



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 143 OF 2008

RUMBA KINUTHIA T/A RUMBA KINUTHIA

& COMPANY ADVOCATES.....PLAINTIFF

VERSUS

JUDITH A. ACHAR.....1ST DEFENDANT

RIFT VALLEY RAILWAYS.....2ND DEFENDANT

JUDGMENT

Main Issue: whether seeking of second legal opinion by client amounts to defamation of the advocate initially instructed to sue

PLEADINGS

1. The plaintiff in this case is **Rumba Kinuthia**, an advocate of the High Court of Kenya. He instituted this suit against the two defendants **Judith Achar** and **Kenya Railways Corporation** (KRC) seeking for general damages, exemplary and punitive damages for defamation, costs and interest. The claim by the plaintiff against the defendants is contained in his plaint dated 14th April 2008.

2. The plaintiff alleges that in or about November 2006 he had been instructed by the employees of the Rift Valley Railways (RVR) to represent them in a legal suit as against Kenya Railways Corporation for terminal benefits, amongst other legal remedies and that the 1st defendant in her individual capacity participated in instructing the plaintiff to act for the parties in HCC 35/2007.

3. The plaintiff claimed that on or about the 17th day of April 2007 the 1st defendant caused to be published a defamatory letter/memo addressed to all Rift valley Railways Employees and parties to **HCC 35/2007 Munai, Isaac Opondo & Others V Kenya Railways Corporation & Another**. It was further alleged that the subject material letter was uttered using company logo of the 2nd defendant. Further that the 1st defendant wrote the said letter in her capacity as an agent of the 2nd defendant hence the 2nd defendant is vicariously liable for the actions of its agent and or servant, the 1st defendant.

4. The 2nd defendant is accused of legalizing the use of its materials which led to the publication of the letter subject matter of this suit hence it was alleged to have been negligent in allowing the

publication of the aforesaid letter on its letter head.

5. The plaintiff claimed that as a result of the negligent acts of the 2nd defendant, he suffered loss and damage and he claimed for damages. He also claimed that the said letter was actuated by malice, spite and ill will against the plaintiff.

6. The following extract of the letter of 17th April 2007 is what the plaintiff reproduced claiming to be defamatory of him:

“However a technical problem was detected in the suit lodged by Ms Rumba Kinuthia & Company Advocates. In this suit Kenya Railways Corporation was not given 30 days notice of intention to sue as is required by Section 87 of Kenya Railways Corporation Act Cap 397.”

(b) “ Further consultations with seven different independent lawyers was sought to ensure that we Rift Valley Railways staff get our grant. Their opinions were channeled to Ms Rumba Kinuthia & Company Advocates in February 2007. The most single recommendation was that the case be withdrawn and filed afresh in compliance with Section 87 of the Kenya Railways Corporation Act Cap 397.”

(c) “ However, when Rumba met with staff and the issue of compliance with the Act was raised he replied that he had give 38 days’ notice to Kenya Railways Corporation. Scrutiny of the notice given to Kenya Railways Corporation on 27th November 2006 reveals it was a 14 days demand letter for payment of dues and not the notice of intention to sue Kenya Railways Corporation.

(d) “ In order to improve the chances of success, it was discussed and agreed that the best alternative remedy available within six months required was through a Judicial Review action in High Court. This has since been implemented through M/s Rachier & Amollo Advocates to run concurrently with the civil case No. 35 of 2007.”

7. According to the plaintiff, the words used as above in the impugned letter were libelous and were taken by Rift Valley Railways employees or any other person who read the memo on the notice boards, in their ordinary meaning and interpretation to mean that:

1. The plaintiff was not qualified as an advocate to represent them in HCC No. 35/2007.

2. The plaintiff and his firm have no valid ground or at all to practice law.

3. The plaintiff does not understand the law more specifically the Kenya Railways Corporation Act Cap 397 Laws of Kenya.

4. The plaintiff had been confirmed by seven (7) different independent lawyers to be incompetent and unqualified.

5. The plaintiff put his interests first before the interests of the plaintiffs in HCC No. 35/2007.

6. The plaintiff was out to defraud the plaintiffs in HCC 35/2007 of their money and in its place file a frivolous suit.

7. The plaintiff has not given a proper statutory notice to Kenya Railways.

8. The plaintiff should be replaced as counsel in charge in HCCC No.35/2007 and/or the claim against Kenya Railways Corporation by its former employees in his place M/s Rachier & Amollo be given the mantle to represent them.

9. *The plaintiff was an impostor masquerading as a lawyer but was actually not qualified and/or competent to practice as one*

7. The plaintiff also averred that as a result of the aforesaid publication which was libelous and defamatory, his relationship with the plaintiffs in HCC 35/2007 was strained to a point near a total collapse and that he suffered loss and damage particularized in paragraphs 13 of his plaint as follows:

i. Portrayed the plaintiff negatively in the eyes of the more than 3000 ex-Kenya Railways employees he was representing in HCC No. 35/2007.

ii. Depicted the plaintiff as an incompetent lawyer.

iii. Depicted the plaintiff's law firm as one that should not be entrusted with any legal work at all.

iv. Depicted the plaintiff as money oriented person rather than an advocate.

v. Depicted the plaintiff as a lawyer who does not understand the law more especially the provisions of Kenya Railways Act Cap 397 Laws of Kenya.

vi. Depicted the plaintiff as a careless and /or reckless advocate who did not care what would become of his clients in HCCC No. 35/2007.

vii. Depicted the plaintiff firm as inferior to other firms of advocates

viii. Depicted the plaintiff as an inferior advocate compared to other advocates.

ix. Exposed the plaintiff to contempt ridicule and public odium from his clients in HCCC No. 35/2007.

x. Portrayed the plaintiff as a mediocre, reckless and inept advocate with nothing to offer the 3000 plaintiffs in HCCC No. 35/2007 and other employees of Rift Valley Railways in particular, and any other litigants in general.

xi. Made the plaintiffs in HCCC No. 35/2007 cast serious doubts on the ability of the plaintiff as their lawyer.

8. The 1st defendant filed defence dated 3rd March 2010 after successfully setting aside the ex parte interlocutory judgment that was entered against her in default of appearance on 21st August 2008. In her said defence, she contended that she only signed the memo complained of after it was drafted by representatives of the management of Rift Valley Railways who are parties in HCC 35/2007.

9. The 1st defendant denied that the memo was defamatory of the plaintiff or that he suffered any loss or damage as alleged. She further contended that the impugned memo was based on a legal opinion given to the management of the 2nd defendant.

10. Further, that it was a fair comment in a matter of interest to employees of the 2nd defendant based on independent legal advice. She denied that the memo depicted the plaintiff in the negative or that it was malicious, spiteful or ill willed as alleged. She urged the court to dismiss the suit against her with costs.

11. The 2nd defendant in its 28 long paragraph defence dated 15th May 2008 denied all the allegations leveled against it by the plaintiff, save that the 1st defendant had used its stationery letter-head in communicating the memo to all Rift Valley Railways staff on 17th April 2007, since she was in its employment as the Principal Public Relations Officer. The 2nd defendant nonetheless denied that in communicating that memo to all Rift Valley Railways staff, the 1st defendant was acting as its

agent or in the course of her employment as Principal Public Relations Officer but in her personal capacity since she was not authorized to use Rift Valley Railways stationery for that purpose of communication.

12. The 2nd defendant also denied publishing the impugned memo. It denied being vicariously liable for acts of the 1st defendant; being negligent; malicious or at all. It also denied the meanings or interpretation given to the impugned memo which it maintained was not official communication of the 2nd defendant.

13. The plaintiff filed reply to the 2nd defendant's defence on 11th August 2008 reiterating the contents of the plaint. He also filed reply to the 1st defendant's defence on 18th March 2010 reiterating the contents of his plaint.

14. On 14th May 2010 the 2nd defendant sought for particulars from the 1st defendant's defence dated 3rd March 2010 at paragraph 5, for the 1st defendant to identify the representatives of the management of Rift Valley Railways who are parties to HCC 35/2007 who were alleged to have drafted the impugned memo.

15. On 3rd June 2010, all the parties filed an agreed statement of issues jointly signed by their respective advocates on record, which issues shall be considered later in this judgment.

16. The plaintiff did change advocates on 24th June 2010 to represent himself, taking over from Gitau J.H. Mwara advocates, who filed this suit on his behalf.

17. The parties complied with all the requirements for discovery under Order 11 of the Civil Procedure Rules by filing and exchanging witness statements and lists and bundles of documents to be relied on at the hearing.

EVIDENCE

18. The plaintiff Rumba Kinuthia testified on 9th June 2015 as PW1 that he was an advocate of the High Court of Kenya and operates a legal practice as Rumba Kinuthia & Co. Advocates in Nairobi. He relied on his written witness statement filed on 13th June 2013 as his evidence in chief and the court adopted it. The plaintiff testified that in November 2006 he was instructed by 3407 ex-employees of the Kenya Railways Corporation who had been transferred to the 2nd defendant herein Rift Valley Railways (RVR) Ltd through a concessionary agreement, to seek for their terminal benefits. That his law firm filed suit on behalf of the said claimants. That he was the lead counsel in the said matter.

19. Soon thereafter, that the 1st defendant published a memo addressed to all Rift Valley Railways staff in which, among other things, she alleged that the suit that had been filed by the plaintiff on their behalf had a technical problem and that she had consulted 7 independent lawyers who had confirmed the technical problem. That the 1st defendant did not name the 7 different lawyers that had been consulted and that neither did she forward the opinion of those 7 advocates to the plaintiff. That the memo also stated that the suit could be withdrawn and filed afresh.

