the trial court to award damages?

25. In prefatory, we need to make observations on the argument by the respondent that the appellant's pleading was defective for failure to set out which part of the lengthy publication and broadcast was defamatory. In this regard, is the holding of Lord Denning MR in the decision of DDSA Pharmaceuticals [supra];

> " In the second place, the pleading is defective because it throws – and I use that word deliberately – on to the defendant a long article without picking out the parts said to be defamatory. Some of the article is not defamatory of anyone at all. It describes only the unnamed chemists, but not of the plaintiffs at all. Yet other parts may be defamatory of the plaintiffs. To throw an article of that kind at the defendants and indeed at the court – without picking out the particular passages is highly embarrassing. Master Bickford Smith put it very sensibly:
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> > 'It is tremendously embarrassing to claim the whole of the article as a libel. There is a tremendous amount of the article which is not defamatory of [the plaintiffs]. You must pick out the particular bits and rely on the rest as extrinsic or surrounding facts giving a defamatory meaning to the words.'
>
> That ruling is in accord with the practice as it has been known for many years. The plaintiffs must specify the particular parts defamatory of them."

26. While it is true that the appellant took up this issue at trial, the learned trial Judge never made a finding on it in one way or another. We nevertheless think that if the contention of the respondents is that the decision of the superior court ought to be affirmed on grounds other than those relied on by the court, then they ought to have given notice of grounds for affirming the decision as required by rule 94 of the past Rules of this (now rule 96) which reads:

> " 96.

(1) A respondent who desires to contend on an appeal that the decision of the superior court should be affirmed on grounds other than or additional to those relied upon by that court shall give notice to that effect, specifying the grounds of the respondent's contention.

2) A notice under sub-rule (1) shall state the names and addresses of the persons intended to be served with copies of the notice and lodged in four copies in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and record of appeal, or not less than thirty days before the hearing of the appeal, whichever is the later.

3) A notice of grounds for affirming a decision shall be substantially in Form H as set out in the First Schedule and signed by or on behalf of the respondent.

4) A respondent who desires to contend at the hearing of the appeal that part of the decision of the superior court should be varied or reversed, and that part of that decision should be affirmed on grounds other than or additional to those relied upon by that court, may include both such contentions in a notice of cross-appeal under rule 93 and shall not be required to give notice also under this rule.

5) The provisions of sub-rules (1), (2) and (3) and rule 97 shall apply mutatis mutandis to an appellant who desires to contend, in opposition to a cross-appeal, that the decision of the superior court should be affirmed on grounds other than or additional to those relied on by that court."

27. Having failed to invoke the above rule, that has to be the end of the protest by the respondents. So to the substantive question; were there falsehoods in the documentaries?

28. In "The Untouchables: Part I", it was broadcast that:

> " The office of the AG appointed State Prosecutor, Dorcas Oduor to lead the prosecution team. The appointment was done by Philip Murgor, then DPP and communicated to the AG. But days before the trial began, another prosecutor John Oriri Onyango was put in charge."

It is submitted by the appellant that the falsity of the publication is evident from the proceedings in Criminal Case No. 3165 of 2015 – Republic vs. David Mugo Kiragu & 7 Others tendered before the trial court as it confirmed that Dorcas Oduor was never assigned the case by Mr. Murgor or at all.

29. Having poured over the entire criminal proceedings, we find evidence in an affidavit sworn in support of an application dated 15th March 2006 where the appellant deposes that he was on 20th December 2004 directed by the Attorney General to undertake the prosecution of the criminal case. In his written

testimony to the High Court, Mr. Philip Murgor, (DW2) who at the material time was the DPP and under whom the appellant worked stated:

> "I recall there was considerable interference with the investigations and prosecutions as follows:
>
> a. The appointment of Mr. Onyango, with no expertise in or specialist training in international drug trafficking, who was on leave, as prosecutor instead of the most qualified prosecutor at the line, Ms. Dorcas Oduor, reason given was that the DCI chose on Mr. Onyango over Ms. Oduor."

30. Whatever problems Mr. Murgor had with the appellant, his testimony fails to debunk the evidence of the appellant that it was he, and not Dorcas Oduor, who was appointed and instructed by the Attorney General to prosecute Criminal Case No. 3165 of 2004. That portion of the broadcast was untrue.

31. The appellant further complains about a claim that he colluded with the police, concealed evidence from the Netherlands and destroyed the drugs before trial. Regarding the destruction of the drugs, the documentaries claimed that: "the CID wanted Oriri Onyango to ask the court to allow the police to destroy more than 700pkts of the 6.4 Billion Shillings cocaine even before the trial begun". This cannot be read to mean, as suggested by the appellant, that the publication alleged that he colluded with the police to have the drugs destroyed before trial. As to the allegation regarding concealment of evidence collected from the Netherlands by the appellant working together with a police team, it is discussed later in this decision for reasons that will be apparent presently.

32. Reading the entire publication, one easily gets the impression that it was the appellant who was the prosecutor in Criminal Case No. 93 of 2005 - Republic vs. Yusuf Ali Mohammed & 6 Others. It is in this case that the publishers alleged, an allegation borne out by evidence, that the Presiding Magistrate, Rose Ougo (now Judge of the High Court), criticized the police and prosecution over the manner in which they conducted the investigation and prosecution. In fairness to the appellant, he was not the prosecutor in that case and the impression strongly created in the documentaries was materially false.

33. We turn to the next publication, "The Untouchables – Part 2". Counsel for the appellant submitted that other than repeating the claims of cover-up, it alleged that he was rewarded for the cover-up by remaining in office beyond his retirement age, while Philip Murgor was unfairly fired. Further, that two policemen, Hassan Abdilahi and Erastus Chemorei were killed in the cover- up and an inference drawn that the appellant was the mastermind of the killings.

34. The story in a part relevant to one of allegations reads:

> "Solicitor-General Wanjuki Muchemi and special counsel, Oriri Onyango whom he accused of mismanaging the case, remained in office. While the media speculated Murgor's dismissal was based on the decision not to prosecute Tom Cholmondeley for the shooting to death of a Kenya Wildlife Service police officer, he insists it was all about the drugs."

35. Under the heat of cross-examination, the 4th respondent conceded that he had inaccurately asserted that the appellant was supposed to retire in the year 2005 when his retirement age was in fact in 2007. In addition, the respondents were unable to prove the onus belonging to them that the appellant's stay in Government was because of his role in the drugs case. The insinuation that, unlike Mr. Murgor, the appellant was retained as a reward for covering up the drugs saga is therefore false and unjustified.

36. As to the killing of the two police officers, the documentaries did not either directly or by innuendo connect the death of the two officers to the appellant.

37. Having considered what the appellant pointed out as the untruths in the documentaries, it is now opportune to set out the law that will guide us to settle this controversy, the bulwark of the respondent's defence being premised on fair comment. It is one of the principal defences to libel. In Kenya, it finds statutory expression in section 15 of the *Defamation Act* which reads:

> " 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."

38. The ingredients of the defence of fair comment were famously summarized in the decision of Lord Nicholls of Birkenhead in

Tse Wai Chun Paul vs. Albert Cheng [2001] EMLR 777 as follows:

> " 16. In order to identify the point in issue I must first set out some non-controversial matters about the ingredients of this defence. These are well-established. They are fivefold. First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today: see Lord Denning in London Artists Ltd v. Littler [1969] 2 QB 375, 391.
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> 17. Second, the comment must be recognizable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes, it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of Myerson v. Smith's Weekly (1923) 24 SR (NSW) 20, 26:
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> > "To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment".
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> 17. Third, the comment must be based on facts which are true or protected by privilege : see, for instance, London Artists Ltd v. Littler [1969] 2 QB 375, 395. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of fair comment is not available.
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> 18. Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.
>
> 19. Finally, 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: see Lord Porter in Turner v. Metro-Goldwyn-Mayer Pictures Ltd [1950] 1 AER 449, 461, commenting on an observation of Lord Esher MR in

Merivale v. Carson (1888) 20 QBD 275, 281. It must be germane to the subject matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in Gardiner v. Fairfax (1942) 42 SR (NSW) 171, 174.

21. These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence."

39. We make some observations of two elements of the defence, which are germane to the matter at hand.

40. Explicit from the language of section 15 is that for the defence to be available in the first instance, the words must be partly allegations of fact and partly an expression of an opinion. An allegation of fact alone is not eligible for the defence of fair comment. It bears repeating the words of Lord Nicholls in Tse Wai Chun (supra) "...the comment must be recognizable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege."

