REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(*Coram: Ojwang, J.)*

CIVIL CASE NO. 1333 OF 2003

HON. MWANGI KIUNJURI.....PLAINTIFF

-VERSUS-

WANGETHI MWANGI…….....…1ST DEFENDANT

NATION MEDIA GROUP LIMITED.....…..2ND DEFENDANT

ROYAL MEDIA SERVICES LIMITED.....…….3RD DEFENDANT

JUDGEMENT

A. FIRST & 2ND DEFENDANT'S WORDS WERE UNDERSTOOD TO REFER TO ME; THOSE WORDS OCCASIONED 3RD DEFENDANT'S REPEATED REFERENCE TO ME; MY REPUTATION WAS DAMAGED: THE CLAIM IN DEFAMATION

The plaintiff, who at the time of filing suit was a Member of Parliament and an Assistant Minister in the Ministry of Energy in the Government of Kenya, made his claim in the tort of *defamation* against the three defendants, by plaint dated and filed on 17th December, 2003. The 1st defendant was at the material time the Editor-in-chief of the 2nd defendant who was (and is) the proprietor, printer and publisher of a weekly newspaper, *The Sunday Nation*. The 3rd defendant was at the material time, the proprietor of a radio and television station, respectively, C*itizen Radio* and *Citizen TV.*

It is pleaded that on 14th December, 2003 the 1st and 2nd defendants printed and published or caused to be printed and published, certain words, of and concerning the plaintiff, on the front page of the issue of the *Sunday Nation*. The said words were as follows:

> ***"Ministers and MP Held in Swoop on Prostitutes: Police Filmed them as they Beckoned the Red-light Girls****. One Cabinet Minister, an Assistant Minister and a NARC MP were caught by the Police in a notorious red light area with half-naked girls in their cars.*
>
> *"They were seized during a routine swoop on prostitutes 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.

"Almost as shocking as the men's determination to prey on the girls was the fact that out of 102 prostitutes netted in the swoop, 58 were found to be students from the University of Nairobi and the city's diploma colleges. Eleven were from the University, 14 from Utalii College, 12 from the Kenya Institute of Mass Training College [sic], three from Strathmore College, and 11 from other City colleges.

"Two of the three politicians netted by 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 Rift Valley Province, the Coast and Nyanza and were all elected on a NARC ticket.

"It was the second time the Assistant Minister had been arrested in the street, trying to pick up prostitutes."

The claim, while acknowledging that the impugned newspaper report "did not name" the plaintiff, asserts that –

"it was clear from the description or the pointers in the article and it was understood by the public and other media entities that the plaintiff was one of the Members of Parliament identified by the said defendants as the intended target of the said statement."

On the basis that *people in general* understood the newspaper account to be referring to the plaintiff, it is asserted that the words objected to, by natural and ordinary meaning and by innuendo, imported in respect of him –

(i) that he had engaged himself in "the criminal activities of prostitution or commercial sex";

(ii) that he had "preyed on young University and college students;

(iii) that he was immoral;

(iv) that he was "unfit to hold a public office whether as a Member of Parliament [or an] Assistant Minister";

(v) that he "had committed an offence or several offences."

On the basis that the allegations in question *referred to the plaintiff*, the plaintiff stated that they were "entirely untrue and/or false."

The plaintiff reaffirmed that the said statements referred to him, and that consequent on the allegations, he had been "seriously injured in his character, credit and reputation"; and he had been "brought into public scandal, odium and contempt".

The plaintiff stated that following the publication of the impugned article, repeat-publications had been put up *elsewhere in the media*, thus causing him even more injury – and so he would ask for enhanced damages against the first two defendants. To the first two defendants, the plaintiff attributed *malice,* and

on that basis he was seeking aggravated and/or exemplary damages.

The plaintiff claimed that the impugned article had been published in sensational terms, in a manner such as would give it maximum coverage, and so attract more readers. It was stated that the 1st and 2nd defendants knew or ought to have known that the material allegations, insofar as they referred to *the plaintiff*, were untrue. It was stated that even when they *knew* the said article would damage the plaintiff's reputation, they did not conduct a proper check to confirm the veracity of the content thereof. The plaintiff stated that his complaint to the 1st and 2nd defendants had failed to elicit a suitable apology.

This refusal to apologize, the plaintiff claimed, resulted from indifference on the part of the 1st and 2nd defendants, or from the possibility that the two had "calculated that the financial benefit in terms of increased sales outweighed the risk of any damages which might have to be paid to the plaintiff."

Of the 3rd defendant, it is stated that it, *predictably,* had based its own story on the foundations of the impugned article by 1st and 2nd defendants: the 3rd defendant had gone on to *broadcast news* on its television channel, in the evening of the material date, to this effect:

> "Investigations by Radio Citizen and T.V. have unearthed unconfirmed reports that the Ministers who were found soliciting for sex on Koinange Street were ***Ali Mwakwere*** of the Ministry of Labour, Assistant Minister **Mwangi Kiunjuri** and Legislator ***Jakoyo Midowo."***

It is asserted that on the following day, on 15th December, 2003 the 3rd defendant broadcast on its *radio channel* that the *plaintiff* was definitely one of the Members of Parliament referred to in the said newspaper article (published by 1st and 2nd defendants) as having participated in criminal and immoral acts, and that he should be arrested and prosecuted for the offence.

The plaintiff pleads that the 3rd defendant published the said statements maliciously, *so as to* cause ruin to the plaintiff's character and reputation. On this account the plaintiff claims *aggravated* and/or *exemplary damages*, urging in that behalf that: the words complained were published *repeatedly and in sensational terms*, with the intent to reach a *wide audience*; 3rd defendant "knew or ought to have known that the said allegations, insofar as they refer to the plaintiff, were untrue"; 3rd defendant did admit that the material allegations were mere unconfirmed rumours; while knowing that the material words were likely to cause damage to the plaintiff, 3rd defendant made no proper investigations before publishing the same; the 3rd defendant though knowing of the falsehood of the material words, has declined to offer an apology to the plaintiff; so the 3rd defendant must have elected the course of indifference; or it has "calculated that the financial benefit in terms of increased audience outweighed the risk of any damages which might have to be paid to the plaintiff".

The plaintiff states that the *Sunday Nation's* sister paper, the *Daily Nation* of 16th December, 2003 did admit that the said allegations have provoked a national outrage against the plaintiff's alleged conduct – which was a foreseeable consequence of the said publication.

The plaintiff states that he had made written demands of the three defendants, in respect of the impugned publications, but they have "failed and/or refused to retract the said statements….or apologise to the plaintiff..."

In the premises, the plaintiff prays for –

> (i) general damages;
>
> (ii) aggravated or exemplary damages
>
> (iii) injunction restraining the defendants, by themselves or their agents or servants or otherwise, from further printing, circulating, distributing, or otherwise publishing any such libels of and

concerning the plaintiff;

(iv) costs;

(v) interest on (i), (ii), (iv).

B. ARTICLE REFERS NOT TO PLAINTIFF, DIRECTLY OR BY INNUENDO; IT'S FACTUAL; IT'S PRIVILEGED; IT'S AN EXERCISE OF FREEDOM OF EXPRESSION UNDER THE CONSTITUTION: 1ST TWO DEFENDANTS' POSITION

The facts at the root of the claim do not, according to the 2nd defendant in the statement of defence, refer to the plaintiff, and no reasonable members of the public could have perceived those facts otherwise.

The first two defendants state that the reference to "Assistant Minister" in its article of 14th December, 2003 is separate from any other descriptive terms, and "cannot be inferred to refer to the plaintiff."

The 1st and 2nd defendants asserted that the impugned article though mentioning an "Assistant Minister", had not referred to *the plaintiff*, inasmuch as the article made no indication that the Assistant Minister in question hailed from the *Rift Valley Province.*

The substance of the 1st and 2nd defendants' defence, however, falls under *qualified privilege*; they assert that the article complained of was published on an occasion of qualified privilege, and they set out facts to show the nature of the claimed privilege.

On the night of *5th December, 2003* the Police did carry out a swoop on prostitutes who operate along Koinange Street in Nairobi. Some of the Prostitutes who were arrested and charged in Court, were students of the University of Nairobi and other City colleges. The 2nd defendant did establish that three politicians, and prominent businessmen, were among those found with the prostitutes. It therefore became *a journalistic duty* incumbent upon 2nd defendant to publish the article complained of.

The said publishing duty is stated to have arisen in the context of the *contemporary social challenges.* This point is set out in para. 5B of the amended statement of defence of 17th February, 2004:

> *"In the light of the high incidence of HIV/AIDS infection among the Kenyan youth, the two defendants, under a sense of duty and without malice and [led by] the honest belief that the facts in the article were true, published the article so as to highlight and address the issue of prostitution and accompanying risky and dangerous sexual behaviour, as a matter of general public interest. Prostitution and the attendant risky sexual behaviour by politicians and/or public figures, prominent businessmen and students, who also have contact with the wider society, renders the exposure of their behaviour and activities matters of general public interest. In the premises the two defendants and the general public had a common and corresponding interest in the subject-matter and publication of the said article and/or words".*

The first two defendants averred that they were under a social and/or moral duty to publish the article to the general public, and the readers had a like interest to receive the information contained in the article.

The first two defendants state that owing to the fact that politicians, students and prominent businessmen freely interact with the wider society, and considering the risk that such people of high esteem may infect innocent members of the public with serious illnesses such as HIV/AIDS, they (the defendants) had published the article complained of in the reasonable and necessary protection of the *interests of the general public.*

In the further alternative, the 1st two defendants averred that the article and words complained of were *fair comment made in good faith and without malice, upon a matter of public interest*.

The first two defendants also stated that, by publishing the article in question, they had served the public interest in the *professional goals of journalism;* they had "intended to assure the unfettered dissemination of information on a matter of general interest for the purposes of bringing about social change in terms of sexual behaviour". The defendants asserted that the article complained of was for the general public good and was, on that account, protected under the head of qualified privilege.

The first two defendants stated that the subject-matter of the article complained of was of profound general interest, an issue in respect of which debate should be "robust and wide open;" a level of debate which is "still to be encouraged even though it may include unpleasantly sharp attacks on the conduct of public officials and other influential members of the society". It was stated that an article touching on the *major public issues of the day* in Kenya qualifies for protection pursuant to the *freedom of expression* guaranteed by s.79 of the constitution. The two defendants invoked the protection guaranteed by s.79 of the Constitution in their defence.

The first two defendants denied that any innuendo alluding to the plaintiff was created in the 2nd defendant's article in question. They denied that the article contained any description or pointers that were understood, or that were capable of being understood by *reasonable members of the public,* as referring to the plaintiff, by way of his office, career or otherwise.

The first two defendants averred that the suit was the result of unwarranted sensitivity on the plaintiff's part, and yet "when the plaintiff chose to seek a parliamentary, and therefore [a] public office, he is deemed to have consented to the likelihood that he may be associated or identified with news reports touching on the conduct of public officers by reason of his being a public officer". These defendants averred that the plaintiff's gravamen failed the test of "the degree of tolerance expected of public officers when subjected to unfounded and unreasonable conjecture and innuendo".

