



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 4 OF 2017

AHARUB EBRAHIM KHATRI.....PLAINTIFF

-VERSUS-

NELSON MARWA.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION.....INTERESTED PARTY

JUDGMENT

1. By a plaint dated 19th January, 2017 and filed in court the same day, the Plaintiff herein Mr. **Aharub Ebrahim Khatri** has filed this suit against the Defendant seeking the following orders: -

- (a) Permanent injunction restraining the defendant from slandering or otherwise defaming the plaintiff or otherwise harassing or intimidating him;
- (b) General damages
- (c) Exemplary and aggravated damages for defamation.
- (d) Costs of and incidental to this suit Any further or other relief this Honourable court may deem fit to grant

2. The Plaintiff's cause of action is founded on a press conference that was streamed live on all media and social media platforms on 14th January, 2017, and remains online to date. It is alleged, that the Defendant, surrounded by unknown members of security apparatus, falsely and maliciously spoke of the plaintiff suggesting that the plaintiff had been arrested for being in possession of fire arms in excess of four in number. He questioned the motive of the plaintiff in holding that number of firearms even while suggesting that those firearms comprised an illegal armory and were for his use as alleged "drug baron" The various media outlets reported the defendant as uttering the following words:-

"Coast region coordinator Nelson Marwa denied that Joho was arrested saying he took himself to the police station to secure release of a wanted suspect who was grilled at the time.

Marwa claims that Joho was neither arrested nor detained but refused to leave the station without the "drug baron"

"The Governor refused to leave the police station together with others saying he was not going to leave without suspected drug baron "said Mr. Marwa.

'What kind of relationship does the Governor Joho have with a suspected drug baron .why does he mobililise everybody to come and rescue a wanted drug baron arrested with several armories in his house, asked a furious Marwa.

3. In addition to the above, the Star newspaper run another story on its webpage on 24th January 2017, in which the defendant is reported to have uttered the following words:-

“And why must he mobilize everybody to come rescue a potential drug baron who is wanted by everyone with several armories in his house.”

“Why was the Governor so determined to rescue a drug baron who was in possession of more than three guns? What was the big agenda?”

4. The Plaintiff alleges that the said words were falsely, maliciously spoken and published or caused to be spoken and published the said words, which are injurious and slanderous to the plaintiff, and likely to harm him in the estimation of right thinking members of society and has exposed him to feelings of hatred, contempt, ridicule fear and dislike that in their ordinary and natural meaning or by innuendo thereat imputed, the said words meant and were understood to mean and/or implied and/or imputed that: -

- a. The Plaintiff is a person capable of complete disregard of the laws of Kenya,***
- b. That the Plaintiff possess highly criminal conduct***
- c. That he Plaintiff is a drug baron***
- d. That the Plaintiff is a terrorist and dangerous person.***
- e. That the Plaintiff is a threat to general members of the public.***

5. In the Plaintiff's view, the statements by the Defendant were made in bad faith, outside the execution of the defendant's official function and role. They were personal views of the defendant based on information received in his official capacity and then twisted so as to make the words malicious, disrespectful and calculated to disparage and lower the esteem with which the right thinking members of the society regarded and held the plaintiff.

6. The Defendant filed a Defence on the 3rd February, 2017 wherein the Defendant has admitted that indeed the National Government public appointed officers in Mombasa called a press conference for purposes of addressing the Kenyan public on misleading information that had been communicated by several media companies in Kenya that there were politicians from the Coast Region who had been arrested which information was not true. The defendant avers that the press conference was not for purposes of referring to the plaintiff or discussing him. The general public in Kenya was informed of individuals who had recorded statements.

7. The particulars of innuendos or how the speech was understood are denied and the plaintiff is put to strict proof thereof and the defendant avers that during the said press conference none of the National Government public appointed officers at the press conference referred to the plaintiff, his business or family.

8. The Defendant further denied that the words pleaded in Paragraph 12,13,14,15,16,17 &18 of the plaint and avers that if the plaintiff was ever arrested (which is denied)it was for purposes of furthering investigations after a reasonable probable cause had been established that there was need to have the plaintiff record a statement to further investigations.

9. In support of his case, the Plaintiff AHARUB EBRAHIM KHATRI, who testified as PW 1 relied on his statement filed on 19th January 2017 whose contents were adopted as part of his evidence in chief. According to his evidence, the plaintiff is a businessman in Mombasa and a friend to the Governor of Mombasa County, H. E Hon Hassan Ali Joho.

10. The plaintiff testified that on the 13th January 2017 he was arrested at his residence in Ganjoni by intelligence officers and taken to Provincial Police Headquarters in Mombasa for questioning. That on completion of the investigations and upon conclusion of the verifying exercise by police regarding the firearms, he was he was released from custody on the same day.

11. The plaintiff stated that on the 14th January, 2017, the defendant accompanied by several members of the security forces held a press conference that was extensively reported on all media platforms where he issued a statement and launched personal, verbal, destructive and ultimately defamatory accusations holding them out as truth against him. He also labelled him a suspected drug baron who is afforded protection by the Governor.

12. It was his evidence that the defendant maliciously spoke and published or caused to be spoken and published the said words which were injurious and slanderous to him and portrayed him as a person befitting of a lawbreaker, a person of highly criminal character, maintaining an armory of firearms and an imminent danger to the citizens of Kenya.

13. In his further evidence the plaintiff told the court that as a result of the defendant's reckless statements against him some unknown people caused posters of *“most wanted criminal”* to be sent out with his picture on them, placing up to Kshs. 2,000,000/= bounty on his head, thus endangering his life and causing unexplained anxiety to his loved ones.

14. The plaintiff stated that he is an active businessman in Mombasa and credibility and reputation are of utmost importance and a reflection of his true character.

15. The plaintiff produced a print out of one of the stories run by Barama FM as P exhibit 1 story run by star New papers as P exhibit 2, print out of poster as P Exhibit 3 and letter of demand and replies from AG and DPP's office as P exhibit 4. In cross-examination, the Plaintiff stated he owned three guns and he was not a threat to the society with the 3 guns (referred to paragraph 9 of the plaint). He said the

defendant called him a drug baron and mentioned that he had been arrested and the governor wanted him released. There was no other person who had been arrested at that time and everyone knew it was him who was being referred to.

16. The plaintiff stated that he had no reason to sue Baraka FM as it was the defendant who said the words. Also the Star newspaper published the story and what was published is entirely what the defendant said about him.

17. The plaintiff further stated that he was a contractor and he can produce a trade licence to confirm that he was doing that business at the time. He confirmed that after the publication he got a job in the County Government of Mombasa as the Speaker of the County Assembly.

18. The plaintiff further states that he was not arrested but detained and his life was in danger, he does not sleep in his house but in hotels mostly.

19. The defendant's witness DW1 Inspector **Kipkemboi Rop**, testified that he received information that the plaintiff was in possession of illegal firearms and on the 13th January, 2017 they visited his home. He requested him to accompany the police officers from his residence to the County Criminal investigation office Mombasa where he was interrogated on the said allegations.

20. However during the interrogation, the Governor of Mombasa County, Ali Hassan Joho came to the police station with several members of parliament. That because of the interference by the politicians, the interrogation and statement recording took far much longer than was expected as the plaintiff severally requested for time to consult with both his counsel and the politicians.

21. DW1 testified that on the evening of the 13th January, 2017, the Governor of Mombasa County, Ali Hassan Joho misinformed the public through his Facebook and Twitter pages that he and some members of parliament had been arrested. The misinformation led to an assembly of the governor's supporters and there was a commotion which necessitated the public at large to be informed of the proper and correct position of the occurrence of the 13th January, 2017. The proper and authorized public officer to conduct the address was the chairman of the regional security committee of the Coast region.

22. DW 1 also testified that the defendant held a press conference in his capacity as the Regional Coordinator Coast Region and the Chair of the regional Security committee and everything done by the defendant during the press conference held on the 14th January 2017 was done in his official capacity and in good faith with the sole purpose of informing the public of the proper and correct position of the events of 13th January, 2017. He stated the press conference was not for the purposes of singling out the plaintiff as he was never mentioned in the press conference and neither was he the target. He denied that the Kenya Police Service ever distributed information that the plaintiff was WANTED as alleged.

23. In cross-examination, DW 1 stated that when they received intelligence information about the plaintiff owning illegal guns, they went to his residence and confiscated three gun with a firearm licence which they took to the police station to verify its authenticity and the plaintiff complied. He said that the plaintiff, on his way to the police station was accompanied by his advocate who was later joined by the Governor of Mombasa County.

24. DW1 stated that the exhibits it presented as exhibits from the governors twitter handle were not accompanied by a certificate as required under section 106 B (4) of the evidence act to confirm the veracity of that evidence and he did not have anything in evidence to verify that indeed it emanated from the twitter handle of the Governor.

25. DW1 stated that the regional security committee called the press conference and it took place at the regional offices where the defendant's offices were situated. He said that **Mr. Marwa** was responding to what governor Joho had informed the public and he did not know whether his speech was published as it was a briefing of the press.

26. DW 1 in cross examination stated that he did not attach **Mr. Marwa's** complete speech and did not have a video filed in compact disc of the press conference called by the defendant. He also stated that he did not have any audio of the speech and he had no record of the utterances in court as he was not present at the time of the press conference and he never heard what was said, but that was present when the Governor of Mombasa informed the public that he had been arrested and released.

27. It is DW1's testimony that he only drafted a brief which he handed over to his seniors. The 2nd brief is attached in the affidavit annexure KK1 and he did not see the press conference and he did not watch the news to know what transpired at the said press conference.

28. All the parties filed written submissions comprising of arguments by either of this with regard to the case at hand. The defendant filed their written submissions on 29th March 2019, the interested party filed theirs on 1st April, 2019 and the plaintiff on 2nd May, 2019.

ANALYSIS & DETERMINATION

29. I have carefully considered the pleadings herein, the oral and documentary evidence adduced by the Plaintiff, Defendant and the Interested Party and the rival submissions by all parties supported by the list of authorities relied on. Having set out the background of this matter, I have read through submissions with regard to their the parties' respective positions and considered the cited cases which the court has been referred to. I now set out to identify the issues for determination which in my view are as follows: -

(a) What is the defamation?

(b) Whether the words uttered by the defendant were defamatory and referred to the Plaintiff.

(c) Whether the Plaintiff has suffered injury to his reputation as a result of the article and the words published therein.

(d) Whether the Defence of fair comment is available

(e) Whether the defendant is protected under Section 22 of the National Government Coordination Act from liability.

(f) Whether demand was made by the Plaintiff for an apology.

(g) What is the quantum of damages, if any, payable to the Plaintiff?

(h) Who is liable to pay the costs of the suit?

What then is defamation?

30. In the English case of **Scott v Sampson (1882) 8 QBD 491 at p 503**, Cave J defined the word “defamation” as “a false statement about a man to his discredit”, and that is the definition preferred by Scrutton, LJ, in the English Court of Appeal case of **Yousouppoff v Metro – Goldwyn – Mayer Pictures Ltd (1934) 50 TLR 581 at p 584**. The leading English monograph of Gately on the subject of defamation defines what is defamatory as:

“Any imputation which may tend “to lower the plaintiff in the estimation of right – thinking member of society generally’ (per Lord Atkin in *Sim v Stretch (1936) 52 TLR 669, at p 671*) ‘to cut him off from society’ (per Wilmot C J in *Villers v Monsley [1769] 2 Wils 403 at pp 403, 404*) or ‘to expose him to hatred contempt or ridicule (per Parke, B, in *Parmiter v Coupland [1840] 6 M & W 105, at p 108*), is defamatory of him.”:

31. In the Black’s law Dictionary 5th Edition (1979) it is defined as: -

“**Holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community - Defamation is that which tends to injure reputation to diminish the esteem, respect, good will or confidence in which the Plaintiff is held, or to excite adverse, derogatory or unpleasant feelings for opinions against him. Statement which exposes person to contempt, hatred, ridicule or obloquy... the unprivileged publication of false statements which naturally and proximately result in injury to another.... A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.**”

Article 33 (1) (a) as read together with Clause (3) of the Constitution thereof both of which provides as follows: -

“**33(1) (a) every person has a right to freedom of expression, which include freedom to seek, receive or impart information or idea.**

Clause 3 provides “in exercise of the right to freedom of expression every person shall respect the rights and reputation of others.”

What then are the elements of the tort of defamation?

32. The elements of the tort of defamation were well laid out in the case of **John Edward Vs Standard Limited** as follows: -

1. The statement must be defamatory.
2. The statement must refer to the Plaintiff.
3. The statement must have been published by the Defendant.
4. The statement must be false.

33. The case of **J Kudwoli Vs Eureka Educational and Teaching Consultants & 2 Others**, HCCC No. 126 of 1990 it was stated as follows:

“For the purposes of deciding this case the court is called upon to consider the essentials of defamation generally, and then to see whether those requisites have been proved. It is common knowledge among students of tort law, that in a suit founded on defamation the plaintiff must prove:-

1. that the matter of which he complains was published by the defendant, and
2. that it was published of and concerning him, and

3. that it is defamatory in character; and,

4. that it was published maliciously; and

5. in slander, subject to certain exceptions, that he has thereby suffered special damage.

34. With regard to whether the words uttered by the defendant were defamatory and referred to the plaintiff,

35. From the evidence on record, it is not in dispute that a press conference was held on the 14th January, 2017, and the same is admitted at paragraph 5 of the defendant Defence. The words being complained of were uttered by the defendant, published by the Star Newspaper and aired by Baraka FM verbatim. The same is evidence at paragraph 10 of the Defendant Defence where it is admitted that paragraph 9 and 10 of the plaint was part of the press conference held on the 14th January, 2017 but the same was only a small extract of the press conference and the plaintiff misinterpreted the same to favor his claim on defamation.

The only issues are whether the uttered words refer to the plaintiff, and whether they are defamatory, false and malicious.

36. In considering whether the words were directed or referred to the plaintiff I make reference to the case of **Shah vs Argus [1971] EA 36** where it was held that, **“it was not necessary for a plaintiff to be referred to by name in an article but that it was only sufficient for readers to understand that it referred to him”**.

37. In **Mwangi Kiunjuri vs Wangethi Mwangi & 2 others [2016] eKLR**, it was stated:

“Where identification is in issue, it is the duty of the trial court to rule whether or not the words are reasonably capable of being understood to refer to the plaintiff. In determining this question, the trial court must consider whether or not ordinary reasonable persons having the knowledge proved could understand the words to refer to the plaintiff. If no reasonable person could have reasonably understood the words as referring to the plaintiff there is no question left for determination.”

38. The test as to whether the words are defamatory and whether they refer to the plaintiff is objective. According to **Halsbury’s Laws of England 4th Edition Volume 28** at Page 23;

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense.”

39. It is the testimony of the Defence witness that after a search was conducted at the plaintiff’s residence, he accompanied the police to their headquarters for interrogation and that the governor for Mombasa County Ali Hassan Joho, accompanied by some members of parliament joined him at the police station, and demanded that the plaintiff be released from police custody. That the press conference held on the 14th January 2017 was necessitated by the need to inform the public and clarify and or dispel the allegations that the governor for Mombasa County had been arrested as tweeted by the governor using his Facebook and twitter handles. He explained that the sole purpose of the press conference was to correct the misinformation that had been relayed by the governor of Mombasa who had mobilized his supporters to accompany him to the police station.

40. I find that the holding of the press conference on 14th January, 2017 has been confirmed and the content of the uttered words not denied. It is only explained that the press conference was arranged in order to correct the misinformation by the Governor of Mombasa County that he had been arrested and yet he had rushed to the police station to demand the release of only one person who is the plaintiff. Accordingly, having considered the evidence that was tendered by the Plaintiff and the response by the defendant, I have no other conclusion other than to find that the words uttered referred to the plaintiff at the time as no other person had been arrested and his guns taken for verification.

41. Being referred to as a drug baron is defamatory considering the fact that it is criminal in the laws of this country to deal in drugs in whichever way.

In considering whether words are defamatory, I make reference to the Court of Appeal case of **S M W vs. Z W M [2015] eKLR**:-

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

2. whether the plaintiff has suffered injury to his reputation as a result of the said uttered word.

42. Looking at the words uttered in the press conference held on the 14th January 2017 as evidenced at paragraph 9 of the plaint which has been admitted by the defendant in the Defence at paragraph 10. The ordinary meaning of the words uttered therein is that the plaintiff is a suspected drug baron who had been arrested with several armories in his house.

43. In my view, the Plaintiff tendered uncontroverted evidence of how the defendant repeatedly referred to him as a suspected drug baron in the press conference of 14th January 2017. The defendant has not furnished the result of the investigations to ascertain that indeed the

plaintiff was a drug baron, and neither is there evidence to show that the plaintiff has ever been arrested, charged, and or even convicted with any drug related offences it is worth noting that to date the plaintiff has not been charged with any drug related offence or possession of illegal firearms. In light of the foregoing coupled with the, defamatory nature of the uttered words it is quite clear that this would affect anyone, his family or occupation and so the plaintiff, his family and business were so affected.

3. Whether the defence of fair comment is available to the defendant.

44. Having considered the Plaintiff's case at length and in determining whether the article was defamatory, false and malicious, this Court has also to consider the Defendants' Defence. It is trite law that a defamatory statement is presumed to be false, unless the Defendant can prove the truth. Defamation law puts the burden of proving the truth of the alleged defamatory statement on the Defendant rather than the Plaintiff and especially where the Defence of justification and fair comment are pleaded. The Defendant has pleaded the Defence of fair comment.

45. The Court of Appeal in **Nation Media Group Limited & another v Alfred N. Mutua [2017] eKLR** held as follows

*"To sustain the Defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is on a matter of public interest. [See **Gatley on Libel and Slander**, 8th edition, 1981 (Sweet & Maxwell) at paragraph 692 at page 291].*

*The respondent could however defeat the Defence of fair comment by showing that the comment was not made honestly or was actuated by malice. In **J. P. Machira t/a Machira & Company Advocates vs. Wangethi Mwangi & another [1998] eKLR**, the Court said that malice "can be inferred from a deliberate, reckless, or even negligent ignoring of facts" and that "deliberate lies can also be evidence of malice."*

46. In **Phineas Nyagah V Gitobu Imanyara (2013) eKLR** where **Odunga J** held that:-

"Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice. ... Malice may also be inferred from the relations between the parties.....The failure to inquire in the facts is a fact from which inference of malice may properly be drawn."

47. The true test of a fair comment is propounded by Buckley LJ in **Peter Walker Ltd vs Hodgson [1909] KB** at p 259 – that the defendant may succeed upon his Defence of fair comment:

"if he shows that that imputationalthough defamatory, and although not proved to have been founded on truth, yet was an imputation in a matter of public interest, made fairly and bona fide as an honest expression of the opinion which the defendant held on the facts truly stated, and was in the opinion of the jury warranted by the facts, in the sense that a fair-minded man might upon these facts bona fide hold that opinion."

48. The defendant had an opportunity of demonstrating that the statements made were made in a matter of public interest, made fairly and bona fide based on the facts he held. However, the defendant witness one **Kipkemboi Rop** in cross-examination, he stated that he was not in attendance during the press conference, he never had what was said in the press conference held on the 14th January 2017. This in my view meant that the Defence of fair comment remained but a mere allegation by the Defendant.

49. The plaintiff, vide a demand letter dated 16th January, 2017 P exhibit 4) demanded for an unconditional apology from the defendant at a press conference within 24 hours. To date this has not been done and there is no explanation or justification for it.

50. In the upshot, I find that from my analysis of the evidence that was tendered by the plaintiff and defendant in this case with regard to the issues I set out for consideration, the plaintiff has proved his case against the defendant on a balance of probabilities.

4. If the Defendant protected from liability under section 22 of the National Government Coordination Act?

51. On whether the defendant is protected from liability for his actions under Section 22 of the National Government Coordination Act, the Court of Appeal in **Aharub Ebrahim Khatiri v Nelson Marwa & another [2019] eKLR** held as follows...

"We think the 1st defendant is insulated by the provisions of the law as a public officer and he need not worry even if the appellant were to prove his case, it is the state that would be responsible to settle the damages. For the purposes of this case, we find it will be necessary for the 1st defendant to remain in the proceedings as the connection to the 2nd defendant who is the legal representative of the government in civil matters."

52. Since the Court of Appeal has already pronounced itself on the issue of applicability of Section 22 of the National Government Coordination Act towards the defendant I see no reason to depart from that finding. Consequently, I hold that the general damages in this suit shall be borne by the Attorney general, as the legal representative of the Government

5. QUANTUM

53. I have considered the submissions by the learned counsel for all the parties with regard to quantum of damages and the authorities relied on by the parties. Having found that the uttered words were defamatory of the Plaintiff, he is entitled to damages which I now proceed to

consider. In so doing, regard is placed to the Plaintiff's standing in the society and more so at the time the article was published.

54. The Plaintiff in its prayers for general damages did not suggest a specific figure. The defendant and the interested party did not submit on the issue of quantum. Section 16 A of the Defamation Act Cap 36 Laws of Kenya provides: -

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem fit; provided that where the libel is in respect of an offence punishable by death, the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term not less than three years, the amount assessed shall not be less than four hundred thousand shillings.”

55. In this regard and as was stated in the case of **Johnson Evans Gicheru Vs Andrew Morton & Another [2005] eKLR**, Hon Tunoi JA (as he then was) had this to say about the assessment of damages: -

“In an action of libel the trial court in assessing damages is entitled to look at whole conduct of the Defendant from the time the libel was published down to the time the verdict was given. It may consider what the conduct has been before action and in court during the trial.”

56. In **Mikindadi V Khangana & Another [2004] KLR 496**, Ochieng J held as follows...

“ A successful plaintiff in a defamation action is entitled to recover as general compensation damages such sum as will compensate him for the wrong he had suffered. That sum must compensate him for the damages to his reputation, vindicate his good name and take account of the distress, hurt and humiliation which the defamatory publication has caused. The court must take the necessary precaution to ensure that whatever award it gives a successful plaintiff is generally in line with what courts have been awarding.”

57. It is not in dispute that the Plaintiff is currently the Speaker of the County Assembly of Mombasa County and at the time the defamatory words were uttered he was a business man. There has not been any mitigating circumstances from the defendant to warrant the utterances and no apologies have ever been issued to the plaintiff. As a result the plaintiff continues to suffer from the defamatory words and going by the evidence on record, the plaintiff has not been shown to be a drug baron and neither has he been shown to own illegal armories.

58. I have looked at decisions from the Court of Appeal and the High Court with regard to quantum of damages in the following authorities:

Miguna Miguna v Standard Group Ltd & 4 others [2017] eKLR where an award of Kshs. 5,000,000/= was made as general damage.

Musikari Kombo v Royal Media Services Limited [2018] eKLR where an award of Kshs. 5,000,000/= was made as general damage.

Kenya Tea Development Agency Ltd v Benson Ondimu Masese [2008] eKLR where an award of Kshs .7, 000,000/= general damages.

Nelson Havi v Headlink Publishers Limited [2018] eKLR where an award of Kshs. 6,000,000/= was made as general damages.

59. In the case at hand, my view is that an award of Kshs. 5, 000,000/= as general damages is reasonable.

AGGRAVATED & EXEMPLARY DAMAGES

In **Ken Odondi & 2 Others vs James Okoth Omburah t/a) Okoth Omburah & Company Advocates [2013] eKLR** the Court stated as follows:

“So the respondent was not only entitled to general damages for defamation but was also entitled to exemplary damages to punish the appellants who had defamed him and refused to retract the offending article or apologize. In the English Court of Appeal decision in the case of John v MG Ltd. [1996] 1 ALL E.R. 35 the Court held:

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

Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.

In the matter before us all essential elements for award of aggravated damages which are well set out in the said English case existed and the award of Kshs. 500,000/= was founded on a proper appreciation of the law.”

In **Francis Xavier Ole Kaparo v the Standard & 3 others HCCC No. 1230 of 2004 (UR)** it was held as follows...

“Malicious and/or insulting conduct on the part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond

that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors ...Damages will be aggravated by the Defendant's improper motive."

Visram J (as then was) In *Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others [2000] eKLR* on the issue of aggravated damages held as follows...

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.

In this case, looking at the conduct of the parties herein from the time of publication of the defamatory statement till the Judgment date, I note that the plaintiff produced a demand letter dated 16th January 2017 wherein it was demanded that the defendant issues an immediate unconditional apology at a press conference within 24 hrs. From the date of the letter. The defendants did not respond to the demand letter or has he made good the plaintiff's claim to date. The allegations that the Plaintiff is a suspected drug baron are of a serious nature as it is common knowledge that the drug menace is an emotive issue in the Coastal Counties, and country at large. Also, dealing in drugs is a criminal in this country and attracts. Many penalties. Therefore, the failure to apologize and/or retract the said allegations has the adverse effect to the Plaintiff's reputation and security as a businessman (as then was) and currently as the Speaker of the Mombasa County Assembly.

60. Having failed to retract or apologize to date, the Plaintiff is not only entitled to general damages for defamation but to exemplary damages as well. I award the sum of Kshs. 1,000,000/= as exemplary and aggravated damages.

61. In the upshot, judgment is hereby entered for the Plaintiff against the Defendant as follows;

- (a) Permanent injunction do issue restraining the defendant from slandering or otherwise defaming that the plaintiff or otherwise harassing or intimidating him;**
- (b) The plaintiff be and is hereby awarded Ksh 5,000,000 /= as general damages;**
- (c) The plaintiff is also awarded exemplary and aggravated damages of Ksh 1,000,000/=;**
- (d) The damages to be borne by the Attorney General and the 1st interested party;**
- (e) Costs of the suit and interest .**

Dated, signed and delivered at Mombasa this 14th day of October, 2019.

D. O. CHEPKWONY

JUDGE