REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 52 OF 2012

ALNASHIR VISRAM.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. This judgment was to be delivered on 21st September, 2016. However, as the court is finalizing all matters belonging to the Civil Division in view of my transfer to the Judicial Review Division from July, 2016, I requested the registry to serve the parties with Judgment Notice for an earlier date since the judgment was ready.

2. On October 21, 2015 the Hawaii Tribune-Herald reported a case where a judge was being sought to hear a case involving a fellow judge, after a Hilo Circuit Court judge disqualified himself from hearing a felony theft case and indicated that there may be no judges in East Hawaii who would preside over that case. The reason was that the victims were the Hilo District Judge Barbara Takase and her husband, Gerald Takase, the County's Director of Liquor Control. Eric Yukio Hernandez, 25, and 23-year-old Emma Theresa Romero were to be arraigned in court but Judge Glenn Hara ordered both to return at 8 a.m. on Dec. 10 for further proceedings on arraignment and plea. The judge stated "Just for the record, what's happening here is I have certificates of disqualification for myself, (Hilo Family) Judge (Henry) Nakamoto, (Hilo Family) Judge (Lloyd) Van De Car and (Hilo District) Judge (Harry) Freitas," Hara said during Romero's appearance. "This may go to (Hilo Circuit) Judge (Greg) Nakamura. I'm not confident he will proceed with the case. He'll most likely file disqualification himself. That's why I'm anticipating, most likely, an off-island judge, or maybe from Kona, not sure."

3. The plaintiff in this case is Alnashir Visram a serving Judge of the Court of Appeal of Kenya and a long serving Judge of the Superior Courts since the year 2001. He is therefore a well known Judge in this country. In this case, however, he is a litigant in his own right. Both counsels representing the claimant and the Defendant are well aware of this fact. They are also aware and it is in the public domain that as I render this judgment, the plaintiff has applied and been shortlisted to be interviewed for the vacant post of Chief Justice of Kenya, following the early retirement of Hon Chief Justice Dr Willy Mutunga on 16th June, 2016.

4. I have given the above background as I echo the words of my brother judge of the Employment and Labour Relations Court of equal status **Justice Rika in D. K. Njagi Marete Vs Teachers Service**

Commission [2013] eKLR as cited with approval by my sister Lady Justice Hon. Maurine Onyango in **Linnet Ndolo v Registered Trustees of the National Council of Churches of Kenya [2014] eKLR** where the two Judge judges had to decide cases involving their brother and sister Judges as claimants respectively. Justice Rika expressed himself as hereunder:

> **"It is not an easy task for any Judge to be called upon to make a decision, in a matter involving a Colleague. This is much more so within the Industrial Court of Kenya, which has only 12 Judges, serving the entire Country. It is a small field, with Officers enjoying a degree of familiarity with one another. The Judges interact all the time, and it would be easy for the issues of bias, or appearance of bias to crop up. Cases such as these ones, can also result in a fallout between the concerned Judges. Judges caught up in such situations must tread carefully, and remind themselves of their Judicial Oath of Office, always dispensing justice fairly and dispassionately. This Court has fervently recited the Judicial Oath of Office, before embarking on this perilous undertaking. Mrs. Mbabu and Mr. Masese also confirmed they know the Claimant is now a Judge of the Industrial Court, and did not have any objection with this Court making the determination."**

5. On her part, Justice Maurine Onyango added:

> ***"I am therefore acutely aware about the fears that the Respondent and its counsel may be having with regard to my objectivity and impartiality in handling this matter. I wish to assure the Respondent that I have reminded myself constantly of that fact and that this case has been handled and the decision made impartiality and dispassionately, and further that the interests of both parties have been taken into account only in their capacity as litigants before the court."***

6. I adopt the views held by my sister and brother Judge in the above cited cases and reaffirm that a judge who is a litigant is like any other citizen litigant and is entitled to have a due process right to an impartial *judge for if a fellow judge refused to hear him, like the case in the Hawaii Court where all judges disqualified themselves from hearing a case involving a fellow Judge, then judges in Kenya would be denied justice contrary to Article 48 of the Constitution since no judge sits in his own cause and as the Constitution does not provide for some offshore island judge to preside over cases involving judges as litigants. On the other hand, the defendant in this case is hereby assured that this is an impartial and independent judge who is living to the oath of office and who is exercising judicial power and authority in accordance with the principles set out in Article 159 of the Constitution as well as the National values and principles of Governance as enshrined in Article 10 of the Constitution and the Judicial Code of Conduct governing the conduct of Judges of the Superior Courts.*

Pleadings for the plaintiff

7. By a plaint dated 3rd February 2012 and filed on 9th February 2012, the plaintiff alleged that the defendant, the Standard Limited, being the publisher of the daily Newspaper " The Standard" published under a banner headline on the front page on 11th February 2011 a caption **"UNFIT FOR JUSTICE"** defamed him. The article complained of as reproduced in the plaint reads:

> ***"UNFIT FOR JUSTICE:" "Law Society discredits Kibaki nominee for CJ;"***
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> ***"President Kibaki's nominees for Chief Justice suffered credibility doubts when the Law Society of Kenya, which is the largest clientele base for the Judiciary discredited him. Justice Alnashir Visram, whose nomination Kibaki's allies have attributed to the fact he hails from a minority group deemed as neutral in Kenya's turbulent sea of ethnic politics was accused of perjury. LSK has written him off as unfit to preside over justice. LSK revealed it filed a complaint in Parliament accused the proposed Chief Justice of committing perjury in 1999, which they are now pulling out and dusting to question his integrity. The umbrella body for Kenya lawyers yesterday presented a memorandum of Parliament's Justice and Legal Affairs Committee questioning the judge's professional background. He could replace Chief Justice Evans Gicheru if Parliament rules out Prime Minister Raila Odinga's protestation he was not consulted on the***

final list, and determines President adhered to the Constitution when he picked the four nominees to key constitutional offices.

LSK told the committee probing the nominations of Attorney General, Director of Public prosecutions and the CJ that Visram swore and signed an affidavit to say he had resigned from a law firm after it was sued for failing to remit proceeds from the sale of property worth Kshs 14.1 million.

But Justice Visram called the Standard newsroom in the evening to dismiss the allegations against him, arguing they were meant to derail his candidature for the job. "All these things are being done to destroy my credibility and ruin my candidature for Chief Justice," said Visram who was speaking for the first time since the controversy over his nomination broke out.

He explained the money in question went to the personal account of one of the firm's partners, T.G. Bakrania. "The court in 2004-2005 ruled the partnership was not liable for the money, as it was not issued to the firm," he explained.

But LSK claims Visram, was not truthful because it is in possession of documents proving the judge was still as an employee of the same firm a year later. They argue Visram, who was appointed a judge in 2001, opted to "resign" from the firm of Veljee Devshi and Bakrania Advocates after he was listed as a defendant following the accusations they failed to remit the money from the sale of property. The other defendants in the case were T.G. Bakrania and M. Rana. " In the matter the judge has sworn an affidavit to the fact that he resigned as a partner in the law firm of Messrs Veljee Devshi & Bakrania Advocates on August 1,1998. This contradicts the declaration accompanying application for practicing certificate for the year 1998 and 1999, filed with LSK in which the judge stated that he was the employer in the said law firm. Reads LSK's memorandum.

LSK says that Visram had informed the court hearing civil case No. 538 of 1999 that he had resigned from the law firm in 1998, but LSK says in 1999 Visram had applied for a renewal of a certificate of practice, saying he was an employee of the same firm.

" That I had joined the partnership on January 1,1996, and resigned as a partner on August1, 1998, and both first and second defendants accepted my resignation and released me from all obligations and benefits of the partnership as of that date." Visram said, when he swore an affidavit dated February 18,2005.

LSK Chief Executive Officer, Apollo Mboya, yesterday said: " It would not serve the country right when we have somebody who gives conflicting information in an affidavit. This is a criminal offence and amounts to perjury."

8. According to the plaintiff's claim, the aforementioned publication which could also be found in the defendant's online version of the aforesaid defendant's Newspaper were *exfacie* defamatory of the plaintiff to the extent that in their ordinary and natural meaning meant and were understood to mean and or were intended to mean and or understood to mean that:

a) The plaintiff was unfit to hold his current position and or office serving as an Appeal Court Judge;

b) The plaintiff was a dishonest person.

c) The plaintiff was a perjurer and liar;

d) The plaintiff was a person who could not be relied upon or trusted;

e) The plaintiff had committed a criminal offence; the plaintiff was of low moral standing and

lacked integrity;

f) The plaintiff could not be trusted to pay debts that were allegedly due by or from him.

9. The plaintiff further averred that the meanings attributable to the publication were false, had no foundation and were published or caused to be published maliciously by the defendant despite the defendant having been informed by the plaintiff the correct position as regards his position vis avis the then law firm of Veljee Devshi and Bakrania.

10. The plaintiff set out in his pleadings the following as particulars of malice:

a) The defendant published the defamatory article in its newspaper edition knowing or having reason to know that the words complained of and each of them were false and untrue but nevertheless published them recklessly without ascertaining whether it was true or false;

b) The statements in the said publications labeling of the plaintiff as 'not truthful', having committed 'perjury' and 'criminal offence' are unfounded accusations made out of spite;

c) The sensational manner in which the publication of the article was headed " UNFIT FOR JUSTICE" on the front page of the said newspaper in block capitals was clearly intended to cause irreparable damage to the plaintiff by discrediting the character of the plaintiff in the most damaging way possible and leaving no room in the minds of the readers of the said publications as to the character and suitability of the plaintiff for the position he had been nominated to hold as well as his suitability for the position he currently held.

11. The plaintiff further pleaded that the position he held in the discharge and administration of justice required a person of unquestionable integrity and moral standing and that his standing also depends on the perceptions of his professional colleagues, and members of the public at large who appear before him for the sole purpose of receiving justice.

12. It was also averred that the said publications were calculated to disparage and injure the plaintiff's credit, reputation and bring him to public scandal, odium and contempt in his personal capacity and in his professional standing as a Judge of Appeal and to cast aspersions on his integrity and suitability for the position in the eyes of the public, his colleagues, members of the legal profession and the general public.

13. It was therefore averred that by the said publication, the plaintiff's reputation has been severely damaged, he has suffered and continues to suffer discredit and negative public image from his professional colleagues and members of the public particularly in light of the fact that the said publication continues to be available through the internet and world wide web for viewing. The plaintiff also pleaded that he continues to suffer extreme embarrassment, discomfort and distress as a result of the loss of his reputation. He claimed for aggravated and exemplary damages for reasons that:

a. The defendant was clearly aware that the plaintiff is and was at all material times a Judge of Appeal in Kenya mandated with the duty and position in which he discharged justice;

b. The defendant, by falsely claiming that the plaintiff was "UNFIT FOR JUSTICE" a " perjurer' and that he had "committed a criminal offence' exercised wanton reckless and was irresponsible in making such publications while aware of the plaintiff's positions, duties and offices;

c. The defendant deliberately and or recklessly published the said article despite its knowledge that the allegations were false or without taking any steps to ascertain whether they were indeed false;

d. The defendant has failed and or refused to substantiate or publish an apology of similar prominence for the said publications despite having been called upon to do so by the plaintiff and despite letter of demand being issued.

14. The plaintiff prayed for an apology and retraction of similar prominence as the defamatory publication, general damages for libel; aggravated/exemplary damage for libel; injunctive order restraining the defendant from further publishing or causing to be published defamatory words against the plaintiff; costs of this suit; interest on damages and costs.

The defendant's pleadings

15. The defendant entered an appearance through the law firm of Guram and Company Advocates on 8th March 2012 and filed a defence on 12th April 2012 dated 11th April 2012 admitting that it published the impugned article entitled **" unfit for justice**" on 11th February 2011 but denied that the newspaper had a wide and extensive circulation online. It also denied that the article was published falsely and maliciously. The defendant also denied being the author of the impugned article but stated that the reporter thereof Mr Peter Opiyo believed the same to be true and that the defamation if any was unintentional. The defendant further pleaded the defence of qualified privilege under Section 7 of the Defamation Act. It denied that the words published were defamatory of the plaintiff or that they were understood in their ordinary or natural meaning to mean what was alleged in paragraphs 4 and 5 of the plaint. The defendant further denied all particulars of malice attributed to it and contended that the publication was fair comment on a matter of great public importance and public interest. It further denied that the publication was calculated to disparage or to discredit or damage the plaintiff's reputation or integrity or that the plaintiff suffered or continues to suffer any or extreme embarrassment, discomfort or distress as a result of the alleged loss of reputation; it also denied that the plaintiff was entitled to exemplary or aggravated damages or that he was injured in his reputation, character and credit. The defendant further faulted the plaintiff for failing to exercise his right under Section 7 of the Defamation Act.

Evidence for the plaintiff

16. The plaintiff testified as PW2 and called one witness PW1 Mr Justus Ambutsi Wabuyabo who is the General Manager, Corporate and Legal Services at the National Water Conservation and Pipeline Corporation, Nairobi. PW1 testified that he had recorded his witness statement on 6th February 2012 which he adopted as his evidence in Chief. Mr Wabuyabo testified that he was an advocate of the High Court of Kenya and that the plaintiff was well known to him. That before the publication of the impugned article, he was a pupil at the firm of Mohamed and Madhani Advocates and that the plaintiff was a consultant in that office while the witness was assigned to work under the plaintiff . That at that time, the plaintiff was a Commissioner of Assize and was very professional; a mentor; kind and with high integrity. PW1 also testified that he knew the plaintiff's wife who used to visit the said office and that he admired the plaintiff and held him in high esteem.

17. PW1 testified that he read the Standard Newspaper of 11th February 2011 while driving to work on the material day so he purchased it and on reading it, he was shocked and thought that he must have been deceived of the person of the plaintiff that he knew very well. He developed mixed feelings about the plain tiff and thought that the plaintiff must have been a very dishonest person who had portrayed an image that was not his. PW1 stated that he avoided talking to the plaintiff. He stated that his family and friends knew that PW1 held the plaintiff in high esteem and spoke highly of him hence, PW1 had to avoid associating with the plaintiff and only read his judgments and would therefore occasionally call and talk to him after 2 to 3 months.

18. The witness also testified that before the impugned publication, the plaintiff had been nominated to serve as the Chief Justice and PW1 send the plaintiff a congratulatory message.PW1 further stated in his evidence that even after leaving the firm of Mohamed & Madhani in 2001 after securing a full time job, he remained in touch with the plaintiff and continued to seek his counsel. However, when he read the impugned publication, he understood it to mean that the plaintiff was not fit to hold the position of Chief Justice of Kenya or any other position that involved the administration of justice; that he was unfit to hold his current position of Judge of the Court of Appeal; he was a dishonest person; he was a perjurer and a liar; he was a person who could not be relied on or trusted; he had committed a criminal offence; he was of low moral standing and lacked integrity; and he could not be trusted to pay his debts.

19. Pw 1 stated that he lost respect for the plaintiff after reading the article but after discussing the issue with the plaintiff , he learnt that the plaintiff could not have lied under oath, that he had committed no criminal offence and that he was, in fact a target of a vicious political agenda, all intended to hurt his reputation, to prevent him from being appointed as the Chief Justice of Kenya. The witness therefore offered to testify on behalf of the plaintiff, to tell the truth of how and what he knew the plaintiff to be.

20. On being cross examined by Mr R. Billing counsel for the defendant, the witness stated that he was admitted to the bar in 2001 and reiterated that he had been a pupil in the law firm of Mohammed & Madhani Advocates, upon joining them in March 1999 and that the plaintiff joined the law firm not long after the witness joining it as a pupil.

21. PW1 responded that on reading the article, he was shocked to learn about issues such as failure to pay debts by the plaintiff, being of double standards; taking out a practicing certificate. He responded that he did not contact the plaintiff immediately because he felt cheated and also thought that the plaintiff must have been distressed so he thought calling him would have been like laughing at him and therefore only called him after a while. PW1 also responded that the plaintiff did clarify to PW1 the issues raised in the publication. He also responded that he changed his perception of the plaintiff after the clarifications and now holds him in better esteem as before.

22. On being cross examined further, PW1 denied that he was aware that the publication was pursuant to a report made by Law Society of Kenya to the Parliamentary Committee on Administration of Justice and Labour and stated that he was seeing the report for the first time. PW1 also maintained that he got detached from the judge for some time after the impugned publication although he had been very excited about his nomination earlier on and that he did inform his peers that he had close association with the nominated Judge. However, that after reading the publication, he got confused and did not know how to relate with the Judge.

23. PW1 also stated that he was aware that the plaintiff's nomination was later rejected by parliament and the process of recruiting a Chief Justice was restarted. He denied being in a position to tell whether the publication had an influence on the plaintiff's rejection as the Chief Justice but maintained that that perception counts. PW1 maintained that the article dented the plaintiff's image but that they speak once in a while since the plaintiff mentored him.

24. In re-examination by Mr Kiragu, PW1 stated that the big headline of the publication was **" unfit for justice"** with the plaintiff's picture prominently displayed and that his view was that the person whose picture was displayed was unsuitable to be the Chief Justice of Kenya. He further stated that as the Chief Justice is the epitome of justice. PW1 denied seeing any mention of the plaintiff's integrity in the judgment by Justice Musinga, which only concerned the process of nomination of the Chief Justice.

25. The plaintiff took an oath and testified as PW2 and stated that he was a serving Judge of the Court of Appeal. He relied on his witness statement recorded on 3rd February 2012; the evidence of PW1 and sought to rely on the written witness statement of Mr Akber Esmail recorded on 5th February 2012 as his evidence in chief.

26. The plaintiff testified that he learnt of the offending publication a day before it was officially published. That on the previous day of 10th February, 2011 at 6.00pm, Honourable Justice Lenaola of the High Court called and informed the plaintiff that he had information that the defendant was contemplating publishing a front page about the plaintiff which publication was going to be damaging to him. That the plaintiff was shocked on receipt of that information. Honourable Lenaola J gave him the contacts of Mr Agina and the plaintiff called the said Mr Agina who appeared disinterested and in a hurry. Mr Agina told the plaintiff that there was to be a story that the plaintiff had lied under oath and that he had been accused of perjury and of committing a criminal offence. That the plaintiff requested that he be given an opportunity to give his response to the allegations leveled against him since the information was false and urged the said Mr Agina not to publish the false allegations and instead go to the plaintiff's chambers the following day for one hour and get the side of the story by the plaintiff before publishing , even if it was on a Saturday.

27. The plaintiff testified that to his dismay, the defendant published the impugned story the following day, authored by Mr Peter Opiyo before speaking to the plaintiff to get his side of story. The plaintiff stated that the basis of the claim that he lied on oath is his application for a practicing certificate to the Law Society of Kenya 1998. That in 1999 he also applied for a practicing certificate which was lodged towards the end of 1998 in December. That he resigned from the law firm of Veljee Devshi & Bakrania Advocates where he worked on 1st August 1998 and issued notice of resignation dated 31st July 1998 to the said law firm as a partner and a notice of change to the Registrar General was send duly signed by all the partners continuing and retiring. It is dated 10th November 1998.

28. The plaintiff further testified that he had in 1997(page 21 of his documents) made an application for a practicing certificate for the year 1998 and continued practicing at the same law firm as an associate/ employee and that he only left the firm on 1st August 1999. Further, that on 6th August 1999 he notified the Law Society of Kenya that with effect from 1st August 1999 he was no longer with the law firm of Veljee Devshi & Bakrania, but that he had joined Mohamed Madhani & Company Advocates. According to the plaintiff, he could not therefore have sworn a false affidavit as he had only resigned as a partner from the firm of Veljee Devshi & Bakrania but remained in the same firm as an employee.

29. That he tried to give to Mr Agina the above facts but that the latter seemed not interested by the plaintiff's concerns and explanation so, on the following morning he saw the offending story and horrendous publication was splashed all over the Standard Newspaper when newspapers were brought to him. The plaintiff testified that he felt shuttered by the impugned publication. That that was the lowest moment in his life because the defendant had published lies that were malicious concerning him and only intended to kill his nomination as Chief Justice and that he firmly believes that that publication did kill his prospects of becoming a Chief Justice.

30. The plaintiff emotionally testified that he has spend all his life building his reputation yet by a stroke of a pen by the defendant, that reputation had been completely destroyed. He maintained that the publication was actuated by malice because it covered 70% of the front page with the Caption **" UNFIT FOR JUSTICE**" and his photograph. That the captioned heading was a quotation and not a question and very visible from a distance. That the letters were bold, and could be read 30 feet away, followed by disturbing words **"LSK discredits President's nominee for Chief Justice."**

31. The plaintiff detailed that the publication set out the substance of why he was discredited. That it claimed that he had sworn a false affidavit; that he had committed a criminal offence and that he had been a dishonest person who had not paid a debt so he could not be trusted to pay his debts. He explained that the issue of client's money had been resolved vide HCC 538/1999 wherein the 'client' claimant lost the claim against the plaintiff but that the defendant continues to be used by that claimant to intimidate the plaintiff over the same issue.

32. The plaintiff further testified that when the said client read the impugned story he sought to file additional evidence to show that the plaintiff had not resigned as a partner when the money was deposited in the law firm of Veljee Devshi & Bakrania where he practiced. That nonetheless, the client's application in the Appeal No. 9/2007 was dismissed.

33. The plaintiff additionally testified that following the impugned publication, he had a very difficult time in his life before his family, friends and community as well as colleagues. That he feels embarrassed as he continues to harbour the feeling that somebody must be thinking about him due to the published lies which he seeks that this court should vindicate him since it is still online and that when one googles, it appears.

34. The plaintiff also testified that his job as a judge takes him to other jurisdictions and since the article is online, it is read widely. He stated that he practiced law in Canada, Pakistan, Uganda, Tanzania and Kenya and that major corporations were his former clients. He stated that the appointment of the Chief Justice is a question of great significance to a country therefore his nomination was of great public importance but that there was no justification for publication of lies to sell the paper for profit to ruin his reputation, which act by the defendant he considered morally and ethically unacceptable.

35. According to the plaintiff the publication was not fair comment because it was pure lies. He also stated that the publication was later repeated after about a year as an editorial, even after his advocate had written to the defendant. That the editorial was on 21st September 2012 by the editor giving an opinion with serious conclusions, that the plaintiff was unfit for justice. The plaintiff prayed for judgment in his favour as prayed in the plaint. He produced a bundle of documents filed on 9th February 2012 as his exhibit 1, which included the impugned publication, the editorial, Sunday Nation Review for April 17th 2011, his affidavit sworn on 18th February, 2005 in HCC 538 OF 1999(OS) , copy of demand Notice date 8th June 2100, letter dated 13th jUne2011 from the defendant acknowledging demand notice and supplementary bundle filed on 27th September 2012 as PEX 2 containing the Standard digital News Web page print out of 11th February, 2011; statement of Akber Ismail filed on 9th February 2012 as PEX 4.

36. In cross examination by Mr R. Billing counsel for the defendant, the plaintiff responded, maintaining that he had read the whole article with a screaming headline which was very offensive. He stated that he had since learnt that the publication emanated from Law Society of Kenya but that then, he was no aware. He maintained that he had, prior to the publication, spoken to Mr Ben Agina who explained to him that the main complaint was perjury in that he had lied on oath and that he had committed a criminal offence. The plaintiff further maintained that he had implored the said Agina to get the plaintiff's side of the story and withhold the intended publication and Mr Agina promised to see the plaintiff the following morning. Referring to the sentence beneath the title " unfit for justice" the plaintiff stated that it was only part of the reservation he had given to Mr Agina who did not get the plaintiff's whole story. However, he maintained that the story distorted the reservation as he was not given a right of reply and neither did the defendant verify the truth of the facts.

37. The plaintiff reiterated his evidence in chief on his status at his former law firm subject matter of the false allegations against him and revealed that he chose to resign from the partnership when he realized that one of the partners was trading with clients' money. He also maintained that the client's suit against him and the other two former partners was dismissed against him but that the court found Mr Bakrania liable.

38. The plaintiff maintained that the article was malicious as it never touched the nomination of Mr Kilukumi and the Attorney General. He stated that although his performance as the Judge of Appeal had not been affected by the publication, but that he was embarrassed and nervous about the publications concerning him. He also stated that he had not called many witnesses because the evidence was all the same. He stated that when the Judicial Service Commission called him for the interview OF Chief Justice after he applied, he was asked about the article in the Standard which was in the minds of his interviewers and that he believed his rejection was influenced by the publication since he was the only candidate with such heavy baggage of the story in the Standard.

39. The plaintiff denied that anybody had refused him to hear their cases but stated that litigants had no choice of which judges should hear their cases. He stated that his reputation is tainted among many people including those he meets in social places and mosques. That he has a feeling that when they see him, they question his integrity which no money can compensate. He maintained that the defendant was the right party to be sued and that if it feels it got the published information from the Law Society of Kenya then it should enjoin the Law Society of Kenya and Mr Apollo Mboya who were the source of the information that was never verified. The plaintiff maintained that the defendant should have waited until after receiving the side of the plaintiff's story and verified the information before publishing it.

40. In re-examination by Mr Kiragu, the plaintiff stated that he is the one who contacted the defendant on the allegations and explained to Mr Agina that he could prove that there was no perjury but that he never received any response to that denial. He also stated that Mr Agina made him believe that he could go for the plaintiff's story the following morning but never turned up. Further, that the purported Law Society of Kenya report was not signed and does not show the author hence the only authentic source of the publication is the defendant.

41. The plaintiff denied ever contradicting himself in his affidavit concerning his status at the law firm of

Veljee Devshi & Bakrania Advocates. He maintained that the publication was malicious and for profit, not made as a public duty. He stated that when he applied for Chief Justice's position after is nomination was withdrawn, the interview panel focused on the article by the defendant saying that even if it was false, perception is what counts hence he believed that that was the major impediment to his nomination by Judicial Service Commission to the position of Chief Justice.

Evidence for the defendant

42. The defendant called DW1 Mr Peter Opiyo who testified that he was a Communications practitioner for the Auditor General and that in 2006 he worked for the Standard as a reporter writing on politics hence he was familiar with the case. He relied on his witness statement recorded on 10th February 2012 adopted as his evidence in chief.

43. DW1 stated that he is the one who authored the impugned article and that he did so because he was under a duty to inform the public as the matter generated a lot of public interest being a current issue touching on the new Constitution.

44. According to DW1, he was instructed by his News Editor to collect some documents from the Law Society of Kenya concerning nomination of the Chief Justice and 2 others. He went and collected the said documents from the Law Society of Kenya's Chief Executive Officer Mr Apollo Mboya.

45. That he spend some time with Mr Mboya seeking clarification and after collecting the documents he returned to the defendant's offices and briefed Ben Agina who authorized him(DW1) to write the story based on those documents. DW1also testified that he discussed with the News Editor on the need to get in touch with the plaintiff to clarify the issues in the documents before the story could be published and left the matter with the editors to contact the plaintiff. That he was however not privy to the discussions between Mr Agina and the plaintiff but that comments from the plaintiff were sought before the publication was done. DW1 also stated that in any event, the publication also concerned the nomination of 4 other public officers thus the Attorney General, Director of Public Prosecutions and the Controller of Budget. DW1 denied defaming the plaintiff and maintained that the article did not cover him alone and that after all he is still a serving Judge of the Appellate Court. He also denied that the article was responsible for the plaintiff losing the opportunity to be the next Chief Justice because Honourable Musinga J and Parliament had already nullified the nominations by the president which issues were in the public domain and further that in any event, the report given on the plaintiff is consistent with the article published. DW1 maintained that the article was not authored maliciously because it was based on a document presented to Parliament by the Lawyers' Bar Association and that he had no personal motive or anything personal against the plaintiff and neither was his then employer the standard malicious.

46. According to DW1, this was the first constitutional process which generated public interest so he had a duty to write the story and that the tag **"unfit for justice"** was not a direct attack on the Judge's person since the report by Law Society of Kenya to Parliament has not been disowned.

47. In cross examination by Mr Kiragu counsel for the plaintiff, DW1 stated that he is a holder of Masters Degree in Mass Communication and has been a practitioner since 2006. That he left the standard in 2013 and worked at World Vision as Communications Officer. He stated that at the material time of the impugned publications, he was a Senior Reporter and confirmed that indeed he authored the article in issue. He stated that the title (heading) of the article was given by the Editors and not him; although he did not know which particular editor designed the headline. When shown the plaintiff's exhibits which included - declaration in support of an application for practicing certificate for 1999 and notice to change of particulars to the Registrar, DW`1 stated that the contradictions in the documents was the time of resignation and the time the plaintiff applied for the practicing certificate. According to DW1, Law Society of Kenya's position was the true position of the matter. He maintained that he knew the difference between a partner and an employee of a firm but that the contradiction was that of ceasing to be an employer and remaining as an employee in the same firm. DW1 also stated that Mr Apollo Mboya gave him an overview of the documents submitted to the Parliamentary Committee. He also stated that part of the publication quoted Mr Mboya verbatim. DW1 stated that he did not interview the plaintiff

because he had no time to do so but that the Editors were to get the plaintiff's side of the story. He stated that the Chief Justice position was the most prominent hence they did not give prominence to Mr Kilukumi who was also mentioned by the article.

48. Mr Opiyo also stated that he did not know that an allegation of commission of a criminal offence is a serious allegation. He conceded that the Standard is a widely published newspaper and that it is online. He denied knowing the person who authored the article of 21st September 2012 calling the plaintiff ***"some chap."*** He denied being reckless and maintained that based on the documents submitted to Parliament by the Law Society of Kenya there were contradictions and that since the plaintiff was given the opportunity to respond, DW1's publication did not wrong the plaintiff.

49. In re-examination by Mr R. Billing, DW 1 maintained that the document which was the source of the article was given to him by Mr Apollo Mboya of the Law Society of Kenya and that he simply refereed to the Law Society of Kenya's allegations in the said article against the plaintiff. That he understood the contradictions in the documents after Mr Apollo Mboya took him through the documents including application for practicing certificates by the plaintiff. He also stated that he saw alterations to the Notice of change to the Registrar General. He stated that he investigated before publishing the story hence he was not reckless and maintained that the plaintiff was given an opportunity to respond.

50. Further, that it is one editor who gave the title. He also stated that he gave equal space to other individuals. He denied defaming the plaintiff who was still a serving Court of Appeal Judge.

51. On being asked by the court whether the publication came before or after Parliament and the Court had deliberated on the same issues, DW1 stated that at the time of the publication, the court had ruled on the nomination process but that Parliament had not finalized on the deliberations.

submissions

52. At the close of the defence case, parties agreed to file and to avail soft copies of their written submissions as well. The matter was slated for mention on 28th January 2016 nearly two months to allow the filing and exchange of the written submissions. On 28th January 2016 when the matter came up for mention, only the plaintiff's counsel had filed and served his written submissions upon the defendant's counsel. The defence counsel Mr R. Billing asked for 4 weeks to file his client's submissions and serve. The court granted 21 days to the defendant's counsel to file and serve submissions on the plaintiff's counsel with corresponding leave of 7 days to the plaintiff to file further submissions in response if need be but by 29th February 2016 no such submissions had been filed by the defendant's counsel. Instead Mr R. Billing explained to court that he needed 14 more days to comply since he had difficulties getting instructions from his client. The court exercised its discretion and granted 14 more days to the defendant's counsel to file and serve submissions and fixed the matter for further mention on 23rd March 2016. On the latter date, the defendant's counsel had not complied and he sought 7 more days to comply. The court after hearing objections from the plaintiff's counsel exercised its discretion and granted the defendant extension of time until 24th March 2016 to file by which date, there was no compliance, with Mr R. Biling expressing his frustrations with his client, the defendant, while trying to get instructions in the matter. The court set a date for judgment on 5th July 2016 and also extended time for the defendant to have such submissions if any filed and served within 14 days if they so wished.

53. To date, even after the judgment date of 5th July 2016 was rescheduled, as I write this judgment, no such submissions have been filed. Nonetheless, I must make it clear that submissions are not evidence and this court could as well have proceeded to write and deliver the judgment herein without any submissions from either side, sine a judgment must be based on the pleadings and evidence adduced before the court.

54. In support of the pleadings and evidence adduced on record, the plaintiff through his counsel filed submissions dated 24th December 2015 on 30th December 2015 providing a summary of the pleadings and evidence adduced by both parties and framing 5 issues for determination namely:

a) Whether the words complained of were defamatory.

b) Whether the publication of the words complained of was malicious ? If so, are the pleaded defences available to the defendant?

c) Whether, as a consequence of publication, the plaintiff's reputation was ruined and what damages are available to him?

d) Is the plaintiff entitled to damages, if so what damage are available to him?

e) Who should bear costs?

55. On the first issue of whether the words complained of were defamatory? The plaintiff's counsel cited **Clerk & Lindsel on Torts 20th Edition, Sweet and Maxwell 1998 at page 1093** that the law protects every person's right to possess a good name and a person who communicates to a third party a matter which is untrue is guilty of a legal wrong and the remedy is a claim for defamation.

56. The plaintiff's counsel submitted that the words complained of in the publication were defamatory of the plaintiff in that they were false; were communicated to at least one other person other than the plaintiff himself; tended to lower or actually lowered the reputation and character of the plaintiff in the eyes of the right thinking members of the society and that the words actually referred to the plaintiff . Reliance was placed on **Daniel Kaimasach V Kalamka Ltd & Another [2005] e KLR** and **Gatley on libel and slander 11th Edition Sweet and Maxwell 1998 page 11** on what elements constitute defamation.

57. According to the plaintiff's counsel, the publication was false in that there were no contradictions in the plaintiff's deposition when applying for a practicing certificate that he had resigned as a partner from 1st August 1998 and when he swore an affidavit in a civil suit wherein he had been sued jointly with the partners of that firm of Veljee Devshi & Bakrania Advocates; yet the defendant's witness DW1 insisted in his evidence that the plaintiff gave contradictory and conflicting facts on oath and that he maintained that the correct position was as stated by the Law Society of Kenya in the report to the Parliamentary Committee. It was further submitted that the testimony of the plaintiff was coherent and supported by the finding of the Honourable Ransley J in HCC 538 of 1999 that the plaintiff was NOT liable for the monies paid to the firm of Veljee Devshi & Bakrania Advocates by the client/claimant as the plaintiff had resigned from the partnership of that firm on 1st August 1998; and as confirmed by the decision in the Court of Appeal **Civ App.Nai. 9/2007 Dr Vijay Kumar Saidha & Another Vs Alnashir Visram & 2 Others** where the Court of Appeal stated that:

> ***" In the application for 1998 practicing certificate, the third respondent is shown as having stated in paragraph 2(9) thereof that my place of business is Veljee Devshi & Bakrania (firm) in the one for 1999 the same information is given except at the end of the firm name it has the term'(employer)'. We agree with Mr Esmail that the first application shows that the 1st respondent was a partner in the firm while the second one shows him as having been an employee of the firm. The issue in this case is whether or not the third respondent was a partner in the firm in September 1998 when the appellants allegedly paid money claimed in the suit to the firm. The trial judge found as a fact that the third respondent resigned from being a partner with effect 1st August 1998."***

58. The plaintiff's counsel urged this court to find that the above ruling of the Court of Appeal is admissible and conclusive proof of the facts as testified by the plaintiff concerning his status at the firm of Veljee Devshi & Bakrania Advocates as at the 1st August 1998 and hence the publication by the defendant was false.

59. The plaintiff's counsel further submitted that there was no denial that the impugned article was published by the defendant to the whole world as authored and conceded by DW1 Mr Peter Opiyo and as

read by PW1 Mr Justus Ambutsi Wabuyabo & Mr Akber Esmail among others. Counsel for the plaintiff maintained that the caption ***" unfit for justice"*** labeled the plaintiff as ' not truthful', as a person who had committed perjury" and a 'criminal offence" and that the words used in their natural and ordinary meaning portrays the plaintiff as a dishonest person, a liar and perjurer, a criminal and unfit to hold his current position or any other office in the judiciary; a person of low moral standing, lacks integrity and thrives on untrustworthiness.

60. Further, it was submitted that the words as published portrayed the plaintiff as an unethical person, a criminal, unprofessional and unscrupulous who lacks integrity and therefore not fit to serve as a Judge of the Court of Appeal. The plaintiff's counsel urged the court to consider the evidence of Esmail Akber as unrebutted since the defendant's counsel did not find it necessary to cross examine him hence, he did not have to come and testify and to find the evidence of PW 1 Justus Wabuyabo credible and showing that the plaintiff was a person of high integrity and that by the impugned publication, the plaintiff's reputation was lowered in the estimation of the right thinking members of the society. It was also submitted that the effect of the publication was severe considering the public office held by the plaintiff and the requirements of Chapter 6 of the Constitution on leadership and integrity.

61. The plaintiff's counsel reiterated that judges have nothing except their reputation which is an integral and important part of the dignity of an individual and once besmirched, by unfounded allegations, it is damaged forever as was held in **Nation Media Group Limited & 2 Others V John Joseph Kamotho & 3 Others [2010] e KLR.**

62. It was further submitted on behalf of the plaintiff that there was no justification for the defendant to publish the offending words prominently with the title ***" unfit for justice"*** and that neither was there justification for the defendant to state that the affidavit sworn by the plaintiff contradicted what he had stated in his declaration accompanying the plaintiff's practicing certificates for the years 1998 and 1999 when there was no such contradiction; which led to the plaintiff being asked questions concerning the publication when he appeared before an interview before the Judicial Service Commission for the position of Chief Justice, and that the plaintiff believed that the words in the article largely contributed to his performance before the Judicial Service Commission.

63. It was further submitted that the defendant's suggestion that itis not liable for defamation because it received the published information from the Law Society of Kenya cannot be correct as was held in **Stanbic Bank Limited V Stephen Mutoro and 2 Others (for CoFEK) [2015] e KLR** that a defendant is taken to have assumed responsibility of what is libelous; and **Safaricom Limited V Porting Access Kenya Ltd [2011] e KLR** where the court clarified that the republication of a rumour is libel itself. Further, that republication of libel is a new libel and, if committed by different persons, each one is liable as if the defamatory statement had originated from him. In this case, it was submitted that the defendant would still be liable for defamation even assuming that they received the untrue information from the Law Society of Kenya as alleged.

