



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Suit 1354 of 2004**

**GEORGE NTHENGE.....PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP.....DEFENDANT**

**JUDGMENT OF THE COURT**

The Pleadings

1. The plaintiff herein GEORGE NTHENGE, commenced this suit by way of plaint dated 10/12/2004 and filed in court on the same day. The plaintiff claims that by its publication dated 12/12/2003, the defendant falsely and maliciously wrote, printed and published words on page 13 of the issue of the Nation Newspaper dated 12/12/2003 concerning the plaintiff in the way of his character, intellect and general repute the following words:

*GUESS WHO'S TOP OF THE CLASS!*

*“Definitely in the opposition camp is Mr. George Nthenge, best remembered as one of the six founder members in 1991 of the Forum for the Restoration of Democracy (FORD), the pressure group that marshalled final push for multiparty democracy and paved way to the opposition’s rise to power a decade late (sic). He served as Kamukunji MP in the seventh Parliament (1992-1997) having earlier served as MP in the third Parliament (1974-79).*

*Yet Mr. Nthenge’s headteacher at Mang’u in 1946-47 junior secondary class did not believe he would have much to offer. His testimonial reads “Below average intelligence. A bit mental, controversial. Sent home due to failure in studies and suspicion of staff.”*

*In his last school examination in form 2, Mr. Nthenge failed in all subjects except Agriculture, never took part in any sporting activity and was described as an introvert.”*

2. The plaintiff contends that by the said words in their natural and ordinary meaning the Defendant meant and was understood to mean that

(a) *The plaintiff is a dim wit, a very foolish and stupid person.*

(b) *The plaintiff has nothing to offer to the Society and is therefore incompetent.*

3. The plaintiff further says that by the aforesaid words, the plaintiff has been injured since his estimation in the eyes of right thinking members of society has been lowered and he has been exposed to ridicule, hatred, contempt and odium. He also says that his reputation has been grossly injured and that as a result, he has been shunned by right thinking members of society and has consequently suffered loss

and damage.

4. The plaintiff also contends that the publication by the Defendant was done recklessly and without lawful excuse and out of malevolence or spite towards the plaintiff when the Defendant knew or ought to have known:-

- i. *That no such testimonial as was published had been made by a head-teacher against the plaintiff*
- ii. *That the Plaintiff had not failed in all his subjects in Form 2 except Agriculture as alleged by the Defendant*
- iii. *That the Plaintiff had passed his Examinations other than Geography.*

5. The plaintiff further contends that the Defendant made the publication in a calculated and sensational scoop with a view to increasing the circulation of the said Newspaper and with a view to making a profit from the sale of the said Newspaper and did so maliciously without ascertaining what the true position regarding the Plaintiff's time at Mangu really was. For the reasons and on the grounds above given the plaintiff prays for judgment against the Defendant for:-

- a. *General damages on the footing of aggravated or exemplary damage.*
- b. *Costs of this suit together with interest thereon at court rates from date of filing suit until payment in full.*
- c. *Any other relief that the Honourable Court may deem fit to grant.*

6. The Defendants filed defence on 22/02/2005 but by an application dated 20/11/2006, the Defendants applied for and obtained leave to amend their Statement of Defence. The amended defence was filed in court on 29/01/2007 pursuant to orders of this Honourable Court given on 22/01/2007. By the said amended defence, the Defendant admits the publication of the article complained of, but denies that the publication thereof was made falsely and maliciously as alleged or at all. The Defendant also denies that the words can be construed either in their natural and ordinary sense or any necessary implication in the manner or form stated in paragraph 4 of the plaint and the Defendant wants the plaintiff to strictly prove his claims.

7. In the alternative the Defendant pleads that in so far as the said words in the publication consist of facts that the words were true in substance and infact and in so far as they consist of opinions they were fair comment on a matter of public interest namely that the public has a right to know the background and history of politicians and political leaders. As to Particulars of Facts, the Defendant alleges that:-

- a. *The Plaintiff's headteacher stated in his testimonial that he was "below average intelligence".*
- b. *The Plaintiff was described as an introvert*

While on particulars of opinion, the Defendant alleges that:-

- (a) *The Plaintiff's performance as compared to those of his peers mentioned in the said article was wanting*
- (b) *The Plaintiff had failed in some of his subjects such as Geography.*

8. The Defendant avers further and denies that the Plaintiff has suffered any loss or damage as alleged in paragraph 5 of the plaint and further denies that the plaintiff's reputation if any, has been lowered or injured in the public eye or that he has been exposed to ridicule, hatred, contempt and odium as alleged or at all. The Defendant further denies that it or its servants or agents published the alleged words recklessly and avers instead that the words were published in good faith and with the exercise of all due care and

reason and were accompanied with assertions of truth and fair comment. The Defendant also denies that it published the alleged defamatory words in a calculating and sensational scoop with the intention of making a profit from the sale of the said newspaper and that it did so maliciously and without ascertaining relevant facts.

9. The Defendant also says that the Plaintiff has (a) failed to exercise his right under Section 7A of the Defamation Act Cap 36(1992) and (b) failed to mitigate his alleged loss and damage under Section 7A and Section 16A of the Defamation Act, Cap 36 (1992). The Defendant pleads the defences of justification and fair comment and prays that the plaintiff's suit be dismissed with costs.

#### The Plaintiff's Evidence

10. The Plaintiff testified on oath and told the court that he was a business man in Nairobi for about 50 years from about December 1950 dealing in handicraft both locally and internationally. Regarding his schooling, he stated that he attended elementary school at Mumbuni AIC Elementary School between 1935 and 1941. That between 1942 and 1945, he attended Kabaa Primary School (the equivalent of the current Standard 8 level). That at end of 1945, he sat a qualifying examination to pave his way to Junior Secondary School and was subsequently admitted to Mangu Junior High School between 1946 and 1947. He stated that before going to Mangu Junior High School, he had obtained the Kenya African Primary School Examination Certificate. The plaintiff stated that at the end of 1947, he among other students, was examined and those who qualified would be admitted into Senior Secondary School and that he was one of those who qualified for Senior Secondary School. He produced as evidence PExhibit 1 being the Kenya National Examinations Council (KNEC) statement of Examination Results (Confidential) which was awarded to the Plaintiff, showing that the plaintiff obtained the following grades in the Examination of November/December 1947 J.S.S.E.

<i>Subject</i>	<i>Grades</i>
<i>English Composition</i>	<i>P (Pass)</i>
<i>Arithmetic</i>	<i>D (Distinction)</i>
<i>English II</i>	<i>P (Pass)</i>
<i>Swahili</i>	<i>C (Credit)</i>
<i>Maths</i>	<i>C (Credit)</i>
<i>Science</i>	<i>C (Credit)</i>
<i>Agriculture</i>	<i>P (Pass)</i>
<i>History</i>	<i>P (Pass)</i>
<i>Geography</i>	<i>F (Fail)</i>

The aggregate result was a PASS.

11. The plaintiff started further that after that examination, he was admitted into Senior School at Mangu in 1948 where he remained for one year. He stated that during that year, the Principal of the school left and was replaced by a Priest, one Father Leech who asked the plaintiff to discontinue with school, and that despite his (plaintiff's) complaints to the Catholic Secretariat, he had to leave Mangu. He was then admitted to St. Mary's School Tabora in Tanganyika in 1949 where he completed his Form Four, though he along with others did not sit the final examination due to illness of the teachers. Though they were to sit the examination in 1950, the plaintiff says he did not go back to Tanganyika for the same.

## The Plaintiff's Career

12. The plaintiff stated that upon leaving Tanganyika, he got jobs in different places and in total, he worked with several employers before formally settling down in business. He explained that the reasons why he never stuck with any single employer for any appreciable length of time was because of his uncontrollable temperament. He stated that he thus opted for business initially as a hawker of handicrafts outside The Stanley (by then known as The New Stanley) Hotel. He said the business grew by such leaps and bounds that by the end of 5 years, he was able to start a factory of wood carvings which operated from 1953 to 1956 and that by 1956 he was referred to "*as the learned rich young businessman*" and that he owned his own self drive car. He also said that between 1950 and 1956 he lived in Kaloleni African Family Quarters. At the same time in about 1952, he said he became the leader and treasurer of the Kaloleni Social Club, with the late Milton Obote, the founding President of the Republic of Uganda, as chairman.

## The Plaintiff's Life After 1956

13. The plaintiff stated that after 1956, he declined to join the Legislative Council (Leg Co) though his name had been proposed by the late Joseph Tom Mboya who the plaintiff says was a classmate of his at Mangu Junior Secondary School. According to his further testimony the plaintiff stated that in 1958 the legislative seats were increased from 8 to 14 and among the new seats was Machakos, and that in 1960, he became the Leg Co member for Machakos after its incumbent, Mr. David Mati Mumo was imprisoned. The plaintiff recalled such political greats as the late Masinde Muliro (for North Nyanza) Oginga Odinga (Central Nyanza), Argwings Kodhek Musa Amalemba, Erick Khasakhala, Daniel Arap Moi, John Marie Seroney, Dr. Taita Toweet, James Gichuru, Dr. Gikonyo Kiano, Kariuki Njuri, Tom Mboya, Ronald Ngala, Chokwe, Robert Matano, Danson Mwanyumba, Fredrick Mbiti Mate, Eliud Ngala Mwendwa and Peter Arene.

## Plaintiff's Achievements in Leg Co

14. The plaintiff stated that he was one of those members who negotiated for independence in 1962. He said that though he lost his political seat he served as a member of the Electoral Commission of Kenya between 1963 and 1969 and that between 1962 and 1963, he was the leader of the Opposition. He also told the court that between 1969 and 1974, he served as Member of Parliament for Iveti South.

## The Plaintiff's Life After 1974

15. The plaintiff stated that in 1974, he lost his seat as Member of Parliament for Iveti South and that he also lost his bid for the same seat in 1979, but bounced back into active politics in 1983 when he won the by-elections. Between 1992 and 1997, the plaintiff stated he represented Kamkunji Constituency on a FORD ticket. He said he lost the 1997 elections. The plaintiff made two other statements about his life – that in 1978, he lost his wife and 8 children in a traffic accident; that his future ambition is to become the President of the Republic of Kenya.

## Background to Plaintiff's Present Claim

16. The plaintiff stated that on 12/12/2003, the Defendant published in the Daily Nation a Special Report about Mangu High School in which it was alleged that the plaintiff was best remembered as one of the 6 Founder Members of FORD and that the plaintiff's testimonials from Mangu showed that he was below average. He said that the report was not correct because he was the top mathematician at the school during his time. He said that on reading that report which I have already set out above under "*pleadings*", he became agitated and sought legal advice from his advocates. He said that though his advocates wrote to the defendant seeking an apology no apology was given by the Defendant and as a consequence, he filed the instant suit.

17. The plaintiff stated that he was shocked by the Defendant's allegations of below-average performance and failure in all subjects except Agriculture. He also said that he was shocked by the

allegation that he was an introvert. The plaintiff stated that he had great prowess as a mathematician and was a great debater, and that is how he ended up in Parliament. He said that infact while he was at Mangu he was nicknamed “*Mathematician*”.

18. The plaintiff was cross-examined briefly by Mr. Wanyama advocate. He stated that while at Mangu, he enjoyed a good and cordial relationship with his head teacher, Father O’Mear, a catholic priest from Ireland. The plaintiff also stated that his best subjects at Mangu were Mathematics and Science in which he scored a Distinction and a Credit respectively. The plaintiff also stated that he did not complete his studies at Mangu after Father O’Mear left, and that the reason for the discontinuance was Father Soakley’s dislike for the plaintiff. Regarding his employment record, the plaintiff stated that he worked for only brief moments wherever he worked, and this is basically because of his uncontrollable and independent temperament. He also said that though he exercised his independence of mind while at Mangu, he was never cited for breach of rules and regulations. He said that whenever he left one employer for another, he always did that for greener pastures.

19. In re-examination, the plaintiff stated that the Defendant did not produce in evidence any document to justify the allegation that the plaintiff was a below-average academic performer while at Mangu Junior Secondary School, and therefore that there was no justification for the story. The plaintiff also stated that he suffered a lot as a result of the story, and that if any of his colleagues at Mangu had been alive today, they would have been totally shocked by these allegations. He urged the court to deal appropriately with the Defendant.

The Issues:

20. The parties agreed on the issues to be determined by this court and filed the same on 19/07/200 as follows:-

1. *Did the defendant publish in its edition for Thursday 12<sup>th</sup> December 2003 Newspaper an article captioned ‘Guess who’s top of the Class’*
2. *Did the said article, contain defamatory words against the Plaintiff?*
3. *Does there exist a testimonial by the Plaintiff’s headmaster which reads that the plaintiff is “below average intelligence, a bit mental, controversial and that the plaintiff was sent home due to failure in studies and suspicion of staff as was abolished (sic) in the defendant’s Newspaper edition for 12<sup>th</sup> December 2003?*
4. *Did the Plaintiff fail in all his last school examination in form 2 except Agriculture as alleged in the defendant’s Newspaper for 12<sup>th</sup> December 2003?*
5. *Do the words contained in the article and specifically pleaded in the plaint in their natural and ordinary meaning defame the plaintiff.*
6. *Has the plaintiff by the said article published been injured in the eyes of the urgent (sic) thinking members of Society?*
7. *Was the defendant justified in publishing the said article?*
8. *Did the defendant publish the said article maliciously and without ascertaining the true position of the plaintiff’s academic history?*
9. *Has the plaintiff issued a demand and notice of intention to sue the defendant?*

10. *Is the plaintiff entitled to damages as pleaded?*

11. *Who is to bear the costs of the suit?*

The Plaintiff’s submissions

21. The plaintiff, through his advocates M/s Khan & Katiku Advocates submitted that the defendant’s publication in its natural and ordinary meaning meant and was meant to say

(a) *The plaintiff is dim nit, very foolish and stupid person.*

(b) *The plaintiff has nothing to offer to Society and is therefore incompetent.*

Counsel also contended that the Defendant's publication was reckless, without lawful excuse and out of malevolence or spite towards the plaintiff bearing in mind that that the Defendant was unable to adduce any documentary evidence to support its allegations.

22. The plaintiff contested the Defendant's defence of justification which in essence is a defence of truthful substantiation to demonstrate that what was published was true. The plaintiff's counsel contended that the Defendant had failed to substantiate its claims when it did not produce any testimonial on the plaintiff by the Headmaster of Mangu in 1947 that read, "*Below average intelligence, a bit mental controversial sent home due to failure in studies and suspicion of staff*"; and further that the Defendant failed to adduce documentary evidence to show that the plaintiff failed all subjects except Agriculture. It is to be noted at this point that the Defendant did not adduce any oral evidence to rebut the sworn testimony given by the plaintiff. The plaintiff contends through his counsel that the Defendant's failure to adduce both oral and documentary evidence to substantiate its claims completely shatters the Defendant's defence; and that the court should find the Defendant liable.

23. The plaintiff also contends that the article was published maliciously and recklessly, and that the defendants have not demonstrated in any way that they verified their information before publication. Counsel referred me to Civil Appeal No. 179 of 1997 – P.J. Machira T/A Machira & Company Advocates –vs- Wangethi Mwangi & Nation Newspaper – Court of Appeal, Nairobi in which the court unanimously stated, *inter alia*, the following at page 13 of the judgment:-

*"Malice, as I have said, can be inferred from a deliberate or reckless or even negligent ignoring of facts ----- Deliberate and unconfirmed lies is also evidence of malice."*

24. The plaintiff contends that his own testimony, coupled with the Defendants failure to produce testimonials to substantiate their publication, the plaintiffs own documentary evidence showing that he failed only one subject out of the nine subjects he sat shows clearly that what was published by the Defendant concerning the plaintiff's academic performance and character was baseless malicious and without justification and was published without sufficient material. It is to be noted that the plaintiff's testimony on oath was not controverted by the defendant.

25. The plaintiff also contends that contrary to the Defendants contention that the plaintiff has not given particulars of malice, the particulars of malice are given in paragraph 6 of the plaint which states:-

*"6. Further, the Defendant published the said words recklessly and without lawful excuse and out of malevolence or spite towards the plaintiff when it knew or ought to have known:-*

(a) *That no such testimonial as was published had been made by a head-teacher against the plaintiff;*

(b) *That the plaintiff had not failed in all his subjects in Form 2 except Agriculture as alleged by the Defendant.*

(c) *That the Plaintiff had passed his examinations other than Geography."*

26. Order 6 Rule 6A (1) of the Civil Procedure Rules requires a plaintiff who alleges that the words or matters complained of were used in a defamatory sense other than their own ordinary meaning to give particulars of the facts and matters upon which he relies in support of such sense. Looking at the plaint as drawn and in particular paragraph 6 thereof I am persuaded that the plaintiff has complied with Order 6 Rule 6A(1) of the Civil Procedure Rules by reason of the particulars set out there under rebutting the allegations of the Defendant and giving his own side of the story to show that he indeed was not a below-average student.

27. On quantum, the plaintiff, prays for a consolidated sum of Kshs.20,000,000 for both aggravated and

general damages. Counsel for the plaintiff has referred the court to a number of authorities on the issue. He asked the court to consider the plaintiffs' career as a politician and the fact that the publication was made maliciously and with malevolence and to further consider the Defendant's conduct from date of publication up to trial as was the case in *Prand –vs- Graham* 24 QBD 53, 55. On factors to be considered when assessing damages, the court was asked to consider the guidelines contained in *Jones –vs- Pollard* [1977] EMKR namely that

- (a) *The objective features of the authority itself such as its gravity, the circulation of the medium in which it is published and any repetition.*
- (b) *The objective effect on the plaintiff's feelings not only from the prominence itself, but from the defendants conduct thereafter both up to and including the trial itself.*
- (c) *Matters tending to mitigate damages such as the publication of an apology*
- (d) *Matter tending to reduce damages.*

28. The plaintiff contends that the iniquity by the Defendant has not been mitigated in any way. That the publication had no basis. That the publication was malicious and that the Defendant did not even offer an apology despite being asked to do so by the plaintiff. The plaintiff cited Nrb HCCC No.4856 of 1990 – *Waruhiu & Muite –vs- Philip Ochieng & Kenya Times Media Trust* in which the court awarded the plaintiff the sum of Kshs.10,000,000 being a consolidated sum for both general, (Kshs.8,000,000) and Aggravated damages (Kshs.2,000,000/=). Also cited was Nrb HCCC No. 1067 of 1999 – *Kipyator Nicholas Kiprono Biwott –vs- Clays Limited & 4 Others* in which a sum of Kshs.30,000,000/= was awarded to the plaintiff. In Nairobi HCCC No.2143 of 1999 *Kipyator Nicholas Kiprono Biwot –vs- George Mbuggus and Kalamka Ltd.* the court gave the plaintiff a sum of Kshs.20,000,000/= as damages.

#### The Defendant's Submissions

29. In its written submission the Defendant does not deny the publication of the alleged defamatory words, but says that the words complained of are not defamatory and asks the court to consider two issues:-

- (a) *Do the words complained of, in their natural and ordinary sense tend to lower the reputation of the plaintiff in the eyes of right thinking members of society?*
- (b) *Has the plaintiff made out a case for aggravated and exemplary damages, or in the alternative, has the Plaintiff shown by way of evidence that the Defendant's action is such as to attract aggravated and exemplary damages.*

30. The Defendant has asked the court to consider the following facts in light of the entire article; facts which the Defendant says the Plaintiff admitted on oath:-

- (i) *That he participated in the agitation for multiparty democracy.*
- (ii) *That he served as Kamukunji M.P. in the Seventh Parliament (1992-1997) and in the third Parliament (1974-1979)*
- (iii) *That he attended Mangu High School between 1946-47.*
- (iv) *That he is by nature impatient and very independent minded, something which did not go well with the then colonial white teachers.*
- (v) *The plaintiff was discontinued from completing his studies at Mangu High School by his school headmaster. During his examination in chief the plaintiff stated this in his own words as follows: "The then headmaster Father Leech told me that I was a fool and he discontinued me"*

31. The Defendant contends that the words *below average intelligence, a bit mental controversial, sent home due to failure in studies and suspicion of staff* are not defamatory and that since no witness was called to prove the defamatory nature of the alleged words, the words cannot be said to be defamatory. That no evidence of a right thinking member of society was called to testify on behalf of the plaintiff.

32. Alternatively the Defendant contends that the alleged defamatory words were published in good faith; that it is the duty of the Plaintiff to prove that the publication was published maliciously. The defendant further contends that the plaintiff has not pleaded any particulars of malice as provided by Order 6 Rule 6A of the Civil Procedure Rules. Rule 6A(2) is relevant here:-

*“Where in an action for libel or slander the plaintiff alleges the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by malice, he shall file a reply giving particulars of the facts and the matters from which the malice is to be inferred.”*

33. My reading of the above rule brings out the following (a) that the words are fair comment; (b) that the matter published about is one of public interest; (c) or, that the words were published upon a privileged occasion. These are the circumstances upon which the plaintiff is required to file a reply. It is my view that in the plaint and in particular paragraph 6 thereof, the plaintiff has set out the particulars of the facts from which the malice can be inferred. I have already set out the details of that paragraph and I need not say more about it.

34. On quantum, the Defendant contends that the court should consider the purchasing power of the award and of the income it would produce as was held in John –vs- NGN Ltd. [1996]2 ALL ER 35; that a disproportionately large award amounted to a violation of the defendant’s right [to freedom of expression]. The Defendant also contends that S. 16A of the Defamation Act would entitle the plaintiff to no more than an award of Kshs.400,000/= if the publication was serious enough. The Defendant also cited Fred Ojiambo –vs- The Standard Limited – Nrb HCCC No. 1996 of 1997 in which the court awarded Kshs.1,000,000/= to a senior counsel for a defamatory publication alleging that he was being used by the Government to derail the constitutional review process. In Nairobi HCCC No. 612 of 1996 – J.P. Machira –vs- The Standard Limited & Another, the plaintiff who was an advocate of many years standing was awarded Kshs.1,250 000/= in general damages in respect of a defamatory report in which it was alleged that the plaintiff had been involved in a physical punch-up with his client outside the court building. The Defendant in this case proposes a sum of Kshs.1 000 000/= in general damages.

35. Regarding aggravated damages, the Defendant contends that for the court to make an award under this head, it must be satisfied that there was a malicious intention by the defendant in the libel and particularly that the court must consider *“the conduct of the defendant, his conduct of the case, and his state of mind are all matters which the plaintiff may rely on as aggravated damages.”*

36. The Defendant contends that the publication complained of was not sensational. That it was at page 13 of the newspaper and that therefore the Defendant did not intend to make any financial gains out of it. The defendant also contends that since the plaintiff’s plea of malice does not meet the requirements of Order 6 Rule 6A of the Civil Procedure Rules, the court should make only a token award of Kshs.100,000 in aggravated damages.

## The Findings

37. The Defendant’s major contention against the plaintiff’s case is that the words complained of by the plaintiff do not in their natural and ordinary sense tend to lower the plaintiff’s reputation in the eyes of right thinking members of society and second, that the plaintiff has not made out a case for exemplary damages. The plaintiff in his sworn testimony told the court what he has done both as a businessman and as a politician from December 1950 to the end of 1997 when he lost in the second multi-party elections in Kenya. Although the publication is said to have been on page 13 of the Daily Nation, I am of the view

that it was a sensational publication that was accompanied by pictures of prominent Kenyan figures, starting with none other than Hon. Mwai Kibaki, the President and Commander in Chief of the Armed Forces of the Republic of Kenya, together with a file picture of the Founding father of the nation, President Mzee Jomo Kenyatta. Further, the publication did not appear as an ordinary news item on page 13 of the day's DAILY NATION. It was a special Report that should catch the eye of every right thinking member of society. It is noteworthy that at the time of the publication, the new NARC Government had been in power for just a year and the suggestions that were being made were that the Plaintiff among others had risen to the top by virtue of having attended the same school with the incumbent President. Further, a reading of the publication showed that though the Plaintiff had risen to the top and even agitated for multi party democracy, he was a below-average performer in school. So that even if the whole article were to be read as a whole, the finding I would make is that the publication had no basis. PExhibit I, which was not controverted by the Defendant clearly shows that the Plaintiff was an excellent student in his Form 2 Examination in 1947 having failed only one subject out of nine. It is also clear in my mind that the publication was made maliciously and without basis because the Defendant did not produce to the court any documentary evidence to show that the Plaintiff had failed all his subjects except Agriculture nor did the Defendant adduce any evidence to prove that the Plaintiff was "*Below average intelligence. A bit mental controversial. Sent home due to failure in studies and suspicion of staff*". The Defendant seeks to rely on the Plaintiff's statement during cross-examination that the head-teacher thought him a fool and discontinued him. This statement by the plaintiff must be read in the context in which it was made – that the head-teacher had been influenced by Father Soakley to think of the Plaintiff in that light. In any event, what the plaintiff said (and the plaintiff does not admit that he failed his examinations and that he was a fool) does not take the place of evidence by the defence to support its claims. No such evidence has been adduced.

38. It is also my finding that there are no mitigating factors that would persuade this court to consider that the Defendant was not malicious in its publication. I am persuaded that the Defendant did not check out its facts about the Plaintiff's performance while at Mangu before publishing the report. If the Defendant had checked its facts properly, it would have found that the Plaintiff did not in fact fail all his subjects except Agriculture but that he passed all his subjects except Geography. The plaintiff says that by the said publication, he is portrayed as one who was of dim wit, very foolish and a stupid person and that in the real sense, he as a person, had nothing to offer to society.

39. The Defendant says that there was no independent evidence adduced by the Plaintiff to show to the court that indeed the publication has lowered the plaintiff's estimation in the eyes of right thinking members of society. Considering all the authorities cited to me and the law, I find and hold that this point should not be used against the defendant since it is not a requirement that a party should call more than one witness to prove any fact.

40. In summary, I find that the publication was defamatory of the plaintiff and that it was made without justification. I am unable to agree with Defendant's counsel that the publication was justified. No documents or other evidence has been adduced to prove the justification. Nor do I find that the publication was either a fair comment or made on a privileged occasion.

#### Assessment of Damages

##### (i) General Damages

41. On the basis of the authorities that have been cited to me and in particular the persuasive authority in John –vs- MGN Ltd. (supra) I find that the impact of the defamatory article on the plaintiff was mild for the reason that most of his contemporaries who would have been shocked by the publication had all died; so that the magnitude of the damages should not be in the range of the "*Biwot*" cases above who was awarded Kshs.30,000,000/=. Although the plaintiff says that he still entertains the thought of becoming President of the Republic of Kenya, his age is against him and I cannot say that the publication complained of would solely contribute to his inability to capture the seat if he tried it during the next General Election scheduled for 2012.

## Exemplary Damages

42. Regarding these, I am persuaded that the plaintiff is entitled to the same. The testified that upon publication of the article, the plaintiff, through his counsel, wrote to the Defendant seeking an apology, but no apology was published, nor did the Defendant even have the courtesy to respond to the letter demanding the apology. No evidence was called by the Defendant to rebut all the facts that the plaintiff stated in his evidence on oath.

43. I also note that the authorities relied upon by both parties, and in particular by the Defendant were made almost five years ago.

## Conclusion

44. In conclusion I do find and hold that the publication by the Defendant appearing in the Nation of 12/12/2003 under the headline “*GUESS WHO’S TOP OF THE CLASS*” was defamatory of the Plaintiff and enter judgment for him as follows:-

- (a) *General damages in the sum of Kshs.5,000,000/=*
- (b) *Exemplary damages in the sum of Kshs.2,000,000/=*
- (c) *Costs of the suit*

Orders accordingly.

Dated and delivered at Nairobi this 26<sup>th</sup> day of September, 2008.

**R.N. SITATI**

**JUDGE**

**Delivered in the presence of:-**

Mr. Wangila (present) For the Plaintiff/Defendant

Mr. Kiura holding brief for Muende (present) for the Defendant/Respondent