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

Civil Case 5528 of 1990

EZEKIEL NDICHU KIMATU WANJAMA …….....PLAINTIFF

versus

ELIUD MUCHOKI MAHIHU ……. DEFENDANT

JUDGMENT

The Plaintiff relying on the plaint dated 24th October 1990 and filed on 25th October 1990 as well as a reply to defence dated 9th April 1991 and filed on 12th April 1991 instituted this suit against the Defendant praying for judgment against the Defendant for:-

"(a) General damages together with interest at court rates;

(b) General damages for defamation together with interest at court rates;

(c) Costs of this suit together with interest at court rates;

(d) Such other and further relief as this Honourable Court may deem fit and just to grant."

The Defendant filed his defence dated 29th, November 1990 on the same date denying the allegations in the plaint against him adding that otherwise the words complained of by the Plaintiff constituted fair comment and/or enjoyed qualified privilege.

The Plaintiff is an Advocate of the High Court of Kenya and he is represented in this suit by M/s. Muthoga, Gaturu & Company Advocates whose Mr. Gaturu appeared for the Plaintiff during the hearing, while Mr. Inamdar, from M/s. Inamdar & Inamdar, Advocates, appeared for the Defendant who, according to his description in the plaint, was at the material times the Chairman of the Presidential Committee to Probe and Restructure the then Kenya Tea Development Authority, and was also and still is the Chairman of the Tea Board of Kenya, a statutory Board of the Government of Kenya established under the Tea Act, Cap. 343 of the Laws of Kenya.

The Plaintiff was the only witness on his side while, though the Defendant was personally present throughout the hearing, the Defence elected to call no witness.

Written submissions were exchanged and filed before the hearing was closed by oral submissions from both sides.

The Plaintiff told the Court in his evidence that he is a member of Certified Public Secretaries of Kenya; member of Chattered Institute of Arbitration and that it is now about 29½ years since he was admitted as an Advocate of the High Court of Kenya and has served this country in various capacities. In August, 1977, he was employed as Company Secretary in Business Machines Kenya Limited, then agents of Olivetti Machines, where he served until 30th May 1980 before he joined the Tea Board of Kenya as Secretary and Chief Executive from 1st June 1980. His duties with the Tea Board of Kenya included effecting decisions of the Board, administering the entire Kenya Tea Estates including licensing, planting and manufacturing of Tea, supervising research on all matters of tea and promoting consumption of Kenya Tea both locally and abroad. He would represent the Board and sometimes the Board Chairman or the Ministry of Agriculture in meetings touching on tea both locally and internationally.

Kenya Tea Development Authority (KTDA) had a lot to do with the Tea Board of Kenya since the Tea Board was licensing KTDA to plant tea in small holder areas and also it licensed KTDA to deal with and manage Tea Factories.

Nearly half the membership of the Tea Board of Kenya were representing KTDA's interest and they included the Chairman of KTDA and it was as a result of such arrangement that the Plaintiff and the Defendant came to work together starting with the time the Plaintiff was working with the Tea Board of Kenya upto the time the Plaintiff moved from there to KTDA – where their relationship improved to the level of personal friendship.

The Plaintiff moved to the headship of KTDA after nine years' experience with the Tea Board of Kenya which had also enabled him know the working and problems of KTDA. In both capacities he was a Head of State appointee. At the KTDA; the Plaintiff became the General Manager and Chief Executive from 1st June 1989 leading a management team of close to 100 managers over some 1000 workers scattered in all the tea growing areas. He was reporting to a Board of Directors of KTDA and to the Minister of Agriculture.

The Defendant was the Chairman of the Board of KTDA until the President removed him and appointed him Chairman of the Presidential Committee to Probe and Restructure the KTDA. The President appointed Mr. Julius Muthamia to replace the Defendant at the KTDA. Thus the Defendant left KTDA management, a very close and friendly person to the Plaintiff only for a rift between them to develop shortly thereafter and rapidly widen to the extent of crystallizing into this Court litigation. The Defendant was the one who revealed the President's appointment of the KTDA probe Committee to the Plaintiff and that was before that Committee's appointment was officially announced. By that time the Defendant had not ceased Chairmanship of KTDA and did not reveal to the Plaintiff that he (the Defendant) had also been appointed a member of the Probe Committee, although he gave the Plaintiff names of other members of the committee. The revelation about the Probe Committee was confidentially done during a private lunch the Defendant had hosted at his house the Plaintiff being the only guest from outside the Defendant's family.

The Defendant ceased to be Chairman of KTDA because he had been appointed Chairman of the Probe Committee. But by the time he left KTDA Chairmanship, arrangements were in full gear and it would appear Plaintiff Exhibit No. 1, a letter dated 9th October 1989 was written before the Defendant left. The letter was soliciting congratulatory messages – from the Business Community as the KTDA supplement was expected to be published in the press on the occasion of the 25th year of KTDA's "tremendous growth … together with the immense contribution to the development of Kenya with regard to small holder tea development in the 12 Districts of Kenya where it operates."

The Defendant must therefore have left KTDA well aware of the annual event about which the KTDA Supplement used to be published in previous years and was to be published that year. But for reasons undisclosed in this litigation, the two who could subsequently have been easily meeting or otherwise talking to each other to resolve any problems that could arise concerning the relationship between their respective KTDA functions in general and the then intended supplement in particular, are portrayed in the evidence in this case as people who from that time were never talking to, or meeting, each other

concerning those functions and had to communicate only through the media, particularly newspapers, and subsequently through their respective advocates in correspondence leading to the filing of this suit for the usual civil procedure in law to take over and guide the management of that communication between them.

That is the situation in which the KTDA Supplement was published in the Standard Newspaper of 30th October 1989 and the fact that the then KTDA Chairman Mr. Muthamia was also a member of the Presidential Probe Committee, seems to have had no impact in helping to maintain the previous friendly and cordial relationship between the Plaintiff and the KTDA on the one hand and the Defendant on the other.

When the KTDA Supplement was published by The Standard Newspaper on 30th October 1989 therefore, the Defendant was not happy as he felt it ought not to have been done. He on the same date, called a press conference and addressed that conference while at Nakuru uttering the words complained of by the Plaintiff who says the words were published on 31st October 1989 by "The Kenya Times", "The Daily Nation", and "The Standard" all of which have a large circulation "in the Republic of Kenya and abroad." The Plaintiff in his plaint uses the publication in "The Kenya Times" which was on the front page, the lead story titled in bold letters:

"IT'S SABOTAGE, TEA BODY TOLD"

and went on to say:

"As the Chairman of the team probing the affairs of the Kenya Tea Development Authority (KTDA) accused its managers of sabotage, President Moi vetoed a move by them to sell shares to individuals."

"And Mr. Eliud Mahihu, who is leading a committee recently appointed by the President to study the troubled organisation and recommend redress, was miffed by a supplement in "The Standard" yesterday which, he said was calculated to sabotage the investigations."

"Speaking at Nakuru, Mr. Mahihu said K.T.D.A. General Manager, Mr. E. N. K. Wanjama, had caused the publication of a supplement in "The Standard" touching on the terms of reference of this Committee."

"He said I will want an explanat**ion*** ***from him why he did so when he knows we are in the field collecting information from the farmers."***

It is the Plaintiff's case that the said words referred and were understood to refer to him personally and in his capacity as the General Manager and Chief Executive of Kenya Tea Development Authority; that the said words in their natural and ordinary meaning meant and were understood to mean:-

"(i) That the Plaintiff personally ordered or caused the writing and publication of the Kenya Tea Development Authority Supplement in "The Standard" on the 30th Day of October 1989.

(ii) That the said Supplement was prepared and published with the sole purpose of defeating the aims and purposes of the Presidential Committee to probe and Restructure the Kenya Tea Development Authority.

(iii) That The Kenya Tea Development authority Supplement which was published in "The Standard on 30th October 1989, was written and prepared after the appointment of the Presidential Committee to probe and Restructure the Kenya Tea Development Authority, and contained information, words and meanings injurious to the work of the said Committee."

Further or in the alternative the Plaintiff complains that the said words meant and were understood to mean by way of innuendo flowing therefrom:-

"(i) That the Plaintiff was personally sabotaging the work of the Presidential Committee aforesaid,

(ii) That the Plaintiff, in his capacity as the General Manager of the Kenya Tea Development Authority had done and/or was doing certain wrongful, illegal or fraudulent acts which the said Presidential Committee would unearth if its works went on unrestrained.

(iii) That by sabotaging the work of the Presidential Committee aforesaid, the Plaintiff was sabotaging His Excellency the President of the Republic of Kenya, himself, and was therefore disloyal to the Head of State, and to the Government of Kenya.

(iv) That due to matters stated above the Plaintiff was unfit to continue holding the office of the General Manager of Kenya Tea Development Authority, or any other public office in the Republic of Kenya."

The Plaintiff added that by the publication of the said words he was much injured in his credit and reputation and his occupation as General Manager of Kenya Tea Development Authority, and has been brought into hatred, ridicule, odium,, and contempt and has suffered loss and special general damages.

For particulars of special damages he said that the government sent him on compulsory leave with no reason being given although he had worked in the position of General Manager of Kenya Tea Development Authority for only five months. Thereafter on 12th January 1990, while the Plaintiff was on compulsory leave, the Government terminated his appointment as the General Manager of Kenya Tea Development Authority, and again no reason was given for the said termination.

Otherwise as I was saying before, the Plaintiff and the Defendant are people who knew the general format the Supplement used to take and generally knew the type of contents the Supplement used to have and they knew all those things before the said Supplement was due for publication and also before the Probe Committee was appointed.

That is why when the publication was due, both sides seem to have had anxiety as to the effect the publication of the Supplement would have upon the work of the Probe Committee and there seems to have been a feeling to shelve altogether the publishing of the said Supplement that year.

The article or the words complained of clearly show the definite position of the Defendant at that time. He did not want the Supplement to be published. It appears the position on the side of the Plaintiff was not clear and definite as it kept on changing as can be seen from the Plaintiff's evidence. That evidence does not also make it clear whether the Plaintiff was alone when making the decision to publish or not to publish the Supplement.

The Plaintiff told the Court that his relationship with Mr. Muthamia was excellent and that he kept on briefing him (the Plaintiff) about the Probe Committee. The Plaintiff added as can be seen from the bottom of page 11 of the typed proceedings:

"Hence after consultation with him, we decided to stop publication of the Supplement all together and do away with the event. It is in that light that I wrote the letter dated 25th October, 1989 See page 3 of P. Exhibit 1."

But what the Plaintiff says later suggests he was acting alone when deciding whether there should be publication of the Supplement or not. He states at page 12 as follows:

"I had rung respective newspapers to suspend publication of the Supplement. They did not call me to say they will publish. I assumed they had agreed not to publish. However, Kenya Times called and insisted that they will publish. But they did not want to publish it on the day I had intended but chose their own date being 7.11.1989. I explained them the danger of going ahead with publication of the Supplement. But as a compromise I told them that the only day they could publish was 27.10.1989, which was the field day …. My wish was not to publish it at all. But that if they must, it must be on

the field day 27.10.1989 when the Supplement would be seen in its proper context as the Minister on that day at Kericho was going to announce to farmers the second payment of Bonus to small Tea Farmers."

That is the Plaintiff speaking as if he had allowed Kenya Times only, to publish the Supplement on 27.10.1989. But further evidence shows other newspapers were similarly allowed to publish. The Plaintiff told the court that on 27.10.1989 not a single newspaper published the Supplement and he assumed they had accepted his request not to publish although other Field Day events went on. But on Monday 30.10.1989 the Plaintiff woke up to find the Supplement published that morning by The Standard Newspaper. As a result he inquired from the Standard why they had published the Supplement "against our request not to publish". On 31.10.1989 the Plaintiff wrote a letter to the Standard requesting them to apologize both to the Government and other parties concerned for the embarrassment the publication caused. The letter was at page 8 of Plaintiff Exhibit 1 and the Plaintiff continued to say that when The Standard replied – page 9 of Plaintiff's Exhibit 1, he learned that without his knowledge and knowledge of the Board, the Public Relations Officer of the KTDA had instructed the Standard to proceed with the publication of the Supplement. That action prompted disciplinary action against the Public Relations Officer whom the Plaintiff sent on compulsory leave. The Plaintiff proceeded to state at the bottom of page 14 thus

"It is not correct that I caused the publication and that the publication interfered with terms of the Probe Committee."

During the cross examination, the Plaintiff told the court that it was one of the duties of KTDA's Public Relations to enlighten members of the public about the structure and functions of KTDA. He also told the court that if anything went wrong at KTDA, the buck stopped at his door, as the farmers expected that every important act was performed either at his insistence or with his consent. He also said:

"The ultimate decision to publish the Supplement on 27th October 1989 was taken by the KTDA Board with my knowledge and consent."

And in his letter dated 1st November 1989 addressed to the Defendant as a reaction to the Defendant's article complained, of the Plaintiff stated that they had submitted the supplement write-up to the three Dailies and Weekly Review on 9th October 1989 before the Probe Committee was appointed and as a result the new KTDA Chairman Mr. J. Muthamia who was also a member of the Probe Committee, together with him the Plaintiff, found it necessary to re-assess the usefulness of the said Supplement. Consultations were therefore held between the General Manager (the Plaintiff), the Chairman and the Senior Staff whereupon it was decided to postpone the said Supplement indefinitely.

The Plaintiff therefore instructed the Public Relations Officer to convey that decision on the postponement to the three Dailies and the Weekly Review. The Plaintiff's letter continues in paragraphs 6 and 7 stating:

"The dailies responded by saying that once we had submitted the write-up (which was on 9th October) they remained at liberty to print or not to print the Supplement. They added that they had incurred certain costs preparing the Supplement and selling the advertising space, which costs could only be recovered by the publication of the Supplement.

As a compromise, and as the only alternative available, the General Manager (the Plaintiff) authorized the publication of the Supplement on the condition only that it must be published on 27th October 1989, to coincide with the KTDA Field Day. The event of the day would be used as the only justification."

That is when the Kenya Times responded saying it intended to publish the Supplement on 7th November instead of 27th October as it needed more time to solicit and sell more advertising. But the Plaintiff warned the newspaper and insisted that the publication had to be on 27th October or never.

But on 27th October 1989 there was no publication of the Supplement as stated earlier. The Plaintiff stated mid paragraph 9 of the said letter:

"It was therefore with shock, disappointment, embarrassment and a feeling of betrayal that we read the Supplement in the Standard on 30th October 1989."

The Plaintiff informed the Defendant that on 31st October 1989 he wrote to the Standard protesting the action taken and demanding apology and added the KTDA was continuing investigations on circumstances leading to the publication of the Supplement. The letter at paragraph 10 states:

"From the foregoing, it will be seen that at not time did KTDA or the authority's General Manager intend, or allow anybody to embarrass the Probe Committee or any person connected with the work of the Committee. Nor did KTDA or its General Manager intend to , or authorize anybody to sabotage the work of the Probe Committee.

We wish to state here that the management of the KTDA is equally concerned with the improvement of small holder tea farmers, and will give every assistance to anybody or organisation wishing to improve this vital industry. We therefore congratulate H. E. The President, for forming this important Committee, and we believe we are part and parcel of the Committee in so far as its terms of reference are concerned."

Then the apology in paragraph 11 concludes that letter stating:

"Finally, as we await the apology from the Standard, we wish to apologize to the Committee and its Chairman for the embarrassment caused by the publication of the Supplement in the Standard."

As it has already been indicated above, the awaited apology expected from The Standard was to come in response to the Plaintiff's letter to The Standard dated 31st October 1989 directed to Mr. Peter F. M. Gachie, Advertising Features Co-ordinator of the Standard. The letter stated as follows:

"I refer your attention to the story appearing in to-day's "STANDARD" page 11 column 1 headed "KTDA – Managers Rile Team" and the 'Kenya Times' page 13 column 1 under heading "Moi's no to Proposal" regarding the KTDA Supplement carried in your newspaper's centre spready yesterday 30th October, 1989.

According to our Public Relations Officer, Mr. Enos Nyagah, it was agreed on Monday 23rd October 1989 that you should not publish the Supplement. It was made clear to you that this had also been agreed with the other newspapers. Our Public Relations Officer spoke to you over the telephone. He also persistently spoke to your Sales Representative, Mr. Simon Mugo and eventually to the Supplement Editor, Mr. Wang'ombe on Thursday, 26th October, 1989 urging that the Supplement should be carried only on 27th October, 1989 so as to coincide with the Field Day failing which, it should not be published at all.

Despite all these pleas, you went ahead and published the Supplement on 30th October 1989 to the embarrassment of not only the KTDA but also the Government.

This morning, Mr. Mugo telephoned our Public Relations Officer, Mr. Nyagah who was subsequently handed over to Mr. Mutahi Kagwe, the Standard Advertising Manager. Mr. Kagwe pleaded with Mr. Nyagah that the KTDA should not respond to Hon. Elud Mahihu's remarks in the newspaper to-day. Mr. Nyagah eventually transferred the call to my office but I could not speak with Mr. Kagwe as I was engaged with another call.

This letter is, therefore, to kindly request you to unconditionally apologise to both the Government, in particular the Presidential Probe Team and the KTDA for the embarrassment caused. We hope that the good relationship existing between your newspaper and the KTDA will continue in future."

This letter is at page 8 of Plaintiff's Exhibit 1, and it is proper at this stage to look at the relevant reply from The Standard dated also 31st October 1989 seen at page 9 of Plaintiff Exhibit 1. That letter was written by the then Standard Advertisements Manager, Mr. Mutahi Kagwe who addressed it to the Plaintiff stating as follows:

"We acknowledge receipt of your letter of to-day addressed to our Mr. Peter Gachie.

There has definitely been a breakdown of communication regarding the Supplement of 30th October 1989. According to our Mr. Gachie he talked with your Mr. Nyaga on Thursday 26th October, on which day they agreed that the Supplement should not be published on 27th but on 30th of October, one of the reasons given was that Mr. Nyaga will furnish us with more materials and pictures about the Field Day in Kericho. According to our Mr. Wang'ombe, The Supplement Editor, Mr. Nyaga in person, brought the pictures on Saturday 28th at 4.00 p.m. The photographs used on page 13 in the Supplement captioned "Good Tea Plucking by a family …" and the General Manger's photographs as well as the picture on page 14 were all brought on Saturday. Indeed we used some photographs in the Sunday paper which Mr. Nyaga wanted used in the Supplement but there was no space. Mr. Nyaga had further given Mr. Mugo Editorial Material on Friday 27th.

We have published a KTDA Supplement every year for last few years and there has never been any problem. I have no doubt therefore that the problem in this case seems to be as a result of the Honourable Mahihu's remarks in to-days papers.

I take exception to the statement from Mr. Nyaga that I "pleaded" with him not to reply to Honourable Mahihu's statement. I have no authority as to what Mr. Nyaga does or doesn't do. There is clear evidence on our part that the Supplement was published with the full approval of Mr. Nyaga. He supplied the Editorial material and pictures, after the date originally set for publishing i.e. 27th October.

Remain assured that we would never publish a KTDA Supplement without your approval. We have never done so in the past and we will not do so in the future.

We would like to maintain the good relations between KTDA and ourselves, but under the circumstances I do not think that an apology is due."

Following receipt of that letter from The Standard, the Plaintiff wrote a letter dated 1st November 1989 to his Public Relations Officer, Mr. Enos Nyaga expressing his unhappiness over what Mr. Nyaga had done with The Standard – leading to the publication of the Supplement. The letter is at page 10 of Plaintiff Exhibit 1 and the Plaintiff stated, among other things, as follows:

"You will remember that upon our discussion, I decided that I would allow the publication of the Supplement only for 27th October 1989, to coincide with the Field Day. I confirmed that I would not approve the publication of the Supplement on any other subsequent day, as this would be misconstrued as a means to lobby media support against the on-going KTDA Probe.

I therefore instructed you to convey my decision to all the dailies and Weekly Review while I dealt with the more difficult Kenya Times.

……

Upon receipt of my letter, the Standard responded promptly denying ever having had any instructions from you not to publish the Supplement. They even proved that indeed the Supplement material was delivered to them on 27th October, and photographs relating to the same Supplement were delivered on 28th October – with full understanding that you wished the same published on 30th October."

Referring to the meeting the Plaintiff and Mr. Nyaga and Mr. Irungu the Corporation Secretary Administrative Manager had attended that day with officials from The Standard led by Mr. Kagwe, the Plaintiff went on to tell Mr. Nyaga that:

"It was clear from the meeting that the Standard was innocent, and that it acted in accordance with your instructions.

Your behaviour in this matter exhibited that you have all along been lying to me while you knew you were not following my instructions on this very sensitive issue. You have caused me embarrassment to the Standard and the Government, particularly the Probe Committee."

Through that letter the Plaintiff took disciplinary measurers against Mr. Nyaga by sending him on compulsory leave with immediate effect having handed over all the KTDA's property in his possession or under his care to the Corporation Secretary/Administrative Manager Mr. C. M. Irungu the very person to whom the Plaintiff was, eight days later, instructed to leave the affairs of KTDA when the Plaintiff was in turn sent on compulsory leave by the then Permanent Secretary in the Ministry of Agriculture Mr. D. N. Namu.

The Plaintiff had copied to Mr. J. T. arap Leting, Permanent Secretary/Secretary to the Cabinet, Officer of the President, and Mr. D. N. Namu, the letter dated 1st November 1989 which the Plaintiff wrote to the Defendant but by the time Mr. J. T. arap Leting and Mr. D. N. Namu were each writing to the Plaintiff, it appears neither of them had seen the Plaintiff's said letter.

Mr. J. T. arap Leting wrote to the Plaintiff a letter dated 6th November 1989 expressing what he called ***"very serious concern at the publication of a Supplement on Kenya Tea Development Authority in the local daily on 30th October 1989 at a time when the Probe Committee appointed by the Government was in progress."*** He added that

"Such a publication released at the time it was, can easily be seen as calculated to influence public opinion."

He cautioned the Plaintiff against repeating similar action and warned of the option of taking drastic disciplinary action against the Plaintiff. See Page 12 of Plaintiff exhibit 1.

Mr. D. N. Namu's letter dated 8th November 1989, at page 13 of Plaintiff exhibit 1 sent the Plaintiff on compulsory leave and was on 12th January 1990 followed by his letter at page 14 of Plaintiff exhibit 1, terminating the appointment of the Plaintiff at the KTDA with effect from 11th January 1990. That letter said the Plaintiff was going to be advised of his terminal benefits and any other payments, if applicable, "in due course." But the Plaintiff seems to be saying he has never been so advised to-date. May be there was nothing "applicable." However, from the claims the Plaintiff is making in the plaint, no doubt he thinks there was something "applicable".

On the whole therefore, it is clear from the foregoing that it was not only the Probe Committee and the KTDA management who felt that the publication of the Supplement was likely to affect the work of the Probe Committee in some way. The Government, as can be seen from what the two Permanent Secretaries were saying, also had such a feeling and subsequently deemed it advisable to remove the Plaintiff from the management of KTDA; and up to the time of that removal by termination of his appointment, the Plaintiff had not said anything about his defamation by the Defendant. That is he had not complained of any defamation by the Defendant.

From the evidence, the first time the Plaintiff complained of defamation by the Defendant was on 16th August 1990 when the Plaintiff wrote to the Defendant claiming the Defendant had defamed him through the press statement published on 31st October 1989. That letter is at page 15 of Plaintiff exhibit 1.

In that letter, it was the Plaintiff's stand that he had

"Proved beyond doubt that the KTDA Public Relations Officer was totally responsible for the unauthorized publication of the Supplement."

That is in the last paragraph on the first page of the letter, and at the top of the second page the Plaintiff blames the Defendant for having failed to acknowledge receipt of the Plaintiff's letter dated 1st November 1989. I do not know whether in that August 1990 the Plaintiff had forgotten that he was the one who had felt obliged to apologize and did apologize to the Defendant on 1st November 1989 and never demanded repudiation and/or reciprocal apology from the Defendant. Surprisingly in his letter dated 16th August 1990 he stated:

"nor did you repudiate your earlier allegations on my role in the publication of the Supplement."

He went on to say:

"The least I expected from you was an apology to me and the publication of that apology in the appropriate pages of the local press, similar and with the same effect as the report of your allegations."

The Plaintiff thereafter went on to state in that letter what he said were the implications of the allegations and personal attack the Defendant had made against him. The Plaintiff demanded an admission by the Defendant that he defamed the Plaintiff and also demanded publication of the apology in the local press in such a manner as was approved by the Plaintiff. Thereafter, the Defendant was expected to pay general damages, the details and quantum of which were to be discussed between the two. The Defendant was warned that if he failed to comply he would be sued in court and indeed subsequently he was sued in this suit.

To-day therefore the Plaintiff is alleging against the Defendant the defamation the Plaintiff himself had failed to see for a period of 9½ months even when provoked by the drastic action of termination of his appointment as the Chief Executive Officer/General Manager of KTDA on 12th January 1990. At the beginning of that period of 9½ months, he had apologized to the Defendant as he demanded an apology from The Standard Newspaper. One day after demanding the apology from The Standard and apologizing to the Defendant, the Plaintiff declared The Standard innocent, The Standard having told him that in the circumstances the Plaintiff did not deserve such an apology from them. The Plaintiff turned to blaming his Public Relations Officer sending him to a compulsory leave, only to realize that the buck does not stop at the door of the KTDA's Public Relations Officer. Instead, the buck stops at the door of the Chief Executive Officer/General Manager. That was why the Plaintiff did not only have to go on compulsory leave but had also to have his appointment terminated.

Notwithstanding inconsistencies in the Plaintiff's evidence on the issue of approval, there is sufficient evidence from which to conclude and I do conclude that the Plaintiff had approved publication of the Supplement for 27th October 1989. It might have been supplied to the newspapers on 9th September 1989, or earlier, before the Probe Committee was appointed, but when approving the date 27th October 1989 for publication of the Supplement, the Probe Committee was already appointed and at work and the likely effect of publication of the Supplement upon the work of the Probe Committee had been variously discussed by people who included the Plaintiff. For reasons emanating from various problems such as those the Public Relations Officer was called upon to clear on 26th, 27th, 28th October running round to supply newspapers, such as The Standard, with the missing material including pictures and editorials, the Plaintiff might also have understood the failure to publish on 27th October 1989 and the publication a day or two thereafter. In those circumstances, what is the fuss about publication of the Supplement on a day other than 27th October 1989? What difference will it have made had the supplement been published on 27th October 1989 as had been approved by the Plaintiff? It would have been on the Filed Day yes, and the publication would have been seen within its proper context. But would the people who complained about its publication have failed to complain? I was not given evidence to show those people like the Defendant and his Probe Committee and the Government, especially through the two Permanent Secretaries aforesaid, would not have complained just as they did. The issue was whether the Supplement should be published or not, once the Probe Committee had been appointed especially after it had started

its work. The issue was not the date of the publication of the supplement and therefore I do not think publication of the Supplement on 27th October 1989 would have made any difference in so far as the people who came to complain about the publication were concerned. The Plaintiff had approved publication on 27th October 1989. That was why when the publishers, for logistical reasons or perhaps because of confusion, failed to publish the Supplement on 27th October 1989, some of them may have felt it proper to publish the Supplement on some other date and The Standard chose the 30th October 1989 as the Kenya Times was proposing 7th November 1989. The events that unfolded following The Standard publication of the Supplement may have had the effect of preventing further publication of the Supplement by other newspapers.

In the circumstances therefore whether publication of the Supplement on 27th October 1989 was approved by the KTDA Management, or by the KTDA Board or by the Plaintiff, the Plaintiff was responsible and remained responsible whether that publication was actually done on the 27th October 1989 or on any other date with or without facilitation by the KTDA Public Relations Officer Mr. Nyaga. The publication was a blunder on the part of KTDA Management, and the Plaintiff was therefore responsible for that – blunder.

The Supplement, according to page 1 of the Plaintiff exhibit dated 9th October 1989 soliciting congratulatory messages from the Business Community, was

"expected to appear in Kenya Times/Kenya Leo, the Standard, the Daily Nation, the Weekly Review and the Banking Business Review …" to "highlight the tremendous growth of the KTDA together with the immense contribution to the development of Kenya with regard to small holder tea development in the 12 Districts of Kenya, where it operates."

The Plaintiff added:

"Today, the KTDA is the largest and most successful small holder tea project in the world with some 151,860 growers, 39 operational factories and production of around 95,590,000 kilograms of made tea, most of it of premium quality."

The Plaintiff added further that:

"Being closely associated with this National Institution, you are cordially invited to participate in this very important supplement by advertising in it. This could either be in the form of a congratulatory message on KTDA contribution etc to national development or the usual press display of your commercial activities.

Representatives from the Kenya Times, the Standard, the Weekly Review, the Daily Nation and the Banking Business Review will soon be calling on you to book your space."

That, in brief, indicates the nature of the Supplement as something which could influence the public or could amount to lobbying for public support at the time the Probe Committee was doing its work – whether on the KTDA's Annual Filed Day or not on the Annual Field Day.

The Defendant therefore expressed his feelings at a press conference and the Kenya Times published the words complained of. The question is whether the Defendant defamed the Plaintiff?

Defamation alleged contained in a particular article or in a particular publication does not grow so that when the article or publication is first read, the defamation is not seen because it is in its infancy, but as the same article or publication is read more and more thereafter, the defamation grows to be noticed and be seen for it later to mature and be actionable. Defamation in a particular article or publication is seen from the first time the article or publication is read and that is what ought to have happened on 31st October 1989 when the Plaintiff woke up that morning and read, in the daily newspapers, what the

Defendant had told the newspapers the previous day concerning publication of the Supplement on 30th October 1989 by The Standard. As a result the letter dated 1st November 1989 which the Plaintiff wrote to the Defendant could not have been in the apologetic language in which that letter is. That letter could instead have been like the one the Plaintiff wrote to the Defendant, dated 16th August 1990.

The Plaintiff talked about the political climate of the time. But I was given no evidence to show that the political climate in October-November 1989 was hotter than the political climate during August 1990. If during October-November 1989 the Plaintiff could not see defamation in the words complained of, how could he see defamation in the same words during August 1990? The Plaintiff did not give an answer to that question and since in my opinion the Plaintiff could not have written the words he wrote in his letter to the Defendant dated 1st November 1989 if the Plaintiff was at that time feeling the Defendant had defamed him and since, in any case, the Plaintiff could not have waited for 9½ months to notify the Defendant that the Defendant had defamed him in the words complained of, and further since the Plaintiff is a lawyer and advocate who knows very well what defamation is, what happened suggest that the Defendant did not defame the Plaintiff in the words complained of.

Secondly, it is better to note that the words being relied upon by the Plaintiff are the words chosen for use by the Kenya Times newspaper. They are not the exact words which came from the mouth of the Defendant and this fact is vindicated by the fact that The Kenya Times, The Standard and the Daily Nation, each reported what the Defendant had said. But they did not use the same words. While the headlines in the Kenya Times **reads "IT'S SABOTAGE, TEA BODY TOLD**", the Standard newspaper said **"KTDA MANAGERS RILE TEAM"**, and the Nation newspaper said **"Mahihu Accuses KTDA'S Officials."**

According to most important parts of The Standard report, the Chairman of a Committee investigating the affairs of Kenya Tea Development Authority

"Mr. Eliud Mahihu … accused the Authority's Management of undermining the Committee's work.

He said he wanted an explanation from the KTDA General Manager concerning the publication of a KTDA Supplement in a local daily yesterday."

The report in the Standard says more but it does not mention the Plaintiff's name.

The Nation on the other hand stated:

"The Chairman of the team probing the Kenya Tea Development Authority (KTDA), Mr. Eliud Mahihu, yesterday accused the KTDA of releasing to the press information on issues under investigation."

The report in the Nation also says more but it does not mention name of the Plaintiff. Both the Standard and the Nation newspapers do not use the words sabotage anywhere. The Standard used the word "undermining" while the Nation used the word "pre-empt" the team's work.

Looking at the words complained of therefore, it is the Kenya Times only which mentioned the name of the Plaintiff and went ahead to attribute publication of the Supplement to him personally. The other two dailies on the other hand attributed the publication of the Supplement to KTDA or KTDA officials and management. Generally in the report as published in the three newspapers, the accusation is against KTDA and not against the Plaintiff personally or against the Plaintiff as the Chief Executive Officer or as the General Manager. The Kenya Times report was therefore the harshest of the three reports and the Plaintiff has chosen to use it.

If therefore out of three newspapers only one of them attributed publication of the Supplement to the Plaintiff personally or to him in his capacity as the Chief Executive Officer or the General Manager, why should this court overlook the reports in the other two newspapers? Reports in the other two newspapers

must also be taken into account, at least to show that the words complained of, in the Kenya Times, are not the exact words that came from the mouth of the Defendant.

The three newspapers were addressed by the Defendant at the same press conference together. When each published its report of what the Defendant had said, each was reporting the same incident or event so that the three reports were related or connected. There are readers who cannot afford to read all the three newspapers for various reasons, including finance, time, access or availability. But in a case of defamation where the words in question were published in related reports in different newspapers, I think it is fair to use the eyes of the right thinking members of society who have read all the three reports in the three newspapers. Those are the people to form a well informed estimation of the person alleging to have been defamed. They are better informed on the issue of the Defendant's complaint relating to publication of the Supplement than those who have read the Standard newspaper only or the Kenya Times only or the Daily Nation only. They are better informed than those who have read two of those newspapers only. The approach I take in this matter therefore is that of looking for the single natural and ordinary meaning to be ascribed to the words complained of as published in the three dailies, when looked at as a whole by the ordinary, reasonable, fair minded members of society. As it was said in the unanimous decision of the ***House of Lords*** in the case of ***Charleston And Another -V- News Group Newspapers Ltd. And Another (1995) 2 ALL ER. 313,***

"A prominent headline or a headline and photograph could not found 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 (I) to the law of libel for a plaintiff to sever, and rely on, an isolated defamatory passage in an article if other parts of the article negated the effect of the libel and (ii) 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 taken as a whole conveyed to the mind of the ordinary, reasonable, fair minded reader. Accordingly, a plaintiff could not rely on a defamatory meaning conveyed only to the limited category of readers who only read headlines."

It was said that there is a long and unbroken line of authority the effect of which is accurately summarized in ***Duncan And Neill on Defamation (2nd edition, 1983) P. 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. Thus a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage."

That is a quotation from the judgment of ***Lord Bridge of Harwich*** who wrote the leading judgment in ***Charleston And Another –V- New Groups Newspapers Limited And Another*** (ibid). He went on to say that the *locus classicus* is a passage from the judgment of ***Alderson 13 in Chalmers –V- Payne (1835) 2 Cr. M&M 156 at 159, 150 ER 67 at 68*** when it is said:

"But the question here is whether the matter be slanderous or not, which is a question for the jury who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bone and antidote must be taken together."

His Lordship went on to say:

"It is often a debatable question which the jury must resolve whether the antidote is effective to neutralize the bone and in determining this question the jury may certainly consider the mode of publication and the relative prominence given to different parts of it. I can well envisage also that questions might arise in some circumstances as to whether different items of published material relating to the same subject matter were sufficiently closely connected as to be regarded as a single publication."

In my view, such questions as are envisaged in the last part of the above quotation have arisen in this case before me and that was why I was comparing the reporting by The Kenya Times with the reporting by The Standard and the reporting by The Nation newspaper, of what the Defendant had said at Nakuru that 30th day of October 1989. There can be no doubt that those reports by the three dailies are connected. The newspapers were addressed together by the Defendant who used the same words each reporter heard and perceived for each reporter to write what came out in their respective reports in respective newspapers on 31st October 1989. That was the mode of the publication of what the Defendant had said. From the evidence, the Plaintiff read all the three newspapers and chose to use the publication in The Kenya Times to file this suit. The Plaintiff is now before the court and I do not think it will be fair for the court to limit itself to the feeling from the mind of the ordinary, reasonable, fair-minded reader who read The Kenya Times only. The court ought to use the feeling from the mind of the ordinary, reasonable, and fair minded reader who read what the Defendant said as reported in all the three newspapers, because that is the feeling based on better information – than the feeling based upon The Kenya Times reporting only. It is only that way that the words uttered by the Defendant in relation to the Supplement's publication will have been considered as a whole. Those words are closely connected and ought not be separated in a case of defamation like this one where the publisher is not a defendant or a respondent in the case. Each newspaper published its own item and I think the three different items of published material relating to the same subject matter, namely the Defendant's press conference at Nakuru concerning publication of KTDA's Supplement, were sufficiently closely connected as to be regarded as a single publication to be used as a whole to determine whether the Plaintiff had been defamed by the Defendant.

I have said above that it was the Kenya Times only which attributed the publication of the Supplement to the Plaintiff personally. But even if all the newspapers had attributed publication of the Supplement to the Plaintiff, what defamation was there in view of what I stated earlier in this judgment? The Plaintiff admitted in his evidence that the Defendant had every right to ask him for an explanation. The Defendant, in the words complained of, demanded an explanation and the Plaintiff gave that explanation and went to the extent of apologizing without at that time complaining of defamation. In my view, he has no valid basis for an action in defamation against the Defendant who, according to the Plaintiff himself in his evidence, had the right to ask the Plaintiff for an explanation. In the circumstances of this case where the Supplement had been published in the press, as determined by the Plaintiff, the Defendant had the further right to use any generally acceptable method, including the very press, to ask for the explanation, and the Plaintiff has no right to determine the manner in which such explanation was to be sought. To my mind, I find the defamatory meanings or innuendos attributed to the words complained of untenable and unacceptable as I do not think our ordinary, reasonable and fair minded reader will agree with the Plaintiff in what the Plaintiff is claiming to be defamatory and the defamatory meanings the Plaintiff is alleging to exist.

Defamation consists of words which in their natural and ordinary sense tend to lower the reputation of a person, the Plaintiff, in the eyes of right thinking members of society. That is where the single natural and ordinary meaning to be ascribed to the words complained of by the Plaintiff, when looked at as a whole in their context, including mode of publication, convey to the mind of the ordinary, reasonable, fair-minded reader that the words are defamatory of the Plaintiff.

From the evidence before me, I am not persuaded to accept that the Plaintiff was defamed by the Defendant in this suit. I find no defamation of the Plaintiff, and that finding remains the same even if I were to disregard publications in The Standard and The Nation newspapers.

In this case the question of malice does not arise as malice was not pleaded in the plaint. The Plaintiff did not therefore prove express malice against the Defendant particulars of malice not having been given.

However, the Defendant in his submissions says that, assuming the words complained of were defamatory of the Plaintiff, he would rely on two defences which he has pleaded in paragraphs 5 and 6 of the Defence. These are:-

(a) Fair comment on a matter of public importance;

and

(b) Qualified privilage.

It has been submitted that in the circumstances of this case, Order VI Rule 6A (3) of the Civil Procedure Rules does not apply. That Rule states as follows:

"Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relied 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 express malice, he shall file reply giving particulars of the facts and matters from which the malice is to be inferred."

Mr. Inamdar pointed out that the position was the same in England and referred to two passages to clarify the position. The one from ***Atkin's Court Forms Vol. 25 Page 83 Paragraph 24*** clarifies the position as follows:

"As in other types of action, a reply is necessary where the Plaintiff wishes to confess and avoid an allegation in the defence. It is of particular importance in defamation actions for when it is intended to allege express malice in answer to a plea of fair comment or qualified privilege, it is necessary to serve a reply giving particulars of the facts and matters from which malice is to be inferred."

The second passage is ***from Carter Ruck on Libel And Slander 4th Ed. P. 146*** as follows:

"Once qualified privilege is established the onus lies upon the plaintiff to prove express malice: if he fails to do so his action must be dismissed. In order to be entitled to give evidence tending to establish malice the plaintiff must in every case deliver a reply setting out all the facts and matters from which he says that malice is to be inferred. This pleading is required so that the defendant shall know in advance what is going to be alleged against him as tending to prove spite, ill will or improper motive and so that he shall not be taken by surprise at the trial by evidence which he is unprepared to meet. If a defendant established a plea of qualified privilege, or, for that matter, a plea of fair comment, and no reply has been delivered the defendant must succeed. What the plaintiff has to prove is that in publishing the statement complained of the defendant was actuated by express malice."

The defence of fair comment in defamation is meant to show that the words complained of are fair comment on a matter of public interest. It is stated by Gatley on Libel And Slander (Ibid) at page 247 paragraph 12.1 that:

"The right of fair comment is one of the fundamental rights of free speech and writing … and it is of vital importance to the rule of law on which we depend for our personal freedom." The right is a "bulwark of free speech. There are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters it is desirable that all should be able to comment freely, and even harshly, so long as they do so honestly and without malice."

At page 248 paragraph 12.2 it is stated:

"To succeed in the defence the defendant must show that the words are comment and not a statement of fact. However, an inference of fact from other facts referred to may amount to a comment. He must also show that there is a basis of comment, contained or referred to in the matter complained of. The comment must satisfy the test of being objectively fair in the sense that an honest or fair-minded person could hold that view. The defence is not, however, inapplicable because the comment was prejudiced or exaggerated or unfair in the ordinary sense of that word. Finally, the defendant must show that the comment is on a matter of public interest, one which has been expressly or implicitly put before the public for judgment or otherwise a matter with which the public has a legitimate concern. If the plaintiff can show that the comment was actuated by malice, he will defeat the plea."

At paragraph 12.4 of the same book the Author contrasts the two defences of fair comment and qualified privilege as follows:

"Although a separate defence of fair comment in relation to criticism of writings and plays was early recognised, it was not till well on the nineteenth century that the defences of fair comment and privilege became clearly separated in the field of public discussion of public matters. It came to be settled that fair comment was a defence to comment only, including inferences of fact and motive, and was open to all, whereas qualified privilege was a defence also to misstatements of fact but was confined to those individuals who stood in such relation to the circumstances as to be entitled to say or write what would have been libelous or slanderous on the part of anyone else…"

With that stated, Section 15 of the Defamation Act (Cap. 36 Laws of Kenya) is useful to look at as it states as follows:

"In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression 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."

In a recent decision where it was stated there was a "modern approach to the defence of fair comment on a matter of public interest" in England, ***Mr. Justice Eady*** of the High Court stated in ***Branson vs Bower (2002) 2 WLR 452*** that

"in every case of fair comment the court needs to rule whether the words were, objectively judged, fair comment. It will ordinarily be for the jury to decide whether each relevant comment, or opinion, is such that a hypothetical person could (in the light of the material facts) honestly express it. It is important to emphasise that it is immaterial whether the jury agrees with the views expressed.
……

……

It has long been clear that one may be prejudiced or biased and yet claim the protection of a fair comment defence for the expression of one's views. Those views may themselves be exaggerated or obstinate and yet fall within the concept of honest opinion. If one is writing or speaking on a matter of public interest, there is no doubt that the law permits the language to be rude and offensive. It has been acknowledged, for example, that a critic is entitled to dip his pen in gall for the purpose of legitimate criticism."

The learned Judge referred to the judgment of ***"Lord Nicholls of Birkenhead"*** in the case ***of Cheng V Tse Wai Chun (2000) 3 HKLRD 418 in the Court of Final Appeal in Hong Kong*** and remarked

"The judgment re-emphasises that for the defence traditionally known as fair comment on a matter of public interest, the touch stone is always honesty and that it should not be watered down by considering issues such as fairness or moderation. That is relevant, of course, to stage 1 of the defence of fair comment, when the court is concerned whether a hypothetical commentator could express the views in question honestly. It is also relevant at stage 2, when the inquiry turns to the individual defendant's stage of mind for the purpose of resolving a plea of malice. Once again, the only touchstone is that of honesty."

Thus Lord Nicholls's analysis emphasises that honesty and honesty alone, should be the touchstone for the defence of fair comment is open to a commentator however prejudiced he might be and however exaggerated or obstinate his views. That view rejects the view that

The relevant expression of views must be judged additionally, by the standards of a fair-minded or reasonable person."

And Justice Eady adds:

"It is necessary to acknowledge that if a defendant does indeed have to pass any more restrictive test, going beyond that of honesty, then the consequence would be a significant inhibiting effect on freedom of expression on matters of public interest …

As Lord Nicholls makes clear, the whole point about a defence of fair comment is that it is to allow citizens to express hard-hitting opinions on matters of public interest honestly without fear of being brought before the courts.

……..

It is well settled that a defendant does not have to persuade the court, whether judge or jury, to agree with his opinions (although the remarks of Fletcher Moulton LJ in Hunt V Star Newspapers Co. Ltd (1908) 21CB 309 might be taken as suggesting the contrary), nor yet should he have to demonstrate that honestly expressed opinions fall within some elusive and nebulous margin of what is reasonable or fair. Freedom of speech is not a game to be played according to an umpire's subjective assessment of what constitutes fair play…

I have therefore come to the conclusion … that the only two requirements in this contract are (1) that a defendant should have expressed the opinions honestly and (2) that he should have done so upon facts accurately stated. This second requirement is the only objective criterion that makes sense, because such facts are capable of proof.

A commentator must not deliberately distort the true situation. That would be relevant on malice even according to Lord Nicholls's criterion. It would not be honest. The matter of distortion (whether dishonest or otherwise) may also come into play, however, at the stage of the objective test, because one cannot decide whether a hypothetical commentator could hold an opinion in a vacuum. Even at this point, it is surely necessary to test the matter against some factual assumptions."

Another useful case Mr. Inamdar referred to was ***Telnikoff –vs- Matusevitch (1991) 4 ALL E.R. 817***, a House of Lords decision where ***Lord Keith, Lord Brandon, Lord Templeman and Lord Oliver,*** stated that

"A defendant who relied on a plea of fair comment in libel proceedings did not have to show that the comment was an honest expression of his own views but merely that the facts on which his comment was based were true and that the comment was objectively fair in the sense that any man, however prejudiced and obstinate, could honestly have held the views expressed, since in alleging unfairness the onus was on the plaintiff, as was the case where he alleged malice, to prove that the criticism was unfair either from the language used or from some extraneous circumstances."

It is Mr. Inamdar's submission, and I think he is right, that in this case, not only has no malice been pleaded but the Plaintiff has also failed to discharge the burden of proving that the Defendant did not honestly hold the belief which he expressed to the dailies on 30th October 1989. That in the absence of a plea of malice and further, in the absence of proof of an absence of honest belief on the part of the Defendant, it was altogether unnecessary to lead evidence in rebuttal on behalf of the Defendant.

Concerning the term "matter of public interest", Gatley at page 269 paragraph 12.27 says the defence of fair comment is confined to comment on matters of public interest which are numerous and should not be confined "without narrow limits …". Presently, there appears to be two rather different approaches to the basis on which matters are held to be of public interest.

The older is that matters of public interest are matters which are expressly or impliedly submitted to public criticism or attention. On the other hand, it has come to be recognised that the public has a legitimate concern in matters or events which the Plaintiff might even be seeking to keep from the public gaze, or which have taken place in contexts formerly regarded as private.

"As has been said more recently whenever a matter is such as to affect people at large, so that they may be legitimately interested in or concerned at what is going on or what may happen to them or others then it is a matter of public interest on which everyone is entitled to make fair comments. … The courts now treat many more matters as being of legitimate public concern or interest than would have been the case in the nineteenth century … The question whether the matter commented on is of public interest is solely for the Judge."

The publication of the Supplement whilst the affairs of KTDA were being probed by a Committee appointed by the President was a matter of public interest and the Plaintiff's evidence also reveals that fact and he expressly admitted during cross examination that the public had interest to know whether the Probe Committee was discharging or was being prevented from discharging its duties under the terms of reference.

Concerning fair comment, in this case before me, the comments objected to by the Plaintiff are firstly that the publication of the Supplement amounted to a sabotage or undermining or preempting of the investigations then being carried out by the Probe Committee and secondly, that since that publication was caused by the Plaintiff at that time when he was aware of the impact of that publication on the investigations, an explanation from him as to why he did so was necessary.

It is the Defendant's case, and I do agree, that both those comments are fair comments honestly made by the Defendant on facts which are true; the Plaintiff having failed to discharge the onus on him to show that the Defendant's comments were not an honest expression of his views in regard to the publication of the Supplement. The effect of publication of the Supplement was known to the Plaintiff just as it was know n to the Defendant as I stated earlier on the basis of the evidence on record.

The further comment that the publication of the Supplement called for an explanation as to why that publication had been done, was equally fair comment honestly made by the Defendant. The Plaintiff recognised the legitimacy of the Defendant's comment that an explanation was required and that was why he promptly wrote his letter dated 1s^{t} November 1989 to the Defendant readily giving the explanation and going further to apologise for the embarrassment caused by that publication.

Concerning the defence of Qualified Privilege, Gatley, from paragraph 14.1 page 325 states as follows:

"There are occasions upon which, on grounds of public policy and convenience, less compelling than those which give rise to absolute privilege, a person may yet, without incurring liability for defamation, make statements about another which are defamatory and in fact untrue. On such occasions of privilege a person is protected if the statement was fairly warranted by the occasion (that is to say, was reasonably necessary to achieve the purpose for which the law grants the privilege) and so long as it is not shown that he made the statement with malice i.e. knowing it to be untrue or with some indirect or improper motive. These occasions are called occasions of qualified privilege …"

The commentary goes on at page 326 stating:

"The question whether the occasion on which the statement was made was a privileged one is a question for the judge and the defendant bears the burden of establishing the facts and circumstances necessary to create the privilege. If the judge rules that the occasion is privileged, the plaintiff must, in order to succeed in the action prove that the defendant was not using the occasion honestly for the purpose for which the law gave it to him, but was actuated by malice, and this is a matter for the jury, provided there is evidence from which it can reasonably be inferred".

As for the reason for the defence, Gatley at page 327 paragraph 14.2 continues:

"Statements published on an occasion of qualified privilege are protected for the common convenience and welfare of society. It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that

persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest. In such cases no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances; the law declares if privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would out-balance that arising from the infliction of a private injury. It may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be contrary to public policy and the general interest of business and society that persons should be hampered in the discharge of their duty or the exercise of their rights by constant fear of action for slander … The principle on which these cases are founded is a universal one, that the public convenience is to be preferred to private interests and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice notwithstanding that they involve relevant comments condemnatory of individuals …"

Examples of statement are given which qualify for qualified privilege. Two of them relevant for the purpose of this case are: -

(a) Statements made on a subject-matter in which the defendant has legitimate interest; and

(b) Statement made by way of complaint about those with public authority or responsibility.

and the learned counsel for the Defendant submits that the statements made by the Defendant which are subject matter of the Plaintiff's complaint were clearly statements on a subject matter in which the Defendant as Chairman of the Probe Committee had a legitimate interest. His interest, or his duty was to guard against any action by anyone which tended to interfere with or impede the proper and efficient working of the Probe Committee. Likewise if the Defendant found anyone occupying a position of public responsibility as was the case with the Plaintiff in October 1989, who was hampering or undermining the work of the probe team, he was entitled, under the protection of qualified privilege, to make statements by way of complaint against such interference.

According to the defence case, this was the occasion of qualified privilege when the Defendant was under a social or moral duty (if not a legal one) to make the statements which he did in furtherance of his legitimate interest as Chairman of the probe team to ensure that the work of the probe team was not undermined or interfered with. Likewise, members of the public had a corresponding interest in receiving statements from the Defendant as Chairman of the probe committee in order to know whether there was any interference with the working of the Probe Committee. As per paragraph 14.8 of Gatley at page 333 under the heading "Protection of Interests"; Lord Esher M. R. stated in ***Hunt vs Great Northern Ry*** as follows:

"A privileged occasion arises if the communication is of such a nature that it could be fairly said that those who made it had an interest in making such a communication and those to whom it was made had a corresponding interest in having it made to them. When those two things co-exist the occasion is a privileged one."

Members of the public also had an interest in the investigations which the probe team was required to carry out in the affairs of KTDA because KTDA itself was, and still, is, a public body created for the benefit of the public.

On page 330 paragraph 14.6 Gatley considers what is a moral duty stating:

"The duty may be moral or social one. In Stuart vs Lindley L.J. said: "I take moral duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal … Would the great mass of right-minded men in the position of the defendant have considered it their duty under the circumstances to make the communications? In considering whether the occasion was an occasion of privilege, the court will regard the alleged libel and will examine by whom it was published, when,

why, and in what circumstances it was published, and will see where these things establish a relation between the parties which gives rise to a social or moral right or duty, and the consideration of these things may involve the consideration of questions of public policy."

It was submitted that going by that test, the Defendant was clearly under a moral duty to complain about the publication of the Supplement in the instant suit.

The privilege attaches to the occasion on which the statements complained of were made. It does not attach on any person. The occasion to which the qualified privilege attaches, in this case, was the publication of the Supplement at the time when the affairs of KTDA were being investigated by the Presidential Probe Committee. It is the defence case, and correctly so, that on the basis of the evidence given in this case, the occasion was privileged and the Plaintiff has no claim against the Defendant.

I will now move to the Plaintiff's claim for damages. This is a suit for defamation. True damages ought to be paid if the Plaintiff's case succeeds. But I think the claims the Plaintiff is making in this suit go beyond the damages that should be claimed in a defamation case because they include claims for what the Plaintiff calls unlawful dismissal or unlawful termination of his employment.

If there was unlawful termination of the Plaintiff's employment even if that termination were caused by the Defendant, the said Defendant was not the Plaintiff's employer and cannot therefore be liable for an unlawful termination of the Plaintiff's employment. Indeed the Defendant never terminated the employment of the Plaintiff. It was the Government that terminated the employment through the Permanent Secretary, Ministry of Agriculture.

Having said the above, I do conclude this judgment by stating that from the evidence adduced before me, the plaintiff has not succeeded in proving defamation by the Defendant against him.

If on the other hand there was defamation, it was done in circumstances where the defences of fair comment and or qualified privilege, relied upon by the Defendant defeat the Plaintiff's claim.

Otherwise if it were held that defamation has been proved and that the defences advanced by the Defendant do not succeed, I would have awarded the Plaintiff general damages for defamation, under prayer (b) in the plaint, of Ksh.3,000,000/= plus costs of the suit. I would have dismissed the Plaintiff's claim for general damages under prayer (a) and the claim under prayer (d).

Finally therefore, the Plaintiff's suit against the Defendant be and is hereby dismissed in its entirety with costs to the Defendant. That is the order of this court.

DATED this **19TH DAY** of **JULY 2007**.

J. M. KHAMONI

JUDGE

Present:

Mr. Gaturu for the Plaintiff

Mr. Amogo holding brief for Mr. Inamdar for the Defendant

Mr. Kipkurui – Court Clerk

The Defendant In Person.

J. M. KHAMONI

JUDGE

Further Court Order:

Upon oral application by Mr. Gaturu, the Plaintiff's Advocates be supplied with uncertified copy of the proceedings and a certified copy of the judgment herein.

J. M. KHAMONI

JUDGE

19.7.2007