41. Sometimes differentiating a fact from a comment may not be a straightforward affair because the line between a fact and a comment may be blurred. This difficulty is noted in Kemsley vs. Foot [1951] 2 KB 34; [1952] AC 345 where Lord Porter said, at pp356-357:

> " The question, therefore, in all cases is whether there is a sufficient sub-stratum of fact stated or indicated in the words which are the subject matter of the action, and I find my view well expressed in the remarks contained in Odgers on Libel and Slander (6th Ed., 1929), at p.166. "Sometimes, however," he says "it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the Defendant accurately states what some public man has really done, and then asserts that "such conduct is disgraceful", this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the Defendant enables his readers to judge for themselves how far his opinion is well-founded; and therefore what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a Defendant has drawn from certain facts an inference derogatory to the Plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact."

42. A useful test in working out the distinction was suggested by Cussen, J. in Clarke vs. Norton [1910] VLR 494:

> " I understand that counsel on each side argued on the assumption that "comment" here was used in or nearly in its primary sense of something which is or can reasonably inferred to be a deduction, inference, conclusion, criticism, judgment, remark, observation, etc"

So, for example, is this illustration by the editors of the 11th Edition of Winfield and Jolowicz on Tort (1979):

> " To say that 'A is a disgrace to human nature' is an allegation of fact, but if the words were 'A murdered his father and is therefore a disgrace to human nature', the latter words are plainly a comment of the former."

43. Second, is the place of proof an alleged fact or alleged facts in the defence. In London Artists Ltd vs. Littler [1969] 2 QB 375, [1969] 2 All ER 193, [1969] 2 WLR 409, [1968] EWCA Civ 3, The Master of the Rolls (Lord Denning) had this to say:

> "The second point is whether the allegation of a "plot" was a fact which the defendant had to prove to be true, or was it only comment? In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter, see Cunningham-Howie v. Dimbleby (1951 1 K.B.) at page 364. They are the facts on which the comments are based or from which the inferences are drawn -as distinct from the comments or inferences themselves. The commentator need not set out in his original article all the basic facts, see Kemsley vs. Foot in 1952 Appeal Cases, 345: but he must get them right and be ready to prove them to be true. He must indeed afterwards in legal proceedings, when asked, give particulars of the basic facts, see Burton v. Board (1929 1 K.B. 301); but he need not give particulars of the comments or the inferences to be drawn from those facts. If in his original article he sets out basic facts which are themselves defamatory of the plaintiff, then he must prove them to be true: and this is the case just as much after section 6 of the *Defamation Act*, 1952, as it was before. It was so held by the New Zealand Court of Appeal in Truth v. Avery (N.Z.F.R. 274), which was accepted by this Court in Broadway Approvals Ltd. v. Odhams Press Ltd. (1965 1 W.L.R. 805). It is indeed the whole difference between a plea of fair comment and a plea of justification. In fair comment, he need only prove the basic facts to be true. In justification, he must prove also that the comments and inferences are true also."

44. While "the writer must get his facts right" there is the statutory rider in section 15 that "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." This rider is an acknowledgment, we think, that while certain portions of the impugned publication may have allegations of fact or facts that the publisher is unable to prove, still the defence will hold if the factual substratum for the comment is accurate. What matters is that the underlying and relevant facts are true. Put differently, the facts upon which the comment is based must be substantially true. As Lord Porter in Kemsley (supra) graphically stated:

> " As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one is justified, yet if that fact were sufficient to support the comment so as to make it fair ,

a failure to prove the other nineteen would not of necessity defeat the defendant's plea. The protection of the plaintiff in such a case would ,in my opinion, be, as it often is in cases of the like kind, the effect which an allegation of a number of facts which cannot be substantiated would have upon the minds of a jury who would unlikely to believe that the comment was made upon one fact or was honestly founded upon it and accordingly would find it unfair."

45. In wrapping our observation of the law, we need to restate that the defence of fair comment is not available if a comment is made maliciously, for there can be no fairness in ill motive. The onus of proving malice lies on the Plaintiff.

46. The thrust of the documentaries was that there was a massive cover-up by State officers of the key players in the shipment of several tonnes of cocaine from South America into the Country. In the broadcast, the 4th Respondent pronounced:

> " This is the story of cocaine deal worth tens of Billions of shillings. The story of how key people in the Government deliberately mishandled the largest narcotic seizure in Kenya's history."

47. A substantial part of the story was in regard to how two criminal cases were deliberately bungled up in the cover-up scheme. The words published in this regard were as follows:

> " All were acquitted after police messed up investigations presented a weak case with little or no evidence of any kind.
>
> The other case relating to the drugs found in Malindi and Embakasi was also deliberately bungled. George Kiragu's brother, David, stood in the dock. Three other people who had rented out properties to his brother – he witnessed one of those deals – and 2 cousins who had done business with George Kiragu some years earlier.
>
> Presiding magistrate Rose Ougo sharply criticized the police and the prosecution over the case. The police had failed to build a case connecting the defendants with the drugs. The evidence he understood had been collected, was never presented in court. After 14 months in custody the 6 defendants were set free except for David Kiragu.
>
> David/Mburu Kiragu was jailed for 30 yrs. and fined 20 million shillings. Prosecutors later called the media to say the judge meant 20 billion shillings.
>
> The office of the AG appointed state prosecutor Dorcas Oduor to lead the prosecution team. The appointment was done by Philip Murgor, then DPP and communicated to the AG. But days before the trial begun another prosecutor John Oriri Onyango was put in charge."

48. This part of the documentary was ostensibly referring to Criminal Case No. 93 of 2005 - Republic vs. Yusuf Ali Mohammed & 6 Others and Criminal Case No. 3165 of 2004. As we have already observed, the appellant was only involved in criminal case 3165 of 2004. There was, undeniably, a mix-up of the two cases in the documentaries. The presiding magistrate, Rose Ougo (as she then was) in Criminal Case No. 93 of 2005 criticised the police and prosecution over the handling but this was not a case that the appellant prosecuted. The report misses the facts completely. The wrong impression given is that the appellant was responsible for the debacle in the prosecution of Criminal Case No. 93 of 2005.

49. Specifically regarding Criminal Case 3165 of 2004 which the appellant prosecuted is this portion of the broadcast:

> " Murgor was unhappy that Oriri Onyango who should have been under his direction was receiving instructions from Muchemi. Murgor's successor as DPP, Keriako Tobiko, who later clashed with Muchemi over issues regarding the management of the DPPs office. On directions from the interference by the solicitor general, I request that you expressly direct the SG to desist from interfering with my department and its state counsel. Over the DPPs protest Oriri Onyango was cleared by Office of the President to the Netherlands where George Kiragu and 4 other traffickers had been arrested. He was to travel with 3 police officers. Their job was to work with the Dutch authorities to gather more evidence.
>
> But the trip was timed just as the case on the largest cocaine haul ever were going to court. other than ask for more time Onyango delegated the case to another lawyer who showed up in court without a case file. Whatever the team learnt in the Netherlands and Belgium was never used in the 2 trials conducted locally.
>
> Five days later Oriri Onyango Gideon Kimilu and Peter Njeru and Dominic Mate were cleared to travel. Murgor wrote another protest letter to the AG asking why the SC Wanjuki Muchemi was again interfering with the DPPs office. Murgor wanted to know if the SG had any vested interests in the case.
>
> During the time Oriri Onyango and the 3 officers were in the Netherlands, stories in the media indicated the Dutch had agreed to extradite George Kiragu. However when the team was back in the country, the DPP was once again left out of the loop as they presented their report. Local trials went on without any evidence or witness in the Netherlands."

50. The evidence is that the DPP protested the travel of the appellant to Netherlands in relation to that criminal case. So under what circumstances did the appellant travel to the Dutch country?

51. In his memorandum dated 14th January, 2005 to the Attorney General, the appellant explains that the Netherlands Police Authorities had invited Kenyan police involved in the investigations of the case to travel to Netherlands and compare notes in the investigations of a case involving a George Kiragu who was held in Netherlands and was also the 1st accused in the Kenyan case. The appellant explained:

> "The presence of investigators and me in Netherlands during the interview of the said accused by the lawful authority of that country would assist in further investigations and prosecution of this case. Indeed, any documents obtained during the interviews and statements made by any witnesses in Netherlands should be secured and handed over to the Kenya investigations team and the prosecutor. In view of the magnitude of this case coupled with complex legal issues involved, the police department invited me to accompany the investigations of the case in Netherlands."

52. It is true, and this is conceded in the appellant's letter of 28th January 2005 to Mr. Murgor, that the clearance to travel was from the Office of the President. It is also true that on 18th January 2005, Mr. Murgor wrote to the Solicitor General seeking an explanation as to why the Solicitor General was interfering with his department. It was the view of Mr. Murgor that Mr. Oriri should have sought authority to travel from either the Attorney General or him as the department head and not the Office

of the President. In his evidence in chief, the appellant defended the clearance from the Office of the President:

> " That letter cleared me indeed but that is how clearance is done. Nothing wrong."

