REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1073 of 2004

AMRITAL BHAGWANJI SHAH ………………………...PLAINTIFF

Versus

1. THE STANDARD LIMITED….......….......…… FIRST DEFENDANT

2. NJONJO KIHURIA …………...…..…….. SECOND DEFENDANT

JUDGEMENT

In use in this suit, and therefore in this judgment, are the Plaintiff's plaint dated 8th October,2004 and the Defendant's Defence dated 26th November, 2004. During the hearing before me the Plaintiff was represented by Mr. O.P. Nagpal pairing with Mr. A.N. Ngunjiri while the Defendants were represented by Mr. E.O. Nyamunga. The Plaintiff was the only witness in the matter as he called no additional witnesses and the defence elected to call no witnesses. At the end of the hearing, written submissions were exchanged before I sat down to write this judgment holding the view that though, learned counsel for the Plaintiff did not think it important discussing in their written submissions the part the Law Society of Kenya played in this matter in relation to the relevant provisions of the law as revealed from the evidence, such discussion is important to try and find where the truth is. Had the Law Society of Kenya not conducted itself the way it did in this matter, this case could not have been there. Apart from the law of defamation therefore, relevant provisions of the Advocates Act are important.

The Plaintiff seeks judgment against the Defendants jointly and severally for;
(i) General damages;
(ii) Exemplary damages
(iii) Costs of this suit;
(iv) Interest on costs and damages at court rate from the date of ascertainment until date of payment in full.

The suit is founded on the type of defamation known as libel, the First Defendant being described as the proprietor and publisher of a Kenya National Newspaper then known as the East Africa Standard, a daily newspaper having a wide and extensive circulation throughout Kenya, Uganda and Tanzania and also available for browsing through the internet throughout the English speaking world.

The second Defendant is described as a reporter in the employ of or attached to the said newspaper owned and published by the First Defendant. Just before I started taking evidence the parties by consent handed

in a signed and agreed bundle of documents they wanted to be referred to in the evidence as “Agreed Bundle of Documents” to be referred to as Plaintiff, exhibit, 1 and folios therein to be referred to by page numbers. In addition two letters marked exhibit 4 (a) and exhibit 4 (b) were admitted in evidence during the hearing only as evidence of the fact that the letters were written without admission of the correctness of the contents thereof.

The Plaintiff is a retired Judge of the Court of Appeal in Kenya and an Advocate of the High Court of Kenya. He told the court he was called to the English Bar at Middle Temple on 27th November, 1962 as can be seen at folio 10 in the Agreed Bundle of Documents P. exhibit 1. On 16th September, 1963 he was admitted as an Advocate of the then Supreme Court of Kenya as can be seen at Folio 11 of the Agreed Bundle of Documents (also herein referred to as The Bundle). He started practising as an Advocate in Kenya in the law firm of M/S K.A. Shah Advocates before the firm name changed to M/s Shah & Parekh & Co. Advocates. He was a Litigation Counsel and later in 1986 became a Commissioner of Assize before being appointed a High Court Judge in1993 and subsequently Judge of the Court of Appeal of Kenya 1994.

As a Judge, the Chief Justice assigned him various other duties such as membership of the Rules Committee, starting the Kenya Law Reporting, the Judicial Pension Scheme, member of the Building Committee.Outside the Judiciary, the Plaintiff continues to be a member of the Chartered Institute of Arbitrators of London in its Kenya Branch.

As a practicing advocate and before he was appointed a Judge in 1993, Plaintiff acted for a number of Insurance Companies apart from acting for other companies and individuals as an advocate. He retired as Judge of the Court of Appeal on 30th October, 2003 as a result of a report by Justice A. Ringera which included his name among judges whom the report said ought not remain on the Bench. By then he was 66 years old. That was only a few months after he had lost his lawyer daughter who was a State Counsel and the Plaintiff had therefore not got out of that shock when the bomb shell of the Ringera Committee struck and the Plaintiff found himself already convicted and sentenced without having been given the opportunity to be heard. Confused and disgusted as he felt resigned in his advanced age, the Plaintiff opted to retire in haste.

> **At that time during the NARC Euphoria and when the clamour for fighting graft occupied much of media space, the official Law Society of Kenya view was that judges removed from the Bench following Justice Ringera’s Committee recommendation should go to farming or kiosk (shop) keeping and not to legal practice. But later in March 2004, the Plaintiff asked himself the question; why not legal practice? According to the Plaintiff, the Law Society of Kenya’s official stand was a second conviction and sentence without the Plaintiff having been heard; and I may add that such are the terms and conditions of poor Judges in the Kenya Judiciary whose real security of tenure in the Judiciary is no better than that of a casual labourer on streets of Nairobi as majority of Kenyan lawyers, including Human rights activists, close their eyes to all the corruption, graft and vice in the Kenyan society in which they are emersed and stuck to turn inciters and mob justice leaders against an influenceless single institution in the name of a humble Judiciary the said lawyers deceiving themselves they are angels fighting corruption or graft in Kenya and that the Judiciary is Kenya. Surprisingly, the said judges are so complacent that a reminder, becomes a fool. They even have no Judiciary Pension Scheme.**

Continuing with the Plaintiff’s evidence,however, he went on to tell the court that he decided to write to the Law Society of Kenya applying to go back to the legal practice he had ceased to practise for about 10 years when he become a judge on recommendations which included that from the then Council of the

Law Society of Kenya. His letter dated 25th March, 2004 was delivered personally by him to the Secretary, Law Society of Kenya. Seen at Folio 1 of the Bundle which Bundle is also Plaintiff Exhibit 1. That letter forwarded the Plaintiff's application for renewal of his practising certificate after 10 years of non-practice.

The Plaintiff said he was applying under section 22(1) of the Advocates Act and enclosed his cheques for **Kshs.19,010/=** as the required fees and pointed out he was a life member of the Advocates Benevolent Association. He sent a copy of the letter to the Registrar, High Court of Kenya, saying he wanted the certificate for the year 2004.

The reply from the Law Society of Kenya (L.S.K.) is at Folio 2 of the Bundle Acknowledging the receipt of the letter at Folio 1.

The Plaintiff says that after consulting the law further, he discovered he should have acted under section 25 and not under section 22 of the Advocates Act because he had gone out of practice for a while. At Folio 3 of the Bundle therefore there is the letter the Plaintiff sent to the Registrar, High Court of Kenya under section 25 giving the Registrar and the Law Society of Kenya notice for renewal of the Plaintiff's practising certificate. The letter is also addressed to the Secretary, Law Society of Kenya. The letter dated 24th May, 2004 states as follows:

> "Re: Practising Certificate – Admission Number P105/398/63
> **Pursuant to provision in section 25(a) and 25(2) of the Advocates Act, Cap 16, Laws of Kenya, I hereby give you notice for renewal of my practicing certificate. This letter is to serve as the requisite six week (minimum) notice under section 25(2) of the Advocates Act. Please consider my application for renewal of my practising certificate, dated 25th March, 2004, as withdrawn as the same was lodged under provision in section 22 of the Advocates Act whereas my right to apply for such certificate accrues under section 25 (a) and 25(2) of the said Act. My practicing certificate was last renewed for the year 1993. As I was a Judge from 30th December, 1993 until 30th October, 2003 I did not seek renewal of my practicing certificate. I look forward to hearing from you in due course."**

The said letter giving six weeks notice of intention to apply, was received by both the Registrar of the High Court and the Law society of Kenya on 24th May, 2004 as the copy at Folio 3 is duly stamped as acknowledgement by both addressees using their respective rubber stamps. Where in the first paragraph it is written 25(a) it should have been 25(1) (a). When the six week minimum period under section 25(2) of the Advocates Act had expired, the Plaintiff drew the attention of the Registrar of the High Court and that of the Law Society of Kenya to that fact. That was through the Plaintiff's letter dated 14th July, 2004 addressed to the former and copied to the latter as seen at Folio 4 of The Bundle. At Folio 5 of The Bundle there is another letter the second application by the Plaintiff for a practising certificate addressed to the Registrar of the High Court dated 9th August, 2004.

That was the application intended in the Notice dated 24th May, 2004. It is not shown copied to the Law Society of Kenya. In that letter the Plaintiff referred to his notice of intention to renew his practising certificate he had given the Registrar and the Law Society of Kenya on 24th May, 2004. He also referred to his letter of 14th July, 2004 addressed to the Registrar and the Law Society of Kenya. He told the Registrar he was enclosing copies of same letters for ready reference. He added:

"I enclose, now, the Declaration to accompany the application for renewal, as well as a banker's cheque for Kshs.19,010/= made payable to Law Society of Kenya. As the period stipulated in section 25(2) of the Advocates Act is long past, I request you to issue to me the Practising Certificate for the year 2004 and I request you to transmit

the enclosed banker's cheque to Law Society of Kenya. Also enclosed is the Statutory Declaration under the provisions in Advocates (Accountants Certificate) Rules. All requirements of sections 25 and 22 of the Advocates Act are complied with."

Clearly the Plaintiff wrote and sent that letter before he received re-action to his six weeks Notice he had given on 24th May, 2004 to the Registrar and the Law Society of Kenya despite his reminder through his letter dated 14th July, 2004 in which he had reminded them saying:

"As the statutory six week period is now past, I shall be pleased to hear from you. As soon as the renewal is approved I will pay the sums due to the Law Society of Kenya which payment I had earlier sent but the cheque was returned pending consideration of the application earlier made."

If by 14th July, 2004 the period of six weeks from 24th May, 2004 had passed, then by 9th August, 2004 that period was long past. How long was it necessary to have **"the widest possible consultation"?**

Indeed the Law Society of Kenya had been with the question of renewing the Plaintiff's practising certificate since 25th March, 2004 when the Plaintiff submitted his first Application and that was under section 22 only before the Plaintiff realized, according to his evidence, that he should have applied under section 25; It means that under section 22 the Plaintiff was applying as if he was seeking the certificate for the first time. As such under subsection (2) of section 22, the Registrar ought to have issued the practising certificate to the Plaintiff "**within fourteen days of the receipt by him (the Registrar) of the application;"** the necessary fees having been paid to the Law Society of Kenya who already had possession of the relevant cheque in their favour from the Plaintiff. But what happened was that by 24th May, 2004 a period two months, when the Plaintiff was giving the Registrar and the Law Society of Kenya notice under section 25 of the Advocates Act, no practising certificate had been issued to him pursuant to his application under section 22, now referred to as the first application, although there was acknowledgement of that application by the Law Society in their letter to the Plaintiff dated 7th April, 2004 seen at Folio 2 of the Bundle.

The first application is therefore the application the applicant said was withdrawing as seen in the third paragraph of his Notice letter dated 24th May, 2004 aforesaid. That first application, subsequently withdrawn, should not be confused with the second application which was done by the Plaintiff's letter dated 9th August, 2004. The two are different and separate applications. Evidence is that the Plaintiff had paid the necessary fees for his first application. I have noted the Law Society of Kenya acknowledged receipt of that application by their letter dated 7th April, 2004 informing the Plaintiff that the application was to be placed before the Council for a decision. That letter by the Law Society of Kenya was written on the 14th day from the date of the receipt of the application which was 25th March, 2004 and therefore under section 22(2) the Registrar ought to have issued the certificate as at that date but the certificate was not issued in clear contravention of section 22(2). The necessary fees had been paid and that application had been made to the Law Society of Kenya directly and not to the Registrar who was only given a copy. Although the letter dated 7th April, 2004 from Law Society of Kenya to the Plaintiff does not say anything about the fees the Plaintiff paid, it is in his evidence that what he had paid, had been returned to him **"pending consideration of the application earlier made."** The Plaintiff mentions that in his letter dated 14th July, 2004 addressed to the Registrar and copied to the Law Society of Kenya. The Plaintiff went on to clarify that the payment was refused by the Law Society of Kenya and that could be so because the Law Society of Kenya ought to have remained with the Plaintiff's payment until they made their decision on the Applicant's first application before the Plaintiff withdrew it on 24th May, 2004 after a period of two months the mandatory provisions of section 22(2) that the practising certificate be issued in fourteen days having been ignored and the Law Society of Kenya having conveyed no decision to the Plaintiff as to whether a practising certificate was going to be issued to him.

The Plaintiff clarified further during cross examination that the cheque he had given the Law Society of Kenya with the first application was returned to him with the letter dated 7th April, 2004 from the Law Society of Kenya although that letter is silent about the cheque. In any case that first application ended

with its withdrawal by the Plaintiff who also calls it erroneous application but it signifies two things: Firstly, that the Law Society of Kenya was refusing or reluctant to accept payment of the required fees by the Plaintiff. Secondly, whether the Plaintiff's application was erroneous or not through that first application, the Law Society of Kenya had been made to live, for two months, with the question whether to issue or renew a practising certificate to the Plaintiff and that question could not be wiped away by the Notice given by the Plaintiff to the Registrar and the Law Society of Kenya in the Plaintiff's letter dated 24th May, 2004 because it was in that Notice that the Plaintiff communicated his withdrawal of the first application as the Notice at the same time perpetuated the question whether to issue a practising certificate to the Plaintiff. Concerning the length of time the Law Society of Kenya and the Registrar had in order to consider issuing the practising certificate to the Plaintiff therefore, it is fair and proper to include the period between 25th March, 2004 and 24th May, 2004 being a period of two months within which no decision on that question had been communicated to the Plaintiff who had to remain waiting for the decision for three more months in vain from 24th May, 2004 until 23rd August, 2004. Granting that someone may refuse to include the first two months 25th March to 24th May, 2004, the three months from 24th May, to 23rd August, 2004 remain. Those three months had their own distinct payments in the two banker's cheques No.12184 dated 9th August, 2004 for Kshs.19,010/= and No. 122004 dated 23rd August, 2004 for Kshs.1500/= and these should not be confused with the payment which had accompanied the first application for the Plaintiff's practising certificate.

The Plaintiff's letter dated 9th August, 2004 was the second application for the Plaintiff's practising certificate and was received by the Registrar of the High Court on the same date but the Registrar did not write a reply until 23rd August, 2004 having added two more weeks to the extra weeks he and the Law Society of Kenya were already having from the Notice dated 24th May, 2004. That application dated 9th August, 2004 should not be confused with the notice of intention to apply given in the letter dated 24th May, 2004 a foresaid. I note that the Plaintiff's Counsel in his written submissions refers to that notice of intention to apply as the Plaintiff's application. That is not correct if that law has to be applied correctly. The application for a practicing certificate was to be made after six weeks from the giving of the notice and that application was the Plaintiff's letter dated 9th August, 2004. Section 25(2) says that the notice of six weeks has to be given by the applicant before his application and not at the time of his application for a practicing certificate. From the letter dated 14th July, 2004 the Plaintiff was waiting to hear from the Registrar and the Law Society of Kenya before sending them the things he subsequently sent by his letter dated 9th August, 2004. On the 9th August, 2004 therefore he decided to send the Registrar those things even though his reminder through the letter dated 14th July, 2004 had not been responded to. That is what he told the court.

The Plaintiff's counsel does not agree with this, but I think the letter dated 9th August, 2004 should also have been copied, if not co addressed, to the Law Society of Kenya though that is not to say that the Plaintiff did follow the law. The Registrar of the High Court perhaps seems to have felt the Law Society of Kenya had had more than sufficient time to respond to the Plaintiff's Notice in the letter dated 24th May, 2004 as read together with the Plaintiff's letter dated 14th July, 2004 and that therefore in the absence of a response from the Law Society of Kenya, he, the Registrar, was justified to assume the Law Society of Kenya was raising no objection to the renewal of the Plaintiff's practising certificate and the Registrar therefore proceeded to issue the same to the Plaintiff advising the Plaintiff in the letter dated 23rd August, 2004 as follows:

"I refer to your notice dated 9th August, 2004 applying for a practising certificate for the year, 2004. I have not received any objection from the Law Society of Kenya and hereby enclose the said practising certificate, having exercised my discretion under section 25(3) of the Advocates Act, subject to the conditions that you shall not appear as an advocate in your court, namely, the Court of Appeal in the next three (3) years. You are reminded of the Provisions of section 26(3) of the Act, which provides that you may appeal this decision to the Honourable the Chief Justice of the Republic of Kenya."

I should point out the Registrar was also wrong to have used the word "notice" seen in the first sentence.

What was dated 9th August, 2004 was the “application” and not a “notice” as the relevant notice was the letter dated 24th May, 2004. In any case,, the letter dated 23rd August, 2004 was copied to the Chief Justice and the Law Society of Kenya forwarding to the latter the two Banker’s cheques one for Ksh.19,010/= and the other for Kshs.1500/= the last amount being for the Advocates Benevolent Association and the other cheque the necessary fees. But when the then Chairman of the Law Society of Kenya re-acted harshly and swiftly, I have no evidence that he had been able to connect that letter dated 23rd August, 2004 with the Plaintiff’s Notice in the letter dated 24th May, 2004 as read with the Plaintiff’s reminder dated 14th July, 2004. I say so because the Plaintiff having failed to copy his letter dated 9th August, 2004 to the Law Society of Kenya, the way the Registrar’s reply dated 23rd August,2004 was worded did not disclose the existence of previous correspondence in the matter.

The wrong impression is that the Plaintiff’s letter dated 9th August, 2004 was not only the notice but also the application as well as the first letter and the Plaintiff’s request therein was therefore being granted after only two weeks of that notice/application. The Banker’s cheques were rejected by the Law Society of Kenya. A small mistake by the Registrar not referring to previous correspondence and then using the word “notice” instead of the word “application” in his letter to the Plaintiff dated 23rd August, 2004 may have caused the wrong impression That way, the complaint from the then Chairman of the Law Society of Kenya could have been understood and that is if he had not been an official of the Law Society of Kenya. Otherwise that complaint is not understood because from the date 24th May, 2004 even if not adding the two months between 25th March and 24th May, 2004, the Law Society of Kenya had more than enough time and more than the statutory minimum six weeks to do the “widest possible consultation” and let the Registrar of the High Court know their opinion or representations or recommendations to convey to the Plaintiff without undue delay as the year 2004 for which the licence was needed was running out at a speed, a factor the Law Society of Kenya should also have put into consideration because a question arises that where there is delay, by the Law Society of Kenya to convey their opinion or representations or recommendations to the Registrar, does the law give the Registrar no discretion to make a decision and convey that decision to the Applicant?

The Plaintiff’s Notice in his letter dated 24th May, 2004 and his reminder in the letter dated 14th July, 2004 were each sent to the Law Society of Kenya the same office which received the Registrar’s letter dated 23rd August, 2004 and whatever may have been the circumstances in which the then Chairman of the Law Society of Kenya responded to that letter dated 23rd August, 2004 from the Registrar when the Chairman wrote the letter dated 24th August, 2004 produced as Plaintiff exhibit 4(b), I must assume the Chairman was aware of all those previous letters when the letter dated 24th August, 2004 was written. Further, I do not think he had forgotten that the process of issuing a practising certificate to the Plaintiff had been started by the withdrawn application dated 25th March, 2004 – which triggered the perpetuated question whether the Plaintiff could be issued with a practising certificate and that that was the perpetuated question the Registrar was answering in his letter dated 23rd August, 2004.

The Chairman’s letter above returned to the Registrar, High Court of Kenya, the two Banker’s cheques No.12184 dated 9th August, 2004 for Kshs.19,010/= for the practising certificate and No.122004 dated 23rd August, 2004 for the Advocates Benevolent Association Kshs.1,500/=. The practising certificate issued was dated 23rd August, 2004. Following return of the two Banker’s cheques aforementioned, by the Law Society of Kenya to the Registrar, the same cheques were returned by the Registrar to the Plaintiff forwarded by the Registrar’s letter dated 29th September, 2004, Plaintiff exhibit 4(a), stating:

“I refer to a letter dated 24th august, 2004 from the Chairman of the Law Society of Kenya, a copy of which I enclose. As the Law Society of Kenya does not seem interested in accepting the banker’s cheques sent to them in respect of Fees and Benevolent Fund, the same are herewith returned to you.”

A copy of the letter was sent to the Law Society of Kenya Chairman. All that having happened and as the

Plaintiff was resuming his practice as an advocate, the Defendants in this suit on 8th September, 2004 printed and published or caused to be printed and published the first newspaper article the Plaintiff is complaining about – in the East African Standard aforesaid. On that day the publication was on page 4 of the newspaper under the heading:
"2 disgraced Judges Okayed to practice."

