

Acknowledgements

Our deepest and heartfelt appreciation goes to everyone who made this work possible. We are grateful to the author, Emmah Khisa Senge Wabuke and the ISLA team that worked on the project, including Winnie Rumbidzai Limani, Dr. Ruth Nekura and Cathrine Ramaoka.

We also wish to thank all the participants in the violence against women in-depth seminar in Mombasa in December 2021, including Beatrice Njeri, Winfred Odali, Brenda Madumise-Pajibo, Zanele Malindi, Beatrice Kayaga, Dr Keina Yoshida and Jennifer Robinson whose insights have greatly nourished this publication.

The final design of the publication is the creative work of Heilet Grobler, and the language and format of the publication have benefited enormously from the academic editing services of Rachel Fleetwood.

“Some rights reserved. Except for commercial purposes, part or the whole of this publication may be transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without seeking the prior permission of the publisher. However, copyright remains with ISLA.”

Table of Contents

ACRONYMS AND ABBREVIATIONS	2
FOREWORD	3
1. INTRODUCTION	7
1.1. Project overview	7
1.2. Methodology and structure of the research project	7
2. SETTING THE SCENE: AN AFRICAN BACKGROUND	9
2.1. Socio-legal contextual background	9
2.2. Spotlight on emerging cases from Africa	11
3. ONLINE DEFAMATION, DEFENCES AND SEXUAL VIOLENCE	13
3.1. Defamation, freedom of expression and right to reputation	13
3.2. Defences to defamation and sexual violence	14
4. COMMONALITIES AND TRENDS ON DEFAMATION AND FREEDOM FROM VIOLENCE	18
4.1. Gendered stereotypes	18
4.2. Perpetuation of rape myths	19
4.3. Conflation between criminal and civil processes	21
4.4. Subversion of laws intended to protect women survivors	21
4.5. Demonstration of harm	22
4.6. Access to justice and costs of litigation	24
5. INFUSING FEMINIST ANALYSIS INTO DEFAMATION LAWS	25
5.1. Right to tell one's own story and defamation claims	25
5.2. Sexual and gender violence as a matter of public interest	26
6. CONCLUSIONS AND WAY FORWARD	28
Selected Bibliography	29
1. Case law	29
2. Books and book chapters	29
3. Journal articles	29
4. Online resources	30
Summary of Key Jurisprudence	32

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'¹ entails, 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 Kasirye 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).

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.

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] ZAECGHC 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).

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).

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.

I Khan 'Statement by Special Rapporteur on the Promotion of Freedom of Opinion and Expression' (76th Session of the UN General Assembly -Third Committee, 2021) UN Doc A/76/258 <<https://undocs.org/A/76/25>>

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>>

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>>

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>>

A Ohlheiser 'The woman behind 'Me Too' knew the power of the phrase when she created it — 10 years ago' (*Washington Post*, 17 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/>>

ISBN 978-1-7764012-3-9



**INITIATIVE FOR STRATEGIC
LITIGATION IN AFRICA**

5th Floor | Marble Towers
208 - 211 Rahima Moosa Street
Johannesburg | 2000 | South Africa

Email: info@the-isa.org

Tel: +27 11 338 9014 / 9024 / 9028

Fax: +27 11 338 9029

www.the-isa.org