



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 430 OF 2006**

**LUCY M. KAMBUNI ..... PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED .....DEFENDANT**

**JUDGMENT**

1. In her Amended Plaintiff dated 30<sup>th</sup> May 2006, *Lucy M. Kambuni*, an Advocate of the High Court of Kenya then practicing in the name and style of *L M Kambuni & Associates* sued the defendant, *Nation Media Group Limited* seeking the following reliefs:

*a) General damages for libel.*

*b) Exemplary, punitive and/or aggravated damages.*

*c) An order for a permanent injunction prohibiting the defendant whether by itself, its servants, and/or agents or otherwise howsoever from further publishing defamatory articles concerning the plaintiff in respect of the subject matter.*

*d) A suitable apology and retraction article given the same prominence as the defamatory articles.*

*e) Costs of the suit.*

*f) Interest on (a) and (b) above at court rates.*

2. The plaintiff's case is that between 27<sup>th</sup> February to 5<sup>th</sup> March 2006, the defendant caused to be published in the East African, its weekly newspaper under a banner headline "**State Paid Six Nairobi Lawyers \$1m to Fight Five Day Case**" defamatory statements in reference to her and other senior Advocates. The publication was continued in pages 6 and 7 of the newspaper under the heading: "**Private lawyers earning millions from Kenya Government**".

The entire publication was reproduced in paragraphs 6 and 7 of the Amended Plaintiff.

3. The plaintiff further pleaded that in the Daily Nation of 27<sup>th</sup> February 2006 under the heading "**Row Over KShs.72m lawyers' fees**" and in the Daily Nation of 2<sup>nd</sup> March 2006 under the heading "**KShs.72m lawyers' pay defended,**" the defendant caused to be published additional defamatory material in reference to the plaintiff which was set out in paragraphs 8 and 8 A of the Amended Plaintiff (hereinafter the plaintiff).

4. It is the plaintiff's contention that the statements in the aforesaid publications were not only false, malicious and defamatory of her but were also calculated to injure, discredit and destroy her personal and professional image as a prominent Advocate of the High Court of Kenya of long standing. The particulars of the defendant's falsehood and malice were pleaded in paragraph 10 of the plaintiff.

5. Further, the plaintiff averred that in their natural and ordinary meaning, the published words meant and were understood by the reading public to mean *inter alia*; that the plaintiff was among a group of lawyers who had received the sum of KShs.72 million for a five day case; that the payment had sparked controversy within the legal fraternity and she was as a result been shunned and frowned upon by her colleagues; that her integrity was doubtful and that her appointment to provide legal services to the Government was based on reasons other than her competence and expertise.

6. In addition, the plaintiff contended that by reason of the publications, her reputation, integrity and credibility both personally and as an Advocate of long standing had been seriously and irreparably damaged and she had suffered distress, humiliation, agony, mental torture and extreme embarrassment.

7. In denying the plaintiff's claim, the defendant filed its statement of defence dated 6<sup>th</sup> June 2006 which was amended on 7<sup>th</sup> March 2006. While admitting having published the articles complained of by the plaintiff, the defendant denied that the articles were defamatory as alleged or at all and put the plaintiff to strict proof thereof.

8. The defendant averred that the words in the publications were published in good faith after the exercise of due care and reason; that in the alternative, they consisted of facts which were true and where they consisted of opinions, they were fair comment on a matter of public interest. Further, the defendant pleaded that the plaint did not disclose a reasonable cause of action and that the same should be struck out.

9. Following an application presented by the plaintiff vide a Notice of Motion dated 8<sup>th</sup> September 2016, this court on 22<sup>nd</sup> June 2017 ordered that the instant suit be tried as a test suit on liability in respect of five other suits which had been filed by the other senior Advocates mentioned in the publications and that those other suits be stayed pending the hearing and determination of this suit. The other suits are as follows:

- i. Kioko Kilikumi V Nation Media Group Limited – HCCC No. 429 of 2006;
- ii. Charles Waweru Gatonye V Nation Media Group Limited – HCCC No. 431 of 2006;
- iii. Fred Ngatia V Nation Media Group Limited – HCCC No. 432 of 2006;
- iv. Njoroge Regeru V Nation Media Group Limited – HCCC No. 433 of 2006; and
- v. Gibson Kamau Kuria V Nation Media Group Limited – HCCC No. 448 of 2006.

10. At the hearing, the plaintiff testified in support of her case and called two additional witnesses. The defendant did not offer any evidence to substantiate the claims made in its amended defence (the defence).

11. The plaintiff who testified as PW1 adopted her written statement dated 15<sup>th</sup> July 2016 as her evidence in chief and produced the publications in question collectively as Exhibit 1. In her statement and in her evidence under cross-examination, PW1 claimed that on or around Mid 2005, she was appointed by the Constitution of Kenya Review Commission (CKRC) together with another advocate *Mr. Njoroge Regeru Esq*, to handle High Court Civil Case No. 677 of 2005, a suit which was filed by a network of civil society organizations (the yellow movement case). The suit sought to stop the holding of the referendum on the proposed Constitution of Kenya which was scheduled to take place on 21<sup>st</sup> November 2005. She further stated that on or about Mid August 2005, she was instructed by the Hon. Attorney General to join a team of other eminent lawyers, namely, *Mr. Njoroge Regeru, Mr. Fred Ngatia, Dr. Gibson Kamau Kuria SC; Mr. Kioko Kilukumi* and *Mr. Waweru Gatonye* who had been appointed to represent the Government of Kenya in Misc. Civil Application No. 1216 of 2005, a case which also sought to stop the constitutional review process and the scheduled referendum.

12. The plaintiff further testified that though she had been instructed together with learned counsel *Mr. Njoroge Regeru* by the CKRC in the yellow movement case, they accepted the Hon. Solicitor General's proposal that they were to handle that case together with Misc. Civil Application No. 1216 of 2005 in collaboration with the rest of the legal team and that subsequently, fees for handling both cases was negotiated with the Hon. Solicitor General (SG) who acted as an agent for the instructing authority. It was agreed that a total sum of KShs.72 million inclusive of VAT was to be paid to all counsel as a corporate entity.

13. It was the plaintiff's further testimony that soon thereafter, she put off all her other engagements and started intensive preparations for the hearing of Misc. Civil Application No. 1216 of 2005; that as a team led by learned counsel *Mr. Waweru Gatonye*, they filed a preliminary objection/interlocutory application challenging the continuation of *Hon. James Orengo* as a counsel in the matter on the basis of conflict of interest; that though the preliminary objection was heard in five days, the determination of the interlocutory application in their favour did not dispose of the entire case; that a large amount of time was undertaken in conducting research and general preparations for the hearing given the enormity and complexity of the case; that HCCC No. 677 of 2005 proceeded to full hearing and was concluded on 15<sup>th</sup> November 2005 when judgment was delivered.

14. The plaintiff further stated that the defendant did not publish the full and true facts surrounding the payment and that the publications were not only exaggerated but contained falsehoods and innuendos. She denied that she had monopolized cases at State Law Office noting that save for the two cases, she had not previously acted for the Hon. Attorney General. According to her, there was nothing suspicious about her appointment as the Hon. Attorney General was at liberty to appoint her as counsel given her exemplary record of performance as a member of the Law Society of Kenya.

15. In addition, the plaintiff claimed that the allegation in one of the publications that one of the lawyers had a legal partner who was the wife of a former official in the Ministry of Justice referred to her since she was the only member in the team who had a lady advocate, *Caroline Wanjiru Githae* as a partner in the law firm of *Kambuni & Githae Advocates*; that the allegation inferred that her partner was the wife of *Hon. Robinson Githae* who at the time was an Assistant Minister in the Ministry of Justice which was not the case.

16. The plaintiff recalled that the defendant did not seek any clarification from her to ascertain the truth or veracity of the contents of the articles before their publication; that had she been contacted, she would have willingly provided the correct information.

She narrated how the publications caused her great distress and embarrassment and how her esteem was lowered in the eyes of her family, friends and professional colleagues to an extent that she was unable to practice law as freely and as confidently as before as her colleagues kept asking her questions about her alleged irregular appointment and payment; that though she was ordinarily a courageous woman of faith, she was forced to keep house; that the publications greatly injured her reputation and image both in her personal and professional capacity.

17. PW2, *Caroline Wanjiru Githae* stated in her evidence that she had known the plaintiff since 1980 when both of them were admitted to study law at the University of Nairobi; that for a period of 15 years, the two were partners in the firm of *Kambuni & Githae Advocates* which they later dissolved on amicable terms.

18. PW2 recalled that she has known the plaintiff for about 40 years as a hardworking, honest and dependable professional; that the plaintiff had informed her about all the technical and financial details of her retainer in HCCC No. 1216 of 2005; that on reading the publications, she was immediately struck by their insinuation that the brief was a product of underhand dealings; that on her part, she had no reason to doubt the plaintiff's integrity and the manner in which she was retained to handle the case.

19. She supported the plaintiff's claim that in one of the publications, she was described as the wife of *Hon. Robinson Githae* who was then an Assistant Minister in the Ministry of Justice. She confirmed that she was married to a doctor and she did not have any ties whatsoever with the said *Robinson Githae*.

20. The plaintiff's second witness, M/s. *Jane Njeri Onyango* also an Advocate of the High Court testified as PW3. She adopted her witness statement dated 15<sup>th</sup> July 2016 and testified that she had known the plaintiff for the last 33 years; that the plaintiff was an honest, diligent and highly respected member of the legal profession and that together with other lawyers, she looked up to her as a role model and mentor.

21. PW3 recalled that on reading the subject publications, she was shocked since they painted a very different picture of the plaintiff from the person she knew; that she immediately contacted the plaintiff and found her in extremely low spirits and that subsequently, the plaintiff went into a depression.

22. As stated earlier, the defendant did not offer any evidence and at the close of the hearing, the parties filed written submissions which were highlighted before me on 9<sup>th</sup> March 2020 by learned counsel *Mr. Ohaga* for the plaintiff and learned counsel *Mr. Wakhisi* who held brief for *Mr. Wetangula* for the defendant.

23. The court record shows that the parties framed eighteen (18) issues for the court's determination in their statement of agreed issues filed on 13<sup>th</sup> November 2007. A close scrutiny of the list of issues framed by the parties shows that most of them were a duplication of each other.

24. After carefully considering the pleadings, the evidence adduced by the plaintiff, the comprehensive written and oral submissions made on behalf of the parties, I find that since the defendant has admitted having published the articles carried in the *East African* and the *Daily Nation* on the dates specified in the plaint, only six main issues crystalize for my determination in this case. These are:

i. *Whether the amended plaint discloses a reasonable cause of action;*

ii. *Whether the publications are defamatory of the plaintiff;*

iii. *Whether the defence of fair comment is available to the defendant;*

iv. *Whether the plaintiff is entitled to the reliefs sought;*

v. *If the answer to (iv) above is in the affirmative, whether the East African and the Daily Nation newspapers have circulation throughout the Republic of Kenya and East Africa as well as globally through the internet;*

vi. *What orders should be made on costs.*

I will now proceed to consider the issues I have identified above separately and sequentially.

***(i) Whether the Amended Plaint discloses a reasonable cause of action.***

25. The defendant in its submissions reiterated its averment in the amended defence that the amended plaint did not disclose a reasonable cause of action. The defendant argued that contrary to *Order 2 Rule 7 (1)* of the *Civil Procedure Rules, 2010* (the *Rules*), the plaintiff failed to indicate in her plaint with a reasonable degree of certainty the actual words she alleged to be defamatory; that instead, she reproduced the entire publications verbatim and only highlighted the words complained of in her written submissions which could not cure the defect in the plaint. To buttress its argument, the defendant relied on the case of ***Harrison Kariuki Moro V National Bank of Kenya Limited & Another, [2019] eKLR***, where the court held, *inter alia*, that in an action for libel, the plaintiff must not only state in his pleading with reasonable certainty the words complained of but must also be prepared to give particulars that would ensure that he has a proper case to put before the court and that he was not merely engaged in a fishing expedition.

26. On her part, the plaintiff in her submissions maintained that the plaint as drawn and filed disclosed a reasonable cause of action. she placed reliance on the case of ***Nkalubo V Kibirige, [1973] EA 102*** which was quoted with approval by the Court of Appeal in ***Dr. Lucas Ndungu Munyua V Royal Media Services Limited & Another, [2014] eKLR*** where the court stated the following at paragraph 64:

***“In all suits for libel the actual words complained of must be set out in the plaint. In libel and slander, the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends...”***

The plaintiff submitted that she had reproduced the words used in the publications which were the words which constituted her cause of

action.

