



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 319 OF 2005

KWACHA GROUP OF COMPANIES.....1ST PLAINTIFF

JIMI WANJIGI.....2ND PLAINTIFF

VERSUS

TOM MSHINDI.....1ST DEFENDANT

DAVID MAKALI.....2ND DEFENDANT

THE STANDARD LIMITED.....3RD DEFENDANT

FINAL JUDGMENT

Having determined the Constitutional issue raised by the Defendants under Article 34 of the Constitution, I now proceed to determine the suit on the basis of pleadings, evidence and submissions made by the parties.

PLEADINGS

The Plaintiffs' claim is to seek reliefs against the Defendants for the alleged defamatory words in respect of the Plaintiffs published by the Defendants.

It shall be appropriate to quote paragraphs 6 of the plaint which sets the basis of the claim.

“On or about the 6th day of March 2005, the defendants jointly and/or severally falsely and maliciously wrote, printed, published and/or caused to be written, printed and published at page 1, 27 and 28 of the said Sunday Standard Newspaper and in particular an article under the heading “MASTERS OF THE SYNDICATE” words defamatory to the plaintiffs that is to say:-

“In another incident, on May, 29th that year officers from the Commission went to inspect the premises of Kwacha Group of Companies, a company alleged to be associated with Jimmy Wanjigi. Kwacha was suspected to have been involved in the transmission of illegal international calls. According to a confidential report on the operation, Mr. Mwaura refused to open the door, even on the orders of uniformed policemen. The following day the officers came back only to be denied entrythe officers say that they suspected that the illegal equipment was moved before allowing the inspection to take place.

The incident was yet another example of the clout that the suspected operators have in the corridors of power”.

Further at page 1 and 27 of the said Sunday Standard Newspaper, the defendants published, printed and/or wrote and/or caused to be published, printed and/or written the following words which were defamatory to the plaintiffs under the heading “HOUNDED OUT BY CORRUPTION CARTEL”

“A senior official of the Communication Commission of Kenya who tried to break a telephone fraud ring has lived to regret the day he stepped on the toes of corruption cartel that run deep into the Kibaki administration.

Mr. Francis Wangusi, the Communication Commission of Kenya Director in charge of licensing, compliance and standards, believed he was serving his country when he dutifully led investigations into illegal telephone connections that were costing Telkom Kenya millions of shillings monthly in lost revenuehe was promptly sent on an unexplained compulsory leave

Their fate has left officers of CCK extremely apprehensive about confronting the power cartels involved in illegal phone business”

Paragraph 7 of the plaint has averred *inter alia* that by the said words, taking their natural and ordinary meaning, the Defendants meant and were understood to mean that the Plaintiffs were carrying on an illegal business, were dishonest, corrupt, thieves, criminals, fraudster, part of corruption cartel etc.

Paragraph 10 also avers innuendo and the same were particularized, namely:-

“Alternatively and without prejudice the said words by implication, imputation, inference, intonation and innuendo were used, applied, written, printed, published and disseminated in a defamatory sense in that:-

(i) The words were published in an article condemning corruption, fraud, theft, criminality and public wastefulness in the Kibaki government and the defamatory words portrayed in the plaintiffs as corrupt, fraudulent, thieves, criminals and persons misusing/abusing power. The words were published without giving the plaintiffs an opportunity to be heard and condemned them without hearing their sides of the story.

(ii) The said words were published and gave the plaintiffs as examples of persons and/or companies involved in transmission of illegal international calls, and key players in the corruption cartels that run deep in to the Kibaki government administration and/or that hounded out of office one Francis Wangusi who was a senior official of the Communications Commission of Kenya.

(iii) The false, malicious and defamatory words were written and published at a time, when there was no or no adequate evidence presented to the defendants by the Communications Commission of

Kenya, investigating officers and other relevant parties.

(iv) The words “masters of the syndicate” portrayed the plaintiffs as mastermind of the alleged corrupt practices defrauding Telkom Kenya Millions of shillings.”

The Defendants, in their joint Statement of Defence in paragraph 3, have admitted publishing the words alleged in paragraph 6 of the Plaint. Furthermore, in paragraph 4 they have admitted that in the last three paragraphs of the sub-Article under the heading ‘Masters of the Syndicate’ at page 28 of “Business intelligence”, in Sunday Standard issue of 6th March, 2005 referred to the Plaintiffs but denied that, the words published at page 1, page 27 and any other words complained of, referred to or were understood to refer or were capable of referring to the Plaintiffs.

In paragraph 5 of the Defence it is denied that the words published and which are complained of by the Plaintiffs were defamatory or were capable of bearing the meaning which are pleaded in paragraph 7 and 10 of the Plaint.

Paragraph 6 of the Defence pleads justification and paragraph 7 thereof avers that the published words were fair comment and opinion on the matter of public interest and that were published on an occasion of qualified privileges under Sec. 7 of the Defamatory Act.

In Reply to Defence, it was averred that:-

(1) The Defendants knew that the Plaintiffs were not part of the alleged syndicate and that they did not verify from the Plaintiff.

(2) The Defendants having known that the Plaintiffs were honest, the publication was malicious and unjustified and

(3) The Defendants had reasonable opportunity to know that the Plaintiffs were not operating cyber café or other gadgets with the aim of defrauding Telkom Kenya.

With the above pleadings specified in short, the following issues were agreed to be determined. The Agreed Statement of Issues was filed on 5th August, 2005. The following issues were noted:-

(i) Whether the words published in the Sunday Standard of 6th March 2005 were defamatory of the plaintiffs.

(ii) Whether the words so published were meant or understood as alleged in paragraph 7 and 8 of the Plaint.

(iii) Whether the words so published were calculated to disparage the plaintiffs either businesswise, professionally or socially and/or whether the plaintiffs’ reputation was seriously damaged causing them distress and embarrassment.

(iv) Whether the words published and complained of were fair comment made in good faith and opinions on matters of public interest.

(v) Whether the words published and complained of were true in substance and/or justified as alleged in paragraph 6 of the defence.

(vi) Whether the words published and complained of were published on an occasion of qualified privilege as alleged in paragraph 6 of the defence.

(vii) Whether the plaintiff's entitled to the prayers sought in Plaintiff.

EVIDENCE:

The Plaintiffs called two witnesses, which were Jimi Richard Wanjigi, the 2nd Plaintiff and Fredrick Ngatia the lawyer of the companies grouped under the 1st Defendant.

The 1st witness testified on the background and businesses of the companies grouped by him under the name of the 1st Plaintiff which is Kwacha Group of Companies. According to him, the companies under the group started business since 1963 when his parents were the Directors and Shareholders. The businesses range widely. It has also come on record during his testimony, (through the cross-examination), that his father had been the Cabinet Minister for 20 years and Member of Parliament for 25 years. It has been emphasized by the Defence counsel that the witness has not given any proof as to the incorporation and the businesses of the 1st Plaintiff. However, I do note that in the Statement of Defence paragraphs 1 to 5 of the Plaintiff have been admitted as regards the descriptive parts.

Similarly, there is no denial of the averments made in paragraph 14 of the plaintiff that a demand notice of intention had been made and served and the Defendants have not made good the Plaintiffs' claim. It is true that the notice of demand including that of apology has not been produced but in cross-examination of PW1 he has specified the date of letter of demand.

PW1 introduced and produced the copies of relevant pages of 6th March, 2005 Sunday Standard. The relevant parts of the publication on those pages are detailed hereinbefore.

In his further testimony he stated that the contents of the publication in issue were not true, that the 1st Plaintiff was duly licenced on 7th April, 2003 by the Communication Commission of Kenya (referred to as "CCK") to install and operate VSAT (Very Small Aperture Terminal) and the same was to be used purely for Data Service like Internet and e-mails. VSAT cannot be used for Audio Transmission. He denied that the VSAT which was installed was used for any illegal purpose of international telecommunication bypassing Telkom System. He also denied that the company's premises was actually raided by the police and that entry was refused even under the orders of uniformed policemen. He emphasized that if the police had entered the premises, he ought to have been informed and would have known of the incident. He however, agreed that CCK has right to inspect the installed equipment and that can be done on *ad hoc* basis prior to the renewal of the licence.

He testified that the article published affected the Plaintiffs in their businesses, locally and internationally. Their clients and Banks started doing more detailed due diligence on any transactions that they were undertaking. The reputation built in respect of their businesses over 40 years was soiled by the said publication with unsubstantiated facts. That the Defendants did not tender apology although demanded and that before publication of the article, the Defendants did not verify the information which might have been received by them from their sources.

The 2nd witness as stated earlier was Mr. Fredrick Ngatia who is a long-standing Advocate and as per his

testimony, he was rendering professional services to the Plaintiffs since 1990. Commenting on the publication in question, he testified that the article on page 1 of the Sunday Standard was eye catching and was fairly investigative piece of journalism. The article continued on page 27. On page 28, the sub-article was printed under the title “Masters of the Syndicate”. He stated that the said sub-article was tied up with the main Article and the Plaintiffs were described as being one of the masters of the syndicate. He justified his opinion by stating that the publication of the scam at page 1 of the Newspaper cannot be separated from the said Article because the company mentioned as being raided in that page was also referred to in the sub-article “Masters of the Syndicate” which has no relation with the 1st Plaintiff.

He further testified that when he read those publications, he was taken aback and thought that he could have dedicated his services to the two clients (two Plaintiffs) who might be involved in such “low level activities”. He further testified on the results of the publications on the activities of the Plaintiffs. He mentioned a court case being Milimani HCCS No. 461 of 2001 between one of the companies of the 1st Plaintiff and Kenya Commercial Bank. In the case 2nd Plaintiff was the instructing client. The case involved fairly major claim i.e. Kshs.1Billion and he had almost reached the finalization of the negotiations in March, 2005. But after the publications the exercise was rendered difficult. The KCB’s demand was denied by the clients with assertion that they had paid the claimed sum, that there was an immediate reluctance to settle the matter from KCB which was eventually recorded on 27th February, 2007 and was filed in court on 15th March, 2007 though since the interim injunction, there was no activities in respect of the case upto the said date. The consent was produced as P Exhibit 2,

As regards 2nd Plaintiff, the article had immediate adverse effect. His loan with Barclays Bank POC, London was recalled immediately and he had to repay the same. Secondly, despite the 2nd Plaintiff had five years visa for UK, the Home Office of UK denied him entry. After a petition was filed in Immigration Tribunal, his visa was restored. At the local stage, according to him, he received many calls after the publication asking the questions of veracity thereof.

He was cross-examined intensely. As regards the settlement of the case, he specified that the consent recorded stated that no party had any claim against each other. His proposals submitted in the year 2004 was approved by the Board of Directors of KCB but could not be spelt into consent after the publication of the articles.

He agreed that he had not carried any documents to substantiate his evidence which is his own evidence and that it is not skewed to assist the case of the Plaintiffs. He testified that he had come to help the court to arrive at the right decision. He denied he had come to put the Plaintiff in more favourable position.

He answered that he had also made his own inquiry as to the truth of the accusations and had talked to the 1st Defendant who is a member of the Parklands Sports Club and he is its legal adviser. He discussed the issue with him openly and indicated that he did not expect such low level of journalism from the Standard Newspaper.

He emphasized that the author of the sub-article is not disclosed and that he cannot understand the publication of an alleged event after two years of its occurrence and that, even the Director of CCK was “hounded out” in October, 2003.

He conceded that the Plaintiffs are not mentioned in the first article and that without the second sub-article, the Plaintiffs could not have any claim against the Defendants.

The defence also called two witnesses.

The first witness is Gordon Opiyo who has apparently authored the first article appearing on page 1 and 27.

His testimony did indicate that he was also owning the second sub-article at page 28, though there is nothing to support that indication. I state so because on page 1 under the title “**Hounded out by**

corruption cartel” his name appears even on page 28 under the title **“self-inflicted woes”** the words appear i.e. **“Telkom’s growth is stifled by fraudsters colluding with staff as competition bites, writes Gordon Opiyo”**.

However, article titled “Masters of the Syndicate” is not shown to be owned/authored by any one.

In his testimony, he conceded that the said sub-title on page 28 of Sunday Standard the Plaintiffs are named.

According to him, he was investigating the claim of problems in Telkom Kenya Ltd. as it had not been making expected profits. The Senior Director of CCK was also sent on compulsory leave and had been out in the cold for trying to stop the cartel involved in illegal activities of international calls.

He agreed that the articles in the Sunday Standard issue were published after his investigations and information which he received from his contacts one being a senior police officer. He also stated that he also talked to security people at Ukulima House who confirmed that there was a standoff between the CCK enforcement officers and the regular police. He also agreed that he did not witness the incident which occurred long time ago in the year 2003 and that he published the article **only because the entry to the Plaintiffs’ premises was refused.**

I may also note that this witness did not state that he interviewed anyone from CCK office and also agreed that he did not verify the veracity of his information from the Plaintiffs. He testified that he published the article based on the facts he gathered and then claimed that **“the publication was justified on the basis of my relationship with police officer and what I saw”** (emphasis mine).

He agreed that the sub-article was written in respect of a company called Data Globe and that he made a differentiation at the end to show that the master of syndicate was Data Globe and not Kwacha Group of Companies. He emphasized the words **“In another incident”** and in his opinion, the Plaintiffs were not unfairly depicted.

He got information from the police officers who were involved in the investigation of Data Globe and took them to the court. He saw a document as regards the inspection on Kwacha Group at Ukulima House and that is the reason he published the paragraphs in respect of the Plaintiffs in the sub-article at page 28.

He agreed that “the only thing for which Kwacha Group qualified to be included in this article was the refusal to open the door”. He further stated that it was an investigative publication and Kwacha Group had CCK Licence.

He finally agreed that in journalism practice, if any information is defamatory, they had an obligation to verify. He also accepted that he was aware of the demand made by the Plaintiffs but after he and the Managing Director of the Standard reviewed the source and documents, they concluded that publication was true and thus the Defendant did not publish the clarification that Kwacha Group of companies was not a part of cartel which swindled the Telkom Kenya.

The second witness was Stanley Opwolo Moyi who, in the year 2003, was working with CCK as a Senior Officer in charge of International Standard and Type Approval which involves testing of any new equipment brought in Kenya either for sale or use.

According to his testimony, CCK started investigation on the lost revenue of Telkom Kenya due to illegal connections not licenced by CCK.

On 29th May, 2003, the Director General instructed him and Chief Inspector Atyang Nicholas to put a team together immediately to check VSAT and International Service Provider (ISP) installations. They were to check those equipments to ensure that they did not have capacity to provide international telephone service.

They started their assignment with companies situated along City Centre and when they arrived at

Ukulima House where 1st Plaintiff had offices, the officer-in-charge, one Mr. Mwaura, was not in Nairobi and on contacting him on phone, he refused to let them enter. They went again the next day and found Mr. Mwaura was present. They were told to wait, which they did for an hour when a fleet of 10 police officers, eight in uniform and two in plain clothes, arrived. One of them talked to Inspector Atyang and he talked to Mr. Mwaura to allow the entry, which was refused. On 3rd June, 2003 they were allowed to enter in company of service provider staff member. On inspecting the equipment which was provided by service provider and licensed by CCK, no equipment which could serve as voice switching was found. They also inspected another premises of the 1st Plaintiff situate at Muthaiga close.

He agreed that they were not threatened by the police officers who had guns and that none of them said that they had an order from a politician not to allow them to enter.

He also agreed that he was involved in inspection of Data Globe company. He stated that he was not aware whether any notice was given to the 1st Plaintiff of their visit to inspect the equipment and agreed that the 1st Plaintiff was granted licence one month prior to the said event. He surprisingly, however, stated that as per his previous experience, the owners had been removing the illegally installed equipment.

He also agreed that after the raid of Data Globe, he was involved in recovery and analysis of the equipments.

This in short is the evidence before the court.

SUBMISSIONS AND CONCLUSIONS

Mr. Issa, the learned counsel for the Plaintiffs, stressed on certain facts which according to his contention do not justify the contents of the publication. They are as under.

DW2 Engineer Moyi did not specifically state that Kwacha Group was suspected of any wrong doing and that there was a shootout between the two groups of officers. On the contrary, he testified that the in-charge of the police group knew Inspector Etyang accompanying him and talked to Mr. Mwaura, that the officers had not been instructed not to allow any inspection by a senior politician.

Moreover, as per Mr. Gideon, there was no relationship shown between Data Globe and 1st Plaintiff. Although the title mentions "***Masters of the Syndicate***". No other company except Data Globe was shown in the article. It made reference only of the Plaintiffs, which meant that the Plaintiffs were amongst the Masters of Syndicate.

It is thus submitted that the passage in the said sub-article even in its natural and ordinary meaning are defamatory to the Plaintiffs. I may add that the last sentence of the article, namely "The incident was yet another example of the clout that the suspected operations have in the corridor of power", definitely suggest that the Plaintiffs were suspected of the illegal activities, that they were involved in the syndicate of corrupt dealing in international communication system and that they exercised unlawful influence over the security personnel.

Considering that the articles were referring to the incidents of the year 2003 as regards corruption cartel in the Telecommunication sector, that pages 1, 27 and 28 did delve only on the said specific issue, that Data Globe was taken to court, that the directors of the said company i.e. Data Globe, were foreigners, that they were politically connected and received protection from a cabinet Minister, that after all the recitals made in the said sub-article, the contents, of the three paragraphs mentioned, related to the Plaintiffs specifically, I do tend to agree that the said paragraphs were defamatory in that they tend to lower the Plaintiffs in the estimation of the right thinking members of society.

I would like to add, that the way the last three passages are placed together with both articles, even the innuendo meaning of the three paragraphs of the sub-article point a defamatory finger to the Plaintiffs.

In the premises, I find that the Plaintiffs have discharged the burden of proof that the articles published were defamatory in nature.

Having concluded so, I shall have to consider the defence of justification and fair comment.

The Plaintiffs contended that the Defendants are not entitled to raise the defence of justification in view of the evidence before the court as the allegations which were made against the Plaintiffs and complained are not true in fact and substantially so.

The case of **MACHIRA T/A MACHIRA & CO. ADVOCATES –VS- EAST AFRICAN STANDARD (2001) KLR 638** was relied upon and a passage at page 644 was cited; namely –

“..... A Defendant is permitted to plead justification only where it is clear that the allegations he made and are complained of are true in fact or substantially so. He cannot be allowed to set out a version of a statement which differs materially from that complained of and justify that version. For him to rely on justification, he must accept the Plaintiffs version of the statement, or a statement which is in substance identical with the Plaintiffs version”.

Mr. Issa, thereupon, submitted that the version of the Plaintiffs and that of the Defendants are contradictory and thus he could not raise the defence of justification.

I may state that in ***Machira case*** (supra) the Plaintiff complained of defamatory publication by the Defendant in publishing an ugly confrontation between the Plaintiff who is an Advocate and his client along the court corridors.

As against that Mr. Gitonga, the learned counsel for the Defendants, relied on provisions of Sec. 14 of the Defamation Act in support of Defence of Justification. It stipulates:-

“In any action for libel or slander in respect of words containing two or more distinct charge against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges.”

In short, it was submitted that if the words, not proved to be true do not materially injure the reputation of the Plaintiff having regard to the truth of the remaining charges, the Defence of Justification does not fail.

Mr. Gitonga, The learned counsel for the Defendants reiterated that the most of the words mentioned in the complained paragraphs are proved to be true. He relied on the averred report of a police officer to prove that the 1st Plaintiff was suspected to have been involved in the transmission of illegal international calls. This evidence is not substantiated. These words are material and do tend to injure the reputation and they are obviously not proved by evidence from the police officer who is not identified and/or no documents are also produced. I may note here that Mr. Gitonga did seek adjournment so that he can substantiate those allegations by calling the police officer but he closed his case thereafter without adducing any further evidence.

His submissions on justification solely relies on information from the police officers as per DW1. However, it is worth noting the contradictions in the testimonies of two defence witnesses. DW2 who led the inspection team did not suggest that the Plaintiffs were suspect or that they were threatened or that the Plaintiffs could have removed the illegal installations. His general remark that others had removed the illegal installation if given notice does deserve the careful consideration. He has first of all not given any evidence of earlier inspections and that the first day visits to other premises were without any notice. He has not substantiated his general remark. In the publication, apart from the name of Data

Globe, only the Plaintiffs are mentioned. Moreover, the only purpose of the publication, as per DW1 was the refusal of entry.

I also note that as per DW1, he had commenced his investigation and continued the same by obtaining informations from his contacts etc upto the publication. Even when he had the intention to publish in the media that Kwacha Group associated with 2nd Plaintiff was suspected of having been involved in transmission of illegal international calls, and that there was suspicion of illegal equipment being removed before allowing the entry as well as that the incident was another example of the clout that the suspected operators have in the corridor of power, DW2 still did not contact the Plaintiffs to verify all the aforesaid allegations before publication.

Moreover, the incidents which are reported from pages 1, 27 and 28 were not a current affair and thus it was not necessary to be urgently published. The sensational articles were published almost two years after the events. In my considered opinion, lack of compliance of basic courtesy of journalism deserves to be frowned upon and because of that, the publication could be termed as malicious. The burden to prove justification is definitely on the Defendants and in my view, they have failed to prove that element of Defence and I do find so.

The second issue raised in Defence is fair comment. Mr. Gitonga relied upon Sec. 15 of the Defamation Act, which provides:-

“In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.”

The said defence is available for the words consisting partly of allegations of facts and party of expression of opinion, only if the expression of opinion is a fair comment.

Even if I take the last sentence of the sub-article as the expression of opinion, that opinion is not expressed from the materials published which are proved to be true. I cannot state that the Defendants have proved that the Plaintiffs were suspected of illegal transmission of international calls. DW2 stated that the directions he received was to inspect all the installation of VSAT and the unsubstantiated information from police officers cannot be relied upon to give mark of fair comment on the expression of opinion.

Yes, it is true that the public has interest in knowing any wrongful activities in society or in government. Mr. Gitonga relied on a passage from Gatley on Libel and Slander at page 327:-

“... The principle which is an universal one is that the public convenience is to be preferred to private interests and communication which the interest of society require to be unfiltered may be made by persons acting honestly without malice notwithstanding that they involve relevant comments condemnatory of individuals”. (emphasis mine)

I have adequately stated the facts of the case hereinbefore. Except the fact, even if accepted as true, that the entry by the CCK officials were refused twice and at the last visit the security officers were called, cannot prove that the Plaintiffs were the master of syndicate along with the company shown to have been dealing in illegal transmission of international calls.

In my view, the Defendants transgressed their privilege of fair comments in view of the facts of the case and, looking at the lapse of long time, without checking with the Plaintiffs as to the veracity of the allegations.

I may quote a passage from Ratanlal & Dhirajlal's "The Law of Torts" at page 244 –

“a journalist does not transgress the limits of fair comment if all material facts are truly stated in the article, though it may be that there are one or two small deviations from absolute accuracy on minor points which have no influence on the conclusion, and the conclusions are such that ought to be drawn from the premises by a critic bringing to his work amount of care, reason and judgment which is required of a journalist.”

Emphasis mine

As observed hereinbefore, there are many major inaccuracies in the article and the conclusions were made from those inaccurate facts without applying care, reason and judgment required of a journalist. I shall thus resist, unfortunately, to accept submissions on fair comment and I do find so. Lastly, on this issue, I shall quote the passage from *Machira's case* at page 645 – namely

“It is also a waste of time and an abuse of the process of the Court, and a matter calculated only to delay the just dues of the plaintiff to drag this case to the trial on the basis of an alleged defence of fair comment. What is complained of are not comments but statements of alleged facts; nor are they inferences of fact from other facts referred to. Again, there was no factual basis for a comment. A comment must be objectively fair in the sense that an honest or fair-minded person could hold that view. Comment must be based on true facts which warrant the comment.” (*emphasis mine*)

The only issue now remains to be determined is the quantum of damages. It is trite that the Libel is actionable per se and that means that the Plaintiff can bring a suit for defamation simply by showing that he has been defamed in a written, audio or video publication.

The law just presumes damages arising from such publication and the claimant is entitled to look to an award of damages sufficient to vindicate his reputation.

I would like to quote a very emotional description of the effects of defamatory publication captured by Supreme Court of Canada in the case of **HILL –VS- CHURCH OF SCIENTOLOGY OF TORONTO (1995) 2 SCR 1130.**

“a defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting a record in a manner that will truly remedy the situation.”

The Court of Appeal in the case of **JOHNSON EVAN GICHERU –VS- ANDREW MARTON & ANOTHER CA NO. 314/00** has adopted with approval the following passage from the English case of **UREN –VS- JOHN FAIRFAX & SON PTY LTD.**

“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 measureable in money.”

In the same case, the Court of Appeal adopted the guidelines captured in English 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 petition.

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.***

Mr. Issa relied from passage in Gately's Law of Tort on page 268 which states *inter alia* that while the level of damages should not be so high as to curtail the freedom of expression, ***the Court should be careful not to drive down damages in Libel case to a level which the publishers might, with equanimity, be tempted to risk having to pay.*** Nevertheless, ***"The figure of Justice carries a pair of scales and not cornucopia"***.

In short, the damages are at large and cannot be assessed by referring to any mechanical, arithmetical or objective formula. However, I do observe that the court should along with general factors proposed in earlier precedents take cognizance of circumstances of the case to arrive at an appropriate assessment of damages.

I have been referred to several authorities by both the counsel and my omission to refer to them specifically should not be termed as my failure to note them. I have considered all, with awareness that each case presents its own peculiar circumstances and the court has to weigh at them before arriving at the appropriate quantum for damages.

Before I arrive at the figure of compensatory damages, I shall determine whether the Plaintiffs are entitled to aggravated or punitive damages.

It is now a trite law that while considering the issue of damages, the court can take into account the motives and conduct of the Defendant where they aggravate the injury done to the Plaintiff. It includes the failure to make any or sufficient apology and withdrawal, continuation with determination of the conduct of the trial etc.

Although the Plaintiffs have failed to produce the letter of demand, DW1 himself has accepted that the letter of demand was discussed with the Managing Editor and on review of the "facts and documents" it was decided not to offer any clarification in the Newspaper. It is further to be noted that the facts adduced were as a result of informations received by DW1 and no documents to substantiate those informations were produced. The trial was vigorously contested and there is no doubt that the Plaintiffs were defamed by the publication.

The Defendants on the other hand, did contend that there are no circumstances which could attract the award of aggravated damages.

The case of **MASON –VS- ASSOCIATES NEWSPAPERS LTD. (1965) 2ALL E.R 945** at 960 was cited.

"Exemplary damages are exceptional and only in rare cases are they awarded. It behoves that you give the most earnest consideration to the matter before deciding that it is a case of exemplary damages at all. There must be evidence that directly point to the publication having been made with cynical disregard for consequences or a publication made simply with a view of some benefit to be acquired thereby by the defendants. Exemplary damages cannot be awarded unless after giving it such consideration one is satisfied that the only inference to be drawn is that the publication was made with a view to profit or benefit in the form of scoring a match on the competing newspapers and in the

knowledge that the damages payable would be insufficiently large to make the publication an unprofitable step in the interests of the defendants, but if there is likelihood that there was a little over enthusiasm on the part of some reporter....if it was one of those things which happen occasionally and was not an act of deliberate policy, then exemplary damages must not be awarded,

It was reiterated that the Defendants wrote the article in good faith and in furtherance of their obligation to impart information in public interest rather than to defame the Plaintiffs. It was stressed that there was no intention to gain financial advantage through publication.

I may tend to agree that looking at the pleadings and evidence produced, the matter in question was of a public interest and fact of refusal to give access or entry to the premises are sufficiently placed on record, though denied by the Plaintiffs. The onus to prove that the publication of such refusal was not true has not been discharged appropriately by the Plaintiffs and the Defendants relying on the informations, though not following the norms of journalism, went ahead to publish the article. I have already observed the legal implication of these facts so far as defamation is concerned.

I shall thus consider the issue of compensatory damages with a tint of aggravation because of the last sentence of the article.

The Plaintiffs have cited cases in which the damages from shs.6,000,000/= to 30,000,000/= (inclusive of exemplary damages) were awarded.

The Plaintiffs apart from the suffering of reputation have shown some instances of effects on business and personal lives.

Considering the dictum that justice holds the scales, I award a cumulative damages of Kshs.3,000,000/= to the Plaintiffs jointly and severally against the Defendants.

The Defendants shall pay costs of the suit.

Dated, signed and delivered at Nairobi this 11th day of **May, 2011**

K. H. RAWAL

JUDGE

11.05.2011