



REPUBLIC OF KENYA



**James v Ndirangu & 3 others (Civil Appeal 282 of 2016)
[2022] KECA 82 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 82 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 282 OF 2016
RN NAMBUYE, W KARANJA & PO KIAGE, JJA
FEBRUARY 4, 2022**

BETWEEN

RUTH NJIRI JAMES APPELLANT

AND

NJOROGE NDIRANGU 1ST RESPONDENT

ALVIN GITERIA 2ND RESPONDENT

KEN M. THAIRU 3RD RESPONDENT

PUBLIC SERVICE CLUB 4TH RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya (R. E. Aburili, J.) dated 18th May, 2015 in Nairobi HCCC No. 201 of 2012)

JUDGMENT

1. This is a judgment in a first appeal arising from the judgment and decree of the High Court of Kenya at Nairobi, R. E. Aburili, J. dated 18th May, 2015.
2. The background to the appeal is that the appellant Ruth Njiru James (the appellant) filed a suit for defamation in the High Court of Kenya at Nairobi vide a plaint dated 2nd May, 2012, filed on 3rd May, 2012. The claim was directed against the respondents namely, Njoroge Ndirangu, Alvin Giteria, Ken M. Thairu, all three sued for and on behalf of the 4th respondent, the Public Service Club (the club) an un incorporated body and in their capacities as the club's executive committee.
3. It was the appellant's averments, inter alia, that the 1st, 2nd and 3rd respondents were at the material time when the chain of events triggering the litigation resulting in this appeal were set in motion, members of the executive committee of the club duly vested with authority by the members of the club to manage, coordinate and run the day-to-day affairs of the club on behalf of the members of the club while the appellant served the club as an assistant club accountant/IT administrator. Her duties



- to the club entailed the making of entries on a daily basis into the club's books of bills of sales and the transactions of the club's stock of food, liquor and beverages sold by the club's barmen to its members.
4. On 18th April, 2011, the 3rd respondent while in the company of Joyce Kariuki and Sarah Ndambiri while tapping on a pile of members books uttered words of the plaintiff set out in paragraph 6 of the plaint. On 19th April, 2011 at a closed door meeting in the 3rd respondent's office attended by one, Gerald Ngaacha the accounts clerk, Joyce Kariuki the administrative assistant, Zablon Kepha a former accounts clerk, Sarah Ndambiri and Augustus Kitonga, the 3rd respondent went through members books mentioned at paragraph 6 of the plaint one by one and making references to entries therein and to bills where available dictated to Joyce Kariuki his secretary words uttered by himself insinuating theft by the appellant of cash of the club without allowing the appellant to make any representations in her defence thereof and thereby openly contradicting the entries made therein by the appellant without any independent evidence or confirmation made by Augustus Kitonga the maker of the Bills of Sales of food, alcohol, drinks and beverages to specific members.
 5. The oral allegations dictated by the 3rd respondent at the said meeting and which were handwritten by M/s Joyce Kariuki his secretary in the presence of persons named in paragraph 7 of the plaint were as set out and or particularized in paragraph 8 of the plaint. It was also the appellant's averments that on diverse dates in April and May, 2011 the 3rd respondent publicized the contents of the said write-ups set out in paragraph 8 of the plaint to the 1st and 2nd respondents and Gerald Ngaacha the accounts clerk, Joyce Kariuki the administrative assistant, Mr. Kimosop, Mr. G. K. Meenye, Mr. Alvin Mundia Giteria, Ms. Anne Waruguru Kariuki, Ms. Njuki Waithaka and Mr. Ochola thereby falsely and maliciously alleging that the appellant in collusion with Ben Onjiri and Augustus Kitonga had on diverse dates between about 9th October, 2010 and 15th April, 2011 in the cause of their employment with the club stolen unspecified amounts of cash belonging to the club. Further that the aforementioned dictated write-up was also circulated to employees, executive committee members and other members of the club.
 6. On or about 28th April, 2011 the appellant was summoned by the 3rd respondent to appear before the executive committee of the club namely, Mr. Samuel Kimosop, Mr. G. K. Meenye, Alvin Mundia Giteria, Ms. Anne Waruguru Kariuki, Ms. Njuki Waithaka and Mr. Ochola to answer in writing charges of theft of the club's cash which she did on 29th April, 2011.
 7. On 5th May, 2011, the 3rd respondent not only maliciously caused to be dictated to Joyce Kariuki contents of a letter summarily dismissing her from her employment with the club but also circulated and published the contents thereof to employees, members of the executive and other members of the club. It was the appellant's complaint, that the words complained of in their natural and ordinary meaning meant and were understood to mean that the appellant had been unfaithful in the performance of her duties with the club and had over a period of more than a year stolen an unquantified or unquantifiable sums of money belonging to the club and that as a consequence she had to pay the ultimate price of summary dismissal from her employment with loss of benefits. It was her position that the said words were calculated to disparage and in fact did disparage and injured her in her credit, character and reputation resulting in the loss of career. She was also brought into hatred, ridicule resulting in inability for her to seek any other employment. She therefore sought damages, costs, interest and any other relief that the court may deem fit to grant.
 8. The respondents were served with the appellant's claim. They entered appearance but filed no defence in rebuttal prompting the appellant to apply for interlocutory judgment accordingly entered by the Deputy Registrar of the Court in her favour on 16th October, 2012.



9. The suit was thereafter set down for formal proof. The appellant gave evidence as PW1 adopting her witness statement as her testimony. It was her testimony that the documents that led to her dismissal from her employer were authorized by the 3rd respondent, all of which were produced as exhibits. She never stole any money from her employer as explained by her in her letter of response dated 29th April, 2011. All that her work involved was book keeping. She never handled any cash in the course of the discharge of her duties to the employer. She never colluded with any of her co-employees to steal from her employer. The accusations were false, that is why the matter was never reported to the police. Neither was she ever charged or prosecuted for any offence in relation to the false accusations. She was defamed as the letter containing the false accusations was copied to various people including her union. She was unable to secure any other employment as would be employers insisted on knowing the circumstances under which she was relieved of her employment with the former employer. She maintained the summary dismissal and defamation were instigated by the 3rd respondent for her failure to approve his application for a loan from their Sacco without guarantors. The false accusation had damaged her reputation both before her fellow employees, union and family members and sought damages in redress of that wrong.
10. The appellant called Humphrey Maina Gatururi as her witness. He gave evidence as PW2. In summary, he confirmed that the appellant was employed as an accounts clerk and rose to the rank of assistant accountant as well as an IT personnel. To his recollection, her work entailed dealing with books of accounts which did not involve handling of cash. He was aware of the circumstances that led to her being relieved of her employment with her employer. It was his position that the false accusations that led to the appellant losing her job were instigated by the 3rd respondent in revenge for their (him and PW1) declining to grant him a Sacco loan without guarantors. Further proof that the false accusations against the appellant were unfounded was borne out by the fact that to his knowledge no physical audit of either cash at hand or bank was carried out by the 3rd respondent and those in cahoots with him before laying the unfounded accusations against the appellant. Neither was he ever questioned in connection with those accusations. He also never wrote any statement with the police nor was any investigations carried out into the matter by the management. Neither were internal dispute resolution mechanisms invoked to resolve the issue before summarily dismissing the appellant.
11. At the conclusion of the trial, the appellant filed written submissions. The Judge analyzed the record and identified one preliminary issue which in the Judge's opinion fell for determination first because if it were to be sustained then there would be no need to waste judicial time delving into the merits of the appellant's claim.
12. The preliminary issue identified by the Judge arose from the computation of time for lodging a claim of defamation. According to the Judge's appreciation of the appellant's pleading left no doubt in the Judge's mind that appellant's cause of action arose on the 18th and 19th April, 2011 when events culminating in the letter of summary dismissal dated 5th May, 2011 were set in motion. In the Judge's opinion, the plaint filed on 3rd May, 2011 was filed outside the twelve (12) months' timeline stipulated under section 4(2) of the *Limitation of Actions Act* which in the Judge's view is explicit that a claim for redressing a tortious action of libel and slander has to be brought within twelve (12) months of the date of the cause of action. The Judge took into consideration the locus classicus case of Owners of the Motor Vessel "*Lillian S*" vs. *Caltex Oil (Kenya) Ltd [1989] eKLR* for the principle that jurisdiction is everything, without it a court has to down tools and struck out the appellant's claim on want of jurisdiction to entertain the claim.
13. The above finding of the Judge on want of jurisdiction in the Court to entertain the appellant's claim notwithstanding, the Judge did not down tools as ably stated in her above exposition. Instead she delved into the merits of the claim. In summary, the Judge took into consideration Winfield & Jolowicz



- on Tort (17th Edition) page 815 on the definition of defamation, and considering it in light of the record as analyzed by the Judge ruled that the letter for summary dismissal overtly made allegation against the appellant that she was a dishonest person in her accounting duties; that she had colluded with named colleagues to steal from their employer. The said communication had also been copied to the club's executive committee, Kudheiha a union appellant had admitted she was a member of and her own personal file, and ruled that the said communication could only amount to defamation if there was demonstration that the recipients there of were not entitled to receive the communication.
14. Relying on the High Court decision in the case of *H. W. Ndegwa & Another vs. David Onzere* [2007] eKLR for the holding, inter alia, that publication to a person entitled to receive the communication does not amount to defamation as such a communication is privileged the Judge ruled that since the persons the letter of summary dismissal was copied to were in the Judge's view entitled to receive the communication, there was no publication to third parties. Second, since the matter involved an employer and employee over summary dismissal, the appellant's remedy lay in a claim for wrongful dismissal before the Employment and Labour Relations court and not in a civil court as erroneously laid by her for damages for defamation.
 15. On want of rebuttal of the appellant's claim by the respondents, the Judge relied on sections 107 of the *Evidence Act* on the burden of proof in civil litigation and ruled that lack of rebuttal by way of defence by the respondents notwithstanding, the burden of proof lay with the appellant to prove her claim. According to the Judge, the appellant had failed to discharge that burden on a balance of probabilities for the failure to demonstrate, firstly that her claim was not statute barred and second, that there was material that was libelous of her. On account of the conclusion reached above, the Judge dismissed the appellant's claim against the respondents with no order as to costs.
 16. Turning to the prayer for damages, the Judge adopted the position taken by the High Court in the case of *Lei Masaku vs. Kalpama Builders Ltd* [2014] eKLR for the holding, inter alia, that even in instances where a claim for an award of damages for defamation is declined, the court has an obligation to assess damages it would have awarded had the claim succeeded and proceeded to assess damages.
 17. On the threshold to be applied for assessing quantum of damages in defamation cases, the Judge embraced the principles enunciated in the case of *Jones vs. Pollard* (1997) EMLR 233, 243 as approved by the Court of Appeal in *Gicheru vs. Morton & Another* (2005) 2 KLR 332, as the applicable guidelines namely:
 - i) The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition;
 - ii) The subjective effect on the plaintiff's image and feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself;
 - iii) Matters tending to mitigate damages, such as the publication of an apology;
 - iv) Matters tending to reduce damages; and
 - v) Vindication of the plaintiff's reputation past and future.
 18. In the Judge's opinion were it to be found that the matters complained of were false and defamatory of the appellant and that these were published of and concerning the appellant to third parties not entitled to receive them under privilege they would definitely no doubt have lowered her in the eyes of the right thinking members of the society generally. As in the Judge's view, no employer would recruit a thief or dishonest person. Taking into consideration all the surrounding relevant factors had



the appellant's claim succeeded, the Judge would in the circumstances have awarded the appellant a sum of kshs 5,000,000 as general damages for defamation of character.

19. The appellant was aggrieved. She is now before this Court on a first appeal raising five (5) grounds of appeal which we find prudent to condense and rephrase as follows, the learned Judge erred both in fact and in law;
 - 1) In finding that the appellant's claim against the respondents had lapsed and therefore Statute barred by the provisions of the Limitations of Actions Act.
 - 2) By erroneously reopening the issue of liability after interlocutory judgment had been entered on liability in favour of the appellant and without any invitation by the respondent for the Judge to do so contrary to the prerequisites in section 7 of the *Civil Procedure Act*.
20. The appeal was canvassed via Go-To-Meeting platform due to the ongoing Covid-19 challenges through written submissions adopted by learned counsel, F. N. Wamalwa appearing for the appellant, in counsel's presence and without oral highlighting. There was no appearance for the respondents who the Court was informed and as confirmed by the record never participated in the trial court's proceedings. The Court was also informed that the respondents were served with the record of appeal pursuant to the relevant rules of this Court being the defacto respondents. The Court being satisfied that the above is the correct position on the record allowed counsel to prosecute the appeal.
21. Supporting ground 1, the appellant relies on the case of *Peters vs. Sunday Post Ltd [1958] E. A 424*, on the jurisdiction of an appellate court and invites the Court to fault the trial Judge for erroneously finding that the appellant's claim against the respondents was statute barred and hence dismissing the same. The appellant argues that the dismissal a letter dated 5th May, 2011 formed the basis on which the suit filed on 3rd May, 2012 was founded. The learned Judge therefore erred in holding that the suit was time barred as the same had been brought within the twelve (12) months' timeline prescribed for under the *Limitation of Actions Act*.
22. Supporting ground 2 of the appeal, the appellant relies on the case of *Cleaver Hume Ltd vs. British Tutorial College (Africa) Ltd [1975] E.A. 323* for the holding inter alia that:

“failure to file a defence operates as an admission of all the allegations in the plaint except as to damages” and faults the Judge for misdirecting herself in finding that liability had not been proved when in fact it was evident from the record that no defence was filed by the respondents to controvert the appellant's claim. That is why interlocutory judgment was entered by the Deputy Registrar in favour of the appellant, which had not been set aside as at the time of the formal proof. The appellant's claims were by that default on the part of the respondents deemed admitted. No issue of liability remained for determination by the Court and urged the Court to overturn that finding.
23. The appellant has also relied on excerpts from *Bullen & Leake Precedents of Pleadings*, 12th Edition by I. H. Jacobs, London Sweet and Maxwell 1975. Crucial of this is an excerpt laying out the principles in the *Cleaver Hume Ltd vs. British Tutorial College (Africa) Ltd [supra]* that where a claim is not expressly or impliedly rebutted, it is deemed admitted. The role of the Court in such an instance is to determine issues as laid before it and not to introduce issues on its own in the absence of any amendment to the pleadings.



24. This is a first appeal from a decision of the High Court in its original jurisdiction. Our mandate is as explicitly set out in Rule 29(1) of the *Court of Appeal Rules*. It provides:

29(1) On any appeal from a decision of a superior court, acting in exercise of its original jurisdiction, the Court shall have power -

a. To reappraise the evidence and to draw inferences of fact; and

25. The Court itself has gone further and delineated the parameters in the exercise of that mandate in a plethora of case law enunciated by this Court. We take it from the often cited case of *Selle vs. Associated Motor Boat Co. [1968] E.A 123* in which the Court expressed itself, inter alia, as follows:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

26. We have considered our above mandate in light of the totality of the record as assessed above. The issues that fall for our consideration are whether:

- 1) The trial court properly appreciated its role in the discharge of its mandate as a trial court in the circumstances giving rise to this appeal.
- 2) The appellant’s claim against the respondents was statutorily time barred.
- 3) The trial Judge erroneously introduced the element of liability and used it as basis for vitiating the appellant’s claim against the respondents.
- 4) Whether in the circumstances of this appeal, the appellant should have been accorded the benefit of the award of damages assessed by the trial Judge.

27. On the first issue, the position we take and which we fully adopt is as was restated by the predecessor of this Court in the *Cleaver – Hume Ltd vs. British Tutorial College [supra]* that any issue in a claim not expressly or impliedly rebutted by the opposite party is deemed admitted. In light of the above threshold the mandate of the trial Judge in the circumstances of this appeal was limited to determining the appellant’s claim as filed against the respondents based on the appellant’s pleadings and evidence especially when it is not disputed that those pleadings and evidence had not been rebutted by the respondents and interlocutory judgment entered in favour of the appellant. What was left for the trial court to determine was simply to determine whether the appellant had proved the claim to the required threshold or not. The appellant’s complaint that the Judge overstepped her boundaries in the discharge of her mandate at the time is therefore well founded and is accordingly sustained.

28. On issue number 2, it is undisputed that the appellant’s cause of action is anchored on the tort of defamation. The position in law with regard to timelines within which to lay a claim for defamation by an aggrieved party has already been delineated by statute. We take it from section 4 (2) of the Statute of Limitation Act. It provides:

4(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.



29. The record is explicit that the Judge indeed appraised and took into consideration the prerequisite in section 4(2) of the *Limitation of Actions Act*, applied it to the appellant's claim and vitiated it as being statutorily barred by the above provision for reasons already highlighted above in the assessment.
30. Our take thereon is that the Judge correctly appreciated that under the cited provisions of law, the appellant was obligated to lay her claim within twelve (12) months. The Judge vitiated the appellant's claim because according to the Judge, the appellant's cause of action arose on 18th and 19th April, 2011. Twelve (12) months therefore lapsed long before the claim was filed on 3rd May, 2012. It is the above computation of time that the appellant has invited us to fault for reasons that the events that triggered the appellant's cause of action commenced from 18th April, 2011 to 5th May when the letter for summary dismissal was served on the appellant crystallizing the cause of action. We agree with the appellant's contention as it is well founded both in the pleadings and evidence tendered by the appellant and her witness that the events triggering the claim commenced on 18th April, 2011 culminating in the letter of dismissal dated 5th May, 2011. It is therefore our position that twelve (12) months period had not lapsed as at the time the appellant lodged her claim against the respondents on 3rd May, 2011. It is our position further that the dates forming the transactions resulting in the claim did not fall for consideration as separate and distinct but conjunctively. It was therefore erroneous for the Judge to vitiate the appellant's claim on that basis, a position we reverse, set aside the order declaring the appellant's claim statute barred and substitute it with an order that the appellant's suit was filed within time.
31. Turning to issue number 3, the position in law and which we fully adopt is as per excerpts from Bullen and Leake and Jacob's precedents of pleadings already highlighted above that a pleading not expressly or impliedly controverted by the opposite party is deemed admitted. It cannot thereafter form basis for contest in the absence of an amendment. Herein, it is common ground both at the trial and now before this Court on appeal that the appellant's assertions were not controverted by the respondents. It was therefore not open to the Judge to introduce issues of liability at that belated stage in the trial court's proceedings. It therefore follows that all the reasoning that the Judge gave for vitiating the appellant's claim against the respondents which we have already highlighted above albeit in summary form as demonstrating the contrary position to the appellant's claim had no basis in law, are accordingly set aside and substituted with an order that the appellant's claim was well founded.
32. On damages, claimed, we associate ourselves with the decision in the case of *Murphy vs. LaMarsh (1970) 73 W.W.R 114* on the definition of the word defamation. According to this decision, defamation arises in circumstances where a shameful action is attributed to a party and that such words are considered defamatory because they tend to bring the party named into hatred, contempt or ridicule, lower the party in the estimation of right-thinking members of society generally.
33. This Court in *Selina Patani & Another vs. Dhiranji V. Patani [2019] eKLR* and *Raphael Lukale vs. Elizabeth Mayabi & Another [2018] eKLR* was explicit that: the law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation as it recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements that injure his reputation. Second, that the words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. Third, that the burden of proving the defamatory nature of the words is upon the aggrieved party. He must demonstrate that a reasonable man would not have understood the words otherwise than them being defamatory of the aggrieved party.



34. The test to be applied by the Court in determining as to whether a statement is defamatory or otherwise is an objective one. See *Halsbury's Laws of England 4th Edition Vol. 28 at page 23*, where it is stated as follows:

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

In *Selina Patani & Another vs. Dhiranji [supra]* the Court stated explicitly that: in law, to constitute a cause of action, the alleged defamatory statement should be published to a third party and secondly, that the burden to prove publication is on the claimant.

35. The position taken above in the *Selina Patani & Another vs. Dhiranji [supra]* that the burden is on the claimant to prove defamation is well founded on section 107 of the Evidence Act considered by the Judge. Also falling into this category of provision of law is sections 108, 109, 110 and 112 of the same Act which we find no need to set out. It is sufficient for us to state that under the above provisions of law, the burden of proof in civil cases is not constant. It is said to shift. In the instant appeal, the appellant having pleaded and tendered evidence thereto that she was indeed defamed and the Court having arrived at the conclusion that indeed the words complained of by the appellant were indeed defamatory, she discharged her burden of proof. That burden shifted onto the respondents to disprove which they never did firstly, by default of filing a defence in rebuttal of the appellant's claim and secondly in tendering evidence in support thereof. As already demonstrated above, it is the Judge who stepped in their shoes to agitate the case for them by introducing the defence of privilege which approach we have faulted above for reasons given above.
36. In *Pullman vs. Walter Hill & Co (1891) 1 QB 524*, the ~English Court of Appeal defined publication as:
- “The making known the defamatory matter after it has been written to some person other than the person of whom it is written.”
37. On the defamatory content, the Judge is on record as saying, inter alia, that albeit on the face of it, the letter of dismissal produced in evidence and whose contents the Judge had reproduced in the judgment appeared defamatory as it alleged that the appellant was culpable for colluding to steal money from the club. Further that, assuming that the matters complained of were false and defamatory of the appellant and were published of and concerning her, they would no doubt in the opinion of the Judge have lowered her in the eyes of the right thinking members of the society generally. In the Judge's opinion, no employer would recruit a thief or dishonest person and more so, an accountant who would be entrusted with an organization's financial resources.
38. It is our position that the Judge did not dispute publication but only qualified the nature of the publication by adopting the position taken by the High Court in the case *H. W. Ndegwa & Another vs. David Onzere [supra]* and holding that the persons to whom the publication was done were not third parties as that entitled in law to receive the said communication. It was therefore privileged and on that account vitiated the appellant's claim. As we have already stated above while dealing with pleadings, the plea of “privilege” was a valid defence in favour of the respondents. We have however taken issue with the position taken by the Judge on this issue as in law a party is bound by his/her pleadings. Secondly, the Court had no mandate to step in the shoes of the respondents without their authority, descend



into the arena and litigate on their behalf. Once vitiated there is nothing to counter the appellant's pleading and evidence that there was publication.

39. Once the issue of "alleged privileged communication" is discounted what is left bare is that the words were defamatory. What we have before us is that the communication was authored by the 3rd respondent. The record is silent as to whether the executive committee members were privy to the nature of the communication that was to be done by the 3rd respondent. If they were not, then the appellant was defamed to his employers by the false allegations which subsequently resulted in the loss of her employment with them. Likewise, absent privilege, the appellant was defamed to her union Kudheiha. She was also defamed to other fellow employees and members of the club at large and was therefore entitled to damages.
40. On an appropriate award for damages, the guiding principle is that the rationale behind an award of damages in defamation actions is to restore or give back to the injured party what he lost, save in exceptional circumstances where punitive or exemplary damages may be awarded. In its assessment, the trial court's duty was to look at the whole conduct of the respondents from the time the libel was said to be published to the time the matter was heard in court. On the record, the learned Judge did not analyze the respondents conduct before the action, after the action and in court during the trial which the record is explicit that there were not interrogated. We have played that role in our own and castigate the conduct as being not only unfair but also deplorable. Unfair because upon laying false accusations against the appellant which cost her employment. They never took any steps to justify their actions when challenged by the appellant to do so. See *Johnson Evan Gicheru vs. Andrew Morton & Another* [2005] eKLR.
41. Turning back to the commensurate award for damages, the trial court guided by the checklist of compensatory factors in libel actions as enumerated in *Jones vs. Pollard* [1997] EMLR 233.243 held that an award of Kshs.5,000,000.00 general damages would have been reasonable in the circumstances had the appellant succeeded in establishing that the claim was not statute barred.
42. We are alive to the principle that an award of damages should be fairly compensatory in light of the nature of the injury to reputation and that an award must appear realistic in the circumstances. In the English Court of Appeal decision in the case of *John vs. MG Ltd* [1996] 1 ALL E.R. 35 the Court held that;

"The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and take account of the distress, hurt and humiliation which the defamatory publication caused."
43. We find nothing in the judgment of the trial court to suggest that the learned Judge erred in assessing the above proposed damages of which we have not been invited to tamper with either by the appellant or the respondents. On the basis of the conclusion reached above that appellant's claim was erroneously vitiated, the award of damages assessed by the Judge ought to have been accorded to the appellant as assessed.
44. The upshot of the totality of the above assessment and reasoning is that we find merit in the appeal. It is accordingly allowed on the following terms:
 1. The High Court judgment and decree dated 18th May, 2015 dismissing the appellant's claim against the respondents and all consequential orders flowing therefrom be and are hereby set aside and substituted with orders as follows:



- i) Liability for defamation of appellant's character by the respondents be and is hereby entered in favour of the appellant at 100% as against the respondents jointly and severally.
- ii). The appellant be and is hereby awarded Kshs. 5,000,000.00 as general damages for defamation of character as against the respondents jointly and severally.
- iii) The amount awarded at item (ii) above will attract interest at court rates from the date of judgment at the trial until payment in full.
- iv) The appellant will have costs both on appeal and the trial court.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

