



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 2148 OF 1997

ELIZABETH WANJIKU MUCHIRAPLAINTIFF

VERSUS

THE STANDARD LIMITEDDEFENDANT

JUDGMENT

BACKGROUND

The present suit for the tort of defamation has been filed against the Defendant claiming that several publications, made in the Defendant's several issues were authored, printed and published by the Defendant from 15th to 22nd March 1997 and 25th April 1997 and were defamatory in respect of the Plaintiff. The Plaintiff claims that this publications were false and were so published with the intend to disparage the reputation of the Plaintiff or alternatively to injure her character and to expose her to hatred, ridicule, scandal odium or contempt. It is further claimed that the publications contained false and malicious articles and stories.

She has cited those publications in paragraph 7 of the plaint. The gist of the above paragraph is as follows:

Date of Publication	Passage
16/03/97	"SCHOOL GIRLS IN LESBIAN SEX TRAP"
Sunday Standard	"Tales of bizarre homosexual escapades and drugs are a nightmare you pray your child will never encounter or be caught up in

But what began as a story on a small-scale drug pusher led our team to a horrifying findings that were shrouded in threats, big money, influential individuals and powerful forces. According to documents and interviews, we established that the former wife of an ex-cabinet minister, a woman who is highly placed in a reputable international organization headquartered in Nairobi, has been illegally supplying free hard drugs to secondary school girls.

The students, some as young as 14 have been lured into secrete lesbian (female homosexual) prostitution dens camouflaged as “Tourism Parlours” located in Westlands, Kileleshwa and Kahawa areas of the city. The parlours are frequented by wealthy, high class elderly women. The “Godmother” lesbian syndicate leader reportedly regularly gives the schoolgirls pocket money of about Kshs.3,000/= each in her efforts to entice them into her devoted business.

The school children are thereafter canvassed into becoming lesbians and, under the influence of drugs, serve the kinky sexual whims of affluent women, many of them working in highly placed positions in local and global organizations in the city.

For a one hour stint of lesbians “passion” with the school girls, the rich women behind the vile trade which is said to be enjoying a boom. We have established that the former ex-minister’s wife behind the lesbians racket poses as a strong advocate of gender equality and attended the 1995 Women’s Conference in Beijing, China.

SECRET

She is, according to information passed to us, allegedly the head of a thriving secret lesbian society that is patronized by rich women. She has also been leading a spirited fight for the implementation of the Beijing resolutions. The Government is yet to act on all Beijing Resolutions. A confession letter from a student victim of the lesbian sex syndicate addressed to the headmistress of her school, Kinare Girls High School in Matathia, Lari constituency, Kiambu District narrates a harrowing and graph account of her saga at the hands of the “Godmother”.

CHURCH

“And the bizarre trade had not only infiltrated schools, but also church located in an upper class section of a residential estate located close to the city centre, where the woman is said to be a member. One of the women lay leaders who asked for anonymity, admitted that she knew the syndicate master maid well but detested her involvement in lesbianism. “Yes, I have known her for many years. She even contributed lot of money for my wedding. But I have not known her to be a lesbian. However, in a letter addressed to our sister publication, the East Africa Standard, and allegedly emanating from the same church, numerous details are given about women tycoon’s activities, some of which we followed and verified as mentioned above.

But the church leader said the letter could be part of a malicious plot to malign the woman.

I have seen one of the letters purportedly written by a woman’s leader and addressed to the press. She (the former ex-minister’s wife) has not engaged in such acts of lesbianism)

16/3/1997

JANE 16 TELLS OF DRUGS, ORGIES

Sunday Standard

“Jane Wangari was celebrating her sixteenth birthday when she first met this all powerful former wife of an ex-cabinet minister.

She was given four thousand shillings (Kshs.4,000) in cash, some white tablets and a kiss on the

cheek all as a birthday present or so she thought.

The woman visitor, dressed in glittering jewellery, had driven to Kinare Girls High School in Lari, Kiambu District, in a brilliant new beige BMW, that Jane equated to power and success. In the eyes of this conspicuous affluent woman, Jane saw the reflection of her future. Wealth, authority, and respect, all exclusively cut for her. And as far as she was concerned, all that glittered was gold.

PLUSH

Jane had first met the ex-minister's former wife last October, through a classmate who had told her so much about the woman's plush lifestyle.

