



**Omariba v Isuzu East Africa Limited & another (Employment and Labour Relations Cause 868 of 2019) [2023] KEELRC 3376 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3376 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 868 OF 2019  
JK GAKERI, J  
DECEMBER 20, 2023**

**BETWEEN**

**FELIX ERICK GWARO OMARIBA ..... CLAIMANT**

**AND**

**ISUZU EAST AFRICA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**HONDA MOTORCYCLE (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 20<sup>th</sup> December, 2019 alleging unfair termination of employment and defamation.
2. It is the Claimant's case that he joined the 1<sup>st</sup> Respondent on 9<sup>th</sup> May, 2019 as a Vehicle Warehouse Supervisor at a basic salary of Kshs.200,000/= and served diligently.
3. The Claimant avers that before joining the 1<sup>st</sup> Respondent, he worked with the 2<sup>nd</sup> Respondent as the Assistant Parts Manager and resigned voluntarily on 1<sup>st</sup> April, 2019 by written notice.
4. The Claimant further avers that when the 1<sup>st</sup> Respondent sought a reference from the 2<sup>nd</sup> Respondent, it published defamatory statements about him as they were unfounded allegations published arbitrarily with malicious intent as it was not within the Claimant's knowledge and the 2<sup>nd</sup> Respondent had already acknowledged his resignation.
5. That acting on the information from the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent terminated the Claimant's employment without being afforded a fair hearing to respond to the allegations.
6. The Claimant prays for;
  - (i) 12 months compensation by the 1<sup>st</sup> Respondent for unfair termination.
  - (ii) Damages for defamation by the 2<sup>nd</sup> Respondent, Kshs.25,000,000/=.



- (iii) Costs of the suit.
- (iv) Interest on (i) (ii) and (iii).

### **1<sup>st</sup> Respondent's case**

- 7. The 1<sup>st</sup> Respondent admits that the Claimant was indeed its employee serving the probationary period and the offer of employment was subject to satisfactory references from 3<sup>rd</sup> parties.
- 8. That the Claimant's salary was consolidated.
- 9. It is the Respondent's case that it sought a reference from the Claimant's immediate employer, the 2<sup>nd</sup> Respondent and responses dated 23<sup>rd</sup> May, 2019 and 6<sup>th</sup> June, 2019 were provided which the 1<sup>st</sup> Respondent considered unfavourable and terminated the Claimant's employment vide letter dated 8<sup>th</sup> April, 2019.
- 10. That the 1<sup>st</sup> Respondent sought and obtained detailed confirmation of the alleged fraudulent activities from the 2<sup>nd</sup> Respondent.
- 11. The 1<sup>st</sup> Respondent avers that the termination of the Claimant's employment was based on a condition precedent and disciplinary hearing did not arise and the 1<sup>st</sup> Respondent had no reasonable cause to believe that the information provided was false and had no obligation to verify the same and the unsatisfactory reference was a valid and justifiable reason to terminate the Claimant's employment.

### **2<sup>nd</sup> Respondent's case**

- 12. The 2<sup>nd</sup> Respondent denies having defamed the Claimant or being responsible for his termination from employment as the information given to the 1<sup>st</sup> Respondent was not defamatory nor published maliciously and the Claimant resigned after investigations had been concluded.
- 13. It is the 2<sup>nd</sup> Respondent's case that it did not publish the information in the letter dated 8<sup>th</sup> May, 2019.
- 14. That there is no labour dispute between the Claimant and the 2<sup>nd</sup> Respondent as he was not an employee when the alleged defamation took place.

### **Claimant's evidence**

- 15. On cross-examination, the Claimant confirmed that the offer by the 1<sup>st</sup> Respondent was conditional upon satisfactory references and admitted that he was serving the probationary period.
- 16. That he tried to explain himself but his employment was terminated.
- 17. The witness admitted that he was paid for the days worked and one month's salary in lieu of notice.
- 18. That a meeting was held on 10<sup>th</sup> June, 2019 but he was not heard.
- 19. The witness confirmed that the Respondents were competitors and his work required a high level of integrity.
- 20. That he disclosed to the 2<sup>nd</sup> Respondent that he had gotten employment with the 1<sup>st</sup> Respondent and the letter dated 6<sup>th</sup> June, 2019 was given to him by the 1<sup>st</sup> Respondent.
- 21. The witness testified that no investigation was going on against him or any of the associates and further admitted that he attended the meeting held on 11<sup>th</sup> April, 2019 and signed the same on 13<sup>th</sup> May, 2019 while an employee of Isuzu EA Ltd, the 1<sup>st</sup> Respondent.



22. The Claimant admitted that he was invited for a disciplinary hearing vide email dated 3<sup>rd</sup> May, 2019 and attended the hearing on 6<sup>th</sup> May, 2019, two days before he left the 2<sup>nd</sup> Respondent's employment and was cleared of the alleged malpractices.
23. On re-examination, the Claimant testified that he had consented that referees be contacted, was paid all dues other than compensation and had no pending disciplinary letter.
24. The Claimant maintained that he was not afforded the opportunity to rebut the allegations by the 2<sup>nd</sup> Respondent.
25. That the email had no specific allegations, his resignation 2 days later was accepted unconditionally and the outcome of the hearing was not filed in court.
26. That the allegations made to the 1<sup>st</sup> Respondent had not been itemized in any document.

### **1<sup>st</sup> Respondent's evidence**

27. Mr. Anthony Musyoki confirmed that the Claimant was entitled to a fair process during his exit and his employment was terminated on the basis of the information provided by the 2<sup>nd</sup> Respondent and was afforded a chance to respond to the allegations but no notice to show cause was issued or invitation to discuss the contents of the letter.
28. The witness confirmed that the 1<sup>st</sup> Respondent did not confirm whether the information was accurate or not.
29. That the Claimant served the 2<sup>nd</sup> Respondent for about one (1) month and was still on probation.
30. That the 1<sup>st</sup> Respondent relied on the letter dated 23<sup>rd</sup> May, 2019.
31. The witness testified that other than the 2<sup>nd</sup> Respondent's letter, the 1<sup>st</sup> Respondent had another undisclosed source of information.

### **2<sup>nd</sup> Respondent's evidence**

32. Mr. Eric Ngugi confirmed on cross-examination that the Claimant resigned voluntarily and had previously been invited for a disciplinary hearing but minutes were not filed.
33. The witness confirmed that no notice to show cause had been given as investigations by the Finance Manager were on-going but the report was not filed.
34. That the letter dated 6<sup>th</sup> June, 2019 made no reference to the particulars of the alleged improprieties.
35. The witness confirmed that the information provided to the 1<sup>st</sup> Respondent was truthful.
36. That the Claimant was accorded an opportunity to explain what he knew about the allegations.
37. On re-examination, the witness told the court that the 2<sup>nd</sup> Respondent had not adduced evidence of the Claimant's personal involvement in the activities alleged but he was the one in-charge of the Parts department and oversaw all the operations.

### **Claimant's submissions**

38. Counsel isolated three issues for determination on termination, defamation and reliefs.
39. On termination, counsel submitted that it was unfair and unlawful for want of a substantive justification and procedural fairness as no notice to show cause was issued and no hearing took



place and RWI confirmed that the 1<sup>st</sup> Respondent did not verify the information and the Claimant's probationary contract was terminated.

40. Reliance was made on the sentiments of the court in *Ezekiel Nyangoya Okemwa V Kenya Marine & Fisheries Research Institute* (2016) eKLR and *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR on the elements of a fair termination of employment.
41. Counsel submitted that the Claimant was not afforded the opportunity to rebut the allegations and no evidence was adduced.
42. That he was entitled to all the rights as an employee.
43. Reliance was also made on the decision in *Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd* (2014) eKLR to urge that the Respondent did not employ a fair procedure.
44. On defamation by the 2<sup>nd</sup> Respondent, counsel urged that since the Claimant's resignation was unconditionally accepted, and RWII confirmed that the Claimant was invited to a disciplinary hearing, and investigations were carried out by the Finance Manager but availed no report, the 2<sup>nd</sup> Respondent was aware of the alleged fraudulent activities but accepted his resignation unconditionally and no formal accusation had been made.
45. According to counsel, if the Claimant had serious disciplinary issues, the Respondent would have declined the resignation or express it in its letters dated 8<sup>th</sup> May, 2019 and 23<sup>rd</sup> May, 2018.
46. Counsel submitted that the 2<sup>nd</sup> Respondent's letter dated 6<sup>th</sup> June 2019 lowered the Claimant's reputation and cited Uhuru Muigai Kenya V Baraza Ltd to urge that a defamatory statement is presumed false unless its truthfulness is proved by the maker and the 2<sup>nd</sup> Respondent failed to do so as no evidence was adduced to prove that the Claimant acted as alleged.
47. As regards the reliefs sought, counsel submitted that the Claimant was entitled to maximum compensation and Kshs.25,000,000/= in general damages based on the holding in *Kipyator Nicholas Kiprono Biwott V Clays Ltd & 5 others* (2000) eKLR where the court awarded the plaintiff Kshs.15,000,000/= as the Claimant lost his employment and there was no evidence implicating him.

### **1<sup>st</sup> Respondent's submissions**

48. Counsel identified two issues touching on termination and 2<sup>nd</sup> Respondent's notice of claim.
49. Counsel relied on the decision in *Monica Munira Kibuchi & 6 others V Mount Kenya University; Attorney General (Interested Party)* (2021) eKLR to urge that the facts in question in the instant suit took place before the foregoing decision and the law permitted termination in the said manner as held in *Mathias Amata Mwalo v Kenya Wildlife Services* (2021) eKLR.
50. That even a retroactive application of the decision in *Monica Munira Kibuchi V Mount Kenya University* (Supra) would still conclude that the termination was fair as the 1<sup>st</sup> Respondent complied with the requirements of Section 41 of the *Employment Act*, 2007 as the Claimant was invited for a hearing and was notified of the findings of the background checks.
51. That the 1<sup>st</sup> Respondent had no reason to doubt the 2<sup>nd</sup> Respondent's information about the Claimant.
52. On the 2<sup>nd</sup> Respondent's Notice of Claim for breach of confidentiality, counsel submitted that the information was requested for in confidence and was only divulged to the Claimant whom it related to as opposed to anyone else.



53. That the writer of a reference owes a duty to the prospective employer not to misrepresent facts about employees if they are likely to injure the employee or 3<sup>rd</sup> party.
54. That the information about the Claimant was truthful.
55. That no ascertainable damage was occasioned to the Claimant as he still works in the automotive industry and the 2<sup>nd</sup> Respondent's Notice of Claim cannot be ascertained.
56. According to the 1<sup>st</sup> Respondent's counsel, termination of the Claimant's employment was fair and the 2<sup>nd</sup> Respondent's letter to the 1<sup>st</sup> Respondent was not malicious and no breach of confidentiality ensued.

### **2<sup>nd</sup> Respondent's submissions**

57. On the alleged defamation, counsel submitted that the letters dated 21<sup>st</sup> May, 2019 and 4<sup>th</sup> June, 2019 were not defamatory as the ingredients of defamation as set out in *John Ward v Standard Ltd* (2006) eKLR were not met as demonstrated in *Naqvi Syed Omar v Paramount Bank Ltd & another* (2015) eKLR.
58. That the Claimant's reputation was not injured as he adduced no evidence to establish the same.
59. According to counsel, there was loss of tyres and sale of oil to an associate in the Claimant's department.
60. That the 2<sup>nd</sup> Respondent enjoyed qualified privilege as the letters related to the Claimant's employment and there was no malice or intent to injure his character.

### **Findings and determination**

61. It is common ground that the Claimant was an employee of the 2<sup>nd</sup> Respondent before joining the 1<sup>st</sup> Respondent on 9<sup>th</sup> May, 2019 pursuant to a written contract of employment dated 5<sup>th</sup> April, 2019.
62. It is also not in contest that the Claimant was serving the probationary period when the 1<sup>st</sup> Respondent terminated his employment based on information it had received from the 2<sup>nd</sup> Respondent.
63. It is also not in dispute that the Claimant left the 2<sup>nd</sup> Respondent's employment vide a resignation letter dated 8<sup>th</sup> April, 2019 and served the 30 days' notice.
64. The issues for determination are:
  - (i) Whether termination of the Claimant's employment by the 1<sup>st</sup> Respondent was unfair.
  - (ii) Whether the 2<sup>nd</sup> Respondent defamed the Claimant.
  - (iii) Whether the 2<sup>nd</sup> Respondent's Notice of Claim is enforceable.
65. As regards termination of the Claimant's employment, counsels adopted opposing positions with the 1<sup>st</sup> Respondent's counsel urging that the termination was fair as the facts of the case took place before the decision in *Monica Munira Kibuchi V Mount Kenya University (Supra)* prior to which the provisions of Section 42 (1) of the *Employment Act*, 2007 exempted probationary contracts from the provisions of Section 41 of the *Employment Act*, 2007 in relation to procedural fairness.
66. Clause 1 of the Claimant's offer of employment by the 1<sup>st</sup> Respondent stated inter alia;

“ This offer of employment is also subject to receiving satisfactory references from whatever source(s) the company may refer to”.



67. This would appear to suggest that the offer was conditional upon receipt of what the 1<sup>st</sup> Respondent considered to be satisfactory references.
68. The letter of termination dated 10<sup>th</sup> June stated that the Claimant's employment was grounded on unsatisfactory background report.
69. The letter is reticent on the nature of the report but as confirmed by RWI and RWII and letters on record, the 1<sup>st</sup> Respondent relied on the 2<sup>nd</sup> Respondent's letters to terminate the Claimant's probationary contract on 10<sup>th</sup> June, 2019.
70. According to the 2<sup>nd</sup> Respondent's letter dated 6<sup>th</sup> June, 2019, the following were the Claimant's transgressions.
1. Under the Claimant's supervision, there was loss of tyres under unclear circumstances and he attempted to cover up using money that was meant for cash back to the 1<sup>st</sup> Respondent's Dealers without consulting management.
  2. There was sale of oil to an associate in the Claimant's department using a dealer's account so that the associate could enjoy quantity discount. This happened under his watch.
  3. He never reported on these two issues up to the point when the management discovered and enquired from him what was happening.
71. The 2<sup>nd</sup> Respondent's letter was in response to the 1<sup>st</sup> Respondent's letter dated 4<sup>th</sup> June, 2019 which intimated that the 1<sup>st</sup> Respondent had informally learnt of the Claimant's involvement in fraudulent activities.
72. It would appear to follow that the 2<sup>nd</sup> Respondent's letter of 6<sup>th</sup> June, 2019 confirmed their fears as it solidified and confirmed the information provided by the informal source.
73. Both RWI and RWII were unambiguous that the 1<sup>st</sup> Respondent relied on the information provided by the 2<sup>nd</sup> Respondent in dismissing the Claimant from employment.
74. Based on the conditional nature of the offer of employment by the 1<sup>st</sup> Respondent and the information provided by the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent in the court's view had a reason to terminate the Claimant's probationary employment contract and although the 1<sup>st</sup> Respondent did not avail a copy of the minutes of the meeting.
75. The Claimant admitted that he was invited by the Director Human Resource for an on-line meeting which had 5 participants and he tried to explain himself but was still dismissed from employment.
76. Clause 3 of the Offer of Employment was explicit that;
- “ . . . During this period, (3 months), employment may be terminated by either side giving the other thirty (30) calendar days of notice or one (1) month's salary in lieu of notice”
77. Was the 1<sup>st</sup> Respondent bound to take the Claimant through a disciplinary process analogous to the requirements of Section 41 of the *Employment Act*, 2007?
78. The court is not so persuaded as relying on the decision in *Monica Munira Kibuchi V Mount Kenya University (Supra)*, Section 41 of the *Employment Act*, 2007 was still operational and the



1<sup>st</sup> Respondent was bound to act accordingly as submitted by the 1<sup>st</sup> Respondent's counsel, a fact admitted in the 3<sup>rd</sup> Judge Bench decision as follows;

“Having so found, the next question is whether the respondent is liable for terminating the services of the petitioners without according them a hearing as stipulated under section 41 of the Act. The answer to this question would be in the negative. The respondent honestly believed and applied the law as it was prior to the pronouncements contained in this judgement. It would therefore be unjust to condemn the respondent for applying the law as enacted by parliament even if that law is, as we have found it be, inconsistent with *the Constitution*”.

79. In the court's view, the fact that the Claimant was informed of the outcome of the background checks and the unsatisfactory nature of the reference from the 2<sup>nd</sup> Respondent in accordance with the Terms of the Contract and the law at the time, a formal disciplinary hearing to justify his dismissal on letters from another employer would be subjecting the 1<sup>st</sup> Respondent to an onerous burden on proof as it was relying on secondary information provided by a 3<sup>rd</sup> party and had no access to the primary documents.
80. In the sum, the court is in agreement with the 1<sup>st</sup> Respondent's counsel that termination of the Claimant's employment was fair and lawful.
81. As to whether the 2<sup>nd</sup> Respondent's letter dated 6<sup>th</sup> June, 2019 was defamatory, the court proceeds as follows:
82. In the words of V.W Rogers in *Winfield and Jolowcz on Tort* 16<sup>th</sup> Ed. 2002 at P.404-405
- “Defamation is the publication of a representation which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him. For historical reasons, defamation takes the form of two separate torts, libel and slander. The former being generally more favourable to the claimant because it is actionable per se and injury to reputation will be presumed.”
83. It is also defined as the publication of a representation which subjects a person to hatred, ridicule and contempt.
84. Whereas under English Law Libel is actionable per se so that the plaintiff is not required to prove actual loss or damage, slander is not except in four circumstances, damages must be proved.
85. As correctly submitted by the 2<sup>nd</sup> Respondent's counsel, the elements of defamation were summarised in *John Ward V Standard Ltd* (Supra) as follows;
- (i) The statement must be defamatory in its ordinary or natural meaning or by innuendo.
  - (ii) The statement must refer to the plaintiff.
  - (iii) The statement must be published by the defendant.
  - (iv) The statement must be false.
86. In the instant suit, it is not in contest that the 2<sup>nd</sup> Respondent published information about the Claimant to a 3<sup>rd</sup> party which the Claimant characterizes as defamatory.
87. Has the Claimant established a cause of action for defamation?



88. The Claimant argues that the information given to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent was false or untrue.
89. It is the Claimant's case that he was invited for a disciplinary hearing on 6<sup>th</sup> May, 2019 via email dated 3<sup>rd</sup> May, 2019. The email did not set forth any specific allegations other than the phrase "malpractices and procedural mishaps".
90. Significantly, the email made reference to an investigation.
91. The Claimant testified on cross examination that he attended the hearing and was cleared of the alleged malpractices, evidence the 2<sup>nd</sup> Respondent did not controvert.
92. If there were unresolved issues at the hearing, why were they not documented in the minutes for records or issuance of a notice to show cause or summary dismissal letter? Had the 2<sup>nd</sup> Respondent concluded the investigations or were they still on-going and if so, when were they concluded? The letter dated 6<sup>th</sup> June, 2019 makes no reference to an investigation or report.
93. In further embellishment of his argument, the Claimant confirmed that the alleged hearing took place 2 days before his notice lapsed, he completed and signed the exit interview on 13<sup>th</sup> May, 2019 and left and the 2<sup>nd</sup> Respondent did not confront him with the alleged malpractices when he was still their employee or refuse to accept his resignation letter and make it conditional at the very least.
94. Minutes of a Departmental Meeting held on 11<sup>th</sup> April, 2019 which the Claimant attended and signed while in the employment of the 1<sup>st</sup> Respondent on 13<sup>th</sup> May, 2019 was a typical department meeting not a disciplinary one.
95. Puzzlingly, although the email dated 3<sup>rd</sup> May, 2019 make reference to an investigation which RWII referred to, the witness was emphatic that the report was prepared and none was filed in court. RWII testified that the investigation was conducted by the Finance Manager. Equally, the 2<sup>nd</sup> Respondent did not file the minutes of the purported disciplinary hearing.
96. In sum, the 2<sup>nd</sup> Respondent had neither the specific allegations made against the Claimant or supportive evidence nor the minutes and recommendations of the disciplinary committee and RWII testified as much.
97. RWII also confirmed the fact that the Claimant's resignation was acknowledged by letter dated 8<sup>th</sup> May, 2019 after the alleged disciplinary hearing and investigation.
98. The writer thanks the Claimant for his "valued contribution to the company" and wishes him "every success in future".
99. A panoramic view of the documentary evidence before the court reveals that the 2<sup>nd</sup> Respondent has not demonstrated the factual basis of the contents of the letter dated 6<sup>th</sup> June, 2019 as it has neither availed a catalogue of the accusations the Claimant faced, his response, minutes of the disciplinary hearing and the investigation report.
100. These documents would have effortlessly shown that by the time the Claimant left or subsequently, the 2<sup>nd</sup> Respondent had in its possession information implicating the Claimant's honesty and trustworthiness and was not a reliable supervisor.
101. Without a factual basis of the contents of the 2<sup>nd</sup> Respondent's letter to the 1<sup>st</sup> Respondent, it is evident that the statements painted the Claimant in a negative light as one who was unreliable, corrupt and dishonest among others.



102. In the court's view, the statements were defamatory in their literal sense as they lowered the Claimant's image in the estimation of right-thinking members of society and the 1<sup>st</sup> Respondent cannot be faulted for having relied on the letter to terminate the Claimant's probationary contract.
103. On reference to the Claimant, it is common ground that the contents of the 2<sup>nd</sup> Respondent's letter of 6<sup>th</sup> June, 2019 identified the Claimant by name. The Reference is clear that it was the Background check on Felix Enock Edward Omariba, the Claimant.
104. On publication of the statements, the court is guided by the sentiments of the Court of Appeal in *Selina Patani & another v Dhiranji V. Patani* (2019) eKLR as follows;
- “In, to constitute a cause of action, the alleged defamatory statement should be published to a 3<sup>rd</sup> party . . .” (See *Pullman V Water Hill & Co.* (1891) 1 QB 524).
105. In this case, the 2<sup>nd</sup> Respondent made the defamatory statements known to the 1<sup>st</sup> Respondent before it had made the same to the Claimant for a response or rebuttal.
106. As to the untruthfulness of the statements and as adverted to elsewhere in this judgement, the 2<sup>nd</sup> Respondent provided no verifiable material on which it arrived at the conclusion that the statements in its letter dated 6<sup>th</sup> June, 2019 were indeed true.
107. In the absence of an investigation report and/or findings of the disciplinary committee meeting, the 2<sup>nd</sup> Respondent had no reasonable basis to make the statements about the Claimant.
108. An investigation report would have shown when and how many tyres were lost and how much cashback was used to conceal the loss.
109. It would equally have shown how much oil was sold and to whom and the irregularities involved as well as the Claimant's complicity.
110. From the evidence on record, it is the finding of the court that the 2<sup>nd</sup> Respondent has failed to prove that the contents of the letter dated 6<sup>th</sup> June, 2019 were indeed true.
111. In the upshot, the court is satisfied that the Claimant has demonstrated that the 2<sup>nd</sup> Respondent published defamatory information about the Claimant vide the contents of the letter dated 6<sup>th</sup> June, 2019.

## Reliefs

### (i) Compensation for unfair termination

112. Having found that the Claimant failed to prove that termination of his employment by the 1<sup>st</sup> Respondent was unfair or unlawful, the prayer for compensation under Section 49(1)(c) of the *Employment Act* is unmerited and is declined.

### (ii) General damages for defamation

113. Having found that the Claimant had proved that he was defamed by the contents of the 2<sup>nd</sup> Respondent's letter dated 6<sup>th</sup> June, 2019, the Claimant is entitled to general damages for the tort of defamation.



114. It is however unclear on what basis the Claimant assessed damages at Kshs.25,000,000/= which is a humongous amount as the decision relied upon related to a politician and long serving Member of Parliament and government minister and the information was published to all the sundry.
115. In this case, the information was only made known to one person and as confirmed by the Respondent's witness, the Claimant secured a job in the same industry notwithstanding that libel is actionable per se as emphasized in *Mohammed Nasoro Dima v Mohamed Omar Soba* (2013) eKLR as well as *Patrick Lang'at & another V Samwel Otieno Odera & others* (2021) eKLR.
116. In determining the quantum of damages, the court is guided by the sentiments of the court in *Johnson Evan Gicheru v Andrew Morton & another* (2005) eKLR as follows;

“In action of Libel, the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict was given. It may consider what his conduct has been before action, after action, and in court during the trial *Prud V Graham* 24 QBD 53, 55. In *Broom V Cassel & Co.* (1972) A.C 1067 the House of Lords stated that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of *restitutio in integrum* has necessarily and even more highly subjective element. Such actions involve money award, which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover, the estimated sum of his past and future losses, but in case the libel driven underground, emerges from lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges.

As Windeyer J. well said in *Uren V John Fairtax & Sons Pty Ltd* 117 C.L.R 115, 150, it seems to me that, properly speaking, a man defamed does not get compensation for his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as a consolidation to him for a wrong done. Compensation is here a *solatium* rather than a monetary recompense for harm measurable in money.”

117. Significantly, the decisions relied upon by the Claimant on defamation are of little persuasion as they relate to publication of defamatory statements either by the media or other public mode of communication as was the case in Hon. *Uhuru Muigai Kenyatta V Baraza Ltd t/a KTN* (2011) eKLR where the court awarded Kshs.7,000,000/=.
118. In *Kipyator Nicholas Kiprono Biwott V Clays Ltd & 2 others* (2000) eKLR, the defamation took the form of a book published in the UK. The court awarded Kshs.15,000,000/= as compensatory damages.
119. In these cases, the plaintiffs were politicians who are widely known locally and internationally and the publication was both national and international.
120. Finally, in *Ezekiel Okemwa V Kenya Marine & Fisheries Research Institute* (2016) eKLR, the court awarded Kshs.20,000,000/= for unfair and unlawful termination, diminished employability and in compensation for other violations.
121. It is unclear as to what fraction of the award related to defamation.
122. More importantly, however, the Claimant was a highly educated, skilled and experienced man who was internationally recognized, associated with an institution which shared the Nobel Prize for



- Climate Change with Al Gore, and a distinguished scientist and was listed among 2,000 outstanding intellectuals of the 21<sup>st</sup> Century among other accolades.
123. Finally, the Claimant lost appointments to work in prestigious international institutions on account of a criminal trial and his employability suffered enormously.
124. In this case, the Claimant did not adduce evidence of his standing in society, his work, or institutions he had been associated with, fame, recognition, credit and reputation.
125. The 1<sup>st</sup> Respondent testified that it only disclosed the letter to the Claimant, thus only three persons were aware of the statements, the 2<sup>nd</sup> Respondent, 1<sup>st</sup> Respondent and the Claimant.
126. From the foregoing, it is evident that the gravity of the libel was overall minor.
127. In the circumstances, the court is satisfied that the sum of Kshs.200,000/= is fair compensation.
128. On the last issue, the court is not persuaded that the 2<sup>nd</sup> Respondent's notice of claim is enforceable as it gave the information while aware that it would be relied upon by the 1<sup>st</sup> Respondent in decision making and it behooved it to ensure that the information had a factual justification.
129. The fact that the Claimant availed no evidence on how his reputation was injured and was employed in the same industry cannot avail the 2<sup>nd</sup> Respondent other than by way of mitigation as libel is actionable per se.
130. In the upshot, judgement is entered for the Claimant against the 2<sup>nd</sup> Respondent with costs.  
It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF DECEMBER 2023**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**



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