20. The plaintiff further testified that upon reading that memo, he summoned a meeting with officials representing the ex-employees of KRC and explained to them that Section 7 of the Kenya Railways Corporations Act only provide that no suit could be instituted until expiry of 30 days, which notice of 30 days had been issued by the plaintiff, and that his position had been vindicated by Honourable Waweru J's ruling delivered on 5th July 2007 and a subsequent ruling by Honourable Sitati J delivered on 13th May 2011.

21. According to the plaintiff, the memo was on the 2nd defendant's letter head and that it was written by the 1st defendant in her capacity as the Principal Public Relations Officer of the 2nd defendant.

22. Further, the plaintiff asserted that the said memo was widely distributed and pinned on notice boards of Rift Valley Railways Headquarters and other stations. He blamed the 2nd defendant for failing to prevent the publication of the memo which was highly libelous of him and that he promptly notified the 1st defendant in writing and blamed the 2nd defendant for allowing its facilities to be used to perpetuate the libel through the use of its letter head and its notice boards where the memo lasted for about 10 days.

23. The plaintiff testified that after the memo was published, his relationship with his clients was never the same again as it deteriorated because of the allegations in the memo that the plaintiff had acted incompetently in the filing of the Sui on their behalf.

24. The plaintiff testified that eventually his said clients took the file away from his office thereby denying his firm prospects of costs which he would have earned from the success of the suit. He prayed for damages against both defendants. He produced his list and supplementary lists of documents as his exhibits 1 and 2 respectively. The exhibits are:

1. Letter dated 17th April in HCC 35/2007 Ref RVR/PR/1/3
2. Amended plaint in HCC 35/2007
3. Plaint in HCC 143/2008
4. Plaintiff witness statement.
5. Ruling by Honourable Sitati J on 13th May 2001 dismissing application to strike out HCC 35/2007
6. Ruling by Honourable Waweru J in HCC 35/2007 dated 5th July 2007.

25. In cross examination by the 1st defendant's counsel Mr Osiemo, the plaintiff stated that the suit revolves around interpretation of Section 87 of the Kenya Railway Corporation Act. The plaintiff conceded that lawyers often disagree on interpretation of the law and that is why the appeal process is available on points of law. The plaintiff also conceded that the fact that he disagrees with another counsel's interpretation of the law does not necessarily mean that they disrespect him. He also conceded that at one point, Kenya Railways applied to have HCC 35/2007 struck out.

26. PW1 denied earlier seeing the legal opinion given by Charles O. Dulo advocate but that he had now seen it when pointed out to him by his assistant in court to which he responded that Mr Dulo's opinion was to the effect that Section 87 of Kenya Railways Corporation Act demanded that the Managing Director of Kenya Railways Corporation be given 30 days notice before filing suit against the Corporation and if no notice is given the suit would be fatally defective.

27. The plaintiff stated that if the advocates wrongly advised their clients, that had no bearing on his suit. He stated that the memo was written on 17th April 2007 after the legal opinion which was dated 2nd February 2007. He also stated that what was in the legal opinion was reflected in the memo but that he would not know if the memo was an offshoot of the legal opinion since the memo does not mention when the legal opinion was given. He also stated that there were similarities in the two documents but that the legal opinion could have been contrived. He stated that the tone of the memo was tough talking and depicted an opinion formed to remove the case from the plaintiff's advocate's firm and pass the brief to Rachier & Amollo Advocates.

28. Mr Kinuthia stated that the memo cast aspersions on his competence since it stated that

Rachier& Amollo Advocates had already filed the Judicial Review proceedings. Further, that the memo emanated from the 1st defendant who was talking of the best alternative remedy available being Judicial Review as already implemented by Rachier& Amollo Advocates. He also stated that the legal opinion by Dulo recommended withdrawal of the suit from court and filing of Judicial Review. He stated that the memo was written by the 1st defendant in her official capacity although he did not know whether she had any legal training but that following advice of a lawyer could be actuated by malice or it could be in good faith.

29. The plaintiff also stated that the memo was circulated in the Kenya Railways Corporation premises all over the county including Nairobi and Nakuru for consumption of its employees and any other interested parties. He stated that the memo did not state the deliberations he had with the steering committee to which the 1st defendant was not one. He stated that he had explained to the steering committee the importance of Section 87 of the Kenya Railways Act.

30. In cross examination by Mr Kiche counsel for the 2nd defendant, the plaintiff stated that in HCC 35/2007 he was instructed by former employees of Kenya Railways Corporation and not the Rift Valley Railways Ltd. That when some employees were paid their dues, the suit had to be amended to remove them from the proceedings. He maintained that the memo originated from Rift Valley Railways and signed by the 1st defendant as the Principal Public Relations Officer. He however stated that he could not tell whether the memo was an internal memo but that it refers to all Rift Valley Railways staff. He could also not tell the job description of the 1st defendant. He denied being instructed or being paid legal fees by the 2nd defendant. He also stated that the legal opinion was addressed to the committee of eminent persons not Rift Valley Railways or Judith Achar.

31. Mr Kinuthia also stated that he send emissaries from his office who confirmed that the memo was all over the Rift Valley Railways premises for 10 days and that the 2nd defendant had not denied the publication but filed a general defence.

32. The plaintiff also clarified that the 2nd defendant had distanced itself from the memo and sought indemnity from the 1st defendant. The plaintiff closed his case without calling any witness.

DEFENCE EVIDENCE

33. The 1st defendant testified as DW1 on 22nd September 2015 and stated that she worked with Rift Valley Railways as Principal Public Relations Officer in 2006 and in 2008 she was promoted to manager, Public Relations. Previously, she had worked with Kenya Railways Corporation from 1997 as the Managing Director's Secretary and also served as the administrative Officer, Public Relations officer and Public Manager until Rift Valley Railways took over Kenya Railways Corporation through a concession then her previous services were transferred to Rift Valley Railways as Principal Public Relations officer. She relied on her witness statement recorded on 11th March 2013 as her evidence in chief.

34. DW1 testified that as former Kenya Railways Corporation employees, they filed suit resisting their transfer to Rift Valley Railways until their dues were settled by the KRC and so they engaged the plaintiff who filed the suit on their behalf. That they had representatives and that at that time, they were still in occupation of the Kenya Railways Corporation houses. The latter wanted to evict them if the employees were not willing to pay rent at market prices. They were threatened by Kenya Railways Corporation with eviction. Auctioneers went to distress for rent from the employees/tenants and that she was always called upon as the Public Relations Officer to manage the negative publicity of the company since there were frequent employee strikes.

35. Further, that representatives of the ex-Kenya Railways Corporation staff sought a second legal opinion which came from Charles Dulo in writing to the effect that the case as filed in court had 50/50 chances of success and that it should have been instituted by way of Judicial Review. That Mr Dulo also advised them to give that legal opinion to their lawyer, the plaintiff herein.

36. That the 1st defendant delivered the legal opinion together with a cheque for the rents issued by Rift Valley Railways payable to Kenya Railways Corporation to the plaintiff and asked him to go to Rift Valley Railways to meet the staff over the issues, which he obliged after 2 days.

37. Concerning the impugned memo, DW1 stated that it was written by a team of people in the management who were 15 people and that she was one of them hence she signed the memo as the Public Relations Officer since the issues fell in her docket.

38. That after this suit was filed against her; she contacted the Human Resource Manager and spoke to the Managing Director informing them that she never intended to defame the plaintiff. They advised her to fax the pleadings to the 2nd defendant's advocates herein but after one year, she was advised to take her own lawyer to defend her in this suit but that the 2nd defendants paid the legal fees to her new advocates Odero Osiero & Company Advocates. She also stated that she wrote a brief to the management of Rift Valley Railways and wrote memos and reports on behalf of Rift Valley Railways. She denied conveying any personal opinions in her correspondence/ memo. She stated that she was not a lawyer and would not know what Judicial Review entailed but only conveyed what Charles Dulo advocate gave as legal opinion after he had met the staff of Rift Valley Railways and briefed them .

39. DW1 also stated that the impugned memo was given to the Human Resources Manager Mr David Rimberia to circulate to all staff in all regions and that it would be put on the Notice Boards, intended for employees who had an interest in the material suit.

40. The 1st defendant also stated that she stopped working for Rift Valley Railways in 2012 when her services were terminated for reasons that she authored the impugned memo subject of this suit, which was written in 2007. That the Company Secretary of Rift Valley Railways had initially asked her to write a letter exonerating Rift Valley Railways from this case and when she requested that the request be put in writing, the same was not forthcoming.

41. DW1 testified that the memo was written on the Rift Valley Railways letter head because they were dealing the matter as Rift Valley Railways staff and that the Rift Valley Railways management especially the Managing Director and Executive Director were aware of the issue as they are the ones who were facilitating payment of the staff rent to Kenya Railways Corporation. She stated that before the staff case, she only used to hear of Rumba Kinuthia as an advocate but that she had never met him and that she regarded him highly hence she could not have said anything untoward about him since she had a cordial relationship with him. She also stated that she had no reason to cast aspersions against the plaintiff as an advocate and that she still held him in regard. She maintained that the memo was derived from the advisory legal opinion of Charles Dulo advocate. She produced her list of documents filed on 12th March 2013 as Dex1-10 which are listed as follows:

1. D Exh 1- Legal opinion by Charles O. Dulo.
2. DExh 2 – letter to Charles Church by ex- Kenya Railways Corporation employees dated 11th April 2007.
3. DExh 3- Contribution/pledges towards constitutional case in court
4. DExh4- Memo dated 17th April 2007.
5. DExh 5 Internal memo Ref RVR/PR/3 to Kevin Whiteway dated 28th October 2008.
6. DExh 6- Internal memo Ref RVR/PR/3 to Kevin Whiteway dated 28th October 2008
7. DExh7-Receipt No. 482 from Odero Osiero & Company Advocates of shs 15,000/-

8. DExh 8- payment voucher for refund of shs 15,000 being legal fees paid to Odero Osiemo & Company Advocates.

9. DExh 9- Email send on 2nd March 2009 to Brown Ondego from Judith Achar.

10. DExh10- Emails sent on 15th September 2010 at 5.06 pm and 10: 33 am respectively.

42. In cross examination by the plaintiff, DW1 stated that he was unemployed at the moment since losing her job in 2012 and that she has no other income generating activity. She maintained that the memo originated from the legal opinion by Charles Dulo Advocate who gave a brief saying he had consulted 7 other lawyers over the matter.