Later, under cross-examination, he seems to concede that authority to travel should have been obtained from the Attorney General. This is what he said:

> " When I travelled to Netherlands, I first sought permission to travel out of the country from the Attorney General and not from Mr. Murgor, the DPP."

53. The evidence however does not support the assertion by the appellant that he had sought permission from the Attorney General. He simply informed the Attorney General of the trip. His letter of 28th January, 2005 belies any suggestion that he sought permission from his senior. He writes:

> " Since I was travelling over the weekend I decided to write detailed brief to the Hon. Attorney General through you informing him of the trip and its importance."

54. It has to be curious that the appellant, who was making an important trip in respect to a critical criminal case he was prosecuting, sought and obtained the clearance to travel from the Office of the President and not the Attorney General or through the Attorney General who appointed him to prosecute the case.

55. We recall that the reason given by Mr. Oriri for travelling to Netherlands was to gather information, which would assist in further investigations and prosecution of Criminal Case No. 3165 of 2004. So did it? Just five days or so after the appellant returned from the trip, the Director of Criminal Investigations writes to him on 30th January 2005 asking him to seek an adjournment of the case for at least two reasons:

> "1) The key investigation team visited Netherlands for the purposes of conducting further inquiries in this case. The suspects held in lawful custody in Netherlands and who include the 1st accused in our case were interviewed. During the interview, new matters surfaced which the investigating officer would like to pursue to gather more evidence.
>
> 2) The investigation officer also intends to record some further statements of the witnesses in this case before they called upon to testify. This intention arises from some new developments in this case after the Netherlands visit." (emphasis ours)

56. Although the appellant denied receiving the letter, he did not discredit its authenticity. That the appellant may not have received the letter does not change the centrality of its contents to the matter at hand. The letter was making reference to the outcome of the visit by the appellant and the investigation team to Netherlands. The letter is proof that, one, the inquiries there yielded further and useful information and there were matters which needed to be pursued by the investigators to gather more evidence. Second, that the investigating officer intended to record some further statements from the existing witnesses before they were called upon to testify. This, no doubt, would be in the knowledge of the appellant who was part of the team and as a prosecutor would certainly know that it was crucial for further evidence to be gathered on the basis of information received in Netherlands before the criminal case was prosecuted further. And this was no ordinary case!

57. Raised, as a concern in the documentaries, was that the local trials proceeded "without any evidence or witness in the Netherlands". The authors then observe:

> " Why crucial (sic) evidence was not presented in court has continued to raise suspicion....
>
> Was this a well-crafted cover-up by State officials to protect power figures?"
>
> and adds;
>
> "Both Oriri Onyango and Wanjuki Muchemi promised to return our calls but they never did."

58. There is no evidence that the information or evidence obtained from Netherlands was ever deployed to prosecute Criminal Case No. 1365 of 2004. The appellant who was the prosecutor of that criminal case was best placed to tell the trial court why that information was never used to carry out further investigations or why the evidence gathered in Netherlands was never used to improve or support the prosecution here. Not without significance, the author of the publication attempted to reach the appellant for clarification but he failed to return his calls even after promising to do so.

59. Given these set of circumstances, not forgetting the controversy around how the appellant travelled to Netherlands, the inference drawn in the publication that the appellant was one of the State Officers who was part of a well-orchestrated cover-up amounted to fair comment. The appellant was given an opportunity to refute that damning allegation but chose not to. On analysis of the evidence, we find and hold that although some of the allegations made in the documentaries did not have a factual basis and were in fact outright false, some key allegations were substantially true and those facts formed a sound foundation for the comments made in the documentaries as regards the appellant. Simply, the factual substratum for the comments was proved and the deductions arrived at were not defamatory. They were fair comment.

60. Let us also add that the appellant, on whom the responsibility rested as the claimant, did not prove that the publishers of the documentaries were guilty of malice in the instances where they fell short and made false allegations.

61. Without any analysis of the evidence at all, the learned trial Judge came to the conclusion that:

> " the plaintiff has not tendered plausible evidence to show that the publications were false, wrongful and defamatory."

We trust we have done a lot more than the trial court in arriving at the same outcome.

62. The appeal therefore fails on liability. Had the result been different, then we would have used the power donated to us by Rule 33 of the Rules of this Court to make an appropriate award.

63. Ultimately, we dismiss this appeal and shall not be as benign as the High Court on Costs. The appellant shall pay costs on the dismissed appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

S. GATEMBU KAIRU, FCIARB.

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR