



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, OKWENGU & OTIENO-ODEK, J.J.A.)

CIVIL APPEAL NO. 221 of 2012

BETWEEN

HON. MWANGI KIUNJURI.....APPELLANT

AND

WANGETHI MWANGI.....1<sup>st</sup> RESPONDENT

NATION MEDIA GROUP LIMITED.....2<sup>nd</sup> RESPONDENT

ROYAL MEDIA SERVICES LIMITED.....3<sup>rd</sup> RESPONDENT

*(An appeal against the judgment and decree of the High Court at Nairobi*

*(Hon. J.B. Ojwang J.) dated 3<sup>rd</sup> October 2008*

in

H.C.C.S. NO. 1333 of 2003)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. By a Plaint dated 17<sup>th</sup> December 2003, the appellant, **Hon. Mwangi Kiunjuri**, filed a defamation suit against the respondents, **Wangethi Mwangi**, **Nation Media Group Limited** and **Royal Media Services Limited**. At all material times, the appellant was a Member of Parliament (MP) and an Assistant Minister in the Government of Kenya. The particulars for defamation against the 1<sup>st</sup> and 2<sup>nd</sup> respondents are different from the particulars alleged against the third respondent.

2. The particulars against the 1<sup>st</sup> and 2<sup>nd</sup> respondents are:

*“That on 14<sup>th</sup> December 2003, the 1<sup>st</sup> and 2<sup>nd</sup> respondents printed and published or caused to be printed and published the following words of and concerning the appellant on the front page of the Sunday Nation newspaper.*

*“Ministers and MP held in swoop on prostitutes; police filmed them as they beckoned the red light*

girls. One cabinet minister, an assistant minister and a Narc MP were caught by police in a notorious red light area with half-naked girls in their cars. They were seized during a routine swoop on prostitutes in Nairobi's Koinange Street. The three were first watched and videotaped before police moved in. The politicians were seen shamelessly beckoning the girls to their cars then ushering them inside before the police descended....Two of the three politicians netted by police were first time MPs while the other has been in Parliament since 1992....It was the second time the assistant minister had been arrested in the street trying to pick up prostitutes....”

3. As against the 3<sup>rd</sup> respondent, the alleged particulars of the defamation are as follows:

*“That on 14<sup>th</sup> December 2003, in the evening, the 3<sup>rd</sup> respondent relying or acting on the faith of the contents of the publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondents broadcasted in its television channels to its audience the contents of the article published by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the following terms:*

*“Investigations by Radio Citizen and T.V. have unearthed unconfirmed reports that the Ministers who were found soliciting for sex on Koinange Street were Ali Makwere of the Ministry of Labour, Assistant Minister Mwangi Kiunjuri and legislator Jakoyo Midiwo.”*

4. In his plaint, the appellant admitted that the article and publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondent did not name him by name but that it was clear from the description or pointers in the article and it was understood by the public and other media entities that the appellant was one of the Members of Parliament identified by the respondents as the intended target of the publication.

5. The appellant averred that the words as published in their natural, ordinary and or innuendo meaning was to the effect that the appellant engaged himself in criminal activities of prostitution or commercial sex, he was of immoral character, he was unfit to hold a public office whether as Member of Parliament or Assistant Minister and that he had committed an offence or several offences. The appellant averred that the said publication was false and untrue; the appellant averred that he had suffered injury in his reputation, character and credit and that he had been brought into public scandal, odium and contempt; in his plaint, the appellant sought general and aggravated damages and injunctive orders restraining the respondents by themselves, servants or agents from further printing, circulating or distributing such libels of and concerning the appellant.

6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in their amended defence denied liability for defamation; they denied that the article as published was understood or was reasonably capable of being understood by any reasonable members of the public to refer to the appellant; that the article neither mentioned the appellant by name nor set out that the appellant hailed from Rift Valley Province and no sequence of constituency representations was deducible from the article to refer to the appellant; that the article was published on occasion of qualified privilege in which the 1<sup>st</sup> and 2<sup>nd</sup> respondents were under a social and or moral duty to publish the article to the general public who had a like interest to receive the information contained in the article; the 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that in view of the fact that politicians, students and prominent businessmen freely interact with the wider members of society, and considering the risk that the said group of people who are held in high regard by society may infect innocent members of society with diseases such as the deadly HIV/AIDS which they may contract as a result of engaging in prostitution, the published article was reasonable and necessary protection of the interests of the wider society and or general public interest; the 1<sup>st</sup> and 2<sup>nd</sup> respondents further pleaded freedom of expression under **Sections 70** and **79** of the repealed Constitution; they contended that the words complained of were not capable of disparaging the appellant in his character, credit or reputation.