43. She denied quoting Mr Dulo in her paragraph 4 of the memo and further denied that the memo quoted him. She stated that Charles Dulo met them and took them through the legal opinion and told them that 7 lawyers had contributed to the legal opinion that he gave them but she denied knowing the identity of those seven lawyers. She conceded that when the plaintiff met them, he explained that he had given 38 days Notice to Kenya Railways Corporation before filing of the suit in court. She maintained that she gave to the plaintiff a copy of the legal opinion from Charles Dulo when she handed him the cheque although she had no acknowledgement from him.

44. The first defendant also conceded that the contents of the memo show that action had been taken by staff who had instructed Rachier & Amollo advocates to file Judicial Review. She stated that the third last paragraph of the memo was clear that before writing it, "*it had been discussed and agreed....*" and that she had produced a list of people (staff) who had agreed to that position of taking Judicial Review action in their case. When shown DExh 9, DW1 stated that David was a Human Resource Manager at RVR and that she referred to an email send by David Rimberia to Brown Ondego, who was the Managing Director of Rift Valley Railways, correcting the impression created by David who had given incorrect information by misquoting the memo that the 1st defendant had written concerning the case.

45. DW1 conceded that the memo had been distributed to all stations where Rift Valley Railways had employees and copied to Human Resource Welfare officers who did not deny it until 5 years later is when she was being victimized for having written the memo. She stated that she wrote the memo in her capacity as the Principal Public Relations Officer of Rift Valley Railways. That she only signed the memo on behalf of the 15 committee members and that at that time there was a crisis of being threatened with eviction from Rift Valley Railways houses.

46. She stated that the memo was pinned on notice boards stationed in corners in the offices, although she conceded that there were no mechanisms to stop any other person from reading it.

47. On being cross examined by Mr Kiche counsel for the 2nd defendant, DW1 stated that she was a party to HCC 35/2007 seeking for benefits from Rift Valley Railways. That at the time of writing the memo, she was the Principal Public Relation Officer and dealing with both internal and external memo. She also stated that the committee of expert persons was Rift Valley Railways staff in the management level that was over 2100 people. She stated that in her communication regarding staff, she was not required to write through the Human Resource, although Human Resource department dealt with staff issues but that she was not answerable to the Human Resource Manager.

48. She denied that in all the memos she wrote, she was required to refer to previous minutes. She stated that Charles Dulo is the one who mentioned committee of experts but that in the meeting they had agreed that she signs the memo after they summarized the legal opinion hence she only wrote it on behalf of the team although she did not sign it on behalf of the team as it was not a requirement to do so all the time.

49. She stated that the memo was written because of Rumba Kinuthia's involvement in the case. She stated that she met the Managing Director of RVR and Mr Charles Church on the payment of legal

fees. She stated that RVR refunded her shs 15,000/- which she had paid to her advocates. She also stated that she signed for the money in the accounts office and that the acknowledgement was retained by Rift Valley Railways. She denied a suggestion that Rift Valley Railways was only involved in this case on the use of its letter head to write the memo.

50. She stated that HCC 35/2007 was instituted by staff of Rift Valley Railways. She maintained that the memo was drafted by representatives of the management of Rift Valley Railways who were parties to HCC 35/2007, being an internal communication to them. Further, she stated that David Rimberia the Human Resource Manager was involved in the meeting although only 5 members brushed the memo up.

51. She also stated that matters of staff had a direct impact on the work of Rift Valley Railways as its staff was being threatened with eviction from their residences. She maintained that there was no intention to publish the memo to the media.

52. In re-examination by Mr Osiemo, DW1 stated that when the memo was written, it was given to David Rimberia who was the Human Resource Manager to disseminate it to staff affected as per the procedure at the time. She denied ever being admonished by Rift Valley Railways for using their letter head to communicate and maintained that that was not the only memo done regarding HCC 35/2007 as shown by DExh 6 an internal memo dated 28th October, 2008 written by her to Kevin Whiteway.

53. DW1 denied receiving any memo from RVR declining the payment of her legal fees. She also stated that David Rimberia is the one of those who pledged to pay shs 5000/- towards legal fees and that he signed the undertaking under staff No. 38964 from Human Resource Department after participating in the proceedings (meeting) throughout. She emphasized that the memo clearly communicated what had been "*discussed and agreed....*" To show that its content was as a result of discussions and consultations by management staff on the legal opinion of Charles Dulo. She denied putting her own personal opinion in the memo.

54. On being questioned by the court, DW1 stated that she wrote the memo to inform staff of what had-transpired and to assure them of an alternative remedy in the event that the case filed by Rumba Kinuthia collapsed; and that they handed copy of the legal opinion to Rumba Kinuthia because he is the one who was handling their HCC 35/2007.

55. She also stated that they wrote the memo as a team that was affected by what was happening.

56. The 1st defendant called DW2 Richard Otieno who testified that he was an accountant working in Homabay. That he previously worked for Kenya Railways Corporation and from March 2011 he joined RVR from KRC where he had worked from 2006 during the concession.

57. DW2 recalled that employees of the former Kenya Railways Corporation filed suit against Kenya Railway regarding payment of their terminal benefits and they engaged the plaintiff advocate to represent them. That they were also being asked to vacate Kenya Railways Corporation staff houses which they resisted and the issue was settled. That when they realized that the suit was delaying they sought an opinion from Mr Dulo advocate and he gave the case a different approach.

58. That Mr Dulo called them (committee) and explained the issues and stated that Judicial Review was the best option. That upon the committee receiving the legal opinion, they resolved to pursue the two options separately and also decided that the plaintiff pursues the case already filed in court while they instruct another lawyer to pursue Judicial Review option and they communicated that decision to other employees.

59. That the committee tasked the 1st defendant Judith Achar who was the Public Relations officer to write an internal memo, capturing the committee's deliberations on the matter and not opinions of the office.

60. That the Public Relations Officer communicated with staff decisions made/reached by the committee, summarizing deliberations of the committee. That as a committee, they had no intentions of casting aspersions or disrespecting the plaintiff advocate but were only looking for a second opinion on the matter. He stated that they never thought the plaintiff was incompetent and that they had nothing against him.

61. On being cross examined by Mr Onindo, DW2 stated that the legal opinion was by Mr Charles Dulo and that he did not know whether it was send to the plaintiff. He confirmed that another case was filed by a different law firm by but he could not recall the case number and whether it was finalized. He stated that he was laid off and paid by Kenya Railways Corporation. He stated that he did not know what happened to HCC 35/2007 and how it was concluded. He admitted being in the steering committee and seeing the internal memo written by the 1st defendant and that he read it before it was distributed. That before the impugned memo was send out she called him to go and read it after which it was sent to Notice Boards of Rift Valley Railways and Kenya Railways Corporation.

62. DW2 emphasized that the communication was on behalf of the steering committee not DW1's own personal communication and that the communication was not her personal communication but as mandated by the committee.

63. In cross examination by Mr Kiche the witness stated that it is the committee of former Kenya Railways Corporation employees that mandated d Judith Achar to write the memo and that he was part of that committee. He also stated that Rift Valley Railways aware of that committee having taken over employee from Kenya Railways Corporation. He stated that Mr Rimberia was the Human Resource Manager although he was not incorporated in the committee. He stated that Senior Managers of Rift Valley Railways were involved in the writing of the memo.

64. In re-examination by Mr Osiemo, DW2 stated that Rift Valley Railways Senior Managers were given copies of the impugned memo. Further, that the committee sat at Rift Valley Railways offices without objection from Rift Valley Railways Managers. He also stated that Rift Valley Railways facilitated the committee with paper and time to meet and discuss their issues.

65. Tom Mboya Ojijo testified as DW3 on behalf of the 1st defendant and stated that he works for Awanad CFS. That he previously worked for Kenya Railways Corporation from 1995 to August to 2006 when he joined Rift Valley Railways under a concession. He gave evidence similar to DW2 evidence that the former Kenya Railways Corporation staff filed suit against Kenya Railways Corporation seeking to be paid their dues before they could be absorbed by Rift Valley Railways so they hired Rumba Kinuthia advocate who filed suit on their behalf. That the suit was taking long so they sought opinion of another lawyer and so they got one from Charles Dulo.

66. That DW3 was one of the representatives of the employees and that at that time he was working in Mombasa. That the committee met and agreed to communicate the legal opinion to all the affected staff after summarizing it and tasking their Public Relations Officer Judith Achar to write it and have it signed and have it dispatched to members in the regions. That the contents of the memo was input of the committee not her personal opinion or individual committee members.

67. DW3 confirmed that David Rimberia signed on the first page of the memo as the Human Resource Manager and that he knew and was sure of Mr Rimberia's signature. That all top management including the financial controller Mr Charles Church was kept in the picture.

68. Further, that staff made contributions which were advanced by Rift Valley Railways. DW3 maintained that if the committee operations were not authorized by RVR the committee members could have been disciplined for acting contrary to the company's policies. He testified that the committee was provided with office space to meet and were granted permission to travel from the regions to congregate in Nairobi.

69. DW3 denied that seeking a second opinion was disrespect for Mr Rumba Kinuthia. He maintained

that their case had taken too long and that staff had compared their case with the case of their counterparts in Uganda who had been paid under similar circumstances. That they tasked Judith Achar and other committee members to brief Rumba Kinuthia on the matter of the second legal opinion.

70. DW3 confirmed that he was part of the committee that authored the impugned memo which was never intended to defame the plaintiff.

71. On being cross examined by Mr Onindo, DW3 stated that he was the Regional Operations Manager, Rift Valley Railways Mombasa, and stated that Rift Valley Railways had 3 regions- Mombasa, Makindu, Eastern Region which covered Makindu to Naivasha; Western Region covered Naivasha to Kisumu & Nakuru to Malaba areas and that in all the regions, virtually all employees who joined Rift Valley Railways came from Kenya Railways Corporation.

72. DW3 stated that the memo subject of this case was to be circulated to all staff in the regions. That the memo was circulated through the Human Resource Department to majority of employees. That he also got a copy from his regional Human Resource Office and he gave a copy to the yard master to share with their juniors and that he also saw it at the Head quarters when he visited Judith Achar's office where he read it from her office.

73. That as a committee, DW3 could not recall if they wrote to Rumba Kinuthia complaining of the delay in the conclusion of their case but that members complained of the delay. He maintained that the memo was collective views of the committee from the legal opinion received from Dulo advocate and that all they wanted was to let Rumba Kinuthia know what second legal opinion they had received.

74. DW3 also stated that he was aware that Judith Achar verbally briefed Mr Rumba Kinuthia. He could however not remember if there was any other suit filed after the 2nd legal opinion.

75. In cross examination by Mr Kiche, DW3 stated that Mr Nyandiega was a Human Resource officer based at the Head quarters and that he attended committee meetings, representing his Section although DW3 did not have minutes of the meetings.

76. He reiterated that the memo had Mr Rimberia's signature and that he received it through his regional personnel officer. He stated that Mr Rimberia was the Human Resource Manager at the Headquarters and that he could also see his name on the list of contributors although his signature was not very clear. He denied that the committee had any malice and maintained that the committee used Rift Valley Railways offices. He denied that they had any malice or disrespect for Mr Rumba Kinuthia.

77. In reexamination by Mr Osiemo, DW3 stated that they sued Kenya Railways Corporation and not Rift Valley Railways for their benefits to be settled before being transferred to Rift Valley Railways and that RVR facilitated them to pursue their suit. Further, that they were nearly evicted from their residences so Rift Valley Railways was fully aware of the situation.

78. The 1st defendant also called DW4 Geoffrey Nyandiega a lecturer at KCA University and formerly Rift Valley Corporation. He gave evidence similar to DW2 and DW3, stating that he used to work in the RVR Mombasa office and was also a member of the committee that sought a second legal opinion from Mr Dulo advocate. He emphasized that the impugned memo was channeled through the Human Resource office who would minute it authorizing it to be circulated hence Mr David Rimberia was the Human Resource Manager who minuted on it like he did on many other memos by initializing on the memos, not signing his full signature as identified on PEx 4. DW4 also stated that without Mr Rimberia authorizing the circulation of the memo it could not be circulated.

79. In cross examination by Mr Onindo. DW4 stated that he used to be the Human Resource officer in charge of welfare and that they sought for a second legal opinion because of the delay in concluding the case, not because of the incompetence by Mr Rumba Kinuthia. He stated that he saw the memo in Mombasa and that indeed it was circulated to majority of employees. He also maintained that the legal

opinion received was shared with Mr Rumba Kinuthia. DW4 denied being aware of any other legal opinion.

80. On being cross examined by Mr Kiche, DW4 stated that he was part of the committee but not representing RVR. He stated that he read the memo after it was written but not on the same day. Further, that he did not know whether Mr Rimberia was at the head office on 17th April 2007. He confirmed that the memo was put on the notice boards by the Human Resource and that he was party to HCC 35/2007. He stated that it was a normal procedure for memos to be authorized by Human Resource before being circulated and that Judith was an expert in communications so she assisted them in communicating.

81. Further that the memo would look more official if circulated through Human Resource. DW4 also stated that the original memo was also copied to Human Resource Manager. He maintained that the memo was originated by the committee and that there was no other memo.

82. In re-examination by Mr Osiemo, DW4 stated that having worked for Rift Valley Railways, he knew the systems and that Judith Achar could not have circulated the memo without the authorization of the Human Resource Manager and Department.

83. At the close of the 1st defendant's case, the 2nd defendant called Mr David Rimberia who testified on oath as DW5 that he was a Human Resource Practitioner with Kenya Airways as Head of Employee Relations and that he had previously worked with an international company. He also worked with Rift Valley Railways for 3 years from 2006- 2009 as a Human Resource Manager. He admitted seeing an internal memo written by Judith Achar dated 17th April 2007 and that he saw it on 18th April 2007. That on 17th April 2007 he was in Mombasa on official duties. He stated that he could not recall signing or writing on PEx 4 the impugned memo and that neither could he recall sanctioning it. He also stated that he could not recall being called prior to the writing of that memo. He stated that his role included handling Human Resource matters, distinct from Public Relations. He stated that the latter communicated with the media and external clients while him he dealt with internal staff. He stated that there were instances when Public Relations Officer communicated with internal staff as long as it was sanctioned by the Human Resource Manager or the Managing Director or the Executive Director of Rift Valley Railways.

84. DW5 stated that he did not authorize the internal memo dated 17th April 2007. He also stated that he could not tell if his seniors were consulted on the impugned memo but that when he went to the office, he was asked about it. He however admitted forwarding PEx2 which was the normal procedure.

85. On being asked whether he endorsed on the memo in question, DW5 stated that he could not say that the endorsement on the memo was his signature because it was not very clear (hesitantly and evasively). DW5 also admitted being aware of the suit filed by former Kenya Railways Corporation employees but denied that Rift Valley Railways was involved in that suit. He denied that Rift Valley Railways paid any legal fees for the employees. He could not recall any refund of legal fees paid by the 1st defendant towards filing of the employees' suit. He stated that he understood the memo to mean that the ex employees of Kenya Railways Corporation were pursuing their own dues and a lawyer's opinion was sought in the manner in which the matter in court was being handled.

86. According to DW5, when the memo was brought to their (management) attention, they withdrew it from the notice boards. That they called the plaintiff and explained to him that they had no malice against him and that the plaintiff also met the Rift Valley Railways employees.

87. On being cross examined by Mr Onindo, DW5 confirmed that the memo was on Rift Valley Railways letter head. He stated that he was on duty on 17th April 2007 but outside the office and in Mombasa and that he saw the memo when he was given one from the notice board but he denied seeing the memo on the notice board. He denied that Human Resource was given the memo.

88. DW5 admitted that Rift Valley Railways received a demand notice from the plaintiff but that he

could not tell whether the demand notice was responded to by Rift Valley Railways. He stated that the memo was pulled down from the notice board even before the complaint was made by the plaintiff Mr Rumba Kinuthia.

89. In cross examined by Mr Osiemo, DW5 stated that information from the Head Quarters to branches would go through him, to the regional Human Resource for dissemination to all other officers/employees. He stated that he was not aware that the impugned memo was pinned on notice boards of regional offices. He stated that he was not aware that the memo reached Human Resource officers in the regions.

90. DW5 stated that the Public Relations Officer was tasked with communicating with the external public not internal staff. He admitted that he was aware that in 2007, Rift Valley Railways engaged Oglivy to engage with the external public but that they were under Judith Achar. He also stated that Judith Achar communicated with internal staff with authorization of the Human Resource Department. He stated that he could not recall if he authorized the circulation of the impugned memo.

91. When questioned on whether he had evidence to show that he was in Mombasa. On 17th April 2007 DW5 stated that he had no evidence but given time he could produce that evidence.

92. DW5 also admitted attending the meeting where Mr Rumba Kinuthia addressed employees after he requested to come and meet them. He stated that there were no minutes of that meeting because the meeting was consultative. DW 5 stated that he was aware that employees requested for salary deductions to go towards legal fees and that Rift Valley Railways gave the committee offices and venues for their meetings concerning the pending suit but denied being aware of refunds to Judith for legal fees. He stated that the claim for refund could have passed through him.

93. When DW5 was shown PEx 6, a memo by the 1st defendant to Whiteway, he stated that it went to the Managing Director from the 1st defendant without passing through DW5 and that a refund of legal fees paid to the advocate could have been made. He stated that Judith was answerable to Russel not DW5. He stated that he was not party to HCC 35/2007 proceedings and that he did not contribute any money towards that suit. When shown DExh 3 he stated that he made contributions towards the filing of the Constitutional court case and not the Civil Suit No. 35/2007.

94. DW5 further stated that he could not recall if the constitutional court's case was to be filed as a result of the legal opinion by Charles Dulo advocate. He stated that the Constitutional case involved management staff but he denied knowing its status. He maintained that he received the memo after 17th April 2007 and that they withdrew it from the notice board and that later the plaintiff came to meet employees. He denied being aware that Rift Valley Railways assisted Judith Achar to get her an advocate in this matter.

95. In re-examination by Mr Kiche DW5 stated that the publication of the impugned internal memo was not authorized by Rift Valley Railways and that the mandate of Oglivy was to manage the Public Relations issues of the Rift Valley Railways outside the company's working with Public Relations Department, which did not take away the responsibilities of Judith Achar but strengthened her role.

96. He maintained not being party to HCC 35/2007 but admitted that he contributed shs 5000/- towards the filing of Judicial Review in pursuit of benefits. He stated that where refunds were made, employees would have a payment voucher but that in this case he had not seen any evidence of refund. He also maintained that on 17th April 2007 he was not in Nairobi.

SUBMISSIONS

97. The parties' advocates filed written submissions in support of their respective positions.

98. In the plaintiff's submissions dated 24th February 2006 and filed on the same day, he endeavoured to answer the issues as agreed and filed, urging the court to enter judgment in his favour and to award him damages of twenty five million (shs 25,000,000) million in general and punitive damages as well as exemplary damages.

99. On the first issue of whether the 1st defendant was an employee of the 2nd defendant as at 17th April 2007 when the memo subject herein was written it was submitted that this fact was confirmed by the 1st defendant's own testimony.

100. On the 2nd issue of whether the 2nd defendant RVR was established under a concession within the Kenya Railways Corporation Act to take over the operations of Kenya Railways Corporation or whether the 2nd defendant was a limited liability company that entered into a concession agreement with Kenya Railways Corporation to operate certain rail services in Kenya, the plaintiff relied on Section 11A of the Kenya Railways Corporation (Amendment) Act which gave the legal life and relevance to the 2nd defendant, which section provides:

“ 11A (1) notwithstanding any other provision of this Act, the board may enter into an agreement with a person appointed in accordance with this Section, for the performance of any of its powers under this Act by that person;

(2) An agreement under Subsection (1) May take the form of a concession, lease or management contract

(3) The board shall appoint the person for the purposes of an agreement under this Section (herein after referred to as “ the appointed persons” through competitive tendering in accordance with the law for the time being applicable to the procurement of public services.

(4) Where a function or power of the board is conferred on the appointed person by virtue of an agreement under this section, the performance of the function or the exercise of the power by that person shall be denied to be the Authority of this Act”

101. The plaintiff submitted that the 2nd defendant was established after the enactment of the above law.

102. On the 3rd issue of whether the plaintiff was lead counsel in HCC 35/2007 on behalf of ex Kenya Railways Corporation employees whose services had been transferred to Rift Valley Railways, which case concerned terminal benefits and other legal remedies, the plaintiff submitted that this fact was confirmed by DW1, DW2, DW3, DW4 and DW5 in their evidence on record.

103. On the 4th issue of whether the 1st defendant did in her individual capacity instruct the plaintiff to represent her for or on behalf of the plaintiffs in HCC 35 /2007 and whether the memo of 17th April 2007 was published by her to all employees of the 2nd defendant and parties in HCC 35/2007, it was submitted that there was no evidence of any minutes of resolution by the committee to instruct the plaintiff and or to seek for independent legal opinion or even to authorize the writing and publication of the memo of 17/4/2007 hence the 1st defendant must have acted as an individual.

104. Further, that the 1st defendant irregularly authored the memo in violation of the mandate of representatives who were in place and who acted between the plaintiff and ex employees of KRC in HCC 35/2007; and that in authoring that memo the 1st defendant was establishing her influence with the 2nd defendant which carried more weight with the 2nd defendant's employees.

105. Further, that the first defendant did not deny being the author of the memo but that it was not fair comment, not an internal memo but that its intention was to injure the character and reputation of the plaintiff which it did.

106. The plaintiff submitted that as the Public Relations Officer, the 1st defendant wrote the impugned memo in her own personal capacity by stating “*I to you...*”

107. It was also submitted that although DW2, 3 and 4 stated that they wrote the said memo, there was no evidence of minutes or their authority to the 1st defendant to write that memo or to sign it on their behalf. It was submitted that their evidence was therefore an attempt to exonerate the 1st defendant and an afterthought.

108. On the fifth issue of whether the impugned memo was defamatory, the plaintiff submitted that as pleaded in his plaint, the memo was published of and concerning him and that by stating “*further consultation with seven different independent lawyers...the most single recommendation was that the case be withdrawn and filed afresh in compliance with Section 87 of the Kenya Railways Corporation Act Cap 397*”; that the 1st defendant intended to embarrass the plaintiff and paint him as an incompetent lawyer; and that she used her influence and position to create doubt and apprehension among the thousands of litigants in HCC 37/2007 to enhance her position while defaming the plaintiff by pinning the memo on the 2nd defendant’s notice boards country wide to achieve that defamatory objective.

109. The plaintiff further submitted that the suggestion that Rachier & Amollo advocates were the best option and had already implemented that best option, was a defamatory statement of the plaintiff because the plaintiff was embarrassed and he was forced to convince the litigants of the position after the misleading alleged legal opinion of 7 advocates.

110. It was further submitted by Mr Rumba Kinuthia that the publication of the memo country wide was intended that it be read by litigants in HCC 35/2007, non litigants, employees of Rift Valley Railways and members of the public who visited those offices of the 2nd defendant, who upon reading the impugned memo, took it to impute the matters as pleaded in paragraph 12 and 13 of the plaint as a result of which the plaintiff suffered loss and damage, as no apology, clarification or retraction was given by the 2nd defendant even after the plaintiff was vindicated by the rulings of Honourable Waweru J and Honourable Sitati L.J. produced in evidence.

111. On the sixth issue of whether the 1st defendant wrote the memo in her capacity as agent of the 2nd defendant and whether the 2nd defendant is vicariously liable for acts of the 1st defendant and whether the 2nd defendant was negligent for allowing the publication of the memo, the plaintiff submitted that the 2nd defendant having brought notice of claim against the 1st defendant on 8th March 2013 but having failed to pursue it with evidence; and that the 1st defendant having confirmed being promoted in 2008 even after writing the memo and having received a refund of shs 15,000/- from the 2nd defendant which money she had paid for legal fees to her current advocates; and that the 1st defendant having been exonerated from blame initially until after the RVR management changed hands is when she was relieved of her duties, was clear evidence that the 1st defendant was also acting as agent of the 2nd defendant.

112. The plaintiff also submitted that the fact that the 1st defendant used the 2nd defendant’s letter head to issue the memo which memo was also distributed on the 2nd defendant’s premises and notice boards without any disciplinary proceedings being brought against the 1st defendant was sufficient evidence that the 1st defendant was acting for the 2nd defendant.

113. Reliance was placed on **Jimi Masege Vs Kenya Airways Ltd[2010] e KLR CA 63/2003** where the Court of Appeal held that Kenya Airways was vicariously liable for publications found on its notice board and stated:

“.....giving out space and allowing the document to be published and read by third parties even when authorship of it was not Kenya Airways was a different from publishing it

directly....”

114. On the seventh issue of whether the ‘letter’ was actuated by malice, spite and ill will and or whether the words were capable of defamatory meaning or interpretation as alleged in paragraph 12 of the plaint and or whether the matters in the memo were fair comment on the matter of interest to the employees of the 2nd defendant, the plaintiff submitted that the constitutional provisions under Articles 32(1) and 33(1) are clear that freedom of opinion is granted but limited by Article 33(3) to create defamation.

115. According to the plaintiff, the memo was actuated by malice because he had explained to the defendants that the plaintiff complied with Section 87 of the Kenya Railways Act and that therefore by consulting Mr Dulo who in turn consulted 7 other lawyers on the same issue and addressing the memo to “ **ALL RVR STAFF,**” was malicious and failed to take into account those litigants/plaintiffs in HCC 35/2007 and who understood his explanation of Section 87 of the Kenya Railways Corporation Act.

116. That the fact that the defendants were not patient to wait for the court rulings on the issue of Section 87 of the Kenya Railways Act to see whether their interests were well catered for was evidence of malice.

117. That the 1st defendant was not even a party to HCC 35/2007 and therefore she used her position and influence to interfere with the plaintiff’s conduct of the said suit.

118. On quantum, the plaintiff urged the court to consider that the memo strained his relationship with 3407 clients; that instructions were withdrawn and that he lost the prospects of getting legal fees from a claim ranging in hundreds of millions due to the unfounded defamatory memo.

119. The plaintiff also urged the court to consider that no apology was given; that the memo was published country wide to the effect that the plaintiff was incompetent for all the members of the public to read.

120. On the basis of the cases of **Johnson Evan Gicheru V Andrew Morton & Another [2005] e KLR** and **Wangethi Mwangi & Another V JP Machira t/a Machira & Company Advocates[2012]eKLR** wherein the court awarded shs 6,000,000 and shs 10,000 for defamation respectively, the plaintiff urged this court to award him shs 25,000,000 general damages, punitive and exemplary damages against both defendants jointly and severally.

THE 1ST DEFENDANT’S SUBMISSIONS

121. The 1st defendant’s counsel filed her submissions on 10th March 2016 contending that the claim by the plaintiff against his client was unsustainable in that, there was no suggestion in the memo that the plaintiff was unqualified to practice law or handle clients and that the plaintiff admitted in cross examination that a mere fact that a lawyer had a conflicting position on an issue does not by itself suggest that the other lawyer disrespects him. Further that the very essence of law is that lawyers advance differing viewpoints in a very respectful manner.

122. Further, that the mere that fact that 7 lawyers held a position different from the plaintiff’s view, that notice given in HCC 35/2007 was defective was not in itself disrespectful or defamatory in any way and if that was not so, the plaintiff could have sued the adverse advocates who argued in court that the notices were defective after the court ruled in his favour.

123. The 1st defendant also contended that the allegation that memo suggested Rachier & Amollo Advocates were the best option was defamatory is based on conjecture since no such comparison was in the memo.

124. While relying on the submissions of the 2nd defendant on whether the memo was defamatory of the plaintiff, the 1st defendant's counsel submitted that there was no defamatory meaning capable of being derived from the impugned memo but that it was a communication to the affected parties, of the legal opinion received from an independent lawyer sought by the committee.

125. Further, that clients are free to seek different legal opinions hence that cannot be construed to be defamatory of their advocates and that if changing lawyers was defamatory then courts would not manage to handle all the defamation cases that would arise from lawyers suing their ex-clients and their new lawyers because of differing views. The 1st defendant urged this court to find the suit herein not proved against her and to dismiss it with costs.

THE SECOND DEFENDANT'S SUBMISSIONS

126. The 2nd defendant's counsel filed their detailed submissions on 1st March 2016 by framing three issues for determination by the court:

Whether the words in the impugned memo dated 17th April 2008 were in their natural and ordinary meaning defamatory of the plaintiff's character, reputation, professional and social standing.

127. Relying on **Wycliffe A. Swanya Vs Toyota EA Ltd & Another CA 70/2008** and **Gatley on Libel and Slander's 8th Edition** definition of what a defamatory matter is, the 2nd defendant's counsel contended that there was no prove that the words contained in the impugned memo was defamatory of the plaintiff for reasons that there was no evidence of any independent witness to testify that the plaintiff was viewed positively before the publication and or that after the publication, he was shunned, avoided, disparaged, insulted, ridiculed or that he suffered any form of dent, stigma, loss of business, clients or job opportunity. Reliance was placed on **Simeon Nyachae Vs Lazarus Ratemo Musa & Another [2007] e KLR**, **Daniel N. Njuguna V KGGCU Ltd CA 281/1998**; **Gibson Ombonya Shirako V British Airways CA 149/2004**, **George Mukuru Muchai V The Standard**; and to crown it all, this court's recent decision in **HCC 196/2013 – Miguna Miguna V The Standard Group Limited & 4 Others** wherein all the other above decisions were applied and the court held that there can be no defamation where there is no independent evidence of those who read the impugned publication and what they thought of the plaintiff before and after the publication.

128. On whether the memo of 17th April 2007 was published maliciously:

129. it was submitted by the 2nd defendant that the issuance of notice to sue under Section 87 of the Kenya Railways Corporation Act was a legal question interpreted differently by legal Practitioners and that that issue was only put to rest by Honourable Waweru J and Honourable Sitati J in HCC 35/2007.

130. It was also submitted that the words used in the memo were not disrespectful of the plaintiff or at all and that there was no evidence of malice, recklessness or negligence on the part of the defendants; and neither was there evidence of bad blood between the plaintiff and the defendants. Reliance was placed on **Machira V Wangethi Mwangi (supra)** and **Godwin Wachira V Okoth [1976-80] 1 KLR 428**.

131. It was submitted that the memo was a summary of legal opinion received hence consultations were done. It was contended that as there was no proof of defamation, no liability could attach to the defendants.

132. On quantum, the 2nd defendant submitted that no basis was laid for the general, exemplary and punitive damages sought hence the plaintiff's claim should be dismissed. Reliance was placed on **Miguna Miguna** case (supra) and **Eric Gor Sungu V George Oraro Ochunga [2014] e KLR** where the

court of Appeal enhanced general damage to 5 million. It was submitted that in this case, having regard to the circumstances of this case, shs 500,000 or less should be awarded should the court attach any liability to the defendants since there was no republication of the memo and that no specific damage was proved and that exemplary and punitive damages are not available to the plaintiff since it was not proved that the publication was for profit or the defendants had acted oppressively, arbitrarily or unconstitutionally.

133. Further, that as there was no evidence that the publication tended to cause people to shun or avoid the plaintiff, the suit must fail with costs to the 2nd defendant.

DETERMINATION

134. Having carefully considered the pleadings, the testimonies of the parties and their respective witnesses and the documentary evidence coupled with their submissions supported by statutory and case law, in my humble view, the issues for determination in this suit, taking into account the agreed filed issues are:

- 1. Whether the memo dated 17th April 2007 signed by Judith Achar on the 2nd defendant's letter head and circulated to all staff of Rift Valley Railways was defamatory of the plaintiff;***
- 2. Whether the memo dated 17th April 2007 was laced with malice, spite and ill will and or whether it was falsely, recklessly and or negligently written;***
- 3. Whether the plaintiff is entitled to any award of damages and if so, how much;***
- 4. What orders should the court make;***
- 5. Who should bear the costs of this suit?***

135. On the first issue of whether the plaintiff was defamed by the memo dated 17th April 2007, to answer this important question, it is important first of all, to establish what defamation is. In **Wycliffe A. Swanya V. Toyota East Africa Limited & Francis Massa Nairobi CA NO. 70 of 2008**, the Court of Appeal stated that:

“It is common ground that in a suit founded on defamation the plaintiff must prove:-

- i. That the matter of which the plaintiff complains is defamatory in character;***
- ii. That the defamatory statement or utterances was published by the defendant and that defendant's publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed .***
- iii. That it was published maliciously.***
- iv. In slander, subject to certain exceptions that the plaintiff has suffered special damages.***

136. In **Richard Otieno Kwach V The Standard Limited & David Makali Nairobi HCCA 1099 of 2004**, the court observed that ***“ words are defamatory if they involve a reflection upon the personal character or official reputation of the plaintiff....”***

137. In **J.Kudwoli V Eureka Educational and Teaching consultants & 2 Others HCC 126/90** Kuloba J set out the matters that a plaintiff in a suit founded on defamation be it libel or slander, must prove. The matters are:

i. The matter of which the plaintiff complains was published by the defendant:

ii. That the publication concerned or referred to the plaintiff;

iii. That the publication was defamatory in character.

iv. That it was published maliciously; and

v. In slander, subject to certain exceptions, that the plaintiff has thereby suffered special damages.

138. In the instant case, it is not in dispute that some of the issues framed by the plaintiff are settled. For example, it is admitted that the impugned memo was written by the 1st defendant, on the letter head and material of the 2nd defendant who was her employer; that the said memo was addressed to all staff of Rift Valley Railways, the 2nd defendant and posted to all notice boards of the 2nd defendant's offices countrywide and admittedly, any other person other than the Rift Valley Railways staff could read it.

139. It is also not in dispute that although the memo was written by the 1st defendant it was distributed/circulated and or published by the 2nd defendant through its Human Resource Department and Human Resource officers in the regions.

140. This evidence was brought about by the 1st defendant's witnesses and especially DW4 who was a Human Resource Officer himself and who confirmed that DW5 Mr David Rimberia the Head quarter Human Resource Manager endorsed the memo before it was circulated to the region to be distributed by Human Resource Officers in those regions.

141. Although DW5 tried to deny the fact of his authorization/endorsement on the memo and or being aware of the memo before it was distributed countrywide by saying that he was in Mombasa and that he only learnt of it on 18th April 2007, this court had the opportunity of hearing and seeing DW5 as he testified and I observed that he was not a truthful witness or at all. He gave very evasive and doubtful answers to the questions put to him at all times. He did not deny that the signature of endorsement on the memo was his. He simply appeared not to be sure simply because it was not clear. This court did not believe this witness at all who only tried to give direct answers of yes and no during re examination. He also contradicted himself by denying that he ever paid/pledged any contributions for the court case and later admitting that he paid after being shown the list of contributors in DExh 3 where is listed as No 3 from the bottom on page 3 of the listing with a pledge of 5000, his staff No, 38964 from Human Resource Department.

142. Further this court believed the 1st defendant and her witnesses evidence that indeed Dex4 the impugned memo was endorsed by DW5 for all Human Resource staff to note. DW4 was categorical that no memo would be distributed to staff unless the Human Resource Manager endorsed or authorized such circulation and that that was the established protocol in Rift Valley Railways.

143. I therefore find that it was hypocritical of DW5 to claim that he was no aware that the memo reached Human Resource officers in the regions.

144. I therefore agree with the plaintiff's submissions that the publication of the memo was done by the 2nd defendant through its agents/employees in the regions after DW5 endorsed its distribution/circulation through all Human Resource staff. I also accept the holding in **Jimi Masege V Kenya Airways Ltd [2010] e KLR** that **".....giving out space and allowing the document to be published and read by third parties, even when authorship of it was not KQ's was no different from publishing it directly.."** which holding is in parimateria with this case wherein the impugned memo was pinned on the notice boards of the 2nd defendant although it was authored by the 1st defendant.

145. Consequently, I find that the matter which the plaintiff complained of was authored by the 1st defendant as admitted and published by the 2nd defendant. Had the DW5 refused to endorse its circulation, the memo would not have gone to the Rift Valley Railways regional offices and notice boards.

146. The claim that DW5 was on 17th April 2007 in Mombasa on official duties was farfetched and incapable of belief as there was no such proof of him being in Mombasa at the time he is said to have endorsed on the memo to all Human Resource staff.

147. As earlier stated, DW5 was a very evasive witness incapable of being believed by the court. He must have come to court simply to cover up his former employer and to cover his own “sins” of allowing the memo to be distributed which gave rise to this suit. I also found him escapist for and on behalf of his former employer. From his testimony, DW5 knew everything about the former Kenya Railways Corporation staff committee which was pursuing their legal rights to their terminal benefits as he was one of those former KRC staff that is why he pledged to pay legal fees of shs 5000/- for filing of the constitutional case, but he pretended not to be knowing what was happening to those former employees of KRC and who were transferred to RVR.

148. For example, at one time DW5 was saying that the constitutional case was for senior Management, forgetting the fact that case, from the available evidence, was the option for HCC 35/2007 after the legal opinion of Charles Dulo was received. The witness also pretended that he did not know anything about the legal opinion of Mr Charles Dulo yet he know about the meetings that were going on concerning the benefits of ex Kenya Railways Corporation staff including the meeting held with the plaintiff to clarify on the issue of validity of notice given to Kenya Railways Corporation before institution of HCC 35/2007.

149. Having found that the impugned memo was published by the defendants jointly and severally, the next question is whether the publication concerned or referred to the plaintiff. The impugned memo dated 17th April 2007 Ref. RVR/PR/1/3 addressed to all staff of Rift Valley Railways concerned an update on **High Court Civil case No. 35 of 2007- Ex Kenya Railways Corporation employees Vs Kenya Railways Corporation**. In the said memo, paragraphs 3,4, and 5 clearly mention the plaintiff as the advocate who was engaged to assist in settling the issues of transfer of services of staff from Kenya Railways Corporation to Rift Valley Railways. The memo also states that ***“.....However, a technical problem was detected in the suit lodged by M/S Rumba Kinuthia & Advocates. In this suit, Kenya Railways Corporation was not given a 30 days’ notice of intention to sue as it is required by Section 87 of Kenya Railways Corporation Act Cap 397.”***

“.....However, when Rumba met with staff and the issue of compliance with the Act was raised, he replied that he had given 38 days notice to Kenya Railways Corporation....”

150. From the above extract, no doubt, the publication complained of concerned the plaintiff’s handling of HCC 35/2007 specifically, the issue of notice to institute suit as required by Section 87 of Kenya Railways Act Cap 397 Laws of Kenya.

151. The next question is whether the publication which concerned the plaintiff was defamatory of the plaintiff’s character and reputation. From the very nature and definition of defamation as a tort, defamation is the publication of a false statement which *tends* to lower a person’s reputation in the estimation of right thinking members of the society generally and which make or cause him to be shunned or avoided.

152. Therefore, it was upon the plaintiff to prove that by the publication which was allegedly false, he was exposed to public hatred, contempt or ridicule or that the words in the memo caused him to be shunned or avoided by certain people.

153. The plaintiff must also demonstrate that the natural effects of the published words were meant to destroy, demean, degrade and diminish the esteem in which he was ordinarily and generally held,

even if there was no proof of damage since this was libel. It is not sufficient to state that the publication defamed the plaintiff. In **Hill Vs Scientology [1995] 2 SCR 1130** the Supreme Court of Canada held that:

“Freedom of expression has never been recognized as obsolete.....The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means.....” freedom governed by law.”

154. The above holding echoes the spirit and letter of Articles 32(1) 33(1) and 33(3) of the Constitution of Kenya, 2010 which not only guarantee the freedoms of speech and expression but also limit the same freedoms under Article 33(3) thereof where defamation or vilification of others, propaganda for war or hate speech is concerned.

155. It therefore follows that albeit the defendants hung on Article 32(1) of the Constitution, the freedom guaranteed therein is not absolute. The plaintiff must prove that the publication tended to lower him in the estimation of right thinking members of the society generally and caused them to shun or avoid him or treat him with contempt.

156. This court has no doubt that consideration must be given to the particular significance reputation has for an advocate of the High Court of Kenya, and a senior advocate for that matter of the stature of Mr Rumba Kinuthia. As was held in the **Hill V Scientology** case (supra) that: :

“..... A lawyer’s practice is founded and maintained upon the basis of a reputation for professional integrity and trust worthiness. It is the cornerstone of a lawyer’s professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation.....Judges rely upon commitments and undertakings given to them by counsel. Our whole system of administration of justice depends upon counsel’s reputation for integrity. Anything that leads to the tarnishing of a professional reputation can be disastrous for a lawyer.....”

157. The plaintiff in this case singled out certain phrases in the impugned memo that he considered highly disrespectful and therefore defamatory of him. He averred that the general language and tone of the memo was highly negative and disrespectful to anyone reading it. According to the plaintiff, *“referring someone by name in most cases shows some respect but referring to the same person as an object as in paragraph 2 of the memo that.....”* *“You all know.....Rift Valley Railways staff engaged “a Lawyer”.....”, shows some negativity , which makes the rest of the memo all the more susceptible to defame”*

158. The plaintiff also complained that the act of saying *“ further consultation with seven different independent lawyers....the most single recommendation was that the case can be withdrawn and filed a fresh in compliance of Section 87 of the Kenya Railways Corporation Act Cap 397,”* was a solidification of the plaintiff’s incompetence by the legal opinions of Mr Charles Dulo and 7 Other lawyers. Further, that those words *“created doubt and apprehension among the said litigants* hence the defendants by publishing such a memo achieved their defamatory objectives.

159. Whereas I accept that defamatory statements, as was held in the **Hill V Scientology** case (supra) ***“...are very tenuously related to the core values.....and that they are inimical to the search for truth; and that injurious statements cannot enhance development, nor can it ever be said that they lead to healthy participation in the affairs of the community; and are indeed detrimental to the advancement of these values and harmful to the interest of a free and democratic society;***”, in the instant case, I find it extremely easier said than done to find that the words contained in the impugned published memo were or bear any defamatory meaning or imputation against the plaintiff.

160. I find that the epitome of the complaint by the plaintiff who is a very senior advocate of this court touches on the interpretation of Section 87 of the Kenya Railways Corporation Act which requires that before instituting suit against the Corporation, a plaintiff must give 30 days' notice of intention to institute suit.

161. In the instant case, after the claimants in the HCC 37/2007 had instructed the plaintiff to file the said suit on their behalf, it was alleged that the case took some time to be heard and that because the claimants who were former employees of KRC were worried of being evicted from the Kenya Railways Corporation Staff residences because of the demand by Kenya Railways Corporation (their new employer) that they pay market rates for the staff houses they occupied prior to the concessioning of KRC to RVR, while their case on their benefits was still pending, the claimants sought independent legal opinion and Mr Charles Dulo advocate was consulted to provide that legal opinion dated 2nd February 2007 addressed to the “*Committee of Eminent Persons.*”

162. One of the advisories by Mr. Charles Dulo was a recommendation that non compliance with a statutory notice under Section 87 of the Kenya Railways Corporation Act Cap 397 Laws of Kenya rendered the suit fatally defective.

163. In addition, the advisory recommended that the claim should have been commenced by way of Judicial Review Orders of certiorari to quash the decision of Kenya Railways Corporation to transfer the claimants' services to the Rift Valley Railways and Mandamus, to compel Kenya Railways Corporation to pay them their terminal dues as at 1st November 2006 in accordance with the Kenya Railways Corporation (Pensions and Gratuities) Regulations, 1983 and that Judicial Review is usually fast tracked and it does not require witnesses.

It is from the above legal opinion that the staff's committee decided to instruct Rachier & Amollo Advocates to implement the filing of Judicial Review matter in court before instructing the 1st defendant to write a memo to all the former KRC who were now RVR staff, notifying them of the “*technical problem detected*” in the plaintiff's brief.

165. As it turned out from the rulings of Honourable Waweru J and R. Sitati J dated 5th July 2007 and 13th May 2011 respectively, which rulings dismissed the preliminary objections raised in HCC 35/2007 to the effect that the suit was incompetent for want of valid notice under Section 87 of the Kenya Railways Corporations Act, cap 397 Laws of Kenya, among other grounds; the plaintiff was vindicated in his advice to his clients that the suit was not fatally defective.

166. The question is, could that in itself, that is, a difference in legal opinion by two different advocates and the client believing one advocate and not the other be construed to bear the defamatory connotation? My answer is a resounding NO!

167. While changing instructions from one advocate to another by a client may be construed as being due to lack of faith in the competence of the first advocate, it must be understood that a party has a right to be represented in court or any proceedings before any tribunal, by an advocate of their own choice, whether under the current constitution or the repealed constitution. That being the case, this court is unable to find that lack of faith in the advocate's competence and therefore seeking a second or even 8 opinions to satisfy oneself of the status of one's case would amount to being disrespectful and therefore defamatory of an advocate.

168. The advocate who has lost the client like the plaintiff herein, and therefore losing out his legitimate expectation to earn hundreds of millions of shillings in legal fees following the departure of the client has a sure remedy in law. He can never go empty handed. The law (Advocates Act Cap 16) Laws of Kenya gives him the right to file and or tax his advocate/client bill of costs and obtain judgment for those costs under Section 52 of the Advocates Act. The remedy is not found in suing the instructing client(s) for defamation of character!

169. Clark & Lindsell on Tort 17th Edition , London Sweet & Maxwell 1995 at page 1018 paragraph 21-42 states:

“Whether the statement is defamatory or not does not depend on the intention of the defendant but on the probability of the case and upon the 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. The mere intention to vex or annoy will not make a language defamatory which is not so in its own nature. Words apparently defamatory may be proved by evidence of the circumstances to have been understood in another and involvement meaning.”

170. Advocates who are students of professional ethics are forever reminded that clients remain clients. They are never friends of their counsels. The fact that clients come and go is not necessarily attributable to disrespect or out of lack of the appreciation of their counsel’s industry, although that may be the main reason, in most cases.

171. In **Nation Newspapers Limited Vs Cheshire [1984] KLR 156** the Court of Appeal held that:

“ An action or libel by innuendo depends for its success on the proof by the plaintiff that special circumstances are known to persons who read the offending publication and evidence of the special circumstances.”

172. The plaintiff in this case has not demonstrated to the satisfaction of this court that the impugned memo portrayed him as not being qualified to practice law or handle clients cases in a competent way. I find that the impugned memo merely communicated to the staff the summarized form of the legal opinion received from the Mr Charles Dulo advocate.

173. Furthermore, from DEx 2, in the letter dated 11th April 2007 from Rift Valley Railways staff to the Executive Director Mr Charles Church, the parties to HCC 35/2007 had agreed to pursue parallel Judicial Review proceedings to the main case as a fallback position upon being advised and in the said letter, the various staff requested for salary advances of shs 224,000 to be paid to Rachier & Amollo Advocates as legal fees to kick start the Judicial Review process.

174. The other ancillary question is whether strictly speaking, words which are published could be said to be defamatory of the plaintiff where the plaintiff does not call any witness or third party evidence to demonstrate that they read the impugned words and found those words to be defamatory of the plaintiff or to bear any defamatory meaning.

175. The plaintiff herein testified and claimed that as a result of the publication, the clients took from him their file in the HCC 35/2007 and that he was viewed as an incompetent advocate by the 8 lawyers who reviewed the matter and gave the advisory and that other persons who read the memo who included litigants and non litigants in HCC 35/2007, and the general public, being employees and visitors of the 2nd defendant’s offices country wide who read the memo, took it to impute the pleaded matters.

176. However, the plaintiff did not produce any letter showing that his clients withdrew instructions from him following the publication of the memo. None of his clients or other general member of the public testified that they read the memo and found it to be defamatory of the plaintiff.

177. Reputation is what other people think of a person who alleges that he was defamed by the publication. It is not one’s own opinion of him. Therefore, for words to *tend* to injure one’s reputation, the person or claimant must adduce evidence to prove that the published words *tended* to cause other people to shun or avoid or treat him with contempt. In other words, the right thinking members of the society generally who read the publication and viewed the claimant with disrespect, ridicule, dislike or de esteem must be called as witness(es) or communication from those people in the form of emails produced to show their reaction after they read the impugned publication.

178. In **Simeon Nyachae V Lazarus Ratemo Musa & Another [2007] e KLR** cited with approval in **Miguna Miguna V The Standard Limited & 4 Others [2016] e KLR**, the court was clear that the plaintiff in a defamation case must demonstrate that as a result of the publication, the plaintiff has been viewed differently from the way he was viewed before or that he has become a light weight as a person, professionally, financially and or politically or in any other manner.

179. In other words, the plaintiff claimant must prove that there are those people who believe that he was defamed by the publication.

180. In **George Mukuru Muchai V The Standard Limited HCC 2539/1997**, the court stated and I agree:

“ In my view, the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complaint and not how he/she himself/herself feels the words portray about him/her.”

181. In **Daniel N. Ngunia Vs KGGCU Ltd CA 281/1998** the court of Appeal also clarified that:

“ leaving aside any questions of privilege upon which the learned judge dismissed that aspect of the appellant’s claim, we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence or qualified privilege (Emphasis added).

182. I am equally inclined to accept the decision in **Gibson Ombonya Shiraku V British Airways Plc CA 149/2004** where the Court of Appeal was emphatic that:

“We decline the invitation by counsel to hold that there is a presumption that somebody must have heard the alleged defamatory words. If there were defamatory words, and if they were published, the burden of proving both their existence and publication reposed on the appellant. He failed to discharge it”

183. I also rest with my recent decision in **Miguna Miguna** case(supra) that in defamation cases, there is necessity for independent evidence to show that indeed there are those who believe the plaintiff was defamed by the publication. The plaintiff in this case could even have called his emissaries whom he send out to conform that the memo was all over the 2nd defendant’s regional offices and whether those emissaries read the memo and whether they considered in to be defamatory of the plaintiff.

184. In my view, the words in the impugned published memo had no defamatory tendency, in as much as they may have vexed or annoyed the plaintiff but I find no defamatory imputation or connotation in those words and therefore not actionable.

185. The other issue for consideration is whether the impugned publication was published maliciously. As already stated, there was no evidence that the publication tended to lower the plaintiff’s reputation in the estimation of right thinking members of the society generally and which made them to shun or avoid the plaintiff or treat him with contempt and disesteem.

186. For a publication to be malicious, malice can be inferred from a deliberate or reckless or even negligently ignoring of facts (see **JP Machira Vs Wangethi Mwangi & Nation Newspapers Ltd CA 179/77**). Further, malice doesn’t necessary mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice may also be found in the publication itself if the language used is utterly beyond or disproportionate to the facts.

187. In the present case, even if the court was to find that the memo as published was defamatory, which as I have stated is not defamatory, there is absolutely no manifestation of any deliberate or reckless or negligent ignoring of facts. The evidence on record is clear that the author and the

committee that she was writing the memo on behalf of were not and are not lawyers and that is the reason why they sought legal counsel and advisory of another advocate to assist in interpreting to them the effect of non-compliance with Section 87 of the Kenya Railways Corporation Act. The evidence is clear that it was upon receipt of that legal opinion that the claimants' representatives went for a second option of filing Judicial Review proceedings and brought to the attention of the plaintiff the advice received.

188. Although the plaintiff claims that he was not notified of the legal opinion by DW 1, and the latter maintaining that she personally took the impugned memo to the plaintiff together with the cheque for rent from Rift Valley Railways, this court believes the testimony of DW1 Judith Achar for reasons that she impressed the court as a forthright witness and capable of being believed. From her demeanor in court, the court could not derive any lie, evidence of malice or even disrespect for the plaintiff advocate.

189. Furthermore, the plaintiff did not tell the court how he accessed the impugned memo, although he claimed that it remained on the 2nd defendant's notice boards for 10 days. He did not disclose the person who brought the memo to this attention, albeit he testified that after the memo was published, he sought audience with the committee which he addressed, clarifying to them that he had served notice to sue upon Kenya Railways Corporation contrary to the advisory which they had received from Charles Dulo.

190. The record is also clear that the two rulings by Honourable Waweru J and Honourable R. Sitati J only came after the publication of the memo and not before. Thus, it cannot be said that the defendants disregarded the decisions of the court and published a memo touching on a matter which the court had found in favour of the plaintiff- that of issuing notice to sue, which Honourable Hatari Waweru J found that the requisite notice was given on 29th November 2006 before suit was filed on 25th February 2007.

191. From the ruling of Hatari Waweru J in HCC 347 of 2007 on the issue of notice of intention to institute suit, it is clear that the issue of non-compliance with Section 87 of Kenya Railways Corporation Act was raised as a response to the application for injunction against Kenya Railways Corporation by its ex employees, at a time when Kenya Railways Corporation had increased housing rents for its ex employees and was evicting them from the staff houses. That is also the time when the ex employees sought a second legal opinion on the matter and before the ruling was delivered on 6th July 2007. That being the case, I believe the 1st defendant's testimony that there was a lot of anxiety at the time and that they cannot be blamed for failure to inquire since the issue of whether or not the 30 days notice had been issued to Kenya Railways Corporation and whether failure to issue such notice was fatal to their suit was pending determination by the court. In my view, it cannot therefore be claimed that the defendants ignored the facts or failed to inquire into the facts.

192. I also find that the fact of calling the plaintiff "*a lawyer*" or '*Rumba*' in the mentioned memo is not, in my humble view evidence of disrespect, spite or malice. Further, although the plaintiff wanted the court to believe that choosing Rachier & Amollo advocates was the best option for the 1st defendant and her team, that is not the case. The memo was recommending, as per the legal advisory opinion, that Judicial Review would be the alternative and that they had instructed Rachier & Amollo Advocates to file for judicial review since, going by the advisory of Mr Charles Dulo advocate, the time frame for instituting Judicial Review was almost expiring hence the matter had to be filed expeditiously. The impugned memo was also clear that Judicial Review proceedings were to run concurrently with the HCC 35/2007.

193. This court does not find any overreaching language used in the impugned memo that is utterly beyond or disproportionate to the facts.

194. Moreover, there is no evidence of any bad blood between the plaintiff and the two defendants. DW1 was clear in her testimony that when she submitted that impugned memo to the plaintiff, she also gave

him a cheque for payment of their rent, which was due to Kenya Railways Corporation.

195. In my humble view, if there was bad blood, the defendants could not have entrusted the plaintiff with a cheque for payment of rents due to Kenya Railways Corporation. I am on the evidence available, unable to find any extrinsic malice, ill will or spite or any indirect or improper motive in the 1st defendants mind at the material time that she wrote the memo.

196. In the end, I find that the plaintiff has failed to demonstrate that he was defamed by the publication of the memo dated 17th April 2007. However, had I found liability for the plaintiff, the next issue is what damages if any would the plaintiff be entitled to.

197. In **Mikindadi V Khangana & Another [2004] KLR 496**, Ochieng J was clear that:

“ A successful plaintiff in a defamation action is entitled to recover as general compensation damages such sum as will compensate him for the wrong he had suffered. That sum must compensate him for the damages to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused. The court must take the necessary precaution to ensure that whatever award it gives a successful plaintiff is generally in line with what courts have been awarding.”

198. Thus, in the event that I am found to have erred in my verdict that the plaintiff did not prove the tort of defamation, I would have awarded the plaintiff damages to vindicate for his alleged embarrassment and disrespect. Considering the case law relied on by both the plaintiff and second defendant in their submissions, and the principles laid down in **Johnson Evan Gicheru V Andrew Morton CA 314/2000 Nairobi** borrowed from the guidelines in **Jones V Pollard [1997] EMLR 233** regarding quantum of damages, namely:

1. *The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any reputation.*
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.*
5. *Vindication of the plaintiff's reputation past and future.*

199. And taking into account the above guidelines, and considering the fact that this was a one off publication which was distributed to staff of Rift Valley Railways country wide; not repeated and with no apology offered and there being no aggravating or mitigating factors, in my view, an all inclusive sum of shs 4,000,000 general damages for defamation of character would suffice to compensate the plaintiff, vindicating him to the public and solatium for any wrong done.

200. I would also award him costs and interest at court rates from date of judgment until payment in full based on the **Miguna Miguna** (supra) case grounded on **Samuel Phillip Koloti V Kenya Cargo Handling Services Ltd CA 76/92** where the court of Appeal held that:

“General damages bear interest from the date of judgment while special damages bear interest from the date of filing suit”

201. However, in this case, having found that the plaintiff was not defamed and that there was no wrong done to him, I dismiss his suit against each of the defendants, whether jointly or severally.

202. Costs are in the discretion of the court and to the successful party. The defendants are the successful

litigants in this suit. However, having considered the circumstances of this case, which pitied an advocate and his former clients represented by the 1st defendant Judith Achar; and the latter's former employer - the 2nd defendant Rift Valley Railways, I would, in the circumstances order that each party bear its own costs of this suit.

Dated, signed and delivered in open court at Nairobi this 19th day of September 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mr Muchoki for the plaintiff

Mr Kiche for the 2nd defendant

Mr Otieno h/b for Mr Osiemo for the 1st defendant

CA: Adline