



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 15 OF 2013.

ABDI MOHAMED FARAH.....PLAINTIFF

VERSUS

THE NAIROBI STAR PUBLICATION LTD.....1ST DEFENDANT

DOMINIC WABALA.....2ND DEFENDANT

JUDGMENT

PLEADINGS

The plaintiff filed a plaint dated 22nd January 2013 seeking judgment against the defendants for:-

1. *General damages for defamation*
2. *Aggravated damages for defamation*
3. *An order that the defendants do publish an unqualified apology through the same medium as prominently and in the same page and in similar manner as the offending as the article;*
4. *Cost of this suit*
5. *Interest on a) and b) above at court rates*
6. *Any other relief that this honourable court may deem fit.*

The cause of action arose from a publication attributed to the defendants published on 22nd November 2012, through an Article in the Star News paper issue no. 1632 titled “*Al shabaab implicated in Garissa*”, which according to the plaintiff was false, malicious and defamatory. The plaintiff contends that the defendants were subjective as they gave a partial explanation; they failed to ensure that accuracy of the alleged report and indeed failed to contact the plaintiff to establish the veracity of the information.

The plaintiff claims that the article was defamatory by innuendo. He maintains that the said article is false, reckless and malicious in material particulars and without justification and is calculated to discredit the plaintiff and has indeed exposed him to danger of losing his life. He pleaded the following particulars of falsehood and defamation.

1. *Publishing falsehood that the plaintiff is a wanted man;*
2. *Publishing untruths that the plaintiff is an al shabaab operative*
3. *Publishing falsehoods that the plaintiff is a criminal and terrorist*
4. *Publishing falsehood that the plaintiff was organizing attacks on security officers*
5. *Publishing falsehood that the plaintiff coordinated the attacks security forces in Garissa and refugee camps.*
6. *Falsely implicating the plaintiff as a participant in the organized attacks against the three KDF*

- soldiers, resulting in fatalities;*
7. *Falsely associating the plaintiff with committing murder;*
 8. *Falsely associating the plaintiff with al shabaab, an illegal terrorist gang prescribed in Kenya.*
 9. *Defaming the plaintiff.*

The plaintiff contends that the said publication has also destroyed the plaintiff's standing, reputation and character amongst the right thinking members of society and subjected him to mental anguish, suffering and compromised his security. The plaintiff further claims that the article has infringed on his inherent dignity occasioning him loss and damage.

The claim is denied by the defendants. Through their joint defence dated 26th February 2013 the defendants admitted the publication of the article but denied the same was false and malicious. The defendants state that the words published on 22nd November 2012 concerning the plaintiff were true in substance and in fact. The defendants pleaded the following particulars:

1. *In the year 2012, the Government of Kenya was involved in an operation in Garissa to investigate and find the organizers of attacks on security officers; and*
2. *The provincial security and intelligence committee named the plaintiff as one of the organizers of the attacks.*

The defendants also denied that the words published contained any defamatory meaning as alleged by the plaintiff or capable bearing any defamatory meaning by innuendo. The defendants maintained that the publication of 22nd November 2012 concerning the plaintiff is not defamatory on the face of it and the defendant did not know of circumstances by virtue of which it might be understood to be defamatory to the plaintiff.

EVIDENCE.

The plaintiff's case is supported by the testimony of **Abdi Mohamed Farah**, the plaintiff who testified as **PW1** told the court that he is a business man and operates a shop at Garissa. He filed this suit against the defendants because they defamed him in the Star News paper on 22nd November 2012. The publication alleged that he was a terrorist while he was not. He also told the court that he is disturbed psychologically because he fears for his life as the security agent might kill him anytime because of the allegations. He stated that he is neither a terrorist nor a sympathizer of alshabaab terrorist group. He stated that he is a victim of insecurity caused by alshabaab but not a member, and that his family members now shun him.

The plaintiff testified that he did not murder or even participate in the murder of KDF soldiers as mentioned in the article published by the defendants. He stated that after reading the article, he presented himself to the security enforcement agencies in Garissa. The security agencies informed him that there was nothing against him concerning the publication. The said security agency also advised him to seek legal advice and action against the publishers of the article.

The plaintiff's advocates wrote a demand letter and notice of intention to sue before filling his suit which he produced as an exhibit. The defendants responded saying that they wanted to interview him and that the source of their information was the Provincial and District Security Intelligence Committee. The defendants alleged that the report was concrete and true. He claimed that the defendants were not also remorseful and they stood by the report. He produced all his documents as Exhibit "**PEX1**" which included the original publication concerning his alleged association with alshabaab terrorist group. He also produced news papers cuttings containing incidents of insecurity in the country at the time caused by Alshabaab and as reported by the media. The bundle was produced as "**PEX2.**"

In cross examination by Mr Havi advocate for the defendants, **PW1** told the court that he was born in Garissa and also resides there with his family. He also stated that he comes from the Ogaden clan and Odak sub clan. He also stated that there were several people with names similar with his, he schooled with some of them and they live together in the same neighborhood. He claimed that he was called by his relatives who included his brother inlaw Rage Mohamed Farah and sister Faitho Ali Osman and friends

who read the article. He also stated that the security in Garissa at the material time was very bad, which insecurity was attributed to the residents of Garissa. He also told the court that he did not go for the interview with the Star New Paper to clarify his side of the story because the offer came after his request to give an interview following the publication of the offensive story but that his offer was turned down by the defendants. The plaintiff also stated that his life was in danger and he also suspected the state could come after him because of the said publication. He claims that the security forces went after him after his name appeared in the publication. He stated that the police in Garissa advised him to go clear his name with the national security.

In re-examination by Mr Nyanga, the plaintiff stated that he asked for information to enable him grant the defendants an opportunity to interview him but the same has not been supplied to date. He also stated that his nick name was “Maash” and he did not know any other person going by that name. He maintained that the publication only referred to him and not any other person and that it targeted him and no other person.

Hussein Abdi Dagane, testified as **PW2**. He told the court that he was employed by the County Government of Garissa as an enforcement office. He stated that he knew the plaintiff since they schooled together and they are also neighbours. He also told the court that the plaintiff's other name was “Maash.” That he read the article which referred to the plaintiff; he also stated that his nick name “Maash” was also mentioned in the article. He called the plaintiff to inquire whether the content was true after reading the article. He testified that after the publication the plaintiff was shunned by his friends as belonging to the alshabaab terror group.

In cross examination, PW2 told the court that the plaintiff acquired the nickname of “Maash” when he was in primary school. He also stated that he did not know Rago Mohamed Farah and Faitho Mohammed Farah. He further testified that when he read the article he believed the content concerned the plaintiff.

George Kombo Oruta, a retired teacher, also testified as **PW3** in support of the plaintiff's case. He told the court that he knows the plaintiff because he gave him accommodation when he was first posted to Garissa. He read the article and he was shocked and thought the security might attack them. He testified that some tenants in the houses owned by the plaintiff vacated the houses and he was the only one who remained there because he knew the plaintiff very well.

In cross examination, PW3 testified that he rented the houses owned by the plaintiff for 4 years. He went to the plaintiff's house after he read the article to inquire about the story from him.

The 2nd defendant, **Dominic Mayo Wabala Sikwata**, also testified in support of the defence case as **DW1**. He confirmed that he was the second defendant and author of the impugned article. He stated that he got the information from the Provincial and District Security Intelligence reports. The said reports were shown to him by a source at the Department of Defence in Nairobi. The article referred to an individual known as Abdi Mohammed Farah aka “Maash” whose name was in the reports. He told the court that prior to the article he did not know the plaintiff. He stated that he had no malice against the plaintiff as he did not know him. He explained that he wrote the story based on the information from the security intelligence. He stated that he did not make a copy of the report because he was told that it was an intelligence report; he was only allowed to read and make notes.

In cross examination by Mr Nyanga, DW1 told the court that he was shown the report by a military officer whose name could not be revealed. That he took a photo of the report so the only available copy was blurred and not legible. He also stated that in his article he did not say the plaintiff was a terrorist but the report said so. He admitted that he did not verify the story in any way before publication. He also stated that if the report referred to an innocent person then the consequences is weighty since the matter is also grave. He also stated that he would not know if the publication is true and whether it would injure the reputation of the person referred to therein. He also stated that the plaintiff was referred as the intelligence coordinator of alshabaab.

SUBMISSIONS.

Parties agreed to file in written submissions. The written submissions were filed and exchanged. The parties also filed the following agreed issues for determination by the court.

1. **Whether the defendants' publication of 22nd November 2012 concerning the plaintiff (the said publication) was defamatory of the plaintiff.**
2. **Whether the said publication was true in fact and substance or whether the same was false, malicious, negligent and /or reckless.**
3. **Whether the defendants were justified to make the said publication in its form, manner and style.**
4. **Whether the said publication disparaged and discredited the plaintiff reputation and injured his character and exposed him to hatred, ridicule scandal, odium, or contempt.**
5. **Whether the said publication exposed the person of the plaintiff to danger and jeopardy.**
6. **Whether general and aggravated damages are payable in the circumstances of this case and if so , how much.**
7. **What is the appropriate order as regards the cost of the suit.**

The plaintiff submitted that he was referred to and fully named in the article and even his nick name "Maash" was also given. The plaintiff stated that his witness PW2 testified that although there were several people who went by the name Abdi Mohammed Farah, the name "Maash" included in the article referred only to the plaintiff in this matter as he was the only one who bore that name since childhood and was infact widely known by the name "Maash" more than his official name Abdi Mohammed Farah. The plaintiff relied on the case of **Hayward vs Thompson and others (1982) 1QB 47, Morgan vs Odhams Press ltd and another (1971) 2 ALL ER 1156.**

On whether the publication was defamatory, the plaintiff submitted that in the article the plaintiff has been accused of many things in sensational version ranging from terrorism, murder, membership of alshabaab and being in hiding and or wanted alongside many more and very inhumane acts. The plaintiff referred the court to the case of **Kudwoli vs Eureka Educational and Training Consultants& 2 others. HCCC 126 of 1990.** He submitted that the publication must be about the plaintiff, false statement, must be to the plaintiff's discredit, must tend to lower the plaintiff in the estimation of right thinking members of the society generally, or the statement should tend to expose the plaintiff to hatred, contempt or ridicule, to be defamatory, the statement does not depend upon the intention of the defendant but upon the natural tendency of the publication and the surrounding circumstances.

The plaintiff further submitted that the words published by the defendant are grossly and out rightly defamatory of the plaintiff, intended to disparage the reputation of the plaintiff and/or to injure his character and intended to expose him to hatred ridicule, scandal, odium and/or contempt.

The plaintiff submitted that he had been directly accused of committing heinous, inhumane and very serious criminal offences. The accusation is a criminal offence under our laws and internationally in particular the **Penal Code Cap 63 the Laws of Kenya.** The plaintiff further submitted that the documents or evidence that allegedly formed the basis of the publication of the report have not been presented before this honorable court as evidence. The plaintiff stated that the defendant insisted that what was published was true in the letter of 5th December 2012 and the copies of PSIC and DSIC were in his possession.

The testimony of DW1 was also attacked by the plaintiff's submission that whereas the 2nd defendant stated that what was in his possession was a blurred copy of the report from the Department of Defence which he relied on to write the story, he did not call any other witness to testify and produce the alleged report, and neither did he avail to court the said blurred copy. The plaintiff therefore submitted that DW1 evidence is of no evidential value particularly given the nature of the allegations he wishes to maintain against the plaintiff.

The plaintiff further submitted that he presented himself to the Garissa police station to enquire about the complaints against him where his presence was recorded in the Occurrence Book. The plaintiff submitted that his evidence was not challenged at all. He testified that the police cleared him of any association with the Alshabaab terror group, or murder of KDF soldiers. The police also advised him to seek legal redress

against the defendants. The plaintiff submitted that the publication was false, malicious, negligent and recklessly done.

The plaintiff's counsel submitted that the defendants did not bother to contact the plaintiff for verification of the sensational and dangerous accusation they published of and concerning him. The plaintiff relied on the case of **Mikidadi vs Khalfan & Another (2004) 2 KLR 496, Nashon Oluoch vs Kenya Times Media Trust Ltd James Kutai civil suit 306 of 2004.**

On whether the defendants were justified to make the said publication in its form and manner, the plaintiff submitted that the publication named the plaintiff as an alshabaab operative in charge of the terror group's intelligence in Garissa. In the ordinary sense, the plaintiff was named by the defendant as an alshabaab spy and the coordinator of its activities in Garissa. That the allegation meant that the plaintiff was responsible for the murder of the three KDF soldiers and after that he had gone into hiding. The plaintiff submitted that if a plea of justification is made and the allegation are of a grave nature as in this case, then a higher standard of proof is required than the normal proof in civil cases. The plaintiff relied on the case of **United Africa press Ltd vs Zaverchand K shah (1964) 1EA 336.**

On whether the publication discredited the plaintiff's reputation and injured his character and exposed him to hate, ridicule, scandal odium or contempt, the plaintiff submitted that alshabaab or its initiative is matters of general or local notoriety. It is a terrorist group which thrives in ideological violence primarily domiciled in Somalia and the East Africa region. This terrorist group uses guerrilla warfare and terrorist tactics against innocent people. That the group has also used suicide bombings and stormed malls killing innocent people indiscriminately. The group is affiliated to al-qaeda a major international terrorist group founded by the terror grandmaster the late Osama Bin Laden.

The publication complained of stated that *a wanted man said to be alshabaab operative in Garissa for organizing attacks on security officers*. The said publication continued to state that *intelligence officers say that Abdi Mohammed Farah aka Maash is suspected alshabaab head of intelligence in Garissa and is believed to have coordinated the recent attacks in Garissa and Dadaab refugee Camp*. The plaintiff submitted that the words discredited his reputation and injured his character and exposed him to hate, ridicule, scandal odium and contempt. The plaintiff testified that people ridiculed him once the article was published and many people started avoiding him. The court was referred to the case of **Nation Media Group Ltd & 2 others vs John Joseph Kamotho and 3 others Nairobi Civil Appeal 284 of 2005.**

On whether the plaintiff was exposed to danger and jeopardy, the plaintiff submitted that linking any person to al shabaab is like a death penalty on that person in Kenya. The plaintiff explained that in view of the atrocities the terror group had committed in this country, it is a grave thing to call a person a member of al shabaab therefore the plaintiff was exposed to danger and jeopardy.

On damages payable, the plaintiff submitted that the court has a wide discretion to determine the level of compensation for a person dignified through defamation. The defendants made these publication headline news and never apologized at all and thereafter refused to concede to the claim, subjected the plaintiff to trial and eventually failed to prove any of the allegations. Taking into account the reputation of the plaintiff, the behavior of the defendants and the effect the publication has on the plaintiff and such other matters. The plaintiff proposed Ksh 12,000,000. The plaintiff relied on the case of **Elizabeth Wanjiku Muchira Vs The Standard Limited** where the court awarded Ksh 5.5 Million on a publication which imputed prostitution, lesbianism and the like but not membership of al shabaab, murder and terrorism.

The defendants filed their submissions contending that the evidence of DW1 showed that he saw a report dated 20th November 2012 by the Garissa County Commissioner, M.A. Maalim and another one dated 19th November 2012 by the North eastern Provincial Commissioner, F.O.Ouma at the Department of Defence in Nairobi. The claim that the plaintiff was a suspected criminal and terrorist were made in the two reports. The defendant submitted that the publication was not defamatory of the plaintiff. The defendants maintained that the publication contained true facts of the allegation of the plaintiff's involvement in the activities of al shabaab as per reports of the Department of Defence. The defendant stated that the plaintiff admitted in cross examination that he was indeed a suspect. The defendant referred

to the following statement by the plaintiff during cross examination “*security forces have also come after me after the publication. The police have asked me to go and clear my name within National security.*”

The defendant argued that the admission confirms the truth in the defendants’ defence. They stated that the defendant came across the plaintiff’s name when they did not know him before the publication. The defendants submitted that the matters published were not false, malicious nor was the publication negligent and reckless.

The defendants submitted that the plaintiff did not adduce any evidence to support the plaintiff’s claim that he was disparaged and discredited. In fact, none of the witnesses claimed that they believed that the plaintiff was al shabaab. According to the defendants, the two witnesses continued to treat the plaintiff with respect even after the publication complained of. The defendant further submitted that the plaintiff had failed to prove key ingredients of a claim in defamation . The court was referred to case of **Simeon Nyachae vs Lazarus Ratemo Musa & Another (2007) eKLR**.

On quantum, the defendants submitted that the plaintiff did not testify as to the fact of any financial loss suffered by him as a result of the publication. The defendant argued that the prove of financial loss would have formed a basis for ascertainment of damages. The defendant also stated that the court was not supplied with information to ascertain the plaintiff’s worth on account of any claimed injury in reputation and character or credit. The defendants submitted that if liability is found against the defendants, an award of Ksh 500,000 would be sufficient. The defendant relied on **J Kudwoli vs Eureka educational and Training consultant & 2 others (1993) eKLR**, **Benard Bifwoli vs Simon wetundu & 2 Others (2008) eKLR**, **Dr Richard S. Kimanzi vs nation Newspapers Ltd (2011) eKLR**, **Daniel Mutunga Nzoka vs Duncan Kisilu Singi (2012)eKLR**, **Elizabeth Wanjiku Muchira Vs The standard Limited HCCC no. 2148 of 1997**

FINDINGS AND DETERMINATION.

Having considered the pleadings filed by all the parties in support of their respective position and having considered the evidence that was adduced by the plaintiff and the 2nd defendant during the trial including the written submissions and authorities provided, the Parties’ framed issues which I have reproduced, I will consolidate the issues and address them in the following two issues:

1. *Whether the publication made on 22nd November 2012 was capable of being construed as defamatory in its natural and ordinary meaning or by innuendo?*
2. *Whether the plaintiff is entitled to an award of damages and how much?*

On the first issue it is the plaintiff’s case that the publication was false, malicious and defamatory of the plaintiff with the sole intent to malign the reputation or to injure his character and expose him to hatred, ridicule, scandal, odium or contempt. The plaintiff was accused of being a terrorist, murderer, a member of the al shabaab terrorist group, being in hiding and at the same time being wanted by the Kenyan security agencies. The plaintiff claimed that his life was in danger and he feared that the state might go after him because of the publication.

The defendants on the other hand contended that the publication was not defamatory. That they were justified in the sense that the article was written after the 2nd defendant saw the report by the Garissa County Commissioner, M.A. Maalim and another one by the North Eastern Provincial Commissioner, F.O.Ouma at the Department of Defence in Nairobi.

The Court of Appeal in the case of **Wycliffe A. Swanya v Toyota East Africa Ltd & Another civil Appeal 70 of 2008 [2009] eKLR** stated:

“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

(iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage.”

Applying the first ingredient to the facts of this case, the publication the plaintiff claims to be defamatory is that which appeared in the Star News Paper at pg 6....the article read in part *a report by the North Eastern provincial security and intelligence committee have implicated a wanted man said to be al shabaab operative in Garissa for organizing attacks on security officers.*

The reports further accused politicians of fueling the chaos in the town and stated: *The reports by the Provincial and intelligence committee (PSIC) and District security and intelligence committee (DSCI) which have been sent to the internal security Permanent Secretary Mutea Iringo dated November 20 and November 19, however differ on the sequence of events preceding the violence that has rocked the town since three Kenya Defence Forces soldiers were gunned down by armed men as they repaired their trucks tyres on Sunday.*

“ intelligence officers say that Abdi Mohammed Farah aka Maash is suspected Al shabaab head of intelligence in Garissa and is believed to have coordinated the recent attacks in Garissa and refugee camp” the PSIC report says.....”

The plaintiff contends that those words as published referred to him, were false, malicious and intended to paint him as a member and or coordinator of a terrorist gang hence highly defamatory of him and meant to expose him to ridicule and injure his reputation as a law abiding citizen of this country. In **GATLELY ON LIBEL AND SLANDER** 6th Edition at pg 6 the learned author stated that –

“A defamatory statement must be false and it must also be defamatory to the plaintiff, that it is to say, the statement must contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts not contained in the statement, as the reader must reasonably be expected to possess.”

In my view the publication is defamatory of the plaintiff. The publication states that *Abdi Mohammed Farah aka Maash is suspected Al shabaab head of intelligence in Garissa.* It therefore refers to him. During the oral hearing the plaintiff told the court that he is known as Abdi Mohammed Farah and also known as “Maash” as his nickname. His evidence was corroborated by that of PW2 and PW3 who also testified that the article referred to the plaintiff since his nickname was also mentioned. Although the plaintiff admitted during cross examination that there were other persons with the same names as his, thus Abdi Mohammed Farah, he stated that he was also known by his nickname. The defendant did not tender evidence to rebut what the plaintiff had stated.

The publication is also false, the defendant did not in any way try to verify the information acquired from the report. The defendant did not also adduce evidence to support the allegations. It is not disputed that after he read the article and also received numerous phone calls from the friends and family he went to Garissa police station. If the publication was true as alleged by defendants then the police serving in the station would have arrested him since he was a suspect and a security threat, they instead advised him to seek legal redress. In my view, the fact of the plaintiff being a security threat could not have been unknown to the security agencies and more so, the local police station, if the same information was already with PSIC and DSIC, before the same information could even reach the Department of Defence as alleged.

In addition, the said allegations were made in the year 2012. The plaintiff filed the current proceedings in January 2013. He appeared before the court on 24th September 2014 and gave his oral evidence, if he was a suspect and in hiding then the defendants would have been the first persons to alert the police or the authorities that the wanted man was now found and the plaintiff could have been arrested without difficulty, given the gravity of the allegations.

I am therefore persuaded that the matter of which the plaintiff complains is defamatory in character. The words published by the defendants are grossly defamatory of the plaintiff and intended to injure the reputation of the plaintiff and expose him to hatred and ridicule as an alshabaab operative without the slightest link being proved to exist between him and the said terror group.

On whether the defamatory statement or utterance was published by the defendants. It is not disputed that the article was published by the defendants. DW1 told the court that he was the author of the article that was published by the 1st defendant. He also stated that he relied on the intelligence report to write the article. The defendant pleaded that the article and words were published innocently and were indeed a fair representation of the intelligence report. I have no doubt therefore that the defamatory publication was published by the defendants.

On whether the publication was malicious, the defendants took the defence of justification. It is the defendants' case that they relied on official reports from the provincial security intelligence committee (PSIC) and DSIC. The plaintiff maintained that a publication of such magnitude linking the plaintiff to grave and serious criminal acts required strict verification of the facts. In **Phinehas Nyagah v Gitobu Imanyara Civil suit no. 697 OF 2009[2013] eKLR**, Odunga J observed that:

“Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. 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 but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.”

In this case the said alleged intelligence report relied on by the defendant was not produced in court. The DW1 stated that he was only allowed to read the report and take notes and that he could not get a copy of the report. Later in cross examination he stated that he could only take a photo of the report which was blurred. In this case I find the publication was actuated by malice.

The defendants did not tender any evidence to show the steps taken to check the veracity of the information published. In my view the publications were an unconfirmed lie which is evidence of malice. I am unable to agree with the defendants that the publications were justified. No documents or other evidence was been adduced to prove the justification. I also do not find that the publication was either a fair comment or made on a privileged occasion as no attempt was made to provide particulars of fair comment or privileged occasion.

From the foregoing I find that the plaintiff has proved that he was defamed by the defendants by their publication of the story linking the plaintiff to the alshabaab terror group and with the aforesaid, the court is now left to determine the prayers sought in the plaint. The plaintiff is seeking:

1. ***General damages for defamation***
2. ***Aggravated damages for defamation***
3. ***An order that the defendants do publish an unqualified apology through the same medium as prominently and in the same page and in similar manner as the offending as the article;***

4. *Cost of this suit*
5. *Interest on a) and b) above at court rates.*

An award of damages in defamation case is discretionary. 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.”*

In **Ken Odondi & 2 Others vs James Okoth Omburah t/a) Okoth Omburah & Company Advocates [2013]eKLR** the court stated:

“So the respondent was not only entitled to general damages for defamation but was also entitled to exemplary damages to punish the appellants who had defamed him and refused to retract the offending article or apologize. In the English Court of Appeal decision in the case of John v MG Ltd.[1996] I ALL E.R. 35 the Court held:

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

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

In the matter before us all essential elements for award of aggravated damages which are well set out in the said English case existed and the award of Kshs. 500,000/= was founded on a proper appreciation of the law.”

The plaintiff submitted 12 million for general damages and aggravated damages will compensate the plaintiff adequately taking into account the reputation of the plaintiff and the behavior of the defendants.

The following are awards made by the High Court and Court of Appeal in similar cases of defamation.

In 2011, Rawal J (as she then was) in **HON. UHURU MUIGAI KENYATTA v BARAZA LIMITED [2011] Eklr** awarded Kshs.7, 000,000/= to the Plaintiff.

In 2013, Ougo J in **PATRICK NYOIKE v PEOPLE LIMITED [2013] eKLR** awarded the

plaintiff **Kshs.4, 000,000** general damages and **Kshs.100,000** as aggravated damages for published article on 5th August 2009 in the publication known as “*Pyramid scheme owners revealed.*”

In **KEN ODONDI & 2 OTHERS V JAMES OKOTH OMBURAH T/A OKOTH OMBURAH & COMPANY ADVOCATES [2013] eKLR** the Court of Appeal awarded the appellant ksh 4,000,000/= general damages for libel and the award of Kshs. 500,000/= aggravated damages.

In the instant case and taking into account the facts and circumstances of this case as well as the principles of law discussed herein relying on decided cases, as well as doing the best I can, the right compensation to the plaintiff is Ksh3,000,000.00 as general damages and Ksh 1,000,000.00 as aggravated damages and I proceed to award him.

The plaintiff also prayed for an unconditional apology. 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 Newspaper 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 22nd November 2012 and today 28th July 2015 which is well over two and a half 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 500,000.00 damages in lieu of an apology. This is in line with the plaintiff’s prayer in his plaint dated January, 2013 for “**any other relief that this court may deem fit.**”

I have in awarding this sum considered that the defendants did not republish that defamatory story concerning the plaintiff in any of their subsequent publications.

I also award the plaintiff costs of this suit and interest on damages and costs at court rates from date of this judgment until payment in full.

Dated, signed and delivered in open court this 31st day of July, 2015.

R.E.ABURILI

JUDGE