**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 60 OF 2010**

**HON. UHURU MUIGAI KENYATTA …….PLAINTIFF**

**VERSUS**

**BARAZA LIMITED**
**T/A KENYA TELEVISION NETWORK (KTN)……..DEFENDANT**

**JUDGMENT**

The cause of action of this Amended Plaint filed on 27th May, 2010 arises from a publication of televised broadcast of 3rd January, 2008 in the feature of the "Election 2007" by the Defendant.

On 15th March, 2011, before the hearing commenced, the date mentioned as 10th January, 2008 in paragraph 3 of The Amended Plaint was amended by consent to read 3rd January, 2008.

The Defendant did not amend its Amended Statement of Defence after the aforesaid amendment.

The Plaintiff, who is a Deputy Prime Minister and known political person, has claimed that on 3rd January, 2008, the Defendant had published defamatory words of him in their feature of the "Elections 2007", which were spoken by the Hon. Raila Odinga, namely:-

***What we have seen defies description. We can only describe it as genocide of grand scale. We have seen so many dead kids, children cut with pangas. We have seen bodies that have been decimated by the fire. We have seen people whose bodies are riddled with bullets. We have been saying that what is happening right now in our country is nothing but short of genocide and this is being done mainly by the police officers and a gang. It is terrorist gang known as mungiki which has been around for a long time is supposedly banned gang but it is connected to the political class which is now sitting in the State House as we are talking right now. One of them Mr. Uhuru Kenyatta is the principal master and another one called Njenga Karume who is the Minister for Defence. "***

***"It is not a tribal violence. This is a genocide being conducted by the political class illegally sitting in State House."***

The plaint has also particularized the natural and ordinarily meaning meant and intended to mean of the said statement as well as, in alternative, what it meant or understood to mean by way of innuendo with particulars thereof in paragraphs 4 and 4A of the Amended Plaint.

The Plaint avers that the said words were false and were published maliciously.

The plaint further pleaded the facts to support the claim of malice, exemplary and/or aggravated damages which are:-

***a. The words were broadcast in a sensational manner.***

***b. The Defendant knew or ought to have known that the allegation that the Plaintiff was a mungiki leader or involved in acts of genocide were untrue.***
***c. That the Defendant could have edited the defamatory words before broadcasting them but opted not to.***

***e. The court will be asked to infer that;***

***The Defendant broadcast the said words in the knowledge that:***

***(i) They were libelous and/or with a reckless disregard as to whether or not they were libelous; and***

***(ii) Having established that the prospect (sic) the prospect of material advantage to itself outweighed the prospect of material loss.***

***f. The Defendant knew or ought to have known that the said words or accusations would render the Plaintiff a suspect in subsequent investigations on the criminal activities surrounding the said violence and deliberately and cynically decided to publish them in order to ruin the Plaintiff's name and career by rendering him a suspect in the said criminal activities.***

***g. The words plainly accused the Plaintiff of being a mass murderer and obviously ruined the Plaintiff's name and reputation. Notwithstanding that the Defendant could have easily verified the information from the Plaintiff before publication in order to confirm the veracity of the factual matters in the allegations and was aware that this would constitute normal journalistic practice, they deliberately and cynically decided not to do so because their only concern was to ruin the Plaintiff's name and reputation.***

The Plaintiff has further averred that despite demand made, the Defendant has not published any apology or explanation for the broadcast.

The Plaintiff has thus claimed general damages, aggravated or exemplary damages and injunction.

The Defendant in the Amended Statement of Defence conceded that the impugned article was published on 10th January, 2008 but denies other averments made in the plaint. It further avers that the publication was verbatim report of the Statement made by Hon. Raila Odinga (who is at present is the Rt. Hon. Prime Minister of Republic of Kenya), and it was obliged to report the same in public interest under the circumstances prevailing and denies the allegation of malice. In paragraph 10 of the Amended Statement of Defence, it raised the defence of ample qualified privilege to report pertinent issues of national security and public interest.

The issues which need to be considered from the pleadings are:-

***(1) Whether the impugned statement was defamatory;***

***(2) Whether the Defendant can avoid liability because the statement was uttered by the Hon. Raila Odinga now The Rt. Hon. The Prime Minister;***

***(3) Whether the defence of qualified privilege available to the Defendant***

***(4) What reliefs, if any, the Plaintiff is entitled to be granted;***

***(5) Who pays costs of the suit.***

**EVIDENCE**

There are some undisputed and/or indisputable facts arising from this matter.

The Plaintiff is a prominent personality in political, social and business spheres of the country.

The election of December, 2007 sparked violence specially after declaration of the result of Presidential Election. Hon. Raila Odinga was a Presidential candidate who was a disputant to the Presidential election result. As at 3rd January, 2008, there were acts of violence in Kenya that resulted in deaths of children, deaths by fire as well as bullets. The issue of Post Election Violence (referred as 'PSV') was an issue of concern both in Kenya and Internationally.

The people, in Kenya and internationally, were keenly watching and were concerned to get information of and insight into the happenings in the country.

From the evidence led by the Plaintiff himself and his Personal Assistant, Mr. Njee Maturi and defence witness Mr. Kaikai the following further facts emerge as undisputed.

In the afternoon of 3rd January, 2007 the Plaintiff was in his house with his brother Mr. Muhoho Kenyatta and the said Mr. Njee Muturi when the impugned statement was recorded around 4.00 pm and was broadcast by the Defendant at around 5.00 pm. The said three persons were at his house who viewed and heard the impugned statement on television. Mr. Muturi immediately called the Defendant to complain as to how the Defendant could have broadcasted the said statement which was false. The publication of the statement was made only by KTN which was not repeated after the call from Mr. Muturi. The Defendant did not call the Plaintiff to verify or receive his comment before the broadcast. The broadcast included the statement from Hon. Raila Odinga along with footage and comments by Defendant's reporter outside the City Mortuary. The statement was made by Hon. Odinga. The said statement was made after the ODM members visited the mortuary accompanied by the camera crew and reporters from the KTN and other media personnel in an impromptu Press Conference. The Defence witness Mr. Kaikai agreed that he did not see any dead body burnt by fire. What he saw were three bodies of children cut with pangas and two bullet ridden bodies.

Furthermore the defence witness conceded the broadcast which was part of a daylong broadcast of different events around the country at the peak of PSV and that a statement from a political leader like Hon. Raila Odinga was of public interest which was their guideline while publishing the same and that when he talked to Mr. Muturi, he told him that they were open to rebuttal from the Plaintiff and could avail their cameraman. However, it is interesting to note that he did not inform Mr. Muturi that before the broadcast, he had made attempts to call the Plaintiff. Mr. Muturi was also not told of this fact by Ms. Farida, the in-charge of News on the day. She was the first person who was contacted by Mr. Muturi who promised to call him back after consultation. If there were attempts to call the Plaintiff, logically the first reaction would be to divulge that fact. I shall thus be reluctant to accept the evidence as credible, that the Defendant made efforts to contact the Plaintiff before publication.

Mr. Kaikai, the Defence witness conceded that he understood the publication as imputing that the Plaintiff was amongst the leaders of the group that was responsible for the killings and genocide referred to in the footage. He also stated that Hon. Raila Odinga made very angry remarks. The Defendant could not produce any evidence that other media (including international media), who were present, did broadcast the statement in the manner in which the Defendant has televised the same.

He further stated that he was not aware that the broadcast was damaging to the Plaintiff, as according to him, those claims were made by Hon. Raila Odinga, a fellow politician and at that time, ***there was trend of flying accusations at each other and that he did not have any other reasons or grounds for this belief.*** He also agreed that till the date of his testimony, he has not established that the contents of the broadcast were true.

**SUBMISSIONS ON LIABILITY AND CONCLUSION**

Mr. Oyatsi, the learned counsel for the Plaintiff commenced his submissions by stressing that the Defendant's crew were with Hon. Raila Odinga at the mortuary, saw what was seen by Hon. Raila Odinga and captured the same in camera. After that, the speech/statement was made which was captured once again on camera. Thus they knew or ought to have known that what was stated by the Speaker was not true. He added that they had second chance to check, edit and review the contents so captured at the Editorial level. According to the evidence from the Defendant, it was so reviewed and edited before the publication but what was captured on camera did not confirm what was said in the statement. Furthermore, the Defendant knew that what they were to broadcast was definitely going to vilify the Plaintiff. Despite that, they went ahead to broadcast/publish the statement which was false as per the facts seen and established on camera. Yet, the Plaintiff was labeled as a person co-ordinating the action of genocide in the country which publication had worst implication on the reputation of the Plaintiff.

It was conceded that the Plaintiff has to prove following factors to establish the cause of action in the suit of defamation against the Defendant namely:-

**i) The Defendant published false or untrue statement**
**ii) The statement was defamatory**
**iii) The statement was published to a third party**
**iv) The words in the statement referred to the Plaintiff**

(i) In support of the contention of falsity of the statements, it was submitted that from the evidence of the case that following facts have emerged:-

**(ii) There was no genocide committed in Nairobi on that day contrary to the allegations made in the statement.**
**(iii) The Plaintiff did not commit genocide contrary to the allegation made in the statement.**
**(iv) The Defendant did not see burnt dead bodies in the mortuary as well as in the footage contrary to the allegation made in the statement.**
**(v) The Defendant saw three bodies of dead children in the mortuary contrary to the allegation made in the statement that they had been so many dead kids, children cut with pangas.**
**(vi) The Defendant only saw three bodies of adults riddled with bullets in the mortuary contrary to the allegation made in the statement that they had seen many people whose bodies were riddled with bullets.**
**(vii) The Defendant did not know where the Plaintiff was at the material time, contrary to the allegation made in the statement that the Plaintiff was sitting in State House as the statement was being recorded.**
**(viii) Being unaware of the Plaintiff's whereabouts, the allegation made in the statement that the Plaintiff was at State House in Nairobi co-ordinating acts of genocide being committed by Mungiki on Kenyans was false and untrue.**
**(ix) The evidence led showed that the Plaintiff was at his house with his brother and Personal Assistant (PW2).**

(ii) The observations in the book titled ***Gatley on Libel and Slander***, (6th Edition) at page 2 paragraph 3, describes the meaning of defamation in law, namely:-

***"A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another. In English law publication to the person himself defamed is not actionable (though it may be criminal); the interest protected is not personal pride. Broadly speaking, if the publication is made in permanent form or is broadcast the matter published is a libel; if in fugitive form, it is a slander. The most important distinction between the two is that the law presumes that some damage will flow from the publication of a libel;. "***

***Gately's*** book has mentioned the following passage which stipulates further the difficulty in having an all

encompassing definition of defamation.

***"There is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend "to lower the Plaintiff in the estimation of right-thinking members of society generally." "to cut him off from society," or "to expose him to hatred, contempt or ridicule," is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published. Where, as in the cases of libel and of slander actionable per se, the publication of the matter containing the defamatory imputation is actionable without proof of damage, the law will presume that some damage flows from such publication."***

It is further submitted that even though the recipient of the statement may not believe the statement or even know it be unfounded, if it imputes discredible conduct, the statement is defamatory.

The following passage of Goddard L J in the case of **Hough –vs- London Express Newspaper Ltd. (1940) 2 KB 575** was adopted with approval by the Court of Appeal for East Africa in the case of ***J N Bendzel –vs- Kartar Singh (1953) Vol. XX page 53.***

***"If words are used which impute discredible conduct to my friend, he has been defamed to me, although I do not believe the imputation and may even know that it is untrue."***

The court was asked to note that the Defendant has admitted that it understood that the words published did mean or impute that the Plaintiff was amongst the leaders of the group that was responsible for killing and genocide referred to in the footage; that the country was undergoing a serious political crisis at the material time which had degenerated into violence, serious bodily injuries and death and that the Plaintiff was identified as the one who was master minding the aforesaid violent acts. By the said publication, the Defendant has evidently exposed the Plaintiff to hatred, ridicule and contempt by entire Kenyan society as well as International community. It was therefore submitted that the Plaintiff has met all the requirements material to establish cause of action against the Defendant in defamation.

It was stressed that the depiction on the footage did not confirm what was mentioned in the statement of the speaker. The impugned televised statement thus vilified the Plaintiff, it was emphasized.

Mr. Oyatsi taking support from the Constitution stressed that the Defendant violated the provisions of Article 33 (2) (c) & (d) of the Constitution which stipulate:-

***33. (2) The right to freedom of expression does not extend to—***
***(a) .....***
***(b) .....***
***(c) hate speech; or***
***(d) advocacy of hatred that—***
***(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or***
***(ii) .....***

The Defendant also violated the Plaintiff's right of dignity and reputation which is granted in Article 33 (3) and Article 28 of the Constitution and the court was urged to follow the 6th Schedule Clause 7 (1) of the Constitution which enjoins the court to interpret all the laws in force immediately before 27th August, 2010 in conformity with the Constitution.

It was submitted that from the facts of this case, the rights of the Plaintiff has been violated in a manner which can only be described as 'wicked'. The Defendant violated the Supreme Law as aforesaid and cannot take shelter under any other law.

In opposing the contentions from the Plaintiff, while the Defendant did admit the publication of the statement of Hon. Raila Odinga as averred in the Plaint, Mr. Wanjala, the learned counsel for the Defendant, emphasized on the peculiarity of the present proceedings. It was stressed that considering the

submissions made by the Plaintiff this court is, in fact, invited to make final pronouncement as to the falsity or truthfulness of the issues raised in the statement under scrutiny when the same issues are also pending against the Plaintiff before the International Criminal Court (referred as 'ICC') in the case of the ***Prosecutor –Vs- Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali Case No. 01/09-02/11.***

Mr. Wanjala, in view of the aforesaid, raised a challenging and an unprecedented issue by submitting that as per Article 2 (6) of the Constitution, the Rome Statute which is ratified by Kenya, is part of laws of Kenya and thus the said proceedings before that court, and specially as far as they concern Kenya, are the proceedings under the laws of Kenya. The proceedings before ICC thus shall be construed as the proceedings before the Kenyan court.

It is now in public domain that the ICC Pre-Trial Chambers, with majority of two judges, have made a Ruling dated 8th March, 2011, in which the ICC has found that it has reasonable grounds to believe that the Plaintiff with others had major involvements with Mungiki in planning to carry out retaliatory attacks in Rift Valley.

Several paragraphs from the said Ruling were cited in the submissions and I shall advisedly refrain from citing them in this Judgment.

It was further argued that those observations and/or finding by Pre-Trial Chambers of ICC were based on the evidence produced before that court. If so, the substance of the statement impugned before the court cannot be found to be false. Mr. Wanjala emphasized that there is evidence which has been analyzed and ruled upon by another court which found *prima facie* that the substance of the publication are not false. This court has not seen the evidence and cannot negate that finding just on the strength of the Plaintiff's denial. It was stressed that it is the onus of the Plaintiff to demonstrate that the publication is false.

It is conceded that the said finding of ICC is not holding the Plaintiff guilty criminally since there is still a process to be completed by the chambers but the fact, that there is a decision by the ICC to the effect that there exists evidence to form the belief as aforesaid, is sufficient to reach a conclusion by this court that the issues complained of by the Plaintiff in the publication are not false.

Mr. Wanjala submitted that in view of the above facts, if the court does find in favour of the Plaintiff it will be making a Ruling that:-

***i) By January, 2008 there were no incidents of genocide in Kenya;***
***ii) By January, 2008 there were no incidents of violence in Kenya that left casualties; many dead children cut with pangas;***
***iii) By January, 2008 there were no incidents of violence in Kenya that left bodies decimated by fire;***
***iv) By January, 2008 there were no incidents of violence in Kenya that left dead bodies riddled with bullets;***
***v) There were no killings committed mainly by the police officers and a gang called Mungiki in Kenya in the year 2008;***
***vi) The gang called Mungiki was not a proscribed gang;***
***vii) Mungiki at the time had no ties with the political class that was sitting in State House;***
***viii) Mr. Uhuru Kenyatta was not a principal master of Mungiki;***
***ix) The genocide was not being conducted by the political class illegally sitting at State House.***

Mr. Wanjala boldly submitted that this court has concurrent jurisdiction with ICC as per the Constitution and thus ICC shall be bound by the finding of this court, which would be based simply on the denial of the Plaintiff. As per the Defendant, that onus is not discharged by the Plaintiff.

Lord Diplock's observation in the case of ***Thoday –vs- Thoday (1964), ALL ER 341*** at 351 was relied upon, namely –

"***If a court having jurisdiction to inquire into a fact has once inquired into the truth of a particular allegation of fact and reached a decision thereon, another court of concurrent jurisdiction in the exercise of its own discretion should not re-embark on the same inquiry but should accept the decision of the first court"*** *(emphasis mine)*

It was further submitted that if the court finds on the falsity of the statement impugned, the Republic of Kenya would have tremendously prejudiced the proceedings of the Pre-Trial Chamber as well as its obligation to co-operate with ICC. This court, it was contended, should accept the decision of the Chamber that there is probative evidence which leads to the conclusion that the publication is not false.

The Defendant on the premises aforesaid, submitted that the tort of libel is not established and the plaint be dismissed with costs.

When given further opportunity to address the court on the introduction of ICC Ruling during submissions, Mr. Wanjala contended the introduction of the Ruling is limited to the issue i.e. whether the publication was false or true! The court shall have to make finding on the issues which are specified as hereinbefore in the Ruling while proceeding to determine the said issues!

Mr. Wanjala focused on last four factors mentioned on items vi to viii and paused a question, whether in view of the Ruling of ICC, the court would be in a position to find that those factors were not true? The said Ruing will fit in the present case. It was submitted that the Ruling of ICC has not been produced as evidence but has been cited as an authority of the court which becomes admissible and in any event, the court cannot ignore the Ruling and, if done, it shall be akin to refusing to take into account the proceedings before the court of this country.

It was admitted by Mr. Wanjala that the Ruling of ICC did not indict the Plaintiff in respect of happenings in Kibera which would be the events and the Area mentioned in the statement. However, he stated that the substance of the Ruling does refer to the Plaintiff's association with the group called Mungiki which was also referred to in the publication.

The above submissions were associated also with the issue of fair comment, Mr. Wanjala emphasized that the issue was very much of public interest which attracted international concern and participation. Reference of killings of group of persons could be taken as genocide in ordinary parlance and would fit what the Defendant saw and what was happening around the country. It was suggested that although the offences stipulated in Article 7 of the Rome Statute, under which the Plaintiff has been indicted are not covered under the offence of genocide, killing of group of persons could be included therein and that is what the speaker of the statement had in mind. I may however, at this juncture find that this particular aspect of the submissions from the Defence cannot be accepted which, in any event, is neither pleaded nor produced in evidence. The submissions on what was in the mind of the speaker cannot be accepted in law as well as in equity. It is on the record that the speaker has not been called as a witness and that the Plaintiff is not indicted of offences of genocide.

However, entirely without prejudice to the above, it was submitted that the Defendant pleads the defence of qualified privilege and relied on paragraph 6 of Part II of Defamation Act which stipulates:-

***"A fair and accurate report of the proceedings of any public meeting in Kenya bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern whether the admission to the meeting is general or restricted."***

Mr. Wanjala submitted that the meeting was a lawful public meeting and the statement was fair and accurate report of the statement made by Hon. Raila Odinga who was a Presidential candidate and had gone to the mortuary to console the victims of Post Election Violence.

The issue, even the Plaintiff admitted, was of public interest in the country as well as International Community and Regional bodies. The situation of PSV exasperated to a level of crimes against humanity and that was the reason that the matter was taken to the ICC, whose Pre-Trial Chambers has given the

ruling which is mentioned hereinbefore. Thus the issue of public interest has been established and the public was admittedly interested in knowing all the issues surrounding the PSV. The Defendant being a media house, whose principal business is dissemination of information to the public, had legal as well as moral obligation to cause news and information to reach the public.

Mr. Wanjala relied on a passage by Lord Atkinson in the case of ***Adam –vs- Ward* (1917) AC 309** at page 334, namely –

***"A privileged occasion is an occasion when the person who makes the communication has an interest, or a duty legal, social or moral, to make it to the person to whom it is made and the person to whom it is made has a corresponding interest or duty to receive it."***

As regards the conduct of the Defendant, it was submitted that as per second schedule, paragraph 1 (d) of the (Defamation Act), a journalist has a discretion to distinguish while publicing a statement between comment, conjecture or fact. Mr. Kaikai the defence witness has testified that he viewed the broadcast and he had time to judge and review and thereafter allowed the same to be broadcasted. In his discretion the broadcast did not fall short on accuracy or fairness.

The above cited paragraph 1 (d) provides:-

***"When stories fall short on accuracy and fairness, they should not be published. Journalist, while free to be partisan, should distinguish clearly in their reports between comment, conjecture and fact."***

The discretion which was exercised, it was submitted could not be substituted by what the Plaintiff has testified to be the discretion or obligation of a journalist. It is for the journalist to decide as per his discretion.

I have already made my observations on the evidence from the Defendant as regards inability of the Defendant to contact. In my view, the above paragraph of the Act may not help the Defendant simply because as per Defendant's witness, what was stated did not conform to what was seen on footage and videos and no distinction was made during the publication as regards comment, conjuncture and fact. While I agree there is no legislated or accepted norms or standard of accuracy or fairness, the said factors had to be weighed in the background and circumstances of each event.

In respect of the claim of protestation by the Plaintiff against the broadcast, the Defendant responded that the statement in question was from the Hon. Raila Odinga and the Defendant could not have possibly published an apology or denial of that statement.

The relay of information received from a third party was made as per the discretion of the defence witness and found to be fit for publication and there was no malice in doing so. It was further stressed that the statement was not repeated.

In rejoinder to the aforesaid submissions from the Defendant, Mr. Oyatsi submitted that the Defendant's contentions that the publication was the relay of statement made by Hon. Raila Odinga does not help the Defendant.

Article 1 (d) of 2nd Schedule cannot be relied upon by the Defendant for simple reason that the publication was supposed to be factual statement on what had been seen and witnessed in mortuary by the speaker and the Defendant's crew. The evidence before the court is to the contrary.

If so, the publication of statement has to be construed as the repetition of defamatory statement which is libel by itself.

The following passage from the case of ***Stern –vs- Piper* (1996) 3 ALL ER 385** on page 389 – 390 was relied upon in support of this submissions. The Court of Appeal adopted with approval the observations made earlier by Lord Denning in ***Truth CN (NZ) Ltd. –v-s Holloway* (1960) 1 WLR 997** at 1002 – 1003,

namely:-

***"Every republication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him", [see Gatley on Libel and Slander (4th edn. 1953) p 106, quoting Morse v Times-Republication Printing Co. (1904) 124 Iowa Rep 707 at 717 per curiam]. This case is a good instance of the justice of this rule. If Judd did use the words attributed to him it might be a slander by Judd of Mr. Holloway in the way of his office as a Minister of the Crown. But if the words had not been repeated by the newspaper, the damage done by Judd would be as nothing compared to the damage done by this newspaper when it repeated it. It broadcast the statement to the people at large…"***

A passage from the Judgment from Lord Hodson in the case of ***Lewis –vs- Daily Telegraph Ltd., Lewis N. Associates Newspaper Ltd (1963) 2 AL ER 151 (1964) AC 234*** was also relied. It was quoted in ***Stern's case*** (supra) at page 391.

***"It has been argued before your lordships that suspicion cannot be justified without proof of actual guilt on the analogy of the rumor cases such as Watkin v. Hall (1868) LR 3 QB 396, [1861 – 73] ALL ER Rep 275). Rumor and suspicion do, however, essentially differ from one another. To say that something is rumored to be the fact is, if the words are defamatory, a republication of the libel. One cannot defend an action for libel by saying that one has been told the libel by someone else, for this might be only to make the libel worse … It may be defamatory to say that someone is suspected of an offence, but for this must surely offend against the ideas of justice, which reasonable persons are supposed to entertain. If one repeats a rumor one adds one's own authority to it, and implies that it is well founded, that is to say, that it is true. It is otherwise when one says or implies that a person is under suspicion of guilt. This does not imply that he is in fact guilty, but only that there are reasonable grounds for suspicion, which is a different matter.' (See [1963] 2 ALL ER 151 at 167 – 168, (1964) AC 234 at 274 – 275)***

In response to the submissions made in reference to the pending ICC case, it was submitted that the said issue first of all has not been pleaded, that the Defendant has fully participated in trial and adduced evidence, that no indication by the Defendant of the Ruling of Pre-Trial Chambers has been made before the court during the trial, that after the trial was finalised the parties consented to prepare and file submissions and highlight the same, that at all times the Defendant was aware of the ICC proceedings which are now referred to only during submissions with full details. Moreover, the ICC Ruling is given after the impugned publication.

Mr. Oyatsi cited English case of ***Cohen –vs- Daily Telegraph Ltd. (1968) 2 ALL ER 407.*** It was held in the said case:-

***"The facts on which a plea of fair comment was based must be facts existing at the time when the comment was made and accordingly the two paragraphs relating to events that occurred after the publication of the alleged libel had been rightly struck out."***

Lord Denning on page 408 between H and I observed:- ***"No ordinary person can look into the future and comment on facts which have not yet happened."*** And that it was also observed that the comment must be on existing facts.

Another English case of ***Pamplin –vs- Express Newspapers Ltd. (2) (1988) 1 ALL ER (282)*** was relied upon wherein, it was found that when adducing evidence of the Plaintiff's bad reputation to support an argument for lessened damages, it ought to be restricted to adducing evidence of the Plaintiff's general reputation and was not permitted to adduce evidence of Plaintiff's specific conduct apart from previous conviction.

From the local jurisdiction, the case of ***Godwin Wanjiki Wachira –vs-Okoth 1977 KLR 24*** was cited.

The facts of this case are that the Plaintiff was convicted for the office of dishonestly receiving a motor

vehicle knowing or having reason to believe that it was stolen. The High Court upheld the appeal against that conviction. However, during the pendency of appeal on article about the conviction appeared in monthly newspaper. Allowing the Plaintiff's claim of libel, the High Court observed:-

***"I would go further and hold that failure on the part of first defendant to inquire into true facts and true position from court records when he should have found that the Plaintiff had appealed against his conviction is a fact from which inference of malice may properly be drawn."***

The Court of Appeal then upheld the said Judgment of the court. Mr. Oyatsi thereafter made following propositions that every person is deemed to be of good reputation and looses that right in the following events –

1. ***If there is a conviction prior to the publication.***
2. ***If the person admits the acts done by him to show that he had bad reputation, and***
3. ***Where the Defendant places the evidence that the publication is true.***

In the cases of previous conviction the defence of justification can be raised as per the law of defamation.

It was observed that subsequent conviction can be relied upon to mitigate the damages, however, in both cases, the facts of conviction has to be pleaded, and produced in evidence, so that the Plaintiff has been given opportunity to give evidence in rebuttal.

The Defendant has not pleaded justification which it had ample opportunity before the case was heard. The Plaintiff was not asked in cross-examination if his reputation has been tarnished and the Defence witness did not give any evidence on ICC matter which, in any event, shows that there are merely suspicions against the Plaintiff. The impugned publication, however, portrays the averments as if they are factual and true. ICC only states he is suspect and is innocent till proved otherwise. The Defendant cannot justify on the basic of ICC Ruling that the publication is true in substance relying on suspicion. The Ruling produced is no authority or evidence that the impugned statement is true. No fact is established so far and the Defendant by relying on ICC Ruling to justify its publication, only compounds its liability.

I may also cite case of ***Independent Newspaper Holdings Ltd. –vs- Suliman (2004) ZASCA5A at*** paragraph (24) and (32) –

***"The harsh reality of the situation is that even mere suspicion to put it at its lowest raises doubts in the mind of those to whom it is communicated as to whether the hitherto unsullied reputation which the person enjoyed continued to be deserved or whether it should not be regarded as undeserved. That the doubt may be temporary and ultimately transient because of the subsequently established innocence of the person cannot cure the loss of esteem which that person endures pending the establishment of his or her innocence."***

While taking defence of justification of qualified privilege in the Defamation Case, the Defendant was required by law to establish the true facts and the Plaintiff has no burden to prove the defence raised by the Defendant. However, it was contended that the defence of qualified justification, in any event, does not avail to the Defendant because it refused to accede to the request from the Plaintiff to publish a correction, specifically in the face of the fact that the Defendant's crew were present during the visit of the mortuary, and that both the statement of the visit and the Speaker were recorded on camera.

See 7 (2) of the Defamation Act was relied upon which stipulates:-

***"In an action for libel in respect of the publication of any such report of matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the Defendant has been requested by the Plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having***

***regard to all the circumstances."***

Moreover, Sec. 35 (11) of the Media Act stipulates:-

***"The media shall, in a free and independent manner and style inform the public on issues of public interest and importance in a fair, accurate and unbiased manner whilst distinctly isolating opinion from fact and avoiding offensive coverage of nudity, violence and ethnic biases."***

It was further contended that the publication in question is wanting in fairness, accuracy and lack of bias. In further response to the submissions as regards ICC proceedings, it was contended that the Defendant has admitted that the truth or otherwise of the allegations made in the publication is yet to be known and is pending to be established in the ICC proceedings and yet the publication has shown or articulated the same as having been concluded. This apparent conclusion is defamatory and shall have to be concluded as rumors.

Aforesaid provisions of the Defamation Act, can be assimilated with the ***Reynold's*** principle as regards the freedom of the Journalist to publish the matters in public interest.

It was submitted that the Plaintiff, evidently, is not charged with the offence of genocide before the ICC and the publication in question has implied so in most provocative manner and the same is further even implied as such in submissions.

In further response to the contention that the issue before the court is akin to the issues before ICC, it was submitted that ICC, either under Rome Statute or under The Constitution, has not been given jurisdiction to try the matters of defamation.

It was urged that it is a fallacy to submit that the publication was a fair and accurate report of the speaker's statement when the statement itself falls short of accuracy and contains nothing but rumours.

It was re-emphasized that in ***Stern's case*** (supra) at page 395, the court has determined the legal position, namely –

***"I can well understand that if you say there is a rumor that X is guilty you can only justify (it) by proving that he is guilty because repeating someone else's libelous statement is just as bad as making the statement directly."*** *(emphasis mine)*

Further, it was reiterated that the Defendant's crew were present during visit to mortuary and captured the scene and later the statement by the speaker.

The public interest and qualified privilege cannot be extended to publishing falsehood when the fabricated falsehood vilify or defame a person by allegation of very serious crime like genocide. Neither the Constitutional provisions specified hereinbefore i.e. Article 33 (2) and Article 33 (3), nor the provisions of Defamation Act give such liberty to the Defendant.

The following passage at page 57 letter (h) in the case of ***John –vs- MGM (1996) 2 ALL ER 34*** was emphasized, to show that the manner in which the publication was made was reckless.

***"The crucial ingredient of state of mind is, however, lack of honest or genuine belief in the truth of what is published. That is what makes the publisher's conduct so reprehensible or 'wicked' as to be deserving punishment."***

The Plaintiff then urged that the Defendant cannot be heard to have the qualified privilege. With the above submissions, it is indisputable that the issues raised are not only challenging but absolutely unprecedented. The court thus has to tread carefully on this critically serious and delicate status of the facts in this case along with the spirit and tenets of the Constitution and those of laws on defamation.

The matter of first principle takes a very special place in the development of jurisprudence and I shall endevour to take one step forward in that direction.

It is not in dispute that the statement which is in focus is uttered by Hon. Raila Odinga who was a contestant for Presidential election and was strongly opposing the declaration of its result. In order to deliberate the defamatory nature of the impugned publication, the said statement has to be considered along with the full transcript including footage and commentary of the Reporter of the Defendant Mr. Michael Oyier. (Page 6 and 7 of the Plaintiff's bundle of documents).

It shall not be out of place to quote the said commentary by Mr. Michael Oyier.

The following comments were made after the first passage of statement was made by Hon. Raila Odinga.

***"Well that is an impromptu press conference being held by ODM leader outside the city mortuary where earlier on we saw the pictures and it seems like they were perusing a register of sorts of what I want to believe the bodies that have been received at the city mortuary thus far (sic) talking of children and adults' bullet ridden bodies and burned bodies alike. Those are members of the Pentagon, the ODM Pentagon"***

The following comments were made after the statement as regards genocide.

***"And it seems like a passionate description of what Mr. Raila Odinga believes might be taking place. As we know many people with various different beliefs and we haven't opportunity for evidence to be produced to have any of these of the sort of beliefs that different sides might have and we are trying to reduce the amount of inflammatory statements that might be going out toward the public, a difficult situation editorially trying to keep the balance of factual information. But as it stands the ODM members have been visiting City Mortuary and Raila Odinga still making his presentations to the media there outside the mortuary after looking at the register and I believe walking through the mortuary and witnessing what has evidently and apparently disturbed him very strongly talking of bodies that have been found bullet ridden, bodies that have been burnt and making allegations of different sorts about the suggestions of who might be behind the incidents that have been occurring in the City and have lead to the bodies that have been taken to the city mortuary."***

The beginning of the said transcript clearly shows that the Hon. Raila Odinga leader of ODM visited the City Mortuary which was captured on camera and shown during broadcast I would like to note from the above comment that it was clearly commented by Mr. Oyier that they did not have opportunity for evidence to be produced and were trying to reduce the amount of inflammatory statements and there is a difficult situation editorially trying to keep the balance of factual information. Moreover, the last sentence of the transcript is very much relevant to be noted which makes note on Hon. Raila's suggestions of the culprits behind the incidents which occurred were in respect of events in the city and which have led the bodies having been taken to the City Mortuary.

Despite those comments made by Mr. Oyier, the statement by the speaker making very specific defamatory allegation in respect of the Plaintiff has not been edited. On the contrary, as per the Defence, it is admitted that the whole unedited statement from the speaker has been published.

A cursory perusal thereof, even without any further critique, would show that the statement is undoubtedly derogatory to the reputation and dignity of the Plaintiff.

Moreover, it is trite law that, if there is evidence that while publishing the statement, the Defendant either knew that the statement was false or did not care whether it was false, it shall be considered as evidence of malice. I shall further note that malice in actual sense may exist even though there be no spite or desire for vengeance. In this case, Mr. Oyier had specifically stated that it was difficult to keep the balance of factual information.
I pause here to note that it is not in dispute that the suggestions regarding the perpetrators of deaths from Hon. Odinga was meant to be restricted only to the incidents in City Mortuary (which is obviously

Nairobi) and not in relation to the occurrences in the other parts of the country.

Would then, the attempts by the Defendant in submissions, to extend those occurrences and statement thereon by Hon. Raila Odinga, to the occurrences of other parts of Kenya, be justified?

I shall hesitate to interpret and accept that the statements were referring to the occurrences in any other part of the country. I would also refer to the observations made by the Pre-trial Chambers as regards occurrences of PEV which took place in Kisumu and/or Kibera in its Rulings. I am making these observations restrictive to the submissions made by the Defence that from the said Ruling, the impugned statement could be seen as true in substance.

It is also very much clear from the said Ruling that reasonable grounds to believe, which were enumerated by the ICC Pre-Trial Chamber judges, are in respect to the areas of the country which are not the subject matter of this defamation suit.

I can, in brief, observe that in the premises aforesaid, the observations by the ICC are not for the occurrences which are before this court, even if I agree, which I do not, with the submissions made by Mr. Wanjala that my decision in this matter shall prejudice the process before the ICC and/or the stand of Government of Kenya to Co-operate with the process before the ICC.

*However, I must place on record that this court is only determining the incident of publication by the Defendant of the statement made in an impromptu press conference by the speaker on 3rd January, 2008.* The speaker of the statement was a politician and a Presidential Candidate who was aggrieved by the result of the election and which result was admittedly the cause of country wide violence. The statement by the speaker made in an impromptu conference was thereafter published verbatim by the Defendant.

Whether that particular published statement was defamatory, as per law as at that date, is the issue before this court. Nothing more, nothing less.

It may not be improper if it is observed that the fact of importing ICC proceedings into this proceedings in the manner in which it is sought to be done by the Defendant, is against all norms of known procedural law. Apart from the plausible unfairness to the Plaintiff, it shall also be difficult to stretch the nexus of this case with the ICC process which has only shown suspicion. ICC has no allegiance to Kenyan laws of defamation or to any procedural law of Kenya. Acceptance of the International law as laws of Kenya under the Constitution has absolutely different connotation, purpose and purport. In any event, the said process before ICC is governed by a totally different process which has to be termed criminal in our parlance, to say the least. In short, even if all is taken on board, the suspicion cast by ICC cannot convert the impugned statement as substantially true.

The principle culled out by in Lord Nicholls case of ***Reynolds –vs- Times Newspaper Ltd. (2001) 2A.C 127*** stated as under:-

Lord Nicholls then set out a non-exhaustive list of circumstances which would be relevant to the privilege issue in a “media” case:

***“1. The seriousness of allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.***
***2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.***
***3. The source of the information. Some informants have no direct knowledge or the events. Some have their own axes to grind, or are being paid for their stories.***
***4. The steps taken to verify the information.***
***5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.***
***6. The urgency of the matter. News is often perishable commodity.***

***7. Whether comment was sought from the Plaintiff. He may have information others do not possess or have not disclosed. An approach to the Plaintiff will not always be necessary.***
***8. Whether the article contained the gist of the Plaintiff's side of the story.***
***9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statement of fact.***
***10. The circumstances of the publication, including the timing.***
***The list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary facts will be a matter for the jury, if there is one. The decision on whether having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up."***

In that regard, I may also cite two cases of Newzeland Court of Appeal, namely:-

(1) ***Lange –vs- Atkinson (2002) NZCA 95, (2003) NZ LR paragraph 13.*** It was observed by the court:-

***"No consideration and insufficient consideration are equally capable of leading to an inference of misuse of the occasion. The rationale for loss of the privilege in such circumstances is that the privilege is granted on the basis that it will be responsibly used. There is no public interest in allowing defamatory statements to be made irresponsibly – recklessly – under the banner of freedom of expression. What amounts to a reckless statement must depend significantly on what is said and to whom and by whom. It must be accepted that to require the defendant to give such responsible consideration to the truth or falsity of the publication as is required by the nature of the allegation and the width of the intended dissemination, may in some circumstances close to a need for the taking of reasonable care."*** *(emphasis provided)*

***(2)*** In the case of ***Vickery–vs- McLean (2000) NZCA 338 paragraph 27 "Even if such allegations were responsibly made, it would be contrary both to settled law and to the public interest to allow such communications to be made under qualified privilege. We do not consider that society has changed in such a way as to justify a departure from previous perceptions of the public interest in this respect. It is, in our view, demonstrably not in the public interest to have criminal allegations, even if bona fide and responsibly made, ventilated through the news media. That could only encourage trial by media and associated developments which would be inimical to criminal justice processes. Society has mechanisms for investigating crime and determining guilt or innocence. It is not in the public interest that these mechanisms be bypassed or subverted."*** *(emphasis provided)*

The Defamation Act has made relevant and adequate provisions specified hereinabove as regards the qualified privilege and rights and duties of media.

I can simply conclude this issue by observing that the Statement which was derogatory to the Plaintiff cannot be shown to be factual in substance on the basis of an unconfirmed charge based on suspicion, reasonable or otherwise.

Stretching the argument made from the defence, I ponder, whether taking support of the said Ruling, can anyone even at present be justified to call a press conference and utter the impugned defamatory words against the Plaintiff and state with impunity that he is the mastermind behind killings in PEV and can the Defendant justifiably reproduce those words in its publication? I would consider that act as defamatory pure and simple because there is as yet only a suspicion of guilt and not the pronouncement of the guilt.

The counsel for the Plaintiff has submitted on the principles of libel vis-à-vis the subsequent events with following observations:-

***Cohen's case*** *(supra)* came in the forefront. Although the case was decided on the issue of striking out some materials in the pleadings which would be in the nature of evidence. However, the court rightly

observed, in my view, that in the case of justification or fair comment, the party cannot rely on facts which happened subsequently. The court specifically observed that plea of fair comment must be one of fair comment on existing facts. Davis L. J. on page 409 thereof relied on observation made on page 110 of Fraser on Libel and Slander Law and Practice.

***"Sample the comment must be upon the facts which were present to the mind of commenter at the time it was made not upon facts which were subsequently discovered."***

I would also quote a passage from the Judgment of Lord Anderson in ***Wheatley –vs- Anderson & Miller (1927) S.C. 133 at page 147 – 148;*** viz

***"The jury is entitled to know which (sic) what was in defender's mind at the time he made the comment otherwise they will not be properly equipped for the discharge of their duty. It seems to me however, to be quite incompetent for a defender, in support of a plea of fair comment to aver and substantiate facts which were not in his mind at the time the comment was made but which were discovered at a later date."***

In my considered view the above propositions of law are completely justified and same should be applied with added weight to the defence of fair comment or qualified justification in the matter of public interest. I do not think any public interest can be served if the public is told something which could not be justified as fair comment or qualified justification on the basis of the existing facts.

I may further cite the cases of ***GKR Karate (UK) Ltd. –vs- Yorkshire Post Newspaper Ltd. (2000) 1 WLR 2751***
***"… it is a general principle that the question of privilege is to be judged by reference to the circumstances known at the time the statement is made and the defendant cannot rely in order to establish privilege, on information which subsequently comes to his attention."***

Moreover, so far as the events of this matter are concerned, even as of to-date, the statements made against the Plaintiff are not shown to be true or substantiated and relying on which the Defence of fair comment or qualified privilege be justifiably raised.

What is before the court is the repetition of a statement that the Plaintiff is the principal master of the heinous crimes perpetuated in the City. The statement repeated by the Defendant is not shown to be true or factual in substance.

The words in the statement were defamatory on plain reading thereof. Those words were broadcast without any restraint or assessment as to their veracity even though the comments of Mr. Oyier did indicate that they did not have evidence as to its veracity, that they were trying to reduce the amount of inflammatory statement, that it is a difficult situation editorially trying to keep balance of factual information etc. The statement published, weighed on any standard, was inflammatory to the extreme. It is admitted that the statement was neither edited nor verified as to its truthfulness even at the date of the testimony of the Defendant.

The act of publication on hand, under the circumstances, was re-publication of a libel and is a new libel and the publisher is answerable for his act when he placed the statement before the public.

Yes, the issue of PEV was of public interest, but that interest does not include re-publication of a statement which has not been verified or tested for its accuracy. The public's emotion need not be inflamed by publishing the allegations, even if coming from a political rival, specifically sensing a very delicate edge of public emotion at the relevant time. I shall reiterate Lord Nicholls observation ***Reynold's case*** *(supra).*

In my view, such publication ought to be made by a journalist after bringing to his work sufficient amount of care, reason and judgment and in absence thereof, unfortunately, I cannot uphold the Defence of qualified privilege in this case.

Once not verified, the justification or qualified privilege does not enure the Defendant and in any event, the onus that the same is true, rests on the Defendant to make it a fair publication. The production of ICC Ruling does not help the Defendant as has been observed hereinbefore, so far as the publication in question is concerned. The Plaintiff on the other hand has proved, under required standard of proof, that the publication is false and defamatory.

In the case of ***Machira t/a Machira & Co. Advocates –vs- East African Standard (2001) KLR 638,*** it observed at page 644:-

***"…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 ------ For him to rely on justification, he must accept the Plaintiff's version of the statement or a statement which is in sum identical with the Plaintiff's version."***

In view of the premises aforesaid, I do find that the Plaintiff has proved that the Defendant is liable in defamation of the Plaintiff as averred by him.

With the aforesaid, I am now left to determine the prayers which are for:-

***(1) General damages***
***(2) Aggravated and exemplary damages***
***(3) Permanent injunction***
***(4) Costs and interests on (1) and (2)***

Mr. Oyatsi began with the statutory provisions of the Defamation Act. He cited Sec. 7 (A) (6)

***"in any civil proceedings for libel, the court, unless it is of the opinion that any reply under this section is either irrelevant or unreasonable in all the circumstances of the case, shall be at liberty to award an additional amount of damages together with the damages for defamation where the published has failed or refused to publish a correction or failed to give it the prominence required by this section"***

*And 16 (a)which states that,*

***"In any action for libel, the Court shall assess the amount of damages payable in such a manner as it will be deemed just; provided that where the libel is in a respect of an offence punishable by death, the amount assessed shall not be less than Kshs.1 million, 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 Kshs.500,000/=***

It is known that the principles which are applicable for assessment of damages have been well established.

I shall further note that Kenyan jurisprudence has adopted the compensable factors in the libel cases enumerated and crystallized in English Jurisprudence. The Court of Appeal has heavily relied on many English cases like ***John –vs- MGN (1996) 2 ALL ER 346***, ***Counsel & Co. Ltd. –vs-Broome (1971) 2 ALL ER 801***, ***Uren –vs- John Fairfox*** & ***Jones –vs- Polland (1997) EMLR 233***.

The main factors could be briefly stated as under:-
***(1) Gravity of the allegation.***
***(2) Extent of circulation.***
***(3) The conduct of the Defendant prior to the commencement of the action upto the judgment which includes the stage of submissions.***
***(4) Mitigating factors.***

The circulation of the Defendant is countrywide and accessible through internet. The publication was made during the time when Kenya was experiencing worst era of violence and every person in Kenya was

watching the unfolding of events around the country.

Mr. Oyatsi relied on the following passage from the case of ***Broome –vs- Cassell & Co. Ltd. (1971) 2 ALL ER 187*** at 204 – 205 from Judgment of Salmon J.

***"For centuries the law has held that exemplary damages may be awarded against Defendants in respect of certain torts committed in outrageous circumstances. This is because the law has always recognized that it is in the public interest that such conduct should be punished and deterred. Providing such damages are reasonably assessed it does not lie in the mouths of Defendants to complain. Doubtless it may not be strictly logical that the punitive element of the damages awarded (even if it could be separated from the compensatory element) should go into the Plaintiff's pocket. But no harm is done if it does. The public interest requires that in some cases exemplary damages shall be awarded and there is nowhere more appropriate for them to go."***

It was then submitted from the Plaintiff that the allegations imputed against the Defendant were very grave. The Plaintiff was stated to have committed genocide of grand scale and that the speaker had seen very heinous acts of killing many people including children. Even as per International Crimes Act and Rome Statute, it is the most serious crime that could be committed by any human being.

It was pointed out that the Plaintiff is a known person through his family and on his own right.

The conduct of the Defendant was also emphasized as wanting genuine fairness. The Defendant was aware of the situation in the country and seriousness of the accusations made against him. Despite the fact that its crew members were present on the scene and captured the same on camera, the Defendant did not bother to check and verify its veracity of the statement either from the video or from the Plaintiff. The simple answer of the Defendant is that it was in the public interest to make the publication as it was uttered by another politician. I may also note that the Defendant was the only media house which published the event without restraint. It also refused to publish any apology or explanation when demanded by the Plaintiff and has continued with great tenacity to defend the suit till the last stage of the trial and submission.

With the above factors in mind, the Plaintiff has submitted that if the principles for liability found in ***MGN's case*** and ***Broome's case*** *(supra)* are accepted by our courts the principles behind the quantifications of damages allowed in those cases also should be followed.
The Plaintiff thus submits that the Plaintiff be awarded compensatory damages in the sum of Kshs.500 million and Kshs.250 million in exemplary damages. The Plaintiff also asks for shs.20 million as damages under Section 7 (a) of the Defamation Act.

Mr. Oyatsi relied on the following passages in ***Broome's case*** (supra) at page 824

***As Windley J. well said in Uren –vs- John Fairfax & Pty Ltd.***
***"It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He get damages because he was injured in his reputation, that is simply because he was publicly defamed. For reason, compensation by damages operates in two ways – as a vindication of the Plaintiff to the public, and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money'***
***This is why it is not necessarily fair to compare awards of damages in this filed with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the Defendant. The bad conduct of the Plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libeled the Defendant in reply. <u>What is awarded is thus a figure which cannot be arrived at by any purely objective computation.</u> <u>This is what is meant when the damages in defamation are described as being 'at large'.</u> In a sense, too, these damages are of their nature punitive or exemplary in the loose sense in which the terms were used before 1964, because they inflict an added burden on the Defendant proportionate to this conduct, just as they can be reduced if the Defendant has behaved well***

***– as for instance by a handsome apology – or the Plaintiff badly, as for instance by provoking the Defendant, or defaming him in return. In all such cases, it must be appropriate to say with Lord Esher Mr. in Praed v Graham."*** *(emphasis provided).*

As against that the Defendant submitted that absence of malice takes away an indispensable limb for the grant of exemplary damages, that there is no evidence present to show that the Defendant has deliberately libeled the Plaintiff for profit or has acted oppressively or arbitrarily towards the Plaintiff before and during the trial or that the Plaintiff had a direct financial gain by the broadcast. I shall add that there was no repetition of the publication.

In short the Defendant has submitted that the Plaintiff should not be awarded more than Kshs.500,000/=. It is well established by now that the issue of assessment of damages is at large in the case of defamation and the figure cannot be arrived at by any objective standard of computation. It is very difficult to measure the agony suffered by loss of reputation or the feelings of a person hurt by such publication.

I may hesitate to give very high awards usually given in the Western world and on the other hand, the court also should not lower the award to such an extent that it gives the publisher a temptation to repeat the wrongs with impunity.

Considering the case wholly and specifically the manner of publication, I shall grant the cumulative award of Kshs.7,000,000/= (seven Million) to the Plaintiff.

The Defendant shall also pay costs of the suit.

Orders accordingly.

**Dated, signed** and **delivered** at Nairobi this 15th day of **July, 2011**

**K. H. RAWAL**
**JUDGE**
**15.7.2011**