She had been told of her lavish splendor and grand visits to exquisite hotels for sumptuous feast. Of her charm, wisdom and quick wit qualities that any woman's ego would only long for.

The woman, who highly placed in a reputable international organization and one that has its headquarters in Kenya, told Jane and her friends stories of boldness and courage. She spoke of "breaking away with tradition". Of doing away with men who lacked affection and understanding of women's issues. She told them that time of self-realization and self actualization was now".

17/03/1997

OUTRAGE OVER MP'S FORMER WIFE'S SEX SYNDICATE

Monday Standard

The Sunday Standard's in-depth report on the lesbianism scandal told how school girls were being enticed into the practice by the wealthy and influential woman who holds a senior position at an international non-governmental organization headquarters in Nairobi. Victims said the woman supplied them free drugs to entice them onto the queer practice. In documentary evidence made available to the reporting team, some of the school girl's victims were shown to be as young as 14"

18/3/1997

ARREST THIS SEX PEST

East African Standard

"Our investigations revealed the syndicate is organized by the wealthy former wife of a cabinet Minister. She has been reportedly luring school girls with money and drugs to houses in affluent residential areas of the city where the girls were introduced to bizarre acts of lesbianism, often with elderly women. The government, non-governmental organizations and church groups condemned the revelations by our sister paper, the Sunday Standard, and called for the perpetrators to be brought to justice.

Since Sunday, our Likoni and Town House switchboard have been jammed with calls from outraged parents and appalled wananchi, expressing their indignation at the syndicate's activities. According to documents and interview, the report lasts Sunday established that the ex-wife of a minister and one who is highly placed in a reputable international organization based in Nairobi was involved in the free supply of illegal drugs to school children.

Students some as young as 14 have been lured into this secret lesbian (female homosexual) dens camouflaged as Tourism Parlours".

20/03/1997

UN LINK IN LESBIAN SEX RING

East African Standard "The ex-wife of a Cabinet Minister involved in a child lesbian syndicate, is to be transferred overseas for a "cooling off period" by her employer, the United Nations Environmental Programme, reliable sources claimed yesterday.

The woman, a Kenyan in her mid 40's, is, it is understood to be given a temporary transfer to allow the furore to die down – although her future thereafter within the united nation is unknown.

Ditto

SEX LINK; UN TO TRANSFER 3'

Our sister paper, the Sunday Standard reported that a former wife of a minister had been supplying free hard drugs to school children before luring them into the syndicate.

It is common knowledge in Gigiri (UN Headquarters) that these two European woman have been involved in lesbianism Not only with adults but children as well' said the source. The source further claimed that two European women were the brains behind the syndicate and they involved the minister's ex-wife to help lure school children into the trade.

They are now embarrassed that all this is now in the open and fear prosecution. That is why they plan to leave the country" said the source.

UNEP, the source said, had declined to take action against the two Europeans because they viewed the matter as private.

22/03/1997

SEX LINK SCHOOL SHUT

East African Standard "Investigations and confession from affected students indicate that a woman working with UNEP has been luring innocent girls from the school for her selfish sexual gratification and those of her other elderly female clients hungry of lesbian performance by the girls. The victims (students) have already recounted to us their pervert sexual liaisons while a Local District Officer Moranga Morekwa has independently confirmed the investigations".

25/04/1997

Agriculture Minister Darius Mbela yesterday accused Githunguri MP Njehu Gatabaki (FORD ASILI) of misusing the privileges of the House to malign his name over the lesbianism issue. He said the move is meant to spoil his name in the society. Mbela asked the speaker to expunge his names from the House records because they are completely unrelated.

An Assistant Minister for Education Yuda Komora said the Government had carried out investigations and found no evidence that lesbianism was practiced by students.

He said the government has left investigations open adding parents or members of the public who have any information can pass it to the Government.

He said parallel investigations are being carried out by the Criminal Investigations Department (CID) and the Immigration Department into the matter.

Komora said the matter came up by way of anonymous letter and the author had not come out to offer any further details.

Lari MP Philip Gatonga (FORD – Asili) said the woman's victims had confessed and acknowledged the existence of the practice.

On the basis of the aforesaid publication and averments made thereof, she has asked for the following prayers:-

(a) Damages on the footing of aggravated or exemplary damages;

(b) An order that the Defendant do publish an unqualified apology in such terms and at such place in the newspapers as this Honourable Court may determine;

(c) General damages for libel;

(d) Interest on (a) and (b) at Court rates;

(e) Costs of this suit together with interest thereon at Court rates.

The claim of the Plaintiff is denied by the Defendant and in the statement of the defence dated 10th September, 1997, it is averred that those words were published after painstaking and conscientious research and the same were reported without reference to the Plaintiff. That the said words were a fair comment made in good faith without malice upon a matter of public interest, and in so far as the words consist of allegations of fact, they are true in substance and in fact. The particulars of these publications are stated in paragraph 10 of the defence and the Defendant wants this claim to be dismissed.

It is not in dispute that the Plaintiff was, during the material time working for United Nations and was assigned to UNEP as she also was working in the capacity of Chief General Services Section (UNON). She joined UN on 1st November, 1973 and retired on 30th of May, 2003. During this tenure, she worked as Personal Assistant to the Executive Director and Special Assistant to the Executive Director in protocol matters. According to her, she was held in high esteem and in good regard amongst her colleagues at work which comprised of 2200 persons and she was also regarded highly by the church community at Parklands Baptist Church. She was married to one Darius Mbela who has been a member of cabinet for various ministries. That after the divorce she has changed her name. Due to her high position in the UN, she was given the diplomatic passport of the UN. She had produced all the relevant documents regarding her long services as well as her marriage and divorce to the said Mr. Mbela and her change of name after the divorce.

It is also on record that in response to the letters of demand dated 3rd of June, 1997 and 20th of June 1997 addressed to the Defendant, the Defendant denied any liability as well as refused to tender an apology claiming that they had several documents and witnesses in support of the publications as well as veracity of their respective contents. The Defendant did not produce any document before the court and did not call any witness except one Peter Muriithi Macharia who is a Human Resource Manager with the Defendant.

The Plaintiff filed and produced two bundles of documents in support of the case. The parties thereafter filed statement of agreed issues namely;

- 1) Is the Plaintiff a woman of high repute and esteem as claimed under paragraph 3 of the plaint?**
- 2) Were the publications by the Defendant false, malicious, negligently or recklessly done?**
- 3) Were the publications published in relation to the Plaintiff, her profession or conduct or in any way understood to refer or being capable of referring to or being understood to refer to the Plaintiff?**
- 4) Were the publications by the Defendant intended to disparage the reputation of Plaintiff or to injure her character and intended to expose her to hatred, ridicule, scandal, odium or contempt?**

- 5) *Was there a conspiracy between the Defendant and others to disparage the reputation and character of the Plaintiff?*
- 6) *Were the publications made in reference to the Plaintiff?*
- 7) *Were the publications made consist of words made in fair comment made in good faith without malice based on matter of public interest?*
- 8) *Were the publications made true in substance and in facts?*
- 9) *Were the quotations from the Defendant's newspaper false in all material particular and were they defaming on the Plaintiff?*
- 10) *Did the Defendant publish the words complained of on occasions of qualified privilege and in the interest of the public?*
- 11) *Has the Plaintiff suffered any injury, damages and loss as a result of the publications complained of made by the Defendant?*
- 12) *Are there any damages or aggravated damages available or awardable to the Plaintiff from the circumstances of this suit?*
- 13) *Does the plaint disclose a reasonable cause of action?*
- 14) *Was the Defendant ever served with the Plaintiff's request to admit liability and offer to make amend to the Plaintiff/*
- 15) *Who bears the costs of this suit?*

EVIDENCE

The Plaintiff testified and called one witness, Mrs. Grace Kambua. In short, the Plaintiff reiterated her background and her profile up to the time of publications as a reputable person in the society. I have narrated in short her background hereinbefore. She also produced the publications in question and asserted that she had no doubt that the articles referred to her only, although none of the articles mentioned her name. She indicated some factors of identification from the articles, namely ***“ex-minister's former wife”, “woman working with UNEP”, “influential woman who holds senior position at an International non-governmental organization headquarters’ in Nairobi”, “highly placed in a reputable international organization and one that has headquarters in Kenya”, “ex-minister's wife behind lesbianism”, “strong advocate of gender equality and attended the 1995 Woman's Conference in Beijing, China”***.

Further in her testimony, she stated that after those publications, she was asked by UN to go on annual leave for security reasons because the country was up in arms. She did not want her 23 years daughter to

be left behind as she was also traumatized by the events. Thus UN arranged for her visa for USA and relocated them to UN Headquarters' New York. She left Kenya on 25th of March 1997 and returned on 10th May, 1997 as the Parliament was also deliberating this matter. She produced her passport to substantiate her evidence. On her return, she received many hate mails through the mail box of the UNEP and she reported this matter to Gigiri Police Station. After investigations by the police, a worker in their mail section one Patrick Githehu Gatonye was charged with publishing all those defamatory letters. She though conceded that in appeal his conviction was set aside.

PW2 works as a teacher in kindergarten and is a very good friend to the Plaintiff. According to her testimony on a Sunday, the date whereof she did not recall, she read an article in the newspaper which caught her eyes and she identified that the article referred to the Plaintiff. She also identified the article in cross-examination as the publications of 16th, 17th, 18th, and 20th March, 1997. She was shocked to read the contents thereof but could not believe the story. She conceded that due to her personal problems (the loss of her husband) she could not be in constant touch with the Plaintiff after these publications but confirmed that she could not believe that the story was true and did not hold the Plaintiff in contempt because of those publications. She, however, stated that after those publications, she received many calls from friends and relatives inquiring about those articles, because they knew she was a friend to the Plaintiff.

She again confirmed during cross-examination that she could easily identify the Plaintiff from the articles and reiterated that those publications were definitely pointing her as the subject thereof.

The Defendant called, as I have stated earlier, Mr. Macharia who works as a HR manager with The Standard (The Defendant), and he also works as a freelance journalist since 1986. He confirmed that in none of those articles Plaintiff's name is mentioned and he stated that he did not know the Plaintiff prior to this case. But testified thereafter and I quote; ***“previously, a report had been made by a staff member of The Standard wherein the Plaintiff and school, Kinare High School were mentioned”***. Thereafter, the news editor sent him to the school to do the follow up of the report and interview the headmistress. He went to the school and interviewed the headmistress and testified that the article of 22nd March, 1997 published in The Standard contains what he was told by the headmistress to the best of his knowledge. On 24th March, 1997, he was called by some parents of that school to attend parents, teachers and students meeting and he was sent again to the school. The article of 25th March, 1997 contains what happened at the said meeting.

In cross examination, he was confronted with the contents in 2nd column of the 1st paragraph of the issue of 22nd March, 1997, wherein the words

“investigations and confessions”, were referred. He conceded thereafter that he did not carry out any investigations or did not hear any confessions. He reiterated that, that article was written by him and no confessions were made to him or no investigation to that effect was carried out by him. He talked about some students whom he met on his way to the said school who told him that some of their colleagues were involved in the sexual liaisons. However, none of them said that they were involved. That version thus was nothing but hearsay or outburst by young excited children. As regards the parents' meeting, he stated that a few girls were called upon to narrate some of their experiences. They only talked about hearing of some noises and thumping of feet at night as well as about the rumour that the school had been infested with strange forces. He confirmed that those narrations were the basis of his report. He again asserted that nobody talked of any sexual liaison during that meeting. He repeated that he was not involved in any investigations. However, he agreed that the 1st paragraph of his report mentioned that ***“a woman working in the UNEP was luring the students into those acts”*** but was quick to state that the said paragraph was written from the backdrop of the previous story which was published on 16th March, 1997 being the Headline News. He confirmed that he was not privy to any of the earlier reports made by other teams and did not even know who was assigned to publish the earlier reports. He said, however, that he would still stand for the report of 25th March, 1997 which was prepared by him.

I have carefully perused the said two publications authored by this witness which were admittedly written without any investigations made by him and thus the mention of **“senior female officer at the United Nations Environmental Programme (UNEP)”** and its paragraph at Col. 2 namely

“investigations and confessions from affected students indicate that a woman working with UNEP has been luring innocent girls from the school for her selfish sexual gratification and those of her other elderly female clients hungry of lesbian performance by the girls” are without any basis and unfortunate. It can border on malice as the author has conceded that he did not even know who were the members of team who made the previous reports which were relied by him and further it can be noted that obviously he has not confirmed the veracity of the publications authored by him either from the plaintiff or from his own source.

The Defendant has failed to call those members of team who made reports published earlier as well as later to these two articles referred by this witness.

