



**Oira v Standard Limited & another (Civil Appeal 57 of 2017)  
[2022] KECA 1361 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1361 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 57 OF 2017  
W KARANJA, HM OKWENGU & MSA MAKHANDIA, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**HEZEKIEL OIRA ..... APPELLANT**

**AND**

**THE STANDARD LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JAMES RATEMO ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal against the judgment and decree of the High Court of Kenya at Nairobi-Milimani (Aburili, J.) delivered on 18th November, 2016 in H.C.C.C. No. 64 of 2011))*

**JUDGMENT**

1. The appellant, Hezekiel Oira (Hezekiel), has brought this appeal challenging the judgment and decree of the High Court (Aburili, J) delivered on November 18, 2016 dismissing his suit. He had filed the suit against the Standard Limited (the Standard) and James Ratemo (James) claiming damages for defamation.
2. Hezekiel's claim was that on June 23, 2010 the Standard and James, maliciously, falsely and without justification caused to be printed on the front page of the Standard Newspaper, an article titled, 'how KBC lost Ksh 110 million world cup deal to competitor'. The article alleged in part that the government had lost an opportunity to recover Ksh 75 Million spent to buy broadcasting rights of the then ongoing FIFA World Cup tournament, and attributed this loss to alleged impropriety by Kenya Broadcasting Corporation (KBC) officials.
3. The publication further stated that Hezekiel, who at the time worked as a corporation secretary for KBC, together with the KBC managing director, had been suspended to pave way for investigations, and that the editor in chief had taken up the management role. The article further quoted the then Information and Communication Permanent Secretary - Bitange Ndemo (PS), as stating that KBC



had been given Ksh 75 million to buy the World Cup rights, and was expected to raise the amount through advertising, and that the government had lost the said amount.

4. Hezekiel claimed that those words published through the Standard Newspaper, which is one of the leading dailies with extensive audience in East Africa region, were false and malicious, as KBC did not request or receive any financial support from the government or elsewhere for the purpose of acquiring the 2010 World Cup broadcasting rights. Hezekiel claimed that the publication which was read by the public, was understood by right thinking members of society and the world at large, to mean that he was suspended to pave way for investigations as he was suspected of colluding with the managing director at KBC to defraud the corporation and was responsible for the loss of the reported Ksh 75 million. In addition, the words implied that he committed the offences in his official capacity as the corporation secretary, and that he is a corrupt person. Hezekiel maintained that his character, credit and reputation were injured by the article, and that the authorship and publication of the said article was actuated by malice.
5. The Standard and James filed a joint defence denying Hezekiel's claim. They contended that the words published in the impugned article consists of true reporting of facts relating to KBC, a public broadcaster, in whom the general public had an interest; and that the findings adverted to in the article were made by an independent government body which detected misgivings on the part of Hezekiel. The Standard and James denied that Hezekiel's reputation was injured due to the publication of the said article, or that they were actuated by malice in publishing the article. They maintained that the said article was published in due exercise of freedom of the media and the general public's right to access information concerning public matters.
6. During the hearing of the suit, the appellant testified in support of his claim, and James also testified on behalf of the respondents. The parties also filed written submissions, each urging the court to find in their favour.
7. In her judgment, the trial judge found inter alia, that the standard published the impugned article, and that the article mentioned Hezekiel as one of the persons who had been suspended by KBC following allegations of impropriety by KBC officials relating to the tendering of the 2010 FIFA World cup broadcasting exploitation rights. The trial judge also held that James who authored the article did not obtain the information from the KBC website as the information on the KBC website was published on September 9, 2010 and concerned the sacking of Hezekiel and the managing director and not their suspension as reported by James in the impugned article which was published on June 23, 2010 The trial judge concluded that James must have obtained the information from an interview which he had with PS, Bitange Ndemo and that apart from the question whether Hezekiel was suspended or sent on compulsory leave, the impugned article merely reported what factually led to Hezekiel's suspension and what resulted in his being charged in court. Further, that the publication did not impute the commission of a crime by Hezekiel nor was it calculated to incite the public against him. Consequently, the trial judge found that the Hezekiel had failed to prove that he was ridiculed and shunned or avoided by right thinking members of the society, and dismissed his suit
8. In his memorandum of appeal, Hezekiel has challenged the decision of the trial judge on 13 grounds, in which he faults the trial judge for, inter alia,: failing to find that the impugned publication was defamatory; allowing the defence to rely on irrelevant and extraneous documentary evidence; admitting hearsay evidence; failing to infer malice in the fact that the respondents had an interest in exploitation of the World Cup rights; and requiring Hezekiel to adduce evidence to show that 'right thinking members' of society would have held him in contempt based on the article.



