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Advocates Against:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 42 OF 2014

Joseph Njogu Kamunge.....Appellant

Versus

Charles Muriuki Gachari.....Respondent

(An appeal from the Judgment and Decree of Hon. D. N. Musyokai, (Ag. P.M) delivered on 17th April 2014 in Nyeri C.M.C.C. No. 110 of 2009)

JUDGMENT

This appeal challenges the decision rendered in Karatina S.R.M.C.C No. 110 of 2009 in which the learned magistrate awarded the Respondent general damages in the sum of Ksh. 1,500,000/= for defamation plus costs of the suit.

The respondents' claim against the appellant in the lower court is enumerated in the plaint dated 2nd July 2009 in which the Respondent averred *inter alia* that the Appellant on or about the 4th day of May 2009 at a Coffee Farmers Meeting held at Kangocho Coffee Factory attended by well over 200 Coffee farmers, the Appellant wilfully and maliciously uttered of and concerning the Respondent the words enumerated in paragraph three of the plaint as a consequence of which the Respondent claimed to have been brought to hatred, humiliation, ridicule and contempt, hence his claim for damages.

In his defence filed in court the appellant denied malice and insisted that that he made the words in public interest as a representative of the coffee farmers and that it was true that there was a 10% deduction from the proceeds of coffee sale, which deduction was not approved by the farmers.

It is settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. (See ***Stanley Maore -vs- Geoffrey Mwenda "the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusions...."***)

The appellant raised six grounds of appeal which in my view can be addressed effectively by answering the following issues:-

- a. *Whether the Respondent established the necessary ingredients to prove the tort of defamation.*
- b. *Whether there are grounds to interfere or set aside the award of Ksh. 1,500,000/=.*

Defamation was well described in a 1970 British Columbia Court of Appeal decision of *Murphy v. LaMarsh* where a Member of Parliament, Judy LaMarsh wrote about the plaintiff as follows:-

"A brash young radio reporter, named Ed Murphy (heartily detested by most of the Press Gallery and the members), had somehow learned that Maurice Lamontagne (then Secretary of State, and a long-time friend and adviser of the Prime Minister) had purchased furniture but had not paid for it."

In finding that there was actionable libel, the British Columbia Supreme Court (appeal dismissed) wrote:-

"(Defamation is where) a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution), (or) a shameful condition (he has smallpox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule. The more modern definition (of defamation) is words tending to lower the plaintiff in the estimation of right-thinking members of society generally."

Another authority often cited as definitive on defamation is *Gatley on Libel and Slander* who wrote this, as was adopted in **Thomas v CBc** as follows:-

*"The gist of the torts of libel and slander is the **publication** of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one **to a man's discredit**, or which **tends to lower him in the estimation of others**, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of **right-thinking persons generally**. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory."*

The common law protects every person from harm to their reputation by false and derogatory remarks about their person, known as **defamation**. It is a tricky and slippery field of law, based on statutes, English common law and many defences. No wonder it has been called a "peculiar tort" and, from *Broadway Approvals, Ltd. v. Odhams Press, Ltd.*

"The law of libel seems to have characteristics of such complication and subtlety that I wonder whether a jury on retiring can readily distinguish their heads from their heels."

Perhaps it may be necessary to recall the words of Shakespeare cited by counsel for the Respondent that *"Good name in man and woman, is the immediate jewel of their souls. Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands. But he that filches from me my good name robs me of that which not enriches him and makes me poor indeed.*

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

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

evidence of malice The defamatory words must be shown to have been published by the defendant.

The foregoing ingredients of defamation were reiterated in the case of *John Edward vs Standard Ltd* where the court stated 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."*

Black's Law Dictionary defines defamation as "the act of harming the reputation of another by making a false statement to a third person." The book *Gatley on Libel and Slander* authoritatively states that a statement is defamatory of the person of who it is published if it tends to lower him in the estimation of right thinking members of the society generally or it exposes him to public hatred, contempt or ridicule or it causes him to be shunned or avoided. A plaintiff in a defamation case must prove that the words were spoken or written by the defendant, that those words refer to him/her, that those words are false. That the words are defamatory or libelous and that he/she suffered injury as a result, that is, his/her reputation was injured as a result.

