IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & KIAGE, JJ.A)

CIVIL APPEAL NO. 286 OF 2016

BETWEEN

RAPHAEL LUKALE.....APPELLANT

AND

ELIZABETH MAYABI.....1ST RESPONDENT

ROYAL MEDIA SERVICES LIMITED.....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Aburili, J.) dated 26th day of September, 2016

in

H.C.C.C. No. 7 of 2012)

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JUDGMENT OF THE COURT

In a rather lengthy judgment running to 81 pages and 213 paragraphs, Aburili, J found no substance in the appellant's claim for defamation of his character and dismissed the action he had instituted against the respondents.

This is how this dispute arose. The appellant, a school headmaster alleged that on 9th August, 2011 after the 9.00 pm news, the first respondent who hosts a programme called ***Akomwitala***" (matters of family life) on "*Mulembe*" FM, a Luhya dialect radio station;

> **"…falsely and maliciously broadcast to the public of and concerning the plaintiff and of him in his position as a head teacher words in the Luhya language, the effect of which the appellant understood to mean in the English language as follows**:
>
> **a) It is shocking that there is a woman in [particulars withheld] village in Butere who deserted her husband called Mr J A, leaving him shocked and miserable which led to his death.**
>
> **b) Later after the death of the late J A his widow returned to her late husband's home. That widow who is called RA lives at [particulars withheld] village, Eshirembe Sub-location Township location- Butere District. It is said that Mwalimu Rapheal Lukale lives in the deceased's home. But what is surprising is that Mwalimu Raphael Lukale abetted the widow to withdraw the deceased's funds. Mwalimu Raphael Lukale and the widow drew the deceased's funds and they squandered on drinks and buying beef meat and some of those funds were used by Mwalimu Raphael Lukale to educate his children. It is said that Mwalimu Raphael Lukale used the deceased's funds to educate his children up to college and secondary level while the deceased's children dropped from school due to lack of school fees and live in misery. Mwalimu Raphael Lukale is retarding or ruining the family of the late J A and he must know that his children will be cursed or have bad luck.**
>
> **c) Another surprise is that Mwalimu Raphael Lukale tricked the deceased's wife and colluded with her to sell the deceased's posho mill and they squandered the proceeds of such sale while the deceased's daughter one M A dropped out of school due to lack of school fees. Even the Assistant Chief has tried to advise and restrain the widow and Mwalimu Raphael Lukale from continuing with the wanton squander of the deceased's wealth to no avail.**
>
> **d) Mwalimu Raphael Lukale has caused the widow to be so hostile to her own children that any time they try to come to their**

home their mother armed with a machete (*panga*) chases them away and they now live with neighbours.

e) Again Mwalimu Raphael Lukale has taken over the deceased's parcel of land which he tills and takes to his family the harvested produce while the deceased's children live in poverty.

f) The area leader and neighbours of that widow ought to take action against the widow and Mwalimu Raphael Lukale and if possible they be taken to court and Mwalimu Raphael Lukale ought to be sacked".

Offended by those words, the appellant instituted the aforesaid action against the respondents claiming general and exemplary damages, costs and interest. He contended that the words set out above were offending in their natural and ordinary meaning and were understood to mean that he is;

"a)… a dishonest person and had taken advantage of a naïve widow to misappropriate the widow's dues from her late husband's retirement benefits, his posho mill and farm.

b) … a dishonest person who should be dismissed from his employment as a teacher".

By reason of those words, the appellant pleaded that he was greatly injured in his credit, character and reputation and that he had been brought into hatred, contempt and ridicule; that his reputation was greatly lowered in the estimation of the right-thinking members of society; and that, as a result, he suffered public ridicule, distress, embarrassment, odium, and loss of esteem.

In opposition, the respondents jointly denied broadcasting or airing or publishing the words complained of. Without prejudice to the foregoing, they argued that, if they aired those words, then they did so in good faith, without malice, in the public interest and without intending to injure the character of the appellant. In other words, that the publication was privileged and a fair comment on a matter of public interest. They also relied on the freedoms of expression and of the media guaranteed by **Articles 33** and **34** of the Constitution.

After hearing the witnesses called by the parties, the learned Judge (Aburili, J) isolated the following issues, among others for determination.

"1. Whether the reproduced words were the ones spoken by the 1st defendant and disseminated by the second defendants' radio programme on Mulembe FM "AKOMWITALA."

2.. Whether the plaintiff has established to the required standards that he was defamed by the defendants

3. Whether the defenses of truth/justification/qualified privilege or fair comment on a matter of public interest are available to the defendants

4. Is the plaintiff entitled to damages and if so how much."

The appellant has taken issue with these framed issues and has argued that they do not conform to what the parties had themselves framed; and that the first two issues above were irrelevant.

The learned Judge disposed of the above issues by holding that the failure by the appellant to present the English literal translation certificate for the words complained of was fatal to his claim. According to her the appellant did not clarify how and by who the words allegedly spoken by the 1st respondent were extracted and translated in English. She dismissed the evidence of the appellant's witnesses that they only heard the words in Luhya language and could not vouch for the verbatim English translation, since they neither taped nor recorded the words in any electronic format during the live broadcast; and that it was not possible for them to memorize all the words which were allegedly spoken by the 1st respondent. On this question the learned Judge concluded that;

"In this case, although the defendants admit broadcasting words uttered by M A expressing her displeasure with the plaintiff who had allegedly inherited her mother and that both the plaintiff and M's mother had abandoned her and her siblings, the plaintiff did not prove that the words in fact, as uttered by Mayabi the first defendant are the ones which were reproduced in the plaint at paragraph 7 as per his literal English translation, and not those ones which Mayabi stated that were broadcast……..the law is clear that he who alleges must prove. In this case, it is the plaintiff who alleged that he was defamed and therefore it was his primary duty to prove the actual publications and that they were defamatory of him……..the only burden that was cast on the defendants is that of proving their defences of truth, justification and or fair comment ….I am unable to find that the plaintiff has, on a balance of probabilities proved that the defendants did utter or broadcast the words that are reproduced in paragraph 7 of the plaint. And even if the 1st defendant did utter those words, in the absence of a literal English translation certificate, this court does not take judicial notice of the Luhya translation in English done by unknown/undisclosed persons who are not independent witnesses to this suit".

To buttress this view the learned Judge relied on the literary work, **Gatley on Libel and Slander,** 10th Edition, Para. 32.5 where it is stated that the proof of libel is the production of the document itself, the case of **Clement Muturi Kigano V. Hon. Joseph Nyagah** HCCC No. 509 of 2008 where the plaintiff's action failed for failure to produce any clip or "**defamatory statement....made in writing or some other permanent form....."** as evidence to prove publication.

Similarly the court in **Odero O. Alfred V Royal Media Group Ltd**, Kisumu HCCC No. 145 of 2006 dismissed the plaintiff's suit because

he did not produce the audio clip as evidence of that broadcast.

In the result the learned Judge found no evidence to prove that the respondents published or broadcast any defamatory words of and concerning the appellant. Consequently she found no purpose in addressing the merits of the other framed issues. Hypothetically, the learned Judge was of the opinion that had the appellant succeeded in proving that he was defamed, she would have awarded him compensatory damage in the sum of Kshs 1,000,000 bearing in mind that he was a primary school head teacher.

The appellant was naturally aggrieved by the foregoing determination and lodged this appeal through L.M Ombete & Co Advocates citing eight grounds, but condensed into three clusters in the submissions, namely;

a) Whether the appellant proved publication of the words pleaded in paragraph 7 of the plaint on a balance of probabilities.

b) Whether the respondents proved justification.

c) What quantum of damages would adequately compensate the appellant? To begin with the appellant submitted that the Judge erred in substituting the five issues agreed by parties with her own; that the five issues mutually agreed upon sought a determination whether the 1st respondent was at the time material to the matters in question an employee of the 2nd respondent; whether the 1st respondent published in the Luhya language the words produced in their English translation in paragraph 7 of the plaint; whether the words were defamatory of the appellant, and if so, whether the respondents were entitled to the defence of qualified privilege; whether the defence of justification was available to the respondents; and whether the appellant was entitled to general damages. It was contended that counsel representing the respondents conceded the first and third issues leaving only three issues to be determined by the court.

The appellant has also complained that the learned Judge failed to differentiate between committing the tort of defamation and the manner of proving it; that the learned Judge misapprehended the purport of **section 8(1)** of the Defamation Act by insisting that the only way of proving publication of broadcast was only by the production of tape records; and that, although the duty to prove publication was on the appellant the standard of doing so was on a balance of probabilities.

The learned Judge is said to have misconstrued the provisions of **sections 106A** and **106B** of the Evidence Act, which, in the first place did not deal with radio broadcast statements and secondly the sections did not amend **section 63** of the Evidence Act which allows a person to give evidence of matters he heard.

For their part the respondents in opposing the appeal maintained that by Order **15 Rule 2** of the Civil Procedure Rules the learned Judge could frame the issues for determination; that as a requirement under **section 8(1)** of the Defamation Act, the appellant failed to produce any tape of the alleged broadcast through which he had been defamed; that it is only upon playing the tape that the court could be satisfied that the alleged defamatory words as set out actually referred to the appellant and were defamatory; that the appellant and his witnesses admitted that they did not record that broadcast; and that neither libel nor slander was proved.

The respondents further submitted that once they denied having made any defamatory statement as set out in the appellant's plaint, the burden shifted to the appellant to prove how the alleged defamatory words were conveyed; that as a requirement the alleged defamatory words must be set out verbatim. For these reasons and with the support of decided cases, the respondents urged us to uphold the determination of the learned Judge.

This is a first appeal and the duty of this Court is well-known. It must reconsider the evidence on record, evaluate it and draw its own independent conclusion, but bearing in mind always that it has neither seen nor heard the witness and further that, it is not bound to follow the trial judge's findings of fact. See **Selle V. Associated Motor Boat Company Ltd** (1968) EA 123, 126.

The logical corollary of this principle is that the Court may only interfere with the exercise of discretion of the trial judge if it is satisfied that the judge misdirected himself and as a result arrived at a wrong decision, or that he was clearly wrong in the exercise of his discretion and that as a result there has been misjustice – **Mbogo & Another V Shah** (1968) EA 93.

Starting with the easier ground, whether it was open for the learned Judge to frame issues in departure from those framed by the parties. We shall provide the answer by citing the decision of this Court in **Mburugu K. Muringa V. Municipal Council of Mombasa,** Civil Appeal No. 5 of 2014, relying on the case of **Odd Jobs V. Mubia** (1970) EA 476, where it was explicitly stated that it would be a misdirection for a court to frame and determine issues that neither flow from the pleadings nor are expressly addressed by parties. However, it can only do so if it is evident that parties have canvassed a matter not in the pleadings and have made it an issue and left it to the court for determination. The issues framed by the learned Judge were substantially the same as those framed by the parties. We reject this ground.

On the substance of this appeal, to begin with, it is common factor that the 1st respondent was an employee of the 2nd respondent during the time material to the matters under our review. It was also conceded by the respondents in their submissions before the trial court that **"…..on the face of it, the words pleaded in the plaint are defamatory"**. That being so the only three issues before the learned Judge were, whether the 1st respondent published the words in question; whether the defence of justification was available to the respondents and what measure of general damages, if any, the appellant was entitled to.

To the first issue, the respondents in their joint statement of defence denied broadcasting or publishing the offending words. They pleaded that, without prejudice, if they were found to have broadcast them, then it was in good faith, without malice, in public interest and not intended to injure the character of the appellant; that the publication was privileged and amounted to a fair comment.

That was in the pleadings. The respondents filed their witness statements and also gave oral testimony. It was admitted in evidence before the

trial court that the source of the words complained of was M, the daughter of R A, who allegedly deserted her late husband for an illicit union with the appellant; that the 1st respondent recorded her story, the details of which were contained in paragraph 6 of the 1st respondent's statement. The paragraph may be paraphrased thus; M, a girl aged 15 years is said to have complained that her mother deserted her father, who was a teacher and married the appellant, who was a headmaster of another school; that M and her siblings remained with their father, who later on died; that following his death M and her siblings were rendered destitutes as they dropped out of school and had to move to live their grandfather; that their grandfather, apart from being very old and sickly, was blind; that their grandmother later died after which they moved to live with an elderly relative, aged 70 years; that although they performed well in their examinations and were called to good schools, their mother did not bother to support them with school fees; that instead, with the connivance of the appellant, their mother sold their deceased father's *posho* mill; that with the assistance of the area chief, they embezzled the funds in the deceased's bank account; that the appellant never wanted to see them near their mother, who in turn would arm herself with a *panga* and chase them away; that the mother gave away the last born in the family to be a house help; and that M approached the area chief to help them to no avail.

The 1st respondent confirmed that the story was aired in the Luhya language and gave the foregoing English translation. After recording the story, the 1st respondent explained, it would be aired and listeners would be asked to express their views on the story.

We have keenly looked at the respondent's version paraphrased above and that contained in the appellant's plaint and are of the view that there is no substantial distinction in the overall import of the two. Because there is no dispute that the story was aired, the question to be determined is whether the learned Judge misdirected herself in insisting that, without a recording of actual words, the appellant did not prove that the words in question were the same ones which were reproduced in paragraph 7 of the plaint; whether she further misdirected herself in finding that the appellant did not prove actual publication of the words and that they were indeed defamatory of him; whether she erred by holding that those words, in the absence of a literal English translation certificate could not be said to be defamatory; and whether she made an error for insisting that the appellant ought to have disclosed the person who translated the words into English.

Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. 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. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See ***Gatley on Libel and Slander*** **(8th edition para. 31)**

The ingredients of defamation were summarized in the case of **John Ward V Standard Ltd** , HCCC 1062 of 2005 as follows:-

> **"……The ingredients of defamation are:**
>
> **The statement must be defamatory.**
>
> **The statement must refer to the plaintiff.**
>
> **The statement must be published by the defendant.**
>
> **The statement must be false."**

The specificity and detail with which the story was told left no doubt, to those who knew the appellant, as to who was at the heart of the story. Not only was his name disclosed, but specified also was the fact that he was a headmaster of a known school. The appellant and his witnesses testified that they heard the 1st defendant broadcast the said words through Mulembe FM Radio Station and that the said broadcast was in the Luhya language, which they understood and spoke, the English version of which was reproduced in the plaint.

The use of language and participation in culture today under **Article 44** of the Constitution are fundamental rights. The official languages of the Republic of Kenya according to **Article 7** are Kiswahili and English. Although **Section 86** of the Civil Procedure Act provides that the official language of the High Court and Court of Appeal is English we think that by the aforesaid **Article 44** this has changed, at least in so far as oral testimony in the High Court is concerned. We are of the considered view that today the relevance of that provision remains in the requirement that documents used in the proceedings in the High Court must be translated into English. Translation or certificate of translation of the words does not arise in view of the 1st respondent's own confirmation in both her statement and testimony before the trial court that the translation of the Luhya words used in the broadcast into English in paragraph 7 of the plaint was "reasonable". According to her the broadcast was simply a reproduction of what she had been told by M.

All the law requires is that the plaintiff must try as much as possible to reproduce the words used in a defamation claim. See ***Gatley on Libel and Slander,*** 11th Edition at 28.17 page 973 **"…If the exact words cannot be pleaded, the words must at least be set out with reasonable precision."**

We entertain no doubt whatsoever, therefore, that the words used in the story were not only published but intended to bring the appellant into hatred, contempt or ridicule by the right-thinking members of society generally. The appellant's reputation was indeed injured as explained by his witnesses and he was brought into hatred, contempt and ridicule by those who knew him and heard the allegations that he, a whole school headmaster had eloped with the wife a professional colleague, took advantage of the relationship to impoverish his children, by colluding with her to sell the deceased's *posho* mill, use his land for personal enrichment and embezzle the funds in the deceased's bank account.

We reiterate that the words complained of will only be defamatory if they are proved to be false. In our own assessment of the evidence, it was established, that R A, the widow of the late J A deserted him before he died and began an illicit union with the appellant out of which

they had two children. We are equally persuaded that, upon the death of the deceased, R moved back to the home of the deceased and continued to see the appellant. This, relationship naturally did not sit well with some of the children of the deceased, led by M, who attributed their suffering to it.

It may very well be that M haboured feelings of intense loathe for the appellant and for good reason. And equally there is nothing wrong in the circumstances to express a feeling of revulsion. But in doing so one has to know the limits and ensure that any statement made out of that feeling is accurate. Here the respondents specifically accused the appellant of abetting R A to withdraw funds from the deceased's account, which they squandered on drinks, food and to educate the appellant's children. Secondly they alleged that the appellant colluded with R A to sell the deceased's *posho* mill and squandered the proceeds while the deceased's children dropped out of school due to lack of school fees. The third claim was that the appellant took over the deceased's parcel of land which he tilled and took the harvested produce to his family while the deceased's own children live in poverty.

All the witnesses called by the respondents were however categorical that they did not know the deceased's bank account number from which the funds were allegedly withdrawn. They did not know how much was withdrawn, just as they could not tell to whom the *posho* mill was sold and for how much. Similarly they did not know the particulars of the deceased's land allegedly tilled by the appellant, the produce from which he used to educate his children.

The 1st respondent explained that she confirmed these allegations with one lady who was a neighbour. Unfortunately she did not disclose the name of this lady. Secondly, the lady was not a witness, and finally, according to the 1st respondent she only went on the ground to confirm the story after airing it. Statements that are potentially defamatory ought to be ascertained and verified before they are released to the public. **Regulation 22** of the Kenya Information and Communications (Broadcasting) Regulations, 2009 requires verification of information by a broadcaster before public dissemination as follows:

> **"22. Unconfirmed reporting:**
>
> **A licensee shall ensure that—**
>
> **(a) reports or broadcast from its station are based on fact and that are not founded on opinion, rumour supposition, or allegation unless the broadcast is carried out in a manner that indicates these circumstances clearly;**
>
> **(b) it does not broadcast any report where there is sufficient reason to doubt its accuracy and it is not possible to verify the accuracy of the report before it is broadcast."**

The respondents were, to the extent that they did not verify what M told them, reckless. The duty to verify such statements is even greater where there is obvious bad blood because the tendency and temptation to exaggerate is high.

There cannot be any doubt, at least from the 1st respondent's evidence that the object of programme was noble; to educate the public. But education must not be based on unsubstantiated falsehood, fury and vitriol.

The learned Judge for her part believed that there was no malice in the story. The respondents on the other hand maintained that the story was justified or was a fair comment. Malice can be inferred from a deliberate or reckless ignoring of facts. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. Malice may also be inferred from the relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. See **Godwin Wachira V Okoth** (1977) KLR 24 and **J P Machira V Wangethi Mwangi,** Civil Appeal No. 179 of 1997.

It was unanimously accepted that the programme, ***Akomwitala*** was quite popular among the Luhya- speaking communities. On the question of malice we come to the conclusion that the Judge was plainly wrong as there was evidence of malice.

We have said elsewhere in this judgment that the sole reason why the learned Judge dismissed the suit was the fact that there was no audio recording and/ or certificate of translation of the offending words, hence, in her opinion there was no proof of publication of those words.

The word "publication" is repeatedly used without definition in the Defamation Act. Its permanent form has also not been explained. This is important in construing the provisions of **section 8** of the Act on wireless broadcasting which provides that;

> **"8 (1) For the purposes of the law of libel and slander, the publication of words by wireless broadcasting shall be treated as publication in a permanent form."** (Our emphasis).

Black's Law Dictionary 9th edition defines publication as **"the act of declaring or announcing to the public".**

In **Pullman v Walter Hill & Co** (1891) 1 QB 524, the English Court of Appeal explained what publication constitutes as follows:

> **"What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise……. If the writer of a letter shows it to his own clerk in order that the clerk may copy if for him, is that a publication of the letter? Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, 'I have shown it to you and to no one else.' I cannot, therefore, feel any doubt that, if the**

writer of a letter shows it to any person other than the person to whom it is written, he publishes it" (*per* Lord Esher, MR). (Our emphasis).

Publication of a defamatory material occurs when the material is negligently or intentionally communicated in any medium to someone other than the person defamed.

The learned Judge insisted that there was no proof of publication merely because the appellant did not produce the audio version of the broadcast in the Luhya language as well as the certificate of translation.

Upon close reading of section 8 aforesaid we find nothing to suggest that all wireless broadcasts are either from recorded tapes or are reduced into some form of a document and that in order for a plaintiff to prove publication of a wireless broadcast he must tape record it and produce the tape record in court as evidence. That proposition is not realistic as it would require people to always have in their possession devices for recording and dwell in constant and vigilant anticipation of being defamed.

The appellant's case was grounded on the fact that he and his four witnesses heard with their ears the words spoken by the 1st respondent and transmitted through the 2nd respondent's Mulembe FM radio station.

The learned Judge in insisting on an audio recording in the original language appeared to have had in mind the provisions of **Section 106B** of the Evidence Act which requires that for a party wishing to rely on a recording, it must be accompanied by a certificate by a person who operated the recording device. That is the admissibility of electronic records. In our opinion this provision does not make it mandatory for parties who wish to prove that some defamatory statement by way of broadcast has been made of them.