64. On the second issue of whether the publication was malicious, the plaintiff's counsel maintained that the publication was actuated by malice and that therefore the defences of qualified privilege and fair comment on a matter of public interest are not available to the defendant. Reliance was placed on **Stanbic Bank Limited V Stephen Mutoro** & 2 Others (supra) citing with approval the decision in **Phineas Nyagah V Gitobu Imanyara [2013] e KLR** where it was held that:

> ***" Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice…….malice may also be inferred from the relations between the parties. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn."***

65. The plaintiff's counsel also relied on **Dorcas Florence Kombo V Royal Media Services Limited (2014) e KLR** where the court held that malice will exist if the language used is utterly beyond the facts or where the mode of publication and dissemination of the statement is wider than is necessary; and that malice can appear from the relationship between the parties before or after the publication or from the

conduct of the defendant in the course of proceedings. Further reliance was placed on the **Dorcas Florence Kombo (supra)** case that malice will be inferred where the defendant insists on the defence of justification at the trial without making an attempt to prove it.

66. In the instant case, it was submitted that the conduct of the defendant prior to the publication of the offending words show that the publication was actuated by malice and that the fact that none of the defendant's editors testified should be used to draw an inference that their testimony would be advanced to the defendant's case. It was submitted that the plaintiff having spoken to Mr Agina the editor before the publication, and the latter having assured the plaintiff that he would go to the plaintiff's office the following morning to get the whole story on the allegations; yet went ahead to publish he article without giving he plaintiff an opportunity to give his side of the story, showed deceit, misrepresentation and spite on the part of the defendant towards the plaintiff.

67. Further, it was submitted that the defendant's failure to counter check the truthfulness of the information received from the Law Society of Kenya showed recklessness and malice on its part.

68. Further malice was said to be in existence following the publication on 11th September 2-011 by the defendant in an editorial article that referred to the plaintiff as ***"….some chap" called Alnashir Visram……."*** yet referring to Kioko Kilukumi as "***a respected lawyer***" which according to the plaintiff was spiteful of the plaintiff Judge of the Court of Appeal.

69. The plaintiff's counsel further submitted that the conduct of DW1 showed malice. That the seasoned journalist who nonetheless does not know whether it is a serious thing to say that a judge has committed a criminal offence, was an insult to the plaintiff and his office. Further, that the witness appeared rude and reckless when he responded that it was not his responsibility to decide how the title of the article would look like.

70. The plaintiff's counsel urged the court to consider the magnitude of the publication and how sensational it was which is a calculated move to malign and damage the plaintiff's character and meant to ensure that he does not get the position of the Chief Justice.

71. On the plea of fair comment on a matter of public interest and of qualified privilege, reliance was placed on **Dorcas Florence Kombo** (supra) case that the two defences could only be available to the defendant if the facts relied on were true which is not the case here. Reliance was placed on Article 33 of the Constitution and the decision in **John Kamau Mbugua V Standard Limited & Another [2015] e KLR** where this court held that the right to freedom of expression and information by the media must be regulated to the extent that in the exercise of that right, the media respects the rights and reputation of others and that they do not violate the rights and freedoms of others. It was therefore submitted that the defendant owed a duty of care to respect and protect the dignity and reputation of the plaintiff, and having breached that duty by the offending publication, it ought not to be allowed to feign the defences of fair comment and qualified privilege. Further, that no public interest can be pleaded of maters which are false and injurious to the dignity and reputation of others as is the case here.

72. On the issue of whether the plaintiff was entitled to damages and if so, how much, the plaintiff relied on the case of **Francis Xavier Ole Kaparo V Standard Limited & 3 Others [2010] e KLR** where the court held that where a plaintiff's reputation and dignity are injured, he is entitled to general, exemplary and aggravated damages to vindicate him to the public and to console him for the wrong done. Further reliance was placed on Section 16A of the Defamation Act which obliges the court to assess an amount of damages as it may deem fit. The plaintiff urged the court to apply the principles set out in **Gicheru V Morton & Another** as applied in **Samuel Ndungu Mukunya V Nation Media & Another [2015] e KLR** in arriving at the damages due to the plaintiff, commensurate with the distress, hurt and humiliation that the defamatory publication caused him, considering the extent of the publication as it can still be accessed through www.standard media.co.ke/-headlines.ph-unfit – for –just…….! and that therefore aggravated and exemplary damages are merited, based on the decision in **Kipyator Nicholas Biwott V Dr. Ian West & Another [2000] e KLR** where the court awarded exemplary damages because it was satisfied that the defendant's conduct was calculated to make some profits for the defendant which would

have exceeded the compensation payable to the plaintiff.

73. On what appropriate damages the plaintiff would be entitled to, the plaintiff's counsel relied on **John V MGN Limited [1996] ALL ER 35 page 47** where it was held that in assessing the appropriate damages for injury to reputation, the most important factor is gravity of the libel. It was submitted that in this case, the libel touched on the integrity, honour, and professional reputation of the plaintiff who is a sitting judge of the Court of Appeal who had been nominated to the position of the Chief Justice hence higher level of damages should be awarded. More reliance was placed on the decision in the cases of **Samuel Ndungu Mukunya Vs National Media Group Limited & Another [2015]eKLR and David Kipkurgat & Another V Peter Okebe Pango CA 68 of 2004** where the Court of Appeal held that in assessing damages, comparable injuries shall, as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases. The plaintiff's counsel also cited **Standard Ltd V GN Kagia t/a Kagia & Company Advocates [2003] e KLR** where the court held that there is need to have regard to comparables even in terms of the standing of the libeled person because both the law and level of awards must be certain and predictable.

74. The plaintiff's counsel then proceeded to provide several decisions (8 in number) where the courts made awards for damage for libel these are:

a) ***Amritlal Bhagwanji Shah Vs Standard Limited & another CC 1073/2004*** *where he plaintiff , a retired Court of Appeal Judge was awarded shs 6,000,000 general damages and shs 1,000,000 exemplary damages in 2008;*

b) ***Johnson Evan Gicheru V Andrew Morton & Another [2003] e KLR*** *the Court of Appeal awarded a Judge of Appeal a composite award of shs 6,000,000;*

c) ***Kalya & Another V Standard Ltd [2002] 2 KLR*** *Tunya J awarded an Eldoret prominent lawyer shs 9,000,000 general damages aggravated damages 2 million and shs 300,000 in lieu of an apology;*

d) ***John Joseph Kamotho & 3 Others V Nation Media Group Limited & 2*** **Others**, *the plaintiff was awarded shs 6,000,000 general damages and shs 1,000,000 aggravated damages to a prominent politician and Cabinet Minister which award was upheld on appeal;*

e) ***Charles Kariuki T/A Charles Kariuki & Company Advocates*** *cited in* **Ole Kaparo** *(supra) case, an award of shs 10,000 was made in favour of an advocate of the High Court of Kenya;*

f) ***Francis Xavier Ole Kaparo V Standard Limited & 3 Others*** *(supra) shs 15,000,000 general damages and shs 2,000,000 exemplary damages were awarded to a Speaker of the National Assembly.*

g) ***Eric Gor Sungu V George Oraro [2014] e KLR*** *where the Court of Appeal awarded shs 4 million aggravated damages where there was no remorse on the part of the defendant even when it transpired that the statement was false and he persisted in his statement throughout the trial.*

h) ***Samuel Ndung'u Mukunya V Nation Media Group Ltd & Another [2015]*** **e KLR** *where the court awarded shs 20,000,000 inclusive of general damages for defamation of character, exemplary damages and damages in lieu of an apology to a sitting Judge of the Environment and Land Court who had been defamed while he was a practicing advocate and had retired as Judge of the Interim Independent Constitution Dispute Resolution Court (IICDRC) .*

75. In the instant case, the plaintiff prayed that having regard to all the evidence, submissions, circumstances of this case and case law, an award of shs 20,000,000 general damages; 4 million aggravated damages should be awarded; shs 2 million in lieu of the apology or a tender of an unconditional apology in equal measure of size and prominence as the published article impugned herein; and 2 million exemplary damages. He also prayed for an injunction. The plaintiff also prayed for costs of

the suit.

Determination

76. I have carefully considered the pleadings, evidence and submissions in this matter as supported by case law and statute law. In my humble view, the following issues arise for determination in this matter:

a) Whether the words complained of in the published article are defamatory of the plaintiff's character and reputation;

b) Whether the publication was actuated by malice;

c) Whether there is substance in the defences of fair comment in the matter of public interest and qualified privilege;

d) Whether the plaintiff is entitled to an apology as prayed

e) Whether the plaintiff is entitled to an injunction

f) Whether the plaintiff is entitled to damages and if so, how much.

g) What orders should this court make.

h) Who should bear the costs of the suit herein.

77. On the first issue of whether the published article is defamatory of the plaintiff's character and reputation, it is important to appreciate that defamation is a common law tort which reflects a long standing interest in protecting people's reputation. In the ninth century, the reputation was considered such a valuable asset that the Laws of Alfred the Great provided that public slander was " to be compensated with no lighter a penalty than the cutting off of a slanderer's tongue." However, with time, the remedies became less severe with courts struggling to find a reasonable balance between protecting one's reputation and protecting free speech, which in our case is protected under the provisions of Articles 33,34, 35 of the Constitution of Kenya, 2010, as well as the penal Code.That freedom of speech must, however be balanced with Article 28 of the Constitution which obliges the respect, promotion and protection of every person's inherent dignity. In addition, Article 33 of the Constitution, besides guaranteeing the freedom of free speech, provides limitations for such freedom.

78. Regarding the freedom and right to access information and freedom of expression,Lord Denning MR had this to say in the case of **Frazer Vs Evans & Others :[1969] ALL ER 6:**

" The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed."

79. And on the person's right to protection of character and reputation, William Shakespeare's words are instructive:

"Lago: Good name in a man or woman, dear my Lord, is the immediate jewel of their souls. Who steals my purse steals trash; it's something, nothing; Twas mine, tis his, and has been slave to thousands; But he that filches from me my good name robs me of that which not enriches him; And makes me poor indeed." (Othello Act 3 Scene 3,155-16).

80. In Kenya, the freedom of expression is guaranteed under Article 33 of the Constitution that ***" Every person has a right to freedom of expression, which includes freedom to seek, receive and impart information or ideas."*** Freedom of the Media is also guaranteed under Article 34 of the Constitution. It provides: ***" Freedom and independence of electronic, print and all other types of media is guaranteed,***

but does not extend to any expression specifies in Article 33 (2) limits that freedom of expression which does not extend to among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethic incitement, vilification of others or incitement to cause harm, or is based n ay ground of discrimination specified or contemplated in Article 27(4) of the Constitution. Further, ***that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.***

81. It is not in dispute that the defendant published the impugned article in its Daily Newspaper as claimed by the plaintiff. It is also not in dispute that the publication referred to the plaintiff by name and picture which was the headline for that day the 11th February, 2011. To appreciate whether the publication by the defendant as admitted in its statement of defence and testimony of DW1 is defamatory of and concerning the plaintiff, it is important to understand what defamation is. Defamation is the publication of a statement which tends to lower a person's reputation or character in the estimation of right thinking members generally and which makes them shun and avoid him. The burden of proof lies on the claimant to establish that the published words or statements as published of and concerning the plaintiff are defamatory of him or her. The claimant must prove, on a balance of probabilities, that the words complained of were published of and concerning him; that they were published by the defendant; that they were false; and that they were defamatory in character of the claimant by tending to lower him in the estimation of right thinking members of the society generally, making them shun or avoid him). Finally, the claimant must prove that the publication was done with malice(see **Wycliffe A. Swanya V Toyota East Africa Ltd & Another [2009] e KLR.**

82. In the instant case, the defendant admitted in defence as pleaded, and by the testimony of DW1 Peter Opiyo, that it published the article complained of. DW1 conceded that he was the author of the impugned article. He also admitted that he was then an employee of the defendant as a Senior Reporter when he wrote the article subject matter of this suit. He is the one who collected the information from the Law Society of Kenya and wrote the story and gave it to the Editors to give it the befitting title. There is further no dispute that the publication was on the front page of the defendant's newspaper, the Standard on a Friday, and carrying a coloured caption of the plaintiff with the headline **"unfit for justice**" which words concerned the plaintiff Alnashir Visram as pictured.

83. What the defendant and its agent/servant, the author of the offending article dispute is the claim by the plaintiff that the said publication was defamatory of him; or that it was published with malice or intended to disparage the plaintiffs character and reputation. The defendant also contends that the publication was done on a qualified privilege and that statements in the article are or amount to fair comment on matters in the public interest concerning the nomination of the Chief Justice of Kenya at that time.

84. The big question is whether the words as published of and concerning the plaintiff are defamatory of his character and reputation. A publication is considered to be defamatory of a person's character and reputation if it conveys a meaning which is likely to either lower the persons' reputation in the eyes of ordinary reasonable members of the community; lead those people to ridicule, avoid or shun or despise the person; or injure the person's reputation in business, trade or their profession.

85. It is worth noting that the meaning behind the publication can be implied or express. It all depends on the context and circumstances of each case. Thus, defamation may arise from the direct meaning of words used when taken on the face value, through an innuendo from the statement itself, or from an innuendo based on known facts that are not included in the statement. It is also irrelevant whether the publisher or author intended to make a defamatory statement of and concerning the plaintiff when he or she published the defamatory words complained of. The applicable test is an objective test; whether or not the statement is defamatory is judged against contemporary community standards from the stand point of a reasonable person.

86. Further, it is important to note that not all criticism or abuse is necessarily defamatory. The main issue is whether or not the ordinary person would tend to form a significantly lower opinion of the plaintiff because the plaintiff is the subject of that criticism. In addition, one cannot avoid the publication being defamatory by reporting something as an allegation which implies that it has not been substantiated. This

is so because statements couched as allegations can be defamatory, where the ordinary person is likely to conclude that there is some factual basis to the allegations. The only exception is for criminal proceedings, where, reporting that one has been charged with an alleged offence where such charge exists will not be seen as a statement that the accused is guilty as ordinary people are assumed to know that the law presumes innocence until guilt is proved. Lastly, a person libeled need not prove actual financial loss as a result of the defamatory publication. Libel is actionable perse and therefore damage is presumed.

87. Applying the above tests to this case, and in determining whether the impugned publication was defamatory of the plaintiff, it is important to examine the impugned publication *vis avis* the claim by the plaintiff and the defences raised by the defendant in its written statement of defence and the evidence adduced by DW1 who was the author of the impugned publication.

88. The Standard Newspaper, describing itself in the cover page as **'Kenyas' Bold Newspaper'** for Friday February 11, 2011 No. 28754 then costing a sum of shs 40.00 only and also found at www.standard media.co.ke as given on the body of the said publication, splashes the coloured picture of the plaintiff Justice Alnashir Visram, clad in his impeccable judicial attire comprising a wig. At the top of the said Newspaper is **'judicial matters'** and a screaming headline for that day **' Unfit for justice'** in bold. Beneath those words is a subheading that reads:

> ***" Law Society discredits Kibaki nominee for CJ; Marende defies judiciary; and house committees get more time to probe nominations."***

89. The story then begins with the author thereof a Mr Peter Opiyo, who is DW1 stating as follows:

> ***" President Kibaki's nominees for Chief Justice suffered credibility doubts when the Law Society of Kenya, which is the largest clientele base for the Judiciary discredited him. Justice Alnashir Visram, whose nomination Kibaki's allies have attributed to the fact that he hails from a minority group deemed as neutral in Kenya's turbulent sea of ethnic politics was accused of perjury. LSK has written him off as unfit to preside over justice."***

90. The story continues on page 5 of the said Newspaper as **"the nominations saga: Parliament's challenge:" Nominees: LSK claims two unfit to hold office."** On the right top of the said page 5 there a picture said to be of **"women protesting at the Kibaki nominations of judicial officials outside Parliament Buildings, Nairobi, yesterday"** taken by Govedi Asutsa/Standard. The whole of that page 5 of the paper was dedicated to **the "Nominations saga."**

91. The defendant on the said page gave a very detailed account of what it considered allegations by the Law Society of Kenya, leveled against the plaintiff, including what it says the Chief Executive Officer of the Law Society of Kenya Mr Apollo Mboya had said the previous day that **" It would not serve the country right when we have somebody who gives conflicting information in an affidavit. This is a criminal offence."**

92. It is the detailed account as given by the defendant in the impugned publication concerning the plaintiff as reproduced in the plaint at paragraph 3 and as reproduced in this judgment that the plaintiff avers are defamatory of him in that any ordinary person reading them would conclude that the plaintiff was unfit to hold his current position and or office serving as Judge of the Court of Appeal; that he is dishonest; is a perjurer and liar; he could not be relied on or be trusted; he committed a criminal offence; was of low moral standing and lacked integrity and could not be trusted to pay debts, which words, according to the plaintiff, had no foundation.

93. The plaintiff also claims that although he spoke to Mr Agina the editor of the defendant's paper on the eve of the impugned publication upon being tipped by Hon Justice Isaac Lenaola, and asking Mr Agina not to publish the falsehoods and instead get the whole story from the plaintiff first, the editor did not turn up for an interview with the plaintiff the following morning and that instead, the defendant only published a paltry paragraph **" All these things are being done to destroy my credibility and ruin my candidature for Chief Justice……court ruled the partnership was not liable for the money as it was**

not issued to the firm…….Justice Visram," concerning the plaintiff's rebuttal of the allegations leveled against him.

94. The plaintiff's testimony and that of his witness PW2 Mr Justus Wabuyabo was to the effect that he felt ridiculed and his reputation damaged by the impugned publication which was false. Further that his reputation as a judge of the Court of Appeal and the then nominee for the position of the Chief Justice of Kenya was lowered in the estimation of right thinking members of the society generally. PW1 who testified for the plaintiff was categorical that the plaintiff was his mentor and that he was shocked to read that the plaintiff was Unfit for Justice. That he had known the plaintiff to be an honest, forthright person of integrity both from the time he served under the plaintiff's pupilage at the plaintiff's former employment place of Mohammed Madhani Advocates in private practice where he served as a consultant and that even when the plaintiff became a judge. That the two remained close friends and that PW1 always looked up to the plaintiff as his mentor. According to PW1, he felt cheated of the plaintiff's character after reading the publication. He avoided calling the plaintiff because he thought the plaintiff must have been very distraught and or that the plaintiff would think he was being scorned, until after some time and that the plaintiff explained out his position which PW1 later believed since he had known the plaintiff as an upright person who could not engage in acts of perjury described in detail by the defendant's paper.

95. The plaintiff also testified that as a Judge of the Court of Appeal, the publication made him feel isolated. That many of his friends and family members as well as community members whom he associated with avoided him. At this point, I hasten to add that the definition of what a defamatory statement is as stated in the **Halsbury's Laws of England, 4th Edition VOL 28 paragraph 10**; and **Winfield on tort 8th Edition,** do not impose an obligation on the plaintiff to prove that he or she was actually shunned or avoided or exposed to hatred, contempt or ridicule. The claimant only needs to prove that the publication ***tended*** to lower him in the estimation of right thinking members of the society generally. The definitions are:

> ***" 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."(emphasis added).***

96. On the other hand, Winfield on Tort states that:

> ***"The tort consists in the publication of a false and defamatory statement concerning another person without lawful justification"***

97. Rawal J (as she then was) in **Elizabeth Wanjiku Muchira V Standard Limited** [**2011] e KLR** stated that***: " to satisfy that "tendency" the court has to see the gravity, the nature and extent of the publications made to the public by the defendant."*** The learned judge found support in the following cases:

> 1) **Jones V Skelton [1963] 1 WLR 1362 at 1371** where it was observed that:
>
> ***" The ordinary and natural meaning may therefore include any implications 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 a reasonable persons would understand the words complained of in a defamatory sense."***
>
> 2) **Halsbury's Laws of England 4th Edition VOL 28 paragraph 1** where it is stated that:
>
> ***" In English Law, speaking generally, every person is entitled to his good name and to the esteem in which he is held by others, and has a right to claim that his reputation shall not be***

disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse. If a defamatory statement is made in writing or printing or in some other permanent form, the tort of libel is committed and the law presumes damage."

Paragraph 18***: " if a person has been libeled without any lawful justification or excuse, the law presumes that some damage will flow in the ordinary course of events from the mere invasion of his right to his reputation, and such damage is known as general damages. Thus, a plaintiff in a libel action is not required to prove his reputation, nor to prove that he has suffered any actual loss or damage. The plaintiff is not obliged to testify, although is it a customary for him to do so, but, having proved a statement is defamatory of him and not excused by any available defence, he is always entitled to at least nominal damages. However, it is open to a plaintiff in a libel action to plead and prove special damage which he is entitled to recover in addition to general damages. In appropriate circumstances, he may also seek aggravated or exemplary damages."***

3) In **Clerks & Lindsell on tort 17th Edition 1995 page 1018**, it is stated as follows:

" 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."

98. So, was the publication defamatory of the plaintiff or was there any truth in the publication whose source is said to be the Law Society of Kenya's dossier to a Parliamentary Committee then responsible for vetting of Constitutional Office holders but which dossier, had, at the time of publication of the impugned article, not been tabled and or debated in Parliament?

99. A quick glance at the impugned publication starting with the headline **"Unfit for Justice"** and the writing under it clearly gives the impression that the person being referred to was not fit to be Chief Justice. The article then goes on to give reasons why the plaintiff was not fit for nomination to the post of Chief Justice of Kenya, saying that that was according to the Law Society of Kenya' dossier to a Parliamentary Committee. The defendant did not produce any evidence to show that the so called dossier was subject of Parliamentary debate. In my humble view, only truth into the allegations that the plaintiff was unfit for Justice would be a defence to those published words of and concerning the plaintiff which i find were highly defamatory of the plaintiff. The words **"Unfit for Justice"** with the picture of the plaintiff next, covering nearly 70 percent of the paper followed by detailed allegations of perjury, committing a criminal offence by swearing affidavits and making statutory declarations that he knew or ought to have known to be false which the defendant maintains is the truth about the plaintiff is without any more, defamatory and would definitely tend to lower the plaintiff in the estimation of right thinking members of the society generally. The article also reveals that the plaintiff received client's money while he was a partner in the named law firm of Veljee Devshi & Bakrania and refused to pay the said client leading to a recovery suit being instituted against him and his co-partners.

100. To counter those defamatory allegations, the plaintiff produced in evidence all the documentation subject of the allegations by the defendant which are: an affidavit in reply in HCC 538/99(OS)-Dr Vijaly Kumar Sadha & D Uma Saidha Vs T.G. Bakrania, M. Rana and Alnashir Visram (practicing as a firm in the name of Veljee Devshi & Bakrania Advocates) sworn on 18th February 2005 by the plaintiff; a Partnership Deed dated 16th January 1992;a letter dated 6th August 1999 by the plaintiff to the Secretary Law Society of Kenya informing the latter that the plaintiff was no longer with the firm of Ms Veljee Devshi & Bakrania Advocates from 1st September 1999 and that he had relocated to Mohammed Madhani & Company Advocates. That letter was received by the Law Society of Kenya on the same day 6th August 1999; a Declaration dated 6th January 1999 by the plaintiff accompanying application for practicing certificate for the year 1999, stating that his place of business was Veljee Devshi & Bakrania Advocates as employer; letter of resignation from the partnership of Veljee Devshi & Bakrania Advocates by the plaintiff effective 1st August 1998 dated 31st July 1998; Declaration in support of application for

practicing certificate dated 6th January 1998 for the year 1998 where the plaintiff's place of business is described as Veljee Devshi & Bakrania Advocates firm; Notice of change in the particulars registered relating to the partnership of Veljee Devshi & Bakrania Advocates dated 10th November 1998 stating that the change took effect from 1st August 1998 affecting the plaintiff herein ceasing to be a partner and naming the remaining two partners; and the impugned publication.

101. The defendant's witness DW1 who is the author of the impugned publication also produced the above stated documents as produced by the plaintiff its documentary evidence in support of their defence. In addition, it also produced a document titled "Memorandum to the Parliamentary Department Committee on Administration of Justice and Legal " by the Law Society of Kenya subject being: **" Nomination to the offices of the Chief Justice, Attorney General and the Director of Public Prosecutions."** The said document which is undated and unsigned contains information to the Parliamentary Committee on the suitability of the nominees for the stated posts of Chief Justice, Attorney General and Director of Public Prosecutions.

102. On the person of Justice Alnashir Visram, the document alleged that:

> ***1) "In the Nairobi CA9/2007, the judge is a respondent in a matter for failure to remit proceeds of a sale totaling shs 14,167,080. In the matter the judge has sworn an affidavit to the fact that he resigned as a partner in the law firm of Messers Veljee Devshi & Bakrania Advocates on 1st August 1998 (see page 81 in the bundle annexed). This contradicts the declaration accompanying application for practicing certificate for the year 1998 and 1999 filed with the Law Society of Kenya in which the Judge stated that he was the employer in the said law firm(see page 94a and b .***
>
> ***2) In Nairobi Court of Appeal Civil Application No. 265 of 2009 the judge sitting in a bench comprising two other judges took out a matter from a cause list and denied a hearing to a litigant on the basis of extraneous issues inter alia:***
>
> - ***That the litigant is not happy appearing before all judges in the Republic of Kenya.***
> - ***That the litigant according to press reports filed a complaint in the UN Human Rights Committee in Geneva against his brother judge.***
>
> ***(see judgment annexed to this memorandum)."***

103. It is out of the above three very brief paragraphs of the alleged Law Society of Kenya Memorandum that the defendant in its wisdom found the title ***"unfit for justice"*** appropriate for a splashing headline in a Friday Daily publication of its paper the Standard ; Kenya's Bold Newspaper.

104. Whereas this court does appreciate that a dossier on a public figure or a person seeking to occupy a high public office like the office of the Chief Justice of Kenya is necessary to inform the public and especially the appointing authority of the kind of a person or leader they should expect, that dossier must contain no false hoods. It must contain nothing but the verified truth and not peddled inaccurate and hollow falsehoods.

105. In other words, the publisher can get away with a defence of truth if it can prove on a balance of probabilities that the story though defamatory, was true in substance. Minor errors may however be excused, but not those that go to the heart of the defamatory sting or stings.

106. From what the defendant published, and the evidence adduced, despite the timely intervention by the plaintiff who called the editor Mr Agina urging the latter not to publish anything until he gets the full story on the matter and side of the plaintiff, it would appear from the sprint manner of publishing the story and as admitted by DW1the author thereof, that the defendant was not prepared to doubt what the Law Society of Kenya had written of and concerning the plaintiff since it was nothing but Holy scripture and it proceeded to convert that source's information into bullet proof facts.

107. My above conclusion is guided by the evidence adduced by the defendant's witness and author of the impugned publication maintaining that the publication was fair comment which was an opinion expressed in the public interest. When pressed to answer questions as to whether he found it necessary to cross check the facts before publication, he evasively answered that the plaintiff was accorded an opportunity to state his side of the story and that Law Society of Kenya gave him an overview of the document submitted to the Parliamentary Committee. Further, the defence witness maintained that the LSK's position on the matter concerning the plaintiff was the correct position.

108. Further, that there was a contradiction in the plaintiff's affidavit since he-DW1 could not see how the plaintiff could have ceased being an employer and yet remain an employee in the same firm. Further, DW1 maintained that he verified the truthfulness of the allegations without indicating from which sources he verified since the court files regarding the suits wherein the plaintiff was alleged to have committed perjury were available including the decision of Hon Justice Ransley and the Court of Appeal decision which had upheld the High Court's decision that the plaintiff did not swear any false affidavit or make a false declaration that he was not a partner in the law firm of ***Veljee Devshi & Bakrania Advocates*** when the client's money was received by Mr Bakrania personally and not in the name of the law firm.

109. For the defence of fair comment to succeed, it must be clearly comment, not assertions of fact; it must be based on provable facts set out or referred to in the publication and; must be honestly believed. Assertion of facts can only be defended by proving their truth.

110. Examining the impugned publication and the documents annexed to the Memorandum of the Law Society of Kenya as produced by the defendant, and comparing the impugned affidavit with two Statutory Declarations and the letter to the Law Society of Kenya on the relocation of the plaintiff and his letter of resignation from the partnership and the Notice of Change of particulars of the partnership, this is what this court quickly establishes:

> i. That although the plaintiff was a partner in the law firm of Veljee Devshi & Bakrania as per the partnership deed produced by both parties dated 16th January 1997, on 1st August 1998 the plaintiff by his memo dated 31st July 1998 resigned from the partnership and on 10th November 1998, the notice of change following of such resignation was presented to the Registrar General, showing date of cessation of the plaintiff as a partner to be 1st August 1998. Although there is some erasure on the date which was initially written 1st ~~September~~ 1998 to handwritten August, that erasure is duly counter signed/ endorsed by the continuing partners who also endorsed on the notice of change. The said partners are Tribhuvan Gordhan Bakrania and Mahmud Gordhan Bakrania and Mahmud Mohamedali Rana, the continuing partners.
>
> ii. What this court can also clearly see is that in the Declaration accompanying application for practicing certificate for the year 1998 dated 6th January 1998 signed by the plaintiff, he clearly declared that his place of work was Veljee Devshi & Bakrania/ firm/~~employer~~, an indication that he was applying in his capacity as the partner in the firm.
>
> iii. However, in a similar declaration for the year 1999 dated 6th January 1999, the plaintiff declared the same place of business but with ~~firm/~~employer crossing out and employer being in the status of the place of business, a clear indication that now, the place of business was his employer since he was no longer in the partnership of the firm, after resigning on 1st August 1998.

111. Those are the unconcealed and lucid facts which, when the plaintiff was confronted with the suit filed against the partnership in HCC 538/1999(OS) (supra), he swore an affidavit dated 18th February 2005 deposing that although he had joined the partnership in January 1996 which was governed by the partnership deed, he had nonetheless resigned as a partner on 1st August 1998, which resignation was accepted by the remaining partners, releasing the plaintiff from all obligations and benefits of the partnership as of that date. The plaintiff also annexed the copy of memorandum of resignation, and explained that the notice of change of particulars to the Registrar General could however could not be effected by registration with the Registrar of Business Names until 1st November 1998 as the file relating

to the firm of Veljee Devshi and Bakrania Advocates could not be found at the registry at that time.

112. In the said affidavit, the plaintiff clearly deposed that it was within his knowledge that the claimant in that case had deposited his finds with the 1st defendant T.G. Bakrania Advocate, in the latter's personal bank account with the Bank of India which was not the partnership's bankers hence, the plaintiff herein who had retired from the partnership could not be held liable for liabilities of a partnership that he was not part of.

113. I have also had the advantage of perusing CA 9/2007 Dr Vijay Kumar Saidha & Another V Tribhuran Godhan Bakrania & 2 Others where judgment was delivered by the Court of Appeal on 4th December 2015 upholding the decision of Ransley J made on 6th October 2005 in HCC 538/1999 (OS).

114. In the above judgment, the Court of Appeal found that the 1st respondent who is the plaintiff's former partner, in receiving and depositing the appellant's money in his personal account at the Bank of India acted alone but not on behalf of the firm. The court at page 3-6 of the judgment reproduced *in extenso* the affidavit which was sworn by the 1st Respondent Mr Tribhuran Gordhan Barkrania. But of particular relevance to this case is paragraph 5 of the said 1st respondent's affidavit which in no uncertain terms exonerated the 3rd respondent who is the plaintiff herein from any blame or liability for swearing an affidavit denying that he was a partner in the law firm of ***Veljee Devshi & Bakrania Advocates*** as follows:

> ***" 5 That the 3rd defendant (hereinafter Visram) resigned as a "partner" on 1st August 1998, and both the second defendant (hereinafter "Rana" and I accepted his resignation and released him from all obligations and benefits of the "partnership" as of that date. However, Visram's formal notice of resignation could not be filed and registered with the Registrar of Business Names Act until 1st November 1998 as the file relating to the firm of Veljee Devshi & Barkrania could not be found at the registry at that time."(emphasis added).***
>
> a. Although section 28 of the Partnership Act stipulates that resignation of a partner would take place within three months from the date when the outgoing partner gives notice of resignation to the continuing partners, the Court of Appeal in **CA 9/2007 Dr Vijay Kumar Saidha & Another V Tribhuran Godhan Bakrania & 2 Others** made it clear that on the evidence adduced, it was glaring that the plaintiff herein was not party to the receiving of the client's money which money was received and banked by the other partner in his own bank account and not the firm account. Furthermore, the above deposition by the plaintiff's former partner was contained in the affidavit sworn by Mr Bakhrania. With the above clear, plain and obvious facts, would the so called dossier by the Law Society of Kenya alleging that the plaintiff had committed perjury and unleashed to the defendant herein for publication have contained any truth capable of being published? The answer is a resounding No.

115. The plaintiff had the right to associate or disassociate with the firm. That is why the law provides for the formation and dissolution of partnerships and or retirement and resignation from partnerships. And although the law tied his resignation to take effect three months from the date of notice, in the instant case, it is clear that not only had his other partners released him from any liabilities of the firm as at the time the client allegedly deposited money, but that infact, the said client did not deposit any money with the firm but with an individual advocate and in that particular advocate's personal account. I find that the defendant in this case owed the plaintiff a duty of care. That duty involved, upon receiving the so-called dossier, to investigate into the allegations contained in the brief to the by the Law Society of Kenya, and to establish whether those allegations were true.

116. The defendant through its witness- DW1 being the person who was tasked to collect the juicy dossier and who, being a Senior Reporter, together with Mr Agina the defendant's Editor, should have contacted the plaintiff immediately, to get his side of the story before publishing the story. They did not. Instead, even after the plaintiff herein had gotten wind of the intended publication and called Mr Agina and tried to explain himself out, and begging the editor not to publish the false story before getting full

details from the plaintiff the following morning, the editor seemed disinterested and non committal. He went ahead and gave the publication a very attractive title **" Unfit for justice"** and proceeded to republish the defamatory falsehoods perpetrated by the Law Society of Kenya, concerning alleged perjury by the plaintiff; which perjury cannot be decoded from the very clear documentation that the Law Society of Kenya was relying on and supplied to the defendant's witness DW1.

117. In my humble view, it was open to the defendant to verify facts from the court records before publishing the impugned article which as i have stated, contains hollow statements of fact extracted from what the Law Society of Kenya claimed to be a dossier questioning the plaintiff's professional background and capable of impeding Justice Alnashir Visram from being considered as Chief Justice of Kenya.

118. In my humble view, had the plaintiff been accorded a hearing as per his request on the eve of the publication, the false inflammatory publication would not have been published. The defendant chose to ignore the plaintiff. Had they given him an ear, they would have discovered that the plaintiff had been exonerated from the blame by his former partner and even the court (Ransley J in HCC 538/1999 vide the decision dated 6th October 2005 which was upheld on appeal on 4th December 2015 by the Court of Appeal while this suit was pending.

119. I am in agreement with the plaintiff's submissions that failure to accord the plaintiff an opportunity to give his side of the story is a manifestation of recklessness and spite and therefore malice. Indeed, the defendant media house chose to design to suppress credible and truthful information which they would easily have gotten from either the plaintiff on the allegations of perjury or from court records in HCC 538/1999. Haste publications that suppress the truth are a clear demonstration of malice on the part of the defendant. Malice can be inferred from failure to investigate into the facts provided. As stated earlier, the defendants chose to accept the 'dossier' as though it was a full proof Holy Scripture which was to the contrary.

120. In my humble view, the plaintiff has, on a balance of probabilities established that the publication which called and painted him as unfit for justice for being a perjurer was false and intended to harm the reputation of the plaintiff and expose him to ridicule, contempt and hatred. The publication also tended to lower the plaintiff's reputation in the estimation of right thinking members of the society generally. PW1 is an advocate of the High Court of Kenya who was mentored by the plaintiff. His testimony was articulate. He was steady and sure in his testimony of and concerning the plaintiff. That evidence of PW1 on oath was never watered down by the defendant's counsel's severe cross-examination. PW1 read the impugned publication and was shocked at the allegations being leveled at the plaintiff whom he knew as a forthright person. He avoided the plaintiff because he felt cheated by the good character that he thought and believed the plaintiff possessed before the publication. It was not until after the plaintiff explained out to PW1 the situation that the witness warmed up to the plaintiff. In my view, PW1 fits the description of a reasonable member of the society generally.

121. The article, from the headline to the continuing page, when read as a whole conveys to an ordinary person reading it that it was not fair comment and neither was it based on an honest opinion but statements of facts which the defendant had an opportunity to inquire into but chose not to.

122. Furthermore, the defendant though pleaded fair comment on matters of public interest, did not attempt to state in its defence the facts upon which the opinion or the fair comment was based, so that readers could form their own opinion or views on those facts; which facts should have been known to the defendant when it made the publication.

123. In addition, it cannot be in the public interest to perpetuate falsehoods about people simply because those people or persons are public figures. PW1 who passes the test of a reasonable man was clear in his testimony that he considered the plaintiff to have been defamed by the publication and that from the date of the publication, he avoided or shunned the plaintiff because he thought he had been cheated by what he verily believed the plaintiff to be, an honest and upright person for the long period that he had associated with him as a his former pupil and mentee.

124. Although the defence sought the plaintiff's answers as to whether or not he was still serving as a Court of Appeal Judge which is a matter in the public domain, it does not mean that for one to succeed in the claim for libel, then the claimant must prove that he lost his job or business. A judge is a state officer. He is bound by a code of conduct prescribed under the Public Officers Ethics Act and the Judicial Service Act. He is also governed by Chapter Six of the Constitution of Kenya on leadership and integrity. He is expected to uphold justice, Integrity, fairness and be honest in the exercise of his duties, and exercise a public trust in a manner that brings honour to the nation and dignity to the office of a judge; and promote public confidence in the integrity of the office. He is also required to be honest in the execution of public duties and to be accountable to the public for decisions and actions, besides being disciplined and committed in service to the people. A state officer is not expected to conduct oneself in a manner that demeans the office that he holds.

125. The above values, plus other values and principles of the Constitution as stipulated in Article 10 and 159 of the Constitution are applicable to judges. As at the time of the impugned publication, the plaintiff was and is still an Appellate Court Judge who has served the judiciary for a considerable period of time. At the time of hearing this suit, it is common knowledge that he had gone through the vetting process before the Vetting of Judges and Magistrates Board as required by section 23 of the Transitional and Consequential provisions of the Constitution and was found suitable to continue serving as Judge of the superior court. The Law Society of Kenya and any other person of interest who had serious concerns about the suitability of the plaintiff to continue serving as a judge of the superior court had opportunity to prove before the Vetting Board that the plaintiff did not deserve to remain serving as a judge. There are indeed judges who were found unsuitable to continue serving and were removed. The defendant did not demonstrate to the court that what the Law Society wrote and which the defendant published was the truth, that is, that the plaintiff was unfit to serve as Chief Justice or as judge or judicial officer in the administration of justice.

126. In my view, the publication taken as a whole clearly paints the plaintiff to be a person who does not deserve to hold the office of a judge to administer justice and therefore that of a Chief Justice. The article painted him as a liar, a perjurer and dishonest person with questionable professional background.

127. I must however revisit the undisputed fact that in 2011, the then President Mwai Kibaki nominated the plaintiff for the post of Chief Justice of the Republic of Kenya. That nomination, no doubt was procedurally unconstitutional since the power to nominate suitable persons for consideration for appointment to the office of the Chief Justice is vested in the Judicial Service Commission, through a public participatory process and after vetting/interviewing of the shortlisted candidates by the Judicial Service Commission, the best candidate's name is submitted to the President for submission to Parliament. Once approved, Parliament submits the name to the President for appointment.

128. This court does therefore appreciate the vigilance of the people of Kenya including the media and the Law Society of Kenya which latter has a statutory mandate to protect and promote the public interest and the rule of law. Equally, all persons without exception are obliged to respect, uphold and promote the values and principles of the Constitution. The Law Society of Kenya cannot therefore be faulted for raising a red flag that the Constitution was being contravened by the unprocedural nomination of the plaintiff as Chief Justice. However, the protest at that time should not have been turned into a platform for witch-hunting and providing false information of and concerning the plaintiff, which information was highly defamatory of the plaintiff.

129. In my humble view, having examined the documents produced by both parties to this suit, I find that there was no basis upon which the plaintiff was being disparaged by the Law Society of Kenya and which denigration was picked up and perpetuated by the defendant media. The Law Society of Kenya and therefore the media's rage should have been directed at the President who had flouted the procedure provided for in the Constitution by nominating or purporting to nominate suitable persons for consideration for appointment as Chief Justice, Attorney General and the Director of Public Prosecutions into constitutional offices.

130. There was no evidence to show that the plaintiff applied for that unprocedural nomination or that he

gladly accepted that unprocedural nomination. And in that rage, the best forum for all interested parties would have been to challenge that act of unprocedural and unconstitutional nomination by either presenting an advisory or protest note to Parliament or filing into court a petition seeking to annual the President's actions. Falsely attacking the credibility, character, profession and reputation of the plaintiff was an uncalled for stripping.

131. The rule of defamation tort is that whoever reports a defamatory matter is liable for it. Even if it is from an apparently reputable and knowledgeable source such as the Law Society of Kenya. The publisher, in this case , the defendant, must prove the truth of the sting of the article, since that is what the readers will take and PW1 took it to mean. It is not enough for the publisher to prove that it reported the article accusing the plaintiff accurately. It must be able to prove that the accusation itself is true.

132. The defendant in this case wanted this court to believe that it was only reporting an allegation made by the Law Society of Kenya to the Parliamentary Committee. Regrettably, using the term 'alleged' is only but a fanciful way of saying " I am reporting what someone else has said," so the same answer applies. In other words, sprinkling a story with the word " alleged" or "allegations " or "rumoured" or " word has it that ' or it is in the "grapevine" or its "street talk" or its "gossiped" does not in any way insulate the publisher from a defamation claim. No publisher is allowed to pass on someone else's allegation or gossip as was done in this case by the defendant passing on the false allegations by the Law Society of Kenya concerning the plaintiff. The writings of **Gerald R. smith** in **Valparaiso University Law Review Volume 27 No. 1 1992 of Malice and men: The Law of Defamation: page 39-9**3 are useful for my exposition. At page 41 he writes :

> ***"Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. The right by an individual to maintenance of his or her good name " reflects no more than our basic concept of the essential dignity and worth of every human being…..a concept at the root of any decent system or ordered liberty".***
>
> ***Reputation is a dignity interest worthy of protection apart from any other harm that might attach. Additionally, specific types of harm resulting from damage to the reputation justify legal protection.***
>
> ***Reputational image involves the loss of esteem in the eyes of others, a threat to existing and future relations with third persons, a threat to an existing positive public image, and the potential image, and the potential for development of a negative public image for one with no previous public reputation. Loss of reputation may also result in lowered self esteem and personal integrity and may lead to public embarrassment, humiliation, and mental anguish. Defamation Law allows a plaintiff to mitigate those damages by setting the record straight in a public forum….."***

133. In this case, the defendant did not adduce any evidence to show that infact, the so called dossier was delivered to or discussed by Parliament. Therefore, whereas this court does recognize that freedom of speech and of the media is of paramount importance since nearly all other constitutional freedoms depend on it, in that, the free flow of information in the society ensures the vitality of a democratic governance, providing checks on governmental abuse, aiding in the choices among competing opinions and opinions; and whereas, indeed, free speech also acts as a safety valve for reducing the incidence of more destructive modes of expressing dissatisfaction; and promotes self fulfillment, personal growth and self realization, there must be a balancing of interests protected by the free speech and a free media with other interests including respect for the inherent dignity of a person and avoiding anything that vilifies them. This does not imply that debate on public issues or public officials should be inhibited, but that where it is apparent that the information being disseminated to the public by the media is done in such a highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers who are not willing to correct these false statements then, no doubt, malice, ill will and spite will be inferred .

134. In the instant case, there is no reason why, upon receiving information from the Law Society of

Kenya , the defendant never bothered to cross check those facts with the plaintiff and or the court records in HCC 538/1999 wherein the court had already pronounced itself on whether there was any plausible evidence to show that the plaintiff had lied on oath or had even attempted to lie on oath. I reiterate that failure to inquire into those facts and or to check out the court records is evidence of malice on the part of the defendant.

135. Further conduct of the defendant that demonstrates malice is when on 21st September 2012 after this suit had been filed, they published in their editorial in the same paper produced as an exhibit, an article that was very condescending of the plaintiff, to the effect that: ***" Kibaki will retire with his record on appointment bloodied by rejections. He first got it wrong when he tried to appoint some chap called Alnashir Visram as Chief Justice. Others followed including his failed bid to appoint respected lawyer Kioko Kilukumi as Director of Public Prosecutions."***

136. Anyone reading the above editorial article in the defendant's paper would no doubt conclude, from the selective manner in which the editor described the plaintiff as "some chap called Alnashir Visram," who was a subject of "Kibaki's bloodied attempted appointments" compared with the description of Mr Kioko Kilukumi, that the defendant had scores to settle with the plaintiff. Since when did the plaintiff, with his long service on the bench as a Commissioner of Assize, Judge of the High Court and then Judge of the Court of Appeal, a well known person degenerate into a character called *some chap called Alnasir Visram*.? What was the motivation for such demeaning colloquial slang in the description of the plaintiff? Why not just call him Alnashir Visram since it in the public domain as earlier reported by the defendant in its headline subject of this suit that the plaintiff had been nominated for the position of Chief Justice as opposed to "some chap called Alnashir Visram?" I have no doubt in my mind that Mr Kioko Kilukumi is a respected lawyer in this country but the question is, what was the motivation for calling the plaintiff **'some chap called Alnashir Visram."** This court can only infer malice in that although the latter publication only showed disrespectful, discourteous; snub and demeaning language, and not necessarily defamatory of the plaintiff, in my view, It was meant to add insult to injury already caused to the plaintiff by the defendant's earlier defamatory publication. It was meant to lower his self esteem further and to cause him public embarrassment and humiliation.

137. In addition, the author of the impugned article Mr Peter Opiyo who testified as DW1 for the defendant demonstrated such a cavalier attitude while testifying. He showed no remorse for authoring such a defamatory article. He stuck to his guns that the plaintiff was given an opportunity to respond to the article and that he did give his comments which were also published and when shown documents which indeed showed no contradiction or at all in the declarations accompanying applications for practicing certificates for 1998 and 1999 and affidavits sworn by the plaintiff, DW1 insisted that there were contradictions and maintained that the plaintiff could not be believed. DW1 also rubbished the decision in HCC 538/1999 which exonerated the plaintiff from any liability and stated that it was not his responsibility to decide how the title of the publication would look like. This court did read excessive malice in the conduct of the defendant and its agents/servants in authoring and publishing the article as impugned.

138. In my view, inherent dignity and worth of every human being is at the root of any decent system of ordered liberty or freedom. Unjustified invasion and wrongful/harmful falsehoods of that dignity and worth as has been demonstrated in this case on the part of the defendant's Newspaper of wide circulation must be discouraged since it is the same Constitution which guarantees the freedom of speech and of the media that also guarantees the respect, promotion and protection of inherent human dignity as well as the right to privacy and not to be vilified thereby ensuring that one's right to a good name is protected and respected.

139. There is no constitutional right to inflict injury to others. As was vividly put by Justice **Oliver Wendell Holmes, Jr**, that ***" the right to swing one's arm stops at the point of the other person's nose." (See Weirum V RKO General, Inc. 539 page 2 (Cal.1975).***

140. The court's duty is to enforce basic rights so that those rights are not infringed with impunity and that is just what I have been asked to do in this case, and which I must do and do it well, while reminding

all that the Bill of rights binds all persons and state organs. In my humble view, the publication by the defendant concerning the plaintiff was false and done in a very sensational manner. The splashing negative headline**" unfit for justice"** was in my humble view meant to attract wide readership and unjust profiteering at the expense of the inherent dignity and reputation of the plaintiff. The plaintiff testified and it was not denied or controverted by the defendant that when he appeared for interview of Chief Justice, he was questioned about the impugned publication and although he explained out himself he was reminded that what matters is the perception created by the publication that he had sworn a false affidavit and had failed to pay to his clients monies received by him and his partners at his former place of work.

141. Although this court cannot find that the plaintiff lost the nomination by the Judicial Service Commission when he applied for the position of Chief Justice due to the publication as no report giving reasons for his rejection was produced in evidence, no doubt that evidence of his experience with the interviewer creates an impression that the interview panel were poisoned by the screaming headline **" unfit for justice**" and that after all they were not the ones going to sanitize the plaintiff who was now being perceived as being unfit for justice. But that is just one aspect of the humiliation that such screaming headlines can cause to an individual.

142. I reiterate that the defences of fair comment on a matter of public interest and qualified privilege, in the circumstances of this case and on the evidence adduced, are not available to the defendant. On the first defence of fair comment the defendant did not prove that the material communicated was an expression of honest opinion but rather, were statements of fact as given by Law Society of Kenya. The defendants' witness too testified and maintained that what the law society of Kenya wrote was truth concerning the plaintiff's unfitness for justice. It was not just an observation or a criticism; and neither were there any provable facts upon which the fair comment was made. In **Dorcas Florence Kombo V Royal Media Services** (supra) the court was clear that:

> ***" The defence of fair comment is available if facts are true and the matter is of public interest and the opinion is honestly held." In the same decision, the court found that " qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or used of the privileged occasion for an improper purpose."***

143. On the latter defence of qualified privilege, this court does acknowledge that some speech is so important to society that there is a moral or social or legal duty or interest to tell it out since the recipient has a corresponding interest to receive such information, even if it turns out to be untrue, provided the defendant's dissemination can demonstrate that the publication was in good faith. And good faith here involves the publisher publishing only after getting and reporting the other side of the story in rebuttal to the allegations; the publisher relying on reliable and impartial source; the publisher not overlooking obvious sources and the publisher not overtyping the story.

144. Further, the publication should not be laced with malice as was the case in the instant case; and the defendant's conduct in publishing the matter should be reasonable in the circumstances. In the instant case, there was malice and the conduct of the publisher was not reasonable. They refused to get information from the plaintiff on the position of the matter and failed to inquire into the facts before publishing. They also overtyped it with a negative headline. In **Honourable Uhuru Muigai Kenyatta V Baraza Limited [2011] e KLR** Rawal J (as she then was) observed that:

> ***" While taking defence of justification or qualified privilege in the defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant…..once not verified, the justification or qualified privilege does not inure the defendant and in any event, the onus that the same is true, rests on the defendant to make it a fair publication."***

145. The Court of Appeal for **Eastern Africa in Daily Nation V Mukundi & Another [1975] EA 311** stated that:-

" When the defendant publisher accepted an item for publication, it had the right and indeed the duty to see whether such item contains seditious or libelous matters, and if it fails in that duty, it always publishes at its own risk and that suggests recklessness on the defendant's part".

146. In the instant case, I have already confirmed what the High Court in HCC 538/1999 and Court of Appeal CA 9/2012 found, that there was no truth or at all in the Law Society of Kenya's dossier that the plaintiff had committed perjury. The defendant having relied on Law Society of Kenya report were under a duty to see/verify whether it contained libelous matters. It did not, which amounts to recklessness. And as the subject matter was infact available in the court records for verification, failure to do so amounted to reckless and negligent and irresponsible publication. Any reasonable fair minded person reading the publications as impugned gets a straight message that the plaintiff is indeed a liar, a perjurer and therefore a criminal. A criminal is not a fit person for justice. In **Godwin Wanjuki Wachira V Okoth [1977] KLR 24**, Muli J (as he then was) held that:

" I may go further and hold that failure to check court records to ascertain the true position may very well be negligence on their part….the defendants must be deemed to have acted recklessly in publishing the distorted story…… I hold that the author published the defamatory statement complained of…with reckless indifference as to whether it was just or unjust."

147. Swearing falsely is not only a criminal offence under Section 114 of the Penal Code but is also unethical and unprofessional. The caption **"unfit for justice",** in my view, covering 70% of the cover page on a Friday with the plaintiff's photograph was intended to strategically capture the wide readership of the defendant's paper.

148. In the end, I find that the defendant did not attempt to prove that the contents of the Law Society of Kenya dossier concerning the plaintiff, and from which it extracted the defamatory publication was true and fair in respect of the plaintiff or that it was qualified privilege. Accordingly, I find that the plaintiff has proved, on a balance of probabilities, that the publication by the defendant concerning the plaintiff was highly libelous of the plaintiff and put the plaintiff into contempt and disrespect and disrepute. The publication tended to make/cause reasonable members of the society like PW1 generally to shun or avoid the plaintiff. It was also laced with malice and spite.

149. On whether the plaintiff is entitled to an award of damages as pleaded and if so, how much, a plaintiff who establishes the tort of defamation is entitled to damages which are in the discretion of the trial judge. The principles guiding an award of damages in an action for libel were stated in the case of **Johnson Evan Gicheru V Andrew Morton & Another[2005] e KLR** where the Court of Appeal stated, adopting the guidelines given in **Jones v Pollard [1997] EMLR 233-242** that no case is like the other. In the exercise of discretion to award damages for defamation the court has a wide latitude. The court must look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. The court may also consider what the conduct of the defendant has been before action, after action, and in court during the trial. The above decision adopted the following checklist as the factors to be considered by the trial court in awarding damages in libel cases:

1. The objective features of the libel itself, such as the gravity, its province, the circulation of the medium in which it is published, and any repetition;

2. The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself;

3. Matters tending to mitigate damages such as the publication of an apology;

4. Matters tending to reduce damages; and

5. Vindication of the plaintiff's reputation past and future.

150. **See also CAM V Royal Media Services Limited CA 283/2005[2013] e KLR.**

151. Besides the above factors, this court is also guided by Section 1A of the Defamation Act which provides that:

> ***" In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem fit.***
>
> ***Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings."***

152. In **Standard** Limited **v** G.N. **Kagia** T/A **Kagia** & Company Advocates [2010] eKLR the court took the view that in situations where the author or publisher of a libel could have with due diligence verified the 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. The court also stated that the level of damages awarded should be such as to act as a deterrence and to instill a sense of responsibility on the part of the authors and the publishers of libel and that personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.

153. Applying the above established principles to this case, I find that first, the defendant did absolutely nothing to mitigate the damage done to the reputation of the plaintiff. They insisted that what was published was fair comment on a matter of public interest and at the hearing, DW1 the author of the article insisted that what Law Society of Kenya had written was the truth. He refused to accept the fact that a competent court of law, at the High Court level and even the Court of Appeal upheld the finding by the High Court that there was no wrongdoing by the plaintiff who was sued for allegedly withholding a client's money. In other words, the defendant could hear nothing like the plaintiff had been falsely accused of and or that he was innocent of all the allegations leveled against him by the Law Society of Kenya in its purported dossier. The defendant's conduct, in my view showed that it had a pre determined view of the plaintiff as a person who was unfit for justice and it mattered not that the allegations leveled against the plaintiff in a civil suit and propagated by Law Society of Kenya were all false and unwarranted.

154. The defendants never apologized to the plaintiff for the false and malicious publication that he was unfit for justice and to date, they have not found it necessary to apologize for defaming him even after the whole truth of the matters complained of was unveiled, clearly exonerating the plaintiff from any blame as alleged by Law Society of Kenya.

155. I also find that the prominence with which the publication was given was intended to attract high and wide readership of the defendant's newspaper for that day. The title **"unfit for justice"** being a headline with the picture of the plaintiff at a time when, indeed, as stated by DW1 in his testimony, the appointment of the Chief Justice was a big issue since it was an appointment coming in the new constitutional dispensation, was in my humble view, intended to place the plaintiff on the world map as a criminal who was unfit, not only to hold office of Chief Justice for which he had been nominated by the President, but that he was equally unfit to hold the office of Judge of Appeal his then domicile in the dispensation of justice to all.

156. In my humble view, by announcing that the plaintiff was unfit for justice, implied that the plaintiff was already tainted wherever he was as judge of the Court of Appeal hence he could not be any better as Chief Justice of the Republic of Kenya. The question is, why did the defendant and their so called informers not raise those issues which came about in 1999, before or during the time when the plaintiff was being considered for the position of the judge of the Court of Appeal? Why were they very comfortable with him remaining as a 'tainted' court of Appeal Judge but they could not withstand him being elevated to the position of Chief Justice?

157. In my humble view, the defendant's paper whose readership as conceded by the author of the impugned article was wide and online too, was motivated by profiteering at the expenses of personal

rights, freedoms and values of the plaintiff, which rights, freedoms and values and values of the plaintiff, which rights, freedoms and values are guaranteed by the Constitution.

158. In addition, from the plaintiff's moving testimony and the testimony of his witness PW1 Mr Justus Ambutsi Wabuyabo, I am persuaded that the impugned publication gravely injured the plaintiff's feelings not only from the prominence of the publication but from the defendant's conduct thereafter when it published an editorial calling him *'some chap called Alnashir Visram'* in the context of the President's nomination of the plaintiff as Chief Justice and Mr Kioko Kilukumi as the Director of Public Prosecution.

159. In my humble view, therefore, the damages awardable in the circumstances of his case should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and publishers of highly libelous matters and to remind them that the freedom of the media and of the press is not absolute freedom to vilify others. That freedom is limited by balancing out with the rights and freedoms and values of individuals and their inherent dignity which must be protected and respected.

160. From the evidence adduced on record, the plaintiff's character and profession was cast into doubt by the reckless maligning of his reputation by the defendants. The defendant has had an opportunity, upon learning of the courts' decisions that exonerated the plaintiff from any blame, to correct and delete the obviously untrue and misleading information that they published of and concerning the plaintiff, as espoused in Article 35(2) of the Constitution. The defendant ignored the truth and chose to stand and be bound by the lies and libelous publication to millions of readers of its publication nationally and worldwide as conceded by the defendant's own witness and author of the impugned article.

161. This court takes judicial notice of the fact that at the time of writing of this judgment, the plaintiff has applied and has been shortlisted for interview for the post of Chief Justice of Kenya. Nonetheless, that cannot be a vindication for the false and malicious defamatory publication made by the defendant against him in 2o11. It is not the media that Judges who is the person suitable and who is unsuitable for such position. There are established constitutional institutions and mechanisms that vet/interview individuals seeking to occupy such high positions in this country; and it does not necessarily mean that if one does not make it to be appointed to such a high position of Chief Justice then he or she is unsuitable. I say so because the top positions like that of Chief Justice are always limited while the applicants are many therefore any false statement made by the media or any other person concerning the candidature of a person and which is not verified may, or is likely to affect the prospects of a highly qualified and even suitable candidate for such positions.

162. From the defendant's defence, they asserted the truth of the libel and refused to retract or make an apology yet the falsity thereof was apparent.

163. In awarding damages I shall also consider awards made in comparable or similar cases in the recent past, taking into account the standing of the libeled person as was espoused in the **Standard Limited V G.N. Kagia t/a Kagio & Company Advocates CA 115/2003**. The damages to be awarded serve the purpose of restitution and as a solatium as was stated in the cases of **Nation Media Group Limited & 2 Others V Joseph John Kamotho & 3 Others** that:

> ***" In actions of defamation aid in any other actions whose damages for loss of reputation are involved, the principle of restriction in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, nut, in case the libel, driven underground, emerges from the lurking place at some future date, he must be able to point to a sum by a jury sufficient to convince a by stander of the baselessness of the charges" (adopted from Broom V Cassel & Company [1972] A.C. 1027.***

164. And in **Windeya J in Uren V John Fair fax & Son PTY Ltd 117 C.L. R 115, 150** stated that:

> ***" It seems to me that, properly speaking, a man defamed does not get compensated for his***

damaged reputation. He gets damages because he was injured in his reputation, which 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 a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

165. In arriving at the awards prayed, I would apply the above principles and the following decisions involving equally important public figures in Kenya.

i. In **Johnson Evan Gicheru V Andrew Morton & Another** the Court of Appeal awarded the then Appellate Court Judge shs 6,000,000 damages for defamation of character following publication a book.

ii. In **Kalya & Company Advocates V Standard Ltd [2002] e KLR** Tunya J awarded 9,000,000 general damages aggravated damages 2,000,000 and shs 300,000 damages in lieu of an apology.

iii. In **A.B. Shah & Another Vs The Standard Limited & Another HCC/1073/2004** Khamoni J in 2008 awarded the plaintiff a retired Court of Appeal shs 6,000,000 general damages plus shs 1,000,000 exemplary damages.

iv. In May 2005, Khaminwa J awarded shs 10,000,000 general damages for libel to the plaintiff in **HCC 102/200 Daniel Musinga t/a Musinga & Company.** The plaintiff is now a Judge of Court of Appeal.

v. In **Nation Media Group Ltd & 2 Others V John Joseph Kamotho & 3 Others[2010] e KLR** the Court of Appeal upheld an award of shs 6,000,000 general damages s and shs 1,000,000 aggravated damaged made by Ojwang J (as he then was) on 1st July 2005 in favour of the plaintiff who was a cabinet minister and prominent politician.

vi. In **Eric Gor Sungu V George Odinga Oraro [2014] e KLR** the Court of Appeal set aside an award of shs 3,000,000 and submitted with shs 5 million while in **Wangethi Mwangi & Another Vs J.P Machira (advocate) [2013] e KLR** the award of shs 8 million general damages and 2 million aggravated damages by the High Court was upheld by the Court of Appeal.

166. The plaintiff pleaded and sought for:

a) an apology and retraction of similar prominence as the defamatory publication,

b) General damages for libel.

c) Aggravated and or exemplary damages for libel.

d) Injunctive order restraining the defendant from further publishing words against the plaintiff.

e) Costs of the suit.

f) Interest on costs and damages at court rates from date of ascertainment until date of payment in full.

167. Having regard to the evidence adduced and the circumstances of this case, and considering awards made in similar cases in the recent past, I am of the view that an award of shs 18,000,000 general damages for defamation would compensate the plaintiff for his injured reputation and character.

168. On the claim for aggravated/exemplary damages, I have considered that the defendant was irresponsible in the performance of its duties. It acted with vigour in reporting the falsehoods. It lacked the scriber's integrity and responsibility in reporting concerning the plaintiff's professional background.

The defendant used a language that was disproportionate to the facts. It refused to inquire into the facts or to even peruse the court file to establish the veracity of the allegations leveled against the plaintiff by Law Society of Kenya. It refused to accord the plaintiff a right to rebut the allegations when he sought to clarify the allegations. Irresponsible media reporting imperils the constitutional goals for which the constitution grants freedoms and rights to be exercised in order to invigorate and strengthen our fledgling or hatchling democracy **(see HCC 1333/2003 (Ojwang J).** in this case, defendant did not provide objective and fair reporting. It went overboard in vilifying the plaintiff without any justifiable cause. I would in the circumstances award the plaintiff shs 8,000,000 aggravated damages.

169. On the claim for an apology, and retraction of similar prominence as the defamatory publication, I find that the prayer is indeed merited with a view to correcting the highly libelous matter from being believed to be or to have been true, in view of the fact that the truth was suppressed by the defendant.

170. In the instant case, although it has taken over 5 years since the publication of the defamatory words, I find that an apology would still serve a useful purpose, considering that the plaintiff's innocence in the whole saga was finally upheld by the court of Appeal only in December, 2015. Accordingly, I make an order that the defendant, The Standard Ltd do make a full and unqualified apology and make amends and withdrawal on the statements made and published by the Defendants Daily Newspaper THE STANDARD, against the plaintiff and that such apology, amends and withdrawal be given the widest possible circulation similar to the one given to the publication the plaintiff complained about. Such apology shall be published on a Friday in The Standard Newspaper and its online version The Standard Digital within seven Days from the date hereof.

171. I also find that in the circumstances of this case, an injunction is an appropriate remedy. Accordingly, I hereby grant an injunction restraining the defendant, its agents , servants and or any other person acting on behalf of the defendant from further publishing or causing to be published any defamatory words of and concerning the plaintiff.

172. Total damages shs 26,000,000.

173. I also award the plaintiff costs of this suit and interest on damages and costs from date of ascertainment until payment in full.

174. In conclusion, I must mention that the written and filed witness statement by Akber Esmail was not considered as part of the evidence for the plaintiff as it was not made on oath. It was therefore a mere statement of facts that was never substantiated. The fact that the defence did not want to cross examine him did not necessarily mean that it was fool proof evidence. It was upon the plaintiff to bring the witness to testify and leave it to the defendant to decide whether or not it wished to cross examine him. Accordingly, I therefore reject that statement.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 17th day of August 2016.

R.E. ABURILI

JUDGE

Judgment read and pronounced in open court in the presence of:

Miss Kashindi holding brief for Mr Kiragu Kimani for the Plaintiff

Mr Kaberia h/b for Mr R. Billing for the defendant

Court Assistant: Adline