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

Civil Suit 1329 of 2003

HON. AMB. CHIRAU ALI MWAKWERE. …….....…….PLAINTIFF

-Versus-

NATION MEDIA GROUP LTD……..……..……1ST DEFENDANT

WANGETHI MWANGI……..……...……2ND DEFENDANT

J U D G M E N T

The plaintiff filed this suit praying for judgment against the Defendants jointly and severally for:

"***(a) General damages for defamation***

(b) Damages on the footing of aggravated and exemplary damages

(c) Costs of the suit.

(d) Interest on (a) and (b) at Court rate until payment in full and final

(e) A permanent injunction restraining the Defendants whether by themselves, agents and employees from publishing the said words or words similar in effect and/or in substance.

(f) Any other or further relief that the Court in its own wisdom might think appropriate or fit to grant."

Mr. Roger O. Sagana from the law firm of M/s Ahmadnasir, Abdikadir & Co. Advocates, represented the Plaintiff before me while Mr. Munyu from M/S Iseme, Kamau & Maema, Advocates, represented the Defendants. They told me that for the prosecution of this suit, they are relying on the Plaintiff's plaint dated 17th December 2003 and the Defendant's joint written statement of defence amended on 18th March 2004. It was filed on 19th March 2004.

From what they said, at all material times to this suit, the plaintiff was a member of Parliament representing Matuga Constituency, Kwale District, a Cabinet Minister in the Government of Kenya then in charge of Labour and Human Resource Development portfolio.

The 1st Defendant was and still is the Publisher of the Sunday Nation newspaper and the Daily Nation newspaper both published at Nairobi and having a wide, and it was said, the largest circulation of any newspapers in the Country.

The 2nd Defendant was at material times to the suit, the editorial director of the Sunday Nation and the Daily Nation Newspapers and was providing editorial guidance and leadership to the said newspapers and would decide all issues relating to the editorial content of the said newspapers as he was an employee of the 1st Defendant.

The Plaintiff's suit is based on two publications by the Defendants. The first publication was "***on 14th December 2003 in the Sunday Nation newspaper",*** page 1 under a lead story entitled "**Ministers and M.P. held in swoop on prostitutes"**. The article or the Publication read as follows:

"***One Cabinet Minister, an assistant Minister and a Narc M.P were caught by Police in a notorious red light area with half-naked girls in their cars. They were seized during a routine swoop on prostitution in Nairobi's Koinange Street. The three were first watched and video taped before Police moved in. The politicians were seen shamelessly beckoning the girls to their cars then ushering them inside, before the Police descended..... Two of the three politicians netted by the police were first time MPs, while the other has been in parliament since 1992. One of the MPs is a 35 year old trained teacher. He is married with a child and is serving his second term in Parliament. Another is a 58 - year - old father of three who spent many years overseas as a student and a professional. They come from the Rift valley province, the Coast and Nyanza and were all elected on a Narc ticket----. The Officers were treated to more drama when the Minister and assistant Minister later turned up at Koinange Street and picked up girls. The shocked officers called their seniors and told them they had seized two more members of Parliament. It was then decided that the two Ministers and all the businessmen be released to save them, their families and the Government from embarrassment. However, the Police warned them that they would be charged in court should they be caught again."***

That is found in paragraph 7 of the Plaint. In paragraph 8 of the Plaint is found the Second Publication complained of and it is said to have been in the "***Daily Nation of 15th December 2003"*** the article entitled, "***Reservist is shown the door for tipping off girls on police swoop***."

"***A police reservist involved in a swoop on prostitutes which netted a Cabinet Minister and a Narc MP was later sacked for allegedly tipping off some of the girls. He warned them to stay away from Nairobi's notorious red light area, Koinange Street, while the raid took place, it was revealed yesterday. The swoop took place on December 5 and the reservist was dismissed just a few days later-------. It revealed that the Ministers and the MP were among a number of prominent people, including well - known businessmen, seized during the routine swoop. They were caught with half-naked girls already in their cars. The three all belonging to Narc, and from the Rift-Valley Province, the Coast and Nyanza were first watched and then photographed and video taped before police moved in----------"***

It is the Plaintiff's case that the words complained of as given in paragraphs 7 and 8 of the plaint, which I have herein above quoted, are defamatory of him; that even though the two articles do not name the Plaintiff expressly, the insinuation, innuendo, and the prescriptive description of a 58 year old as stated and detailed in the said articles leave no doubt that they refer to the Plaintiff; that the Defendants in stating that one of the Members of Parliament involved in collecting the call girls

"***was a 58 year old father of three who spent many years overseas as a student and a Professional"***

so descriptively gave a picture of the Plaintiff and sufficiently detailed the Plaintiff that any ordinary sensible person who knew the Plaintiff and having read the said two articles and who understood the same in light of the factual description so given, and with no special knowledge of the issues raised therein, would reasonably believe and reach the inescapable conclusion that the said two articles implicitly and clearly referred to the Plaintiff as the Member of Parliament so described; that the words used in the two articles by the defendants sufficiently induce the ordinary and reasonable persons to think ill of the Plaintiff and make him contemptible and ridiculous.

The Plaintiff's case goes on that in the natural and ordinary meaning, the words complained of meant and were understood to mean that the Plaintiff is a man of loose moral character, a father and husband of

loose moral character, a pervert who prays on venerable members of the society, a person not fit to be a Member of Parliament and Minister in the Government, a man of loose religious belief, dishonest and extremely unreliable and unworthy of his standing in society, a sleazy character unworthy of holding a public office and has even committed a criminal offence.

In the alternative, it is the Plaintiff's case that the words complained of meant and were understood to mean by innuendo that the Plaintiff is a man of loose moral character and religious belief; that he is a pervert who prays on venerable members of the society, not fit to be a member of Parliament, a Minister of Government or hold a public office; that he is dishonest and extremely unreliable; that he is unworthy of his standing in the society, a sleazy character who has also committed a criminal offence.

The plaintiff continues saying that the words complained of or the story from those words were or was false in that, the plaintiff was not at Koinange street at the material times to this suit, as he was attending the African Union Labour Minister's Council, an official Government function or duty at Addis Ababa, Ethiopia on 5th December, 2003 and was never caught or arrested by the police in a swoop on prostitutes along Koinange street on any date, was never with a half-naked girl, was never caught or arrested with such a woman at Koinange Street at all; that there is no truth in any of the allegations published and printed by the Defendants against the Plaintiff and that the Plaintiff was at Mombasa on the night of 12th December 2003.

The Plaintiff alleges malice on the part of the Defendants. He states that in publishing the words complained of the Defendants were driven by malice, malevolence and spite against the Plaintiff who gives "*Particulars of Malice"*: that the Defendants knew that the Plaintiff was not arrested or involved in any way whatsoever with the issues the Defendants choose to write about and that the story they wrote about the Plaintiff was not true, yet the Defendants proceeded to add the plaintiff in the story and that by so doing the Defendants wanted to harm the plaintiff and destroy him as the Defendants could have easily verified the truth with the Plaintiff as to where he had been on 5th and 12th December 2003. Instead the Defendants sensationalized the story in the publication adding the Plaintiff the Defendants having been actuated by ill will, spite and improper motive, as no fair person could have published such words against the Plaintiff.

The Plaintiff supports his claim for exemplary damages by stating that the words complained of were published and republished when the Defendants had no evidence to support the publications the Defendants

knew were false and recklessly published having calculated that the Commercial benefit was going to outweigh any compensation payable to the Plaintiff. They aimed at destroying the Plaintiff politically and socially. The Defendants have therefore threatened and continued causing publications of the same and similar charges against the plaintiff so that when the Plaintiff demanded an apology from the Defendants, the Defendants declined and refused to retract the said words and render an appropriate apology thereby making the institution of this suit necessary.

The Plaintiff said that prior to the Defendant's publication of the words complained of, the Plaintiff enjoyed an excellent and priceless reputation as a father, loving and faithful husband, clean and honest member of parliament and a respected and well regarded Cabinet Minister in the Government of Kenya, a respected former diplomat well respected and well regarded Internationally, and enjoyed priceless status both locally and Internationally. But by the publication of the articles complained of by the Defendants, the Plaintiff as a father, husband, Member of Parliament, Cabinet Minister and diplomat has been exposed to ridicule, hatred, odium and contempt in order to lower him in the estimation of right thinking members of society, and has as a consequence thereof suffered and continue to suffer, massive injury to his credit, name and reputation and the Plaintiff has suffered damages.

The Plaintiff who produced his long and impressive curriculum vitae in Plaintiff exhibit number 1 told the court that on Saturday morning the 13th December 2003 while at his home in Kwale District was telephoned by somebody who said wanted to write a feature on him and asked him many questions which the Plaintiff answered telling the caller that he, the Plaintiff, was 58 years old, married to one wife with

whom they have three children. The questions he answered included where he went for his education. As he found the questions to be too many, the Plaintiff invited the caller to go to Kwale to get all the answers. The person had told the Plaintiff was calling from Nation Newspapers. A man whose name Plaintiff is not sure whether the caller gave.

The Plaintiff said the following day Sunday 14th December 2003 he was shocked to learn of the publication complained of dated that day. Not only, him, but also members of his family, his religious community, friends and other relatives seemed to have also been shocked.

The Plaintiff's daughter called him from Canada asking the Plaintiff what has happened. The supreme council of Kenya Moslems (SUPKEM) led by one Sharrif Hussein went to see the Plaintiff expressing their concern that the Plaintiff had disgraced himself, his religious community as well as his family. When the Plaintiff told them that he had not been at Koinange Street as published in the article, they could not believe it. Thereafter the Plaintiff could only ask them to give him time to explain and they did, eventually agreeing with him that he seeks legal intervention.

The Plaintiff was even called to State House to go and explain the position and he went.

The Plaintiff explained his absence from the country from 2nd to 6th December 2003 and produced authorization letter from Secretary to the Cabinet, permission from the National Assembly Speaker for absence from The House, his passport with relevant visas plus the Kenya Airways Boarding Pass showing he traveled to Addis Ababa on 2nd and returned on 6th December 2003 – using Kenya Airways.

The Plaintiff said, it was painful as he lost some of his friends and his political opponents got the opportunity to say nasty things against him some making derogatory remarks that they do not see much traffic jam on Koinange Street because the Plaintiff takes more care of traffic on that street than on other roads and that was in a question put to the Plaintiff by a caller when the Plaintiff was subsequently one day being interviewed on a public T.V. concerning the work of his new ministry. He added that some people even refer to him as

"***Koinange Street"***

adding other slogans. The Plaintiff said the publication amounted to malice as it was aimed at destroying him politically and socially and when apology was demanded, the Defendant refused to apologize. He said the evening Television and radio stations, following the publication, mentioned names which included the Plaintiff's name thereby making the focus to be much more on him-before he gave his press conference the following day – 15th December 2003.

Concerning paragraph 4 of the Defendant's defence where the Defendants averred that a plain and ordinary reading of the article complained of, following the order of seniority would show that the article referred to

"***(a) A Cabinet Minister who is a 35 year old trained teacher and who is married with one child and is serving his second term in office;***

(b) A Cabinet Minister who is from the Rift Valley";

the Plaintiff remarked that that statement could not be true because in the year 2003 there was no Cabinet Minister aged 35 years in the country and that all Cabinet Ministers from the Rift Valley were above 35 years old. That contention by the Plaintiff was not challenged by evidence from the Defendants in which case they never adduced evidence to prove paragraph 4 of their Defence.

The Plaintiff rejected the suggestion during cross examination that he simply fitted himself into an article which did not concern him. He said that could not be so because before he was aware of the publication of the article and therefore before he read it, people who knew him and had read the article

were the ones who made him aware of the existence of the publication of the article by telephoning him inquiring why he had conducted himself as published. In other words he was not the one who started announcing to the readers that he was the Cabinet Minister the published article was about. Those who knew the Plaintiff, when they read the publication identified the Cabinet Minister the article referred to as the Plaintiff. When the said article was drawn to the attention of the Plaintiff and he read it, he identified himself as the Cabinet Minister the published article was talking about although no name was mentioned by the article.

Although conceding that the article as published did not specify that the Minister came from the coast or the Rift Valley or Nyanza and did not say the 58 year MP came from the coast or any other particular place, the ***Plaintiff said that "by analysis when you narrow down the whole thing goes to him because there was no Member of Parliament other than him, who was 58 years old, married with three children and had spent many years overseas as a student and a professional".*** He said that no other Member of Parliament fitted that description. The Defendants did not challenge or disprove the Plaintiff on that point which they would have done easily had their defence been truth that they had published the words complained of concerning and about a Member of Parliament other than the Plaintiff.

The Plaintiff emphasised that following the publication on 14th December 2003, morning, in the evening radio stations and television stations had come out with news items mentioning his name yet he had done completely nothing to inform them that he was the one. Those were in addition to numerous telephone and oral inquiries he had faced during the day from other people who had connected him with the story without his knowledge or influence. He clarified that he is suing the Defendants only because they were the first persons to connect him with prostitution in Koinange Street and those other people merely followed what the Defendants had done narrowing down on the Plaintiff, among few others like college girls, and making him a specific subject of discussion on a matter that was not true of him. He clarified further that the institution of this suit against the Defendants did not mean that he was not aware that the Government has been in the forefront fighting HIV/AIDS and does not also mean he does not realize prostitution contributes to the spread of HIV/AIDS as the area of highest risk. He has no quarrel with newspapers carrying out campaign against HIV/AIDS as that is a positive contribution by newspapers. But he was against someone using his name, destroying him, spoiling his name in matters where his name ought not be soiled. He added that if it is true the MPs were caught on cameras and videos, the Defendants must be knowing what they are talking about.

Like the Plaintiff, the Defendants also brought only one witness. It was Mr. Joseph Odindo who gave evidence as DW 1 having told the court he was, by 2nd December 2008, Group Managing Editor, Nation Media Group and that as such, editors in charge of each newspaper report to him. He was fully aware of this suit. He gave evidence with a background of a joint amended written statement of defence which admits publishing the story alluded to in paragraphs 7 and 8 of the plaint. For each publication, however, the Defendants deny that they published the words complained of concerning the Plaintiff. That is they are saying that what they published was not about the Plaintiff. It was about somebody else and that if the Plaintiff thinks that the words were referring to him, let the Plaintiff adduce evidence to prove it.

According to the Defendants therefore the publication complained of in paragraph 7 of the plaint referred to

"***(a) A Cabinet Minister who is a 35 year old trained teacher and who is married with one child and is serving his second term in office;***

(b) A Cabinet Minister who is from the Rift Valley."

The articles were not therefore defamatory of the Plaintiff. Clearly here the Defendants are not concerning themselves with the words complained of as set out in paragraph 7 of the plaint although they mention that paragraph. This is because the words they are now attributing to that paragraph as shown here are not the words complained of in that paragraph.

Otherwise the Defendant continue that since the issue of prostitution and the involvement by

university and other students and also the conduct of public figures is a matter of general public or national interest, the Defendants have a right to inform the public on such matters particularly considering that the activities detailed in the articles complained of impact on the deadly HIV/AIDS scourge which has already been declared a national disaster.

The Defendants further aver that the article published on 14th December 2003 and the words complained of "*were published on an occasion of qualified privilege"* and proceed to give four particulars:-

"***i) On the night of 5th December 2003, the police carried out a swoop on the prostitutes who operate along Koinange Street Nairobi.***

ii) Some of the prostitutes who were arrested and charged in court, were students at the University of Nairobi and other colleges in Nairobi.

iii) The 2nd Defendant established that among the people found with the prostitutes were three politicians and prominent businessmen.

iv) Thereupon it became the duty of the two Defendants to publish the article complained of."

In addition to the qualified privilege, the Defendants aver that "***they were under a social and/or moral duty to publish the article to the general public who had a like interest to receive the information contained in the article."***

The Defendants then go further to claim that the articles were "***a fair comment on a matter of general public interest."***

They aver that the Plaintiff has mischievously selected words from different parts of the article to fit his purposes and that therefore the Plaintiff has deliberately misled the court and should not be allowed to benefit from his deception. The words actually published by the Defendants were not reasonably capable of being understood to be referring to the Plaintiff or to any other member of the class of people referred to, to wit, Cabinet Minister and Members of Parliament. The allegation that the words complained of could reasonably be understood to refer to the Plaintiff are too remote and untrue.

The Plaintiff was neither named nor otherwise referred to or described in the article and the allegations in paragraphs 13 and 14 of the plaint cannot be true and the Defendants deny that the article complained of was false. The defendants were under no obligation to verify the Plaintiff's whereabouts as the article complained of did not name or identify the Plaintiff and Defendants did not write any story of or concerning the Plaintiff other than for the retraction made by the Plaintiff himself. Otherwise the Defendants aver in the alternative that in so far as the article and/or words complained of consist of allegations of fact, they are true in substance and in fact; in so far as they consist of expressions of opinion, they are fair comments made in good faith without malice upon the said fact, which are matters of public interest.

Particulars of Facts are:

"***i) The police carried out a swoop on Koinange Street on 5th December 2003.***

ii) The police arrested more than 100.

iii) Some of the arrested prostitutes were students.

iv) Some of the men found with the prostitutes were three politicians and several prominent businessmen.

i) That the politicians were praying on the prostitutes and particularly the young students.

ii) ***Members of Parliament are no strangers to Koinange Street***."

The Defendants aver that if the reputation, name and credit of the Plaintiff have been affected or lowered, then the same is not as a result of the articles complained of or any other wrong doing by the Defendants. The articles complained of were not calculated to disparage and were not capable of disparaging the Plaintiff in his office, reputation or credit or at all. The Plaintiff has not shown any or any reasonable connection or nexus between himself and the words complained of.

The Defendants say that the prayer for an injunction in the plaint has no foundation and should not be granted. The defendants further aver that the Plaintiff's suit is meant to muzzle the press and restrict the Defendant's constitutionally enshrined freedom of speech and expression. The prayers meant in addition, to curtail debate or comment on a matter of general public or national interest and the Defendants' claim the Plaintiff's suit is unconstitutional and bad in law.

The two Defendants further aver that in view of the profound general interest in the involvement of students, politicians and prominent businessmen in conduct that would lead to the escalation of the HIV/AIDS infections, debate on the issue should be uninhibited, robust and wide open and such debate is still to be encouraged even though it may include sometimes unpleasantly sharp attacks on the conduct of public officials and other influential members of the society. An article touching on the major public issues of the day in Kenya qualifies for protection pursuant to the freedom of expression guaranteed by **Section 79** of our Constitution. And the two Defendants invoke the protection guaranteed by the said **Section 79** of the Constitution in their defence.

Mr. Joseph Odindo therefore told the court that in December 2003 he was the Group Managing Editor and also acted as the Editorial Director of the Sunday Nation and the Daily Nation because the then Editorial Director was on leave; and that while acting as the Editorial Director, he would be consulted by Editors of various Sections and Managing Editors. That was how he got involved in this matter especially, through their normal regular meetings, as it was during one of those meetings that on 3rd December 2003 the Editor in Charge of Crime and Security Section told the meeting that the police were conducting a campaign to rid the City Centre Streets of Prostitutes and Criminals. That was three days after the National Aids Day when the Nation Media had published problems on various aspects to assist in the campaign against the disease. They were therefore interested in the information as to what the police intended to do to further the campaign against the disease. They asked the Reporter Stephen Muiruri to go to the source to get more information and he attended a press conference held by the Provincial Police Officer (P.P.O.) on 11th December 2003 showing what had been done – in the matter – including the arrest of 102 prostitutes.

Following that the Reporter, Stephen Muiruri, was asked to get more information and subsequently came back with a bigger story stating that police officers had arrested politicians who included a Cabinet Minister, an Assistant Minister and an ordinary Member of Parliament. Others arrested were college students and other students as well as business people. At a subsequent meeting of Editors therefore, it was decided to treat that story as a "*Package"* that is develop the story in a multiplicity of related articles all on one subject to give it different angles the aim being to signify to the reader the extra-ordinariness of the story being covered while at the same time satisfying the information need. Different reporters were asked to generate those articles.

The articles were checked by Mr. Joseph Odindo (DW 1) who decided they be published in the Sunday Nation of 14th December 2003; Mr. Stephen Muiruri having confirmed he had access to police record of those who had been arrested, names and pictures and even video. Mr. Odindo cautioned the Reporters not to name anybody and avoid as much as possible giving descriptions which would suggest who the person was as this was a police matter which would end up in court and should not prejudice any prosecution. Ethically, Mr. Odindo discouraged the Reporters from dwelling on individuals, unless on

public interest. Also people of influence and with money were involved and parents of the students involved were affected.

Mr. Odindo claimed that all those cautionary measures were being taken on the basis of guidelines the Nation Media Group has issued to its journalists as to how they should conduct themselves professionally laying down what they can and what they cannot do. He produced the guidelines as Defence Exhibit 1 and also the Code of Conduct on Practice of Journalism in Kenya, as Defence Exhibit 2 which is binding to

Media Houses,

Media Institutions,

Media Employees And Practitioners

After publication of the articles Mr. Odindo and his officers had a post mortem meeting as to what had been published and what the reactions were.

By then three politicians, Hon. Mwakwere, Hon. Kiunjuri and Hon. Midiwo had called press conferences in which each had said that although the story were referring to him, he had not been present at Koinange Street as claimed. The Defendants published what was said in the press conferences making it a lead story on 16th December 2003 with pictures of the three Members of Parliament.

Mr. Odindo explained that by so publishing the press conferences, the Defendants accorded fairness, the right to be heard and the right to reply to the three politicians. By then other Media Houses, television and radio stations had joined in the discussion in various degrees some of them mentioning names of the three politicians. Mr. Odindo produced D. Exhibit 3 and D. Exhibit 4 being copies of The Standard Newspaper of 15th and 16th December 2003 respectively.

Mr. Odindo pointed out that in the publication complained of, it does not talk of "***a 58 year old Minister from the Coast Province.***"

It refers to

"***a 58 year old father of three who has spent many years overseas as a student and professional.***"

The part concerning origin of the ministers mentions three regions, Rift Valley, Coast and Nyanza so that the 58 year old father of three, who is not identified in the story as a Minister, could have come from any of those three regions. He could also have been the Assistant Minister or the non Minister Member of Parliament.

This witness said that in the publication complained of, they were not talking about the Plaintiff who also called a press conference and told the public he was not in Koinange Street on 5th December 2003. He did not think the ordinary person would specifically link the publication complained of with the Plaintiff in this suit and he does not see how malice towards the Plaintiff arises.

He went on to tell the court that it was true the Defendants knew the Minister they were talking about and went ahead to describe him to establish credibility because they wanted the public to know and accept what the Defendants said. But the Defendants did not want to name names to avoid prejudice and adverse effect because the Defendants mention names only when it is necessary and must protect themselves legally. The intention, according to DW 1, was to put the description in such a way that the same description could be said to apply to any of the three Members of Parliament. The witness did not therefore accept the suggestion that the third Member of Parliament was not described, but he could not show, for example, the age of the third Member of Parliament.

Mr. Odindo stated:

"***I do agree that if the person meant in the published article were the Plaintiff and it were found that he had not been arrested, the words/innuendos in paragraphs 12 to 14 of the plaint would be true.***

It is true that a person who was 58 years old and had three children and had spent considerable years abroad as student and a professional was arrested by the police.

For that information, the witness depended upon Mr. Stephen Muiruri. The said Mr. Stephen Muiruri is no longer the 1st Defendant's employee. But an Editor relies on a Reporter as that is the way work can be manageable in journalism, he emphasised.

Although Mr. Odindo agreed the publication generated a lot of heat and went on to remark that when he heard the story he wished that the Plaintiff was not one of the people involved and bearing in mind Mr. Odindo's repeated evidence that indeed the publication did not refer to the Plaintiff because the Plaintiff was not one of the men with prostitutes in Koinange Street on 5th December 2003, Mr. Odindo admitted that following the Plaintiff's press conference wherein the Plaintiff stated he was not one of the people reported to have been in Koinange Street with prostitutes, the Defendants did not go ahead and publish to the public that indeed the Plaintiff was saying the truth that he was not one of the people so reported to have been in Koinange Street. Mr. Odindo's explanation of that failure was that it was

"***because immediately after that press conference and as we were reading his letter requesting us to retract the statement, we were told this suit had been filed and we decided to answer him (Plaintiff) through this suit that we would defend the suit."***

It may be asked whether it required more than one hour following the Plaintiff's aforesaid press conference, for the Defendants to simply take step, on their own, to publish to the readers in the next day's edition of their newspapers, that indeed what the Plaintiff had said at the press conference that he had not been at Koinange Street involved in the incident, was true and that therefore the publication of 14th December 2003 had nothing to do with him? Was it not cheaper and quicker doing it that way than waiting to do it to-day through evidence in this suit and therefore through this judgment? Mr. Odindo could not buy any of those suggestions, arguing that the Plaintiff filed this suit on 17th December 2003 the same day the Plaintiff's demand letter dated 15th December 2003 reached his (Mr. Odindo's) desk though received in his office on 16th December 2003 and that therefore the Defendants did not have the time to exonerate the Plaintiff from the story and that once the matter reached the court, the Defendants could not publish a retraction unless through their lawyers. That is not withstanding the fact that it would have been a good mitigating factor had such a retraction been published Mr. Odindo continued to say:

"***As to the person I have said was the person we meant in the publication whom I have said is not the Plaintiff, I am not in a position to mention his name. Yes I know I am in a Court of Law covered by absolute privilege but I am not in a position to mention his name. Not because I have now forgotten his name, but just because I am not in a position to mention his name. I am not refusing to mention his name. I would not know how many NARC MPs who were 58 years with 3 children and spent several years abroad as students and professionals were as at 14-12-2003 from the Rift Valley. I cannot tell how many had such qualifications."***

Mr. Odindo did not agree that the Defendants' failure to apologize or their quietness on that issue following the Plaintiff's press conference on 15th December 2003 published on 16th December 2003 gave the public the impression that although the Plaintiff was complaining, he was the one the words complained of were published about. He said that publishing on 16th December 2003 what the Plaintiff had said was sufficient.

I should explain here that although Mr. Odindo, when giving evidence took the stand as shown above, the position is that the Defendants had had sufficient time to publish in the Daily Nation of 16th December 2003 at the end of the papers report about the press conference the following statement:

"***The Nation stands by the report that appeared in the Sunday Nation."***

They were able to write that instead of simply writing something like:

"***The Nation clarifies or explains that the report that appeared in the Sunday Nation had nothing to do with Hon. C. A. Mwakwere."***

They definitely had enough time to write something like that to exonerate the Plaintiff from the words complained of and it definitely would have carried a different meaning from the meaning in the first passage. It was a mere clarification or explanation not amounting to an "*apology*" or "*a retraction*", the two words the Defendants may have hated to use. A better word than the word "*clarifies"* or "*explains"* could even have been used and the matter was as simple as that for the Daily Nation dated 16th December 2003.

Even if the Plaintiff would not have accepted it, this court would today have accepted that word – the Plaintiff's suit having been filed on 17th December 2003. In those circumstances, a demand letter from the Plaintiff was not necessary, and if any, would have been rendered superfluous and the situation in ***Hon. Jakoyo Midiwo vs Kenya Times Media Trust Limited & Another***, ***H.C.C.C. No.308 of 2004*** and ***Broadway Approval Limited vs Odhams Press Limited (1965) 2 All E.R. 523*** would not have arisen and the defence herein to-day would have been stronger; as it should also be remembered that in the same Daily Nation of 16th December 2003, the police were reported to have told the press that they had not arrested any Member of Parliament or any male suspect in the matter on 5th December 2003.

Mr. Odindo refuted the suggestion that the Defendants published the story to improve sale of their newspaper to the public. He said they made no effort to verify whether the Plaintiff was in the country or not because the publication was not about the Plaintiff. Also the Defendants do not know of any incident where they threatened to continue publishing defamatory matters about the Plaintiff other than covering the Plaintiff as a Minister or Public Officer in his official functions as they do to other officials.

He said that the media gives more prominence to politicians than to business people more so since politicians sit in Parliament and pass laws on matters affecting lives of people.

He would not consider that many readers knew how old the Plaintiff is and whether he is a father of three. He explained the position of Defence exhibit 1 which is the "*Editorial Policy Guidelines and Objectives*" saying that though drawn up by the "*Nation Media Group*" are largely taken from Universal Guidelines and Objectives, except that parts of the exhibits deal with issues peculiar to Kenya like tribal issues. Thus they could give the description of the people involved in the Koinange Street activities without mentioning those people's names.

This witness emphasised that for the purpose of him authorising publication as he did in this matter, he did not need to have witnessed the incident himself. It was sufficient if a Reporter, reported the incident to him, concluded Mr. Odindo, and that closed evidence on the side of the Defendants.

As I said in the case of ***AMRITAL BHAGWANJI SHAH –vs- THE STANDARD LIMITED & ANOTHER***, H.C.C.C. NO.1073 of 2004

"……***..We should cherish freedom of the press or the media. But in so doing, we must also cherish the truth, for freedom cannot thrive in an atmosphere of irresponsible journalism, lies, ridicule, bias or propaganda and scandalous atrocities. Say the truth, stand by it, and come to defend it in a court of law when the matter goes to court. Filing a defence and engaging a brilliant lawyer to cross examine the Plaintiff and his witnesses when giving evidence while the Defendant and his witnesses, if any, do not dare face similar treatment in the Court's witness box, deprives the court of vital information or facts which would perhaps have assisted the court make a better informed judgment in the administration of justice. Sometimes they do not even file a defence. Reputed Newspapers like The Standard are expected to be responsible newspapers and ought not allow irresponsible journalism even if they have no problem paying awards made by courts in defamation litigation. Irresponsible journalism has consequences and increasingly courts are not letting it go uncensored and in those circumstances the media ought not be heard complaining about high***

amounts in damages courts may award successful Plaintiffs."

Since saying that, and some of my learned sister and brother judges had made similar statements, I have not seen further similar complaints from the media, but it is apparent the said media has adopted an alternative mode of indirectly complaining and that is through leadership of onslaught against the Judiciary with a view to replacing all the judges with new ones who, hopefully, will "*not be censoring*" the media. Interestingly the ONSLAUGHT does not seem to see the "*Magistracy in the same Judiciary.*"

In any case and in view of some of what I have said in the long passage just quoted above, I must at this stage express my gratitude and appreciation to the Group Managing Director, Nation Media Group, Mr. Joseph Odindo, who, unlike those others, spared his precious time to come and educate the court as defence witness number one, (DW 1), during the hearing of this suit. He was the only witness for the defence but did a wonderful job forcefully, conscientiously and intellectually presenting the Defendant's case on policy, principles, background, duty, service, privileges, facts, evidence, and opinion. There should be more of Mr. Joseph Odindo's in the Media to assist courts in locating and getting hold of "***JUSTICE***" in this deceitful society – which is increasingly manifesting tendencies to ignore not only the Rule of Law but also the importance of an orderly society based upon unquestionable obedience to the law to foster democracy.

The above having been said, the issue to be resolved at this stage is whether it is correct for the Defendants to claim, as it is stated in their written submissions at page 5, that

"……***the Plaintiff has picked certain sections of the article and juxtaposed them against each other to suit a description that does not emerge from a reading of the entire article.***

…….***the Plaintiff should not paraphrase the said article to fit his purposes and thus induce an interpretation that does not otherwise emerge from a reading of the said article."***

On that issue, the concern of the court in this suit is whether the words complained of as set out in Paragraphs 7 and 8 of the plaint aforesaid are same words identified and highlighted on page 1 of the Sunday Nation dated 14th December 2003 and produced as Plaintiff exhibit 9 in respect of Paragraph 7 of the plaint; and same words identified and highlighted on page 12 of the Daily Nation dated 15th December 2003 produced as Plaintiff exhibit 10 in respect of paragraph 8 of the plaint – dated 17th December 2003.

The answer is that my reading and comparison of those words satisfies me that there is no difference. What is contained in the written submissions of the Defendants as quoted above therefore, to my mind, amounts to an attempt to misrepresent the facts and I do hereby reject those allegations as in this suit the focus is upon the words complained of as stated in paragraphs 7 and 8 of the plaint. The important questions remaining the same, namely, whether those words are spoken of and concern the Plaintiff and whether they are defamatory of him. The fact that the words complained of are printed and published among other words not complained of, is not lost to this court which is therefore reading the whole publication of 14th as well as that of 15th December 2003 where the word "*publication*" means the "*story*" or the "*package*" consisting of a number of Articles including the Article having "*the words complained of*".

Further, it must be appreciated by everybody that each party had the liberty to present its evidence in the manner and order it wanted to present in accordance with the law and this court had no particular formular or format in that respect.

Another issue I should clear at this stage is the issue of hearsay evidence raised by the Plaintiff's counsel as seen from pages 8 to 9 of the Plaintiff's written submissions – relating to the evidence of Mr. Joseph Odindo who relied on what his Crime Editor, Stephen Muiruri, had told him. The learned Counsel concludes by asking this court not to admit that evidence.

I am not sure whether the learned counsel does not remember that evidence is admitted or not admitted at the time it is being adduced in the trial. If a party does not want a certain piece of evidence to be admitted therefore, that party raises objection to admission of that evidence at the time the evidence is to be admitted during the trial. That time, in relation to the evidence in question here, passed when Mr. Joseph Odindo was adducing that piece of evidence during the trial. If, with or without objection from the learned Counsel Mr. Sagana, that piece of evidence was admitted, it is too late in the day for the learned Counsel to submit now that the said piece of evidence be held by this court to be inadmissible. In law, this court is now *fuctus officio* on the issue of that admissibility. Otherwise it would have been unfair amounting to denial of justice for this court to hold at this late stage of writing judgment that the piece of evidence in question is not admissible.

A third issue I should clear at this stage concerns the Constitutionality of this suit. While at one stage the Defendants come out in their filed defence talking as if they are claiming this suit offends certain Constitutional provisions, the Defendants subsequently fizzle out on that issue as they give no evidence in support of that proposition and instead go on to mention **Section 79** of the **Constitution** among other grounds, in support of their case. As such, I do not find any issue of Constitutionality among other grounds, in support of their case. I therefore do not find any issue of the Constitutionality of this suit in this matter.

A fourth issue is, and I point this out to make each side aware as this is an important issue, that while in his written submissions the learned Plaintiff's Counsel has proceeded on the basis of what some people are calling the "***old principle or old line of thinking or jurisprudence, the learned Counsel for the Defendants has proceeded on the basis of what those people call the "new principle or new line of thinking or jurisprudence,"*** which proponents seem to be using in an attempt to oust and sweep away present relevant Constitutional and statutory provisions relating to defamation in Kenya. That is why in this suit, there is mention of the unconstitutionality of this suit which issue I have said the Defendant's Counsel has not pursued. In the case of ***HON. MWANGI KIUNJURI –vs- WANGECHI MWANGI, NATION MEDIA GROUP LIMITED and ROYAL MEDIA SERVICES LIMITED, H.C.C.C. No.1333 of 2003*** where the said new principle was being used to support a prayer to declare "*The Defamation Act, Cap. 36.*" in this country "*ultra vires,*" the Constitution of Kenya, Justice J. B. Ojwang had this fitting reply:

"***I think that would not be necessary, since, as already noted, the law of defamation has grown freely, on the basis of common law initiatives – a process which has not been limited by the said statute."***

The new principle has been established from a line of cases said to have set the pace in defamation jurisprudence. The new line cases are ***NEW YORK TIMES V. SULLIVAN 376 U.S 254 (1964); REYNOLDS v. TIMES NEWSPAPER LIMITED (2001) 2 A.C. 127; (1999) 4, ALL E.R. 609; THEOPHANOUS v. THE HERALD AND WEEKLY TIMES LIMITED and ANOTHER*** (1994) 3 LRC 369; ***KHUMALO And OTHERS v. HOLOMISA*** (CCT 53/01) (2002) 2 ACC 12; 2002 (5) S.A. 401; 2002 (8) BCLR 771 (14 June 2002); ***JAMEEL AND OTHERS v. WALL STREET JOURNAL*** (2006) 4 ALL E.R. 1296; ***BONNICK v. MORRIS And Others*** (2003) 1 A.C. 300 (PC). Those are cases from the U.S.A., the United Kingdom, Australia, South Africa and I think the most important of them all is the case of ***REYNOLDS v. TIMES NEWSPAPER LIMITED***.

Briefly looking at the said cases starting with the American case SULLIVAN which talks of "*Constitutional Privilege"* which does not seem to have been in the U.S.A. before, the relevant passage is the one stating as follows:

"***The Constitutional privilege extended to the press and to any public medium requires a differentiation between private individuals on the one hand, and public officials and figures on the other. Statements made about public officials and public figures especially when made by a public medium generally relate to matters of general public interest and are made about people that have substantial influence and impact on the lives of other people. Moreover, public officials and public figures generally have some access to public medium for answering disparaging falsehoods whereas private individuals do not have ready access to a medium reaching the recipients of private defamatory communications.***

The category of public officials includes not only those who are commonly classified as public officers but also public employees who exercise any substantial governmental power."

That is a persuasive authority from the United States of America. It is not binding upon courts in Kenya. From that authority, it is being said that "***a publisher of an inaccurate statement is not liable where he has acted responsibly and that malice is irrelevant***," because debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes, unpleasantly sharp attacks on government and public officials.

It is argued that the new, jurisprudence in Sullivan's case has influenced a number of countries including European Countries, Australia, India, South Africa, and New Zealand as reckoned from some of the cases earlier on mentioned in this judgment. Those are cases where the Defendant is part of the media as the Media plays a vital role in a democratic-society so that

"***If the press, in the course of practicing investigative journalism publishes a statement of public interest, after verifying the facts, it will not be held liable if it subsequently turns out that it made a mistake and damaged the reputation of the Plaintiff."***

In the "***USA this defence is known as CONSTITUTIONAL PRIVILEGE associated with SULLIVAN***

v NEW YORK TIMES";

while in England the defence is termed:

"***REYNOLDS V TIMES NEWSPAPER LIMITED***

Privilege or defence"; and

the Defendant's Counsel in this suit says

"***the privilege here is now popularly known as the publication privilege or the Reynolds privilege."***

How is the defence (privilege) stated in Reynolds' case? I put it here very briefly as follows on the basis of 28 Halsbury's Law of England, 4th edition reissue paragraphs 109 to 130:

"***An occasion is privileged where the person who makes a communication has interest or a duty, legal, social or moral to make it to the person to whom it was made and the person to whom it is so made had a corresponding interest to receive it."***

In the case itself therefore, it was "***held that the elasticity of the common law principle of qualified privilege, based on consideration of all the circumstances of the publication, enabled the court to give appropriate weight, 'in to-day's conditions', to the importance of freedom of expression by the media on all matters of public concern and confined interference with freedom of speech to what was necessary in the circumstances of the case. Those circumstances were not to be considered separately from the duty-interest test, but rather were to be taken into account in determining whether that test was satisfied or, putting it more simply and directly; whether the public was entitled to know the particular information."***

Emphasis supplied.

It was therefore explained that:

"***in considering whether allegations made in the press attracted qualified privilege, the matters to be taken into account, depending on the circumstances, included, the seriousness of the allegation, the nature of the information and the extent to which the subject matter was a matter of public concern, the source of the information; the steps taken to verify the information; the status of the information;***

the urgency of the matter; whether comment had been sought from the Plaintiff; whether the article contained the gist of the Plaintiff's side of the story; the tone of the article; and the circumstances of the publication, including the timing. That list was not exhaustive, and the weight to be given to those and any other relevant factors would vary from case to case.

Moreover, a newspaper's unwillingness to disclose the identity of its sources should not, in general, weigh against it, and it should always be remembered that journalists act without the benefit of the clear light of hind sight. Above all, the court should have particular regard to the importance of freedom of expression, and should be slow to conclude that a publication was not in the public interest, especially when the information was in the field of political discussion. Thus any lingering doubts should be resolved in favour of publication."

Lord Nicholls added:

"***The epithet 'fair', as applied to the defence of comment on a matter of public interest, is now meaningless and misleading. The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it."***

I said earlier that to me **REYNOLD's** case is the most important of the other cases mentioned together with it in relation to what I will hence-forth be referring to as "***The Constitutional Privilege***" or "***the Publication or the Sullivan And Reynolds' Privilege".***

One of the reasons I take Reynolds' case to be most important is that it was decided after ***New York Times v Sullivan*** (Sullivan case) was decided and therefore I take ***Reynolds'*** case to contain more developed views than the views in **Sullivan** case. Secondly, the rest of the cases have been influenced by ***Sullivan*** and ***Reynolds***' cases. Thirdly, Reynolds' case being a United Kingdom Case is closer to Kenya than the U.S.A.'s Sullivan case which is only persuasive and no more. Reynolds on the other hand, may even try to claim a place in the Laws of Kenya through the Defamation Act-Cap 36, when that case is not being used to oust that Act as I will show below that it ought not be used to oust the Act.

The circumstances being as I have indicated above, it would appear to me that some people tend to run away from Reynolds' case to rely more heavily on Sullivan's case because the Defendant's cross appeal in Reynolds' case on the basis of qualified privilege was dismissed and they may find it rough explaining that dismissal. Otherwise it seems to me that, generally, the two cases stand on equal footing with regard to the privilege being discussed.

In dismissing the Defendant's cross appeal in Reynolds' case, the House of Lords held that though

"…….***the subject matter was undoubtedly of public concern in the United Kingdom, ……the article made serious allegations without mentioning R's considered explanation. In those circumstances, the allegations were not information that the public had a right to know, and thus the publication was not one which should, in the public interest, be protected by privilege in the absence of proof of malice."***

It is common knowledge, of cause, that once a defence of qualified privilege is proved, it stands unless there is sufficient evidence of malice against it. Their Lordships in Reynolds' case were saying that even without moving to the stage of proving malice, the Defendant's appeal on the issue of qualified privilege was already no more.

It reminds me of a similar situation I encountered in the case of H.C. ***AMRITAL BHAGWANJI SHAH v THE STANDARD LIMITED & ANOTHER*** C.C. No.1073 of 2004, (supra) where the Defendants had ignored completely the Plaintiff's side of the story given to them by the Plaintiff's Advocates with a request for a retraction of the offending publication the Defendants had already made against the Plaintiff. That was before the suit was filed. Later in the suit it was better than in the instant suit that the Defendants avoided the defence of qualified privilege of the press.

Today, and that is what I find in this suit, views are being expressed that because of what courts said

in the case of "Sullivan" and the case of "Reynolds'" thereby establishing a new principle or jurisprudence known as "The Constitutional Privilege" or "*The Publication" or "the Sullivan And Reynolds privilege"*, the media freedom of expression is unlimited. Those views are strongest in the case of ***HON. MWANGI KIUNJURI*** (supra) in so far as it relates to the Third Defendant in that suit.

But having held the views or having come to the conclusion that the media Freedom of Expression is unlimited, holders of those views say that the position of the law as expressed in "*The Constitutional Privilege*" or "*The Publication or the Sullivan And Reynold's Privilege"* is the same as the law expressed in **Section 79** of the current **Constitution of Kenya**.

Accordingly, the Defendant's written submissions in the instant suit refers to the case of ***BONNICK – vs- MORRIS*** (2003) I A C 300 where it is said the Privy Council was called upon to consider provisions of **Section 22** of the **Constitution of Jamaica** and it is added that the said **Section 22** is word for word similar to **Section 79** of the **Constitution of Kenya**. The Privy Council stated in relation to **Section 22** aforesaid as follows:

"…….***..their Lordships are of the view that the law relating to qualified privilege as declared in Reynolds is……..consistent with Section 22 of the (Jamaican) Constitution. The wording……..is different but in its context its effect is the same."***

The Defendant's learned Counsel having put the position that way, thereafter, with all due respect, proceeds to put the law in Kenya upside down or in a confusing manner as follows:

"***This case is a typical example of the dilemma that confronts the Courts in seeking to balance the interest of an individual to the protection of what he considers to be his reputation and the all important concept of freedom of expression.***

It is true that an individual is entitled to the protection of his reputation. However, there are exceptions. In Kenya, the principle exception is the fundamental right of freedom of expression. That right is enshrined in Section 79 of the Constitution. It is remarkable that while the right to protection of one's reputation is protected by statute, freedom of expression enjoys Constitutional protection. It follows that freedom of expression occupies a hierarchically higher position than the protection of an individual's reputation.

In our view, it is not by mistake or oversight that the hierarchy exists. The need to allow the free and uninhibited dissemination of information is clearly of higher calling…….

It is important that the right to speak and write freely should not be inhibited by the prospect of being sued should the information turn out to be mistaken or misinformed……The Article is clearly not actionable."

It was in the same breadth that it was sought, in HON. MWANGI KIUNJURI's case, to declare the Defamation Act, *ultra vires* the Constitution of Kenya.

In as much as Kenya is a developing country, it is at the same time a Sovereign State with its own Constitution, statutes and other laws with its own social, political and economic lifestyle, conditions and circumstances. Foreign things are welcome especially in the present set up of International order, but while doing so, it is important also to look at Kenya itself to see what relevant things Kenya already has, considering the effect entry of the foreign thing in question will have on Kenya. It may even turn out that Kenya already has a better thing than the foreign thing being sought to replace the Kenyan thing.

Concerning "*Sullivan*" and "*Reynolds*" cases for example, people in Kenya should not conduct similar cases as if there were a vacuum in the relevant law in Kenya or as if the relevant law already in Kenya were no law at all. Kenyan law is there and may be developed and amended in the right and orderly manner and only for the benefit of Kenya and the people in Kenya.

"***Sullivan" and "Reynolds"***

cases were decided in countries which did not at that time have written law protecting freedom of the press or the media. The U.S.A. and the United Kingdom had up to that time depended on common law which had no special place for protection of freedom of the press. "*Sullivan*" came first in the year 1964 before "*Reynolds*" came in the year 1994. Before the year 1964 arrived, Kenya was already having the present Constitution with Chapter V therein intact containing Section 79 for the "*protection of freedom of expression*."

In the U.S.A. and the United Kingdom there were impending changes and pending written law had been drafted and were therefore spelled out in judgments in the two cases, with the mind and eyes of courts in those countries focused upon the then impending legislation. In the case of "*Sullivan*" the legislation was to extend the Constitutional Privilege to the press and any public medium by requiring a differentiation, between private individuals and public officials or public figures concerning matters of general public interest. In Reynold's case, there was a pending draft "*Human Rights Act*" to establish in English law "*The Right of Freedom of Expression*."

That being the position, and to be fair to Kenya, it should be said that this country by having **Section 79** in **Chapter V** of the **Constitution of Kenya**, was legislatively a head of the USA and the United Kingdom with respect to Protection of the Freedom of the Press.

Chapter V of the Constitution of Kenya is about "***PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL***" and according to Nyamu J, as he then was and Emukule J, in ***HON. MARTHA KARUA v RADIO AFRICA LIMITED t/a KISS F.M. STATION & TWO OTHERS***, HCCC No.288 of 2004.

"……***the fundamental rights and freedoms (in Chapter V) have over the years acquired an international dimension which can no longer be ignored by the municipal courts. Courts should therefore recognize that there is international public law dimension to the Chapter 5 rights and freedoms and also that the interpretation should be guided by the underlying purpose of the right or freedom."***

That is at page 14 and at page 18 the learned Judges had this to say:

"……..***the defendants contention that the limitation on press freedom or the right to freedom of expression should not apply……., as a matter of law, lacks proper foundation in that nearly all International instruments recognize the limitations and that there is a social need to protect the rights and freedoms of others, reputations, morals and national security etc. These are carefully weighed social interests. The recognition of the need for limitation is clearly evident in the entire European Union landscape……."***

and the learned Judges refer to the case of HANDSIDE as well as

"***Article 12(3), 13, 18(3), 19(3), 21,22(2) of the International Covenant on Civil and Political Rights and Articles 11 and 12(2) of the African Charter on Human and People Rights and also Articles 11(2), 12(3), 13(2) 15 and 16(2) of the American Convention on Human Rights and finally Articles 18(2) – 21(2) of the European Convention on Human Right;"***

noting that all those provisions recognize the need for limitations on the rights. They continued:

"***Most countries have passed the necessary laws to provide for the limitation to safeguard certain social interests including reputation, morals and the right to respect for ones private and family life. We find the limitations are consistent with a sense of responsibility by those involved and the need to discourage impunity. We further find that the limitation on the right of expression or freedom of expression is not inconsistent with what is now an universally accepted principle that freedom of expression is the basic element of the public order of a democratic society and that it presupposes both***

the widest possible circulation of news, ideas and opinions and the widest possible access to information by society as a whole and that the hallmark of the concept of public order in a democratic society is free debate that is to say……a debate in which dissenting opinions can be fully heard and views can therefore be disseminated although they may shock, offend or disturb. After all as often repeated a society that is not well informed is not truly free.

A careful consideration of International jurisprudence concerning the reputation of public figures and their rights clearly demonstrates that their right is also recognized although criticism and scrutiny limits are wider in their case than against ordinary persons."

With respect, I do entirely agree with what the two learned Judges said as recorded above indicating the position of Kenyan Law Internationally consistent with what I said earlier that Kenya was in that area legislatively, a head of the U.S.A. and the United Kingdom as at the years 1964 or 1994 respectively.

On the other hand, since the law in "***The Publication or the Sullivan and Reynolds Privilege***" is said to be consistent with the law in **Section 79** of the **Constitution of Kenya**, it follows that the law in "***The Publication or the Sullivan and Reynolds Privilege***" has to be subject to limitations in the same way **Section 79** of the Constitution of Kenya is subject to limitations. It is therefore wrong to present to Kenya the law in "***The Publication or the Sullivan And Reynolds Privilege***" as if that law is unlimited and to be used to declare the **Defamation Act, Cap 36**, *ultra vires* the Constitution.

It should not be forgotten that in Reynold's case the court listed a number of matters to be taken into account in considering whether allegations made in the press attracted "***The Publication or Sullivan and Reynolds Privilege***". They are already referred to above in this judgment and they included the reason why the Defendant's cross appeal in that suit was dismissed – namely –

"***whether comment had been sought form the Plaintiff; (and) whether the article contained the gist of the Plaintiff's side of the story;"***

And therefore the Defendant's cross appeal was dismissed because

"***the article made serious allegations without mentioning R's considered explanation."***

That is not evidence of unlimited freedom of the press sought to be introduced in Kenya. On the contrary, that is evidence of a responsible press where facts are verified before publication is done and that is limitation.

Later in the case of ***JAMEEL (Mohammed) and ANOTHER v. WALL STREET JOURNAL EUROPE Sprl (2006) 3 WLR 642 (HL); LORD HOPE OF CRAIGHEAD,*** who had been one of the Judges in REYNOLDS' case, stated as follows commenting on their judgment in that case:

"***The cardinal principle that must be observed is that any incursion into press freedom that the law lays down should go no further than is necessary to hold the balance between the right to freedom of expression and the need to protect the reputation of the individual. It must not be excessive or disproportionate."***

LORD SCOTT OF FOSCOTE in the same case JAMEEL (Mohammed) and ANOTHER aforementioned added as follows:

"***Newspapers exist to supply information to the public. The information may be interesting but trivial; it may be lacking in much interest but nonetheless important……..(in) other information the public interest is real and unmistakable. In relation to information of that character it makes sense to speak of newspapers having a duty to publish. They, and their reporters, should, of course, take such steps as are practicable to verify the truth of what is reported."***

In other words, there is no unlimited freedom of the press. The urge for TRUTH is important and Justice

P. J. Ransley said this in the case of HON. AMB. CHIRAU ALI MWAKWERE V ROYAL MEDIA SERVICES LIMITED, HCCC No.57 of 2004:

"***I accept that a person in the public arena is a target of comment and can be criticized more openly than a private individual. The comment must however be reasonable and fair and does not extent to making untrue statements about a public figure which impute some grave wrong doing to him or her of which they are innocent."***

The learned Judge was commenting on the American case, NEW YORK TIMES –VS- SULLIVAN (Supra), and I may add by asking the following question:

Who are we to ignore the "tort of defamation" to-day to the extent of saying there be unlimited freedom of the press simply because the "tort" or the "defamation" complained of is about and concerns a public figure, yet:-

(a) inhabitants of Kenya have not become angels as seen from the examples already given elsewhere in this judgement;

(b) even Stakeholders in the Media Industry themselves see it fit and proper to formulate and adopt the Code of conduct And Practice of Journalism in Kenya "being a way of ethical limitation to freedom of the press or media in Kenya; and a little more on that "Code" to come later in this judgement;

(c) in days as old as the First Elizabeth era great men like Shakespeare.

recognized the negative effect that tort has, indicative of the high value placed upon reputation, regardless of whether the Plaintiff was a private or public figure with public interest as the deciding factor based on the new jurisprudence derived from Sullivan And Reynolds' privilege? The Plaintiff's written submissions contain the following from Othello, Act III Scene 3 where Shakespeare says:

"***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."

In Richard II the worth and price of reputation is summarized as follows:

"***The purest treasure mortal times afford is spotless reputation; that away, men are but gilded loam or painted clay. A jewel in a ten times-barr'd-up chest is a bold print in a loyal breast. Mine honour is my life, both grow in one;***

Take honour from me and my life is done."

Thus the Plaintiff in this suit is pleading that his honour, his reputation and indeed his life, have all been taken away by the defamatory statement of the Defendants and that as a result his life is done.

With all that in my mind, let me now look more closely at the law in Kenya concerning freedom of the press. I therefore, go back to Chapter V of the present Constitution of Kenya.

It is clear from the outset that Chapter V correctly and properly recognizes everybody's human rights and

freedoms and goes further to recognize public interest and therefore the rights and freedoms the chapter grants are not unlimited. They are not absolute. Provisions of the law in the chapter impose limitations upon themselves and from what I have been saying in this judgment, the imposition of such limitations is desirable, proper, lawful and Constitutional as well as acceptable not only in Kenya but also Internationally in every democratic society.

Start with Section 70 which in effect is a preamble to Chapter V. The rights and freedoms are granted but necessary limitations are imposed straight away in the Constitution itself before moving outside the Constitution to find relevant statutes that handle the matter further, all constitutionally. **This is what the preamble Section 70 says**:

"***Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely:-***

(a) life, liberty, security of the person and the protection of the law;

(b) Freedom of conscience, of expression and of assembly and association; and

(c) ***Protection for the privacy of his home and other property and from deprivation of property without compensation,***

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The limitations are

"***designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."***

Thus "***Public Interest***" has always been in our laws and Kenya did not have to wait for ***Sullivan And Reynold's cases*** to come on the scene to get "***Public Interest***" in our mind and laws.

Section 70 therefore gives notice that **Sections 71** to the last Section in **Chapter V** may each lawfully contain protections and such limitations. Bearing that notice in mind and looking for the Section dealing with the press**, Section 79** comes to the mind as it says that it is for the "*protection of freedom of expression*;" and states as follows:

"***79(1) Except with his own consent no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference, (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence."***

Then follow limitations under sub-paragraphs (a), (b) and (c) of subsection (2) of Section 79 and our concern in this judgment is the limitation in paragraph (b) in so far as it is relevant only. Starting with the opening part of sub-section (2), it goes as follows:

"***(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision: -***

(a) ……..

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons……..”

The one law in question in relation to the part of sub-paragraph (b) of sub-section (2) above in quotes is “*The Defamation Act, Chapter 36 Laws of Kenya*”, and there could be more than one such law, like The Media Act, The Kenya Communications Act and Others. That is the law about which **Section 79(2)** of the **Constitution of Kenya** is saying nothing contained therein or done under the authority thereof should be held to be inconsistent with or in contravention of **Section 79**. Use of the word “*law*” in singular should create no problem, and as to what remains the contents of that law, that is the responsibility of Parliament which consists to-day of a sizeable number of lawyers – expected to ensure that wording of sections, like the recently contentious 88 of The Kenya Communications Act, is tamed. That being the position, how does the Defamation Act aforesaid became *ultra vires* the Constitution of Kenya? If there is a contravention, which section of the Constitution is being contravened by the Defamation Act in view of clear terms of sections 70 and 79 of the Constitution? Sections 70 and 79 are definitely not being contravened by the Defamation Act. No other provision under Chapter V of the Constitution of Kenya is being contravened by the Defamation Act and I do not find any such contravention to any other section of the Constitution of Kenya. The Defamation Act itself says it is: -

“***An Act of Parliament to consolidate and amend the statute law relating to libel, other than Criminal libel, slander and other malicious falsehoods.”***

Concerning newspapers the Defamation Act is clear and states in **Section 7(1)** as follows:

“***Subject to the provisions of this section, the publication in a newspaper of matter as is mentioned in the schedule to this Act shall be privileged unless such publication is proved to be made with malice”***

There is only one schedule to the Act. It has two parts-being Part 1 and Part II. Both consist of matters that fall under qualified privilege. None of the publications complained of in this suit is covered either under Part I or Part II of the schedule. Thus the publications complained of in this suit are not covered by the qualified privileges provided for in the schedule. Section 6 which provides for absolute privilege is not relevant in this suit.

But there is something in **Section 7(4)** which states as follows:

“***Nothing in this Section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of Section 4 of the Law of Libel Amendment Act 1888, of the United Kingdom) immediately before the commencement of this Act or conferred by this Act.”***

Section 7(4) of the **Defamation Act** should be read together with **Section 3(1)** of the **Judicature Act**, **Chapter 8 Laws of Kenya**, which brings into Kenya “*the application of common law*” which application is dictated by “*the circumstances of Kenya and its inhabitants*.” **Section 3(1)** of the **Judicature Act** states as follows:− in so far as it is relevant to this suit:

“***3(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with:-***

(a) the Constitution;

(b) ……

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrine of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date;

but the common law, doctrine of equity and statutes of general application shall apply so far only as

the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

That brings in "*Common Law*" and "*its privilege if any*" as at 16th June 1970 which was immediately before the commencement of the Defamation Act on 17th June 1970. The decision in "*Sullivan's*" case was in existence but the one in Reynolds' case was not.

But being open minded let me assume that by virtue of the very existence of the decision in the case of "*Sullivan*", common law in the United Kingdom embraced the law in the court's decision in that case and that therefore that law could apply in Kenya under **Section 7(4)** of the **Defamation Act** through the Common Law of the United Kingdom.

If that is so, then common law qualified privilege in Sullivan's Case would come into the Defamation Act just as any other common law qualified privilege would do under Section 7(4) aforesaid. A question, however, arises whether that common law qualified privilege should, in this suit escape the sanction in Section 7(2) if the Defamation Act concerning qualified privileges mentioned in Part II of the schedule to the Act"? The section states as follows:

"***In an action for libel in respect of publication of any such report or matter as is mentioned in Part II of the schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the Plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or Construction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances."***

The same question arises even if it is assumed that what is accepted under **Section 7(4)** of the **Defamation Act** or under an International Protocol is "*The constitutional privilege" or "The Publication or Sullivan and Reynolds' Privilege*," which is a qualified privilege.

That is a foreign qualified privilege in Kenya. Is it going to be said that because that privilege is foreign in Kenya, it enjoys "*Diplomatic Immunity*" and cannot therefore be subjected to the sunction in **Section 7(2)** of the **Defamation Act**?

I think that foreign qualified privilege should not enjoy Diplomatic Immunity. It is a "*qualified privilege*" and once in Kenya, it must be subjected to the sunction in **Section 7(2)** just as local "*qualified privileges*" are because the intention of the Legislature was to subject all "*qualified privileges*" to that kind of sunction.

I should add that I think this is the right place where "*The Constitutional Privilege*" or "*The Publication or Sullivan and Reynolds Privilege*" should be, when in Kenya. To come in as a "*qualified privilege*" either under **Section 7(4)** of the **Defamation Act** or under International Protocol. The privilege remains a qualified one. It is not an absolute privilege but even if it were, it should not and cannot be elevated to the position of **Section 79** of the **Constitution** of this country even if it is consistent with that section. Being consistent is not being equal or being the same. It ought not be elevated and this is more so bearing in mind that Section 79 is not concerned with freedom of the press only. It is about "Freedom of Expression" in general covering other fields apart from freedom of the press as seen from the wording of sub section (l) of Section 79.

Moreover, Kenya, unlike the United Kingdom, has a written Constitution where **Section 79** aforesaid is with its own limitations paving the way to the lawful existence of the Defamation Act, and other relevant Acts, which may contain provisions for absolute and qualified privileges of newspapers or the press and the law in "*The Constitutional* or *The Publication or Sullivan and Reynolds Privilege*" ought not be elevated to the status of **Section 79** of this country's Constitution when that law says nothing and does not even know anything about the existence in Kenya of the Defamation Act with its qualified privileges to which the law in "*The Constitutional or The Publication or Sullivan And Reynolds Privilege*" must belong as a newspaper or press privilege law within the wider law of The "Freedom of

Expression."

Going back to **Section 7(2)** of the **Defamation Act**, there is no dispute in this suit that there was no apology or retraction or clarification or contradiction or explanation or correction from the Defendants who were, nevertheless able to inform the public on 16th December 2003 that they stood by the publication of 14th December 2003. As indicated elsewhere in this judgment, it is my view that the Defendants had no valid reason for failure to publish an explanation or a contradiction or clarification or a correction on the 15th or 16th of December 2003 or on any other day thereafter even if this suit was filed on 17th December 2003. It follows that in the circumstances, **Section 7(2)** of the **Defamation Act** prevents Defendants from relying on the defence of qualified privilege of newspapers.

But even if section 7(2) is not applicable, sections 70 and 79 of the Constitution of Kenya still remain there to make it be seen that the Defendant's:

enjoyment of any privilege by virtue of Section 7(4) of the Defamation Act does not prejudice the rights and freedoms of other people including the plaintiff.

Accordingly, I do rule that the defence of qualified privilege is not available to the Defendants in this suit whether or not that defence is derived from "*The Constitutional Privilege" or "The Publication or Sullivan and Reynolds Privilege*".

That is one aspect of "*The Constitutional Privilege" or "The Publication or Sullivan and Reynolds Privilege*" now concluded. They call it "*The Constitutional Privilege*" when confined to "*Sullivan's Case*."

There is, also another aspect, the social implication of the application of such privilege or any other foreign law in this country. The application of that law in the present conditions or circumstances in Kenya. Call the privilege "*The Constitutional Privilege*" or "*The Publication or Sullivan and Reynolds Privilege"*; the social implication is important to consider. It was stated in the South African Case of ***KHUMALO And Others v. HOLOMISA (CCT 53/01) (2002) ZACC 12; 2002 (5) S.A. 401; 2002(8) BCLR*** (14 June 2002) as follows:

"***In a democratic society, then, the mass media play a role, of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their Constitutional mandate will have a significant impact on the development of our democratic society.***

If the media are scrupulous and reliable in the performance of their Constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the Constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society……"

Emphasis supplied.

It is clear that when "*Sullivan's case*" was decided in the U.S.A., the feeling in that country was that there was social need for a "*Constitutional Privilege of the press*" to serve people in that country better and even legislation to that effect had been drafted. A similar situation arose when the "*Reynolds' case*" was decided in the United Kingdom – taking into account conditions then obtaining in that country. Each one of those judgments specifically states so, Reynolds using the phrase "*in to-day's conditions*" in the United Kingdom.

That being so, do we consider to-day's circumstances or conditions in Kenya when deciding to apply

decisions in those cases here in Kenya? Are circumstances in Kenya to-day the same as those in the U.S.A. and/or the United Kingdom? I am saying this now assuming that the defence of qualified privilege were available to the Defendants.

Framers of **Section 3(1) (c)** of the **Judicature Act** mentioned earlier are not, in my view, to be faulted to-day. "***Just as the received law under Section 3(1) (c) of the Judicature Act is; the application in Kenya to-day of any other law from outside Kenya ought to be dictated by "the circumstances of Kenya and its inhabitants and be subject to such qualifications as those circumstances may render necessary***". Do not apply those laws blindly.

This is because, unlike the United States of America and the United Kingdom or any other country for that matter, to-day's Kenya is a country of the likes of Hon. William Ole Ntimama's "*Tutakanyagana mpaka mwisho*" being the Kenyan stamped lifestyle as they trample upon each other in their mad rush to also eat; this is Kenya where majority of the people magnify a molehill into a mountain to hide sinister agenda; Kenya where majority of the people lack civility and humility; and they daily and widely shout of certain institutions manned by a cadre of officials who are all corrupt and inefficient yet unable to identify any such officials and successfully prosecute them in accordance with the law, suggestive of shouting from wild imagination for wild following to echo wild real for sinister agenda, for they cannot, for example, satisfactorily explain how and why every university professor who has been highly efficient, successful and incorruptible elsewhere he has worked, suddenly becomes corrupt and inefficient simply because he has become an employee of the condemned institution in the condemned cadre of officials; this is Kenya with voters who will always insist that "*mkono mtupu haulambwi*" – thereby becoming starters and causers of wheels of corruption, incompetence and untruthfulness in society, same people who in the end poss as innocent victims of corruption, victims of incompetence and untruthfulness, without first confessing that they were the starters, causers and nourishers of those vices in the society; this is Kenya where the truth is humiliated, ridiculed and silenced by many because of hidden sinister agenda; where majority of the people who have eyes choose not to use them, have ears but choose not to use them because of hidden sinister agenda; Kenya where everything is political without political will, bombastic language being the order of the day, yet politics, politics and politics without political will, without interest of Kenya being put first, without respect for the law, spoils everything whether the perpetrator is Government or non government legal person, for while the law is made by the people for the people, where the people live without the law, or ignore the law they have made, they perish; this is Kenya where generally Kenyans have short memory and the media, like the politicians, take advantage to biasely make and guide Kenyans in expressing opinions on important issues Kenyans are not given relevant or enough relevant facts, or evidence including the law, and in the end the media and or politicians treat the outcome of such misguided or misinformed or ill informed opinion as public opinion in support of their mob justice (injustice) ending in actions dignified by high sounding descriptions like mass action, radical surgery or radical reform yet they are injustice without reform in reality; this is Kenya where the media, like politicians, pray, play and thrive upon ignorance among Kenyans to seek support without first discharging their duty of adequately educating Kenyans on the relevant and correct facts, law and truth; Kenya where the media assumes it knows everything with a mission to influencing and making everybody else follow it, the media, with the best opportunity to reach and inform the public claiming to do so in the public interest yet the media which cherishes no objectivity, no fairness, no truth and no responsibility and therefore the media that suppresses or distorts opposing views or information in order to achieve its aim; unlike out there where a privileged "*duty – interest*" publication or a privileged "*right to know*" publication can only turn out to be false because at the time of publication the publisher honestly by mistake or wrongfully believed the publication to be truth; this is Kenya where many publishers take the existence of the "*privilege*" to be a licence for telling lies, libelling, ridiculing with impunity; while out there a publisher who learns of his mistake or error immediately and readily apologizes appropriately, in Kenya such an apology or even a mere correction, clarification, explanation or exoneration is hardly forthcoming; this is Kenya where the "***Code of Conduct and Practice of Journalism in Kenya approved by stakeholders in the Media Industries in Kenya***" is ignored by some stakeholders and/or many of their members as each puts profit motive or other considerations above everything else; and in the words of Mr. Abdulahi Ahmednasir, learned and senior Advocate, this is the media which "kicked off a well oiled campaign against Parliament and vilified it in a most undignified and irresponsible manner, that "*the media threw objectivity out of the window and personalized a serious*

debate" attacking personalities and vilifying Parliament, while Mr. Collins Wanderi adds: "***My friends in the media openly admit that prominent politicians always have the press in tow because they generously tip reporters for favourable coverage. Any wonder that all media houses in East Africa often ignore professionals and businesses, I have been a victim of unethical conduct among journalists too. ……And even strange some ask for tips to facilitate publication of a good topical issue. I have been asked for bribes by journalists in Kenya, Uganda and Tanzania***……"; this is Kenya where majority of lawyers run around, on unsubstantiated and/or drummed up grounds petitioning and inciting the Executive, the Legislature, the public and every body else to at once replace, contrary to existing provisions of the law, the entire, High Court bench and Court of Appeal bench with Judges they can control and manipulate because probably the lawyers find the present Judiciary the most independent Judiciary in the history of Kenya so far, lawyers who surprisingly do not see the existence of the Magistracy and para-legals in the Judiciary, and the said lawyers together with members of the public are probably mesmerized by these same judges who are the only Public Servants in Kenya who on their own individual inner feelings of duty to serve the Public each takes her/his annual leave to go and write, without overtime allowance, judgments and rulings in cases handled instead of going to relax and enjoy like the rest of Public Servants and everybody else including the lawyers do, and that being in addition to week-end days and daily after office hours plus vacation days spent by the said judges dealing with judgments and rulings the lawyers should be knowing are never provided for in the daily long cause lists, that pre-occupy the judges all the official working hours all being done manually; for in the words of Mr.Kennedy Buhere talking about the same lawyers, "….***..the flaw with so-called reformers, however, is that they are driven by ignorance, envy, spite and vaulting ambition not patriotism or knowledge ….. (for) it is not individuals that we want to deal with but institutions (because) if heads roll and the system remains even new ones will continue to do the same things…….malice, envy and spite should never inform the reform process for that is a path to self destruction***". Reform the entire system embracing all the law enforcement agencies, lawyers included, and not just the Judiciary; and lawyers should be a leading group cooperating and working with the Judiciary, other law enforcement agencies and well wishers to bring about the required meaningful and useful reforms in the Judiciary instead of lawyers turning into enemies of the Judiciary with negative attitudes to destroy the institution an act of destruction which becomes the most uncivilised event in the history of any Judiciary in the civilised world; and in the words of Mr. Pravin Bowry, "***The society (the Law Society of Kenya) and all its members must, of necessity, venture into a truthful honesty and realistic self-examination. It has so far failed to do so and instead embarked on stone throwing***." To extend that to Kenyans generally, we are living in a Kenyan society where its members have failed to truthfully, honestly and realistically, self examine themselves to discover why, for example, they elect majority of leaders who practice the politics of tribalism, nepotism, corruption and survival, or "*tumbo*" meaning it is a society of that character. It includes public interest journalists. It is a society which instead has embarked on stone throwing reminiscent of mob justice (injustice). To continue with Mr. P. Bowry, himself a learned very senior Advocate, continues: "***sad as it may sound, the lawyers in the present day Kenya are perceived by an average Kenyan as parasitical, mercenaries, inefficient, corrupt and exploiters of the weak. …… The Law Society of Kenya should stop perceiving itself as super-citizen***." People who sleep soundly in a pending suit after obtaining an injunction in their favour while in civil cases generally "***advocates delay the process of expeditious finalization of the cases by long, intricate and often unjustified preliminary objections, applications and other delaying tactics***;" this is Kenya where many people including those in the media are very good at intentionally suppressing credible and truthful information in order to give the public untruthful information based on false evidence or on no evidence at all; people who can claim the criticized is deaf to public cries and that therefore sees no evil, hears no evil and knows no evil, yet they themselves are no better as they see no truth, hear no truth and know no truth and in the words of Lucy Oriang who likens Kenyans to snakes, "***they have had 46 years to prove that they can build the Kenya that we want children to grow up in. All they have succeeded in doing is to create a war machine that threatens to shake this country to its very roots ……they engage in endless bouts of shadow boxing and take this country closer to the brink of destruction.***"

I take judicial notice of all those and those are only a few examples portraying the circumstances of Kenya and its inhabitants that exist to-day and should be considered in order to see whether they permit the application in this country of such foreign laws and principles as "*The Constitutional Privilege*" or "*The Publication Privilege or the Sullivan And Reynolds Privilege*" and any others to avoid possible harm

to Kenya caused through the application of such law or principle whether or not derived from "*The Constitutional Privilege*" or "*The Publication Privilege or the Sullivan And Reynolds Privilege*", such possible harm being like the call for declaring the Defamation Act *ultra-vires* the Constitution of Kenya as if all the people in Kenya have suddenly become angels. If other Nations are civilized and advancing and therefore deserving to have more friendly laws than they already have while we in Kenya get more and more uncivilized resulting into no advancement in the quality of our civility, humility and truthfulness, we will not deserve having in this country the friendly laws those other Nations may be having in the field of defamation or any other relevant field. Do not act blindly.

That brings me to the end of my discussion on the defence of "*qualified privilege of the press*" – in Kenya except in relation to the issue of malice which I wish to cover later together with the conclusion on the defence of "*fair comment*".

I will now look briefly at the defence of "*Fair Comment*" as I find it in paragraph 7 of the Defendant's defence where it is stated that

"***the Defendants aver that the articles complained of were a fair comment on a matter of general public interest."***

The defence does not say more than that about "fair comment".

In paragraph 14, of the defence, "*malice*" is denied by the Defendants.

The Plaintiff put particulars of what he called the "Defendant's malice" in paragraph 16 of the plaint. The position at law is found in Order VI of the Civil Procedure Rules – where rule 6A sub-rule (3) states as follows:

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

In this suit when the Plaintiff in paragraph 16 of the plaint alleged malice on the part of the Defendants, he went ahead in the same paragraph at the same time to give particulars of the alleged malice. He did not wait for the defence to be filed asserting fair comment, privilege and therefore denying malice. But I think he ought not be penalized for that because the law as can be seen is permissive on that issue.

However the Defendants failed to comply with sub rule (2) of that same Order VI rule 6A which states that:

"***Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."***

The Defendants did not give the required particulars in their filed defence as they completely avoided and ignored the words complained of in paragraphs 7 and 8 of the Plaint and went on talking about statements of facts and opinions the Plaintiff was not complaining against and were therefore not found in paragraphs 7 and 8 of the plaint. It follows that the Defendants should have been confronted with **Order VI Rule 6B** when they brought DW 1 to give evidence because that Rule states as follows:

"***In an action for libel or slander in which the defendant does not by his defence assert the truth of the***

statement complained of, the defendant shall not be entitled at the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the Plaintiff, without the leave of the court, unless at least 21 days before the trial he has given the Plaintiff particulars of the matters on which he intends to give evidence".

Furthermore, it follows that the Defendants having failed to comply with **sub rule (2)** of **Order VI Rule 6A**, they could not avail themselves of the defence of fair comment. This is because that defence is available only when **Order VI Rule 6A (2)** has been complied with for that rule is intended to clearly show claimed statements of facts which are truth in substance and those that are truth in fact, separately from expression of opinions claimed to be fair comments in order to give the Plaintiff the opportunity to file a reply in terms of **Order VI Rule 6A (3)** to the extent of being able to say where he thinks malice is found.

It follows still that the Defendants, through non compliance with **Order VI Rule 6A (2)** having failed to avail themselves of the defence of Fair Comment they claimed they were having, whatever DW 1 may have said under the claim of Fair Comment could not in law stand.

On the other hand assuming that the Defendants availed themselves of the defence of Fair Comment, which is difficult to pin point in the absence of compliance as stated above, the Plaintiff had gone ahead and given particulars of malice in paragraph 16 of the plaint and subsequently adduced evidence in support. That evidence was not demolished as the Defendants keep on saying that the publication complained of did not concern and was not about the Plaintiff and that therefore they did not have to do anything about what the Plaintiff said.

But the Plaintiff's evidence on malice affected the Defendant's defence based on qualified privilege as well as the Defendants defence based on Fair Comment. Since the Plaintiff's evidence on malice, was not demolished by the Defendants, it means that had the Defendants sustained the defence of qualified privilege as well as the defence of Fair Comment, the Plaintiff's evidence proving malice against the Defendants would have demolished the defence of qualified privilege as well as the defence of Fair Comment.

Those are the circumstances of this suit so that the Plaintiff's Counsel having raised no objection during the hearing, the Defendant's witness adduced evidence on any aspect of the suit he wished to and was able to assert that the plain reading of the articles published will show that some of the words complained of are such as:

"***MPs are no strangers to Koinange Street" "prostitution is illegal in Kenya" "The Politicians were shamelessly beckoning to the girls".***

"***The men's determination to preyon girls was shocking".***

The Defendant's Counsel was therefore able to submit that all those comments arose from the swoop which was carried out by the police on the 5th December 2003 and that the evidence of DW 1 clearly showed that it is true that the swoop took place and that several prostitutes were arrested. He added that the Defendants were able to assert that that aspect of the suit was not challenged by the Plaintiff who concentrated on evidence showing that he was not in Kenya on the said dates. The learned Defendant's Counsel therefore stated as follows in his written submissions:

"***It is clear that the facts set out in the Article complained of were true. The description of the conduct of the men who were picking the prostitutes as shocking and shameful were comments made in good faith and without malice on a matter of public interest.***

The comment that Members of Parliament are no strangers to Koinange Street, is based on the fact that an Assistant Minister had been arrested on the street before and a former Member of Parliament had also been previously arrested. These were not facts disputed by the Plaintiff. To the extent therefore that the Article comprised of comments based on facts contained in the body of that Article, it

was a fair comment on a matter of public interest. ……..

The words complained of were clearly comments based on the facts set out in the Article and inferences of facts from other facts on a matter of clear public interest".

Looking at that line of defence, which surprisingly the learned Plaintiff's Counsel does very little in his written submissions to demolish, it can be seen that the Defendants are succeeding in drawing the focus away from the words complained of as set out in paragraphs 7 and 8 of the plaint so that the focus be on the whole publication of 14th December 2003 as well as the whole published "*Article*" of 15th December 2003, and subsequently the whole story or publication, about which there is no dispute that there is a high incidence of HIV/AIDs infection among Kenyans and that therefore the two Defendants may have published the story or package to highlight and address the issues of prostitution and accompanying risky and dangerous sexual behaviour as a matter of concern indicating categories of the people involved who also have contact with the wider society thereby facilitating the spread of HIV/AIDs infection. That is the substance of it. When therefore the Defendants assert that what they published were facts which were true and that the opinions expressed were fair comments on those facts; no body, I believe including the Plaintiff, would dispute such assertion had the Defendants stopped at that. Here I should point out that the Defence as a whole talks of "***the publication complained of***" or "***the Article complained of" in a mixed up manner and has cleverly avoided use of the statement "the words complained of***" as set out in paragraphs 7 and 8 of the plaint.

It follows that the Defendants' expansion of the information they published to include statements that some of the people involved were students from mentioned institutions of learning and that other people were businessmen while others were Members of Parliament who included an assistant minister, a cabinet minister and an ordinary Member of Parliament, would not have changed the position had the Defendants stopped there. It is in that respect, that it appears no student or businessman has filed a defamation suit against the Defendants respecting the same publication. A similar situation would have obtained with Members of Parliament because it would have been said that out of the more than 210 Members of Parliament the Articles or the publication had not identified any of them including those who were ministers and assistant ministers.

It is therefore the <u>further description the Defendants attributed to the Members of Parliament</u> that changed the position with regard to that category of the people mentioned in the two Articles or the publication. <u>In the case of the Plaintiff in this suit, the said further description is that which is contained in the words complained of as set out in paragraphs 7 and 8 of his plaint</u>. The Defendants' effort to blind the court, the Plaintiff and right thinking members of the community, further by claiming that the words complained of in Paragraphs 7 and 8 of the plaint are mere comments is not acceptable as those words contain facts or statements of facts as well as comments all of which the Defendants have failed to handle in compliance with Order VI Rule 6A of the Civil Procedure Rules thereby making the defence of fair comment unavailable to them. <u>I say this remembering what Lord Nicholls said as referred to earlier that instead of fair comment the defence should be "*Honesty*" to make the test be: "Was the opinion honestly held</u>?"

The Plaintiff did the proper thing to single out and clearly identify those words so that "*the focus of all of us*", that is the Plaintiff, the Defendants, the court and "*the right thinking members of the community*", is directed at those words to see whether they are defamatory of the Plaintiff. An attempt by the Defence to divert the focus away from the words complained of in paragraphs 7 and 8 of the plaint to the substance of whole two Articles as published on 14th and 15th December 2003, or substance of the whole publication, is not acceptable notwithstanding the fact that the words complained of in the plaint must be read together with or within the context of the two Articles or the whole publication.

In that respect therefore, when the Defendants say that the facts are true they should be understood as meaning to say that those facts are true of the Plaintiff. When the Defendants say those statements are true, the Defendants should be understood as meaning to say that those statements are true of the Plaintiff. When the Defendants say that the opinions they expressed are fair comments on matters of public interest, the Defendants should be understood as meaning to say the said fair comments were in respect of the Plaintiff; and therefore when the Defendants said in the Daily Nation of 16th December

2003 that:

"***the Nation stands by the report that appeared in the Sunday Nation…."***

That statement must be read and understood with reference to the Plaintiff among the other two Members of Parliament whose published press conference is the one which prompted the Defendant's above quoted remarks. That is how this suit stands and should be understood. Not otherwise, because this suit is about the Plaintiff and the Plaintiff only and that is in relation to the words complained of in paragraphs 7 and 8 of the plaint. Not otherwise.

That being the position, it means that even if the Defendants try to divert our focus from the words complained of in paragraphs 7 and 8 of the plaint as we look for defamation of the Plaintiff, this court, the Plaintiff and "***the right thinking members of the community***" continue to focus on the words complained of in paragraphs 7 and 8 of the plaint: as what the Defendants say does not bind us unless and until we agree with the Defendants – on the basis of clear, credible and sufficient evidence – which, unfortunately in this matter, we are not finding for them to convince us.

These are Defendants who are admitting to have published the two articles from which the words complained of in paragraphs 7 and 8 of the plaint were taken although of course the Defendants complain that the words complained of aforesaid had not been put together in the Articles, the way the words have been put together in paragraphs 7 and 8 of the plaint.

The Defendants defend themselves saying that since they did not mention the name of the Plaintiff in the Articles and therefore in the words complained of, then they were not talking about him in the two Articles and they seek to strengthen that line of defence by claiming that they were talking about another person whom they know but refuse to disclose to the court.

Now if that is the position, how is it that when confronted with the Plaintiff's plaint in this suit, the Defendants are saying that what they published was truth, meaning truth of the Plaintiff; and that it is fair comment, meaning fair comment about the Plaintiff? To my mind, that is illogical because there cannot be a defence of true facts, true statements and fair comment or honesty about and against a Plaintiff the Defendants are saying was not the one they talked about in the relevant publication or Article or words complained of. Accordingly, I do reject that illogical line of defence.

Two more lines of defence now remain. One is that the Defendants are telling the Plaintiff that "yes we published the Articles and therefore published the words complained of. But since we did not name you in the publication or in the words complained of, then prove that you were the Cabinet Minister we talked about. In the remaining second line of defence, the Defendants want the Plaintiff to prove that he was defamed.

Beginning with the first one, it concerns the identify of the Plaintiff…. "***He must prove that the words complained of were published of him***". It is not in dispute that the words complained of do not contain the name of the Plaintiff. But according to "***Gatley on libel and slander, 10th Edition***" paragraph 7.2

"***It is sufficient if he is described by nickname, his initial letters, or by the first and last letter of his name, or even by asterisks, or blank, or if he is referred to under the guise of an allegorical, historical, fictitious or fanciful name, or by means of description of his status, physical peculiarities, or by recognizable likeness or caricature or his residence, the place where he has visited on his travels, his products or, indeed, if he is not mentioned at all; there need be no peg or pointer for his identification in the words complained of themselves. Thus if there is a statement that X is illegitimate there is sufficient reference to X's mother…."***

In this suit the plaintiff told the court that though the words complained of did not mention his name expressly, the same words gave specific and definite description which fitted him to the exclusion of everyone else in the whole world. Those words were:

"***Another is a 58 year old father of three who spent many years overseas as a student and a professional."***

That was description of one of the three members of Parliament who were all said to have been "*elected on a Narc ticket*" and that two of them "were first-time MPs" while the other was in Parliament since 1992. It is a Parliament of Kenya.

The plaintiff adduced unchallenged evidence before me that as at 14th December 2003 he was indeed 58 years old having been born in 1945 as can be seen from his passport. He was a father of three children and had spent many years overseas as a student and a professional. He said, and was not challenged, that as at 14th December 2003, he was the only member of Parliament with all those attributes, whether as a Minister or as a mere Member of Parliament. Other attributes in the Defendant's story like Cabinet Minister and election on Narc party ticket, a first timer in Parliament and the Cost Province follow after words all fitting him.

Added to that was his evidence that on a day before the words complained of were published by the Defendants, he received a call from a male reporter from the First Defendant who said he wanted to do an article on the Plaintiff and sought the Plaintiff's details, which the plaintiff gave concerning his family, his age, his academic and professional background. The Plaintiff in the end invited the Reporter caller to go to the plaintiff's constituency to learn more about the plaintiff since the caller wanted more. But the following day the plaintiff was surprised to learn the information he had given the reporter the previous day was in the words complained of as published in the Defendant's Sunday Nation dated 14th December 2003.

Thirdly, people who knew the plaintiff, including knowledge of the information in the words complained of, and had read the publication before the plaintiff was aware of it, were the ones who contacted the plaintiff first informing the plaintiff of the existence of the publication before the plaintiff got hold of a copy to read it by himself to confirm what those people were reporting to him, some complaining as already stated elsewhere in this judgment. The plaintiff did not bring any of those people to testify but his evidence on that basis was not shaken as he gave details of the people's reaction including his religious leaders and how he tried in vain to convince them he had not been in Koinange Street as published in the relevant articles.

That was a group of people, that is relatives, friends, religious leaders and other well wishers who the Plaintiff had not met to inform them of the existence and contents of the publication before those people re-acted with those inquiries a clear indication of association of the Plaintiff with the words complained of by readers who sufficiently knew the Plaintiff.

If true that the defendants did not mean to write the words in question about the plaintiff, then to a truthful, honest, objective and responsible journalist, that was clear indication and evidence that something was wrong from the publication as some readers were thinking that one of the persons present and involved in the incident the defendants had published was the plaintiff when in fact the article had nothing to do with the plaintiff.

The defence does not show whether anyone made inquiries at their end on that issue as there must have been. But whether there were such inquiries or not, the Defendants were definitely aware during the evening newscasts that day 14th December 2005 that some radio and television stations relayed the news specifically mentioning the name of the plaintiff as one of the three Members of Parliament the published article of Sunday nation dated 14th December 2003 had been about.

That evening newscast must have left no doubt in the mind of the Defendants that some people who had read the published article dated 14th December 2003 were saying that one of the three members of Parliament was the plaintiff. He had not by then addressed a press conference.

This time the Defendants would have had no doubt about that identification by readers whether or not

some of those readers claimed to have carried out their own investigations which have never been proved anywhere to the satisfaction of a court. If the Defendants were truthful, honest, objective and responsible journalists like the ones they claim to equal in the United Kingdom and the United States of America and if indeed it is true that as at that time the Defendants had it in their mind that the questioned Article of 14th December 2003 in the Sunday Nation had nothing to do with the plaintiff, at that stage the Defendants would have had no reason to keep quiet on that issue until the plaintiff's press conference on the 15th December 2003 was published in the Daily Nation of 16th December 2003. If not the same evening of 14th December 2003, through their radio and/or television, the Defendants as responsible journalists would have easily on their own motion inserted, a correction or an explanation or a clarification or an exoneration in their Daily Nation dated 15th December 2003, even if they did not want to make an apology and that, is what, would have been in the "*public interest*" as the Defendants would also have performed their "*Public Duty*" and availed themselves of the benefits of a defence derived from Section 13 of the Defamation Act which makes provisions for "*Unintentional defamation*"……

Surprisingly, that did not happen and the Plaintiff's press statement had first to come out the following day 15th December, 2003 for publication on 16th December 2003. On 15th December 2003, the Defendants had simply repeated in the Daily Nation, what they had published the previous day in the Sunday Nation. At the press conference therefore, the Plaintiff did his best to exonerate himself from the Article Published on 14th December 2003. As stated elsewhere, in this judgment, when that press conference was reported in the Daily Nation dated 16th December 2003, the Defendants had the best opportunity to insert a correction, explanation, clarification or an exoneration concerning the Plaintiff if what they are saying in their defence that the words complained of have nothing to do with the plaintiff is truth, honest, objective and responsible.

But, and this is the fourth step showing identification of the Plaintiff by Defendants, they decided not to do so. Instead they inserted brief remarks

"***the Nation stands by the report that appeared in the Sunday Nation*.**"

Upto to that publication of 16th December 2003 the Defendants had made no effort on their own, to get any information from the Plaintiff. They thus stood in a similar position as the position the Defendant in the case of ***Reynolds vs Times Newspapers*** (Supra) stood in and had its cross appeal subsequently dismissed by the House of Lords yet the Defendant in that case had not inserted the kind of remarks just referred to above stating the Nation stood by the report.

What that statement meant in the circumstances of this suit, is simply this: that the Defendants were informing members of the public that although the Plaintiff had attempted to exonerate himself from the report that appeared in the Sunday Nation, dated 14th December 2003, the Defendants knew he was one of the members of Parliament the report referred to and that was why the Nation stood by that report about the Plaintiff.

To my mind**,** that is the correct interpretation of the Defendant's brief remarks above. That was on a date before the Defendants filed their first defence in this suit on 12th January 2004, the defence dated 9th January, 2004 and the amended defence dated 18th March, 2004 each to the effect that in the questioned report that appeared in the Sunday Nation dated 14th December, 2003 the Plaintiff was not one of the members of Parliament the report was about although the Nation had stood by that report on 16th December 2003 in the face of the Plaintiff's attempts to exonerate himself from the said report. That must be a smart way of doing things. But public interest is definitely not served that way. Such dirty cunningness cannot be anything in the Public Interest. Public Interest entails truth, honesty, objectivity and responsibility only. In the absence of those elements, there is no Public Interest served and none should be claimed even if there is a Public Duty because it means the person charged with that Public Duty to serve Public Interest has failed in the performance of his Public Duty. He therefore has no protection in law on the basis of having served Public Interest he failed to serve. The public have no right to know falsehoods, unverified facts, biased or prejudiced information or any information founded on

irresponsible journalism and the irresponsible journalist has no corresponding public duty to give such information to the public.

To my mind, that is a clear contradiction on the part of the Defendants who failed to reveal before me the Member of Parliament, other than the Plaintiff, whom they claim they talked about in the Sunday Nation Article dated 14th December 2003 in relation to the words complained of in paragraphs 7 and 8 of the plaint. Yet there is unchallenged evidence from the Plaintiff that in the year 2003. there was no cabinet Minister aged 35 years in the country, that all cabinet ministers from the Rift valley were above 35 years old, and that there was no member of Parliament, other than the Plaintiff himself aged 58 years, married with three children and had spent many years overseas as a student and a professional. Other attributes were that he was a first timer in Parliament and Narc Member of Parliament from the Coast Province but these other attributes, though adding to, were not necessary for the identity of the Plaintiff.

The Plaintiff's evidence was that nobody except him fitted that description. In the absence of evidence to the contrary from the Defendants, positively showing another Member of Parliament fitting that description at that time, I do accept the evidence of the Plaintiff. In the circumstances, the Defendants were at liberty and may have decided to change their mind at the time their defence was filed in this suit but they cannot persuade me to agree with them that, at least, as at 16th December 2003 they were not saying the plaintiff was one of the members of Parliament the Articles and the words complained of as Published in the Sunday Nation of 14th and 15th December 2003 were written about.

I do therefore find that the Articles complained of included the Plaintiff as one of the members of Parliament alleged found and arrested by the Police in Koinange street because the words complained of as particularized in paragraphs 7 and 8 of the Plaint point at and identify the Plaintiff, a report consciously and intentionally made by the Defendants who therefore subsequently saw no reason to correct, or explain or clarify the report concerning the Plaintiff even when he complained although they had ample opportunity to do so and are now trying to hoodwink this court in believing their defence based on an afterthought that the Articles or the words complained of were not published of and concerning the Plaintiff perhaps hoping that since the name of the Plaintiff had not been specifically mentioned, this court would accept their defence - on that line. The Defendants, even under the absolute protection accorded by the law to court proceedings failed to prove their claim that the words complained of referred to somebody other than the Plaintiff and that was the fifth step showing identification of the Plaintiff by the Defendants. They could not also prove their claim that as at 14th December 2003 there was a Narc Party Minister aged 35 a teacher from the Rift valley Province. I do reject that line of defence as I find the Plaintiff identified in the words - complained of, the Defendants having failed to explicitly disclaim responsibility through explanation or clarification or correction or exoneration to the Public to serve the "*Public Interest*" as no public interest is served through lies, untruths, hoodwinks, irresponsibility, cunningness and such like conduct by journalists.

Where an Editor, or any journalist, Publishes an article about A. but members of the Public who get the information associate it with C. whom they know, the Editor or journalist is thereby made responsible not only to A. but also to C. as well as the public, so that if that Editor is a person with ethics, is truthful, objective and responsible, he will take the earliest opportunity to explain, or correct or clarify the position and exonerate C, apologizing not only to C. but also to the Public to correctly serve "*the Public Interest*", journalists always profess to work for. That in fact is consistent with clause 22 in the Code of Conduct And Practice of Journalism In Kenya 2nd Edition (D. Exhibit 2) concerning the Editor's Responsibility where it is stated that:

"***The editor shall assume responsibility for all content, including advertisements, published in the newspaper. If responsibility is disclaimed, this shall be explicitly stated before hand."***

That takes me back to the "Code" and as earlier on indicated, I have a little more to say about the "Code." It contains ethical limitations backable by the law or judicial opinion.

It is surprising that Journalists in Kenya have such a good "*Code of Conduct And Practice*" yet many of

them conduct themselves and practice as if such a good document does not exist. It has now been incorporated in THE MEDIA ACT (N0.3 of 2007), which is one of the Statutes Passed by Parliament in the laws of Kenya.

According to the "Preface", "The Code of Conduct and Practice of Journalism in Kenya is the cornerstone of the system of self-regulation to which the industry has made a binding commitment. Editors and Publishers must ensure that the Code is observed rigorously, not only by their staff but also by anyone who contributes to their publications."

The need for free and independent media is emphasized and freedom of expression cherished, and it is pointed out that:

"***It is essential to the workings of an agreed code that it be honoured not only to the letter, but in the full spirit. The code should not be interpreted so narrowly as to compromise its commitment to respect the right of the individual, nor so broadly that it prevents publication in the Public interest.***

Yet the freedom of expression must be enjoyed and counter balanced against other equally important freedoms such as the RIGHT OF PRIVACY. Such balancing poses a challenge to the operations of the media. On the one hand the media must be guardians of the Public's right to know, while on the other, they must be careful not to invade or trample upon individual rights to privacy, conscience and thought. The media must therefore operate within clear ethical standards.

All members of the press have a duty to maintain the highest professional and ethical standards. This code sets the benchmarks for those standards. It both protects the rights of the individual and upholds the Public's right to know"

The "*Foreword*" says that the "*Code*" is a result of the effort of various stakeholders in the media industry in Kenya and that the stakeholders are:

"***The Kenya Union of Journalist;***

The Media Owners Association;

Editor's Guild of Kenya;

The Alternative Press;

Media Training Institutions;

Kenya Correspondent's Association;

Media NGOs;

Public Media."

They established the Media Industry Steering Committee (MISC) whose efforts gave birth to "*The Media Council of Kenya*" and that "*This Code intended to serve as the ethical foundation for the practice of journalism in Kenya*" the "*preamble*" being as follows:

"**Whereas** the freedom of expression and the right of the Public to information are fundamental to the establishment, nurturing and sustenance of democratic society,

and

Whereas respect for **truth** and the right of the Public to truth is the first duty of a journalist **and**

Whereas the right of the Public to Know must be balanced against the need to protect **the Privacy** of **the individual** in a manner that secures the **Public Interest,**

NOW THEREFORE, we members of the Media Industry Steering Committee, hereby adopt this Code of conduct as the foundation for the practice of journalism in Kenya".

I have said that Code is now incorporated in THE MEDIA ACT and that is by virtue of Section 35 of the Act where sub-section (1) states as follows: -

"***(1) The Media shall in a free and independent manner and style, inform the public on issues of public interest and importance in a fair, accurate and unbiased manner whilst distinctly isolating opinion from fact and avoiding offensive coverage of nudity, violence and ethnic biases***."

Sub-section (2) emphasizes that:

"***(2) The media shall keep and maintain high professional and ethical standards and shall, at all times, have due regard to the Code of Conduct Set Out in the Second Schedule to this Act."***

I therefore now refer to some of the provisions of the Code of Conduct as set out in the said Second Schedule to the Act aforesaid.

On "*Accuracy and Fairness*" the Code says as follows:

"***(a) The fundamental objective of a journalist is to write a fair, accurate and an unbiased story on matters of public interest. All sides of the story shall be reported, wherever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context.***

(b) Whenever it is recognized that an inaccurate, misleading or distorted story has been published or broadcast, it should be corrected promptly. Corrections should present the correct information and should not restate the error except when clarity demands."

From what I have been saying in this judgment, I have no doubt in my mind that the Defendants failed in their duty as required under, **Section 35 sub-sections (1) and (2)** of **The Media Act** and paragraphs (a) and (b) of the clause on Accuracy and Fairness aforesaid. This is because the Articles complained of in this suit, including the words complained of cannot, objectively, be said to have been "*a fair, accurate and unbiased story*" of and about the Plaintiff as it cannot, objectively, be said that "All sides of the story was reported. Definitely no comments from the Plaintiff were sought and obtained before the story was published. In any case the Defendants should have had no problem using paragraph (b) if what they are telling the court today is true that as at the time the Article complained of was published, the

"***58 years old father of three who spent many years overseas as student and a professional***"

the Defendants were writing about was not the Plaintiff. The fact that the Defendants never used that paragraph to clarify the position, reinforces the finding in this judgment that the defence claiming that the Defendants wrote those words about somebody other than the Plaintiff is an attempt by the Defendants to hoodwink the court.

To continue with the next paragraphs of the clause on "*Accuracy and Fairness*," they state as follows respectively:-

"***(c) An apology shall be published or broadcast whenever appropriate in such manner as the council may specify.***

(d) when stories fall short on accuracy and fairness, they should not be published. Journalists, while free to be partisan, should distinguish clearly in their reports between comment, conjecture and fact."

(e) In general, provocative and alarming headlines should be avoided. Headings should reflect and justify the matter printed under them. Headings containing allegations made in statements should either identify the body or the source making them or at least carry quotation marks.

(f) Journalists should present news fairly and impartially, placing primary value on significance and relevance.

(g) Journalists should treat all subjects of news coverage with respect and dignity, showing particular compassion to victims of crime or tragedy.

(h) Journalists should seek to understand the diversity of their community and inform the public without bias or stereotype and present a diversity of expressions, opinions, and ideas in context.

(i) Journalists and other media practitioners should present analytical reporting based on professional perspective, not personal bias.

On privacy the Code states as follows:

(a) The public's right to know should be weighed against the privacy rights of people in the news.

(b) Journalists should stick to the issues.

(c) Intrusion and inquiries into an individual's private life without the person's consent are not generally acceptable unless public interest is involved. Public interest should itself be legitimate and not merely prurient or morbid curiosity. Things concerning a person's home, family, religion, tribe, health, sexuality, personal life and private affairs are covered by the concept of privacy except where these impinge upon the public.

Emphasis supplied.

As to the opportunity to reply, I think what is in "*The Code of Conduct and Practice of Journalism in Kenya*" produced as Defence Exhibit 2 aforesaid is better and I go back to it as it states as follows: -

"***a fair opportunity to reply to inaccuracies should be given to individuals or organizations when reasonably called for.***

If the request to correct inaccuracies in a story is in the farm of a letter, the editor, has the discretion to publish it in full or in its obligated and edited version, particularly when it is too long. But the remainders should be an effective reply to the allegations. However, the editor should not omit or refuse to publish important portions of the reply/rejoinder which effectively deal with the accuracy of the reply/rejoinder, even then it is his or her duty to publish it with liberty to append an editorial comment doubting its veracity. Note that this should be done only when this doubt is reasonably founded on unimpeachable evidence in the editor's possession. The editor should not, in a cavalier fashion without due application of mind, append such a note as: We STAND BY OUR STORY. In this context these standard also apply to electronic media."

Those are extracts from the aforesaid "*Code of Conduct and Practice of Journalism in Kenya*" I have thought relevant and convenient to refer to in this judgment. If all journalists in Kenya were genuinely observing, applying, adhering to and practicing all the contents of that "Code" this country would be free from the unethical, untruthful, in-objective or irresponsible journalists who seem to be the overwhelming majority today claiming to have a "*Public Duty*" yet, from their very standing on the basis of the "*Code*" do not qualify to have and be trusted with that important "*Public Duty*" necessary to serve "*Public Interest*" in a democratic society under " *Freedom of the Press*" granted to people in Kenya by laws of Kenya as indicated in this judgment.

The other exhibit by the Defendants, Exh.1 "*The Nation Media Group Editorial Policy Guidelines*

and Objectives" is also good but in my opinion it is too much influenced and overshadowed by Commercial interests and considerations which would tend to make a journalist overlook the importance of contents of the "*Code of Conduct and Practice of Journalism in Kenya*". Indeed I noticed that the Defendants' sole witness in this suit, DW1, tended to do just that, as he put emphasis upon use of "*The Nation Media Group Editorial Policy Guidelines And Objective*" in a way tending to suggest non existence of the "*Code of Conduct and Practice of Journalism in Kenya*," producing it as Exh.2 only on being pressed to let the court know whether there was any source for Defence Exh. 1. Of course as can be seen from the contents of Defence Exh. 1, the whole of it could not have been sourced from Defence Exh.2.

The proper position concerning "The Nation Media Group Editorial Policy Guidelines and Objective" seems to be that if the prospects of material advantage outweigh the prospects of material loss, then publication of the objectionable matter can go ahead even if it is not in accordance with what the "***Code of Conduct and Practice of Journalism in Kenya***" Says.

At this stage, let me now answer the question whether the words complained of as stated in paragraphs 7 and 8 of the plaint are defamatory of the Plaintiff.

The best known definition of defamation is given by Fraser on Libel and slander, 7th Edition which defines a defamatory statement as

"***A statement concerning any person which exposes him to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or trade***"

That is the definition adopted by Halsbury's Law of England 4th edition in paragraph 40 stating:

"***A statement is defamatory of a person of whom it is published if broadly speaking, it is calculated to lower him in the estimation of right thinking members of the society or cause him to be shunned or avoided or expose him to hatred, contempt, or ridicule, or to disparage him in his office, profession, calling, trade or business.***

A statement is prima facie defamatory if the words in their natural and primary sense, that is their plain and popular meaning are defamatory."

From the evidence before me, it is clear that the words complained of by the Plaintiff sufficiently induce the right thinking members of the society to think ill of the Plaintiff and those words expose him to contempt and ridicule. Even the Defendants' witness conceded before the court that the words complained of if untrue about a complainant are definitely defamatory as pleaded in the Plaint. The Plaintiff told the Court that wherever he goes whether in his constituency or on National Television the issue of Koinange Street and the Plaintiff are raised together.

The insinuation, as result of the defamatory statement is that the Plaintiff and Koinange Street are extrinsically linked together. The evidence of the Plaintiff is already summarized elsewhere and I do not have to repeat it here. That insinuation was not challenged.

From the evidence of the Defendant's sole witness who is the 1st Defendant's Group Managing Editor, DW1, the publication complained of were written by Mr. Stephen Muiruri who was described by DW1 as an experienced crime reporter. The reporter's articles were approved by no less than DW1 before publication and DW1 told the court the publication was delayed to allow for further investigation and verification.

This Court recognizes that the published articles relate to conduct of a secretive nature and that it is not the kind of conduct with a victim. It involves willing participants, both of whom will be keen to keep the details away from the praying eyes of the press. But it is not proper to hold the view that

"***There is no likelihood that the girls involved or the Politicians or the prominent businessmen would provide any information or confirmation regarding their dalliance".***

If that view were correct, how is it that the plaintiff and the other two members of Parliament held a press conference on the 15th December 2003? Once a participant is known and can be reached as it is being claimed were the position with the members of parliament, why not reach them and report what they say together with the other information about that participant?

"***The Court" is not holding that an article of this nature cannot be published without first seeking the comments of the participants."***

All that the court wants is truth, objectivity, ethics and responsibility in the publication so that in a suit like this one, apart from Mr. Joseph Odindo coming to give evidence, Mr. Steven Muiruri and any other person should also have come to give evidence to say.

(a) He went to Koinange street during the swoop;

(b) He attended a press conference by the police revealing the Police operation;,

(c) Read the occurrence book confirming that three members of Parliament were arrested;

(d) Saw the still photos of the Members of Parliament arrested;

and

(e) ***Saw the video slip .of the Members of Parliament soliciting for prostitutes and while being arre*****sted.**

That means

(a) The Police occurrence book would have been produced.

(b) The still pictures would have been produced.

(c) ***The video clip would have been produ*****ced**.

That was important in view of what the Commissioner of Police. Mr. Nyaseda, said as reported in the Daily Nation of 16th December, 2003 (Def. Exh.5), categorically denying that any member of parliament was arrested and that any video was taken. In the case of ***Hon. Mwangi Kiunjuri - vs- Wangethi Mwangi & 2 Others*** (Supra), evidence to the effect of what the Commissioner of Police said was adduced and it was added that no male person was in fact arrested in the swoop. Only ladies were.

"***Public Interest" Cannot be served by the Press which is free, but unethical, untruthful, irresponsible and lacking objectivity for that is not even the case in the United States of America and the United Kingdom under The Constitutional Privilege or The Publication or The Sullivan And Reynolds Privilege. If that happens, it would amount to a Negation of the solicited "Public Interest" thereby rendering the solicited" Public Duty" of the Press non existent in the matter being published".***

The subject of the discussion is of a very serious nature namely HIV/AIDs and prostitution involving women and men. The press alleges that men who included prominent businessmen and three members of Parliament were arrested, photographed, video clipped, booked in police Occurrence book; but the police who were supposed to have done all those things come out to say they never did any of those things to any man on 5th December 2003 as alleged by the press; yet the press fails to adduce evidence to disprove the police even in a court of law but claim they are entitled to be left handling matters in that manner because they are performing a "*Public Duty*" to serve "*Public Interest*". There is **no Public Duty to serve**

any Public Interest in that manner and I am saying that now by looking at whole publication beyond the confines of the words complained of from the two Articles.

The situation is as follows : even assuming the defence of qualified privilege is available to the Defendants. What may be correctly called "*The Publication complained of*" consists of "*The Story*" that was treated as "*a package*" meaning written in "*a multiplicity of related articles all on one subject*". Strictly speaking, the Plaintiff is not complaining against "*The Publication*" or against "*The Story*" or against "*The Package*" as such. What the Plaintiff is complaining against is the presence of certain words in one of the "*Package Articles*" published on the 14th December 2003 and in the only "*Package Article*" published on 15th December 2003 and those are the words in paragraphs 7 and 8 of the Plaintiff's plaint aforesaid.

If the Defendants had a Public Duty" to publish "*The Story*" and therefore to publish "The Publication", or the "Package", the Defendants had no Public Duty to publish the words complained of because the words complained of lack truth, they lack objectivity, they lack ethical considerations, they lack responsibility from the Defendants and the Defendants could not by publishing "*the words complained of*" serve any "*Public Interest*".

The Public Duty the Defendants had therefore was to publish "*The Publication*" or "*The Story*" or "*The Package*" minus "*the words complained of*" and if the Defendants had a qualified privilege to enjoy, that enjoyment ended there. It did not extend and cover the Defendants' inclusion of "*the words complained of which, because are in "two of the Articles in the Package*" make the two Articles to be referred to as "*the Articles complained of*" and in turn make "*The Publication*" be referred to as "*The Publication Complained of*". It is this situation which leaves the Defendants liable to the Plaintiff in defamation.

Having said that, I now narrow down to "*the words complained of*" and add the following, starting with a reminder, the example of two people A. and C. I gave earlier. The media or the Reporter remains responsible to the innocent C.

Similarly in an old English case of ***E. Hulton & Co. - vs- Jones (1908 - 1910) ALL E.R. (Rep.) 29 Lord Loreburn,*** L.C (at P.47 stated as follows:

"***Libel is a tortuous act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame the Plaintiff. He has nonetheless imputed something disgraceful, and has nonetheless injured the plaintiff. A man may publish a libel in good faith believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances, he has no defence to the action."***

Pertinent equally is a passage in the judgment of ***Fletcher Moulton L.C*** (at P.42) where he said:

"***But the most serious aspect of the new doctrine is when we apply it to cases where the description is not by name. After all, a name is only one means of identification, and, considering the millions of names that must exist in England and the improbability of any man's (woman's) name being borne by him alone, is not a very strong one. There is no difference in the eye of the law with regard to an indication of identity by name or indication by other modes of description. Now suppose that no name is mentioned, but that the description is purely circumstantial, let us take the case of a preacher or speaker who in denouncing some practice may introduce into his discourse some hypothetical case in order to render his meaning clear. Some detail innocently introduced by him or even the choice of that particular theme may lead his hearers to imagine that he is referring to some particular person in the neighbourhood of whose existence and circumstances he is wholly ignorant and to whom personally he is not in any way referring. The learned judge clearly indicates that in that case he (the preacher) would be liable for defamation.....Nor do I see how a person could guard himself against such***

liability or what defence he could raise. It is clear law that no omission of the name, or statement that it is a hypothetical one, or declaration that he does not intend to refer to anybody in particular, can or ought to protect a person so speaking whose intention Is to libel."

Clearly from the last passage the law holds liable an innocent preacher for making reference to some person in the neighbourhood whose existence and circumstances the preacher was ignorant of while in the course of denouncing some ungodly practice. Can the same law, and that is the law applicable in this suit, spare the Defendants in this suit bearing in mind what I have been saying in this suit? My answer is no, because as already shown from the evidence there were members of the Public who knew that the words complained of referred to none other than the plaintiff. That evidence shows that it became common knowledge within Kenya and beyond that the story referred to the plaintiff as one of the culprits. It is not what the Defendants believe; it is what the general public perceives that counts.

I have already pointed out that if the Defendants were innocent then upon it becoming so obvious to them that public perception of the people who had been involved in the events the Defendants reported upon included the plaintiff, it was the duty and obligation to the Public for the Defendants to have published a correction or an explanation or a clarification or an exoneration or even to apologize. But rather than do any of those, the Defendants used the best opportunity they had to publish further offending words stating

"***the Nation stands by the report that appeared in the Sunday Nation***"

To my mind that obviously, means that the Defendants intended the words complained of to refer to the plaintiff and encouraged all members of the public to accept that position. Indeed members of the public accepted what the Defendants were telling them and I therefore find the words complained of to have been defamatory of the Plaintiff thereby making the two Defendants jointly and severally liable to the Plaintiff in defamation.

I have no doubt in my mind that the words complained of when looked at, either in isolation as printed in paragraphs 7 and 8 of the Plaint or within the contexts of the published articles complained of, looked at by right thinking members of society, those words are calculated to lower the estimation of the Plaintiff. The words ridicule the Plaintiff and bring him to disrepute as the words demean him.

In as much as we must cherish freedom of the press or freedom of the media, we must also cherish the ethics, the truth, the objectivity as well as the responsibility of the press or media. That is sometimes referred to simply as "*responsible journalism*"; and therefore the need for responsible journalism is an important matter of public interest and Kenya's media must resist the temptation to over dramatise the subject or the issue they are reporting on.

Along with responsible journalism is the need for investigative journalism so that the media is able to unearth the scandal behind a scandal so that, for example, if X is not the person the media was writing about when the media reported the Koinange Street prostitution scandal, what is the name of the person the media wrote about? ***The matter is in a court of law and the public are entitled to know and have the right to know the truth in the "Public Interest" because the media should earn its authority and respect only through its ethical conduct, its truth, its objectivity and its responsibility as well as sound investigative procedures and judgments. Otherwise such a media does not qualify to arrogate to itself the onus of shouldering "Public Duty" and proceed to claim "serving public Interest" as no public Interest is served by the media where there is no ethics, no truth, no objectivity and no responsibility in a democratic society.***

Having said the above, what award do I give the Plaintiff in this suit? Granted human feelings cannot be actualized in cash value, I am aware the law has developed guidelines to attempt to cool down the passions of anger and feelings generated by libel.

In the case of ***Joshua Kulei -vs- Kalamka Ltd. HCCC No. 375 of 1977***, it was stated as follows:

"***An action for defamation is essentially an action to compensate a person for the harm done to his reputation. In all actions for libel and in some cases for slander, the law presumes that the Plaintiff has suffered harm and in these actions, usually described as actionable parse, the damages are and to be at large. Although a person's reputation has no actual costs value, the court is free to form its own estimate of the harm in light of all the circumstances."***

In ***John -v- MGN Ltd (1996) 2 ALL ER, 35*** at P. 47, the Court stated as follows:

"***The successful plaintiff in a defamation action is entitled to recover in general compensatory damages, such sums as will compensate him for the wrong he has suffered. The sum must compensate him for the damage to his reputation vindicate his good name, and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel, the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the publication is also very relevant; a libel published to millions has a greater potential to cause damages than a libel published to a handful of people..... it is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in unfounded assertion that the publication was true, or refuses to apologize, or cross-examines the plaintiff in a wounding or insulting way....."***

A number of case authorities have been cited by learned counsel on each side the tendency being that as counsel for the Plaintiff looked for cases in which damages awarded are high to support a high award in favour of the plaintiff; counsel for the Defendants looked for authorities in which damages awarded are low to support a low award against the Defendants if Plaintiff is successful and one would perhaps begin with the case of ***Muriuki Karua Muriuki -vs- The Standard Limited***. In HCCC No. 28 of 2003 at Nakuru where damages were assessed at Ksh. 100/-.

In ***Hon. Amb. Chirau Ali Mwakwere -vs- Royal Media Services Limited, HCCC No. 57 of 2004***, the High court awarded a total of Ksh. 3,000,0000/- to the Plaintiff. This was a suit arising from the publications now being considered in this suit before me. Thus the Defendant's in that case, Royal Media Services Limited, had used the publication complained of in the instant suit, to make the publication the plaintiff complained of in HCCC. No. 57 of 2004.

In **Akilano** ***Malade Akiwumi -vs- Andrew Morton and Another,*** HCCC No. 1717 of 1999, the Plaintiff then a sitting Court of Appeal Judge, the High Court, Ransey J, awarded him Ksh, 3,000,000/- in general and exemplary damages, the learned judge having been against exorbitant libel awards just as the Court of Appeal was in the case of ***Johnson Evan Gicheru -vs- Andrew Morton & Another (2005) eKLR*** - although the said Court of Appeal enhanced the damages that had been awarded by the High Court of Kshs. 2,250,000/- to a composite figure of Kshs. 6,000,000/- including aggravated damages awarded because the Defendants had not responded to the Plaintiff's demand letter.

In ***Benson Mases -vs- Kenya Tea Development Agency Ltd. (2005)*** the court awarded the Plaintiff Ksh. 7,000,000/- general damages and Kshs.3,000,000/= exemplary damages making a total of Ksh. 10,000,000.

In ***Richard Otieno Kwach -vs-_ The Standard Ltd & Another (2007)*** the High Court awarded the plaintiff a composite award of Kshs. 5,500,000/- as general damages and aggravated damages.

In ***Kipyator Nicholas Kiprono Biwott -vs- Clays Limited and 3 others, HCCC. 1067 of 1999*** where it was stated that 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; and that malicious and insulting conduct on the part of the Defendant will aggravate the damages to be awarded, the High Court awarded Kshs.30,000,000/= general damages; while in another case ***Biwott –vs- Mbuguss & Another (2002) 1 KLR 321*** the High Court awarded Kshs.10,000/= compensatory damages. In both cases, the Plaintiff Mr.

Biwott was a Cabinet Minister by then.

In ***Daniel Musinga t/a Musinga & Company Advocates –vs- Nation Newspapers Limited (2006) e KLR***, the High Court at Mombasa, Khaminwa J, considered the principles that govern the assessment and award of damages in libel cases in the English authority of ***John –vs- MGN Limited*** earlier on referred to in this judgment.

The learned Judge in the Musinga case held that the

"***Court has to look at the whole conduct of the parties before action, after action and in compensatory damages such sum as will compensate him for the wrong he has suffered."***

The Judge further held that an award of damages:

"***Must cover injured feelings the anxiety and uncertainty undergone during the court trial. Malicious and insulting conduct on the part of the Defendant will aggravate the damages to be awarded to compensate the Plaintiff for the additional injury going beyond that which would have flowed from the words alone."***

In that case the court found that the Defendant behaved in a high handed malicious manner. Taking all such factors into account the court felt it was

"***entitled to go to the top basket of the bracket to award the largest sum that could fairly be regarded as fair compensation."***

The court awarded the Plaintiff Kshs.10,000,000/= damages.

From the above authorities and in the circumstances of this suit, much having already been said and needing no repetition and bearing in mind that this suit is more serious than the suit between the same Plaintiff and the Royal Medial Services Limited, HCCC No.57 of 2004 because HCCC No.57 of 2004 emanated from the Publication which has given rise to this suit before me which publication started it all; and further bearing in mind that the Court of Appeal justifiably, in my view, frowns at what Ransley J. termed exorbitant awards especially if the economic circumstances of this country and the standard of living of Kenyan inhabitants to be faced with these case precedents are considered, I do hereby grant the Plaintiff in this suit the sum of Kshs.8,000,000/= general damages.

In addition, I do award to the Plaintiff a further sum of Kshs.1,000,000/= aggravated damages on account of malice which was pleaded and proved against the Defendants. Further, I do also award another sum of Kshs.1,000,000/= to the Plaintiff being exemplary damages on account of refusal by the Defendants to render an apology when asked by the Plaintiff to do so, a refusal which extended to mere giving of an explanation or a clarification or making a correction or an exoneration if the defence were true that the Articles complained of were written of and concerning a person other than the Plaintiff. The Defendants refused to render any of those corrective measures and are now giving a lame excuse.

In total therefore, judgment be and is hereby entered for the Plaintiff against the Defendants jointly and severally in the sum of Kshs.10,000,000/= plus costs of this suit and interest thereon the latter at court rate from the date of this judgment till payment in full.

As it is my considered opinion that no injunction is desirable in this suit, prayer (e) in the plaint is hereby dismissed and I make no orders in terms of prayer (f).

Delivered, signed and dated at Nairobi this 8th day of May 2009.

J. M. KHAMONI

JUDGE

In the presence of:

Mr. Sagana for the Plaintiff

Mr. Munyu for the Defendant

Florence J. Boswony - Court Clerk