In this case the appellant did not seek to produce any audio evidence. As a matter of fact he relied on oral evidence of witnesses who heard the broadcast by the 1st respondent. This was direct evidence as defined in section **63(2)(b)** of the Evidence Act. Publication in a permanent form conveys the meaning that the defamation is libel as opposed to slander which is in a non- permanent form. See: ***Gatley On Libel And Slander*** 11th Ed At Paragraph 3.9, like our section 8(1) confirms that;

"….for purposes of the law of libel and slander the publication of words in the course of any programme included in a programme service shall be treated as publication in the permanent form."

We have emphasised that in **Section 8** aforesaid and in the above authority that the publication of words by wireless broadcasting "will be treated" as publication in a permanent form; the key words being "*treated as."* So that, though slander is generally regarded as an oral defamatory statement, where it takes the form of broadcast it is considered to be permanent in form.

The appellant in our considered opinion pleaded the words complained of with reasonable precision and the 1st respondent largely agreed with the English translation of those words.

From the totality of the foregoing there cannot be any debate that the defamatory material portraying the appellant as a dishonest person was published. The respondents themselves conceded that the story they broadcast of the appellant, was *"on the face of it defamatory"*.

With the foregoing in mind, we can only say that the learned Judge failed to analyze the evidence presented before her and to accurately apply the law to those facts. Instead she went off on a tangent. We do not wish to spend more time than necessary on the unusual route she adopted. Noting the obvious bad blood within the family and quoting extensively from the Bible in an apparent attempt to reconcile Ruth Anunda and her children, the learned Judge spent considerable space in what she termed alternative (traditional) dispute resolution. But in the end all she did was to implore the children to respect their mother and the latter to reach out to her children and embrace them. We suspect the outcome of the case may have been influenced by this tangent, the Judge having trained her eyes on making peace and avoiding further acrimony in the family.

The respondents claimed that the defence of justification was available to them. That defence is justification available if the truth in the offending statement is proved. On the other hand, fair comment, on which the respondent also relied, is proved if the statement complained of is an expression of opinion made as fair comment.

Our ultimate determination is that the story in question were defamatory. Justification and fair comment was not proved and must fail.

On the quantum of damages, we remind ourselves that the decision to award or not to award damages is one of judicial discretion. In the matter before us the learned Judge did not award any damages, the action having failed. She, however hypothetically suggested an awarded of Kshs. 1,000,000 had she found the respondents liable. As noted earlier, we can only interfere with that decision if we think that the Judge misdirected herself in some matter and as a result arrived at a wrong decision, or that the judge was clearly wrong in the exercise of her discretion. In defamation cases, the Court of Appeal, in **Standard Limited V G.N Kagia T/A Kagia & Company Advocates** , Civil Appeal No.115 of 2003, set out the following principles to be applied in awarding damages:-

"1) In situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages.

2) The level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and publishers of libel. Personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers."

In the case of **John v MGM Ltd** (1997) Q.B 586 the English Court of Appeal said in part at page 607 paragraph F:-

> **"In assessing damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people."**

Although the Judge hypothetically stated that she would award Kshs. 1,000,000 to the appellant, had he succeeded, according to her, she failed to apply the principles enunciated in the **Standard Limited** case (supra) and also to base the award on any formula derived from similar decided cases, as is usually the requirement. The test is to maintain a similar level of awards in similar cases, bearing in mind inflationary trends. By the recent decisions, this award was not justified, taking into consideration the evidence before the court below on the popularity and wide listenership of Mulembe FM radio station among the Luhya communities, the fact that the appellant is a head teacher of a school, the nature of defamatory statement and the failure by the respondents to apologize to the appellant. The awards of Kshs. 1,000,000 in **Aziz Kassim Lakha V Standard Limited T/A East African Standard**, Civil Appeal 81 of 2009, **Benedict Ombiro v Board of Governors Kenya Utalii College & Another,** Civil Appeal No. 32 of 2017 **and Nation Newspapers Limited v Peter Baraza Rabando,** Civil Appeal No. 71 of 2010 *vis a' vis* the circumstances of this case are slightly lower.

In the result, we make an award to the appellant of Kshs. 1,500,000 together with costs and interest.

Dated and delivered at Nairobi this 20th day of April, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

P.O. KIAGE

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR