Ongwen & 5 others v Omollo & 6 others (Civil Appeal 133 & 150 of 2018 (Consolidated)) [2023] KECA 1444 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1444 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 133 & 150 OF 2018 (CONSOLIDATED)

F TUIYOTT, PO KIAGE & M NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

ODUOR ONGWEN .... 1ST APPELLANT

RONALD NG'ENY .... 2ND APPELLANT

BETH SYENGO .... 3RD APPELLANT

DR DAVID OLIMA .... 4TH APPELLANT

AND

ANNE OMOLLO .... 1ST RESPONDENT

NAIROBI STAR PUBLICATIONS LIMITED .... 2ND RESPONDENT

JUSTUS OCHIENG .... 3RD RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 150 OF 2018

BETWEEN

NAIROBI STAR PUBLICATIONS LIMITED .... 1ST APPELLANT

JUSTUS OCHIENG .... 2ND APPELLANT

AND

ANNE OMOLLO .... 1ST RESPONDENT

ODUOR ONGWEN .... 2ND RESPONDENT

RONALD NG'ENY .... 3RD RESPONDENT

BETH SYENGO .... 4TH RESPONDENT

DR DAVID OLIMA .... 5TH RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Kisumu, (J.E.N. Maina, J.) Dated 21st December, 2017 in HCCC No. 16 of 2015)

Standards for reporting allegations and the duty of verification in publication

The consolidated appeals arose from a defamation suit brought by Judge Anne Omollo against members of a political taskforce and a media publication, "The Star," for publishing defamatory content in a report and newspaper article. The Court of Appeal upheld the High Court's ruling, awarding damages to the plaintiff and ordering an apology from the media publication, confirming that both the taskforce and the media outlet were liable for defamation.

Reported by John Ribia

Law of Torts *– defamation – elements of defamation – where a claimant was not referred to directly in a defamatory statement - what were the ingredients of defamation - whether a defamatory statement can be deemed to have been made where the claimant/victim was not referred directly by name - whether a defamatory statement that did not refer to the claimant by name but inescapably pointed at the claimant as the person of interest was defamatory - Defamation Act (cap 36) sections 5 (1)(a) and 7(1).*

Law of Torts *– defamation – responsible journalism - elements of responsible journalism – where a newspaper reported on a taskforce that made a report containing defamatory statements – duty to verify information - what were the elements of responsible journalism - whether a taskforce investigating a public officer had a duty to verify allegations before publishing a report where such allegations involved serious accusations against a public figure - whether the Orange Democratic Movement Taskforce members acted within their mandate in publishing allegations of corruption against a Judge without verifying the accuracy of the information - whether the Orange Democratic Movement Taskforce report publication of unverified defamatory statements against a judge constituted defamation against the respondent - whether a journalist who, after offering the individual a chance to comment, went beyond simply reporting third-party allegations and made specific references to the individual, had fulfilled the duty of care required to avoid making a defamatory statement - whether the newspaper adhered to the principles of responsible journalism when it republished the allegations from the Orange Democratic Movement Taskforce report, including the respondent's name and position as a judge, without independently verifying the accuracy of the claims - whether the newspaper's reliance on the Orange Democratic Taskforce report and inclusion of the respondent's denial in the publication was sufficient to constitute responsible journalism - whether the general damages awarded for defamation were appropriate, taking into account the failure of both the taskforce and the media to exercise responsible journalism and the harm caused to the respondent's reputation - Defamation Act (cap 36) sections 5 (1)(a) and 7(1).*

Brief facts

Anne Omollo, a judge, claimed defamation after the ODM party's taskforce published a report suggesting that money had been deposited into her account, linking her to alleged corruption involving Kisumu County officials. The claim was later republished by "The Star" newspaper. She denied receiving any funds, stating she did not know the people mentioned in the report. The appellants, members of the taskforce, argued that the taskforce acted within its mandate and the media only republished content from the report. The trial court found the statements defamatory and awarded damages against both the taskforce and the media publication. The trial ordered for the appellants to be jointly liable for damages of Kshs. 6,000,000. Aggrieved the appellants filed the instant appeal.

Issues

i. What were the ingredients of defamation?

ii. Whether a defamatory statement could be deemed to have been made where the claimant/victim was not referred directly by name.

iii. Whether a defamatory statement that did not refer to the claimant by name but inescapably pointed at the claimant as the person of interest was defamatory.

iv. What were the elements of responsible journalism?

v. Whether a taskforce investigating a public officer, had a duty to verify allegations before publishing a report, especially when such allegations involved serious accusations against a public figure.

vi. Whether the Orange Democratic Movement Taskforce members acted within their mandate in publishing allegations of corruption against a Judge without verifying the accuracy of the information.

vii. Whether the Orange Democratic Movement Taskforce report publication of unverified defamatory statements against a judge constituted defamation against that judge.

viii. Whether a journalist who, after offering the individual a chance to comment, went beyond simply reporting third-party allegations and made specific references to the individual, had fulfilled the duty of care required to avoid making a defamatory statement.

ix. Whether the newspaper adhered to the principles of responsible journalism when it republished the allegations from the Orange Democratic Movement Taskforce report, including the respondent's name and position as a judge, without independently verifying the accuracy of the claims.

x. Whether the newspaper's reliance on the Orange Democratic Taskforce report and inclusion of the respondent's denial in the publication was sufficient to constitute responsible journalism.

xi. Whether the general damages awarded for defamation were appropriate, taking into account the failure of both the taskforce and the media to exercise responsible journalism and the harm caused to the respondent's reputation.

Held

1. The mandate of a first appellate Court was to re- evaluate the evidence afresh and to draw its own conclusion having regard to the fact that, unlike the trial court, it did not see or hear the witnesses testify.
2. The character witnesses did not create a nexus between the words in the taskforce report and the words in the article, the claim for an award of damages should have failed.
3. By reporting that the Judge referred to in the ODM taskforce report had denied the contents of the report, the Star had not distorted the taskforce report. It aligned with the position of the taskforce members that the Justice Anne Omollo referred to in their report was the respondent, although they did not say so explicitly in the report.
4. The mandate of the taskforce was wider than investigating financial irregularities. It included making recommendations on what needed to be done to ensure that the Assembly was functional, implementing the party manifesto and performing its role of oversight over the County Government. Yet the portion of the report which touched on the respondent was under the heading: "The involvement of the speaker in misappropriation of Assembly resources and misuse of office." In so far as the Star publication was an accurate reflection of a portion of the task force report but also merely added the Judge's denial then the two were inseparable.
5. The ingredients of defamation were that; a statement was made concerning the plaintiff, the statement was defamatory and the statement was false. It was not essential that the claimant be referred to by name. All that the claimant was required to establish was that the offending publication inescapably pointed at the claimant as the person referred to.
6. There was ample evidence placed before the trial court that proved that the person referred to as Anne Omollo in the taskforce report and the newspaper publication was the respondent. A member of the taskforce thought that the Anne Omollo was the jurist and that the taskforce was at one time minded to seek a reaction from her to the accusations made. It was unequivocal that the publication concerned the respondent.

7. The publication before the Nation and Standard Newspaper was not put in evidence and so it was not possible to know if the two newspaper reports referred to Anne Omollo, a jurist. Second, however the publication in the two newspapers, at least two people who called the respondent thought the publications referred to her. The respondent's evidence regarding the Nation and Standard newspapers did not bolster the 1st to 4th appellants' defence, or absolve them.
8. No money was paid by Factor Connect to the respondent. The statement was false. There was sufficient evidence by the character witnesses summoned by the respondent that whilst they disbelieved the contents of the publication after the respondent told them that it was untrue, the respondent had still been exposed to contempt or ridicule. The trial court could not be faulted for reaching the conclusion that the essentials of the tort of defamation had been established.
9. Responsible journalism had two facets. The need to verify the information and, in certain instances, the duty to give the claimant an opportunity to comment. The extent and scope of the responsibility must turn on the circumstances of each case. The matters to be taken into account in weighing whether the standards of responsible journalism had been reached were: (the list is not exhaustive).
    1. The seriousness of the allegation. The more serious the charge, the more the public was misinformed and the individual harmed, if the allegation was not true.
    2. The nature of the information, and the extent to which the subject-matter was a matter of public concern.
    3. The source of the information. Some informants had no direct knowledge of the events. Some had their own axes to grind, or were being paid for their stories.
    4. The steps taken to verify the information.
    5. The status of the information. The allegation may have already been the subject of an investigation which commanded respect.
    6. The urgency of the matter. News was often a perishable commodity.
    7. Whether a comment was sought from the plaintiff. He may have information others did not possess or had not disclosed. An approach to the plaintiff would not always be necessary.
    8. Whether the article contained the gist of the plaintiff's side of the story.
    9. The tone of the article. A newspaper could raise queries or call for an investigation. It need not adopt allegations as statements of fact.
    10. The circumstances of the publication, including the timing.
10. A more involved verification of information would be required where the impugned allegations were made, or at least adopted, by the publisher as opposed to where the publisher simply reported the allegations made by a third party without seeking to adopt or endorse them. Investigative journalism would fall in the first category while the latter was reportage.
11. The reporter took the judge's response as a denial and proceeded to publish the impugned taskforce report with the denial but without doing more. Yet the article published was not simply a reportage. The taskforce report did not state that the jurist was a Judge but in the article the publication was that a Judge denied she received Kshs.1.6 M cited in Kisumu task force report
12. It had to be assumed that the reporter had verified that the jurist mentioned in the taskforce report was Justice Anne Omollo. In choosing to go the extra mile, the reporter placed on himself a duty of verifying whether or not the money was actually paid to the judge. Having elected to do more than just a reportage, he could not be heard to complain that a more elaborate verification was either unreasonable or an onerous task. Sending the plaintiff an SMS to comment though affording her an opportunity to respond was not enough.
13. In principle, damages against two or two sets of defamers could be separated. Yet, for such segregation to be justified it must be shown that the two played distinct and disproportionate roles in the tort without requiring the court to carry out an artificial and intricate dissection of which tortfeasor did

what. The objective of separating the damages would be to apportion damages in a manner that accorded with the culpability of each tortfeasor.

14. There were two sets of offending publications, one which was solely attributable to the taskforce. The defamatory context of that report became clearer in the manner in which it was published by the Star but which publication, was not a distortion of the contents of the taskforce report. The manner in which the Star published the article breached the rules of responsible journalism. It was not easy to differentiate or dissect the blame and there could be no justification to punish the taskforce members more than the Star and its reporter or *vice versa*.
15. The Star was just as culpable as members of the task force under the repetition rule. The policy of the rule was that repeating someone else's libellous statement was just as bad as making the statement directly. By failing to observe responsible journalism, the Star ended up repeating the libellous report of the taskforce as though it had made the report itself.
16. The latitude of an appellate court interfering with an award of damages by a trial court was circumscribed. It was not the business of the court to interfere with an award of damages simply because the court thought that it may have arrived at a different award from that of the trial court.
17. The appellants did not demonstrate why a global sum of Kshs.6,000,000 was excessive. The instant court was unable to see any reason why that award was excessive or unreasonable for a sitting Judge who had been blatantly defamed as corrupt.
18. Regarding the order to publish an apology, the Star had waited to be compelled to publish an apology when it had a chance to do so even before the suit was filed against it. Instead, it chose to ignore the 1st respondent's demand for an apology. While it was true that considerable time had passed between the date of the publication of the offending article and the date when judgment was handed down at trial, the court was not told how an apology would prejudice the Star. The apology was to be published in Star's own newspaper and Star had not demonstrated that that would be an onerous or costly exercise. On the other hand, the respondent strongly feels that an apology was imperative and may have the effect of restoring her reputation, however late it was in coming.
19. The idea underpinning court-ordered apologies was to restore the claimant's reputation in the minds of the people who were misinformed by the defamatory statement or publication by compelling the defendant to take back his injurious words and apologize for spreading them. An award for damages years after a defamatory speech was published could hardly restore the plaintiff's reputation. Publication of a court-ordered apology, reaching the same audience as the one to whom the original material was addressed, was more likely to achieve that result.
20. The respondent's standing was important enough that a court ordered apology was essential in restoring her reputation and there was no reason to deny her that remedy, more so because publishing such apology was neither inconvenient nor expensive to the Newspaper.
21. All who would publish words of and concerning others must do so while being mindful not to defame. The duty to respect and uphold the reputation of our fellows was a reasonable one in a free and rational society. To publish with scant regard to truth and in the process injure another's reputation must invite tortious consequences.

Consolidated appeals dismissed.

Citations

Cases

Kenya

1. *Butt v Khan* Civil Appeal 40 of 1977; [1978] KECA 24 (KLR) - (Explained)
2. *Karua, Martha v The Standard Limited & another* Civil Case 294 of 2004; [2007] KEHC 3074 (KLR) - (Followed)
3. *Kiunjuri, Mwangi v Wangechi Mwangi & 2 others* Civil Appeal 221 of 2012; [2016] KECA 648 (KLR) - (Followed)

4. *Reynolds v Times Newspapers Ltd and Others* [1999] UKHL 45; [1999] 4 All ER 609; [2001] 2 AC 127 - (Explained)
5. *SMW v ZVM* Civil Appeal 56 of 2006 - (Followed)

United Kingdom

1. *Associated Newspapers Ltd v Dingle* [1964] AC 371 - (Followed)
2. *Charleston & another v News Group Newspaper Limited & another* [1995] 2 All ER 313 - (Followed)
3. *Flood v Times Newspaper Limited* [2012] UKSC 11 - (Explained)
4. *Lachaux v Independent Print Ltd and another* [2019] UKSC 27 - (Explained)
5. *Lewis v Daily Telegraph Ltd* [1964] AC 234, 236 - (Explained)

Regional Court

Selle & another v Associated Motor Boat Company Ltd & others [1968] EA 123 - (Explained)

Texts

Vandenbussche, W., (2021), *Rethinking Non-Pecuniary Remedies for Defamation: The Case for Court- Ordered Apologies* Journal of International Media and Entertainment Law pp 109-170

Statutes

Kenya

Defamation Act (cap 36) section 7(1); paragraph 5(a)- (Interpreted)

Advocates

Ms. Ochieng for the 1st to 4th appellants

Mr. Mwangi for the 5th and 6th appellants

JUDGMENT

Judgment of Tuiyott, JA

1. This judgment is in respect to two appeals No 133 and 153 of 2018 which were consolidated by an order made on November 30, 2022. The two appeals arose from the judgment of the High Court (EN Maina, J) dated December 21, 2017. As will be apparent shortly, the only true respondent to the consolidated appeals is Anne Omollo who is the only party referred to as the respondent in the body of this decision.

2. Prior to joining the Bench as a Judge in the Environment and Land Court (ELC), the respondent was an advocate of the High Court running her own practice in the name of Anne Omollo & Company Advocates. She was admitted to the Bar in 1996 and considers herself to be, as she would, a "jurist", a word that took on some prominence in the proceedings before the trial court and persists here.

3. On February 19, 2015, the respondent received a text message on her phone from a strange number. The message read:

> " Good evening Jurist Anne Omollo, my name is Justus Ochieng, a journalist with the Star Newspaper, based in Kisumu. May I get your comment in regards to an ODM party Task Force report released yesterday (February 18) alleging that a travel company named, Factor Connect allegedly remitted some close to one million shillings into your account for unknown reasons. The company is said to have been sourced to handle Kisumu MCAs trip to China, Singapore and Israel sometimes last year. With due respect madam may I get any clarification to this effect if any. Thank you."

4. She was appalled and on the same day at 20.20 hours, responded:

> " Good evening Mr Ochieng. Please ask your source why would the MCAs deposit the money in the account of a Judge who is not even stationed in Kisumu."

5. Justus Ochieng (Justus) is the 6th appellant.

6. Five days later, on February 24, 2015, the Nairobi Star Publications Limited (The Star or 5th appellant) published an article in their daily Newspaper "The Star" on page 19 in the following words:

> " A Judge denies she received Kshs 1.6 M cited in Kisumu task force report. A Judge mentioned in the ODM task force report on financial improprieties in the Kisumu County Government has distanced herself from the report. Justice Anne Omollo denied knowledge of Kshs 1.6 million said to have been deposited into her account irregularly. On June 9, Kshs 1,620,000 was remitted to Omollo's account by Factor Connect. Omollo is said to be a senior jurist and a close friend of the speaker."

7. A colleague of the respondent called her through the intercom of the Judiciary at 8.30 a.m. to ask if she had read the article. It was the first of many calls she received from her friends regarding the article. The Judge bought a copy of the Newspaper. It was her testimony before the High Court that she did not know the County Assembly Speaker personally nor have they interacted either in the course of her work or elsewhere. Further, that the task force did not take the liberty of asking her about the matter during the investigation. She denies receiving money from the County Assembly, the speaker, or the entity known as Factor Connect.

8. Aggrieved with the publication, the respondent instructed her advocates who wrote demand letters to the appellants and demanded an apology, but to no avail.

9. Orange Democratic Movement (ODM) is a renowned political party in Kenya. The party's National Executive Committee appointed a taskforce to inquire into the circumstances surrounding the ouster of Ms. Ann Atieno Adul on October 16, 2014 as the speaker of the County Assembly of Kisumu. Oduor Ongwen, Ronald Ng'eny, and Dr. David Olima (referred to as the 1st to 4th appellants respectively) were members of the task force who undertook the overall mandate and published a report which was handed over to the party leader on February 18, 2015 in a public function.