Under that heading the following words were, published:
"Two disgraced Court of Appeal Judges who left the Judiciary last year, have been mysteriously issued with law practice certificates by the Registrar of the High Court. While fellow Judges who left under the same circumstances are crying foul and accusing the Registrar of issuing the certificates selectively, the Law Society of Kenya (LSK) has censured him for contravening the law. Practising lawyers and some former judges we talked to urged the Kenya Anti- Corruption Commission boss Justice Aaron Ringera to institute investigations into the conduct of the High Court Registrar Letters dated August 23 this year from high court registrar C.K. Njai, to Justice A.B. Shah and copied to the Chief Justice and the LSK, read in part "I have not received any objection from the Law Society of Kenya and hereby enclose the said practicing certificate, having exercised my discretion under section 25 (3) of the Advocates Act.

<u>Contravening</u>
In a swift rejoinder , LSK boss Ahmednasir Abdullahi in a letter the following day accused Njai of contravening express provisions of the statute and establishing procedures on issuance of practicing certificates. Said Ahmednasir "The law requires you to satisfy yourself that a person who applies for a practicing certificate has paid for it to the Society. In these cases (Kwach and Shah), neither of the applicants had at the time you issued the certificate, paid for it."The law also requires that an applicant fill and forward to the Society copies of declaration forms, one of which should be transmitted to the office of the registrar and which forms the basis on which the certificate is issued. According to Ahmednasir, the two judges have not filled the requisite forms up to now. In his letter also copied to the Chief Justice, the LSK boss points out that the applicants have not shown that they have paid for and are members of the Advocates Benevolent Association. "A practicing certificate is conditional on such membership which is completely outsideyour powers to regulate."

The Plaintiff complains that by publishing those words the Defendants meant and were understood to mean that the Plaintiff was a dishonest person who obtained his practising certificate as an Advocate through some mysterious, underhand and corrupt means and that the same was obtained without payment of the prescribed fees; and that the Plaintiff was issued with that certificate selectively and/or that the Plaintiff was treated more favourably than other applicants who had applied for such certificates; innuendos from the article being that the Plaintiff corruptly influenced the Registrar of the High Court of Kenya to issue the said certificate; that the Plaintiff stole a march on other such applicants; that the Plaintiff did not pay the requisite fees in particular fees payable to the Advocates Benevolent Association; that the Plaintiff was not entitled to obtain a practising certificate as applied.

The Plaintiff points out that by publishing the contents of the letter addressed by the Chairman of the Law Society of Kenya to the Registrar of the High Court and copied to the Chief Justice of the Republic of Kenya, the Defendants represented to the Kenyan Public at large and the professional as well as past and future clients of the Plaintiff, that the Plaintiff was a person who corruptly obtained the practising certificate and that he ought to be shunned and avoided.

The Defendants published the said contents without inquiring the truth or falsity thereof and without regard to the damage the same could cause to the Plaintiff. Despite request having been made by the Plaintiff for correction and apology, the Defendants have thought fit not to publish the true facts as regards the manner in which the said practising certificate was lawfully obtained. Such in action on the part of the Defendants, the Plaintiff noted, was being persisted into despite documentary evidence having been supplied to the Defendants such evidence pointing out the lawful manner in which the said practising certificate was issued.

The Plaintiff is here referring to letters like the one dated 9th September, 2004 written by the Plaintiff's counsel Mr. Ngunjiri and addressed to each Defendant as well as Mr. Ahmed Abdulkadir Nasir personally and as Chairman of the Law Society of Kenya setting out the sequence of what took place including copies of relevant letters and documents, apparently, with the hope that the addressees would realize that the Plaintiff obtained his practising certificate lawfully. But the Plaintiff goes further to note, disappointingly, that despite all that effort, the Defendants persisted falsely and maliciously in publishing once again in the same newspaper being the edition dated 11th September, 2004, a similar article under the heading:
"Legal blow to war on graft;"
by which article the Defendants and each of them challenged the integrity of the President of Kenya and the Chief Justice of Kenya and the Registrar of the High Court of Kenya. The Defendants also suggest that the Plaintiff obtained his certificate by corrupt and devious means.

The words complained of under that heading and are specifically pleaded on page 4 to page 5 of the plaint state as follows:-
"The Chief Justice and the Head of State may have dealt the fight against corruption a huge blow after making decisions based on lop-sided advice. Their decisions have far-reaching legal implications that could see the conduct of their offices questioned and their names dragged into embarrassing legal battles. Sometimes last month, the Registrar of the High Court of Kenya Mr. C.J. Njai, issued practice certificate to retired Justice Kwach and A.B. Shah in apparent blatant disregard of the due process. This process includes clearance from the Law Society of Kenya, which was completely ignored and only got to know about the registration when certificate issuance letters were copied to the society.
The two former judges had not made applications to Law Society Kenya, which would have informed the Chief Justice whether or not it objected to their coming into legal practice. Sources say the Chief Justice was made to understand by his juniors that LSK had not objected to them being licensed to practice. Whoever informed the Chief Justice thus misled him, knowing well that LSK would have objected to the move.
The Registrar even went ahead to inform the two retired judges in a letter copied to LSK that indeed the society had not expressed any objection! He even forwarded cheque (apparently for LSK subscription fees) from the two new practitioners to the society, which were awkwardly returned, together with a letter that harshly censured his action.
Law Society of Kenya could simply not understand how Judges who had left the Judiciary in the manner that Kwach, Shah and others could be sneaked back into the system with no due consultation. "How could individuals who had been perceived to be unfit to adjudicate cases, now go into legal practice? "wondered L. S. K. Chairman Ahmedasir Abdulahi. Although they have a right to earn a living some legal experts argue that they should have been made to wait a while longer at least five years, to sort out their anger with society and get rehabilitated. Their protagonists further argue they are yet to cultivate the necessary mental frame to practice law due the nature of their exit from the Judiciary and the trauma they must have experienced as a result. To many Kenyans and especially the colleagues of the Judges who went out of the door the same way, Kwach and Shah's comeback was highly selective. Is there a whiff of corruption here? Most of the Judges who were roughly pushed out of the Judiciary last year have been seeking certificates to practice law in vain. So what conditions have Shah and Kwach fulfilled that the others have not? What evidence and who has it that the two have been adequately rehabilitated where the others have not? Could the decision to give them licences opened a Pandora's box? Does it not invite unnecessary legal suits against the Government? It is evident that the Chief Justice was misled to believing that the Law Society of Kenya had no objection to Kwach and Shah and through that misrepresentation, the two got their practicing certificates."

The Defendants had gone on to publish the offending article on 11th September, 2004 without having cared to reply Mr. Ngunjiri's letter dated 9th September, 2004 a copy of which is seen at folio 12 of the Bundle. Mr. Ngunjiri, complained to the Defendants in his letter dated 15th September, 2004, seen at Folio 16 of the Bundle, as follows:

“We refer to our letter of the 9th September, 2004 to which you have not so far responded. This letter was hand-delivered on the 10th September, 2004. On Saturday, 11th of September 2004 in that issue’s page 5 you not only repeated the libel but in column 3, paragraph 2, you expressly imputed that our client was issued with the practicing certificate by the Registrar of the High Court corruptly. You have now compounded the earlier libel and this calls for exemplary damages.”

To that the Defendants replied as follows in their letter dated 6th October, 2004, seen at Folio 17 of the Bundle, addressed to Mr. Ngunjiri:

“Your letters of 9th and 15th September, 2004 are acknowledged, the contents of which are noted. With respect we do not agree that there was any malice in respect to the publications complained of. The allegations of corruption being imputed in your letters are unfortunate for you have overrated the contents of our publications. This Company has no intention to defame your client or at all. We appreciate the annextures accompanying your letter and under the circumstances obtaining don’t you think it is appropriate if your client could utilize the provisions of section 7A of the Defamation Act? Let us have your views. No admission of liability is forthcoming.”

Section 7A of the Defamation Act is about the Plaintiff’s or the complainant’s right of reply and from what Mr. Ngunjiri had been saying to the Defendants, I could have thought he already had ready material for him to use that right of reply. He did not and the Plaintiff says it was because of the rule of sub judice. I do not see how at that stage. Just as I do not understand why almost every defendant media does not offer evidence in their defence during the trial, I also do not understand why I have never found a Plaintiff who had complied with section 7A of the Defamation Act before filing his or her suit in a defamation claimed published in a newspaper. Yet in a newspaper, those who read what you claim to be defamation will also read your reply while in a court judgment normally only the Defendant and the court will know what a victim of the alleged defamation is saying in relation thereto. In any case to go back to what the Plaintiff was saying about the publication of 11th September, 2004, he adds that the publication further compounded and enlarged upon the defamatory matters of and concerning the Plaintiff and therefore that makes him claim exemplary damages in addition to general damages because the Plaintiff has been seriously injured in his character, credit and reputation, profession and brought into public scandal, odium and contempt.

The Plaintiff explained that he received many telephone calls from people who included relatives, friends colleagues asking to know what was going on and as a result of the publication complained of, the amount of professional work he expected to receive as an advocate did not materialize and that included consultant work as many people shunned him even in social life for some time and he lost the position he was holding as Registrar of the Masonic Lodge. Concerning payment of the money to the Law Society of Kenya the Plaintiff says he could not force it through the Law Society of Kenya’s throat having given them in March the cheque for Kshs.19,010/= directly himself when they subsequently returned the money to him and he had to do the payment the second time, then through the Registrar of the High Court who sent the two cheques, including the one for Kshs.1500/= Advocates Benevolent Association, to the Law Society of Kenya but they subsequently returned the cheques to the Registrar who in turn returned them to the Plaintiff. He says he later sent the money to the Law Society of Kenya himself again and they again refused. He received the money back and kept quiet. But subsequently the Law Society of Kenya has been receiving his money for 2005, 2006, 2007 and 2008 practicing certificates he has been using.

The Plaintiff says there was nothing mysterious in his application for a practising certificate and that it is wrong for the Defence to say he made the application for a practising certificate under section 22 as he applied under section 25 and the Plaintiff denies that there was corruption in the process and also denies that the Registrar could mislead and did mislead the Chief Justice in this matter.

In their joint defence dated 26th November, 2004 the Defendants admit the publication of the newspaper articles complained of but deny that the same was done either falsely and/or maliciously and defamed the Plaintiff. They deny that the words bear any of the meanings either express or by innuendo attributed to

those words by the Plaintiff. Otherwise the Defendants say that in so far as the said words in the publications consist of facts that those facts were true in substance and in fact and that in so far as they consist of opinions, those opinions were fair comment on a matter of public interest as the public has a right to know of any transactions involving the Judiciary. The Defendants attempt to give Particulars of facts under Order VI Rule 6A of the civil procedure rules starting with and relying on the contents of the Registrar's letter dated 23rd August, 2004 already quoted the Defendants pointing out that it is a fact that the High Court Registrar stated in that letter that he was exercising his discretion under section 25 (3) of the Advocates Act to issue the practising certificate after having received no objection from the Law Society of Kenya and that with a copy of that letter, the High Court Registrar forwarded to the Law Society of Kenya the banker's cheques issued by the Plaintiff. Those are particulars (a) (b) and (c), of paragraph 7 of the defence. The Defendants assert that it is a fact that at the time of issuing the practising certificate, the Law Society of Kenya had not been made aware by the Registrar of any application by the Plaintiff for a practising certificate under section 22(1) (a) of the Advocates Act and that as such the Law Society of Kenya could not formally have objected to the application. That is said in particular (d).The Defendant add in particular (e) that it is a fact that in a letter dated 24th September, 2004 the Law Society of Kenya boss, by then, Ahmednassir Abdullahi stated that the Plaintiff did not pay the application fee for the practising certificate.

The Defendants therefore assert in particular (f) that it is a fact that at the time of the Registrar issuing the practising
certificate, the Plaintiff had not paid to the Law Society of Kenya the prescribed fee for the practising certificate as is required by section 22 (a) of the Advocates Act and that Mr. Ahmednassir's letter aforesaid stated so. Concerning their opinions in the matter, the Defendants say that what they said in that respect was fair comment, explaining in particulars of opinion (a) under paragraph 7 of the defence that it was fair command for them to say that the act of the Registrar issuing the practising certificate at the time of forwarding the bankers cheques to the Law Society of Kenya in view of the provisions of section 22 (1) (b) of the Advocates Act which required the Plaintiff to produce satisfactory evidence that he had paid to the Law Society of Kenya the prescribed fee was mysterious; That is all concerning particulars in paragraph 7 of the defence. Paragraph 10 of the defence gives particulars intended to relate to the Defendant's second article " Legal blow to war on graft" The Defendants say they reiterate the contents of paragraph 7 of the defence and go on to give particulars of fact (a),(b) and (c) where particular (a), is similar to particular (d) in paragraph 7; particular (b) is similar to particular (e) in paragraph 7; and particular (c) is similar to particular (f) in paragraph 7. Concerning particulars of opinion under paragraph 10 of the defence the Defendants say in (a) that it is fair comment for them to have said that the Chief Justice must have been misled by his juniors that the Law Society of Kenya had not objected otherwise he would not have permitted a practicing certificate to issue to the Plaintiff. The Defendants go on to say in the particular of opinion (b) that it was fair comment for them to have said that the irregularity in the facts implied corruption.

On the whole therefore the Defendants aver that the Plaintiff's suit be dismissed with costs to the Defendants. During the hearing the Defendants did not think it necessary to come and cloth that skeleton defence with tested evidence in the witness box. They ought to realize that pleadings do not constitute proof of the allegations therein. In any case, from the foregoing, I think it is necessary first to know the law we are talking about. What I have noticed is that the Defendants would rather talk of section 22 instead of section 25 of the Advocates Act while the Plaintiff is taking the opposite view talking of section 25 rather than section 22. Mr. Ahmednassir's letter dated 24th August 2004 which ought to have pin-pointed the relevant provisions of the law he was talking about begins and ends talking a lot about "the law" without pin-pointing the relevant provisions of that law and includes the following" **" _ _ _ you have contravened not only the express provisions of statute but also established procedures on the issuance of practising certificates."**

The question is: which statute and where is evidence of the established procedures? Curiously it is the Defendant's counsel now submitting that the Plaintiff has failed to lead evidence of the established procedure, yet in law it is the party asserting a fact who has the burden of proving that fact. In this case no such evidence has been adduced and the Plaintiff's counsel specifically states in his written submissions that such evidence is not necessary yet what is required here is the applicable law which must not be

ignored if the court has to know the persons who were doing the right thing and vice versa to try and effect justice. That puts me in a situation in which I have to make my own decision and I am obliged therefore to look at sections 22 and 25 of the Advocates Act in so far as they may be relevant in this suit since the parties don't have a common stand on those provisions. I will start with section 21 which states as follows:-
"21. The Registrar shall issue in accordance with, but subject to, this Part and any rules made under this Act certificates and annual licences authorizing the advocates named therein to practice as advocates."

Next is section 22 which starts with subsection (1) as follows:
"(1) Application for a practising certificate shall be made to the Registrar:-
(a) by delivering to him an application in duplicate, signed by the applicant specifying his name and place of business, and the date of his admission as an advocate; and
(b) by producing evidence satisfactory to the Registrar that the applicant has paid to the Society the fee prescribed for a practising certificate and the annual subscriptions payable for the time being to the society and to the Advocates Benevolent Association.
(2) Subject to section 31, the Registrar, if satisfied that the name of the applicant is on the Roll and that he is not for the time being suspended from practice, shall within fourteen days of the receipt by him of the application issue to the applicant a practising certificate.
(3) The Registrar shall cause one copy of each declaration delivered to him under this section to be filed in a register kept for that purpose, and any person may inspect the register during office hours without payment."

Section 31 referred to in subsections (2) of section 22 above is about unqualified persons being disallowed from acting as advocates. Moving to section 25 which grants to the Registrar the discrection: "to issue practising certificate in special cases." and starting with subsection (1) thereof the section states as follows:

"(1) Subject to subsection (3) and to section 28(5), subsection (2) shall have effect where an advocate applies for a practising certificate:-

(a) when for twelve months or more he has ceased to hold a practicing certificate in force; or

(b) whilst he is an undischarged bankrupt or a receiving order in bankruptcy is in force against him; or
(c) when, having been suspended from practising or having had his name removed from or struck off the Roll, the period of his suspension has expired or his name has been restored to the roll, as the case may be, or
(d) not having held a practising certificate in force within twelve months next following the date of his admission as an advocate; or
(e) _ _ _ _ _ _ _
(f) _ _ _ _ _ _ _"
The subsection goes on specifying four other main categories to make a total of eight special cases or categories. Subsection (2) of section 25 is important as it specifically provides that:
"The applicant shall give to the Registrar and to the Secretary of the Society not lessthan six weeks, before his application for a practising certificate, notice of his intention to apply therefore"
Subsection (3) of section 25 provides that:
"The Council of the society may make representations or submit a recommendation to the Registrar with respect to any application made under this section and any such representations or recommendations shall be absolutely privileged."
Under subsection (4) of section 25:
"The Registrar may in his discretion

(i) grant or refuse any application made under this section; or
(ii) decide to issue a practising certificate - - - upon such terms and conditions as he may think fit.”
Section 28(5) which is mentioned in section 25 (1) gives the Registrar separate discretionary powers to handle applications affected by suspensions under section 26(2) and/or suspensions under section 27 of the Advocates Act. Those applications are send to the Registrar under subsection (3) of section 28 of the Advocates Act for the Registrar to terminate the suspensions and they do not concern us in this suit. It follows from the above that the law is saying that the Registrar is the person who has the authority to issue certificates and annual licences authorizing the advocates named therein to practice as advocates. That is section 21. Section 22 makes it clear that before the Registrar issues such certificates (Practising Certificates) the advocate who requires one must apply for it to the Registrar. Once such an application is made under normal circumstances the Registrar must issue the practising certificate within 14 days. But the law goes further to say in section 25 that there are special cases which should not be handled in the same way normal applications are handled. Section 25(1) lists eight of those special cases under paragraphs (a) to (h) and the Plaintiff told the court that when he read that section he found he was covered under paragraph (a) because he had ceased to hold a practising certificate for more than twelve months. Subsection (2) of section 25 is mandatory that applicants in those special cases must take a longer route than the 14 days route applicants under normal cases would take under section 22. A notice of not less than six weeks must first be given by the intending applicant to the Registrar and to the secretary of the Law Society of Kenya. That is a notice of an intention to apply and it is not the application itself. It is after the six weeks have expired that the application for a practising certificate may be made, and since section 25 does not say the person to whom that application should be made after six weeks, the applicant must go back to sections 21 and 22 which must therefore be read together with section 25 in each of those special cases. Six weeks gone. The Applicant Advocate has applied to the Registrar for a practising certificate with evidence of payment of the necessary fees together with the money required for the Advocates Benevolent Association and has included a statutory declaration, all those after a period of six weeks or longer has passed since the date of the giving of the Notice. Under section 22 (2) why should the Registrar take more than 14 days from the date he receives the application, to issue the practising certificate? Such an application should not be taken to be another notice as the law does not provide for such second notice. All is passing through hands of learned Advoactes who ought to respect, and lead non lawyers, in respecting the law and the rule of law; to respect not only constitutional rights but also human rights and bring about social justice for the good of this country.

The Plaintiff in this case gave his Notice of Intention to apply for or renew his practising certificate to the Registrar and to the Secretary of the Law Society of Kenya dated 24th May, 2004. It was received on same date and I have already shown elsewhere in this Judgment that the Registrar and the Law Society of Kenya each had had more than the minimum six weeks statutory notice period when the Plaintiff finally sent to the Registrar the Application for a practicing certificate by way of the Plaintiffs letter dated 9th August 2004.Perhaps the only thing I need to do here is to emphasize the fact that although to some people it may have appeared that the Registrar acted too quickly on 23rd August 2004 when he replied the Plaintiff’s letter dated 9th August 2004, looking at section 22 (2) of the Advocate’s Act, the period of 14 days within which the Registrar was required to respond was almost gone. The law is mandatory that the Registrar
“—shall within fourteen days of the receipt by him of the application issue to the applicant a practising certificate.”

The Registrar, obeying the law, had no Legal authority as at 23rd August 2004 to keep on waiting for the “widest possible consultation” which seems not to have been started even by the 24th the August 2004 as per the impression given by that date’s letter from the Chairman, Law Society of Kenya and one would wonder why, because the Plaintiff’s notice dated 24th May 2004 was not, under the Act, required to be accompanied with payment of practising certificate fees or any other fees including that for the Advocates Benevolent Association. No statutory declaration was required at that stage to accompany the notice. Yet the Plaintiff was a person notoriously known to the Law Society of Kenya Council who had no problem utilizing subsection (3) of section 25 before the Registrar exercised his discretion under subsection (4) of section 25. It is also better to realize here that in law the Registrar retains his discretion even after receiving representations or recommendation from the Law Society of Kenya. That is what comes out

from reading subsections (3) and (4) of section 25 of the Advocates Act. (Supra) I have already discussed elsewhere the fact that the Plaintiff did not copy his letter dated 9th August 2004 to the Law Society of Kenya. I went on to indicate the effect of that action. But I think I should add that section 22(1) (supra) does not say that in addition to the Registrar, that application should also be made to the Law Society of Kenya or be copied to the Society although the section says the application be induplicate. It is therefore not proper here to say that the Plaintiff did not comply with the law when he did not address the letter or copy it to the Law Society of Kenya. Subsection (2) of section 22 adds that the Registrar needs only be satisfied:

1. That the name of the Applicant is on the Roll, and
2. that he is not for the time being suspended from practice

No evidence has been adduced before me to show that the Plaintiff was not, at that time, on the Roll or that he was suspended from practice. Retirement from the Bench, as the evidence before me shows, is neither suspension from practice nor removal from the Roll of Advocates, and that is why the Plaintiff rightly said that the then Official view of the Council of the Law Society of Kenya that Judges who left the Bench as a result of Justice Ringera Committee's recommendation could only go to farming or run kiosks and not practice law, amounted to a second conviction and sentence of those judges without the said Judges having been heard first. I add that it was an abuse not only of the Plaintiff's Constitutional and human rights but also of the principle of natural justice by advocates who surprisingly allowed themselves to be carried away by mob justice for how else could the Law Society of Kenya deny an advocate on the Roll who was not suspended, the right to practice law as an advocate without having taken the requisite disciplinary measures against that advocate and fairly and lawfully found him guilty?

Such conduct may explain why the Law Society of Kenya ignored the Plaintiff's notice dated 24th May 2004 together with the reminder dated 14th July 2004 for the Chairman later to come out harsh and swift in his letter dated 24th August 2004 against the Registrar's letter dated 23rd August 2004 as if that letter dated 23rd August 2004 was the first letter on the question of whether the Plaintiff could be issued with a practising certificate for the year 2004. The Chairman conveyed that wrong impression to the Defendants in this suit and the Defendants, conducting themselves like parties dying of hunger to destroy, clung tenaciously upon that wrong impression even in the light of clear evidence to the contrary already availed to the Defendants by Mr. Ngunjiri before the second publication complained of. Otherwise why had the Law Society of Kenya Council refused to accept the Plaintiff's money for five months from 25th March 2004 to 24th August 2004 only to come out to convey the message that the Plaintiff was an advocate who had obtained his practising certificate without payment of the requisite fees? If talking about non filing of things like declaration, I could understand because the Plaintiff's letter dated 9th August 2004 was not copied to the Law Society of Kenya and they may not have known the Registrar had all the necessary documents. But over non payment of the required fees by the Plaintiff, I would not see the good excuse the Law Society of Kenya Council had. How could the Plaintiff have paid the money in a better way when the Law Society of Kenya, the payee, was stubbornly refusing to accept the payment for five good months up to the time the Registrar issued the practising certificate while having in his possession all the required fees in banker's cheques payable to the Law Society of Kenya? The Registrar had the cheques not because he loved the money and the Plaintiff wanted the Registrar to use the money, but because that money had to pass through the Registrar in order to reach the Law Society of Kenya perhaps with a hope, on the part of the Plaintiff, that the new channel could induce acceptance of the money by the Law Society of Kenya. Disappointingly the Law Society of Kenya still refused to accept the money which had been put in their possession on the very day the practising certificate was issued. They therefore returned the money to the Registrar with speed the following day. The Registrar had in turn to return the money to the Plaintiff who already had his practising certificate. The Plaintiff subsequently tried to persuade the Law Society of Kenya to accept the money to no avail. In those circumstances I do not see the justification in blaming the Plaintiff for non payment of the money instead of blaming the Law Society of Kenya Council of that time of refusing to accept the money. Why did it refuse to take that money for five good months? It was not just 23rd to 24th August 2004. It was 25th March to 24th August, 2004. The truth was not that the Plaintiff did not pay, but rather that the Plaintiff did pay but that the Law Society of Kenya refused to and did not accept payment. The Plaintiff had done all he could to make payment timeoulsy and properly. The issue was simply that of non acceptance of payment by the Law Society of

Kenya and not that of non payment by the Plaintiff. No reason was being given for the refusal of the money. No representation or recommendation forthcoming under subsection (3) of section 25 for three full months. The Registrar had to issue the practising certificate, in accordance with section 22(2), within 14 days from the date he received the Plaintiff's application dated 9th August 2004 for a practising certificate. The 14 days were already expiring on or about 23rd August 2004. Was the Registrar not justified in the circumstances to say that he had received no objection from the Law Society of Kenya? I think he was. But as I pointed out earlier, even if such an objection were received, the Registrar's hand would not have been tied to rejecting the application as the Chairman of the LSK, with due respect, thought. The Registrar still had his discretion, after putting all the facts and factors before him into consideration. He could not correctly and fairly and even lawfully say he was not satisfied the Plaintiff had paid the required fees when he, the Registrar, himself was in possession of the required fees in banker's cheques payable to the Law Society of Kenya as at the time the practising certificate in question was being issued. To say that the fees shall be paid to the Law Society of Kenya does not mean that the Registrar as the issuer of the certificate, cannot receive such fees on behalf of the Law Society of Kenya and forward it to the Law Society of Kenya as the Registrar did in this case especially when the Law Society of Kenya was conducting itself the way it was doing at that time in this matter. That, in my view, was good payment of the fees to the Law Society of Kenya in the circumstances of this case and was good or satisfactory evidence before the Registrar that the required fees had been paid by the Applicant – in terms of section 22(1) (b) and section 84 of the Advocates Act as read with Rule (2) of The Advocates (practising certificates) (Fees) Rules 2003. These were banker's cheques, and not personal cheques, - payable directly to the LSK and were forwarded by the Registrar and received by the LSK on the very same day and date 23rd August 2004 on which the practising certificate was issued by the Registrar. In that respect the Plaintiff had not run away with a practising certificate without payment of the required fees. It was only after the Law Society of Kenya had returned the cheques to the Registrar and the Registrar in turn returned the cheques to the Plaintiff who thereafter again tried in vain to have the cheques accepted by the Law Society of Kenya; that the Plaintiff held the practising certificate lawfully issued to him but the required fees having been paid and not having been accepted by the Law Society of Kenya apparently because the Law Society of Kenya felt the Plaintiff should not have been given the practising certificate under any circumstances. It is clear the Law Society of Kenya held the wrong view that the Registrar in his decision to issue a practising certificate was bound by the decision of the Law Society of Kenya so that once the Law Society of Kenya says No, the Registrar has no power to say to the Applicant YES and go ahead to issue a practising certificate. That is why the then Chairman of the Law Society of Kenya in paragraph six of his letter dated 24th August 2004 told the Registrar: **"The established procedure is for an applicant to submit his application to both your office and this Society for a practising certificate. Your office would normally only issue a practising certificate on the advice of this Society and not otherwise."**

That clearly means the Registrar has no discretion **in "The established procedure which was clearly contrary to section 25(4) (i) of the Advocates Act," which says that "The Registrar may in his discretion**
(i) grant or refuse any application made under this section;"

It was perhaps in that perspective that the Law Society of Kenya was refusing, from 25thMarch 2004, to accept payment from the Plaintiff in order to deny the Plaintiff practising certificate without having to give a formal official reason for that refusal perhaps because they knew they had no valid reason to give as they had not lawfully instituted any disciplinary proceedings against the Plaintiff and lawfully found him guilty, convicted him and sentenced him to a sentence of not practicing as an advocate or suspended him from practising as an advocate if not removing him from the Roll of Advocates. Otherwise why should the law be there if clear provisions of that law can be disregarded by parties who simply opt to use their own **"established procedure**"? If the law is not suitable, why has the Law Society of Kenya not seen it fit to cause the amendment of subsection (1) and subsection (2) of section 22 as well as subsection (4) (i) of section 25 of the Advocates Act to include "**The established procedure**"? Is this country to be governed by the rule of law or by the rule of **"established procedures**" not enacted in the country's statutes and inconsistent with or even contradictory to the enacted statutes? Apparently a refusal to accept payment of the fees was to act as a No from the Law Society of Kenya because the Plaintiff was to have No evidence of payment to the LSK

to show the Registrar who would therefore, "according to established procedure", be compelled not to issue a practising certificate; the Plaintiff having already been condemned to be a farmer or kiosk peddler instead of practising law. To my mind, that is a move not only lacking in transparency but also grossly unfair as it is unlawful, the Plaintiff being an advocate on the Roll who had not been suspended from practising as an advocate

<u>and section 22(2) of the Advocates Act does not include a refusal by the Law Society of Kenya to accept fees from an advocate as a reason for the Registrar denying that advocate a practising certificate.</u>

Upon receipt of the Plaintiff's Notice of his intention to apply for or renew his practising certificate in the letter dated 24th May 2004, the Law Society of Kenya Council ought to have been honest enough and therefore to have sent to the Registrar their representations or recommendation under section 25(3) within six weeks, as there was no problem about their decision, that they had already decided the Plaintiff should go to farming or to run a kiosk instead of practising as an advocate and that therefore the Registrar should not issue to the Plaintiff a practising certificate when the Plaintiff applies for it. That was the transparent way the Law Society of Kenya should have handled the question whether or not a practising certificate could be issued to the Plaintiff. Silently using the tactic of refusal to accept or refusal to collect the necessary fees from the Plaintiff and later coming out crying the angles and depicting the plaintiff as an ethicless advocate who run away with a practising certificate without payment of the requisite fees and filing the necessary documents was indeed callous. Concerning similar applications for practicing certificates from other Judges who retired in the same way like the Plaintiff and whose cases the Registrar is accused of having skipped in favour of hearing the Plaintiff's case or application, it could be, just as courts are accused of delay in hearing and determining cases where the parties, and not the court, should be blamed, the Registrar may be getting blames here when the applicants themselves in those cases are to blame. The keener a party is to move its case to hearing and determination, the sooner that case is determined especially where there is a single party like it was in the Plaintiff's application for a practising certificate. When parties are keen to have their case determined without delay, they get it done and they do not have to corrupt any officer of the court for that work to be done because it is a requirement of the law that cases be heard and be determined without undue delay. Neither the Registrar nor the Plaintiff should be smeared with mud when evidence only points to the fact that each of them simply did his job keenly and in accordance with the law. Moreover, what was the real concern of the Law Society of Kenya and the Defendants on that issue? Their real concern, people who were reading corruption in everything that happened in this matter, could have been, not to do justice to those other judges, already condemned to be farmers and kiosk peddlers, but to prevent them from getting their respective practising certificates as the fact that the Plaintiff and Justice (Retired) Kwach had obtained their practising certificates was likely to act as a precedent for the Judges in that category then aspiring to get their respective practising certificates which, I understand, some of those judges subsequently got. With the above scenario and on the whole therefore where does the defendant's defence stand?

Starting with particulars of facts given in paragraph 7 of the defence 1 find that there is no dispute on particulars given under sub paragraphs (a), (b) (c) and (e). But in sub paragraph (d), it cannot be "a fact that at the time of issuing the practicing certificate, the Law Society of Kenya was not made aware of any application by the plaintiff for a practising certificate." That cannot be a fact from the evidence on record and considering what I have been discussing above. The Law Society of Kenya was aware of the question whether a practising certificate could be issued to the plaintiff and did not have to be informed by the Registrar as asserted in subparagraph (d). In fact section 22 (1) (a) being relied upon by the Defendants does not require the Registrar to make the Law Society of Kenya aware about such applications and any objection to be raised by the Law Society of Kenya did not have to wait until the Registrar made the Law Society of Kenya aware. Concerning subparagraph (f), it is not a fact that at the time the Registrar issued the practising certificate the Plaintiff had not paid to the Law Society of Kenya the prescribed fees. I have already discussed that at some length. Moreover, section 22 (a) of the Advocates Act the Defendants are mentioning does not exist. If it is meant to write section 22 (1) (a), those provisions are not about fees. Moving to particulars of opinion, the facts as disclosed in this suit lend a hand to the existence of no mystery as is claimed under subparagraph (a)of paragraph 7. I have also discussed that at some length.

There was no justification for describing what happened as "mysterious" and that cannot therefore be "fair comment" - even if that was on a matter of public interest because it concerns the Judiciary. Concerning contents of paragraph 10 of the defence, sub paragraph (a), is a repetition of sub paragraph (d) of paragraph 7 which I have said is not a fact. Sub paragraph (c) is similarly a repetition of sub paragraph (f) of Paragraph 7 which I have said is not a fact. Sub paragraph b) is a repetition of sub paragraph (e) of paragraph 7 which I accept is a fact. Moving to particulars of opinion subparagraph (a), firstly, it was the Registrar and not the Chief Justice, at that stage, to make the decision to issue or not to issue a practising certificate to the Plaintiff. The Chief Justice had to wait for appeal from the decision of the Registrar where such appeals are appropriate. It follows therefore that the question of the Chief Justice having been misled by his juniors in the issuance of a practising certificate to the Plaintiff did and does not arise in law in the circumstances of this case and the Defendants ought to have known this when they decided to drag the office of the Chief Justice into the matter. That is not withstanding the fact that the Registrar had copied to the Chief Justice the letter dated 23rd August 2004 forwarding the practising certificate to the Plaintiff. The Registrar was supposed to be independent in his decision at that stage to create the proper and lawful conditions and opportunity for a possible appeal to the Chief Justice. As for sub paragraph (b) where the Defendants say that "The irregularity in the facts implied corruption, the Defendants should have come into the witness box for the testing of their evidence if any, on that allegation. Otherwise where is credible evidence of the alleged irregularity? From what is before me, I find no such credible evidence. There is no fair comment on that issue. I should add that while particulars under Order VI Rule 6A of the Civil Procedure Rules are supposed to be from the articles complained of, Defendants in this suit appear to have taken their particulars from the Registrar's letter dated 23rd August, 2004 and Mr. Ahnmednasir's reply dated 24th August, 2004 rather than from the offending articles. None of the particulars therefore seems to support the defamatory statements which the Defendants failed to come to court to prove in the witness box during the hearing of this suit that indeed the statements were true. Moving to fair comments therefore, in the present proceedings the Defendants have failed to defend as fair comment. To comply with that rule, correctly, the Defendants were required to look at their two articles complained of, set out and identify which statement of fact is true and give its particulars. Then follow that up with the relevant statement of opinion they claim to be fair comment to enable our reasonable right thinking member of society generally to see it to make his judgment because the sense of comment is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation etc. **See Gatley on Libel and Slander 9th Ed. From paragraph, 12.1.** The Defendants have failed to do that in this suit; yet it has been held that misdescription of conduct only leads to the one conclusion detrimental to the person whose conduct is misdescribed and leaves the ordinary reasonable reader no opportunity for judging for himself the character of the conduct condemned nothing but a false picture being presented for judgment – **See Gately (supra) paras. 12.7 and 12.8.** That is why in the case of **Digby v. Financial News Ltd v. Hodgson (1909) 1 KB 239** Collins MR held that "if the defendant makes a misstatement of any facts upon which he comments, he at once negatives the possibility of his comments being fair", and in the case of **Christie v. Robertson (1889) 10 NSWLR 152** it was held that it is not comment --- grossly to misrepresent the conduct of a public man and then to hold him up to execration for his alleged wrongdoing; while in ***Hunt*** *v. Star Newspaper (1908)* ***2 KB 309*** it was held that in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the commend purports to be made do not exist the foundation of the plea fails. In **Rodger Abisai abisai & Co., Advocates –vs- Wachira Waruru & another, Civil Appeal No.12 of 2003 at Kisumu**, the Kenya Court of Appeal adds that the imputation of corruption - a Criminal Conduct or offence – by Defendants against the Plaintiff denies the Defendants the defence of their comments. Now looking at the statement of defence generally, the Defendants denying that the publications complained of were done falsely and/or maliciously and that the words did not carry the meanings and innuendo attributed to them by the Plaintiff, I think it becomes necessary to look at all the contents of two letters together in the light of what I have said so far. The first letter is dated 24th August 2004 produced as Plaintiff exhibit 4 (b), the letter to the Registrar from the chairman, Law Society of Kenya. The second one is the letter at Folio 12 to 15 of the Agreed Bundle of documents, dated 9th September 2004 written by Mr. Ngunjiri as the Plaintiff's Advocate, to the Managing Director, of the First Plaintiff and also addressed to the Second Defendant personally. That letter was also addressed to the then Chairman of the Law Society of Kenya. The letter dated 24th August

2004, Plaintiff exhibit 4 (b) stated as follows:
"Dear Sir,
RE: PRACTISING CERTIFICATE FOR JUSTICES A.B. SHAH & R.O. KWACH I refer to your two letters dated 23rd August, 2004 addressed to Justice A.B. Shah and R.O. Kwach and copied to us.The contents of the two letters are astonishing to us as you have contravened not only the express provisions of statute but also established procedures on the issuance of practicing certificates. The law requires you to satisfy yourself that a person who applies for a practicing certificate has paid for it to this Society. In these cases, neither of the applicants had, at the time you issued the certificate, paid for it. Secondly, it is a requirement of the law that an applicant must fill and forward to this Society copies of declaration forms, one of which will be transmitted to your office and which forms the basis on which the certificate will be issued. The two applicants have, up to now, not filled the requisite declaration forms, and yet you have purported to issue them with certificates. Thirdly, the applicants have not shown to you that they have paid for and are members of the Advocates Benevolent Association. A practicing certificate is conditional on such membership, which is completely outside your powers to regulate. The established procedure is for an applicant to submit his application to both your office and this Society for a practicing certificate. Your office would normally only issue a practicing certificate on the advice of this Society and not otherwise. In the case of Justice Shah and Kwach, no such advice has been given. Your remarks that this Society has no objection to the issuance of the certificates is, with respect, mischievous. An application for a practicing by a former Judge is an unusual and rare occurrence. The applications by Justice Shah and Kwach, given the circumstances under which they left the Judiciary, are exceptionally unusual and would have required the widest possible consultation. We deem your action as an attempt for reasons we not understand, to avoid such consultations. The circumstances of this case leave us in the very embarrassing situation where we have to return to you the cheque you forwarded for Justice Shah and Kwach. The upshot of this is that you have issued them with practicing certificate grantis, a situation which the law does not contemplate. We are within out rights to insist that, even at this late stage, consultations, should be instituted to make a decision acceptable to all concerned, about the applications by Justice Shah and Kwach for practicing certificates. We would advice in the meantime, that you recall or cancel the certificates.
Yours faithfully
AHMEDNASIR ABDULLLAHI
CHAIRMAN
c.c. The Chief Justice
Chief Justice Chambers
High Court of Kenya
NAIROBI

It is apparent that the Defendants became aware of that letter dated 24th August 2004 and as a result they published the first article complained of under the heading**; "2 disgraced judges okayed to practice**", quoted earlier in this judgment. The plaintiff was not happy with that publication in the then East African Standard of 8th September 2004 and as a result Mr. Ngunjiri was instructed to write and did write the letter dated 9th September 2004 stating as follows:
"Dear Sir,
RE: THE HON. MR. JUSTICE (RTD) A.B. SHAH
We act for the above-named client Retired Justice A.B. Shah, now an advocate of the High Court of Kenya. Our client takes issue with the news item appearing in the Wednesday (8.9.2004) issue of the E.A. Standard at page 4 under the title "2 Disgraced Judges okayed to practise". The news article is clearly defamatory of and concerning our client. The innuendo, clearly, is that the Practising Certificate was issued through some underhand and corrupt means and that the Registrar of the High Court was corruptly influenced to disregard the law in issuing the practicing certificate. The facts under which the Certificate was issued are as follows: Our client first applied for renewal and issuance of the practicing Certificate vide his letter of 25th March 2004. The Law Society acknowledged receipt thereof by their letter dated 7.4.2004 stating that the matter was under consideration. However, our client later applied for such issuance and renewal under Section 25 of the Advocates Act vide his letter of 24.5.2004 addressed to the Law Society of Kenya and the

Registrar of the High Court and withdraw his earlier Application for renewal. The said letter of Application was received by both the Registrar of the High Court and the Law Society of Kenya on 24.5.2004 duly stamped and was acknowledged by both with their respective rubber stamps. The six week period under Section 25 of the Advocates Act expired and our client drew the attention of the Registrar to this fact by his letter dated 14.7.2004 which letter was copied to the Law Society of Kenya. Vide his letter of 9.8. 2004 our client forwarded to the Registrar of the High Court duly filed in Application (Declaration) to accompany Application for Practicing Certificate for the year 2004. He also sent the relevant statutory declaration stating that he had not handled any clients' account funds in the last ten years. He also sent a banker's cheque for Shs.19,010/= with the said letter. Although he is a life members of the Advocates' Benevolence Association he, as a matter of abundant caution, sent a further cheque for Shs.1,500/= to cover the Benevolent Association fees. The Registrar of the High Court not having had received any objection from the Law Society of Kenya lawfully and quite properly issued the Practicing Certificate for the year 2004. In your article in question the use of the word "mysteriously" insinuates that the circumstances under which the Practicing Certificate was issued would only be suspect and corrupt. The Registrar of the High Court having received the Application for renewal of Practising Certificate and having received no objection from the law Society of Kenya for a period of nearly four months was under a legal duty to issue the Practising Certificate which in his dicretion he issued. He had before him the declaration and banker's cheques for the requisite fees, such cheques having been made payable to the Law Society of Kenya which he in fact forwarded to the law Society of Kenya under cover of his letter of 23.8.2004. The innuendo that the Practising Certificate was issued corruptly is highly defamatory of and concerning our client who is not a "disgraced" Judge. He is a Retired Judge. Our client takes great exception to the word "disgraced". The allegation that the Practising Certificate was issued without payment is an obvious untruth which compounds the innuendo that it was issued corruptly and by underhand means as all was required of the Registrar is to be satisfied that the Applicant has produced before him "satisfactory evidence of payment, of the prescribed fees" and filing of all the requisite forms.The Law Society of Kenya had received the first Application in March, 2004 and upto the time it was withdrawn in May, 2004 had not been forwarded to the Registrar of the High Court any objection to the renewal of our client's Practising Certificate. Further the Law Society of Kenya received the Notice of the second Application on the 24.5.2004. Yet they did not make any objection(s), until after the issuance of the Practising Certificate. We now demand, forthwith, a suitable apology and correction from each of you and an offer of damages which offer will be considered after it has been made. To prove our point we enclose all copies of the following:
1. Letter dated 25.3.2004 addressed by our client to the Law Society of Kenya and copied to the Registrar of the High Court.
2. Letter dated 7.4.2004 addressed by the Law Society of Kenya to our client.
3. The application (letter) dated 24.5.2004 for renewal of Practising Certificate with proof of service endorsed thereon.
4. Our clients reminder to the Registrar dated 14.7.2004
5. Our client's letter dated 9.8.2004 enclosing the relevant documents and banker's cheque.
6. Copy of letter addressed by our client to the Registrar dated 23.8.2004 If you fail to respond proceedings will be taken without further notice.
Yours faithfully
FOR A.N. NGUNJIRI & CO.,
A.N. NGUNJIRI
ADVOCATE
c.c
The Registrar
High Court of Kenya
NAIROBI."

After the Defendants had received that letter dated 9th September 2004, on the 11th September 2004 the Defendants went ahead to publish the Second Article on page 5 of the same newspaper under the heading: "Legal blow to war on graft?" That article is already quoted elsewhere in this judgment. The plaintiff's and Mr. Ngunjiri's attention were drawn to that article and Mr. Ngunjiri wrote to the Defendants his letter dated 15th September 2004 already quoted earlier. The Defendants replied that letter by their letter dated

6th October also quoted earlier in this judgment. What comes out is that the Defendants after receiving information from the letter dated 24th August 2004 written by the Chairman of the Law Society of Kenya to the Registrar, do not seem to have tried to inquire into the truth of the allegations in the letter. They therefore went ahead to publish the first article. Their stand did not change even after Mr. Ngunjiri had re-acted to the first article and, through his letter dated 9th September 2004, had voluntarily given the Defendants the Plaintiff's side of the story. In fact their stand became more hardened and the result was the publication of their second article which, after it had drawn further complaints from Mr. Ngunjiri who had not been replied and therefore wrote the second letter dated 15th September 2004, the Defendant's letter to Mr. Ngunjiri dated 6th October 2004 was in effect telling him that**:**

yes we have got what you gave us as yourclient's side of the story but we don't want to use it to try and get at the truth or to letthe public know that we have got such information because we only want to publish what the Chairman of the Law Society said and that is the only information we want members of the public to know. If you want members of the public to know what you have given us, use section 7A of the Defamation Act and we will have the opportunity to convey that information to the public in the manner we like even if you will not like that manner. Otherwise we want members of the public to know what we have got from the Chairman of the Law Society of Kenya only.

Clearly that is not suggestive of a fair or responsible or objective press. It is suggestive of a misleading press; a biased press; a partisan press or even destructive press – which section 79 of the current Constitution of Kenya does not protect. That freedom is limited by various freedoms of other persons in that chapter. A press which can peddle falsehood or malice is a press worthy doing without in the country; for of what good to the Public is a press which suppresses credible and truthful information it has in order to insist giving the public falsehoods, that a practising certificate has been "mysteriously" issued to an advocate by the Registrar who issued the same "selectively" while "contravening the law" in "apparent blatant disregard of the due process" as the requisite fees was not paid and relevant documents not filed, clearance from the Law Society of Kenya "completely ignored and the Law Society only knowing about the registration when certificate issuance letters were copied to the" Law Society as no application by the advocate had been made to the Law Society of Kenya for practising certificate, and that the Chief Justice had been misled by his juniors through misrepresentation; and that the advocate had been sneaked back into the system (practising) without due consultation; that the Advocate was an individual who had been perceived to be unfit to adjudicate cases yet he now goes into legal practice; that the come back had been "Highly selective" suggesting corruption which should be investigated by the Anti-Corruption Commission that the decision to issue practising certificate could open a Pandora's box inviting unnecessary legal suits against the Government. The advocate is described as "disgraced" and his return to practising as an advocate termed a "Legal blow to war on graft." All those and even more, from the two articles. As it was in the case of Christie v. Robertson (1889) 10 NSWLR 157, that amounted to grossly mispresenting the conduct of a public man and then holding him up to execration for his alleged wrongdoing. That is not fair for it is absurd and I find nothing good to the Public from such conduct of the Press. The gross misrepresentation in this suit by the Defendants resulted into misstatements of facts by the same Defendants; which misstatements have therefore been specifically denied by the Plaintiff in his evidence which has not been controverted by evidence from the Defendants. That press or the Defendants can claim there are no falsehoods and/or malice, no defamation, in what they said as summarized above but can a reasonable man, a right thinking member of society, accept that those words are not defamatory of the Plaintiff? I do not think so. On the contrary the reasonable right thinking member of society will easily pronounce those statements defamatory of the person of whom the statements are spoken. There is no doubt that those statements injure the reputation of the Plaintiff, lowering him in the
estimation of right thinking members of society generally. The words ridicule the Plaintiff making him to be shunned, hated or avoided and his evidence supports that scenario. While it may be said that the law of libel does not protect the reputation of the individual or person from mere sarcastic comment, irony or even vulgar abuse where there is no loss of reputation; and that insults which do not diminish a man's standing among other people do not found an action for libel or slander; and further that the fact that the published words are annoying and irritating cannot be a basis of suing and the mere fact that the words are falsedoes not in itself give rise to an action for libel, it is important to remember that drawing a line

between what is not defamatory and what is defamatory is not easy.

The essence of a defamatory statement is its tendency to injure the reputation of another person. A statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally or if it exposes him to public hatred, contempt or ridicule or if it causes him to be shunned or avoided. Halsbury's Laws of England 3rd Edition, volume 24 of paragraph 8 page 6 says that a **"A defamatory statement is a statement which if published of and concerning a person, is calculated to lower him in the estimation of right thinking men or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."**

In the circumstances of this case therefore the Defendants are not entitled to say as they are saying that the words complained of are not defamatory because they are incapable of lowering the plaintiff's reputation in any way known to law. It is not right for the Defendants to say so. The two articles whether taken separately or taken together and looked at by right thinking members of society are no doubt calculated to lower the estimation of the Plaintiff. I have just been referring to some of what the Defendants told members of the public in platant disregard of the easily available credible and truthful evidence to the contrary the Defendants held. I do not need to repeat that here. I have no doubt that our right thinking members of Society will look at all those as defamatory. Accordingly I find all that to be defamation of the Plaintiff a retired, and not a "disgraced" Judge of the Court of Appeal of Kenya. When the Defendants, for example, choose to use words like "Disgraced" knowing very well that the word "disgrace", according to dictionaries like the "Concise Oxford English Dictionary" means "loss of reputation as a result of a dishonourable action, a person or thing regarded as shameful and unacceptable", and latter the Defendants turn round to claim that such a statement, "2 disgraced judges okayed to practice", said of and concerning the Plaintiff, was not defamatory of the Plaintiff, the view that such a press must be a misleading press becomes more justifiable in the circumstances of this case where the
Defendants know the Plaintiff had never been given the opportunity to be heard and was therefore never heard by Justice Ringera's Committee on the allegations against him before he was first convicted by that committee of being "unfit to adjudicate cases" and was sentenced to the removal from the bench; and was for the second time convicted this time quietly by the Law Society of Kenya of being "unfit to hold a practising certificate" and sentenced to "farming or kiosk running" also without being heard in this country which professes to rule by The Rule of Law under a Constitution having provisions for the "Protection of Fundamental Rights And Freedoms of the Individual". Adding to the word "disgraced", the Defendants' subsequent words, "Legal blow to war on graft", makes the justification aforesaid much more stronger as those banner headings are subsequently clothed with respective contents under them. Contents of the two articles must be read together and considered together whether or not they have the "bone" and "antidote".
As Mr. Ngunjiri rightly complained in his letter dated 15th September 2004 (supra), while the Defendants had his explanation as given in his letter dated 9th September 2004, the Defendants on 11th September 2004 did not only repeat the libel they had published on 8th September 2004, but enlarged it and made the wound worse by driving a hot nail into that wound by expressly imputing that the Plaintiff – was issued with the practising certificate by the Registrar, corruptly. That clearly compounded and enlarged the libel of 8th September 2004 and called for the award of exemplary damages. I should add here that in my view, not only was the conduct of the Defendants a clear manifestation of falsehoods, which may be described in the words of Judge Kimaru in the case of Peter Rabado – v- Nation Newspaper Ltd (2006) KLR as "Opinionated falsehoods", but also of malice towards the Plaintiff. Their impunity in ignoring completely what was being said on the side of the Plaintiff and therefore apparently ignoring to look for the truth of the matter, cannot, to my mind, suggest otherwise. It is an established legal principle that malice may be inferred from the relations between the parties before and after publication and even during the course of court proceedings and that malice can be found in the publication itself where the language used is utterly beyond the facts. It was said in Godwin Wachira – vs Okoth (1977) KLR 24 that failure to inquire into the true facts is a fact from which inference of malice may be properly drawn; and that remains so, like it is in this suit, where the Plaintiff pleaded malice in the plaint even if he failed to file particulars of that malice

as required under Order VI A rule (3) of the Civil Procedure Rules because, and as was said in the case of Daniel Musinga t/a Musinga & Co., Advocates –vs- Nation Newspaper Ltd, HCCC No.102 of 2000 of Mombasa (unreported), in this case, the Court has head evidence of that malice from the Plaintiff and the Defendants did not support their denial of malice by any evidence thereby leaving the Plaintiff's evidence uncontroverted. Finally therefore, I am satisfied from the evidence before me that the plaintiff has proved his case against the Defendants that they defamed him. As it can even be seen from the Defendant's side, the publication was to members of the public generally this being libel and therefore the Plaintiff did not have to call, as Mr. Nyamunga demands in his written submissions, "any witness to give evidence of having received or read any of the articles that the Plaintiff complained of in this case;" in order to prove, "in the acceptable legal standard, that a publication in the sense required by the law of defamation had taken place." In fact this is a publication which is not denied in the Defendant's filed defence and therefore Mr. Nyamunga's submissions introduce, an inconsistency rendering his submissions on that issue inconsequential. That reminds me what was said in the case of Joshua Kulei – vs- Kalamka Ltd. HCCC No.375 of 1977 as follows:-

"An action for defamation is essentially an action to compensate a person for the harm done to his reputation. In all actions for libel and in some cases for slander, the law presumes that the Plaintiff has suffered harm and in these actions, usually described as actionable per se, the damages are and to be 'at large'. Although a person's reputation has no actual costs value the court is free to form its own estimate of the harm in light of all the circumstances."

In the Kenyan context though this principle applies, there is a slight restriction imposed by Act No. 11 of 1992 in the Defamation Act. Section 16A of the Defamation Act has a proviso as to the amount of damages a court can impose in the case of libel action where there is also an offence established whose punishment is death; the damages assessed shall not be less than Kshs.1,000,000/= 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.400,000/=. While the first limb of the limitation does not apply in this case, the second limb of the limitation applies because corruption is imputed by the Defendants to the Plaintiff and a criminal offence derived from corruption like bribery would be punishable by a term of imprisonment of not less than three years. The assessed damages must not therefore be less than Kshs.400,000/=. To add a few remarks to what I have been saying about the press, I should say that we should cherish the freedom of the press or the media. But in so doing, we must also cherish the truth, for freedom cannot thrive in an atmosphere of irresponsible journalism, lies, ridicule, bias or propaganda and scandalous atrocities. Say the truth and come to defend it in a court of law when the matter goes to court. Filing a defence and engaging a brilliant lawyer to cross examine the Plaintiff and his witnesses when giving their evidence while the defendant and his witnesses, if any, do not dare face similar treatment in the court, deprives the court of vital information or facts which would have assisted the court make a better informed judgment in the administration of justice. Sometimes they do not even file a defence. Reputed Newspapers like The Standard Ltd. are expected to be responsible newspapers and ought not allow irresponsible journalism even if they have no problem paying awards made by courts. Irresponsible journalism has consequences and increasingly courts are not letting it go uncensored and in those circumstances the media ought not be heard complaining about high amounts in damages courts may award successful Plaintiffs.

At the same time I have no doubt any media which is indeed responsible and out for the truth would find no problem learning from relevant judgments courts hand our in defamation cases against the media in general. Not necessarily reading the whole judgment but only that part which has the effect on how to avoid defamation. Those judgments are self explanatory on how the media should conduct themselves to avoid defamation and by now we would be having no successful defamation case against any media because it is very simple and easy for the media to avoid defamation. If others are successfully avoiding it, why not the media who seem to be emersed and stuck in defamation in Kenya, especially, newspapers. Is it because they have no problem paying awards made by courts in favour of the many successful Plaintiffs?

I now go back to section 7A of the Law of Defamation concerning the right of a Plaintiff or complainant to reply and I intend to be brief as this judgment is getting too long. That section is in a statute and is therefore used as matter of law. As such I should have thought it is not necessary for a party in a defamation suit to specifically plead it in order to raise it during the trial. However, let me point out that subsection (7) of that section does not expressly provide

that the Court should reduce the amount of damages which that court would have awarded to a Plaintiff who was entitled to the right of reply but failed to exercise it. In other words subsection (7) of section 7A is not mandatory and therefore the correct position is that the trial court is "at liberty to reduce the amount of damages it would have otherwise awarded" or not to reduce depending on the circumstance of each case. Thus the subsection gives the court discretion to reduce the amount or not to reduce the amount Although I said earlier that I did not understand why the Plaintiff said he did not use the right to reply because this suit was by then "subjudice" yet the suit was by then not filed around 15th September to 6 October, 2004, in the circumstances of this suit bearing in mind what I have been discussing in this judgment, I do not deem it fit to reduce the relevant award. Having said the above therefore, what award do I give the Plaintiff in this suit? Granted human feelings cannot be actualized in cash value, I am aware the law has developed guidelines to attempt to cool down the passion of anger and feeling generated by libel. A number of authorities have been cited by learned counsel on each side the tendency being that as counsel for the Plaintiff looked for cases in which damages awarded are high to support a high award in favour of the Plaintiff, counsel for the Defendants looked for authorities in which damages awarded are low to support a low award against the Defendants if plaintiff successful and one would perhaps begin with the case of Muriuki Karua Muriuki – vs- The Standard Limited in HCCC No.28 of 2003 at Nakuru where damages were assessed at Kshs.100/= In Chirau Ali Makwere –vs – Royal Media Services Limited (2005) e KLR the High Court awarded a total of kshs3 Million to the Plaintiff. In Akilano Malade Akiwumi – vs – Andrew Mortion and another, HCCC No. 1717 of 1999 (unreported), the Plaintiff then a sitting Court of Appeal Judge, the High Court, Ransley J., awarded him Kshs.3 million in general and exemplary damages the learned Judge having been against exorbitant libel awards just as the Court of Appeal was in the case of Johnson Evan Gicheru – vs – Andrew Morton & Another (2005) e KLR – although the said Court of Appeal enhanced the damages that had been awarded by the High Court Kshs.2.25 million to a composite figure of Kshs.6 million that included aggravated damages awarded because the Defendants had not responded to the Plaintiff's demand - letter In Daniel Musinga t/a Musinga & Co., Advocates v. Nation Newspapers Ltd (2006) eKLR the High Court at Mombasa, Khaminwa J, considered the principles that govern the assessment and award of damages in libel cases in the English authority of John v. MGN LTD (1996) 2 ALL ER 35 which states that **"the successful plaintiff in a defamation action is entitled to recover as general compensatory damages such sum as will compensate him for the wrong he has suffered. That sum must compensate him for damage to his reputation, vindicate his good name and take into account the distress, hurt and humiliation which the defamatory publication has caused."**
The learned Judge in the Musinga case held that the **"Court has to look at the whole conduct of the parties before action, after action and in compensatory damages such sum as will compensate him for the wrong he has suffered."**
The Judge further held that an award of damages **"must cover injured feelings the anxiety and uncertainty undergone during the court trial. Malicious and insulting conduct on the part of the Defendant will aggravate the damages to be awarded to compensate the Plaintiff for the additional injury going beyond that which would have flowed from the words alone."**
In that case the Court found that the Defendant behaved in a high handed malicious manner taking all as such factors into account the court felt was **"entitled to go to the top basket of the bracket award the largest sum that could fairly be regarded as fair compensation."**
The court awarded the Plaintiff Kshs.10,000,000/= damages In Benson Masese – vs – Kenya Tea Development Agency Ltd (2005) the Court awarded the Plaintiff Kshs.7,000,000/= general damages and Kshs.3,000,000/= exemplary damages. In the case of Richard Otieno Kwach – v – The Standard Ltd & Another (2007) the High Court awarded the Plaintiff a composite award of Kshs.5,500,000/= as general damages and aggravated damages. From the above authorities therefore and in the circumstances of this suit before me, I do hereby award the Plaintiff the sum of Kshs.6,000,000/= general damages plusKshs.1,000,000/= exemplary damages.The Defendants will pay costs of this suit to the Plaintiff plus interest as prayed.

Delivered, dated and signed at Nairobi this 24th day of April, 2008.

J.M. KHAMONI
JUDGE
Present:
Mr. Nagpal
Mr. Ngunjiri for the Plaintiff
Mr. Nyamunga for the Defendants
The Plaintiff himself
Muturi Court Clerk