



REPUBLIC OF KENYA



KENYA LAW
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Konosi v Adam; Judicial Service Commission (Third party) (Civil Case 18 of 2020) [2025] KEHC 3902 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 18 OF 2020
HI ONG'UDI, J
MARCH 27, 2025**

BETWEEN

WILFRED NYAUNDI KONOSI PLAINTIFF

AND

MAJID MOHAMED ADAM DEFENDANT

AND

JUDICIAL SERVICE COMMISSION THIRD PARTY

JUDGMENT

1. By a plaint dated 21st May 2020, the plaintiff herein instituted this suit against the defendant seeking the following orders:
 - a. General, exemplary and aggravated damages for libel and malicious falsehood.
 - b. A permanent injunction restraining the defendant, whether by himself, his servants or agents or otherwise howsoever, from further publishing or causing to be published, the said words or any words similarly defamatory of the plaintiff.
 - c. Costs of the suit.
 - d. Interest on (a) and (c) above.
 - e. Any such further or other relief as the court deems fit and just to grant in the circumstances.
2. This suit arose from a letter authored and/or caused to be authored by the defendant to the third party. The said letter reads as follows:

Private And Confidential.



Re: Complaint Against Wilfred Konosi's Application to be Appointed Judge of the High Court

I make reference to this matter and would like to file a formal complaint against the above individual who has been short listed to become a Judge.

For the period I have known Wilfred Konosi I feel he is not suited to be a Judge. He is a land grabber who has swindled people of their parcels of land and has cases pending in court over land matters.

There are Environment and Land Case No. 1 of 2018 Wilfred Konosi versus Herman Ngari Kirika and Environment and Land Case No. 472 of 2017, Wilfred Konosi versus Majid Mohamed Adam all pending in the High Court. The two cases all involve land fraudulently obtained by Mr. Konosi or allegation that he obtained title by adverse possession and using his position as an advocate, he has made sure the cases don't get finalized as he keeps using the land.

Other basis of my complaint is that Wilfred Konosi is under Criminal investigation at DCI's office regarding illegal occupation of my property being Nakuru Municipality Block 11/680, that Mr Konosi has asserted an illegal claim of my land and the land in which he currently occupies being Nakuru Municipality Block 11/66. He purports to be a tenant on that land yet goes ahead to file numerous suits in court purporting to eject me from my land and further claiming adverse possession for the land which he claims he is a tenant.

This matter I believe is not civil in nature but has a criminal element in that title to Nakuru Municipality Block 11/66 does not exist and therefore the lease document Mr Konosi is using to assert a claim over my land is fraudulent,

Needless to say, this matter is under active investigation at the DCI headquarters and this being the case it is my believe that Mr. Konosi is not fit to become a judge of this great Country, if given the tool he wall destroy many. His character is questionable as he lacks integrity and cannot discharge his duties as a judge properly and with impartiality.

I have attached a relevant document in respect of which I believe you will find to be useful.

Thank you

Yours faithfully,

Signed

Majid Mohamed Adam

3. The plaintiff contends that the above words are libelous and have brought his reputation to odium and public ridicule in the eyes of right-thinking members of the society and the legal fraternity. Further, that on the 17th July 2019 he appeared before the third party for an interview which was streamed live to members of the public. He was questioned on the malicious contents of the letter and eventually not nominated for appointment as a Judge of the Environment and Land Court. He averred that unless restrained by this court, the defendant would further publish or cause to be published the said or similar words defamatory to him.
4. The defendant in his written statement of defence dated 1st July 2020 stated that the plaintiff's suit was misconceived, bad in law and incurably defective as it raises no reasonable cause of action against him. Further, that it was frivolous, vexatious and an abuse of court process and he intended to raise a preliminary objection in the most opportune time to have it struck out. He added that in line with



- the provisions of the Judicial Service Act No. 1 of 2011 and particularly Section 45 (3) of the aforesaid Act, any information or evidence given to the Judicial Service Commission by an individual could not be used against him or her in any criminal or civil proceedings since such a person was protected from any personal liability.
5. He denied the contents of paragraphs 3, 4 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the plaint and the plaintiff was put to strict proof thereof.
 6. The defendant also filed a third-party notice claim against the third party herein for the following reliefs and remedies;
 - i. Indemnity and or contribution in full in respect of the claims made against the defendant by the plaintiff.
 - ii. The costs of defending this action inclusive of costs of these third party proceedings and the Advocate /client's cost.
 - iii. Such further and/or alternative reliefs as this honorable court may deem fit to grant.
 7. The defendant's claim against the third party was on the grounds that the letter he addressed to it was private and confidential and the same did not amount to publication. Thus, the said letter amounted to privileged communication between him and the third party. That unknown to him the contents of the said letter were disclosed to the plaintiff which amounted to breach of confidentiality the third party owed him. Further, that the said disclosure resulted in the institution of a defamatory suit against him.
 8. The third party filed a response to the said notice and the defendant's statement of defence, the same is dated 1st November 2021. It admitted to the contents of paragraphs 1, 2, 3, 4, 5, 6, 10, 12, 13, 14 16, 19, 20, 21, 22, 23 and 24 of the defence. In response to the contents of paragraphs 7 of the defence, the third party admitted to having received a letter dated 27th May 2019 from the defendant concerning the suitability of the plaintiff to be appointed to the position of judge of the Environment and Land Court.
 9. In response to the contents of paragraph 8, it stated that the letter and its publication took place only on occasion of qualified privilege. That the individual writing such a letter was serving his civil, legal and moral duty and it had a corresponding interest and duty to receive it. Thus, the same was privileged and did not amount to publication for purposes of defamation. It stated that the letter was shared with the plaintiff who provided his substantive response to the allegations. That it was bound to adhere to the principles of natural justice and the provisions of Fair Administrative Action in accordance with the dictates of the Constitution and other relevant laws by according him an opportunity to respond to the complaint(s) raised.
 10. The third party denied the contents of paragraph 9 of the defence and stated that it had no obligation to ensure that any information or evidence it received from the defendant remained confidential and anonymous in the circumstances of this matter. That the letter was neither privileged nor confidential as between it and the defendant as its duty in law was paramount.
 11. In response to the contents of paragraph 11 and 15 it stated that the letter was never published but it was within the knowledge of the defendant as the author of the same. Thus, he could not apportion any liability to it. It added that a letter written to it pursuant to its functions and/or obligations under Section 9 (1) (c), Part II of the First Schedule to the Judicial Service Act did not amount to publication for purposes of a defamation action.
 12. It further stated that any statements made in the context of proceedings by the Third-Party are privileged and therefore protected by law. Thus, the third-party proceedings commenced against it



- was without merit. That the plaintiff's plea to the effect that he lost the position on account of the complaint and/or allegations by the defendant was without merit for the reason, that the criteria for his evaluation went beyond the contents of the letter presented by the defendant.
13. The matter proceeded for hearing and the plaintiff (PW1) testified as the only witness. He adopted his statement dated 21st May 2020 and testified that he is an advocate of the High court of Kenya and that his first contact with the defendant was in 2017. That the letter produced as P. EXB 2A was published to the third party and circulated to all its members. During the interview he was asked questions on it therefore its contents were not privileged as alleged. Further, its contents were not genuine or true since he had not been sued anywhere over the land and the only case he had was ELC Case No. 472/2017 where he had sued the defendant. He further testified that in the said matter he obtained an injunction against the defendant and his complaint was about the defendant's lies against him. Further that the third party's statement on the letter being privileged publication was false. He thus sought the reliefs listed under paragraph 19 of the plaint. He produced his documents as P.EXB 1, 2A, 2B, 3 & 4.
 14. When cross examined by the defendant's counsel, he stated that the only complaint by the defendant was the one marked as P.EXB 2A addressed to the third party's chairman not copied to anyone since it was private and confidential. He confirmed that he was not aware whether the defendant ever appeared before the third party since he never got a chance to interrogate him. He added that he had not produced any documents to confirm the position of the cases as they were still pending before the ELC Nakuru.
 15. He further stated that the letter attached to PEXB 2A was a complaint to the DCIO and he had been arrested in regard to the property in the ELC case No. 472/2017. That the assertions in the letter were not true as he filed a judicial review application which was allowed. He confirmed that he had explained himself before the third party but he did not know whether the said letter was the cause of him being unsuccessful.
 16. When cross examined by the third party's counsel, he stated that the third party had a duty to investigate the candidates. That the said information was called to enable them do so and he was asked to respond which he did. He referred to his letter to the third party dated 14/6/2019, and stated that the third party had a right to question him.
 17. The defendant testified as DW1, he adopted his statement recorded on 7th May 2020 and stated that the third party called for comments and information in respect of candidates to be interviewed. He complied and addressed the information to its chair who received it. That all he wrote was true, private and confidential and his intention was for it to reach the third party's chair. He never give anybody else a copy of that letter.
 18. When cross examined by the plaintiff's counsel he confirmed that his complaint to the third-party produced as P. EXB 2A was done on 27th May 2019. He personally took the letter and the recipient was the chairman's deputy. He added that the land in issue was No. 11 in Milimani which he believed was his.
 19. When cross examined by the third party's counsel he stated that the JSC called on good citizens to send any information for or against the candidates and he sent his dated 27th May 2019. He confirmed that his complaint was personal between him and the plaintiff. He added that the third party had to investigate the issues he had raised, because the plaintiff wanted to be an ELC Judge.
 20. The third party called one witness one Isaac Omasa its acting Registrar. He adopted his witness statement signed on 22nd August 2024 as his evidence in chief.



21. When cross examined by the plaintiff's counsel, he confirmed that the letter was not published but its contents were noted. That the commissioners had a copy of the letter and such complaints were considered in appointments. He stated that they had no obligation to ensure that the material remained confidential. Further, that the letter was not confidential as far as the plaintiff was concerned and he had to be asked about it. He added that he was not aware that some of the complaints they receive were defamatory even the one filed by the defendant.
22. When cross examined by the defendant's counsel, he stated that the third party never informed the defendant that his letter would not be treated as confidential within the commission.
23. At the close of the parties' case the court directed the parties to file their written submissions.

Plaintiff's submissions

24. These were filed by Robert Ndubi & Company Advocates on 4th October, 2024. Counsel gave a brief background of the case and identified two (2) issues for determination.
25. On the first issue on whether the defendant's letter was defamatory, counsel submitted that the defendant expressly referred to the plaintiff as a land grabber and a swindler of people's parcels of land. Further at paragraph three (3) of the letter, he referred to the plaintiff as a fraudulent person. He argued that anyone reading the letter would get the impression that the plaintiff was not worthy of holding any office. Further, that the said letter specifically and clearly referred to the plaintiff. That on the face of the letter it is clear that it was written by the defendant and he confirmed the same in his statement and testimony.
26. He placed reliance on the case of John Ward v Standard Limited (Civil Case 1062 of 2005) [2006] KEHC 2629 (KLR) (Civ) (5 May 2006) (Ruling) where the court reiterated the ingredients of defamation as follows:

“A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are:

- i. The statement must be defamatory.
- ii. The statement must refer to the plaintiff.
- iii. The statement must be published by the defendant.
- iv. The statement must be false

See also; Wycliffe A Swanya v Toyota East Africa Ltd & Francis Massai (Civil Appeal 70 of 2008) [2009] KECA 379 (KLR) (Civ) (13 March 2009) (Judgment).

27. Counsel further submitted that the letter having been received by another person other than the intended chairman meant that it was exposed to third parties. That all the information in the impugned letter was false and the defendant had not provided any evidence to prove them. He added that the defendant's letter was defamatory having met all the ingredients of defamation. The court's attention was drawn to decision in Selina Patani & Ashit Patani v Dhiranji v Patani (Civil Appeal 114 of 2017) [2017] KECA 480 (KLR) (CIV).
28. On the issue as to whether the plaintiff merits the orders sought, counsel submitted that having demonstrated that the defendant's impugned letter was defamatory what followed was to allow the reliefs sought by the plaintiff. He placed reliance on the several decisions including Johnson Evan



- Gicheru v Andrew Morton & Another (Civil Appeal 314 of 2000) [2005] KECA 81 (KLR) (14 October 2005) where it was held that in an action for libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. Further, that the trial court may consider what the defendant's conduct has been before the action, after the action and in court during the trial.
29. Counsel further submitted that before the said defamatory publication the plaintiff enjoyed extremely high esteem and respect amongst his peers and colleagues in the legal profession. He placed reliance on *Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others* (Civil Appeal 234 of 2005) [2010] KECA 360 (KLR) (Civ) (25 March 2010) (Judgment) where the elements of the tort of defamation were set out as; that the statements complained of have to be defamatory in character, secondly that the statements referred to the claimant or that he could be identified, and thirdly, that the statements were published or communicated to someone other than the claimant.
 30. He further submitted that it was trite law that once a person has been defamed without any justification by law, then damages will follow from the ordinary course from the invasion of the plaintiff's right to reputation and damage done. That this court ought to consider that no damages can undo the harm done to the plaintiff and award him a substantive award of general damages in the sum of Kshs. 20,000,000/= for the defamatory statement and a sum of Kshs 1,500,000/= as exemplary and aggravated damages.
 31. On costs, counsel submitted that even though the award of costs was at the discretion of the court the general rule is that costs follow the event. He placed reliance on the decision in *Jasbir Singh Rai & 3 others Vs. Tarlochas Singh Rai & 4 Others* [2014] eKLR.

Defendant's submissions

32. These were filed by Mirugi Kariuki & Company Advocates on 28th October, 2024. Counsel gave a brief background of the case and identified three (3) issues for determination.
33. The first issue is whether the communication was defamatory to the plaintiff and published with malice. Counsel submitted that it was not disputed that the basis of the suit was the letter dated 27th May 2019. That the same was written to the third party's chairman pursuant to the invitation in line with the *Judicial Service Act* under paragraph 9(1)(c) Part III of the First Schedule. That based on the said undisputed facts, it could not be said the defendant's complaint was actuated by malice but rather on the truth, good faith and fair comment.
34. He further submitted that the defendant being the holder of title to property forcibly occupied by the plaintiff could not be accused of acting in malice when he complained. That the impugned letter was accurate and did not amount to defamation.
35. On the second issue on whether the defence of justification, fair comment and privilege applied, counsel placed reliance on the decision in *George Benedict Maina Kariuki v Nairobi Star Publication Limited & Carole Maina* 2016 eKLR where the learned judge relied on the defence of fair comment as upheld in the case of *Slim vs Daily Telegraph* (1968)1 All E.ER. 497 where the judge held that:

“If the writer is an honest man expressing his genuine opinion on a subject of public interest then no matter that his words conveyed derogatory imputations no matter that his opinion was wrong or exaggerated or prejudiced and no matter that it was bad expressed so that other people read all sorts of innuendos into it nevertheless he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it...I



stress this, because the right of fair comment is one of the essential elements of freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to ‘write to the newspaper’ [or write in the newspaper, as is the case herein] and the newspaper should be free to publish his letter (or article). It is often the only way to get things put right. The matter must of course be one of public interest. The writer must get his facts right and he must honestly state his real opinions but that being done, both he and the newspaper should be clear of a liability. The should not be deterred by fear of libel actions...”

36. Counsel submitted that according to the precedent set above the defendant was clear of any liability as alleged by the plaintiff. That the publication was a subject of public interest, it was accurate information and the facts are true. Thus, the defence of fair comment applied in the defendant’s case.

37. Counsel further submitted that the defence of justification also applied in this case since the letter was a fair reporting of the plaintiff’s character or conduct of adverse possession. That, his connection to the said properties which he forcibly occupied against the will of the title holders but was in court trying to legitimize an illegality of trespass and forceful detainer by a claim of adverse possession, supported his position. He placed reliance on section 14 of the *defamation Act* and two decisions among them Hon. Uhuru Muigai Kenyatta vs. Baraza Limited (2011) eKLR, where Judge Rawal DCJ (as she then was) stated as follows;

“While taking defence of justification or qualified privilege in the defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification or qualified privilege does not insert the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication.”

38. On the defence of privilege counsel submitted that should there be any liability, the third party should bear it in view of the express request by the defendant to keep the information on the letter as private and confidential as possible. He placed reliance on Paragraph 5 (1), Part II of the First Schedule to the *Judicial Service Act* which enjoined the third party to maintain confidentiality of information requested for by the author. It provides as follows

“The Commission shall maintain the confidentiality of sensitive and highly personal information in applications, including home and e-mail addresses, home and mobile telephone numbers, income, names and occupations of immediate family members, formal disciplinary or ethical complaints, charges or grievances brought against the applicant as a lawyer or otherwise that did not result in public discipline, medical and health history, the financial interests of the applicant, and all unsolicited comments and letters for which the author requests confidentiality or which the Commission in its discretion believes should remain confidential to protect third parties.”

39. Regarding the plaintiff’s claim for exemplary damages, counsel urged the court not to award the same. He placed reliance on the decision in Board of Trustees, National Social Security Fund VS Judy Wambui Muigai (2017) eKLR reiterated the position of the law when it comes to exemplary damages by holding that as follows;

“Such damages are in our view called for in situations of oppressive arbitrary or unconstitutional actions by servants of the government or wrongful conduct which has been calculated by the defendant to make a profit for himself where such award is expressly



authorized by the statute.....exemplary damages go beyond compensation and are meant to punish the defendant may well be ordered against a defendant who acts out of improper motive or where he is actuated by malice.”

40. In conclusion, he urged the court to dismiss the plaintiff’s suit with costs since it did not disclose any reasonable cause of action justifiable under the law.

Third party’s submissions

41. These were filed by Mukele Moni & Company Advocates and are dated 24th January, 2025. Counsel gave a brief background of the case and identified four (4) issues for determination.
42. The first issue is whether the third party is a proper party to the suit. Counsel submitted that though the third party was enjoined in this suit vide the third party notice pursuant to the provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010, it was not a proper party in the instant suit. That for it to be lawfully joined to the suit, the subject matter and the cause of action in the said notice ought to align with those in the main suit.
43. He placed reliance on the decision in *Bowen v Muchungu* [§ another Civil Case E007 of 2021 2023 KEHC 27407](#) where Chepkwony J at Paragraph 14 stated thus;

“...for a court to allow a Third Party Notice to issue it must establish that the cause of action between the Defendants and the intended third Party is the same as the original cause of action between the Plaintiff and the Defendants.”

See also:

- i. *Interactive Advertising Limited & Another v Equity Bank Limited & 2 Others* [2016] Eklr.
 - ii. *Dong Yi (Suing on his own behalf and as the administrator of the estate of the late Luo Jinli) v Sun African Hotels Limited t/a Keekorok Lodge Masai Mara; First Assurance Company Limited (Intended Third Party) (Civil Suit 12 of 2019)*.
44. The second issue is whether the third party breached its duty to confidentiality to the defendant by sharing the complaint with the plaintiff. Counsel submitted that the third party had a lawful duty to receive the defendant’s complaint letter. However, it had no obligation to ensure that any information or evidence received from him with respect to the complaint remained confidential and anonymous. That the third party’s duty in law was paramount and it was executed in the interest of the public.
45. Counsel submitted further that it would have been unlawful for it to consider the contents of the defendant’s complaint letter without according the plaintiff an opportunity to respond or address the same. He placed reliance on Article 171 and 172 (2) of *the Constitution* of Kenya 2010 and the decisions in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 560-G, *Ridge v Baldwin* [1963] 2 ALL ER 66 at 81, *Board of Education v Rice* [1911] AC 179, *Baker v Canada (Minister of Citizenship & Immigration)* 2 S.C.R 817 6, *Selvarajan v Race Relations Board* [1976] 1 All ER 12, *Egal Mohamed Osman v Inspector General of Police & 3 others* [2015] eKLR at page 7 and *Breen v Amalgamated Engineering Union* [1971] All E.R 1148.
46. On the third issue, counsel submitted that any information presented in the context of proceedings before the third party was privileged and protected by law in accordance with the provisions of section 45 of the *Judicial Service Act*. He placed reliance on *Halsbury Laws of England* 4th Edition Vol. 28 at



paragraph 109 and the decision in *Chirau Ali Mwakere v Nation Media Group Ltd & Another* [2009] eKLR where Khamoni J (as he then was) defined a privileged occasion as follows;

“An occasion is privileged where the person who makes a communication has interest or a duty, legal, social or moral to make it to the person to whom it was made and the person to whom it is so made had a corresponding interest to receive it.”

See also:

- i. *Ndung'u Njoroge & Kwach Advocates and another v Standard & Others* [2018] KECA 584 (KLR)
- ii. *Gatley on Libel and Slander* 8th Edition page 327 and 441 paragraph 442.

47. The fourth issue is whether the defendant is entitled to indemnity and contribution in respect of the claims made against him by the plaintiff. On this, counsel submitted that the plaintiff had failed to present any evidence before this court to demonstrate that the contents of the complaint letter received by the third party lowered his reputation in the estimation of others or exposed him to hatred, contempt, or ridicule. Further, that the plaintiff failed to meet the threshold for proving defamation and he equally failed to call any witness to substantiate any alleged harm to his reputation.

48. He placed reliance on the decision in *John Edward v Standard Ltd* HCCC 1062 of 2005 where the court outlined the essential elements of the tort of libel/defamation as follows:-

- i. the statement must be defamatory.
- ii. the statement must refer to the plaintiff.
- iii. the statement must be published by the defendant.
- iv. the statement must be false.

See also:

- i. *Selina Patani & Another v Dhiranji V. Patani* [2019]eklr.
- ii. *Clifford Okello Rachuonyo t/a Rachuonyo Advocates v Mohamed Yusuf Soroya* (Civil Appeal no. 224 of 2018) [2020] KECA 622 (KLR).
- iii. *Sammy Ngigi Mwaura v John Mbugua Kagai & another* [2006] KECA 377 (KLR).
- iv. *Khaemba v The Supreme Court of Kenya & Another* (Petition 100 of 2019) [2019] KEELRC 917 (KLR).
- v. *Halsbury's Laws of England* Volume 28 at paragraph 58.

49. In conclusion, counsel submitted that the defendant had no claim against it by virtue of the provisions of sections 45 (1) of the *Judicial Service Act* which grants the third party immunity with respect to any actions or omission conducted in good faith. Further, he was not entitled to indemnity and contribution in respect of the claim presented against him by the plaintiff. He urged the court to dismiss the defendant's claim against it with costs.

Analysis and determination

50. Upon analyzing the facts of the case, evidence and the submissions tendered by all the three (3) parties I find the following issues to arise for determination namely;



- i. Whether the plaintiff has made out a case for the tort of defamation.
 - ii. Whether the plaintiff is entitled to an award of damages and if so how much.
51. On the first issue, whether the plaintiff has made out a case for a tort of defamation. The Blacks Law Dictionary 8th Edition defines defamation as:
- “The act of harming the reputation of another by making a false statement to a third person. A false written or oral statement that damages another’s reputation”.
52. In Halsbury Laws of England 4th Edition Vol. 28 at paragraph 22, the defamatory words must refer to the plaintiff. The same states:
- “The proper purpose of an action of libel or slander is to vindicate the reputation of the person defamed, and accordingly the proper and the only party to bring the action is the person actually and personally defamed. This is not enough that the words reflect on the persons properly; there must also be imputation against the plaintiff personally.....”.
53. Further, in *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, the Court of appeal stated as follows regarding defamation;
- “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:
- i. The statement must be defamatory.
 - ii. The statement must refer to the plaintiff.
 - iii. The statement must be published by the defendant.
 - iv. The statement must be false.”
54. In view of the foregoing, it is clear that in concluding that the statement is defamatory, it must be shown that the same refers to the plaintiff, it was published by the defendant, and that the same was false. Further, in order to prove defamation, the plaintiff must establish or demonstrate that the matter complained of was defamatory in nature, that the defamatory statement was uttered to someone else other than the person who was said to have been defamed and that the defamatory statement was published maliciously. In other words, the elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff’s reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by



other persons. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

55. In applying the said principles to this case, the alleged publication by the defendant which the plaintiff claims is defamatory is in form of a letter addressed to the third party herein. The plaintiff contends that the said letter referred to him as a land grabber, a swindler of people's parcels of land and a fraudulent person. That anyone reading the letter would get the impression that the plaintiff was not worthy of holding any office. Further, that before the said defamatory publication the plaintiff enjoyed extremely high esteem and respect amongst his peers and colleagues in the legal profession. He added that the letter having been received by another person other than the intended chairman meant that it was exposed to third parties not intended to receive the information in the said letter.
56. On his part the defendant argued that his letter dated 27th May 2019 addressed to the third party's chairman was written following the invitation by the third party pursuant to the *Judicial Service Act* under paragraph 9(1)(c) Part III of the First Schedule. That the impugned letter was accurate and did not amount to defamation. Further, it could not be said his complaint was actuated by malice but rather on the truth, good faith and fair comment.
57. On the other hand, the third party argued that it had a lawful duty to receive the defendant's letter of complaint. However, it had no obligation to ensure that any information or evidence received from him with respect to the complaint against the plaintiff remained confidential and anonymous. That its duty in law was paramount and it was executed in the interest of the public. Further, that any information presented in the context of proceedings before the third party was privileged and protected by law in accordance with the provisions of section 45 of the *Judicial Service Act*. Thus, the defendant had no claim against it by virtue of the said section. Additionally, that the plaintiff had failed to meet the threshold to proving defamation and he equally failed to call any witness to substantiate any alleged harm to his reputation.
58. It is clear from the above set of facts that the defendant's complaint against the plaintiff was in form of a letter addressed to the third party as private and confidential. It is not in dispute that the said letter was addressed to the third party's chairman and no one else. As argued by the third party it had a duty to call for such information on any individual who had been shortlisted for the Judgeship position. There is no doubt that this was well within the knowledge of the plaintiff when he applied for the said position.
59. In my view the statements in the defendant's letter were meant only for the third party's official use since the same was addressed as "private and confidential" meaning that his intentions were that no one else accessed the said letter other than the third party. The plaintiff failed to adduce any evidence to the contrary. Further, the third party argued that any information presented in the context of proceedings before it was privileged and protected by law. Section 45 (3) of the *Judicial Service Act* provides as follows;
- "A person who appears before the Commission shall not, whether such appearance is in pursuance of any summons by the Commission under this Act or not, be liable to any criminal or civil proceedings, or to any penalty or forfeiture whatsoever in respect of any evidence or information given to the Commission by such person."
60. The plaintiff failed to prove that the said letter was published to third parties hence lowering his reputation in the estimation of right minded persons in the society or caused him to be shunned or avoided by other persons as was illustrated in *Miguna Miguna v Standard Group Limited & 4 others* (supra). In my view, in order for one to succeed in a defamation case the ingredients of defamation as



summarized in the case of John Ward V Standard Ltd (supra) ought to be proved and in the instant case the plaintiff failed to so.

61. Section 107 of the *Evidence Act* provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist?”

62. Also, Section 109 of the *Evidence Act* provides as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact lies on any particular person.”

63. For the above reasons, I find that the plaintiff has failed to establish his case on a balance of probabilities and the same is hereby dismissed with costs.

64. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 27TH DAY OF MARCH, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

