



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO.290 OF 2008

JAMES GITAU SINGH.....PLAINTIFF

VERSUS

HEADLINK PUBLISHERS LIMITED.....1ST DEFENDANT

PAUL KIMANI T/A PRINT MAXIM.....2ND DEFENDANT

TOM ALWAKA.....3RD DEFENDANT

BRYAN YONGO.....4TH DEFENDANT

JUDGMENT

Subject: Defamation

1. The plaintiff James Gitau Singh sued the defendants herein Headlink Publishers; Paul Kimani T/A Print Maxim; Tom Alwaka; and Bryan Yongo vide a plaint dated 3rd July 2008. The plaintiff's claim against the defendants jointly and severally is for:

- a. Compensatory damages.
- b. Aggravated damages and or exemplary damages.
- c. An injunction to restrain the defendants whether by themselves, their servants and or agents or otherwise from further publishing the said or similar libel upon the plaintiff;
- d. A withdrawal by way of publication in the 1st defendant's weekly citizen front cover in both Daily Nation and Standard Newspapers a complete apology to the publication complained of.
- e. A permanent injunction restraining the 1st defendant and 3rd defendant from publishing the Weekly Citizen or any other publication.
- f. Costs and interest.
- g. Such other relief as this court may deem fit.

2. The 1st defendant did not enter appearance hence interlocutory judgment was entered against it in default. The claim against the 2nd defendant was withdrawn. The 3rd and 4th defendants entered appearance and filed defenses but did not appear in court during the hearing despite notice of hearing date being served upon them. The plaintiff was therefore allowed to proceed with the hearing, the defendants' absence notwithstanding, in accordance with the provisions of Order 12 rule 2(a) of the Civil; Procedure Rules.

3. The plaintiff alleged in his plaint that on 16th June 2008, the 1st defendant Headlink Publishers Ltd published and printed the following defamatory words of the plaintiff in the Weekly Citizen **“Kibaki family lawyer caught in sex Act.”** The article which was reproduced in the plaint at paragraph 8 stated:

“Now Kibaki lawyer unmasked

“James Singh Gitau- a top lawyer based at Unity House, Koinange Street Nairobi whose clients include members of President Mwai Kibaki family is causing havoc in the country’s houses of vice.

The lawyer of mixed origin in his mid 40’s has impregnated a record 18 women and abandoned the children amid threats that he would use his connections and influence to neutralize them should they attempt to file any claims against him.

Gitau who is also a lawyer to Finance Minister Amos Kimunya a key member of Kibaki kitchen cabinet is further reported to prefer the so-called group sex or groupies to the initiated and does not bother to take any protective measures.

One of the victims, according to our investigation, is a sacked Kenya Airways hostess by the name Cynthia, now a pale shadow of her former dazzling self and who rues the day her path crossed with Gitau’. after Cynthia’s sacking from the national carrier that passes itself as the pride of Africa, Singh, commonly known as Mhindi Mwafrika in the high circles threatened her with dire consequences if she ever as little as entertained the thoughts of the two being intimate again.

In private, Gitau, who was fostered by the late powerful permanent secretary Hezekiah Nelson Oyugi lionizes himself as the most successful young lawyer in the country with who is who clients and can buy anybody. Among his clients is Asian tycoon Manish Shah, the brains behind collapsed Trust Bank and Citi Finance.

Singh despite having been raised by late Oyugi, has engaged in auctioning property owned by the same family that raised him up and occasionally disclosed in social places how the widows of the late PS queue in his office awaiting for hand-outs which he refuses to give.

Our investigation reveals as a result of being heartless, his wife, banker working at Citi Bank head office Upper Hill Nairobi is in deep shock.

And to make matters worse, Singh who frequently drinks with the Finance Minister at “Soho’s” Karen Blixen, Dusty Nails and Macushla is embroiled in a tug-of-war with a lady of mixed origin called Julie with whom he had a three year old baby. Although he has flatly rejected her, the lady has sworn to go down fighting, saying that it is time someone belled the cat.

Nene Kalinga is the saddest case. She befriended the lawyer, had a kid with him and died mysteriously in a tragic road accident, but the flamboyant lawyer still refused to take responsibility of his child.

Known to acquire top of the range automobiles from unsuspecting Asian clients whom he charges exorbitantly, the lawyer preys especially on those who are incapable of paying whose vehicles he confiscates before using them to entice his victims.

Our two- month investigations which involved a 24 hour chase with the latest undercover technology equipment unearthed his secrets happenings in various bedrooms and social joints.

Singh who has a tattoo on his upper arm is a man of means in the real estate world. He has acquired various homes through his proxy auctioneering firm and has eight houses in the high-end Runda Estate Nairobi. Controversy surrounds a house in a Riverside Drive which he claims to own yet the real owner still claims he acquired it fraudulently.

We have established that former Limuru MP George Nyanja, who designed Nyayo Stadium, Nairobi West is cursing the day he met the shrewd, outwardly polite lawyer who likes donning designer-made suits and shoes resembling those of Minister Kimunya.

Whenever out of the country running errands for the minister, which involves millions of shillings, Singh spends a good part of his time and money shopping around for classy suits from the capital fashions of the world.

Back to Nyanja saga, it is said sometimes back, the lawyer bought the ex-MP's home through a proxy company for a paltry sh 60 million. The property in question is located in the much-coveted Karen and is said to be valued at over sh 350 million.

Using his political connections, he is said to hold offshore bank accounts and secrets of the First Family's business investments both locally and internationally. It is suspected, Singh was instrumental in helping the First Family acquire substantial shares in tycoon Nausha Merali's Equatorial Bank which has a branch at Bruce House Nairobi, a building owned by the president.

A source who has been close to Singh for years claims he has gone crazy and is overheard saying that he defrauded the First Family in the controversial land tussle pitting a Citi lawyer and Belgo Holdings relating to prime property in Kitusuru.

He also attempted to defraud an MP from Western province sh 50 million and demanded an inducement from him to enable him compromise his case with an Asian-owned bank.

Our sleuths have established that Singh leaves his house at 7am on some occasions, moves like he is going to his office then goes to visit his girlfriends with whom he spends a good part of the day.

His victims include green university students and span across young corporate executives, high-class flesh peddlers to prominent models in the country.