I note that the first issue of Sunday Standard 16th March, 1997 is shown to have been made by a special team. None of its member is called to substantiate the Defendant’s averments that **“The said words were published after painstaking and conscientious research”**.

SUBMISSIONS AND CONCLUSIONS

Be that as it may, the Defendant’s learned counsel, in his written submissions has culled out two issues from the aforementioned issues; namely –

(1) Whether there was actual reference to the Plaintiff or identification from the publication;

(2) Whether the meanings attributed to the publication are defamatory as a matter of fact.

In respect of the 1st issue framed by the defence counsel, I have already indicated the factors which are shown to indicate that they referred to the Plaintiff. The Defendants’ averment is simply that the Plaintiff is not named in any of the articles which were published and are referred to in the plaint. PW2 unquestionably testified that on reading the first issue of Sunday Standard (identified by her as that of 16th March, 1997), she knew that the same referred to the Plaintiff. Moreover she testified that many of her relatives and friends called her after the publication knowing that she was a close friend to the Plaintiff. I may not reiterate the factors specified hereinbefore, but suffice it shall be to state that the articles definitely pointed to the Plaintiff by descriptions repeatedly made in those articles.

I shall also reiterate the testimony of DW1 cited by me hereinbefore, and which in no uncertain terms stated that **“he knew of the previous report made by a staff member of the Defendant mentioning the Plaintiff and the school-Kinare High School”**. It will be a very draconian law which shall but require only the publications of name of the person to give him/her cause of action in the defamation case. I shall do no better than quoting an illuminating passage from Lord Denning MR in the case of Hayward –vs- Thomson & Others (1982) 1 QB 47 at 60

“One thing is of the essence in the law of libel. It is that the words should be defamatory and untrue and should be published ‘of and concerning the Plaintiff’. That is, the Plaintiff should be aimed at or intended by the Defendant. If the Defendant intended to refer to the Plaintiff, he cannot escape liability simply by not giving his name. He may use asterisks or blanks. He may use initials or words with a hidden meaning. He may use any other device. But still, if he intended to refer to the Plaintiff, he is liable. He is to be given credit for hitting the person whom he intended to hit. The law goes further. Even if he did not aim at the Plaintiff or intended to refer to him, nevertheless, if he names the Plaintiff in such a way that other persons will read it as intended to refer to the Plaintiff, then the Defendant is liable.” (emphasis mine)

Similar observations were made by *Viscount Simon LC* in the case of *Knupffer –vs- London Express Newspaper Ltd. (1944), 1 All ER 495* – namely:

“Where the Plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the Plaintiff to believe that he was the person referred to.”

To crown all these facts, The Standard itself stamped the identity of the Plaintiff by publishing the comments of former husband of the Plaintiff in the Parliament in its issue of East African Standard of 25th April, 1997. The former husband Mr. Darius Mbela was then the Minister for Agriculture. With the above facts on record, I shall have no hesitation to find, which I hereby do, that the publications in question did refer to the Plaintiff who was identified as the subject of those publications from several references made to identify her.

After finding as above, I further find that the Plaintiff has thus the *locus standi* and cause of action to file this suit.

As regards the issue whether the words published were defamatory, very interesting and elaborate submissions were made by both parties.

I shall begin with submissions made by Mr. Werimo, the learned counsel for the Defendant.

It was contended that the Plaintiff should prove that the publications lowered the Plaintiff in estimation of right thinking members of the society. It was stressed that PW2 categorically stated that she did not believe the contents of the publications and that she did not hold the Plaintiff in contempt.

Mr. Werimo cited many cases namely:

- (1) ***Daniel N. Ngunia –vs- KGG (L) Ltd. (Civil Appeal No. 281/98)***
- (2) ***George Mukuru Muchari –vs- The Standard Ltd. (HCCS No. 2539 of 1997)***
- (3) ***Kagwiri Mutwiri Kioga –vs- The Standard Ltd. & 3 Others (HCCS No. 85/05)***
- (4) ***Haridon Andala Ashikhube –vs- The Standard Ltd. (HCCS No. 705/07)***

They all are well reasoned judgments but the only and very material distinguishing feature thereof is that in those cases only the Plaintiff gave evidence. I am not privy to the evidence led by the Plaintiff in any of those case. But in the present case, I have before me the evidence of the Plaintiff who had to leave the country to cool the matter off and her former husband had to face the brunt of the allegations against her in the Parliament. She received hate letters and one person was charged. Even PW2 stated that many people called her after the publications.

I would also add here, that the gravity and extent of those publications are also relevant factor in the defamation cases.

That brings me to the question what is the defamation and its meaning as well as the implication of the trite law that the defamation of libel is *actionable per se*.

Our Defamation Act (Cap 36) does not define defamation and thus I shall have to take shelter in English

Law.

I shall start with Halsbury's Laws of England 4th Ed. Vol. 28 paragraph 10, it is stated:

“A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.” (emphasis mine)

Winfield on Tort (8th Edition) also mentions the first two elements, mentioned in Halsbury's Laws of England.

Salmond, the great English Jurist has stated as under as regards Tort of Libel:-

“The tort consists in the publication of a false and defamatory statement concerning another person without lawful justification.”

I shall pause here and note that the operative verb in what defamation means is ***“tends to lower”*** and advisedly, it is not ***“which lowers”***. Moreover, I do note that the two sentences namely; ***“which tends to lower a person in the estimation of right thinking member of society generally”*** and ***“to cause him to be shunned or avoided or to expose him to hatred***” are joined by ***‘or’*** and not ***‘and’***. It thus can be clearly and readily interpreted that those factors are independent and exclusive to each other.

The above definition, which has been time tested, thus does not impose an obligation on the Plaintiff to prove that he or she was actually shunned or avoided or exposed to hatred, contempt or ridicule. If he can prove that the publication tends to lower him in estimation of right thinking members of society generally, that shall suffice. To satisfy that ***“tendency”*** the court has to see the gravity, the nature and extent of publications made to the public by the Defendant.

I have some support in my aforesaid observations namely:-

(1) In ***Jones –vs- Skelton*** (1963) 1 WLR 1362 at 1371 it was observed:-

“The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.”

(2) I have already cited a passage from ***Hayword –vs- Thomson and Others*** (1982) 1 QB 47 at page 60 observed by Lord Denning MR hereinbefore:-

(3) Halsbury's Laws of England 4th Ed. Vol. 28 in paragraph 1 it is stated:-

“In English law, speaking generally, every person is entitled to his good name and to the esteem in

which he is held by others, and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse.

If a defamatory statement is made in writing or printing or some other permanent form, the tort of libel is committed and the law presumes damage.

It is further stated in paragraph 18:-

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

(4) Lastly, in the test-book of Clerk & Lindsell on Tort 17th Ed. 1995 at page 1018 it is stated:-

“Whether the statement is defamatory or not depends not, as has been pointed out already, upon the intention of the Defendant, but upon the probabilities of the case and upon natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published.” (Emphasis mine)

If one glances through the publications in question it can be easily agreed that the articles were defamatory to the Plaintiff and would definitely tend to lower the Plaintiff in estimation of right thinking members of the society generally. The articles imputed serious allegations against the Plaintiff like child prostitution, lesbianism, drug pushing and many more disparaging remarks were made against her.

I thus do find without hesitation that the publications were defamatory against the Plaintiff.

I also find that from the evidence before this court, the Defendant has failed to discharge the burden to prove that the averments made in the article were true as pleaded and thus the court has no other option but to presume the same as false.

It is further submitted by Mr. Nyaanga, the learned counsel for the Plaintiff that the Defendant has failed to prove that the defamatory statements were made in good faith and without improper motive. It is shown that the publications carried out by the Defendant relating to the Plaintiff are not covered by the protections of law as stipulated in Sec. 7 of The Defamation Act as well as the Schedule thereto.

The Defendant has also failed to prove the said issue raised in Defence which could have exonerated it from the liability.

I shall reiterate the two passages from Halsbury’s Laws of England as regards the presumptions of damage on the proof of commission of tort of libel and shall find that the Plaintiff has suffered injury and loss and is entitled to solatium as is very well covered by Windeyer J. in the case of ***Uren –vs- John Fairfax & Son Pty Ltd. (117 CLR 115 at 150)***. This passage is adopted with approval by the Court of Appeal in the case of ***Gicheru –vs- Morton & Another (2005) 2 KLR 332:-***

“It seems to me that, properly speaking, a man defamed does not get compensation for his damaged

reputation. He gets damages because he was injured in his reputation, that is, simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the Plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.”

Both counsel have relied on the aforesaid passage to substantiate their respective contention.

Both of them also have relied upon the factors to be considered while assessing the compensation to be awarded to the defamed person. They are adopted from the Case of ***Jones –vs- Pollard (1997) EMLR 233 at 243:-***

- 1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any reputation.***
- 2. The subjective effects on the Plaintiff’s feelings not only from the prominence itself but from the Defendant’s conduct thereafter both up to and including the trial itself.***
- 3. Matter 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.***

Mr. Nyaanga added further two factors which are considered by Court of Appeal in ***Civil Appeal No. 115 of 2003 Standard Ltd. –vs- C N Kagia t/a Kagia & Co. Advocates.***

- 1. In situations where the author or publisher of a libel could have with due diligence verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages.***
- 2. The level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and publishers of libel. Personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.***

In deriving the above factors, the Court of Appeal relied on observations made in English cases of ***John – vs- MGN (1997) QB 586*** and ***Kiam –vs- MGN Ltd. (2002) 3 WLR 1036.***

Mr. Nyaanga relied on the above cases and observations to claim the aggravated damages which he stressed, under the circumstances of this case, should be given without reference to any proof of actual loss suffered by the Plaintiff.

It was urged that the same be given as a punishment or deterrent.

It is contended that the gravity of the allegations published against the Plaintiff are very grave going to the core of moral turpitude and deprivation of any decency or shame on the part of the Plaintiff. She has been depicted as a despicable, vile, evil and decadent person of the lowest level. Moreover, the size and influence of the circulation is self evident. Its effect has been described in one of the publication when it was stated that “*since Sunday their Likoni & Town House switchboard had been jammed with calls from outraged wananchi and parents*”. It is added that the Plaintiff has been shown to be a person of rank and

repute in the society.

Lastly, the behavior of the Defendant has been also very stark. The Defendant has exhibited arrogance and devoid of any reluctance. The publications had been made without checking on the Plaintiff of their veracity and, when asked for, the Defendant had denied to publish any apology.

The above contentions are not disputed by the Defendant and Mr. Werimu in respect of the Quantum of Damages relied on *Gicheru's case* (supra). The Court of Appeal in the said case, have commented of several cases like – *Joshua Kutei –vs- Kalamka Ltd. HCC 375 of 1997*, *Nicholas Biwot –vs- Clays Ltd. No. 41068 of 1999* and Others, where the courts had awarded high awards. Hon. Tunoi JA (who wrote the said Judgment) described the awards as ***“lacking juridical basis’ and has observed that ‘they may be found to be manifestly excessive and should not be at all taken as persuasive or guidelines of the awards to be followed by the trial court, since the trial judges concerned appeared to have ignored basis fundamental principles of awarding damages in libel cases”***.

However, I do note that the Court of Appeal in *Gicheru's case* has not denied that the concept of aggravated damages should be done away with.

The award of compensation or the damages is in discretion of the court and the court, in a right case, should frown upon the publication which is grave, without justification and consistent and when asked by a demand letter, not retracted.

In short, in each and every case of defamation, the court has to carefully consider all the circumstances surrounding publication, its nature, its extent of circulation, the behavior or the Defendant before and after the publication, during trial and, may be, special circumstances of any given case.

The Constitution gives every person the right of dignity and preservation of reputation, and any person, unless done lawfully cannot violate that right.

I need not repeat the peculiar circumstances of this case and also the effect of the publication not only on the Plaintiff and her daughter but the whole society as such, including the Parliament. The publication is in permanent form which could be seen by any one at any time. The Defendant has failed to prove any of the issues raised in defence to those publications. Even during the trial, it has not come forward to show any remorse or tender any apology.

Considering carefully all the facts, evidence and submissions made, as well as observations and findings hereinbefore, I am of an opinion that cumulative award of Kshs.5,500,000/= shall be adequate solatium and the Plaintiff can henceforth show the same, to any one raising any issue thereon, that her rights has been vindicated by a court of law.

I thus enter judgment in favour of the Plaintiff in the sum of Kshs.5,500,000/= against the Defendant with costs.

Dated, signed and delivered at Nairobi this 17th day of **January, 2011**

K. H. RAWAL

JUDGE

17.01.2011