



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 130 OF 2009

LT GEN. J.M MUTWII.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED....DEFENDANT

JUDGMENT

1. The plaintiff **LT GENERAL J.M. MUTWII** instituted this suit on 16th March 2009 against the defendant **NATION MEDIA GROUP LIMITED** vide plaint dated 5th March 2009.
2. The plaintiff's case against the defendant is for general damages for loss of reputation; exemplary damages; costs of the suit; interest; and any other relief that this court deems fit and just to grant. The plaintiff's complaint against the defendant is that on or about 5th February 2008 at page 6 and 8 of its 'Daily Nation' publication and page 6 of the 'Sunday Nation' issue dated 7th December 2008, the defendant published the following matters: "***Lt General Tuwei named Army Commander***" and also in the Sunday Nation of 7th December 2008 at page 6 for matters of security I a title ***headed "military chiefs may get more time in office."*** The defendant is said to have published and circulated a defamatory article concerning and referring to the plaintiff which read:

"Lt General Njoroge's former Deputy Lt General J.M. Mutwii, swapped places with the "New Army Commander to head the National Defence College Lt General Mutwii who is past his grade retirement age of 58 years, and the Chief of the General Staff are married to Sisters."

3. The plaintiff averred that the aforesaid article and publication contained facts that the plaintiff was neither conducted nor consulted on- issues of age; his term of service having been extended twice and the fact of the plaintiff having married sisters together with the Chief of the General Staff. That the editor or author of the article created malicious facts- that were not factual and went further to comment on them.
4. The plaintiff further averred that the impugned article and facts thereof in their ordinary and natural meaning meant and were understood to mean that:
 - i. *The plaintiff did not deserve the promotion since the Chief of General Staff favoured him due to the fact of them being married to sisters.*
 - ii. *The plaintiff did not deserve the promotion because he is past the necessary age for the positions promoted to.*
 - iii. *The plaintiff did not warrant the promotion since there was/or there is no extension of the term of*

the promotion.

- iv. *The plaintiff does not deserve any respect from juniors or supervisors in the Armed Forces as well as the public.*
 - v. *The plaintiff was promoted due to nepotism.*
5. The plaintiff further pleaded that the article and the incorrect facts had exposed him to ridicule, contempt and odium in the eyes of the right thinking members of the society who include the members of the Armed Forces and the public at large and the defendant was asked to retract and apologize but ignored notice given on 18th December 2008.
 6. The defendant entered an appearance on 8th April 2009 and filed defence dated 23rd April 2009 on 24th April 2009 denying all and singular the allegations by the plaintiff that he was defamed or that the alleged publication was made maliciously as stated and put the plaintiff to strict proof thereof.
 7. The defendant further stated that in so far as averments in paragraph 6 of the plaint were concerned, they consist of statements of fact, true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest.
 8. The defendant did set out the particulars of truth and facts as follows, in accordance with order 6 rule 6A of the Old Civil Procedure Rules.
 - i. *It is a fact that the plaintiff was moved to the National Defence College where he replaced Lt General Njoroge;*
 - ii. *It is a fact that at the time of the deployment to the National Defence College, the plaintiff was past his retirement age.*
 - iii. *It is a fact that the plaintiff and the Chief of General Staff are related;*
 - iv. *It is a fair comment to state in view of the foregoing that "Military Chiefs may get more time in office"*
 9. The defendant denied that the words explained of meant or could have been understood to mean in their natural and ordinary sense the meanings ascribed to them. It is also denied that the plaintiff ever suffered any distress, embarrassment or damage to reputation as pleaded and that if at all he so suffered then the same were occasioned by reasons other than the publication and as such he is not entitled to any compensation or damages. The defendant prayed that the suit be dismissed with costs.
 10. On 6th May 2009 the plaintiff filed a reply to defence reiterating the contents of the plaint. He denied the particulars of facts set out in paragraph 5 of the defence. He maintained that he suffered distress, embarrassment and damage to his reputation before his supervisors and juniors in the Armed Forces and to the public at large attributable to the publications of incorrect facts. He also maintained that his claim was meritorious.
 11. Each party filed own issues for determination by this court. I had the opportunity of hearing the parties to this suit who gave viva voce evidence.
 12. The plaintiff testified on 27th January 2015 as PW1 and adopted his written witness statement filed on 16th May 2012. He stated that he was a businessman having retired from the Kenya Army as a Lieutenant Deputy Army Commander. He stated that on 3rd December 2008 he was promoted to Lt General and posted to the National Defence College having served in the military since 30th August 1974 when he was only 24 years old. That in 2008 he was aged 56 years, 11 months and 24 days old. He produced his national identity card as P exhibit 1 showing that he was born in 1951. It is No. 5773178. The plaintiff stated that he was promoted on 3rd December 2008 and on 5th December 2008 the defendant published an article concerning him as pleaded in the plaint. That another article was published on 5th December 2008 on page 6 and on 7th December 2008 in the Sunday Nation.
 13. The plaintiff further stated that the defendant alleged that he had swapped places with Lt General Njoroge his former boss to take over at the National Defence College; that he was past retirement age of 58 years; his term of service had been extended twice; and that he was married to the sister of the wife of the Chief of General Staff which was false.
 14. According to the plaintiff, the publication was false, malicious and was intended to malign his