Also in *Gatley on Libel and Slander* it is stated that:- "a defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit."

Winfield on Tort gives the following definition of defamation:- "Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tends to make them shun or avoid that person."

On the other hand, *Halsbury's Laws of England* defines a defamatory statement as:- "A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

It is not in dispute that the words complained of were uttered by the Appellant. It is not disputed that the words were uttered in a meeting attended by about 200 people. It is not disputed that the words complained of referred to the Respondent. What is disputed is that the words were defamatory of and concerning the Respondent.

As stated above the appellant in his defence denied malice and insisted that the revelation was a matter of public interest and that the words were true. On malice, **Odunga J** held in *Phineas Nyagah Vs Gitobu*

Imanyara that:-

“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice.Malice may also be inferred from the relations between the parties..... The failure to inquire in the facts is a fact from which inference of malice may properly be drawn.” (Underlining mine)

From the English translation in the plaint, the appellant is said to have uttered of and concerning the Respondent words *inter alia* to the effect that " *These two people are the ones who assisted Charles Muriuki to defraud your money.....Charles Muriuki is not- trustworthy at all as he has been stealing your money for a long time.....*" I find it necessary to examine below the meaning of the words "defraud" and also "not-trustworthy"

Merriam-Webster dictionary defines the word "*defraud*" as to [cheat](#), [cozen](#), [swindle](#), to get something by dishonesty or deception. [Cheat](#) suggests using trickery that escapes observation. [Cozen](#) implies artful persuading or flattering to attain a thing or a purpose, [defraud](#) stresses depriving one of his or her rights and usually connotes deliberate perversion of the truth. [Swindle](#) implies large-scale cheating by misrepresentation or abuse of confidence.

The Free Dictionary defines *defraud* as "To make a [Misrepresentation](#) of an existing material fact, knowing it to be false or making it recklessly without regard to whether it is true or false, intending for someone to rely on the misrepresentation and under circumstances in which such person does rely on it to his or her damage. It also means to practice [Fraud](#); to cheat or trick. To deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice.

Intent to defraud means an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter, or terminate a right, obligation, or power with reference to property.

Cambridge Dictionaries Online defines defraud as "to take something "[illegally](#) from a "[person](#), "[company](#), etc., or to "[prevent](#) someone from having something that is "[legally](#) theirs by "[deceiving](#) them.

Not-Trustworthy means not worthy of trust or belief; "an untrustworthy person, [undependable](#), [unreliable](#) - not worthy of reliance or trust, not true to duty or obligation or promises, [dishonest](#), [dishonorable](#) - deceptive or fraudulent; disposed to cheat or defraud or deceive.

It is clear from the letter dated 15th October 2008 which formed the basis of the appellants allegations that the alleged 10% deduction was clearly explained as commission in the same letter at the third paragraph from the bottom, hence the allegations attributed to the appellant had no basis at all and went against the contents of same letter he relied upon. Further, the minutes of the meeting held on 4th May 2009 contains the words complained of in the plaint which are attributed to the appellant, a confirmation that he uttered the said words reproduced in the plaint the subject of the defamation.

I have carefully considered the evidence, the literal meaning and possible interpretation of the words used as explained above and the fact that the said words were uttered in the presence of close to 200 persons, hence publication is not in dispute. I have also considered the defence offered by the appellant. The following statement from Harry Street's *The Law of Torts* is relevant:-

“The judge decides whether a statement is capable of bearing a defamatory meaning, whether in its normal meaning or by innuendoThe judge has to construe the words used, to decide whether they are

capable of a defamatory meaning..”

The appellant pleaded in his defence that the words were true. As mentioned above, the letter and minutes referred to above suggest otherwise. Further, his evidence in the lower court did not demonstrate that the words were true both in fact and in substance. I find that the defence of justification is not available to the appellant in the circumstances. Terminologically, “**justification**” as used in the law of defamation, means “**truth**”. The defence calls for the defendant demonstrating that the defamatory imputation is true. He cannot get away with it by saying that he believed that the matter complained of was true. He has a burden to prove the words are true.

In *Hon. Uhuru Muigai Kenyatta v Baraza Limite Rawal J* (as she then was) observed the information that causes the defamation, will be assumed to be untrue until the defendant proves otherwise. The learned judge stated:-

“...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.....”

The Supreme Court of Nigeria in *Joseph Mangtup Din vs African newspaper of Nigeria Ltd, Adolphus Godwin Karib Whyte* J.S.C held that:-

“It is well settled that the onus lies on the respondent to prove the truth of the words in their ordinary and natural meaning:-See Dumbo v. Idugbo.

In *Digby v. Financial News Ltd.* Collins, M.R., said:-

“A plea of justification means that all the words were true and covers not only the bare statements of facts in the alleged libel but also any imputation which the words in their context may be taken to convey”.

Allowable defences are justification (i.e. the truth of the statement), fair comment (i.e., whether the statement was a view that a reasonable person could have held), and privilege (i.e., whether the statements were made in Parliament or in court, or whether they were fair reports of allegations in the public interest). An offer of amends is a barrier to litigation. A defamatory statement is presumed to be false, unless the defendant can prove its truth. Defamation law puts the burden of proving the truth of allegedly defamatory statements on the defendant, rather than the plaintiff. I have carefully studied the entire record and I am not persuaded that any of the above defences was proved by the appellant.

The appellant also raised the defence of public interest in his defence. As pointed out above, there is a wide range of defences that may be pleaded in defamation, but the one that is most famously associated with the public interest is “**qualified privilege**”. The essence of this defence is that the person making a statement has a duty to do so and that the person who hears, or reads, the statement has a corresponding interest in doing so. The defence is by no means limited to the publication of stories by the media, but it is in that context that the idea of publication in the public interest is at its most pronounced. The leading case on the defence remains *Reynolds v Times Newspapers*.^[25] which was an action taken by the former Prime Minister of Ireland in respect of stories about how he had conducted himself while in office. Given the political context to the story, the defendant had argued that the story should automatically attract privilege and that the claimant should be required to show that the defendant had acted with malice. However, the House of Lords was of the view that such an approach would swing the pendulum too far away from the protection of reputation, and it instead proposed a number of

guidelines that a defendant should observe if wishing to argue that a publication was responsible and in the public interest. Those non-exhaustive guidelines, listed by **Lord Nicholls**, require the person publishing the story to consider:-

1. *The seriousness of the allegation, i.e. if the allegation is not true what will be the level of misinformation to the public and what will be the corresponding harm to the individual.*
2. *The nature of the information and the extent to which the subject-matter is a matter of public concern.*
3. *The source of the information and whether it is reliable or motivated by malice and/or avarice.*
4. *Whether suitable steps have been taken to verify the information.*
5. *Whether the allegation in a story has already been the subject of an investigation which commands respect.*
6. *Whether it is important that the story be published quickly.*
7. *Whether comment was sought from the claimant, or whether that was not necessary in the context of the story.*
8. *If the article or story includes the gist of the claimant's version of events.*
9. *Whether the article or story is written in such a way as to amount to statements of fact, or whether it raises questions and is suggestive of the need for further investigation.*
10. *The timing of the publication.*

I have carefully studied the entire record and I am unable to trace any of the above guidelines in the defence offered by the appellant to bring his allegations within the purview of public interest. No attempt was made to show that the appellant took steps to verify the truth of the allegations or whether any comment was sought from the Respondent prior to publishing the allegations only to mention some of the above guidelines.

In addition to the defence of qualified privilege, the law of defamation also recognizes public interest as a component part of the further defence of "fair comment". This defence is made when the maker of a statement demonstrates that the statement in question was one of *opinion*, not of fact, and that it was made on a matter of "public interest." This position was considered in detail in the case of [Galloway vs Telegraph Group Ltd](#). The appellant did not raise the defence of fair comment nor did he state that the statement was one of opinion not of fact.

In conclusion, I find that the learned magistrate correctly interpreted and applied the law and arrived at the correct findings, hence I uphold the decision of the lower court.

On damages, the law on circumstances under which an appellate court would interfere with an award of damages has been reiterated in numerous authorities and in various jurisdictions throughout the world

and the general principle is the same. The Court of Appeal of Nigeria discussing the same issue in the case of *Dumez (Nig) Ltd V. Ogboll* had this to say:- "*It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial Court unless:- (a) where the trial Court acted under a mistake of law; or (b) where the trial Court acted in disregard of principles; or (c) where the trial Court took into account irrelevant matters or failed to take into account relevant matters: or (d) where the trial Court acted under a misapprehension of facts; or (e) where injustice would result if the Appellate Court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."*

Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. In *Butt v Khan* Law, JA stated:-

"... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low...."

In *Tanganyika Transport Co. Ltd v Ebrahim Nooray* the Court of Appeal for East Africa stated that the latitude in awarding damages in an action for libel is very wide and the court must avoid substituting their own views on what the damages should have been against the award by the judge.

Tunoi, JA (as he then was) in *Johnson Evan Gicheru v Andrew Morton & Another* had this to say on assessment of damages:

" 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 is given. It may consider what his conduct has been before action, after action, and in court during the trial: Praud V Graham.

In Broom V Cassel & Co 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 restitution in integrum has necessarily and even more highly subjective element. Such actions involve a 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 its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charges. As Windeyer J. well said in Uren V John Fairfax & Sons Pty.Ltd.

"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 consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

I would think that in the instant case to arrive at what could have been said to be a fair and reasonable awards the learned trial Judge could have drawn considerable support in the guidelines in Jones V Pollard and where a checklist of compensatable factors in libel actions were enumerated as:-

1. *The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.*

2. *The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself.*
3. *Matters tending to mitigate damages, such as the publication of an apology.*
4. *Matters tending to reduce damages.*
5. *Vindication of the plaintiff's reputation past and future.*

The rationale behind awarding of damages in defamation actions is to restore or give back to the party injured what he lost save in exceptional circumstances where punitive or exemplary damages may be awarded. A successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. The award must compensate him for damages to his reputation. Section **16A** of the Defamation Act provides that:-

In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.

Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation one's reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. See *Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others*.

In assessing damages in an action for defamation the court has to consider the particular circumstances of each case, the plaintiff's position and standing in society, the mode and extent of publication, the apology, if offered and at what time of the proceedings, the conduct of the defendants from the time when libel was published up to the time of judgment.

In determining damages, I am alive to the principle that the sums should be fairly compensatory in the light of the nature of the injury to reputation and that a restrained hand in the award of damages is desirable since the court must maintain stable bearing. The award should also appear realistic in all the circumstances.

In the English Court of Appeal decision in the case of *John v MG Ltd* the Court held:-

"The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused....."

Exemplary damages on the other hand had gone beyond compensation and are meant to "punish" the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurried defence of justification or failure to apologize."

I find nothing in the judgment of the lower court to suggest or even in the arguments advanced by the appellants counsel to suggest that the learned magistrate erred in assessing damages nor has it been demonstrated that the award is inordinately high as to be an erroneous estimate. I find no reason to fault the award of damages arrived by the magistrate. The upshot is that I hereby dismiss this appeal with costs to the Respondent.

Orders accordingly.

Signed, Delivered and Dated at **Nyeri** this **25th** day of **May** 2016

John M. Mativo

Judge



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