10. From the contents of the report of the task force, one of the allegations was that the Speaker had contracted the management of study tours of the assembly to Israel, Singapore, and China to a travel firm called Factor Connect through single sourcing. It is under this allegation that one of the findings of the task force was that:

> " On June 9, 2014, a sum of Kshs 1,620,000 was remitted to bank account of one Ms Ann Omolo by Factor Connect. Ms Omolo is said to be a senior jurist and close friend of the Speaker."

11. Responding to the respondent's claim at the High Court, the 1st to 4th appellant's averred that:

    a. Neither of them played any role in publication of the impugned Newspaper article/s of the February 24, 2025nor did they participate in the dissemination of the same.

    b. The task force conducted an inquiry into the management of the County Assembly of Kisumu, the relationship between the County Assembly and the members of County Assembly (MCAs), and circumstances surrounding the impeachment of the speaker as a

matter of genuine public interest, as a result of which the Task Force Report referred to in the Plaint was collate, prepared and published.

c. All the averments contained in the Task Force report were on the basis of an honest opinion and a factual and true summarization of the facts and evidence tendered to the said Task Force in the process of compiling its report."

12. As for Justus and the Star, they denied that they were involved in the publication of the taskforce report. That at any rate they contacted the Judge and sought her comments regarding the offending contents, which comments was carried alongside the publication. It was also their defence that the words published cannot be understood to be defamatory in their ordinary or natural meaning, implication, or by necessary inference.

13. Justus and the Star sought to rely on the defence of qualified privilege, asserting that the publication was a fair and accurate reporting of the contents at page 42 of the report. The two also relied on section 7(1) as read with paragraph 5(a) of the Schedule of the *Defamation Act*, Cap 36 of the Laws of Kenya.

14. After the hearing which comprised evidence of 4 witnesses for the judge, the 4th appellant and the 6th appellant, the trial Judge found all the appellants to be culpable and made an award of general damages of the sum of Kshs 6,000,000 (Six Million Shillings) against the six, jointly and severally. In addition, the Star was ordered to publish a written apology in its newspaper for three consecutive days.

15. The appellants are aggrieved by that decision and invite this Court to consider and determine the appeal under the following issues:

    (a) Whether the statement in the task force report should be read together with the article by Justus in the Nairobi Star Publication or was there a distinction between the two.

    (b) Whether the respondent established the element of defamation against the appellants.

    (c) Whether the task force members had power to invite, investigate, question and interview the respondent.

    (d) Whether the 5th and 6th appellants successfully established the defence of qualified privilege.

    (e) Whether the damages awarded were excessive.

16. The courtconsiders and determines these issues under the involved mandate of a first appellate courtwhich is to re- evaluate the evidence afresh and to draw its own conclusion having regard to the fact that, unlike the trial court, it did not see or hear the witnesses testify. This position was stated in the case of *Selle & another v Associated Motor Boat Company Ltd & Others* [1968] EA 123 as follows: -

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled.
>
> Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness

is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955) 22 EACA 210)."

17. On the first issue, the two groups of appellants think that the task force report and the publication should be treated differently but for diametrically different reasons. The 1st to 4th appellants argue that the statement captured in the Task Force Report, which is at the heart of this matter, should be considered separately and independently from the Newspaper article. Ms. Ochieng, learned counsel who appeared for the 1st to 4th appellants, submitted that Justus admitted that he penned the impugned article without consulting the task force for clarification.

18. Further, that none of the three witnesses who testified for the respondent had seen or read the task force report. Making reference to the decision in *SMW v ZVM* [2015] eKLR the four appellants submit that in determining the words for purposes of defamation, the court does not employ legal construction but that the words complained of must be construed in their natural and ordinary meaning. Being so, having established that the character witnesses did not actually create a nexus between the words in the taskforce report and the words in the article, it followed that the claim for an award of damages should have failed. At least as against the four.

19. It is contended, on their behalf, that the contents of the taskforce report and that of the article published in the Star were materially different. We are urged to find that the words in the task force report did not embellish the findings in any way and the fact of payment was actually proved. On the other hand, the Star published an article which is said to have the following differences from that of the task force report: the task force report referred to a jurist while the Star made reference to a Judge; the Star report talked of financial improprieties while the taskforce report was not just about improprieties as it involved other issues touching on administration and governance.

20. The 1st to 4th appellants refer this court to paragraphs 36 and 37 of the judgment of the trial court to prop up their contention that the taskforce report and the publication should be treated separately. That in paragraph 36, it is admitted that even the respondent read about the report in *Standard* and *Nation* Newspapers but did not think it to refer to her. In paragraph 37 the trial judge held that it was the 5th and 6th appellant's article that directly cast aspersions on the respondent.

21. To underscore the distinction, the four appellants submit that in the task force report, a Ms. Anne Omollo received money from Factor Ecconent while the respondent never received any money from the said firm. The Ms. Anne Omollo in the task force report, is said to be a friend of the Speaker while the respondent categorically stated that she does not know the Speaker nor has she met her. We are urged to find that the two statements should not be taken together as they are different in content and effect and were made separately by and of different people.

22. Citing the decision in *Martha Karua v The Standard Limited & another* [2007] eKLR; *Charleston & another v News Group Newspaper Limited & another* [1995] 2 All ER 313, Mr. Mwangi learned counsel appearing for the 5th and 6th appellants submitted that it is an established principle of defamation law that an alleged defamatory publication must be read in its entirety in order to establish whether it is defamatory. We are invited to interrogate, afresh and holistically, the contents of the Star publication against the taskforce report. It is submitted that from the headline of the article to its body, a holistic reading of the article by an ordinary, reasonable, fair- minded reader would plainly show that it reported the respondent's denial of what was contained in the taskforce report. It is emphasized that an ordinary, reasonable and fair- minded reader would not conclude that an accusation of impropriety is similar in meaning to a denial of an accusation of impropriety. The former being defamatory while the latter is not.

23. Justus and the Star fault the judge's finding that the two publications were inseparable and suggest that the conclusion was based on two findings. It was the Star article which drew readers' attention to the task force report and the Star article reproduced the defamatory words. Further, the conclusion was as a result of the trial court's focus around what it found to be failure of Justus and the Star to verify the contents of the task force report.

24. The two fault the findings and argue that their article drew the readers' attention to a denial by the respondent of the allegations in the task force report. It is contended that it is not enough for the purposes of defamation law that the publication draws a reader's attention to another publication. The import of the two publications should be the same in order for the former to amount to a republication of the latter, unlike here.

25. Regarding the alleged failure to verify, Justus and the Star hold the view that responsible journalism entails seeking a comment from a claimant and no more. Learned counsel for the duo suggests that this accords with this court's decision in *Mwangi Kiunjuri v Wangechi Mwangi & 2 others* [2016] eKLR.

26. In defence of the trial court's decision, the respondent submits that the taskforce report, unveiled in front of the media, is what led to the publication in the Star and are one and the same. Further, in it, Justus clearly brought out that the task force report was referring to the respondent. That in reaching the conclusion that the words were defamatory, the learned Judge got into the context of the words of the task force report by looking at the whole task force report as well as the newspaper publication.

27. The respondent differs with the 1st to 4th appellants that because the 6th appellant did not seek clarification from them before publishing the report, then the publication should be treated differently in so far as the report was made available to the four. Emphasizing the point, the respondent submits that as the taskforce report is what led to the publication by the Star, a nexus was created between the report and the publication in the newspaper.

28. It is further argued that the appellants had the task of producing another Anne Omollo to dispute the fact that she was the only jurist going by the name of the respondent but which they failed to do. It is asserted that the difference in reference to a jurist and Judge does not arise as the respondent was the only person being referred to in both publications.

29. I begin by looking at the pleadings of the claimant to see the true nature of the respondent's complaint and cannot do so effectively without reproducing the statement of claim in extensor: -

> " 9. That pursuant to the said assignment the 1st to 5th defendants published a report in December, 2014 in which they stated in page 42 that:
>
> > " On June 9, 2024, a sum of Sh 1,620,000 was remitted to bank account of one Ms. Ann Omolo by Factor Connect. Ms. Omolo is said to be a senior jurist and close friend of the Speaker."
>
> 10. The said words as used in the report referred and were understood to refer to the plaintiff.
>
> Facts and Matters Relied Upon to Show Reference to the Plaintiff.
>
> (a) Ann Omolo is the plaintiff's name.
>
> (b) The plaintiff is a senior advocate who has practiced law for a very long time.

(c) The plaintiff is an advocate who used to practice in Kisumu before being appointed as a judge of the High Court of Kenya.

11. That on or about the February 24, 2015, the 5th and 6th defendants did published an article in their daily newspaper the Star on page 19 in the following words:

> "A judge denies she received Sh 1.6m cited in Kisumu task force report. A judge mentioned in the ODM task force report on financial improprieties in the Kisumu County Government has distanced herself from the report. Justice Ann Omolo denied knowledge of Shs 1.6 million said to have been deposited into her account irregularly...On June 9, Sh 1,620,000 was remitted to Omolo's account by Factor Connect. Omolo is said to be a senior jurist and a close friend of the speaker." says the report.

12. The said words as set out in paragraph 10 and 11 aforesaid in their natural and ordinary meaning meant and were understood to mean.

(a) that the plaintiff is a corrupt person.

(b) that the plaintiff is not fit to hold public office.

(c) that the plaintiff has been associating with corrupt individuals.

(d) that the plaintiff is a beneficiary of the alleged corrupt dealings at the County Government of Kisumu."

30. The respondent did not only reproduce both the extract of the taskforce report and of the newspaper publication but in paragraph 12 suggests that there is a nexus between the two. The undisputed evidence is the task force report was made available to the media, including the 5th and 6th appellants, and the 1st to 4th appellants would be barely able to disassociate the taskforce report with the newspaper article unless the latter had embellished or somewhat distorted the taskforce report.

31. The 1st to 4th appellants assert that the newspaper publication embroidered its report in three ways: by stating that it was the respondent who was mentioned in the task force report; by reporting that the task force report was on financial improprieties when its mandate was wider; and by stating that the deposit was irregular.

32. What does the evidence reveal? The evidence is that the respondent is a Judge of a superior court in Kenya and has been an advocate of the High Court of Kenya for over 27 years having been admitted to the Bar in 1996. She undoubtedly would be a senior jurist. The testimony of the 4th appellant put it beyond conjecture that the respondent is the Senior Jurist referred to in the task force report. This is what he said:

> "I knew Anne Omollo as an Advocate but did not know she is a Judge. My first reaction was to contact her to find out if the allegations was true. I spoke to one Ochieng a clerk in the firm of K'Owinoh & Company Advocates. I could not reach her through Ochieng so I told Mr. Ouma Njoga Advocate who said he would contact her."

Later,

> " I did not know who the Anne Omollo was until now. I said I wanted to know if the Anne Omollo in this report is the one I knew but I never got the opportunity."

33. It has turned out that the Anne Omollo who was contacted by Justus for clarification was the respondent, a Judge. The respondent was known to the 4th appellant who in fact thought her to be the person mentioned and he had at some point the mind to contact her to find out if the allegations were true. For that reason, by reporting that the Judge referred to in the ODM taskforce report had denied the contents of the report, the Star had not distorted the taskforce report. It aligned with the position of the taskforce members that the Anne Omollo referred to in their report was the respondent, although they did not say so explicitly in the report.

34. Next, it is true that the mandate of the taskforce was wider than investigating financial irregularities. Indeed, looking at the specific terms of reference of the taskforce, they included making recommendations on what needed to be done to ensure that the Assembly was functional, implementing the party manifesto and performing its role of oversight over the County Government. Yet the portion of the report which touched on the respondent was under the heading:

> " Ground 1: The involvement of the speaker in misappropriation of Assembly resources and misuse of office."
>
> Regarding the deposit to the Bank Account of one Mrs. Ann Omollo, the report read that it was one of the remittance from Factor Connect to accounts of persons deemed to be close to the speaker. It was therefore not a distortion of the taskforce report that in respect to the deposit to Anne Omollo the report was on financial impropriation in the Kisumu County Government and the deposit was irregular."

35. In so far as the Star publication is an accurate reflection of a portion of the task force report but also merely adds the Judge's denial then the two are inseparable. It is for this reason that the following holding by the trial judgeis for endorsing;

> " Though the Article and the report were published at different times and by different people they cannot in the circumstances of this case be separated."

36. The ingredients of defamation are that; a statement is made concerning the plaintiff, the statement is defamatory and the statement is false. In addition, as restated by this court in the case of *SWM v ZMW* [2015] eKLR, a statement is defamatory when:

> " ... if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided: see *Gatley on Libel and Slander* (10th edition)."

37. Indeed, it is not essential that the claimant be referred to by name. All that the claimant is required to establish is that the offending publication inescapably points to the claimant as the person referred to. See *Mwangi Kiunjuri* (*supra*);

> " For defamation to succeed, the statement must be published of and concern the claimant, and in this case the impugned statement must be published of and concern the appellant. In the case of *Knupffer v London Express Newspaper Limited* (1944) AC 116; [1944] 1 All ER 495 it was held that words are not actionable as defamatory unless they are published of and

concern the plaintiff. In *Newstead v London Express Newspaper Limited* (1940) 1 KB 377, [1939] 4 All ER 319 it was held that where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him (See *Morgan v Odhams Press Ltd*. [1971] 2 All ER 1156). Such special facts are material facts which must be pleaded in the plaint and must be proved in evidence in order to connect the plaintiff with the words complained of. Such a pleading is often referred to as a "reference innuendo" in contrast to a "true innuendo" where the extrinsic facts only bear on the defamatory meaning. (See *Halsbury's Laws of England*, 4th Edition Vol. 28 page 20 paragraph 39)."

38. Here, there was ample evidence placed before the trial court that proved that the person referred to as Anne Omollo in the taskforce report and the newspaper publication was the respondent. As earlier alluded to, no less than the 4th appellant, a member of the taskforce, thought that the Anne Omollo was the jurist and that the taskforce was at one time minded to seek a reaction from her to the accusations made. Regarding the Star publication, it was unequivocal that the publication concerned the respondent.

39. The argument by the 1st to 4th appellants that the Judge's evidence that disassociated her from receipt of the money or friendship with the speaker was sufficient to demonstrate that the Anne Omollo in the taskforce report was not the respondent may seem attractive but cannot have much traction. To uphold the argument would mean that a denial by a claimant of the truthfulness of a publication must always lead to the conclusion that the publication is not of and concerning the claimant. Every defamation claim would fail!

40. There is then the contention that the impugned extract of the taskforce report was not of or concerning the respondent because, she, herself, upon reading about the taskforce report in the *Standard* and *Nation* Newspapers, did not think it referred to her. Yet this argument must be examined in the context of the respondent's entire evidence regarding the publication in the two newspapers. It is true that her testimony was;

> " The first time I knew about the taskforce report was a text message sent to me by the 6th defendant. The report had existed for that week. The *Nation* and *Standard* had in that week reported about money being siphoned by an Anne Omollo but I did not consider it referred to me."

Later,

> " In regard to the *Nation* and *Standard*, I was called by a friend in Bondo and an Advocate in Kisumu but as I said at that point I was not sufficiently concerned"

41. First, the publication before the Nation and Standard Newspaper was not put in evidence and so it is not possible to know if the two newspaper reports referred to Anne Omollo, a jurist. Second, however the publication in the two newspapers, at least two people who called the respondent thought the publications referred to her. Clearly therefore, the respondent's evidence regarding the *Nation* and *Standard* newspapers does not bolster the 1st to 4th appellants' defence, or absolve them.

42. It turned out that, from the totality of the evidence, no money was paid by Factor Connect to the respondent and the statement was therefore false. In addition, there was sufficient evidence by the

character witnesses summoned by the respondent that, whilst they disbelieved the contents of the publication after the respondent told them that it was untrue, the respondent had still been exposed to contempt or ridicule.

43. The trial Judge cannot therefore be faulted for reaching the conclusion that the essentials of the tort of defamation had been established.

44. On behalf of the 1st to 4th appellants it was argued that the superior court below fell into error when it held that the taskforce ought to have invited the respondent to verify the identity of Anne Omollo, the jurist. It is submitted that the task force was limited to interviewing the members of the County Assembly of Kisumu, the staff of the Assembly, County Executive and the County Assembly Service Board. This argument was answered by the 4th appellant himself when he said:

> " If somebody was adversely mentioned and they were not members of the County Assembly, we had power to call them to come and clarify."

Need more be said?

45. It is now opportune to consider whether the 5th and 6th appellants adhered to the standards of responsible journalism. The decision of this court in *Mwangi Kiunjuri* (*supra*) explains responsible journalism and what it entails:

> " The House of Lords in *Reynolds v Times Newspapers Ltd*. [2001) 2 AC 127 created qualified privilege for publications to the general public on matters of public concern. This privilege is founded on duty and interest; its very existence requires that the defendant has adhered to standards of responsible journalism and this involves matters like the nature of steps taken to verify the information and whether comment was sought from the claimant. The mere fact that the defendant honestly believes in the truth of what he says does not of itself provide a basis for the privilege (See *Blackshaw v Lord* [984] 1QB 1 CA at 27). It is trite that if *Reynolds's* privilege is part of a defendant's case, he must demonstrate that he complied with the standards of responsible journalism."

46. Responsible journalism has two facets. The need to verify the information and, in certain instances, the duty to give the claimant an opportunity to comment. The extent and scope of the responsibility must turn on the circumstances of each case. In *Reynolds*, Lord Nicholls of Birkenhead sets out some matters (the list is not exhaustive) to be taken into account in weighing whether the standards of responsible journalism have been reached. His Lordship said;

> " My conclusion is that the established common law approach to misstatements of fact remains essentially sound. The common law should not develop 'political information' as a new 'subject-matter' category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.
>
> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.

3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

4. The steps taken to verify the information.

5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.

6. The urgency of the matter. News is often a perishable commodity.

7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

8. Whether the article contained the gist of the plaintiff's side of the story.

9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

10. The circumstances of the publication, including the timing."

47. It has to be pointed out, however, that a more involved verification of information will be required where the impugned allegations are made, or at least adopted, by the publisher as opposed to where the publisher simply reports the allegations made by a third party without seeking to adopt or endorse them. Investigative journalism would fall in the first category while the latter is reportage. In *Flood v Times Newspaper Limite*d [2012] UKSC 11 Lord Phillips discusses the two levels of verification;

" 34. So far as verification is concerned, Lord Nicholls included in his list of relevant factors "the steps taken to verify the information". He was, however, dealing with a case where the relevant allegations were made, or at least adopted, by the publisher. The publication was not simply reporting allegations made by another. In *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* [2001] EWCA Civ 1634 [2002] EMLR 215 the Court of Appeal, by a majority, found that Reynolds privilege was made out in respect of a report in a newspaper of defamatory allegations made in the course of an ongoing political debate, notwithstanding that the publishers had made no attempt to verify the allegations. The newspaper had not adopted or endorsed these allegations. Giving the leading judgment Simon Brown LJ at p 236 identified circumstances where both sides to a political dispute were being reported "fully, fairly and disinterestedly" and where the public was entitled to be informed of the dispute. In such circumstances there was no need for the newspaper to concern itself with whether the allegations reported were true or false. The public interest that justified publication was in knowing that the allegations had been made, it did not turn on the content or the truth of those allegations. A publication that attracts Reynolds privilege in such circumstances has been described as "reportage". In a case of reportage

qualified privilege enables the defendant to avoid the consequences of the repetition rule."

In paragraph 77 his Lordship observes:

> " ... Reportage is a special, and relatively rare, form of Reynolds privilege. It arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made. It protects the publisher if he has taken proper steps to verify the making of the allegation and provided that he does not adopt it..."

48. Let me now apply the standards of responsible journalism to the facts of the case before us. To his credit, the 6th appellant requested the respondent for comment and sought her clarification regarding the task force. The response by the respondent was:

> " Good evening Mr Ochieng. Please ask your source why would the MCAs deposit the money in the account of a Judge who is not even stationed in Kisumu."

49. The 6th appellant took this as a denial and proceeded to publish the impugned taskforce report with the denial but without doing more. Yet the article published was not simply a reportage. The taskforce report did not state that the jurist was a judge but in the article the publication is that

> " A judgedenies she received Kshs 1.6 M cited in Kisumu task force report. A Judge mentioned in the ODM task force report on financial improprieties in the Kisumu County Government has distanced herself from the report. Justice Anne Omollo denied knowledge of Kshs.1.6 million said to have been deposited into her account irregularly,"

It has to be assumed that the reporter had verified that the jurist mentioned in the taskforce report was Justice Anne Omollo. In choosing to go this extra mile, the reporter placed on himself a duty of verifying whether or not the money was actually paid to the judge. Having elected to do more than just a reportage, he cannot be heard to complain that a more elaborate verification was either unreasonable or an onerous task.

50. In the peculiarity of the facts in this matter, I would agree with the trial judge that:

> " Sending the plaintiff an SMS to comment though affording her an opportunity to respond was not enough."

51. At trial, the respondent was awarded a sum of Kshs 6,000,000. The appellants reject this as being manifestly excessive. On the part of the 1st to 4th appellants, it is submitted that the taskforce was mandated to investigate the problems bedeviling the County Assembly; the statement about Anne Omollo was merely recorded as it was said by the interviewees and that no comment, judgment, conclusion or interpretation were made on the said information and further the taskforce had no powers to call and question the people named by the interviewees. It has also been contended that even the respondent herself, at first, did not think that the article by the taskforce cast aspersions on her, it being argued that the taskforce report in and by itself did not affect the claimant's feelings. In addition, none of the witnesses saw nor read the taskforce report.

52. As for the Star and Justus, it is submitted that separate awards should have been made as against the two sets of appellants. Related, that the award against them ought to have been significantly lower as the article was a denial and was therefore not similar in meaning and import as that of the taskforce. The newspaper contends that damages of Kshs 500,000 would have been reasonable as against them.

Last, that bearing in mind the lack of prominence of the article, its non-repetition, the duration that had lapsed from the date of the article to the judgment of the superior court below and its minimum impact, an order for apology was not justified.

53. The respondent defends the award and submits that the learned trial judgeset out factors she took into consideration in making the award. The respondent reiterates that she has had an illustrious career as a lawyer and as a sitting Judge. Further, that from the evidence of Justus, it was evident that the article was of and concerned her. This as well as the fact that the taskforce report was unveiled in the presence of the media was a demonstration of the wide coverage that the report received. Further, that the appellants did not care about her reputation as they published unverified information.

54. Regarding the complaint on the order for apology, the respondent submits that the effect of having an apology for three consecutive days was to ensure that the apology reaches a wide audience considering the status of the person. In any case, it was asserted, the 5th and 6th appellants have not told the court what prejudice they would suffer given that the apology is made through the same newspaper published by the Star and no extra costs would be incurred.

55. I take the view that, in principle, damages against two or two sets of defamers can be separated. Yet, for such segregation to be justified it must be shown that the two played distinct and disproportionate roles in the tort without requiring the court to carry out an artificial and intricate dissection of which tortfeasor did what. The objective of separating the damages will be to apportion damages in a manner that accords with the culpability of each tortfeasor.

56. Here, there were two sets of offending publications, one which was solely attributable to the taskforce. The defamatory context of that report became more the clearer in the manner in which it was published by the Star but which publication, as I have sought to demonstrate, was not a distortion of the contents of the taskforce report. Another finding is that the manner in which the Star published the article breached the rules of responsible journalism. In these circumstances it is not easy to differentiate or dissect the blame and there can be no justification to punish the taskforce members more than the Star and its reporter or vice versa.

57. It may also be possible to find the Star to be just as culpable as members of the task force under the repetition rule. The policy of the rule is that "repeating someone else's libellous statement is just as bad as making the statement directly" as Lord Reid said in *Lewis v Daily Telegraph Ltd* [1964] AC 234, 236:-

> " Before leaving this part of the case I must notice an argument to the effect that you can only justify a libel that the plaintiffs have so conducted their affairs as to give rise to suspicion of fraud, or as to give rise to an inquiry whether there has been fraud, by proving that they have acted fraudulently. Then it is said that if that is so there can be no difference between an allegation of suspicious conduct and an allegation of guilt. To my mind, there is a great difference between saying that a man has behaved in a suspicious manner and saying that he is guilty of an offence, and I am not convinced that you can only justify the former statement by proving guilt. I can well understand that if you say there is a rumour that X is guilty you can only justify it by proving that he is guilty, because repeating someone else's libelous statement is just as bad as making the statement directly. But I do not think that it is necessary to reach a decision on this matter of justification in order to decide that these paragraphs can mean suspicion but cannot be held to infer guilt."

58. By failing to observe responsible journalism, the Star ended up repeating the libellous report of the taskforce as though it had made the report itself!

59. It is old hat that the latitude of an appellate court interfering with an award of damages by a trial court is circumscribed. In *Butt v Khan* [1978] eKLR it was famously restated:

> " 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 either inordinately high or low."

60. It is not the business of this courtto interfere with an award of damages simply because we think that we may have arrived at a different award from that of the trial court.

61. The arguments by the 1st to 4th appellants against the award are a regurgitation of why they were not liable and not why the award was excessive and unreasonable. The arguments do not advance their attack on the damages awarded. On their part, the 5th and 6th appellants proposed an award of Kshs 500,000 on the basis that they played the more benign role in the tort, an argument which I have rejected. The argument of the Star may also fail on the Dingle rule (*Associated Newspapers Ltd v Dingle* [1964] AC 371) whose effect is that a defendant cannot rely in mitigation of damages on the fact that similar defamatory statements have been published about the same claimant by other persons. It was adopted by the UK Supreme Court in *Lachaux v Independent Print Ltd and another* [2019] UKSC 27 which stated that:-

> " The effect of the Dingle rule is to treat evidence of damage to the claimant's reputation done by earlier publications of the same matter as legally irrelevant to the question what damage was done by the particular publication complained of. It has been criticised, but it is well established."

62. Again, these two appellants do not demonstrate why a global sum of Kshs 6,000,000 was excessive and on my part, I am unable to see any reason why that award is excessive or unreasonable for a sitting Judge who has been blatantly defamed as corrupt.

63. Regarding the order to publish an apology, the Star has waited to be compelled to publish an apology when it had a chance to do so even before the suit was filed against it. Instead, it chose to ignore the 1st respondent's demand for an apology. While it is true that considerable time had passed between the date of the publication of the offending article and the date when judgment was handed down at trial, the Court is not told how an apology would prejudice the Star. As correctly submitted by counsel for the respondent, the apology is to be published in Star's own newspaper and Star has not demonstrated that this will be an onerous or costly exercise. On the other hand, the respondent strongly feels that an apology is imperative and may have the effect of restoring her reputation, however late it is in coming.

64. In the article by Wannes Vandenbussche, *Rethinking Non- Pecuniary Remedies For Defamation: The Case for Court- Ordered Apologies* (Journal of International Media & Entertainment Law, Vol 9(No1), 109–170) the author says the following of the purpose and importance of court-ordered apologies:

> " Court-ordered apologies are worth examining nowadays because they are capable of overcoming the objections that have been raised to traditional remedies, such as their limited expressive or restorative power. The idea underpinning court-ordered apologies is to restore the claimant's reputation in the minds of the people who were misinformed by the defamatory statement or publication by compelling the defendant to take back his injurious words and apologize for spreading them. In our increasingly interconnected world, this remedy is even more relevant than before. An award for damages years after a defamatory

speech was published can hardly restore the plaintiff's reputation. Publication of a court-ordered apology, reaching the same audience as the one to whom the original material was addressed, is more likely to achieve that result ... "

65. These can be said of the circumstances here. The respondent, a judge, takes the position that her standing is important enough that a court ordered apology is essential in restoring her reputation and there can be no reason to deny her that remedy, more so because publishing such apology is neither inconvenient nor expensive to the Newspaper.

66. As is clear, I am for upholding the decision of the trial court. I would propose that the consolidated appeals be dismissed with costs to the respondent.

Judgment of Kiage, JA

1. I have had the advantage and pleasure of reading in draft the thorough judgment of my learned brother Tuiyott, JA, with which I am in full agreement.

2. It seems to me a matter too plain for argument that all who would publish words of and concerning others must do so while mindful not to defame. The duty to respect and uphold the reputation of our fellows is a reasonable one in a free and rational society. Thus, before utterance or publication one should at the very least pay some attention to veracity. Is this matter, touching on the character and reputation of this person true? I have no hesitation finding that to publish with scant regard to truth and in the process injure another's reputation must invite tortious consequences.

3. I also agree with Tuiyott, J's ruminations and findings on responsible journalism which I hold, without hesitation, to be an imperative desideratum for both a free press and a society mindful of the rights of others.

4. Ultimately, and as Mumbi Ngugi, JA is also in agreement, the consolidated appeals be and are hereby dismissed as proposed by Tuiyott, JA.

Judgment of Mumbi Ngugi, JA

1. I have had the advantage of reading in draft the judgment of Tuiyott, JA. I entirely agree with his reasoning and conclusions, and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023.

F. TUIYOTT

....

JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR