REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 518 OF 2010

BRIGADIER KENNETH OKOKI DINDI.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....DEFENDANT

JUDGMENT

1. This is a test suit on liability affecting nine other suits namely, HCC 511,512,513,514,516,517,519 and 527 all of 2010 respectively, following a consent order made on 11th October, 2012 and issued on 18th October, 2012 by Hon Mr Justice Odunga which latter suits were all stayed pending the hearing and determination of this suit.
2. The Plaintiff **BRIGADIER KENNETH OKOKI DINDI** filed this suit against the defendant **THE STANDARD LIMITED** seeking general damages, aggravated or exemplary damages and a permanent injunction to restrain the Defendant by itself, its agents or servants from publishing, printing, circulating or distributing allegations that the Plaintiff is corrupt or has abused his office as a Government Officer to confer benefits to himself or others, has flouted the procurement law and rules in the processing or award of the tenders or a tender by the Department of Defence.
3. The impugned articles as pleaded are reproduced herein as follows:-

"SH. 1.6 BILLION TENDER SCANDAL ROCKS DoD

CGS stops payment to SA firm and calls for statements for tender officials as PS tells Kenyans contract process transparent.

Fright struck

The APCs are what Kenyans popularly refer to as tankers, which transport infantry to the battlefield and other hostile zones and to protect them from shrapnel and enemy bullets, and are used mostly as minesweepers. They are also equipped with mortars, missiles or machine guns.

In addition to cancelling the letter of Credit- which in financial terms stands for irrevocable undertaking to pay- the CGS also ordered that the ten officers who constitute contract negotiation committee to state, in writing , their side of the story on how the SA firm got the contract.

The officers are the Chief Finance Officer Mr C.K. Muhia who was the Chairman, Brigadier A.N. Owuor (chief of Logistics), Brigadier K.O. Dindi (Chief of Legal), Brigadieir J. Bukhala (chief of Systems) and MR. E.N.Murimi (Principal Accounts controller).

The others are Mr Z.G. Ogendi (Chief procurement Officer), colonel G.G. Kbugi (Deputy Commander Armour), Colonel T.C.K. Kipng'etich(Col Budget), Colonel H.A. Oduor (colonel in charge Research and Development) and Major H . Kiprotich (Mechanical Department), who is also secretary to the committee.

FURIOUS KIANGA

The officers were expected to hand in their signed statements by close of business yesterday.

The officers' mandate included terms of payment, technical aspects such as review of technical specification provisions of spares special tools, technology transfer, inspections and delivery period and warranty.

Sources told the Standard the CGS who arrived in his ulinzi House Office quite early was furious that the original timeline approved for the procurement of the APCs and certified by himself, were ignored and a new one drafted without his knowledge.

Our sources said the CGS was not aware of the revised timeline that saw the contract awarded to M/S OTT Technologies (Pty) Limited within a week.

According to the original timeline approved by the CGS, DoD was to open a Letter of Credit to the winning firm by January 11,2011 with a 50 percent down payment of the contract sum of shs.1.6 billion.

However, the revised timeline did not give e any indication as to when the down payment should be made, but only indicated the delivery date of APCs as February 15, 2011.

Sources said the manner in which the contract as fast –tracked raised more questions than answers.

Yesterday, the CGS is said to have ordered Brigadier Dindi too get him a copy of the contract that was sent to the Attorney General to enable him see the comments given by the Government's Chief Legal Advisor.

In his earlier communication to the contract negotiation committee, the Permanent Secretary to the Ministry of State for Defence Ambassador Nancy Kirui asked the team to forward the resultant contract agreement to the AG for advise on its suitability.

Kirui noted in the letter that the final contract agreement would be signed between the PS and the contracted firm.

DoD awarded the US$20 million deal to the South African firm to the chagrin of the other four companies that had been invited to take part in a restricted, but competitive tender.

The other firms are Paramount Group, Mechem Technologies (PTY) Limited, Integrated Convoy Protection(PTY) Limited all from south Africa and Israel's Ramta.

Sources informed the Standard that M/S OTT Technologies was last Friday awarded the tender for the APCs after a surprise and last –minute review of the initial timeline set out by the Ministerial Tender Committee(MTC)

PRESIDENT INNER-CIRCLE

The new scandal draws the procurement procedures of the secretive military headquarters to public scrutiny, particularly because the tender seemingly contravenes DoD's stated claim that its procedures emphasise procuring " the right equipment and systems at the right

time, in the right quantity, at the right place, and at the price by advocating competitive bidding" Interestingly, it was Kirui not Kianga on whose behalf Military Spokesman Mr. Bogita Ongeri issued yesterday's statement denying there was anything untoward in the procurement process.

The statement was, however, silent on the part if the story that reported that three senior officers- a Major General, a Brigadier and a Colonel- would in a unprecedented move be court- martialled soon over claims of involvement in another scandal which involved raising invoices of payments involving millions of shillings without attaching the requisite documents.

The three- whose investigation is being led by Maj- General Simon Karanja who is in charge of the Western Command- are believed to have closely linked to a senior commander at DoD whi is perceived to be well-connected within president Kibaki's Government inner-circle.

In her rebuttal statement, Kirui suggested the revelations on the procurement were part of the work of "commercial vested interests" she claimed were working to scuttle the process".

<u>Military Chiefs too must be accountable</u>

Kenya's military to brass are fighting claims of corruption and inappropriate conduct of some of its senior officers. Predictably, the media and in this case the Standard is being accused of fabricating a story about the suspect shs 1.6 million tender awarded to a South African firm last week. Though going by the past, which is replete with denials of questionable deals, no one expected them to own up to battling a scandal.

It was therefore expected the military chiefs would ignore the pertinent issues we raised and throw in the wild claim that it was fanned by 'commercial vested interests working to scuttle this (tendering) process."

But curiously the Chief of General Staff cancelled a sh 800 million letter of credit to the South African firm, even as his team denied there was nothing untoward in the process. He also demanded written statements in what transpired from the ten members of the Contract Negotiation Committee. They were expected to reveal who varied General Jeremiah Kianga's earlier order and that of the Ministerial Tendering Committee that the five companies invited to bid for the supply of military tankers under the Restricted Tender procedure be given equal opportunity. Instead, as we reported, the team that went to inspect what the firms have to offer in South Africa, where four of the companies are based, received a curious if not criminal directive to just focus on one- which eventually got the contract.

Interestingly, even after the award, DoD has through the defence Permanent Secretary Nancy Kirui, denied the process has been concluded. The PS defends the need for the minesweepers but does not explain to the public what the urgency is all about.

MAKING HAY

As far as the country is aware, there is no external threat to warrant the circumventing of procurement rules. The real fear is some of the top brass who could be existing soon could be out to make hay while the sun shines. What is even more intriguing is that in this era of ne constitutional dispensation, which makes greater demands on the grounds of morals standing and integrity on public servants, the military chiefs still believe their traditional magical wand- anchored onto the primitive and age-old dogma of secrecy of security issues –would work this time round.

The last time this magical word was waved at the Kenyan public was in relation to the unresolved shs 4.1 billion suspect naval ship contract given to a foreign country. It is still

believed the ship would have been procured at shs 1.8 billion or less- but of course someone in the military and office of the President made sure that was not to be for obvious reasons.

There is also the smelly shs 360 million helicopters' servicing contract given to a SA firm when the routine maintenance could be done locally. The choppers 'engines were freighted to SA for repairs, and when the media reported, it was again dismissed as 'fabrications.'

Then there is the shocking sh 2.6 billion constructions of Nexus- a secret military communication centre Karen- which despite payments the military has not used. Just like the latest scandal, the tendering was short circuited. What is, however encouraging despite the denials is that DoD still acted on the tanker scandals but away from public glare.

