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

Civil Case 727 of 2005

MARTIN TINDI KHAEMBA......................**PLAINTIFF**

VERSUS

STANDARD NEWSPAPERS...................... **DEFENDANT**

JUDGMENT

The Plaintiff herein moved to this Court vide a plaint dated 31st May 2005 and filed on 14th June 2005. The complaint is against the defendants, who are the publishers, and proprietors, of the Standard Newspaper, a daily Newspaper which has a substantial circulation within Nairobi Town, that and even great readership within the rest of the Republic of Kenya. It is stated that in the second and 3rd column on page 8 of their issue dated 5th February 2005 they published words defamatory of the Plaintiff namely:-

"*Three administration police officers remanded at Wajir prison have written to the Law Society of Kenya (LSK) to help them traced lawyer whom they claimed had gone into hiding.*

The officer in charge Wajir prison has written a letter to LSK Chairman Ahmed Nassir on behalf of Benedict Wasinde Elvin Odhiambo and Morris Mala to help in tracking down the lawyer who allegedly vanished with the trios legal fees. The officers facing robbery with violence charges claim they engaged the services of a lawyer Martin Tindi of Martin Tindi & Co. Advocates but he has since gone under ground.

They claimed that the lawyer after receiving a total of Kshs 88,000/= out of the agreed kshs 150,000.00 has declined to appear during the mention of their case at Wajir Law Courts forcing frequent adjournm1ents".

It is the Plaintiffs' contention that the above set out words in their natural and ordinary meaning meant to refer to the plaintiff as set out in paragraph 4 of the Plaint namely.

(a) *The Plaintiff has been guilty of his honest and dishonourable conduct.*

(b) *The Plaintiff is unfit to practice law as a lawyer.*

(c) *The Plaintiff fraudulently obtained money by false pretences with no intention of offering legal services.*

(d) *That the Plaintiff had gone into hiding after being paid legal fee.*

(e) *The Plaintiff was a "fugitive" who had to be traced by the relevant authorities.*

(f) *The Plaintiff is the sole cause of the sufferings of the accused persons.*

In consequence thereof the Plaintiff contends in paragraph 5 of the Plaint that the words complained of were understood to mean that the Plaintiff deliberately short changed his clients and was accordingly guilty of theft.

He Plaintiff alleges that as a result of matters aforesaid, the Plaintiffs reputation has been seriously damaged and has suffered considerable distress and embarrassment including clients collecting files from the offices due to the image of him pot rayed by the defendants.

As a result of the aforesaid damage the Plaintiff claims the following reliefs:-

(a) Damage for libel including

(b) Exemplary damage

(c) Aggravated damages

(d) Interest on (a) and (b) above

(e) Costs of the suit.

The summons to enter appearance were taken out and the defendant was served. A perusal of the record reveals that the defendant failed to enter appearance and file defence in time necessitating the plaintiff to file a request for interlocutory judgment dated 11th July 2005 and filed on the same date. The same was endorsed by the Deputy Registrar on 28th day of July 2005.

A further perusal of the record reveals presence of a memorandum of appearance dated 31st day of August 2005 and filed on 1st September, 2005. The same was filed simultaneously with a chamber summons dated the same date and filed the same date. It was presented under Order IXA rule 10 and 11 Civil Procedure Rules, Order VIII rule 1 and all other enabling provisions of the law. It sought four prayers namely:-

(1) That interlocutory judgment entered herein be set aside.

(2) That leave be granted to the defendant to enter appearance and file a defence out of time.

(3) That the memorandum of appearance and defence filed herein on behalf of the defendant be deemed as filed within time and that this matter proceed on merit.

(4) That costs of this application be costs in the cause.

A perusal of the record reveals that the said application was disposed off on 20.12.2005 by consent of the parties. The terms of the consent is "*By consent the application dated 31.8.05 be and is hereby allowed with costs assessed at Kshs 10,000.00 to the Plaintiff/Respondent.*

(2) *The defendant/applicant do file his defence within 7 days from the date hereof.*

Signed

Wendo J.

The Court has not traced a defence filed within 7 days from 20.12.2005 on record. However, since

parties proceeded as if the defence was on record, the Court gives the defence benefits of doubt of filing the same, in view of the fact that this court has judicial notice filing of documents within registry is faulty and wanting. For this reason the Court has no alternative but to go by the content of the copy of the defence that had been annexed to the application for setting aside as annexture NM1. This has been resorted to, solely to avoid delay in the disposal of the matter, and secondly based on the assumption that had the defendant not complied with the consent order, the plaintiffs Counsel would have raised complaint to that effect.

Paragraphs 2, 3, 4,5 and 6 of the said defence are the responses to the Plaintiffs claim as follows:

· *Vide paragraph 2 thereof, denied the descriptive contents of paragraph 2 of the plaint and made no admission as to the circulation of the Standard Newspapers.*

· *Vide paragraphs 3 thereof admitted that in the 2nd and 3rd column and page 8 of the Standard Newspapers dated 8th February 2005 the words complained of in paragraph 3 of the plaint were published but it is denied that the same were defamatory of the plaintiff.*

· *Vide paragraph 4 averred that in so far as the words were understood to refer to the plaintiff, it denied that they bore or were understood to bear or were capable of bearing the meaning pleaded in paragraph 4 and 5 of the plaint or any wording defamatory of the plaintiff and the plaintiff was put to strict proof thereof.*

· *Vide paragraph 5 that, in so far as the said words in their natural and ordinary meaning bore and were understood to bear the meaning set out below, they were in substance and in fact true".* The particulars of truth set out in paragraph are as follows:-

(a) That three administration officers remanded at Wajir prison through the officer in charge of Wajir prisons wrote to the law society of Kenya to help them trace their lawyer.

(b) That the remanded officers were Benedict Wasinde, Elvin Odhiambo and Morris Mala and they had engaged the Plaintiff as their Counsel.

(c) That they claimed they had paid the Plaintiff Kshs 88,000.00 out of the agreed Kshs 150,000.00 but he declined to appear for mention of their case forcing frequent adjournments.

The particulars pursuant to requirement of statute and the Civil Procedure Rules are given in the same paragraph 5 of the defence as:-

(i) The officers were remanded in Wajir Prison.

(ii) The officer in charge wrote to the Law Society of Kenya Chairman at the time.

(iii) The officers claimed that the lawyer failed to appear at Wajir Law Courts for mention of the case.

Vide paragraph 6 thereof averred that it was a stranger to the allegations in paragraphs 6 of the plaint and put the plaintiff to strict proof thereof.

By reason of the foregoing averments the defence denied the Plaintiff's entitlement to damages as claimed and prayed for the suit to be dismissed with costs to them.

Parties were heard and each side fielded one witness. The Plaintiff was the sole witness on his side. The salient features of his evidence are as follows. He is an advocate of the High Court of Kenya having been admitted to the roll of advocates in October l999 and as at the time of testimony he was in possession of a current practicing certificate.

(a) Upon admission to the roll of advocates he joined the firm of Wetangula and Co. Advocates where

he worked from l993 – 2003, when he opened his own firm of Martin Tindi & Co. Advocates.

The officers were located at Town House on Kaunda Street 2nd floor room No.7. The same building housed the defendant on the first floor. The practice was small as the staff comprised himself, a secretary and a court clerk.

Concerning the case he stated that he had gone to Mombasa for a case, when a colleague rang him and drew his attention to an article published at page 8 of the Standard Newspapers issue of Saturday February 5th 2005. The article is headed three suspects want Law Society of Kenya to trace the lawyer. The copy was produced as exhibit 1.

There after in addition, to several calls from colleagues expressing shock at the content of the article, his own father complained that the article imputed that the had stolen money and gone underground.

Upon reading the article and understanding the content, he immediately contacted two relatives of two of the subject accused persons namely Janet Omulo, mother of Elvin Odhiambo and Mr. Mala, uncle to Morris Mala. Both expressed shock at the content of the article after reading it and disassociated themselves with the content.

Among his colleagues, when he appeared at Mombasa Law Courts the next Monday, some looked shocked, others appeared apologetic.

When the Plaintiff called at his office in Nairobi he was informed by the secretary and court clerk that clients had called at the office inquiring about the article and some even asked for their files. To him the article had given the impression that he had stolen money. The clients came personally to him asking an explanation. It is his evidence that as a result of the content of the said article he lost:

(i) most of the few clients he had.

(ii) The good will he had established.

(iii) Financial ability forcing his office to be distrained for rent and eventually closed office.

(iv) He was unable to pay rent at Onyonka Estate of 21,000.00 per month forcing him to move to Ongata Rongai for cheaper accommodation.

(v) He had to seek employment in another firm of Advocates in Mombasa.

(vi) His own father suffered too as a result of the said article as he faced pressure from relatives to clear the plaintiffs name that he plaintiff had stolen money.

Further evidence on the issue is that him Plaintiff received a letter from the law Society of Kenya dated 8.02.05 exhibit 2 which had enclosed a letter from Benedict Wasinde and Alvin Odhiambo dated 28th January 2005. The letter exhibit 3, was addressed to the Chairman Law Society of Kenya through the officer in charge Wajir prison. The Plaintiff was asked to address the issues raised in the said letter. They key issues raised in the said letter, were that the two had hired the services of lawyer Martin Tindi, who had been paid Ksh 88,000.00 out of total agreed of Kshs 150,000.00. That the said lawyer had gone under ground and they were unable to hire on other lawyer to pursue their case.

The Plaintiff responded to exhibit 2 vide his letter dated 29th March 2005 exhibit 4. The salient features of the same are that:-

(i) The matter had been adjourned on 12.10.2004 indefinitely to await confirmation of the health status of the complainant alleged to have been in a critical condition as a result of which the matter could not be fixed for hearing hence the numerous mentions to await the confirmation of the health condition of the

complainant.

(ii) On the same date of 12th October, 2004 Plaintiff had raised objection at the accused persons being held in custody indefinitely but he was overruled.

(iii) It was not true that he was hiding or had gone under ground, evidenced by the fact that when he contacted the parents of the accused persons, they parents expressed shock and apologized for the embarrassing conduct of their children, who have also blaming them, they parents, of having abandoned them in Wajir.

(iv) Concerning legal fees only 30,000.00 had been paid. A further 40,000/= was paid to appeal against the magistrates decision that hearing dates will only be fixed after ascertaining the health condition of the complainant. One of the parents disagreed and withdrew her contribution as shown by the acknowledgment dated 28th Jan. 2005 exhibit 6.

In view of the amount paid as deposit of his instructions fee, and in view of the distance involved between Nairobi and Wajir which takes three days going and 3 days coming back it was irrational for him to be going to Wajir every two weeks for mention. For the reasons given he felt that the complaints raised had been raised in bad faith.

Upon receipt of the Plaintiffs letter exhibit 4, the Law Society responded to the accuseds' letter vide their letter dated 1.4.2005 exhibit 5. The central theme, in it, is that on the basis of the content of the advocate's explanation in exhibit 4, there was no merit in the accused persons' complaint.

Feeling aggrieved at both the content of the publication and by reason of the publication, him plaintiff instructed Counsel to issue a demand letter to the defendants dated 8th March 2005 produced as exhibit 7. The content of the said letter is what forms the basis of paragraph 3 and 4 of the plaint. The communication adds that by reason of the said content, the plaintiff, had been severally injured in his credit, character, reputation and profession as a lawyer and advocate of the High Court of Kenya and had been brought into public scandal, ridicule, odium, and contempt. It was further contended that the said words had been published out of male violence or spite towards the plaintiff. The letter demanded appropriate apology published in the same Newspapers at a conspicuous page failing which they could be addressed and the issue of recompense.

The defendants responded vide their letter dated 10th of June 2005 exhibit 8 denying that the content of the said article is defamatory of the plaintiff.

The net result of the evidence given is that it is the plaintiffs stand that the accused persons had been charged with the offence of robbery with violence which is not bail able, hence the requirement that accused persons do remain in custody till hearing.

It is the Plaintiffs stand that he was justified to move to Court because the content of the Newspapers article was not correct because;-

(a) The letter had been written by two in mates and not three.

(b) It had not been authored by the officer in charge G.K. prison Wajir.

(c) It was simply seeking legal assistance from Chairman Law Society of Kenya.

(d) They did not seek help to trace down a lawyer who had vanished with their money.

(e) There was no complaint that the lawyer had failed to go for mentions causing frequent adjournments.

(f) The impression created by the article is that him plaintiff was the one responsible for the frequent adjournments by failing to go to Wajir to attend court.

(g) It is further his evidence that the defendants were a floor below him and if anything they should have made efforts to trace him and confirm the correct information before publishing the same.

The injuries suffered by him were:-

· Loss of goodwill of his practice.

· Tarnishing of his reputation as well as that of his entire family.

· He suffered distress and embarrassment when clients came collecting their files on allegation that he was a thief.

· Since Law Society of Kenya had absolved him of blame the article was malice driven and it is therefore a proper candidate for the categories of damages claimed.

The salient features of his cross examination are that:-

· The writer of the letters of complaint to the Law Society of Kenya namely 2 of the three accused persons were not his instructing clients, as he had been instructed by the accuseds relatives.

· He agrees that the letter of complaint to Law Society of Kenya is to the effect that he had been paid Kshs 88,000.000 and he had gone underground.

· It is his testimony that the instructing client used to visit the complainant and were aware that he was unwell.

· His lack of frequent attendance of the mentions was because of the distance between Nairobi and Wajir, there had been given indefinite adjournment to the fixing of the hearing date and lastly the complainant's ability to attend the trial was unknown.

· It is his stand that there is mischief in the article because it falsely alleges that the complaint was raised by the officer in charge Wajir provision which was not the case.

· He maintains that it is not an accurate reporting that he had received 88,000/= and refused to go to Court.

· It is his stand that the writer should have sought to establish the truth before publishing the article.

· That the impression created by the articles is that him plaintiff is the one responsible for the frequent adjournments and yet the letter of complaint exhibit 3 had not raised that as one of the complaints, where as the correct position is that adjournments were caused by the complainant's sickness.

· He agreed that he personally never called the defendant to clarify the position before publishing the story.

· The Plaintiff agreed that he wrote exhibit 7 to the defendants asking for an apology before discussing damages as they should have construed the correct position from the Court record to confirm the position before publishing.

· He agreed that although the Law Society of Kenya absolved him, he did not bring that absolution to the notice of the defendant.

· The Plaintiff agreed that although he had an office at the Town House, he had no lease agreement to

the same and so it is difficult to prove that he had such an office.

· The Plaintiff also agreed that though he had a register containing names of about 50 client's ¾ of whom took away their files, after the publication, he had nothing to show to the Court that that, was the correct position.

· He still maintains that the publication is not covered by the provisions of Section 14 and 15 of the Act and do not fall into the categories of what can be termed as fair comment.

The defence on the other hand also fielded one witness. The sum total of his evidence is that:-

· He is a journalist working with the Standard based in North Eastern province in Wajir District.

· He is the Author of the Article complained of He was aware of the arrest of the three administration police officers who had been arrested and facing robbery with violence charges. It is his evidence that he had been following their case since the nature of these officers work attracted public interest being police officers.

· It is him who high lighted the story when they were arrested and took a plea in Wajir Law Courts. He wrote two articles one on the arrest and another on the plea. Thereafter he monitored its progress and that as when he came across the issue of frequent adjournments.

· It is in the process of following the frequent adjournments that he learned that the accused persons had written a letter to the chairman on Law Society of Kenya complaining that the lawyer they had hired and paid had gone underground.

· He made efforts and got a copy of exhibits 3 and he wrote a story based on its content.

· He D.W.1 agrees that he did not know the lawyer then. He tried to reach him at that point in time but he could not. It is his evidence that he held the story for a week looking for the lawyer but failed to trace him and then released the story to be published as it was.

· While commenting on the content of the demand letter exhibit 7, and the defendant's response to it exhibit 8, D.W.1 stated that what the Plaintiff did in exhibit 7 was just to reproduce the article. That he did not bring to the defendants notice the correct information which should have been published and so the defendants were justified in responding the way they did in exhibit 8. Neither did the plaintiff bring to the attention of the defendant the absolution he received from the Law Society. Neither did he seek to have his version published.

· It is his stand that the article complained of did not reproduce the letter but a formulated story based on the letter other were he had nothing in particular against the said officer.

When cross-examined D.W.1 responses were as follows:-

(i) He maintained that he followed the story of the three officers because they were police officers. He did two stories on them before, one when arrested and another when arraigned in court but he did not have them in Court.

(ii) He agreed, he did not attend the mention, neither did he peruse the file to appraise himself of the correct position on the file.

(iii) He maintains he tried to call the plaintiff on the mobile phone number given him by the three officers in order to clarify the position but he was unable to reach him. He concedes he did not contact the plaintiff's office.

(iv) He asserted that he was not willing to apologies because up to now they have not received the

correct version contrary to what he had published.

(v) It is not him who determined that the story be published. That lay with the Editorial board which passes the story for publication depended on proximity, relevance and urgency.

At the close of the entire case both Counsels filed written submissions. After reviewing the evidence adduced on the record Counsel for the Plaintiff stressed the following.

(1). That defamation is a tort consisting of a false and derogatory statement, respecting another person without lawful justification. Where as a defamatory statement is one which exposes the complainant to hatred, ridicule, contempt or which causes him to be shunned or which has a tendency to injure him in his office, profession or trade. It may constitute libel or slander and it must be construed in its natural and or ordinary meaning.

(2). Taking into account the provisions of Section 3 of the defamation Act Cap.36 Laws of Kenya the Court is asked to take judicial notice of the fact that the words complained of were published in one of the second leading Daily Newspapers in terms of readership which readership is nation wide.

(ii) The Court is also urged to find that the words complained of as well as their, after publication effects were was calculated and was meant and did in fact disparage the plaintiff in his office, profession, calling trade and business at the time of publication.

(iii) That it was and is not necessary to allege or prove special damage as the words were spoken of the plaintiff in the way of his office, profession, calling trade or business.

(3) It is not true as alleged by the defence witness that the article complained of is on all fours inline with the content of the letter which had been written by the accused persons' because:

(i) The chairman of the Law Society of Kenya named by the writer had not been named in the said letter.

(ii) Only two of the accused persons namely Benedict Wasinde and Alvin Odhiambo wrote the letter and not Morris Mala.

(iii) The Authors of the letter are two of the accused persons and not the officer in charge of Wajir prison.

(iv) The heading of the letter shows that the writers were simply seeking legal assistance from the Chairman Law Society of Kenya,

(v) It is the reporter who spiced up the story by alleging that it is the plaintiff who had declined to attend Court, forcing frequent adjournments.

(vi) The reporter identified the plaintiff by name.

(4) It is their stand that the reporter went overboard. Despite admitting that he had done other articles previously on the matter and alleges having had a keen interest in the matter because it involved public officers, and yet he D.W.1, failed to produce the other 2 articles he had done on it and also failed to peruse the court file to find out and or confirm the reasons for the frequent adjournments and also to confirm that the Plaintiff had appeared in court and argued a preliminary objection concerning mentions that wound be in definite taking into account the complainants health then.

(5) Since the reporter was reporting on court proceeding they submit that he was bound by section 6 of the defamation Act Cap.36 Laws of Kenya to report a fair and accurate proceedings.

(6) The plaintiff still stands by what he has attributed to the said words as their meaning as set out in

paragraph 4 and 5 of the plaint.

(7) The defendants plea of justification does not hold because their evidence has not shown that:-

(i) The defendant simply put up a general denial which is in sufficient as they did not single out each and every allegation and either admit or deny it.

(ii) The untruthfulness of the said words is evidenced by the fact that it was reported that the plaintiff had been paid 88,000.00 when in fact only 70,000.00 had been paid to him.

(8) Since the allegation imputes commission of a crime, the defence of justification can only succeed where there is proof of the commission of the said crime as strictly as if the Plaintiff had been prosecuted for the same.

(9) It is their stand that the article as published portrays a dishonest lawyer who takes money from poor accused persons with no intention of rendering legal services to them.

(10) They contend the defence pleading does not satisfy the requirements in order 6A rule 2 and order VI rule 9 (3) of the Civil Procedure Rules.

(11) Concerning allegation of a criminal and dishonourable conduct as there is no proof that the Plaintiff appropriated any property with a view to permanently deprive the owner of the appropriated property.

(12) Commenting generally on the evidence of D.W.1 Counsel submitted that the evidence of the said witness should be dismissed because:-

(i) He went out of his way to obtain a scoop.

(ii) Spiced up the story from some other source and not the letter on the basis of which the article was written.

(iii) Falsely asserted that he wanted to have clarification from the plaintiff on his mobile and yet he does not have the Plaintiffs number.

(iv) If he was following the case with a keen interest he could have landed on copies of the letters copied to the accused persons by the Law Society of Kenya and then followed up the article complained of with another one absolving the plaintiff of any blame.

(13) It is their stand that the words underground" tracing, and tracking down bear defamatory meanings. In that in common parlances tracking down is viewed by a common man to refer to pursuit of criminal elements or persons of unsavory character.

On the basis of the foregoing points Counsel submitted that the defendant did not prove its defence.

On case law as well as legal principles the plaintiffs Counsel referred the court to several authorities as set out here under.

On Gatley on libel and slander chapter 27 on defence page 683, paragraph 271 under general principles it is stated "*The defendant must not plead a general denial of the allegations in the statement of the claim, but must take each allegation separately and either admit it or say that he does not admit it. The defendant must plead with sufficient precision and clarity so as to enable the plaintiff to know what he will be obliged to prove and what case he must prepare to meet.*"

In the same Gatley on libel and slander Chap 11 page 241 r 11.10 on material in accuracy it is stated "*any statement which alters the character of the main imputation or adds to its sting must be proved to be true otherwise the defendant will fail in his plea of justification*"

In the same Gatley on libel and slander in the 1st supplement to the 10th Edition Chapter 3 page 16 paragraph 3.29 it is stated "*the feasible range of meanings is to be derived from the article as a whose, read through the eyes of a sensible person and the principle that if the article contains a defamatory statement or imputation that will defence its meaning unless it is very plainly negative in the same article.*

In the case of **MIKIDADI VERSUS KHAIGAN AND ANOTHER (2004) KLR 496 Ochieng Ag. J.** as he then was now J. as had occasion to consider issues of libel concern was publishing in truth without verifying information whether that amounted to recklessness. Whether refusal to apologize amounted to malice. Also factors tending to led to an award of aggravated damages and when exemplary damages may be awarded. In a judgment delivered on November 2, 2004 the learned judge held inter alia.

(1) *When the defendant fails to adduce evidence to controvert the evidence led by the plaintiff, the court must before accepting the plaintiffs evidence as reflecting the factual position satisfy itself that the evidence was backed by tangible matter.*

(2) *Where the defendant in a defamatory suit fails to contact the plaintiff to verify the truth or otherwise of the statement before causing it to be published and upon publication says that no apology is necessary or warranted and even further insists that the contents are factual when they are not, that may be a clear manifestation of an attitude of recklessness.*

(3). *The successful plaintiff in a defamation action is entitled to recover as general compensation damages such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damages to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused.*

The court must take the necessary precaution to ensure that whatever award it gives to a successful plaintiff is generally in line with what courts have been awarding.

(5). *Exemplary or aggravated damages are meant to compensate the plaintiff for the additional injury going beyond that which flawed from the words alone.*

(6). *The factors which tend to increase or aggravate damages are:*

(a) *Manner of publication and extent of circulation.*

(b) *Defendants actual malice.*

(c) *Defendants subsequent conduct*

(d) *Failure to apologize*

(e) *Justification and*

(f) *Conduct of the defendant's case.*

(7). *Exemplary damages are only to be awarded in limited instances namely.*

(a) *oppressive arbitrary or unconstitutional action by servants of government.*

(b) *Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or*

(c) *Cases in which the payment of exemplary damages is authorized by statute.*

(8) *In demonstrating the defendant's calculations to profits it is not sufficient to show merely that the*

Words were published in the ordinary course of business, run with a view to profit; the publication must be intended to make a specific profit.

Digest case law on the subject was not spared. There is no harm in noting them here. In **JOSHUA KULEI VERSUS KALAMKA LTD NAIROBI HCCC NO. 375 OF 1997** it was held inter alia that damages to be awarded are compensatory save in exceptional circumstances i.e. to restore or give back to the party injured what he lost (see also **WAMBUGU NJOROGE VERSUS KENYA COMMERCIAL BANK LTD CIVIL APPEAL NO. 179/92)**

(ii) Malice can be inferred where the defendant in publishing the information knows the statement to be false or did not care whether it be true or false and regard is to be had to the defendants conduct and the information available to him.

(iii) Section 16 of the defamation Act provides that where libel is in respect of an offence punishable by death the amount asked shall not be less than one million shillings.

In, the case of **GEKONG'A MONG'ARE, t/a GEKONG'A MOMANYI ADVOCATES VERSUS**. The **STANDARD LTD CIVIL APPEAL NO. 233 OF 2000**, It was held inter alia by the C.A. that the failure by the Plaintiff to cooperate with the reporters cannot make the facts reported by them true as they could have counter checked the matter although it is a matter which can be taken into account when considering what damages ought to be awarded to the appellant.

(ii) Justification cannot succeed where the basic facts are false as one cannot justify what is false.

(iii) A comment can only be fair if the basic facts upon which the comment is premised are correct as a comment which is based on lies or falsehood cannot be designated .

In the case of **FRANCIS P. COTODO VERSUS STAR PBULISHERS AND ANOTHER NAIROBI HCCCC NUMBER 883 OF (1998)** it was held inter alia that:-

(i) Section 7(1) of the law of Defamation Act Chapter 36 allows for qualified privilege if what was published was fair and accurate report on a matter of public interest, unless malice is proved and that qualified privilege is not lost even if in the course of publishing the fair and accurate report on a matter of public interest, a matter defamation to the plaintiff included but it can be lost if the Plaintiff demanded an explanation or contradiction, as required under Section 7(2) of the defamation Act, and the defendants refused or neglected to give that explanation or contradiction or the defendants gave the explanation or contradiction in a manner not adequate or not reason able having regard to all the circumstances.

(ii) An information w ill not be granted where the defendant pleads justification unless the court can be sure that his defence cannot be sustained at the trial and the plaintiff will receive more than normal damages, even if the publication of the would clearly be libelous.

(iii) To justify the court in granting an interim injunction, it must come to a decision upon the questions of libel or not and therefore the jurisdiction is of a delicate nature and ought only to be exercised in the clearest cases.

(iv) The court would not restrain the publication of an article, even though it was defamatory, when the defendants said that they intended to plead justification or fair comment.

(v) The discretion will not be in exercised unless there is a strong provision, facie evidence that the statement complained of is in the "for" for until it is clear that an alleged libel is in true it is not clear that any right at all has been infringed.

Further guidance is from the **C.A. No. 314 of 2000 JOHNSON EVAN GICHERU VERSUS ANDREW MORTON AND MICHAEL O'MARA BOOKS LTD.** At page 8-9 the Court of Appeal set oral guiding principles on defamation generally. At line 12 from the bottom of page 8 there is quoted

the case of **TANGANYIKA TRANSPORT CO. LTD VERSUS EBRAHIM NOORAY (1961) E.A. 55** where the principle established is that "*in actions of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. It may consider what his conduct has been before action, after action and in court during trial. At lien 5 from the bottom on the same page there is quoted the case of BROOM VERSUS CASSET & CO (1972) A.C. 1027 where the principle is that "in actions of defamation and in any other actions where damages for loss of reputation are involved the principle of restitution in interim has necessarily in even marvel highly subjective element, such actions involve a money award which may put the plaintiff in a purely financial sense in a much strange position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but in case the libel driven underground emerges from its looking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by stander of the be sellers loss of the charges"*

In the case of **DANIEL MUSINGER T/A MUSINGA & CO. ADVOCATES VERSUS NATION NEWSPAPERS LTD, MOMBASA HCCC NO. 102 OF 2000**. At page 12 of the judgment lien 16 from the bottom Khaminwa while quoting with approval the case of JOHN VERSUS M.G.N. LTD (l996) 2 A.E.R. 35 stated that the guiding principle on awarding damages in libel cases in that:

"*The success for plaintiff fin 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 damages to his reputation, vindicate his good name, and take account of the distress, hurt and humiliation which the defamatory publication has caused."*

At line 11 from the bottom the learned judge quoted a passage from the decision in **BIWOTT VERSUS DR. IAN WEST AND ANOTHER HCCC 1067 OF 1999** to the effect 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. That sum must compensate him for the damage to his reputation, vindicate his good name, and take account of the distress, hurt humiliation which defamatory publication has caused:.*

The award must cover injured feelings, the anxiety and uncertainty, in defence during 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 flawed from, the words done.

In the case of **ABRAHAM KIPSANG KIPTANUI VERSUS FRANCIES MWANIKI AND 4 OTHERS, NAIROBI HCCC NO. 42 OF 1997. J.U. JUMA at page 10** of the judgment lien 5 from the bottom observed this "*The articles raised serious allegations bout the Plaintiff. The defendant never bothered to is certain the truth before publishing the same. They were reckless. Having received complains from the plaintiff and his advocate they chose to keep quite instead of setting the record strength. They were malicious".*

At page 11 line 1 the learned judge continued "where as recognize the freedom of expression enjoyed by the press, that freedom must be exercised with maturity. It should not be used as a weapon to destroy the names of those they hate. That freedom should not be used to injure the reputations of others unless the one exercising such freedom is ready to substantiate the injurious allegations.

In this case the plaintiff has been seriously injured in his reputation. The defendants have just kept quiet thereby justifying their action. They stood by what they had published of the Plaintiff until the morning of the hearing on the 19th February, l998. they must answer for their action:".

At the same page 11 the learned judgment quoted with approval from **GATLEY ON LIBEL** and slander 8th Edition para 1 452 which deals with aggravated damages as follows "*The conduct of the defendant his conduct of the case, and his state of mind are this all matters which the plaintiff may merely on as aggravating the damages.*

Moreover, "*it is very well established that in cases where the damages are at large the judge on take into account the motives and conduct of the defendant, where they aggravate the injury done to the Plaintiff…………..* In awarding aggravated damages the natural in designation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous, rather than a move which deals with aggravated damages as follows "*The conduct of the defendant his conduct of the case, and his state of mind are this all matters which the plaintiff may rely on as aggravating the damages.*

Moreover, it is very well established that in cases where the damages are at large the judge on taking into account the motives and conduct of the defendant, where they aggravate the injury done to the plaintiff ….. In awarding aggravated damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous, rather than a move moderate award to provide an adequate societal ……. That is because the injury to the plaintiff is actually greater and as the result of the conduct exalting indignation, demands, a more generous solliatum"

At page 12 line 5 from the top the learned judge continued this "*In this instant case the defendant here not stated when they discovered the error. When the matter came up for hearing on the 19th February 1998, a draft apology dated the same date was filed in the court file and it was agreed that the same would be published on Friday 27th February l998 in the Standard, Nation and Kenya times. By the time the hearing resumed on the 4th March l998 the defendants had not published the apology is as had been agreed. An apology is supposed to be published immediately one discovers the error. This was not done in this case. The defendants were then given nine days -19th February to 27th February l998 to publish the apology this again they did not do.*

To be fair to the defendants an apology was subsequently published in the standard and the Nation after the hearing of the case was concluded. The apology in eh Standard was filed away among the advertisements. The apology in the Nation was put away in a corner in a small print.

No explanation was given by the defendants why they flaunted the court order of 19th February, 1998 by not publishing the apology as recorded by the court. This marks of arrogance. It is malicious.

At page 13 lien 2 form the top the learned judge quoted with approval a passage from Mcregovon damages, 13th edition para 1309(a) on evidence to prove malice in aggravated damages:-

"*malice may be shown by the defendant's conduct generally but there are two particular ways in which it has come to be shown by other derogatoriness of tantamount made of the plaintiff by the defendant and by the defendant's persistence in the aviation such persistence being either by way of an unreasonable plea of justification or by lack of any or any adequate apology"*. One has also to consider the conduct of the defendant during trial the cross examination was carried out in a way to justify the publications".

There is also the case of **HON. AMB. CHIRAU ALI MAKWERE VERSUS ROAYLA MEDIA SERVICES LTD NAIROBI HCCC NO. 57 OF 2004**, the learned judge P.J. Ransley as he then was at page 6 of the judgment quoted with approval from the case of **MOLADE AKIWUMI VERSUS ANDREW MORTON AND ANOTHER, NAIROBI HCCC NO. 1717 OF 1999** where at lien 8 from the bottom the learned judge quoted this "*the rationale for any award of damages in our legal systems is to try to compensate the inured person with a sum sufficient to reinstate that person back into the same position. They were in prior to the injury being suffered. Hurt feelings are only awarded in a few exceptional cases".*

The defence on the other hand has submitted in writing that they rely on the defence if justification. Relying on principles derived from **RATANIAL & DHIVAJILALS'S THE LAW OF TORTS 22ND EDN. Reprint** pg. 240-241, Haliburys laws of England, 4th EDN pg.42 paragraph 83, page 42 paragraph 84, Counsel for the defence submitted that the ingredients they have to justification are Estimated here under

(i) In order for the defence of justification to hold, the string of the defamatory statement in its proper

context is true in substance and in fact.

(ii) Justification may be made in their proper context in any meaning which they are reasonably capable of bearing in their natural ordinary meaning or an Innuendo meaning.

(iii) The defendant must prove the justification of defamatory matters alleged but he need not prove the literal truth of every fact which he was stated. It is enough if he proves the substantial truth of every material fact.

(iv) To justify comment a state of facts must be proved to exist which puts it beyond all questions that the comment is well founded. If the comment arises out of facts proof amounting to justification of the statement is a justification also of the comment (see also Clerk & Lindsell on Torts 17th EDN p.1062.

Turning to the article complained of Counsel submitted in defence of the said article that the same was written based on the letter written to the law society of Kenya Chairman, and in so far as the said words were understood to refer to the plaintiff they did not bar or they were not understood to bear or they were not capable of bearing any meaning defamatory of the plaintiff and that in so far as the said words in their natural and ordinary meaning bore and were understood to bear the meaning set out in paragraph 5 of the defence. They were the in substance and in fact because:-

(i) The administration officers remanded at Wajir prison, through the officer in charge of Wajir prison did write to the law society of Kenya to help them trace the lawyer.

(ii) The remanded officers were Benedict Wasindi Alvin Odhiambo and Morris Mala and they had engaged the Plaintiff as their Counsel

(iii) The remanded officers did indeed claim that they had paid the plaintiff Kshs 88,000/= out of the agreed Kshs 150,000.00.

(iv) It is true that the Plaintiff did not appear for mountains of their case forcing frequent adjournments. This is irrespective of the fact that the plaintiff contends that the purpose of the mention did not necessitate his travel all the way to Wajir from Nairobi.

They maintain that the inaccuracy in figures and the number of signatories to the letter that the plaintiff alleges is not enough to initiate the truth of the article and to impute malice, or defamation for that matter.

(ii) it is their stand that the inaccuracies in figures and the number of signatories to the letter that the plaintiff alleges is not enough to vitiate the truth of the article to impute malice or defamation.

(b) mistake or falsehood does not necessarily impute malice or libel.

Regarding the allegation of the plaintiff that the plaintiff did not go into hiding nor decline to attend to the mentions learned counsel submitted that the truth of the matter is that the plaintiff was neither attending mentions nor could he be reached on cell phone. Neither did he make efforts to reach his clients either by cell phone or by paying them a visit at the prison.

(ii) They maintain that lack of contract between the plaintiff and his clients took the clients to seek the intervention of the law society which can be inferred to mean tracing of the law as opposed to the plaintiffs' reputation that the assistance sought might have meant legal aid.

(iii) That it is not disputed that the LSK responded to the plaintiffs clients requests to it for assistance which assistance they gave by asking the plaintiff to respond to the complaint raised. To the defence counsel, the action by the LSK strengthens their inference that the suspects indeed wanted LSK to intervene and cause the plaintiff to make good of the instructions he had accepted.

(iv) They also maintain that since the lawyer took one month to respond to the law society's letter is

sufficient proof that the plaintiff was not readily available.

(v) Further that the plaintiffs explanation to the LSK to the effect that "as for my representation to the accused person not withstanding the fact that what they have paid is not sufficient. My hands are tied in that attending mentions every two weeks or major to ascertain the health of the complainant is not rational at all", goes to show that indeed the plaintiff did not have any intention of attending any of his clients mentions because to him they were not of much importance as evidenced in his letter.

(vi) They also add that considering that the plaintiff's clients were in ……, he could not be ready on phone and he was not attending mentions and he was not also calling them is sufficient truth for saying that he could not be traced. Which leads to a fair comment. On a matter of public interest that the suspects had asked the LSK to help them trace their lawyer.

Turning to the issue of reporting counsel for the defence relying on the decision of Rimita J. as he then was at page 5 of the judgment lien 5 from the bottom where the learned judge observed "the key word here is "reportedly". The reporter or the defendant does not state story to be a fact". In the case of Mongare Gekonga and OMARI MOMANYI VERSUS THE STANDARD LTD NAIKURU HCCC NO.542/97 (UR) the Counsel contends that what the defendant's reporter is saying is that what was reported to them. They do not state the story to be a fact. It could be true or not true.

(ii) They contend that regarding the p plaintiffs assertion that he received 70,000.00 out to f120,000.00 as opposed to the reported 88,000.00 out to f150,000.00, assumed assertion that the letter was signed by Benedict Wasindi and Elvin Odhiambo and not Morris Wala amount small in accusation in figures complied with that of one suspect not signing, do not materially injure the plaintiff having regard to the truth of the other facts.

(iii) Further submitted that in so far as the article may have contained expression of opinion they are a fair comment on a matter of public interest. Justification for this is that legal representation is a matter of public interest, as advocates are officers of the court hence part of the judiciary which is an integral part of the three arms of the government. They contend that as officers of the court, the are supposed to injure that their clients are well represented. The public is entitled to renew that if they give instructions to an advocate and he/she fails to represent them adequately as per their instructions, they have free release of lodging their complaint to the Law Society of Kenya who will in turn write to the Advocate and compel him to respond or redress the complaint against them.

On press freedom and its role in high lighting wrongs they rely on the case of HON. SIMEON NYACHAE VERSUS LAZARUS RATEMO MUSA AND ANOTHER KISUMU HCCC NO. 17 OF 2005. At page 16 lien 3 from the bottom Warsame J. had this to say "*The court must play its role by encouraging mature and responsible journalism. The court must not allow itself to be threat of fighting the press by giving injunctions and overzealous awards in matters involving public interest*".

(ii) *To strengthen their stand on this they submit that the plaintiff who had practiced as a lawyer for five years before taking up the brief subject of these proceedings, must have known that taking a criminal brief entails attending hearings, mentions and visiting his clients in prison. It is therefore not right for the plaintiff to give an excuse that the said maintains were not important enough to warrant his attendance and that the deposit given was insufficient.*

(iii) *They contend that the plaintiff cannot be heard to complain about the distance between Nairobi and Wajir warranting him to justify on attendance at every mention and also to claim that the money was in sufficient when he agreed to take the brief with its attendant consequences within the brief. Having accepted the brief in the condition, was in he should have made six to attend to his clients needs.*

As regards the need for the reporter to verify the information before publishing it, Counsel for the defence contends that the reporter did his best to try and get the plaintiff on his cell phone to no avail. This is a reasonable explanation as the reporter could not have been expected to travel all the way from Wajir to Nairobi to hunt for the plaintiff in order to seek confirmation from the plaintiff who has testified that the

was in Mombasa at the time.

Turning to the issue of the effect, the publication complained of had on the Plaintiffs practice Counsel for the defence submitted that the alleged loss of practice cannot be sustained because:-

(i) The Plaintiffs in ability to produce evidence as to the existence of his practice at the time of the incident as he failed to produce a certificate of registration of a business name and or a lease for the office he occupied a list of his clients at the time telephone bills, electricity bills and any evidence of his employees. All these are proof that the Plaintiff had closed down his firm long before the article was published, that he had no office and no clients at all.

(ii) It is their stand that since at the time of publication of the said article the Plaintiff was in Mombasa, this is an indication that he had closed down his office and was already in the employment of the form of M/S Khaminwa and Khaminwa advocates. More so when he Plaintiff never produced a letter of appointment to the employment of the said firm to show when he was actually employed, which alleges reinforcing their stand that he could have been employed earlier than he claims.

Regarding rendering of an apology by the defendant they contend that the plaintiff should not complain about lack of an apology from the defendant when he never demanded a wife up or further response, neither did he course his version of the truth to be published. His failure to do so is evidence that he was only interested in suing the defendant in order to aggravate damages. That is why he also never sought any interlocutory relief or attempt to mitigate any loss or damage that might have accrued as a result of the said article because he wanted to aggravate damages and has come to court with unclean hands.

On the general jurisprudence on the subject arising from case law cited by the defence. In addition to what is already noted are as follows:-

(1) In the case of **MARTHA KAWA VERSUS STANDARD LTD AND ANOTHER [2007] EKLR) Nairobi HCCC 294 OF 2004** Khamoni J. at page 12 of the judgment 2nd paragraph quoted with approval from the claims in the case of **CHARLESTON AND ANTOEHR VERSUS NEWS GROUP NEWSPAPER LTD AND ANOTHER [1995] 2 AER of 313** where the house of Lords held inter alia that a plaintiff could not rely on a defamatory meaning conveyed only to the limited category of readers who only read headlines. Further that a prominent headline or ahead lien and photograph could not find a claim in libel in isolation from the related text of an accompanying article which was not defamatory when considered as a whole because it was contrary to the law of libel for a plaintiff to server and rely on an isolated defamatory passage in an article of other parts of the article negated the effect of the libel and secondly to the principle that if no legal innuendo was alleged the single natural and ordinary meaning to be ascribed to the words of an allegedly defamatory publication was the meaning which the words which the words taken as a whole conveyed to the mind of the ordinary reasonable, fewer minded reader.

On the same page at lien 11 from the bottom the learned judge quoted with approval from the text Dinion Nell on defamation 2nd Edition l983 pg. 13 paragraph 411 as follows:-

In order to determine the natural and ordinary meaning of the words of which the plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication. This a Plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different right on that passage".

In the case of **MONACURE GEKONGA AND ANOTHER VERSUS THE STANDARD (SUPRA)** RIMITA J. ash he then was at page 6 of the judgment lien 1 quoted from SALMOND on the Law of Torts 14th Edn. Pg/95 thus "*The wrong of defamation consists on the publication of a false and defamatory statement concerning another person without lawful justification. (At pg.54) A defamation statement is one which has tendency to injure the reputation of the person to whom it refers, which tends that is to say to lower him in the estimation of right thinking members of Society generally and in particular to cause him to be regarded with feelings of hatred contempt ridicule, fear, dismiss or esteem.*

In the case of **HON. SIMEON NYACHAE VERSUS LAZARUS RATEMO MUSA AND KALAMKA LTD (supra)** Warsame J. at page 9 of the judgment line 8 from the bottom made the following observation.

1. I appreciate that every man/woman is entitled to his alleged good name and to the esteem in which he is held by them and has a right to claim that his reputation shall not be disparaged by defamation statement made about him/her without lawful justification or excuse. It means that if defamatory statements is made in writing or printing or some other permanent form the tort of libel is committed and the law presumes damages to follow". At page 10lien 4 from the top the learned judge continued "*in my view the object of the plaintiff's case is to vindicate his reputation, character and/or dignity and to make reparation for the private injury done by the alleged wrongful publication. It is therefore incumbent upon a party faced with such situations to prove the truth of the defamatory matter and this show he has suffered injury. In essence it means that the defamation reflects upon the plaintiff personally, therefore the plaintiff must prove that the words complained of were published and/or printed with actual and deliberate malice and without legitimate reason against this character, reputation and dignity. The offence statement must be proved to be false and was published with actual malice towards the plaintiff and causing actual damages".*

The plaintiff want ahead to file a written reply to the defence submission. The court has accordingly gone through it and in it is in this court's opinion it simply reiterates their written submission and qualifies the defence gratification of the plaintiffs submissions as follows:-

1. The Plaintiff has demonstrated thro ugh exhibits produced that the took necessary steps to correct he negative impression attributable to the article firstly by dealing with the Law Society of Kenya letters emanating from the Law Society of Kenya were copied to the complaints and if the reporter was still interested he could have checked and then publishing a correct version of events based on those letters.

2. (i). Though Section 7A of the defamation Act gives the Plaintiff the right of a reply to the allegation there is present in it a corresponding duty on the defendant after discovering that its publication was defamatory to make a conviction without being prompted.

(ii) The defence response to the plaintiffs demand been a tone of finality which left no room for a follow up from the plaintiff.

(iii). The court is urged to find that section 7A of the defamatory Act is not absolute.

3. On case Law cited by the defence, the Plaintiffs response to them is that:-

(i) The case of **Hon. MARTHA KARUA VERSUS THE STANDARD LIMITED** (supra) is distinguishable because the defence relied upon therein was fair comment, where as the defence relied upon herein is one of justification firstly. Secondly it concerned the issue qualification a matter appearing in several articles was to be considered as a whole or the Plaintiff could press out one of the articles and have them considered in isolation. Thirdly herein one article was involved and though the defence had pleaded that he accused's case was a matter of public interest, they changed on submissions to an allegation that the article was a fair comment on a matter of public interest.

4. Regarding the authority of Mongare Gekonga and Another Versus the Standard (supra) the Court was urged to disregard the High Court decision and instead rely on the decision of the Court of Appeal on the same case vide Court of Appeal 223 of 2000 where the central theme in the ruling is that found at page 4 of the judgment line 2 from the top to the effect that "*That the respondent could not plead justification as a defence. The basic facts were false and one cannot justify what is false. Even if we were to accept Mr. Majanja's contention that the issues was one of the public interest in the sense that the public is entitled to knew how advocates did with their clients, yet it is trite law that comment can only be fair if the basic facts upon which the comment is promised are correct. A comment which is base don was or falsehood cannot be designed as fair".* On this account it is their stand that if the reporter failed to get the lawyer or the lawyer failed to cooperate he should have gone to read the court file to

confirm the correct information.

5. Lastly, the court was urged to be persuaded by the stand of J. V. Juma J. in the case of Abraham Kipsang Kiptanui Versus Francis Mwaniki and 4 others Nairobi HCCC No.42 of 1997 by rejecting the change of defence of the defendant in their submissions and dismiss it and instead.

There were also oral high lights of the submissions. The stand of the Plaintiffs was that the defence in its evidence and submission departed from its pleading and so their defence cannot hold whereas the Plaintiff was consistent and supported by the authorities.

Whereas the defence maintained that they rely on the defence of justification as pleaded because:-

(i) The reply from Law Society Kenya confirms that the accused had a right to complain.

(ii) The Plaintiff explanation to Law Society of Kenya as to why he was not attending to the clients could be the but also goes to prove what the defendants had written about was out of reach of his clients.

(iii) Their plea of fair comment on a matter of public interest has a basis in that an advocate is a public figure whose dealings with the clients is also a matter of public interest.

(iv) The Plaintiff did not prove existence of his practice as at the time of publication.

(v) The Court was urged to take not of the fact that the plaintiff failed to exercise his right of reply because he was only interested in claiming.

(vi) On quantum the court was urged to consider the provisions of Section 16A of the defamation Act and make an award not in excess of Kshs 400,000.00.

In addiction to the foregoing this court would like to add own observation on the subject made in its own ruling delivered on the 28th day of September, 2007 in the case of **ANTHONY GACHOKA VERSUS HEADLINE PBULSIHERS LTD AND 4 OTHERS, NAIROBI HCCC NO. 1201 OF 2005.** At page 30 of the said ruling the Court quoted with approval Halisbuys Laws of England 4th Edition Volume 28 page 41 paragraph 82 on truth as a defence on the defence of justification. It is stated "*The defence of justification is that the words complained of were true in substance and in fact. Since the law presumes that every person is of good repute until, it is for the defendant to plead on proven defamatory words complained of consist of fact and comment, he must prove that the defamatory statement of fact are true or substantially true and that the defamatory inference borne by the comments are true".*

At line 5 from the bottom the court also quoted from Winfield and Jowiez on Tort 15th Edition l998 London Sweet and Maxwell l998. At page 416 2nd paragraph it is stated "*It is on general principle that the justification must be as broad as the charge and the defendant must prove that the content of the statement must be true not merely that it was made"*

At page 417 last paragraph it i8s stated "*just on the Plaintiff of any defamatory meaning which Is not plain ordinary meaning of the words and so must the defamer make clear and explicit the meaning he seeks to justify. This it will be observed is not quite the same as requiring him to specify what the words do mean".* At may one note in his defence of his preparedness to justify two or three different meanings and was not obliged to pick one of those.

At page 31 of the same ruling 2nd paragraph the Court had occasion to quote from the text on media law on the rights e.g. found lists and Broadcaster second edition, Longman page 56 last paragraph where it is stated "*Truth is a complete defence to any defamatory statement of fact, whatever the motives for its publication, and however with its revelation is unjustified or contrary to the public interest. The legal title of the defence justification and it operates whenever defendants can show by admissible evidence that the allegation is on a balance substantially correct. On substance it is not necessary to prove that*

every single fact stated in the eviction is accurate so long as the “string” *(its defamatory impact) is substantially true….. The fact that a defamatory statement has been made or the fact that a defamatory rumor exists, is no justification for publication. The law requires the law requires the truth in such cases to be the truth of the rumor not the truth of the fact that it is circulating”.*

At page 61, on honest comment as a defence. It is stated that “*It protects the honest expression of opinions, no matter have unfair or exaggerated, on any matter of public interest. The question for the court is whether the claims could honestly have been held by a fair minded person on facts known at the true”.*

At page 64 it is stated “*The fair comment defence is defeated by proof that the writer or publisher was activated by malice in the legal. Sense of that from. It will resolve itself into the question of whether the document was honestly made*”.

At page 65 2nd paragraphs that the defence of fair comment may only be sustained if the comments is on a matter of public interest …….. *Courts have held that the public is legitimately interested not merely in the conduct of public officials and institutions but also of private competence whose activities affect individual members of the public”.*

On the same page 32 line 5 from the bottom the court quoted with approval Gatley on libel page 161 paragraph 71, it is stated “*to succeed in an action of defamation the plaintiff must not only prove that the defendant published the words and that the said words are defamatory but also has to identify himself as the person defence.*

At page 33 of the same ruling lien 2 form the top there is a quotation from clerk and Lind sell on tort, 17th Edition London, Sweet and Maxwell l995 at page 1018 (paragraph 21-13 where it is stated” whether the statement is defamatory or not depends not, upon the intention of the defendant, but upon the probabilities of the case and upon the natural tendency of ht publication having regard to the surrounding circumstances. If the words published have a defamatory tendency, it will suffice even though the imputation is not believed by the person to whom they are published. The mere intention to vex or annoy will not make language defamatory which is not so in its own nature. Words apparently defamatory may be proved by the evidence of the circumstances to have been understood in another and innocent meaning”.

At page 37 line 10 from the top this court observed “*The law says that rumors cannot be relief upon as a ground of defence. What can be relief upon is that the said rumor is true”.*

Turning to the determination of the claim, it is to be noted that parties neither filed own issues or agreed issues hence the need for the court to draw up issues for determination before assessing the evidence set out above. In this courts opinion, the under listed are issues identified for determination herein.

From the foregoing assessment of the legal principles gathered from legal texts and case law on the subject, it is the opinion of this court that the guiding principles that this court has to bear in mind when assessing the evidence in this matter, as identified by the court are as set out here under. The court is enjoined to take note of the following:-

(1) That the meaning that is to be attributed to the alleged defamatory words has to be derived from the entire publication and not from Sections of it.

(2) The Court has to ensure that the plaintiff’s evidence is backed up by tangible matter.

(3) The court has to note that the defence of justification cannot succeed where the basic facts are false. Likewise a defence of fair comment can only flourish where the basic facts are correct and not on falsehoods.

(4) The defence of fair comment on a matter of public interest is lost where the plaintiff demands an explanation from the defendants, but the same is denied and or the same is given in a manner not adequate.

(5) When assessing damages the court is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. That is, what the conduct has been before action, after action and in court during the trial.

(6) The court has to note that in assessing an award of damages, the sum awarded should be such as to be able to compensate the victim for damages to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused.

(7) The Court has to note that the press has a right to enjoy the freedom of expression. The only fetter to this freedom of expression, or the only faulting factor to it, is that the Court has to ensure that the said freedom has to be exercised with a sense of maturity and at no time should it be used as a weapon to destroy the names of those they hate. At no time should it be used to injure the reputation of others unless the one exercising such freedom is ready to substantiate the injurious allegations.

(8) In the exercise of this freedom of press, it is desirable that the defendant should bother to ascertain the truth of the allegation before he publishes the same. Where a publication in made without bothering to find out the truthfulness of the matter before publication, such a defendant exposes himself to face the consequences of being deemed reckless or malicious or both.

(9) It is a mitigating factor if shown that upon discovery of the error the defendant rendered an appropriate apology.

(10) When searching for malice the Court is to note that malice may be established by:

(a) defendant's persistence in the assertions.

(b) By an unreasonable plea of justification.

(c) By continuing the making of derogatory statements of the plaintiff.

(d) Lack of rendering of an apology.

11. The Court has a duty and a role to play by encouraging mature and responsible journalism. But must not allow itself to be theatre of fighting the press by giving injunctions and over zealous a wards in matters involving public interest.

12. What amounts to a defamatory statement or words, is a statement or words, which when taken as a whole convey to the mind of the ordinary reasonable, fair minded reader a defamatory meaning.

(ii) It consists in the publication of a false and defamatory statement concerning another person without lawful justification.

(iii) It must tend to lower him in the estimation of right thinking members of society generally and in particular to cause him to be regarded with feeling of hatred, contempt ridicule, fear dislike, or lower esteem.

13. The court to sake note of the fact that every man/woman is entitled to his alleged good name and to the esteem in which he/she is held by others and has a right to claim that his reputation shall not be disparaged by defamatory statement made about him/her without lawful justification or excuse.

14. The Plaintiff has a duty to prove that the words complained of were published and or printed with actual and deliberate malice and without legitimate reason against his character, reputation and dignity.

15. The court has to note that though Section 7A of the defamation Act Cap.36 Laws of Kenya gives the Plaintiff a right of reply to allegations, there is also present in it a corresponding duty on the defendant to make correction as soon as the correct facts are presented to them or come to their knowledge, without being prompted.

16. It is correct that, it is a matter of public interest to publish dealings of advocates with their clients as the public has an interest to know the dealings of advocates with their clients. But justification for this is only to the effect that the publication should not be false.

17. The law presumes that a person is a person of good repute until the contrary is proved.

18. It is not necessary to prove that every single fact stated in the criticism is accurate so long as the "sting" (defamatory impute) is substantially true.

19. The fact that a defamatory rumor exists is no justification for publication.

20. The law does not protect rumor but the truth in the rumor.

21. The law also protects the honest expressions of opinions no matter how unfair or exaggerated on any matter of public interest.

22. The court is also to note that the public is legitimately interested not merely in the conduct of public officials and institutions but also of private companies and institutions whose activities affect individual members of the public.

23. Whether a statement is defamatory, or not, depends not upon the intention of the defendant but upon the natural tendency of the publication having regard to the surrounding circumstances.

(i). If the words published are defamatory they will have effect irrespective of whether believed by the person to whom published or not.

(ii). The mere intention to vex or annoy will not make a language defamatory though some times defamation words may be understood to convey a completely innocent meaning.

Neither party drew and filed issues for determination. This necessitates the court to draw up its own issues for determination as it progresses with the assessment.

(1). The first issue to be determined is whether there was a publication that gave rise to these publication. This is answered in the affirmative as the same has been proved by the production of exhibit I.

(2). Whether the said publication concerns the Plaintiff herein. This too is answered in the affirmative as shown by the pleadings, exhibit 1, and the evidence of both parties. The Plaintiff has therefore been identified as the person forming the subject of the article published by the defendant, in exhibit 1.

(3). Whether the plaintiff is an advocate of the High Court of Kenya and whether at the time events leading to these proceedings, he was acting as such and had been engaged by the persons mentioned in the said article namely Benedict Wasinde, Alvin Odhiambo and Morris Mala to render professional services to them, namely representation of the named persons in a criminal prosecution for the offence of Robbery with violence in Wajir court. This too is answered in the affirmative, because though the plaintiff produced no documentation to prove that he had leased an office, hired staff, there seems to be no serious contest on the plaintiff's stand, that indeed he had been hired by the named persons in his professional capacity to represent them in criminal proceedings. Further fortification for this comes, from the content of exhibit 1,2,3,4,5 and 6 produced by him. The Court therefore makes a finding that indeed the plaintiff had been hired by the named persons in his capacity as legal counsel, to represent them in a criminal proceeding in Wajir Court where they were facing a robbery with violence charge.

(4). The 5th question is whether him plaintiff had been paid any money towards the said services. It is on record from both sides and as per Plaintiff's, own admission that indeed, he had been paid some money, towards the rendering of the said services. The article mentioned receipt of 88,000.00 out of the agreed figure of 150,000.00, where as the plaintiff, mentioned that he had received only 70,000.00 out of the agreed figure and out of this figure of 70,000.00 part of it was to cover cost of an appeal or judicial review of the Wajir Magistrates order of remanding the accused persons indefinitely pending determination of the status of the complainant in that case. It is further contended by the Plaintiff that out of that figure, Kshs 10,000.00 was refunded back to a relative of one of the accused persons who did not want to proceed with the auxiliary proceedings of appeal or judicial review as shown by the content of exhibit 6.

It is therefore apparent that there is a dispute as to the exact amount which had been received by the plaintiff. However as submitted by the defence lawyer, the issue of numbers should not matter much. More so when no duplicate receipts were produced by the plaintiff to prove how much he had received. Of importance should be the establishment of the existence of an advocate/client relationship which if admitted could have even existed if a lesser amount had been paid towards those services. The Court is therefore satisfied that on the facts presented herein, an advocate/client relationship existed between the Plaintiff and the named persons.

(6). The next question is a determination as to whether any complaint was raised against the plaintiff in relation to his professional services to the named persons, and if so who is the originator of the said complaint.

The content of the article in exhibit 1 tends to portray that the complaint had been raised by the officer in charge Wajir, GK prison, on behalf of the three accused persons, namely Benedict Wasinde, Alvin Odhiambo, and Morris Mala. Whereas exhibit 3 reveals that the originators of the said complaint are only 2 of the said three accused persons namely Benedict Wasinde, and Alvin Odhiambo. The 3rd accused person namely Morris Mala did not complain. The finding of this court is therefore that, on the facts presented herein, it is not true as reported in the publication exhibit 1, that it is the officer in charge Wajir GK prison who had complained on behalf of the three.

(7). The 7th question is; what is the content of the said complaint. Exhibit 1 and 3 are the exhibits that are alleged to be containing the complaint. The salient features of exhibit 3 as identified by this court are:-

(i) That the named suspects were currently in remand at Wajir G.K. prison.

(ii) That they had been arrested in connection with an alleged robbery with violence offence.

(iii) That they were seeking legal assistance.

(iv) That they had hired the services of a lawyer by name Martin Tindi and Co. Advocates.

(v). That the lawyer had since gone underground after receiving a total of 88,000.000 out of the agreed 150,000.00.

(vi) That they were unable to hire another advocate.

(vii) That it has been a problem to locate, Mr. Martin Tindi due to the fact that he practices in Nairobi.

(viii) Only two complained.

Where as the salient features of the content of the article are:-

(i) That there are three administration officers remanded at Wajir G.K. prison.

(ii) That the three have written to the Chairman Law Society of Kenya, seeking help.

(iii) That the kind of help they seek from the Chairman Law Society, of Kenya, is to help them trace a lawyer whom they claimed had gone underground.

(iv) The officer in charge Wajir prison has written a letter to Law Society, of Kenya, Chairman, Ahmed Nassir, on behalf of Benedict Wasindi, Elvin Odhiambo, and Morris Mala, to help in tracing down the lawyer who allegedly vanished with the trios legal fees.

(v) The officers facing robbery with violence charges, claim they engaged the services of lawyer Martin Tindi, of Martin Tindi & Co. Advocates, but he has since gone underground.

(vi) They claimed that the lawyer after receiving a total of 88,000.00 out of the agreed 150,000.00 has declined to appear during the mention of the criminal case, at Wajir, Law Courts, forcing frequent adjournments.

(vii) The officers are charged that on July 27,2004 while in the company of others, they assaulted and robbed Herbert Wangila, an officer of his mobile phone worth Kshs 14,000.00.

A copy of exhibit 3 was passed on to the plaintiff by the Chairman Law Society of Kenya for comments, vide, the Law Society, of Kenya, letter dated 08.02.05 exhibit 2. The Plaintiffs response is found in exhibit 4. The salient features of the same are that:-

(i) He had looked at the letter dated 28th January 2005 by Benedict Wasindi and Alvin Odhiambo.

(ii) That him, plaintiff, had attended to the said matter on 12th October 2004 wherein, the court, despite his objection, adjourned the hearing indefinitely to ascertain the health of the complainant.

(iv) That the prosecution had indicated to the Court that the complainant was in a crucial (critical) condition and his life was uncertain.

(v) That the matter had been coming for mention to ascertain the complainant's state of health, who as at that date, when the plaintiff wrote the replies on 29th March 2005 was yet to be discharged, he was also paraplegic and was not yet able to go to Wajir.

(vi) That the matter could only proceed on the complainants' appearance in Wajir Law Courts.

(vii) That on 12th October, 2004, him plaintiff, had appeared in Court, and raised a preliminary objection, to the accused persons, being held indefinitely in custody, but the Honourable Court, overruled his objection. The remedy therefore lay in appearing.

(viii) That he had been in Wajir for 2 days, and the allegation that he had gone under ground was malice driven.

(ix) Him Plaintiff as well as the parents of the accused persons who were the instructing clients were shocked to read the article in the Saturday, Standard that he was hiding.

(x) That information gathered from the parents of the accused persons, who were his instructing clients was to the effect the there was a misunderstanding between the accused persons, and their parents, who were the instructing clients.

(xi) That the agreement between him and the accused persons was that each was to pay 100,000.00 as legal fees, out of which, 150,000.00, was to be paid upfront. But they raised 30,000.00 which enabled him to proceed to Wajir for the hearing.

(xii) That on coming back, he briefed his instructing clients, what had transpired in Wajir, and expressed an opinion that they needed to appeal against that decision.

(xiii) The instructing clients, raised 40,000/=, but one of them disagreed and withdrew 10,000/= citing lack willingness to proceed.

(xiv) That him plaintiff, had duly advised the parents of the accused, that the only remedy for the Wajir, case lay in appearing against the magistrates' ruling which stated that the matter could only proceed to hearing only after the complaint, is discharged from Kenyatta hospital. As long as the complainant, was in hospital, the matter could not proceed.

(xv) To him notwithstanding what had been paid, it was his view, that attending Wajir, for mentions every 2 weeks to ascertain the health of the complainant was not rational at all.

(xvi) That the complaints raised had not been brought in good faith.

The Law Society (LSK) responded vide exhibit 5 dated 1.4.05 to the effect that they had not seen any merit in the accused persons' complaint.

It is against this background information that the Plaintiff has anchored his claim, claiming that on the facts presented, he is within the law of defamation. Whereas the defence allege that he is not. It is therefore necessary to examine the relevant provisions of law, examine them and then apply them to the facts herein to determine who is within the law of defamation and who is not.

The first stop is the provision of Order VI rul3 6A (1) (2) (3) and 4 and Order VI rule 6 B. These provides as follows:- Order VI rule 6A(1) requires the Plaintiff to set out the facts alleged to be containing the defamation and give particulars of the alleged meaning other than the ordinary meaning of the words. The Plaintiff complied with this requirement by setting out the words in paragraph 3 of the plaint and the defamatory meaning attributed to them in paragraph 4 thereof.

Order VI rule 6 A (a) requires the defendant, where he alleges that the words complained of consist of a statement of facts which are true in substance, and fact, and where they consists of expressions of opinion, they are fair comment on a matter of public interest. He is required to give particulars of the words complained of which he alleges to be a statement of fact and matters he relies on in support of the allegation that the words are true.

The defendant complied with the rule by denying the meaning attributed to the said words by the plaintiff in paragraph 4 thereof. They went on to plead in paragraph 5 of the defence, that the words complained of were true in substance and in fact and gave particulars of the alleged truths, thereof.

The foregoing coupled with the fact that no complaint was raised about either party's mode of pleadings, leads the court to make findings that the manner of pleading is proper and in accordance with the law and so they merit consideration as it is being done.

The defences available are those found in Section 7A on the right to reply, Section 12 on publication without malice, Section 14 on justification, and Section 15 on fair comment. The defence availed itself of the defence of fair comment under Section 15. Where as in their submissions, they have also sought to avail themselves of the defence of justification in Section 14 and failure to exercise the right of reply on the part of the plaintiff under Section 7A of the act.

The defence of the plaintiff to that claim is that, indeed the right of reply is available to the plaintiff in Section 7A of the Act, but failure to so exercise that right does not absolve the defendants from blame as the right bestowed on them is not absolute. There is also a corresponding duty on the defendant to correct the wrong impression created by their publication. Further that the defendants failed to mitigate damages by rendering an apology even after one had been called for by the plaintiff in the plaintiffs' letter, exhibit 7 and the defendant's replies exhibit 8.

The said section provides:-

"***7A(1)*** *any person or body of persons shall be entitled to a right of rely to any factual inaccuracy affecting them which has been published in a newspaper and which is damaging to the character, reputation, or good standing of that person or body of persons.*

(2) *Where a person or body of persons is entitled to a right of reply under sub section (1), a correction shall be printed in the next possible edition of the newspaper.*

(3) *The correction shall be printed free of charge and be given similar prominence as the item complained of and shall appear at a similar place in the newspaper.*

(4) *The correction must be of such length as is necessary to identify the original items.*

(5) *Any person or body of persons seeking to exercise the right of reply under the provisions of this section shall do so in writing to the editor or publisher of the newspaper within a period of fourteen days, from the date of publication of the damaging material provided that the right of reply shall not be exercisable after a period of six months, from the publication of the relevant damaging material.*

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

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

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

Submissions of each side on the satisfaction or non satisfaction of the said defence or availability or non availability of the same are already on the record. The duty of this court is simply to bear them in mind when determining, whether they hold and or available or that they do not hold hence are not available.

As noted earlier on, publication proved by production of exhibit is not in dispute. It is the content which is in dispute, only in so far as the meaning and imputation is concerned as well as the reason for publication.

The defendant pleaded truth in substance and fact. They gave 3 aspects as items of the said truth namely:-

(a) That it is true that the administration officers remanded at Wajir prison, through the officer in charge of Wajir Prison wrote to the Law Society of Kenya to help them trace their lawyer.

(b) That the remanded officers were Benedict Wasinde, Elvin Odhiambo and Morris Mala and they had engaged the plaintiff as their counsel.

(c) That they claimed they had paid the plaintiff Kshs.88,000.00 out of the agreed Kshs.150,000.00 but he declined to appear for mention of their case forcing frequent adjournments.

The particulars of truth given in the said paragraph are:-

(i). The officers were remanded in Wajir Prison.

(ii). The officer in charge of Wajir Prison wrote to the Law Society of Kenya Chairman at the time.

(iii). The officers claimed that the lawyer failed to appear at Wajir Law Courts for mention of the case.

When the content of paragraph 5 of the defence is taken, and married, to the originating document exhibit 3, and the publication exhibit 1, this court makes findings that they do not tally. Contrary to the principles of law set out herein, the defence, instead of taking the publication or a whole, they lifted out what they believed favoured them and left out what did not favour their stand.

The principles of case Law, as well as those from legal texts, enumerated earlier or in this judgment, enjoins not only the parties but also the court not to dismember or server the publication but consider it as a whole when determining its truthfulness or when determining whether it bears any defamatory meaning. This means that this court has no alternative but to ignore the particulars lifted out of the said publication, by the defence to be the only ones for consideration and revert back to the publication in exhibit l and consider it as a whole.

This consideration is to be done in comparison with the content of the complaints letter, exhibit 3. When so compared the court finds that items of truth set out in item (a) (b) and (c) in paragraph 5 are true as they form part of the content in exhibit 3. The court also finds that particulars (i) and (ii) are correct as they are also reflected in exhibit 3. Particular. (iii) is not true.

In addition to particular (iii) which is not true, there are other un truths in the said publication which the defence chose to leave out when considered in the light of the totality of the evidence on record. These are:-

(i) It is not true that all the three Administration police officers remanded at Wajir, prison, had written to the Law Society of Kenya (LSK) to help them trace a lawyer whom they claimed had gone underground. The correct position from the content of exhibit 3 is that only two of them complained.

(ii) It is not true that the officer in charge of the Wajir prison had written a letter to LSK Chairman Ahmed Nassir on behalf of Benedict Wasindi, Elvin Odhiambo and Morris Mala to help in tracking down a lawyer who alleged vanished with the trios legal fees. The correct position is that the officer in charge, simply forwarded the letter written and signed by two of the three officers.

(iii) It is true that the two alleged that they had engaged the services of Martin Tindi, of Martin Tindi, and Co. Advocates but he had since gone underground.

(iv) It is also true that the two had claimed that the said lawyer had been paid 88,000.00 out of the agreed 150,000.00.

(v) It is not however true that the two alleged that the lawyer had failed to appear during the mention forcing frequent adjournments.

(vi) It is however true that the three officers had been charged with the offence of Robbery with violence in that they had assaulted and robbed one Herbert Wangila.

(vii) It is also evident that it is not true that the Law Society of Kenya, Chairman was asked to help in tracking down the said lawyer. The two simply asked for the LSK Chairman for legal assistance because they were unable to hire another lawyer. They also added that they could not locate the said lawyer because the lawyer practices in Nairobi.

This Court is aware of the legal requirement both in sections 14 and 15 of the Defamation Act, Cap. 36, Laws of Kenya, that it is not necessary that each and every allegation complained of be found to be true especially those that are not central in the publication. This court has given due consideration of the said

two sections alongside the principles of law enumerated herein, as guiding principles for this court in the assessment of the facts and finds that the untruths identified by the Plaintiff as set out in his plaint as well as above by this court are not peripheral. They are central. By virtue of them being central, they cannot be ignored. They form the core of the Plaintiffs complaint against the defendant. They form what the plaintiffs Counsel has termed spices of the story.

Before turning to the merits of the said untruths, it is better to interpose here a question as to whether the defence witness (D.W.1) is entitled to claim the right to publish the story as a matter of public interest. Persuaded by the superior courts' decision in the Daniel Musinga case (supra) and the Gekong'a Mong'are case as well as the guidance from the CA decision on the same GEKONGA MONGARE case (supra), matters touching on advocates/clients relationship are matters of public interest. Though an advocates' practice is a matter involving a private institution, namely the advocate's firm, the advocate's dealings with members of the public is a matter of public concern and interest. It is therefore this courts finding that D.W.1 was entitled to publish such a story minus the untruths.

The duty placed on D.W.1 is that one observed by Warsame J. in the Simeon Nyachae case (supra) that the right to high light such ills calls for responsible and mature journalism. It therefore follows that D.W.1 in the exercise of that right was enjoined to practice a sense of maturity in his practice of responsible journalism. This entailed him not to spice up his stories, and confirm the content before publication. Where he fails to do so principles in case law, on the subject, state that he will be called upon to make good the damage.

The question to be paused at this juncture, is a determination as to whether D.W.1 in the circumstances of this case, practiced responsible and mature journalism when publishing the said story. In this Courts opinion he did not do so because as submitted by the Plaintiffs lawyer, this could have been achieved by:-

(i). Publishing the content of the complaint letter exhibit 3 in the manner it had been written.

(ii). By avoiding spicing the story as he did by adding the untruths identified by the court.

(iii). By interviewing the complainant or the accused persons to get the correct position of the matter.

(iv). By perusing the Court file.

(v). By confirming the correct version from the plaintiff.

It is on record that although D.W.1 said that, he allegedly made efforts to trace the plaintiff, to confirm the content of what he D.W.1 intended to publish, he gave no details of the mobile phone number which he allegedly used to get in touch with the Plaintiff. Neither does he say how or from whom he got the said mobile phone number.

In response to this assertion, the plaintiffs' lawyer invited the court to find that D.W.1'S allegation and or assertion that he tried to contact the plaintiff to confirm the story, to be, untrue for reasons given. This Court agrees with the Plaintiffs' counsels, assertion that D.W.1's allegation that he made attempts to confirm the story to be untrue because of the following:-

(i) As noted earlier, he D.W.1 gave no details of the mobile phone number he tried to contact P.W.1 through.

(ii) He D.W.1 did not reveal from whom he got the said mobile phone number.

(iii) If it is true, that he failed to get the plaintiff, then the most next prudent action, that he could have turned to if he was sincere was to turn to the accused persons, who had complained, who were within reach of D.W.1 who was also within Wajir where the prison in which the complainants were detained then was situated

(iv) The other prudent action that D.W.1 could have done was to interview the officer in charge GK prison Wajir.

(v). He could also have consulted the court file by perusing the same.

It is on record that D.W.1 admitted both in Examination in Chief as well as cross-examination that he neither consulted the officer in charge GK prison Wajir, the accused persons who had complained, neither did he consult the court file. Even after the notice to sue had been issued and the action filed, he did not consult the records to confirm the correct position. Even after the matter had reached the Court room, discovery done and copies of documents relied upon by the Plaintiff in support of their case supplied D.W. 1 through the defence did nothing to correct the position.

Turning to the issue of determination as to whether the content of the publication in exhibit 1 is defamatory of the plaintiff, the first stop is paragraph 4 of the Plaint which contains the innuendos relied upon. These have already been set out elsewhere in this judgment. In summary the Plaintiff alleges to have been portrayed as:

(a) a dishonent person.

(b) a person of dishonourable conduct.

(c) A person not fit to practice law.

(d) A person who had gone into hiding after receiving legal fees.

(e) A fugitive who had to be traced by the relevant authorities.

(f) A person who is the sole cause of the sufferings of the clients.

This Court has given due consideration to those innuendos and considered them in the light of the defence put forward by the defence, both in their pleadings and secondly those raised by them in their submissions namely:-

(a) Fair comment

(b) Justification

(c) Failure to offer a reply, and proceeds to make the following findings on the same.

On fair comment, the central theme in Section 15 is that such a defence will not fail “by reason only that the truth of every allegation of fact is not proved If the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as ore proved”.(emphasis own).

This Court has already ruled on the issue of fair comment herein in this judgment, to the effect that in order to succeed the truths proved must be central to the theme of the publication. This court has made a finding when dealing with the particulars of the truths pleaded in paragraph 5 of the defence that truths, proved were not central to the publication. The untruths not proved were the ones which were central to the publication. For this reason the defence of fair comment pleaded by the defence has been ousted. The general rule is that it has to be anchored on correct information. Herein it is anchored on incorrect information.

As for the other two defences of justification, and failure to furnish a reply by the plaintiff, it is conceded by this court as submitted by the Plaintiff’s Counsel, that a party is bound by his pleadings. However failure to so plead does not bar the court from considering the same in the light of the pleadings herein, since they are matters touching on points of law. Order 6 rule 7 of the Civil Procedure Rule

provides “*a party <u>may</u> by his pleading raise any point of law*” the operative word here is ‘*May*”. The use of this word gives a leeway to the defendant to plead the points of law or not. Existence of this lection gives room for the defendant or plaintiff to raise points of law even if not pleaded. It is therefore the finding of this Court that the defence was justified in raising them at the submission stage. The only hurdle they have to pass is a demonstration on that them same is available to then or not.

Justification is provided for in Section 14 of the Act. The central theme in this Section is that <u>the allegation must contain 2 or more distinct charges against the plaintiff.</u>

(b) <u>It is not necessary to prove all the charges.</u>

(c) <u>It is available if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truths of the remaining charges.(emphasis own).</u>

Applying that to the facts herein, it is clear that as ruled by this court earlier on the charges proved and relied upon by the defendant, were central to the publication. The charges or untruths not proved, were the ones proved to have been central to the publication.

For this reason the court, makes a finding that this defence is not available to the defendant.

As regards failure to reply on the part of the plaintiff as required by Section 7A of the Act, the Court, is in agreement with the Plaintiffs’ Counsel, that failure to so comply by the plaintiff does not give the defence a walk over in so far as the plaintiffs claim is concerned. There is a salient corresponding duty on the part of the defence to publish the correct information once the same is brought to their notice. Further failure to so comply does not oust the Plaintiffs claim but acts as a mitigation in damages.

Having ousted the defences available to the defendant, of fair comment, and justification and having qualified the failure to reply by the Plaintiff, the question for determination is whether the plaintiff’s plea of defamation stands. It is on record that as per the relevant principles, the publication has to be taken and considered as a whole in the light of the defences and the innuendos put forth by either party. This Court has done so and it is satisfied on a balance of probability that on the facts displayed, and for the reasons given, the central theme in the publication was defamatory of the plaintiff as a lawyer. The seriousness of the defamatory remarks arises because this Court has judicial notice of the fact that an advocates hunting ground, is the clientele he operates in. If that is destroyed, he cannot practice his profession.

Having so established defamation, the Court comes to the assessment of damages. The guiding principle as set out herein, are that the Court, has to consider the conduct of the defendant before action, after action, during the proceedings, and after the proceedings, before judgment. This court has taken due consideration of these factors, and related them to the conduct of the defendant displayed herein and makes the following findings:-

(1) The conduct of D.W.1 before publication was one of an I don’t care as he never bothered to check the correctness of the information from the court record, plaintiff himself, the complainants, accused persons, the officer in charge Wajir GK prison, and the Chairman of the law society of Kenya.

(2) At the moment of publication, he DW.1 in particular and the defendant on general failed to note that spicing up the story having regard to the existence of a client/advocate relationship was likely to give rise to an action for defamation.

(3) After exhibit 7 was brought to their notice, they defendants, still displayed an I don’t care attitude by not only refusing to admit liability but also to fail to render an apology.

(4) After discovery and being availed documentary proof, of the correct position, of the matter, as shown by the content of exhibit 3,4 and 5, they did not attempt to offer an apology.

(5) Even after the plaintiff gave evidence clarifying any grey areas in the matter, the defence showed no

remorse for their action.

(6) At the submission stage, they still maintained their stand. The type of conduct displayed herein is one, case law, terms reckless and it is the one that invites a finding from the court that a defendant who has behaved in such a manner, be held accountable for his conduct in terms of damages.

The heads of damages claimed by the Plaintiff are set out in the plaint herein. The duty of this court is to determine if each has been established, and where so established determine the amount of the quantum. In the assessment of the quantum, the court, has to bear in mind the fact that the sum must compensate the victim for his reputation, vindicate his good name, and take account of the distress, hurt, and humiliation which the defamatory publication has caused.

This court has applied all these factors to the facts displayed herein, and note that although the publication was damaging on to the plaintiff, it did not cripple the plaintiff's tools of trade, namely, the right to use his profession to earn a living. Though he complained that he was forced to close down his office, of which proof he did not provide, his means of sustenance has not been seriously affected as he is still practicing his profession though in an employed position. He therefore has a chance of naturing and, sharpening his skills for future prominence.

Zeroing in to the nature of damages sought from the defendant, the first heard of damages are set out in prayer (a). These cover general damages for libel. Prayer (b) seeks exemplary damages. Prayers (c) aggravated damages. Guiding principles as regards circumstances under each head is awarded are now settled. These are derived both from, the legal texts and case law by both the superior Court and the Court of Appeal. The superior Courts decisions are persuasive to this Court where as those of the Court of Appeal are binding. As shown by case law set out herein, the applicable principles are the same in both Courts.

The general rule is that exemplary damages are only awarded in limited instances, namely in oppressive, arbitrary or unconstitutional actions by servants of the government. Here in no such oppressive or arbitrary, unconstitutional conduct has been displayed by the defendants such as persistent publication of the story. The Courts finding is that this heard has not been established.

Factors favouring an award of aggravated damages are:-

(a) Manner of publication and extend of circulation. Herein the manner of publication is one which was spiced up. Extent of circulation, is extensive as the Court has judicial notice of the fact that the particular daily in which the publication was made, has both a nation wide circulation. Internet circulation bringing it to the international circulation scene cannot be ruled out. But the Court gives the benefit of doubt for the international circulation as it was not pleaded firstly, and secondly it may not have been widely used, in the year 2004 as it is now.

(b) The defendant's actual malice. Malice was not pleaded. What has been displayed here is reckless reporting.

(c) Defendant's subsequent conduct is one of indifference.

(d) Failure to apologize – None was tendered by the defence. Even after a demand note was given asking for an apology, none was given. During testimony when D.W.1 was asked if he was ready to apologize, he withheld the same.

(e) Justification – the defence of justification failed though at some point the court ruled that maters touching on an advocate/client relationship is a matter of public interest and consumption. The Court however went ahead to state that the right to so publish enjoins the publisher to act responsibly by practicing responsible journalism..

Journalism failing which he faces action for damages. The Court went ahead to find that in the instances

demonstrated herein, the defendant did not display conduct or behaviour demonstrating responsible journalism.

(f) On conduct of the defendants case, the court has already ruled that both D.W.1 in particular and the defendant in general have displayed a conduct that depicts, recklessness and indifference both in publication in exhibit 1, failure to apologize and reasons given in exhibits 8, failure to publish a correction or render an apology after receiving the documentation relied upon by the plaintiff and failure to apologize both at the trial stage and the submission state.

In view of the foregoing reasoning, this is a proper case where aggravated damages are awardable. Doing the best I can, the Court award Kshs 1,000,000.00 one million under this head.

As for general damages under prayer (a), the Court is persuaded by the reasoning of Warsame J. in the **SIMEON NYACHAE CASE (supra)** that over zealous awards are likely to muzzle freedom of expression.

The Court also takes into consideration the provisions of Section 16 of Cap.36 Laws of Kenya which is to the effect that no apology was rendered by the defence hence no plea in mitigation of damages. The court stands guided by the award of Kshs 6,000.000.00 in the case of **JOHNSON EVANS GICHERU VERSUS ANDREW MORTON C.A. 314 of 2000** decided on 14th October, 2005. It involved the reputation of a prominent Court of Appeal judge then, now the Chief Justice of the Republic of Kenya. The Court took into account an element of profit making by the publisher who had published the offending book.

In the case of **DANIEL MUSINGA t/a MUSINGA AND CO. ADVOCATES VERSUS NATION NEWSPAPER LTD (supra)** an award of Kshs 10,000.000.00 to an advocate who had been accused of theft of clients funds was made.

In the case of **ABRAHAM KIPSANG KIPTANUI VERSUS FRANCIS MWANIKI AND 4 OTHERS (supra),** the factors taken into consideration were that the publication involved allegations of commission of offences. The court awarded kshs 3,500.000.00 as general damages and Kshs 1,500,000.00 as aggravated damages.

The case of **KARIMI HADI VERSUS KENYA AIRWAYS LTD AND 2 OTEHRS (supra)** which involved accusation of drug trafficking which in a serious international crime, the Court awarded Kshs 5,000.000.00 as general damages and 1,000.000.00 as aggravated damages.

The case of **HON. AMB. CHIRAU ALI MAKWERE VERSUS ROAYAL MEDIA SERVIES LTD HCCC NO. 57 OF 2004 (supra)** the Court awarded Kshs 1,000,000.00 as general damages, 1,000,000.00 exemplary damages and 1,000,000.00 as aggravated damages.

Due consideration has been given to those awards in past decisions. In addition to other principles enunciated on record as regards awarding damages, the court, also considers, the following:-

(a) an award of damages should not enrich a party but restore him to the position he was in before the injury.

(b) Awards in past decisions are mere guides and each case should depend on its own circumstances.

(c) Inflationary trends should be taken into consideration where awards in past decisions are taken into consideration.

Due consideration of all relevant factors taken into account and doing the best I can and avoiding the trend of making over zealous awards, the Court awards the plaintiff kshs 3,500,000.00 as general damages for libel.

I therefore enter judgment for the plaintiff against the defendant on the following terms:-

(a) Aggravated damages kshs 1,000,000.00

(b) General damages for libel Kshs 3,500,000.00

(c) Costs of the suit.

(d) Interest on (a), (b), and (c) at Court rates from the date of judgment till payment in full.

DATED, READ AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY 2008.

R.N. NAMBUYE

JUDGE