REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 1869 of 1998

ANYASI OLUSESE…….……1ST PLAINTIFF

SAMMIE MACHARIA…….……2ND PLAINTIFF

- Versus –

THE STANDARD LIMITED……..1ST DEFENDANT

DEO OMONDI……..……2ND DEFENDANT

J U D G M E N T

For the avoidance of doubt, briefly, this is how I have found myself writing and delivering judgment in this suit. It was on the 10th day of March 2006 when the parties appeared before my learned brother Justice Ojwang that he stated and directed as follows:

"***The taking of testimony in this case over the years has taken place as follows: -***

(a) 20/5/2002 before Waki, J. (as he then was).

(b) 24/10/2002 – before Waki, J.

(c) 5/10/2005 – before Ojwang, J.

(d) 9/11/2005 – before Ojwang, J.

In the course of the four different hearings listed above, the plaintiff's case has closed. What is outstanding is the opening of the Defence case. I have suggested to Counsel that the hearing of the Defence case, should begin before different Judge in the Civil Division. This is because of full – time engagement which I now have in Criminal trials, as well as substantial involvement which I have in the hearing of many part-heard civil matters.

I now direct as follows:

1. Executive Officer to have the proceedings herein typed – within 15 days of the date hereof.

2. Counsel appear before the Duty Judge for mention on 4/4/2006 – for directions for continued hearing within the Civil Division."

On 4/4/2006 Counsel appeared before the Duty Judge as directed by Ojwang J. and the said Duty Judge, by then Visram, J. further directed that proceedings be typed expeditiously for a hearing date to be taken

at the Registry on priority basis.

Pursuant to those directions, on 4/2/2008 Counsel for the Plaintiff fixed the suit for further hearing on 9th and 10th July 2008 and served the Defendant's Counsel with the relevant hearing notice.

By 9th July 2008 I was the Head of the Civil Division and the case was unfortunately listed before me for hearing. At the same time, certain changes had taken place with regard to the parties. These were that the 1st Plaintiff had decided to act in person and had therefore dropped his advocates M/s C. N. Kihara & Company. Further M/s Guram & Company Advocates had replaced M/s Mohammed & Muigai, Advocates as Counsel for the Defendants. Furthermore, the 2nd Plaintiff had passed away and this being a defamation suit, M/s C. N. Kihara & Company Advocates for the 2nd Plaintiff, do not seem to have seen it fit to bring in substitution for the 2nd Plaintiff and therefore there was no appearance for the 2nd Plaintiff before me on 9th July 2008 – it being assumed that the 2nd Plaintiff's case against the defendants in this matter had abated.

Before me therefore on the 9th day of July 2008, Mr. Billing, the Counsel, then conducting the Defendant's case, informed the court that they were not offering any evidence and that they were therefore closing the case for both defendants.

Thereafter I recorded a consent to the effect that since previous proceedings were typed, the 1st Plaintiff and Mr. Billing to exchange and file their respective written submissions by 23rd July 2008, latest, to enable me write and deliver judgment on the basis of the already recorded evidence and the said written submissions. That is exactly what I am doing the parties having complied with their consent order aforesaid.

I have heard the opportunity to read the pleadings, the evidence adduced during the trial before Waki J. as he then was, and Ojwang, J and written submissions by the 1st Plaintiff and Mr. Billing. The basis of the suit is defamation in the form of libel alleged to have been published by the Defendants against the Plaintiffs on 31st August 1997 and 13th September 1997.

By that time the 1st Plaintiff was the Attorney General's representative to the Music Copyright Society of Kenya (MCSK), a company limited by guarantee and dealing in local and foreign copyright music matters and processing the payable royalties to artists and/or musicians by the designated user and/or beneficiaries. The 2nd Plaintiff was the Chief Administrator of the said Music Copyright Society of Kenya.

The 1st Defendant was and still is a limited liability company duly registered under the **Companies Act, Cap 486**, **Laws of Kenya** and engaged and still engages, among other business activities, in the printing, publishing, distribution and sale of the East African Standard Newspaper, a large daily newspaper with a wide circulation in Kenya and elsewhere in the world. The 2nd Defendant was at the material times believed to have been employed by or working for the said 1st Defendant as a journalist or writer, servant and/or agent regarding editorials, articles, feature and story writing and related matters thereto, for the use and benefit of the 1st Defendant.

On the 31st August 1997 the said defendants wrote and published or caused to be written and be published in the East African Standard Newspaper, Sunday Standard Edition, of and concerning the Plaintiffs in the way of their said offices or occupations in the form of newspaper articles in both the front page and else where, the words that are reproduced in paragraph 5 of the Plaintiff's Amended Plaint filed on 22nd November 2000.

The Plaintiffs further aver that, on or about, 13th September 1997 the Defendants wrote and published, or caused to be written and published in the East African Standard Newspaper, of and concerning the Plaintiffs in the way of their aforesaid offices or occupations in the form of a newspaper article, the words

complained of in paragraph 6 of the said Amended Plaint filed on 22nd November 2000.

In respect of the publication of 31st August 1997 as well as the publication of 13th September 1997 the Plaintiffs claim that the publications were done falsely and maliciously and Plaintiffs go on to say that the said words published in their material and ordinary meaning meant and were understood to mean that the Plaintiffs were dishonest officers or persons in relation to the society's funds; that the Plaintiffs had misappropriated the Music Copyright Society of Kenya's funds for personal ends; that the Plaintiffs were incompetent and unfit in the management of the affairs of the Music Copyright Society of Kenya, also referred to simply as the Society; that the Plaintiffs had neglected, frustrated, and defrauded members of the said society by denying them their rightful dues; that the Plaintiffs had engaged in corrupt and tribalistic practices in the running and management of the said society; that the 1st Plaintiff in particular was rude, overbearing and disrespectful of authority and had dishonestly and fraudulently got himself over involved in the financial mismanagement of the society for his personal and selfish ends; that the Plaintiffs were under suspicion and investigation by the police for various corrupt dealings in relation to the management of the society meaning that the Plaintiffs had committed a criminal offence punishable under the Penal Code, **Cap 63 Laws of Kenya.**

The Plaintiffs contended that by reason of the publication of the words complained of, the Plaintiffs were greatly injured in their credit, character and reputation, and in their said offices or occupations and have been brought into hatred, contempt and ridicule. The Plaintiffs' reputation have been lowered in the estimation of the right – thinking members of society who have shunned or avoided the Plaintiffs since the time of the publication.

The 1st Plaintiff added that as a consequence of the publication of the words complained of, he had his highly desired and paid for invitation to visit South Africa to attend a very anticipated rewarding International seminar on Copyright law and its application in Africa withdrawn at the last minute and consequently suffered loss and damage – to the total value of Kshs.200,000/=.

The Plaintiffs therefore prayed that judgment be entered against the Defendants jointly and severally for:

"(i) Damages on the footing of general and exemplary damages.

(ii) Special damages aforesaid.

(iii) An injunction to restrain the defendants and each of them by their servants or agents or otherwise howsoever from repeating publications printing and/or dissemination by any other means of the contents of the publication of the said words or any of them or of any similar words.

(iv) Any other or further relief that this……court may consider just to grant.

(v) Costs."

In their filed statement of defence, the Defendants start by saying they deny each and every allegation of fact in the plaint but turn round to say they admit paragraphs 1 to 4 of the plaint in so far as same are mere descriptive of the parties, but turn again to say they admit having published the words complained of but deny that the same was false, malicious or negligently published.

The Defendants assert that the said words were fair comment made in good faith and without malice upon a matter of public interest, namely, the need for the general public to be informed of the functions, conduct and performance of the Plaintiffs in their employment as officials of the Music Copyright Society of Kenya being the only umbrella body responsible for collection and distribution of musical and artistic products for all musicians and performing artists within Kenya, and of foreign artists for sales within Kenya.

Further they state that in so far as the words consist of allegations of fact, they are true in substance and in

fact. In so far as they consist of expressions of opinion, they are fair comment upon the said matters, which are a matter of public interest. That is said in paragraph 5 of the defence where the Defendants give particulars under **Order VI rule 6A(2)** of the **Civil Procedure Rules** in **sub paragraphs (a) to (h)**.

They go further still to say that the words complained of do not bear the meanings the Plaintiffs are assigning in the plaint and assert that the words were published on occasions of qualified privilege and that thereafter they wrote to the Plaintiffs requesting for their version of the story but the Plaintiffs did not reply.

The Defendants therefore denied that the Plaintiffs suffered any injuries or loss and want the Plaintiff's suit dismissed with costs.

The Plaintiffs filed a reply to that defence stating, among other things, that they had not received the letter the Defendants claim wrote requesting for the Plaintiff's version of the story and pointing out that it was not true they were being investigated by the police for criminal offence.

As each one of the two publications complained of is lengthy, I do not see it appropriate to reproduce them in this judgment. They are reproduced in the plaint aforesaid and Plaintiff's exhibits 1 and 2 were produced in support.

Looking at the recorded evidence, by the time the Plaintiff, Anyasi Olusese, was giving his evidence as PW 1 on 20th May 2002, he told the court he was a retired civil servant having been a State Counsel at the office of the Attorney – General. He went on to say that on a date before 31st August 1997 the 2nd Defendant went to him and the 2nd Plaintiff seeking information concerning a case of theft involving a clerk at the Music Society of Kenya offices. He told the 2nd Defendant that the story the 2nd Defendant wanted would pre-empt a matter already before Police and could jeopardize investigations and prosecution of the suspect as police had not completed investigation which had been going on for two years.

However, on 31st August 1997 he saw a story in the Sunday Standard saying he was involved in the said theft. He was surprised. Those are the words complained of in paragraph 5 of the Amended Plaint starting with the head banner

"***Mystery of disappearing royalties***"

"***THE HUGE MUSICAL RIP-OFF***

(EXCLUSIVE)"

The story is shown written "By Deo Omondi" the 2nd Defendant in this suit and has articles which run up to the top of page 10 of the said plaint.

The 1st Plaintiff told the court that he objected to the story when it says he was involved in the loss of Kshs.2 Million as the Attorney General's representative because that touched on his profession. The 2nd Plaintiff was then the Administrator of the Music Copyright Society and Peter Kagai was their clerk. Peter Kagai was the one who was then under police investigation. He was subsequently charged with 13 counts of theft and forgery and was convicted.

The 1st Plaintiff's objection therefore was that he the 1st Plaintiff, was not involved in any loss of money as the cheques alleged to have been used to steal the money were forged, the 1st Plaintiff's signatures having been forged.

The 1st Plaintiff said he also objected to an allegation of spending Ksh. 1.6 Million in transport. There was no proof and he was not involved. He pointed out that the publications were done during the election

campaign for members of the Music Copyright Society and that words like "fraud, tribalism and frustrating artists" against his name were meant to assist in the campaign and that on 13th September 1997 publication of the second words complained of was done and those are the words found in paragraph 6 of the amended plaint. The alleged offensive words start with head banners

"***MUSICIANS' PLEAS"***

"***sack MCSK board,***

they ask the State"

This is also referred to as the second publication. The writer was merely referred to as

"***Standard Correspondent and Reporter."***

Though published in different words, the subject matter of discussion or the substance is the same. But being in different words, the danger of adding more insults to the insults, if any, complained of in the first publication would be there and it may not have been surprising therefore for the 1st Plaintiff to have complained as he did complain in Paragraph 6 of the Amended Plaint aforesaid and to have gone on to tell the court as he did in his evidence that the said second publication referred to him negatively because they meant he was a criminal stealing musician's money and therefore unfit to hold office in this country. He went on to tell the court that there was no truth in those words – as he was not charged with theft and the person who stole the money was charged and convicted for forgery of his (the 1st Plaintiff's) signature. The 1st Plaintiff therefore added that as a result of those words he suffered damage, his contract was not renewed. His selection to attend a conference in South Africa on Copyright law was cancelled, as can be seen from his exhibit 3, a letter dated 30th September 1997; which cancellation made him suffer financial loss in terms of allowances for the seminar or conference to the tune on Kshs.200,000/=. The said letter addressed to the Registrar General, Attorney General's Office, states as follows in so far as it is relevant:

"***This letter is to let you know that the United States Embassy has withdrawn its invitation to Mr. Anyasi Olusese, State Counsel for Copyright, to attend a regional conference on intellectual property issues, including specific legal issues and implementation. The invitation was issued in a letter to you dated August 25th 1997.***

Given the controversies surrounding copyright issues in Kenya at this time, it would not be appropriate for a leading copyright official to be out of Kenya at a conference."

The 1st Plaintiff continued to tell the court that after his retirement he never got another offer of employment.

During cross examination, the 1st Plaintiff clarified that he joined the MCSK Board in 1988 as an appointee of the Attorney General, not only to advice the Board on matters of Copyright law but also as a representative from the office of the Attorney General for collection and distribution of Royalties which involved the 1st Plaintiff's signing of cheques when the cheques were taken to him to sign because signatures from other directors could not be obtained.

He said the money involved in the case against Peter Kagai, a clerk, was royalties from artists. The 1st Plaintiff added:

"***Yes it was a matter of legitimate concern to the Members and Directors. We reported to the Police because we were concerned. For two years the Police did not take action until we pressed for it.***

There was nothing wrong in informing the public about the theft. Among other things it

involved…..forgery of my signature. What was wrong was to say my signature was on the cheques. It was a forgery. The reporter did question me about the theft of the money but I declined to tell him anything because it was before Police. It might scare the suspect."

The 1st Plaintiff emphasised he was an ex officio of MCSK and was not therefore subject to the election for directors which was due to take place at the time the two publications complained of were published by the Defendants. Other non elective members of the MCSK Board were two members appointed by the Performing Rights Society of London and one representative from the Ministry of Culture and Social Services. The other members of the Board were subject to the election which was due and there was a lot of propaganda and insulting words being used under the guise that Musicians, as members, had a democratic right to air their grievances. The stolen money was an issue during the election campaign in which the 1st Plaintiff had not issued and public statement concerning the stolen money.

He said he was therefore offended by the caption on overhauling of MCSK, not because there was anything wrong for Musicians demanding the overhaul, but because his involvement in that context was wrong. After the first publication was out, reporters looked for musicians to issue statements on interviews based on the said publication and therefore several musicians gave interviews that were included in the second publication, the Defendants having sponsored the musicians in an effort for the Defendants to justify what they were alleging against the Plaintiffs.

The 1st Plaintiff having concluded his evidence, the 2nd Plaintiff who gave evidences as PW 2 took into the witness box. Looking at his evidence concerning the two publications complained against, that evidence contains corroboration of what the 1st Plaintiff said though, admittedly, has other facts not mentioned by the 1st Plaintiff. To begin with, there is what I think a typographical error where the 2nd Plaintiff talks of the date of the first publication complained of as being 1st August 1997 instead of 31st August 1997 as stated in the pleadings, the evidence of the 1st Plaintiff and exhibits and both written submissions. That error therefore does not affect the Plaintiff's case.

Otherwise the 2nd Plaintiff, a trained business executive in corporate Administration, told the court that at the material time he was the Administrator of the Music Copyright Society of Kenya. He said that when he read the first publication complained of, he was very surprised as the publication contained a damaging report with falsehood and was offensive against the MCSK. He said the reference to royalties collected never being passed to the Artists was false and malicious as they distributed the money when available.

As a result of reading the publication, on 1st September 1997 Musician members of MCSK flocked to the 2nd Plaintiff's office demanding an explanation he could not give before calling the governing council and the aim of those musicians was to eject the 1st Plaintiff by force from the MCSK office. The time was campaign time and the musicians accused the two Plaintiffs of eating money belonging to musicians. They said so having read the Defendant's first publication which made those allegations having said also that the Accounts Clerk, Peter Kagai, was being accused wrongfully because the bank cheques relevant had been signed by the 2nd Plaintiff and Olusese, the 1st Plaintiff. The 2nd Plaintiff remarked:

"***That was false because the chits (cheques?) had been forged."***

He went into the contents of the publications pointing out what was false about MCSK and explaining that before those publications were made by the Defendants, MCSK had not yet received complaints from any Artist as was required by the law regarding breaches of relationship rights.

He explained that Peter Kagai was an Accounts Clerk acting as MCSK's Accountant; and that the said Peter Kagai forged the 1st Plaintiff's and the 2nd Plaintiff's signatures and was arrested, prosecuted and convicted for fraudulently obtaining the cheques, obtaining money fraudulently and forgery, the questioned signatures on the fraudulently obtained cheques having been verified by handwriting experts as not having been signed by the Plaintiffs or any of them.

Referring to their meeting with the 2nd Defendant, the 2nd Plaintiff stated that the 2nd Defendant found him with the 1st Plaintiff and told them he wanted an interview with them. By that time the 2nd Plaintiff had been telephoned by the police and the Bank informing him that the 2nd Defendant had gone to the police and the Bank making inquiries concerning matters he now wanted to interview the Plaintiffs about and the two institutions had referred the 2nd Defendant to the Plaintiff's. The 2nd Plaintiff therefore told the court the following:

"***I was careful in answering his questions. I noted he was not doing it in good faith. He had gone to Police. The matter was still under investigation and so I could not answer some questions."***

The evidence continues to the effect that as a result of what the 2nd Defendant published, the 2nd Plaintiff lost his job with MCSK because the publication injured the 2nd Plaintiff's character and moral uprightness and the society turned against him. He also subsequently lost the Gatanga Parliamentary seat because his opponent distributed the article in all centers in the constituency and he was regarded as a dangerous man who could not be trusted especially in the Music Industry. The publication by the 2nd Defendant was that there was misappropriation of funds through cheques signed by the Plaintiffs. The story was intended to show the world that MCSK was not operating properly and that the people responsible for that were the Plaintiffs– and that the police were therefore investigating the Plaintiffs.

Concerning the authority of the 1st Plaintiff to sign cheques, the 2nd Plaintiff said that the 1st Plaintiff as a director had the right to sign for any money passed by the Governing Council. He added:

"***1st Plaintiff was a director representing Attorney General's Office. He was director under the articles. He was a signatory to the cheques. I most of the time passed on to him (1st Plaintiff) cheques for signature. The other director had left the society – so we would turn to him."***

He said that other directors could also sign but it was decided in a meeting of the Governing Council that the Administrator and Olusese be signatories.

PW 3 was Peter Murage Kimani who told the court that he was a musician, recorder and composer and was an MCSK Member No.580 or 582. He said that Anyasi Olusese was one of their directors and Sammy Macharia their Chief Executive Officer and that in August 1997 he (PW 3) saw a report in the Standard that the two, meaning Anyasi Olusese and Sammy Macharia, had stolen money belonging to members. He added that he learned of that information from that report because he had not heard of it before. He said the report he was talking about was in the court in exhibit 1 under the heading "THE HUGE MUSICAL RIP-OFF" dated 31st of August 1997. He did not read exhibit 2.

He said that when he saw the Standard account of 31st August 1997, he was very upset. He went on to say as follows: -

"***It said Macharia and Olusese had stolen our money. We discussed it among ourselves as members. Our office was in Westlands Waumini House. Many of us (more than 300) went there to expel the thieves. I was with – J. B. Maina, Ngatia, Moses Wanyoike, Wamoche Benson, Elizabeth Nyambere, Eliza Wanjari (musicians and members), Wamoche Benson – Dance music. Now he wants to get into gospel music, Elizabeth Nyambere – Gospel music.***

*……**we invaded Waumini House, Westlands. We went there demonstrating. A director, Ndege, calmed us down. We were told any grievances would be investigated. Olusese and Macharia – I had known them as bosses; Olusese as Director; Macharia as CEO. I knew them as good people. Olusese was from the office of the Attorney General.***

They were responsible for the society's management. We felt that the persons accused Olusese and Macharia were bad people. We wanted to expel them from office to stop the theft. We have not got the truth on this matter."

This witness, like the 2nd Plaintiff, told the court that "Standard had a Radio Capital FM" and that that Capital FM used the musician's music but did not want to pay for same as required. I should add that on that issue, the 2nd Plaintiff had told the court that the MCSK is affiliated to the International Confederation of Copyright Societies which sets tariffs for charging of music royalty rates based on International parameter. Based on those tariffs, the MCSK had set a rate of 5% for electronic media operators. The Standard, in collaboration with the Standard Group of Companies were operating as Capital FM 98.4, Radio Broadcaster. Capital FM resisted paying at the rate of 5% and organized a meeting of media houses in London to try and pressurize the MCSK to reduce the royalty rate to 2%. That meeting held in February 1997 reinforced the MCSK's stand that media houses had to comply with rates by the International Confederation of Copyright Societies. They were referred back to MCSK and that decision appears to have angered the Standard Group which, seizing upon the opportunity of an election season for directors of the MCSK, appear to have gone out of its way to try and incite local musicians against the then management of the MCSK.

Accordingly, the 1st Defendant refused to publish the MCSK's correcting views, insisting that MCSK must buy space to put the correction. At the same time the Defendants never apologized or published any correction even after the facts were availed to them by the 2nd Plaintiff.

Going back to the evidence of PW 3, he went on to tell the court that he had no other basis for seeing Olusese and Macharia as bad people and that he was waiting for the truth.

During cross examination, PW 3 told court that before he saw the Standard report of 31st August 1997 complained of, he had heard that an employee of MCSK had been charged. This witness was a member who used to receive payment at Sheikh Karume – near River Road annually. He had never heard fellow members with whom he was being paid discuss the society's accounts. He said they were more than 1000 members and he did not know whether any of them were not being paid properly. He thought that following those events, Olusese and Macharia were suspended and never went back to MCSK office as the members elected other directors.

Those were the three witnesses who testified in this suit and I think what I have recorded above from their evidence is sufficient for the purpose of this judgment.

I now move to what is said in written submissions starting with the Defendant's submissions. Learned Counsel for the Defendants have submitted that the burden of proof is on the 1st Plaintiff to prove he was defamed. They submit that he has not displaced that burden and that therefore there is no liability to attach against the Defendant.

They go on to say that in any event, if there is liability, the defence of "fair comment" made in good faith and without malice upon a matter of public interest would be available to the Defendants. There is no dispute that Music Copyright Society of Kenya deals with collection and distribution of musical artistic products for all musicians and performing artists within Kenya and foreign artists for sales within Kenya. This is also a statutory defence under **Section 15** of the **Defamation Act**. No malice has been pleaded or proved.

The Defendants further submit that the defence of "qualified privilege" is also available to them because the matter was of great public importance in that the Defendants had a legal, moral or social duty to communicate the statement to the public and which communication the public had a corresponding interest in receiving. Counsel refer to ***LONDON ARTISTS LIMITED –VS- LITTLER (1968) 1 W.L.R. 607***.

Also referred to is this court's HCCC No.294 of 2004, ***MARTHA KARUA – VS – THE STANDARD LIMITED, 2003, KLR***, this court being said to have noted that in the article complained of the Defendants were expressing their views on an issue of National importance, and inviting the public to consider the implications of the current policy. It is said the court in that case observed that even though something is said which is false about the Plaintiff, the mere fact of the statement being false is not itself

capable of being defamatory.

The learned Counsel add that the alleged defamation did not make the 1st Plaintiff loose his employment. He told the court he retired in January 1998 at the age of 55 and he did not call evidence to show that because of the publication his contract as a State Counsel was not renewed, nor to prove he applied for employment and was rejected because of the publication.

The Defendants therefore urge this court to dismiss the 1st Plaintiff's suit with costs to the Defendants.

Turning to the 1st Plaintiff's written submissions, he relies upon the evidence of three witnesses who he says have fully proved that the published words in their material and ordinary meaning did amount to defaming the 1st Plaintiff as particularized in paragraph 7 (i) to (viii) inclusive in the Amended Plaint and have also proved in detail the pleadings in paragraphs 8, 9 and 10 of the plaint. The Defendants opted to call no evidence and there is no explanation given. He submits that in the circumstances the defence should be dismissed and Plaintiff's evidence accepted as uncontroverted on the basis of ***OCHIENG J. – VS- STANDARD LTD***, being HCCC No.1760 of 2002.

Otherwise it is submitted that the Defendants admitted, through their filed defence, having published the words complained of but denied that those words were false, malicious and negligently published. That being the position, the Defendants should have adduced evidence to vouch the truth of the allegations. The 2nd Defendant should have taken to the witness box to establish the truth or otherwise of the words complained of – having been named and served as the author of the publication. The famous musicians like Daudi Kabaka, David Amunga, Daniel Kamau (D K) Gacheru, Steve Gatitu, Owino Misiani, Ochieng Kabasseleh and the rest, all mentioned in the publications complained of were all along present and most of them alive. If they were the sources of the material published should have given evidence for the Defendants who pleaded the truth and lack of falsity in the publications complained of. The natural inference to be drawn from the Defendant's failure to call those witnesses is that evidence from those witnesses would have been adverse to the Defendant's assertions in their statement of defence. There is uncontroverted evidence from the three Plaintiffs' witnesses to prove falsity, malice and negligence in the publications. Further, the Defendants have made no attempt to avail of the defence in **Section 12** of the **Defamation Act** and therefore the publications remain malicious and false.

On the defence of fair comment and justification on account of public interest, the 1st Plaintiff submits that this defence is not available to the Defendants, firstly, because the comments relied upon came on or about 13th September 1997 after the Plaintiff was libeled on 31st August 1997. The facts relied on to support a plea of fair comment must be facts existing at the time of the comment and not facts or events occurring after the publication of the libelous material. Reference is made to "Bullen and Leake and Jacobs, Precedents of Pleadings, 12th Edition page 1177, ***quoting Cohen vs Daily Telegraph Ltd, (1968) 1 W.L.R. 916."***

Secondly, the defence aforesaid is not available to the Defendants because they have not adduced evidence to prove that the words complained of are fair comment on a matter of public interest. The onus of adducing such evidence lies on the Defendants.

Thirdly, the facts on which fair comment is made must be true. In the instant suit, the truth was that both Plaintiffs were not suspects in the criminal case as the only suspect was Peter Kagai. The Plaintiffs were never investigated by police or anybody else for that matter. In fact both Plaintiffs were complainants against Peter Kagai who had forged their respective signatures.

Fourthly, there was premeditated malice in this case. This comes out clearly from the evidence of PW 2 on the rating disputes with Capital FM 98.4. That malice destroyed any notions of fair comment on public issue. Furthermore, dragging of the Plaintiff's names into a theft case against an employee was in itself very malicious. Defendants should have come to court to lead evidence of the Plaintiff's involvement in any misappropriation of the Society's money.

Fifthly, from the tone and lay out of the publications, it is vividly clear that the 2nd Defendant was moved by malice and devilish desire to tarnish the Plaintiff's reputation, because despite the fact that he had in his possession clear facts and information to the effect that the Music Copyright Society's accounts clerk Peter Kagai, who had stolen the money using forged cheques, was under Police arrest or investigation and was due to appear in court, the 2nd Defendant went ahead and published totally untrue stories about the Plaintiffs: and with that said by the 1st Plaintiff, it may perhaps be proper for me to quote an example from the Defendant's publication dated 31st August 1997 as follows:

"***It's the greatest rip-off in the history of the Kenyan Music Industry. Millions of shillings in music copyright, collected on behalf of International and local musicians, have never been passed to the artists.***

……***Complaints from musicians led us on a long trail. The findings were shocking.***

……..***We have established that MCSK's administrator Sammy Macharia and a representative of the Attorney General's Office, A. Olusese, are suspected to be implicated in a scam amounting to over Shs.1,700,000/= in royalties belonging to local musicians. A junior MCSK employee Peter Kagai, we discovered, was regularly issued with cheques in 1995 that were duly signed by Macharia and Olusese, despite the fact the cheques were routinely unaccounted for in the society's books of accounts. Police spokesman Peter Kimanthi said the anomalies in the MCSK accounts had been reported to Parklands Police and a warrant of arrest of Kagai has already been issued."***

On qualified privileged, the 1st Plaintiff submitted that such privilege must not only have been pleaded, but must also have been proved in evidence. Defendants decided to call no evidence. The plea fails as unsubstantiated. At the same time, the Plaintiff has rebutted the privilege by proof that the defendants were actuated by malice. Moreover, the facts and circumstances raising any qualified privilege should have been stated by the Defendants in a concise form so that the ground on which the privilege is claimed may appear. None were raised in paragraph 8 of the amended statement of defence or any other aspect of the pleadings. Since no evidence was led, the 1st plaintiff concluded by saying that this plea must also fail.

With all the above said, I have now to conclude this judgment by stating, firstly that although in paragraph 5 of the Defendant's defence they give what they claimed to be particulars of statements of fact and of the facts and matters relied on in support of the allegation that the words are true as well as particulars of the opinions they claim to be fair comment, they only attempted to give words they claimed to be true. There was no full compliance with **order VI Rule 6A(2)** which says:

"***he (defendant) shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."***

Furthermore, after such particulars have been so given, evidence must be adduced during the trial to defend or cloth the said particulars for without such evidence, who will believe the alleged particulars?

Secondly, under Order VI rule 6A(3), the Defendants denied malice claiming what they said was fair comment which was said under qualified privilege, but the Defendant singled out no such fair comment and/or the words they claimed to be under qualified privilege. Noted that Plaintiffs in their filed reply also failed to give particulars of malice as required under sub-rule (3) of rule 6A of Order VI, but they proceeded to give evidence of malice during the trial thereby placing themselves in a much better position than the Defendants.

Thirdly, the Defendants claim the defence of qualified privilege without mentioning the law that confers to them that qualified privilege. In Kenya, it is Section 7 of the Defamation Act, Chapter 36, and the schedule thereof, which govern qualified privilege of newspapers and a party claiming such privilege has to show clearly the part and paragraph of that schedule under which that party is covered – in terms of

Section 7. Defendants in this suit never attempted to do that yet it would appear they are not covered under those provisions. If the Defendants are relying on a law outside the Defamation Act aforesaid, the Defendants ought to have specifically said so explaining how they do qualify to rely on such a law. They have not attempted to do that in this suit and have therefore established no basis for their claimed qualified privilege.

Fourthly, Section 15 of the Defamation Act is not available to the Defendants because they adduced no evidence to prove any fact alleged or referred to in the words complained of and therefore no fair comment was proved to any extent.

Having said the above, I have brief remarks about reference to this court's HCCC No.294 of 2004, *MARTHA KARUA – VS – THE STANDARD LIMITED, 2007, K.L.R.* on the second page of the Defendant's written submissions second paragraph. I could not trace, in the said judgment where the words relied upon are written as the page is not mentioned and the words apparently not quoted. I therefore doubt the correctness of what is said in that paragraph, and I am unable to know what I exactly said because to my mind, falsehood would only be acceptable or tolerated under privilege, absolute or qualified, where the Defendant published that falsehood honesty believing it was truth. That is the kind of situation covered by Section 12 of the Defamation Act which states as follows: -

"*(1) In any action for libel contained in a newspaper or other periodical publication it shall be a defence for the defendant to show that such libel was inserted in such newspaper or periodical without malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity thereafter, he inserted in the same newspaper or periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should ordinarily be published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the Plaintiff.*

(2) The defence provided by this section shall not be available unless, at the time of filing his defence, the defendant has made a payment into court by way of amends."

Section 13 comes into provide the procedure in case of amends. But where, as in this suit, the Defendants knew what they were publishing was false or could be false, for example publishing that the Plaintiffs had been signing cheques, in respect of which the money had not been accounted for, but went ahead to publish it and subsequently took no steps under Section 12 aforesaid, the above protection does not cover such defendants. Courts of law should not condone and/or encourage peddling of falsehood in the country as Truth is the virtue to be cherished by every body in order to build a law abiding corruption free, peaceful, progressive, healthy and happy democratic society.

On the other hand, I am not saying that falsehood necessarily becomes libelous or slanderous; for instance falsely stating that Miss X was at Mombasa, *per se,* is not defamatory.

That leads me to the question, what is defamation? The answer is that defamation consists of words which in their natural and ordinary sense tend to lower the reputation of the Plaintiff in the eyes of right thinking members of society. Such are words which ridicule the Plaintiff or make him to be shunned or avoided by right thinking members of society. From what I have recorded in this judgment, there is sufficient evidence to show that the reputation of the 1st Plaintiff was lowered in the eyes of right thinking members of society following the Defendant's publication of the words complained of. I do not have to repeat what has already been stated in this judgment.

The defamation proved in this suit is libel which is actionable *per se* and the 1st Plaintiff did not have to prove special damages. Nevertheless the evidence he adduced shows he suffered some loss and was even shunned or avoided even though he retired and was not dismissed as a State Counsel. He might perhaps have lived a better retirement life had the Defendants not defamed him. Look at the conduct of musicians following their reading of the publications complained of. They went to look for the "thieves". That is what PW3 confirmed in his evidence. From all that therefore I come to the conclusion and find that the 1st Plaintiff was defamed by the two defendants who are therefore liable to compensate the 1st Plaintiff.

Moving to the award therefore, I have been reminded to, and do of course, take into account the following factors:

(i) Stature of the Plaintiff;

(ii) Extent and gravity of the libel;

(iii) Factors tending to mitigate damage; and

(iv) ***Factors tending to aggravate damages***.

Accordingly, a number of case authorities have been referred to by both sides for persuasion and they include the following:

HCCC No.612 of 1996, Nairobi; ***J. P. Macharia –vs- The Standard Limited and Another*** where the Plaintiff, an Advocate of many years standing and considerable reputation was awarded Kshs.1,250,000/= in general damages for a defamatory report in which it was alleged that he was involved in a physical punch up with his client outside the courts building.

HCCC No. 1709 of 1996, Nairobi, John Machira –vs- Wangechi Mwangi & The Nation Newspapers where, an advocate was awarded Kshs.8,000,000/= damages for a defamatory report alleging the stealing of client's money.

HCCC No. 1996 of 1997 Fred Ojiambo –vs- The Standard Limited where the Plaintiff, a Senior Counsel, was awarded general damages of Kshs.1,000,000/= for a defamatory publication alleging that he was being used corruptly by the Government to derail the Constitution review process.

HCCC No. 160 of 2001 Jared Omonde Kisera –vs- The Standard Limited where the Plaintiff an Advocate of considerable reputation and standing was awarded Kshs.800,000/= for allegation of corruption.

On the issue of exemplary damages, I think what was said by Lord Denning, M.R. at Page 757 in ***Associated Leisure Ltd & Others –vs- Associated Newspapers Ltd. (1970) 2, A.E.R. 755*** concerning a plea of justification is relevant.

"***A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence to the truth of the imputation, for failure to establish this defence at the trial may probably be taken in aggravation of damages."***

I should think a defendant who places in his defence a plea of the truth of a fact he subsequently fails to clearly and sufficiently establish during the trial is included in that statement. Of similar effect should be a defendant who places in his defence a plea of fair comment or plea of privilege of any type and subsequently fails to clearly and sufficiently establish such plea by evidence during the trial. Does such an impunity on the part of such a defendant not warrant the imputation of aggravation of the situation deserving exemplary damages? I would give an affirmative answer to that question.

Further, I wish to make a few remarks in relation to **Section 16A** of the **Defamation Act**. The learned Defendant's Counsel refers to that section in his written submissions but I do not see how it benefits the Defendant's case. It ought to be noted, that the Defendants failed to take any action under **Section 16** of the **Defamation Act** concerning an apology. **Section 16A** sets out the minimum sum in the award the court may make "Where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years." The award should not be less than Kshs.400,000/=.

Since in this suit the defamatory publications complained of alleged that the Plaintiffs had stolen money and even committed other additional criminal offences, a sum of Kshs.1,700,000/= being mentioned only as part of the money stolen, the criminal offence the Defendants were alleging against the Plaintiffs must

have been one punishable by imprisonment for a term not less than three years. The felony of theft by director, for example.

In the final analysis therefore, taking into account all that has been brought to my attention in the circumstances of this case, I will not grant the injunction prayed for under prayer (iii) of paragraph 10 in the Amended Plaint because that prayer has been overtaken by time.

I will not also grant prayer (ii) because while the evidence before me is sufficient to show that the 1st Plaintiff's sponsorship to go to South Africa was subsequently withdrawn because of the Defendant's publications complained of in this suit, there was no sufficient evidence proving that he lost a compensable sum of Kshs.200,000/= or any other sum in respect of that cancellation.

The above having been said, and bearing in mind that currently the Court of Appeal has been frowning at high awards in defamation cases, I do hereby grant prayer (i) in paragraph 10 of the Plaintiff's amended plaint in the sum of Kshs.3,000,000/=. Costs of this suit under prayer (v) of paragraph 10 of the amended plaint also be paid by the Defendants jointly and severally.

In addition, interest on (i) and (v) be paid at court rate from the date of this judgment.

Delivered, dated and signed this 29th day of September 2008.

J. M. KHAMONI

JUDGE

Present:

Mr. J. B. Shilenge representing the 1st Plaintiff

1st Plaintiff also present

Mr. Keyonzo holding brief for Mr. Billing for the Defendants

Mr. Kabiru court clerk