



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO 420 OF 2011

(Coram: R.E. ABURILI J)

SAMUEL NDUNG’U MUKUNYA.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT

ALPHONSE SHIUNDU.....2ND DEFENDANT

JUDGMENT OF THE COURT

The plaintiff **SAMUEL NDUNG’U MUKUNYA** filed this suit against the defendants **NATION MEDIA GROUP LIMITED AND ALPHONE SHIUNDU** in a plaint dated 28th September, 2011 seeking for damages for defamation of character, arising from the defendant’ publication of an article written by the 2nd defendant and published by the 1st defendant on 10th July 2011 in the Sunday Nation together with costs and interest. The impugned article was entitled **“Act on this JSC Cronyism Lawyers Tell Mutunga.”**

The plaintiff claims that the words contained in the said whole article were in their natural and ordinary meaning false, malicious and defamatory of him.

The following is the impugned extract publication as pleaded in the plaintiff’s plaint:

... The JSC published the 234 names of applicants for the position of judge of the High Court in local dailies. The name of Mr Mukunya Samuel Ndung’u did not appear in the list of applicants. Similarly and obviously the name of Mr Mukunya did not appear among those of the 114 names of the shortlisted candidates.

.....Mr Mutunga’s explanation-as the chairman of the JSC-that the controversial inclusion was as a result of an error of omission does not wash

....it should not have taken a “whole 22 days” to correct an error, if it was a genuine case.

Why did the JSC not correct the anomaly regarding Mr Mukunya within the 22 days? When the matter was rightfully raised by the media on June 28, 2011, Mr Gateere explained that Mr Mukunya’ name was inadvertently left out in good faith. But how did this happen? Mr Mukunya did not appear in the published list of 234 applicants in the first lace, how could his name have been left out? Was his

application received belatedly or by whom?

They now want Mr Justice Mutunga to take over the matter and ensure that ‘he makes things right’ regarding the controversial short listing of Mr Mukunya.

... Former judge and Mr Gateere are close friends and they both boast of high level connections in the government.

Mr Mukunya is well connected and has relations with the political class, right up State House. He does not shy to remind young advocates who reside and practice in Mt Kenya region of this fact....

[Mr Gateere] could not however say why it took about 20 days to single out the omission to explain why they were quick to inform Mr Mukunya in private why he was left out and did not bother to publish the omission in the media for public consumption considering the sensitivity of the matter.”

The plaintiff complained that the words /statements in the said article in their natural and ordinary meaning were understood to mean of and concerning the plaintiff inter alia that:

- a. *The inclusion of the plaintiff’s name both in the list of applicants and shortlisted candidates for the positions of judges of the Supreme Court and High Court of Kenya was irregular and fraudulently done on factors other than merit.*
- b. *The short listing of the plaintiff was controversial.*
- c. *Mr Titus Gateere, the Chairman of Public Service Commission and the plaintiff are close friends who enjoy high level connections in government right up to State House.*
- d. *Mr Gateere is behind the inclusion of the plaintiff’s name in the above indicated lists.*
- e. *The plaintiff is corrupt and dishonest and thrives on untrustworthiness since he had gone around canvassing for the position of judge of both the Supreme Court and High Court.*
- f. *The plaintiff is an unethical and unscrupulous person and therefore not a fit and proper person for the position of Judge of the Supreme Court and /or High Court as well as to practice as an advocate of the High Court of Kenya.*
- g. *The plaintiff does not uphold the professional ethics and responsibility of the legal profession.*
- h. *The plaintiff is incompetent as an advocate of the High Court of Kenya.*
- i. *The plaintiff should be shunned and avoided by all right thinking members of the society.*

The plaintiff further pleaded that the contents of the said article were disparaging of him and were indeed false, malicious and defamatory and that the defendants in so publishing the article did so out of extreme unfounded malice and spite which was calculated to injure the plaintiff and cause him great embarrassment besides exposing him to great ridicule, odium and contempt in the eyes of the plaintiff’s family, professional peers, clients and the public at large.

The plaintiff also particularized malice and spite on the part of the defendant in publishing the said article in that:

- a. *On or before the 21st June, 2011 through a telephone interview by the defendants agent, servant or employee, Mr Ken Nzioka, the plaintiff confirmed that he had applied for both positions of the Judge of the High Court and Judge of the Supreme Court. This was confirmed by the defendant’s article entitled **“Ex judge added to list of High Court applicants”** published in the 1st defendant’s issue of 28th June 2011. Thus the above indicated fact was known to the defendant prior to the publication of the said article.*
- b. *the said article was published four(4) days after the chairman of JSC had clarified the position*
- c. *the plaintiff is not known to Mr Gateere and he has no political or government connections*
- d. *the defamatory material was published at a very sensitive time when the plaintiff was waiting to take his interview for the position of judge of the High Court of Kenya*
- e. *the defendants did not take time to ascertain the veracity of the facts or statements concerned, or if the defendants did ascertain proceeded in full knowledge of the falsehood of their statements and chose to publish false, malicious and defamatory article concerning the plaintiff*

- f. *the defendants knew or ought to have known that the contents of the said article would cause injury to the plaintiff's image, reputation and standing in the eyes of society and plaintiff continues to be injured to date*
- g. *The defendants knew or ought to have known that by publishing the said article the plaintiff's image in the eyes of the right thinking members of the society would be maligned and discredited.*
- h. *The defendants deliberately and maliciously employed false unfounded facts and used strong derogatory language calculated to maximize the injury to the plaintiff and reduce his standing and or perception in society.*

It was further alleged by the plaintiff that the defendants published the said article not only in Kenya but in East Africa as well as globally and that despite demand for an apology and notice of intention to sue given, the defendants had refused, neglected and or failed to grant the plaintiff retraction or apology and admission of liability hence the suit.

The plaintiff therefore prayed for Judgment against the defendants for general damages for defamation and loss of bargain and aggravated damages for defamation. He also demanded for a full and unqualified apology and amends and a withdrawal of the said publication and statements in the widest possible circulation similar to that given to the said publication and an unconditional admission of liability for libel.

The plaintiff's claim was resisted by the defendants through their joint statement of defence dated 8th November 2011. The defendants admitted that they published the material article complained of but contended that the said publication was not malicious or defamatory of the plaintiff. The defendants also entered the defence of fair comment and fair information upon facts which are matters of public interest and that the same were published without malice.

The defendant also claimed that the words were published on a privileged occasion and sought to rely on the whole article for its full tenor and effect. In addition, the defendants pleaded that the publication related to the interviews of the Judges under the new Constitution and the related process and were therefore published under a sense of public duty, without malice and in the honest belief that the information contained therein was true. The defendants further stated that they published the story to correct the position in an article dated 28th June 2011. The defendants vehemently denied the particulars of malice and denied ever receiving demand or notice of intention to sue.

In a reply to defence dated 9th December 2011 the plaintiff reaffirmed his averments as stated in the plaint and denied that the defenses offered by the defendants were available to them or at all.

At the hearing of this suit the plaintiff testified on oath as PW1 adopting his filed written statement and told the court that he was the acting Resident Judge in Bungoma. That he was also serving as Land and Environment Judge in Bungoma. He testified that the article was published on 10/7/2011 indicating that he was fraudulently included in the list of persons to be interviewed as a judge; that he did not merit it but that such inclusion was based on other factors and that the said short listing was controversial.

According to the plaintiff, he applied for consideration for the post of Judge of the High Court to the Judicial Service Commission (JSC) as was required on 20th April 2011 (application letter produced an exhibit as contained in the bundle of documents filed in court on 29th September, 2011 produced as a whole) and that his application was received on the same day and acknowledged by the Acting Registrar JSC as shown by the letter dated 30/5/2011 (acknowledgment letter produced in evidence as exhibit). The plaintiff testified that the JSC also corrected the impression that had been created that his non short listing was controversial. That the error of omission of his name from those who had applied and those who had been shortlisted was sufficiently explained by the JSC's letter dated 30/5/2011 (produced as exhibit) written to him and that he was invited for the interview on 29/7/2011 (letter dated 15th June 2011 inviting him for interview produced as exhibit) for the post of Judge of the High Court, but later rescheduled for 10th August, 2011. He asserted that the allegations in the article published by the 2nd defendant in the 1st defendant's Sunday Nation Newspaper on 10th July, 2011 that he never applied for the job was false and

without any foundation.

The plaintiff testified that prior to the publication of the impugned article he had an interview with the 1st defendant's publisher from their Nyeri Bureau Mr Ken Nzioka who asked the plaintiff if the plaintiff had applied for a post of Judge of the High Court because his name was not in the initial list. That the plaintiff did explain to the said Bureau Chief that he had actually applied for the job of Judge and that JSC had written to him clarifying the position regarding the omission. The plaintiff stated that on 6th July 2011 in another paid up advertisement in the Daily Nation (produced as an exhibit), the Chief Justice clarified that the plaintiff's name had been inadvertently left out from the shortlist on 27/5/2011 and that he was candidate No. 115.

The plaintiff testified that Mr Gateere did not influence the plaintiff's inclusion into the list of candidates who qualified for the position advertised. The plaintiff stated that the article by the defendants was defamatory since the publishers chose to ignore the clarification by the Chief Justice which was published by the same Nation Newspapers before the offensive publication was carried oblivious of the clarification by the Chief Justice and the plaintiff's own interview with the Nyeri Bureau Chief for the 1st Defendant.

The plaintiff also stated that the publication was malicious as it covered three quarters of a page which stated that the information concerning him came from an anonymous email. He urged the court to take judicial Notice of an article by Peter Mwaura published on Friday March 6 in the Daily Nation as an opinion on page 13 explaining why publishers should not rely on anonymous emails.

The plaintiff explained that at the material time he was a practicing advocate in Mount Kenya Region. He referred to and produced as an exhibit a letter dated 22/7/2011 written by Nyeri Bar Association. In that letter the Nyeri Bar Association through their Chairman Mr Mogambi refuted claims that the Nyeri Bar Association was responsible for any letter of complaint to the Registrar High Court over Mr Mukunya's belated inclusion in the list of shortlisted candidates. They explained that they were not the authors of the so called "**anonymous email**" referred to by the defendants in their impugned publication as being the source of their information. The Nyeri Bar Association also denied ever having been contacted by the media or having complained over judicial appointments.

The plaintiff also told the court that Mr Gateere was never known to him. That he first met Mr Gateere at the interview and the plaintiff later learned that the said Mr Gateere comes from Nyeri. The plaintiff also stated that the publication was false since he was interviewed in public not in camera as stated in the article. He further stated that the article appeared on its Sunday edition on 10/7/2011 as a feature (newspaper article for July 10 2011 produced as an exhibit). He claimed that the paper had full capacity of readership on that day (Sunday) as most people read newspapers on Sunday. Further, that to attract more attention to the issue, the defendants also put a photo of the Chief Justice in the offensive article. The plaintiff further stated that the article was intended to spoil his integrity and to show the world that he was not a fit and proper person to be a Judge of the High Court and that he did not merit being shortlisted for the job but that he got shortlisted through canvassing using Mr Gateere his alleged close friend, which the plaintiff denied.

The plaintiff told the court that at the time of the publication, he was an advocate of 33 years standing and in November 2011, he had been appointed Judge of Interim Independent Constitutional Dispute Resolution Court (IICDRC) which was wound up in 2011. He also testified that he was a married man with 5 children and the youngest child was 23years old attending Kenya school of law. That his wife and children all read the article in the Newspaper and they were all disturbed by the publication. That one of his daughters Lillian who is married in Australia is the one who woke the plaintiff up on Sunday morning after reading the article on the internet. That as a practicing advocate, clients shunned him and some of them took away their files. Further, that at the material time the plaintiff was the Chancellor of the Diocese of Mount Kenya West Anglican Church and the article embarrassed him since he held a responsible position in the Church affairs and in the community. The plaintiff claimed that the offensive article appears on Google to date and that whenever one does a search on his name, the article pops up.

The plaintiff urged the court to find that he was defamed and make an order that the defendant offers an

apology in an appropriate and equal space. He also sought damages for defamation, aggravated damages as the defamation was still continuing, correction of the message on Google, costs of the suit and interest.

In cross examination by **Miss Serem counsel for the defendants**, the plaintiff told the court that he also applied for the position of Supreme Court Judge but that he was not shortlisted. He stated that the Chief Justice explained the omission but the Nation Newspaper did not correct the defamatory publication. Further, that the correction made by the Chief Justice on 6/7/2011 was sufficient as he was only explaining the omission. The plaintiff denied that it was the 1st defendant correcting their false defamatory publication since the publication by the CJ was a paid up advertisement. He stated that he was only approached by the 1st defendant's head of Bureau in Nyeri to clarify on the omission. He also told the court that he believed he was going to be a judge again after he retired from the IICDRC in 2011 and went back to legal practice but that he was not attending court matters.

The plaintiff maintained that he had a good track record. He stated that he did not get the job of High Court Judge but when he applied later he succeeded. The plaintiff stated that the publication demeaned him and he lost many cases through notices of change of advocates. He stated that he was concerned and saw malice in the publication since it came after the clarifications had been made.

Mr Mwangi Kariuki an advocate practicing in Nanyuki testified as PW2 in support of the plaintiff's case. He told the court that he had recorded a statement on 2/10/2013 and he wished to adopt his statement as his evidence in chief. In his adopted statement, the witness stated that he had practiced law for 34 years and was based in Nanyuki Town practicing under the firm name and style of Mwangi Kariuki and Company Advocates. That he had known the plaintiff since 1975 at the University of Nairobi. He stated that the plaintiff was his close professional colleague and that he knew the plaintiff's family.

Mr Kariuki stated that Mr Mukunya had had an industrious legal practice commanding great respect and admiration by his professional peers in Nyeri and the wider Mt Kenya Region as well as across the country. That he knew the plaintiff as a dedicated family man and a Christian who served as a Chancellor of the Anglican Church of Kenya.

Mr Mwangi testified that on the morning of 10/7/2011 he read the offensive article concerning the plaintiff which occupied nearly three quarters of a page and it being a Sunday and with little to do, he read the article slowly and keenly. He stated that the article made very strong allegations against the character of the plaintiff alleging that the plaintiff fraudulently and or irregularly had his name included in the shortlisted candidates for the position of judge of the High Court without having applied for the said position, and that the plaintiff had used his government connections to ensure that he gets the job.

PW2 further testified that he was utterly shocked after reading the article which totally painted a different plaintiff from the one he had known for ages. That later on the same day he called Mr Mukunya and expressed to him his disappointment on the allegations and that Mr Mukunya explained that he had applied for the job and that he had even done an interview with the 1st defendant's reporter prior to the publication of the article. He stated that Mr Mukunya even referred him to the paid up advertisement by the Chief Justice and chair of the JSC on 6/7/2011 stating that the omission of the plaintiff's name from the shortlist was by an inadvertent error. The witness stated that it was difficult for him to understand the justifications that the plaintiff was trying to make as the witness' mind had been poisoned by the publication such that it was not easy to believe him anymore, as the article presented a corrupt and dishonest plaintiff who had made all attempts to join the bench as High Court Judge otherwise than by merit. That the plaintiff and PW2 being members of Nanyuki Golf Club, after the publication, PW2 overheard some members who knew the plaintiff discussing the article and the plaintiff's character in a terribly bad light.

In cross examination by **Miss Serem counsel for the defendants**, PW2 confirmed that he had known the plaintiff since 1975 and that they had always been friends. He stated that he knew the plaintiff as an upright person until the publication of the offensive article about the plaintiff. He stated that his relationship with the plaintiff who is now a Judge changed after the plaintiff was portrayed as a person

who tried to corrupt his way into the judiciary.

In re-examination by **Mr Thangei**, PW2 testified that he imagined that the plaintiff would do anything to get to the bench.

Mr Charles Wanjohi Wathuku testified for the plaintiff as PW3 and said that he was a businessman in Nyeri and Nairobi. He confirmed that he had recorded and signed a witness statement on 2/10/2013 which was adopted as his evidence in chief.

In his adopted statement, Mr Wathuku stated that he knew Mr Mukunya very well, after he was introduced to the witness by Mr Mumo Matemu, a lawyer too then and from thence PW3 retained the plaintiff as his family lawyer. PW3 stated that the plaintiff had since offered him exemplary legal services in all manner of cases. He stated that in 2010 the plaintiff told PW3 that the plaintiff had been appointed a Judge in some Constitutional Court but assured him that his office in Nyeri was still open and that there was an advocate who would continue rendering services in the witness' matters for which the witness agreed.

According to PW3, he learnt of the offensive article on the morning of 10th July, 2011 when he received a call from a fellow businessman in Nyeri, a Mr Njogu Kang'aru who was also the plaintiff's Landlord informing him about the article in the Sunday Nation concerning the plaintiff. That he bought the Sunday Nation and saw and read the article concerning the plaintiff titled "**Act on this JSC cronyism, lawyers tell Mutunga,**" which article stated that the plaintiff had irregularly had his name added to the list of shortlisted candidates for position of the High Court Judge.

PW3 further stated in his statement that the article stated that the plaintiff had used his political and government connections to have his name added and it named Mr Titus Gateere the then Chairman of Public Service Commission as being behind the inclusion of Mr Mukunya in the list. The witness also stated that he was deeply shocked by those revelations since he had known the plaintiff as a reputable lawyer and he called the plaintiff to find out what the matter was all about and the plaintiff explained that the allegations were false and meant to defame him. Pw3 further informed the court that when he later met Mr Mukunya who explained the correct position, the witness nonetheless had lost faith and trust in the plaintiff following the allegations and that he has never consulted the plaintiff anymore. He stated that he had since retained other advocates to take over his matters from the plaintiff.

In cross examination by Miss Serem, PW3 told the court that the plaintiff was his advocate but he later sacked him and took another Advocate. He stated that he did not trust the plaintiff after reading the story published by the defendants. According to PW3 the plaintiff's character was in question.

In re-examination by Mr Thangei, PW3 stated that the publication made him change his mind over the plaintiff's honesty. He stated that he keeps the plaintiff as a friend not a professional consultant because he thought the plaintiff was dishonest.

At the close of the plaintiff's case, the defense did not call any witness. Counsels for both parties agreed to file and exchange written submissions.

The plaintiff filed his submissions on 27th March, 2015 attaching several authorities for the court's consideration whereas the defendants' counsel filed their written submissions on 20th April, 2015 challenging the position taken by the plaintiff on the matter.

The plaintiff's counsel submitted that the defendant did not controvert the plaintiff's evidence and urged the court to adopt his evidence as adduced as the true position. He reiterated that the defendants having admitted publishing the article in question, it was upon them to demonstrate that whatever they wrote and or published was true. The plaintiff maintained that the article was full of falsehoods and that it greatly devastated him with his family who wondered why someone hated him that much. In his view, the article must have poisoned the minds of the interviewing panel because he never got the job of Judge of the High

Court that he had applied for at that time.

The plaintiff submitted that the defense of fair comment is not available to the defendants and must fail because the defendants published falsehoods yet they had the correct facts known to them. In addition, that the defendants did not call any evidence to show that the publication was true. The plaintiff submitted that he had demonstrated by evidence that all the allegations of fact published of and concerning him were wrong and unfounded and that the publication was therefore reckless and malicious. He also submitted that whereas his name was not in the initial shortlist of 114 candidates, the JSC had clarified the issue to the public which cleared any suspicion as to what could have transpired hence the subsequent publications by the defendants after such clarifications were unjustified. The plaintiff relied on **Gatley on Libel and Slander 6th Edition Page 706** where the learned authors stated that:

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

The plaintiff also relied on **HCCC No. 1709 of 1996 J.P Machira v Wangethi Mwangi & Another**, where it was held inter alia that:

“Any evidence which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence i.e. of malice. In the instant case, the plaintiff had supplied the defendant with the true position of the matter before the publication was made. Inevitably therefore, at the time of publication, the defendant knew or is taken to have known that the relationship between the plaintiff and Ms Grace Wahu Njoroge was not an advocate/client relationship and that there was no relationship of such a nature between them.

Further, considering also the post publication conduct of the defendant, the correction was made more than a week after the publication, which was made with the knowledge that it was false. I have no hesitation in finding the publication being malicious.”

The plaintiff also relied on **Civil Appeal No. 9 of 1975 Kitto v Chadwick & Another (1975) EA 141**, where the Court of Appeal for Eastern Africa held inter alia:

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

The plaintiff also relied on **HCCC No. 102 of 2000 Daniel Musinga v Nation Newspapers Limited** where it was stated that ***“failure to inquire into the true facts... is a fact from which inference of malice may properly be drawn.*** **HCCC no 1896 of 1999 Fidelis Mueke Ngulli T/A Ngulli & Company Advocates v Nation Newspaper & Printers Limited** and **CA 179/1997 J.P Machira v Wangethi Mwangi & Nation Newspapers** were also cited to propose that malice can be inferred from a deliberate or reckless or even negligent ignoring of facts.

On quantum the plaintiff submitted that an action in defamation is essentially an action to compensate a person for the harm done to his reputation and no apology or retraction or withdrawal can ever guarantee to completely undo the harm done by the defamatory publication. The plaintiff submitted that the law presumes that the plaintiff has suffered harm in these actions usually described as being actionable and the sum to be awarded are said to be at large.

The plaintiff further submitted that in awarding damages the court will normally consider the circumstances of each case. The court will consider the plaintiff’s position and standing in the society *vis-a-vis* what has been published of him, the mode and extent of publication, apology if offered and what time in the proceedings and also the conduct of the defendant from the time libel was published up to when judgment was entered.

The plaintiff submitted that at the time of the publication the plaintiff was an advocate of the High Court of Kenya of 33 years standing and a retired Judge of the Interim Independent Constitutional Dispute Resolution Court. He was also the Chancellor of the Anglican Church Central Kenya Region. That the impugned article was run on a Sunday and on a three quarter page with a photo of the Chief Justice Dr. Willy Mutunga alongside to catch the reader's attention and that the defendants referred to the plaintiff's name 13 times in the said publication.

The plaintiff further contended that to date the offending article is still appearing on Google against the plaintiff's name, which continues to injure his reputation. The plaintiff proposed that an award of Kshs 25,000,000 would be fair and reasonable compensation for the injury caused to his reputation.

The plaintiff further proposed Kshs 5,000,000 in aggravated damages for the additional injury caused by the defendant and Kshs 2,000,000 in lieu of the apology sought in the plaint. The plaintiff was guided by the decision in **HCCC No. 1709 of 1996 J.P Machira v Wangethi Mwangi & Another** where the court awarded Kshs 8 million general damages and Kshs 2 Million aggravated damages to the plaintiff who was a senior Advocate. On appeal, the above award was upheld In **CA 148/2003 Wangethi Mwangi & another v J.P. Machira**. It was further submitted that in 2005 in **HCCC No. 102 of 2000 Daniel Musunga v Nation Newspapers Limited** the court awarded the plaintiff who was a senior Advocate Kshs 10 Million general damages for defamation; In **HCCC No 5 of 2000 Charles Kariuki T/A Kariuki & Co Advocates v The Nation Newspapers Ltd** the plaintiff who was a senior advocate in Meru was awarded 20 Million for defamation of character in 2003. In **HCCC No 1230 of 2004, Francis ole Kaparo v The Standard Limited** the court awarded Kshs 7 Million to the former Speaker of the National Assembly.

The defendants submitted that there is nothing defamatory with regard to the published article reasons being that the said article was on point with regard to the belated inclusion of the plaintiff's name in the shortlist for top judicial position. The defendants argued that if indeed the mistake or omission of the plaintiff's name from the shortlist was honest why then did it take too long to rectify the mistake, and that it was that belated inclusion of his name that the article was questioning together with the delayed explanation for the omission. The defendants submitted that it was a fact that only the plaintiff's name was not included in the list of applicants and that although he did not get the shortlisted job he eventually got his current job. The defendants contended that it is not therefore true that the article complained of was set to poison the minds of the interviewers or that the same made him miss out. They argued that if that were the case the plaintiff would not have been appointed to the current position.

The defendants also submitted that the court should disregard the evidence of PW2 and PW3. They stated that the two witnesses testified to the effect that the article made them change their mind about the plaintiff's character and the friendship they enjoyed for many years, yet the two witnesses travelled all the way from Nyeri to Nairobi to testify in support of the plaintiff's case, which, according to the defendants is not the behavior of someone who claim the article complained of strained the relationship and after the article wanted nothing to do with the plaintiff.

The defendants submitted that the article was published as a matter of fact regarding the last minute inclusion of the plaintiffs name into the shortlist of a top judicial position which the plaintiff admitted. The defendants denied that the article stated that the plaintiff had anything to do with the belated inclusion of his name into the shortlist.

The defendant also submitted that the article did not give prominence to the plaintiff nor does the heading mention him. The defendant submitted that the plaintiff had not shown how his character and reputation was injured. The defendant further contended that the defense of fair comment only applies to facts that are true. They stated that the article published was true that there was a belated addition of the plaintiff's name to the shortlist of top position in the Judiciary.

On the appropriate damages to be awarded, the defendants submitted that the court should take into account whether the plaintiff had proved the alleged damage to his prospect. The defendants also submitted that quantum would also depend on the evidence on record to prove that as a result of the

defamation the plaintiff suffered loss. On this point the defendant relied on the decision in **Eriab Wavaman vs Sseezi Cheeye Kampala HCC No. 402 of 1992** quoted by **Odunga J in NAIROBI HCCC 41/2003-Rossely Olivia Adero & another V Devski Steel Mills Limited & another**.

The defendants also urged the court to note that the award of damages should not enrich a party but restore the said party to the position he was before the alleged injury. The defendants proposed an award of Kshs 1,000,000 as general damages and a further 1,000,000 as aggravated damages. The defendant relied on the case of **Sankale Ole Kantai v Nyamodi Ochieng Nyamodi & Another (2012) eKLR** where the court awarded the plaintiff, an advocate of 20 years standing in the profession Kshs 800, 000 as damages. The defendants argued that the amounts per head as proposed by the plaintiff were excessive taking into account all circumstances.

Having read, reproduced and considered the pleadings filed by all the parties hereto in support of their respective positions and having considered the evidence that was adduced by the plaintiff during the trial including his answers in cross examination and documentary evidence produced by the plaintiff, which included the article complained of as published in the Sunday Nation on 10TH July, 2011, whose publication is not denied by the defendants herein, the written submissions, and having considered all the circumstances of this case, I now proceed to identify the main issues for determination.

The plaintiff's advocates framed 5 issues for determination which they filed on 4th February, 2014 namely:

1. ***Whether the article published by the defendants on 10th July 2011 of and concerning the plaintiff was false, reckless and malicious.***
2. ***Whether the words in the said article, in their natural and ordinary meaning were defamatory of the plaintiff's reputation and professional standing.***
3. ***Whether the defence of fair comment is available to the defendants.***
4. ***Whether the plaintiff is entitled to aggravated and general damages for defamation.***
5. ***Who meets the costs of the suit?***

The defendants did not file or frame any issues for determination even in their submissions.

Adopting the issues framed and filed by the plaintiff, I now proceed to determine them in line with the fundamentals of defamation.

For the tort of defamation by way of libel as is in this case to succeed the following elements must be proved by the claimant:

1. The libel must be published and published by the defendant
2. The published words must refer to the claimant i.e. identify him
3. The statement as published must be false and defamatory of the plaintiff
4. It must be published i.e. communicated to at least one person other than the claimant. See **Winfield and Jolowicz on Tort: 16th Edition 2002 pp 159 and 162.**
5. That the publication was malicious.

In **Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR** the Court of Appeal observed that:

“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. 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 defamatory statement or utterance was published by the defendants. 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.”

Applying these principles to the facts of the present case in resolving the issues as framed by the plaintiff, it is the plaintiff's contention that the article was defamatory, false, reckless and malicious. It is admitted by the defendants that the words complained of were published by them. However, the defendants have disputed the allegation and contention by the plaintiff that the published article was about the plaintiff and or that the published words were false and defamatory in character. In the defendants' view, the words complained of were incapable of bearing the meaning that the publication allegedly bore, according to the plaintiff.

I commence from the position that the court in deciding defamation cases must balance the provisions of Articles 33, 34 and 35 of the Constitution, dealing with freedoms of expression and media and the individual's right to access information on the one hand and Article 28 in respect of the inherent dignity of every person which dignity must be respected and protected. On the right to access information and the freedom of expression, **Lord Denning MR stated in Fraser v Evans & others (1969) All ER 6:**

“There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be whistled away.”

Lord Coleridge, CJ in Bernard & another v Perriman (1891-4) ALL E.R 965 had previously stated that:

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

Speaking about a person's right to protection of reputation and character, William Shakespeare said:

“Lago: Good name in a man or woman, dear my Lord, is the immediate jewel of their souls. Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him; And makes me poor indeed.” (Othello Act 3 Scene 3, 155-161).

Freedom of the media is guaranteed by Article 34 of the Constitution as follows:

“Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).”

Under Article 33(2) specified above, as well as Article 33(3) of the Constitution, every person has the right to freedom of expression ***which does not extend to***, among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred that- constitutes ethnic incitement, ***vilification of others*** or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4) and that ***in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.***

For the plaintiff who was a chancellor of the Mt Kenya West Anglican Church and a Christian who swore by the Holy Bible, the Holy Bible in Proverbs 22 verse 1 instructs that ***“a good name is more than great riches; to be esteemed is better than silver or gold.”***

It is not in dispute that the impugned article was published by the defendants and that the issue under review was the belated inclusion of the plaintiff's name in a list of candidates shortlisted for the post of Judge of the High Court, which issue the 1st defendant had picked up and reported in their earlier edition

of the Tuesday June 28, 2011 in an article titled “ **Ex Judge added to list of High Court applicants,**” which publication the 1st defendant had done after interviewing the plaintiff on phone and who had referred the 1st defendant’s reporter to the JSC to explain as they had written to him.

The said publication of 28th June 2011 also pointed out that the 1st defendant had spoken to Mr Titus Gateere who chaired the selection Committee at the JSC and who had informed the reporter that the plaintiff’s name had been inadvertently omitted adding that the Commission had written to him over the matter. The said publication further confirms that the Nation reporter had spoken to the Chairman of Law Society of Kenya Mr Kenneth Akide who had referred the reporter to the JSC.

It is also not in dispute that on 6th July 2011 in the Daily Nation page 23, the Judicial Service Commission did, vide a paid up advertisement headed “**PUBLIC ANNOUNCEMENT**” covering half page, provided information on recruitment of Chief Registrar and Deputy Chief Registrar of the Judiciary and beneath, under item No. 2, on “**RECRUITMENT OF HIGH COURT JUDGES**” the advertisement clarified that:

“On 27th May, 2011 names of applicants and shortlisted candidates for the advertised positions of High Court Judges were published in the daily newspapers. The name of Hon Justice (Rtd) Mukunya Samuel Ndung’u was inadvertently left out in the list. The error was corrected and his name appeared as candidate No. 115 in the advertisement dated 17th June, 2011.”

Hon. Justice Dr. Willy M. Mutunga

CHAIRMAN

JUDICIAL SERVICE COMMISSION”

Then come 10th July 2011, 4 days after the above public announcement in the 1st defendant’s Daily Nation on 6th July, 2011 clarifying the position on the belated inclusion of the plaintiff’s name into the shortlist, the defendants herein published the impugned article.

It is not in dispute that the Nation Newspaper enjoys wide readership and national as well as international circulation via the internet hence an online version can be accessed and read by persons in the Diaspora and that is why the plaintiff’s daughter living in Australia which is ahead of Kenya by 7 hours was able to read the article in real time and call his father the plaintiff to inquire on what was up.

The plaintiff also called two witnesses, his fellow legal practitioner and his former client who read the article that morning and called the plaintiff who had to explain all that it was his version. To that extent, I find that the act of publication of the impugned article by the defendants has been sufficiently proved.

As to whether the article referred to the plaintiff, can be gleaned from the overt repeated use of the plaintiff’s name “**Samuel Ndung’u Mukunya**” and or “**Mr Mukunya.**” The article mentions him about 15 times. On other occasions the article uses the title ‘**former Judge.**’ The defendants have not denied publishing the article referring to the plaintiff hence that aspect is proved without controversy.

But were the published words defamatory of the plaintiff? As I have stated above, the impugned article was published 4 days after the Chief Justice had, in a paid up public announcement in the 1st Defendant’s own Daily Nation on 6th July 2011, clarified the issue of omission of the plaintiff’s name from the shortlisted candidates. The publication also came after the initial publication of 28th June, 2011 wherein the plaintiff had been interviewed over the same issue by the 1st defendant’s reporter in the 1st defendant’s Nyeri bureau and that the plaintiff had explained that JSC had written to him explaining the inadvertent error.

The impugned publication also came after the 1st defendant’s reporter had interviewed Mr Gateere the

chairman of the Selection Committee of JSC and Mr Kenneth Akide the Law Society of Kenya Chairman over the same subject matter, all of whom had given their answers on the issue and which answers were published on 28th June, 2011.

The impugned article claims that the Chief Justice of the Judiciary was under pressure from lawyers over the belated inclusion of the plaintiff in the list of applicants as well as in the shortlist. According to the said article, the lawyers alleged that the belated inclusion was a sign of cronyism in the Judicial Service Commission. The article went ahead to state that the lawyers have singled out the chairman of Public Service Commission, Mr Titus Gateere as being behind the inclusion of the plaintiff.

It is alleged in the article that the said Mr Gateere and the plaintiff are close friends and both boast of high level connections in the Government up to State House. The article also stated that the lawyers were apprehensive that the incident was an indication that there were candidates who had already been assured of appointment to the office of the High Court Judge beforehand.

The article further alleged that lawyers were of the view that there was foul play in the way the name of Mr Mukunya was included and they also noted that interview dates for some candidates were changed, when they ought not to have been altered. The article further alleged that Mr Mukunya was interviewed in camera. At the top of the impugned article, the writer states:

“COMPLAINT/ Email says the era of entitlement to public positions and past impunity must not be allowed to go on.” The above words appear before the main bold heading of ***“Act on this JSC cronyism, lawyers tell Mutunga.”*** Beneath these words are: ***CJ put to task over belated inclusion of a former Judge in the shortlist of candidates for top judicial positions.”***

The article then goes on from line 4 of the whole which I have reproduced in this judgment to state that ***“Chief Justice Willy Mutunga has come under pressure from lawyers over the belated inclusion of former Judge Mukunya Samuel Ndung’u in the shortlist of candidates for the positions of Judges of the High Court.”***

As one reads the article further, it states: ***“they now want Mr Justice Mutunga to take over the matter and ensure that he “makes things right” regarding the “controversial” short listing of Mr Mukunya. They allege that “the former judge and Mr Gateere are close friends and that they both boast of high-level connections in the government.....” “Mr Mukunya is well connected and has relations with the political class, right up to State House.”“He does not shy to remind young advocates who reside and practice in Mt Kenya region of this fact,” the lawyers wrote in the email seen by the Sunday Nation.” “We hope that this matter regarding Mr Mukunya is not an indication that there are candidates who have already been assured of appointment to the office of the High Court beforehand.”(Parentheses for emphasis).***

It is uncontroverted testimony of the plaintiff that he applied for the position of the High Court Judge like all other applicants, and that his name did not appear in the list of applicants and shortlisted candidates initially published, but that his name was included later and the omission thereof and later inclusion explained by JSC to have been due to an inadvertent error following a mix up of his application with the application he had made for position of Judge of the Supreme Court. The plaintiff produced a letter dated 30th May, 2011 from the Ag Registrar of JSC MS Winfridah B. Mokaya and another letter dated the same day inviting him for an interview on 29th July 2011. The plaintiff also produced a letter dated 15th June 2011 revising interview dates from 29th July to 10th August 2011.

Indeed, the article also refers to the Judicial Service Commission and the Chief Justice Willy Mutunga as being under pressure from lawyers over the JSC and the CJ belatedly including the name of the plaintiff in the shortlisted candidates. The subject matter is the belated inclusion of the plaintiff in the shortlist of candidates for top judicial position.

However, any one reading the article would know that the story is referring to the plaintiff herein and his role with the help of his ***“close friend”*** Mr Gateere the chairman of the selection panel of JSC as well as

the plaintiff's "**close connections and relations with government and the political class up to State House**" in ensuring that his name was included in the shortlisted candidates, notwithstanding the fact that he neither applied for the job nor met the minimum requirements for consideration for the top post of Judge of the High Court, and that his name not having appeared among the 234 applicants on 27th May, 2011, then he did not apply for the said job. The article has centered writings extracted from the full story to highlight the above position that:

"234

The number of applicants for the position of Judge of the High Court published on May 27 in local dailies

114

The number of candidates who were shortlisted for interview. Mr Mukunya's name did not appear on this list.

In this court's view, the words published of and concerning the plaintiff, used in their natural and ordinary meaning by their tenor portrayed the plaintiff as a person who could not have secured the position of Judge of the High Court on merit or without canvassing for help from his high level government and political connections including Mr Gateere who was the chair of the JSC Selection Panel, as explained in the pleadings.

From the testimonies of the two witnesses who supported the plaintiff's case, I have no doubt in my mind that the said words in the article separately and taken as a whole implied that the plaintiff is a corrupt person who thrives on untrustworthiness since he had canvassed for his name to be included in the list of shortlisted candidates even when he had not applied for the post of Judge of the High Court. If proven against the plaintiff, that kind of behavior would not only render the plaintiff as an unethical but an unprofessional and unscrupulous person and therefore not fit and proper person for the position of Judge.

This is compounded by the claim that in the anonymous email send to the Registrar of the High Court and the Judiciary, the explanation by the Chief Justice as Chair of JSC that ***the "controversial inclusion was as a result of an error of omission does not wash."*** In my view, the article **was highly defamatory of the plaintiff and portrayed the plaintiff as a dishonest man who used cronies to have his name included among applicants for post of Judge of the High Court and to be shortlisted for the said top position.**

That evidence was supported by the uncontroverted evidence of PW2 and PW3 who knew the plaintiff very well and who read the article and called him to seek an explanation of what was happening and the plaintiff had to explain the position as rectified by JSC. Taking into consideration the position of the plaintiff in society, as a senior advocate and Church Chancellor who had also successfully served as Judge of the IICDRC, there is no doubt whatsoever that his standing in society was lowered by the defamatory words.

Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. See **Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others [2010] eKLR.**

Those words by the defendants, I find could not amount to fair comment, in the public interest or made on privileged occasion as alleged by the defendants in their statement of defence. I find no justification for the defendants to describe what happened as "**controversial inclusion**" of the plaintiff's name in the shortlist, as this court has not heard any evidence pointing to any controversy in the plaintiff's name being included late in the shortlist. I reiterate that no evidence leave alone credible evidence of the alleged controversy in the short listing of the plaintiff and or the plaintiff having high level connections to government, political class and State House to warrant fair comment on the issue.

The alleged “**controversy**” in the plaintiff’s inclusion in the shortlist and his alleged boasting of “**close connections with high level government official up to State House**” implied corruption and nepotism, which the defendants should have taken the witness stand for the testing of their evidence if any, on those allegations.

Without the defendants giving evidence to prove their allegations of fair comment, their allegations remain allegations emerging from the thicket, far-fetched and unsupported.

Under section 107 of the Evidence Act, Cap 80 Laws of Kenya, the burden of proof lies on he who asserts yes and in this case, the burden of proving that the published article was defamatory lay on the plaintiff.

However, under Section 109 of the Evidence Act, as was held in **JENNIFER NYAMBURA KAMAU VS HUMPHREY MBAKA NANDI CIVIL APPEAL NO. 342 OF 2010, [2013] EKLR** the court stated that:

We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

“However, Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

In this case, the defendant did not adduce any evidence to prove any of the defenses relied on in their pleadings. They however made submissions urging this court to find that those defenses of fair comment, public interest and qualified privilege were available to them. They also suggested that the plaintiff had admitted in cross examination that his inclusion in the shortlist was belated.

However, it is the view of this court that answers in cross examination cannot form a basis of a party’s case. Parties must tender evidence in support of the allegations. This is a principle espoused in the Court of Appeal decision in the case of **JOHN WAINAINA KAGWE VS HUSSEIN DAIRY LTD-MOMBASA CIVIL APPEAL NO 215 OF 2010, per Githinji, Makhandia&Murgor JJA**. I add that neither can submissions on points of fact support a party’s case where no evidence is adduced to prove that fact which is alleged.

Therefore, while this court does appreciate that the defendants are entitled to deny that the publication was false, or defamatory of the plaintiff, the question is, can a reasonable man or woman, a right thinking member of the society generally accept that those words are not defamatory of the plaintiff? I do not think so. On the contrary, a reasonable right thinking member of the society will easily pronounce those statements defamatory of the person of whom the statements are spoken. There is no doubt that those statements as published injured the reputation of the plaintiff herein, lowering him in the estimation of right thinking members of society generally.

The words ridiculed the plaintiff making him shunned or avoided and his evidence and that of his witnesses, which evidence was uncontroverted support that position. Further, the defendants relied on no particulars of facts to establish the truth of the allegations in the article as analyzed above to entitle the Defendants to the defence of justification of truth. Had they held their horses with the article of 28th June, 2011, I do not think that the plaintiff would have complained since that publication only tended to complain about the omission of his name from the applicants and shortlist and the belated inclusion, with

explanations as to why that had happened.

In my view the plaintiff has established that the publication made on 10th July 2011 is capable of being construed as defamatory in its natural and ordinary meaning or by innuendo.

Was the publication actuated by malice?

The defendants contended that the article simply touched on the judiciary which the CJ heads and that it was made out of a moral duty of the defendants to bring to the attention of the public the “*suspect*” addition of the plaintiff’s name last minute which was admitted by the plaintiff. This court did not receive any evidence of “*suspect addition of the plaintiff’s name last minute.*” As I have stated, the defendant did not tender any evidence to show the steps taken to check the veracity of the information published. The defendants heavily relied on what they described as anonymous email allegedly send to the Registrar High Court and of the Judiciary. If the alleged email was anything to go by, the defendants ought to have availed it to this court for consideration. In my view the publication was therefore an unconfirmed lie which is evidence of malice. I agree with the court holding in **Phineas Nyagah V Gitobu Imanyara (2013) eKLR** where **Odunga J** held that:-

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

I further reiterate that I am unable to agree with defendants that the publication was a fair comment. In **Adams v. Guardian Newspapers [2003] Scot CS 131** Lord Reed stated that:

“In London Artists Ltd v Littler, Edmund Davies L.J. (as he then was) said (at page 395): "It behoves a writer to indicate clearly what portions of his work are fact and what are comment, for, in the words of Fletcher-Moulton L.J. in Hunt v Star Newspaper Co Ltd [1908] 2 K.B.309, 319:'... comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see Andrews v Chapman (1853) 3 C & K 286.'Failure to exhibit clarity in this respect carries its own risks, for, as Fletcher-Moulton L.J went on to say, at page 320:'Any matter,...which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment.’

‘The same point was made more recently by Lord Nicholls of Birkenhead in Reynolds v Times Newspapers Ltd [2001] 2 A.C.127 at page 193: "[T]o be within this defence the comment must be recognizable as comment, as distinct from an imputation of fact. The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made.”

In this case the defendants have not shown the fair comment in the said article and facts on which the fair comment is being made. That aspect, as I have stated, could only be pointed out in evidence not by way of pleadings of fair comment being thrown at the court to discern what fair comment is from the pleadings. Neither could the court discern fair comment from the submissions of counsel for the defendants from the bar. Counsel did not come to court as a witness for the defendants but as a legal counsel. The role of legal counsel in legal proceedings is clear and has never been one of a witness unless he or she is representing oneself in proceedings where they are parties or they are specifically called as witnesses. It was not the case here.

Neither was it a case of the defendants raising any preliminary objection on a point of law in which case then their counsel would submit on those points of law. It is a fundamental principle of ethics and advocacy in Kenya and elsewhere, that counsel must have a proper basis for stating from the bar a fact in any pleadings; and the practice of the courts is based upon an expectation that the said principle is respected. In my view, that principle applies to an averment that a defamatory statement is true, is fair comment, is of public interest, with no less force than it applies to other averments such as qualified privilege. The occasion of qualified privilege is a question of law. However, the court could not decide that question without facts that were never brought before court by the defendant and or proved.

The defendants' submissions also deny that the presence of the CJ's picture in the article gives prominence to the plaintiff and state that the article was written out of a moral duty of the defendants to bring to the attention of the ***public the suspect addition of the plaintiff's name last minute, that the article contains allegations of fact and true in substance and so far as it consist of expression of opinion, they are fair comments made in good faith and with no malice against the plaintiff and that the plaintiff had not shown how his character or reputation had been injured and that the subsequent publications were only a follow up on the main article and did nothing to aggravate the situation.***

In the present case, on a proper understanding of what the defendants had to prove in order to establish their defenses raised in the pleadings, they fell short of the standard required.

I find that the defendants chose to misdescribe the conduct of the plaintiff in the whole matter of selection of judges of the High Court. **In Gatley on Libel and Slander 9th Edition from Para 12.7-12.8**, It was stated, and I agree that misdescription of conduct only leads to the one conclusion detrimental to the person whose conduct is misdescribed and leaves the ordinary reasonable reader no opportunity for judging the character of the conduct condemned anything but a false picture being presented for judgment. In **Digby v Financial News Ltd v Hodgson (1909)1 KB 239 Collins MR** held that “ *if the defendant makes a misstatement of any facts upon which he comments, he at once negatives the possibility of his comments being fair*” and in **Christie v Robertson (189)10 NSWLR** it was held that “ *it is not comment grossly to misrepresent the conduct of a public man and then to hold him up to execration for his alleged wrongdoing*”; while in **Hunt v Star Newspaper(1908)2 KB309** it was held that in order to give room for plea of fair comment the facts must be truly stated. If the facts upon which the commend purports to be made do not exist the foundation of the plea fails. In **Rodger Abisai t/a Abisai &Co Advocates v Waruru Wachira & another CA 12 of 2003** Kisumu it was held that imputation of corruption which is a criminal offence by the defendants deprives them of the defence of fair comment.

It is clear from the evidence on record that the defendants had been given information on what had transpired and the 1st defendant was even paid to publish and explanation to that effect. If it was not satisfied with the explanation given, it should have contacted the JSC or the plaintiff for more particulars.

What I have reproduced in this judgment as published and disseminated by the defendants concerning the plaintiff is in my view not suggestive of a fair and or responsible or objective press. It is suggestive of a misleading, biased, partisan and destructive press. It is a press that does not respect and or protect the dignity of persons. The defendants clearly peddled falsehood and suppressed credible and truthful information it had in order to give the public thirst quenching scandalous falsehoods, that the inclusion of the plaintiff in the shortlist was controversial and suspect and that he boasts of being highly connected to high level government officials and or politicians up to State House and that a member of the JSC selection panel was his close friend and did influence his inclusion in the shortlist of candidates.

This court had the opportunity of seeing and hearing Mr Samuel Ndung'u Mukunya and observing his demeanor in court and meeting him for the first time since I am fairly new on the bench, turning one year on 1st July, 2015. He did not testify as if he was highly placed or connected. He appeared troubled by the

publication. His expression was that of a maligned and scandalized individual.

I find that the language used by the defendants in the publication and their failure to inquire into the facts are a clear manifestation of malice on their part, against the plaintiff and therefore the defenses raised are not available to them.

Whether the plaintiff is entitled to an award of damages and if so, how much? I hold the view that an award of damages is a matter of judicial discretion by the court. The Court of Appeal in **C A M v Royal Media Services Limited Civil Appeal No. 283 of 2005 [2013] eKLR** stated that:

“No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones V Pollard (1997) EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; 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; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff’s reputation past and future.”

25. *In the case of Standard Media V Kagia and Co. Advocates (supra) the court took the view that in situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages. The court also stated that the level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and the publishers of libel and that personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.”*

A successful plaintiff in a defamation action is entitled to recover the general compensatory damages of such sum as will compensate him for the wrong he has suffered. The award must compensate him for damages to his reputation. **Section 16A of the Defamation Act Cap 36 Laws of Kenya** provides for the same it states:

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”

Also the Court of Appeal in the case of **JOHNSON EVAN GICHERU V ANDREW MORTON & ANOTHER [2005] eKLR** stated that in an action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial. In the said case the learned Judges of Appeal quoted with approval the checklist of compensable factors in **Jones v Pollard [1997] eMLR 233, 234** which I apply in this case. The checklist was enumerated as follows:-

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

2. **The subjective effect on the plaintiff’s feelings not only from the prominence itself but from the defendant’s conducts 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.

In applying the principles in this case, I find that the defendants conduct before, during and after the trial of the case is one which will aggravate the damages to be awarded. The defendants after publishing the offensive article, they were approached by the plaintiff who sought to explain the position as clarified by the Chief Justice himself in a paid up advertisement with the 1st defendants' own publication, the Daily Nation.

It was therefore expected that the defendants would have offered an apology or a correction over the apparent incorrect information published of and concerning him which was falsehoods that had been peddled which gave the impression that first, the plaintiff did not apply for the job of Judge of the High Court, he was never shortlisted and that his name was belatedly and *controversially* included in the shortlist with the influence of the plaintiff's alleged acquaintance, Mr Gateere, the Chairman of Public Service Commission of Kenya who, together with the plaintiff are highly placed and connected with government up to State House hence, he was not fit to be a Judge. To date, they maintain that the plaintiff's belated inclusion in the list of applicants and shortlist was controversial and suspect, as shown by their submissions, without availing the source of that email of truth, especially after the Bar Association of Nyeri disowned the so called anonymous email.

The defendants were, in my humble view, by their conduct malicious in publishing the article concerning the plaintiff which exposed him in his personal and professional standing and character to public scandal, ridicule, contempt and embarrassment and continue to cause him loss and damage. The words published by the defendants on 10th July 2011 were effectual in the country and the rest of the world via the internet. The publication was done on a Sunday, a day when indeed most people rest away from the hustles of work and in the comfort of their homes and other places, and to make it more juicy, the defendants featured the photograph of the Chief Justice to attract more attention.

It is common knowledge that at that particular time, the Chief Justice, the judiciary and the reform agenda were matters that attracted attention of every Kenyan. This was because the Judiciary had set the pace by advertising names of persons who had applied for judicial positions, those shortlisted, calling for information on each shortlisted candidate and the entire vetting process was in the glare of the media and the public.

In their ordinary meaning or by imputation and or innuendo, the words contained in the publication portrayed the plaintiff as a person who did not deserve to be appointed as a Judge. Now that he is a Judge of the High Court, anybody reading his name by googling sees the same publication, creating an impression that he did not get his current position on merit, and that his short listing and appointment was controversially influenced by Mr Titus Gateere and other connections in the Government.

The plaintiff was a prominent lawyer/advocate of the High Court of Kenya who had been honoured to serve as a Judge of the Interim Independent Constitutional Dispute Resolution Court. No doubt, his reputation and standing in the society was lowered in the perception of right-thinking people or even ordinary members of the society some of whom he had served as their legal counsel, by the defendant's publication.

In my view therefore the plaintiff's character and profession was cast into doubt by the reckless maligning of his reputation by a fabricated story. If the defendants indeed had published the story after obtaining an email from the Mount Kenya Law Society as alleged in the article, nothing prevented them from producing that email in court to demonstrate good faith and or innocent publication.

Obviously, one's image and reputation is an integral and important part of the dignity of the individual as espoused by Article 10 of the National Values and Principles of Governance as well as Article 28 of the Constitution which provides that "every person has inherent dignity and the right to have that dignity respected and protected."

The defendants had a duty to protect and respect the plaintiff's inherent dignity. They had an opportunity, upon the clarification provided by the plaintiff and the Chief Justice to correct or delete the obviously untrue and misleading information published of and concerning him, which no doubt affected him. See Article 35(2) of the Constitution.

I find that indeed, the publication by the defendants was highly libelous of the plaintiff, untrue in substance and did clearly, on the evidence of the plaintiff and his witnesses injured his reputation.

It is for those reasons that I find that the plaintiff qualifies for an award of damages.

In **John v MGN Limited**[1966] 2 ALL ER 35 P47, cited with approval by the Court of Appeal in **Nation Media Group Ltd & 2 others V John Joseph Kamotho & 3 others**[2010] eKLR it was stated:

" in assessing the appropriate damages for injury to reputation the most important factor is gravity of the Libel: the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the publication is also very relevant: a libel published to millions has greater potential to cause damage than libel published to a handful of people. A successful litigant may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libelous publication took place."

In David Kiprugut & another v Peter Okebe Pango CA 68/2004 the Court of Appeal stated that in assessment of damages, comparable injuries shall, as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases. in Standard Ltd V GN Kagia t/a Kagia &co Advocates , CA 115/2003 the Court of Appeal also stated that there is need in having regard to comparables even in terms of the standing of the libeled person because both the law and the level of awards must of necessity continue to be certain and predictable.

And where the awards appeared excessive, the Court of Appeal in Gicheru v Morton & another [2005] 2 KLR 332 observed that the awards did not have any juridical basis, were manifestly excessive, could be taken as persuasive or as guidelines of the awards to be followed by trial courts; that they departed from fundamental principles of awarding damages in libel cases. Those principles were summarized as:

- 1. the Court has wide latitude in awarding damages in an action for libel.*
- 2. In assessing damages in an action for libel, the court is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time of judgment.*
- 3. An award in case of defamation is not compensation for the plaintiff's damaged reputation but is a vindication to the public and a consolation for a wrong done to him.*
- 4. Where the defendant could have, with due diligence verified the facts the libelous story or where he was simply reckless or negligent, such recklessness or negligence must be taken into account*
- 5. The level of damages should be such as to act as deterrence and to instill a sense of responsibility on the part of the defendant*
- 6. The gravity of the libel and*
- 7. The extent of publication is also a factor to be considered.*

In this case, the plaintiff testified that the publication was first brought to his attention by his daughter

living in Australia who had read it online. Australia is ahead of Kenya in time margins by 7 hours. Many of his friends and associates, including PW1, clients like PW3 and others as well as his family members who comprise of majority lawyers like him read the article and called him. Some of his clients like PW2 shunned him by changing instructions to other advocates to represent him in a matter where the plaintiff was his counsel.

In my view, the publication which was on a Sunday and a feature at that reached many people. I have also not seen any amends by the defendants by way of an apology. The defendants in their defence plead truth, justification and public interest in their publication of the story. But they did not make any attempts to lay a basis for those defenses by way of evidence.

The follow up publication or repeat publication added insult to injury already caused to the plaintiff's character, credit and reputation as it was prominently made by the defendants even after the Chief Justice had purchased in the 1st Defendant's own Newspaper, the Daily Nation, space to clarify the issue. This was also after the plaintiff had personally explained to the 2nd defendant that he had applied for the job and the Judicial Service Commission had written to him explaining that his name had been inadvertently left out of the shortlist.

In the absence of any rebuttal of the plaintiff's evidence, which I find was credible, I find the defendants jointly culpable and liable for defaming the plaintiff, which defamation was highly laced up with malice.

In determining how much damages I should award the plaintiff, I am alive to the principle that the sums should be fairly compensatory in the light of the nature of the injury to reputation and that a restrained hand in the award of damages is desirable since the court must maintain stable bearing. The award should also appear realistic in all the circumstances.

In **Broom v Cassel & Co [1972] A.C 1027** cited by the Court of Appeal with approval in **Nation Group Media Ltd and 2 others v Joseph John Kamotho and 3 others (supra)** the House of Lords stated that:

“ in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges. Also cited in the above Court of Appeal decision was Windeyer J in Uren v John Fairfax & sons PTY Ltd 117 C.L.R 115, 150 that :

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

The following are awards by the High Court and Court of Appeal in similar cases of defamation concerning important personalities in Kenya:

On 6th May, 2005; Khaminwa, J in Mombasa **HCCC No. 102 of 2000 DANIEL MUSINGA T/A MUSINGA & CO. ADVOCATES**, the Judge made an award to the then advocate and now a Puisne Judge for a published libelous statement in a local daily, of KShs. 10,000,000.00.

In **JOHNSON EVAN GICHERU V ANDREW MORTON & ANOTHER (Supra)** the Court of Appeal awarded the appellant, Judge of the Court of Appeal a composite award of KShs.6, 000,000.00.

In 2008 **Khamoni J in Amrital Bhagwanji Shah Vs Standard Limited & another Civil Case 1073 of**

2004 awarded the plaintiff, who was a retired Court of Appeal Judge sum of Kshs.6,000,000/=general damages plusKshs.1,000,000/= exemplary damages.

In **Nation Media Group Ltd & 2 others v John Joseph Kamotho and 3 other [2010] eKLR** the Court of Appeal upheld and award of Kshs 6,000,000 for general damages and Kshs 1,000,000 aggravated damages made by the High Court Ojwang J.B J on 1st July, 2005 in favour of JJ Kamotho the 1st respondent being a cabinet Minister, a prominent politician with reputation.

In **Kalya and another v Standard Limited(2002) 2 KLR** Tunya J awarded the 1st plaintiff who was a prominent advocate in Eldoret general damages Kshs 9,000,000.00, aggravated damages Kshs 2,000,000.00 and damages in lieu of apology Kshs 300,000.00.

In this case, the person of the plaintiff was at the time of the impugned publication an advocate of the High Court of Kenya who had just retired from the IICDRC in 2011. He was also aspiring to become not only a Judge of the High Court, but also to sit on the Highest Court of the land, the Supreme Court. He was no doubt a prominent advocate and one with repute. He testified and called two independent witnesses, one, a fellow practicing advocate from Mt Kenya region and Club Member and the second witness, a businessman and former client of the plaintiff. The two witnesses testified as to how they considered reviewing any future dealings with the plaintiff upon reading the publication.

The second witness withdrew his instructions in a matter that the plaintiff was handling because he could not trust his advocate with his case. The 1st witness spoke of what transpired at the Club where the plaintiff was a member. There is no doubt, therefore, that the plaintiff did suffer injury to his good reputation among his peers as well as his clients and being a former Judge of the IICDRC and Chancellor of Mt Kenya West Anglican Church, this court finds that the plaintiff was humiliated by the false publications since the correct facts had been communicated to the defendants prior to the impugned publication.

Despite those facts being put right through a paid up advertisement by the Chief Justice and the plaintiff being interviewed by the 1st defendant's Bureau Chief based in Nyeri, the defendants went ahead to publish the article rubbishing the explanation by the Chief Justice in a paid up advertisement in the 1st defendants' own Daily Nation and the explanation given by Mr Gateere as being belated. ***The impugned publication had a subheading "CJ put to task over belated inclusion of a former judge in the short list of candidates for top judicial position."***

In view of the above circumstances, if find that the publication was done recklessly without regard to the torturous or violent nature of their actions to the character and reputation of the plaintiff. To date, the defendants have not told the court as to who the person is that put the Chief Justice to task over the alleged *belated "controversial or suspect"* inclusion of a former judge in the short list of candidates for top judicial position, especially after the Mt Kenya Law Society dissociated themselves from the alleged anonymous email that was even never brought to the view of the court.

On the defendant's conduct after the impugned publication, it should be noted that on 28th July 2011, the 1st defendant published a letter to the editor written by Nyeri Bar Association wherein the Bar Association vehemently denied ever authoring or being part of the so called "**concerned Legal Practitioners, Mt Kenya Region**" who allegedly send to the defendants an alleged anonymous email. The said Nyeri Bar Association denied ever complaining or even meeting to discuss the matter relating to Mr Mukunya or in relation to the ongoing judicial appointments as alleged by the publication. They also denied being contacted by the media. The letter was signed by Mr R.P Mogambi Advocate and Chairman of Nyeri Bar Association. However, on Thursday 11th August, 2011, the defendants on the page 8 of the Daily Nation on National News again ran an article titled in Bold:

"Candidate for Judge quizzed in Camera." "Lawyers had raised queries' after Mukunya's name was omitted from the shortlist."

By Aggrey Mutambo

@mutambo@ke.nationmedia.com

The article reads:

Interviews for High Court Judges ended yesterday with the vetting of five candidates.

One of the candidates, Justice (rtd) Samuel Mukunya, was interviewed in camera but no reasons were given by the judicial Service Commission.

The Commission had earlier raised eyebrows among lawyers when it belatedly included his name among the shortlisted candidates for interview.

In an email to the Commission, the lawyers mainly from the Mt Kenya region had accused it of cronyism, arguing that his name had not even appeared on the initial list of 234 candidates who had applied for the posts. But the Commission, through the chair of the preliminary selection Committee, Mr Titus Gateere, had explained that the omission was “inadvertent.”

Justice (rtd) Mukunya had also applied to be a Supreme Court Judge but he was not shortlisted. The lawyers had asked the Commission why it took so long to issue a list of rescheduled interviews, which increased the number of candidates from 114 to 115 after the retired judge, was listed.

Justice (rtd) Mukunya sat on the bench of the Interim Independent Constitutional Dispute Resolution Court, which made a landmark ruling that allowed prisoners to vote in last year’s constitutional referendum in August.

.....”

Beside that publication is the photograph of the current Chief Registrar of the Judiciary, captioned: “*Ms Anne Amadi before the Judiciary (sic) Service Commission in Nairobi Yesterday,*” appearing quite distressed.

The above caption, according to the plaintiff, came after it had been made clear to the defendants by the Nyeri Bar Association that they were not aware of any such email to the Commission. Mr Mukunya also stated that he was interviewed overtly and not ***in camera*** as alleged in the article above. The said article continued to refer to the email by Nyeri Bar Association as if the defendants had not published any denial by the said Nyeri Bar Association on 28th July, 2011.

That consistent subsequent publication of the same issue instead of an apology no doubt point to malice in itself is a callous, inexcusable conduct of the defendants particularly with regard to falsehoods on the allegation that the source of information was an anonymous email from “concerned lawyers from the Mt Kenya region” since the latter publication of 28th July 2011 never mentioned that the said lawyers had disowned the anonymous email.

This court takes into account that kind of conduct of the defendants in deciding whether to award aggravated damages. In the latter publication, the 1st defendant was justifying its earlier publication that is impugned herein. There is no mention in the latter publication that Nyeri Bar Association had denied any links to the alleged email. The publication also did not say that the email was anonymous. This time round they were emphatic that ***“in an email to the Commission.....”*** Not ***“in an anonymous email send to the Registrar of the High Court and to the Judiciary”*** as earlier published on 10th July, 2011.

In Adam v Guardian Newspaper Ltd (supra) Lord Reed referring to Lord Devlin in Lewis v Daily Telegraph Ltd [1964] A.C 234 P 283-284 stated:

“I agree, of course, that you cannot escape liability for defamation by putting the libel behind a prefix such as “I have been told that ...” or “it is rumoured that...”, and then asserting that it was true that you had been told or that it was in fact being rumoured. You have, as Horridge J said, in a passage that was quoted with approval by Greer L.J. in Cookson v Harewood [1932]2KB.478n, 485n, “to prove that the subject matter of the rumour was true.”

Two letters addressed to the defendants as required under section 7A of the Defamation Act (right of reply) before this suit was instituted, one by the plaintiff himself dated 11th July, 2011 a day after the publication urging the defendants to stop assassinating his character before his scheduled interview and another letter dated September 7th 2011 by the plaintiff’s advocates Waruhiu, Kowade & Ngang’a advocates were ignored.

Therefore, taking into account the plaintiff’s standing in society and the sadistic damage to his reputation, that he is a person who could only get into state office of a judge through favoritism, and taking into account the serious ramifications of attempting to get into public office through other means other than through fair competition and merit, among other principles as a basis of appointments, and the Constitutional principles as commanded by Chapter Six of the Constitution on leadership and integrity, especially section 73 (2) which provide:

“The guiding principles of leadership and integrity include:

- a. ***Selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;***
- b. ***Objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism.”***

By refusing to publish an apology and instead make a further publication without alluding to any new and verifiable facts which led to the paid up publication by the Chief Justice and the denial by the Nyeri Bar Association’s publication denying the allegations that they were the authors of an email, I find the Defendant’s conduct in all the circumstances as opposed to that of the plaintiff making the defendants liable to pay aggravated damages which I assess at Kshs 3,500,000. I also award the plaintiff Kshs15,000,000.00 general damages for defamation of character.

I would have ordered that the defendants do, in equal measure of the size of the publication give an unconditional apology to the plaintiff in their Sunday feature page with equal prominence that they gave to the impugned article within **Seven (7) days** from the date of this judgment. However, on the authority of **J.P Machira v Wangethi Mwangi & Nation Newspapers Ltd** (supra) the period between 10th July 2011 and this 29th June 2015 which is nearly 4 years is so long that to order an apology would have no effect on the damage to the plaintiff’s reputation in this digital world. Accordingly, I award the plaintiff Kshs 1,500,000.00 damages in lieu of an apology.

Final Orders

- a. That the plaintiff has proved, on a balance of probabilities that the defendants jointly defamed him by their publication of 10th July, 2011 in the Sunday Nation and I find them liable for defaming the plaintiff
- b. The plaintiff is entitled to an award of damages
- c. Damages:
 - i. General damages Kshs.....15,000,000.00
 - ii. Aggravated damages Kshs3,500,000.00
 - iii. Damages in lieu of an apology Kshs...1,500,000.00

TOTAL DAMAGES Kshs.....20,000,000.00

- d. Costs of this suit
- e. Interest on (c) and (d) at court rates from the date of this judgment until payment in full.

Dated Signed and delivered in open court at NAIROBI this 29th day of June 2015.

R.E.ABURILI

JUDGE