- name as it was not true that he had been given any extensions twice. He stated that he was not past 58 years but that he was 56 years then and could only retire at 59 years. He denied that he was married to the sister of the Chief of General Staff's wife. The plaintiff produced the impugned articles as P Exhibit 2 and P exhibit 3. He stated that besides being in the army, he held other community responsibilities including being Chairman of Board of Governors of Nduluku Secondary School; member of District Church Council African Inland Church at Kiondo; Member of African Centre for Strategic Studies with Headquarters in Washington DC; Member of Mbooni East District Education Board and other social committees.
15. The plaintiff stated that he was at the highest level of the military command and administration and belonged to several military committees, being the head of the National Defence College. That he had attended several courses including special operation, command trained in USA, South Africa and Kenya; he had a degree in law, diploma in Diplomacy and International Studies and a Diploma in Resource Management and Development.
 16. That when he read the impugned articles, he got the impression that his promotion was not deserved and that he was not competent and only relied on his blood relations with the Chief of General Staff for those promotions. He denied ever receiving favours to continue being in the military. He also denied marrying a sister to the wife of the Chief of General Staff. He also denied that his wife was related to the Chief of General Staff.
 17. The plaintiff stated that the publications were a culmination of other articles written concerning the plaintiff hence the articles impugned were calculated to malign him and paint him as an incompetent/inappropriate person to rise to higher ranks in the military and that the articles alleged that Chief of General Staff, Gen Kianga favoured the plaintiff because of the blood relations for purpose of promotions. Further, he stated that the impression created to the public is that the plaintiff was past 58 years hence he should have retired but that he was exploiting the relationship with Kianga's wife to get favours and that in Kenya there is a general perception that one only gets promoted when they are related to those in high ranks even when they do not qualify for such promotions. He stated that the defendant never sought any information from him or his wife to clarify the matter, not even after he send a demand notice through his advocate produced as P exhibit 4.
 18. The plaintiffs testified that he retired from the military on 14th December 2010 and he was given a certificate of service produced as P exhibit 5 and retirement letter P exhibit 6.
 19. The plaintiff testified that after the publications of the offensive articles, he did not get any other promotions. He stated that in December 2008, Mr Mutuma Imathiu of the Nation went to him at National Defence college urging the plaintiff to drop the complaint upon which the defendants would publish an apology in the papers but that the plaintiff rejected the offer. He prayed for judgment and damages.
 20. On being cross examined by Ms Lelei counsel for the defendants, the plaintiff responded that the subject articles also mentioned the appointments of other military officers and their promotions but that the paper never gave their details and that it painted him in the wrong. He also stated that procedures in the military were not open to the public to know how promotions and appointments were done in the military and admitted that such concerned public interest but only if what they said was correct. He admitted that the public have legitimate interest in the leadership in the Kenya Defence Forces.
 21. The plaintiff also conceded that there were speculations on how the appointments were done in the military. He stated that the chief of General Staff is the highest rank in the military but Chief of General Staff does not appoint his juniors as there is an appointment process that would be followed. He stated that his appointment to the National Defence College was by the President who was the Commander in Chief of the Armed Forces. He stated that even if his wife was a sister to General Kianga's wife, which was not the case here, that would have no bearing on his appointment which was done by His Excellency the President and not General Kianga. He stated that the article was published immediately after his appointment as head of the National Defence College and he continued to serve until 2010 when he retired at age 59. He stated that when the defendant's article says that his term had been extended twice, there was such term in the military where one either retires or is promoted. He admitted that the Commander in Chief could nonetheless extend one's service after the mandatory retirement age and that it was

- likely that exemplary service could be a factor when considering extension of the term. The plaintiff stated that his wife and General Kianga's wife came from the same clan but that the article did not say that he and Chief of General Staff came from the same clan or area or are related.
22. In re examination by Mr Manthi Masika advocate, the plaintiff stated that the article meant that his wife and the wife of General Kianga Chief of General Staff were blood sisters. He also stated that an ally was a close associate or friend. That he was concerned about the perception given to the public about him in the military circles. That procedures in the military are confidential so if any civilian wanted information from the military, they would get information from the liaison officer.
23. The plaintiff called PW2 Susan Nduku Mutuku who stated on oath that she was a businesswoman and spouse of the plaintiff. She adopted her written statement filed in court on 16th May 2012 and denied that she was the sister to Chief of General Staff wife. She testified that she got married to the plaintiff in 1971 and had 4 children. That the plaintiff was initially a teacher who later joined the military 2 years after their marriage. That as at the time of the impugned publication when he was promoted he was almost 57 years while his retirement age was 59 years. PW2 also stated that her husband was well educated, supporting his evidence on his academic qualifications. She further stated that she knew General Jeremiah Kianga who comes from Nduluku location whereas she comes from Kisau location. That she had one sister called Elizabeth Wanza who was married to Pius Muema whereas the wife of General Kianga was Christine Kianga and that she had 3 sisters. She stated that she was not the sister to General Kianga's wife but that they belonged to the same clan in Ukambani of 'Mutangwa' but different families.
24. PW2 stated that she read the impugned articles which contained falsehoods about her husband. That the information was never verified and therefore it was reckless, and malicious as it was made at the time when military officers were being retired while others were being promoted so the publication was made to tarnish his name. That she understood the article to mean that her husband was promoted to the rank he reached through nepotism and did not deserve any promotions and that since he had reached retirement age, his promotion was illegal and done because of his connection to Chief of General Staff and so his juniors could not respect him. That due to the malicious allegations, he was never promoted to be Chief of General Staff. That after the publications, friends and enemies approached her to find out how come her husband was promoted through nepotism when he was supposed to have retired simply because of his relations with General Kianga and that their family is was ridiculed, humiliated and they have suffered for being disrespected.
25. The defendant's counsel had no questions for the PW2.
26. PW3 Christine Kianga testified on oath that she was a housewife and businesswoman. She was the spouse to Chief of General Staff, Gen Jeremiah Kianga. She adopted her witness statement filed on 24th May 2012 and denied being a sister to PW2 as alleged by the impugned article, save that they came from the same Atangwa clan in Ukambani. She stated that she read the impugned articles which she considers to be malicious and meant to hurt the reputation of Lt General (Rtd) J.M. Mutwii and General (Rtd) J.M. Kianga since she is not a sister to General Mutwii's wife as alleged and that she was highly offended by the article since it was incorrect and nobody had approached her to establish the true position. That after the publication, people approached her to find out why her husband ruined the military by promoting relatives against existing regulations and that she wanted to sue for defamation but her husband General Kianga restrained her.
27. The defence had no question for PW3.
28. Samson Ngati Mutweia testified as Pw4. He adopted his witness statement filed in court on 16th May, 2012 and stated that he was an accountant working with Roofteck Ltd since 2001. That he knew the plaintiff who was his neighbor at home and knew his wife as well since they had interacted at the community level and socially for about 10 years. That he knew the plaintiff worked with the Army from 1974 and retired in 2010 and that they were family friend. That he read the articles complained of and to him, they were not correct in that the wife to the plaintiff was not the sister to General Kianga's wife and neither was it true that the plaintiff had been promoted even after attaining his retirement age.

29. That the articles were malicious and false. That after reading the articles, the witness contacted Lt General Mutwii and inquired of the matter and that the plaintiff was very bitter about the whole issue. That his friends thought that the plaintiff's promotions were earned through nepotism and favoritism and tribalism since it overlooked his alleged retirement age.
30. PW5 Mr David Ratemo Minga testified on 6th May 2015 and adopted his written witness statement signed on 19th April 2012 and filed on 16th May 2012 as his evidence in chief. He stated that he had worked in the military for the last 35 years and retired in 2011 December. That he had known the plaintiff in 1976 when both were private soldiers in the same 5KR Unit and the plaintiff was their Platoon Commander. That he knew the plaintiff as a very hardworking person. They worked together and the plaintiff earned his promotions into the rank of Deputy Army Commander. He testified that he read the impugned articles which he found malicious because the Lt General Mutwii had not been promoted after his retirement age and that after the publication he raised the issue of Lt General Mutwii's wife being sisters with Chief of General Staff wife which the plaintiff refuted. He stated that he understood the article to mean that the plaintiff was being promoted due to nepotism and tribalism and not competence. That he knew the plaintiff and that in his view, the plaintiff deserved those promotions which were done through various military promotion boards. That the article could have affected the promotion of the plaintiff to Chief of General Staff.
31. In cross examination by Ms Lelei the witness stated that appointments in the military were not open to the public and that it was a topic that was not discussed freely. He stated that the Commander In Chief- the President, appointed the Chief of General Staff while the other top brass were appointed by the Defence Council. He stated that the Chief of General Staff had no monopoly. He denied that the offensive article suggested that Chief of General Staff is the one who appointed the plaintiff. He admitted that in the military, if one had not attained retirement age, the term could be extended by the panel and such extension was pegged on good performance.
32. In reexamination by Mr Masika, the witness stated that according to the military hierarchy there was a Defence Council and Board No. 1 which recommended promotions and that after he read the article, he consulted and discovered that it was false. He stated that it appeared as if the plaintiff had been promoted due to nepotism.
33. At the close of the plaintiff's case, the defendant did not call any witness and both parties' advocates filed written submissions and highlighted the same.
34. In the plaintiff's submission dated 30th May 2015, his counsel reiterated his pleadings as per the plaint and his testimony on oath as supported by his witnesses who included his wife- PW2, Chief of General Staff wife PW3 and his former colleague PW4 who all testified that they read the impugned article which concerned the plaintiff as authored by the defendant on the two occasions. The plaintiff maintained that the publications were false and malicious. It was further submitted that the plaintiff's testimony and the testimonies of his witnesses as to the incorrectness/falsity of the impugned articles and how the publication was perceived by those who read it was never controverted by any evidence on the part of the defendant who opted to close its case without calling any witness to prove the correctness or factual, fair comments on matters of public interest or opinion. In that regard, it was contended by the plaintiff that the publications were reckless since there was ample evidence that the plaintiff earned his promotions in the military on merit.
35. On what is defamation, the plaintiff relied on the case of **Geoffrey Seijoga V Reverend Patrick Rwabigonyi [1977]** reported in the Digest of Odunga page 1583 that:

“ Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally or which tends to make him be shunned or avoided.

The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are the attack upon the moral character of the plaintiff attributing to high form of

disgrace conduct such as crime, dishonesty cruelty and so on.”

36. Further reliance was placed on the case of **Blaze Balbigua V Hanna Besigye** (No citation provided) where the Ugandan Court stated:

“ The test which has been laid down on determining whether a statement is defamatory or not is whether the defamatory statement has exposed the defamed person to hatred, ridicule or contempt or it has caused him to be shunned or avoided or one which has a tendency to injure the plaintiff’s reputation in his office profession or trade, in the estimation of right thinking members of the society.”

37. According to the plaintiff, the publication was malicious and not done in good faith. That it was made to show that the plaintiff’s relationship in the service when his term had expired was because of his relationship with the Chief of General Staff who was favouring the plaintiff, and which was not true. That there was no evidence of the plaintiff and Chief of General Staff being married to sisters as testified by PW2 and PW3 his wife and wife to Chief of General Staff respectively. Further, that there was evidence that at that time, he had not attained his retirement age hence the issue of extension of service after attaining mandatory retirement age did not arise; which publications were made just 4 days after his promotion on 3rd December 2008 to Lt General and hence the perception created was that he did not deserve that promotion.

38. On quantum of damages for loss of reputation, the plaintiff urged the court to look at the reputation of the plaintiff in the armed forces and the number of years he had worked in the Armed Forces, the name he had earned nationally and regionally and globally which was a good name taking with it personal integrity, honesty and good discipline, respect in the Army and that therefore the published articles as circulated injured his name and that had the allegations been true would have amounted to criminal offences leading him and Chief of General Staff being court marshaled under the Armed Forces Act 1968 and if found guilty, they would be sentenced to a maximum of 2 years imprisonment in that:

- a. *Under Section 61(a) of the Armed Forces Act the offence would be signing a false service document. The Chief of General Staff would be charged with promoting a person who had passed his age to be promoted such that the plaintiff would have earned the promotion knowing that he had passed the age and both officers would be culpable.*
- b. *Section 58 of the Act: making a false answer on enlistment: The plaintiff would have cheated his age for retirement and would be assisted by the Chief of General Staff to commit the offence due to their relationship.*
- c. *Section 67(a) of the Act: conniving as a commission service: aiding, abetting or counseling or procuring or conniving at the commission of service office.*
- d. *Section 68 of the Act: conduct to prejudice the good order and service discipline.*

39. It was submitted that the plaintiff and the Chief of General Staff would have been court marshaled for practicing nepotism and favourism and would both earn 8 years imprisonment.

40. On the discretion of the court to award general damages for defamation, reliance was placed on Section 16A of the Defamation Act. The plaintiff urged the court to award kshs 15,000,000 general damages and shs 15,000,000 exemplary damages, based on the decisions in **HCC 1230/2004 Francis Ole Kaparo V The Standard Ltd & 3 Others** where Onyancha J awarded shs 7,000,000 general damages for defamation of character in favour of the plaintiff speaker of the National Assembly.

41. On exemplary damages it was submitted that the plaintiff was a very senior military officer and in view of the sensitivity of security issues regarding promotion the defendant would make lots of sales of its publication as more people would be interested in knowing who would be promoted or retired. Reliance was placed on **Nicholas Biwott V Dr Ian West and Another** where Onyancha J was satisfied that the conduct by the defendant was calculated to make them make some profit exceeding the compensation payable to the plaintiff. In this case it was submitted that the defendant repeated the publication and that it has a global readership. That the

plaintiff being a senior military officer, the defendant did not care whether the publication was true or false hence it was reckless. Further reliance on quantum of damages was placed on **HCC 2143/99 Nicholas Biwott Vs George Mbuggus and Kalamka Ltd** where the plaintiff was awarded shs 10,000,000 general damages and 10,000,000 exemplary damages in 2002 ;and **HCC 1329/2003 Honourable Ambassador Chirau Ali Mwakwere Vs Nation Media Group Ltd and Another** where Khaminwa J awarded the plaintiff shs 8,000,000 general damages and shs 1,000,000 exemplary damages.

42.The plaintiff also relied on Gatley on Libel and Slander 7th Edition Chapter 9 page 266 on the principles applicable for awarding exemplary damages.

43.In their submissions dated 23rd July 2015 the defendant's counsel submitted admitting that it published the impugned articles but that discussions regarding the leadership of the Armed Forces are a matter of general public interest to inform the public of the changes in the leadership within the Armed Forces, in the fulfillment of the defendant's duty of imparting information that is of great public interest or concern to the public.

44.The defendant's counsel further submitted that the statements made in the articles were statements that were true in substance and fact, thus not actionable since they were not at all malicious. The defendant also averred through its advocates that the articles expressed opinion, hence they were fair comment on a matter of public interest.

45.On justification, the defendant's counsel submitted that indeed the published articles contained statements of fact and contended that the plaintiff's testimony confirmed that :

- a. *he had been appointed commander of the National Defence College where he replaced Lt General Tuwei.*
- b. *The plaintiff's term had been extended twice.*

46.That the plaintiff's submissions were that his grade's retirement age is 57 which was in line with his testimony that he was born in 1951 and that as at the time of publication in December 2008 he must have been 57 years. That the plaintiff and PW4 confirmed that the President had the discretion to extend the term of military officials past their retirement age in recognition of exemplary service or performance by an officer hence the imputation of the statement in the articles was not to defame the plaintiff but to express an endorsement of the plaintiff by the President and the honour that had been bestowed on him for his devotion to duty and exemplary performance, which is not defamatory but shows that the plaintiff merited his promotions.

47.On the question of whether the plaintiff and the Chief of General Staff were married to sisters, it was submitted that PW2 and PW3 testified that they came from the same clan Mutangwa and are relatives. Further, that in any event it was the President who appointed military officers in the highest echelons and not the Chief of General Staff . Reference was made to the case of **Martha Karua V Standard Group Ltd & Another [2007] e KLR** where the court opined that:

“ In order to determine whether the words complained of in their natural and ordinary sense tend to lower the reputation of the plaintiff in the eyes of right thinking members of the society, the court must look at the whole article to appreciate its full import, and tenure as that is what a right thinking member of the society would.”

48.Further reliance was placed on **Charleston & Another Vs News Group Newspapers Ltd & Another [1995] 2 ALL ER 313** where the House of Lords held:

“.....in order to determine the natural and ordinary meaning of the words of which the plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication. Thus a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage.”

49. It was submitted that the plaintiff admitted in his testimony that any familial relationship he had with the Chief of General Staff could not have influenced his promotion within the military as the Chief of General Staff was not the appointing authority hence, despite the incorrectness of that statement regarding the family relations between the Chief of General Staff and the plaintiff, when read and interpreted in its natural and ordinary sense and in the context of the entire article could not reasonably be capable of conveying an imputation of nepotism on the plaintiff and therefore not a defamatory statement. Reliance was placed on Section 14 of the Defamation Act which provides that:

“ In any action for libel or slander in respect of words containing two more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges.”

50. The defendant further relied on **Moore V News of the World Ltd [1972] 1QB 441, page 448** where Lord Denning stated that:

“..... a defendant is not to fail simply because he cannot prove everything in libel to be true. If he proves the greater part of it to be true, then even though there is a smaller part not proved, the defendant will win as long as the part not proved does not do the plaintiff much more harm.”

51. It was therefore submitted that since the greater part of the statements in the article were true and accurate, the defence of justification ought not to fail for the reason that the two statements not proved to be true do not injure the plaintiff's reputation.

52. On whether the article was fair comment on a matter of public interest, it was submitted that the article concerning the plaintiff being highly expected to take over as Army Commander, the article expressed opinion and was fair comment on a matter of public interest. It was submitted that since members of the public were not privy to appointments in the Armed Forces, the procedures and criteria for making such appointments not being of general public knowledge, members of the public, nonetheless, have a legitimate interest in knowing who sits in the leadership of knows organs of the National Defence Forces which are matters relating to our security and therefore important to the public, which the plaintiff allegedly agreed with in his testimony. It was therefore submitted that the publication was within the defendant's professional duty as a media institution to collect, publish and distribute to the public information and or occurrences of matters of public interest and as such the publications were made within the confines of the law. The defendant relied on Section 15 of the Defamation Act which provides that:

“ In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, defence of fair comment shall not fail by reason that the truth of every allegation of fact is not proved if the expression of opinion of fair comment having regard to such of the facts alleged or referred to in the words complained of as proved.”

53. It was further submitted that no evidence of malice was adduced. Further, that in any case the right to fair comment is one of the fundamental rights of speech and writing. Reliance was placed on **Gatley on Libel and Slander 9th Edition at page 327** that:

“.....The principle which is a universal one is that the public convenience is to be preferred to private interests and communication which the interest of society requires to be unfiltered may be made by person acting honestly without malice notwithstanding that they involve relevant comments condemnatory of individuals.”

54. On quantum of damages it was submitted by the defendant's counsel that should this court be

minded otherwise then the court should not rely on the decisions cited since they concerned prominent personalities and that the defamatory imputations conveyed in each of those cases were much more serious than in this case. They invited the court to consider and be guided by the authority of **Evans Gicheru V Andrew Motion & Another [2005] e KLR** and to be guided by the whole conduct of the defendant from the time the libel was published to the time of the verdict; the conduct before action, after action and during the trial.

55. On exemplary damages the defendant relied on **John V MGN Ltd [1997] QB 586** cited in **CAM V Royal media Services Ltd [2013]** that:

“exemplary damages can only be awarded if the plaintiff proves that when the defendant made the publication knew that he was committing a tort or was reckless whether his action is tortuous or not, and decided to publish because the prospects of material advantage outweighed the prospects of material loss.....if the case is one where exemplary damages can be awarded the court or jury should consider whether the sum which it proposes to award by way of compensatory damages is sufficient not only for the purposes of compensating the plaintiff but also for the purpose of punishing the defendants.”

56. The defendant also relied on the guide provided by Section 16A of the Defamation Act and submitted urging this court to find that the published articles do not qualify for statutory minimum in terms of gravity. The defendant also relied on **Kanyi Naran Patel V Noor Essa and Another [1965] EA 484**.

57. It was submitted that the plaintiff continued to serve as commandant at National Defence College until he retired honourably regardless of the publication hence there was no evidence of any injury suffered as a result of the impugned publications and neither was the alleged defamation repeated. Relying on **Nyamogo V Nyamogo Advocate V Barclays Bank of Kenya [2015] e KLR** the defendant proposed a sum of shs 500,000 general damages in view of the relative mildness of the defamation.

58. In a rejoinder to the defendant's submission, on 27th October 2015 the plaintiff's counsel filed reply to defendant's written submissions. It was submitted that there was denial that the defendant had denied that impugned publications were made by the defendant and concerned the plaintiff. It was also submitted that there was no evidence adduced by the defendant to prove justification, truth and fair comment on matters of public interest. The plaintiff maintained his denial that his term was ever extended twice. He also denied admitting that his retirement age was 57 years in his submissions and that he stated that retirement age for his rank was 59 not 57 years. That the articles targeted to injure his reputation and were malicious since no reference to the ages and terms of service of other Generals was discussed and that there was no statement that the plaintiff was promoted due to his devotion to duty and exemplary performance. That it was wrong to stretch the meaning of sister to refer to clan relationship as defined in the **Black's Law Dictionary 'sister' means "a woman who has the same father and mother with another or has one of them only."**

59. That the perception that Chief of General Staff is a key figure in Defence Council and had influence cannot be wished away or ignored. That the articles were meant to influence the public to perceive any promotion to be pegged on favouritism and therefore the President would have appointed a wrong person who did not qualify. On the authorities cited it was contended the **Martha Karua** case assists the plaintiff's case whereas **Charleston** case was not applicable.

60. The plaintiff denied that he only isolated portions of the articles. It was further submitted that Section 14 of the Defamation Act was inapplicable since none of the allegations were proved to be correct and charges made were not distinct as there were a series of Articles with the aim of injuring the plaintiff's reputation and that the **Moore Vs News of the World Ltd** case does not change the position. That the plaintiff was never consulted hence they were not fair comments since the statement of opinion was not based on correct facts. Reliance was placed on **TRUTH (NZ) Ltd & AVERY TRUTH (NZ) Ltd Vs HOLLOWRY [1960] NZLR6 page 93**.

61. It was further submitted that Section 15 of Defamation Act was inapplicable because the

allegations made were not factual. That the right to free speech and writing was only available if one was making correct statements hence the statement from Gatley on Libel and slander as cited was inapplicable.

62. It was submitted that it was not justified why the plaintiff should be entitled to nominal damages reliance being placed on **John V MGN (supra)** and that in this case, substantial damages were justified because:

1. *The allegations made were serious that the Chief of General Staff was being assisted/ aided to commit criminal offences by introducing tribalism, nepotism and violating the Armed Forces Act.*
2. *The status of the plaintiff in society.*
3. *Circulation of the defamatory statement locally and internationally.*
4. *The defendant did not investigate facts and was reckless.*
5. *The defendant failed to tender an apology, failed to testify.*

63. That exemplary damages were awardable because the defendant failed to tender evidence to prove that it had no knowledge that it was admitting a tort by the publication was reckless; the prospect of material advantage outweighed prospects of material loss on that security matters were sensitive so, many people would be anxious to buy the newspaper. That the case of **Kanyi Naran Patel** (supra) was not relevant and that the plaintiff did not become Chief of General Staff because of the publications. That **Nyamogo & Nyamogo** (supra) case was inapplicable and that this court should follow the award in **Samuel N. Mukunya V Nation Media Group Ltd & Another** where the court awarded a High Court judge shs 20,000,000 on 29th June 2015. The plaintiff urged this court to award shs 25,000 general damage; 3,000,000 aggravated damages' 2,000,000 damages in lieu of apology, costs and interest.

64. The parties' advocates did on 28th October 2015 make oral highlights of the submissions as filed and in brief, reiterating the written submissions and which I need not reproduce here as they are all due for consideration.

65. I have carefully considered the plaintiff's claim against the defendant, by way of his pleadings, his testimony in court, and that of his three witnesses, documentary evidence, submissions, case law and statutory law submitted. I have given equal consideration to the defendant's statement of defence, what they gathered through cross examination and the submissions on record supported by statutory and case law.

66. I note that although each of the parties did file their own independent statements of issues with the plaintiff filing his on 3rd March 2010 and another statement of issues filed on 30th June 2011, while the defendant filed on 22nd February 2010, none of the parties relied with specificity on the said issues in their submissions. I will therefore, before framing my issues for determination, set out those issues as hereunder:

67. The plaintiff's issues:

1. *Whether the plaintiff has a cause of action as pleaded by the plaintiff and denied by the defendant.*
2. *Whether he published articles of the defendant's newspapers dated 5th December 2008 page 6 and 8 and the one of Sunday Nation dated 7th December 2008 at page 6 are true or not.*
3. *If the words in the said articles are not true, whether they are defamatory.*
4. *If the words are defamatory, whether the words could be attributed the meanings stated in paragraph 7 of the plaint.*
5. *Whether the defendant was actuated by ill motive or malice when publishing the said articles.*
6. *Whether the plaintiff was injured by the incorrect words or not as stated in paragraph 8 of the plaint.*
7. *Whether the statements on the aforesaid articles complained were fair comments as far as public interest are concerned or not.*
8. *Whether the plaintiff demanded for an apology both orally and in writing from the defendant and the same was either ignored or neglected or refused by the defendant.*

68. The plaintiff's other statement of issues as filed on 30th June 2011 are:

1. That the words published in the Daily Nation on 5th December 2008 and Sunday nation on 7th December 2008 are defamatory.
2. That the published articles are incorrect, untrue and malicious .
3. That the words published in their ordinary sense amount to the contents of paragraph 7 of the plaint.
4. That the articles has exposed the plaintiff ridicule, contempt and odium.
5. That the plaintiff has suffered damage as a result of the publication

69.The defendant’s statement of issues:

1. Whether the words complained of by the plaintiff in paragraph 5 of his plaint can be considered as defamatory as alleged by the plaintiff;
2. Whether any malice can be inferred from the publication of the facts as alleged in paragraph 6 of the plaint;
3. Whether the words complained of could mean or be understood to mean, in their natural and ordinary sense, the meanings ascribed to them in paragraph 7 of the plaint.
4. Whether the suit as pleaded discloses any reasonable cause of action;
5. Whether the plaintiff is entitled to any of the reliefs sought in the plaint;
6. Which party should bear the costs of the suit.

70. From the above separate issues as filed by each party, in my humble view, the following issues emerge for determination in this suit:

1. Whether the publications of 5th and 7th December, 2008 by the defendant as admitted was defamatory of the plaintiff.
2. What damages if any are awardable to the plaintiff?
3. Who should bear costs of the suit?

71.To answer the above questions, I must first state what a defamatory matter is and its implications on the established law that the defamation tort of libel is actionable perse, without proof of damages.

72.I note that the defamation Act Cap 36 Laws of Kenya does not attempt to define defamation. Recourse is therefore had to English Law. In a suit that is founded on defamation, the plaintiff must prove that:

- a. *The matter of which the complains was published by the defendant;*
- b. *And that it was published of and concerning him and*
- c. *That it is defamatory in character and*
- d. *That it was published maliciously*
 - a. *And in slander, subject to certain exceptions, he has thereby suffered special damages.*

73.In this case, the matter complained of is libel hence the last element above shall not be considered. Therefore, on what is defamation or what is a defamatory matter, the leading English Monograph of **Gatley on libel and slander 8th Edition paragraph 4 page 5** defines defamation as:

“Any imputation which may tend to lower the plaintiff in the estimation of right thinking member of society generally.....or to expose him to hatred contempt or ridicule.”

74.**Winfield in J.A. Jolowicz and T. Ellis Winfield on Tort 8th Edition at page 254** defines defamation as:

“ The publications of a statement which tends to lower a person in the estimation of right thinking members of society generally or which tends to make them shun or avoid that person.”

75. Halsbury's Laws of England 4th Edition VOL 28 paragraph 10 states:

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

76. From the above definitions which have been accepted as standard definitions of the term defamation, it is clear to me that the operative verb thereon is “which tends to lower.....” and not “which lowers.....”

77. Thus, the above definitions do not impose an obligation on the plaintiff to prove that the defamatory words actually caused him to be shunned or avoided or to be treated with contempt. What the plaintiff is required to establish is that the publication *tended* to lower him in the estimation of right thinking members of the society generally.

78. In **Jones V Skelton [1963] 1 WLR 1362 P 1371** the court stated that:

“ The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words explained of in a defamatory sense.”

79. In **Hayward V Thomson & Others [1982] 1QB 47 at 60** it was stated inter alia:

“One thing is of essence in the law of libel. It is that the words should be defamatory and untrue and should be published of and concerning the plaintiff....”

80. In **Clerk & Lindsell on tort 17th Edition 1995 page 1018** it is stated that:

“ Whether the statement is defamatory or not depends not, as has been pointed out already, upon the intention of the defendant, but upon the probabilities of the case and upon natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published.”

81. Applying the above legal principles to this case, it is not disputed by the defendant that it was the publisher of the impugned articles/publications of 5th December 2008 and 7th December 2008. It is also not denied that the publications concerned the plaintiff who was referred to therein by name. The article of 5th December 2008 was in the National News Column under “**Security News**” with the picture of Chief of General Staff Jeremiah Kianga clad in full military gear and titled “**military chiefs may get more time in the office.**” The subtitle as written by David Okwemba says:

“Chief of General Staff and his Deputy won't retire next year after all.”

82. Against the above article is the allegation in the article that extension of terms of military officers is against the rules introduced by retired Chief of General Staff General Daudi Tonje and that therefore the plaintiff who was past his grades retirement age of 58 years had, as per the subsequent article of 7th December 2008, his term extended twice.

83. Albeit this court does not find the fact of extension of the plaintiff's term twice *per se* defamatory, even if he had received two extensions and or that he was past his retirement age, when such extensions were made, the tone of the articles and in the context in which the

articles were published create an irresistible inference that the plaintiff's term had been extended twice *contrary to the established military rules and secondly, that most probably, his likely appointment to take over as the Army Commander is due to his familial relationship with the Chief of General Staff and not based on merit or excellent performance.*

84. I also find that albeit the appointment to such an office done by the Commander in Chief who is His Excellency the President, It is not disputed that the President only appoints on the advice of the Defence Council to which the Chief of General Staff is a member of great influence. I am in total agreement with the plaintiff, having read the articles and heard the plaintiff testify in court, that any reasonable or right thinking member of the society reading the articles would construe the cited paragraphs to mean that the term of the plaintiff had been extended twice contrary to the established military rules and; that despite the plaintiff having reached his retirement age, he continued to serve and expected to be appointed Army Commander by virtue of his familial relations with the Chief of General Staff.

85. In my view, imputation of accepting appointments which are done in breach of the established military rules is defamatory and *tends* to lower a person's reputation and credibility in the mind of right thinking members of the society generally who may shun or avoid him.

86. As was correctly stated by **Clerk and Lindsell on Tort 17th Edition 1995 at page 1018 that:**

“ Whether the statement is defamatory or not depends not, as had been pointed out already, upon the intention of the defendant, but upon the probabilities of the case and upon natural tendency of the publications having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published.”

87. In the instant case, PW4 and PW5 who knew the plaintiff very well for over 35 years did not believe that the plaintiff could have been promoted by virtue of his familial relations with the Chief of General Staff. PW5 knew the plaintiff to be a very hard working military officer who earned his promotions on merit. Although there was a suggestion to the plaintiff's witness by the defence counsel in cross examination that the Commander in Chief could extend the terms of top military chiefs based on their excellent performance, this court is minded that the above answer only came in cross examination.

88. The defendant did not call any evidence to prove any of the defenses of truth, justification and fair comment on matters of public interest as pleaded. Answers in cross examination could not therefore build the defence for the defendant. The law is clear under Section 107 of the Evidence Act that he who alleges must prove. In the instant case, albeit the burden of proof that the 2 impugned articles were defamatory of the plaintiff lay on the plaintiff, but the moment the defendant raised defences of truth, justification and fair comment, the burden of proving those defences being available to them lay on the defendant. The defendant could not, with utmost respect, rely on the submissions of counsel to build their defence against the plaintiff's evidence as adduced in court, for submissions are merely marketing strategies and not hard evidence. Furthermore, the role of counsel is confined to being legal counsel for the party to a proceeding and not that of a witness adducing evidence from the bar by way of strong submissions to counter the plaintiff's oral testimony. This is not to say that where the defendant does not testify then the plaintiff's suit must as of right succeed, but that in order for the defendant's defenses raised to be considered by this court as being available to it, the defendant must adduce evidence to prove its defenses raised in the pleadings. As matters stand now, the plaintiff's evidence remains uncontroverted and it is on the basis of that uncontroverted evidence that this court must decide whether that evidence, on a balance of probabilities meets the threshold of proving that the impugned articles were defamatory of the plaintiff. The published articles in my view, imputed serious allegations against the plaintiff like his term of service being extended twice contrary to the laid down procedures in the military circles and his being expected to be appointed the Army Commander even after attaining retirement age because of his familial relations with the Chief of General Staff.

89. The plaintiff denied that his term had ever been extended. He also denied that he had at that material time attained the grade age of retirement. He also denied and called evidence of PW2 his wife and PW3 the wife to the former Chief of General Staff who testified to the effect that

they were not sisters albeit they came from the same clan in Ukambani. Sisterhood is a fact and no contrary evidence was adduced to that of the two ladies whose clan relation was being used to disparage the plaintiff's promotions in the military circles.

90.No doubt, the allegations by the defendant were serious and any right thinking person reading the publications would be persuaded that they were true. It was therefore expected that the defendant adduces evidence of that truth that it alleged. I do find, without hesitation that the impugned publications were false and defamatory of the plaintiff. Although the defendant alleged in the submissions that a substantial part of the publication was true, in my humble view, the only part that was true concerning the plaintiff was his appointment as the head of the National Defence College. The rest of the words imputed that the plaintiff was promoted and his term extended twice despite the plaintiff reaching past retirement age because of his association familial relations with the Chief of General Staff. No evidence of tribalism, Nepotism or favoritism was proved against the Chief of General Staff. I also find that from the evidence adduced, the defendant failed to discharge the burden of proving that the averments made in the impugned articles were true in substance as pleaded and thus the court has no other option but to presume the same as false.

91.The defence counsel also submitted that the articles were published in good faith and fair comment on matters of the public interest. However, having failed to prove that there was truth in the publication regarding the extension of terms or appointment of the plaintiff when he was past his grade age and or that his wife was the sister to Chief of General Staff Kianga's wife hence the expected appointment as Army Commander, I find that the publications were reckless, malicious and ill motivated.

92.In **Gatley on libel and slander 6th Edition page 706**, the learned author stated that :

“ If the words complained of contain allegations of facts, the defendant must prove such allegations of facts to be true. It is not sufficient to plead that he bona fide believed them to be true. The defence of fair comment does not extend to cover misstatement of facts, however bona fide. Bona fide belief in the truth of what is written may mitigate the amount, but it cannot disentitle the plaintiff to damages.”

93.I am further fortified by the decision in **J.P Machira V Wangethi Mwangi & Another** where it was held that,

“ Any evidence which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice .

In the instant case, the plaintiff has supplied the defendant with the true position of the matter before the publication was made. Inevitably, therefore, at the time of publication, the defendant knew or is taken to have known that the relationship between the plaintiff and Ms Grace Wahu Njoroge was not an advocates/client relationship and that there was no relationship of such nature between them. Further , considering also the post publication conduct of the defendant, the correction was made more than a week after the publication, which was made with knowledge that it was false. I have no hesitation in finding the publication being malicious.”

94.In **KittoV Chadwick & another [1975] EA 141** the Court of Appeal for Eastern Africa held that:

“ where the allegations made are false and the same are not disputed by correspondence or evidence and in the absence of any attempt to show some belief in the truth of the allegations, then malice is established and there is no sustainable defence.”

95.In the instant case, the defendant never adduced evidence disputing the evidence adduced by the plaintiff and his witnesses. It also never adduced any evidence to show some belief in the truth of the allegations. In the premise, malice is established and therefore there is no sustainable defence.

Failure to inquire into the true facts is a fact from which inference of malice may properly be drawn as was held in **HCC 102/200 Daniel Musinga V Nation Newspapers Limited**. In addition, the Court of Appeal in **J.P. Machira V Wangethi Mwangi & Nation Newspapers Ltd** (supra) case held that malice can be inferred from a deliberate or reckless or even negligent ignoring of facts.

96. In the instant case, the plaintiff testified that he was never consulted by the defendant on the issue of his age, whether his term had been extended twice or a all extended and or whether his wife was the sister to the Chief of General Staff Lt General Kianga. It therefore follows that the defendant was reckless in failing to inquire into the facts which turned out to be false and even after discovery of the falsity thereof, no effort was made to apologize or correct the impression created in the minds of readers.
97. The defendant also submitted that the article was written in the public interest and in the exercise of its right to freedom of expression and the right to impart information and ideas to others as a media institution and that therefore it could not be actionable. I agree that Articles 33,34 and 35 of the Constitution that deal with freedoms of expression and the media, as well as the individual's right to access information are essential and must be taken into account in cases of defamation of character but I must mention that those freedoms and rights must be balanced with the freedoms and rights under Article 28 of the Constitution on the right to inherent dignity of every person which dignity must be respected and protected. Furthermore, the freedoms enshrined in Articles 33 and 34 of the Constitution are not absolute, they are qualified by the same articles as explained below.
98. This court is aware that there are some things which are of public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment on it; and that is an integral part of the right of speech and expression which must not be whistled away(Per **Lord Denning MR in Fraser V Evans & Others [1969] ALL ER**. However, while that freedom and right should be exercised without impediment, no wrongful act should be done and the alleged libel should not be untrue (Per Lord Coleridge, CJ in **Bernard & Another V Perriman [1891-4] ALL ER 965**).
99. Further, freedom of the media as guaranteed by the Constitution under Article 34 and freedom of expression under Article 33 of the Constitution is limited in that it does not extend to among others, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others and incitement to cause harm and that in the exercise of such right to freedom of expression, every person shall respect the rights and reputation of others.
100. In the instant case, the defendant's submissions contend that it was under a duty to inform the public of how the military promotions were done since it was a guarded secret. What the defendant is submitting is that although it has no evidence to prove the contents of the articles, it is a guarded secret that established rules and procedures relating to retirement and promotions in the military are flouted by the military in favour of nepotism. That for example, the plaintiff's term was extended twice and that he was likely to be appointed as the Army Commander despite his past grade age because of his familial relations with the Chief of General Staff. Yet, when called upon to substantiate those claims, the defendant insists that what it published was the truth, that it was justified, that it was fair comment and in the public interest, without attempting to adduce any evidence to prove the truth, the justification, fair comment or public interest.
101. It is not in dispute that the first article covered half a page of National News on security matters which every person within and without this jurisdiction would be interested to read since security matters are sensitive matters. However, where is the evidence that the Plaintiff was past his retirement age alleged to be 58 years at that time yet he was still in office contrary to the established military rules and where is the evidence that because the plaintiff was married to the sister to the Chief of General Staff's wife, he was therefore highly expected to take over as Army Commander?
102. Nothing prevented the Defendant's officials or authors of the impugned articles to take that bold step of taking the witness stand to table that important evidence that would persuade Kenyans that after all, the Plaintiff was a beneficiary of nepotism.
103. I am persuaded on the evidence adduced by the Plaintiff and his witnesses that as a Senior Military Officer, that the publications/articles being false tended to lower his reputation in the eyes of right thinking members of the society generally and therefore highly defamatory of him. As

was stated in **Nation Media Group Ltd and 2 others v John Joseph Kamotho & 3 Others CA [2010] e KLR**, that:

“Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation a reputation can be damaged forever, especially if there is no opportunity to vindicate one’s reputation.”

104. I therefore find that on a balance of probabilities, the plaintiff has established that the two articles of 5th and 7th December 2008 touching on the plaintiff by the defendant were defamatory of him and were actuated by malice.

105. On what quantum of damages the plaintiff is entitled to, In libel, the Plaintiff need not prove any specific damage. Therefore on the damages awardable to the Plaintiff, the court notes that the Plaintiff claimed for:

- a. General damages for loss of reputation
- b. Exemplary damages
- e. Any other relief this Honourable Court deems fit and just to grant

106. In **Uren v John Fairfax & Son Pty Ltd (117) CLR 115 at 150** cited with approval by the Court of Appeal in **Gicheru V Morton & Another (2005) 2KLR 332**, the court stated:

“It seems to one that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is, simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the Plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.”

107. Both counsels have relied on the applicable principles enunciated in case law for consideration while assessing the compensation to be awarded to the defamed person. Those principles are an offshoot of the case of **Jones v Pollard [1997] EMLR 233 at 243** that:

1. *The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition.*
2. *The subjective effects on the Plaintiff’s feelings not only the prominence itself but from the Defendant’s conduct thereafter both up to and including the trial itself.*
3. *Matter tending to mitigate damages such as the publication of an apology.*
4. *Matter tending to reduce damages*
5. *Vindication of the Plaintiff’s reputation, past and future.*

108. Other factors on quantum in defamation cases were considered in the Court of Appeal Case of **Standard Ltd vs C.N Kagia t/a Kagia & Co. Advocates CA 115/2013** and are:

1. *In situations where the author or publisher of a libel could have with due diligence verified libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages.*
2. *The level of damages awarded should be such as to act as defence and to instill a sense of responsibility on the part of the authors and publishers of libel. Personal rights, freedoms and values should never be scarified at the altar of profiteering by authors and publishers.*

The Standard Ltd v Kagia (Supra) case deemed the above factors from the case of John vs MGN (1997) QB 586 and Kiam vs MGN Ltd (2002) 3 WLR 1036.

- 109.108. The Plaintiff and defendant's counsels both relied on the **John v MGN Ltd** (supra) case among other cases which I have considered in this Judgment. In the instant case, the Plaintiff contends that the publications against him were very grave and that had they been proven, he would be liable under the Armed Forces Act for ordering and abetting crimes under the said Act and hence, would be subjected to Court's Marshal proceedings and if found guilty he would be imprisoned for a period not exceeding 2 years on each count.
110. It was also submitted that the Nation Newspaper has wide circulation and that since Security matters are sensitive, every reader of the Nation Newspaper seeing the article would be anxious to read and find out what the matter was all about.
111. That the articles were read by at least 4 people besides the Plaintiff himself is not in doubt. The Plaintiff also contended and it was not denied that he was a long serving military officer up to the rank of Deputy Commander and retired while serving as the Head of the National Defence College. The Plaintiff also contended that the conduct of the defendant was very stark for maintaining that the articles were true; that they were justified; that it acted in the public interest in publishing the "**truth**" and that it was **fair comment**, yet it never adduced any evidence to justify the above. That it never published any apology and that it never tried to rectify the truth or veracity from the Plaintiff, his wife or Chief of Staff General Kianga's wife Christine Kianga on their alleged familial relationship.
112. The above contentions by the Plaintiff are not disputed by the Defendant who nonetheless relied on the cases of **Kipyator Nicholas Biwott**; (supra) **Evans Gicheru v Andrew Morton** (supra); Section 16 A of the Defamation Act; **Kanyi Navan Patel v Noor Essa and Another**; and **Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya** (supra) among other statutory provisions considered and urged the court to award Shs 500,000 nominal damages should it find the Defendant liable.
113. The Plaintiff in a rejoinder submission revised his quantum and maintained that he lost the prospects of being promoted to Chief General of Staff due to the offending false and defamatory publications which was never retracted. He cited cases of **Martha Karua vs The Standard; Truth (NZ) Ltd V Avery Truth (NZ) Ltd and John V MGN** and dismissed the cases relied on by the Defendant as being irrelevant. He also relied on **Samuel N. Mukunya vs Nation Media Group Ltd & Another** and urged the court to award him Shs 25,000,000 general damages, 3,000,000 aggravated damages; and 1,000,000 damages in lieu of an apology.
114. The award of compensation in damages is in the discretion of the court and the court, in a right case, should frown upon the publication which is grave, without justification and consistent and when asked by a demand notice, no retraction is offered.
115. Thus, each case of defamation must be carefully considered depending on the circumstances of the case surrounding the publication, its nature, and extent of circulation, the conduct of the defendant before and after the publication during trial and any special circumstances of the given case.
116. This court notes that the publications were made before the effective date of the 2010 Constitution which guarantees every person the right of personal dignity and preservation of reputation and therefore any publication, unless done unlawfully, cannot violate that right. However, the older decisions that both parties have referred to all espouse the above Constitutional principles.
117. I am conscious that the libel as published is in permanent form, which could be read by anyone. Am also alive to the issues raised in defence to those publications and even during the trial. The defendant never put forward any remorse or even tender any apology for the incorrect publications. Based on the decision in **CAM Vs Royal Media Services Ltd [2013] eKLR**, I enter judgment for the plaintiff against the defendant in the sum of Kenya shillings Five Million (**shs 5,000,000**) all inclusive of general and exemplary damages as adequate solatium. As there was no proof of prior and subsequent publications during the hearing and after this suit was instituted and as no pleading related to aggravated damages, I decline to award any damages under this head. The plaintiff pleaded for exemplary damages. However, I find no aggravating circumstances warranting an award under this head as well. An apology at this stage would be too

late and would have no effect on the plaintiff. I decline to make any awards there under. I am also not persuaded that I should award any amount in lieu of an apology as submitted, having regard to the circumstances of this case as a whole, which are not comparable to the Samuel Mukunya (supra) case or at all.

118. I also award the plaintiff costs of this suit and interest at court rates from date of this judgment until payment in full to be paid by the defendant.

Those are the final orders of this court.

Dated, signed and delivered in open court at Nairobi this 26th day of April, 2016.

R.E. ABURILI

JUDGE

In the presence of:

Miss Nyambenge holding brief for Mr Manthi Masika for the plaintiff

Miss Lelei for the defendant

Henry: Court Assistant.