27. Having taken into account the submissions made by both parties on this point, I take the following view of the matter:

Though the defendant had pleaded in its defence that it was going to seek that the plaint be struck out for not disclosing a reasonable cause of action, it did not make any application to that effect before the case proceeded for hearing. An objection challenging the competence of a plaint is a preliminary point of law which ideally should be canvassed before the hearing of a suit. This is so because if indeed the plaint was defective, there would be no basis for the case to proceed for hearing.

Be that as it may, since the defendant has revisited the matter in its submissions, I will proceed to determine the issue by examining what in law constitutes a reasonable cause of action and the provisions of *Order 2 Rule 7 (1)* of the *Rules*.

28. In *DT Dobie & Company (K) Limited V Joseph Mbaria Muchina & Another, [1980] eKLR*, the Court of Appeal when interpreting *Order VI Rule 13 (1)* of the repealed *Civil Procedure Rules* (the equivalent of our current *Order 2 Rule 15*) defined the term *reasonable cause of action* to mean “.... **reasonable cause of action means a cause of action with some chance of success when (as required by paragraph(2) of the rule) only the allegations in the plaint are considered. .... A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.**”

29. *Order 2 Rule 7 (1)* of the *Rules* provides that where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

30. In this case, the plaintiff reproduced verbatim the publications containing the words or statements complained of; the particulars of falsehood, malice and the sense in which the words were alleged to be defamatory. To my mind, the plaint clearly discloses a reasonable cause of action against the defendant. In the premises, I do not find any merit in the defendant’s objection to the validity of the plaintiff’s suit as filed and the same is hereby overruled.

***(ii) Whether the plaintiff has proved that the publications were defamatory***

31. The law of defamation is concerned with the protection of reputation. Defamation is defined in *Blacks Law Dictionary 8<sup>th</sup> Edition at page 448* as:

***“The act of harming the reputation of another by making a false statement to a third person ...”***

32. A defamatory statement is defined in *Halsbury’s Laws of England 4<sup>th</sup> Edition Vol 28 paragraph 10* as:

***“... a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession calling, trade or business.”***

33. The Court of Appeal in *SMW V ZWM, [2015] eKLR* and in *Musikari Kombo V Royal Media Services Limited, [2018] eKLR* defined a defamatory statement in the following terms:

***“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”***

34. In *Wycliffe A. Swanya V Toyota East Africa & Another, [2009] eKLR*, the Court of Appeal laid down the essential elements which a plaintiff must prove in order to succeed in an action for defamation. The plaintiff must prove the following:

- i. That the matter of which the plaintiff complains is defamatory in character.
- ii. That defamatory statement or utterance was published by the defendants. Publication in the form of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- iii. That it was published maliciously.

35. The plaintiff started her submissions on this issue by pointing out the ingredients of defamation as set out by *Justice Aburili* in *Samuel Ndungu Mukunya V Nation Media Group Limited & Another, [2015] eKLR* which I have already identified above.

The plaintiff submitted that she had met the threshold of proof through her uncontroverted evidence that the three publications were defamatory in the sense that they portrayed her as a greedy and exploitive advocate who was in a clique of lawyers who monopolized Government cases without regard to the need for capacity building in the State Law Office; that she had been retained in the constitutional review case for reasons other than her competence.

36. Further, the plaintiff submitted that in publishing the defamatory statements, the defendant was actuated by malice, contempt and spite as prior to the publications, the defendant did not make any effort to verify the truth of the information contained in the publications. She relied

on the definition of malice as enunciated in the case of *Phineas Nyagah V Gitobu Imanyara, [2013] eKLR*.

37. It was the plaintiff's further submissions that the publications were aimed at destroying the high esteem in which she was held in the society and in the legal profession and that as a result of the publications, she not only lost her reputation but also suffered great mental anguish and torture.

38. In its riposte, the defendant, besides restating the essentials of an action in defamation denied that the words used in the publications in their plain and ordinary meaning were defamatory of the plaintiff or that they negatively impacted on her character, reputation, professional and social standing. In the defendant's view, the words were taken out of context. According to the defendant, the impugned publications merely disclosed facts surrounding the appointment of lawyers to render legal services to the Government and the amount paid for such service.

39. The defendant also denied the plaintiff's claim that the publications were actuated by malice. Relying on the definition of malice as stipulated in *Phineas Nyagah V Gitobu Imanyara [supra]*, the defendant submitted that there was no evidence that the language used in the articles were beyond or disproportionate to the facts in the matter considering that the plaintiff had admitted having been engaged by the Government for provision of legal services, having performed the said services and being paid for the same.

40. As stated earlier, it is not disputed that the three articles subject matter of this suit were published by the defendant in reference to the plaintiff and five other prominent Advocates. What is disputed and what this court is called upon to determine is whether the plaintiff has proved to the required legal standard that the publications were indeed defamatory of her.

41. In her evidence, the plaintiff testified that while it was true that she was instructed to represent the Government of Kenya in Misc Civil Application No. 1216 of 2005 together with a team of other lawyers and that they were paid for their services, the manner in which the information was published and the words used meant and were understood to mean that their engagement was not above board; that they lacked the competence and skills necessary to undertake the work assigned and that the payment made to them was suspicious and not commensurate to the work done; that she was a greedy, exploitive advocate who was lacking in integrity. She further testified that the publications deliberately and maliciously omitted vital information and contained falsehoods and innuendos.

42. Her evidence was materially supported by the evidence of PW2 and PW3 who had known her closely for over 30 years. They confirmed that on reading the publications, they were shocked and embarrassed by the way they portrayed the plaintiff.

43. I have carefully read and considered the three publications holistically and in their entirety. I find that the articles published in the Daily Nation of 27<sup>th</sup> February 2006 and 2<sup>nd</sup> March 2006 were basically a repetition of the article that had earlier on been published in the East African of 27<sup>th</sup> February to 5<sup>th</sup> March 2006.

44. Besides reporting that the plaintiff and five of her colleagues had been paid KShs.72 million to represent the Government in a case that lasted only five days, the articles alleged that the payment had sparked controversy within the legal fraternity "**with questions raised about the manner in which the lucrative contract was shared out and how it was procured.**"

Other excerpts in the articles published in the East African referring to commentaries allegedly made by other lawyers read as follows:

**"...They said some of the appointments in the constitutional review case for which the six lawyers were paid KShs.72 million (\$1 million) were suspect since they were a closed shop involving the counsel appointed and top officials in the Ministry of Justice at the time. Another of the lawyers is said to be a legal partner of the wife of a former top official in the Justice Ministry. .... Questions were also raised about the issue of a small clique of lawyers in private practice, who out of a bar of 3,000 practitioners, seem to monopolise government cases, with the State Law Office being accused of being partial in giving out briefs."**

Another passage read as follows:

**"....Although legal sources point out that there is nothing wrong with the State Law Office engaging lawyers in private practice, what is being questioned is the manner of appointment and the amount of money paid to outside counsel at the expense of developing capacity within the State Law Office."**

45. In the article published in the Daily Nation of 2<sup>nd</sup> March 2006, the defendant though purporting to report the Hon. Solicitor General's remarks defending the payment of the KShs.72 million to the plaintiff and her team proceeded to question their appointment implying that it was unprocedural and that other than *Dr. Kamau Kuria*, the other advocates' competence and legal skills to handle the brief were doubtful.

46. The plaintiff in her evidence maintained that though it was true that she was contracted to represent the Government in Misc. Civil Application No. 1216 of 2005 and was paid KShs.72 million together with her colleagues for the work done, the content of the rest of the publications was false. Her evidence that the aforesaid payment was not only meant to cover arguments in the preliminary objections but also included payment for handling the yellow movement case which was heard to its conclusion as well as the extensive and massive preparation which the legal team had done before the case took off was not challenged by any evidence to the contrary.

47. The plaintiff also proved that the claim that she was in a clique of lawyers who had monopolized Government cases was false since the defendant did not disprove her evidence that except for the two cases involving the constitutional review process, she had not previously acted for the Government. The plaintiff maintained that there was nothing irregular about her appointment as she had an impeccable record as an advocate and the Hon. Attorney General was at liberty to appoint any advocate to represent the Government. The defendant did not adduce any evidence to the contrary.

In the premises, I am persuaded to find that the plaintiff has proved on a balance of probabilities that the information in the offending articles regarding the manner in which her appointment and that of her colleagues was made and the purpose for the payment of KShs.72,000,000 was false.

48. In my view, any reasonable person who read the articles would not have had any difficulty in concluding that the procurement of the plaintiff's services and those of her colleagues was irregular and unprocedural; that it was done in an opaque process which involved a conspiracy with officials of the Ministry of Justice aimed at locking out other qualified advocates from accessing state briefs hence the inclusion of the innuendo that the plaintiff's legal partner was married to an official in the Ministry of Justice; that the plaintiff and her colleagues were a group of selfish and conniving advocates who were bent on unjust enrichment using public funds in the guise of rendering legal services at the expense of capacity building in the State Law Office; that they lacked integrity and the necessary competence and expertise to undertake the assigned task. These allegations no doubt negatively impacted on the plaintiff's character, image and standing in the society.

49. It is also important to note that the publications indicated that the payments sparked tension and controversy in the legal fraternity implying that members of the bar had frowned upon the actions of the plaintiff and her counterparts as alleged thus confirming the plaintiff's assertions that her esteem had been lowered in the eyes of her professional colleagues. The defendant as noted earlier did not avail any evidence to prove that this was in fact the case.

50. On the issue of malice, I wish to point out that malice is not restricted to spite or ill will. As held in the case of *Phineas Nyagah V Gitobu Imanyara [supra]* which was referenced by both parties, it can be inferred from the publication itself if the language used is beyond or disproportionate to the facts or from the conduct of the defendant either before or during the proceedings. The failure to inquire into the facts or any evidence which shows that the defendant knew the statement was false or did not care whether it was true or false constituted evidence of malice.

51. In *Grace Wangui Ngenye V Wilfred D. Kiboro & Another, [2009] eKLR*, the Court of Appeal held *inter alia*, that failure by the defendant to verify the truthfulness of the words complained of before publication and failure to offer an apology where the same was demanded was evidence of malice.

52. In this case, the plaintiff claimed that the defendant was motivated by malice in making the publications since it did not bother to ascertain the truth of the matter before making the publication and did not contact her to verify the allegations or to hear her side of the story. This claim was not refuted by the defendant either in its pleadings or during the hearing. This means that the defendant published the articles without caring whether their content was true or false.

53. The defendant did not also dispute the averment in the plaintiff's pleadings that though a retraction and a suitable apology was demanded, it did not offer any retraction or apology.

In view of the above, I have absolutely no hesitation in finding that the defendant recklessly published the publications without making any inquiry into the facts which is by itself evidence of malice.

54. It is also pertinent to note that the defendant published the libelious articles three times in two different Newspapers apparently with the intention of giving them extremely wide coverage and extensive prominence in order to inflict maximum damage to the plaintiff's character and reputation. To my mind, this conduct by the defendant is further evidence of malice.

I thus find that the defendant was actuated by malice in making the publications.

55. Having found that the publications lowered the plaintiff in the estimation of right thinking members of the society and that they seriously injured her reputation and standing both in her personal and professional life and having also found that the published statements were mainly false and were actuated by malice, I am convinced that the plaintiff has proved to the required legal standard that the publications were defamatory and I so find.

56. Since this case was selected as a test suit in a series of cases which arose from the impugned publications, my finding on liability in this case will apply to and bind all the other five cases specified earlier in this judgment. The cases will now proceed for hearing for assessment of damages.

***(iii) Whether the defence of fair comment is available to the defendant***

57. The defendant pleaded the defence of fair comment which if proved amounts to an absolute defence in actions for defamation. The burden of establishing the defence rests on the defendant who raises it in alignment with the principle in the law of evidence that he who alleges must prove.

58. In its submissions, the defendant advanced the view that the three articles were published in good faith in a matter of legitimate public interest; that they were based on facts which were true and opinions based on those facts. The defendant relied on the case of *Nation Media Group Limited & Another V Alfred N. Mutua, [2017] eKLR* to demonstrate the threshold required to be met by a defendant to sustain the defence. In this case, the Court of Appeal after reviewing several other authorities held as follows:

***“In Mong’are t/a Gekong’a & Momanyi Advocates vs. Standard Ltd... this Court stated, “that comment can only be fair if the basic facts upon which the comment is premised are correct. A comment which is based on lies or falsehood cannot be designated as fair.” And in Grace Wangui Ngenye vs. Chris Kirubi and another, Civil Appeal No. 40 of 2010 [2015] eKLR this Court reiterated that a fair comment must be based on facts that are true or substantially true; and that a fair comment is a commentary, an expression of opinion based on true or substantially true facts.”***

59. Similarly, in *Nation Media Group Limited & another V Alfred N. Mutua [2017] eKLR*, the same court listed the following as the ingredients to be established under this defence:

**“First, the comment must be on a matter of public interest. Second, the comment must be recognizable as comment, distinct from an imputation of fact. Third, the comment must be based on facts, which are true or protected by privilege. Fourth, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded. Fifth, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views.”**

60. In this case, though I agree with the defendant that the publications were made on matters of public interest, the defendant did not adduce any evidence to prove its contention that the publications consisted of facts which were true or substantially true and that opinions expressed therein were based on such facts. The defendant did not also indicate which of the statements consisted of facts and which ones comprised of opinions. In my opinion, any person reading the publications could not have differentiated the two.

61. It is trite that the defences of justification, qualified privilege and fair comment can be extinguished by malice. In this case, I have already found that the defamatory statements were not only false but were also malicious. Consequently, I am satisfied that the defendant has failed to establish the defence of fair comment and the same is thus not available to it.

***(iv) Whether the plaintiff is entitled to the reliefs sought***

62. Having found that the publications were defamatory of the plaintiff and that the defence of fair comment is not available to the defendant, I find that the plaintiff is entitled to some of the reliefs sought. The plaintiff had sought an award of both general and punitive damages, a mandatory injunction prohibiting the defendant or its agents from publishing further defamatory articles concerning her on the same subject matter, a suitable apology and retraction, costs of the suit and interest.

63. Though I find that the plaintiff is entitled to an award of damages which I will proceed to assess shortly, I find that she is not entitled to an order of mandatory injunction in terms sought given the effluxion of time since the publications were made and considering that there is no evidence that the defendant has since republished the articles or threatened to do so. Learned counsel for the plaintiff *Mr. Ohaga* readily appreciated this fact and abandoned the prayer in his oral submissions.

64. Regarding the prayer for a suitable apology and retraction of the defamatory material, it is not disputed that the defendant has to date not retracted the offending publications or offered an apology. The plaintiff prayed that the apology and retraction of the offending article be given the same prominence as the defamatory articles.

65. I have considered the aforesaid prayer and the plaintiff's submissions on the same urging the court to award damages of KShs.4,500,000 in lieu of an apology relying on the persuasive authority of *Samuel Ndungu Mukunya V Nation Media Group Ltd & Another [supra]* where the plaintiff was awarded KShs. 1,500,000 in lieu of an apology. I agree with the plaintiff's submissions that since it has been 14 years since the date of the publications, an apology cannot be an efficacious remedy. I am also of the view that the facts and circumstances in the *Samuel Ndungu Mukunya case* were materially different from those in this case and am not persuaded that it would be appropriate to award damages in lieu of an apology in this case. In the premises, I decline to direct the defendants to publish an apology as prayed or to award damages in lieu thereof as urged by the plaintiff.

66. On the prayer for general damages, the plaintiff proposed an award of KShs.20,000,000 on grounds that the plaintiff was a senior advocate and the publications were circulated widely in Kenya, East Africa and beyond through the internet. The plaintiff relied on, *inter alia*, the following cases where the plaintiffs were senior advocates:

*?JP Machira V Wangethi Mwangi & Another, HCCC No. 1709 of 1996* where the plaintiff was awarded KShs.8,000,000 in general damages.

*?Charles Kariuki T/A Kariuki & Company Advocates V Nation Newspapers Limited, HCCC No. 5 of 2000* where the plaintiff was awarded KShs.20,000,000 in general damages but which award was subsequently criticized by the Court of Appeal in *Johnson Evan Gicheru V Andrew Morton & Another, [2005] eKLR*.

*?Samuel Ndung'u Mukunya V Nation Media Group Limited & Another, [2015] eKLR* where the plaintiff was awarded KShs.15,000,000 in general damages.

67. The defendant on its part proposed an award of KShs.1.5 million in general damages relying on among others, the following authorities which involved some senior advocates:

*?Fred Oliver Omondi Ojiambo V Standard Limited & 2 Others, [2004] eKLR* where the plaintiff was awarded KShs.1,000,000.

*?Miguna Miguna V Standard Group Limited & Another, [2017] eKLR* where the plaintiff was awarded KShs.5,000,000.

*?Nelson Havi Versus Headlink Publishers Limited, [2008] eKLR* where the plaintiff was awarded KShs.6,000,000.