7. The 3<sup>rd</sup> defendant in its defence denied liability and averred that being a broadcaster of Radio and TV stations, it exercised its freedom of expression as protected by **Section 79** of the former Constitution and which freedom includes the publication of information that shocks and disturbs the public and that the broadcast complained of fell in that category of publication; the 3<sup>rd</sup> respondent pleaded justification and

averred that its investigation revealed that the appellant was the person referred to in the article published by the 1<sup>st</sup> and 2<sup>nd</sup> respondents; in furtherance of its plea of justification as a defence, the 3<sup>rd</sup> respondent stated that its investigations revealed that the appellant accompanied by a one **Nderitu** picked up two ladies from Nairobi who were not their spouses and drove in a green Land Cruiser to Thompsons Falls Lodge in Nyahururu; that the said Mr. Nderitu booked two double rooms known as the Laikipia Cottage and Orlarambei Cottage where they spent the night of 5<sup>th</sup> and 6<sup>th</sup> December 2003; that the appellant spent the night with one of the women and Nderitu with the other.

8. Upon hearing the parties, the trial judge dismissed the appellant's suit against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and entered judgment for the appellant against the 3<sup>rd</sup> respondents. The trial court awarded damages in favour of the appellant as against the 3<sup>rd</sup> respondent being general damages of Kshs.4,000,000/= and aggravated damages of Kshs.1,000,000/= plus costs of the suit.

9. In dismissing the appellants' defamation claim against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the trial court on the issue of liability expressed as follows:

*"...there were 222 Parliamentarians in Kenya. How in the course of normal human behavior, could PW3 (Ngata Peter Mwangi), a university graduate and a secondary school teacher, immediately have thought that an article such as complained of, did not refer to any of the 221 parliamentarians other than the plaintiff herein? Such a scenario, I hold, has no direct connecting link to the plaintiff at all, unless the witness himself had some special reason for the suspicion which he was harbouring; but since any possible suspicion, in that regard, was not made the subject of testimony, this Court must treat it as purely private, not to be brought into account in this public forum...I hold that the Sunday Nation article of 14<sup>th</sup> December 2003 bore no innuendo that linked the plaintiff to the facts alleged...."*

10. As regards the 3<sup>rd</sup> respondent's liability for defamation against the appellant, the trial court observed:

*"But the 3<sup>rd</sup> defendant even when found to have published libelous material of and concerning the plaintiff, has taken certain lines of defence. The defences are qualified privilege, public interest and freedom of expression.*

*Can the 3<sup>rd</sup> defendant benefit from the constitutional privilege for publication of matters in the public interest?...Unlike the 1<sup>st</sup> and 2<sup>nd</sup> defendants, who built a theme around their publication and went on to publish a series of educative articles on the threat of infection posed by the contemporary HIV/AIDS pandemic, the 3<sup>rd</sup> defendant had merely made a pot-shot, which tortuously injured the plaintiff. While the public interest in curbing the spread of HIV/AIDS is a matter which this Court must take judicial notice of, as a subject of great public interest, the 3<sup>rd</sup> defendant's publication could not be said to have been aimed at that same public interest.*

*It is clear to me that if the plaintiff had been shown to have been arrested during a police swoop on prostitutes, his fitness for public office would have merited appropriate press reporting, considering especially the current threat posed by the spread of HIV/AIDS in the country. But in this case, no proof has been laid before the Court and therefore the plaintiff's endeavour to protect his reputation by enforcing the applicable tort law would not show an over – sensitivity on his part as a public office holder."*

11. On damages and costs, the trial judge held that "it is obvious the plaintiff expected to win damages and costs against each of the defendants; but I have already held that he cannot win damages against the 1<sup>st</sup> and 2<sup>nd</sup> defendants; indeed, he will have to pay the costs of the 1<sup>st</sup> and 2<sup>nd</sup> defendants; but the plaintiff is entitled to damages and costs against the 3<sup>rd</sup> defendant."

12. Aggrieved by the judgment of the trial court, the appellant has lodged the instant appeal citing the following grounds:

*“(i) The learned judge erred in fact and law by holding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents bear no liability to the appellant for the publications made; the judge further erred in finding that the appellant is to pay costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents;*

*ii. The judge erred in fact and law publication made by the 1<sup>st</sup> and 2<sup>nd</sup> to the appellant; when he held that the respondent did not refer to the appellant;*

*iii. The judge erred when he held that the thrust of the 3<sup>rd</sup> respondent’s publication was to dupe or mislead the public and make profit from the fabrications and falsehoods invented by the 1<sup>st</sup> and 2<sup>nd</sup> respondents at the expense of the reputation of the appellant;*

*iv. The judge erred in failing to find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents originated the said publications or falsehoods of and concerning the appellant in order to make profit for themselves;*

*v. The judge erred in failing to find and hold that the said subsequent repetition or republication by the 3<sup>rd</sup> respondent was a foreseeable consequence of the actions and breaches of the 1<sup>st</sup> and 2<sup>nd</sup> respondents against the appellant;*

*vi. The judge erred in failing to hold that it was not a lawful practice of journalism for the 1<sup>st</sup> and 2<sup>nd</sup> respondents to abuse their position as owners of a media enterprise to engage in character assassination of the appellant and total destruction of the appellant’s reputation and integrity;*

*vii. The judge erred in awarding damages to the appellant for the serious breaches committed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents;*

*viii. As regards the 3<sup>rd</sup> respondent, the learned judge erred in awarding low damages which does not properly compensate the appellant; the appellant urges this Court to re-assess and increase the damages awarded.”*

13. The 3<sup>rd</sup> respondent filed a Notice of Cross-Appeal urging the following grounds:

*“(i) That the learned judge having recognized qualified privilege and freedom of expression as espoused in the Reynolds’s Privilege erred in holding that the 3<sup>rd</sup> respondent committed the tort of defamation;*

*ii. The judge erred in not applying the Reynolds’s Privilege to the case before him;*

*iii. The judge erred in awarding the appellant Ksh. 5 million as compensatory and exemplary damages;*

*iv. The judge erred in not dismissing the suit against the 3<sup>rd</sup> respondent with costs.”*

14. At the hearing of this appeal, learned counsel Mr. Desterio Oyatsi appeared for the appellant, learned counsel Mr. Kamau Karori appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents while Senior Counsel Dr. Kamau Kuria appeared for the 3<sup>rd</sup> respondent. All parties filed written submissions.

15. The appellant urged this Court to find that the trial judge erred in failing to find the 1<sup>st</sup> and 2<sup>nd</sup> respondents liable for defamation. Citing the case of **Broom -v- Cassel 7 Co. Ltd. & Another (1971) 2 All ER 187**, it was submitted that all the three respondents in this case were joint tortfeasors and were equally liable to the appellant. It was submitted that the trial court having made a positive finding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents published the article complained of and that the 3<sup>rd</sup> respondent repeated the said publication, the trial court should have held that here was a positive nexus or link between the publications initially made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the subsequent publication by the 3<sup>rd</sup>

respondent; the trial court erred in failing to find that the nexus or link existed and thus erred in failing to find liability on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The appellant further submitted that the trial court erred in deciding that the 3<sup>rd</sup> respondent who repeated the publication was liable and not the 1<sup>st</sup> and 2<sup>nd</sup> respondents who originated the publication; that the trial court having found that the publication made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the Sunday Nation was “readily treated as foundation by the 3<sup>rd</sup> respondent for a subsequent publication”, the judge erred and misapplied the law on repetition and republication of libelous material or defamatory statements; that the judge erred in finding that there was no evidence that the 1<sup>st</sup> and 2<sup>nd</sup> respondents defamed the appellant when the court found that the 3<sup>rd</sup> respondent and “The Independent Newspaper” treated the publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as a foundation for their subsequent publication. Based on the foregoing submission, the appellant stated that the learned judge erred in law in failing to apply the principle in **E. Hulton & Co. -v- Jones (1908-19810) All E.R. (Rep) 29.**

16. On the issue of quantum of damages, the appellant submitted that the trial judge erred in awarding a low sum of Ksh. 5 million. Citing the United Kingdom cases of **Broom -v- Cassel (1971) 2 All ER 187** and **John -v- M.G.N. Ltd (1996) 2All ER 35**, the appellant submitted that the correct sum to be awarded was Kshs. 125 million (One hundred and Twenty Five Million).

17. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in opposing the appeal submitted that the trial judge did not err in law and fact. It was emphasized that the publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not name or identify the appellant by name; this Court was urged to find that the appellant failed in his duty to lead evidence to prove that a reasonable man would have understood that the article published by the two respondents referred to the appellant; counsel emphasized that the trial court correctly arrived at the conclusion that the identity of the persons referred to in the publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was not obvious; that the 3<sup>rd</sup> respondent’s identification of the appellant did not depend on the article published by the two respondents but was due to the 3<sup>rd</sup> respondents independent investigations; that the information and material unearthed by the 3<sup>rd</sup> respondents as a result of its own investigations did not emanate from the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that the trial court correctly held that the material published and report made by the 3<sup>rd</sup> respondent was a product of the 3<sup>rd</sup> respondents own investigations and quite separate from the investigations done by the two respondents; that the two respondents cannot be liable for an article or publication published by a third party; that the two respondents cannot be held liable for re-publication by the 3<sup>rd</sup> respondents because the specific information naming the appellant did not originate from the two respondents; that there was no nexus between the two respondents publication and the 3<sup>rd</sup> respondents publication and that the nexus was cut the moment the 3<sup>rd</sup> respondent indicated it had conducted its own investigations.

18. With regard to the defence of qualified privilege, the 1<sup>st</sup> and 2<sup>nd</sup> respondents cited the case of **University of Nairobi -v- Mbutia Civil Appeal No. 20 of 1979** where this Court recognized qualified privilege as part of defamation law in Kenya.

It was submitted that the article complained of was given a package treatment to ensure that sufficient information regarding conduct that is capable of spreading HIV/AIDS was disseminated to the public; that the article was designed to ensure maximum dissemination of information on HIV/AIDS; that publication of information sensitizing the public on HIV/AIDS is covered by qualified privilege and supported by public interest; that the appellant did not demonstrate that the information disseminated through the article published by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was not of paramount public interest; that the privilege known as publication privilege or Reynolds’s Privilege seeks to protect any publication that is held to be in public interest on the basis of the public’s right to know; that the article complained of was written on occasion of qualified privilege with the public right to know and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the Reynolds’s Privilege in that the impugned article was on a matter of public interest. Citing the cases of **Charles Onyango Obbo & Another -v- The Attorney General, Constitutional Appeal No. 2 of 2002**, the 1<sup>st</sup> and 2<sup>nd</sup> respondents urged this Court to uphold the freedom of expression which entails the right to speak and write freely and the right of the public to know and be

given information.

19. On quantum of damages, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the article published was not of and concerning the appellant and as such he is not entitled to any compensation in form of general or exemplary damages from the two respondents; that no malice was proved on the part of the two respondents in publishing the impugned article; that qualified privilege having been proved, neither liability nor damages should be visited upon the two respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondent reiterated that the primary objective of the impugned article was the need to disseminate information for the greater public interest and in public interest; no liability should be meted on the two respondents.

20. The 3<sup>rd</sup> respondent in opposing the appeal urged us to dismiss the appeal and enter judgment as prayed in the cross-appeal. The 3<sup>rd</sup> respondent's submission dwelt on the issue of liability and quantum of damages. On liability, it was submitted that the trial court erred in failing to find and hold that the defence of qualified privilege was available to the 3<sup>rd</sup> respondent; that the trial court erred in failing to hold that the 3<sup>rd</sup> respondent was entitled to journalist privilege as espoused in Reynolds's Privilege; that the defamation complained of was not grave as no concrete evidence was given to show that the appellant suffered any actual damage and that the appellant neither substantiated the actual damage he suffered to enable the trial court correctly assess the quantum of damages nor did he submit evidence to entitle the trial court to award aggravated damages. The 3<sup>rd</sup> respondent faulted the trial court in ignoring pertinent facts relevant to the application of the Reynolds's Privilege.

21. The 3<sup>rd</sup> respondent emphasized the Reynolds's Privilege which guarantees freedom of expression (See Justice Brandeis in **Whitney -v- California 274, US, 357,375-376**). It was emphasized that the trial court ignored Reynolds's privilege, freedom of expression and journalist privilege as well as the role of media in a democratic society; the court ignored that the broadcast by the 3<sup>rd</sup> respondent came in the wake of a national debate on governance and morals in the Kenyan society and a move to educate Kenyans on HIV/AIDS; that the court also ignored the problem of discrimination against women in all democratic societies which in Kenya was reflected by the fact that although men were found with prostitutes on Koinange Street, not a single man was arrested and taken to Central Police Station, which made it probable that the broadcast was excusable.

22. On quantum of damages, the 3<sup>rd</sup> respondent submitted that this Court ought to interfere with the damages awarded by the trial court in the following context; that if this Court were to find that qualified privilege or Reynolds's privilege as a defence was available to the 3<sup>rd</sup> respondent, then this Court should set aside in entirety the general and exemplary damages awarded in favour of the appellant. In the alternative, if this Court were to find liability for defamation, this Court should reduce the general and exemplary damages awarded to a sum of Ksh. 1.5 million. Citing the dicta in **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini -v- A.M.M. Lubia & Another (1982-88) 1 KAR 777**, the 3<sup>rd</sup> respondent submitted that the trial court awarded inordinately high damages and failed to take into account relevant facts in assessing and awarding the damages; that the court failed to consider the truth, justification and the constitutional privilege raised by the respondent; there was no evidence to support the award of exemplary damages of Kshs.1,000,000/= and that the total composite award of Ksh. 5,000,000/= was manifestly too high in the circumstances of the case.

23. We have considered the record of appeal, grounds of appeal and cross appeal as well as submissions by learned counsel and the applicable law. As this is a first appeal, we are obliged to re-evaluate the evidence on record and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123**); see also (**Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270**).

24. In our consideration of this appeal, we shall separately consider and determine the issue of liability of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and then liability of the 3<sup>rd</sup> respondent. Thereafter, we shall consider the issue of general and exemplary damages as well as costs of the suit.

25. The relevant facts in issue are not in dispute. It is not in dispute that the 1<sup>st</sup> and 2<sup>nd</sup> respondents

published the article complained about. It is also not in dispute that the publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondents neither expressly referred to nor mentioned and identified the appellant by name. The legal question is whether a reasonable man reading the article published by the 1<sup>st</sup> and 2<sup>nd</sup> respondents could deduce and arrive at the conclusion that the publication concerned of and referred to the appellant. The trial court in its judgment came to a finding that no reasonable man could deduce and come to the conclusion that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' publication concerned of and referred to the appellant.

26. For defamation to succeed, the statement must be published of and concern the claimant, and in this case the impugned statement must be published of and concern the appellant. In the case of **Knupffer -v- London Express Newspaper Limited (1944) AC 116; [1944] 1 All ER 495** it was held that words are not actionable as defamatory unless they are published of and concern the plaintiff. In **Newstead -v- London Express Newspaper Limited (1940) 1 KB 377, [1939] 4 All ER 319** it was held that where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him (See **Morgan -v-Odhams Press Ltd. [1971] 2 All ER 1156**). Such special facts are material facts which must be pleaded in the plaint and must be proved in evidence in order to connect the plaintiff with the words complained of. Such a pleading is often referred to as a "reference innuendo" in contrast to a "true innuendo" where the extrinsic facts only bear on the defamatory meaning. (See **Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 28 page 20 paragraph 39**).

27. In the present case, as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the issue is whether a sensible/reasonable person in reading the publication complained of is able to identify the appellant as the person under reference. Where identification is in issue, it is the duty of the trial court to rule whether or not the words are reasonably capable of being understood to refer to the plaintiff. In determining this question, the trial court must consider whether or not ordinary reasonable persons having the knowledge proved, could understand the words to refer to the plaintiff. If no reasonable person could have reasonably understood the words as referring to the plaintiff, there is no question left for determination; but if the words could reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to, then the trial court has to make a determination whether or not the words did in fact refer to him. (See **Lord Morris of Both-y-Gest in Jones -v- E. Hutton & Co. [1909] 2 KB 444 at 454**).

28. In making the determination whether the statement could reasonably identify the plaintiff, the trial court has to assess the witnesses and their reasonableness and decide whether reasonable persons would reasonably understand that the plaintiff was referred to. The trial court makes this determination as a matter of fact.

29. In the instant case, the issue of liability of the 1<sup>st</sup> and 2<sup>nd</sup> respondents depends on whether the article published could reasonably identify the appellant as the person who the publication referred to. In this case, the trial court in its evaluation of the evidence arrived at the conclusion that no reasonable person reading the publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondent could deduce and come to the conclusion that the publication was of and concerned the appellant. In other words, the trial court established as a fact that the publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondents could not reasonably identify the appellant as the person under reference.

30. On our part we have re-evaluated the evidence on record to determine if a reasonable person reading the publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondents could identify the appellant as the person under reference. The evidence on record that allegedly links the appellant to the publication is the testimony of PW 3 (Ngata Peter Mwangi). The trial court evaluated the testimony of PW3 and his credibility. The trial court impugned the credibility of PW3; the court also questioned the reasonableness of the deductions made by PW3.

31. We have re-evaluated the testimony of PW3 who in relevant excerpts testified that when he saw the 1<sup>st</sup> and 2<sup>nd</sup> respondents' publication, he thought it was written about the appellant. However, in his view,

the description in the article did not relate to the appellant and did not fit at all because he knew very well where the appellant was on the days in question; that he thought the story fitted him but did not relate to him and the appellant was not an MP since 1992.

32. In arriving at its conclusion on liability of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the trial court assessed the credibility of PW3. It is trite that an appellate court rarely interferes with findings of the trial court on matters of credibility of witnesses. In assessing the credibility and reasonableness of PW3's testimony, the trial court expressed that there were 222 Parliamentarians in Kenya and wondered how in the course of normal human behaviour, PW3 could have thought that the article published by the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not refer to any of the 221 parliamentarians other than the appellant. The court concluded that such a scenario had no direct connect link to the appellant, and that no innuendo linking the appellant to the publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was established.

33. The record shows that the article published by the 1<sup>st</sup> and 2<sup>nd</sup> respondents referred to unnamed parliamentarians and unnamed Assistant Minister. The publication complained of reflect on a body or class of persons and in such cases, no particular member of the class can maintain action unless a reasonable person can conclude that the claimant as an individual was pointed at. It must be noted that the broader the class, the less likely this is. The leading case on this is **Kupffer -v- London Express Newspaper (1944) AC 116**. The facts of this case are were that a war-time article accused a Russian émigré group, "Mlados Russ" of being instruments of Hitler. The group numbered 24 members in England and about 2,000 in the world and the plaintiff was head of the British branch. Although four of the plaintiff's witnesses said that their minds went to him when they read the article, the House of Lords held that as a matter of law the words were incapable of referring to the plaintiff as an individual. In **Obrien -v- Easson (1913) 47 Ir. L.T. 266**, where comments of an alleged defamatory character were made upon an association called the Ancient Order of Hibernians; it was held that an individual member of the order, who was not named, nor in any way referred to, could not maintain an action of libel.

34. Guided by the persuasive authorities of ***Kupffer Case (supra)*** and ***Obrien Case (supra)***, we are of the view that the article published by the 1<sup>st</sup> and 2<sup>nd</sup> respondents contained insufficient reference to the appellant that can sustain an action for defamation. Guided by the persuasive authorities, we find that the trial court did not err in arriving at the conclusion that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not liable in defamation to the appellant. Accordingly, the appeal against the trial court's findings and determination on non-liability of the 1<sup>st</sup> and 2<sup>nd</sup> respondents has no merit.

35. The next issue for our consideration is the liability of the 3<sup>rd</sup> respondent for defamation. The 3<sup>rd</sup> respondent does not dispute that it published and broadcasted the words complained of and identified the appellant by name. In an action for defamation, where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable (See **Newstead -v- London Express Newspaper Limited (1940) 1 KB 377, [1939] 4 All ER 319**).

36. In the instant appeal, the 3<sup>rd</sup> respondent published and broadcasted the complained publication and identified the appellant by name. Unless a defence is available to the 3<sup>rd</sup> respondent, the publication complained of is actionable and liability against the 3<sup>rd</sup> respondent is proved. The legal issue for our consideration is whether there is a tenable defence available to the 3<sup>rd</sup> respondent.

37. In its submissions before us, the 3<sup>rd</sup> respondent urged that the Reynolds's Privilege defence was applicable in relation to its publication and the trial judge erred in failing to apply the privilege; that the defence of freedom of expression as enshrined in ***Sections 70 and 79*** of former Constitution were applicable; that qualified privilege and public interest were defenses available to the 3<sup>rd</sup> respondent and the trial court erred in failing to appreciate and apply the identified defences.

38. The core of the 3<sup>rd</sup> respondent's defence is justification and qualified privilege. What is the law on qualified privilege? The House of Lords in **Reynolds -v- Times Newspapers Ltd. (2001) 2 AC 127** created qualified privilege for publications to the general public on matters of public concern. This

privilege is founded on duty and interest; its very existence requires that the defendant has adhered to standards of responsible journalism and this involves matters like the nature of steps taken to verify the information and whether comment was sought from the claimant. The mere fact that the defendant honestly believes in the truth of what he says does not of itself provide a basis for the privilege (See **Blackshaw -v- Lord [1984] 1QB 1 CA at 27**). It is trite that if Reynolds's privilege is part of a defendant's case, he must demonstrate that he complied with the standards of responsible journalism. In the Australian case of **Lange -v- Australian Broadcasting Corporation (1997) 189 C.L.R. 520**, it was held that for the privilege to apply "reasonable conduct" by the publisher must be proved and reasonable conduct includes steps to verify the information and the opportunity for response by the claimant.

39. We now apply the principles of qualified privilege as espoused in the Reynolds's Privilege to the facts of the present case. The 3<sup>rd</sup> respondent pleaded justification and qualified privilege emphasizing that its investigation revealed that the appellant was the person referred to in the article published by the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that its investigations revealed that the appellant accompanied by one Nderitu picked up two ladies from Nairobi who were not their spouses and drove in a green Land Cruiser to Thompsons Falls Lodge in Nyahururu; that the said Mr. Nderitu booked two double rooms known as the Laikipia Cottage and Orlarambei Cottage where they spent the night of 5<sup>th</sup> and 6<sup>th</sup> December 2003 and that the appellant spent the night with one of the women and Nderitu with the other.

40. In order to rely on Reynolds privilege, the 3<sup>rd</sup> respondent had to establish that it conducted investigations and that its conduct met the standards of responsible journalism. In addition that it took steps to verify the information and comment was sought from the appellant.

41. We have re-evaluated the evidence on record particularly that of the 3<sup>rd</sup> respondent's witnesses. The 3<sup>rd</sup> respondent never tendered evidence to prove that indeed it conducted investigations. Nor was evidence tendered to demonstrate the nature of the investigations conducted, or to show that the 3<sup>rd</sup> respondent verified the information that it broadcast; the 3<sup>rd</sup> respondent pleaded justification but tendered no evidence to prove that the appellant picked prostitutes along Koinange Street. Of relevance to Reynolds's privilege, the 3<sup>rd</sup> respondent did not lead evidence to prove that its conduct met the standards of responsible journalism.

42. The 3<sup>rd</sup> respondent in its submissions stated that the learned judge held that the 3<sup>rd</sup> respondent readily treated as a foundation its own broadcast the publication by the 1<sup>st</sup> and 2<sup>nd</sup> respondent. We see no reason to depart from this conclusion by the trial court because the 3<sup>rd</sup> respondent did not tender in evidence any other foundation for its broadcast publication. In this regard, the relevant foundation would be the nature of investigations conducted by the 3<sup>rd</sup> respondent and proof of responsible journalism.

43. We reiterate that what was required of the 3<sup>rd</sup> respondent was proof that it conducted its independent investigations and evidence to support its defence of justification. The 3<sup>rd</sup> respondent failed to lead any such evidence with the legal consequence that facts relevant to establish and apply Reynolds's privilege and defence of justification were neither tendered in evidence nor proved. For this reason, we are satisfied that neither the defenses in Reynolds's privilege, justification nor qualified privilege and or freedom of expression were established and proved by the 3<sup>rd</sup> respondent. The liability of the 3<sup>rd</sup> respondent for defamation of the appellant was thus established and proved to the required standard.

44. On the issue of repetition of publication of defamatory publication, it is neither a defence nor a mitigation to show that the defendant copied a libel from another source or that at the time he published it, it was already in circulation (See **Hobbs - v- CT Tinling & Co. Limited, Hobbs -v- Nottingham Journal Ltd. [1929] 2 KB 1 at 46**; see also **Jones -v- E. Hulton & Co. [1909] 2 KB 444 at 479**; see also **Cadam -v- Beaverbrook Newspapers Limited (1959) 1 QB 413**; **Aspro Travel -v- Owners Abroad Group (1966) 1 W.L.R. 132**). The facts on record aptly show that the 3<sup>rd</sup> respondent did not repeat the contents of the publication made by the 1<sup>st</sup> and 2<sup>nd</sup> respondent. The 3<sup>rd</sup> respondents' publication had its foundation on investigation by the 3<sup>rd</sup> respondent and it went beyond the publication

by the 1<sup>st</sup> and 2<sup>nd</sup> respondent by expressly identifying and naming the appellant.

45. We now turn to consider the issue of quantum of damages and costs of the suit. It is a well-established law that assessment of quantum of damages is a discretionary exercise. The discretion must be exercised judicially, with wise circumspect and upon defined legal principles. Invariably, when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court took into account an irrelevant factor or left out of account a relevant factor or, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

46. **In case of Kenya bus Services Limited -vs- Jane Karambu Gituma Civil Appeal Case No. 241 of 2000**, this Court stated as follows:-

**“In this regard, both the East African Court of Appeal (the predecessor of this Court) and this Court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low as to represent a wholly erroneous estimate of the damages (see, for example, KASSAM V KAMPALA AERATED WATER CO. LTD[1965] E. A 587, IDI SHABANI V NAIROBI CITY COUNCIL [1982-88] I K.A.R. 681, BUTT V KHAN [1981] K.L.R. 349 and KIMOTHO & OTHERS V VESTERS & ANOTUHER [1988] K.L.R.48).”**

47. In the instant case, the 3<sup>rd</sup> respondent in cross appeal urged us to find that the quantum of damages awarded to the appellant was too high and we should reduce the same to Ksh.1.5 million. Conversely, the appellant in the appeal urged that the quantum of general and aggravated damages awarded is too low and urged us to increase the award to Ksh.125,000,000/=. In support of its submission for award of Ksh.125 million the appellant cited UK cases of **Broom -v- Cassel (1971) 2 All ER 187** and **John -v- M.G.N. Ltd (1996) 2All ER 3**.

48. The 3<sup>rd</sup> respondent in support of its submissions for a lower sum of Ksh. 1.5 million cited dicta in **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini -v- A.M.M. Lubia & Another (1982-88) 1 KAR 777**, and submitted that the trial court failed to take into account relevant facts in assessing the general and exemplary damages; that the trial court failed to consider the truth, justification and constitutional privilege raised by the 3<sup>rd</sup> respondent; that there was no evidence to support the award of exemplary damages of Kshs.1,000,000/= ; that the total composite award of Kshs.5,000,000/= in reliance of the decision in **Johnson Evans Gicheru -v- Andrew Morton (2005) KLR 332** was manifestly too high in the circumstances of the case.

49. We have considered the rival submissions on the quantum of damages. In arriving at our final determination on quantum, we are guided by the quantum of award for defamation made by this Court in the case of **Ken Odondi & 3 Others -v- James Okoth Omburah t/a Okoth Ombura & Co. Advocates, Kisumu Civil Appeal No. 84 of 2009** where a sum of Kshs.4,000,000/= was awarded as general damages for libel and Kshs.500, 000/= awarded for aggravated damages. We are satisfied that the award in the **Ken Odondi case (supra)** is comparable and commensurate with the award by the trial court. For this reason, we are not satisfied that the trial court erred in the exercise of its discretion in assessing and making the award for general and exemplary damages against the 3<sup>rd</sup> respondent. We uphold the award of Kshs.1,000,000/= as exemplary/aggravated damages for reason *inter alia* that the 3<sup>rd</sup> respondent pleaded justification and failed to prove the same. We uphold and confirm in entirety the judgment of the trial court dated 3<sup>rd</sup> October 2008

50. In totality, we find this appeal has no merit and is hereby dismissed with costs to the respondents. The cross-appeal has no merit and is hereby dismissed with costs to the appellant.

*Dated and delivered at Nairobi this 15<sup>th</sup> day of April, 2016.*

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

**H. M. OKWENGU**

.....

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**