9. Hezekiel has filed written submissions in support of his appeal, in which he states: that the only statement that was correct in the impugned publication was the fact that he had been suspended following a complaint from Radio Africa Group over post- transmission radio commentary rights granted to Royal Media Services Limited at Ksh 500,000; that the loss of Ksh 110 million and Ksh 70 million respectively attributed to him was a malicious creation of the respondents orchestrated to injure Hezekiel and therefore, prima facie, defamatory; that the offending statement injured his reputation because it imputed theft or loss that did not exist; and that in the absence of a transcript of the alleged interview between James and the PS, the evidence of the PS being the source of the published information, was hearsay.
10. Referring to *Oweb v Amalgamated Press of Nigeria Ltd (1957) 1 LLR 6* (reproduced in Kodilinye & Aluko, *The Nigerian Law of Tort*), where it is stated that:

' Actual malice does not necessarily mean personal spite or ill will and it may exist even though there is no spite or desire for vengeance in the ordinary sense. Any indirect motive other than a sense of duty is what the law calls malice. Malice means making use of the occasion for some indirect purpose.'
11. Hezekiel submitted that the respondents' malice was evident from the use of the article to exacerbate an existing situation. He faulted the trial court for failing to appreciate that the cause for his suspension was not the loss of Kshs 75 million given to KBC and another sum of Ksh 110 million, as these losses were invented by the respondent; that James' interview with Dr Bitange Ndemo took place after September 6, 2010 and was not interrelated nor had any logical connection to the defamatory statement made in June 2010.
12. In addition, the trial court also failed to appreciate that the adduction of evidence by Hezekiel of the judgment in ACC No 18 of 2011 was to support the argument that KBC had not lost any money as reported by the respondents; and that if there was any loss, KBC would have counterclaimed the money in Industrial Cause No 299 of 2011 where Hezekiel has sued KBC. He faulted the trial judge for failing to evaluate the evidence and introducing irrelevant matters relating to the two cases instead of focusing on the offending statement made on June 23, 2010; that the court relied on extraneous and wrong finding that James reported on September 6, 2010, that Hezekiel was subsequently sacked, while the published information could not have been available to the respondents at the time of the impugned publication.
13. Hezekiel cited amongst others the Supreme Court of Nigeria in *Joseph Mangtup Din vs African Newspaper of Nigeria Ltd No 44/1989* in which Adolphus Goodwin Karib Whyte, JSC held that the onus lies on the respondent to prove the truth of the words in their ordinary and natural meaning and that a plea of justification means that all the words were true and covers not only the bare statements of facts in the alleged libel but also any imputation which the words in their context may be taken to convey. He faulted the trial judge for finding that he failed to prove his case as he did not call any witness to prove that he was shunned or ridiculed by right thinking members of the society, arguing that the term 'right thinking member' is a legal construction that does not require a witness; and that it was for the court to put itself in the shoes of such a person and make a finding that there was defamation; and that in any case a libelous statement is actionable per se without proof of damage, Hezekiel contended that the trial judge erred in relying on the report prepared by the inspectorate of state corporation of June 2010 which was not produced in evidence, and this was hearsay evidence which was prejudicial to him. The appellant urged the court to find in his favour as the publication of the impugned article was not disputed, it referred to him and was defamatory.



14. The standard and James also filed written submissions urging the court to dismiss the appeal. They maintained that on the basis of defence of justification, they were not liable to the appellant as what they published in the impugned article was true.
15. The respondents cited *Wycliffe A Swanya vs Total East Africa Ltd, [2009] eKLR, (CA 70 OF 2008)*, in urging that in proving defamation, one has to go beyond proving falsehood and prove injury to reputation; that the use of the word ‘alleged’ in the impugned article showed that the respondents were not reporting facts or conclusion, but information that James had received; and that there was no falsity in the publication.
16. The respondents submitted that Hezekiel failed to prove that the impugned publication lowered his standing in the eyes of ‘right thinking members’ of society; that as a matter of law and fact, there can be no inference of malice on the part of the respondents from the wording of the article. In this regard, the respondents relied on several cases including *George Mukuru Muchai vs The Standard Limited HCCC No 2539 of 1997* in which the Aganyanya, J stated:
- ‘ The most important ingredient in a defamation case is the effect of spoken or written words in the minds of third parties about the complaint and not how he/she himself/herself feels the words portray about him/her.’
- And Douglas odhiambo Apel & Anor vs Telkom Kenya Limited, Civil Appeal 115 of 2006 in which this court held that:
- ‘ Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submission. Cases are decided on actual evidence that is tendered before the court. The need for proof is not lessened by the fact that the claim is for special damages. It is not enough to merely point to the plaint or to repeat the claim in submissions.’
17. On the issue of damages, the respondents referred to *Bhatt vs Khan, Civil Appeal No 40 of 1997*, where Law JA, stated that:
- ‘ An appellate court will not disturb an award of damages unless it is so high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.’
18. The respondents urged the court to follow its previous decision in *Kenya Tea Development Agency Limited vs Benson Ondimu Museet/a BO Masese & Co Advocates [2008] KLR 149*, wherein the judges endorsed the principles to be considered by a trial court in determining the amount of damages to be awarded to a plaintiff, from an English decision in *Jones vs Pollard [1997] EMLR 233, 243* as follows:
- (a) The objective features of libel itself such as its gravity, its province, the circulation of the medium in which it is published and any repetition;
  - b. The subjective effect on the plaintiff’s feelings not only from the prominence itself but from the defendant’s conduct thereafter, both up to and including the trial itself.
  - b. Matters tending to mitigate damages, such as the publication of an apology.
  - b. Matters tending to reduce damages.
  - b. Vindication of the plaintiff’s reputation past and future.’



19. The respondents urged the court that if inclined to allow the appeal, taking into account the principles adopted in Kenya Tea Development Agency Limited case, a composite award of Ksh 200,000 would be sufficient compensation to the appellant.
19. This being a first appeal, this court has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, giving allowance to the fact that it did not see witnesses testify and must defer to the finding of the trial court. (See [Abok James Odera t/a Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates \[2013\] eKLR](#)).
20. As was stated by Sir Clement De Lestang VP in *Selle & Another v Associated Motor Boat Co Ltd & Others (1968) EA 123*:
- ' 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 Hammed Saif v Ali Mohamed Sholan (1955), 22 EACA 270).'
21. With the aforesaid obligation in mind, we have considered this appeal, the submissions made before us, and the authorities cited. It is not disputed that the respondents published the impugned article. What is in issue is whether the article was defamatory, and if so, whether the defence of justification is available to the respondents. In considering these issues, the following ancillary issues arise in the appeal. These are whether the learned judge erred in finding: that the impugned article was not defamatory; that Hezekiel failed to prove that the publication of the impugned article damaged his reputation in the eyes of right thinking members of the society; and that the publication of the impugned article was not actuated by malice but was fair reporting of what was happening in a state corporation in which the general public had an interest.
22. In her judgment, the trial judge drew from the definition of defamation in determining whether or not Hezekiel was defamed by the alleged publication. In this regard, the trial judge properly directed herself stating in part as follows;
112. The defamatory statement of and concerning a person is one which has a tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of right thinking members of society generally, and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem.
113. Defamation is thus not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of the society generally.
- ...
117. The ancillary questions that I must answer in relation to the main issue of whether or not the plaintiff was by the impugned publication defamed are:



- a. whether the publications by the defendants of and concerning the plaintiff are capable of being construed as being defamatory of the plaintiff in their natural and ordinary meaning or by innuendo.
  - b. whether the said publications were made maliciously.
  - c. whether the plaintiff's credibility, character and reputation has been injured and therefore, whether he is entitled to damages, and if so, how much?
127. In a defamation claim, the claimant must prove to the required standard that the words complained of were published of and concerning him; that the words were published by the defendant; that the words were false; that the words were defamatory on the character of the claimant; and finally; that the publication was done with malice.'
23. It is not disputed that the impugned article was published by the respondents, nor is it disputed that the article referred to Hezekiel. The bone of contention is whether the article was defamatory. Hezekiel contended that it was so because there was no evidence produced to show that he had been involved in unethical or unprofessional conduct, or that he caused the corporation to lose money as alleged, through fraudulent dealings.
24. The first issue that we must address is whether the impugned article was defamatory. [\*Gatley on Libel and Slander 10<sup>th</sup> Edition\*](#) at page 8 states as follows on the ingredients of defamation.
- ' There is no wholly satisfactory definition of defamatory imputation. Three formulae have been particularly influential: (1) would the imputation tend to 'lower the plaintiff in the estimation of right-thinking members of society generally? (2) would the imputation tend to cause others to shun or avoid the claimant? (3) would the words tend to expose the claimant to 'hatred' contempt or ridicule? The question what is defamation relates to the nature of the statement made by the defendant: words may be defamatory even if they are believed by no one and even if they are true, though in the letter case they are not, of course, actionable.'
25. In [\*Selina Patani & another v Dhiranji V Patani \[2019\] eKLR\*](#), this court differently constituted, approved the ingredients of defamation as summarized in the case of John Ward v Standard Ltd, HCCC 1062 of 2005 as follows;
- (i) The statement must be defamatory.
  - ii. The statement must refer to the plaintiff.
  - ii. The statement must be published by the defendant.
  - ii. The statement must be false.'
26. Halsbury's Laws of England 4<sup>th</sup> Edition Vol 28 at page 23 states 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 any circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in defamatory sense.'



26. We are in agreement with the following proposition by Mativo,J (as he then was) in *Joseph Njogu Kamunge vs Charles Muriuki Gachari [2016] eKLR*:

' The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice. The defamatory words must be shown to have been published by the defendant.'

27. In order to succeed in his claim, Hezekiel had to prove not only that the respondents published the impugned article, but that the article published referred to him and contained false statements about him that in the natural and ordinary meaning of the words injured his reputation by lowering his estimation in the eyes of right thinking members of the society and that the impugned article was made without justification and maliciously
28. In order for us to address and apply the law in regard to the issues at hand, we reproduce the impugned article which was published on June 23, 2010.

' How KBC lost Shs 110m World Cup deal to competitor by James Ratemo

The government has lost an opportunity to recover Shs 75 million it spent to buy broadcasting rights of the ongoing FIFA world cup tournament. This is due to the alleged impropriety by the Kenya Broadcasting Corporation (KBC) officials. As a result, KBC managing director and the corporation secretary Hezekiel Oira have been suspended with the inspectorate of state corporations called in to investigate. Editor in chief Waitihaka Waihenya has taken over as acting MD. Information and Communication PS Bitange Ndemo said KBC had been given Kshs 75 million to buy the world rights and was expected to recover the money through advertising. 'The Government has lost the money and already the inspectorate of corporations is investigating the matter, the two are suspended to pave way for investigation which will take about a month', Ndemo told the standard on telephone.

Board chairman Charles Muoki said yesterday in a statement the two had been suspended to allow independent investigations. Sources said that KBC had signed a Kshs 110 million agreements with Patrick Quarco of Radio Africa Group to co-screen world cup matches. Radio Africa Group reached an agreement with the committee of experts (CoE) and was expected to receive Kshs 110 million to educate the public on the proposed constitution during the world cup season. But KBC also signed a Kshs 500,000 deal with Royal Media Services which went ahead to negotiate with CoE and clinched the kshs 110million deal from Quarco arguing it had countrywide coverage hence better placed to conduct the



campaign. This denied Radio Group Africa the funds to seal the deal with KBC.’ (Emphasis added)

29. It was Hezekiel’s case that the published information was not true and that it had a negative impact on his reputation. On the other hand, the respondents pleaded the defence of justification contending that they were simply reporting facts made available to them in a matter that was of public interest.
30. Hezekiel maintained that the impugned article was published maliciously in order to settle scores against him and the managing director who declined the 1<sup>st</sup> respondent’s co-hosting deal. Secondly, that it was calculated to incite the public against him, and thirdly, it was calculated to influence the investigation by the inspector of state corporations, and that it imputed the commission of a crime which was orchestrated to have Hezekiel prosecuted and lynched professionally. These are matters that Hezekiel needed to prove in order to succeed in his suit.
31. In analyzing the evidence, the trial judge rendered herself on the issue of falsity and malice in regard to the impugned article as follows:
  146. In other words, the 2<sup>nd</sup> defendant must have obtained the information from the interview with the permanent secretary as that is demonstrated by the article/publication itself and which evidence was never controverted.
  147. The question, however, is whether the publication was false, and if so, whether it was laced with malice and therefore intended to injure the plaintiff’s reputation in the estimation of right thinking members of the society generally and whether the publication, read as a whole, would tend to make those readers who are right thinking members of the society shun or avoid the plaintiff.
  148. From the plaintiff’s own testimony, both oral and as adopted from his written witness statement filed in court and all other circumstances surrounding this case, I am unable to find that the publication was defamatory. In my humble view, the publication was reporting on the state of affairs of KBC a state corporation in which the public have an interest on the goings on. I do not find that any reader of the article who is a right thinking member of the society generally would find the article as asserting facts to the effect that the plaintiff was involved in the alleged loss of Shs 110 m. The plaintiff himself conceded that he was suspended pending investigations into the alleged impropriety regarding the exploitation rights for broadcasting the FIFA World Cup matches, and that is exactly what the article reported.
  149. In my view, reading the impugned article shows a mere declaration of the situation at KBC as later uploaded on the KBC Website. The only difference is that the plaintiff claimed that he was send (sic) on compulsory leave in his oral testimony but in his submissions he conceded that he was suspended by KBC to pave way for investigations by the inspectorate of state corporations. The plaintiff does not deny what was published in the KBC website which was in essence reproduced by the defendants herein in the impugned article, save that as at the time the article was uploaded on the KBC website, the plaintiff and Mr David Waweru had already been sacked.
  150. The plaintiff even went further and produced court proceedings from Anti Corruption Court vide ACC NO 18 of 2011 wherein the plaintiff jointly with David Waweru the then managing director of KBC were charged with two counts of the offences of wilful failure to comply with the law relating to the tendering of contracts contrary to section 45(2)



- (b) as read with section 48(1) of the *Anti Corruption and Economic Crimes Act No 3 of 2003*. The evidence in that case also shows that the plaintiff and his co accused were sacked after investigations by the inspectorate of state corporations, into the alleged wrongdoing.
151. Although the article may have been published before the investigations by the inspectorate of state corporations commenced, this court is unable to find that the publication was calculated to incite the public against the plaintiff or that it falsely attributed the loss of Kshs 110 million to the plaintiff.
152. In addition, I do not find any evidence to suggest that the publication was intended to influence the investigations by the inspectorate of state corporations as no such investigations report was produced and or a specific part of it pointed out to the court to indicate how the publication influenced the outcome of the investigations.
153. I further do not find any evidence to suggest that the article imputed the commission of a crime by the plaintiff and or that it was orchestrated to having the plaintiff prosecuted as well as lynching him professionally.
176. In view of the above this court finds that this is one of those cases where the court would not hesitate to protect the rights of the media (although the media rarely acknowledges the courts when the courts protects their rights anyway) in reporting accurately what was happening at a state corporation and which reporting I find was fair and accurate and not actuated by malice or ill will or spite but necessitated by the need to inform the general public of what was the state of affairs at KBC a public corporation.'
33. We have re-considered and re-analyzed the evidence that was before the trial judge. The impugned article was entitled 'how KBC lost Shs 110m World Cup deal to competitor'. This caption gives the impression that the writer is about to give information on how KBC lost an opportunity of a Ksh 110M deal to its competitor. The first paragraph of the article reads thus:
- ' The government has lost an opportunity to recover 75 million it spent to buy broadcasting rights of the ongoing FIFA world cup tournament. This is due to the alleged impropriety by the KBC officials. As a result, KBC managing director and the corporation secretary Hezekiel Oira have been suspended with the inspectorate of state corporations called in to investigate.'
34. As indicated in the heading, the paragraph gives information: that the loss of the opportunity resulted in loss to KBC of Ksh 75M; that the loss was due to impropriety by KBC officials; that investigations were ongoing; and that the appellant and the KBC managing director had been suspended in order to facilitate the investigations. While the article may have cast some suspicion against Hezekiel and the managing director, it does not necessarily lead to an insinuation or conclusion that they were the KBC officials involved in the impropriety. Being the senior most officials of KBC, they were simply being held accountable as the impropriety ought not to have taken place under their watch, in the first instance, if they were diligent in their work.
35. Contrary to Hezekiel's submissions that the allegations in the impugned article were untrue, the suspension and the 'allegations' of loss were apparently true facts which actually led to investigations, resulting in Hezekiel and the managing director being charged with a criminal offence. As noted by the trial judge, the information concerning the loss and the suspension of Hezekiel and the managing director was actually later reported in the KBC website. Hezekiel, during cross-examination did admit that he was actually sent on compulsory leave in June, 2010 because of the allegations arising from



the World Cup rights with the Standard Group. Whether or not the allegations of loss of Ksh 75M was established, was not the issue, as the respondents were merely reporting what was happening at KBC concerning ‘allegations’ of loss arising from impropriety of KBC officials, which had resulted in Hezekiel and the managing director being suspended to facilitate investigations.

36. We do not therefore find any reason to fault the finding of the trial judge that the information on the impugned article was not false, but only reported a matter of public interest concerning a public corporation. Nor did the impugned article either directly or by innuendo allege impropriety on the part of Hezekiel. The impugned article was fair reporting as vindicated by the subsequent investigations resulting in Hezekiel and the managing director being charged. The trial judge fully addressed the evidence in this regard, including the fact that the interview with PS Ndemo was after the impugned publication, and the fact that Hezekiel was subsequently charged and acquitted of committing offences under the Anti- Corruption and Economic Crimes Act, arising from the contract with Federation of International Football Association (FIFA) and the African Union of Broadcasting (AUB). These were not extraneous matters as they were actions that arose from the allegations reported in the impugned publication thereby giving substance to the allegations.
37. In her judgment, the trial judge had this to say about James who was the 2<sup>nd</sup> defendant:
- ‘ I had the opportunity to hear and observe the 2<sup>nd</sup> defendant as he testified in court and I am unable to find that his conduct during the proceedings demonstrated any bad blood or ill will or spite against the plaintiff or that he was being used by the 1<sup>st</sup> defendant to settle any scores especially on the allegations that the KBC management refused to partner with the 1<sup>st</sup> defendant in the World Cup broadcasting rights and instead partnered with the 1<sup>st</sup> defendant’s media rivals.’
38. The conclusion of the trial judge on James is anchored on her observation of the demeanor of James as a witness, which advantage we have not had. Moreover, Hezekiel did not adduce any evidence to prove any malice either on the part of the Standard or James in the publication of the impugned article. Malice being a critical component of the tort of defamation, this failure was fatal to Hezekiel’s case.
39. At paragraph 10 of the plaint, Hezekiel had pleaded that the impugned words in the article in their natural and ordinary meaning, meant and were understood by right thinking members of the society and the world at large to mean inter alia:
- (i) By stating that the plaintiff was suspended pending investigations, the defendants were understood to mean that the plaintiff was a suspect in the loss of Kshs 75 million which was a falsity.
  - ii. that the plaintiff corroborated with the managing director of KBC to defraud the corporation.
  - ii. that the plaintiff committed offences in his private capacity as a corporation secretary.
  - ii. that the plaintiff is corrupt.’
40. The trial judge noted that Hezekiel did not call any independent witness to support his claim that the publication was defamatory of him, or that it tended to cause him to be shunned or ridiculed by right thinking members of the society generally. Hezekiel was under an obligation to prove his claim regarding the effect of the impugned article at paragraph 10 of the plaint, that right thinking members of the society shunned him, or avoided him as they understood the words in the impugned article to impute what Hezekiel alleged at paragraph 10. Having failed to call any witness in this regard, there



was no evidence to prove that the words used in the publication were defamatory of him or caused him to be shunned, ridiculed or avoided by right thinking members of the society.

41. In any case, the trial judge considered the likely opinion of right thinking members of the society and made a finding at paragraph 148 of the judgment as follows:

' In my humble view, the publication was reporting on the state of affairs of KBC a state corporation in which the public have an interest on the goings on. I do not find that any reader of the article who is a right thinking member of the society generally would find the article as asserting facts to the effect that the plaintiff was involved in the alleged loss of Kshs 110 m. The plaintiff himself conceded that he was suspended pending investigations into the alleged impropriety regarding the exploitation rights for broadcasting the FIFA World Cup matches, and that is exactly what the article reported'

42. As we have endeavored to show, the impugned article reflected true reporting of what was going on at KBC, a state corporation in a matter in which the respondents as members of the fourth estate had a constitutional right to inform the public, subject of course, to respect and protection of the reputation of others. The respondents were therefore protected by the defence of justification as what was published was exactly what was happening in a matter of public interest.

43. The failure to prove the negative opinion of right thinking members of the society arising from the article, was another critical ingredient of the tort of defamation that was not established. As stated by the trial judge, it was not enough for Hezekiel to make the allegations in his pleadings, he had to go further and comply with sections 107 and 108 of the *Evidence Act*, by proving the effect of the impugned article in lowering his estimation in the eyes of 'right thinking members' of the society as he alleged in the pleadings.

44. The sum total of the above is that Hezekiel failed to prove that the impugned article made untruthful statements or that it was made maliciously or that it lowered his esteem in the eyes of right thinking members of the society. His suit was therefore properly dismissed.

45. As regards the issue of damages, assessment of damages is a discretionary exercise that an appellate court can only interfere with if satisfied that the amount awarded is either too excessive or too low as to represent an erroneous estimate or that the trial judge proceeded on wrong principles - (Bhatt vs Khan, supra). The trial judge herein was of the view that if the appellant is to be awarded damages, a sum of Ksh 6,000,000 would be adequate. Given the circumstances of this case, and noting that the trial judge properly directed herself by referring to appropriate legal principles applicable in assessing damages, we would therefore not have interfered with the award of damages had the appeal succeeded.

46. For all the aforesaid reasons, we come to the conclusion that this appeal has no merit. It is accordingly dismissed with costs. Those shall be the orders of the court.

**DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.**

**W KARANJA**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**



**ASIKE MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

