Githongo v Murungaru (Civil Appeal 404 of 2019) [2022] KECA 821 (KLR) (19 May 2022) (Judgment)

Neutral citation: [2022] KECA 821 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 404 OF 2019

RN NAMBUYE, PO KIAGE & S OLE KANTAI, JJA

MAY 19, 2022

BETWEEN

JOHN GITHONGO .... APPELLANT

AND

CHRISTOPHER NDARATHI MURUNGARU .... RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court at Nairobi (Hon. Joseph K. Sergon, J.) dated 2nd May 2019 in Nairobi Milimani HCCC No. 44 of 2006)

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya at Nairobi (J. K. Sergon, J.) dated May 2, 2019.
2. This appeal was triggered by the respondent successfully tortuous action against the appellant by a plaint dated April 28, 2006, seeking: an order of injunction to restrain the appellant, his servants and or agents from further publishing words or articles relating to the respondent and in particular linking the respondent to corrupt activities and the Anglo-leasing affair, general damages for libel, aggravated, punitive and exemplary damages for libel, costs of the suit, interest and any other or further relief this court deems fit to grant.
3. Cumulatively both in his pleadings in the plaint and oral testimony in court, the respondent claimed, inter alia, that on or about the November 22, 2005, the appellant initially published the impugned defamatory matter christened the “Githongo dossier” to the then President, and the Director Anti-Corruption Commission in the course of his official functions. He however subsequently variously caused it to be posted, published and republished on the internet and circulated worldwide and by all print media houses in Kenya. He also gave many interviews to broadcasting stations inclusive of the British Broadcasting Corporation (BBC), Kenya Broadcasting Corporation (KBC), Nation TV, CNN, Aljazeera and various other radio stations. He also gave lectures in many parts of the world based

on the same contents. The said contents were subsequently published in 2009 by Michela Wrong in the book titled "*It is our Time to Eat" – the story of a Kenyan Whistle Blower"*, all to the detriment of his reputation.

4. The impugned words, which according to him were false and made by the appellant with malicious interpretation meant and were understood by ordinary members of the society to mean the meanings the respondent attributed to them in the plaint.

5. As a consequence, he was gravely injured in his character, credit, and reputation, and was lowered in the estimation of right-thinking persons of the society generally, brought into public scandal, odium, ridicule, and contempt. His feelings were hurt. He suffered considerable embarrassment and distress. His reputation was tarnished, tarred by the impugned tortuous acts of the appellant, resulting in his suffering loss and damage, in respect of all of which he claimed the reliefs set out above.

6. In support of the above position, the respondent called PW2, PW3, PW4 and PW5 as his witnesses. In their testimonies in court, they were categorical that they variously knew the respondent as a man of good reputation which was subsequently ruined by the impugned defamatory publication.

7. In rebuttal, the appellant cumulatively both in his defence dated 16th October, 2008 and oral testimonies as supported by his witness DW2, admitted authoring the Githongo Dossier, and officially communicating it to the then President and the Director Anti-Corruption Commission communication. According to him, the communication was a fair comment on the substratum of the dossier. He therefore had both legal and moral authority and social duty to communicate the same to those above two initial entities. He also claimed that these were made on an occasion of qualified privilege and could not therefore form basis for a defamation suit. He denied disseminating the contents to the internet but admitted he read the manuscript of the impugned book before publication. He also gave interviews and tape recordings to BBC, Aljazeera and others. He also variously gave public lectures on the subject.

8. He denied the respondent's assertions that he (respondent) had been gravely injured in his character, in the manner particularized both in his plaint and evidence nor that he was entitled to the reliefs prayed for in the plaint and prayed for the respondent's suit against him to be dismissed with costs.

9. At the conclusion of the trial, the learned Judge analyzed the record and identified only two issues for determination namely, (1) whether the respondent was defamed by the publication as alleged in his plaint and denied by the appellant; and (2) whether he was entitled to damages and, if so, how much.

10. On the first issue, the learned Judge made findings that the appellant deliberately authored the impugned defamatory contents and caused the same to be published and republished by media houses both in print and electronically as more particularly set out in the respondent's pleadings and evidence. He also admitted on oath that he gave his story to Michela Wrong and even read the manuscript of the book titled "Its our turn to eat" before publication. He approved DW2's request to serialize publication of the dossier both in the NTV and Daily Nation Newspaper series. The publication was therefore globally within reach through the named mediums of publication. The Judge was also of the view that on the record as laid before him, the appellant further published the defamatory content when he granted interviews to various Television stations. On that account he rejected the appellant's plea of a defence of qualified privilege and public interest.

11. On the defamatory nature of the content, the learned Judge made a findings firstly, that the appellant having admitted on oath that he was not aware of any corruption related cases that the respondent was charged with, any monies forming proceeds of corruption traced in the respondent's account(s), any criminal proceedings initiated against the respondent by the Anti-Corruption Commission; secondly,

since the appellant had not adduced any evidence linking the respondent to corrupt practices, and/or made any attempt to establish the truthfulness or justification for the contents before publication and republication; his publication and republication of the impugned contents depicting the respondent as a person who engaged himself in corrupt practices, lacked integrity, was dishonest and was the mastermind of the Anglo-Leasing scandal as sufficient basis for the Judge to make a finding that the appellant had defamed the respondent in the circumstances and granted the injunctive relief sought in the plaint, KShs.20,000,000.00 general damages, KShs.5,000,000.00 aggravated damages, KShs.2,000,000.00, exemplary damages with interest at court rates from the date of judgment until full settlement together with costs of the suit.

12. The appellant was aggrieved and filed this appeal raising fifteen (15) grounds of appeal, which we find prudent to condense and rephrase, namely that the learned Judge erred both in law and in fact in:

    1) Failing to appreciate that failure to tender evidence from the author of the book "It's Our Turn To Eat" - the story of a Kenyan whistle blower offended section 35(1)(a) and (b) and 36(1) of the *Evidence Act*, Cap 80 Laws of Kenya rendering the content of the said book inadmissible hearsay evidence.

    2) Failing to appreciate that there was no evidence tendered by the respondent to support his assertions that there was publication and republication of the impugned defamatory matter.

    3) Depriving the appellant of his right to fair hearing under Article 50(1) of *the Constitution* of Kenya, 2010 when he (the Judge) failed to properly appreciate and take into consideration from transcripts of recordings forming conversations between the appellant and persons named therein touching on the Anglo-Leasing scandal hence arriving at the erroneous conclusion that there was no iota of evidence linking the respondent to corruption practices and secondly that in the absence of establishing the truthfulness of the content of the dossier meant that the publication was defamatory of the respondent.

    4) Failing to give a fair consideration of the appellant's defence hence arriving at an erroneous conclusion in the matter.

    5) Failing to accord the appellant protection as a whistle blower notwithstanding sufficient evidence pointing irresistibly to the appellant as a whistle blower.

    6) Denying the appellant, the defence of qualified privilege without any basis.

    7) Erroneously mis-appreciating and misapplying principles of law on assessment of damages and as a result arrived at an erroneous award of damages in the circumstances.

    He prayed for the judgment of the High Court delivered in favour of the respondent to be set aside, and the respondent's suit against him to be dismissed with costs. In the alternative, the suit to be remitted to the trial court for rehearing afresh before a Judge other than Sergon, J.

13. The appeal came for virtual plenary hearing before this Court on April 26, 2021. Learned counsel Mr. Isaac Okero appeared for the appellant while learned counsel Mr. Kilukumi appeared for the respondent. Both learned counsel adopted fully their written submissions filed herein on behalf of their respective parties without oral highlighting as basis for the Court's determination of the appeal.

14. Supporting the appeal, the appellant among others relied on the case of *Charles Mwithalii vs. Julius Bariu M'Itobii* [1988] eKLR and faulted the Judge for erroneously failing to appreciate firstly, that failure to tender evidence from the author of the book "It's Our Turn to Eat – the Story of a Kenyan Whistle-Blower", offended section 35(1)(a) and (b) and 36(1) of the *Evidence Act*, Cap 80 Laws of Kenya rendering the contents of the said book inadmissible hearsay.

15. The appellant also asserted that he was deprived of his right to fair trial enshrined under Article 50(1) of *the Constitution* of Kenya when the Judge failed to properly appreciate and take into consideration four transcripts of recordings forming conversations between him and the persons named therein touching on the Anglo-Leasing scandal hence arriving at the erroneous conclusion that there was no iota of evidence linking the respondent to corruption practices and, secondly that the contents of the dossier in the absence of any evidence establishing their truthfulness or justification led to the conclusion that the publication was defamatory of the respondent.

