



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NUMBER 470 OF 2010**

**HON. GEORGE BENEDICT MAINA KARIUKI. .... PLAINTIFF**

**VERSUS**

**NAIROBI STAR PUBLICATION LTD. .... 1<sup>ST</sup> DEFENDANT**

**CAROLE MAINA. .... 2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

By a plaint dated 13<sup>th</sup> October, 2010 and filed in court the same day, the Plaintiff herein Hon. George Benedict Maina has filed this suit against the Defendants jointly and severally seeking the following orders: -

- a) General damages
- b) Aggravated damages.
- c) Costs of the suit
- d) Interest on 1, b and c above.
- e) Any other remedy that his Honourable court may deem fit to award.

The Plaintiff's cause of action is founded on a publication carried out by the 1<sup>st</sup> Defendant in an Article dated the 16<sup>th</sup> day of October, 2009 wherein, it is alleged, the Defendants falsely and maliciously published to the general public of and concerning the Plaintiff the following words: -

***"A Judge accused of stabbing a motorist in a road rage shed tears of joy yesterday afternoon as he walked out of court a free man.***

***Judge GBM Kariuki escapes a life sentence as he was cleared of attempted murder and assault. The police had given contradictory evidence since the trial began last year, magistrate Gilbert Mutembei said.***

***Mutembei said the case against the Judge was shaky because police records contradicted the evidence given in court.***

***The case hit the headlines last year when Kariuki was arrested by CID Officers and accused of trying to kill Robert Karori in a Nairobi Road.***

***Karori and Kariuki were driving from opposite directions on October, 18, on Ngecha Road in Lower Kabete, when their vehicles got involved in a minor accident that led to a scuffle.***

***He later stabbed Karori and sped off, according to the police.***

***The former Kericho Judge was driving his official Mercedes Benz when the accident occurred.***

***The charges were really spurious and did not hold any water.” His lawyer Stephen Mwenesi said after the judgment was read.***

***“We regret it had to happen to a Judge of the High Court.***

***Karori, a driver of the International Organization for Migration had claimed that the Judge was drunk when he attacked him with a Somali sword.***

***The police however failed to find the weapon. The driver told police that the Judge had slapped him twice and stabbed him in the chest. Karori said he slapped the Judge once, only to retract his statement during cross-examination. He further said he was not drunk but a doctor who examined him testified that he smelt of alcohol when he was admitted in hospital.***

***The magistrate blamed the police for carrying out shoddy investigations.”***

The Plaintiff alleges that the said words were false, malicious and highly libelous of him and that in their ordinary and natural meaning and in the innuendo thereat imputed, the said words meant and were understood to mean and/or implied and/or imputed that: -

- a) The Plaintiff had quit the office of a judge of the High Court of Kenya and/or had been removed and/or suspended.
- b) That the Plaintiff luckily dodged/escaped jail, thereby imputing he was guilty of a crime.
- c) That the Plaintiff is guilty until proven innocent.
- d) That the Plaintiff is ill tempered.
- e) That the Plaintiff is a violent person.
- f) That the Plaintiff did not deserve an acquittal.
- g) That the Plaintiff is a person of high moral and ethical decadence and does not befit any just treatment before the law.

In the Plaintiff's view, the publication by the Defendants of the words complained of was actuated by malice and the said words were false and calculated to discredit the Plaintiff and to damage his reputation and character in the eyes of members of Society and public in general. That the said words were highly defamatory of him and were published by the Defendants with the aim of assassinating his character and to damage his reputation and character in the eyes of members of the society and the public in general.

The Plaintiff averred that by the said words he has been greatly injured in his character and his reputation as a High Court Judge has been compromised not only to Kenyans but to the rest of the world and for the said reason, he claims damages against the Defendants.

The Defendants filed a defence on the 15<sup>th</sup> November, 2010 wherein 1<sup>st</sup> Defendant has admitted publishing the words complained of by the Plaintiff but avers that they were true in substance and in fact in that: -

- a) On the 15<sup>th</sup> day of October, 2009, the Plaintiff was acquitted of a charge of attempted Murder of Robert Karuri.
- b) The Plaintiff was thereby set free.
- c) The Plaintiff was happy and joyful to be free.
- d) "**Tears of Joy**" is an English Phrase that means happiness.
- e) "**Escape**" is an English word that means to gain freedom.
- f) Prior to the incident culminating in the arrest and arraignment in court for charges of attempted murder, the Plaintiff was the Resident Judge in the High Court of Kenya at Kericho.
- g) The Plaintiff did not sit in the High Court of Kenya at Kericho throughout the period of trial for the charge of attempted murder.
- h) The Plaintiff was driving his official motor vehicle at the time of the accident and incident culminating in the arrest and arraignment in court for the charge of attempted murder.

The Defendants further denied that the words pleaded in Paragraph 5 of the plaint bore or were understood to bear or were capable of bearing the meaning attributed to them by the Plaintiff or any meaning defamatory of the Plaintiff. They averred that the words as pleaded in the Plaintiff were a fair comment on a matter of public interest namely, the involvement of the Plaintiff in a traffic accident, the ensuing confrontation between the Plaintiff and the other motorist leading to the Plaintiff's arrest, arraignment in court for charges of attempted murder, trial and eventual acquittal. That the publication subsequent to the Plaintiff's arrest, arraignment in court, trial and acquittal were and are a fair and accurate report of proceedings heard before the Chief Magistrate's Court, a court exercising judicial authority within Kenya and were published contemporaneously in the first Defendant's newspaper without any malice towards the Plaintiff and are therefore absolutely privileged.

The Defendants contends that the Plaintiff was entitled to but did not exercise a right of reply as would have been due to him in respect of the words referred to in the plaint. That in view of the Plaintiff's refusal and/or failure to exercise any such right of reply as would have been due to him, the claim for aggravated damages is not merited. In view of the foregoing matters, the Defendants have pleaded that the Plaintiff's suit discloses no reasonable cause of action, is scandalous, frivolous and vexatious and is otherwise an abuse of the court process.

In the reply to the Defendant's defence, the Plaintiff joins issues with the Defendants' entire defence save for any admissions contained therein. He denies the contents of the defence and repeats averments contained in the plaint.

In support of his case, the Plaintiff who testified as PW I relied on his statement filed on 2<sup>nd</sup> April, 2012 whose contents were adopted as part of the examination in chief. According to his evidence, he is a Judge of the Court of Appeal. That on the 16<sup>th</sup> October, 2009 he bought a copy of the Star Newspaper and in the issue he found a story written about him regarding a criminal case in which he had been acquitted for the charge of attempted murder. The story bore the heading: -

**"A Judge sheds tears of joy as he dodges life in jail".**

It was his evidence that the contents of the story were not factual and that the picture painted by the article depicted him as a person who had committed a criminal offence namely attempted murder and was lucky to escape jail. That the article did not mention that he had been acquitted of the offence and according to him the closest the article came to acquittal is where it stated that he walked out of court a free man.

In his further evidence he told the court that the article stated that the reason he was acquitted is because the police had a shaky case. He referred to the first column of the article which says: -

***“He latter stabbed Karori and sped off according to the police, which in his view, was libelous because he had been acquitted of that charge.”*** That the article went on to say that he was a former Judge of Kericho when the accident occurred but the fact of the matter was that he was the resident Judge of Kericho High Court and at no time did he leave the Office of a Judge.

According to him, any reasonable person reading the article would get the impression that he stabbed the person named and that he could not believe that having committed the offence he managed to dodge jail instead of being convicted and sent to jail. That he was lucky to escape and that is why he was shedding tears in disbelief.

It was his further evidence that the article depicted him as ill tempered and did not merit to be a judge.

Regarding his reputation and credibility, the Plaintiff told the court that he was appointed a High Court Judge in the year 2003 and before then, he was an advocate of the High Court of Kenya, a Senior Counsel and was practicing in the name and style of G. B. M. Kariuki & Co Advocates having been admitted to the bar in the year 1972. That he was conferred with the title of Senior Counsel in the year 2003 and he served as the Chairman of the Law Society of Kenya between the years 1985 and 1987.

In cross-examination, the Plaintiff admitted that there was a criminal case in which he was charged and acquitted being criminal case Number 1655 of 2008 and that the story is the one captured in the article but averred that the facts are distorted. According to him, what he found defamatory is that the writer of the article said he shed tears of joy as he dodged life in jail.

The 2<sup>nd</sup> Defendant testified on her own behalf and that of the 1<sup>st</sup> Defendant. In her evidence she told the court that she is a reporter with the 1<sup>st</sup> Defendant. She adopted her witness statement sworn on the 12<sup>th</sup> November, 2014 and filed in court on the 20<sup>th</sup> November, 2014 as her evidence in chief.

In the said statement she admitted having written the article published by the 1<sup>st</sup> Defendant and that the article concerned the Plaintiff but averred that the words and the contents were true in fact and in substance. She further stated that the Plaintiff was charged with a criminal offence of attempted murder in Criminal Case No. 1655 of 2008 (Republic Vs George Kariuki) and on 15<sup>th</sup> October, 2009 he was acquitted of the charge and therefore, the article contained true information concerning the charges that the Plaintiff faced and the acquittal.

It was her further evidence that the article was a fair comment on the circumstances surrounding the Plaintiff's arrest, arraignment in court, hearing and acquittal and that the article was an accurate report of the criminal proceedings that the Plaintiff faced and the outcome thereof. That the article was not malicious nor was it intended to injure the Plaintiff.

In cross-examination, it was her evidence that she was in court on the 15<sup>th</sup> October, 2009 and she spotted the Judge in court sitted on the dock and though the photo in the article does not show the Judge shedding tears, the witness in her evidence said she saw the Judge shed tears as he walked out of the courtroom.

Parties filed written submissions and list of authorities in support of their respective positions with regard to the matter at hand. The submissions by both parties reiterate the evidence on record and the pleadings which this court has already considered in this judgment and it would not be prudent to reproduce them again save for what has not been captured.

The Plaintiff on his part submitted on the following issues: -

- a) Defamation – libel.

b) What can be termed as fair comment?

c) Whether the Plaintiff is entitled to an award of damages and if so how much.

The Defendants on their part dealt more on the defences available to them and as pleaded in their defence.

I have carefully considered the pleadings herein, the oral and documentary evidence adduced by the Plaintiff and the 2<sup>nd</sup> Defendant and the rival submissions by both parties supported by the list of authorities relied on. Having set out the background of this matter, the parties respective positions and the decided cases which the court has duly considered in details I now set out to indentify the issues for determination which in my view are as follows: -

a) Whether the article published in the Nairobi Star Publication limited on the 16<sup>th</sup> day of October, 2009 by the Defendants was libelous and malicious of the Plaintiff.

b) Whether the article was defamatory of the Plaintiff.

c) Whether the article and the words refer to the Plaintiff.

d) Whether demand was made by the Plaintiff for an apology.

e) Whether the article and the words were absolutely priviledged.

f) Whether the Plaintiff has suffered injury to his reputation as a result of the article and the words published therein.

g) What is the quantum of damages, if any, payable to the Plaintiff?

h) Who is liable to pay the costs of the suit?

### ***What then is defamation?***

In his submissions, the Plaintiff has made a good effort to define the term defamation. I use the word “***Effort***” deliberately because well intended ambitions of eminent Judges and legal scholars of profound erudition to define the term have resulted in many a formula for describing or defining it without rendering any wholly satisfactory definition or description and for that reason, a sample of a few of such definitions as set out hereunder shall suffice.

In the English Case of **Scott Vs Sampson (1882) QBD 491** at page 503, Dave J defined the word ‘***defamation***’ as “***A false statement about a man to his discredit***”

The leading English monograph of Gatley on the subject of defamation defines it as thus: -

***“Any imputation which may tend to lower the Plaintiff in the estimation of right thinking members of the society generally.”***

The well known work of **Winfield** gives the following definition of defamation.

***“It 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 them shun or avoid that person.”***

In the Black’s law Dictionary 5<sup>th</sup> Edition (1979) it is defined as: -

***“Holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of***

*the community - Defamation is that which tends to injure reputation to diminish the esteem, respect, good will or confidence in which the Plaintiff is held, or to excite adverse, derogatory or unpleasant feelings for opinions against him. Statement which exposes person to contempt, hatred, ridicule or obloquy... the unprivileged publication of false statements which naturally and proximately result in injury to another.... A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."*

The tort of defamation was well described in the 1979 British Columbia Court of Appeal Decision of **Murphy Vs Ha March (13DLR 3d 484)** where a Member of Parliament Judy Ha March wrote about the Plaintiff as follows: -

*"A brash young radio reporter, named Ed Murphy (heartily detested by most of the press gallery and the members had somehow learnt that Maurice Lamontagne (then Secretary of State) and a long-time friend and adviser of the Prime Minister had purchased furniture but had not paid for it".*

In finding that there was actionable libel, the British Columbia Supreme Court in dismissing the appeal wrote: -

*"Defamation is where a shameful action is attributed to a man (he stole my purse) a shameful character (he is dishonest) a shameful course of action (he lives on avails of prostitution) or a shameful condition (he has small pox). Such words are considered defamatory because they tend to bring the man's named into hatred, contempt or ridicule. The more modern definition of defamation is words tending to lower the Plaintiff in the estimation of right thinking members of the society generally."*

Another authority often cited as definitive on defamation is that of **Thomas Vs C.B.C (1981) 4 WWR 289** as follows: -

*"The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others, or to expose him to hatred contempt or ridicule or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need not have actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory."*

The common law of defamation protects every person from harm to their reputation by false and derogatory remarks about their person known as defamation. The same protection is also anchored in the Constitution under Article 33 (1) (a) as read together with Clause (3) thereof both of which provides as follows: -

*"33(1) (a) Every person has a right to freedom of expression, which include freedom to seek, receive or impact information or idea.*

*Clause 3 provides "in exercise of the right to freedom of expression every person shall respect the rights and reputation of others."*

What then are the elements of the tort of defamation?

The elements of the tort of defamation were well laid out in the case of **John Edward Vs Standard Limited** as follows: -

1. The statement must be defamatory.

2. The statement must refer to the Plaintiff.
3. The statement must have been published by the Defendant.
4. The statement must be false.

The case of **J Kudwoli Vs Eureka Educational and Teaching Consultants & 2 Others**, HCCC No. 126 of 1990 also sets out the same elements of the Tort of Defamation (both libel and slander) and in addition to the ones set out above and in cases of slander, subject to certain exceptions, the Plaintiff has to prove any special damage that he/she has suffered. These elements are substantially in tandem with the issues for determination by the court and which I hereby proceed to consider.

From the evidence on record, it is not in dispute that the article complained of was published by the Defendants and that it referred to the Plaintiff. The only issues are whether the words in the article are defamatory, false and malicious.

In considering whether words are defamatory, I make reference to the case of **Richard Otieno Kwach Vs the Standard Limited & David Makali** Nairobi HCCA No. 1099 of 2004 where Visram J observed: -

***“Words are defamatory if they involve a reflection upon the personal character or official reputation of the Plaintiff.”***

Having considered the Plaintiff's case at length and in determining whether the article was defamatory, false and malicious, this court has also to consider the Defendants' defence. It is trite law that a defamatory statement is presumed to be false, unless the Defendant can prove the truth. Defamation law puts the burden of proving the truth of the alleged defamatory statement on the Defendant rather than the Plaintiff and especially where the defences of justification and fair comment are pleaded.

The Defendants have pleaded the defences of justification, fair comment and absolute privilege. The particulars of the defence of justification are particularized at paragraph 5 of the defence. According to them, the publication of the 16<sup>th</sup> October, 2009 contained true facts of the allegation of the Plaintiff's charge of attempted murder and his subsequent acquittal. The Defendants contend that the Plaintiff admitted during examination in chief and in cross-examination that criminal case number 1655 of 2009 had been filed against him for the charge of attempted murder and that he was acquitted on 15<sup>th</sup> October, 2009. That he also confirmed that he was a judge at Kericho throughout the period of the trial and that at the time of the accident, he was driving his official motor vehicle. In the Defendant's view, the Plaintiff's admission confirms the truth in the defence.

The defence of justification is closely related to that of fair comment which the Defendants have equally pleaded and relied on. In considering the defence of fair comment the court considers whether the statement was a view a reasonable person could have held. In support of this defence, the Defendants alleges that the article was a fair comment on a matter of public interest and that the Plaintiff being a Judge of the High Court held a public office and being charged with attempted murder was a matter of public interest. That the office of a Judge is an office that is held with a high level of esteem and holders of such an office ought to carry themselves with high moral standards and therefore the Defendants had an obligation to inform the public of what had transpired in a case involving a judge charged with attempted murder.

In further support of that defence, the Defendants relied on the case of **Kagwiria Mutwiri Kioga & Another Vs Standard Limited & 3 others (2015) Eklr** where the learned Judge in explaining what amounts to fair comment had this to say:

***“It is clear from a full consideration of the case that what riled and rankled Kioga the most was not any alleged inaccuracy of the facts and figures contained in the publication, but the headlines given, especially the main one of “Robbing the Dying” and others like “Shame of Public Officers Feasting on HIV/AIDS Funds”. Those headlines themselves did not, in our view,***

*contain facts..... They were expressions of opinion. The test to be applied to them in one of honesty. If the opinions were honestly held by the Respondents, culpability does not attach."*

On the same defence, the Defendants also relied on the case of **Slim Vs Daily Telegraph [1968] 1 All E.E.R. 497**, where the court observed:-

*"If [the writer] is an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong or exaggerated or prejudiced, and no matter that it was badly expressed so that other people read all sorts of innuendos into it, nevertheless he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it... I stress this, because the right of fair comment is one of the essential elements of freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to 'write to the newspaper' [or write in the newspaper, as is the case herein] and the newspaper should be free to publish his letter [or article]. It is often the only way to get things put right. The matter must of course be one of public interest. The writer must get his facts right; and he must honestly state his real opinions. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions..."*

The Defendants have also relied on the defence of Absolute Privilege and in its support thereof avers that the article was a fair and accurate report of the proceedings heard before the Chief Magistrate's Court, a court exercising Judicial Authority. They relied on Sections 2 and 7 of the Defamation Act.

It was the Defendants' further defence that though the Plaintiff was entitled to right of reply in respect of the Article to correct any factual inaccuracy, he declined the offer stating that the damage had already been done, yet he did not call any witnesses to support assertion that the damage had already been done and that the Plaintiff had been disparaged and discredited. That as a matter of fact, the article did not damage the Plaintiff's career in the judiciary since the Plaintiff was promoted to the rank of a Court of Appeal Judge. The Defendants contended that the Plaintiff failed to prove that his reputation was lowered in the minds of right thinking members of the society.

Finally, the defence of public interest was relied on by the Defendants. For that defence to succeed, the following are the guidelines as laid down in the **Reynolds Vs Times Newspapers (1999)**.

1. The seriousness of the allegation i.e. if the allegation is not true what will be the level of misinformation to the public and what will be a corresponding harm to the individual.
2. The nature of the information and the extent to which the subject is a matter of public concern.
3. The source of the information and whether it is reliable or motivated by malice and/or avarice.
4. Whether suitable steps have been taken to verify the information.
5. Whether the allegation in a story has been the subject of an investigation by a government body which commands respect.,
6. Whether it is important that the story be published quickly.
7. Whether comment was sought from the claimant or whether that was not necessary in the context of the story.
8. If the article or the story is written in such a way as to amount to statements of fact, or whether it raises questions and is suggestive of the need for further investigations.

## 9. The timing of the publication.

Back to the case herein, the genesis of the cause of action is a road accident that occurred on 18<sup>th</sup> October, 2008 along Lower Kabete Road within Nairobi which involved the vehicles that were being driven by the Plaintiff and the Defendant herein. It is not in dispute that following the accident, the Plaintiff was charged with the offence of attempted murder Contrary to Section 220(a) of the Penal Code and an alternative charge of causing Grievous Harm Contrary to Section 234 of the Penal Code, in Criminal Case Number 1655 of 2008 (Republic Vs Hon. George Kariuki) but on the 15<sup>th</sup> October, 2009 he was acquitted on both counts under Section 215 of the Criminal Procedure Code.

The court has carefully gone through the proceedings and the judgment in the said criminal case and the following are clear: -

- 1) The learned magistrate observed that the evidence given by the witnesses was contradictory.
- 2) The Plaintiff had been accused of trying to kill the complainant (Robert Karori) and that was the reason for his arrest by Criminal Investigation Officers.
- 3) When their vehicles got involved in an accident, the Plaintiff and the Defendant were driving from the opposite directions.
- 4) In their evidence, both the Plaintiff and the Defendant told the court that they slapped each other at the scene of the accident.

The observations set out herein above form the contents of the Article complained off by the Plaintiff. According to the Plaintiff what was defamatory about the article was the heading and the fact that the article referred to him as the former Kericho Judge and that it did not state that he had been acquitted of the charges. Looking at the said heading and in my view, the phrase "**tears of Joy**" used therein is just an idiomatic expression, which means "**happiness**" and the same was not used in its literal meaning and in any event though the Plaintiff denied that he shed tears of joy, the 2<sup>nd</sup> Defendant in her evidence testified that the Plaintiff indeed shed tears.

As for the contention that the article did not state that he had been acquitted of the charges, paragraph one of the same clearly states that the Plaintiff walked out of the court room a free man, which meant that he was not convicted of the offence as charged. The article further stated that the Judge was cleared of attempted murder and assault. The writer of the article may not have used the word acquittal but the meaning of walking out of court a free man and being cleared of the charges are clear to anybody reading the article.

The Plaintiff also had an issue with the usage of the word "**escape**" by the Defendants in the article complained off. The word "**escape**" in the Concise Oxford English Dictionary means, "**elude or get free from**". By being acquitted of the charges, the Plaintiff got free of the charges and by the Defendants using the said word in the context it was used, in my view, it was not defamatory of the Plaintiff.

Having considered the evidence on record, it's the finding by this court that the article published by the 1<sup>st</sup> Defendant in the Star Newspapers on 16<sup>th</sup> October, 2009 was not defamatory. The defences raised by the Defendants of fair comment, justification and absolute privilege are absolute defences in this case. As submitted by the Defendants the publication subsequent to the Plaintiff's arrest, arraignment in court, the trial and the acquittal were a fair and accurate reporting of the proceedings heard before a court of competent jurisdiction exercising judicial authority published without any malice, pursuant to Section 2 of the first schedule of the Defamation Act. Though the Plaintiff testified that his reputation was maligned, he did not tender evidence to that effect.

In view of the foregoing this court has no option but to dismiss the Plaintiff's claim but in the event that I am found to be wrong in my finding, the law obliges me to assess damages that the court would have

awarded the Plaintiff had I entered a judgment in his favour.

I have considered the submissions by both the learned counsels on quantum of damages and the authorities relied on by the parties. In this regard and as was stated in the case of **Johnson Evans Gicheru Vs Andrew Mortion & Another [2005] eKLR**, Hon Tunoi JA (as he then was) had this to say about the assessment of damages: -

***“In an action of libel the trial court in assessing damages is entitled to look at whole conduct of the Defendant from the time the libel was published down to the time the verdict was given. It may consider what the conduct has been before action and in court during the trial.”***

On the same subject of damages, I find it imperative to quote the following passage as was said by Windeyer J, in the case of **Vein Vs John Rairax & Son Pty Limited**.

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

I would think that in the instant case to arrive at what could have been said to be fair and reasonable awards, I could draw considerable support in guidelines in **Jones Vs Polland (1997) EMLR 233-243** where a checklist of compensatable factors in libel actions were enumerated as follows: -

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 effect to the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both upto and including the trial itself.*
3. *Matters tending to mitigate damages such as the publication of apology.*
4. *Matters tending to reduce damages.*
5. *Vindication of the Plaintiff's reputation past and future.*

Coming from the background of the authorities quoted herein above, it is not in dispute that the Plaintiff is a Honourable Judge of the Court of Appeal of Kenya who was appointed a Senior Counsel in the year 2003 by the former President, His Excellency Mwai Kibaki, he was the Chairman of the Law Society of Kenya in the years 1985 – 1986, before he joined the judiciary he was a prominent advocate of the High Court practicing in the name and style of G. B. M Kariuki and Co. Advocates for 30 years, he was the founder and Chairman of the Law Society of Kenya Savings and Credit Co-operative Society, former Deputy Secretary General of the International Bar Association (IBA) East African Region, a member of the International Bar Associations Committee on the Future of the IBA, and treasurer of the Africa Bar Association and going by the evidence on record, he is no doubt a person of high moral character and integrity.

The Plaintiff testified that the publication affected his career as a Judge who is meant to create law and order as people now see him as a violent person engaged in criminal activities and that he underwent immense embarrassment as his reputation was tarnished since the article posed him as a law breaker who did not merit to be a Judge. In his submissions on damages, he has suggested a sum of Ksh.10,000,000/- (Ten Million) for General Damages and Ksh.3,000,000/- (Three Million) in aggravated damages. Several authorities were quoted in support of his claim for damages all of which I have taken due consideration of.

On their part, the Defendants have suggested a figure of Ksh.1,000,000/- (One Million) and they have

equally quoted several authorities in that regard. The Plaintiff has claimed exemplary damages in addition to general damages. In this regard I wish to rely on the English Court of Appeal decision in the case of **John Vs MGN Ltd (1996) 2 ALL E.R. 35**, the Court of Appeal held: -

***The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....***

***Exemplary damages on the other hand goes beyond compensation and are meant to “punish” the Defendant. Aggravated damages will be ordered against a Defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.***

Under Section 7A, of the Defamation Act, the Plaintiff is entitled to a right of reply where under a person aggrieved by a Newspaper publication may provide a rebuttal or clarification which the Newspaper is bound to carry with the same prominence as the impugned publication and at the earliest. The Plaintiff chose not to exercise this right in respect of the article complained of. In cross-examination, he stated that he saw no need to publish a reply as the damage had already been done.

Applying the principle in **John Vs MGN Ltd** case, the evidence before the court and taking into account all the surrounding circumstances of this case, a figure of Ksh.5,000,000/- (5 Million) would have sufficed as general damages. On aggravated damages, this court does not find any aggravating circumstances that would have persuaded it to award the Plaintiff aggravated damages. There was no evidence of re-publication of the impugned article and there is also no evidence showing that Defendants conducted themselves in a malicious manner. In fact the Defendants had offered to republish a reply but the Plaintiff declined the offer.

All said and done, the Plaintiff did not prove his case against the Defendants, jointly and severally on a balance of probabilities and it's unfortunate that the court has to dismiss the same but with no orders as to costs.

Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of July, 2016.

.....

**L NJUGUNA**

**JUDGE**

**In the presence of**

*Miss Serem holding brief for Mr. Macharia Kahonge For the Plaintiff*

*Miss Kisela for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants*