



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1067 OF 1999**

**KIPYATOR NICHOLAS KIPRONO BIWOTT.....PLAINTIFF**

**VERSUS**

**CLAYS LIMITED.....1ST DEFENDANT**

**LITTLE BROWN & COMPANY LIMITED(UK).....2ND DEFENDANT**

**BOOK POINT LIMITED.....3RD DEFENDANT**

**CHANDERMOHAN BAHALT/A BOOK STOP.....4TH DEFENDANT**

**CONSOLIDATED WITH CIVIL CASE NO. 1068 OF  
1999**

**KIPYATOR NICHOLAS KIPRONO BIWOTT.....PLAINTIFF**

**VERSUS**

**DR. IAN WEST.....1ST DEFENDANT**

**CHESTER STERN.....2ND DEFENDANT**

**JUDGMENT**

The Honorable Nicholas Biwott (hereinafter “the plaintiff”) is a member of the Kenyan Parliament, and a senior Minister in the Government of Kenya.

As Minister representing the important portfolio of Tourism, Trade and Industry, the plaintiff travels extensively around the world representing our nation at important conferences, seminars and negotiations aimed at attracting investment in, and business with, our country. His exposure and reputation, which extends far and wide beyond our borders, has been severely and wantonly attacked and injured by the defendants in a book entitled “*Dr Ian West’s Casebook*” published in the United Kingdom. As a result, he has brought two separate actions claiming damages and restraining orders against a total of six defendants.

The first action, being HCCC No 1067 of 1999, is against four defendants. The first two defendants, namely Clays Ltd and Little Brown & Company (UK) Ltd are described as printers and publishers

respectively of books and magazines in the United Kingdom (hereinafter collectively referred to as “the UK Companies”). The third and fourth defendants are both Kenyans. The Kenyan defendants, who filed a defence through their advocates, Salim Dhanji & Co, of Nairobi eventually admitted liability and a consent judgment was entered against them in terms of a joint statement read in Court on July 12, 2000. By that statement, which was made the order of this court, the Kenyan defendants were required to pay Kshs 5,000,000 each (making Kshs 10,000,000/= in total) to the plaintiff in damages and to make an unqualified apology for their publication of the offending material by its sale. For this reason, we are not concerned with the Kenyan defendants in the proceedings that follow. All the same, the award against these defendants is relevant because it shall be taken into account in making the ultimate award. This is because it is a cardinal tenet of justice that a person shall not be allowed to recover compensation twice over the same claim.

On the other hand, the UK Companies did not take action even though they were served. The plaintiff’s advocates obtained leave of this court to serve the UK Companies with summons to enter appearance in the United Kingdom. They instructed David Price & Co Solicitors who were their agents in London. The London agent organized for, and effected service on the UK Companies. Service was done by Ms Jacqueline Judge who has sworn an affidavit to that effect, and also attended this Court as a witness and confirmed that she had indeed effected service upon the UK Companies. As a result of the default to enter appearance within the prescribed time, an interlocutory judgment was entered against them.

The second action is HCCC No 1068 of 1999 in which two defendants have been named - Dr Ian West, a UK pathologist who participated in the investigations of the murder of the late Dr Robert Ouko, and Chester Stern, an author based in the UK. These two defendants were also served by the said Ms Jacqueline Judge and both failed to enter appearance within the prescribed time. A default judgment was also entered against them. Both suits have now come before me for assessment of damages. The suits were consolidated on this occasion pursuant to the application of Mr Oyatsi, counsel for the plaintiff, under order XI rule 2 of the Civil Procedure Rules.

The offending book was compiled, authored and/or co-authored by Dr Ian West and Mr Chester Stern. The UK Companies are responsible for the printing and publishing of the book. On page 88 of the book are contained the following words:

“During the visit, there was an angry argument between Ouko and the Kenyan Energy Minister, Nicholas Biwott. It was to prove a costly outburst for the fiftyeight- year-old Foreign Secretary. Ouko criticised the foreign bank accounts held by Biwott and other Ministers, saying that the huge sums of money in them should be repatriated to Kenya to help pay for economic development. Their existence, which was known to the international aid authorities, was hindering Kenya’s applications for foreign assistance. Biwott, widely suspected of being the most corrupt of Moi’s Ministers with overseas investments and cash sums alleged to top \$200m, was furious and went to the President, a member of the same minority Kalenjin tribe and his closest political friend. Ouko’s position within the entourage was already precarious because he had been welcomed with open arms by President George Bush and the US administration while Moi and the others had been treated with cold disdain. President Moi told Ouko that the foreign accounts issue was none of his business, ordered him to leave the Government entourage and fly home on a commercial flight, and had his passport seized when he arrived in Nairobi. In this atmosphere of hostility and suspicion Ouko sought a meeting with the President, but instead of reconciliation found himself banished to one of his three homes - a farm at Koru, forty miles from the shores of Lake Victoria. There he began an anxious wait, telling friends and family that he feared for his life because of his threats to expose a network of corruption within the Government.”

The plaintiff’s case is that these words in their natural and ordinary meaning were calculated to mean, and did mean, that the plaintiff killed or participated in the murder of the late Dr Robert Ouko. Dr Ouko was Kenya’s Foreign Affairs Minister before his death. His death in 1990 has not been resolved. By this, I mean that it has not been established how he met his death. No person has been convicted in our Courts for that death. The charge of murder in this country is very serious. A person convicted of murder must be sentenced to face capital punishment. The plaintiff’s further case is that these words in their natural and ordinary meaning implicated him in corruption - an offence which carries a custodial sentence of 5 years.

The offending book was published in the United Kingdom and is sold widely in many parts of the world including this country. The plaintiff produced the book and a cash sale receipt for the book which is retailing at Kshs 1,900/= or thereabouts. In the United Kingdom, the book is sold at UK £18 just about the same retail price as in Kenya.

The plaintiff testified that the circulation of the book has damaged his reputation both locally and internationally by portraying him as a murderer and a most corrupt person. He first noticed the book in 1999. He instructed his lawyers, Shapley Barret & Co of Nairobi to issue a demand for the retraction of the book. His lawyers sent a notice to the UK Companies, Dr Ian West and Mr Chester Stern Messrs Biddle, Solicitors of London, for Little Brown & Co Ltd, Dr Ian West and Mr Chester Stern replied as follows:

“We do not accept that the words complained of bear the meaning which you attribute to them nor that they are defamatory of your client. The incidents in question have been investigated carefully and our clients have witnesses who are willing to testify as to the truth of the facts in issue ...”

Of course, no witnesses were called to testify as all the defendants in the United Kingdom failed to enter appearance in the actions. Clays Ltd wrote back and said they were investigating the matter and would revert to the plaintiff’s advocates “in the near future”. The plaintiff was not satisfied with the action of any of the defendants and filed these suits. As was expected, the suits generated great media attention in this country and were widely reported. One of the defendants was reported in a national paper of this country, namely the Sunday Nation of May 30, 1999 as saying that he would not apologize for the book and its matter, whatever, and that the publishers of the book had no intention to withdraw it. The reporting on page 1 of that respected Kenyan newspaper was as follows:

“Cabinet Minister Nicholas Biwott will not get an apology from British authors of a book implicating him in Dr Robert Ouko’s murder. One of the authors Mr Chester Stern, yesterday said: ‘There is no way, we will apologize to Mr Biwott for suggesting he either murdered or was implicated in Dr Ouko’s murder.’ Mr Stern welcomed Mr Biwott’s suit seeking general and aggravated damages for libel in the book - *Dr Ian West’s Casebook*. ‘ There is no way I am going to admit liability over page 88 of the book,’ said Mr Stern who is a journalist on the Mail on Sunday newspaper in the United Kingdom. ‘ I will also not be apologizing to Mr Biwott. I understand also that the publishers have no intention of withdrawing the book and we will defend any libel action against us’, said Mr Stern.”

As stated earlier, none of the UK defendants entered appearance in any of these suits despite Mr Stern’s assertion to the contrary as reported in the foregoing material. As a result of that failure, interlocutory judgments were entered against all the four UK defendants. This was once again reported widely in the Kenyan media. On August 6, 1999 there was a report in the Daily Nation a sister publication of the Sunday Nation that Mr Chester Stern had never received the writ in respect of one of these suits.

Dr Ian West was part of the Scotland Yard Team (popularly known as the “Troon Team” because of its leader) that investigated the murder of Dr Ouko. He was the pathologist on the team. According to the evidence before this Court, that investigation was never completed. There was no official finding of that team. The plaintiff’s evidence is that if anyone, Dr Ian West knows this well. It was, therefore, wrong of Dr Ian West to publish or participate in the publication of the offending material without any reference to the plaintiff. “Dr Ian West only concerned himself with the profits he would reap from such publication without considering what damage it would cause me,” said the plaintiff, in his testimony.

When the Kenyan defendants settled the plaintiff’s claim against them, there was once again a lot of media coverage of this matter. In the Daily Nation of July 14, 2000, it was reported that the publisher of the offending book was unmoved by the Kshs 10,000,000= award made to the plaintiff against the Kenyan defendants and that the same would continue to be sold internationally. Mr David Young, the Managing Director of the publisher was quoted as having said that he was aware of one of these suits in which the publisher is a defendant “but no action has been brought against us either verbally by fax or in any other form.” The publisher was also reported to have vowed to “vigourously defend” the book should the plaintiff sue them in London. It was also reported on the same day that Mr Stern did not know

anything about the case.

Mr Wangethi Mwangi the Editorial Director of the Nation Media Group, the publishers of the Daily Nation and the Sunday Nation was called as a witness in these suits. He confirmed the accuracy of the reports carried in his papers.

Mr Oyatsi, counsel for the plaintiff, has submitted that the plaintiff is entitled to damages of Kshs 75,000,000/= jointly and severally against all UK the defendants, except Clays Ltd against whom there is no claim for exemplary damages but only compensatory damages of Kshs 25,000,000/=. This is obviously a substantial claim. I do not think that there has been any claim of this magnitude for a tort of this nature in the history of this country. This case, therefore, calls for great attention and careful consideration. I have, therefore, taken the trouble to study and consider all the authorities provided to this Court by the plaintiff's advocate, as well as several others. As would be expected (because of the novelty of the sums claimed) most of those authorities are English, as are the defendants with whom we are now concerned.

Let me now consider the principles of law which in my view will guide us to a fair decision in this case.

If I may, let me repeat once again that liability is not at issue here. This Court is concerned only with the damages payable to the plaintiff for the injury caused to his feelings and reputation and whether he should be awarded exemplary damages and if so, what amount.

A plaintiff who has been defamed is entitled to bring an action against the person who published the defamatory material or caused it to be published. The plaintiff may sue one or some only of the persons liable to him for the offending material but this does not in anyway bar him from bringing an action against the others. Where the plaintiff chooses to sue persons liable to him in instalments, the sums recoverable by subsequent actions can only be limited to the amount awarded by the first judgment. Contributions are recoverable between tortfeasors liable for the same damage whether jointly or otherwise, but subject to any enforceable indemnity. A plaintiff may accept money paid into Court by one defendant and still continue the action against the others. (see generally *Halsbury's Laws of England* (3rd Edition) at p 17). That is exactly what the plaintiff has done with respect to the Kenyan defendants. It is, therefore, perfectly in order for the plaintiff to proceed with these actions notwithstanding the fact that he has compromised his claim against the Kenyan defendants.

Under order XI rule 1 and 2 of the Civil Procedure Rules, this Court has jurisdiction to order, on the application of any of the parties, for the consolidation of actions so that they may be tried together. The application may be made by Chamber Summons or orally in Court. In the present case the consolidation was made on an oral application. Where the suits have been consolidated the Court must assess the whole amount of the damages if any, in one sum, but a separate verdict must be taken for or against each defendant as if the actions consolidated had been tried separately and where there is need to apportion the amount of damages which have been found between and against the defendants, this must be done (see generally *Halsbury's Laws of England*, 3rd Edition (vol 24) at p 97). In *Mitchell v Hirst, Kidd and Rennie Ltd* [1936] 3 All ER 872 Lawrence J apportioned damages and costs in a libel action against the defendants equally .

If any defendant, in an action for libel against several defendants sued jointly, pays money into Court, the plaintiff may elect to accept the money so paid in satisfaction of his claim against that defendant. After taxation of the costs against that defendant has been done the action against him must thereupon be stayed. The plaintiff may continue with the action against the other defendants, but the sum paid into Court must be set off against any damages awarded against the other defendants. These matters shall become relevant at the point of assessment of damages which is dealt with later.

Now, what principles govern the award of damages in libel cases? They are as follows:-

Damages in libel actions are awarded to compensate the plaintiff for the following:

(1) Injury to his reputation, and

(2) the hurt to his feelings.

These are called compensatory damages. There is no secret about the assessment of damages for libel actions. Therefore, compensatory damages in these cases have been said to be “at large.” In *Cassel & Co Ltd vs Broome and another* [1972] 1 All ER 801 at p 825, Lord Hailsham of St Marylebone, LC said as follows:

“...the whole process of assessing damages where they are “at large” is essentially a matter of impression and not addition.”

At the same page, the Lord Chancellor said that damages when awarded must be a single lump sum in respect of each separate cause of action. The damages are awarded for the plaintiff to vindicate him to the public and to console him for the wrong done. In *John v MGN Ltd* [1996] 2 All ER 35 at p 47 the Court of Appeal of England said as follows:-

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

The assessment of damages in libel actions is a complex matter. This is because in doing so, the law is attempting “to put monetary value on something which can be neither evaluated in money terms nor fully compensated for by a monetary award” (per Lord Donaldson, Mr in *Sutcliffe v Pressdram Ltd* [1960] 1 All ER 269 at p 281). An award in a libel action should nevertheless compensate the plaintiff for pain and suffering caused to him by the publication. This must take into account the extent to which pain and suffering is aggravated, or reduced by the defendant’s subsequent conduct. The award should vindicate the plaintiff’s reputation in the eyes of the public. In *Cassell & Co Ltd* case *supra* at p 824 Lord Hailsham, LC said as follows:-

“In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but in case the libel, driven underground, emerges from its lurking place at some future date; he must be able to point at a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.”

The plaintiff must be awarded a sum to which he can refer to convince others that he was wrongfully accused. He must beat the defendant if you like. The award must cover “(injured feelings) the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant” (*ibid* Per Lord Hailsham, LC).

In assessing damages the Court must look at the whole conduct of the plaintiff and the defendant from the time of the publication until the time of judgment. The Court will look at the conduct of the parties before action, after action and in Court during trial. Malicious and insulting conduct on the part of the defendant will aggravate the damages to be awarded. These “aggravated damages” (as distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words alone, caused by the presence of the aggravating factors.

Exemplary damages go beyond compensation and are meant to “punish” the defendant. Where exemplary damages are to be awarded against joint tortfeasors, only one sum should be awarded and this must represent the highest common factor, that is to say, it must not exceed the highest sum which the least blameworthy defendant ought to pay by way of punishment. I think similar principles apply to aggravated damages.

In the *Cassel & Co Ltd* case *supra* at p 824 Lord Hailsham, LC quoted with approval the following statement by Lord Esher, Mr in *Praed v Graham* (1889)24 QBD at 55

“...in actions of libel .....the jury in assessing damages are entitled to look at the whole conduct of the defendant [I would personally add ‘and of the plaintiff’] from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action after action, and in Court during trial.” (Brackets his)

A plaintiff who behaves badly, as for instance by provoking the defendant, or defaming him in return will be viewed less favorably; a defendant who has behaved well eg by apologizing will be treated with favour and vice versa. Damages will be aggravated by the defendant’s improper motive eg where he is actuated by malice. Repetition of the libel; failure to contradict it; insistence on a flimsy defence of justification; and a nonapologetic cross examination are all matters that will aggravate damages.

In *Sutcliffe v Pressdram Ltd* [1990]1 All ER 269 at p 288 Nourse, LJ quoted with approval the following words of Pearson, LJ in *McCarey v Associated Newspaper Ltd* [1964] 3 All ER 947 at 958; 2QB 86 at 104:

“It has long been recognized that in determining what sum within that bracket should be awarded, a jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a highhanded, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation.”

In Nourse, LJ’s view, the following conduct by the defendant may be regarded as aggravating injury to the plaintiff’s feelings, so as to support a claim for aggravated damages: failure to make any or any sufficient apology and withdrawal; repetition of the libel; conduct calculated to deter the plaintiff from proceeding; persistence, by way of prolonged or hostile cross examination of the plaintiff or in turgid speeches to the jury, in a plea of justification which is bound to fail; the general conduct, either of the preliminaries or of the trial itself in a manner calculated to attract further wide publicity; and persecution of the plaintiff by other means.

The plaintiff’s conduct and the degree of respect which he has shown for the feelings of others should be taken into account. In *Sutcliffe v Pressdram Ltd* [1990]1 All ER 269 at p 281 the Court of Appeal of England said as follows:-

“The first is that under the law as it stands at present what is called ‘the measure of damage’ is or may be different in two cases. In relation to claims for personal injury the law calls for compensation to be assessed by reference to the pain and suffering caused by the injury itself. In cases of libel, the law calls for compensation to be assessed by reference not only to the pain and suffering caused to the plaintiff by the publication of the libel, but also to the extent to which this pain and suffering is aggravated, or reduced, by the defendants’ subsequent conduct. It also requires account to be taken of the plaintiff’s need to receive an award which will vindicate his or her reputation in the eyes of the public.”

Once again, the Court will have to consider any previous damages recovered by the plaintiff or that he has brought other actions for libel in respect of the publication of words to the same effect as the words on which the action is founded. Further, it will be relevant that the plaintiff has received or agreed to receive compensation in respect of such publication. In that case the Court must consider how far the damage suffered by the plaintiff can reasonably be attributed solely to the libel with which the Court is concerned, and how far it is the joint result of the two libels. Where some part of the damage is the joint result of the two libels, it should bear in mind that the, plaintiff ought not to be compensated twice for the same loss. In *Lewis & another v Dail v Telegraph Ltd, Lewis & another v Associated Newspaper Ltd* [1963]2All ER 151 at p 156 Lord Reid said as follows:-

“I do not think that it is sufficient merely to tell each jury to make such allowance as they may think fit. They ought, in my view, to be directed that in considering the evidence submitted to them they should

consider how far the damage suffered by the plaintiffs can reasonably be attributed solely to the libel with which they are concerned and how far it ought to be regarded as the joint result of the two libels. If they think that some part of the damage is the joint result of the two libels they should bear in mind that the plaintiffs ought not to be compensated twice for the same loss. They can only deal with this matter on very broad lines and they must take it that the other jury will be given a similar direction. They must do the best they can to ensure that the sum which they award will take into account that part of the total damage suffered by the plaintiffs which ought to enter into the other jury's assessment."

Finally, the Court will consider the manner of the publication and the extent of circulation. The extent of the circulation and the geographical area within which the distribution takes place and the nature of the audience are always relevant. Obviously where many copies are supplied to a wide population and area, the Court will award more damages.

The foregoing are the principles which govern the assessment of compensatory (including aggravated) damages. Below is a brief discussion of the principles governing the assessment of exemplary damages.

Where the Court is satisfied that the defendant's conduct was calculated to make him profit which may well exceed the compensation payable to the plaintiff, it may award the plaintiff exemplary damages. This will be the case where the defendant knew that the publication would be tortious, or was reckless as to whether or not it would be, and nevertheless decided to publish the words complained of on the basis that the prospective profits outweighed the likely compensatory damages. In the *John v MGN Ltd* case *supra* Sir Thomas Bingham quoted with approval the following passage in *Duncan and Neill on Defamation* (2nd Edn, 1983).

"(a) Exemplary damages can only be awarded if the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless whether his action was tortious or not, and decided to publish because the prospects of material advantages outweighed the prospects of material loss. 'What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical, penalty' "

The Court will, therefore, award exemplary damages where it is satisfied that compensatory damages are insufficient.

There is no formula for assessment of damages in libel cases. Nevertheless, the Courts have invented guidelines to help one reach at a figure. In *Sutcliffe v Pressdram Ltd supra* the Court of Appeal recommended that the purchasing power of the award must be taken into mind. In that case the jury had awarded the plaintiff in a libel action £600,000/= (about Kshs 60,000,000/=). The Court set aside this award for being excessive. Nourse, LJ said as follows:-

"How do I arrive at that conclusion? We must look into the minds of the jury. We must look, as best as we can, into the minds of ordinary sensible men and women, people with ordinary incomes and mortgages and a proper respect for the reputations and feelings of others, who have watched and listened attentively throughout the trial, knowing the values of houses, motor cars, foreign holidays and life insurance policies they could not regard £ 600,000 as anything other than an enormous sum of money, a sum which would transform the life of any of them who received it. However grave the injury to Mrs Sutcliffe's reputation, however pressing the need for its vindication, however profound the injury to her feelings and however disgraceful private eye's conduct, they could not, these ordinary men and women, think that that enormous sum was appropriate, far less necessary, as compensation for one who in other circumstances might have been numbered among them. And if, with Lord Donaldson MR, they were to look at the £600,000 not simply as a capital sum but as one whose investment would both preserve it and provide Mrs Sutcliffe with a gross income of over £1,000 per week, they would think their view of it to be the more obvious still."

An award which is divorced from reality cannot stand. There must be some reasonable relation between the wrong done and the damages awarded. The damages are not meant to enrich the plaintiff but this does not prevent the Court from making a high award in a proper case (see generally *Sutcliffe v Pressdram*

Ltd).

Now let us try and apply these principles of law to the facts before this Court. Here is a plaintiff who is one of the senior most and high ranking Ministers in the Government of Kenya. He enjoys a high profile position within and outside our country. He attracts enormous media attention. He travels extensively around the world representing our nation in important meetings. Part of his job is to promote trade and business with this country, and to attract investment in his tourism portfolio. In this endeavour he rubs shoulders with the high and mighty around the world. He interacts as much with the ordinary *wananchi* - the thousands of people in his constituency who he represents in Parliament. And he deals routinely with his peers in Parliament, his friends outside, and his community around him. He is a respected member of the society. Now to call such a prominent man a “murderer” and “a most corrupt person” is to say the least, highly outrageous and serious. Indeed, these are among the most serious crimes in our country.

Murder is a heinous offence carrying the death sentence, while a person convicted of corruption may be sentenced to at least five years in prison. I accept the plaintiff’s testimony that these allegations have caused him much distress and hurt his feelings deeply. I accept his evidence that his reputation has been severely damaged as a result of this libel. According to the evidence before this Court the offending book is being sold internationally, including in this country. It is in hard-bound cover, and according to the plaintiff represents reference material which will be found in libraries around the world for generations to come. Clearly, he cannot stop this unless he files for restraining orders in every country where the book is sold. Meanwhile, the defendants continue to make profits on the book. Their aim according to the plaintiff is “wicked and mercenary” intended only to profit from their wrong, at the expense of the plaintiff. In addition, the conduct of the UK defendants since the publication has not helped matters - in fact they have deliberately and arrogantly announced that they will neither apologize nor withdraw the book. They have even had the audacity to say that the offending words in the book are true, and that they have witnesses to swear to the truth of these words. Of course, no such witnesses have been produced. Although they have made public announcement that they will vigorously defend any action, they have not bothered to do so. They have simply continued to enjoy the media attention. As the exhibits in this case show, this subject has been headline and/or front page news of many publications in this country. Clearly, this is of great benefit to the defendants who, because of this high media attention, continue to sell more books and make huge profits. They need not advertise the book. It is being done for them free of charge.

Having reviewed the principles of law governing the quantum of damages in libel cases, and taking into account the facts before this Court, the next and the most important issue is the measure of damages that the plaintiff is entitled to in this case .

So, then, how much should this Court award him in this case?

The plaintiff is entitled to a sum of money that represents, in my view, proper and vindictive compensation for the serious injury to his reputation. This is what I will call “compensatory” damages. In addition, the conduct of the defendants, especially after the publication of the offending material, has been so wanton as to merit punishment. The libels perpetrated upon the plaintiff are grave, quite deliberate, and without regard to their truth, or recklessly without caring about their truth, for the sole purpose of personal gain notwithstanding the distress it might cause to the plaintiff. And this is what gives rise to “exemplary” damages.

The counsel for the plaintiff has submitted that an appropriate award for compensatory damages should be Kshs 25 million, while exemplary damages should be double that amount, that is, Shs 50 million making a global award of Shs 75 million. His notion of “doubling” compensatory damages to arrive at exemplary damages is probably derived from some English authorities, especially the case of *Sutcliffe v Pressdram Ltd (supra)*. However, there is no basis for that proposition, and in the *Sutcliffe* case the Court of Appeal rejected the huge award of £600,000 made by a jury, and asked that the damages be re-assessed.

I have reviewed the awards made in the English authorities referred to me. In the *Sutcliffe* case *supra* the plaintiff was a school teacher. She was the wife of a murderer known as “The Yorkshire Ripper” who had

been convicted of 13 murders and 7 attempted murders of young women. When he was arrested the press sought interviews with anyone remotely connected with the case. The press offered money for stories given by such people. This caused a public outcry against what was called “chequebook journalism.” A magazine owned by the defendant published an article stating that the plaintiff had ‘made a deal’ with a national newspaper “worth £250,000”. The magazine repeated the statement in a subsequent article. The matter was found to be libellous of the plaintiff in that the words in their natural meaning meant and were understood to mean that the plaintiff, finding herself to be married to a murderer had agreed to sell her story to a magazine. The magazine was not interested to justify the matter complained of but alleged that the words bore the alternative meanings that the plaintiff was prepared to capitalise and benefit financially from her notoriety as the wife of a serial killer and to consider selling the story to the press for a substantial sum. Three months before trial the magazine published two further articles which the plaintiff alleged meant that she knew before her husband’s arrest that he was a murderer and had lied to the police to provide him with a false alibi and that she was defrauding the Department of Social Security. The plaintiff claimed aggravated damages on the basis of the two articles. At the trial, the magazine put forward no evidence in support of its plea of justification but relied entirely on cross-examination to prove its case. The jury found that the magazine had libelled the plaintiff and awarded her £600,000 damages. On appeal, the Court of Appeal was of the view that this was an excessive award in the eyes of ordinary people like the plaintiff and members of the jury. The case was sent for retrial but later the parties agreed to settle the claim in the sum of £60,000 general damages. In the *John v MGN* case the Court of Appeal awarded the famous Rock Superstar Elton John £25,000 as general damages and £50,000 as exemplary damages for a libellous statement that Elton John had a dietary disorder and was pursuing a bizarre form of diet which involved eating food and then spitting it out without swallowing.

I was not referred to any local authorities, although I have considered some of them. Admittedly, there are very few local authorities, and most of them are not relevant. In *George Oraro v Barack Weston Mbaja* (HCCC No 85 of 1992) the High Court awarded Shs 1.5 million for defamation contained in an affidavit sworn in the USA but published in Kenya. In *Abraham Kipsang Kiptanui v Francis Mwaniki* (HCCC No 42 of 1997) the High Court awarded Shs 3.5 million for libel contained in a Kenyan newspaper called “Target”. The case that comes closest to the facts before this Court, and which is the most recent of all the cases, is the case of *John Evan Gicheru v Andrew Morton & Another* (HCCC No 214 of 1999) where Aluoch J awarded Shs 2.25 million for libel contained in a book titled “Moi the Making of an African Statesman” by Andrew Morton.

I must say that I have been particularly troubled by the inordinately low awards made by the High Court in libel cases. This is especially so with the latest case of the Hon Justice Gicheru. That award is manifestly and inordinately low. I believe I have found the reason for this low award. On page 12 of her judgement, Aluoch J states:-

“The prayer for damages as I see it was left to be Court’s discretion as no obvious principle to be followed in calculating damages was given by either of the 2 lawyers.”

Clearly, the honourable judge did not have the benefit of argument and proper submissions, and was unable to apply the proper principles of law. However, as I understand it, that case is before the Court of Appeal and I need say no more.

In assessing the measure of damages in the case before this Court, I believe the starting point is the settlement amount with the two Kenyan defendants. They agreed that a fair compensation for their wrongdoing (which involved selling and distributing the offending book) amounted to Shs 10 million. In addition, they tendered an acceptable apology. If this sum represented fair settlement against two individuals whose role in the perpetration of libel was rather marginal; that the agony of a trial was avoided, and where an apology had been tendered, then obviously the measure of damages against the UK defendants must be much higher. These UK defendants have aggravated the damage. They have continued to repeat the libel, have refused to apologize and continue to make profits from their wrong. Accordingly, I have come to the conclusion that a fair award for compensatory damages is Shs 15 million, plus another Shs 15 million for exemplary damages, making a total of Shs 30 million which I award to the plaintiff against all the defendants jointly and severally except as follows:-

1.The Kenyan defendants shall be liable to no more than Shs 10 million as per their out of Court settlement;

and

2.Clays Ltd shall be liable to a maximum of Shs 15 million as exemplary damages have not been claimed against them, and none are awarded.

I also award a permanent injunction restraining the defendants from selling and circulating the book within the jurisdiction of this Court. And I award costs to the plaintiff.

Let me conclude by saying that I fully recognize that the award made by this Court is the highest ever made in this country for the tort of libel. However, the fact that such an award has not been made in the past, does not mean it cannot be made at this time, or whenever appropriate circumstances present themselves.

I believe that time is propitious to send a clear message to all those who libel others with impunity, and who get away with ridiculously small awards, that the Courts of law will no longer condone their mischief. No person should be allowed to sell another person's reputation for profit where such a person has calculated that his profit in so doing will greatly outweigh the damages at risk.

The orders of this Court shall be as I have indicated earlier in this judgment.

**Dated and Delivered at Nairobi this 20th day of December 2000.**

**A.VISRAM**

**COMMISSIONER OF ASSIZE**