Of the general import of the words complained of, and without prejudice to the line of defence taken, the first two defendants contended that, insofar as the said words consisted of allegations of *fact,* they were *true* in substance and in fact; and insofar as these words consisted of expressions of *opinion*, they were *fair comment*, made in good faith and without malice, on matters of public interest.

The 1st and 2nd defendants averred that the words complained of were not capable of disparaging, and were not understood to disparage the plaintiff in his office, character, credit or reputation as alleged.

The 1st and 2nd defendants denied that they were the basis for *others in the media* to begin new initiatives of disparaging the plaintiff.

The first two defendants opened up the point as to the *status quo ante* of the plaintiff's reputation: they denied that "the plaintiff's reputation and character were such as would be or would have been injured by the publication of the article complained of".

The first two defendants stated that since they had denied writing the article in question, of and concerning the plaintiff, they were under no obligation to publish or offer an *apology* or *retraction*, as demanded by the plaintiff. It was stated that since there had been a public duty to publish the article in question, the fact that the 2nd defendant may have benefited from the sale of its newspapers "cannot be the basis of founding a cause in defamation or libel."

The first two defendants denied that their aforesaid article had any connection with the publications emanating from *3rd defendant;* because 3rd defendant was "clearly stated [to have acted on] investigations carried out by [itself]".

The 1st and 2nd defendants averred that in their later publication, in the *Daily Nation* of 16h December, 2003 they had indicated that 2nd defendant stood by its earlier publication of 14th December, 2003, and also "faithfully carried the plaintiff's denial of involvement in prostitution".

Lastly, the first two defendants averred that they are entitled to the freedom of expression provided for under ss.70 and 79 of the Constitution, which entails the *freedom to disseminate and receive information,* in a free and uninhibited manner. These defendants contended that the plaintiff's suit, as framed, seeks to *curtail* or *inhibit* their freedom of expression; and on this account, the two defendants contended that the plaintiff's suit was unconstitutional and bad in law.

C. PUBLICATION WAS BASED ON TRUTH ESTABLISHED BY INVESTIGATION; PLAINTIFF AS PUBLIC FIGURE MAY NOT BE SQUEAMISH OVER HIS REPUTATION; CONSTITUTIONAL FREEDOM OF EXPRESSION APPLIES: 3RD DEFENDANT'S PLEADING

The third defendant pleaded that the plaintiff had no cause of action against that defendant. The reasoning to support the contention is thus set out:

> "By virtue of the plaintiff's status as Member of Parliament for Laikipia East Constituency and also an Assistant Minister in the Ministry of Energy in the Kenya Government he has, within the meaning of section 79 of the Kenya Constitution, consented to a robust debate and discussion of his personal life during the period he serves as a Member of Parliament. The 3rd defendant further contends that section 79 of the Constitution embodies the rule in ***New York Times v. Sullivan***, 376 U.S. 254 (1964) and consequently a publisher is not liable for publishing pertinent facts pertaining to a public figure upon investigation of the circumstances of the facts published of the public figure. The 3rd defendant further contends that section 16A of the Defamation Act (Cap.36, Laws of Kenya) is *ultra vires* section 79 of the ...Constitution [of Kenya] and is null and void to the extent that it purports to burden the exercise of freedom of expression [with] awards of damages that are manifestly excessive. The 3rd defendant contends that the broadcast complained of was made during the period the plaintiff was serving as a Member of Parliament when the 3rd defendant was at liberty to subject the plaintiff's conduct to severe scrutiny."

It was 3rd defendant's contention that the freedom of expression which is protected by s.79 of the Constitution, includes the publication of information that shocks and disturbs the public, and that the broadcast complained of fell within that category of publication.

The 3rd defendant pleaded *justification*, in the account which it had broadcast, and which has led to the suit, as the same was based on *investigations.* In its statement of defence, the 3rd defendant states:

> "Its investigations show that the plaintiff was the person referred to in the publication by the [2nd defendant], [and it] relies on the defence of justification (as an alternative plea)."

The 3rd defendant goes on to give particulars of the claimed justification:

> "Investigations [by] the 3rd defendant show that the plaintiff accompanied by one ***Nderitu*** picked up two ladies from Nairobi who were not their spouses and drove in a green Land-cruiser to Thomson's Falls Lodge in Nyahururu. The plaintiff and the said ***Mr. Nderitu*** booked in the hotel two double rooms known as the Laikipia Cottage and the Orlarambel Cottage where they spent the night of 5th to 6th December, 2003. The plaintiff spent the night with one of the women whilst ***Mr. Nderitu*** did the same with the other woman."

The 3rd defendant avers the foregoing facts to be *the truth*, and "contends that the public are entitled to know of this information about the plaintiff."

D. QUESTIONS FALLING FOR DETERMINATION BY TRIAL

Counsel for the several parties identified the crucial matters of disagreement, to be resolved by taking evidence and considering submissions.

(a) ***Questions as between the Plaintiff on the one hand, and 1st and 2nd Defendants on the other***

The questions under this head are 16, and may be set out as follows –

1. Was the article published on 14th December, 2003 by 2nd defendant written of and concerning the plaintiff?

2. Was the said article capable of being understood by right-thinking members of the public as referring to the plaintiff?

3. If the answer to 1 and 2 above is in the affirmative, are the allegations in the said article defamatory, and were the same driven and/or actuated by malice, malevolence or spite, against the plaintiff?

4. Was the said article published on an occasion of qualified privilege?

5. Are the issues of prostitution, HIV/AIDS infection and the conduct of public figures a matter of general public and national interest?

6. Did the subject article consist of expressions of opinion amounting to fair comment made in good faith?

7. Are the words published by 2nd defendant on 14th December, 2003 descriptive of certain groups of people namely, students, politicians and businessmen involved in prostitution?

8. Was it foreseeable that the contents of the said article would be repeated by other media and, if so, was there such repetition?

9. Are the said defendants liable to the plaintiff for the consequences of the repetition?

10. Do the 1st and 2nd defendants have control over publications, articles and news items by other independent media houses?

11. Are the 1st and 2nd defendants liable for interpretations given to the publications of 2nd defendant by other independent media houses?

12. Does the freedom of expression guaranteed by ss.70 and 79 of the Constitution of Kenya provide protection to 1st and 2nd defendants with respect to the article published on 14th December, 2003?

13. Is the plaintiff entitled to aggravated and/or exemplary damages.

14. Is the plaintiff entitled to the damages sought at all?

15. Is the plaintiff entitled to the relief of permanent injunction against the said defendants?

16. Which party is liable to pay the costs of this suit?

(b) Questions as between the Plaintiff on the one hand, and the 3rd Defendant on the other.

Under this head there are 10 questions, which may be set out as follows –

1. Were they true, the words published of and concerning the plaintiff?

2. Are they true, the allegations made of and concerning the plaintiff?

3. If the answer to the above is in the negative, was the plaintiff defamed by those words?

4. Did the 3rd defendant act maliciously towards the plaintiff?

5. Was it foreseeable that the contents of the said article would be repeated by other media and, if so, was there such repetition?

6. Is the 3rd defendant liable to the plaintiff for the consequences of the repetition?

7. Is the plaintiff entitled to aggravated and/or exemplary damages?

8. What is the quantum of damages payable to the plaintiff if any?

9. Is the plaintiff entitled to the relief of permanent injunction against the 3rd defendant?

10. Which party is liable to pay the costs of this suit?

E. SUBMISSIONS OF COUNSEL ON EVIDENCE AND LAW

1. The Plaintiff's Initial Submissions

Learned counsel ***Mr. Oyatsi*** set out in his submissions by refuting an impression he associated with the defendants' case, that they "have portrayed themselves as parties with a certain noble role or mission in society and that their actions which form the subject of this litigation were motivated by their desire to perform this public duty for the good of the Kenyan public and society". Counsel urged that "none of the three defendants is a charitable organization or entity. The publications which form the subject- matter of this litigation, were not in aid of any charity nor were they charitable actions." Counsel contended that the 2nd and 3rd defendants "are nothing but traders." Of the 1st defendant, counsel urged: "He is there as part of the team appointed by the second defendant to operate and manage the business and make profits. If the second defendant does not make profits, he will lose his job immediately …"

Mr. Oyatsi saw no medium-of-expression-for-the-public role for the defendants as part of the media. He contended: "… the defendants sell a service or product to the public. They do so as an economic activity and their existence is driven by only one factor, to make profit. The defendants are therefore traders and seekers of profit".

After contesting the main plank in the defence of qualified privilege, which the defendants have invoked, learned counsel went on to restate the plaintiff's case. Counsel for the plaintiff stated he would show how the evidence proved several contentions in the claim –

(i) that the defendants deliberately and maliciously defamed the plaintiff;

(ii) that the defendants conducted themselves as "nothing more than greedy seekers after profits and wicked inventors of calumnies or falsehoods";

(iii) that the defendants invented a non-existent story, duped the gullible public, and made a lot of money from the public through "acts of deception and trickery".

(iv) that the defendants caused the public who were unaware they had been duped, to demonise, condemn and express outrage at the plaintiff for actions that were non-existent and which the plaintiff did not engage in;

(v) that the defendants filed pleadings which contained falsehoods;

(vi) that the defendants were not, in publishing falsehoods against the plaintiff, engaged in the

professional practice of journalism.

Learned counsel relied on past decisions, ***Vizetelly v. Mudies Select Library Limited*** [1900] 1QB 178 and ***Amritlal Bhagwanji Shah v. The Standard Ltd & Another,*** Nairobi HCCC No. 1073 of 2004 to support his submission that the plaintiff had three situations to prove, to be held to have been damnified and, therefore, entitled to damages; these are: (a) that the statement in question refers to the plaintiff; (b) that the statement is false; (c) that the statement is calculated to lower the plaintiff in the estimation of right-thinking persons, or cause him to be shunned or avoided, or expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.

Do the Allegations complained of refer to the Plaintiff?

This point, counsel urged, had a plain answer in the case of *3rd defendant;* for "the publication by this defendant specifically and expressly refers to the plaintiff and names him". Counsel concedes that "the publication by the first and second defendants *does not name the plaintiff."* So, how does counsel loop in 1st and 2nd defendants? He does so by invoking *case law* touching on cognate situations. He calls in aid the old English case, ***E. Hulton & Co. v. Jones*** [1908 – 1910] All E.R. (Rep.) 29; he relies on the words of ***Lord Loreburn, LC*** (at p.47):

> ***"Libel is a tortious 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 none-the-less imputed something disgraceful, and has none-the-less 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, LJ*** (at p.42):

> ***"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 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 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."***

Mr. Oyatsi relied on the opinion of ***Fletcher Moulton, L.J.,*** and thus urged:

> "Taking the first example given in the ***Hulton*** case...,where the law holds liable an innocent preacher for making reference to some person in the neighborhood whose existence and circumstances he is wholly ignorant [of] while in the course of denouncing some ungodly practice, how can the same law spare the seeker of profit such as 1st and 2nd defendants herein from liability?"

Counsel was convinced that there *were* members of the public who knew that the publication complained of referred to *none but the plaintiff.* To validate that contention, he referred to the testimony of a key witness for 1st and 2nd defendant. The relevant words of DW2, ***Joseph Odindo***, the Group Managing Director of Nation Media Group, are as follows:

> "After our *Sunday Nation* article the matter became public, and other media entered the [scene]. On 15th December, 2003 we were not able to cover the protest accounts. But *The Standard* frontpage on 15th December, 2003 read 'Police ordered to destroy sex proof'. [*The Standard*] [reported] that the Police had come under pressure to destroy the evidence."

The same witness, and with regard to 3rd defendant, later said:

> "They had their allegations. *The Standard* had; and *The Kenya Times* too had. We do not control them. They decide on their own what to publish".

It emerged, from the evidence, that yet another newspaper, *The Independent*, published an article stating categorically that 2nd defendant's publication referred to the plaintiff; it even were further and alleged that the plaintiff had not used a condom in his sexual encounters with the prostitutes.

Counsel submitted that after the publication by *3rd defendant*, "it was now common knowledge within the whole country and beyond, that the story referred to the plaintiff as one of the culprits". He urged that if the defendants were innocent, "then upon it becoming so obvious that the public perception of the people who had committed this heinous crime which the defendants had reported included the plaintiff, it was the duty and obligation of the defendants to publish a correction…." But rather than apologise, counsel submitted, the defendants published a further article in which they stated that "they stood by their story". This, ***Mr. Oyatsi*** urged, means that "the defendants intended their story to refer to the plaintiff and encouraged *even those members of the public who were sceptical* to believe so".

Did the Article complained of carry False Allegations?

Learned counsel submitted that no evidence had been tendered to show that politicians were among those found with prostitutes on the material day; that the Police filmed the Ministers and Members of Parliament as they were consorting with prostitutes; that one Cabinet Minister, an Assistant Minister and a NARC Member of Parliament were caught by Police in a notorious red-light area with half-naked girls in their cars; that the Cabinet Minister and the Members of Parliament were first watched on video-tape, before the Police moved in; that politicians were seen shamelessly beckoning girls from their cars, then ushered them in before the Police took action; that out of the 102 prostitutes netted, 58 were found to be students of the University of Nairobi and of diploma colleges.

Did 1st and 2nd Defendants give only Hearsay Evidence?

Counsel urged that the evidence given by DW2 was essentially hearsay evidence; in counsel's words –

> "This witness readily admitted that he was not at the scene of the events referred to in the article. The source of his information was one ***Muiruri*** who is or was an employee of 2nd defendant".

Relying on the evidence Act (Cap.80, Laws of Kenya), ss. 62 and 63, learned counsel submitted that "the allegations published by the second defendant could only be proved as true facts by the direct evidence of ***Mr. Muiruri***", as it was, by the evidence of DW2, ***Mr. Muiruri*** who had direct evidence on: the existence of the video recording of the alleged acts of prostitution; the existence of photographs of the arrested girls, which he is said to have seen; the existence of photographs of men arrested with the girls which he is said to have seen; the video recording of the arrested men with the girls which he is said to have seen; and the Police Occurrence Book entries, with the names of the girls and the men which he is said have seen. Counsel wondered why ***Mr. Muiruri*** was not called as a witness, even though, according to DW2's evidence, he was alive and had been in the 2nd defendant's employ. It was urged that the failure to call

Mr. Muiruri to testify, was evidence that "the defendants all along knew that the ....allegations were false".

Counsel urged that the allegations in the article complained of were false, because a defence witness, Police Force No. 230088, ***Chief Inspector Patrick Oduma*** who brought the Nairobi Central Police Station Occurrence Book, confirmed that no Member of Parliament or Minister had been named among the 61 persons arrested by the Police in the said operation against prostitutes; that all the women who were arrested by the Police in the said swoop were street girls, and did not include University students or college girls; that there was no video recording of the incident of the swoop on prostitutes.

From such a state of the evidence counsel urged that it had been established that the story published in the article complained of was a false one.

The Words complained of – were they calculated to lower the Plaintiff in the estimation of right-thinking Persons, or to cause him to be shunned or avoided, or to expose him to Hatred, Contempt or Ridicule, or to disparage him in his Office, Profession, Calling, Trade or Business?

Counsel submitted that the words complained of carried certain imputations on the plaintiff's reputation –

(i) that he was a carrier of the HIV/AIDS virus;

(ii) that he preys on young University and college girls.

Counsel urged that the plaintiff was deliberately defamed by 1st and 2nd defendants.

The Position of the Third Defendant

Learned counsel submitted that the plaintiff's case against 1st and 2nd defendants applied with equal force in relation to *3rd defendant*. He urged that whereas the 1st and 2nd defendants are guilty of "inventing wicked calumnies and publishing them against the plaintiff," the 3rd defendant *"took over and provided other details* which the 1st and 2nd defendants had not brought out"; and such details "include specific reference [to] or *naming of the plaintiff …."*

2. Submissions for 1st and 2nd Defendants

(i) First Defendant's Case: Was this a Misjoinder of Parties?

Learned counsel ***Mr. Karori*** urged that the suit against the 1st defendant was misdirected, for this defendant was only a director of 2nd defendant and not the editor, and is not the one who wrote the article complained of. He urged that the 1st defendant's name had been brought in by *misjoinder* of parties; and consequently the suit against him should be dismissed.

(ii) Is it Material that the Article Complained of did not name the Plaintiff?

Learned counsel considered it material that the article complained of bore no express reference to the plaintiff by *name*; in counsel's words:

> "It didn't name the plaintiff anywhere. One cannot be defamed to [oneself]. Not one witness said he read the article and concluded it [referred to] the plaintiff. It was only the plaintiff who came to the conclusion [that the article referred to him]. That is not evidence of defamation."

Counsel contested the evidence of PW3, a personal friend of the plaintiff, as being inconsistent and untruthful.

PW3 was ***Peter Mwangi Ngatia***, a teacher at Inooro Secondary School in Nanyuki – a friend of the plaintiff's since their student days at Moi University (1990–1994). On *6th December 2003* PW3 had accompanied the plaintiff to Thompson's Falls Lodge in Nyahururu, where the plaintiff was attending the wedding of one ***Mr. Oseko***. PW3 said he had been in Nairobi on *5th December, 2003 (the material date)*, and he and the plaintiff had driven together in the *afternoon*, towards Nyeri and then on to Thompson's Falls Lodge.

It was PW3's testimony that he read the *Sunday Nation* newspaper with the article complained of on *12th December, 2003*, and thereafter contacted *the plaintiff;* in his words:

> "I called the plaintiff and told him on *12th December, 2003* that the story in the media fitted him very well. He told me he had been receiving many calls from others and I was not the first one to call. If it was published on *14th December, 2003* then I must have mixed up the dates – as I said I read it on 12th December 2003….. I did not have the facts ……*I thought it was written about him. I didn't know if these facts could fit another person*. But the activities reported, according to me, did not relate to the plaintiff. They didn't fit at all. I knew very well where the plaintiff was on the days in question. I thought the story fitted him – but I did not relate it to him."

The witness went on to say:

> "This is the plaintiff's *second term* [in Parliament]. [As at 12th December, 2003] he was serving the second term. Several paragraphs do not relate to him. The plaintiff *had not been in Parliament since 1992.* Two of the MPs referred to *were first-time MPs* and *the third had been in Parliament since 1992. None of the three instances fits the plaintiff.* For the MP who had been in Parliament since 1992 would be serving his *third term*."

(iii) Defence of Qualified Privilege

The main defence of the 1st and 2nd defendants was *qualified privilege*, which is well recognized at common law, and is further provided for in s.7 of the Defamation Act (Cap.36, Laws of Kenya). Section 7 (1) of the Act provides:

> ***"Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the schedule to this Act shall be privileged unless such publication is proved to be made with malice."***

Section 7(2) of the Act protects material published for the *public benefit;* it provides:

> ***"Nothing in this section shall be construed as protecting the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit."***

From the outset, counsel for the plaintiff had sought to shut out any possible notion that the 1st and 2nd defendants were dealing with a matter of "public concern", or of "public interest"; ***Mr. Oyatsi*** urged, at length, that these defendants had been moved by calculations of increased *sales*, and sheer *profiteering.* Counsel had urged that qualified privilege had no application to the publication complained of, and that the 1st and 2nd defendants must carry full liability for defamation.

It was learned counsel's submission that PW3's evidence did not show the article in question to have been written *of* and *concerning the plaintiff.* He denied that an immediate link could be perceived between the said article and the identity of the plaintiff; counsel urged that the perception that there was such a link was only arrived at –

> "*through an elaborate analysis of the article and picking parts and pieces of the story in*

isolation".

Such a *part-by-part treatment* of the article was contrary to law, counsel contended. Counsel relied on case law to support this argument: ***Jameel*** (***Mohammed***) and ***Another v. Wall Street Journal Europe Sprl*** [2006] 3WLR 642 (H.L). That case carries certain relevant passages –

(i) **per Lord Bingham of Cornhill** (at p. 53):

"It is of course true that the defence of qualified privilege must be considered with reference to the particular publication complained of as defamatory, and where a whole article or story is complained of no difficulty arises. But difficulty can arise where the complaint relates to one particular ingredient of a composite story, since it is then open to a plaintiff to contend, as in the present case, that the article could have been published without inclusion of the particular ingredient complained of. This may, in some instances, be a valid point. But consideration should be given to the thrust of the article which the publisher has published. If the thrust of the article is true, and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance of irresponsibility as it might if the whole thrust of the article is untrue."

(ii) *per* ***Lord Hoffman*** (at p. 658):

"The first question is whether the subject matter of the article was a matter of public interest. In answer to this question, I think that one should consider the article as a whole and not isolate the defamatory statement."

(iii) *per* ***Lord Hoffman*** (at p. 659):

"The thrust of the article as a whole was to inform the public that the Saudis were co-operating with the United States Treasury in monitoring accounts. It was a serious contribution in measured tone to a subject of very considerable importance."

(iv) *per* ***Lord Hoffman*** (at p. 659):

"If the publication is in the public interest, the duty and interest are taken to exist."

(v) *per* ***Lord Hoffman*** (at pp – 659- 60):

"If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be *part of the story*. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article. But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for *editorial judgment*. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. *The fact that the judge, with the advantage of leisure and hindsight, might have made a different decision should not destroy the defence.* That would make the publication of articles which are, *ex hipothesi*, in the public interest, too risky and would discourage investigative reporting" (emphasis supplied).

(vi) *per* ***Lord Hope of Craighead*** (at p.672):

"The duty-interest test based on the public's right to know, which lies at the heart of the

matter, maintains the essential elements of objectivity. ***Was there an interest or duty to publish the information and a corresponding interest or duty to receive it, having regard*** **[to]** ***its particular subject- matter*****? This provides the context within which, in any given case, the issue will be assessed. Context is important too when the standard is applied to each piece of information that the journalist wishes to publish. The question whether it has been satisfied will be assessed by looking to the story as a whole, not to each piece of information separated from its context**." (emphasis supplied).

(vii) *per* ***Lord Hope of Craighead*** (at pp. 672 – 673):

"I do not believe [it was intended in *Reynolds v. Times Newspapers* [1994] 4 ALL E.R. 609)…. that the public's right to know each piece of information in any given article should be assessed, piece by piece, without regard to the whole context. On the contrary, each piece of information will take its colour and its informative value from the context in which it is placed. A piece of information that, taken on its own, would be gratuitous can change its character entirely when its place in the article read as a whole is evaluated. The standard of responsible journalism respects the fact that it is the article as a whole that the journalist presents to the public. Weight will be given to the judgment of the editor in making the assessment, as it is the article as a whole that provides the context within which he performs his function as editor."

(viii) (***Lord Hope of Craighead*** also considered the relationship between the principle invoked on behalf of the first defendants herein, *freedom of expression*, and the reputation of the individual, at p. 673):

"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. [Counsel's] test which introduces the criterion of 'high-quality journalism especially if it is applied to each particular piece of information that is published, would contravene that principle" (emphasis supplied).

(viii) *per* ***Lord Scott of Foscote*** (at p.682):

"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…….[There] is other information the public interest of which 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."

Relying on the ***Jameel*** case, ***Mr. Karori*** contested the submissions made for the plaintiff, on the basis that those submissions rested on a wrong assumption: that the outcome of this case must "turn on whether the story published turns out to be *true or false."*

Is availability of defence of Qualified Privilege affected by the fact that Newspaper Sales generate Income?

Mr. Karori contested the contention made at the very beginning of the plaintiff's case, that the 1st and 2nd defendants had been motivated by the sheer profit-object, in publishing the article complained about. Counsel urged that newspapers "serve the useful purpose of keeping the public informed," and so they merit no punishment just because they sell their publications. To support this contention, counsel relied on the persuasive English authority, **Loutchansky v. Times Newspapers Ltd. & Others [**2001] EWCA Civ. 1805, in which the following pertinent passages appear –

(i) (at p.6):

> ***"At the end of the day the court has to ask itself the single question whether in all the circumstances the 'duty-interest test, or the right-to-know test' has been satisfied so that qualified privilege attaches. If, of course, it does, then, unless the claimant can prove malice, the defamatory publication is protected irrespective of whether it turns out to be true or false."***

(ii) (at p. 8):

> ***"Once the publication of a particular article is held to be in the public interest on the basis of the public's right to know, can the privilege really be lost because the journalist (or editor?) had the dominant motive of injuring the claimant rather than fulfilling his journalistic duty? It is a surprising thought".***

Even more squarely on the point, counsel relied on the English High Court decision, ***Manson v. Associated Newspapers Ltd*** [1965] 2 All E.R. 954 in which it was held (***Widgery, J.***) that (pp. 956 – 957):

> ***"……the mere fact that a newspaper is run for profit and that everything published in the newspaper is published, in a sense, with a view to profit, does not automatically bring newspaper defendants into the category of those who may have to pay exemplary damages on the footing that what they have done has been done with a view to profit. It is perfectly clear that a newspaper which reports news in an ordinary run-of-the-mill way and happens to make a mistake in its report is not to be mulcted in exemplary damages merely because what it does is done with a view to profit."***

The Claim of Outrage in the Reporting, and the Question whether there Was a Reputation capable of being injured

Whereas learned counsel ***Mr. Oyatsi*** devoted a good deal of his submissions to depicting outrage in the alleged vilification of the plaintiff's reputation, ***Mr. Karori*** submitted that such a picture did not emerge from the evidence tendered in Court. What emerged, by contrast, counsel urged, was that the plaintiff possessed not a reputation so good, that the article complained of would have lowered it in the perception of ordinary, right-thinking persons. In the words of counsel (and as emerges from the evidence) –

> *"he confirmed that he had intimate relations with two ladies not married to him. He confirmed that his conduct in that regard contradicted [the principle of taking] care, in the face of [the HIV/AIDS pandemic]. That touched on conduct and reputation."*

Mr. Karori submitted that the words in the article complained of were, indeed, in the public interest, and that the article had several public- interest purposes –

> (i) it exposed the fact that students were not in class as expected, but were instead engaged in risky sexual behaviour – and this information was important to parents, guardians and other interested persons;
>
> (ii) it exposed the fact that businessmen were engaging in risky sexual behaviour and were in that respect, interacting with student partners and others – and this was useful information for the general public that had to deal with such prominent business persons;
>
> (iii) it exposed the fact that politicians were not always leading an exemplary life-style, as they were engaged in such sexual behaviour as might spread the HIV/AIDS infection;
>
> (iv) it exposed the dangers of prostitution, as a medium in the spread of HIV/AIDS in the country.

Counsel urged that these are "matters of clear public interest", and he relied on the ***Jameel*** case (*op.cit*), to support that proposition.

3. Submissions for 3rd Defendant.

(i) Strict Liability is not Tenable

The 3rd defendant's defence is built around the persuasive authority of the American case, ***New York Times v. Sullivan,*** 376 U.S. 254 (1964), and on the basis of that case and others (notably ***Jameel*** (***Mohammed***) and ***Another v. Wall Street Journal Europe Sprl,*** *op.cit.),* learned counsel ***Dr. Kuria*** urged that "a publisher of an inaccurate statement is not liable where he has acted responsibly, malice is irrelevant"; he submits that "in this particular case all the information which concerned matters of public interest, if not most of it, was accurate and if a part of it was inaccurate the defendants are not liable". Counsel contended that the plaintiff's case is partly based on an erroneous view of the law, and a "misconception of the role of the press in a market or democratic society."

Counsel urged that new jurisprudence from a considerable number of countries (USA, European Countries, Australia, India, South Africa, New Zealand, Zambia, England) has established a certain defence to suits in defamation, where the defendant is part of the *media*:

> "the press plays a vital role [in society] and, for this reason, there has emerged...the defence that if the press, in the course of practising 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,*** whilst in England it is termed ***Reynolds v. Times Newspaper Ltd [***2001] 2 A.C. 127 privilege or defence."

Such was also, ***Dr. Kuria*** urged, the principle contained in the Supreme Court of Appeal of South Africa decision in ***National Media Ltd. & Three Others v. Bogoshi Nthendi Morole,*** Case No. 579 of 1996. The learned Judges, in that case, thus held (pp.25-26):

> **"If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*. Much has been written about the 'chilling' effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error….Strict liability has moreover been rejected by the Supreme Court of the United States of America (*Gertz v. Robert Welch*), the German Federal Constitutional Court (BVerf Ge 12, 113), the European Court of Human Rights (*Lingens v. Austria* (1986) 8EHRR 407), the courts in the Netherlands ….,the English Court of Appeal, the High Court of Australia …, the High Court of New Zealand (*Lange v. Atkinson and Australian Consolidated Press NZ Ltd*, 1997 (2) NCLR 22 …."**

(ii) Does the Constitution of Kenya give "Constitutional Privilege" as in Sullivan v. New York Times?

It is contended for the 3rd defendant that "section 79 of the Constitution embodies the rule in ***New York Times v. Sullivan*** which protects the publication of material that is in the public interest."

Section 79 of the Constitution of Kenya is concerned with freedom of expression, which it protects thus:

> ***"(i) 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."***

This provision has a proviso in s.79 (2) (b) which states:

> ***"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 –***

…….

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, posts, wireless broadcasting or television …."

Subject to the said qualification, the Constitution guarantees all persons freedom of expression; and although no express mention of the *media* is made, there is no doubt at all, in my opinion, that the safeguarded exercise of this freedom is recognized to be *purveyed by the media.*

So the third defendant, as part of the media, claims to be protected under the principle of the Constitution which is urged to be akin to that in ***New York Times v. Sullivan,*** and more so as the 3rd defendant had, prior to publication, "*made investigations*"; therefore, the 3rd defendant *did* practice "responsible journalism".

(iii) New York Times v. Sullivan and its Principle

New York Times v. Sullivan, which carries the main plank in the 3rd defendant's case, has been considered in the learned work***, Prosser and Keeton on Torts*** (5th ed.), from which the following paragraphs may be set out (at p. 805):

"The constitutional privilege, it has been described, has abolished the common law principle that a public medium – such as (a) publisher of a book, magazine, or newspaper, and (b) television or radio broadcaster – publishes at his peril, and substitutes therefor the requirement that in every case, fault is a prerequisite to liability. The common law rule subjecting the media to liability except when there was either a qualified or absolute privilege to publish, or proof by the defendant- publisher of the truth of all discreditable statements does not afford adequate protection to the First Amendment guarantee of freedom of the press.

"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 a 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."

On the ***Sullivan*** principles, ***Dr. Kuria*** submitted that the instant matter should be resolved against the plaintiff – 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".

Counsel submitted that the evidence of defence witnesses, ***Mr. Igambi*** and ***Mr. Odindo*** had shown that on 14th December, 2003 the media, through the statements complained of, was "holding the NARC Government accountable for pledges which it had made as regards gender equality, good governance, the high rate of the spread of HIV/AIDS, and the upholding of the rule of law".

Dr. Kuria attributed eminent merit to the ***Sullivan*** case, and sought to show how the principle in that case has been adopted elsewhere; and in point here is the High Court of Australia decision in ***Theophanous v. The Herald and Weekly Times Ltd and Another*** [1994]3 LRC 369 – in which the plaintiff, in a

defamation case, was a Member of Parliament, just as is the position in the instant case. The pertinent holding in that case which was decided by a Bench of seven Judges, may be set out here –

[at pp.369 – 70: majority position] –

> ***"The first issue was the scope of the implied freedom of communication with respect to discussion of government and political matters…The implied freedom was not limited to communication between the electors and the elected. Because the system of representative government depended for its efficacy on the free flow of information and ideas and debate, the freedom extended to all those who participated in political discussion. Thus the Constitution better equipped the elected to make decisions and the electors to make choices and thereby enhanced the efficacy of representative of government. Criticism of the views, performance and capacity of a Member of Parliament and of the Member's fitness for public office lay at the very centre of political discussion and therefore the implied freedom of communication in relation to such discussion extended to the publication of matter concerning Members of Parliament relating to the performance of their duties and their suitability for parliamentary office. 'Political discussion' thus embraced discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office."***

Learned counsel urged that an *expansion to the scope of qualified privilege* as a defence to a defamation suit, was now well recognized and was already captured in works of scholarship. He relied in this respect, on ***Gatley on Libel and Slander*** 10th ed. by ***P. Milmo*** and ***W.V.H. Rogers*** (*London: Sweet and Maxwell,* 2004). The following passage appears in that work (pp.451 – 452):

> ***"Until the very end of the twentieth century there was in England (and, indeed, in the rest of the Commonwealth) a strong reluctance to extend the protection of qualified privilege to publications in the news media. The fundamental principle was that a statement was protected by privilege only if the publication of it was to persons who had a proper interest or duty in the matter with which it was concerned, and the public as a whole was not generally regarded as having a relevant interest or duty. The media defendant [or other defendant who causes his statement to be published in that way) was in no different position from anyone else and had to show the relevant reciprocity of duty and interest. Such a duty only arose where it is in the interest of the public that the publication should be made and will not arise simply because the information appears to be of legitimate*** **public interest [*London Artists v. Litter* [1968] I WLR 607 (*Cantley, J.* at p. 619)]. A privilege for publication to the world at large was, in English law, the exception rather than the rule, even if the subject-matter was politics or public affairs. Nor was there any defence of 'fair information upon a matter of public interest' [*Blackshaw v. Lord* [1984] Q.B. 1, CA], still less of 'fair attributed report' of what someone else has stated or of 'neutral reportage'. "**

Although there had been certain qualifications to the courts' long-running approach to defamation cases, new horizons of perception, especially on *human rights* issues, led to the landmark decision of the English House of Lords in ***Reynolds v. Times Newspapers Ltd*** [2001] 2AC 127, HL. In this case the position was taken, as is depicted in ***Gatley (****op. cit.*, p.455), thus:

> ***"Both Lord Nicholls and Lord Steyn referred to the fact that as the right of freedom of expression was shortly to be buttressed by the implementation of the [Human Rights Act, 1998], it was common ground that in considering the issues the house should proceed on the basis of the reality that the Act would soon be in force and for Lord Steyn it was a 'new landscape' in which the 'starting point is now the right of freedom of expression, a right based on a constitutional or higher-legal-order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need. These are fundamental principles governing the balance to be struck between freedom of expression and defamation' [p.208]."***

Dr. Kuria urged that the ***Sullivan*** principle was now well established in many jurisdictions. In a decision of the South African Constitutional Court, ***Khumalo and Others v. Holomisa*** (CCT 53/01) [2002] ZACC 12; 2002 (5) S.A.401; 2002 (8) BCLR 771 (14 June 2002) it had been held (pp.13 – 14):

> ***"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 imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society …"***

(iv) Applying the Sullivan Principles to the Evidence

Against the background of principle marked by the cases above-considered, learned counsel made certain submissions in respect of the 3rd defendant's position.

Counsel urged that the plaintiff had wrongly taken specific statements in the publication complained of, out of context. He urged that ***Duncan Karia,*** Executive officer of the City Court, had produced in Court records showing that there were Police swoops conducted on Koinange Street, on *5th December, 2003* and *9th December, 2003* (the material date) and the prostitutes arrested then, were charged in Court and they pleaded guilty; and this fact had been correctly reported by the 2nd defendant in the *Sunday Nation* of *14th December, 2003*. From the Court file, it was clear there were other similar Police swoops on *10th a*nd *13th December, 2003*, and the ladies arrested were charged with the same offence, under the Nairobi City Council Bye-laws, and they pleaded guilty. All this, counsel noted, was prior to the 2nd defendant's said publication of *14th December, 2003*. This showed, counsel urged, that "the defendants had checked their facts before publishing the statements complained of".

Counsel noted the content of the testimony of another defence witness, ***Chief Inspector Patrick Oduma***, the OCS at the Nairobi Central Police Station. This witness had produced an extract from the Police Station's Occurrence Book showing that, on the night of *5th – 6th December, 2003* some 46 ladies were arrested in a Police Swoop on prostitutes, and were held at the Central Police Station, and later charged in Court. The witness testified that such swoops were carried out frequently, because prostitutes were a vector of HIV/AIDS, and they were in the habit of plying their trade on certain particular city streets: Koinange Street; Muindi Mbingu Street; Kenyatta Avenue; City Hall Way; Wabera Street.

The witness testified that he had seen *no parliamentarian* among those arrested during the said Police Swoops; he said it had proved *easier to arrest women*, than men, on such occasions. In his words:

> *"We have never charged any man. The behaviour of the ladies shows their [preoccupation] so easily; but it is difficult to identify a man."*

Dr. Kuria submitted that the pattern of arrests, in the Police swoops on prostitutes, "manifests the Police bias against women; the women's customers are men and there can be no reason for not arresting men who are found with them."

A defence witness, ***Herman Igambi*** produced the *NARC Government manifesto* used in the general elections of 2002, and stated that the press, to which he belonged, held the *Government* responsible for the discharge of its stated commitments *"to fight against HIV/AIDS and corruption"*; and thus when he read the 2nd defendant's publication of *14th December, 2003* he, as Editorial Director of the 3rd defendant, "sent journalists to *verify the information* contained in the [*Sunday Nation*], and [he]……*decided to*

broadcast the statement complained of". ***Mr. Igambi*** testified that his employer (3rd defendant) operates under considerable time-constraints, as the *investigation process* is to be conducted expeditiously. He explained how the decision to air the broadcasts complained of was arrived at:

> *"After reading [the Sunday Nation report], we as senior editors felt there could be truth in it, as this matter came from the quality press. We sent reporters out to various media houses, and to the Police station, to verify. The team from the Police station reported that it was shown in the Occurrence Book there had been a swoop on Koinange Street. We decided to carry one paragraph of the story. Coverage was on both radio and television – and the names of [Minister]* ***Mwakwere,*** *[Assistant Minister]* ***Kiunjuri*** *and [Member of Parliament]* ***Jakoyo Midiwo*** *were confirmed."*

Learned counsel submitted that as the publication by the 3rd defendant *rested on the earlier newspaper publication by 2nd defendant*, and the essence of the defence put up by 1st and 2nd defendant is a ***Sullivan*** – type defence, this very defence will also sustain the 3rd defendant's defence.

It was urged that the 3rd defendant, in making the broadcast statement complained of –

> (a) was discharging its role to hold the NARC Government accountable for the promises which it had made to the electorate during the general election campaigns of 2002;
>
> (b) included in its broadcast information which *defamed the plaintiff, but which was justifiable;*
>
> (c) acted on information which its journalists obtained from Police stations on 14th December, 2003; the 3rd defendant acted on the basis that 2nd defendant was a quality newspaper upon whose reporting 3rd defendant could rely."

Learned counsel contended that the content of the broadcast statement, released by the 3rd defendant, was *the truth*; and he urged that this be inferred also from the gender-biassed practices of the Police, in respect of which there was evidence. Counsel urged:

> *"The evidence of DW2 brings out the practice of the Police during swoops – to arrest and charge women and never men! This bias is supported by the information….. which came out in the article complained of. One hundred and two girls were arrested whilst businessmen and three politicians were released, and not charged! …..The reason…..the Occurrence Book at the Central Police Station did not contain names of businessmen and politicians caught in the swoop on 5th December 2003 is that the Police practices gender discrimination in the course of swoops."*

The foregoing point touches on a *missing* evidentiary link which is potentially significant, but which learned counsel has subjected to a defensive legal principle, founded on the ***Sullivan*** case. This point is thus made y counsel:

> *"According to the information which the defendants had, the plaintiff was one of the three Members of Parliament who were found in the streets on 5th December, 2003 but benefited from the gender bias which the Police have against women engaging in prostitution. Consequently, he was released and there was, therefore, no evidence of his involvement. If indeed he was not in the streets, [3rd defendant] believed, in view of the facts established, that…. he was one of them and, consequently, according to the* ***Sullivan Reynolds*** *privilege, [3rd defendant] is not liable."*

(v) Is the Plaintiff's Case devoid of a legal Foundation?

Dr. Kuria contended that the plaintiff's case was misguided, as the law upon which it rested was outdated. Counsel urged that a statement is not defamatory if it has a "lawful excuse" – and the defendants had offered the lawful excuse required. He urged that the ***Sullivan*** principle be applied – and the effect would be that liability attaches only where a defendant has not acted *responsibly*. Counsel

submitted that the 3rd defendant, in this case, "has acted responsibly."

Counsel submitted that the basis of the *defamation law in Kenya* is: (a) the *Constitution, s.79;* (b) the *Defamation Act* (Cap.36, Laws of Kenya); (c) the *common law* which applies by virtue of s.3(1) of the Judicature Act (Cap.8. Laws of Kenya). Section 3(1) of the Judicature Act requires that the common law when applied, is to comply with the principle that its application is to be dictated by the *circumstances of Kenya and its inhabitants.* The equivalent of that qualification is found in the case law of several countries; in the case of South Africa, for instance, the ***Sullivan*** principle has been applied to defamation cases. Counsel submitted that the *result is the same,* whether a defamation claim is resolved on the basis of a proper application of the common law, or of an interpretation of the Constitution: "the approach of the courts... is to extend or develop the common law and proceed on the view that, as developed, the common law is in conformity with the Constitution". Counsel urged that the plaintiff's view of the public role of the press should be rejected, as "the plaintiff mocks the role of the press in a democratic society" by his line and mode of claim. Counsel urged that, since the collapse of the ideology of Communism a couple of decades ago, the orientation of society is of the " market" type, a "society in which the good of the individual is promoted partly through public…. and private institutions like media houses which are represented by the defendants in this suit. The contemporary role of the press in society, counsel submitted, is well depicted in case law that contradicts the main thread of the plaintiff's case, the typical examples being the ***Sullivan*** case; the ***Theophanous*** case; ***Reynolds v. Times Newspapers Ltd*** [2001] A.C. 127, H.L.; ***Jameel & Others v. Wall Street Journal*** [2006] 4 All E.R. 1296; ***Bonnick v. Morris and Others*** [2003] 1 A.C. 300 (P.C.) (from Jamaica).

In the ***Jameel*** case, counsel urged, the English House of Lords had remarked the *departure* of the new jurisprudence on the tort of defamation, from the *status quo ante*. In that case ***Lord Scott of Foscote*** had set out the operative principle of the *past,* from ***Adam v. Ward*** [1917] A.C. 309 (at p.334 – *per* ***Lord Atkinson***):

> ***"a privileged occasion is.….an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."***

But the learned Judge then stated that such a position had now proved to be *too restrictive* for the modern-day reality; in the Judge's words:

> **"My Lords, however accurate Lord Atkinson's statement of law may be where the defamatory communication has been made to a relatively limited number of people, *it does not, as it seems to me, cater for the role of the press,* at the end of [the] twentieth century and the beginning of the twenty-first, in reporting on matters of public importance. Newspapers address their contents to the public at large. Some, like the *Wall Street Journal Europe*, have an international readership, but the relationship between a newspaper and the members of the public who choose to read it is essentially the same, whether the readership be international or local. The publication is to the public at large. *To insist on a reciprocity of duty and interest between the publisher of a newspaper and the reader of the newspaper who may be in New York, London, Rome, or anywhere, either makes the requirement of reciprocity meaningless or deprives any defamatory statement in the paper, no matter how important as a matter of public interest the content of the statement may be, of the possibility of the protection of qualified privilege.* It was this undesirable rigidity of the law of qualified privilege that, to my mind, the seminal judgment of *Lord Nicholls of Birkenhead* in *Reynolds* [1999]4 ALL E.R. 609, [2001] 2 A.C. 127 was designed to meet"** [emphasis's supplied].

Learned counsel submitted that the new line of cases had affirmed *responsible journalism* as the yardstick of the fair balance between freedom of expression on matters of public concern, and the reputation of individuals.

The plaintiff had relied on a line of authorities which included a recent decision of the High Court**,**

Amrital Bhagwanji Shah v. The Standard Ltd and Another, Nairobi High Court Civil Case No. 1073 of 2004. This line of authorities**, *Dr. Kuria*** urged, was not in keeping with the current position in jurisprudence; and he submitted that the following point in the plaintiff's submissions be rejected:

> *"The defendants are in no better position. Just like the above entrepreneurs, [HIV/AIDS] provides them with an opportunity to make money and profit from publication and sale of stories such as the one that forms the subject-matter of this litigation."*

Counsel urged that the plaintiff's position that media owners were "greedy seekers after profit," and "wicked investors of calumnies", had no basis in the contemporary understanding of law.

4. Plaintiff's Reply to the Defence Cases

Learned counsel for the plaintiff recalls certain matters arising, in the light of the 3rd defendant's case: (a) that it is admitted the 3rd defendant had identified the plaintiff as the person who had been arrested, along with two other parliamentarians, in the Police swoop on prostitutes, on Koinange Street, on the material night; (b) that, in point of fact, the plaintiff had not been on Koinange street on the material night; (c) that the plaintiff was not arrested by the Police, during the Police swoop on prostitutes aforesaid.

Counsel urged that the allegations made by the 3rd defendant, of and about the plaintiff, were false; and those allegations are as follows:

> "Investigations of the 3rd defendant show that the plaintiff, accompanied by one ***Nderitu*** picked up two ladies from Nairobi who were not their spouses and drove in a green Land Cruiser to Thompson Falls Lodge in Nyahururu. The Plaintiff and the said ***Mr. Nderitu*** booked in the hotel two double rooms ….. The plaintiff spent the night with one of the women whilst ***Mr. Nderitu*** did the same with the other woman. The 3rd defendant contends that the public are entitled to know of this information about the plaintiff."

Mr. Oyatsi submitted that certain pleadings in the defence cases had not been proved: (a) that politicians and students were engaged in acts of prostitution along Koinange Street; (b) that politicians and students were arrested along Koinange Street while engaging in acts of prostitution on the night of 5th December, 2003 and charged in Court, as reported by the defendants.

Learned counsel returned to qualified privilege, which is the main line of defence adopted by all the defendants. He urged that "the defence of qualified privilege or any other defence for that matter must be based on facts to prove it…"

The foregoing contention by counsel, by equating *qualified privilege* as a defence to *"any other defence for that matter,"* quite clearly, in my opinion, does not reckon with *the new line of defence* proposed by the defendants, and, in particular, by the 3rd defendant. For in that defence, the search for a "factual foundation" to an impugned publication is *not always* accorded the greatest importance – so long, only, as the reportage can claim to have been made in exercise of "responsible journalism". Qualified privilege, in this sense, has been elevated above the conventional common law apprehension, that a publication dutifully made in the public interest, and without malice, is to be accorded protection; elevated to assume the level of a *democratic* and *constitutional* principle, where the public interest has been served by the publication in question. Qualified privilege, in the context of the new defence to a suit in defamation, in my opinion, *reposes in the judge a wider discretion* than had been recognized in the past: to weigh the relevant issues, and to draw a judicious balance between the claims of the democratic cause, and of the public interest, as against the rights of the complainant to keep an unsullied reputation. It is clear to me that the growth-path of the law, and the consideration of contemporary developments, must stand on the side of such a progressive reformulation of the defences to claims in the tort of defamation.

On that principle, the submissions made for the plaintiff, which clearly lay emphasis on just *fact or falsehood*, in this particular regard, have missed this fundamental aspect of the governing law.

Mr. Oyatsi submitted that the 1st and 2nd defendants could only prove that there had been a swoop on prostitutes, on the material day – and that this fact, by itself, could not sustain a defence of qualified privilege.

It was learned counsel's submission that qualified privilege, as defined in s.7 of the Defamation Act (Cap. 36, Laws of Kenya), did not apply to the instant case, because the 1st and 2nd defendants had failed to adduce evidence to prove that their allegations of and concerning the plaintiff, *were true*.

Mr. Oyatsi relied on the English Court of Appeal decision in ***Blackshaw v. Lord and Another*** [1983] 2 All E.R. 311, in which the public interest, in relation to the publication of defamatory matter, was held to be capable of variability (p.327, *per* ***Stephenson, L.J.***):

> ***"There may be extreme cases where the urgency of communicating a warning is so great, or the source of information so reliable, that publication of suspicion or speculation is justified; for example, where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs….."***

Such, counsel urged, was *not* the case in the instant matter; "it is clear beyond reasonable doubt that the evidence or the facts established by the 1st and 2nd defendants cannot sustain the common law defence of qualified privilege even remotely".

Mr. Oyatsi submitted that the 1st and 2nd defendants, in their publication which is complained of, must have had in mind the plaintiff even without any mention of names; because otherwise, *how did the 3rd defendant come up with the plaintiff's name*? In counsel's words:

> "the 3rd defendant, a media house, admits that it relied on the description [in the] article published by the 1st and 2nd defendants to reach the conclusion that the plaintiff was one of the politicians referred to in the 1st and 2nd defendants' article". Counsel laid blame squarely at the doors of the 1st and 2nd defendants, because "the plaintiff has also produced *reports by other media houses* such as *The Standard* and *The Independent* which prove as a fact that the said media houses perceived the article published by the 1st and 2nd defendants as referring to the Plaintiff." Defamation by the 1st and 2nd defendants, counsel urged, is, therefore, *proved; "it is not what the defendants believe; it is what the general public perceive"*.

Mr. Oyatsi urged that the new line of defence represented by the ***Sullivan*** case could not avail the defendants; in his words:

> *"This was not a case of responsible journalism or the discharge of an obligation by [the] press, media or other publisher to communicate important information on matters of public interest. It was simply a case of... conduct calculated by the defendants to make a profit for themselves."*

Learned counsel submitted that the new line of defence to a defamation claim *does not apply in Kenya*, in respect of qualified privilege which is provided for in the Defamation Act (Cap.36, Laws of Kenya). He further submitted that even if the new line of defence applied in Kenya, *it would not cover the facts of this case*.

F. FURTHER ASSESSMENT OF LAW AND EVIDENCE

(a) The Analytical Framework

Although I believe my lines of analysis have emerged already, they do not yet point out the outcome which this judgment will bring, at the end. This concluding analysis will now show unambiguously the pattern of liability which emerges, on the basis of the evidence and the law. This analysis is set out under the following headings:

(a) What, in law, is the position of the 1st defendant?

(b) Did the publications complained of, and with reference to the 1st and 2nd defendants on the one hand, and to the 3rd defendant on the other, refer whether directly or by innuendo, to the plaintiff?

(c) Were the said publications, and in relation to the 1st and 2nd defendants on the one hand, and the 3rd defendant on the other hand, true or false?

(d) Had the three defendants conducted proper investigations on fact, before publishing the publications complained of?

(e) Did the plaintiff have a reputation that merited protection under the tort of defamation? (f) Was the law of qualified privilege applicable in the instant case?

(g) Who is, and who is not, the ordinary reasonable person to be the standard for determining whether or not defamation was committed, in the instant case?

(h) Is it material that none of the defendants tendered an apology for the alleged defamation?

(i) Were the publications complained of covered under s.79 of the Constitution of Kenya, or under contemporary theory that upholds democratic principles and the broad public interest?

(j) Is this a case in which a plaintiff holding public office has been overly intolerant, in relation to criticism of his occupancy of such an office?

(k) Can it be said that the defendants, by the publications complained of, had conducted responsible journalism?

(l) Is it the case, as alleged by the plaintiff, that the publication complained of was only motivated by greed for profits?

(b) What, in Law, is the Position of 1st Defendant

The 1st defendant has been sued jointly with the 2nd defendant, the direct publisher of the *Sunday Nation* publication of *14th December, 2003* which has raised the claim herein. Although the 1st defendant is described in the pleadings as Managing Editor of the 2nd defendant, learned counsel ***Mr. Karori*** has urged that the 1st defendant is only a *director,* and should, therefore, not have been made a party to the suit. The exact role of a *Managing Editor* was not the subject of testimony during the trial, and this issue, therefore, remains unclear. I do notice that an English Court, in ***Loutchansky v. Times Newspapers & Others*** [2001] EWCA Civ.1805, left open the question as to the possible liability of an *editor* in a defamation suit brought against a newspaper. On that basis I will hold that no irregularity is necessarily committed, where an editor is named as a co-defendant, in a defamation suit against a newspaper. Accordingly, I will reject the contention made by counsel for the 1st two defendants, on this point.

(c) Did the Publications complained of, and with reference to 1st, 2nd and 3rd Defendants, refer in any way to the Plaintiff?

The evidence is clear, that the *Sunday Nation* article of 14th December, 2003 did not mention the *name* of the plaintiff, in connection with the Police swoop on prostitutes, of the night *of 5th December, 2003*. So, if *direct mention of names* were the basis of the suit in defamation, then on such a criterion alone, neither the first nor the second defendant could be said to have defamed the plaintiff.

But on that criterion if taken by itself, then there would be no doubt at all, that the 3rd defendant ***did***

defame the plaintiff. Even from the 3rd defendant's pleadings, and from its testimonies and submissions, this defendant's publication had referred to the plaintiff *by name*, as a parliamentarian who was arrested in the Police swoop aforementioned. Even though positive proof of the defence allegation was not placed before this Court, the 3rd defendant's position was, in the first place, that the report was the *truth*, even though the 3rd defendant would also claim protection under *qualified privilege*, as well as *under constitutional principles* that protect the democratic cause, and the entitlement of the press to debate vigorously and to publish on matters of *public interest.* On this point the 3rd defendant was relying on the testimony of its witness, ***Chief Inspector Patrick Oduma,*** who said that, on prostitution matters, the practice had been to arrest and charge the prostitutes, but not their *male consorts*. The clear inference running through the 3rd defendants case, is that "102 girls were arrested whilst businessmen and *three politicians* were released, and not charged" – and of the three politicians, one ***was*** the plaintiff.

I would hold that such a conjectural inference on evidence does not *show* that indeed, the plaintiff was one of those arrested in the Police swoop on Koinange Street on the night of 5th December, 2003. The conjecture, besides, tends to be negated by the evidence of PW3, ***Peter Mwangi Ngatia,*** who testified that he and the plaintiff had already driven off from Nairobi in the late afternoon of 5th December, 2003. So long as PW3's evidence on that point is not effectively met, with more credible evidence, the procedure of trial dictates the finding, which I hereby make, that the plaintiff was *not* found along Koinange Street on the night of *5th December, 2003* – and therefore, he was ***not*** one of the persons who were arrested during the Police swoop aforementioned.

For the 3rd defendant, therefore, I hold that the defence of *justification* fails; and I hold that it was a *false account* which the 3rd defendant published – that the plaintiff was among those arrested during the Police swoop on prostitutes, on the material date.

Counsel for the 3rd defendant submitted that this defendant's publications complained of were properly investigated, as the 3rd defendant had *relied on 2nd defendant's publication* of 14th December, 2003 – and that publication had a series of other pieces that validated it; ***Duncan Karia***, the Executive Officer of the City Court, had tendered evidence that there had been Police swoops on prostitutes on *5th December, 2003* and 9th December, 2003, and the prostitutes had been charged in Court; and then soon thereafter, on *14th December, 2003* the 1st and 2nd defendants put up one of the publications complained of, in reaction to the Police swoops on Koinange Street.

While not making reference to the plaintiff by name, did the 1st and 2nd defendants make any *innuendo* which pointed to the plaintiff as the person contemplated, in their publication of 14th December, 2003?

The 1st and 2nd defendants have denied that any innuendo alluding to the plaintiff was created in their article published on 14th December, 2003; or that the said article contained any description or pointers that were understood, or that were capable of being understood by reasonable members of the public, as referring to *the plaintiff*.

As already noted, the tort of defamation "consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it" (***Lord Loreburn, L.C.*** in ***E. Hulton & Co. v. Jones*** [1908 – 1910] All E.R. (Rep.) 29, at p. 47).

PW3, ***Peter Mwangi Ngatia*** is the only witness who said that as soon as he read the 1st and 2nd defendant's article of 14th December, 2003 it was *plain to him* that this article was talking of the *plaintiff*, and was lowering the plaintiff's esteem in the eye of the reader. The evidence of this witness, however, is *contradictory*, for he also said that the plaintiff, in certain respects, *did not fit the description* of the nameless parliamentarian referred to in the publication. Clearly, a number of the pointers in the said article had *nothing* at all to do with the plaintiff herein. And besides, only an *elaborate, deliberate analysis* of the attributes of the individual 222 Members of the Kenyan Parliament, later led to a claim that the person referred to in the said article was the plaintiff.

So, how could an *ordinary reasonable member of the public* reading the said article, have straightaway perceived it as referring to the plaintiff? If even the plaintiff's crucial witness, who said he had all along been in the plaintiff's company, could give no clear account on how he perceived the article as referring to the plaintiff, *on what basis would uninformed, but right-thinking members of the public, come to associate the plaintiff with that publication?* PW3, a University graduate and a secondary school teacher, must have known there were 222 parliamentarians in Kenya. How, in the course of normal human behaviour, could he have immediately thought that an article such as the one complained of, did not refer to any of the 221 parliamentarians other than the plaintiff herein? Such a scenario, I hold, has no direct connecting link to the *plaintiff* at all, unless the witness himself had some *special reason* for the suspicion which he was harbouring; but since any possible suspicion, in that regard, was not made the subject of *testimony*, this Court must treat it as purely private, not to be brought into account in this public forum, in making a claim for remedies; for, had any such unidentified link been ventilated in Court it would have been the subject of *cross-examination*, and therefore the Court would have been able to establish the relevant fact. Without that fact, this Court cannot serve as a forum for a claim made against the party concerned.

I hold that the *Sunday Nation* article of 14th December, 2003 bore no innuendo that linked the plaintiff to the facts alleged; and on this I resolve the relationship between the 1st and 2nd defendants on the one hand, and the plaintiff on the other, with regard to the plaintiff's claim. And this leaves the position of the *3rd defendant* as the outstanding question. If I were to be wrong on this point, as a matter of law, then the following analysis, which focuses upon the position of 3rd defendant, would partly cover also any remaining issue in relation to the 1st and 2nd defendants.

Learned counsel ***Mr. Oyatsi*** insisted on addressing the cases of the first two defendants, and of the 3rd defendant *in the same way* – but I have now held that this cannot be done. Counsel considered the two sets of cases to be mutually-proving; the fact that the 3rd defendant's publications were *ex facie* defamatory, to be probative of tortious action on the part of the 1st and 2nd defendants.

That contention runs in tandem with the argument that the fact that several media houses did run publication proceeding from the fact-foundation set by the 1st and 2nd defendants, *proves* that "the ordinary reasonable person" had perceived the 1st and 2nd defendants' publication as referring to *the plaintiff* herein. But this is denied by the 1st and 2nd defendants, who contend that their publication had no connection with the publications of the 3rd defendant, because the 3rd defendant stated it acted on *investigations* which it had itself conducted; and besides, that the 1st and 2nd defendants had no control over decision-making by other media houses.

The position taken on this point by the 1st and 2nd defendants is, in my opinion, eminently rational. I would, besides, state that the test of the opinion of the "ordinary reasonable person" as the measure of what is defamatory, essentially refers to the thinking and actions of *ordinary people* in the social set-up – quite distinct from the arrangements, decisions, calculations and strategies of *corporate entities*, such as *media houses* and *conglomerates* such as may pick up a story and generate more information or illustration about it. Such commercial entities do not form "opinions" in the same way as men and women in their social lives. I hold, therefore, that Royal Media Services Ltd, *The Standard* and *The Independent*, which put up publications following the *Sunday Nation* publication of 14th December, 2003 were not the "ordinary reasonable person" forming the perception that the *plaintiff* had been defamed. And, therefore, what these papers published does not show that the said *Sunday Nation* publication was referring to *the plaintiff* by innuendo.

(d) Raising Defences where Libel is Proved: The 3rd Defendant's Position

It is clear that the 3rd defendant, in its publications, named the plaintiff as a Member of Parliament and Assistant Minister of the Government who, on the *night* of *5th December, 2003* (the material date) had been arrested along with other parliamentarians and businessmen in a chase for prostitutes, along

Koinange Street in Nairobi. From the partial admissions of the 3rd defendant, and from the evidence adduced, it is the case that the said publications *defamed* the plaintiff; they were libellous; and on this account, the plaintiff is seeking damages.

But the 3rd defendant even when found to have published libellous material, of and concerning the plaintiff, has taken *certain lines of defence.* The rest of this analysis is concerned with those defences.

(e) Was 3rd Defendant's Defamatory Publication covered by Constitutional Principles and by Claims of the Public Interest?

As already noted, s.79 of the Constitution of Kenya guarantees the *freedom of expression* – "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) …" This freedom, so broadly defined, points to the popular, as well as the private context of social life; and as regards the popular context, it is obvious that the *media*, as the agent and the purveyor of mass information, must be involved. No doubt, therefore, section 79 of the Constitution presupposes the existence of an *effective* and *vibrant press.* Since the press has its professional methods of work, and as it interplays so much with *the private domain*, in relation to the pursuit and publication of information, the press must exercise much *responsibility,* and ensure it does not unreasonably injure private reputations as it seeks to inform the *public* at large. This is the principle now well established in the new line of cases that have set the pace in defamation jurisprudence, and which it is not possible to overlook: ***New York Times v. Sullivan***, 376 U.S. 254 (1964); ***Reynolds v. Times Newspaper Ltd*** [2001] 2A.C. 127; ***Theophanous v. The Herald and Weekly Times Ltd 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 & Others v. Wall Street Journal*** [2006] 4 All E.R. 1296; ***Bonnick v. Morris and Others*** [2003] 1 A C. 300 (PC).

Although learned counsel, ***Mr. Oyatsi*** urged that this approach to construction in the law of defamation should be rejected, so that claims of privilege are made only on the terms of s.7 of the Defamation Act (Cap. 36, Laws of Kenya), I would not agree, in view of the fact that the law of defamation has always developed on the basis of the *common law method,* with the incremental integration of new and progressive ideas. I cannot imagine that, with the contemporary recognition of democratic and human rights principles, some of which would be negated by a restricted flow of information, the Court could encourage an approach to the law of defamation which unduly restricts the ventilation of ideas on public affairs; on prudence in conduct of public office; on financial integrity in public office; on planned and orderly management of public resources; on initiatives to curb corruption in public office; etc.

But the more relevant question is whether the *3rd defendant* can benefit from this constitutional privilege for publication of matters in the public interest. Although learned counsel, ***Dr. Kuria*** proposed that the Defamation Act is contrary to the Constitution and should be declared *ultra vires,* 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.

Learned counsel submitted that the 3rd defendant, in publishing the material complained of, had exercised constitutional and democratic principles, by publishing material that carries severe scrutiny, material that is shocking, where this is meet, in the cause of the *public interest.*

For the 3rd defendant, the pertinent questions are: *did it have lawful excuse to publish the material? Was the 3rd defendant doing a public duty, when it published the material?* Above all, *was the 3rd defendant conducting responsible journalism*, when it published the material complained of? I think the state of the law today is that, if the foregoing questions are answered in the affirmative, then, *truth* or *falsehood* in the relevant report will not be the determinant of liability on the part of the 3rd defendant; an untruth not occasioned by *malice, recklessness* or *deliberate falsehood,* would in those circumstances be covered by *privilege.*

This category of privilege merges into the usual category of *qualified privilege*, but introduces *new criteria* based on *constitutional principle,* and on contemporary developments in comparative law and human rights. In the traditional operation of qualified privilege, *mutuality of interest,* between the defendant and the "recipient" public, was required; but the Court will now look beyond such a restricted criterion for covering a press publication with privilege, to a broader scenario in which the constitutional goal being served by the publication, is taken into account.

I have carefully considered the factual position of the 3rd defendant, in relation to the foregoing principles. It is not clear that any real investigations into the material published, was conducted by the 3rd defendant. Although the 3rd defendant's key witness, ***Mr. Herman Igambi,*** gave detailed testimony on the investigative procedures adopted by the 3rd defendant in its operations, no witness came to say exactly how he or she *personally* conducted the investigations.

What is apparent is that, once the *Sunday Nation* publication appeared on *14th December, 2003* the 3rd defendant readily treated it as a foundation for coming up with more specific information, the sourcing of which has not been clarified – and that information, which turns out to have been untrue, had the effect of lowering the plaintiff's esteem in the perception of ordinary, right-thinking persons.

Unlike the 1st and 2nd defendants who built a theme around their publication, and went on to publish a series of educative articles on the threat of infection posed by the contemporary HIV/AIDS pandemic, the 3rd defendant had merely made a pot-shot, which tortiously injured the plaintiff. While the public's interest in curbing the spread of HIV/AIDS is a matter which this Court must take *judicial notice* of, as a subject of *great public interest*, the 3rd defendant's publication could *not* be said to have been aimed at that same public interest.

Learned counsel also urged that the mention of the plaintiff's name in the 3rd defendant's publications was to be covered by privilege, for the reason that the plaintiff, as a public office-holder, ought not to be allowed to restrain the scrutiny of his personal conduct, for his own reasons of private sensitivity. On *principle*, the argument cannot be faulted; I have already considered the Australian case, ***Theophanus v. The Herald and Weekly Times Ltd. and Another*** [1994] 3 L.R.C. 369 in which it was held that –

> "Criticism of the views, performance and capacity of a Member of Parliament and of the member's fitness for public office lay at the very centre of political discussion and therefore the implied freedom of communication in relation to such discussion extended to the publication of matter concerning Members of Parliament relating to the performance of their duties and their suitability for parliamentary office" (at p. 370).

It is clear to me that ***if*** the plaintiff had been shown to have been arrested during a Police swoop on prostitutes, his fitness for public office would have merited appropriate press reporting, considering especially the current threat posed by the spread of HIV/AIDS in the country. But in this case *no proof* has been laid before the Court; and therefore the plaintiff's endeavour to protect his reputation by enforcing the applicable tort law, would not show an over-sensitivity on his part as a public office-holder.

(f) Resulting Determination of Liabilities

The foregoing analysis of law and evidence has defined the lines of liability in this suit. I have held that the 1st and 2nd defendants bear no liability to the plaintiff, but the 3rd defendant does. It is on that basis, that I will now consider the twin issues of damages and costs.

G. DAMAGES AND COSTS

(a) The Plaintiff's Position on Damages

It is obvious that the plaintiff expected to win damages and costs against each of the defendants; but I

have already held that he cannot win damages against the 1st and 2nd defendants; indeed, he will have to pay the costs of the 1st and 2nd defendants; but the plaintiff is entitled to damages and costs against the 3rd defendant.

The plaintiff relied on the principle of award of damages set out in the English case, ***John v. M.G.N. Ltd*** [1996] 2 All E.R. 35 (at pp.47 – 48, *per* ***Sir Thomas Bingham, M.R***.):

> "***The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. 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 publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. 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 an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way."***

On the basis of the principles thus stated, ***Mr. Oyatsi*** invited the Court to start its assessment from the threshold set by s.16A incorporated into the Defamation Act (Cap.36, Laws of Kenya) by Act No. 11 of 1992; the new section thus provides:

> ***"(1) In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:***
>
> ***Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings".***

Learned counsel urged that the assessment of damages, in the instant case, should be treated as if the allegation made about the plaintiff attributed to the plaintiff a *capital offence*; in ***Mr. Oyatsi's*** words:

> " ……the plaintiff was accused of actions akin to those of a serial killer. The number of victims or potential victims was given as 58 in one day alone. Another one victim was added in cross-examination. The impression given is that there are many others who have not been named and whom the plaintiff may have infected before with his deadly virus. It was a matter of time before they die, all because of the plaintiff. Going by the numbers named by the defendants alone, [the…. 59 deaths] would give rise to separate capital offences which would attract damages in the sum of Kshs.59 million at t he very minimum".

The logic or objectivity of the foregoing argument is not appreciated by the Court; for it is overly conjectural, on the relationship between HIV/AIDS infection, and the possible death of a victim; it is also oblivious to the existence on the market, of protective devices that would prevent infection. More importantly, counsel has mentioned no law which equates the death of a person from disease, with death occasioned by murderous assault. Such an apparently-extravagant interpretation cannot, with respect, guide the Court, as the Court has a duty to assess damages on realistic and factual criteria. There is no basis, therefore, for the proposition of Kshs.59 million as a minimum award for the plaintiff.

With regard to the extent of circulation of the publication complained of, learned counsel urged that –

> "The third defendant's radio station and the TV station have countrywide coverage. It is an admitted fact that the publication complained of in this case received the widest possible circulation in Kenya at all levels of society and in all places where ….. the radio and TV are listened [to] and watched."

Mr. Oyatsi made submissions on the position of the plaintiff in the society: he is a Member of Parliament representing a constituency of some 100,000 people; he was and is an Assistant Minister in the Government; he interacts with many people in the society; he is a family man, with a wife and children.

Mr. Oyatsi urged that this was a defamation case *sui generis*, and he had found no relevant authority to use as a guide, in the assessment of damages. In his words,

> "…..the conduct of [the defendants] was so debasing that no decent media house anywhere in the world could stoop so low."

Counsel considered this case unique because, in his perception: the defendants had invented "wicked calumnies or falsehoods"; they had "duped the public, and profited from their calumnies"; they had used the "description of politicians and students as part of a theatre sep-up"; they had "sacrificed the reputation and character of the plaintiff for financial gain"; they had "filed pleadings of falsehoods"; they had "cross-examined the plaintiff in a humiliating manner"; they had "turned the Court into a theatre of pornographic scenes", they had "committed perjury"; they had committed "various acts of contempt of Court". Such a scenario of counsel's perceptions, led him to propose the considerable sum of *Kshs.125 million* in compensation to the plaintiff.

(b) The Third Defendant's Reply on the Question of Damages

Learned counsel, ***Dr. Kuria*** contested the plaintiff's claim for Kshs.125 million in damages – in the first place, because the plaintiff "does not give a breakdown of what the exemplary damages add up to, out of the said Kshs.125 million." The failure to break down the global sum proposed, counsel urged, was in departure from the tenets of judicial practice; and in this regard the following persuasive authorities were cited: ***K.N. Biwott v. Clays Ltd***, Nairobi HCCC No. 1067 of 1999 consolidated with ***K.N.K. Biwott v. Dr. Ian West and Another,*** Nairobi HCCC No. 1068 of 1999 – [2002] 2 E.A. 334; ***Biwott v. Mbuggus*** [2002] 1 KLR 337; ***Hon. Ambassador Chirau Ali Mwakwere v. Royal Media Services Ltd***, Nairobi HCCC No. 57 of 2004. From these cases, counsel urged, it was clear that the Court expected an indication of the proposed general or compensatory damages, and over and above that, the Court could make a further award in respect exemplary damages. For failing to lay such a basis of quantification, counsel urged that the proposed figure was misconceived.

Dr. Kuria disputed, quite rightly in my opinion, the basis of the claim for *Kshs.59 million* as damages, being a portion of the total being claimed. On that component of the claim, learned counsel urged: "Even if – which is denied – the 3rd defendant were liable, the claim for Kshs.59 million would fail, on account of [lack] of evidence to support it." Of the global sum claimed, counsel submitted: "[The plaintiff] plucks out Kshs.125 million from the air and attempts to justify it through [a] weak argument."

Dr. Kuria contested the proposed award of damages as being improper, for sheer failure to make any reference to many past decisions on the question of damages for defamation.

(c) The Court's Position on the Question of Damages

Counsel for the 3rd defendant reviewed the many defamation cases coming before the High Court, in which substantial amounts in damages had been awarded; all these fell far short of the figure now being claimed by the plaintiff. Such a departure from current judicial approaches, I would agree with learned counsel, requires an *explanation,* since it is of the very essence of judicial determinations, that they be guided by *regularity*, a sense of *proportion*, and a *chariness of proliferations that do not rest on principle*

and do not give promise of sustainability. Besides, this Court takes judicial notice that many awards of damages by the High Court in defamation cases, over the last decade or so, have been rightly criticised as not founded on a clearly demonstrable basis of compensation for injury suffered, not to mention that some stood in clear departure from precedent-setting directions in Court of Appeal judgements.

My own thinking on unexplained disparities in awards of damages for defamation has been recorded in ***John Joseph Kamotho and Three Others v. Nation Media Group Ltd.,*** Nairobi H.C. Civ. Suit No. 368 of 2001:

> **"Learned counsel..., while proposing specific figures in damages that should be awarded to each plaintiff, noted correctly that past cases in the High Court have not been entirely consistent in the sums of money awarded for defamation. Such a disparity, I should note, is undesirable; and while it certainly is impossible that consistent figures can always be arrived at, the language of the law should bear *certainty* and *predictability*. Figures awarded in damages should, therefore, be guided by *similar considerations of principle*.**
>
> **"I would propose that, firstly, the figures awarded should be *fairly compensatory*, in the light of the nature of the injury to reputation, as it emerges from the evidence. Secondly, a *restrained hand* in the award of damages is desirable; because the Court must maintain a stable mien, even where the parties would render their damnation with a touch of sensitivity. And thirdly, awards of damages should appear *realistic*, in all the circumstances."**

These are the principles that will guide me as I deal with the question of damages, in the instant matter.

I have already held that the sum of Kshs.59 million out of the total claimed by the plaintiff has no basis in *law* or *evidence*; it is rejected. That leaves a balance of Kshs.66 million which, clearly, the plaintiff would have ascribed to a combination of *three defendants.* Since I have already found the 1st and 2nd defendants to have no liability, the plaintiff could ascribe to the 3rd defendant no more than *Kshs.22 million*. But I will now subject this to the *principles* governing awards of damages in defamation cases.

As already stated, the 3rd defendant, by its radio and television broadcasts, did occasion injury to the plaintiff in his reputation and character. The plaintiff, as a Member of Parliament and an Assistant Minister, has a standing in the public eye which is most important to him, and which the law protects. The plaintiff belongs to family and social circles which hold him in a station of esteem, and which was unavoidably injured, when the 3rd defendant made the radio and television broadcasts complained of. The injuries thus wrought upon the plaintiff were thoughtlessly done; as there was no factual foundation justifying this violation of the plaintiff's reputation; and the mischief was not mitigated at all by the fact that no proper investigation by the 3rd defendant was conducted, before the impugned words were aired on the media. The mode of publication adopted was electronic, and with a substantial reach among listeners and viewers. For this infringement on the plaintiff's reputation and character, the 3rd defendant pleaded justification (but failed to prove it), and stubbornly refused to tender any apology. As if that was not enough, the 3rd defendant mounted a defence that was, in the public forum of the Court, most pejorative and demeaning of the plaintiff. There is no doubt that the plaintiff, in his reputation and character, has suffered considerably, at the hands of a deliberate 3rd defendant.

I consider that a suitable compensation for a person holding the *status of the plaintiff* in the society, in respect of the injury to reputation and character aforementioned, is Kshs.4,000,000/=; but in the light of the circumstances attending the said libellous publications, I will award *exemplary damages* as well.

H. DECREE

The foregoing Judgement leads me to make a decree, with the following specific elements:

1. The plaintiff's suit against the 1st and 2nd defendants is dismissed.

2. To the 1st and 2nd defendants, the plaintiff shall pay costs, which shall carry interest at Court rate as from the date of filing suit.

3. The plaintiff's suit against the 3rd defendant succeeds, and the 3rd defendant shall pay damages to the plaintiff as follows –

(a) general damages in the sum of Kshs.4,000,000/= carrying interest at Court rate as from the date hereof;

(b) exemplary damages in the sum of Kshs.1,000,000/= carrying interest at Court rate as from the date hereof.

4. The 3rd defendant shall pay the proportionate part of the plaintiff's costs which relates only to the suit against the 3rd defendant, and the same shall carry interest at Court rate as from the date of filing suit.

DATED and **DELIVERED** at Nairobi this Friday, 3rd day of October, 2008.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Plaintiff: Mr. Oyatsi

For the 1st & 2nd Defendants: Mr. Karori

For 3rd Defendant: Dr. Kuria