The latest victim mostly found in his company is a banker aged 23 years whom he took to the Rhino Charge in Nanyuki where they spent four nights while his wife remained at home lonely nursing his two sons. The wife is said to have given up on him saying that she is hanging around the lawyer for money yet she is a well paid banker and can be independent.

During parties at the Runda house he acquired through public auctions, he invites his girlfriends who openly ridicule his wife for apparently having failed to tame her cassanova of a husband.

A number of lawyers have now been engaged to file maintenance cases against him in a battle that has now spilled to the press.

The army of victims, we have information, are at an advanced stage of planning to storm his office with wailing babies of all looks and colours and challenge the lawyer with DNA tests.

The move is likely to impact on his corporate clients. The list of his clients includes commercial banks and leading Asian tycoons. He boasts to be close to judges who rule in his

favour.

Singh Gitau, who also owns large tracts of coffee farms in Kiambu, is also at loggerheads with lawyer Mungai Muriu as to who is in control of Minister Kimunya's legal matters.

Confidants of the two lawyers say the bad blood between the two learned friends has to do with damning reports on unscrupulous deals in the offing which according to documents in our possession run into millions of shillings.

But for now, a source at James Singh Unity House office revealed, he holds sh 2.5 billion in secrecy on behalf of the minister on account of various deals. However, the evidence we have is that, the fee charged on the said amount is exaggerated with the lawyer boasting that Kimunya was at one time an accounts clerk with Securicor (K) Ltd living in Buruburu and that the minister who has no children is at his beck and call.

The flamboyant lawyer's wife is Phoebe Gitau with sons Kimani and Kinyanjui.

Singh is among lawyers who have used State House links to mint money. Lawyer Fred Ngatia, John Khaminwa, Gibson Kuria Kamau are a smiling lot too.

During the Moi era, lawyer Donald Kipkorir could not allow any skirt to pass before him and now is struggling to survive after committing himself to refund millions of shillings he owes state corporations. He acted as a lawyer to strategic parastatals and even Moi's son Gideon and was associated with a number of dubious deals.

With his offices at Posta Sacco, Kipkorir's clients included Moi's friends but now his survival depends on God's mercy as women laugh at him and fellow learned friends discuss his fall from grace to grass in the open.

Whether James Singh Gitau will be another Donald Kipkorir, only time will tell."

4. The plaintiff alleged that the above words in their natural and ordinary meaning meant and were intended to mean:

- i. *That the plaintiff who acts for President Mwai Kibaki family visits houses of vice*
- ii. *That the plaintiff had impregnated 18 women and abandoned the children.*
- iii. *That the plaintiff would use his connections to neutralize the women he had impregnated should they file suit against him.*
- iv. *That the plaintiff is involved in act of group sex.*
- v. *That the plaintiff had fathered a child with Kenya Airways hostess, Cynthia and abandoned her.*
- vi. *That the plaintiff having been fostered by the late Hezekiah Oyugi has wrongfully sold the late Hezekiah Oyugi's family assets and boasts that his widows queue for handouts at his offices.*
- vii. *The plaintiff has fathered and abandoned a 3 year old child with a woman called Julie.*
- viii. *That the plaintiff has fathered a child with Nene Kalinga and abandoned the child despite Nene dying in a mysterious road accident.*
- ix. *That the plaintiff charges exorbitant legal fees from his clients and confiscates motor vehicles from them when they are unable to pay.*
- x. *The plaintiff despite practicing as an advocate has an auctioneering firm which he used to purchase houses in auctions.*
- xi. *That the plaintiff has eight (8) houses in Runda including one on Riverside Drive which he acquired fraudulently.*
- xii. *That the plaintiff, whilst acting for George Nyanja has purchased Mr Nyanja's house for kshs. 60 million when it was valued at over kshs. 350 million.*
- xiii. *That the plaintiff is Honourable Kimunya's lawyer and runs illegal errands for the minister.*
- xiv. *That the plaintiff maintains illegal accounts on behalf of the First Family and is privy to the First Family's investments both locally and internationally.*

- xv. *That the plaintiff helped the First Family acquire shares in Equitorial bank.*
- xvi. *That plaintiff has defrauded the First Family of a property in Kitusuru pitting a Citi lawyer and Belgo Holdings.*
- xvii. *That the plaintiff attempted to defraud an MP from Western province of kshs. 50 million and demanded a bribe to enable him compromise a case.*
- xviii. *That rather than go to his office, to work in the morning, the plaintiff visits university students, models and high class flesh peddlers.*
- xix. *That the plaintiff took a young banker of 23 years to the Rhino Charge where they spent four nights whilst his wife remained at home.*
- xx. *That he invites girlfriends for parties at his home in Runda, who openly ridicule his wife.*
- xxi. *That the plaintiff has several maintenance suits against him.*
- xxii. *That the plaintiff uses his close connections with judges so that the latter can rule in his favour.*
- xxiii. *That the plaintiff is involved in unscrupulous deals which have led to fall out between him another lawyer, Mungai Muriu Advocates.*
- xxiv. *That the plaintiff is holding kshs 2.5 billion in a secret account on behalf of Honourable Kimunya.*
- xxv. *That the plaintiff is charging Honourable Kimunya exaggerated fees.*
- xxvi. *That the plaintiff boasts that Honourable Kimunya, who is a minister, is at his beck and call.*
- xxvii. *That the plaintiff has used his State House connections to mint money.*
- xxviii. *That the plaintiff's conduct is similar to that of Mr Donald Kipkorir, a lawyer allegedly involved in dubious deals during the Moi era and who was a rampant woman chaser.*

5. The plaintiff also alleged that the said published words were intended to mean:

- a. *That the plaintiff is a womanizer.*
- b. *That the plaintiff has no regard towards his marital obligations.*
- c. *That the plaintiff visits prostitutes.*
- d. *That the plaintiff is dishonest and cheats his clients.*
- e. *That the plaintiff is a dishonourable person.*
- f. *That the plaintiff is unpatriotic and a thief who hides money abroad.*
- g. *That the plaintiff bribes Judges.*
- h. *That the plaintiff is dishonourable and unfit to be an advocate.*
- i. *That the plaintiff has acquired immense property through fraudulent means.*
- j. *That the plaintiff has defrauded the First Family of property in Kitusuru.*
- k. *That the plaintiff uses illegal means including state house connections to block people of their legal rights and expectation.*
- l. *That the plaintiff has conspired and connived with the First Family and minister for finance in defrauding and looting of the country resources.*
- m. *The plaintiff is a hypocrite and without any sense of objection, propriety or morality.*

6. It was further averred by the plaintiff that the defendants caused photographs of the plaintiff to be published and arranged in such a manner as to suggest that the plaintiff had been involved in sexual conduct with the person in the photographs.

7. The plaintiff testified on oath as PW1. He stated that he was an advocate of the High court of Kenya and a businessman engaged in real property management. He adopted his witness statement recorded on 30th September 2014 and filed in court on 7th October 2014' as his evidence in chief.

8. In the said statement, with amendments allowed by the court, the plaintiff testified that he had previously worked with Hamilton Harrison and Mathews Law Firm until January 2001 when he established his own law firm of Singh Gitau Advocates and in 2011, he founded LJA Associates together with Linda Watiri Muriuki and Andrew Mukite Musangi. The plaintiff also stated that he was a dedicated family man, drops his children (sons) to school at 7.30 am and by 8.00am he is in office preparing to attend to court by 9.00a.m. That on Monday the 16th June 2008 when dropping his son to school he was surprised to see a weekly citizen publication bearing the headline: **“Kibaki family lawyer caught in sect Act”** with page two running a further **“Now Kibaki lawyer unmasked”**. He

averred that the whole story was a malicious fabrication intended to defame him and embarrass him in the eyes of his family, friends, colleagues and clients. Further, that the publication was written in a sensational manner so as to attract as much attention as possible. The plaintiff further testified that no comment was sought from him despite being mentioned in an extremely unfavourable context and only found out about the article accidentally on his way taking his son to school.

9. The plaintiff further testified that the three photographs used were his true image, though the images were more than eight years old as at the time of publication and were taken at a friend's house and not a brothel as alleged. In addition, that the two ladies who featured were his friends Ms Wangechi Gitau advocate and Ms Stacy Muthoni a niece to Mr Njee Muturi who was the best man at the plaintiff's wedding hence they were not prostitutes as alleged in the article. He further stated that the only property he owned was his Runda house wherein he resided and that he did not own any property on Riverside Drive and neither did he acquire any property fraudulently contrary to the allegations in the article.

10. The plaintiff stated that at the material time, he represented Citi Finance Bank and not Honourable George Nyanja as alleged in the article and that neither did he buy a house belonging to George Nyanja, which property was sold by his client the Bank – Citi Finance Bank under its statutory power of sale to Red Mars Holding Limited. The plaintiff denied that he ever acted for the first family and or that he maintained accounts on their behalf and neither was he instrumental nor involved in the alleged purchase of Equatorial Bank on their behalf. He also denied allegations that he ever defrauded the first family or that he was connected to State House to make money or seal deals or that he defrauded a Western MP kshs 50,000,000 as alleged in the impugned publication. The plaintiff admitted knowing Mr Amos Kimunya but denied acting for him, drinking or socializing with him or holding kshs 2.5 million for him. He also denied allegations that he knew Manish Shah, the Asian tycoon behind Trust Bank and Citi Finance Bank. He denied engaging in any form of professional misconduct while billing his clients and or that he relied on favours from Judges to win a case. The plaintiff denied ever impregnating 18 women nor abandoned their babies. He also denied having intimacy relations with the ladies named in the article, impregnating them and or having a tug of war or maintenance suits filed against him. The plaintiff testified that the 4th defendant Bryan Yongo had requested to meet the plaintiff and the two met at the ABC Centre and the 4th defendant asked the plaintiff whether the latter could help in a case in which the plaintiff was acting as advocate for Citi Finance Bank in HCC 1965/91 and HCC 251/2008 in which the plaintiff was George Nyanja and Citi Finance Bank was the defendant, to ensure that the plaintiff in the case George Nyanja got his property back from the Bank and the 4th defendant would ensure the plaintiff was well compensated if he agreed to help. According to the plaintiff, he declined the request and compensation offer and that is when the 4th defendant told him he would teach the plaintiff a lesson by publishing information he had concerning the plaintiff. Further that after the impugned publication he met the 3rd defendant who demanded kshs 200,000 for him to issue a retraction and apology in a subsequent article and it was upon the plaintiff's failure to pay the said money that another article in the weekly citizen 30th June 2008 headlined "Revolt Brews in Cabinet" with a sub heading "As Libya buys Kimunya Crude Oil Shop buys Golden Beach Hotel Mombasa through lawyer James Singh."

11. The plaintiff stated that he had acted for the claimant in HCC 99/2005 Mary Muthoni Murithi, William Gachengo Nduhiu, Dulkan Nderitu Ndegwa, Edwin Alfred Bristow as administrators of the estate of Samson Muriithi Nduhiu V KCB and Mutuality Investment Trust Ltd but denied being involved in the sale of Golden Beach Hotel.

12. The plaintiff further stated that he complained in writing to the Media Council of Kenya who in turn wrote to the 1st defendant to respond by 9th July 2008 but it had no powers to restrain defendants from further defaming him.

13. According to the plaintiff, the articles were merely intrusive in his private life and were not news worthy neither were they of public interest to necessitate a headline coverage. The said articles are said to have caused him great anguish and distress and affected his life and two sons who are mentioned. He

also lost many friends who read the article because of allegations of corruption and infidelity. The plaintiff singled out Mr Rajan Shah a neighbor and close friend and after him reading those articles him and his family became uncomfortable with him in their house during their events. Further, that the articles causes members of the Asian community who were his clients to shun him. He further stated that the articles affected his profession and branded him as a corrupt, overcharged clients, acted against clients interests and therefore clients and prospective clients were hesitant to be associated with him due to the taint of immorality and corruption. Even his professional colleagues shunned him. He produced all the documents referred to him in his testimony as filed in court as exhibits.

14. The plaintiff also called PW2 Mr Rajan Shah who testified on oath, adopting his statement written on 30th September 2014. He stated that he was a friend and close associate of the plaintiff before the impugned publication. That the plaintiff was also his lawyer and they visited each other as family friends since the plaintiff even shared a birthday with PW2's eldest daughter Jiya. That after the impugned publication, people started calling PW2 asking him whether he had read the sensational story about his friend in the Weekly Citizen and when he told them that he had not read, they told him that his lawyer the plaintiff was a conman, womanizer hence he should be careful on his dealings with the plaintiff. That he read the publications after which he was shocked since he knew the plaintiff to be an honest and upright person. That after the said publication, he avoided the company of the plaintiff and did not give him any more legal work as before and neither could he refer any of his friends as earlier done to the plaintiff because he dreaded being seen with a person who had been painted in bad light as an immoral, corrupt person. That he later met the plaintiff and even after the plaintiff explaining himself out, it took the witness along time to believe him, which was after the court injuncted the newspaper. That the story is also found in the internet and every time he googles out the plaintiff's name, the story pop up. Further, that some of his friends always bring up the story of the plaintiff stating "*your friend lawyer who had a story in the Citizen.*" He also testified that some Asian business persons took away work from the plaintiff who as a result suffered financial loss and had to borrow some money from the witness.

15. At the close of the plaintiff's case, the defendants never offered any evidence. Despite being served with a hearing notice, they or their advocates on record did not attend court. The plaintiff's evidence therefore remained uncontroverted. The plaintiff filed written submissions on 17th June 2015, urging the court to find that he had proved his case against the defendants more specifically that he had proved all the ingredients of defamation and prayed for judgment against the defendants as prayed.

16. According to the plaintiff, the published words were defamatory of him in that in their natural and ordinary meaning they meant that

1. He visited houses of vice
2. He had impregnated 18 women and abandoned d their children.
3. He would use his connections to neutralize the women he had impregnated should they file suits against him.
4. He was involved in acts of group sex.
5. He had fathered a child with a Kenyan Airways Hostess, Cynthia and abandoned her.
6. Having been fostered by the late Hezekiah Oyugi had wrongly sold his family's assets and boasted of his windows queuing for hand outs in his offices.
7. He had fathered and abandoned 3 year old child with a woman called Julie.
8. The plaintiff also contended that the said words as published were understood printed in such a manner as to suggest that the plaintiff had been involved in sexual conduct with the persons in the photographs.
9. On quantum, the plaintiff submitted that as the publication had injured his reputation and hurt his feelings, he was entitled to compensatory damages as defined in **Biwott V Clays Ltd [2000] 2 334 and John v M.G Ltd [1996] 1 ALL ER 35**. He submitted those who read the publication and were his friends and professional colleagues shunned him and treated him with contempt. He lost clients like PW2 and others whom the witness used to refer to him, who never wanted to be seen with the plaintiff in public. He had to borrow money as clients shunned him. The plaintiff relied on **Johnson Evan Gicheru V Andrew Moron & Another [2005] e KLR**. in urging the court to consider the factors for compensatory damages on libel actions which were :-

- i. The objective features of the libel itself, such as gravity, its province, the circulation of the medium in which it is published, and any repetition.
- ii. The subject effects 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.
- iii. Matters tending to mitigate damages such as the publication of an apology.
- iv. Matters tending to reduce damages.
- v. Vindication of the plaintiff's reputation past and future.

17. He submitted that no clarification was sought before publication and republication thereof which had the intention of destroying his otherwise unblemished professional and personal reputation hence, calculated to inflict maximum damage to him. He prayed for kshs 15,000,000 compensatory damages based on the case of **Nation Media Group Ltd & 2 Others V John Joseph Kamotho & 3 Others , Biwott V Mbuguss & Another [2002] KLR 1 321. Daniel Musinga V Nation Newspapers [2005] e KLR, Benson Ondimu Mesese v KTDA [2005] e KLR.**

18. The plaintiff also prayed for aggravated damages of 5,000,000 on the ground that the defendants having demanded for kshs 200,000/- to recant the stories, and upon the plaintiff failing to pay the same, they republished the article thereby acting with improper motive. He relied on **John V MGN (Supra) and Biwott V Clays (supra)**. He also prayed for an injunction restraining the defendants from publishing the same libel article, a withdrawal of the said publication; a complete apology and a permanent injunction restraining the 1st defendant and 3rd defendant from publishing the "weekly citizen" or any other publication. The plaintiff also prayed for costs and interest.

Determination

19. The plaintiff filed statement of agreed issues together with the 2nd defendant against whom the suit was withdrawn. The said issues are filed on 23rd July 2010. The 4th defendant filed his own statement of issues on 13th July 2010. The plaintiff's statement of agreed issues is

1. Whether the 1st and 2nd defendants published and caused to be printed a libelous publication in the weekly citizen on 16th June 2008 at the instigation of the 4th defendant.
2. Whether the plaintiff was wrongly and maliciously defamed by the defendants in a subsequent publication in the weekly citizen on 30th June 2008.
3. Whether malicious conspiracy to publish constitutes a cause of action (4th defendant's defence)
4. Whether the 2nd defendant printed the weekly citizen on 16th and 30th June 2008 or was it Mo Printers.
5. Whether the 3rd and 4th defendants maliciously and with intent to injure the plaintiff conspired and caused to be published in the weekly citizen false and defamatory photographs purchased from the 4th defendant.
6. Whether the 2nd defendant published the photographs.
7. Whether the plaintiff had reasonable cause to allege that the 2nd defendant printed the publication.
8. Whether the photographs published by the 1st and 2nd defendants were fabricated and old and published in a manner suggesting the plaintiff had been involved in sexual conduct with the person in the photographs.
9. Whether the 4th defendant bears any responsibility for the matters averred in paragraph 13 of the plaint (4th defendant's defence).
10. Whether the plaintiff's suit discloses a cause of action against the 2nd and 4th defendant's.
11. Whether the publication in the weekly citizen have seriously injured and his character and reputation as an advocate, citizen, and father been brought to disrepute.
12. Whether the plaintiff is entitled to the relief sought.
13. Who is to bear the cost of this suit?

The 4th defendant filed 8 issues for determination but never participated in the proceedings.

20. Having considered the pleadings by the parties to this suit, the evidence both oral and documentary as adduced by the plaintiff and his witnesses and the submissions filed supported by case law, and noting that the defendants never tendered any evidence in support of their defenses to controvert or rebut the plaintiff's allegations and testimony, this court finds the following issues as appropriate for determination in the circumstances of this case, as most of the issues framed by the parties can be conveniently considered together:-

1. Whether the publication of 16th June 2008 complained of was and concerning the plaintiff is capable of being construed as being defamatory.
2. Whether the said publication was made maliciously.
3. Whether there was a conspiracy between the 1st, 3rd and 4th defendants and each of them to publish or cause the publication in question of and concerning the plaintiff.
4. Whether the plaintiff's reputation was injured as a result of the impugned publication and if so, what damages is the plaintiff entitled to.
5. What orders should this court make?
6. Who should bear the costs of this suit?

21. The court in determining defamation cases must at all times balance the provisions of Articles 33, 34 and 35 of the Constitution, dealing with freedoms of expression and freedom of the print and electronic media and the individual's right to access information on the one hand and the command under Article 28 of the Constitution on the right to respect and uphold the inherent dignity of every person. On the right to access information and the freedom of expression, Lord Denning MR had this to say in **Fraser V Evans & Others [1969] ALL ER:**

“There are some things which are of such public concern that newspapers, the press and indeed everyone are 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.”

22. Lord Coleridge, CJ in the case of **Bernard & another V Periman [1891-4] ALL E R 965** had stated in an earlier case:-

“ 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.”

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

“Lago Good name in a man or woman, dear my Lord, is the immediate jewel of their souls. Who steals my purse steals trash; 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).

24. In Kenya, the freedom of expression is guaranteed under Article 33 of the Constitution. That freedom includes:

(a) Freedom to seek, receive or impart information or ideas.”

25. The freedom of the media is also guaranteed under Article 34 of the Constitution. That Article enacts:

“ 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)”.

26. In other words that freedom does not extend to or licence 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.

27. From the above exposition, it is crystal clear that freedom of expression and of the media is guaranteed under the Constitution. Nonetheless that freedom is not absolute. The limitation thereto is spelt out in black and white.

28. On whether the impugned publication concerned the plaintiff and can be construed as being defamatory of the plaintiff, it is important to highlight that the burden of proof always lies on the person who alleges the existence of certain facts. The standard of proof in civil cases is that of on a balance of probabilities. In answering that first issue, we must appreciate that in defamation cases, the claimant, in order to prove that the words complained of are defamatory, he must prove that the said words were published, they concerned the plaintiff, they were published by the defendant(s), that they were false and that they were defamatory in character of the plaintiff and finally, that the publication was done with malice. The locus classicus case on defamation of character is **J Kudwoli vs Eureka Educational and Training Consultant & 2 Others HCC 126 and 135 of 1990** [Kuloba J as he then was]. See also **Wycliffe A. Swanya V Toyota East Africa Ltd & Another [2009] e KLR**.

29. In the instant case, it is not a disputed fact that by a June 16-22, 2008 publication of the Weekly Citizen bracing itself as Kenya's Most Authoritative Political Newspaper, Volume II issue No.23 costing a paltry shs 30/- equivalent to what Judas betrayed Jesus for (save that in the case of Jesus' betrayal it was in Shekels), there is a splashing front headline in bold titled **"Kibaki Family Lawyer caught in Sex Act."** **"Beneath those words are 5 photos of what the newspaper called "James Singh Gitau, top Nairobi lawyer whose clients include first family, Finance Minister Amos Kimunya among others in love exploits as shown in the pictures. His offices are suitably in Unity House along the famous Koinange Street Red Right district."**

30. Those pictures as produced by the plaintiff tell a story. They are res ipsa loquitur. Two of them show the plaintiff half dressed only waist down and in the company of a female. In one of the pictures –the first one in the background is a lady still lying in between the sheets. Below those photos is another photograph showing the plaintiff smooching a lady. The third photograph shows the plaintiff with a lady head down while he drank some liquid.

31. The real story is published on page 2 thereof with a 3/5 page top to bottom headed. **"Now Kibaki family lawyer unmasked."** The publication was done by the 1st defendant's **"Citizen Team."** The photographs were in full colour. The publication also referred to the plaintiff by name. This court had the opportunity to see the plaintiff in court and confirms that indeed by his physical (facial) appearance he is that person whose photographs were conspicuously/overtly and sensationally published by the 1st defendant.

32. But publication is not enough, even if it was admitted by the defendants. There must be proof that a third party did read the publication, other than the printer or publisher. The paper must be exhibited in court and a person who read it called to testify to that fact. In this case, the plaintiff testified, produced the impugned publication and called one witnesses PW2 Mr Rajan Shah, a businessman in real estate and bakery. He was also a friend and client to the plaintiff. The witness testified that he read the paper and was shocked to the extent of shunning the plaintiff for the embarrassing publication. It therefore follows that there was publication of the alleged defamatory words and images of and concerning the plaintiff.

33. The next question is whether the publication was false. The plaintiff admitted that the pictures were true images of him taken more than 8 years prior to their publication and were taken at a friends' house and not at a brothel as the publication alleged. Further, that the two ladies in the picture were his friends, Ms Wangechi Gitau an advocate while Ms Stacy Muthoni who was a niece to his best man at his wedding, and not prostitutes.

34. The plaintiff denied owning the properties at Riverside Drive. He also denied that he acquired

property fraudulently. He also denied defrauding the first family and or that he acted for them in any matter as alleged by the first defendant. He denied using his alleged State House connections to cut deals. He also denied the allegation that he defrauded a Western Parliamentarian of shs 50 million. He denied ever acting for Mr Kimunya and or raising inflated fee notes.

35. The plaintiff denied confiscating a motor vehicle from any of his clients. He also denied relying on favours from any Judge to win cases. He further denied ever impregnating a record 18 women or abandoning their babies. He also denied visiting young University students or high class flesh peddlers. The plaintiff did complain to the Media Council who nonetheless lacked the muscle to restrain the 1st defendant.

36. Albeit the plaintiff admitted the pictures to be his true images, he denied the description given by the 1st defendant depicting him as being engaged in love exploits, that he was amorous, and or that he was involved in sex orgies. The plaintiff explained out the occasion of which those photos were taken and therefore it was expected that the publisher thereof would controvert the plaintiff's averments and testimony by giving evidence to justify the publication of the photos and the entire story which alluded not only to the alleged amorous sex acts and escapades by the plaintiff but also his alleged involvement in illegal, immoral and fraudulent activities not befitting of the plaintiff who is an advocate of the High Court of Kenya. None of the defendants filed any defence of truth of justification or fair comment or publication in the public interest.

37. As earlier stated, the suit against the 2nd defendant was withdrawn and only the 4th defendant filed a defence denying all the allegations leveled against him by the plaintiff. He denied that he ever conspired to publish the impugned article. Interlocutory judgment was entered against the 1st and 3rd defendants in default of defence on 30th March 2009. This case therefore proceeded on formal proof basis against the said 1st and 3rd defendants. The 4th defendant entered appearance and filed defence but despite being served with a hearing notice he never attended court for the hearing to tender his defence. On the basis that the evidence tendered by the plaintiff concerning the publication was not controverted in any way, I find that the allegations in the publication, that he was immoral, dishonest and corrupt, other than the true images of the plaintiff, were false and lacking in substance.

38. **The next question is whether the publication was defamatory of the plaintiff.** As stated earlier, every person is entitled to the protection and respect of their inherent dignity. The ancillary question, on viewing those pictures and reading the sensational story which was also read by the plaintiff's witness, PW2 is what was the motivation on the part of the 1st defendant? What did the 1st defendant purpose to achieve by publishing such half nude photographs of the plaintiff and the story that followed? The plaintiff has explained the circumstances under which those photographs were published. But it is not just about the photographs of the plaintiff. It is about what they depict that he was engaged in love exploits with flesh peddlers and much more, the clear statements by the 1st defendant that the plaintiff was involved in fraudulent, near criminal activities including professional impropriety of influencing judges to win cases in court. It is worth noting that the nature of the defamation grievance is so personal. An intangible but priceless asset of any human being is the respect, reputation and esteem he has from others. In the sociological set up of any society, any human being is entitled to respect of his person and is reciprocal. He is entitled to protect himself from being abused, insulted and disparaged with a view to lowering his reputation in the eyes of right thinking members of the society generally. A person is entitled to his good name. Therefore, if any person makes a publication which is injurious or calculated to injure that good name, the victim of the publication is entitled to seek a redress on defamation in a court of law.

39. In my view, the publication was defamatory of the plaintiff. It demeaned and disparaged him and stripped him naked in public. It even named his wife and two minor children. The plaintiff's witness who was his friend and client and who had previously referred clients to the plaintiff shunned him. His friends also shunned not only the plaintiff but PW2 because of the latter's association with the plaintiff. That evidence was not rebutted or at all. I am persuaded that the publication complained of fits the definition of a defamatory statement as defined in **Winfield in J.A. Jolowicz and T. Ellis Lewis-**

Winfield on tort 8th Edition Page 254 that:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”

A defamatory statement, according to Gatley and Libel and Slander 8th Edition by Phillips Lewis paragraph 4 page 5 discredits a man or tends to lower him on the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit.”

40. In this case, the article made very serious allegations of fraudulent acquisition of property, defrauding of the first family, using State House connections to cut deals, defrauding some politician from Western Kenya, raising inflated fee notes to Kimunya, confiscating a motor vehicle from a client, relying on favours from judges to win cases, abandoning children etcetera etcetera.

41. In the absence of any truth in those allegations, and in view of the evidence tendered by PW2, this court finds that the publication was not only defamatory of the plaintiff but highly inflammatory. The publication was deleterious and purely intended to tarnish and destroy the plaintiff's reputation as a successful lawyer. In **Honourable Uhuru Muigai Kenyatta v Barasa Limited (2011) e KLR** Rawal J. observed that the information will be assumed to be untrue until the defendant proves otherwise.

42. The plaintiff sought a withdrawal of the said publication by the 1st defendant and even complained to the Media Council who was unable to discipline the 1st defendant. He had to contend with the publication and in this digital world; the publication is still alive on any search engine, as testified by PW2 that whenever he googles, the plaintiff's name appears and that his friends refer to him by the plaintiff saying “your lawyer friend whose story appeared in the Citizen paper.”

43. **The next issue is whether there was a conspiracy between the 1st, 3rd and 4th defendants to defame the plaintiff and hence the impugned publication.** From the impugned publication, the author is named as Citizen Team. However the plaintiff testified on oath, which evidence is uncontroverted, that before the impugned publication, the 4th defendant requested to meet the plaintiff and they met at the ABC Centre and the 4th defendant asked him whether the plaintiff could help in a case in which the plaintiff was acting as an advocate for Citi Finance Bank in HCC 1965 of 1991 and HCC 251/2008 in which the plaintiff was George Nyanja and the plaintiff's client was Citi Finance Bank, to ensure that Mr Nyanja got his property back from the bank, as per Plaintiff's exhibit 7 and 13 showing plaint and defence in the said cases. That the 4th defendant told the plaintiff that he was prepared to ensure that the plaintiff was well compensated if the plaintiff agreed to do so; and that when the plaintiff declined, the 4th defendant promised to teach the plaintiff a lesson by publishing information he had concerning the plaintiff.

44. The plaintiff testified that after the impugned publication, he met the 3rd defendant Tom Alwaka at Fair View Hotel where he inquired about the source of the information and he informed the plaintiff that he had been paid sh 500,000 by the 4th defendant Brian Yongo to publish the article and that he had purchased the photographs from Brian Yongo. Further, that Mr Yongo wanted to tarnish the plaintiff's name because of the plaintiff's involvement as counsel in two High Court cases involving George Nyanja and Citi Finance over the former's properties. That the 3rd defendant asked for shs 200,000/- for a retraction to be published and in the subsequent weekly citizen Edition of 30th June 2008, there was another headline “Revolt brews in Cabinet” with a sub heading “As Libya buys Kimunya Crude Oil Shop Buys Golden Beach Hotel Mombasa through lawyer James Singh”. The plaintiff admitted acting for Mary Muthoni in HCC 99/2005 but denied being involved in the sale of the Golden Beach Hotel.

45. As earlier stated, the publication of 16th - 22nd June 2008 was by the 1st defendant “Citizen Team” No

name of author thereof or source was given. In the subsequent publication of 30th June, 2008, there is also no name of the author save "Citizen Team." The 3rd defendant's defence denied any wrong doing, authoring the publication, meeting the plaintiff and or purchasing the impugned photos from the 4th defendant who also denied each and every allegation by the plaintiff.

46. The 3rd defendant in his replying affidavit sworn on 14th July 2008 in opposing an injunction application by the plaintiff had annexed copy of his resignation letter from Headlink Publishers Limited (1st defendant) as Senior Editor, to vie for a Parliamentary nomination in Emuhaya. Albeit there was no rebuttal of the plaintiff's evidence, I find it difficult to believe that there was any conspiracy between the 1st, 3rd and 4th defendants to publish the impugned article. There is no evidence to show the source of the publications. In addition the plaintiff impresses this court as an intelligent lawyer of good repute and if the 4th defendant was demanding that the plaintiff compromises his client's case for a handsome compensation with threats that such publications would be made concerning the plaintiff if he refused to co-operate, it was only prudent that the plaintiff reports the 4th defendant to the police, expresses his concerns to the presiding judge in the matters affecting his client or writes a protest note to the advocate for the adverse party in the material case involving George Nyanja and Citi Finance Bank.

47. In addition, if it appeared to the plaintiff that the 3rd defendant was trying to extort some money from him, nothing prevented the plaintiff from reporting the matter to the police to investigate. Even if there would be no charges pressed against any of the defendants, the plaintiff would have gathered evidence that would lend credence and assist him in a civil claim.

48. I am on the evidence adduced by the plaintiff unable to find any evidence of conspiracy between the 1st, 3rd and 4th defendants to publish the offending article. Since the two defendants denied in their defences although they did not testify, the burden of proof still lay on the plaintiff to prove, on a balance of probabilities that the two defendants conspired, authored and caused the 1st defendant to publish the offensive article and photographs.

49. **On the question of whether the offensive publication was made maliciously**, in Libel, pleading malice is not mandatory. However, malice can be inferred or established from the publications themselves. From the publication a clear message is sent to the reader that the plaintiff is an immoral person, he is a criminal, untrustworthy, fraudster and is doomed to fail like Donald Kipkorir. This court was not shown how fraudulent or immoral the plaintiff was. Neither was it shown how Donald Kipkorir whose name was dragged in the offending article was a failure such that the plaintiff was headed in the same direction. The bold headline and coloured pictures including some showing the plaintiff half nude, and the failure by the 1st defendant to testify as to the plaintiff's immorality and or dishonesty and or publish any apology or even file a defence in this case to controvert the allegations against it denotes impunity and malice. Those publications are not protected by Section 7 of the Defamation Act and the schedule thereto.

50. **On whether the plaintiff's credibility, character and reputation was injured and therefore whether he is entitled to damages**, the plaintiff testified that he is a family man. His wife and children were named personally in the article. He called PW2 who testified as to how he started evading the company of the plaintiff with whom they had freely associated as client /advocate and among the Asian Community. Following the publication which his friends called him after reading it and asking him to read, his friends and colleagues always referred to him as "your lawyer friend." That the plaintiff lost clients and was forced to borrow money to fend for him is not in dispute and this court believes that evidence; for the greatest asset that an advocate in private practice has is his reputation. Once he loses it, he also loses clients and therefore a livelihood. According to the plaintiff and PW2, the plaintiff's friends and professional colleagues and acquaintances shunned him. Taking into consideration the plaintiff's profession and career, and his deportment in court, I have no doubt that he is a person of reasonable fortitude and therefore his reputation and standing in society was greatly lowered by the impugned defamatory publication. That being the case, I find that he is entitled to damages for being libeled unjustifiably.

51. In **Halsbury's Laws of England 4th Edition VOL 28 paragraph** it is stated:-

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

52. In **Gicheru V Morton and Another (2005) 2 KLR 332**, the Court of Appeal was clear that:

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

53. In awarding /assessing the compensation to be awarded to the defamed plaintiff, the case of **Jones vs Pollard [1997] EMLR 233 page 243** is useful. It sets out principles to be taken into account in such assessment thus-

1. *The objective features of the libel itself such as its gravity, its province, the circulation of the medium in which it is published and any reputation.*
2. *The subjective effects on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself.*
3. *Matters tending to mitigate damages, such as the publication of an apology.*
4. *Matters tending to reduce damages.*
5. *Vindication of the plaintiff's reputation, past and future.*

Other factors as set out in Standard Ltd V C.N. Kagia t/a Kagia & Co- Advocates CA 115/2003 are that:

- a. *In situations where the author or publishers of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligence, these factors should be taken into account in assessing the level of damages.*
- b. *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 publishers.*

54. Applying the above principles to this case, it is clear from the evidence adduced that the 1st defendant acted recklessly and sensationally in publishing the plaintiff's photos and alleging, besides the so called sexual exploits, other ills of a criminal nature of and concerning the plaintiff. There was no evidence that they even contacted the plaintiff to verify those wild allegations against the plaintiff. They never responded to the demand with any apology. They never interviewed the plaintiff to give his side of the story before publishing, and they have remained non-responsive to this suit.

55. It is common knowledge that the 1st defendant's paper wherein the offensive publication featured is widely read as a gutter press in the name of **“Kenya's Most Authoritative Political Newspaper.”** If that is anything to go by, what is political about the plaintiff being *naked with prostitutes defrauding people of their property and having his office next to the red lights of Koinange street, strategic enough to nab the call guls?* There was nothing in the publication to show that the plaintiff had political interests other than his alleged defrauding of the 1st family and Mr Kimunya.

56. Those allegations as published against the plaintiff are very weighty going to the core of moral

turpitude and deprivation of any decency or shame on the part of the plaintiff. From PW2's evidence the plaintiff is no doubt without the respect he commanded from his friends, associates, and clients. Any right thinking person would depict the plaintiff as a despicable vile, evil and decadent person of the lowest level.

57. Moreover, the size and influence of the publication is obvious especially in Nairobi. The paper is also cheap enough. It is affordable among many citizens. This court takes judicial notice that people are always attracted to negative stories concerning others. Is that person depicted in the publication the one who is before this court seeking to be vindicated, yes I say and add that indeed Mr Gitau demonstrated before this court to be of repute in the society. He has appeared before the court on other occasions representing his clients. He has showed honour and respect to the court. The 1st defendant never controverted that fact.

58. The subsequent publication of 30th June, 2008 by the 1st defendant only added insult to injury. It was malicious. The 1st defendant did not check the veracity of any of the publications/allegations against the plaintiff. It also refused to publish any retraction.

59. The plaintiff sought compensatory damages and proposed a sum of shs 15,000,000. Compensatory damages were defined by Visram J.(as he then was) in **Biwott vs Clays Ltd[2000] 2 KLR 334** as **"damages awarded to the plaintiff for injury of his reputation and the hurt of his feelings."** A successful claimant in defamation is entitled to general compensatory damages [see **John V MG Ltd [1996] 1 ALL ER 35**. Section 16A of the Defamation Act Cap 36 Laws of Kenya stipulates that:

"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 a 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 not less than three years the amount assessed shall not be less than four hundred thousand shillings".

60. The plaintiff expressed how his feelings were hurt by the impugned publication occasioning him great anguish and distress. He lost friends and clients. Being a family man with children, it cannot be gainsaid that the publication subjected him and his family to ridicule and contempt as per the testimony of Mr Rajan Shah who stopped associating with and or retaining the plaintiff as his advocate and could not recommend any of his friends to the plaintiff for legal advice because of the allegations linking the plaintiff with defrauding the Kibaki family, Mr Kimunya and some western Kenya politician among other clients. The witness avoided being seen with the plaintiff in public albeit the two had been close friends prior to the offensive publication.

61. I am satisfied on the evidence on record that the offensive publication brought the plaintiff into disrepute among his peers, family, friends, clients and professional colleagues, taking into account the prominence with which it was splashed.

62. In awarding the quantum of damages under the head of compensatory damages, I shall borrow guidance from the past decisions. In **Joshua Kulei V Kalamka Ltd HCC 375/97, Nicholas Biwott V Clays (supra)** where the court made higher awards for compensatory general damages, on appeal, those decisions were reduced Tunoi JA who stated that :

"high awards lacked judicial bases and they may be found to be manifestly excessive and should not be used as persuasive guidelines of the awards to be followed by the trial court, since the trial judges concerned appeared to have ignored the basis fundamental principles of awarding damages in libel cases."

63. The award of compensation or damages is in the discretion of the court, which in a right case, should frown upon the publication which is grave, without justification and persistent and when asked by a

demand letter, not retracted. Thus, each defamation case has to be carefully considered in the light of its own circumstances surrounding the publication, its nature, extent of circulation, behavior of the defendant before and after the publication and during the trial.

64. The Constitution of Kenya guarantees every person the right to inherent dignity and reputation which must be respected and protected and any person unless done lawfully cannot violate that right. In the instant case, I find that the plaintiff's right to his inherent dignity was gravely violated by the impugned publication. His privacy was invaded without justification. There was no evidence that the photos were taken in a brothel or that they were current. The publication could be seen and viewed and read by anyone owing to its prominence in the paper. The 1st defendant has not given any explanation why it wrote or published the news item concerning the plaintiff and the insinuations therein which have been denied by the plaintiff to the satisfaction of this court. As was held in **Nation Media Group Ltd & 2 Others V Joseph Kamotho & 3 Others [2010] eKLR**,:

“ reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation one's reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation.”

65. The plaintiff is therefore entitled to damages. Taking into account all the aforesaid circumstances and the plaintiff's standing in society as a prominent lawyer, family person and businessman, and on the authorities cited, I award the plaintiff Five Million Kenya Shillings- **shs 5,000,000** general compensatory damages for loss of reputation guided by the decision in **Ken Odondi & 2 Others v James Okoth Omburah T/A Okoth Ombura & Company Advocates [2013]e KLR** where the Court of Appeal awarded the respondent who is an advocate of the High Court of Kenya shs 4,000,000 general compensatory damages.

66. The plaintiff also prayed for aggravated damages and proposed shs 5,000,000. In **Ken Odondi & 2 Others V James Okoth Omburah (advocates) (supra)** the Court of Appeal held that:

“ In any event the respondent established through evidence that not only had he lostbut a prospective partnership with another lawyer did not materialize as a direct result of the defamatory article. So the respondent was not only entitled to general damages for defamation but was also entitled to exemplary damages for defamation to punish the appellants who had defamed him and refused to retract the offending article or apologize.”

67. In **John V MG Ltd (supra)** the English court held that:

“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 i.e. Where it is attracted by malice; insistence on a flunty defence of justification or failure to apologize.”

68. In this case, I find that the 1st defendant acted out of an improper motive and maliciously. They refused to apologize or retract the offensive publication and neither did they attend court to mitigate their position. They acted with impunity. They republished the article though not with the same prominence. I find and hold that the plaintiff is entitled to exemplary damages. I award the plaintiff Two million **shs 2,000,000 aggravated damages**.

69. The plaintiff also sought for an injunction to restrain the defendants from further publishing the said or similar libel upon the plaintiff and a withdrawal of the said publication together with an apology. In my view, an injunction is merited. An interim one was granted pending hearing and determination of this suit. I accordingly confirm the interim injunction and order that the 1st defendant is hereby permanently restrained by themselves, their agents, servants and or otherwise from further publishing the said or similar libel upon or concerning the plaintiff.

70. On the prayer for withdrawal of the publication and apology, I find that the same were overtaken by events and as there is no other alternative relief sought, I decline to grant those prayers.

71. The prayer for a permanent injunction restraining the 1st defendant from publishing the “Weekly Citizen” or any other publication would drive the 1st defendant completely out of business forever and perpetually. I decline to grant that prayer, having granted an order restraining them from publishing any libelous material of and concerning the plaintiff .

72. In the end, I enter judgment for the plaintiff against the 1st defendant only. I find the 1st defendant liable for maliciously publishing libelous material of and concerning the plaintiff. I award the plaintiff a sum of Kshs **Seven Million Kenya Shillings shs 7,000,000 damages** for defamation of character. I grant an injunction restraining the 1st defendant, Headlink Publishers, its agents, servants, or any other person acting through them or on their behalf from further publishing the said or similar libel upon or concerning the plaintiff. I award the plaintiff costs of this suit and interest on damages from date of this judgment until payment in full.

73. As the claim against the 3rd and 4th defendants were not proved to the standard required on a balance of probabilities, I dismiss the suit by the plaintiff against them. I make no orders as to costs since the 3rd and 4th defendants did not fully participate in these proceedings.

Dated, signed and delivered at Nairobi this 30th day of October, 2015.

R.E. ABURILI

JUDGE