DISCIPLINE, MERITOCRACY

We hope this time round the cartel that is dragging the national Armed Forces' name through the mud would be brought to account. To achieve this President as the Commander - in –Chief must take more that a cursory glance at what is happening at DoD. He also ought to know junior officers are questioning why a few cam be allowed to shred the honour of discipline, meritocracy, and integrity which have been the hall-mark of the military. But we have to tell our military top brass it is foolhardy to expect the country would look the other way just because of some decree that security programmes are national security secrets. Kenya has lost so much in the past- including the daylight robberies christened Anglo Leasing- because of this fallacy and accountability must cascade through all facets of public institutions."

4. The Plaintiff's case was that on 25th October, 2010 and 26th October, 2010, the Defendant published articles with the headlines "***1.6 Billion tender scandal rocks DOD"*** and "***Panic in DOD as Kianga Steps in***" respectively in which the plaintiff was mentioned in a defamatory manner. He stated that the first publication was associated to the Anglo-leasing Security projects and alleged several irregularities by himself in the tender for the said projects. He particularly stated that it was alleged that he was about to be court marshalled for being involved in overpayments. He stated that the article mentioned the members of the negotiating Committee responsible for the procurement which included him. He stated that it was alleged in the article that the other bidders were kept in the dark as OTT got the tender and that one Jeremiah Kianga the Chief of General Staff of the Kenya Defence Forces had to order that all firms that had been listed to be evaluated to ensure that there was no underhand dealings spanned by the committee. Referring to what the defendant alleged to be its sources of information for the publication as contained in his paragraphs 3 of the plaint, the Plaintiff denied that there was any row at the Department of Defence (DoD) concerning the tender process. He further contended that the sources from which the Defendant got that information was undisclosed. He stated that he understood the publication to mean that there was Kshs. 1.6 Billion tender scandal at DoD; that procurement procedures were not followed, that there was cutting out of some firms sampled out; that the scandal could only be equated to Anglo-leasing scandal for lack of competitive bidding; that he and others had occasioned loss to the Government and committed offences under the Anti-Corruption and Economic Crimes Act (ACECA); that he and others had failed to follow Government procurement procedures and were criminals and unfit to hold public office and that he and others were corrupt individuals and criminals.
5. Concerning the second article, the Plaintiff stated that the story alleged that the Chief of Staff stepped in and stopped payment to a South African firm and called for tender officials as the Permanent Secretary in the Ministry of Defence told Kenyans that the contract process was transparent. That the Chief of Staff (CGS) cancelled the order of Kshs. 800,000,000/= letter of credit to OTT the "lucky" firm. He stated that he was mentioned as one of those who were made to write statements of how the South African firm got the contract. He stated that the article alleged that the contract was fast tracked; that he had been ordered by CGS to get a copy of the contract sent to the Attorney General. He stated that the said article further alleged that the tender contravened DoD's procedures of procurement which emphasises on procuring the right equipment and systems at the right time, in the right quantity, at the right place and at the right

price by advocating for competitive bidding. The plaintiff stated that he understood the article to mean that him and others were about to cause loss of Kshs. 800,000,000/= to the Government; that he and others almost succeeded in committing offences and breaches by paying out such colossal sums of money had the CGS not intervened by stopping the procurement; that he and others were criminals and corrupt individuals and were therefore not fit persons to hold their respective positions. The Plaintiff maintained that the publications were false. That the defendant had to date not supplied him with any documents to justify the allegations and further that the Defendant had not apologised or retracted the publication justifying what they had published concerning him.

6. The Plaintiff further stated that on 27th October, 2010, the Defendant published yet another article "***Military Chiefs too must be accountable.***" He stated that since the Defendant has a website which is open to the world over he was disgruntled by the publications. He particularly stated that he was called from England by schools where his children attended and family over the issue to find out whether or not the publications concerning him were true.
7. On being cross examined by Mr Echesa counsel for the defendant, the plaintiff responded that he still worked with Kenya Defence Force (***KDF***) and that no disciplinary action has been taken against him. That at the material time he served as the contract negotiating committee member. He maintained that there was no tendering of APC's from a South African firm. The Plaintiff referred the court to a statement by a Mr. Bogita Ongeri made on behalf of the Ministry of Defence in the Standard on 26th October, 2010 in which the Permanent Secretary clarified that there was no violation of any procurement procedures at DoD. He acknowledged that the impugned articles did not mention the Government Financial Management Act and no offence under Anti Corruption and Economic Crimes Act was mentioned in the articles. He also acknowledged that no specific paragraph said that the officers conferred a benefit upon themselves and that the article talked of top military officers at DoD of whom he considered himself one.
8. The Defendant filed a defence in which it admitted publishing the words complained of but denied that they were malicious or in any way defamatory. Justification for the publication was given particulars of which were as follows:-

a. In October, 2010, ten individuals serving in the armed forces were appointed by the Permanent Secretary to the Ministry of State for Defence to constitute the Contract Negotiation Committee;
b. the appointment was made for the direct procurement for supply of Armoured Personnel Carriers (APC's) on specific terms of reference;
c. the Ministerial Tendering Committee (MTC) in September, 2010 restricted tendering from 5 Companies i.e. MECHEM Technologies (Pty) Ltd, OTT Technologies (Pty) Ltd, Paramount Group, Integrated Convoy Protection (Pty) and IAA RAMTA;
d. that specific timelines had been set with regard to the procurement process beginning in September, 2010 to June, 2011;
e. The award for the tender was made out to OTT Technologies (Pty) Ltd in October, 2010; and
f. Concerns were raised as to the procedural propriety of the procurement process.

9. The defendant also contended that the plaintiff's claim was intended to muzzle the defendant's freedom of the media to disseminate matters of considerable public interest concerning Government departments, officers and processes of which the general public have legitimate right to know.
10. The defendant further pleaded that it had an inherent constitutional right to the freedom of expression that constitutes the reception and impartation of information and the general public having the right to receive information held by the state in the exercise of the constitutionally acknowledged freedom of the media.
11. The defendant also contended that no demand or intention to sue was received and neither did the plaintiff avail himself the right of reply reserved by law and maintained that the plaint did not disclose any cause of action maintainable in law. It pleaded that it would rely on Section 15 of the Defamation Act Cap 36 Laws of Kenya.
12. The defendant despite seeking an adjournment and applying for witness summons to procure the attendance of Ben Agina as a witness to testify on its behalf, closed its case without calling any witness.
13. Both parties' advocates filed submissions to beef their rival positions. It was the Plaintiff's

submissions that the published words did not merely impute discreditable conduct to him but also boldly stated to the whole world, not once but continually that he had committed serious criminal offences. He stated that the said words completely ruined and destroyed his reputation and integrity. That he had discharged the burden of proof placed on him by producing documents containing the publications while on the other hand the Defendant did not call any evidence, admitted the publication and did not produce to prove that the publications were true or imputed any meaning different from the Plaintiff's claim. It was further submitted that the articles referred to him and his colleagues in the Committee by name and also referred to him and his fellow committee members by their respective designations in the Department of Defence.

14. The Defendant on the other hand filed submissions contending that the Plaintiff had not on a balance of probabilities established that the publication evoked to the third parties feelings of contempt or even lowered him in the estimation of members of the public generally and or that the third parties who read it changed their perceptions about the Plaintiff. The Defendant was of the view that the Plaintiff's claim could not have succeeded even without the Defendant calling any witness to adduce evidence. On this point the Defendant cited **Daniel N. Ngunia v. KGGCU Limited Civil Appeal No. 281 of 1998**.
15. To counter that argument, the Plaintiff cited **J.M. Bendzel v. Kartar Singh (1953) Vol. XX 53** where it was held that if the words used impute the discreditable conduct to a person, even if a third person knew them to be untrue, those words shall be found to be defamatory.
16. The effect of failure to tender evidence has been widely discussed by our courts. See **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** where Makhandia J (as he then was) discussed the effect of failure to rebut evidence as follows:-

> ***"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."***

17. In the absence of evidence in rebuttal, the Plaintiff case should carry the day. However, circumstances of each should be considered independently. While the Plaintiff produced documents and tendered evidence, I am reserved to hold as it were in **Karuru case** (supra) for considering the essentials that must be satisfied in cases of libel before finding whether or not the plaintiff has proved his case against the defendant on a balance of probabilities. I am fortified by Hon. Judge Odunga's observation in **Phineas Nyagah v Gitobu Imanyara [2013] eKLR** where he stated as follows:-

> ***"Under article 32(1) of the Constitution every person has the right to freedom of conscience, religion, thought, belief and opinion and provides that the freedom to express one's opinion is a fundamental freedom. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In a tort for defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and***

so on. <u>Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself.</u> <u>An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts.</u> See <u>J P Machira Vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997</u>... in libel, the words cannot be protected as mere abuse since it is presumed that the defendant had time for reflection before he wrote them. Secondly, the words must refer to the plaintiff. 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 hair 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. See <u>Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mwangi</u> (supra)." (Emphasis mine)

17. It follows therefore that in a suit founded on defamation of character, the plaintiff must prove the following elements:
    a. *There must be publication of the words to a third party*
    b. *The words as published must refer to the plaintiff;*
    c. *The words must be defamatory i.e. they must tend to lower or actually lower the plaintiff's reputation in the eyes of the right thinking members of the society generally;*
    d. *The words must be false such that truth is an absolute defence to an action in defamation; and*
    e. *In slander., there must be proof of resultant damage*
    f. *The plaintiff must also demonstrate that the words were published maliciously*
18. On the first element, the defendant does admit that it published the impugned articles in the exercise of its inherent constitutional right to freedom of the media and freedom of expression and to inform the public of the facts and claims surrounding the controversial tender by the Department of Defence, a public entity. It also contended that the publications were fair reporting of the matter made in good faith and without malice upon a matter of considerable public interest in so far as the same concerned the controversy in the acquisition of military equipments APC by DoD which is part of Government thus involving matters of profound public interest as the said procurement related to the use of public funds for and on behalf of the people of Kenya. It went ahead to provide the specific particulars of facts that it relied upon to publish the impugned articles. However, the defendant did not adduce any evidence to prove the truth of those facts that it sought to rely on in its defence. It therefore relied on the plaintiff's answers in cross examination to built their defence. However, it is the view of this court that a mere written defence on record without any evidence to support the positions taken by the defendants is nothing. The defendant's advocates indeed actively participated in the proceedings during the hearing of this case, and only solicited for answers in cross examination which answers cannot form a basis of a party's case or defence. Parties must tender evidence in support of the allegations or contentions. This is a principle of law espoused in the Court of Appeal decision in the case of **JOHN <u>WAINAINA KAGWE VS HUSSEIN DAIRY LTD- MOMBASA CIVIL APPEAL NO 215 OF 2010, per Githinji, Makhandia&Murgor JJA.</u>** I add that neither can submissions on points of fact support

a party's case where no evidence is adduced to prove that fact which is alleged. In addition, submissions by counsel for the defendant from the bar however strong on matters of fact has never been a means of the parties tendering their evidence in court. Submissions are only meant to clarify issues and not for purposes of giving evidence. Furthermore, counsel's role in proceedings has never been that of witness giving evidence on behalf of their clients unless they are called upon as witnesses in which event they would then relinquish their role as advocates for the party and step into the witness box to be cross examined, or unless they are parties to a particular dispute. This being a fresh case for trial and not an appeal or an application, it follows that the submissions on factual matters raised by the plaintiff and contested in the statements of defence filed by the defendant without calling evidence is no defence or at all. See also my decision in **HCC 140 OF 2008 Gideon Onchwati V Kenya Oil Co Ltd and Nation Media Group Ltd [2015]eKLR**.

19. The Plaintiff argued that his name and position as mentioned, among the officers who were in the negotiating Committee was disparaged. The first article specifically talks of top military brass in a spot over unilateral award of a contract for supply of utility vehicles to a South African Company. The defendant's publication revealed that the three senior officials based at DoD- who are a Major General, a Brigadier and a Colonel may be Court marshalled following claims that they were involved in overpayment of several millions of shillings to a firm(name withheld) to undertake freight forwarding on behalf of DoD. The publication then went ahead to name members of the negotiating committee who were alleged to have fast tracked the award of the tender to the South African firm as being chaired by a Mr C.K.Muhia, and nine members with Major H.Kiprotich as the Secretary. The other members are Brig A.N Owuor, Brig K.O. Dindi, Brig J Bukhala,Mr E.N.Murimi,Mr Z.G.Ogendi,Col.C.G Kabugi,Col. TCK Kipngetich and Col. H.A Oduor. Secondly, the second article states that there was panic at DoD as Kianga CGS stepped in to stop payment to a South African firm by tender officials as PS tells Kenyans that the contract process was transparent and that the CGS ordered the Plaintiff and the other nine members of the Contract negotiating committee to state in writing their side of the story on how the South African firm got the contract. The article went ahead to name all the nine officers and their respective designations who include the plaintiff and that the CGS had on the previous day ordered Brig Dindi(the plaintiff herein) to give him a copy of the contract that was sent to the Attorney General to enable him see the comments given by the Government's Chief Legal Advisor.
20. The Plaintiff did not bring any other witness other than him to express what they thought of the publication. However, on the authority of **Nation Media Group Ltd &2 other v John Joseph Kamotho&3 other CA 284 Of 2005** the Court of Appeal stated:

> ***"Mr Kiragu contended in the first limb of his submissions that the learned Judge had erred in law and fact in finding for the respondents when no single person gave evidence that they had heard any of the broadcasts connected to the respondents; and, that the essence for libel is wrongfully affecting the opinion of others, not what the respondents think.***
>
> ***For the tort of defamation to succeed, the following elements must be proved by the claimant:***
>
> 1. ***The statement must be defamatory;***
> 2. ***It must refer to the claimant, i.e identify him;***
> 3. ***It must be published i.e communicated to at least one person other than the claimant (see Winfield and Jolowicz on Tort: 16th Edition 2002 pp.159&162.***
>
> ***It is admitted by the appellants that the words complained of were broadcast on FM Radio station and TV. It is common ground that the two stations receive wide listening both within and without the country. The 3rd appellant candidly admitted that as the host and presenter of the changamka programme he allowed one of his regular callers"Maina" to go on air and publish the words complained of the 2nd appellant, also, as news editor responsible for all news items allowed the said utterances to be broadcast in the new bulletins at 9.00 a.m and 11.00a.m thus, the act of broadcasting or publication by the appellants had been***

proved."

21. In this case, the defendant admits publishing the impugned articles and even goes further to offer defences of truth, justification and public interest. Can the defendant therefore in its submissions be allowed to retort that there is no evidence of any person who read the articles and or construed them to be defamatory of the plaintiff? I do not think so. It is also not in doubt that the defendant's newspaper the Standard wherein the publication was made enjoys national circulation and international readership through online versions and therefore such a story that was a headline covering many pages could not have escaped even non curious readers wishing to know who the top military brass in the spot were that were involved in the unilateral procurement malpractices and scandal rocking the DoD akin to the Anglo leasing scandal that the CGS had to be forced to step in.
22. The impugned articles when read as a whole, no doubt depict that there was a tender scandal at the DoD involving Kshs 1.6 billion and that the officials who were involved in the said scandal of fast tracking and awarding the tender to one South African firm and cutting out other firms did breach the procurement laws and procedures; and those officials who are named are the plaintiff herein and his colleagues members of the contract negotiation team.

19. Iam accordingly satisfied that the plaintiff did not have to prove any of the innuendos. In their ordinary meaning, the words as used in the articles clearly connote that the plaintiff and his negotiating committee members committed a culpable criminal offence whether under the Public Procurement and Disposals Act, that of flouting the public procurement laws and procedures by single sourcing the South African firm for the supply of Military equipment without following the laid down procedures and or under any other written law including the Public Officers Ethics Act or even the Penal Code. Breaching of the public procurement law and procedures is in itself a crime as it can lead to loss of huge of public funds and or resources. The plaintiff, in my view, did not have to prove all other offences that he could most likely be found to be culpable of committing by virtue of him being a public officer and engaged in a public duty. Any reasonable member of the society reading the impugned articles could not be mistaken for construing the impugned articles to be defamatory of the plaintiff. The articles were not simply informing the public, and the burden of proof is upon the defendant to show that a reasonable man would not have understood those words in a defamatory sense. It is presumed that the defendant had time for reflection before publishing those articles and since they pleaded truth and justification, they would avail evidence to prove their truth.

23. This court does indeed welcome that transparency and accountability are national values and principles of good governance as enshrined in Article 10 of the Constitution but takes issue with the habit of media houses simply insinuating that certain individuals are responsible for financial losses and or procurement malpractices without adducing any piece of evidence to prove those allegations. In this case, the court poses a question, where is the evidence to prove those facts that the defendant relied on to publish the very captivating story that had to be the cover story for two consecutive days and even after the Permanent Secretary for Defence clarified in the defendant's own paper by way of a paid up advertisement, denying any malpractice, the defendant still rubbished the clarification by the Permanent Secretary, yet it closed its case without calling any witness to justify the publication? In my view, that is recklessness and evidence of malice on the part of the defendant, for which consequences follow. Responsible media reporting is what our Constitution espouses and not recklessness and sensationalism aggravated by the voracious thirst for profit making through quick sales of the publications that greatly injure people's reputation and professions and based on no facts or at all. This court does not phantom how the public will trust the media if the media is merely engaged in peddling lies and rumour mongering and vilification propaganda about individuals who are expected to be accountable to the public? The media must also be accountable to the public for whatever they publish to inform the public of the truth and where they have evidence, they must be prepared to avail it to court to assist the court and the public know the truth about actions of those individuals. Freedom of the media is not absolute. It is accompanied by responsible reporting. Under article 32(1) of the Constitution every person has the right to freedom of conscience, religion, thought, belief and opinion and that the

freedom to express one's opinion is a fundamental freedom. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In deciding a claim based on a tort of defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which affairs are being administered with the right to protect the dignity and reputation of others so that that right is not trampled upon with impunity in the name of public interest.

24. There was no evidence of any written apology offered to the Plaintiff nor were the words complained of retracted even after the Permanent Secretary for Defence issued a paid up advertisement in the defendant's own newspaper on the authority of the CGS Jeremiah Kianga on 26th October, 2010 denying the allegations made by the defendant.

25. 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 is disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair 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. **See Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mwangi (supra).**

26. The publication by the defendant was, to say the least, too bold. It laid bare serious allegations against the plaintiff and his fellow members of the contract negotiating committee such that one would expect the defendant to put up serious defence to justify the headlines that took centre stage of the defendant's paper, the Standard, of nationwide circulation for two consecutive days. From the above analysis, I find all the elements of defamation against the plaintiff proved on a balance of probabilities. I find that the publication which was admitted by the defendant was made to third parties; the words as published referred to the plaintiff; the words were defamatory i.e. they tended to lower and actually lowered the plaintiff's reputation in the eyes of the right thinking members of the society generally- he testified that the schools where his children went in London called him inquiring to know whether the allegations in the publications, concerning him were true; they were false such that the defendant did not adduce any evidence of truth as an absolute defence; and the words were published maliciously.

29. On damages, as opposed to slander, libel is punishable *per se* without proof of damage and the actual sum to be awarded is "at large" and although a person's reputation has no actual cash value, the Court is free to form its own estimate of the harm taking into account all the circumstances of the case.I am guided by the Court of Appeal decision in **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR** where the Court of Appeal citing with approval Tunoi, JA (as he then was) in **Civil Appeal No. 314 of 2000 Johnson Evan Gicheru v Andrew Morton & Another [2005] e KLR 1** had this to say on assessment of damages:

> **" In action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action, and in court during the trial: *PRAUD V GRAHAM* 24 Q.B.D.53, 55. In *BROOM V CASSEL & CO [1972] A. C. 1027* the House of Lords stated that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily and even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of**

his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charges. As *Windeyer J*. well said in *UREN V JOHN FAIRAX & SONS PTY.LTD*., 117 C.L.R. 115,150:

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

I would think that in the instant case to arrive at what could have been said to be a fair and reasonable awards the learned trial Judge could have drawn considerable support in the guidelines in JONES V POLLARD [1997] EMLR 233.243 and where a checklist of compensatable factors in libel actions were enumerated as:-

1. ***The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.***
2. ***The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's 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.***

30. In the Gicheru case (supra) the Court of Appeal interfered with award of damages and enhanced it. That was on 14th October, 2005. In another Court of Appeal decision made on 29th March, 2012 in **Civil Appeal 148 of 2003 Wangethi Mwangi & Another v J. P. Machira t/a Machira & Co. Advocates** (UR) the Court pronounced itself thus in the course of the judgement:

> ***"We think that while the "Gicheru" judgement will continue to be a useful guide as regards the level or quantum of damages in similar situations, it was never intended to be a yardstick cast in concrete for all time and for this reason we think that peculiar facts of each case should continue to be the hub upon which the awards gravitate or revolve, provided that the Court remains alert to other relevant considerations such wider public interest goals, juridical basis for awards, including any pressing public policy considerations a sense of proportionality and the need for the courts to always recognize that they are often the last frontier of the need to ensure that truth is never sacrificed at the altar of recklessness, malice and even profit making. In addition, the awards should also be geared where circumstances permit to act as a deterrence so as to safeguard and protect societal values of human dignity, decency, privacy, free press and other fundamental rights and freedoms, including rights of others and personal responsibility without which life might not be worth living. The category of considerations will no doubt change as our societal needs change from time to time. In this regard we think that courts must strive to strike a proper balance between the competing needs in the special circumstances of each case."***

31. Hon Justice Tunoi (as he then was) in the judgement cited above, had this to say of the many authorities referred to by counsel where awards of general damages in defamation cases had ranged from Kshs. 1,500, 000/= to Kshs. 30,000,000/=:

> ***"...My considered opinion of the awards so made is that they lack juridical basis, they may be found to be manifestly excessive and should not at all be taken as persuasive or guidelines of awards to be followed by trial courts, since the trial judges concerned appeared to have ignored basic fundamental principles of awarding damages in libel cases ..."***

32. In the instant case the defendant admitted that the Permanent Secretary for Defence did publish a denial of the matters complained of but that the defendant considered the rebuttal as the usual denial and therefore rubbished them. In other words, the defendant had the absolute truth concerning the procurement of APC s which truth, regrettably was not brought to this court by way of evidence. It took the plaintiff to obtain an injunction wherein even the CGS swore an affidavit denying all the allegations published by the defendant for them to stop the publications. Accordingly, I find that the defendant's insistence that procurement procedures were flouted by the plaintiff and his committee team members at the DoD in the absence of any evidence that the said officials were even questioned by the law enforcement agencies unwarranted and without any truth and or justification and therefore the publication was intended to cause damage to the official's reputation and profession and standing in society as the head of legal in the Military and the highest rank held by an advocate in the military circles.
33. Accordingly, I award the plaintiff damages in the sum of Kshs 5,000,000 general damages and Kshs 1,000,000 exemplary damages.
34. The plaintiff also sought for an injunction. Owing to time lapse, such injunction is overtaken by events. Accordingly i decline to issue any order of injunction restraining the defendant.
35. In the end, I find that the plaintiff has proved his case against the defendant on a balance of probabilities and I find the defendant liable for defaming the plaintiff. I enter judgment for the plaintiff against the defendant. And award the plaintiff the sum of Kshs. 5,000,000 general damages for defamation of character and profession and 1,000,000 exemplary damages. Total Kenya shillings Six Million (Kshs 6,000,000). The plaintiff shall also have costs of the suit and interest at court rates on the damages awarded from date of this judgment until payment in full.
36. As agreed between the parties to this suit and plaintiffs in HCC 511,512,513,514,516,517,519 and 527 all of 2010, this being a test suit on liability, this judgment shall for all purposes be the judgment on liability as against the defendant in all the above pending cases related to the publication subject matter of this suit.

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

R.E.ABURILI

JUDGE