16. The appellant also relied on the case of *Musikari Kombo vs. Royal Media Services* [2018] eKLR and faulted the Judge for the failure to give fair consideration of the appellant's defence. Secondly, for the failure to appreciate that the evidence tendered through the four (4) witnesses called by the appellant in support of his case fell short of satisfying the threshold of matters tending to lower the respondent in the estimation of right-thinking members of the society as only one of them viewed them in that perspective. Thirdly, relying on the case of *New York Times vs. Sullivan* [1964] USSC 40 as approved and applied in the case of *Royal Media Services Limited & Another vs. Jakoyo Midiwo* [2018] eKLR faulted the Judge for failing to appreciate that the appellant had sufficiently demonstrated both in his defence and oral testimony in court that the impugned publication was not reckless, and or negligent. Neither was any evidence adduced by the respondent to demonstrate that the appellant was motivated by actual malice with full knowledge of their falsity.

17. The appellant relied on section 65 of the *Anti-Corruption and Economic Crimes Act* (No. 3 of 2003) (ACECA), the *African Union Convention on Preventing and Combating Corruption* (AUCPCC), the *United Nations Convention against Corruption* (UNCAC), in addition to case law highlighted in his submissions on this issue and faulted the trial Judge for the failure to grant the appellant protection as a whistleblower. He also cited the *Universal Declaration of Human Rights* (UDHR), Articles 33(1)(a) and 34(1) of *the Constitution* of Kenya, 2010, and faulted the learned Judge for failure to properly appreciate, take into consideration and apply the principles underlying the above instruments hence arriving at the erroneous conclusion that the appellant was not entitled to grant the interviews he variously gave to the press.

18. On the award of damages, the appellant has invited this Court to take into consideration the case of, *Johnson Evan Gicheru vs. Andrew Morton & Another* [2005] eKLR; among numerous others, all cumulatively on principles that guide a court of law, firstly, in the exercise of its discretionary mandate in determining an appropriate award of damages in defamatory cases and; secondly, on appeal when determining as to whether to interfere or otherwise with an award of damages for defamation made by the court appealed from.

19. On aggravated and exemplary damages the appellant relies on the case of *Judicial Service Commission vs. Gilbert Mwangi Njuguna & Another* [2019] eKLR, among numerous others and faults the Judge for failing to appreciate that the respondent tendered no evidence demonstrating existence of recklessness, malice and deceit, all factors and or ingredients for an award of aggravated and exemplary damages and invited this Court to interfere with the said awards and set them aside.

20. Opposing the appeal, the respondent submitted that the learned Judge cannot be faulted on the manner he admitted and acted on the contents of the book "Its Our Turn to Eat" the story of a Kenya whistleblower" as the said book authored by Michela Wrong was listed in the respondent's list of documents in the process of discovery pursuant to the prerequisites under Order X rule 11A(1) of the Civil Procedure Rules. Its admissibility as an exhibit in evidence was not challenged both at the pre-trial stage nor at the trial. Secondly, the bundles of documents for both parties were admitted by consent without any objection. Thirdly, the content of the said book does not give an account of the story as

narrated by Michela Wrong to warrant her being called to give oral evidence and be cross examined thereon. It records the story as narrated by the appellant to the said author.

21. The appellant filed a defence, tendered oral evidence, offered himself for cross examination and was duly cross-examined on the said contents.

Fourthly, allegation that the contents of the book amount to hearsay does not, arise when the appellant is on record as saying that he was given the raw manuscript of the contents of the book, went through it and raised no objection to any aspect of the said contents before publication. The Judge was therefore in the circumstances entitled to find and hold as he did that the book consists of express admissions by the appellant of the defamatory Githongo Dossier which he published to the whole world in both electronic and print media. The contents of the book were therefore rightly admitted under sections 17, 18(1) and 20 of the *Evidence Act*. Sections 35 and 36 of the *Evidence Act* are therefore inapplicable to the circumstances that gave rise to this appeal.

22. On the defamatory nature of the content of the publication, the respondent submitted that the findings of the learned Judge on this issue were well-founded both on the facts on the record and the law as applied to those facts by the Judge which, according to the respondent, is unassailable.

23. On the complaint with regard to the alleged failure of the Judge to take into consideration tape recordings of the conversations between the appellant and other government functionaries, the respondent submitted that these were rightly discounted by the trial court for the appellant's failure to call those Government functionaries as witnesses to prove the truthfulness of allegations that the respondent was corrupt. The trial Judge cannot therefore, be faulted for arriving at the correct conclusion on the matter that freedom of expression which according to him is not absolute, could not be used by the appellant as basis for tarnishing the reputation of the respondent. According to him, a proper construction of Article 33(3) of *the Constitution* of Kenya is explicit that in the exercise of one's right to freedom of expression, every such person has an obligation to respect the rights and reputation of others.

24. On the appellant's defence of qualified privilege, the respondent submitted that the appellant disentitled himself to the defence of qualified privilege the moment he deliberately and intentionally turned to the media and caused the publication and republication of the impugned Githongo Dossier.

25. On finding of liability against the appellant to pay damages to the respondent, he relied on Article 27(4) and (5) of *the Constitution* and the case of *Royal Media Services Limited & Another vs. Jakoyo Midiwo* [supra] and submitted that in the absence of the appellant adducing evidence to prove the truthfulness of the content of the impugned publication, the learned Judge's finding that the appellant was liable to pay the respondent damages for defamation was well-founded both on the facts and in law.

26. On the quantum of the award for damages, the respondent submitted firstly that the trial Judge properly appreciated factors that guide the court in determining an award of damages for libel, identified the applicable principles of law, applied these correctly to the rival position before him and gave reasons for the quantum of damages arrived which should not be interfered with and urged this Court to affirm the same and dismiss the appeal with costs.

27. In reply to the respondent's submissions, the appellant submitted that there was nothing on the record to demonstrate that the author ever acted on the comments he gave to the author after reading the manuscript. A proper interpretation of sections 17, 18(1) and 20 as read with sections 24 and 61 of the *Evidence Act* leads to only one conclusion namely that neither the book nor any statement therein can be deemed to be an admission and reiterates his submissions in chief that sections 35 and 36 of the *Evidence Act* apply to vitiate the erroneous manner in which the trial court admitted the contents

of the said book and erroneously acted on those contents as a basis for pinning liability in damages against the appellant.

28. This is a first appeal. Our mandate is that we are required to re-evaluate and re-analyze the record and come to our own conclusion on the issues in controversy as between the rival parties herein, bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanor of witnesses. See *Selle & Another vs. Associated Motor Board Co. Ltd* [1968] EA 123. In undertaking this exercise, we are guided by the principle that a court of appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on a misapprehension of the evidence or that the Judge is shown demonstrably to have acted on a wrong principle in reaching the finding he did. See *Jabane vs. Olenja* (1968) KLR 661.

29. We have considered the record in light of the above mandate, the rival submissions, legal authorities and principles of law relied upon by the parties herein in support of their respective positions. Issues falling for interrogation in the disposal of this appeal are the same condensed and rephrased grounds of appeal set out above.

30. On proof of existence of the impugned defamatory matter, it is our position that it is common ground that existence of the "Githongo Dossier" was not in dispute. Neither is it disputed that the appellant originated the said dossier in the exercise of his official mandate as a public servant. It is also common ground that he communicated the contents of the said dossier to the then President and the Director Anti-Corruption Commission both of whom were entitled in law and also as a matter of public policy and interest to receive the said communication. What was in contention both at the trial and now on appeal is firstly, whether the said contents were defamatory of the respondent. Secondly, whether these were properly admitted as evidence to form anchor for the trial Judge's finding and pinning liability against the appellant. Thirdly, using these as a basis for making an award of damages in favour of the respondent against the appellant.

31. In *Gatley on Libel and Slander* 13th edition, it is explicitly stated inter alia, that "the gist of the torts of libel and slander is the publication of matter (usually words) carrying a defamatory imputation. A defamatory imputation is one that results to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade, profession or to injure his financial credit. The standard of opinion to be applied in determining the above is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation as the law looks only to its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought and; likewise, contrary in truth alone does not render an imputation defamatory." *Blacks Law Dictionary* 11th edition (2019) defines defamation as: "the act of harming the reputation of another by making a false statement of a third person." See also *Halsbury's Laws of England* 5th Edition at page 509 which defines a defamatory statement as follows: "A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to disparage him in his office, profession, calling, trade or business".

32. Our take on the above exposition is that elements of a defamatory matter which we find no need to distill but simply adopt and which the respondent as the aggrieved party had the burden of proving are as set out in the above definitions. The threshold of proving was simply proof that a reasonable person reading the content of the impugned publication would have understood them to be defamatory of him. It is our appreciation that it was in compliance with the prerequisites in the above definitions that the respondent not only pleaded in his plaint but also adduced oral and documentary evidence through himself and his witnesses as proof thereof. He went further both at the trial and in the instant appeal

to contend that the appellant's conduct in the manner he published and republished the impugned defamatory words without any basis for doing so was also malicious.

33. Malice is defined in Blacks Law Dictionary 11th Edition page 1145 – 6 as "the intent without justification or excuse to commit a wrongful act, reckless disregard of law or a persons legal right…" actual malice on the other hand is defined as "the deliberate intent to commit an injury as evidenced by external circumstances" while the concise Oxford English Dictionary 12th Edition page 864 defines malice as "the desire to do harm to someone, ill will, wrongful intention…"

34. On the defamatory nature of the content of the impugned words, the Judge reasoned inter alia, that his careful construction of those words left no doubt in his mind that the respondent was depicted as a person who, inter alia, engaged himself in corrupt practices, lacked integrity, was dishonest, masterminded the Anglo Leasing scandal, and concluded that the impugned words were indeed defamatory of the respondent. The reasons the Judge gave for pinning responsibility on the appellant as the originator of those words was because the appellant admitted on oath in cross-examination that he had no proof that the respondent had been charged with any corruption cases. Neither was he aware of any monies forming proceeds of corrupt deals traced into the respondent's bank accounts. The only evidence he had and without giving any proof of those assertions, was that it was the respondent's colleagues who told him that the respondent was corrupt. The Judge therefore concluded that on the record as assessed by him, the appellant acted outside his core mandate as a Permanent Secretary advising the President on policies and strategies for fighting corruption, defamed the respondent.

35. We have considered the totality of the Judge's reasoning highlighted above. It is our position that the appellant undoubtedly admitted being the originator of the impugned defamatory matter. We find no demonstration on the record that he took any steps to establish their truthfulness before penning them down and communicating them firstly, to the original two entities and subsequently to third parties in the manner he did. We therefore find no error in the manner the trial Judge analyzed them, applied the law thereto correctly so in our view and drew out the only logical conclusion on the matter, as he did, that the content of the published matter was indeed defamatory of the respondent.

36. On admissibility, it is evident from the record that parties herein not only filed their lists of documents in support of their rival positions but also exchanged them. The record is explicit that the respondent not only gave oral evidence but also tendered documentary exhibits including the book. He was cross-examined on the evidence tendered inclusive of that touching on the content of the book forming the substratum of the defamatory suit. The appellant likewise concluded his testimony in chief on 19th January, 2013 and on which date he also tendered his bundle of documents. It is evident from the record that what the parties agreed to expunge from the appellants' bundle of documents, did not include the content of the book. The advocate then on record for the appellant raised no objection to the production of the book by the respondent. Neither was there any mention and or request that the author of the impugned book be summoned for cross-examination by the appellant on the veracity or truthfulness of the contents of the said book.

37. Our construction of section 35(1) (a) (i) and (ii) is that in order for a document to fall admissible under these provisions, there must be demonstration that the maker of the document had personal knowledge of the contents or alternatively he/she had sourced the information from a person who had personal knowledge of those contents. Section 35(1) (b) applies where the maker is called as a witness. There is however a proviso to section 35(1) (b) under which the court may accept such evidence where the maker is not called as a witness.

38. Section 36 on the other hand prescribes the weight to be attached to documentary evidence tendered in evidence under section 35. Sections 17, 18, 20, 24 and 61 on the other hand deal with admission of

facts of statements by parties, themselves, their agents, persons expressly referred to by the parties, effect of such admission and lastly, that where parties have admitted facts there is no requirement for proof.

39. We have applied our construction of the above provisions to the appellant's complaint on the manner the learned Judge admitted in evidence and acted on the impugned defamatory matter as basis for finding liability in damages against the appellant. Our position is that the learned Judge cannot be faulted for his failure to inquire into and observe the prerequisites in sections 35(1)(a) (i) and (ii) when admitting the impugned content, as in our view there was no such obligation placed on the Judge firstly, to appreciate; and secondly, take this procedural step as the record is explicit that the appellant's advocate failed to raise objection to the mode of production of the said book as proposed by the respondent. Secondly, it is also our position that the appellant was not prejudiced or disadvantaged in any way by that mode of production of the book having gone on record as admitting that the contents of the book were based on the Githongo Dossier, admittedly originated by him. Secondly, he also admitted giving an interview to the author of the book regarding the contents of the dossier. Thirdly, he admitted receipt of the raw manuscript of the book, went through it before publication. There is no mention that he raised any objection to any aspects of the contents of the manuscript he went through before publication nor the contents of the book after publication. We therefore find and hold that the prerequisites in section 35(1) (b), 2, 3, 4 and 5 would only have been called into play if the defence would have required the author to be called as a witness. Our appraisal of the record as laid before the trial Judge and now this Court on appeal is that the admissibility of the said text fell into matters falling within the realm of matters provided for in section 18, 20, 24 and 61 of the *Evidence Act*.

40. On publication, the approach we take is that taken by the English Court of Appeal in the case of *Pullman vs. Waiter Hulls & Co.* [1891] 1QB54 for the holding inter alia, that "publication is the making known the defamatory matter after it has been written to some person other than the person whom it is written about. Publication may be direct or indirect. That is through third parties". See also the case of *Huth vs. Huth* [1915] 3 KB 32 for the holding/proposition that "a presumption of publication through third parties arises where information or the document is put in the way of being read and understood by those through whose hands it passes in the ordinary cause of events".

41. The learned Judge's assessment and reasoning on the rival positions before him on this issue is as summarized in paragraphs 48, 49, 50, 51, 52, 53 and 54 of the impugned judgment all of which was founded on the uncontroverted evidence on the record that the appellant made known the contents of the dossier to persons other than the two entities initially addressed as we have already pointed out above. These include Michela Wrong who authored the book and other media stations who in turn variously published or republished them. We therefore affirm the learned Judge's finding that had the appellant not granted interviews to Michela Wrong, DW2 and other media stations as admitted in his evidence on oath, the publication of the dossier would have ended with the original addressees who as evidence stands on the record, never published it through their end.

42. Turning to the appellant's defence of qualified privilege and intense public interest, the appellant has relied on the persuasive decision in the case of *Reynolds vs. Times Newspapers Limited & Others* [supra] from which guidelines and or parameters for sustaining a defence of qualified privilege in public interest may be distilled as follows:

  i) The seriousness of the allegation i.e if the allegation is not true, what will be the level of misinformation to the public and what will be the corresponding harm to the individual.

  ii) The nature of the information and the extent to which the subject matter is of matter of public concern.

  iii) The source of the information and whether it is reliable or motivated by malice and/or avarice.

iv) Whether suitable steps have been taken to verify the information.

v) Whether the allegation in a story has already been the subject of an investigation which commands respect.

vi) Whether it is important that the story be published quickly.

vii) Whether comment was sought from the claimant, or whether that was not necessary in the context of the story.

vii) If the article or story includes the gist of the claimants' version of events.

ix) Whether the article or story is written in such a way as to amount to a statement of fact, or whether it raises questions and is suggestive of the need for further investigation.

ix) The timing of the publication.

43. In our view, the overriding objectives therein are as follows: firstly, the presumption that a defamatory statement is false unless the defendant proves its truthfulness. Secondly, determination as to whether there is sufficient demonstration that the said statements or reports or allegations were published in the public interest. Thirdly, determination as to whether a reasonable person reading the impugned statement would reasonably say that it was nothing but a fair comment. Fourthly, demonstration that the originator or maker of the statement had a duty to make it, and likewise the addressee of the contents also had a corresponding interest and or duty to receive the same.

44. We have considered the appellant's complaint on this issue in light of the above identified overriding objectives. The position we take is that besides the appellant pleading qualified privilege in his defence and asserting the same in both submissions before the trial court and now this Court on appeal, nowhere do we find in the said assertions the appellant pointing out any of the above prerequisites as basis for justifying his conduct of publishing/republishing and conducting interviews for his alleged public interest. Neither is there any demonstration on his part to show that he took steps to verify the truthfulness of the contents before publishing/republishing, conducting interviews and giving public lectures beyond the original two addressees who in our view were indeed entitled to receive those contents. He is also on record as we have already pointed above as saying on oath that he had no investigative mandate and therefore had no means of establishing the truthfulness or otherwise of the contents gathered by him.

45. We therefore find no basis for faulting the trial Judge on the Judge's finding that in so far as the appellant failed to restrict the dissemination of the impugned dossier to the initial addressees, the defence of qualified privilege was not available to him. Secondly, we agree with the respondent's submissions that *the Constitution* of Kenya, 2010 does not shield a whistleblower from responsibility for want of restraint in the publication of any defamatory matters in the exercise of his right of freedom of expression and alleged dissemination of matters in the public interest.

46. On malice, we find the Judge's finding that the applicant's publication and republication of the impugned matter to third parties beyond the two original addressees as actuated by actual malice well-founded on the appellant's own admission on oath in his cross-examination that he was not aware of any criminal charges brought against the respondent with regard to the alleged corruption allegations nor of any money forming proceeds acquired through corrupt practices engaged in by the respondent traced into the respondent's accounts. He is also on record as saying that it was the respondent's colleagues, who he failed to name, and or call to testify, who allegedly told him that the respondent was corrupt. Neither was he aware of any corruption charges preferred against the respondent by the Anti-

Corruption Commission. There is also evidence on the record demonstrating that the appellant never made any efforts to verify the truthfulness of the contents before publication.

47. On the Judge's alleged failure to analyze and consider the contents of transcriptions of taped conversations between the appellant and other government functionaries to the detriment of the appellant's defence, we agree with the appellant's assertions that no mention of these were made by the Judge when analyzing the evidence on the basis of which he drew out conclusions forming the impugned judgment, notwithstanding that these were indeed tendered as exhibits in evidence.

48. Sections 78A (3) of the *Evidence Act* provides as follows:

> " in estimating the weight if any to be attached to electronic and digital evidence under sub-section (1) regard shall be held to –
>
> a) the reliability of the manner in which the electronic and digital evidence was generated, stored and communicated.
>
> b) The reliability of the manner in which the integrity of the electronic and digital evidence was maintained.
>
> c) The manner in which the originator of the electronic and digital evidence was identified.
>
> d) Any other relevant factor."

49. In light of the above provision, it is our finding that no prejudice was occasioned to the appellant for the learned Judge's failure to consider the transcriptions in the assessment of evidence before drawing the impugned conclusions because, in our view, they had no probative value that could have swayed the mind of the trial Judge to arrive at a contrary view. Firstly, the conversation was said to have been general. Secondly, no reason was given as to why the appellant was not willing to call those government functionaries as witnesses. On the totality of the above assessment and reasoning, we dismiss the appeal against liability.

50. Turning to the complaint against the damages awarded to the respondent against the appellant, we adopt the principles in the case law already highlighted above when analyzing the appellant's submission in support of this complaint both on the role of this Court when dealing with an invitation to interfere with an award of damages granted by the court appealed from; and secondly on the principle that guides the Court in the exercise of that mandate. It is sufficient for us to distill them cumulatively as follows: an appellate court will not interfere with an award of general damages by a trial court unless in instances where there is sufficient demonstration that the trial court:

a) Acted under a mistake of law.

b) Acted in disregard of principles.

c) Took into account irrelevant matters or failed to take into account relevant matters.

d) Acted under a misapprehension of facts.

e) Injustice would result if the appellate court does not interfere.

f) Where the amount awarded is either inordinately low or inordinately high that it must have been an erroneous estimate of the damage.

g) Misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

h) Though the latitude in awarding general damages in an action for libel is very wide, the court must avoid substituting its own views on what damages should have been given against the award by the Judge had the court been seized of the matter in the first instance.

51. This Court in the case of *Johnson Evan Gicheru vs. Andrew Morton & Another* [2005] eKLR revisited the above positions and after reviewing a wealth of foreign jurisprudence provided the guiding principles when an appellate court is invited to discharge its mandate in an appeal of this nature and which we find prudent to rephrase as follows:

1) In an action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given, meaning, that is before action, after action and in court during the trial.

2) The damages awarded operates in two ways namely, vindication of the plaintiff to the public and as a consolation to him for a wrong done to him.

52. In the same case, the Court approved and adopted what it termed as a checklist of compensatable factors in libel actions as set out in *Jones vs. Pollard [1997] EMLR 233*-243 and which we also fully adopt namely:

1) 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.

2) The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendants conduct thereafter both up to and including the trial itself.

3) Matters tending to mitigate damages such as the publication of an apology.

4) Matters tending to reduce damages.

5) Vindication of the plaintiff's reputation past, present and future.

53. In *Wangethi Mwangi and Another vs. J. P. Machira t/a Machira & Company Advocates* [2012] eKLR additional guidelines for assessing damages were given by this Court as follows:

> "In addition, the awards should also be geared where circumstances permit to act as a deterrence so as to safeguard and protect societal values of human dignity, decency, privacy, free press and other fundamental rights and freedoms, including rights of others and personal responsibility without which life might not be worth living. The category of considerations will no doubt change as our societal needs change from time to time. In this regard, we think that courts must strive to strike out a proper balance between the competing needs in the special circumstances of each case."

54. On aggravated and punitive damages, which the appellant contend weres improperly awarded, we take it from the case of *John vs MG Limited* [1997] QB 586 as approved in the case of *Agnes Zani vs Standard Group Limited* [2019] eKLR in which this Court had this to say:

> "Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is actuated by malice; insistence on a flurry defence of justification or failure to apologize."

55. In light of the threshold set out in the above case law, the rationale behind awarding of damages in defamatory action is to restore or give back to the party injured what he lost. Meaning the general compensatory damages such as sums that will compensate him for the wrong he has suffered. The quantum accorded should be one that must compensate him for damage to his reputation, vindicate his name, and take account of the distress, hurt and humiliation which the defamation publication may have caused him and also provide him with solace or solation. In addition to the above, the court also has to consider the peculiar circumstances prevailing in each case, the plaintiffs position and standing in society, the mode and extent of the publication, the apology if offered and, at what stage of the proceedings the apology was given, the conduct of the defendant from the time when the libel was published up to the time of the judgment.

56. Further, the sums awarded should be fairly compensatory commensurate to the nature of injury occasioned to the plaintiff's reputation. This therefore makes it necessary for calling for a restrained hand in the making of an award of damages which is keeping in line with the applicable principles. The award should also be realistic.

57. Turning to the jurisprudential trend of this Court in determining an appropriate award in an appeal of this nature, we take it from the award in the case of *Nation Media Group Limited vs. George Nthenge* [2017] eKLR in which the court affirmed an award of KShs.5,000,000.00 as general damages but reduced the award for exemplary damages from KShs.2Million to KShs.1Million; the case of *Musikari Kombo vs. Royal Media Services Limited* [2018] eKLR in which this Court sanctioned an award of KShs.5,000,000.00 as general damages and KShs.1,000,000.00 as aggravated damages; the case of *Agnes Zani vs. Standard Group Limited* [2019] eKLR in which this Court affirmed an award of KShs.5,000,000.00 as general damages and allowed KShs.1,000,000.00 as aggravated damages and lastly, *Ruth Njiri James vs. Njoroge Ndirangu & 3 Others (Civil Appeal 282 of 2016)* [2022] KECA 82 (KLR) decided on 4th February, 2022 in which this Court allowed KShs.5,000,000.00 as general damages.

58. Considering the trend in the above highlighted case law, reasoning of this Court forming basis for arriving at the above awards, the peculiar circumstances prevailing in this appeal as more particularly set out both in assessment and the reasoning of this judgment and doing the best we can, we find basis for interfering with the award of damages arrived at by the trial court which we find and hold was on the higher side and therefore not commensurate to what in our view would amount to adequate compensation for the injury suffered by the respondent as a result of the impugned defamatory conduct of the appellant. We find basis for interfering. We accordingly set aside the award arrived at by the trial court and substitute it with an appropriate award for each item as follows:

    1. General damages KShs.7,000,000.00.

    2. Aggravated damages KShs.2,000,000.00

    3. Punitive damages KShs.1,000,000.00

    4. Costs of the proceedings both on appeal and the trial court.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR