J.P. Machira t/a Machira & Company Advocates v Mwangi & another (Civil Appeal 175 of 2019) [2023] KECA 228 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 228 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 175 OF 2019

HM OKWENGU, A ALI-ARONI & JM MATIVO, JJA

MARCH 3, 2023

BETWEEN

J.P. MACHIRA T/A MACHIRA & COMPANY ADVOCATES ..... APPELLANT

AND

WANGETHI MWANGI ..... 1ST RESPONDENT

NATION NEWSPAPERS LIMITED ..... 2ND RESPONDENT

(Appeal against part of the Judgement of the High Court of Kenya at Nairobi (Mwongo, J.) dated 18th January, 2017 in HCCC No.1338 of 2000)

JUDGMENT

1. This is a first appeal against the Judgment and decree of the High Court of Kenya at Nairobi, (Mwongo, J.) delivered on 28th September, 2018 in Nairobi HCCC No. 1338 of 2000, J. P. Machira T/A Machira & Co Advocates v Wangethi Mwangi and Nation Newspapers.

2. In the said case, the appellant, Mr. J. P. Machira, an advocate of the High Court of Kenya had sued the respondents claiming from them jointly and severally general damages, aggravated and exemplary damages plus interest thereon and costs. The appellant's claim arose from alleged defamatory news reports published by the respondents in the Daily Nation Newspaper on 26th July, 2000, 27th July, 2000 and 1st August, 2000. The 1st respondent Mr. Wangethi Mwangi was at the material time the Editor of the Nation Newspapers (the 2nd respondent).

3. The appellant's grievance against the respondents was three- fold. One, that on 26th July, 2000, the respondents published a news report entitled "lawyer flattens his client's house" alleging that the appellant had demolished the matrimonial home of his ailing client, one P. K. M. located in the up-market suburb of Karen, and, that the client who was of unsound mind had been admitted at Mathari Mental Hospital. Two, on 27th July, 2000, the respondents published another report entitled "woman

kept off disputed property" alleging that guards stationed in a property the appellant had allegedly bought from his client, stopped the client's wife and caused the client's children to be evicted. Three, on 1st August, 2000, the respondents published a report entitled "court stops demolition of house" alleging that the appellant was stopped from demolishing more houses owned by a Karen family he had evicted.

4. The appellant claimed that the said publications were based on falsehoods, malice, revenge and spite. He blamed the respondents for failing to establish the truth before publishing the reports. He complained that the publications were malicious and aimed at discrediting him both in his personal and professional capacity.

5. He claimed further, that all the details which would have assisted the respondents in publishing the truth were available in court records and in the Judgment of the court in HCCC No. 113 of 1999. He stated that the alleged eviction was done by a court bailiff pursuant to a court decree. Further, he had a sale agreement for the house duly drawn by the client's advocates, and, the court had issued an order of specific performance. It was the appellant's case that at the time of publishing the defamatory statements, HCCC No. 1709 of 1996 in which he had sued the respondents for defamation under similar circumstances was pending in court.

6. In their joint amended statement of defence filed on 9th December, 2002 the respondents denied publishing the alleged reports, or doing so falsely, maliciously, contemptuously or disparagingly. They denied that the words complained of in their natural and ordinary meaning meant or were understood to have any defamatory meaning and maintained that the publications were a fair and accurate representation of the words uttered in court by the parties in the proceedings, so they were a fair and accurate report of the court proceedings.

7. The respondents also stated that the words were published under a sense of duty and without malice towards the appellant and in the honest belief that the contents were true, and for the public benefit. They asserted that the words complained of were in fact published on a privileged occasion.

8. In his reply to the defence, the appellant maintained that the words were not in respect of court proceedings or a privileged occasion but they were false, malicious, defamatory and contemptuous of him; that the respondents did not bother to establish the truth; nor were the words published under a sense of public duty or for public benefit; and despite his written demand for an apology and correction, the respondents declined to apologize.

9. Notably, the appellant's grievance was triggered by three newspaper reports published in the Nation Newspapers. The first report published on 26th July, 2000 reads:

> " Lawyer flattens his client's house"
>
> "A Lawyer has demolished the matrimonial home of his ailing client, claiming he has bought the property. Mr. John Patrick Machira's lawyer confirmed before Lady Justice Joyce Aluoch yesterday that his client had "flattened" Mr. P K M's house in the up-market Karen suburb, Nairobi. Mr. M, the court was told, was of "unsound mind" and is currently admitted at Mathari Mental Hospital, Nairobi. The Lawyer told the court that Mr. Machira was now the owner of property said to be worth Sh. 16 million, and had started putting up structures after demolishing Mr. M's home and servants' quarters. Lady Justice Alucoh certified an application filed by Mr. M's wife, Mrs. Julia Nyokabi, as urgent and directed that it be heard this morning. The Judge further restrained Mr. Machira from further demolitions. Saying the matter was contentious and should be heard as soon as possible, the Judge directed lawyers for the parties to furnish her with details of the matter this morning. Mrs. M has

filed an application under a certificate of urgency, seeking to have Mr. Machira, his agents or servants restrained from demolishing or renovating her family house in Karen. She is also seeking orders that Mr. Machira, his agents or servants be restrained from carrying on or continuing construction or other work on the land. Her lawyer told the court that her husband did not receive summons to enter appearance in a suit between him and Mr. Machira. She added that she was unaware of a suit between her husband and Mr. Machira over the property, the court was further told that Mrs. M was neither aware of the purported sale of the property to Mr. Machira by her husband nor of money having been paid to her family. Her Lawyer said Mr. Machira had represented Mr. M in two suits between him and his former employer, Kenya Reinsurance, over the property. Mr. Machira knew or ought to have known, the lawyer argued, that Mr. M was ailing when he purportedly entered into an agreement with him to buy the property."

10. The appellant claimed that the above report was meant to show that he had committed a sin of demolition, yet he actually never conducted any demolitions. He maintained that despite protesting the misreporting, the respondents ignored his letter and proceeded to publish two other reports.

11. The second report complained of is reproduced below:

> Report 2 - published on 27th July, 2000: "Woman kept off disputed property"
>
> "A lawyer has hired 11 guards to protect a disputed property he says he has bought; a Nairobi court was told yesterday. Mrs. Julia Nyokabi Kaniaru, who also claims ownership of the Karen property, said through her lawyer that she had visited the premises and found guards stationed there by lawyer J. P. Machira. Mr. Machira says he bought the property worth Sh.16 million, from her husband who is now admitted to Mathari Mental Hospital in Nairobi. But Mrs. Kaniaru maintains she is unaware of any transaction between her husband and Mr. Machira. She and her four children were evicted on June, 30 and one of the houses on the premises demolished. Doors and windows of the second house have since been ripped off. High Court Judge Joyce Aluoch was also told that Mrs. Kaniaru had also been threatened with "dire consequences" if she set foot on the property. Her Lawyer, Mr. Francis Mutua, said Mr. Machira and his lawyer had written to the High Court registry staff, castigating them for allocating a hearing date for Mrs. Kaniaru's application without notifying them. Mrs. Kaniaru wants the court to restrain Mr. Machira from demolishing her home and putting up other buildings. The hearing continues on Monday."

12. The appellant claimed that the above report conveyed the meaning that he was a conman, unethical or unprofessional because the figure of Kshs.16 Million was farfetched and imaginary, since the property had been professionally valued; that he was immoral, dishonest, greedy, unethical, criminal- minded, a conman and a totally unreliable advocate of the High Court.

13. The third newspaper report complained of is reproduced below:

> Report 3 - published on 1st August, 2000: "Court stops demolition of houses"
>
> "A Lawyer was yesterday stopped from demolishing more houses owned by a Karen family he evicted last month after allegedly buying their property, High Court Judge Richard Kuloba made the order after the wife of Mr. P K M urged him to order Nairobi lawyer John Machira not to demolish one of her two houses in Karen. The Lawyer has allegedly demolished a timber house. Mr. Machira claims to have bought the property said to be worth Sh.16 million from Mr. M, who is admitted at the Mathari Mental Hospital, Nairobi. However, Mrs. Julia Nyokabi Kaniaru has challenged the alleged sale, saying her husband

was incapable of entering into a sale agreement due to his mental state. Mrs. Kaniaru, through Nairobi lawyer Francis Mboya, has applied for judgment entered in default of appearance in favour of Mr. Machira to be set aside. She also wants to be allowed to defend the suit instead of her sick husband, and the lawyer ordered to give the property back to her. Mr. Mboya said Mr. Machira has represented Mr. M in two cases involving the property. "He knew Mr. M was of unsound mind," he explained. He produced a certificate from a Mathari Hospital psychiatrist to show that Mr. M was mentally ill. The lawyer further said Mr. M was not served with a notice to attend court. He said five summonses said to have been served on Mr. M were never acknowledged. Mr. Mboya said another lawyer said to have served the summons on Mr. M's former employer, Kenya Reinsurance, at midnight was a "perennial liar". The lawyer said proceedings in the suit were "full of irregularities and misrepresentation and concealment of facts". Had the Court been given the proper picture, the order made in favour of Mr. Machira could not have been made, Mr. Mboya averred. Hearing continues on September, 2000."

14. The appellant complained that the above publications portrayed a negative impression of him and that the publications were defamatory and that they lowered his dignity in the eyes of right thinking members of the society.

15. The respondents did not call any witnesses in support of their case. They however relied on their statement of defence in which they pleaded that the alleged publications were privileged under section 6 of the *Defamation Act*.

16. In the impugned Judgment, the learned Judge addressed three issues namely;

    a. whether the proceedings were in terms of section 6 of the *Defamation Act* and whether privilege attached to them;

    b. whether the publications were false, malicious, spiteful and defamatory of the plaintiff; and,

    c. what damages, if any, were awardable and who should pay costs. The trial court found in favour of the appellant and awarded him a composite figure of Kshs.5,000,000/= for damages.

17. In his memorandum of appeal dated 30th April, 2019 the appellant cited 22 grounds some of which are narrative and repetitive. However, from the submissions by Mr. Kimondo Mubea, learned counsel for the appellant, the core arguments are two. One, whether the quantum awarded was inadequate considering the gravity and magnitude of the libel against the appellant. Two, whether the defamatory materials published on 26th and 27th July, 2000 were watered down by the material published on 1st August, 2000.

18. The appellant seeks enhancement of the award of Kshs. 5,000,000/= to the extent and level this Court deems fit. He also prays that he be awarded aggravated and exemplary damages for libel plus interest, and the respondent to make a full an unqualified apology and such an apology be given the widest possible prominence and circulation, similar to the publications complained of. He also prays for costs of the appeal and costs in the Superior Court.

19. Also aggrieved by the same Judgement, the respondents mounted a cross-appeal on 5th November, 2019 beseeching this Court to dismiss the appellant's suit in the High Court with costs. In the alternative, the award of damages be varied and reduced to the extent this Court deems fit and in any event, the costs of this appeal be awarded to the respondents.

20. In their notice of cross appeal, the respondents raised 10 grounds. However, Ms. Janmohamed SC, representing the respondent addressed only two grounds, namely, whether the publications

complained of were accurate and made in judicial proceedings in HCCC 113 of 1999 which is covered by absolute privilege under section 6 of the *Defamation Act*, and, whether the damages awarded to the appellant were inordinately high.

21. In his submissions, learned counsel for the appellant Mr. Kimondo Mubea submitted that each malicious inaccurate, unfair and defamatory publication constituted a separate independent cause of action attracting damages in favour of the appellant, so that the award of Kshs.5,000,000/= was too little. He argued that the respondent's arrogance, failure and refusal to apologize and offer a correction warranted a higher award since the same respondents were previously in HCCC No. 1709 of 1996 found to have published malicious, false and defamatory material against the appellant and an award of Kshs.10.2 million passed against them. He argued that the respondents failed to learn a lesson from the said award, they refused to apologize and instead filed a cross-appeal against the Kshs.5 million. He submitted that the learned Judge erred in his assessment of damages.

22. On the cross appeal, Mr. Mubea maintained that the respondents did not discharge their evidentiary burden because their allegation that the reports were fair and accurate were not supported by evidence during the trial.

23. In support of the cross appeal, Ms. Janmohamed SC, the respondent's counsel submitted that it is not in dispute that the articles complained of were published by the respondents. She maintained that the articles were not defamatory as alleged and that the law recognizes privileged occasions in which it is for the public benefit that a person should be able to speak or write freely and this should override or qualify the protection. She argued that the articles did not meet any of the tests set out in *Wycliffe A. Swanya v Toyota East Africa Ltd* [2009] eKLR.

24. Counsel further argued that though they did not call a witness, the articles complained of as well as a transcript of the court proceedings in respect of which those articles related were produced in evidence by the appellant and the same were not disputed by the parties. She submitted that it was not necessary for the respondents to adduce evidence because the appellants' evidence was sufficient to prove that the articles were absolutely privileged. She relied on Civil Appeal No. 102 of 2017 *J.P. Machira T/A Machira & Company Advocates v Wachira Waruru and Another* where it was held:

> "... Although, as pointed out by the appellant, the respondents did not adduce any evidence or call any witness during the trial, the articles complained of as well as a transcript of the court proceedings in respect of which those articles related were produced in evidence by the appellant. As the editors of Gatley on Libel and Slander, 12th edition state at page 525 "the onus of proving that the report is fair and accurate lies on the defendant, but it is sufficient if this clearly appears from the claimant's own evidence."

25. Counsel submitted that the respondents were reporting proceedings in a court of law, so they are entitled to absolute privilege under section 6 of the *Defamation Act* unlike qualified privilege which requires an explanation and proof of malice. Counsel argued that the allegations that the proceedings by way of chamber summons application in HCC 113 of 1999 were not proceedings and as such not protected is unfounded and with no iota of truth. She faulted the trial Judge for agreeing with the appellants and cited the *Halsburys Laws of England*, Volume 28, Fourth Edition Reissue at page 47 which defines what forms part of court proceedings as follows:

> " The evidence of all witnesses or parties speaking with reference to the matter before the Court is privileged. The privilege extends to documents properly used and prepared for use in the proceedings. "

Further at page 49 it states as follows;

> "Absolute privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in judicial proceedings including statements in pleadings and witness statements."

Further at Page 64 the *Halsburys Laws of England,* Volume 28, Fourth Edition reissue further state that;

> "Immunity attaches only to the report of actual legal proceedings. The immunity extends to reports of ex-parte proceedings before magistrates and to reports of public proceedings before a judge in chambers, a coroner or a registrar in bankruptcy."

26. Ms Janmohamed SC argued that the proceedings in HCCC 113 of 1999 were open court proceedings, a fact admitted by the appellant and that the proceedings were not conducted in camera. She submitted that the respondents' publications are protected because they fall under section 6 of the *Defamation Act* and cited *J.P. Machira T/A Machira & Company Advocates v Wachira Waruru* (supra) where the court held:

> " ...Although the newspaper report published on 26th January, 2000 was not a verbatim report of what had been said in court the previous day, a comparison of the transcript with the newspaper article leads us to the conclusion that the newspaper article was a faithful report or account of what had taken place in court the previous day. The editors of Gatley on Libel and Slander. 12th edition at para 13.38 at page 525 observe that it is not necessary that the report should be verbatim: an abridged or condensed report will be privileged, provided it gives a correct and just impression of what took place in court."

27. On quantum of damages, counsel submitted that the award of general damages was not founded on any legal principle, that it is inordinately high and it ought to be set aside. She urged this court to re-assess and vary the said award to Kshs.500,000/=.

She relied on *Peter Maina Ndirangu v Nation Media Group Limited* Civil Case No. 396 of 2011 in which the court awarded Kshs.500,000/= as general damages.

28. In response to the appellant's appeal for enhancement of the award, Ms Janmohamed urged this Court to be persuaded either that the trial judge acted upon some wrong principles of law, or that the amount awarded was extremely high as to make it an entirely erroneous estimate and relied on *Butt v Khan* [1978] eKLR as per Law J.A that:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

29. In conclusion, Ms Janmohamed SC prayed that the cross appeal be allowed and the appellant's appeal be dismissed with costs to the respondents.

30. We have considered the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. We are required as a first appellate court by rule 31 of the *Court of Appeal Rules,* 2022 to re-appraise the evidence and to draw inferences before coming to our own independent conclusions. (See *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) E.A 123).

31. We start from the premise that the publication of the alleged defamatory statements and the contents is not disputed. The contestation as we see it is whether the publications are privileged within the meaning of section 6 of the *Defamation Act*. The other issue is whether the damages awarded were inordinately high such that they are an erroneous estimate to warrant reduction as urged by the respondents or whether the damages are inordinately low to amount to an inaccurate assessment meriting this Court's interference to enhance them as prayed by the appellant.

32. It is important to stress that the respondents did not adduce evidence during the trial. Ordinarily, where a litigant fail to adduce evidence, his pleading remains mere unproven averments. (See *Edward Muriga through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No.23 of 1997, Kwach, Omolo & Pall, JJ.A.). However, the circumstances of this case are unique in that the respondents admit publishing the statements complained of. The respondent's position is that because the same statements were produced by the appellant in his evidence, it was not necessary for them to produce the same documents because the publication and contents are not disputed. It is also important to mention that the respondents' defence stood on a pure point of law, namely, that the statements are absolutely privileged under section 6 of the *Defamation Act*. That being the position, it is our view that it was not necessary to adduce evidence to prove a pure point of law. In the circumstances, no adverse inference can be made against the respondent for failing to adduce evidence to prove a point of law. In any event, considering that the publication of the statements and the contents were not in dispute, it would have added no value to rehash the same evidence.

33. We now address the core issues presented in this appeal. First, it is useful to briefly set out the law relating to the tort of defamation, with particular reference to libel. Generally speaking, every person is entitled to his/her good name and to the esteem in which he/she is held by others, and, has a right to claim that his/her reputation shall not be disparaged by defamatory statements made about him/her to a third person(s) without lawful justification or excuse. The classic definition of defamation was given by Mr. Justice Cave in *Scott v Sampson* (1882) 8 QBD 491 as "a false statement about a man to his discredit." In *Sim v Stretch* (1936) 52 TLR 669 (671) Lord Atkin gave this test: "would the words tend to lower the complainant in the estimation of the right thinking members of the society generally?"

34. Therefore, a defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right- thinking members of society generally and in particular to cause him to be shunned or avoided or regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business. Defamation, therefore, is the wrong done by a person to another's reputation by words, signs, or visible representations.

35. The test of the defamatory nature of a statement, therefore, is its tendency to excite against the plaintiff the adverse opinions or feelings of other persons. The statement is judged by the standard of opinion which prevails among ordinary, right- thinking members of society. The test is an objective one, and it is no defence that the statement was not intended to be defamatory, or uttered by way of a joke. A wrong of defamation, as such, consists in the publication of a false and defamatory statement concerning another person without lawful justification. The foregoing propositions of the law were appreciated by this Court in *Wycliffe A. Swanya v Tunyuta East Africa Limited & Francis Massai* Nairobi CA No. 70 of 2008. The word 'defamation' is the generic name for the wrong; libel and slander are particular forms of it. Defamation, therefore, is of two kinds, namely, libel and slander. In libel, the defamatory statement is made in some permanent and visible form in writing or otherwise recorded, such as, printing, typing, pictures, photographs, caricatures, effigies. (See the High Court in *Julius Vana Muthangya v Katuuni Mbila Nzai* [2019] eKLR). In slander the defamatory statement or representation is expressed by speech or its equivalents that is, in some other transitory form, whether

visible or audible, such as, a nod, wink, smile, hissing, the finger-language of the deaf and dumb, gestures or inarticulate but significant sounds. (See *Halsbury's Law of England 4th edition* Vol. 28).

36. The actions of libel and slander are thus private legal remedies, the object of which is to make reparation for the private injury done by wrongful publication to a third person or persons of defamatory statements concerning the plaintiff. The defendant in these actions may prove the truth of the defamatory matter and thus show that the plaintiff has received no injury. For though there may be damage accruing from the publication, yet, if the facts published are true, the law gives no remedy by action.

37. In an action for libel the plaintiff should prove that the statement complained of (a) refers to him; (b) is in writing, (c) is defamatory, and, (d) was published by the defendant to a third person or persons. The foregoing elements of defamation were enunciated by the Court of Appeal in *Wycliffe A. Swanya v Toyota East Africa Limited & Francis Massa,* Nairobi CA NO. 70 of 2008. In an action for libel, therefore, lies on mere proof of publication, even though the plaintiff does not prove that he has suffered any special damage, that is, the loss of some definite temporal advantage. This position was appreciated by this Court in *Selina Patani & Another v Dhiranji v Patani* [2019] eKLR which held:

> " In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered."

38. On proof of the above facts, the plaintiff makes out his case, and, then it is for the defendant to establish one of the defenses recognized by law.

39. Besides the general defences applicable to all actions in torts, such as, limitation, consent, accord and satisfaction, previous judgment, etc., the three special defences available in an action for defamation, under the common law, are (a) justification (or truth), or (b) privilege, absolute or qualified, and, (c) fair comment. The defence of justification is the plea of truth of the words or statements published by the defendant. The form of the plea is that "the words complained of are true in substance and in fact." Truth is a defence in a civil action, for the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess. No action, therefore, will lie for the publication of a defamatory statement if the defendant pleads and proves that it is true.

40. 'Privilege' is used here in the sense of an excuse or immunity conferred by law on statements or communications made on certain occasions called 'privileged occasions'. A privileged statement, therefore, is one which is made in such circumstances as to be exempt from the rule that a man attacks the reputation of another at his peril.

41. 'Privilege' is of two kinds: (a) absolute and (b) qualified. A statement is said to be absolutely privileged when it is of such a nature that no action will lie for it, however false and defamatory it may be, and even though it is made maliciously, that is to say, from some improper motive. These cases are at the opposite extreme from the ordinary cases of unprivileged defamation. When a statement is not privileged, it is actionable, however honest its publication may have been; but if it is absolutely privileged it is not actionable, however dishonest its publication may have been.

42. The publications complained of in this case were in respect of judicial proceedings. Section 6 of the *Defamation Act* provides as follows:

> 6. Newspaper reports of judicial proceedings 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.

43. Section 7 of the act provides for qualified privilege of newspapers as follows:

7. Qualified privilege of newspapers

1. Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice.

2. In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff 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.

44. Part 1 of the schedule to the act lists statements privileged without explanation or contradiction as follows:

1 ...

2. A fair and accurate report of any proceedings before a court exercising jurisdiction throughout any part of the Commonwealth subject to a separate legislature, or of any proceedings before a court-martial held outside Kenya under any written law.

45. A reading of the above provisions leaves no doubt that to be absolutely privileged, the publication complained of must report be (a) a newspaper report of proceedings heard before any court exercising judicial authority within Kenya; and (b) the newspaper report must be "fair and accurate."

46. The *Black's Law Dictionary*, 10th Edition defines proceeding as follows:

> "Proceeding is a word used to express the business done in courts... may include in its general sense all steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and judgment... the term proceeding may include – (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, ... (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action..." (emphasis added)

47. The excerpt reproduced earlier from the Halsburys Laws of England (supra) states as follows "absolute privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in judicial proceedings including statements in pleadings and witness statements. (emphasis added)

48. To be privileged, the statements must be "fair and accurate" although it need not be verbatim, and should convey to its readers the substance of what has taken place in court because this is the reason for the privilege. Interpretation of 'fair and accurate' in relation to report of court proceedings as provided in section 6 of the *Defamation Act* requires the court to consider all of the circumstances of the case, including the following non- exhaustive list of circumstances-

a. an abridged court report will be privileged provided that it gives a correct and just impression of the proceedings,

b. if the report as a whole is accurate, a slight inaccuracy or omission is not material,

c. if a report contains a substantial inaccuracy it will not be privileged,

d. it is not sufficient to report correctly part of the proceedings if, by leaving out other parts, a false impression is created, and

e. a report assuming a verdict, before any verdict has been delivered, is not privileged.

49. As Lord Devlin stated in *Lincoln v Daniels* [1962] 1 QB 237 at 257, the privilege attaches to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, with such protection extending to the contents of documents submitted as evidence. Absolute privilege extends to everything that is done from the inception of the proceedings onwards, and includes all pleadings and other documents brought into existence for the purpose of the proceedings.

50. Case law such as *Khasakhala v Aurah* (1995-1998) 1 EA 112 and leading writers such as Gatley on Libel & Slander 8thEd. pg 265 para 264 are clear that to meet the "fair and accurate" standard, it is not necessary that a report of court proceedings provides a word-for-word account, and a well-grounded summary, even with slight inaccuracies, that provides an overall account, will be acceptable; but that significant inaccuracies that give a false impression, or prejudge a verdict before a verdict has been given will fail the "fair and accurate" standard. The report must be fair and impartial, although it need not be verbatim, and should convey to its readers the substance of what has taken place in court as if they had been present, since this is the reason for the privilege.

51. Turning to this case, there is no dispute that the publications in question were in relation to court proceedings. The question is whether the three publications were fair and accurate report of what transpired in court on the three occasions. We will start with the article published on 26th July, 2000. The transcript of the proceedings of July 25, 2000 before Aluoch, J. in High Court Civil Case No.113 of 1999 show that Mrs. Muturi's lawyer, Mr. Mutua, appeared before the court when an application by Mrs. Muturi was certified as urgent and scheduled for hearing the following day. In that regard, Mr. Mutua is captured in the court proceedings stating as follows:

> " The plaintiff is demolishing properties on the defendant's land. This started subsequently after 18th July 2000. The plaintiff was an advocate for the defendant, since 1994. He was acting for him in respect of the suit HCCC No. 1728 of 1988 and HCCC No. 809 of 1994. These cases are in respect of the same properties i.e. the defendant was having problems with his employer and Machira was representing him. Machira knew or ought to have known that the defendant was of unsound mind. When he purported to have purchased this property, he knew that the plaintiff was of unsound mind, he ought to have sought leave of the court to apply for somebody to represent the defendant. My client through the wife says they have never been served with any document."

52. The trial Judge in respect of the above publication held:

> " I have noted the following critical discrepancies and differences between Report 1 and the Proceedings. In report 1 "lawyer flattens client's house" the defendants make reference to the client's matrimonial home, which is not referred to in the proceedings. Report 1 indicates that the plaintiff's lawyer confirmed in court that his client had "flattened" Mr Kaniaru M's home, which is not in the proceedings. Report 1 makes reference to the suit property as being valued at Shs.16 Million, which is not indicated in the proceedings. Unlike Report 1, the proceedings do not indicate that the court was told that Mr. M was

admitted at Mathari Mental Hospital, though the proceedings indicate that he was alleged to be unwell (of unsound mind). Report 1 indicates that "the Judge further restrained Mr. Machira from further demolitions", when this was neither factual nor evident from the proceedings. Finally, Report 1 states that the court was told that Mrs M was neither aware of the purported sale of the property to Mr. Machira, nor that any money had had been paid to her family, whilst this is not reflected in the proceedings. It must be recalled that the chamber summons application and annexed documents had not been broached or heard at this point.

On the basis of the foregoing, I find the defendant's Report 1 to be generally inaccurate and exaggerated. That notwithstanding, it is clear that the court was made aware that Mr. P K M, the client, was unwell or of unsound mind, a fact repeated by Justice Aluoch whilst determining the urgency of the application.

53. We have juxtaposed the newspaper report published on January 26, 2000 with the court proceeding of July 25, 2000 both reproduced above and the entire record. With tremendous respect, we do not think that the Judge read the entire record before him. As the definitions alluded to earlier suggest, court proceedings include pleadings filed and steps taken in the proceedings. On record is an affidavit sworn by Julian Nyokabi Muturi dated July 17, 2000. At paragraphs 4 and 5 of the affidavit, the deponent stated on oath:

    4. That this is the only property the defendant has and we have been staying on the said land as our matrimonial home.

    5. That in 1997 the defendant herein started developing some mental disorders and has been attending Mathari Hospital where he has been admitted two times and is currently admitted at the said hospital to date. (Annexed herein and marked "JNM1" is a letter confirming this).

    20. That the said property is currently valued at Kshs. 16 million while the plaintiff wants to pay Shs.3 million for it merely by taking advantage of the situation. (emphasis added)

54. With the above averments on record, we fail to understand why the learned judge arrived at the conclusion that "the clients matrimonial home was not referred to in the proceedings." We also find no basis for the judge's conclusion that there was no reference to the value of the suit property or mention of the deponent's husband having been admitted at Mathari Mental Hospital. The above findings were erroneous and un-supported by the record.

55. The second publication complained of was published in the Daily Nation of July 27, 2017. The transcript of the proceedings before the court on July 26, 2000 is reproduced below:

    Mr. K'Owade:

    > "I have instructions from my client that there has been gross misreporting of the proceedings of yesterday in this court. My client has had problems with the press before and the matter even went to the Court of Appeal. Things have been reported which my Lord you did not order. I have all the papers with me."

    Court:

    > "I have not had time to read the newspapers, but if there is a misreporting then I direct the newspaper concerned to correct accurately in future. The parties were

not able to tell me what the "status quo" is at the suit premises so I could make any order to that effect."

Mr. Mutua:

"As we sit here, one of the buildings has been completely demolished, this was a timber building of four rooms with concrete foundation. The second building is a permanent stone building serving as the matrimonial home. All the doors were removed plus all the windows. Secondly, the plaintiff has posted eleven security guards at the entrance and my client cannot go in."

K' Owade:

"The Bailif who was authorized by this court carried out eviction orders on 30.6.2000."

Mutua:

"I require time to respond to this replying affidavit"

Court:

"Leave is granted to the applicant/defendant to file a reply to the replying affidavit.

Further by Court: Hearing of the application to be on Monday, 31.7.2000 at 9.00 a.m."

56. Regarding the 2nd publication, the learned Judge held as follows:

52. In Report 2, "Woman kept off disputed property", the following critical inaccuracies and discrepancies are evident relative to the court proceedings: The report does not indicate that the plaintiff's counsel complained about the mis- reporting or accuracy of the newspaper reports, an aspect which took almost half the time in the proceedings, nor is the court's order thereon reflected in Report 2; the Report 2 states that Mr Machira said he bought the property, worth Kshs16 million from the client's husband, but the proceedings have no such record; the report refers to Mrs Kaniaru's husband as being admitted at Mathari Mental Hospital, which was not recorded in the proceedings; The report refers to Mrs Kaniaru and her four children being evicted whilst the proceedings make no reference to the eviction nor to the children; the report states that Mrs Kaniaru told the court she was threatened with "dire consequences" if she stepped on the premises, which is not reported in the proceedings; Mr Mutua is alleged in the report to have said that Mr Machira and his staff had written to court staff and castigated them for allocating a hearing date without notifying him whilst in the proceedings there is no such record. The Report also failed to mention the important fact stated by Mr Kowade for the plaintiff that a court bailiff had been authorised by the court to carry out the eviction.

53. On the basis of the above observations, I find that the defendant's Report 2 was also inaccurate and exaggerated, to the extent identified above.

57. We have carefully compared the contents of second publication and the entire record. Again, the learned judge fell into error when he alluded that there was no mention of the property being valued at Ksh.16 million, yet in the affidavit referred to above the value of the property was clearly stated. The learned Judge erred by holding that on the material day there was no mention of eviction yet the record shows that on July 25, 2000, Mr. Wachira informed the court that "after eviction of 30.6.2000, he took a date ex parte for July 26, 2000."

58. Further, on record was an application dated July 17, 2000 amended on July 24, 2000 seeking to set aside the default judgment. On 26th July, 2000 (the day the proceedings the learned judge referred to in his finding were recorded), the court fixed the said application for hearing on 31st July, 2000. Significant to the issue before us is the grounds cited in the said application. These were: (a) at the time the proceedings were commenced the defendant was admitted at the Mathari Mental Hospital. A certificate to that effect was exhibited. It was also claimed that the defendant was of unsound mind. It follows that the conclusion by the learned Judge that there was no mention that the defendant was of unsound mind or he was admitted in the said hospital was not supported by the record. By failing to consider the entire record and only basing his findings on portions of the record, the learned Judge failed to address his mind to relevant material and therefore fell into a grave error and arrived at a wrong conclusion which was unsupported by the record.

59. Regarding the third publication complained of published on 1st August, the court proceedings of 31st July, 2000 show that the learned Judge held:

> " ...having carefully compared defendant's Report 3 with the proceedings of 31st July, 2000, I am of the view that Report 3 generally covered what transpired in the proceedings, but in far less detail. That Report is not, in my view, either generally exaggerated or an inaccurate report of what transpired in the proceedings. Further, the day's proceedings ended with the plaintiff's counsel seeking another hearing date to reply, as he was to appear before another judge on a different matter. This explains why the plaintiff's side of the story is not contained in the proceedings of that day, and likewise, in Report 3."

60. We have also contrasted the record with the above finding. We find that the publication of 1st August, 2000 was an accurate account of the oral arguments made by Mr. Mutua counsel for Mrs. Kaniaru while seeking to set aside the default Judgment vide the amended chamber summons referred to earlier. We are fully in agreement with the conclusion reached by the trial Judge that what was reported is actually what was submitted in court and that the appellant had failed to establish his case to the required standard in relation to the report/article published on 1st August, 2000. Consequently, we uphold the finding by the learned trial Judge with respect to the third publication.

61. When considering contents of a written defamatory statement, as in this matter, a court should give the article complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader of the article. It should be borne in mind that hypothetical reasonable readers should not be treated as either naïve or unduly suspicious. They should be treated as capable of reading between the lines and engaging in some loose-thinking, but not as being avid for scandal. It is not what the plaintiff thinks about himself and the alleged publication. It is what an average reasonable reader would construe the publication. A reading of the court record and the three publications leave no doubt the publications reasonably convey what transpired in court on the three occasions as captured in the proceedings. It is our view that a court should avoid an overelaborate analysis of an article in question article, because an ordinary reader would not analyze the article as a lawyer or an accountant would analyze documents or accounts. Judges should have regard to the impression the article has made upon them in considering what impact it would have made upon the hypothetical reasonable reader. The court should certainly not take too literal approach to its task.

62. In defining the term "fair and accurate" one should bear in mind relevance of the publications viewed in the context of the court proceedings. Relevance in the context of absolute or qualified privilege should not be equated with relevance in a strict evidential sense. What is logically irrelevant may not necessarily be irrelevant in relation to privilege and the test is not as rigid as with the evidentiary test.

Relevance here means that the statements complained of must be in all respects germane to the issues before the court. Viewed from this perspective, we find no difficulty in concluding that the message conveyed in the publications was germane to the issues before the court, and therefore the publications meet the test of relevancy in this respect.

63. Having concluded, as we have herein above, that the publications were a fair and accurate report of the court proceedings on the three occasions, and that they were germane to the issues before the court, we find and hold that the three publications were privileged under section 6 of the *Defamation Act*. Statements made in the course of, or in connection with, judicial or quasi- judicial proceedings are protected under section 6 of the *Defamation Act*. Privilege exists where someone has a right or duty to make, or an interest in making, specific defamatory assertions and the person or people to whom the assertions are published have a corresponding right or duty to learn or an interest in learning of such assertions.

64. The allegation that the parties were involved in a similar dispute before in which the respondents were found to have defamed the appellant and therefore there was an element of malice in the publication cannot dislodge the fact that the publications were

> " fair and accurate." We find no evidence of malice in the publications. The publications are supported by the facts as we glean them from the record.

65. Lord Devlin in *Lewis v Daily Telegraph Ltd* {1964} AC 234 – 285 reiterated that Common Law approach limiting liability in defamation cases when he stated as follows:

> " The meaning of words in libel cases "it must depend on whether the impression conveyed by the speaker is one of frankness or one of insinuation. A man who wants to talk at large about smoke may have to pick his words very carefully, if he wants to exclude the suggestion that there is also a fire, but it can be done. One always gets back to the fundamental question, what is the meaning that the words convey to the ordinary man. You cannot make a rule about that: they can convey a meaning of suspicion short of guilt, but loose talk about suspicion can very easily convey the impression that it is suspicion that is well founded."

66. Having concluded as we have herein above that the proceedings were privileged under section 6 of the *Defamation Act*, it is our finding that there was no basis upon which to award damages. We find and hold that the Cross-Appeal succeeds. Accordingly, we set aside the judgment of the High Court dated September 28, 2018 and all the consequential orders arising therefrom and substitute the said judgment with an order dismissing the appellant's suit in the High Court. The appellant shall pay the respondents the costs of this appeal and costs for the proceedings in the High Court.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR