



**Nation Media Group Limited & 2 others v Mubea (Civil Appeal
353 of 2019) [2024] KECA 1508 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1508 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 353 OF 2019
PO KIAGE, A ALI-ARONI & LA ACHODE, JJA
OCTOBER 25, 2024**

BETWEEN

NATION MEDIA GROUP LIMITED 1ST APPELLANT

EMMANUEL JUMA 2ND APPELLANT

KEN MIJUNGU 3RD APPELLANT

AND

MICHAEL KAMAU MUBEA RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Nairobi
(Sergon, J.) dated 27th February, 2019 in HCCC No. 210 of 2016)*

JUDGMENT

1. By this appeal, the appellants challenge the judgment of the High Court of Kenya at Nairobi (J. K. Sergon, J.) by which they were found to have defamed the respondent by their broadcasts and in consequence were condemned to pay to him Kshs. 7 Million general damages and a further Kshs. 3 Million, being aggravated and exemplary damages.
2. In the respondent's plaint filed before that court on 5th August, 2016, and amended on 7th October, 2016, by which he sued the appellants, the respondent pleaded that the 1st defendant in its television news bulletin, NTV Live at 9.00pm on 29th July 2016, falsely and maliciously published and broadcast defamatory content concerning him. The said defamatory material was broadcasted by the 3rd appellant, Ken Mijungu (DW1), as an employee of the 1st appellant, Nation Media Group Limited at its television station known as NTV, and with the knowledge of the 2nd appellant, Emmanuel Juma, the Managing Editor of NTV at the time. The broadcast was, in relevant part, as follows;

Ken Mijungu : Activist Okiya Omtata went to court to challenge statements issued by the Commissioners and the Chief executive officer. He also wanted the court to



compel Commissioner Michael Mubea to make full disclosure regarding a payment of 50.4 Million shillings allegedly paid to him through the law firm of Michael Daud and Associates and Ogolla and Company Advocates. Omtata alleges the money was part of the NYS loot. Lawyer Ogolla is among those fighting money laundry and theft charges. Omtata successfully obtained temporary orders stopping six Ethics & Anti-Corruption Commission Commissioners and the Chief Executive Officer from issuing any other statement touching on allegations made against the chairperson of the commission until the matter before the court is heard and determined, High Court Judge Mbugua Murithi issued the restraining orders.

3. The respondent complained that in its subsequent news bulletin, on 1st August 2016 at 9pm, NTV repeated the publication and broadcast of the defamatory material concerning him in this manner;

Ken Mijungu : Documents in our position indicate that a law firm previously associated with Michael Mubea the deputy chief executive officer at the Ethics and Anti-corruption Commission received 50.4 million shillings on the 14th April last year. The documents were filed in court by activist Okiya Omtata last Friday on a certificate of urgency. Among the prayers, Okiya wants the court to compel Mubea to explain why the money was sent to him. He however, alleges its part of the loot from the National Youth Service. A copy of bank transfer documents appears to support the claim by Omtata that the money was paid to Michael Daud and Associates advocates previously co- owned by Mubea where he was a senior partner before he took the Ethics and Anti-Corruption Commission job. The money was sent by a law firm associated with Patrick Ogola, a suspect in the NYS scandal currently battling theft and money laundry charges in court. EACC chairman Philip Kinisu has been questioned at the Directorate of Criminal Investigation. The secretariat at Integrity Centre has told him to take full responsibility for doing business with NYS thereby occasioning conflict of interest. The court has halted any more pronouncement from the EACC. In the meantime, voices demanding Kinisu resignation are getting louder. The latest is Baringo North Member of Parliament William Cheptumo.

4. Further, the appellants did not make any effort to ascertain the factual correctness of the false content prior to making the broadcast. Instead, they continued with the broadcast on 2nd August 2016, in a program known as 'Am Live' aired at 7.15am, and hosted by NTV's journalist, Debarl Inea featuring certain guest commenters. The broadcast was in part as follows;

Debarl Inea (NTV): Lets move on and take this conversation deeper and talk about now on the EACC and what is happening with EACC and the involvement of Mubea...

Jakoyo Midiwo: [...] There is a piece of land I think on Lenana road that this Mubea and Halakhe went and registered in the name of Irene and went and intimidated her, and told her you see you own, you have grabbed public land and she had no idea. I do not who (sic) this Irene is but I know they went and registered a public land and accused her of forgery in her name, you are dealing with a dark force. Actually axis of evil, now this is what they are trying to do Kinisu.

5. The respondent stated that in a bid to correct the false and malicious allegations, he caused a demand letter to be delivered to the appellants on 2nd August 2016, in which he informed the appellants that he had resigned from the law firm of Michael Daud & Associates in early 2013 and consequently had no relation with the sum allegedly remitted to the law firm.



6. Despite the demand letter, the appellants allegedly proceeded to publish and broadcast defamatory material in the news bulletin of 2nd August 2016 at 9pm on NTV live along these lines, in relevant part;

Ken Mijungu : Michael Mubea features prominently in Kinisu troubles he is the man with nine lives and in spite of accusation of corruption he has survived every on slot against him and remarkably managed to stay on stop.

7. The respondent claimed that the appellants continued to publish and broadcast defamatory material concerning him in NTV's news bulletin, NTV Live, at 9pm on 8th August 2016, in the following manner;

Ken Mijungu : [...]

Another Ethics and Anti-Corruption Commission official in the thick, is the Deputy Chief Executive Officer Michael Mubea. He has been challenged in court to explain 50.4 Million shillings sent to a law firm associated with him. Documents filed in court indicate that Mubea's former law firm received the money for the purchase of a house at Roselynn Estate. The house is one of the properties listed as belonging to Ben Gethi and his mother Charity Wangui and earmarked by the asset recovery agency for forfeiture. Documents in our possession include; a copy of sale agreement; copies of banking slips and swift transfers show the house that costs Shs. 50.4 million was purchased on behalf of Ben Gethi and his mother, Charity Wangui through their lawyer Patrick Ogolla who sent the money to Michael Daud & Associates, a law firm that acting for the seller-Crown Rockshield Kenya Limited- owned by a Ugandan known as George Karunde Rodgers.

8. It was alleged that in its subsequent news bulletin, NTV Live, on 28th September 2016 at 9pm, NTV repeated the publication and broadcast of the defamatory material relating to the respondent. The defamatory material was broadcast by Sheila Sendeyo, a journalist employed by NTV.

9. The respondent went on to plead that the words published and broadcast by the appellants in the aforesaid news bulletins, in their natural and ordinary meaning meant that he;

- a. Is corrupt and was not fit to hold the position he occupied of Deputy CEO, Ethics and Anti-Corruption Commission (EACC).
- b. Has integrity issues and should not be serving in a public body.
- c. Received a bribe and/or an inducement so as to derail investigations.
- d. Is in a corruption ring and/or association
- e. Is unethical.

10. He asserted that the words were false and were broadcast with a malicious intention to disparage and belittle him and diminish his stature in the eyes of the public. The particulars of falsity and malice were pleaded as follows;

- a. The respondent resigned from the law firm of Michael Daud & Associates in early 2013 and thus in the absence of any association with the said firm he could not have received any sum of money that is said to have been sent to the firm.
- b. The appellants did not ascertain either from respondent or the law firm whether the accusations were factually correct before broadcasting them.



- c. The appellants continued with the publication and broadcast even after the respondent had voluntarily availed information demonstrating that the accusations were not factually correct.
11. It was averred that by reason of those publications and broadcasts, the respondent had been ridiculed and his reputation, character and credibility severely damaged. He had also suffered damage to his moral and professional standing in the eyes of the general public. Ultimately, the respondent sought judgment against the appellants jointly and severally for;
- a. A declaration that the words broadcast by the defendants in the news bulletin aired on NTV Live at 9pm on 29th July 2016, 1st August 2016, and 2nd August 2016, 8th August 2016 and 28th September 2016 concerning the plaintiff are false and malicious.
 - b. General damages for libel.
 - c. Aggravated and exemplary damages.
 - d. Interest on (b) and (c).
 - e. Costs of and incidental to the suit and interest thereon at court rates from the date of filing suit.
12. The respondent's claim was contested by the appellants. In their statement of defence dated 25th October 2016, the appellants denied airing a broadcast containing defamatory statements on the respondent. They contended that the statements contained in the broadcast were an accurate reproduction of the allegations made in Petition No. 330 of 2016, Okiya Omtatah Okoiti vs. Attorney General, the Ethics and Anti-Corruption Commission & Others, (the Petition) including paragraph 27 thereof which was framed as follows;
- ‘Circumstances pointing to the witch hunt include but are not limited to the following: -
- 27.1 It has also emerged that on 14th April 2015, the 4th Interested Party through the law firm M/s Michael Daud & Associates, was paid some Ksh. 50,400,000.00 by M/s Ogola and Company Advocates.
 - 27.1.1 Though the payment was disguised as property purchase, there is no evidence of the same.
 - 27.1.2 The Petitioner avers that there is a clear conflict of interest in the transaction given the fact that M/s Ogola and Company Advocates are the advocates for some of the suspects in the theft of Kshs. 791 million from the NYS, and the 4th Interested Party is the Deputy CEO of the 2nd respondent which, at the time the payments were made, was already criminally investigating the matter with a view to recommending the criminal prosecution of suspects by the Director of Public Prosecution.
 - 27.1.3 The Petitioner reasonably suspects that the Kshs. 50,400,000.00 was part of the Kshs. 791 million stolen from the NYS.
 - 27.1.4. Therefore, the Petitioner posits that the Kshs. 50,400,000.00 was paid to compromise the criminal investigations and demands that the 4th Interested Party be put to strict proof on the bona-fides of the alleged transaction.
13. The appellants continued that, to the extent that the broadcast was a fair and accurate report of proceedings before a court exercising judicial authority, the said report was privileged within the meaning of sections 6 and 8 of the *Defamation Act*, Chapter 36 of the Laws of Kenya. It was pleaded



that the broadcasts were in pursuit of the appellants' constitutional rights, including freedom of the media, and, the 1st appellant's social duty to inform their viewers and listeners of matters which directly impact on public resources. It was argued that by virtue of the respondent's office as the Deputy Chief Executive Officer of EACC, at the time, and thus a public figure, he voluntarily exposed himself to the likelihood that he might, at times, be associated with articles and stories published by the media. Further, as a public figure, the respondent had opportunities for rebuttal of any alleged defamatory matter but he did not do so until after 2nd August 2016.

14. The appellants claimed that following the said rebuttal, a report was broadcast on NTV on 9th August 2016, in which it was clarified that the respondent had resigned from the law firm of Michael Daud & Associates and that the sum of Kshs.50.4 Million had been made with respect to a property transaction. It was asserted that the appellants have never had any intention of defaming or injuring the respondent's reputation as alleged and hence he was not entitled to the declarations and orders he sought.
15. In reply to the defence, the respondent contended that the manner in which the 3rd appellant reported the defamatory publications against him did not demonstrate an accurate reporting of the allegations made against him in the Petition. The respondent asserted that the broadcast was an imputation of facts, and not a comment on the allegations made in court. He claimed that the broadcast of 9th August 2016 was not a clarification of the accurate position but a further publication of defamatory words against him.
16. The case proceeded for hearing before Seron, J. with the respondent testifying as PW1. In his testimony, the respondent reiterated that the appellants never sought clarification from him before publishing the offending broadcasts. He complained that the publications affected him emotionally and socially, and among church elders where he served as an elder. The respondent called two witnesses in support of his case, that is, the Chief Executive Officer (CEO) of the EACC at the material time, Halakhe Waqo (PW2) and Adan Daud Mohamed (PW3), a partner at the law firm of Michael Daud & Associates. PW3 confirmed that the respondent was his partner at the law firm before his resignation on 28th January 2013. He also indicated that when the firm received the sum of Kshs.50.4 Million, the respondent was no longer his partner and neither was he associated with the law firm. PW3 faulted the appellants for failing to invite the law firm to respond to the allegations related to the receipt of the money. The 3rd appellant (DW1) testified for the appellants. He confirmed participating in the alleged broadcasts which were done with his employer's knowledge.
17. Upon considering the suit, the evidence adduced and the submissions by parties, the learned Judge held in favour of the respondent.
18. Aggrieved by that decision, the appellants have filed a memorandum of appeal before this Court containing nine (9) grounds, which can be summarised as that the learned Judge erred by;
 - a. Finding in favour of the respondent notwithstanding that he did not produce evidence of the alleged defamatory articles by way of video or audio clips.
 - b. Holding that the respondent was not required to tender evidence of the broadcast recordings.
 - c. Finding that the articles published by the appellants were defamatory of the respondent notwithstanding that the articles were a fair and accurate report of proceedings before court.
 - d. Holding that the defence of qualified privilege and fair comment were not available to the appellants.
 - e. Finding that the appellants acted maliciously in reporting the court proceedings.



- f. Misconstruing the guiding principles on defamation.
 - g. Finding that the respondent was entitled to general damages of Kshs.7,000,000 and aggravated and exemplary damages of Kshs.3,000,000, which awards were excessive, unjustified and not based on comparative decisions.
 - h. Predisposing himself to a mind favourable to the respondent.
19. We were urged to allow the appeal and set aside the impugned judgment. In the alternative, we were invited to reassess the quantum of damages granted to the respondent.
20. During the hearing of the appeal, learned counsel Mr. Munyu and Senior Counsel Mr. Ngatia appeared for the appellants and the respondent, respectively, and highlighted their written submissions which they had filed prior.
21. Mr. Munyu contended that no evidence was adduced by the respondent to prove that the appellants published or broadcasted any defamatory words concerning him. To support this argument, counsel cited the High Court decisions in *Odero O. Alfred Vs. Royal Media Group Limited* [2015] Eklr And *Joseph Ndungi Vs. Victor Munyao* [2020] eKLR, where the court was of the view that the duty to produce evidence of the alleged defamatory broadcast lay with the plaintiff. Mr. Munyu faulted the learned Judge for finding that the evidence of the witnesses who testified was sufficient and that in any case the appellants did not refute the existence of the broadcasts. He asserted that, factual issues, including averments raised at cross-examination, cannot inform a party's case.
22. Counsel charged that the learned Judge misapplied the law of privilege as set out in sections 6 and 8 of the *Defamation Act*. Citing the Canadian case of *Dale Vs. Guardian, Division Of Southamn INC.*, 1999 CanLII 4603 (PE SCTD), Counsel submitted that there is a common law privilege for persons to publish fair and accurate reports of judicial proceedings, including pleadings filed in court, irrespective of whether or not the said pleadings have been the subject of deliberation in open court. It was urged that section 6 of the *Defamation Act* is applicable not only to proceedings in which the subject matter has already been judicially deliberated on and judgment rendered, but also to proceedings and incidental pleadings lodged in court.
23. Mr. Munyu complained that while the learned Judge appreciated that the impugned broadcasts related to a matter of public interest and were based on pleadings filed in court, he nonetheless dislodged the appellants' defence of fair comment and qualified privilege on the basis that the broadcasts were actuated by malice. To counsel, the said malice was not proved by the respondent and neither was it exhibited in the publication by the appellants. Moreover, failure to accord the respondent an opportunity to respond to the impugned broadcast is a not a demonstration of ill intent on the part of the appellants as they were merely reporting allegations contained in the Omtatah Petition filed in court. Citing the High Court decision in *Ibrahim Mukhtar Abasheikh Vs. Royal Media Services & Another* [2020], counsel urged that the respondent bore the onus of proving malice beyond mere inference.
24. On the quantum, we were invited to interfere with the sum awarded as damages for being grossly disproportionate, based on erroneous principles and being manifestly excessive. Mr. Munyu faulted the learned Judge for failing to consider that the respondent did not call witnesses to demonstrate that after listening to the impugned broadcast, they perceived him as a person of lower moral standing or reputation. Further, the learned Judge was criticised for failing distinguish the authorities that had been cited by the appellants, where the awards granted were less than what he awarded. The authorities include, *Johnson Evan Gicheru Vs. Andrew Morton & Another* [2005] eKLR }(Gicheru case), where this Court awarded a composite sum of Kshs.6,000,000 to the former Chief Justice; *Kiunjuri Vs.*



Wangethi Mwangi & 2 Others [2016] eKLR, where a Cabinet Minister was awarded Kshs.1,000,000, and Standard Limited Vs. G. N. Kagia T/a Kagia & Company Advocates [2010] eKLR, where an advocate was awarded Kshs.3,000,000. Counsel submitted that although the foregoing cases involved well known public figures with national and international repute, the learned Judge disregarded them. Mr. Munyu faulted the learned Judge for failing to distinguish exemplary and aggravated damages and, for not giving a justification for each. We were implored to allow the appeal and set aside the impugned judgment. In the alternative, counsel urged that the said judgment be varied with a reassessment of the damages.

25. We probed Mr. Munyu about some of the comments that were made in the broadcasts and whether they were a true reflection of the Petition that was filed in court. For instance, the comment that was made by the 3rd appellant in one of the broadcasts to the effect that the respondent had nine lives. The comment was in the following terms; ‘Michael Mubea features prominently in Kinisu troubles he is the man with nine lives and in spite of accusation of corruption he has survived every on slot (sic) against him and remarkably managed to stay on top.’ In answer, counsel agreed that some of the comments that were made in the broadcasts were not word for word from the Petition that had been filed in court. Counsel, however, added that the broadcasts were matters of public interest and hence we should interrogate the comments within the defence of privilege under section 6 of the [Defamation Act](#).
26. Opposing the appeal, Mr. Ngatia, SC, for the respondent, referred us to pages 310 to 311 of the record where he observed that in cross-examination, the 3rd appellant confirmed having participated in the broadcasts, with the full knowledge of his employers. He also adverted to each transcript as set out in the plaint. Counsel referred us to page 312 of the record where, the 3rd respondent conceded to not reaching the respondent, nor the law firm, concerning the Kshs.50.4 million that had been received by the latter. Mr. Ngatia, SC reiterated that despite writing a demand letter to the appellants on 2nd August 2016, in which he set out the distance between the respondent and the transaction involving the law firm, the publication progressed day after day. Counsel drew our attention to page 315 of the record where the 3rd appellant explained that his comment alleging that the respondent featured prominently in the troubles of Philip Kinisu, the then EACC chair, was not true.
27. Mr. Ngatia, SC submitted that whereas Petition No. 330 of 2016 was withdrawn, the 3rd appellant continued with the broadcasts that were injurious to the respondent, without tendering an apology. He challenged the appellants’ argument that the broadcasts were made as a fair and accurate report of the proceedings in court and therefore privileged. Counsel contended that the appellants forgot about the petition and, ‘took a crusade of crucifixion of the respondent,’ by alleging that he was part of ‘dark forces’ and ‘axis of evil’ at the EACC, words that were not used in the petition. Counsel asserted that the appellants could not hide under the defence of fair comment and/or privilege. Besides, at the time when those comments were made, the petition had long been withdrawn. Further, it was argued that the defence of fair comment as provided under section 6 of the [Defamation Act](#) only applies to newspaper publications and not broadcasts, and even if the Court were to expand that definition to cover broadcasts, the said publications were not fair comment. Mr. Ngatia, SC cited various authorities to support his assertion that fair comment does not apply to misstatements. The authorities include, Hunt Vs. Star Newspaper Co. Ltd [1908] 2 K.b 3019; Nation Media Group Limited & Another Vs. Alfred N. Mutua [2017] Eklr, And Samuel Ndung’u Mukunya Vs. Nation Media Group Limited & Another [2015] eKLR.
28. It was submitted that the fact that the appellants failed to investigate the publication and words that they broadcasted, besides admitting that no opportunity was accorded to the respondent to rebut the



statements, showed that they acted out of malice. For this proposition, counsel relied on the decision in *Alnashir Visram Vs. Standard Limited* [2016] eKLR where the High Court held as follows;

(119) ...failure to accord the Plaintiff an opportunity to give his side of the story is a manifestation of recklessness and spite and therefore malice...”

29. Mr. Ngatia, SC contended that the appellants demonstrated malice in their conduct when they continued broadcasting the false and inaccurate statements concerning the respondent, despite receiving a demand letter pointing out the falsehood in the broadcasts. Further, it was the only media house in Kenya which targeted the respondent without considering his side of the story.
30. Concerning the award of damages, counsel cited decisions, which, to him, courts had granted comparable awards as follows, the *Gicheru* case (supra); *Nation Media Group Ltd & 2 Others Vs. John Joseph Kamotho & 3 Others* [2010] eKLR, Kshs.6,000,000 for general damages and Kshs.1,000,000 for aggravated damages; *The Nairobi Star Publication Limited Vs. Elizabeth Atieno Oyoo* [2018] eKLR, Kshs. 5,000,000 as general damages and Kshs. 500,000 for aggravated damages, and *Christopher Ndarathi Murungaru Vs. John Githongo* [2019] eKLR (*Murungaru Case*), Kshs.20,000,000 for general damages and Kshs.5,000,000 for aggravated damages. It was urged that the respondent who held a position in an Anti-Corruption state organ, was expected to abide by the highest standards of integrity and thus the damage that the broadcasts caused to his reputation were enormous.
31. Mr. Ngatia, SC submitted that the learned Judge cannot be faulted for awarding the respondent Kshs.3,000,000 merely because he did not clarify whether it was for exemplary or aggravated damages. Counsel drew our attention to paragraph 54 of the impugned judgment where in awarding the aggravated damages, the learned Judge considered that the appellants did not offer an apology even after receiving a demand notice. Moreover, they continued to broadcast the offending information. Counsel compared the instant case to the *Murungaru* case (supra) where the court awarded Kshs.5,000,000 for aggravated damages because the defendants had continued to publish the defamatory material. In the end, we were urged to dismiss the appeal with costs.
32. We remind ourselves that this being a first appeal, we proceed by way of a re-hearing with express obligation to re-appraise and re-evaluate the entire evidence with a view to making our own independent inferences and conclusions. This we have faithfully done, while cognizant that we are not possessed of the advantage the learned Judge had of hearing and observing the witnesses as they testified before him, for which we make due allowance. See Rule 31(1)(a) of the Court of Appeal Rules; *Selle & Another Vs. Associated Motor Boat Company Limited & Another* [1968] EA 123.
33. Having painstakingly perused the record, the evidence and submissions by parties, I think, the issues for determination are threefold, namely, whether the broadcasts by the appellants were defamatory of the respondent; whether the defence of fair comment and/or privilege was available to the appellants and, whether the quantum of damages that was awarded to the respondent was excessive, unjustified and not based on comparative decisions.
34. As to whether the broadcasts by the appellants were defamatory, the appellants were rather conflicting in their submissions. While on one hand counsel claimed that no evidence was adduced to show that the appellants televised any defamatory statements against the respondent, he in the same breath submitted that the broadcasts were based on pleadings that were filed in court in Petition No. 330 of 2016, hence their reliance on the defence of privilege under section 6 of the *Defamation Act*. Conversely, the respondent insisted that the appellants published the offending statements. We were referred to pages of the record where the 3rd appellant while testifying on behalf of the appellants, admitted having participated in the said broadcasts, with the knowledge of his employer.



35. The ingredients of defamation have been delineated in a litany of decisions of this Court including *Sanitam Services (e.a) Limited Vs. Nyaga & Another* [2023] KECA 386 (KLR) where the Court observed as follows;
- “13. [...] As rightly stated by this court in the impugned decision, the ingredients of defamation are that the statement must be defamatory; the statement must refer to the plaintiff; the statement must be published by the defendant and the statement must be false. A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling.” See also *Wycliffe A Swanya V Toyota East Africa Ltd & Francis Massai* [2009] Keca 379 (klr) And *James Vs. Ndirangu & 3 Others* [2022] KECA 82 (KLR).
36. It thus follows that a claimant in a defamation suit has to establish the following elements;
- i. The statement must be defamatory;
 - ii. The statement must refer to the plaintiff;
 - iii. The statement must be published by the defendant and,
 - iv. The statement must be false.
37. By the 3rd appellant’s own admission in his testimony, it is patently clear that the alleged broadcasts were aired by the appellants. The 3rd appellant referred to the publications as reflected in the amended pleadings. He confirmed that he never reached the respondent to get clarification on the allegation that Kshs.50.4 million was sent to him, ostensibly as part of a plot to derail further investigations in the National Youth Service (NYS) scandal. Further he did not contact the law firm of Michael Daud and Associates which received the money, nor the counterpart law firm in the transaction, to get an explanation. The 3rd appellant also accepted that his statement about the respondent featuring prominently in the then EACC Chairperson’s troubles was not true.
38. It was pleaded, and indeed the respondent testified, that despite the appellants having been served with a demand notice, indicating that he was no longer a partner at the firm, and neither was he associated in any way with the law firm of Michael Daud and Associates, the appellants continued with the broadcasts and never offered an apology to him. In his testimony, the respondent lamented that he was extremely injured and, affected emotionally and socially amongst his colleagues, peers and church leadership where he served as an elder. His witnesses, PW2 and PW3, also testified that the respondent looked disturbed during the period in question and people contacted them asking questions about the broadcasts.
39. Having reviewed the record and the evidence carefully and exhaustively, I have no doubt whatsoever that the statements made in the broadcasts brought the respondent into hatred, contempt, odium or ridicule among right-thinking members of society generally. For the 1st appellant, a broadcasting Television Station with a countrywide viewership, to publish statements patently false about the integrity of a person who holds a senior position in a body mandated to promote integrity and combat corruption in the country, must have been significantly and indubitably injurious to the reputation of the aggrieved party. I am in agreement with the trial Judge that the broadcasts had a grave impact on the respondent’s standing in society and in his office as the Deputy Chief Executive Officer of the EACC.



40. The appellants pleaded the defence of fair comment and/or privilege under section 6 of the [Defamation Act](#), contending that the impugned broadcasts were a fair and accurate report of proceedings before court. That provision provides as follows;

“A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged: Provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter.”

41. During the hearing before this Court, however, it emerged that some of the more damning words that were uttered in the impugned broadcasts were not part of the pleadings in Petition No. 330 of 2016. Such words include claims that the respondent had nine lives and, he was part of ‘dark forces’ and ‘axis of evil’ at the EACC. Undeniably, the appellants far deviated from the contents of the petition and thus their broadcasts were not a fair and accurate reporting of the proceedings in court. In this regard, I associate myself with the finding of the High Court in Samuel Ndung’u Mukunya Vs. Nation Media Group Limited & Another [2015] eKLR;

“I find that the defendants chose to misdescribe the conduct of the plaintiff in the whole matter of selection of judges of the High Court. In *Gatley on Libel and Slander* 9th Edition from Para 12.7-12.8, It was stated, and I agree that misdescription of conduct only leads to the one conclusion detrimental to the person whose conduct is misdescribed and leaves the ordinary reasonable reader no opportunity for judging the character of the conduct condemned anything but a false picture being presented for judgment.”

42. Similarly, this Court in *Rodgers Abisai T/a Abisai & Company Advocates Vs. Wachira Waruru & Another* [2006] eKLR made the following persuasive observation;

It is however, in evidence that the report in question was not confined to the judicial proceedings. It covered matters which the reporter gathered from people he interviewed after the proceedings in question. The reporter concerned, having admitted that fact when he testified, the defence of absolute privilege under section 6 of the [Defamation Act](#), Cap 36 Laws of Kenya was not available to the defendants.”

43. I concur with the learned Judge that for the appellants to have permitted persons to air their views and/or comment in live broadcasts, on matters that were allegations before court and which the court had not determined, denied them the right to rely on the defence of privilege and fair comment, since the accuracy of the broadcast cannot be guaranteed.

44. Next, the appellants complained that the quantum of damages awarded to the respondent was excessive, unjustified and not based on comparative decisions. They also took issue with the fact that the learned Judge lumped together both exemplary and aggravated damages, without making a distinction and a justification for each. I note that there was obviously an error of principle for the learned Judge to treat aggravated and exemplary damages as if they are undistinguishable. That notwithstanding however, it is apparent that some of the considerations which the learned Judge took into account while making that award was the fact that, the appellants did not offer an apology despite having received a demand notice. They also continued to broadcast the offending information. He thus awarded the respondent Kshs.3,000,000 being a comparable and reasonable award. I am of the considered view that the aggravating factors cited by the learned Judge were sufficient justification for the amount awarded as aggravated damages.



45. Contrary to the appellants' claim, it is also evident at paragraph 51 of the impugned judgment that the learned Judge considered comparable authorities that were cited by them on the question of damages. It is trite that an appellate court will only interfere with an award of damages by a trial court where, there has been an error in principle; a misapprehension of the evidence or facts; or the award is manifestly out of proportion by being too much or too little. It is no justification to do so only if the appellate bench would itself have arrived at a different figure had it tried the case. See *Mwangi Kiunjuri Vs. Wangethi Mwangi, Nation Media Group Limited & Royal Media Services Limited* [2016] Keca 648 (klr) And *Johnson Evan Gicheru Vs. Andrew Morton & Michael O'mara Books Ltd* [2005] KECA 16 (KLR). Having considered the nature of the defamatory words broadcasted, the extent of viewership of the 1st appellant's TV station, the fact that the broadcasts were repeated even after a demand notice was issued, and the impact of the offending words on the reputation and standing of the respondent, I am not inclined to interfere with the award of damages. I do so bearing in mind the decided cases cited by both parties.
46. In the premises, this appeal is without merit and I would dismiss it with costs.
As Ali-Aroni and Achode, JJ.A are of the same view, it is so ordered.

Judgement Of Ali-Aroni, J.A.

1. I have had the advantage of reading in draft the judgment of my brother Kiage, JA, which I entirely agree with and have nothing useful to add.

Judgment Of L. Achode J.A

2. I have had the advantage of reading in draft the judgment of Hon. P. O. Kiage JA. I am in full agreement with his reasoning and conclusions and therefore, have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

P.O KIAGE

JUDGE OF APPEAL

ALI-ARONI

JUDGE OF APPEAL

L. ACHODE

JUDGE OF APPEAL

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

Signed

Deputy Registrar

