REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Civil Suit 184 of 2005

STEPHEN THUO MUCHINA..... PLAINTIFF

VERSUS

WAINAINA KIGANYA……..…....1ST DEFENDANT

DAILY NATION GROUP NEWSPAPER LTD…….....…...2ND DEFENDANT

WILFRED D KIBORO.....…….3RD DEFENDANT

JUDGEMENT

By a plaint dated 1st February 2005 and filed in this court on 18th February 2005 the plaintiff has sued the defendants seeking general damages, aggravated and or exemplary damages costs and interests. The cause of action herein is alleged publication which appeared on 29th May 2004 in a newspaper known as "Taifa Leo" which the plaintiff claims is published and owned by the 2nd defendant but under the control and management of the third defendant and whose Managing Editor is the 1st defendant. According to the plaint the words published were in the English language translation as **follows**:

Police have exposed that they are looking for real dangerous bank robbers. Six very dangerous criminals in Kenya who have been raiding banks and taking money have been identified by the Police yesterday.

These gangsters have robbed a total of one hundred million shillings from five Kenyans within only one year.

Now they are being sought by the CID following many incidents of bank robbery with violence in Nairobi and Nyeri between February 2003 and April this year.

The names of these hard core criminals are Patrick Muriithi Muthee alias 'Musevo', Thomas Gitau alias "Wamatumbo", Stanley Ngure Mwangi, Syslvesta Muthoka Ndolo alias 'Shortly', Stephen Thuo Muchina and Patrick Kamotho alias "JJ".

Police are interested in interrogating the suspect Muthee concerning several bank robberies in Nairobi and Nyeri where more than 44 million shillings has been robbed.

Police have announced that all these suspects are hiding from arrest and would be planning other robberies.

Police have requested the public to save itself by giving the police information leading to the arrest of the suspects.

Police spokesman for the CID Mr. Gideon Kibunja said "These gangsters are being hunted by CID for several crimes in different places.

On top of being sought by ordinary Police, the gangsters are being hunted by Special Forces including the Flying Squad, track unit.

In Nairobi, Blueseas Forex Bureau along Kimathi Street was robbed 12 million and Consolidated Bank of Nyeri robbed 12 million Shillings.

Muthee is a resident of Mathira, Karatina, Nyeri District.

Gitau whose photographs are in the Police files over the Blueseas Forex Bureau and I&M Bank comes from Kiambu but has several hideouts in Kayole and Umoja, Nairobi.

Mwangi was rescued from Mathari Hospital Nyeri by fellow gangsters two years ago.

It is the purported publication of the foregoing that the plaintiff claims has seriously injured his credit as well as reputation as a result of which his income generating activities have been ruined and he has been brought into public scandal, odium and contempt in the estimation of right thinking members of society and has particularised the meaning and/or innuendo in this plaint.

The defendants filed a joint defence dated 15th March 2005 on 15th March 2005 in which it is averred that the plaintiff has filed a similar suit being HCCC No. 45 of 2004. That the 1st defendant wrote and the 2nd defendant published the words complained of is admitted. Whereas it is admitted that the words complained of meant and were understood that the plaintiff was in the most wanted list of six (6) gunmen behind a string of robberies across the country, the other meanings attributed to the said words are, however, denied. According to the defendants there is no cause of action disclosed against the 3rd defendant. It is, however, pleaded that the said words are true in substance, in fact and were fair comments on matters of public interest. According the defendants, the facts of the plaintiff's activities were reported by the police and represented affair and accurate report/summary of information given by the police and hence section 7 of the Defamation Act is cited. The defendant's position is therefore that the plaintiff has not been defamed and is not entitled to the orders sought.

In support of his case the plaintiff called as PW-1 **Dr. James Mwangi Njoroge**, a medical practitioner of 27 years standing trained in traumatic experiences. When he examined the plaintiff, the plaintiff complained of abdominal pains, joint pains and depicted signs of anxiety, sleeplessness, hopelessness, fear and preference to keep to himself. The witness testified that the plaintiff informed him that he developed these symptoms after being incarcerated in March 2001 by police at Parklands Police Station where he was taken after being picked up from his telephone bureau in Umoja. From Parklands Police Station, he was processed at Industrial Area Police Station and then taken to Kamiti Maximum Prison where he was kept for 2½ years until 2002 when he was released. In 2004 the police published his photograph as being wanted in connection with robbery as a result of which he went into hiding for 2 days after which he presented himself and was collected from the premises of People Against Torture and in the company of the press. The police were headed by Deputy PCIO , **Mr. Matete** and was taken to Nairobi Area Police Station where he was interrogated and booked. When the witness saw the plaintiff, he was suffering from nightmares, headaches and flashes. His wife had ran away and had developed peptic ulcer a condition that required him to take daily medication. As a result of the beatings his right foot was affected causing him to walk with a limp. He, however, was in fair general condition with abdominal tenderness near umbilicus left side of the lower abdomen. He had a deformity of the left foot with bones of the 4th tarsal and wounds above the lateral tarsal as well as scars on both knees. He had lost libido and could not cohabit with his wife and was unable to get another wife after his wife left him and therefore went back to stay with his mother. The appearance of his photograph in the public caused him unhappiness and he almost became paranoid. PW-1 prepared a report which he produced as exhibit 1.

In cross-examination the witness stated that he is a physician and had been practising in torture and traumatic injury. His report was, however, written 9 years after the incident but the symptoms still existed. He stated the offending article was on 29th May 2004 and that before the publication the plaintiff had already been arrested and had spent 2 years at Kamiti. He relied on notes from Kenyatta National Hospital although no reference was made to the fact in his report. His report, according to him, was based on what he was told. According to him the injuries resulted from police beatings. Whereas it is possible other injuries on the knees could have been sustained elsewhere, not so for the injuries on the thumb and the phalanx, according to the witness. In re-examination the witness stated that he spent time with the plaintiff before he prepared his report and that the same was based on the plaintiff's behaviour before him.

The plaintiff himself, **Stephen Thuo Muchina**, gave evidence as PW-2. According to him he is a businessman who lives in Nakuru. On 29th May 2004 he was called by a friend who had seen his photograph in ***"Daily Nation"*** and ***"Taifa"*** at about 11.30 pm. He told the friend to pick him in a taxi since he feared for his life and he went to his mother's house where he felt safe since the paper claimed he was a wanted criminal gangster. The photograph contained his name. He took three days to think the matter over during which time he received a lot of telephone calls on the said event which affected both his moral standing and his business. He was traumatised and feared for his life and on the third day he called People Against Torture and he was taken by a **Mr. Mucheke** to the latter's offices and called the press. In his written statement which was adopted as part of his examination in chief he states that his photograph appeared in the ***"Daily Nation"*** and ***"Taifa"*** of 29th May 2004 with his name with a statement that he was among the six gunmen behind a string of bank raids across the country, armed and dangerous. According him the article was lengthy and malicious. Later on 2nd June 2004 the defendants printed yet another article referring to him as "Gunman on wanted list surrenders". On 4th June 2004 yet another article was printed by the defendants to the effect that "suspect who surrendered is still held". On 8th August 2004 another article was printed by the defendants this time round stating that "one most wanted man is set free". According to him these articles referred to him and meant that he was involved in criminal activities. These publications, according to the plaintiff seriously injured his reputation and business and was brought into public scandal, odium and contempt in the estimation of right thinking members of society. The publication, according to the plaintiff, was malicious as they had been appraised of the full exonerating facts and yet they went ahead to publish the same without verifying their correctness. That he was acquitted renders the said publication baseless, alarmist, irresponsible and extremely injurious to him. According to the plaintiff the publication was thoroughly reckless and irresponsible since they knew or ought to have known the extremely grave embarrassment and suffering that would befall the plaintiff. Even after he had been acquitted, members of the public unaware of the fact of his acquittal would still call the police. As a result of the foregoing not only was he forced to close his cyber cafe business but also got sick, suffered ulcers and depression forcing him to seek constant professional medical help and was ultimately diagnosed with Post Traumatic Stress Disorder. The episode, according to the plaintiff, traumatised him and left an indelible mark in his life resulting in his wife leaving him together with his son who have totally alienated him. He has been unable to marry due to lack of trust in him and he had only one child. In support of his case he produced his bundle of documents filed in court as exhibit 2. According to him he is a computer graduate in data processing and sales marketing from Universal Group of Colleges and produced his certificate as exhibit 3. Although the publication adversely affected him, no apology has been made by the defendant, he contends and hence seeks compensation.

In cross examination by **Mr. Okulo**, learned counsel for the defendant, the plaintiff admitted that before the subject publication he had been arrested in 2001 for robbery with violence and was remanded for 2½ years but contends that there was no truth in the said allegation since he used to operate a telephone bureau and the police wanted him to produce some of his customers whose whereabouts he was unaware of. The second time in 2004 he presented himself to police and was charged with commission of an offence. According to him the publication was incorrect since he was charged and released. It was claimed that he had committed 5 robberies in I & M Bank and Chase Bank although he was charged with something else. He is suing the defendants because he believes he should have been contacted first. According to him the injuries he suffered were as a result of police beatings yet no abstract was issued to

him.

At the close of the plaintiff's case, the defendants informed the court they had no witness to call and closed their case as well.

The parties opted for written submissions. I must state that quite a substantial portion of the said submissions is based on material which does not appear anywhere on the record. Submissions must always be based on what is on record and should not be manipulated as an avenue to adduce evidence. Accordingly, I will ignore the attempt by the plaintiff to freshen his case through the said submissions. After reiterating the evidence on record, it is submitted that based on **John Patrick Machira vs. Wangethi Mwangi and Nation Newspaper Ltd HCCC No. 1709 of 1996**, the successful plaintiff in defamation is entitled to recover as general compensation damages such sum as will compensate him for the wrong he suffered which sum must compensate him for damages to his reputation, vindicate his name and take amount of distress, hurt and humiliation which the defamatory publication has caused him and in so doing attempt is made at putting monetary value to something that can never be evaluated in monetary terms or monetary award. Citing **Sutcliffe vs. Press Drum Ltd [1960] All ER 269 at 281**, it is submitted that in assessing the award to the plaintiff it should be taken into consideration the seriousness of the allegations, the wide publication of the defendant newspaper, radio and television, injury to the plaintiff's reputation and feelings, his reputation and the behaviour of the defendants. Instead of an apology, the plaintiff submits, the defendants have instead published further defamatory material. This, according to the plaintiff, negates the freedom of speech and the individual's right against torture, cruelty and subjection to inhuman degrading treatment. The defendants' attitude when the plaintiff testified, it is submitted, was meant to inflict maximum injury to the plaintiff and were hence malicious. Relying on **Chaplinsky vs. New Hampshire 315 US 568 (1942)** it is contended that the publication was adventurous and ignored the rules and practice of responsible journalism. Citing **Nevill vs. Fine Art and General Insurance Co. [1997] AC 68 at 72**, it is submitted that there is a difference between saying that a man has behaved in a suspicious manner and saying that he is guilty of an offence and that it is not true that you can only prove the former by proving him guilty. It is further submitted that what the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words though the expression is rather misleading in that it conceals the fact that it has two elements in it, the first being that sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them that is also regarded as part of their natural and ordinary meaning. The test, it is submitted is whether, under the circumstances in which the writing was published reasonable men to whom the publication was made would be likely to understand it in a libellous sense. According to the plaintiff the employment of such purses as "gun man surrenders" and "quiet release" are not necessarily borne out by the story and that comments should be based on facts which should not be misstated. **Relying on United African Press Ltd vs. Zaver Chand K. Shah [1964] EA 336**, it is submitted that where serious allegations are made and a defence of qualified privilege and justification is made a higher than normal standard of proof is required.

The plaintiff submits that consistent libel after the first one and failure to apologise have aggravated the suffering and pain and that the plaintiff was motivated by profit expected from the sale arising from the said publication. It is submitted that as a result of the publication of the defamatory matter the plaintiff has suffered total loss to both reputation and business. According to the plaintiff he is entitled to an award of Kshs. 10,000,000.00 in general and exemplary damages as well as a suitable apology and costs of the suit.

In their submissions the defendants contend that the injuries allegedly sustained by the plaintiff were attributed to the police and not to the defendants. Accordingly, the medical report of **Dr. James Mwangi Njoroge** has no evidential value since it was written 6 years after the alleged injuries were inflicted and were not supported by any other medial documents yet the defendants were not involved in the plaintiff's incarceration or unlawful assault and in any case he particulars of the alleged injuries and assault were not pleaded. Relying on Parts I and II of the schedules in the Defamation Act Cap 36 as well as **Shah vs. Uganda Argos [1972] EA 80**, it is submitted that there is a moral and public duty to publish government announcements, provided that the matter concerned is of public concern and for the public benefit and

that the heading was correct and the article on the whole reasonably accurate paraphrase of the announcement and accordingly the privilege was not lost. The publication, it is submitted, was in the public interest and that the plaintiff failed to prove that it was actuated by malice and the case of **E L Hoare & Others vs. Eric Jessup [1965] EA 218** is cited in support thereof. In conclusion the defendants submit that the plaintiff failed to prove that the publication was defamatory in that it was based on fact that the plaintiff who had been previously arrested was wanted by police and further the defendants' action was covered by qualified privilege under the Defamation Act and should be dismissed with costs.

From the pleadings and the evidence adduced, the following, in my considered view, are the issues for determination:

1. **Whether the plaintiff has filed a similar suit in HCCC No. 45 of 2004.**

2. **Whether the publication bore the meaning attributed to them in paragraphs 4, 5 and 6(a) to (g) of the plaint.**

3. **Whether the suit against the 3rd defendant discloses any cause of action.**

4. **Whether the words, in their natural and ordinary meaning, are true in substance, in fact and were fair comment on matters of public interest.**

5. **Whether the plaintiff's credibility and reputation has been injured.**

6. **Whether there was a notice of intention to sue or demand for an apology.**

7. **Whether the plaintiff is entitled to damages.**

8. **Who should bear the costs of the suit.**

However, before determining the above issues it is important to set out the various principles of the law of defamation. In my view, one cannot talk about defamation without alluding to the relevant Constitutional provisions Under article 32(1) of the Constitution every person has the right to freedom of conscience, religion, thought, belief and opinion. This Article makes it clear that the freedom to express one's opinion is a fundamental freedom enshrined in the Constitution. 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 a constitutional underpinning.

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. 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. 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. See **J P Machira Vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No.**

There are two kinds of defamation; slander and libel. Slander is where a person orally or verbally utters defamatory words of and concerning another person whereas libel is where a person writes of and concerning another person defamatory statements or words. Slander and libel are therefore different forms of defamation. Libel consists of a defamatory statement or representation in permanent form. As opposed to slander, libel is punishable *per se* without proof of damageand 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.

The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. However, 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. The language used is utterly beyond the facts. The failure to inquire is 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 Mangi** (supra).

The law of course recognises certain defences that may be invoked by a person sued with the tort of defamation I shall only deal with the ones relevant to the present case. The law recognizes that there may be occasions on which freedom of communication without fear of an action for defamation is more important than the protection of a person's reputation and such occasions are said to be "privileged" and the privilege may be either absolute or qualified. Absolute privilege covers cases in which complete freedom of communication is regarded as of such paramount importance that actions for defamation cannot be entertained at all: a person defamed on an occasion of absolute privilege has no legal redress, however outrageous the untrue statement which has been made about him and however malicious the motive of the maker of it. Qualified privilege, though it also protects the maker of an untrue defamatory statement, does so only if the maker of the statement acted honestly and without malice. If the plaintiff can prove "express malice" the privilege is displaced and he may recover damages, but it is for him to prove malice, once the privilege has been made out, not for the defendant to disprove it.

For the purposes of this judgement it includes -Statements made by A to B about C which A is under a legal, moral or social duty to communicate to B and which B has a corresponding interest in receiving.The protection of such statements is justified for the common convenience and welfare of society. With respect to newspaper reports, the matter which is reported may be of very wide public interest, but the protection of privilege is not thrown about it unless its publication is in the public interest and the newspaper can be said to be fulfilling a duty in revealing it. There is no defence of "fair information on a matter of public interest. The defence of fair comment is available if facts are true and the matter is of public interest and the opinion is honestly held.

On the other hand, **Waweru, J** in **Nation Newspapers Ltd vs. Gibendi [2002] 2 KLR 406** held on 29/05/02 as follows:

"But the appellant pleaded fair comment on a matter of public interest that is, qualified privilege. To defeat that defence the respondent needed to prove actual malice. Actual or express malice is ill will or spite or any indirect or improper motive in the mind of the defendant at the time of the

publication...The trial court did not address this issue in its judgement. There was no evidence that in publishing the words complained of the appellant acted from an indirect or improper motive such as spite, ill will or jealousy. Even if it were to be accepted that the reporter was rash or negligent that would not be sufficient...From the evidence placed before the trial court the respondent failed to prove actual malice on the part of the appellant. The appellant's defence of fair comment on a matter of public interest therefore succeeded, and the trial court should have so held. That the matter was of public interest there cannot be doubt. This was a public school and there was evidence, on balance, that there had been some kind of disturbance and that some teachers in the school had staged a sit-in. The matter was serious enough to be investigated by the District Education Officer. The appellant had a social duty to write and comment on it...Upon the defence of fair comment on a matter of public interest therefore, the respondent's action should have failed.

In the case of Shah Vs. Uganda Argus [1972] EA 80 the East African Court of Appeal stated that "a communication by a public servant on a matter within his own province concerning the conduct of a person who is for the time being a public part, the matter being of public interest as to which the public are entitled to information, may be a privileged communication on the part of that public servant, and, if sent by him to a newspaper and published therein, it may also be the subject of privilege in the proprietor of the newspaper, as that is the ordinary channel by means of which the communication can be made public. The publication of a matter of a public nature and of public interest and for public information was privileged, provided it was published with the honest desire to afford the public information and with no sinister motive".

The Court went on to state:

"in the instant case, it was an occasion when the respondent newspaper had a moral duty to publish a matter of a public nature and of public interest and for public information, and qualified privilege attached to the publication. In the article the heading was "Asians Held". The heading was accurate and although there was some shift in the emphasis, the court cannot say that the general sense had in any material particular been altered. This is one of those difficult and border-line cases since the article just stopped short of altering the sense conveyed in the Ministry's hand-out. It was on the whole a reasonably accurate paraphrase of the contents in the handout. The court agrees with the trial judge findings that the defendants in publishing the article were actuated by "the best possible motives and had the honest desire to afford the public information and were seeking to assist the Government, police and general public in ridding Uganda of suspected illegal practices in the Immigration Department. There was no evidence of indirect or improper motive to constitute malice and in publishing the article the respondents were protected by qualified privilege which was in no way destroyed…It is, no doubt, often very difficult to determine whether a particular occasion is privileged or not. The circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact and the facts of each case must be scrutinised in the light of its peculiar circumstances...In this case, the Government through a responsible officer had asked for publicity to be given to its hand-out so that the assistance of the public be sought in connection with the suspected illegal activities in a Government department. The Government and the public had a common and reciprocal interest to communicate and receive the information contained in the hand-out, as being for the common convenience and protection of society. In the circumstances of the present case, the court has come to the said conclusion as the judge that the article complained of was published on an occasion of qualified privilege. The publication in a newspaper of a notice or report at the request of a Government office or department is privileged, provided the matter concerned is of public concern and published for the public benefit…However, the protection of such privilege is destroyed if the plaintiff can show that publication was made maliciously. Malice in this connection does not necessarily connote ill-will or spite; it will include any indirect or wrong motive. "A defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose but is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive...Whether or not the alterations done by the editorial staff amounted to sensationalism and use of excessive language as to amount to evidence of malice in the legal sense such as to deprive the respondents of the protection afforded by the occasion being one of qualified privilege is a question of degree, and where the line is to be drawn has ton be decided in the light of the facts of each case. As regards the heading, the court can see nothing sinister or improper in the words "Asians held". The word "held" is appropriate to describe detention, and the heading was factually correct. As regards the use of the word "arrested", whereas the appellant was in fact detained, this seems to be somewhat a distinction without a difference. The appellant was taken from his home by a police officer, and detained in a prison under the Emergency Regulations for over three weeks. Accordingly the court has come to the same conclusion as the judge that the respondents "were actuated by the best possible motives and had the honest desire to afford the public information and were seeking to assist the Government, Police and general public in ridding Uganda of suspected illegal practices in its Immigration Department".

Qualified privilege can be rebutted by proof of express malice, and malice in this connection may mean either lack of belief in the truth of the statement or use of the privileged occasion for an improper purpose. Lack of belief in the truth of the statement is generally conclusive as to malice, except in cases where a person is under a duty to pass on defamatory reports by some other person. Mere carelessness, however, or even honest belief produced by irrational prejudices, does not amount to malice. But an honest belief will not protect the defendant if he uses the privileged occasion for some other purpose other than that for which the privilege is accorded by law: if his dominant motive is spite or if he acts for some private advantage he will be liable. Existence of malice can be evinced by language; If the language used is utterly beyond or disproportionate to the facts; however, it does not follow that merely because the words are excessive malice must be inferred. It can also appear from the relations between the parties before or after publication or from the conduct of the defendant in the course of the proceedings themselves, as, for example insisting on the defence of justification while nevertheless making no attempt to prove it...However mere pleading of justification is not itself evidence of malice even though the plea ultimately fails. It may be deduced from the mode of publication where the dissemination of the statement is wider than is necessary. When a defamatory communication is made by several persons on an occasion of qualified privilege, only those against whom express malice is actually proved are liable.

We now come back to the issues in this case. The first issue is whether the plaintiff has filed a similar suit in HCCC No. 45 of 2004. Although this was raised in the defence, that was as far as it went since there was no evidence adduced to sustain the same. In the absence of evidence, the said issue is answered in the negative.

The second issue was whether the publication bore the meaning attributed to them in paragraphs 4, 5 and 6(a) to (g) of the plaint.Paragraph 4 simply averred that the 2nd and 3rd defendants are vicariously liable for the acts and omissions of the 1st defendant. Nowhere in this paragraph were the said publication attributed to them. However, it is obvious that the 2nd defendant is a limited liability company and the publisher of the offending material. The 1st defendant is described as the Managing Editor of the newspaper in issue. Whereas the 3rd defendant is not described in the plaint, paragraph 4 seems to attribute his liability to the co-ownership of the newspaper in issue. This is clearly in contrast to the averment in paragraph 2 of the plaint that the paper is owned by the second defendant. The liability of the 3rd defendant is not discernible from the pleadings as filed.

With respect to paragraph 5 it is contended that the publication has seriously injured the plaintiff and his income generating activities ruined and that he has been brought into public scandal, odium and contempt in the estimation of right thinking members of society. It is important to state that apart from the plaintiff and the doctor, there was no other witness who was called to testify on the impression created in his mind by the said publication. As already indicated above defamation is about reputation and reputation is what others think of the plaintiff and not what the plaintiff thinks of himself. Therefore to prove defamation it is necessary for evidence to be adduced to show what third parties thought about the plaintiff as a result of the said publication. Where no such evidence is adduced as happened in this case, there would be no basis upon which the Court would be entitled to find that the plaintiff was defamed unless the case falls under the category which is said to be actionable *per se* which is the case before me. There is, however, no tangible evidence on record with respect to the business that was allegedly carried out by the plaintiff which was ruined as a result of the said publication. Again the injuries sustained by the plaintiff as a result of his incarceration by the police cannot be pinned squarely on the defendants since it is not alleged that the defendants were the cause of the plaintiff's said incarceration. However, that the plaintiff was linked to a spate of robberies cannot be denied and the same is in fact admitted by the defendants in paragraph 4 of the plaint. Just like in **Machira's Case** (supra) it does not require evidence to prove that a person would be hurt in his reputation and be brought into public scandal, odium and contempt in the estimation of right thinking members of society if allegations were made that he was connected with a spate of robberies in the country. Accordingly, I agree that the meaning attributed to the publication in paragraph 6 of the plaint fits the bill.

That leads me to the third issue whether the suit against the 3rd defendant discloses any cause of action. As already stated above the basis for holding the 3rd defendant liable is not discernible from either the pleadings or the evidence. Accordingly I agree that there is no cause of action disclosed against the 3rd defendant.

On the issue whether the words, in their natural and ordinary meaning, are true in substance, in fact and were fair comment on matters of public interest, for the defence of fair comment to succeed it must be proved that the facts are correct. One cannot invent a non-existent state of affairs and purport to fairly comment on them. In this case it is not in dispute that the plaintiff was being sought by police over a spate of robberies. He had in fact been arrested before in connection therewith and pursuant to the second arrest he was charged in a court of law. A reading of the said article reveals that it was mainly a reproduction of information that was given by the police. Apart from the strong language employed, one cannot say with exactitude that the publication was an opinion not based on the facts as given by the police. In my view therefore, there was no comment but just a dissemination of a police report.

The next issue is whether the plaintiff's credibility and reputation has been injured. Obviously the plaintiff's reputation was dented by the said report. The only question is whether the defendants were justified in publishing the said report. The extent of the damage, however, cannot be determined on the scanty evidence on record. The allegation, for example, that the plaintiff's wife left him as a result of the said report cannot be empirically proved since the said wife was not called to adduce evidence. It is this piece of evidence that is the missing link in proof of damages. Again there was no concrete evidence of loss of business as alleged. Although PW-1 stated that the plaintiff had lost his libido, he admitted that this was based on what the plaintiff told him. In his evidence, on the other hand, the plaintiff said that he was unable to get a wife due to the bad publicity generated by the episode. The issue of loss of libido featured nowhere in his evidence. In the absence of the medical reports upon which PW-1 relied I am unable to find that the plaintiff lost such a valuable asset according to him. In any case the loss of the said asset cannot be attributed to the actions of the defendants. Whereas the plaintiff may have suffered as a result of his incarceration by the police I am unable to attribute this suffering to the defendants' actions.

On whether there was a notice of intention to sue or demand for an apology, although that averment was denied, there was no attempt to prove that there was one.

On the whether the plaintiff is entitled to damages, the defendants have pleaded privilege. They have stated that the information that was published came from the police. It is not denied that the plaintiff was suspected of participation in incidents of robberies. It is the plaintiff's case that he went into hiding after the said publication and that when he resurfaced, he was arrested when he presented himself. He was subsequently charged in a court of law. Just like in the case of Shah Vs. Uganda Argus (supra) I find that a communication by a public servant (in this case the police) on a matter within his own province concerning the conduct of a person who is for the time being a public part (the plaintiff in this case), the matter being of public interest as to which the public are entitled to information (the state of security in the country), may be a privileged communication on the part of that public servant, and, if sent by him to a newspaper (the defendants herein)and published therein, it may also be the subject of privilege in the proprietor of the newspaper, as that is the ordinary channel by means of which the communication can be made public. The publication of a matter of a public nature and of public interest and for public information was privileged, provided it was published with the honest desire to afford the public information and with no sinister motive which sinister motive I have not found. In the instant case, it was an occasion when the defendants had a moral duty to publish a matter of a public nature and of public interest and for public information, and qualified privilege attached to the publication. I, similarly agree that the defendants in publishing the article were actuated by "the best possible motives and had the honest desire to afford the public information and were seeking to assist the Government, police and general public in ridding the country of suspected criminal elements. There was no evidence of indirect or improper motive to constitute malice and in publishing the article the defendants were protected by qualified privilege which was in no way destroyed. In this case, the Government through a responsible officer had asked for publicity to be given to its investigation so that the assistance of the public be sought in connection with the suspected criminal activities. The Government and the public had a common and reciprocal interest to communicate and receive the information contained in the statement, as being for the common good and protection of society. In the circumstances of the present case, I have come to the said conclusion that the article complained of was published on an occasion of qualified privilege. The publication in a newspaper of a notice or report at the request of a Government office or department is privileged, provided the matter concerned is of public concern and published for the public benefit. Whether or not the strong language employed by the defendants amounted to sensationalism and use of excessive language as to amount to evidence of malice in the legal sense such as to deprive the defendants of the protection afforded by the occasion being one of qualified privilege is a question of degree, and where the line is to be drawn has to be decided in the light of the facts of each case. As regards the heading, the court can see nothing sinister or improper in the words "Deadly gangsters" ascribed to the words "Wezi ambao ni hatari kwa usalama". The word, in my view, is appropriate to describe situation as presented in the police statement that was published. Accordingly, the plaintiff is not entitled to damages.

In conclusion the plaintiff's suit against the 3rd defendant is dismissed as disclosing no cause of action while the claim against the 1st and 2nd defendant is dismissed for lack of merits. The defendants will have the costs of this suit.

However as the law requires me to assess damages despite the foregoing finding, I will proceed to do so. Although the plaintiff claimed exemplary and aggravated damages, I am unable to find that the conditions necessary for the award of the said damages have been satisfied. Exemplary damages are awarded where compensatory damages are not sufficient and when the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless whether his action was tortious or not and decided to publish it because the prospects of material advantages outweighed the prospects of material loss; i.e. the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty. I am not satisfied that the publication of the article complained of was done with such a motive. Aggravated damages, on the other hand, are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances and will be ordered against a defendant who acts out of improper motive e.g. where is actuated by malice; insistence on a flimsy defence of justification or failure to apologise. I have found that there was no evidence of malice on the part of the defendants. I cannot state that the defences relied upon by the defendants were flimsy and I have already found that there was no evidence that a demand was made before the suit was instituted to entitle me to consider the issue of apology. However, with respect to damages, the offence imputed was that of robbery with violence which carries a death sentence. The proviso to section 16A of the Defamation Act provides that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings. In my view taking into account the foregoing as well as the fact that the publication has countrywide readership, I would have awarded the plaintiff Kshs. 2,000,000.00 general damages for defamation.

That being my finding this suit is dismissed with costs to the defendants.

Judgement read, signed and delivered in Court this 23rd day of July 2012.

G.V. ODUNGA
JUDGE

In the presence of:

Mr. Wangalwa for Mr. Ndwiga for Plaintiff

Mr. Okulo for the Defendants