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4
ISSUE

DEFENDING WOMEN WHO SPEAK:

**EXPANDING LEGAL DEFENCES IN
DEFAMATION CASES FOR WOMEN
WHO SPEAK OUT ON SEXUAL
VIOLENCE**



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Acronyms and Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
Art	Article
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ISLA	Initiative of Strategic Litigation in Africa
SGBV	Sexual and gender-based violence
SLAPP	Strategic lawsuit against public participation
UK	United Kingdom
USA	United States of America

Foreword

#MeToo: An exciting, complicated and messy global moment

The #MeToo and #Times Up moment with its call for solidarity in the face of increasingly high rates of sexual and gender-based violence was a powerful, exciting moment but also a complicated moment. It was powerful because the words resonated with so many women and girls and presented an opportunity to have different conversations in different parts of the world with people representing different cultural contexts. It was exciting because women, girls and gender non-conforming individuals were defining what sexual harassment, violence and assault meant for them in terms of how they lived their lives and how these experiences affected their own understanding of their bodies, their positions within society and the structural forces underpinning patriarchy and violence. What was exciting about #MeToo was that it took something from the individual to the collective perspective and moved from silence, stigma and shame towards solidarity with other survivors and a commitment to no longer shield perpetrators. Google spreadsheets emerged and perpetrators were named on many social media forums. Women were not willing to remain silent anymore. It was what the “break the silence” movement had always been hoping for and we were energized by it.

More than a hashtag

But this moment has also been a very complicated moment for the feminist and women’s rights movement, particularly for Black women and women in the global South for a number of reasons. The underlying assumption that everything started in 2017 with #MeToo was quickly corrected when Alyssa Milano was being credited for “starting the wave of #MeToo” over the internet when in fact a Black woman, Tarana Burke, had started the movement a decade before in 2007. Not only is the date significant but also the purpose of metoo. Tarana Burke recalls that she started metoo as a movement and not a hashtag, as a healing space and a space of solidarity for low income black women and girls who were survivors of sexual and gender based violence. She was not calling for a widespread campaign on the internet where one was naming perpetrators and connecting online. Her movement was acutely aware of the risks and backlash that Black women face when speaking out without the necessary support and healing in place. Her methodology was, and continues to be, rooted in community solidarity, healing and a Black feminist analysis of power, racism and misogyny when it comes to Gender-Based Violence. Her work has always recognized that “speaking out” is not only hard and sometimes impossible but can also result in backlash if there is no community support system in place. She had not envisaged this “support” as virtual but at community level relying on community mobilization, healing and support (with no specific reliance on twitter or a hashtag). In subsequent years the organization metoo International has been organized around the slogan - “more than a hashtag” which Tarana Burke has felt was important to emphasize. There is a complicated path to healing for each survivor, often plagued by backlash and further violence, and this requires responsibility and a duty of care, support and solidarity to survivors.

The Hollywood version of #MeToo which to a large extent named powerful male perpetrators remains complicated because it was formed by a particular U.S. cultural context and political climate where power, class, race, ethnicity, privilege and heteronormativity collided with each other in powerful ways. The Hollywood version of #MeToo is also interesting because whilst it aimed to challenge networks of power and domination - it was itself made up of networks of power and ‘insiders and outsiders’ with the low income Black girls that Tarana Burke was working with clearly on the outside of the world of Harvey Weinstein and the Oscars red-carpet.

Long before Tarana Burke or Alyssa Milano and the Hollywood #MeToo moment we saw women in other contexts mobilizing and going out into the streets to say ‘no’ to gender-based violence. We saw women in South Africa (#NakedProtests), Nigeria, Kenya, Egypt, Brazil, Mexico and India taking up the

issue of gender-based violence in very outspoken, rebellious and creative ways - all geared towards reducing stigma and shame with women and girls taking back their power and speaking their truth. In France, one journalist, Sandra Muller started the hashtag #BalanceTonPorc calling on women to name the pigs that had harassed or raped them. She calls out a fellow journalist Eric Brion in her tweet for sexually harassing her.

There is no denying that the #MeToo moment and the many variations of this movement has had a positive ripple effect in many countries around the world and has resonated for millions of women, girls and gender non-conforming persons. It seems to finally be giving survivors a platform to break their silence and re-imagine what access to justice may look like for survivors, from where they are seated with their own perspectives and experiences at the centre. It facilitates a world where survivors can name their perpetrator(s) within what appears to be a safe space amongst an online community of fellow survivors. The power of the hashtag has been about the power of being believed and not being further victimized and traumatized when speaking out. It has also been an act of making the invisible more visible and validating the experiences of survivors in a very public way when up until now the criminal justice system has not created a safe space for survivors who are often subjected to secondary victimization by the very system meant to protect them. The gains made in this area have inspired movements around the world BUT history has taught us that when we raise our voices to speak out against gender inequality and oppression, our voices are often suppressed and we are not witnessing this in the case of survivors who speak out.

The Backlash: Contextualizing defamation lawsuits

Globally we have seen a backlash by men who have been named as perpetrators and this backlash has been devastating and has primarily taken the form of using the law in order to silence and punish women and girls for speaking out. This has been done through lawsuits where survivors are sued for defamation or interdicted from discussing or naming any perpetrator. In the case of Sandra Muller in France the fellow journalist she had named sued her for defamation. She lost the case with the Court ordering her to pay €15,000 in damages and she then had to Appeal the decision to have the order overturned. Similarly in South Africa students who had named perpetrators at Rhodes University found themselves disciplined and removed from the University as a result of speaking out and in protracted legal battles with the University and perpetrators who had been named. What we are seeing is that perpetrators accused of sexual and gender-based violence are using the courts to effectively punish survivors as a tactic that is meant to discredit and intimidate those who speak out when they have chosen not to pursue their cases via the criminal justice system. More and more survivors around the world are being sued for defamation.

The law of defamation has been developed around the world in order to protect the good name and reputation of people in cases where false statements are made about them and this results in some harm/damage to them. Today we see defamation laws weaponized against women, girls and gender non conforming persons who speak out across Africa, in Europe, India and the United States. These cases have often had a chilling impact on survivors, as is laid out in this ISLA publication and demands our attention as feminist litigators, activists and researchers working in the gender-based violence space. We need to develop the law to protect survivor's right to speak and share their stories of violence as a matter of public interest and freedom of expression that is intricately wound up with the right to be free from all forms of violence and the right to equality. The suing of survivors when speaking out should also be contextualized as part of the cycle of violence and secondary victimization to which survivor's are often subjected. The UN Special Rapporteur on Violence Against Women, Dubravka Simonovic, has in a recent report called the act of threatening survivors with legal proceedings a form of GBV in and of itself which should be seen as part of patterns of abuse and domestic violence which have already been well-documented in terms of counter-claims of domestic violence by perpetrators.

Around the world perpetrators are following a similar playbook in terms of suing survivors and now it is time for the law of defamation to be developed in accordance with international human rights law principles and infused with a feminist and survivor centred perspective. Feminist lawyers have an important role to play in terms of mounting legal challenges to these defamation cases whilst also exposing the discriminatory and chilling effect of these cases on women's ability to be free from all forms of violence. This edition of ISLA insights offers critical guidance for lawyers and legal practitioners to navigate defamation cases with sufficient regard to the rights of survivors and a feminist perspective because allowing judgments against survivors to remain unchallenged could have devastating consequences in terms of access to justice and will fuel a climate of impunity for perpetrators. This is also an area where the weaponization of the law is playing out across multiple jurisdictions and may be ripe for transnational solidarity between lawyers fighting these cases in order for global and sub-regional trends to be assessed and for successful strategies to be shared in real time across borders. This ISLA insights edition also charts a path for further research and advocacy in order to bend the arc of justice towards a more survivor centred feminist perspective. This requires all sectors fighting to end sexual and gender-based violence to better equip and prioritize the healing and care of survivors that are being encouraged to speak out publicly so that they are sufficiently protected in the event of backlash or being sued for defamation. Donors and private philanthropy need to set up special mechanisms (panels of lawyers, legal funds, emergency funds) that recognize how costly these types of vexatious proceedings are and how critical it may be for survivors to have access to free legal services of experts in this area.

Nicolette Naylor
February 2022

CHAPTER 1: Introduction

1.1. Project overview

This Insight is developed as part of the Initiative for Strategic Litigation in Africa's (ISLA) mandate to strengthen the capacity of feminist litigators and non-governmental organisations in the African continent to conduct strategic litigation and to create domestic and regional jurisprudence in the ambit of women's human and sexual rights. ISLA aims to expand jurisprudence to establish a cumulative and progressive interpretation of women's human rights resulting in meaningful change in the lives of women. Insight document our learnings as we do strategic litigation work.

This publication examines defamation claims as a manifestation of violence against women which lacks adequate victim protections. These insights will include an overview of defamation laws in selected domestic contexts and in the international plane and interrogating existing deficiencies therein; comparative judicial responses to defamation cases against the backdrop of the #MeToo Movement, including an in-depth analysis of notable cases; and sharing and documenting identified solutions on how to protect women survivors who speak up from legal blowbacks initiated by their alleged perpetrators.

This is the product of a review of existing literature, analysis of human rights instruments and reflections from an ISLA violence against women in-depth seminar from 13 to 15 December 2021 in Mombasa, Kenya. It is intended for legal practitioners who provide assistance to women survivors in seeking legal redress against their alleged perpetrators. It may also serve as a guide to donors on how to increase funding structures in order to help women survivors overcome financial impediments in their quest to access justice.

It will therefore be useful for donors to understand the challenges that defamation suits generally pose in order to better inform their assessment of proposals in a more contextual manner. Emergency funders are also targeted in light of the roles which they can potentially play in supporting sword defamation litigation (that is, defamation counter-suits filed by victims, which is discussed at length in subsequent paragraphs) and women litigants who may face reprisals.

Ultimately, this publication intends to provide an understanding of what a holistic 'basket of care' entails,¹ as well as ascertaining and considering elements that are essential for proffering successful defences for women facing defamation claims from their attackers.

1.2. Methodology and structure of the research project

The development of this guide involved a combination of intensive desk research and information gathering from a similarly-themed in-depth seminar conducted in Mombasa, Kenya from 13 to 15 December 2021. Desktop research was used to inform the first aim of the research to provide a comprehensive review of the existing situation in respect of defamation claims and relevant defences. This normative analysis consolidates both legislative and jurisprudential frameworks.

This research study adopts a comparative approach, by interrogating the socio-legal contexts across the world and their similarities with the African context. To effectively do so, we have divided this research into five chapters as follows. The first expounds on the objectives of the guide, methodology and approach taken in developing the publication.

¹ This means a holistic and in-depth approach to solving the issue identified, and can include legal interventions, policy initiatives, public awareness, psycho-social support and financial empowerment.

Chapter two sets out the socio-legal contextual background precipitating the use of defamation suits against victims of sexual violence by their attackers while chapter three examines the general elements of defamation and courts' approaches in adjudicating on defamation, including balancing freedom of expression and right to reputation. We will also briefly discuss defences to defamation.

In the fourth chapter, we appraise specific cases and highlight how the courts interpreted each of the defences from both the global and African contexts. This exercise will enable us to identify commonalities and trends emerging from recent jurisprudence, including gendered stereotypes, including that women lie and late reporting of sexual assaults; rape myths; no requirement of demonstration of harm; subversion of laws originally intended to protect women; and conflation of criminal and civil processes.

The next chapter highlights important points on how litigators and courts can infuse a feminist legal analysis into defamation claims. To do so, we will surface gender bias in defamation laws and historicise feminist analysis and its connection to gendered censorship, including tracing on the work that feminist lawyers have done to show problems with gender neutrality and how freedom from violence acts as discrimination. This publication concludes with suggestions and opportunities for reform.

CHAPTER 2: Setting The Scene: An African Background

2.1. Socio-legal contextual background

Although #MeToo as a tool of activist organising against sexual violence began in 2007 with Tarana Burke,² the Hollywood#MeToo campaign gained momentum in October 2017 on Twitter where it focused on workplace sexual harassment in the United States of America (USA), particularly against white women in the entertainment industry.³ It has gradually expanded to encompass other industries, including politics, academia, technology and publishing.⁴

One of the main characteristics of the Hollywood #MeToo movement is the use of social media platforms by victims to publicly name their attackers. This use of what Deborah Tuerkheimer refers to 'unofficial reporting channels', that is, 'a collection of informal channels that circumvent the law and law-adjacent institutional structures'⁵ may have been precipitated by several factors, the foremost being the failure of criminal justice system to effectively address the needs of victims of sexual violence.

Social media platforms, on the other hand, have provided mechanisms in which survivors' needs and desires, to varying degrees, can be satisfied. Some of these needs include deterrence from further predation, validation of survivors' experiences, public apologies and other restorative measures.⁶ As Professor MacKinnon noted, '[t]his mass mobilization against sexual abuse, through an unprecedented wave of speaking out in conventional and social media, is eroding the two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims'.⁷

This use of unofficial reporting channels has also been utilised in sub-Saharan Africa even prior to the global #MeToo Movement. These include the #MyDressMyChoice protests in Kenya against the sexualisation of women's bodies,⁸ #BeingFemaleinNigeria which catalysed conversations among Nigerian women about everyday experiences of sexism⁹ and South Africa's #NakedProtests by black women activists against failure of universities to combat on-campus rape.¹⁰

² A Ohlheiser 'The woman behind "Me Too" knew the power of the phrase when she created it — 10 years ago' (*Washington Post*, 19 October 2017) <<https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/>>.

³ S Kannan & P Krishnakumar 'A Powerful Person Has Been Accused of Misconduct at a Rate of Nearly Once Every 20 Hours Since Weinstein' (*LA Times*, 29 December 2017) <<https://www.latimes.com/projects/la-na-sexual-harassment-fallout>>.

⁴ For more information, see for example P Cohen & T Hsu, 'Children's Book Industry Has Its #MeToo Moment' (*New York Times*, 15 February 2018) <<https://www.nytimes.com/2018/02/15/business/childrens-publishing-sexual-harassment.html>>; A Newcomb 'MeToo: Sexual Harassment Rallying Cry Hits Silicon Valley' (*NBC NEWS*, 23 October 2017) <<https://www.nbcnews.com/tech/tech-news/metoo-sexual-harassment-rallying-cry-hits-silicon-valley-n813271>>; J Disis 'The Media Men Who Have Been Accused of Sexual Misconduct' (*CNN Business*, 30 November 2017) <<https://money.cnn.com/2017/11/29/media/media-men-accused-of-sexual-misconduct/index.html>>; D Corey 'Here's a List of Political Figures Accused of Sexual Misconduct' (*NBC NEWS*, 19 December 2017) <<https://www.nbcnews.com/storyline/sexualmisconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821>>.

⁵ D Tuerkheimer 'Beyond #MeToo' (November 2019) 94(5) *New York Univ LR* 1146, 1190.

⁶ Ibid.

⁷ C MacKinnon '#MeToo Has Done What the Law Could Not' (*New York Times*, 4 February 2018) <<https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>>.

⁸ TF Ajayi '#MeToo, Africa and the politics of transnational activism' (*The Conversation*, 7 June 2018) <<https://africasacountry.com/2018/07/metoo-africa-and-the-politics-of-transnational-activism>>.

⁹ Ibid.

¹⁰ S Msimang 'South Africa's topless protesters are fighting shame on their own terms' (*The Guardian*, 5 May 2016) <<https://www.theguardian.com/world/2016/may/05/south-africas-topless-protesters-are-fighting-shame-on-their-own-terms>>.

However, with more women embracing the global #MeToo movement by naming perpetrators of sexual violence, often by way of social media platforms, there has been a counter-response by the alleged perpetrators who file litigations designed to punish and silence these women victims. The Time's Up Legal Defense Fund, which was founded to help workplace harassment victims cater to their legal bills, has up to 20 per cent of its caseload dealing with defamation suits against women victims.¹¹

In the African context, while the use of social media platforms to name perpetrators of violence has allowed for increased legitimisation of these claims by the MeToo movement, the backlash faced by those who disclose include civil and criminal defamation suits.¹² The larger #MeToo movement might be understood as a challenge to a system of sex discrimination and to institutions that engage in or perpetuate it. Unfortunately, in the male dominated courts where secondary victimisation is rife, the legal standards that are applicable do not take cognisance of the gains being made in the social movement.

One of the foremost social impacts of these suits is the chilling effect not only to the individual victim but also to other women who wish to name their attackers.¹³ Even if the victim is eventually successful in defending the claim, the lengthy and expensive court process may dissuade potential victims from coming forward.

This was further elaborated by Deborah Tuerkheimer, in part, that:

In an ironic twist, a survivor who deliberately eschews formal reporting channels for whatever reason (but often, to avoid the credibility discount) may eventually wind up in a courtroom anyway, telling her story under the most formal conditions possible, having expended enormous resources along the way, in exclusive service of beating back a claim that she lied about her abuse. *With defamation law lurking in the background, no survivor could be faulted for deciding to forsake unofficial reporting altogether and to keep silent about her abuse.*¹⁴

This observation finds support in David B Oppenheimer's empirical study which examined cases of defamation from around the world launched by men in response to women speaking out about their sexual harassment. This study found that 'defamation law has been weaponized to silence women who complain about sexual harassment, and others who report misconduct'¹⁵ and led him to conclude that 'if the law fails to protect the right to speak out about abuses like sexual harassment and violence, those who benefit from unequal power will use that power to sustain inequality, including gender inequality'.¹⁶

The chilling effect of the threat of defamation suits is compounded by the social context within which this work would ensue. Women in African countries grapple with historical, patriarchal notions of what a woman's 'place' is.¹⁷ The gendered construction of men and women's sexuality is seen as the root of the high rate of sexual violence.

¹¹ M Pauly 'She Said, He Sued: How libel law is being turned against MeToo accusers' (*Mother Jones* March/April 2020) <<https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/>>.

¹² See, for example, *Wambui Mwangi v Tony Mochama and Another* Civil Appeal No 507 of 2019 (High Court of Kenya); *Carlton Douglas Kasiye v Sheena Ahumuza Bageine aka Tasha* Civil Suit No 25 of 2020 (Uganda High Court); *Ian Njagi Njeru v Nyaguthii Kioi* Case No 97 of 2020 (High Court of Kenya).

¹³ A Gouws '#MeToo isn't big in Africa. But women have launched their own versions' (*The Conversation*, 7 March 2019) <<https://theconversation.com/metoo-isnt-big-in-africa-but-women-have-launched-their-own-versions-112328>>.

¹⁴ Tuerkheimer (note 5 above) (emphasis added).

¹⁵ D Openheimer 'Defamation Law is Being Weaponised to Destroy the Global #MeToo Movement: Can Free Speech Protections Help Counter the Impact?' (*The Leaflet*, 21 February 2021) <<https://www.theleaflet.in/defamation-law-is-being-weaponised-to-destroy-the-global-metoo-movement-can-free-speech-protections-help-counter-the-impact/>>.

¹⁶ Ibid.

¹⁷ Samuel O Okafor 'Patriarchy and Women Plight in Africa: The Consequences of Living in Passivity' (2020) 17 *Bangladesh e-Journal of Sociology* 54.

From this perspective, patriarchal social conditioning results in the perception that a good woman would not easily consent to sexual intercourse and it is the role of the man to persuade her to engage in sexual activity with him.¹⁸ This creates an environment that excuses male sexual aggression as being normal gender relations and where only extreme cases of brutal abuse are considered socially reprehensible. As a result, a woman speaking out against her abuser is faced with social ridicule and negative public scrutiny.¹⁹

Furthermore, women victims may fear the shame of being found liable for a defamation claim, which suggests dishonest character and tarnishes their reputation.²⁰ For example, an alleged victim who spoke out about a sexual assault by Cristiano Ronaldo, despite an agreement to settle the case, faces not only a countersuit for defamation but also widespread public shaming orchestrated by the footballer's public relations team.²¹

Additionally, with defamation suits, perpetrators can detour around rape shield laws which are designed to prevent admission of victims' past sexual histories as evidence in sexual assault cases since most of these laws do not extend to civil proceedings.²² Therefore, in civil trials, a plaintiff-perpetrator may be allowed to submit victim-defendant's past sexual encounters as part of his evidence to discredit the victim's account of sexual assault.

2.2. Spotlight on emerging cases from Africa

While the dominant narrative surrounding defamation suits and sexual violence following the #MeToo Movement has focused on the Global North, our research indicates that courts across Africa have also been grappling with similar questions. While these cases shall be continually quoted throughout this paper, a quick summary has been prepared below.

In Eastern Africa, we have witnessed alleged perpetrators institute/threaten to institute defamation claims against their victims once they are publicly named. In *Wambui Mwangi v Tony Mochama and Another*, the plaintiff instituted a defamation suit against the defendant-victim after being publicly named by her on Twitter as a sexual predator.²³

The court ruled in favour of the plaintiff, who alleged defamation against women victims he was accused of harassing, and awarded an extraordinarily high amount of damages against the defendants. In doing so, the court opined that the defamation was not justified in that the first defendant, the victim, had failed to establish that the sexual assault occurred. In making this ruling, the court tested the evidence of the truth using the 'beyond reasonable doubt standard of proof' to find against the defendants, notwithstanding the fact that the matter before the court was a civil and not a criminal case. The case is currently under appeal.

Also, in *Ian Njagi Njeru v Nyaguthii Kioi*, the plaintiff filed a defamation suit before the Kenyan courts against the victim-defendant after she named him on social media as a rapist.²⁴ The case is ongoing.

¹⁸ M Chiweshe 'African men and feminism: Reflections on using African feminism in research' (2018) 32(2) *Agenda* 76.

¹⁹ Ibid.

²⁰ S Weisbrot 'The Impact of the #MeToo Movement on Defamation Claims Against Survivors' (2020) 23 *CUNY LR* 332.

²¹ K Ritter 'Lawyer: Ronaldo Rape Accuser Was "Emotionally Fragile" at Time of Settlement' (Associated Press, 3 October 2018 <<https://perma.cc/Z4HF-GEWD>>).

²² LM Slyder 'Rape in the Civil and Administrative Contexts: Proposed Solutions to Problems in Tort Cases Brought by Rape Survivors' (2017) 68 *CASE W RES LR* 543, 552.

²³ *Wambui Mwangi v Tony Mochama and Another* (note 12 above).

²⁴ *Ian Njagi Njeru v Nyaguthii Kioi* (note 12 above).

Conversely, in Uganda, another related trend has emerged, that is, the use of cyber harassment laws against the victim. In *Carlton Douglas Kasirye v Sheena Ahumuza Bageine aka Tasha*,²⁵ the plaintiff filed a criminal case under the country's cyber-harassment laws against the defendant who had used Twitter to name him as a sexual perpetrator. In addition, the plaintiff then filed a defamation case against her, which is currently ongoing.

Numerous cases have also emerged from Southern Africa. In an unsuccessful defamation claim, *Melvin Booysen v June Dolly Major*,²⁶ the applicant, an Anglican priest, sued the respondent who had publicly named him as her attacker in 2002 on Facebook.²⁷ However, the court disagreed and found that the respondent-victim had a right to air out her grievances on social media, taking into account 'the rape culture in South Africa'. Further to this, the Court found that there was no demonstrable harm occasioned to the plaintiff as he still maintained his position in the church despite the allegations.

A contrary conclusion was drawn by the High Court (Western Cape) in *Segerman v Peterson*,²⁸ where the plaintiff approached the court for a protection order against the defendant-victim after accusations of his assault against her were made public. In granting the order, the court erroneously drew a causal link between her private utterances and the supposed 'harm' to the plaintiff and issued a final protection order.

The victim-defendant was successful in the appeal as the judge found that the distributors of the impugned allegations of sexual harassment were made by third parties and not the victim herself. In any event, the judge further held that it was evident that the victim-defendant did not have any intention to harm the reputation of the alleged perpetrator since she made the impugned assertions in a private group.²⁹

Similarly, in *Mdlekeza v Gallie*,³⁰ where the defendant-victim tweeted that the plaintiff, a well-known professor, had attempted to rape her, the High Court of South Africa (Cape Town), guided by debunked and harmful gender stereotypes, granted a heavy-handed judgment, including exorbitant costs, public apology and protection order.

While we have not traced similar cases in Western Africa, there are instances in which social media organising around a victim's experience have received judicial attention. In Gambia, #IAmToufah was used to galvanise support around Toufah Jallow, the estranged wife of the country's dictator, Yahyeh Jammeh, who testified before the state's Truth, Reconciliation and Reparations Commission about the sexual abuse he subjected her to.³¹ Her testimony was included as part of the Commission's Report³² recommending the prosecution of the disgraced dictator.

²⁵ *Carlton Douglas Kasirye v Sheena Ahumuza Bageine aka Tash* (note 12 above).

²⁶ *Melvin Booysen v June Dolly Major* (2021) Case Number 5043/2021.

²⁷ *Ibid* para 3.

²⁸ *Segerman v Peterson* (2021) Case Number H1028/19.

²⁹ *Ibid* para 27; See also, *Segerman v Peterson* Case A177/21 (2022)

³⁰ *Mdlekeza v Gallie* 15490/2020 (High Court of South Africa (Western Cape Division)).

³¹ E Teitel 'I am Toufah: The Toronto woman who stood up to a dictator and launched a West African MeToo movement' (*Toronto Star*, 30 January 2022) <<https://www.thestar.com/news/canada/2022/01/30/i-am-toufah-the-toronto-woman-who-stood-up-to-a-dictator-and-launched-a-west-african-metoo-movement.html>>.

³² Truth Reconciliation and Reparations Commission, 'Final Report – Sexual and Gender Based Violence (Volume 10, 2022) 19 – 26' <<chromeextension://gphandlahdpffmccakmbngmbnjiihahp/https://www.justiceinfo.net/wp-content/uploads/Volume-10-Sexual-and-Gender-Based-Violence.pdf>>

CHAPTER 3: Online Defamation, Defences and Sexual Violence

3.1. Defamation, freedom of expression and right to reputation

As noted above, legal responses to the #MeToo Movement have typically been within the context of defamation. While defamation laws vary from country to country, most jurisdictions have developed means in which the plaintiff may bring either criminal or civil action against the defendant for alleged defamatory words. Defamation incorporates the torts of libel (written words) and slander (spoken words).³³

With slight variation depending on selected jurisdictions, in general, to prove defamation, the plaintiff must establish 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.³⁴ Common law on defamation has traditionally been in favour of the plaintiff, meaning that the courts more often than not lean towards reputation over freedom of expression.³⁵ Justifications for elevating reputation over freedom of expression range from preservation of dignity to sociality reasons.³⁶ In making a dignity-based justification, Post argues that 'our own sense of self-worth ... is perpetually dependent upon the ceremonial observance by those around us of rules of deference and demeanour',³⁷ and thus, defamation law, as the primary means by which the law protects reputation, is thus a mechanism for policing these rules and, in turn, protecting the individual's interest in dignity.³⁸

In making a sociality justification, Howarth explains, in part, that '[i]nterference with a person's ability to associate with other people, which is the most obvious effect of damaging a person's reputation, not only brings indirect disadvantages in terms of lost opportunities to gain access to resources, it also causes direct damage in terms of a sustained reduction in well-being'.³⁹

Gradually, judicial actors have emphasised the need for a more balanced approach between freedom of expression and reputation. The European Court of Human Rights (ECtHR), for example, allocated equal weight to both freedom of expression and privacy. This does not mean that securing this balance has been linear and consistent.

In *Axel Springer AG v Germany*,⁴⁰ the ECtHR noted, in part:

When examining the necessity of an interference in a democratic society in the interests of the 'protection of the reputation or rights of others', the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8.⁴¹

³³ RA Smolla *Law Of Defamation* 2 ed (2019) s 8:5.

³⁴ See, for example, The Defamation Act, ch 36, Laws of Kenya.

³⁵ RL Weaver, AT Kenyon, DF Partlett & CP Walker *The Right to Speak III: Defamation, Free Speech and Reputation* (2006) 35–36.

³⁶ T Aplin & J Bosland 'The uncertain landscape of Article 8 of the ECHR: the protection of reputation as a fundamental human right?' in A Kenyon *Comparative Defamation and Privacy Law* (2016) ch 13, 267.

³⁷ RC Post 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California LR* 691, 692.

³⁸ Ibid.

³⁹ Aplin & Bosland (note 36 above) quoting D Howarth 'Libel: Its Purpose and Reform' (2011) 74 *Modern LR* 845.

⁴⁰ *Axel Springer AG v Germany* Application No 39954/08 (European Court of Human Rights, Grand Chamber, 2012).

⁴¹ Ibid para 84.

Similarly, in *Agnès Uwimana-Nkusi & Saidati Mukakibibi v Rwanda*,⁴² the African Commission on Human and Peoples' Rights (ACHPR) acknowledged that while a state may legitimately restrict the right to freedom of expression, this limitation must be prescribed by law, serve a legitimate public interest and be strictly necessary to achieve such interest.⁴³ In making this determination, the ACHPR reiterated that a state must take the least intrusive measure to achieve the purpose and that the punishment should be proportionate to the offence.⁴⁴

3.2. Defences to defamation and sexual violence

The Hollywood #MeToo Movement has brought a new dimension into the traditional understanding of defamation through the use of online platforms. This movement, which is chiefly characterised by the use of social media platforms to publicly expose perpetrators, raises legal questions about the role of these technological sites within the larger context of defamation.

Reflecting on the need for courts to develop the common law where infringements of privacy take place in the social media Willis J held that:

It is the duty of the courts harmoniously to develop the common law in accordance with the principles enshrined in our Constitution. The pace of the march of technological progress has quickened to the extent that the social changes that result therefrom require high levels of skill not only from the courts, which must respond appropriately, but also from the lawyers who prepare cases such as this for adjudication.⁴⁵ ... The law has to take into account changing realities not only technologically but also socially or else it will lose credibility in the eyes of the people. Without credibility, law loses legitimacy. If law loses legitimacy, it loses acceptance. If it loses acceptance, it loses obedience. It is imperative that the courts respond appropriately to changing times, acting cautiously and with wisdom.⁴⁶

Online defamation has evolved into a distinct area of litigation in view of the evolving technological landscape. This form of defamation may be understood as any person who puts information on the web which is obscene, lewd, lascivious, filthy or indecent, with intent to annoy, abuse, threaten or harass another person.⁴⁷

In the South African context, courts have found that social media is qualitatively different from electronic news media despite the fact that news of significance may feature on both.⁴⁸ While this distinction can be argued to be a pragmatic one, the consideration is to what extent the publishers of information on perpetrators of sexual violence can seek to rely on the defences traditionally available to the media.

Whatever the case, it seems as if defences to online defamation are similar to defences in traditional forms of defamation. These are justification (the truth of the statement), fair comment (whether the statement was a view that a reasonable person could have held) and privilege (whether the statements were made in Parliament or in court, or whether they were fair reports of allegations in the public interest).

⁴² *Agnès Uwimana-Nkusi & Saidati Mukakibibi v Rwanda* Communication No 462/12.

⁴³ *Ibid* para 4.

⁴⁴ *Ibid*.

⁴⁵ *H v W* (12/10142) [2013] ZAGPJHC 1 para 8.

⁴⁶ para 31.

⁴⁷ The Communications Decency Act 1996 (CDA) (United States Enactment).

⁴⁸ *H v W* (note 45 above) para 35.

Justification, that is *truth*, is an absolute defence to any claim of defamation and is thus preferred by defendant-victims in defending themselves against defamation suits.⁴⁹ Justification as truth is also preferred as it allows survivors some flexibility because minor inaccuracies do not automatically render the assertion of sexual assault as untruthful as long as the substance, gist or sting of the charge is generally accurate.⁵⁰

However, the burden of proof in defamation cases can make this defence challenging, as the plaintiff needs only to put forth some evidence of a statement of fact by the defendant that can be proven false with the plaintiff's *prima facie* case.⁵¹ In other words, defamation law puts the burden of proving the truth of allegedly defamatory statements on the defendant, rather than the plaintiff.

This burden is made worse by the fact that the defendant-victims are subjected to improperly high standards of proof in these suits, that is, beyond a reasonable doubt rather than proof on a balance of probabilities.⁵² Put differently, we have witnessed that defamation proceedings against the backdrop of the #MeToo Movement have required victims to prove their truth with evidence beyond their testimony, which has, more often than not, resulted in loss.

Another challenge to this defence is evidentiary as this defence requires the survivor to publicly present the details of their traumatic experience to prove their own truthfulness, when there is often minimal evidence of the violence other than the survivor's own testimony.⁵³

A second possible defence to online defamation may be opinion. This defence arises where a statement cannot be independently verified as true or false. However, statements that contain both opinion and fact may be actionable where the facts alleged are defamatory and false. This approach provides a specific hurdle to the use of this defence in #MeToo case since precedent, such as *Giuffre v Maxwell*⁵⁴ and *Green v Cosby*,⁵⁵ have illustrated that a survivor's allegations of abuse are provable as true or false and are not matters of opinion.

Another possible defence is *public interest*. This defence arises in two main ways depending on the laws governing selected jurisdictions as follows. One, public interest defence can arise as an express provision in relevant legislation, as in the United Kingdom (UK) Defamation Act 2013. Alternatively, public interest may be read into express defences, such as *qualified privilege* or given as a justification for anti-strategic lawsuit against public participation (SLAPP) suits as explained below.

Section 4 of the UK Defamation Act⁵⁶ lists public interest as a defence to defamation, by providing, in part that '[i]t is a defence to an action for defamation for the defendant to show that the statement complained of was, or formed part of, a statement on a matter of public interest; and the defendant reasonably believed that publishing the statement complained of was in the public interest'.

Public interest applies regardless of the truthfulness/falsity of the statement, meaning it can still be pleaded whether or not the statements complained of are untrue provided the defendant

⁴⁹ M Pollack 'Litigating Defamation Claims' (2013) 128 AM JUR TRIALS 1, 2.

⁵⁰ *Jackson v Mayweather* (Ct App 2017) 10 Cal App 5th 1240, 1261.

⁵¹ S Weisbrot 'The Impact of the #MeToo Movement on Defamation Claims Against Survivors' (2020) 23 CUNY LR 332.

⁵² Tuerkheimer (note 5 above) 1190.

⁵³ See generally *McKee v Cosby*, 874 F 3d 54, 63 (1st Cir 2017) (quoting *McKee v Cosby* 236 F Supp 3d 427, 442 (D Mass 2017).

⁵⁴ *Giuffre v Maxwell* 165 F Supp 3d 147, 156 (SDNY 2016).

⁵⁵ *Green v Cosby* 138 F Supp 3d 114, 133 (D Mass 2015).

⁵⁶ Defamation Act 2013, ch 26 (United Kingdom).

satisfies the underlying requirements of the defence.⁵⁷ In *Economou v De Freitas*,⁵⁸ where the defendant was a father whose daughter committed suicide following the institution of private prosecution by the claimant who she accused of raping her, the court noted that for a belief to be reasonable in a public interest defence, it would be necessary for a defendant to carry out 'such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case'.⁵⁹

Public interest is also sometimes included as part of the test establishing the defence of *qualified privilege*. This defence seeks to draw a balance between private right to reputation and public right of freedom of expression which has been established as an indispensable feature of a free and democratic society as well as a major tool for public accountability.⁶⁰

The defence is enshrined at common law and in legislation in multiple jurisdictions, including, Kenya,⁶¹ South Africa⁶² and Nigeria.⁶³ In *Reynolds v Times Newspapers*,⁶⁴ the House of Lords went on further to set out a criteria for determining whether a publication is subject to qualified privilege to include '[t]he seriousness of the allegation; the nature of the information, and the extent to which the subject matter is a matter of public concern and the source of the information'.⁶⁵

Qualified privilege requires a *common interest* between the maker and recipient of the statement. In *Onah v Schlumberger*,⁶⁶ the Supreme Court in Nigeria found that '[t]he defence of qualified privilege is available when there is a common interest between the maker of a defamatory statement and the person to whom it is made. There must be a reciprocity of interest'.⁶⁷

This 'common interest' threshold has been applied by courts in cases where survivors of gender-based violence are facing defamation suits, to cover friends or family within survivors' support systems as well as in defined communities like education systems, businesses or religious organisations.⁶⁸

Another way in which public interest may provide a defence in defamation claims is through anti-SLAPP suits. Anti-SLAPP suits are instituted to deter lawsuits that interfere with the constitutional rights of freedom of expression and which are meant to unlawfully interfere with the exercise of these rights and further where the plaintiff's purpose of their lawsuit is solely to deplete the defendant's energy and drain their resources.⁶⁹

Although anti-SLAPP statutes are unique to the USA, lawsuit mechanics emanating from these statutes may be useful to other jurisdictions. Anti-SLAPP suits provide for the defence of public interest since they are aimed at protecting any speech that is made in any forum in connection

⁵⁷ Ibid.

⁵⁸ *Economou v De Freitas* [2016] EWHC 1853 (QB).

⁵⁹ Ibid 144–152.

⁶⁰ *Kagwiria Mutwiri Kioga & another v Standard Limited & 3 others* [2015] eKLR.

⁶¹ See Defamation Act, ch 36, Laws of Kenya, s 7.

⁶² See, for example, *De Waal v Ziervogel* 1938 AD 112, 121-123; *Clover SA (Pty) Limited and Another v Sintwa* (CA2011/2015) [2016] ZAECHGHC 77.

⁶³ See, for example, *Iloabachie v Iloabachie* (2005) LPELR-1492(SC).

⁶⁴ *Reynolds v Times Newspapers* [1999] 4 ALL ER 609.

⁶⁵ Ibid.

⁶⁶ *Onah v Schlumberger (Nig) Ltd* (2018) 17 NWLR pt 1647 p 84, 102 paras A-C.

⁶⁷ See also Restatement (Second) of Torts § 596 (Am Law Inst 1977, USA) which establishes that a publication is conditionally privileged: 'If the circumstances lead any one of the several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know'.

⁶⁸ S Weisbrot 'The Impact of the #MeToo Movement on Defamation Claims Against Survivors' (2020) 23 CUNY LR 332, 349.

⁶⁹ GL Blum 'Annotation, Application of Anti-SLAPP ("Strategic Lawsuit Against Public Participation") Statutes to Invasion of Privacy Claims' (2013) 85 ALR 6th 475, § 2.

with any issue of public interest. or public concern.⁷⁰ In *Bensussen v Tadros*,⁷¹ where a DJ sued two women for defamation after they claimed that he had sexually assaulted them, the court found that questions around violence against women amount to a matter of public interest.⁷²

This approach was also adopted by the Delhi High Court of India in *Mobashar Jawed Akbar v Priya Ramani* where the court reasoned that ‘the right of reputation cannot be protected at the cost of the right of life and dignity of women, and right of equality before the law and equal protection of the law guaranteed under the Indian Constitution. The woman has a right to put her grievance at any platform of her choice and even after decades’.⁷³

In addition, the Supreme Court of the State of New York, Appellate Division, First Judicial Department, in *Sagaille v Carrega*⁷⁴ reasoned that such defamation suits may constitute a form of retaliation against those with the courage to speak out since most survivors cannot afford years of litigation, nor do they want to be retraumatized through the discovery or endure continued unwanted interaction with the person alleged to have assaulted them through the litigation process.

Similarly, the Court of Appeal of the State of California found in *Wentworth v Hemenway* that the plaintiff who filed a defamation lawsuit against a woman who accused him of sexual harassment brought the lawsuit to silence the defendant thus unduly interfering with her free speech rights on an important issue of public concern.⁷⁵

It is also important to note an emerging defence strategy of defamation counter-suits. While not an express defence, women survivors have at certain instances instituted defamation countersuits against their perpetrators. An example is *Giuffre v Maxwell*,⁷⁶ where the court held that Ghislaine Maxwell’s claim that Virginia Giuffre lied when she claimed Maxwell was involved in her sexual abuse was actionable in a defamation suit. Giuffre alleged that Maxwell participated in Jeffrey Epstein’s sex trafficking ring, which resulted in repeated sexual abuse for Giuffre when she was a minor.

In response, Maxwell stated through her agent that these allegations ‘are obvious lies’. Subsequently, Giuffre filed a defamation claim against Maxwell which the court found that the impugned words were actionable in a defamation claim.

This strategy has produced mixed results. In *McKee v Cosby*,⁷⁷ the Court ruled against the victims who brought a defamation countersuit, finding that the said victims were actually public figures, despite not being household names. Following this, the Court found that the victims had failed to prove the more stringent ‘malice’ rather than ‘negligence’ on Cosby’s part in calling them liars.

⁷⁰ RA Smolla, *Rights And Liabilities In Media Content: Internet, Broadcast, And Print* 2 ed (2019) § 6:34.

⁷¹ *Bensussen v Tadros* No BC682869 2018 WL 2390162 (Cal Super Ct 8 March 2018), *1.

⁷² *Ibid* *6; *Saunders v Jannusi* No B292287 2020 WL 1300880 (Cal Ct App 19 March 2020), *4.

⁷³ *Mobashar Jawed Akbar v Priya Ramani* (17 February 2021) (The Court of Shri Ravindra Kumar Pandey, New Delhi, India).

⁷⁴ *Sagaille v Carrega* 2021 NY Slip Op 1369 (NY App Div 2021) Index No 154010/18 Appeal No 13314 Case No 2020-02369 (9 March 2021) (US) p 2, col 2, §3.

⁷⁵ *Wentworth v Hemenway* (5 June 2019) (US) Court of Appeal of State of California, p 9, col 1 §1 and col 2, §2.

⁷⁶ *Giuffre v Maxwell* (note 54 above).

⁷⁷ *McKee v Cosby* (note 53 above).

CHAPTER 4: Common Trends on Defamation and Freedom From Violence

As indicated in previous section of this work, there is a troubling number of cases post-#MeToo organising which evidence the weaponization of existing legal claims, including defamation, against survivors of sexual and gender violence by their attackers. This section examines relevant caselaw and attempts to isolate common trends emanating from the said caselaw. These trends include harmful reliance by the courts on gendered stereotypes; continued perpetuation of rape myths; conflation of rules of procedure governing civil and criminal justice systems; subversion of laws originally intended to protect survivors and no requirement for demonstration of harm.

4.1. Gendered stereotypes

One key observation from emerging cases is the reliance by the courts on disproved gendered stereotypes in respect of sexual assault. One of these problematic stereotypes is the failure/purported delay to report sexual assault to the police authorities.

In *Wambui Mwangi v Tony Mochama and Another*,⁷⁸ where the alleged perpetrator brought a defamation suit against two women, his alleged victim and her friend who tweeted about the alleged incident, the Magistrate's Court at Nairobi, in finding for the plaintiff, took exception to the fact that the defendants failed to report the incident to the police authorities. To this end, the court erroneously reflected that '[t]he Defendants do not strike me as illiterate or ignorant person. They ought to have known better. They should have known that it is reckless and ill-advised to resort to social media with damaging information concerning a person without any evidence or legal basis'.⁷⁹

In *Mdlekeza v Gallie*,⁸⁰ where the defendant-victim tweeted that the plaintiff had attempted to rape her, the High Court of South Africa (Cape Town) placed undue emphasis on the fact that the defendant-victim had reported the said incident to the police authorities approximately six years after the incident and after posting the impugned tweet.⁸¹ Contrary to the courts' findings, late or non-reporting of sexual violence is not uncommon and thus should not be given unwarranted attention in such cases. According to the USA National Crime Victimization Survey, two out of three sexual assaults are not reported to the police partly due to a well-held and often-accurate belief by victims that the police will take little to no action against the perpetrator.⁸²

Similar findings have been made in Kenya where the National Crime Research Center found that 29.1 per cent of women victims reported that no action was taken by the authorities after reporting sexual and gender-based violence (SGBV) cases.⁸³ In South Africa, the Medical Research Council study on sexual violence indicated that only one in 13 women raped by a non-partner reported the matter, while a scant one in 25 women raped by their partners reported the matter to the police.⁸⁴

⁷⁸ *Wambui Mwangi v Tony Mochama and Another* (note 12 above).

⁷⁹ Ibid.

⁸⁰ *Mdlekeza v Gallie* (note 30 above).

⁸¹ Ibid para 31.

⁸² Department of Justice, Office of Justice Programs, Bureau of Justice Statistics 'National Crime Victimization Survey 2015-2019' (2020); Federal Bureau of Investigation 'National Incident-Based Reporting System 2012-2016' (2017); Department of Justice, Office of Justice Programs, Bureau of Justice Statistics 'Felony Defendants in Large Urban Counties 2009' (2013).

⁸³ National Crime Research Centre 'Gender Based Violence In Kenya' (2014) <http://crimeresearch.go.ke/wp-content/uploads/2018/02/wwwroot_publications_Gender-Based-Violence-in-Kenya.pdf>.

⁸⁴ M Machisa et al 'The War at Home – GBV Indicators Project' (Gender Links 2010).

Reasons for not reporting include fear of not being believed or being accused of lying, fear of retaliation or intimidation by the offender, especially when combined with a lack of confidence that the legal process will result in a conviction, fear of legal processes, including experiencing rudeness and poor treatment by the police, fear of having to relive the trauma in court and during the investigation, fear of the power and authority of the abuser and fear of ostracism or ridicule by peers.⁸⁵

As Deborah Tuerkheimer notes, '[g]iven the systemic discounting of complainant credibility at every stage of the criminal process, it should come as no surprise that most survivors do not report their abuse to the police'.⁸⁶ Therefore, from this we can conclude that the courts' conclusions in apparently reading deceit into non-reporting amounts to assignment of unwarranted and unhelpful attention to harmful gendered stereotypes.

4.2. Perpetuation of rape myths

We have also noted the continued perpetuation of rape myths in the adjudication of defamation claims against survivors of violence by their attackers. Rape myths may be understood as 'the false cultural beliefs that mainly serve the purpose of shifting the blame from perpetrators to victims'⁸⁷ which subsequently contribute to the hesitation by victims to report their abuse to support systems, such as the social network of the victims, legal services and police.⁸⁸

Most rape myths are concerned with the behaviour of the victim before, during and after the assault and include assertions, such as 'the victim is responsible'; 'women say no but really mean yes'; 'women can always say no, or resist forced sex' and 'once men are sexually aroused, sex is inevitable'.⁸⁹

Other discredited assumptions include that women survivors are actually attention-seeking liars; inebriated victims are to blame for their abuse, there is need for physical force to prove rape and stranger rape is the most common (if not the only) form of rape.⁹⁰

These rape myths significantly influenced the content of rape laws. For one, many laws on sexual violence required corroboration before the offence could be proved before the courts.⁹¹ Also, some laws expressly provided that rape could only be proved once it was evidenced that the act was conducted using physical force.⁹² Further to this, many rape laws provided that the burden of proving lack of consent was to be borne by the woman victim.⁹³

The criminal justice system has undergone significant reform in this respect. In Kenya, for example, s 42(2) of the Sexual Offences Act⁹⁴ amended the Evidence Act⁹⁵ to remove the requirement for corroboration in sexual offences and now reads: 'Where in a criminal case involving a sexual

⁸⁵ L Vetten 'Rape and other forms of sexual violence in South Africa' (2014) *Institute for Security Studies, Policy Brief* 72.

⁸⁶ D Tuerkheimer 'Incredible Women: Sexual Violence and the Credibility Discount' (2017) 166 U PA LR 1.

⁸⁷ E Suarez & TM Gadalla 'Stop Blaming the Victim: A MetaAnalysis on Rape Myths' (2010) 25(11) *J of Interpersonal Violence* 2010.

⁸⁸ For more information, see D Tuerkheimer 'Rape On and Off Campus' (2015) 65 *Emory LJ* 1, 1 - 15; KA Lonsway & J Archambault 'The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform' (2012) 18 *Violence Against Women* 145, 154-157; KE Boakye 'Attitudes Toward Rape and Victims of Rape: A Test of the Feminist Theory in Ghana' (2009) *J of Interpersonal Violence* 1633.

⁸⁹ R Jewkes, L Vetten, R Jina, N Christofides, ZR Sigsworth & L Loots 'What we know and what we don't – Single and multiple perpetrator rape in South Africa' (2012) 41 *SA Crime Quarterly* 11-19; R Jewkes, Y Sikweyiya, R Morrell & K Dunkle 'Gender Inequitable masculinity and sexual entitlement in rape perpetration South Africa: Findings of a crosssectional study' (2011) *Plos One* 6 (12):1-11 e29590.

⁹⁰ See, for example, Cambridge Rape Crisis Centre, 'Rape Myths' <<http://cambridgerapecrisis.org.uk/rape-myths>>.

⁹¹ See, for example, now-repealed, Evidence Act, ch 80, Laws of Kenya, s 124.

⁹² CS Deese 'Rape and the Requirement of Force: Is There Hope For Pennsylvania after Pennsylvania v Berkowitz?' (1995) 4(1) *J of Gender and Law* 167.

⁹³ For further discussion, see DG Kilpatrick 'Rape and Sexual Assault' National Violence Against Women Prevention Research Center, Medical University of South Carolina <<https://mainweb-v.musc.edu/vawprevention/research/sa.shtml>>.

⁹⁴ Sexual Offences Act No 3 of 2006, Laws of Kenya.

⁹⁵ Evidence Act, ch 80, Laws of Kenya.

offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth'.⁹⁶

Physical force is no longer a requirement to prove sexual violence in many domestic contexts. In *Pennsylvania v Irvin*,⁹⁷ a defendant argued that his rape conviction should be overturned because his acquittal on an aggravated assault charge precluded any finding of forcible compulsion.⁹⁸ The Pennsylvania Superior Court rejected this argument, holding that lack of consent is sufficient to support a rape conviction if the victim was induced by threats or force to submit without physical resistance.⁹⁹

From the cases identified, this notable legal reform is rarely taken into account by judges in defamation claims. In *Wambui Mwangi v Tony Mochama and Another*,¹⁰⁰ the court relied on the fact the defendant-victim, Shaijla Patel, could not have been telling the truth due to adduced photographic evidence taken after the event showing her smiling alongside the plaintiff.

In *Mdlekeza v Gallie*,¹⁰¹ the court put undue emphasis on the inebriated state of the parties involved, the refusal of the defendant-victim to engage with the alleged perpetrator when he allegedly attempted to apologise and the defendant-victim's insistence to post the incident on social media platforms contrary to her lawyer's advice.

Alleged perpetrators also advance similar arguments in their pleadings. In *Ian Njagi v Nyaguthii Kioi*,¹⁰² the plaintiff argued that the alleged rape was, in his opinion, consensual sex as both he and the defendant-victim were in a relationship. In effect, the plaintiff, in this case, sought to rely on the debunked myth that rape does not occur in the context of romantic relationships.¹⁰³

It seems that, despite progress at least in some respects in criminal justice, multiple rape myths subsist in the context of defending women survivors against defamation claims. These myths bear not only individualised consequences for the defendant-victim but also actively contributes to the perpetuation of rape culture. As Pumla Dineo Gqobla writes:

It is also important to note that rape myths do dangerous work. They can embolden perpetrators and re-traumatise victims and survivors. Rape myths and excuses are at the heart of what is keeping rape culture intact ... it follows that we take up the challenge to constantly debunk rape myths wherever we encounter them because all gender-based violence is brutality, a form of gender war against survivors' bodies and psyches.¹⁰⁴

⁹⁶ Ibid s 124.

⁹⁷ *Pennsylvania v Irvin* 393 A 2d 1042, 1044 (PA Super Ct 1978).

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ *Wambui Mwangi v Tony Mochama and Another* (note 12 above).

¹⁰¹ *Mdlekeza v Gallie* (note 29 above).

¹⁰² *Ian Njagi v Nyaguthii Kioi* (2021) (ongoing case)

¹⁰³ For more information, see SB Fakunmoju et al 'Rape Myth Acceptance: Gender and Cross-National Comparisons across the United States, South Africa, Ghana, and Nigeria' (Society for Social Work and Research 23rd Annual Conference, San Francisco, January 2019) <<https://ujcontent.uj.ac.za/vital/access/services/Download/uj:43861/SOURCE1?view=true>>.

¹⁰⁴ P Dineo Gqola *Rape: A South Africa Nightmare* (2015) ch 7.

4.3. Conflation between criminal and civil processes

Recent cases on defamation cases in the context of gender violence have also illustrated a disturbing trend where civil courts adjudicating on these claims sometimes are guided by criminal justice rules of evidence and procedure. This reliance may be legal, that is, applying the relevant standard of proof; and factual reliance, which includes placing undue emphasis on the outcome of any criminal justice process.

One of the most basic tenets of criminal processes is that the state has the duty to establish its case to the court beyond a reasonable doubt.¹⁰⁵ On the contrary, the standard required in civil cases is demonstrably lower, where the parties are required to establish the alleged facts on a balance of probabilities.¹⁰⁶ This standard is enshrined in common law and applies in all cases, even where aspects of criminal law arise before a civil court,¹⁰⁷ as in these instances, where defamation claims are closely related to sexual violence, which is in itself a crime.

In adjudicating in defamation suits, the civil court has sometimes relied on the outcome of criminal justice process in making its decision. Put differently, the civil court may at times make reference to the process in the criminal court division despite its irrelevance to the defamation suit. If the outcome in the latter division is unfavourable to the defendant-victim's case, the civil court judge will take this as evidence of the overall weakness of her defences in civil court and thus rule in her favour.

In *Wambui Mwangi*, the civil court took failure of the police to institute an investigation against the alleged perpetrator as evidence of his innocence and ruled in his favour.¹⁰⁸ This is despite the fact that criminal justice process, as discussed above, has a higher threshold of proof than the civil one.

Similarly, in *Segerman v Peterson*, the court cast doubt on the victim's testimony that she had been raped not only by the plaintiff in the current case but also by previous lovers because she had failed to report the incidents to the police.¹⁰⁹

4.4. Subversion of laws intended to protect women survivors

Another emerging development is the subversion of laws by alleged perpetrators originally intended to protect women survivors to institute claims against the said survivors. These laws include protection from harassment legislation that provides for protection orders and laws intended to curb cyber harassment and domestic violence legislation that provides for protection orders, including gag orders.

While the original intention of these legislations was to protect victims, who are overwhelmingly female, from continued harassment,¹¹⁰ alleged perpetrators have weaponised these laws to the detriment of their victims. In *Segerman v Peterson*,¹¹¹ the plaintiff approached the court for a protection order against the defendant-victim after accusations of his assault against her were

¹⁰⁵ For more information, see A Keane *The Modern Law of Evidence* (2020); I Dennis, *The Law of Evidence* (2020).

¹⁰⁶ M Schweizer 'The civil standard of proof—what is it, actually?' 20 (2016) *International Journal of Evidence and Proof* 217-234.

¹⁰⁷ Ibid.

¹⁰⁸ *Wambui Mwangi v Tony Mochama and Another* (note 12 above). The court failed to believe the defendant-victims based on the failure of the police to find what they considered to be sufficient evidence in the circumstances despite their consistent testimonies that the police refused to institute charges due to lack of CCTV footage of the incident.

¹⁰⁹ *Segerman v Peterson* (note 28 above).

¹¹⁰ For further information on how women experience harassment, see Ministry of Justice 'End-to-End Rape Review Report on Findings and Actions' (Policy Paper, 18 June 2021) <<https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions>>; European Institute of Gender Equality 'Cyber violence is a growing threat, especially for women and girls' (*European Institute of Gender Equality*, 19 June 2017) <<https://eige.europa.eu/news/cyber-violence-growing-threat-especially-women-and-girls>>.

¹¹¹ *Segerman v Peterson* (note 28 above).

made public. The two parties were in a relationship between 2012 and 2015. The defendant testified that she had ended the relationship after the plaintiff allegedly raped her. Following feminist organising around SGBV in 2019, the defendant-victim posted '@Rapists I see you' on Facebook but did not publicly name the plaintiff.

However, a witness testified that the defendant-victim had named the plaintiff as the perpetrator in a private conversation. Despite any demonstrable evidence of harm occasioned to the plaintiff, the court, nevertheless, drew a causal link between her private utterances and the supposed 'harm' to the plaintiff and issued a final protection order.¹¹² The plaintiff also subverted the intended use of gag orders in *Mdlekeza v Gallie*.¹¹³ On 24 June 2020, the University of Cape Town posted a tweet on its Twitter account saying in part 'UCT's first black South African actuarial science lecturer, Malizole Mdlekeza, said formal and informal mentorship programmes play a crucial role in students' development'. The respondent posted the following tweet on her Twitter account on 24 June 2020, in which she tagged UCT: 'Tsi, I got sexually assaulted by this guy[Mdlekeza] in 2012. he locked me in his house in Platterkloof and tried to force himself on me. Thankfully, I fought my way out and ran to the neighbours and got them to call my mom and the police and to fetch me. He refused to open when they arrived Sies'.

As a result of the tweets, the applicant obtained an interim protection order against the respondent from the Cape Town Magistrate's Court. On 25 November 2020, Acting Justice Hokey granted an order directing the respondent delete the impugned statements within 24 hours. This order made it clear that the deletion of the tweet was not to be construed as an admission of liability by the respondent. However, in a later judgment, the court found for the applicant and ordered, among others, a protection order, exorbitant damages and a public apology which read, in part, 'On 24 June 2020 I tweeted about Mr. Mdlekeza. I was wrong to do so and I apologise for this and for the harm that I have caused him'. The reasons informing the Court's excessive judgement included its observation that the six-year gap between the incident and the impugned tweet evidenced her unwillingness to 'achieve social justice' as she alleged in her affidavit. Additionally, the Court held that the victim was insincere in her quest to seek a public apology as she had rebuffed the plaintiff in previous encounters.

Alleged perpetrators have also used cyber-harassment laws as tools of judicial harassment against the defendant-victim as in *Carlton Douglas Kasirye v Sheena Ahumuza Bageine aka Tasha*.¹¹⁴ In early 2020, the defendant, using her Twitter account @sheena_sheenzy, published a list of names of alleged rapists and rape apologists which included the plaintiff who then filed a police report under the Computer Misuse Act and the defendant was arrested. After refusing to apologise, the police kept her in custody until activists intervened. The plaintiff then sued the defendant for defamation. The case is ongoing.

4.5. Demonstration of harm

One of the emergent challenges in proffering defences against defamation claims is the common law presumption of harm. This presumption provides that the court will presume harm occasioned to the plaintiff irrespective of any actual demonstration by him/her.¹¹⁵ The plaintiff, in cases of defamation against the defendant-victim, therefore, does not need to

¹¹² Ibid para 27.

¹¹³ *Mdlekeza v Gallie* (note 29 above).

¹¹⁴ *Carlton Douglas Kasirye v Sheena Ahumuza Bageine aka Tasha* (note 12 above).

¹¹⁵ See, for example, J Filipovic 'How to Find Room for Forgiveness in the #MeToo Movement' (*TIME*, 26 February 2018) <<https://time.com/5160427/forgiving-sexual-assault-perpetrators-metoo/>> (where the author makes arguments on why it is important to 'rehabilitate' accusers of sexual violence).

demonstrate harm, such as financial loss or loss of employment to prove that the statements were defamatory, which in any event, rarely happens.¹¹⁶

Fortunately, this situation is gradually changing. The UK Defamation Act, for example, provides that '[a] statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant'¹¹⁷ and further that 'harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss'.¹¹⁸ In interpreting this section, the UK Supreme Court, in *BL v Independent Print Ltd and another*,¹¹⁹ noted in part that the common law presumption of harm has been modified by the act which in essence introduced a new threshold of harm, that is 'serious harm'.¹²⁰

The court further found that s 1 of the act on serious harm necessarily meant that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, was not to be so regarded unless it had caused or was likely to cause harm which was serious.¹²¹ In other words, the court found that a successful defamation claim required an introspection of consequences of the publication rather than the publication itself.

In any event, the court also noted that, even prior to the Defamation Act, the courts had already expressed discontentment with the common law presumption and had sought to raise the threshold. In *Jameel (Yousef) v Dow Jones & Co Inc*,¹²² where the claimant had sued the publishers of the *Wall Street Journal* for a statement published online in Brussels to the effect that he had been funding terrorism, the court's judgment indicated first that the common law threshold of harm was low and further that the operation of the threshold might depend, as it did in the case before them, on the evidence of actual damage and not just on the inherently injurious character of the statement in question.¹²³

Also, in *Melvin Booysen v June Dolly Major*,¹²⁴ the applicant, an Anglican priest, sued the respondent who had publicly named him as her attacker in 2002 on Facebook.¹²⁵ In his pleadings, the plaintiff further argued that the respondent-victim's posts damaged his 'reputation, good name and standing in the community'.¹²⁶ However, in finding for the respondent-victim, the court highlighted that the applicant had failed to demonstrate harm. To this point, the court found that despite the respondent-victim's ongoing allegations since 2002, the applicant had continued to hold his position within the church, evidencing that he had not suffered any reputational harm.¹²⁷ In addition, the Court sought to also visibilise harm occasioned to the victim, including, silencing by the Church through the 'oath of canonical obedience'; and the Church's refusal to assist her to relocate which forced her to resign and live in a shelter.

¹¹⁶ Ibid.

¹¹⁷ The Defamation Act 2013 (United Kingdom), s 1A.

¹¹⁸ Ibid s 1(2).

¹¹⁹ *BL v Independent Print Ltd and another* [2019] UKSC 2.

¹²⁰ Ibid para 13.

¹²¹ Ibid para 14.

¹²² *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946.

¹²³ Ibid.

¹²⁴ *Melvin Booysen v June Dolly Major* (note 26 above).

¹²⁵ Ibid para 3.

¹²⁶ Ibid para 21.

¹²⁷ Ibid para 29.

4.6. Access to justice and costs of litigation

Despite access to justice being recognised by many African states as a constitutional right, many hurdles in realising this remain in place.¹²⁸ One of these hurdles is financial costs linked to litigation processes. In Kenya, for example, it is estimated that preliminary costs (before commencement of litigation) may cost up to USD 3000 which prevents many people from accessing the courts.¹²⁹ Meanwhile, the 2015 Socio-Economic Rights Institute Report on Public Interest Legal Services in South Africa noted that '[a] first year junior advocate charges from approximately R550 per hour or R5500 per day. Counsel of ten years' standing can charge between R1500 and R2400 per hour (or between R15000 and R24000 a day). Senior counsel who have been given "silk" status by the President, charge between R25000 and R35000 per day, with some counsel rumoured to charter up to R60000 per day in high-value commercial matters'.¹³⁰

Additionally, legal aid is, more often than not, incomprehensively set out and limited only to capital offences and as such, is inadequate to deal with the compelling needs by the majority of the citizenry in accessing justice.¹³¹ In Sierra Leone, the Parliament budgets 25 million leones for legal aid (7,500 United States dollars) while Rwanda set aside 500,000 United States dollars for a legal aid fund.¹³²

Defamation claims are expensive to defend, and may result in severe financial implications for the victims both in legal fees and fines. In *Wambui Mwangi*, the defendant-victims were required to pay Kenya shillings eight million (approximately USD 80000)¹³³ while in *Mdlekeza*, the said defendant-victim was ordered to pay 200000 Rand (approximately USD 20000) which is exorbitant to an ordinary citizen.¹³⁴

This situation may be aggravated in cases of appeal where defendant-victims, should they choose to appeal, are required to deposit a security of costs as a requirement to file an appeal. The Civil Procedure Rules, Kenya stipulate that, '[i]n any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party'¹³⁵ and further that '[i]f security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit'.¹³⁶ When so ordered, the requirement to satisfy a security of costs order can severely inhibit the defendant-victim from pursuing an appeal.

Fortunately, the situation is changing. In Kenya, for example, while the power to issue security of costs order remains discretionary to the respective court, the said court, more often than not, refrains from issuing the order as a matter of fact, and instead assesses the application pursuant to principles of access to justice.¹³⁷ Additionally, the burden to prove the utility of the security of costs order in the specific case lies with the party making the application (i.e. the respondent in the appeal).¹³⁸

¹²⁸ See, for example, Constitution of Kenya (2010), art 48; Constitution of South Africa, art 34. See further discussion in J Klaaren 'What does justice cost in South Africa? A research method towards affordable legal services' (2019) *SA J of Human Rights* 52.

¹²⁹ P Kameri-Mbote & M Akech 'Kenya: Justice Sector and the Rule of Law' (Open Society Initiative of Eastern Africa, March 2011).

¹³⁰ Socio-Economic Rights Institute 'Public Interest Legal Services in South Africa' (2015) 103–104.

¹³¹ UN Office on Drugs and Crime 'Access to Legal Aid in Criminal Justice Processes in Africa' (2011) <https://www.unodc.org/pdf/criminal_justice/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf>.

¹³² Ibid.

¹³³ *Wambui Mwangi v Tony Mochama and Another* (note 12 above).

¹³⁴ *Mdlekeza v Gallie* (note 29 above).

¹³⁵ Civil Procedure Rules 2010 (Kenya), order 26.

¹³⁶ Ibid order 26 rule 5.

¹³⁷ See, for example, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR where the court noted that '[i]t is therefore imperative in consideration of an application for security of costs, for the court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs'.

¹³⁸ *Europa Holdings Limited v Circle Industries (UK) BCLC 320 CA*; *Kibiwott & 4 others v The Registered Trustees of Monastery of Victory Nakuru HCCC No 146 of 2004*.

CHAPTER 5: Infusing Feminist Analysis Into Defamation Laws

From the previous sections above, it is well-evidenced that the court's supposed rejection of protection to sexual assault survivors, who are predominantly women, in defamation suits is in essence a demonstration of legal inequality.¹³⁹ There is therefore, a need to infuse feminist lens to help alleviate the consequences of this inequality to defendant-victims.

In its 2021 Report to the Special Rapporteur on Freedom of Expression and Opinion,¹⁴⁰ Equality Now submitted that a gendered and feminist perspective on the human right to freedom of opinion and expression, would include, among others:

Recognising that freedom of expression is indivisible from and interdependent with the right to a life free from gender-based violence; preventing lawsuits, such as defamation, to be wielded in a manner that restricts or prevents women from expressing their experiences of violence and discrimination, as this will only serve as an additional barrier to access to justice for survivors, stifle the prevention of future violence, and have a chilling effect on women exercising their freedom of expression; and recognising that when survivor's speak out against sexual harassment/abuse this speech is often a matter of public interest as it brings awareness to the issue and could protect others from future violence.¹⁴¹

We can glean two main points which provide a mechanism in which a feminist analysis can be included in determining defamation claims. These interventions are both individual-based, that is, the right to tell one's story of sexual violence is protected by freedom of expression and opinion and public-oriented, that is, recognising that sexual and gender violence is a matter of public interest.

5.1. Right to tell one's own story and defamation claims

As noted in previous sections, defamation claims have also been weaponised against survivors. In her 2021 Report to the UN General Assembly, the UN Special Rapporteur on Freedom of Expression and Opinion Irene Khan stressed the importance of combating gendered censorship in dubious defamation claims.¹⁴² To this end, the Special Rapporteur stated that: 'In a perverse twist in the #MeToo age, women who publicly denounce alleged perpetrators of sexual violence online are increasingly subject to defamation suits or charged with criminal libel or the false reporting of crimes. Weaponizing the justice system to silence women feeds impunity while also undermining free speech'.¹⁴³

Gendered censorship in this context implies the non-recognition of the importance of women survivors speaking up about the incident *in their own words as they experienced it* without fear of judicial retaliation. In other words, as held by selected judicial actors in varied jurisdictions, interpreting allegedly defamatory statements on sexual violence must be done in accordance with common parlance rather than a strict legal approach. Indeed, emerging best practices have elaborated on the need to understand the right to tell one's own story as part of freedom of expression.

¹³⁹ For further discussion, see D Tuerkheimer 'Underenforcement as Unequal Protection' (2016) 57 BC LR 1287.

¹⁴⁰ Equality Now 'The Right To Freedom of Opinion and Expression of Victims and Survivors of Sexual Violence and Exploitation' (Letter to UN Special Rapporteur, 14 June 2021) <https://www.equalitynow.org/resource/sr_freedom_of_expression_submission_2021/>.

¹⁴¹ Ibid para 20.

¹⁴² I Khan 'Statement by Special Rapporteur on the Promotion of Freedom of Opinion and Expression' (76th Session of the UN General Assembly -Third Committee, 30 July 2021) UN Ref A/76/258 <<https://undocs.org/A/76/258>>.

¹⁴³ Ibid.

In *Stocker v Stocker*,¹⁴⁴ the UK Supreme Court was tasked with interpreting whether the words '[h]e tried to strangle me' elicited an intention to kill or whether it revealed domestic violence. These words had been posted on Twitter by the defendant. The court, in this instance, elaborated its primary interpretative role to focus on how the ordinary reader would construe the words while being conscious of context in which the comment is made. In other words, the court found that its duty entailed the interpretation of the said statements from the position of an ordinary reader since Twitter posts act as a 'conversational medium'.¹⁴⁵

Also, in *Mobashar Jawed Akbar v Priya Ramani*,¹⁴⁶ the court, in dismissing a defamation claim against the defendant-victim expressly provided for the right for the survivor to tell her story by asserting that '[t]he woman has a right to put her grievance at any platform of her choice and even after decades'.¹⁴⁷

5.2. Sexual and gender violence as a matter of public interest

As noted in the preceding sections, public interest may apply as a stand-alone defence or as part of another defence, such as qualified privilege.

Whatever the case, public interest can operate as a feminist shield to protect defendant-victims who publicly share their experiences due to the benefits of open discussion. Public sharing of sexual violence satisfies the public interest requirement as it not only creates an enabling environment for women survivors to share their stories but also offers important information for the protection of other women against violence.¹⁴⁸ While not universally accepted, public interest defence in the context of sexual violence has been successfully pleaded in varied jurisdictions, some of which are highlighted below.

In *Cour d'Appel de Paris, Muller c/ Brion*,¹⁴⁹ a French woman posted tweets denouncing the sexist comments and inappropriate behaviour of a male colleague, after which she was sued in the French courts for defamation against the plaintiff and damage to his reputation. In finding for her, the court found that the information disclosed was based on sufficient evidence for the public good and in the public interest for the protection for other women's interest in general regarding sexual harassment.

In *Mobashar Jawed Akbar v Priya Ramani*,¹⁵⁰ Akbar filed a defamation lawsuit against Ramani after she made statements in print media and online platforms calling Akbar a sexual predator. Akbar's claims were dismissed because the court recognised that Ramani disclosed the truth regarding the incident of sexual harassment against her, based on her testimony and that of her friend, and that she made the publication in good faith and for the protection of other women's interests regarding sexual harassment at the workplace. In this landmark case, the judge reasoned that 'the right of reputation cannot be protected at the cost of the right of life and dignity of women, and right of equality before the law and equal protection of the law guaranteed under the Indian Constitution'.

Similarly, in *Aleksey Alekseyevich Migunov v Ekaterina Alekseyevna Fyodorova & Ors*,¹⁵¹ the Supreme Court of the Russian Federation noted the competing rights between the right to

¹⁴⁴ *Stocker v Stocker* [2019] UKSC 17.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Mobashar Jawed Akbar v Priya Ramani* (note 73 above).

¹⁴⁷ *Ibid.*

¹⁴⁸ *Equality Now* (note 137 above).

¹⁴⁹ *Cour d'Appel de Paris, Muller c/ Brion* (31 March 2021) N° RG 19/19081.

¹⁵⁰ *Mobashar Jawed Akbar v Priya Ramani* (note 73 above).

¹⁵¹ *Aleksey Alekseyevich Migunov v Ekaterina Alekseyevna Fyodorova & Ors* Case No 2-2979/2020 (28 January 2021) (Russia).

freedom of expression of a woman who had experienced sexual violence and the protection of reputation in a defamation claim involving allegations of rape. To that end, the court held in favour of the respondent-victim and reasoned that cases involving sexual violence are peculiar due to their public significance in making commentary on a public interest issue.

Similar approaches have been held by state courts in the USA, including by the Supreme Court of the State of New York, Appellate Division in *Sagaille v Carrega*,¹⁵² and the Court of Appeal of the State of California in *Wentworth v Hemenway*,¹⁵³ where the court dismissed the plaintiff's defamation lawsuit as judicial harassment and an undue interference with the survivor's free speech rights on an important issue of public concern.

In *Booyesen v June Dolly Major*,¹⁵⁴ the High Court in South Africa, in dismissing the plaintiff's case, highlighted the importance of online conversations by survivors in combating rape culture in South Africa and the utility of online sites as 'safe spaces to talk without being judged'.¹⁵⁵

Regional human rights courts have also been steadfast in approaching sexual violence as a public interest issue. In *Juppla v Finland*¹⁵⁶ where a grandmother who reported concerns of abuse of her grandson to a doctor was found guilty of defamation, the ECtHR reversed the domestic court's finding and held that the seriousness of child abuse is a matter of public interest and further that 'persons who act in good faith ... in what they believe are the best interests of the child, should not be influenced by fear of being prosecuted or sued when deciding whether and when their doubts should be communicated to health care professionals or social services'.¹⁵⁷

Also, in *Tolle v Croatia*,¹⁵⁸ where the director of a rape crisis centre was sued for defamation, the ECtHR found that the Croatian courts had been wrong by limiting 'their analysis to the fact that D.O. had never been convicted of domestic violence and that the applicant had never claimed that she suspected or knew that criminal proceedings had been instituted against him'. Additionally, the court decided that the discussion about violence against women and domestic violence was a matter of public interest.

¹⁵² *Sagaille v Carrega* (note 74 above) p 2, col 2, §3.

¹⁵³ *Wentworth v Hemenway* (note 75 above), p 9, col 1 §1 and col 2, §2.

¹⁵⁴ *Booyesen v June Dolly Major* (note 26 above).

¹⁵⁵ *Ibid* para 19.

¹⁵⁶ *Juppla v Finland* (European Court of Human Rights; 2 December 2008).

¹⁵⁷ *Ibid*.

¹⁵⁸ *Tolle v Croatia* [2020] ECHR 883.

CHAPTER 6: Conclusions and Way Forward_____●

The promise of the #MeToo Movement in holding to account perpetrators of sexual and gender violence is under direct threat from weaponization of defamation suits as tools of judicial harassment against victims. While cogent legal responses as canvassed above are important, these efforts must be coupled with advocacy and research initiatives as well.

Important initiatives include development of partnerships and collaborations including with lawyers and activists working on freedom of expression and digital rights due to the obvious overlap between the two areas in these cases.

Continued research is also important, hence a recommendation for repository of information including a regional map on the active/decided cases across Africa and a collation of judgments and other relevant court documents and academic papers. This repository should be bolstered with timely capacity-building sessions involving feminist lawyers and important stakeholders.

Advocacy strategies should also be tailored and directed towards social media platforms, which act as important mediums for survivors to speak up. Possible advocacy activities include reaching out to partners within the social media space and building a country-wide community on social media; and creating important conversation spaces where survivors can safely share their experiences. Other strategies may include judicial sensitization and training in respect of the intersection between defamation claims and sexual and gender violence.

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SUMMARY of Key Jurisprudence

WAMBUI MWANGI V TONY MOCHAMA AND ANOTHER (2019) KENYA

On 20 September 2014, there was a meeting of Kenyan poets and photographers hosted at Wambui's home. Tony and Shailja attended the meeting. Wambui was not present. Participants were to bring their own drinks and food but not alcoholic drinks. Tony and his guest Wanjeri Nderu (also his witness in the case) brought and drank alcoholic drinks.

During the meeting, there was an altercation between Tony and Shailja. Tony had twice attempted to hug Shailja and in one of the instances groped Shailja's breast. Shailja told Tony 'Back off' and 'I don't want to be hugged Tony ... I have been hugged enough'. The event ended and all participants took photos. Later in the evening, Wambui called Shailja to thank her for leaving her house in good order after the guests had left. In the course of the conversation Shailja told Wambui of the sexual assault.

On 22 September 2014, Wambui posted several tweets regarding the incident. In the tweets, she tagged various organisations affiliated with the plaintiff. Shailja retweeted one of the tweets confirming '...This happened. To me'. Wambui created #StopTonyMochama which went viral. Shailja reported the incident to the police on 25 September 2014. Tony did not lose his employment, scholarship or other affiliations. He sued for defamation.

In the court proceedings, the court left out a significant part of Wambui's evidence, e.g. her basis for calling Mochama a rapist. It also stopped her from narrating the exact occurrence that led her to that conclusion. The prayers made by the plaintiff were:

- Mandatory injunction against the defendants restraining them from saying, writing or causing to be published any defamatory statements against the plaintiff (**granted**).
- Mandatory injunction restraining them from contacting, writing or causing to be published any defamatory statements to the public, his employers, scholarship, fund providers and supporters (**granted**).
- General damages (**Kenya shillings eight million**).
- Punitive, aggravated and exemplary judgment (**Kenya shillings one million**).
- A written public apology to plaintiff (**granted, within 14 days**).
- Interest at court rates (**granted**).
- Costs of the suit (**granted**).

The matter is now under appeal.

IAN NJAGI NJERU V NYAGUTHII KIOI (2021) KENYA

In this case, the plaintiff claims that the defendant published a defamatory statement against him on her Twitter handle claiming that he raped her. The remedies he sought were:

- Permanent injunction restraining the defendant from publishing or being privy to the publication of any material that may be libellous or slanderous to the plaintiff
- General damages
- Exemplary damages

- Punitive damages for malicious and deliberate libel
- Costs of the suit and interest

The facts of the case are as follows. The plaintiff and defendant were casually seeing each other. She visited him at his parents' home where he lived for purposes of breaking things off with him but he raped her. As a result she became depressed. On 4 September 2019 and 15 June 2020 the defendant published allegations relating to the plaintiff on her Twitter handle. The main tweet read: 'Okay I'm really scared to do this. But if I don't now I never will. My abuser is Ian Njagi Njeru'. A subsequent tweet referred to the plaintiff as a 'rapist'.

The plaintiff asked her to take down her tweet but she refused. He reported her to the police and instructed his advocates to send her a demand letter demanding that she take down her tweets but she refused. He instituted a civil suit against her.

The plaintiff's case was that the defendant knowingly and intentionally published tweets against him that were defamatory as they were false, malicious and aimed at lowering his reputation in the eyes of right thinking members of the society by portraying him as a man with little regard for women and a man lacking in morals. He only acknowledged that he had engaged in sexual intercourse with the defendant after the defendant disclosed in her replying affidavit to his application the details surrounding the rape. However he maintained that the sex was consensual.

The defendant's case theory is that in publishing the tweets, she was exercising her freedom of expression under art 33 of the Constitution. Her publications were not meant to malign the plaintiff but allowed her to play her part in breaking the stigma and silence that women victims of sexual and gender based violence face. She is relying on the defence of truth in that her publications were true.

ISLA filed an application to join the matter as amicus curiae. The plaintiff put in a preliminary objection while the defendant indicated to the court that she will not be responding to the application and will stand guided by the direction of the court. The court directed that the matter be transferred from the High Court to the Chief Magistrate's Court. ISLA's application will be heard and determined by the lower court.

DANIELL SEGERMAN V ANEES PETERSON (2019) SOUTH AFRICA

The plaintiff approached the court for a protection order against the defendant-victim after accusations of his assault against her were made public. The two parties were in a relationship between 2012 and 2015. The defendant testified that she had ended the relationship after the plaintiff allegedly raped her. Following feminist organising around SGBV in 2019, the defendant-victim posted '@Rapists I see you' on Facebook but did not publicly name the plaintiff.

However, a witness testified that the defendant-victim had named the plaintiff as the perpetrator in a private conversation. Despite any demonstrable evidence of harm occasioned to the plaintiff, the court, nevertheless, drew a causal link between her private utterances and the supposed 'harm' to the plaintiff and issued a final protection order.¹⁵⁹

¹⁵⁹ Ibid para 27.

MDLEKEZA V GALLIE (2020) SOUTH AFRICA

On 24 June 2020, University of Cape Town posted a tweet on its Twitter account saying in part 'UCT's first black South African actuarial science lecturer, Malizole Mdlekeza, said formal and informal mentorship programmes play a crucial role in students' development'.

The respondent posted the following tweet on her Twitter account on 24 June 2020, in which she tagged UCT: 'Tsi, I got sexually assaulted by this guy [Mdlekeza] in 2012. He locked me in his house in Platterkloof and tried to force himself on me. Thankfully, I fought my way out and ran to the neighbours and got them to call my mom and the police and to fetch me. He refused to open when they arrived Sies'. As a result of the tweets, the applicant obtained an interim protection order against the respondent from the Cape Town Magistrate's Court.

On 25 November 2020, Acting Justice Hokey granted an order directing the respondent delete the impugned statements within 24 hours. This order made it clear that the deletion of the tweet was not to be construed as an admission of liability by the respondent. However, in a later judgment, the court found for the applicant and ordered, among others, a protection order, exorbitant damages and a public apology which read, in part, 'On 24 June 2020 I tweeted about Mr. Mdlekeza. I was wrong to do so and I apologise for this and for the harm that I have caused him'.

MELVIN BOOYSEN V JUNE DOLLY MAJOR (2021) SOUTH AFRICA

The applicant, an Anglican priest, sued the respondent who had publicly named him as her attacker in 2002 on Facebook. In his pleadings, the plaintiff further argued that the respondent-victim's posts damaged his 'reputation, good name and standing in the community'. However, in finding for the respondent-victim, the court highlighted that the applicant had failed to demonstrate harm. To this point, the court found that despite the respondent-victim's ongoing allegations since 2002, the applicant had continued to hold his position within the Church, evidencing that he had not suffered any reputational harm.

MOBASHAR JAWED AKBAR V PRIYA RAMANI (2012) INDIA

Akbar filed a defamation lawsuit against Ramani after she made statements in print media and online platforms calling Akbar a sexual predator. Akbar's claims were dismissed because the court recognised that Ramani disclosed the truth regarding the incident of sexual harassment against her, based on her testimony and that of her friend, and that she made the publication in good faith and for the protection of other women's interest regarding sexual harassment at the workplace.

In this landmark case, the judge reasoned that 'the right of reputation cannot be protected at the cost of the right of life and dignity of women, and right of equality before the law and equal protection of the law guaranteed under the Indian Constitution.'

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