

# Defamation Law in Kenya and Posts Made on Social Media and Online Applications

The expanded avenues of expressing ourselves, thanks to the increasing ease of access to the Internet and the availability of cheap communication gadgets, have significantly changed how we interact in a way that would not have been imagined a few decades ago. Most social media users have shown a tendency of being reckless in their posts, maybe due to the illusion of anonymity which the Internet creates. Whereas freedom of expression is a hallmark of democracy, it has limits to the extent that in exercise of this right, a person should not infringe on another's right to a good name.

Defamation is an assault to a person's good name which causes an injury to that person. Benjamin Franklin aptly put it when he said "*Glass, China, and Reputation, are easily cracked, and never well mended*". The Courts have also stated that there has to be a balance between the right to freedom of expression and the right not to be

defamed as was stated in the case of *Phineas Nyaga versus Gitobu Imanyara*.


## *What constitutes defamation?*

Defamation has two limbs and it occurs either in writing (what lawyers call libel) or orally (what lawyers call slander). In the context of social media, libel is a publication of **false and malicious statements** on a blog or micro blogging sites like twitter, Face Book, My Space, and LinkedIn by making a post. An example of online defamation is when a blogger makes an innuendo but another user joins the dots or completes the puzzle by adding more information

making it become obvious who is being talked about. Another *common* behaviour especially among Kenyans on Twitter who go by the moniker #KOT is to use memes, which are modified pictures, texts and videos aimed at being humorous and trending topics that in the

end destroy the reputations of those being ridiculed. Most recently, the Central Bank of Kenya Governor blamed #KOT for defamatory tweets that exacerbated the Chase Bank crisis.

It is also worth noting that sharing or re-tweeting another person's post amounts to a re-publication of defamatory statement as was found in the case of *Safaricom versus Porting Access Kenya Limited*. A person has a duty to verify information before making a



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publication (which includes a re-publication) as the Court of Appeal stated in its decision in a case between former Kilome MP, John Harun Mwau and The Nation Media Group. Similarly, the tone of the language used in a post can ascribe a different meaning to a previously non-defamatory statement. Snide remarks or comments might be actuated with malice, which influences the Courts in their decisions.

The law offers remedies to a person aggrieved by reputational injury from defamatory publications. In this regard, the first and most important thing to note is that a suit for defamation in Kenya must be brought within 12 months from the date on which the defamatory statement(s) is made. Also note that the case of the aggrieved party is strengthened where a person aggrieved by defamatory statements prior to filing an action in court requires the maker of the statement complained of to retract the statement and apologise. Such retraction and or apology has to be made with the same prominence that the statement complained of was made.

The defences available where one is accused of defamation are justification, fair comment, public interest, and privilege/immunity. For instance, law makers have the immunity from prosecution for statements made in the course of their legislative duties since they have to execute their mandate without fear of prosecution. On the other hand, publishers of statements that may be perceived to be

defamatory have a defence if publication was due to public interest or formed part of fair comment which is also closely related to justification. Fair comment has to be made in utmost good faith and based on substantiated facts. A person relying on the aforesaid grounds as defence for defamation has to prove the justification, good faith or fair comment. In the case of *CFC Stanbic Bank Limited versus COFEK*, COFEK relied on the defence of fair comment when CFC Stanbic Bank sued it for a post it shared on its website, Facebook page and twitter account. It reasoned that the publication was a republication of a letter from a member of the public and therefore, it was in public interest and fair comment. The Court found the article to be defamatory on the basis that COFEK did not prove that its publication was part of fair comment.

### *Points to remember*

- Sharing or re-tweeting posts is a re- publication.
- Confirm the truth or falsity of potentially injurious information before sharing it online.
- Act with speed if you have been defamed.