68. The award of general damages is at large. It is dependent on the exercise of the courts discretion after taking into account the peculiar facts and circumstances of each case. In exercising its discretion, the court is guided by several factors which includes the prominence given to the publication, the extent of its publication, the gravity of the libel and the manner in which it affected the plaintiff's reputation and

feelings; the plaintiff's position and standing in society; the defendant's conduct after the publication and in the course of the proceedings and any apology if offered.

69. In the case of *John V MGN Limited, [1996] 1 All 36* which was cited with approval by the Court of Appeal in *Johnson Evan Gicheru V Andrew Morton & Another, [2005] eKLR*, the court set out in great detail the factors a court should consider when assessing general damages for libel. The court expressed itself as follows:

***“In assessing the appropriate damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to handful of people”.***

70. Applying the above factors to the present case, I find that the publication in the East African was given great prominence since it appeared as a headline on the front page. The plaintiff claimed that the newspaper enjoyed circulation throughout East Africa while the publications in the Daily Nation had circulation not only in the Republic of Kenya but also globally through the internet.

71. The defendant admitted in its submissions that the two newspapers had national circulation but denied that they enjoyed regional and global circulation as pleaded by the plaintiff. This is what led to identification of the extent of the publications circulation as issue No. (V) which I will now proceed to determine.

72. A cursory perusal of the front page of the East African shows the price the newspaper retails at in the East African countries of Kenya, Uganda, Rwanda and Tanzania clearly leaving no doubt that the publication has regional circulation.

Regarding the Daily Nation's alleged global outreach, I take the view that this is a matter of general and local notoriety and is a fact which this court ought to take judicial notice of under *Section 60* of the *Evidence Act* which I hereby do. In any event, it is a fact which has already received judicial recognition in the *Samuel Ndungu Mukunya case*. In the premises, it is my finding that the defendant's publications have national, regional and international circulation through the internet.

73. Turning to the plaintiff's standing in society, it is not disputed that she is a prominent senior advocate who due to her exemplary record of excellent performance in the legal profession had been appointed to serve in key positions in different institutions in both the public and private sectors; she also served as Vice Chair of the Law Society of Kenya between 2004-2005. At the time of the offending publications, she had practiced law for 20 years and in the year 2012 she was conferred the rank of Senior Counsel, the highest rank in the legal profession.

74. It is important to remember that reputation is an integral part of an individual's dignity and for this reason, it is impossible to place a monetary measure or value to a dented or lost reputation. All the court can do in actions for libel is to award damages which in its view reasonably compensates a successful plaintiff for the wrong perpetrated by the defendant.

75. Having taken all the aforesaid relevant factors into account as well as the written and oral submissions on quantum made by both parties, I find that a sum of KShs.10,000,000 in general damages would be a fair and reasonable solatium for the plaintiff in this case. The plaintiff is therefore awarded KShs.10,000,000 in general damages.

76. The plaintiff also prayed for exemplary and/or aggravated damages. In *Ken Odondi & 2 Others V James Okoth Omburah T/A Okoth Omburah & Company Advocates, [2013] eKLR*, the Court of Appeal when drawing a distinction between exemplary and aggravated damages stated thus:

***“...Exemplary damages on the other hand had gone beyond compensation and are meant to ‘punish’ the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive eg. where it is attracted by malice, insistence on a flurry defence of justification or failure to apologise...”***

77. In this case, the defendant recklessly published the offending publications and refused to retract them or apologize even after being requested to do so by the plaintiff. The defendant also republished the libelous article published in the East African twice in the Daily Nation which as held earlier has international circulation apparently with the intention of inflicting maximum damage to the plaintiff's reputation. These are aggravating factors which entitles the plaintiff to an award of aggravated damages. In the circumstances of this case, I find a sum of KShs.2,000,000 reasonable under this head and the plaintiff is awarded the said amount.

78. The upshot of this judgment is that judgment is entered in favour of the plaintiff against the defendant as follows:

General damages	- KShs.10,000,000
Aggravated damages	- <u>KShs. 2,000,000</u>
Total	- <b><u>KShs.12,000,000</u></b>

The damages will attract interest at court rates from today's date until payment in full.

79. As costs follow the event, the plaintiff is awarded costs of the suit.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 28<sup>th</sup> day of May 2020.**

**C. W. GITHUA**

**JUDGE**

In the presence of:

Ms Leyla Ahmed for the plaintiff

Mr. Angwenyi holding brief for Mr. Wetangula for the defendant

Ms Orod: Court Assistant