



**THE REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 140 OF 2008**

**GIDEON MOSE ONCHWATI .....PLAINTIFF**

**VERSUS**

**KENYA OIL CO. LTD.....1<sup>ST</sup> DEFENDANT**

**NATION MEDIA GROUP LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff, **GIDEON MOSE ONCHWATI** was employed by the 1<sup>st</sup> defendant, **KENYA OIL CO. LTD** on probation basis for a period of one (1) year from April 2006 to March 2007. On 30<sup>th</sup> March 2007 he tendered his resignation through email and also through a letter dated on the same day which according to the plaintiff the 1<sup>st</sup> defendant refused to acknowledge or recognize. The plaintiff also claims that the 1<sup>st</sup> defendant refused to pay him his salary amounting to ksh 72,000 at the end of the month of March of the same year.

On the 13<sup>th</sup> April 2007 the 1<sup>st</sup> defendant caused to be carried in the 2<sup>nd</sup> defendant, Nation Media Group Ltd, on page 25 a publication prominently placed in the said news paper and headed "**PUBLIC NOTICE**" with the defendant's logo prominently displayed. The said Notice also had the plaintiffs' colored photo, name and identity card number. The plaintiff claims that the Notice carried the following defamatory words: "*Kenol /Kobil would like to contact the said person. Any information on his whereabouts should be reported to the human resource manager on 020-249333 or central police station on the nearest police station.*" That the said statement was also followed by the 1<sup>st</sup> defendant's advertisement of themselves stating "*Kenol/Kobil cares for you!!*"

On the same day in the Standard New paper at page 10 the 1<sup>st</sup> defendant is alleged to have caused the same information to be published in the said publication with the following additional words "*as a result of being engaged in unethical and professional conduct and his whereabouts should be reported.*" The plaintiff claims the words portrayed him to be a wanted man by the police, of questionable integrity, involved in unethical and unprofessional conduct, criminal and in hiding from the law. The said advertisements were also placed in both dailies on 16<sup>th</sup> April 2007. The plaintiff asserts that the advertisements were false, reckless and malicious.

The plaintiff averred that prior to the advertisement the 1<sup>st</sup> defendant was well aware of his whereabouts and his contacts. That plaintiff tried to contact the 1<sup>st</sup> defendant to no avail since its number was busy. He managed to talk to Mr Patrick Kondo and an employee of the 1<sup>st</sup> defendant and a superior who informed

him to report to the Criminal Investigation Department Headquarters. The plaintiff further avers that the 1<sup>st</sup> defendant's Human resource manager also contacted the plaintiff's wife on her cell Phone threatening that the 1<sup>st</sup> defendant would ensure that the plaintiff does not obtain employment anywhere around the world.

The plaintiff alleges that he lost his employment with Motorola Incorporated as a product marketing manager for east and central Africa and the Dubai Free Trade Zone and was suspended with effect from the date of the advertisement 13<sup>th</sup> April 2007 and his contract terminated on 11<sup>th</sup> May 2007. The events allegedly left the plaintiff psychologically, emotionally and financially confused. It is alleged by the plaintiff that he presented a request to the 2<sup>nd</sup> defendant to place a paid up notice in the media to explain the situation to save the already badly damaged reputation but the 2<sup>nd</sup> defendant rejected. That the plaintiff also applied for an anticipatory bail which was granted. The plaintiff alleged that the defendant's actions caused him, him and family great distress especially the plaintiff's wife who suffered brain hemorrhage which necessitated hospitalization for 2 and half weeks.

In his plaint dated and filed on 11<sup>th</sup> April 2008 and amended on 19<sup>th</sup> May, 2009 to substitute the original plaintiff Kenol/Kobil with Kenya Oil Co. Ltd, the plaintiff claims General and exemplary damages. He is also asking for a permanent injunction restraining the defendants from further publishing similar words and defamatory to the plaintiff.

The claim is challenged by both defendants through their individual statements of defense. The 1<sup>st</sup> defendant statement dated 7<sup>th</sup> May 2009 denies the plaintiff's claim stating that he was summarily dismissed on 2<sup>nd</sup> March 2007 for reasons that he engaged in fraudulent and illegal activities contrary to his employment contract. The 1<sup>st</sup> defendant denied that the publication were false, reckless or malicious. It stated that they contained factual true information and also justified. The 1<sup>st</sup> defendant also claims that the said statements were qualified privilege and made Bonafide from a sense of duty, legal, moral and social owed by the 1<sup>st</sup> defendant to its clients, trading partners and business associates.

The 1<sup>st</sup> defendant also claims that the plaintiff's fraudulent and illegal activities occasioned it massive loss and damage. The 1<sup>st</sup> defendant pleaded a counter claim of Kshs US\$ 1,690,633.50.

The 2<sup>nd</sup> defendant also denied the plaintiffs claim stating that the publication was a paid up advertisement notice secured by the 1<sup>st</sup> defendant and therefore it was erroneously enjoined in this matter. The 2<sup>nd</sup> defendant states that the said statement was defamatory in any way. It stated that it was not the author of the defamatory statement and also did not have any reasons to believe that the notice was defamatory as such was an innocent disseminator of fully paid up advertisement by the 1<sup>st</sup> defendant.

In response to the 1<sup>st</sup> defendant's claim the plaintiff denied that there was a misjoinder and /or anon joinder of the 1<sup>st</sup> defendant and or that the defendant is entitled to the defence and counterclaim. He stated that the counter claim was an afterthought and further evidence of malice. The plaintiff also denied the particulars of fraud and loss as claimed by the 1<sup>st</sup> defendant.

In a rejoinder to the 2<sup>nd</sup> defendant's defense, the plaintiff stated that the publication was actuated by malice since the 2<sup>nd</sup> defendant refused to publish a paid up advertisement by the plaintiff to rebut the publication. The 2<sup>nd</sup> defendant also failed to apologize and retract the publication upon being informed by the plaintiff of the falsehoods peddled in the publication.

The plaintiff maintained that the 2<sup>nd</sup> defendant was malicious by failing to authenticate and verify the tale with the plaintiff before publishing and also by requiring and or receiving an indemnity from the 1<sup>st</sup> defendant to publish a defamatory article. The plaintiff also contends that the defense by the 2<sup>nd</sup> defendant is a mere sham, raises no triable issue and is merely intended to delay the expeditious hearing and disposal of the suit.

During the hearing, the plaintiff testified as PW1, relying on his elaborate statement as recorded and filed in court dated 19<sup>th</sup> November 2011 and adopted by the court as his evidence in chief. The plaintiff's statement is a narrative of his life. That he was 32 years old then and had been in his current employment for just 4 months as product operations manager in charge of all Africa black berry service technical operations at Emitac Mobile Solutions LLC, a global strategic technology partner for BlackBerry service provision activation and support. He also stated that he had previously served as the product marketing and business development manager for West Africa for 3 years and Devices and Software manager for 3 years for Eastern and Southern Africa at Nokia International, a global leader in designing development and manufacturing of mobile devices and related services.

That he was hired by the 1<sup>st</sup> defendant in early April, 2006 as Export Assistant to the Exports Manager within the International Sales and Business Division and signed a contract wherein he was placed on probation for one year and learnt on the job. That the Exports Manager resigned two months later and the plaintiff was handed all the Export operations by the Head of International Sales who owned up that he himself had no idea of what happens in exports and stopped offering the plaintiff with any support yet the job involved dealing with customers from Congo, Rwanda, Sudan and Somalia. That the pressure of work was too overbearing and so the plaintiff requested for an additional hand that was recruited 8 months later. That the plaintiff discovered that his job description for which he had been hired had drastically changed which issue he raised with the Human Resource Manager but that he was advised to complete his probation before he could raise the issues later.

The plaintiff testified that in the meantime he looked around and secured a job with Motorola Inc. as Product Marketing Manager for East and Central Africa and Dubai Free Trade Zone and tendered his resignation to the 1<sup>st</sup> defendant by email from 30<sup>th</sup> March 2007 which was never acknowledged by the 1<sup>st</sup> defendant. He began working for his new employer in April 2007 and that during all that time he was in contact with the Human Resource Department, salaries Division and Departmental Head, querying about his unpaid salary for March, 2007 but that his incessant calls were diverted from office to office so he decided to concentrate on his new found job as he was undergoing an orientation and training programme in South Africa.

On his return from South Africa, the plaintiff continued asking the 1<sup>st</sup> defendant for his dues and an acknowledgment of his resignation letter but that he received no answers.

Then on the night of 12<sup>th</sup> April 2007 the plaintiff received a telephone call from the former Exports Manager who told him that the 1<sup>st</sup> defendant was planning to publish him in the newspapers the following day and that he had learnt this from one of the accountants in the International Business Division. At 10.00 pm the same night the plaintiff received another telephone call from one of the interns within the Exports Department asking the plaintiff as to what he had done to the Head of International Business that he was to be put in the newspapers the following day and that he had been reported to the police. The plaintiff wondered why the 1<sup>st</sup> defendant would want to do all that and went to bed but a very troubled man.

The following morning on 13<sup>th</sup> April, 2007 the plaintiff received calls from many people and his friends inquiring from him what he had done that he was all over the papers in the Nation Newspapers and the Standard, which confirmed what he had been told the night before. Most callers were his former High School friends and classmates.

The plaintiff also received text messages and emails and in one such email, his friend told him not to call or text him as he did not want to be tracked down by the police for being associated with the plaintiff. He produced those emails in a bundle of many other documents which were admitted in evidence.

In another email, the plaintiff's former classmate at Mangu High School who was now a practicing Architect in Cape Town, South Africa wrote: "***I hear they are looking for you in Nairobi. What's going on there's a large PUBLIC NOTICE in the Nation Newspaper from Kenol Kobil saying that you ceased to be an employee and that anyone with info about his whereabouts to contact Kenol Kobil ama***

***the nearest police station?***”-email dated 13<sup>th</sup> April, 2007 from Moses Gathua as contained in the plaintiff’s bundle of documents.

The plaintiff stated that he was a school captain at Mangu High School in 1996-1997 hence he received many calls from his former school mates and the school too inquired from him what was happening, which humiliated him.

As he left for the office that morning, he found people talking about him in groups holding newspapers and giving him suspicious looks. He felt humiliated and left. At 7.30 am he called his former employer’s Mr Patrick Okondo who was the Head, International Business and asked him what it was all about but that Mr Okondo arrogantly told the plaintiff: “*there are issues and you know them very well...*” When the plaintiff questioned him why they did that to him yet he was in touch with them all the time, Okondo advised him to go to Central Police Station and see a lady called Naomi from Criminal Investigation Department and that he himself would be there to wait for the plaintiff.

The plaintiff further stated that he left for Central Police Station but on his way a police officer known to him called to inquire on the publication he had seen. He advised the plaintiff not to go to the police station as what was published was in his view not a police matter. He advised the plaintiff to seek legal advice and only go to the police accompanied by his Advocate.

The plaintiff consulted a lawyer to write a demand notice to the 1<sup>st</sup> defendant seeking an apology and an end to the publication. In response, the 1<sup>st</sup> defendant’s Human Resource Manager was emphatic that no apology would be forthcoming from the 1<sup>st</sup> defendant and even copied the letter to the Commissioner of Police and Director of Criminal Investigation Department. The plaintiff had to spend the night at his brother’s house in Doonholm for fear of being arrested. He produced the demand notice and letter written to his lawyer by the 1<sup>st</sup> defendant’s Human Resource Manager.

That on the following day, some two drunken men went to his house and ransacked it in the presence of his sister, house help and 4 year old son and directed that he be informed to go to Central Police Station. On 16<sup>th</sup> April, 2007 the same publication again appeared in the Nation Newspaper as well as in the Standard Newspaper and this the plaintiff learnt from his friend who was travelling to Kisii. The two different newspaper publications were produced as contained in the bundle of documents. His father who is now deceased also called him to inform him that police officers had been to his home looking for him.

On realizing that the matter could be that serious he engaged his lawyer who wrote another notice to the 2<sup>nd</sup> defendant and the Standard Newspapers urging them not to accept any such publications from his former employer concerning him as they were malicious and that the 1<sup>st</sup> defendant was only intended to tarnish his name. His friends also offered to pay for him a paid up notice to counter those publications. The Standard Newspaper agreed and published it on 19<sup>th</sup> May, 2007 but the 2<sup>nd</sup> defendant refused saying it did not want to be involved. From that day the 1<sup>st</sup> defendant went quiet. He sought and obtained anticipatory bail from court but the terms were too harsh for him –deposit of Kshs 200,000 cash bail which was beyond his reach so this agonized him and his wife went down with depression. He was dismissed from employment on 14<sup>th</sup> May 2007. Dismissal letter was produced from Manpower South Africa the payroll managing agency for Motorola Inc. According to the plaintiff, he lost his job because the company was not comfortable dealing with a person of questionable integrity, from the public notices published by the defendants herein.

The events led to his spouse going down with high blood pressure which ruptured her blood vessels necessitating an operation under an emergency and he incurred a bill of 1.2 million shillings in hospital. He produced evidence of hospitalization and the receipts.

He had since secured another job but people still meet him and ask why he is not in jail. He also produced in his bundle of documents Face book chats with his former classmates over the matter.

According to the plaintiff, he had lost job opportunities and many still call him to find out why he is not in jail. He told the court that he is concern about his public life and employment. That as it is now he cannot hold any public office as his name is tainted as a person who lacks integrity. He told the court that the claim that the company lost 1.69 million is not true since he did not hold any transactional role in the company as he was still on probation. He urged the court to allow his claim and pay him damages and dismiss the counter claim by the 1<sup>st</sup> defendant. He also produced documents to prove his case which were marked as **PEX1**. He also asked the court to award damages as his name was tainted as a criminal and to the contrary he has never been charged with any criminal offence in a court of law.

The 1<sup>st</sup> defendant did not participate at the hearing as they did not attend court despite service of a hearing notice upon their counsels. In Cross examination by **Mr Mogere** counsel for the 2<sup>nd</sup> defendant, the plaintiff told the court that the news media provide information to the public through newspapers, which have a wide circulation and have a duty to provide important information such as a person who is wanted. He also stated that the notice can also carry a caption on a person who no longer works for a particular organization for purposes of transaction. The plaintiff respondent that the Nation Media Group published his caption but that he had no idea whether they knew he had any issue with his employer. He testified that he had no relationship with Nation Media Group and he only used to read their newspaper.

He also stated that he did not sue the Standard Media Group since they mitigated the damage after being notified. He also stated that in his paragraph 10 of the amended paint he gave an interpretation of the words which were published by both the Nation and the Standard. He maintained that the words meant that the police were looking for him. He stated that the article in the Nation did not say that he lacks integrity.

In re-examination by **Mrs Madahana**, the plaintiff told the court that he offered the 2<sup>nd</sup> defendant a rebuttal of the publication. He went to the 2<sup>nd</sup> defendant's offices with the publication but they refused to listen to him.

At the close of the plaintiff's case, the defendants offered no evidence in defence.

The parties filed their submissions and a list of eight (8) issues were filed by the plaintiff's counsel for consideration. In his submissions, the plaintiff urged the court to find that the defendants did not deny causing the publications complained of by the plaintiff and which carried on two different occasions as detailed in the plaint. He submitted that the 1<sup>st</sup> defendant knew his whereabouts at any given time and had not made any effort to contact him but instead resorted to publishing on two different days a request to the public to give information as to his whereabouts. The plaintiff submitted that the publications were actuated by malice according to the particulars set out in the amended plaint. That the plaintiff had experienced frustration and lack of job satisfaction prompting him to look for better prospects and when he found a better job he resigned his probationary position.

The plaintiff further submitted that the 2<sup>nd</sup> defendant compounded the malice by refusing to give the plaintiff a chance to rebut the damaging allegations by the 1<sup>st</sup> defendant. This was in spite the fact that the plaintiff was ready to pay for the advertisement which would have been the 2<sup>nd</sup> defendant's financial gain bearing in mind that the 2<sup>nd</sup> defendant was professing its interest in this matter was telling the truth.

The plaintiff also submitted that the publication did injure his reputation. He stated that from the reactions of his friends and acquaintances it is clear that the plaintiff's reputation was damaged. He recalled that in one of the emails his friend stated that he did not want to get in touch with him for 'obvious reasons.' After the publication, the plaintiff was also suspended by his new employer on 13<sup>th</sup> April, 2007 and a month thereafter on 14<sup>th</sup> May 2007 his services were terminated.

The plaintiff maintained that the 2<sup>nd</sup> defendant's refusal to publish a rebuttal also meant that they did not believe in him that he would be telling the truth.

The plaintiff also submitted that he is entitled to damages arising out of the publications and urged the court to take into account the fact that the defendants published of and concerning the plaintiff serious allegations and especially the 1<sup>st</sup> defendant causing the said publication in the dailies with the widest circulation not once but twice falsely implying that the plaintiff was wanted and that he was under police investigation for professional misconduct and on account of integrity issues. The plaintiff relied on the case of **HCC Nairobi 547 of 2008 Hon. Nicholas R.O Ombija vs Kenya Commercial Bank Ltd., Civil Appeal no 314 of 2000 Johnson Evan Gicheru vs Andrew Morton & Another (2005) eKLR**

The plaintiff submitted that the words which were published against him by both the defendant were utterly false, were widely circulated not only within Kenya but beyond the borders. The plaintiff claimed that he felt utterly insecure, helpless, embarrassed and humiliated. The plaintiff proposed an award of Ksh 6,000,000 bearing in mind the observation the court's decision in the case of **The Standard Limited & Another vs Anyasi Olusesse Civil Appeal no 7 of 2009**. The plaintiff also urged the court to grant him exemplary damages of Ksh 100,000,000. He relied on the decision of **Nation Media Group Ltd & 2 others vs John Joseph Kamotho & 4 others civil Appeal 258 of 2005**.

In a rejoinder the 1<sup>st</sup> defendant submitted that the plaintiff was summarily dismissed by the 1<sup>st</sup> defendant from employment on 22<sup>nd</sup> March 2007 for professional misconduct in execution of his duties. That the plaintiff was clearly aware of criminal charges having been instituted against him by the 1<sup>st</sup> defendant as a result of conduct arising out of his employment. That 1<sup>st</sup> defendant issued a caveat emptor notice in the daily newspapers in the normal practice to safeguard its reputation as well as that of its clients.

The 1<sup>st</sup> defendant also submitted that malice does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. Any evidence which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.

The 1<sup>st</sup> defendant submitted that the law recognizes that there may be occasions in which freedom of communication without fear of an action for defamation is more important than the protection of person's reputation and such occasions are to be privileged. That the privilege in this case extended to the 1<sup>st</sup> defendant's duty, legal, moral and social to communicate to the greater public which had a corresponding interest in receiving and the protection of such statement is justified for the common convenience and welfare of society. The 1<sup>st</sup> also defendant submitted that the defence of fair comment is available if facts are true, and the matter is of public interest and the opinion is honestly held. The 1<sup>st</sup> defendant associated itself with the submissions of the second defendant.

The 2<sup>nd</sup> defendant also submitted that the public notice was not defamatory. That the description proffered by the plaintiff did not tally with the plain and ordinary meaning of the words used in the Notice. The defendant stated that the notice did not state why the 1<sup>st</sup> defendant was looking for the plaintiff. The defendant argued that it could be that he was missing and had not reported to work for great number of days or for other possible reasons. The 2<sup>nd</sup> defendant relied on the decision in **Kisilu Maundu v Delta Petroleum Ltd (2004) eKLR**

**On whether the published Notice was malicious**, the 2<sup>nd</sup> defendant submitted that the 1<sup>st</sup> defendant wanted to contact the plaintiff; it sought the help of the public, through the 2<sup>nd</sup> defendant, in its cause. That the public notice drew the public's attention so that it could provide information on the whereabouts of the plaintiff. The 2<sup>nd</sup> defendant also submitted that the plaintiff admitted that the 2<sup>nd</sup> defendant had a duty to provide the information to the public which included information on missing person which was needed urgently. The 2<sup>nd</sup> defendant argued that there was no information on the public Notice concerning the character of the plaintiff. The content of public Notice would have borne almost similar words as a family looking for their child who had gone missing. Such a notice would not have drawn hatred, contempt or ridicule to the child, but interest and concern. The 2<sup>nd</sup> defendant submitted that malice cannot

be imputed to the 2<sup>nd</sup> defendant since they were not aware of all aspects of the situation and its information was limited to what was furnished to it by the 1<sup>st</sup> defendant.

The 2<sup>nd</sup> defendant also submitted that the monetary claim made by the plaintiff are exaggerated and were not proved in evidence. There was no indication that plaintiff was going to be arrested. The medical claim of Kshs 1,200,000 also had no link to the affliction suffered by the publication of the Public Notice.

Having considered the pleadings filed by all the parties in support of their respective positions and having considered the evidence that was adduced by the plaintiff during the trial including answers he gave in cross examination, the written submissions by all the parties, the issues for determination are:-

1. ***Whether the Public Notices published on 13<sup>th</sup> and April 16 2007 respectively of and concerning the plaintiff are capable of being construed as being defamatory of the plaintiff in their natural and ordinary meaning or by innuendo?***
2. ***Whether the said publications were made maliciously***
3. ***Whether the plaintiff's credibility, character and reputation has been injured and therefore whether he is entitled to damages and if so, how much?***
4. ***What orders should this court make?***
5. ***Who should pay costs***

On the first issue, my commencement point is that the court in deciding defamation cases must balance the provisions of Articles 33, 34 and 35 of the Constitution, dealing with freedoms of expression and media freedom and the individual's right to access information on the one hand and Article 28 in respect of the inherent dignity of every person which dignity must be respected and protected. On the right to access information and the freedom of expression, the words of **Lord Denning MR in Fraser v Evans & others (1969) All ER 6 are instructive that:**

***“There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be whistled away.”***

**Lord Coleridge, CJ in Bernard & another v Perriman (1891-4) ALL E.R 965** had previously stated that:

***“The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed.”***

Speaking about a person's right to protection of reputation and character, William Shakespeare said:

***“Lago: Good name in a man or woman, dear my Lord, is the immediate jewel of their souls. Who steals my purse steals trash; 'tis something, nothing; Twas mine, tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him; And makes me poor indeed.”(Othello Act 3 Scene 3,155-161).***

Freedom of expression is guaranteed under Article 33 of the Constitution and it provides:

“Every person has the right to freedom of expression, which includes-

- a. Freedom to seek, receive or impart information or ideas.”

On the other hand, Freedom of the media is guaranteed by Article 34 of the Constitution as follows:

***“Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).”***

Under Article 33(2) specified above, as well as Article 33(3) of the Constitution, every person has the right to freedom of expression **which does not extend to**, among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred that- constitutes ethnic incitement, **vilification of others** or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4) and that **in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.**

From the above constitutional provisions, freedom of expression and of the media is guaranteed but is not absolute and the limitations are also clearly spelt out therein.

It is trite law that in defamation the claimant must prove to the required standard that the words complained of were published of and concerning him, that they were published by the defendant, that they were false, and that they were defamatory in character of the claimant and finally, that the publication was done with malice. See **J Kudwoli vs Eureka Educational and Training Consultant & 2 Others Civil case 126 & 135 of 1990, Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR**

In the instant case it is not disputed that the public notice was issued by the 1<sup>st</sup> defendant who caused it to be published by the 2<sup>nd</sup> defendant and the Standard Newspapers on 13<sup>th</sup> and 16<sup>th</sup> April, 2007, and that the said publication concerned the plaintiff. What is disputed is the claim by the plaintiff that the said Notice was false, malicious and defamatory in character of the plaintiff. It is the defendants' case as pleaded in their statement of defence and as submitted that the publication was factual and true information and therefore justified. The defendants also claim that the publication and statements therein amount to fair comment and qualified privilege.

The burden of proof lies with the person who alleges a certain fact. In this case, the burden of proving that the public notices as issued by the 1<sup>st</sup> defendant and published by the 2<sup>nd</sup> defendant and the Standard Newspapers on the two mentioned occasions was defamatory of him and that they were made maliciously. See section 107 of the evidence Act, Cap 80 Laws of Kenya.

**The 2<sup>nd</sup> defendant raised the issue of misjoinder or non joinder of the Standard Newspapers who also published a similar Public Notice of and concerning the plaintiff. The quick answer to that submission is found in the provisions of Order 1 rule 9 of the Civil Procedure Rules which enact that no suit shall be defeated for misjoinder or non joinder of parties and the rule requires that the court deals with the matter in controversy so far as regards the rights and interests of the parties actually before it.**

This court did not find that the presence of the Standard Group Ltd as a party was necessary for it to effectually and finally determine the dispute between the parties before it. The plaintiff was clear in his mind that he was satisfied that the Standard Group Ltd who also published similar caption of the plaintiff on the named occasions mitigated the damage by apologizing to him and in publishing his paid up advertisement on 19<sup>th</sup> May, 2007. He was also clear that he also asked the 2<sup>nd</sup> plaintiff herein to publish a paid up advertisement clarifying the matter to the public but the 2<sup>nd</sup> defendant refused saying it did not want to get involved in the dispute between the plaintiff and his former employer. With that kind of explanation which this court finds plausible, and which was never controverted by the defendants, there is absolutely no reason why this court would dismiss the plaintiff's suit for non joinder of parties.

As to whether the public notices issued by the 1<sup>st</sup> defendant and published by the 2<sup>nd</sup> defendant were defamatory of the plaintiff, it is important to first remind ourselves of what defamation is. As was stated by Kuloba J in what I call his classical scholastic **Kudwoli case** (supra), there is no acceptable definition of defamation as to embark on defining that term is to embark on a voyage to juristic and scholastic perdition. Judicial time is scarce and therefore I do not have that luxury of exploration at this stage. It is however generally accepted of what a defamatory imputation is, as was stated by **Gatley on Libel and Slander, 8<sup>th</sup> edition by Phillip Lewis, paragraph 4 p 5** which would in my view sufficiently address the circumstances of this case that:

***“ a defamatory imputation is one to a man’s discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit.”***

The well known work of **Winfield in J.A Jolowicz and T Ellis Lewis, Winfield on Tort 8<sup>th</sup> Edition p 254** gives the following definition of defamation:

***“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tends to make them shun or avoid that person.”***

On the other hand, Halsbbury’s Laws of England Vol. 28 4<sup>th</sup> edition para 10 p7 defines a defamatory statement as:

***“ A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.”***

The published words must be false and tend to injure the plaintiff’s reputation in the rating of members of the society generally. In this case, the plaintiff testified that as at the time of the publication, he had resigned from the 1<sup>st</sup> defendant’s employment and secured a lucrative job with Motorola Inc. he had therefore not deserted duty for whatever reason. The 1<sup>st</sup> defendant on the other hand stated in their defence that they had terminated the plaintiff’s services from 27<sup>th</sup> March, 2007.

This court is entreated to ask some factual questions- if the plaintiff’s services had been terminated, where is the letter of termination? Where is the evidence to support the defence of justification and truth? Where is the evidence to prove that the plaintiff had committed some unprofessional conduct and or acted unethically? The plaintiff gave uncontroverted evidence that he was in touch with his former employer’s Human Resource Manager, asking for his unpaid dues. That being the case, was it necessary for the 1<sup>st</sup> defendant to publish in the papers that he was a wanted person by the police? For how long had they looked for him using the police machinery without finding him before they decided to publish his name and photograph in the newspapers?

It should be noted that the plaintiff had resigned effectively from 30th March, 2007 and it was hardly two weeks before the publication was done. Allegations of unethical and unprofessional conduct are grave allegations, coupled with what the counterclaim seriously contended that the plaintiff had committed fraud as a result of which he had caused the 1<sup>st</sup> defendant company to lose a colossal jumbled up figures of **US\$;1690633.50 US\$1,690,623.550 million; US\$1,690,623!**. That is nearly equivalent to **Kshs169,063,330.00- One Hundred and sixty nine million and sixty three, three hundred and thirty three, and fifty cents**, using 1,690,633.50 at an exchange rate of Kshs 100 to the US Dollar.

There is absolutely no evidence that the plaintiff had been involved in unethical and unprofessional conduct and or that he had caused the company to lose that kind of money as alleged through any of the fraudulent dealings. There was also no evidence that the 1<sup>st</sup> defendant had reported the plaintiff to Central Police Station for such serious fraud leading to such monumental loss to the company, or for engaging in unethical and unprofessional conduct and or that the police were therefore looking for him. Furthermore, the plaintiff had been made aware of the 1<sup>st</sup> defendant’s intentions on the night of the publication and he called them to establish what they were planning to do. That being the case, the 1<sup>st</sup> defendant in my view, should not have rushed to gone ahead and publish the notices

In my view, the published notices were a facade and pretentious and were meant to tarnish and destroy the plaintiff’s reputation for prematurely ceasing to work for the 1<sup>st</sup> defendant and were therefore not only defamatory but highly inflammatory, stirring the new employer to terminate his employment. No

employer would comfortably harbor a person of questionable integrity. The impugned publications, no doubt, attracted a lot of attention on the plaintiff as there is ample evidence that many of his friends and colleagues called him and or send him emails seeking to know what was happening. Based on the said publication, his new found employer suspended him for non disclosure and subsequently terminated his employment.

The defendants do not deny publishing the notice but have put up defenses and in law, having adopted the above stated defenses ought to have proved the same by way of evidence.

In **HON. UHURU MUIGAI KENYATTA v BARAZA LIMITED [2011] eKLR Rawal J** (as she then was) observed the information that causes the defamation, will be assumed to be untrue until the defendant proves otherwise. The learned judge stated, and I agree with her that:

*....While taking defence of justification or qualified privilege in the Defamation Case, the Defendant was required by law to establish the true facts and the Plaintiff has no burden to prove the defence raised by the Defendant.....*

*Once not verified, the justification or qualified privilege does not inure the Defendant and in any event, the onus that the same is true, rests on the Defendant to make it a fair publication.*

The Supreme Court of Nigeria in **Joseph Mangtup Din v African newspaper of Nigeria Ltd No. 44/1986, Adolphus Godwin Karib Whyte J.S.C** held that:-

*“It is well settled that the onus lies on the respondent to prove the truth of the words in their ordinary and natural meaning:-See Dumbo v. Idugboe [1 983J 1 SCNLR 29. In Digby v. Financial News Ltd. (1907)1 K.B. 502 at p.509. Collins, M.R., said:*

*A plea of justification means that all the words were true and covers not only the bare statements of facts in the alleged libel but also any imputation which the words in their context may be taken to convey.*

In my humble view, from the evidence adduced by the plaintiff and the circumstances of this case, the 1<sup>st</sup> defendant caused the public notices to be published of and concerning the plaintiff with the sole and clear intention of defaming him. As regards the 2<sup>nd</sup> defendant, they had been paid to publish the notices yes. However, when the plaintiff sought to publish an item with them to correct the impression created by the notices, they refused to accept a counter publication. In their defence as filed, they alleged that they had had an indemnity signed by the 1<sup>st</sup> defendant. Nonetheless, all that the 2<sup>nd</sup> defendant did was to file notice of indemnity in court and that was all. There is no evidence that it even ever served the said notice upon the 1<sup>st</sup> defendant. The signed indemnity form was also never filed in court despite listing it as the 1<sup>st</sup> defendant’s list of documents.

From the 2<sup>nd</sup> defendant’s refusal to publish a counter publication by the plaintiff at his own cost, this court infers that they were aware that the publications were defamatory of the plaintiff. Even if that were not the case, in the persuasive writings of **Duncan and Neill on Defamation, 2<sup>nd</sup> edition by Sir Brian Neill and Richard Rampson, para 8.12, at p 38** states that the law on liability is stated to be, that liability affixes on participation or authorization of publication of the defamatory matter- **“Every person who takes part in the publication of defamatory matter is prima facie liable in respect of that publication.”** *Examples are given such as where a libel is published in a newspaper or book or magazine, everyone who has taken part in publishing it or in procuring its publication or has submitted material published in it is prima facie liable. These include the author, editor, publisher or vendor. However, lending libraries and booksellers who had no reason to suspect that the works lent or sold contained a libel are exempted for merely playing a secondary role in dissemination of the defamatory matter.*

***In Daily Nation V Mukundi and another [1975] EA 311 AT 316 the Court of Appeal for Eastern***

**Africa held that:**

***“when the defendant publisher accepted an item for publication, it had the right and indeed the duty to see whether such item contains seditious or libelous matters, and if it fails in that duty, it always publishes at its own risk” and that that suggested recklessness on the defendant’s part.”***

**In Godwin Wanjuki Wachira v Okoth [1977] KLR 24, Muli J(as he then was) held:**

***“I may go further and hold that failure to check court records to ascertain the true position may very well be negligence on their part...the defendants must be deemed to have acted recklessly in publishing the distorted story.. I hold that the author published the defamatory statement complained of...With reckless indifference as to whether it was just or unjust.”***

From the foregoing, I find that the plaintiff has satisfied this court that the notices as published by the defendants were defamatory of him; were intentionally, recklessly or negligently published of and concerning him; and were published without lawful justification on an privileged occasion.

Any reasonable fair-minded person reading those public notices, as I have stated before, gets a straight message that the plaintiff is a criminal and is wanted by the police for having committed an offence while engaged in the 1<sup>st</sup> defendant’s employment and because the 1<sup>st</sup> defendant cares for its customers and must therefore protect its integrity, it must bring to the attention of the public such important information so that any prospective employer, beware, plaintiff, the man in the caption is on the loose and u might just be the next victim. This is evidenced by the letter written to the plaintiff by his new found employer that the plaintiff had failed to disclose and therefore he was suspended pending investigations. To date, the results of those investigations have never been revealed.

Again, the defendants did not give evidence to the effect that the issue the plaintiff was facing at his place of work was a police case and therefore he was a wanted man. In my view it was for the defendants to verify the facts from the plaintiff directly before rushing to the press to publish his photo with his name and other personal details. The 1<sup>st</sup> defendant having had an employer/employee relationship with plaintiff, it is obvious that they had contacts of the plaintiff which could have been used in this case other than the press.

The defendants only filed defenses and submitted as to their innocence in the whole matter. However, it is the view of this court that a mere defence without any evidence to support the positions taken by the defendants is nothing. For the 2<sup>nd</sup> defendant whose counsel participated in the proceedings during the hearing of this case, answers in cross examination cannot form a basis of a party’s case. Parties must tender evidence in support of the allegations. This is a principle espoused in the Court of Appeal decision in the case of **JOHN WAINAINA KAGWE V HUSSEIN DAIRY LTD- MOMBASA CIVIL APPEAL NO 215 OF 2010, per Githinji, Makhandia & Murgor JJA.** I add that neither can submissions on points of fact support a party’s case where no evidence is adduced to prove that fact which is alleged.

In addition, submissions by counsel from the bar has never been a means of the parties tendering their evidence in court. Submissions are only meant to clarify issues and not for purposes of giving evidence. Furthermore, counsel’s role in proceedings has never been that of a witness, giving evidence on behalf of their clients unless they are called as witnesses in which event they would then relinquish their role as advocates for the party and step into the witness box to be cross examined, or unless they are parties to a particular dispute. This is a fresh case for trial and not on appeal or an application. It therefore follows that the submissions on factual matters raised by the plaintiff and contested in the statements of defenses filed by the defendants without calling evidence is no defence at all.

Therefore, while this court does appreciate that the defendants are entitled to deny that the publications were false, or defamatory of the plaintiff, the question is, can a reasonable man or woman, a right thinking member of the society generally accept that those words are not defamatory of the plaintiff? I do

not think so. On the contrary, a reasonable right thinking member of the society will easily view those publications defamatory of the person of whom the publications and statements are spoken. There is no doubt that those captions and statements as published injured the reputation of the plaintiff herein, lowering him in the estimation of right thinking members of society generally.

### **As to whether the publications were malicious**

It is the plaintiff's case that the said public Notices were maliciously published by the defendants. The plaintiff went ahead and pleaded the following particulars of malice that:-

1. *Publishing the advertisement on prime days Friday and Monday when the papers are widely read.*
2. *Placing advertisement prominently in order to catch the eyes of all readers of the said paper.*
3. *Publishing the advertisement well knowing it was false and that the plaintiff had actually resigned from the 1<sup>st</sup> defendant's employment.*
4. *Calling the plaintiff's family members by phone and distressing them with the false information.*
5. *Publishing false information which was likely to and did lead to loss of employment of the plaintiff with the Motorola Incorporated.*

The captions of the plaintiff contained his photograph covering quarter of a page in each of the respective daily newspapers, the Daily Nation and the Standard Newspaper, in the **Business News page** of the Standard on 13<sup>th</sup> April, 2007 and on **Notices** in the Daily Nation of the same day. On 16<sup>th</sup> April, the caption of same size was put in the **Africa News** of the Daily Nation and **National News** of the Standard Newspaper.

Malice can be established from the publications themselves. A glance at the said public notices will reveal three (3) kinds of information that the defendants conveyed to the public or the impression created by the said notices: One, the plaintiff conducted himself in unethical and professional manner and that the matter had been reported to the Central Police Station. Two, the same publication also sought any information about the plaintiff from the public on his whereabouts. Three, the defendant also put a cautionary forewarning on anyone who might deal with the plaintiff.

It is the plaintiff's uncontroverted evidence that the captions were strategically placed to attract wide readership and I agree. In the Standard on 13<sup>th</sup> April, the caption is on the Business page beside the forex exchange and stocks news. No doubt, business is about money and what the market offers to business entities. The plaintiff had just landed a job of international status and in my view, the caption was placed there to attract international attention as international businesses like Motorola Inc would most likely be checking to see how the Kenyan money market and stocks were fairing and therefore they would not miss out the plaintiff's caption. It is said that where money is, is where the heart of people lies. The National news page is also where most readers are likely to go for news and equally, any serious newspaper reader would not just confine themselves to national news. They would find out what is happening regionally or on the continent of Africa. The caption was therefore strategically placed in the pages for National News as well as Africa News to capture wide readership. For the plaintiff's friend and acquaintances, they could, like the Architect in South Africa, access the information by reading the online editions of the two newspapers.

The plaintiff also testified that he had queried the 1<sup>st</sup> defendant about his salary which they had withheld before the Notice was published which implies that the plaintiff was not in hiding or missing as alleged by the defendants. In its statement of defence the 1<sup>st</sup> defendant pleaded that the plaintiff was summarily dismissed from employment. They also claimed that he had lost money which they sought in a counter claim. The question that begs is why were the 1<sup>st</sup> defendants asking about the plaintiff's whereabouts after dismissing him from employment? Was it therefore just sufficient to say the above captioned person ceased working with the 1<sup>st</sup> defendant and that he was not authorized to transact any business on their behalf? If the 1<sup>st</sup> defendant had the intention of contacting the plaintiff as submitted by the 2<sup>nd</sup> defendant, why then did the Notice not state that? Did they ever call him or give his telephone contacts to the police to track him?

In my view the publications made by the defendants of and concerning the plaintiff were false and exceedingly malicious. I do not agree with the 2<sup>nd</sup> defendant's submission that they were providing information to the public about the plaintiff who was missing. The analogy given of a missing person or child for the public attention to give information is farfetched and baseless.

Defamation of a person's character is taken to be false until it is proved to be true and if a person has stated that which is false and defamatory, malice is also assumed. **See K L v Standard Limited [2014] eKLR.** In the instant case, the defendants have not adduced any evidence to prove that the contents of the Public Notice are true; I therefore find that the publication was actuated by malice.

**On whether the plaintiff's credibility, character and reputation has been injured and therefore whether he is entitled to damages and if so, how much?**

I will determine these twin issues together with the issue of what orders should this court make and who should pay costs of the suit and counterclaim.

It is the plaintiff's evidence that his friends, relatives and acquaintances called him before and after the publication to inquire from him about the Notice. To date his friends still ask him what was happening with the publication. He produced evidence of emails and face book conversations of how the publication was received by his friends and acquaintances. Some of them were afraid of communicating with him lest they be associated with him and be arrested too. His contract at Motorola Incorporation was also suspended instant and terminated following the publication.

**In my view** and taking into consideration his profession and career record as shown by his impressive testimony and which this court has no doubt finding that the plaintiff is a person of reasonable fortitude, there is no doubt whatsoever that the plaintiff's standing in society was lowered by the said public Notice. I therefore find that the plaintiff is entitled to damages.

The rationale behind awarding of damages in defamation actions is to restore or give back to the party injured what he lost saves in exceptional circumstances where punitive or exemplary damages may be awarded. The Court of Appeal in **Johnson Evan Gicheru –vs- Andrew Morton and Michael O'mara Books Ltd(supra)** held:

*“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 in even marvel highly subjective element, such actions involve a money award which may put the plaintiff in a purely financial sense in a much strange 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 looking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by stander of the be sellers loss of the charges.”*

A 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 the award must compensate him for damages to his reputation. **Section 16A of the Defamation Act Cap 36 Laws of Kenya** provides for the same it states:

*In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:*

*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 of not less than three years the amount assessed shall not be less than four hundred thousand shillings.*

Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation ones reputation can be damaged forever, especially if there is no opportunity to

vindicate one's reputation. See **Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others [2010] eKLR**

I find that the defendants conduct before, during and after the trial of the case is one which will aggravate the damages to be awarded. The defendants were malicious in publishing the article concerning the plaintiff which exposed him in his personal and professional standing and character to public scandal, ridicule, contempt and embarrassment and continue to cause him loss and damage. He lost his job because of the defamatory publication and is still answering questions as to why he is not rotting in jail following those false publications. He is therefore undoubtedly entitled to damages.

In assessing damages in an action for libel the court has to consider the particular circumstances of each case, the plaintiff's position and standing in society, the mode and extent of publication, the apology, if offered and at what time of the proceedings, the conduct of the defendants from the time when libel was published up to the time of judgment.

In determining damages I should award the plaintiff, I am alive to the principle that the sums should be fairly compensatory in the light of the nature of the injury to reputation and that a restrained hand in the award of damages is desirable since the court must maintain stable bearing. The award should also appear realistic in all the circumstances.

In **Broom v Cassel & Co [1972] A.C. 1027** cited by the Court of Appeal with approval in **Nation Group Media Ltd and 2 others v Joseph John Kamotho and 3 others (supra)** the House of Lords stated that:

*“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 to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges.* Also cited in the above Court of Appeal decision was Windeyer J in **Uren v John Fairfax & Sons Pty Ltd 117 C.L.R. 115, 150** that :

*“It seems to me that, properly speaking, a man defamed does not get compensated for his damaged reputation. He gets damages because he was injured in his reputation, which is simply, because he was publicly defamed. For this reason, compensation by damages operates in two ways- as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a consolation rather than a monetary recompense for harm measurable in money.”*

In the instant case the publication was done on two dailies on two different occasions. The two dailies have a wider coverage in the country and also outside the jurisdiction of this court through the internet, the Standard News paper did a rebuttal of the information after they were approached by the plaintiff. The plaintiff testified that the 2<sup>nd</sup> defendant refused to accept his paid up advertisement to correct the wrong impression created by the said public notice. The plaintiff proposed Ksh 6,000,000 for loss of reputation. The defendants in their submissions contend that the proposal by the plaintiff is too exaggerated. They did not propose any figures.

In **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR**, the court of appeal awarded the respondent who is an advocate ksh 4,000,000 for damages.

In **FRANCIS XAVIER OLE KAPARO v STANDARD LIMITED & 3 others [2010] eKLR** Onyancha J awarded the plaintiff Kshs.5,000,000/- plus 2,000,000/- exemplary or punitive damages. Also in **K L v Standard Limited [2014] eKLR** Odunga J awarded the plaintiff an award of Kshs 4,000,000.00 in general damages. In the instant case I will award the plaintiff ksh 3,000,000 as damages.

The plaintiff is also seeking exemplary damages for Ksh 100,000,000. In **Ken Odondi & 2 others v**

James Okoth Omburah T/A Okoth Omburah & Company advocates (supra) the court of appeal held that:

*“In any event the respondent established through evidence that not only had he lost clientele but a prospective partnership with another lawyer did not materialize as a direct result of the defamatory article. 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] I 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 this case I find that the defendants acted out of an improper motive and maliciously set in motion the publication of defamatory matter of and concerning the plaintiff. The defendants knew or ought to have known that the basis upon which the publication was made false, yet they did insist in their defenses that they were justified in publishing what they call a cautionary statement to the public when there was no evidence that the matters complained of herein by the plaintiff bore any truth necessitating such need for the caution. The defendants also refused to apologize to the plaintiff. The 2<sup>nd</sup> defendant further rejected a request for a fully paid up advertisement by the plaintiff to correct the wrong impression created by the public notices. The defendants did not attempt to prove their defenses of truth, justification, fair comment and or even qualified privilege and they kept away from availing witnesses to testify on those kinds of defenses to be tested in cross examination. The defendants left the plaintiff at the mercy of the public to judge him- that he was a wanted man by the police for unprofessional and unethical conduct. Being Professional and of good ethical behavior are values that every employee is expected to possess to attract a prospective employer. However, when it is publicly declared that you are unethical and unprofessional, prospective or current employers will shun and avoid you. Those are very loaded terms. It did not take long before the plaintiff lost his employment with Motorola Inc for non disclosure, following the publication.

I find that the defendants jointly and severally acted vindictively and viciously in publishing the impugned notices. If that were not the case, it is unbelievable that the 1<sup>st</sup> defendant could have gone quiet over the plaintiffs alleged fraudulent acts as enumerated in the defence, leading to financial loss as specifically pleaded and prayed for in the counterclaim. Could they have even merely sought for such sums in civil claim without first having the plaintiff put behind bars for fraud which is a criminal offence? I do not think so. The 2<sup>nd</sup> defendant on the other hand, purported to have obtained an indemnity undertaking from the 1<sup>st</sup> defendant for publishing those notices, which indemnity was never produced in court. The defendants are therefore jointly and severally liable to the plaintiff for maliciously and recklessly, without any justifiable or reasonable cause defaming his character and reputation thereby exposing him to hatred, ridicule and contempt, and the plaintiff is entitled to exemplary damages as prayed. I award the plaintiff Kshs 12,000,000 as exemplary damages.

The claim for Ksh 1.2 million was not satisfactorily proved. The plaintiff did not proof or show the connection between the publication and the illness that his wife was treated for. There may have been a link but there was no medical evidence by the doctor to prove that fact and more so, she was

not a party to this suit and she did not testify to that fact. I will therefore not award the same.

I will also not consider the claim for Kshs.72, 000 being the plaintiff's salary for the month of March 2007 for reasons that the said claim is being made in the wrong court. The High Court by dint of Article 162(2)(a) of the Constitution has no jurisdiction to hear and determine disputes relating to employment and labour relations, which jurisdiction is expressly and exclusively conferred on the Employment and Labour Relations Court as espoused in section 12(1) of the Employment and Labour Relations Court Act.. I therefore reject that claim in limine for want of prosecution and in any event, the plaintiff only made reference to it. He did not make it a substantive prayer.

No evidence was led to prove the 1<sup>st</sup> defendant's counter-claim. The particulars of fraud pleaded against the plaintiff were not established against him in any way. The 1<sup>st</sup> defendant's submissions did not even mention the defence of counterclaim or the allegations of the plaintiff being involved in fraudulent activities. There could therefore have been no legal, moral or social authority or duty or justification to communicate such public notice. The 1<sup>st</sup> defendant's counter claim is therefore dismissed with costs to the plaintiff.

The plaintiff sought a permanent injunction to restrain the defendants from publishing such caption of him. In my view, that prayer is overtaken by events. The injunction sought in my view, would not serve any useful purpose nine years after the defamatory and malicious. I however note that the defendants refused to give any apology. The 2<sup>nd</sup> defendant also refused to publish a paid up advertisement to counter the false and defamatory publication.

In his plaint, the plaintiff prayed for such other or further relief as this honourable court may deem fit. I would, in the circumstances of this case, have ordered for an unconditional apology in the like measure as was the defamatory publications and with equal prominence by the defendants. However, on the authority of *J.P Machira v Wangethi Mwangi & Nation Newspapers Ltd* (supra) the period between 13<sup>th</sup> April 2007 to date 2<sup>nd</sup> July 2015 a time lapse of 9 years is so long that to order an apology would have no effect on the damage to the plaintiff's reputation in this digital world. Accordingly, I award the plaintiff Kshs 500,000.00 damages in lieu of an apology.

In the end I enter judgment in favour of the plaintiff against the defendants jointly and severally for:

- a. General damages Kshs 3,000,000.
- b. Exemplary Damages Kshs 12,000,000.
- c. Damages in lieu of an apology Kshs 500,000 being any other relief this court deems fit and just to grant as prayed in the plaint.
- d. Costs of the suit.
- e. Costs of the counterclaim to be paid by the 1<sup>st</sup> defendant.
- f. Interest on a, b, and c, d and e at court rates from date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JULY, 2015

R.E.ABURILI

JUDGE