



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 368 OF 2001**

**JOHN JOSEPH KAMOTHO.....1<sup>ST</sup> PLAINTIFF**  
**CHARLES GITHII KAMOTHO.....2<sup>ND</sup> PLAINTIFF**  
**JAMES KAMOTHO.....3<sup>RD</sup> PLAINTIFF**  
**DAVID KAMOTHO.....4<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

**NATION MEDIA GROUP LIMITED .....1<sup>ST</sup> DEFENDANT**  
**MUTEGI NJAU.....2<sup>ND</sup> DEFENDANT**  
**BOB KIOKO.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

**1. THE PLEADINGS IN A DEFAMATION SUIT**

The plaintiff’s plaint dated 6<sup>th</sup> March, 2001 and filed on 8<sup>th</sup> March, 2001 asserted, in summary, as follows.

At all material times the 1<sup>st</sup> plaintiff was a Cabinet Minister in the Government of Kenya in charge of Local Authorities; he was also the Secretary-General of the then ruling political party, KANU. The 2<sup>nd</sup> plaintiff was a medical doctor working as such, at the Kenyatta National Hospital. The 3<sup>rd</sup> plaintiff was a businessman in Nairobi. The 4<sup>th</sup> plaintiff was a student in Nairobi who had just obtained admission to the Perth Institute of Business and Technology, in Australia. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs are sons of the 1<sup>st</sup> plaintiff.

The 1<sup>st</sup> defendant was at all material times the proprietor of local radio and television broadcasting stations, known respectively as *Nation Radio* and *Nation TV*. The 2<sup>nd</sup> defendant was an employee of the 1<sup>st</sup> defendant and the News Editor of *Nation Radio* and *Nation Television*. The 3<sup>rd</sup> defendant was an employee of the 1<sup>st</sup> defendant and the host of a talk show programme on *Nation Radio* known as *Changamka*.

It was pleaded that, in the *Changamka* programme of 18<sup>th</sup> January, 2001 hosted by the 3<sup>rd</sup> defendant on *Nation* Radio, the 3<sup>rd</sup> defendant as the presenter and host, allowed a caller by the name **Maina**, described by the 3<sup>rd</sup> defendant as “a regular contributor,” to go on air, with the result that a false and malicious publication to the general public took place, of and concerning the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs. The words so published were as follows:

“...this was about 7.15 this morning ...a white Peugeot 405 bursts into the parking lot at a speed of about 80 to 90 kph... the car has three young men and at that speed they are unable to control the car and the car slams into a stationery Nissan.... The young boys reversed the car and moved from the accident scene, got out of the car and bounced off towards the parking office and guess what!!! The three spoilt brats are sons of a Cabinet Minister!! ...Right now I can see them on cellular phones ...I think they are just trying to call their father to try and get them out of this... we don't need this... I wonder whether they will be made to compensate those people who normally park in this parking lot before they can be allowed to leave... hopefully the owner of the Nissan will be compensated and not harassed...but we don't need this kind of spoilt children on our streets.”

It is asserted that, immediately after the electronic publication of the impugned words, the 3<sup>rd</sup> defendant went on air and published to the general public of and concerning the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs, the following words:

“The full effect of the law should apply and hopefully we will see it apply. *Maina* you have given me the names of the young people...if anybody in authority is interested in getting the names you can actually call us here. We are still trying to get a team down to Westlands to check.

“...[As] *Maina* called us at 7.15 this morning, three kids and some of them apparently are [a] Cabinet Minister's kids, drove into a parking lot while racing around it...they seemed to have been drunk on something...they were driving off but the security officers have not allowed them to leave the compound of the parking lot. We'll bring you more details as soon as we are called by anybody in authority to ask us who the young men are, then we can inform them and tell you how quickly it took them to respond.”

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs pleaded that none of them was at the scene of the accident reported in the *Nation* talk show and in the *Nation Radio* broadcast. All the plaintiffs averred that the impugned publication referred to them and were understood, and the defendants meant the same to be understood, by the general public as referring to the plaintiffs, and that, owing to the circumstances prevailing, the impugned words were defamatory of the character of each and all of the plaintiffs.

The plaintiffs gave the particulars that the defendants had in three news bulletins of the morning of 18<sup>th</sup> January, 2001 published the words:

“a son of Local Authorities Minister **Joseph Kamotho** was involved in a scuffle after his friends hit another car in Westlands. **Kamotho's** son intervened after guards detained his friends soon after the accident to prevent them from leaving the scene. By 9.00 a.m. the matter had been sorted out and both vehicles left the scene.”

In the caption of the news bulletin in *Nation TV* it was evident that none of the plaintiffs was present at the scene of the accident. It is pleaded that the follow-up by the news bulletins of the defendants, despite being aware that there was no truth in the publication, was meant to confirm that the persons referred to in the impugned publications were the plaintiffs. It is pleaded that the prominence which the defendants had given what was a minor accident, was motivated by malice, with the intention of publishing to the general public the material which has caused injury to the plaintiffs. Despite learning that none of the plaintiffs were at the scene of the accident in question, the defendants neglected or refused to publish an apology or clarification of the facts.

The plaintiffs pleaded that the words used in the impugned publication, in their natural and ordinary

meaning and by innuendo, meant and were understood to mean —

- (i) that the 1<sup>st</sup> plaintiff, being a Cabinet Minister and Secretary General of KANU, is in the habit of abuse of office by subverting the due process of law, in instances in which his sons have transgressed the law;
- (ii) that, in the same manner, the 1<sup>st</sup> plaintiff commits criminal offences punishable under the provisions of the Penal Code;
- (iii) that, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs, being sons of the 1<sup>st</sup> plaintiff, are irresponsible in character and in the habit of using their father's office for gain including evading the due process of law;
- (iv) that, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs usually commit criminal offences punishable under the provisions of the Penal Code;
- (v) that, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs have not been well brought up by the 1<sup>st</sup> plaintiff and that they are spoilt, irresponsible and of very little social standing;
- (vi) that, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs are immoral in character and are habitual drunkards.

By the impugned words published by the defendants, it is pleaded, each of the plaintiffs has been greatly injured in his character and reputation. For the 1<sup>st</sup> plaintiff, as Cabinet Minister and Secretary-General of KANU, his reputation and his integrity were greatly injured and compromised, not only among Kenyans but also in the world at large. For the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, their reputation and integrity as citizens of Kenya, including their professional integrity, have been put in great jeopardy. For the 4<sup>th</sup> plaintiff, his reputation and integrity as a student has been injured.

Despite notice of intention to sue having been given, the defendants have taken no action to apologise or propose a suitable recompense. The plaintiffs claim: *general damages; aggravated damages; costs of the suit; interests.*

The defendants filed their memorandum of appearance on 4<sup>th</sup> April, 2001, and their statements of defence on 19<sup>th</sup> April, 2001. The 3<sup>rd</sup> defendant denied that he published the words said to be defamatory of the plaintiffs. The 1<sup>st</sup> defendant admits publishing the impugned words, but denies that those words were falsely or maliciously published. The 1<sup>st</sup> and 3<sup>rd</sup> defendants deny that the impugned words were understood to refer to the plaintiffs or any of them, no names having been given nor any identification which pointed to the plaintiffs. The 1<sup>st</sup> and 3<sup>rd</sup> defendants assert that according to their publication, only friends of a son of the 1<sup>st</sup> plaintiff were involved in the incident occasioning this suit, and not the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs, and “there was therefore never any identification of the 2<sup>nd</sup> to 4<sup>th</sup> plaintiffs with the young men referred to in the original broadcasts.” The 1<sup>st</sup> and 3<sup>rd</sup> defendants assert: “the decision whether to publish any incident is for them alone” and they had nothing to apologise for. The 1<sup>st</sup> and 3<sup>rd</sup> defendants assert that no words published referred to the 1<sup>st</sup> plaintiff, and “no words published alleged that anyone let alone the first plaintiff was in the habit of abuse of public office.” They plead that they had accused none of the plaintiffs of having committed a criminal offence. The 2<sup>nd</sup> defendant pleaded that the plaint showed no cause of action against him; and he prayed that the suit against him be struck out with costs.

## **II. THE ISSUES**

The issues for resolution in this case were framed, agreed between counsel, and filed on 24<sup>th</sup> March, 2004. These were as follows:

- (a) whether there is a cause of action against the 2<sup>nd</sup> defendant;
- (b) whether the 3<sup>rd</sup> defendant published the words complained of in paragraph 8 of the plaint;
- (c) whether the words published in paragraphs 8 and 9 of the plaint were published by the 1<sup>st</sup> and 3<sup>rd</sup> defendants falsely and maliciously;
- (d) whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs were at the scene of the accident that was reported in the 1<sup>st</sup> defendant's *Changamka* Radio Programme on 18<sup>th</sup> January, 2001;
- (e) whether the words set out in paragraphs 8 and 9 of the plaint referred to and were understood to refer to the plaintiffs or any of them; and whether the publication contained the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs or specifically identified or referred to the plaintiffs;
- (f) whether the words published by the 1<sup>st</sup> and 3<sup>rd</sup> defendants in their natural and ordinary meaning and/or in the innuendo therein alleged, were meant and were understood to mean the interpretations alluded in paragraphs 12 and 13 of the plaint; and whether the words published by the 1<sup>st</sup> and 3<sup>rd</sup> defendants in its *Changamka* Programme and news bulletin thereafter, have injured the character and reputation of the plaintiffs as alleged;
- (g) whether the words published by the 1<sup>st</sup> and 3<sup>rd</sup> defendants in either its *Changamka* morning programme and/or in subsequent broadcast/news bulletins were defamatory of the plaintiffs as alleged in the plaint;
- (h) whether the plaintiffs have suffered damage, and whether they are entitled to the remedies sought;
- (i) who should pay the costs of this suit.

### III THE EVIDENCE

Hearing in this case began on 6<sup>th</sup> February, 2004 when the evidence of the 4<sup>th</sup> plaintiff was taken *de bene esse*, as he had to leave the country for studies abroad.

**David Waweru Kamotho** was sworn and testified that he was 23 years of age, and a student at Edith Cowan University in Perth, Western Australian, taking an internet computing course. He testified that the 1<sup>st</sup> plaintiff was his father, and the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs his elder brothers. On the material day in the happenings leading to these proceedings, the 4<sup>th</sup> plaintiff was asleep at his father's house, when the 3<sup>rd</sup> plaintiff called home from outside and wanted to speak to him. The 4<sup>th</sup> plaintiff was woken up by his mother and he spoke to the 3<sup>rd</sup> plaintiff on the telephone. The 3<sup>rd</sup> plaintiff had just learned of a negative electronic publication about the family and urged the 4<sup>th</sup> plaintiff to watch the *Nation* Television news bulletin due to be aired at 11.00 a.m. The 4<sup>th</sup> plaintiff watched the *Nation TV* news bulletin at 11.00a.m, and it carried the report that a son of the Honourable **Mr. Kamotho** (1<sup>st</sup> plaintiff) was involved in a scuffle with watchmen at the Westlands suburb of Nairobi, following the occurrence of an accident. The said son of the 1<sup>st</sup> plaintiff was reported to have called the police, who came along and sorted out the contretemps. *Nation TV* on that occasion showed pictures of boys involved in conflict; but the 4<sup>th</sup> plaintiff was unable to identify any of those boys in the TV footage, or even the vehicles pictured next to them at the *locus in cuo*. In his words: "They were unknown to me."

Soon after the 11.00 a.m. *Nation T.V.* bulletin, the 4<sup>th</sup> plaintiff testified, he began receiving telephone calls from friends, who wanted to know what exactly had happened. When he replied that he knew nothing of it, some of his friends thought he was not telling the truth; in his words, "some told me off."

The 4<sup>th</sup> plaintiff said, this made him look irresponsible, especially as he had not been involved in any accident lately, and he had never been accosted by a policeman over a possible breach of the law. He averred: “I have never sought my father’s help to save me from any situation with the police. This incident, the 4<sup>th</sup> plaintiff said, “assassinated my character”; “as a result I lost some friends. They see me as an irresponsible kid who uses his father to get him out of trouble.”

The 4<sup>th</sup> plaintiff averred that although his advocates had sought apology from the defendants, none had been forthcoming. He urged that the defendants should apologise, and should pay damages for the harm done to the plaintiffs. He said he was due to complete his course in Australia, and would have been keen to take up a job in Kenya thereafter; but he apprehended that the impugned publication had exposed him in bad light and this could hurt his chances of securing employment.

On cross-examination, the 4<sup>th</sup> plaintiff said he had missed the 9.00 a.m. news bulletin of the 1<sup>st</sup> defendant; but at 11.00 a.m. he listened to *Nation TV* and Radio news. On *Nation TV* it was stated that a son of the Local Authorities Minister, **Mr. Kamotho**, had been involved in a scuffle with the police. The report regarding the calling of the Police had been on the radio broadcast. The 4<sup>th</sup> plaintiff said he had been in Kenya continuously, about the time of the incident in question, but he had left the country for Australia a couple of weeks later. He averred that he thought his eldest brother (the 2<sup>nd</sup> plaintiff) would have been at his home on the material morning of 18<sup>th</sup> January, 2001; but it was the 3<sup>rd</sup> plaintiff (who was also at his own house) who had called him on the telephone on that morning. The 4<sup>th</sup> plaintiff said he had concrete proof that the impugned broadcast had indeed been aired; the plaintiffs had recorded the same, and the 3<sup>rd</sup> plaintiff had the custody of the audio-tapes and video-tapes. When the 3<sup>rd</sup> plaintiff heard the radio broadcast at 9.00 a.m. he had formed the impression that the subject was the 4<sup>th</sup> plaintiff, and this is how he came to call the 4<sup>th</sup> plaintiff soon thereafter. The immediate purpose of the call which the 3<sup>rd</sup> plaintiff made after the 9.00 a.m. *Nation* Radio bulletin, was to ascertain where the 4<sup>th</sup> plaintiff was, at the time.

PW2, **James Mwai Kamotho**, was sworn and gave his evidence on 11<sup>th</sup> May, 2004. He testified that he was aged 32 and was a businessman, running two companies. He is the proprietor and Managing Director of County Carhire, and Internet Trade Technologies. He testified that the 1<sup>st</sup> plaintiff was his father, while the 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs were his brothers.

On 18<sup>th</sup> January, 2001 PW2 was driving to work, with his car radio tuned into *Nation F.M.* Radio. At about 7.20 a.m. he was listening to that station’s *Changamka Show*. Then suddenly there was a report about a scuffle which was taking place at Westlands. The radio station was relaying on air the instantaneous report of a caller who was speaking of three brats who were the sons of a Cabinet Minister. Then at that moment a friend, by name Rachael, who apparently had also been listening to the *Changamka Show*, called the 3<sup>rd</sup> plaintiff on mobile phone and wondered just what was happening! This inquiry, for the first time, gave his mind focus on what was just being aired in the *Changamka Show*. The 3<sup>rd</sup> plaintiff called his father’s home, and spoke to his mother. He inquired where the 4<sup>th</sup> plaintiff was; his mother checked, and found the 4<sup>th</sup> plaintiff asleep. The 3<sup>rd</sup> plaintiff then called the 2<sup>nd</sup> plaintiff who was already on his way to work. As the 3<sup>rd</sup> plaintiff kept on receiving more calls on his mobile phone, he decided after listening to the 9.00 a.m. *Nation F.M.* Radio news, to return home. He called the 4<sup>th</sup> plaintiff who, as it turned out, knew nothing of the incident reported by *Nation F.M.* Radio. The matter disturbed the 3<sup>rd</sup> plaintiff so much, he did not go to work and spent the whole day worrying about the morning’s news item. His impression of the scenario was, in his own words, as follows:

“We were alleged to have driven into a parking lot, knocking another vehicle, and that we were drunk; and that we now started calling our father to bail us out of the situation.”

The 3<sup>rd</sup> plaintiff said the 1<sup>st</sup> defendant was giving regular bulletins on the news item it had generated in the morning of 18<sup>th</sup> January, 2001. On the following day a documentary based on the story was shown, at some car-park in Westlands; but the persons whose figures appeared in the documentary were unknown

to the 3<sup>rd</sup> plaintiff.

The 3<sup>rd</sup> plaintiff testified that his family had contacted the Nation Media Group (1<sup>st</sup> defendant) and requested a correction to the bulletin of 18<sup>th</sup> January, 2001. A letter was sent out by M/s. Kiarie Kamere & Nyiha Advocates, on behalf of the plaintiffs, to the News Editor of *Nation Radio* and T.V., seeking corrections and apology. However, the 1<sup>st</sup> defendant gave no reply, and refused to retract the story.

The plaintiffs decided to seek legal redress in the form of damages. In preparation, they purchased from Roger Steadman Associates audio and video cassettes on the *Nation Radio Changamka* show of 18<sup>th</sup> January, 2001. A request was made to have the said cassettes played in Court, and there was no objection to this quite proper request. The Court allowed a viewing on the television screen of the tapes.

On the television screen, what appeared was a scene at Westlands, showing that the reporter was speaking from the second floor of Mpaka House. He was observing the happenings at a parking lot five metres in length, saying that a white Peugeot car was careering into that parking lot at a speed of 70 – 80 kph; in it were three young men who had lost control of the car; they banged into a Nissan van; they got out, three spoilt brats, sons of a Cabinet Minister; they are trying to get their father to help them out.

The 3<sup>rd</sup> plaintiff testified that the *Changamka* show had attributed the report to one **Maina** who is said to have observed the unfolding of the incident. He had said that the mischief-makers were three drunk sons of a Cabinet Minister, who were trying to escape but were stopped by security personnel. The 3<sup>rd</sup> plaintiff produced the tape of the *Changamka* talk show activity as an exhibit (pl's exhibit No. 2).

The 3<sup>rd</sup> plaintiff testified that the story in the *Changamka* Show was repeated in the *Nation F.M.* Radio news bulletin, which referred to a white Peugeot 405 car as the one that had lost control and caused damage at the car park at Westlands, being occupied by **Mr. Kamotho's** sons. In the *Nation T.V.* news at 11.00 a.m., on 18<sup>th</sup> January, 2001, the very first news item was about the said Westlands car-park incident. The 3<sup>rd</sup> plaintiff produced a video-tape of the *Nation T.V.* Programme (pl's exhibit No. 4) which showed a white Peugeot 405, registration No. KAE 790 R. The 3<sup>rd</sup> plaintiff said he had never owned such a vehicle; and he did not know the several people appearing on the clip shown on the screen.

The 3<sup>rd</sup> plaintiff testified that while it was true he had been involved in a car accident, that was much earlier, possible in 1999, near Gil Gil in the Rift Valley; he had not, on that occasion, been apprehended and had not been charged in Court, and neither had he used his father's name to bail him out in any manner whatsoever.

The 3<sup>rd</sup> plaintiff testified that many of his friends and relatives still feel that he had been involved in a fracas at the Westlands car-park, on the morning of 18<sup>th</sup> January, 2001. Some of his business associates are of the same persuasion. He averred that the impugned words depicted him as a spoilt brat; a drunkard; an irresponsible individual; a person who seeks the intervention of his father to bail him out of problems. He testified that he was a married man with two daughters, in respect of whom he bore certain responsibilities; but after the incident leading to this suit, his business colleagues still view him negatively. He said he wants an unconditional apology, as well as recompense in damages.

In cross-examination, which took place on 7<sup>th</sup> March, 2005 the 3<sup>rd</sup> plaintiff restated that in the *Changamka* Show of the morning of 18<sup>th</sup> January, 2001 the impugned story had referred to children of a Cabinet Minister as the ones who had driven a car improperly and caused an accident at Westlands, but the names of these children were not specifically mentioned. He testified that neither the audiotape (plaintiffs' exhibit No. 2) nor the videotape (plaintiff's exhibit No. 3) mentioned the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs by name, but they mentioned a son to the Minister for Local Government, **Mr. Kamotho**. They made reference also to the children of the **Hon. Mr. Kamotho**. In the *Changamka* Show it was stated that a son of **Mr. Kamotho** was driving the vehicle which caused the accident at Westlands. The 3<sup>rd</sup> plaintiff said it was **Bob Kioko**, the 3<sup>rd</sup> defendant, who had conducted the *Changamka* Show of the morning of

18<sup>th</sup> January, 2001; and he had added to the report of his caller by remarking that the conduct of the children of the **Hon. Mr. Kamotho**, exemplified abuse of power. The *Changamka* Show made reference to three sons of the **Minister, Mr. Kamotho**; and its content was confirmed in the 9.00 a.m. news bulletin.

PW3, the **Hon. Mr. J.J. Kamotho** (1<sup>st</sup> plaintiff) was sworn and gave his evidence on 7<sup>th</sup> March, 2005. He testified that he is at the moment a Member of Parliament, and a Commissioner on the Parliamentary Service Commission. He testified that he has three sons who are, in order of seniority, **Dr. Charles Kamotho, Mr. James Kamotho** and **Mr. David Kamotho** (2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs respectively).

PW3 averred that in January, 2001 he was the Minister for Local Government, and Secretary-General of the ruling party, KANU. At about 7.20 a.m. on 18<sup>th</sup> January, 2001 his wife was talking on the telephone to his second son (3<sup>rd</sup> plaintiff), and the name of the 4<sup>th</sup> plaintiff came up in the conversation. His wife went to the 4<sup>th</sup> plaintiff's room and found him asleep. She then told the 3<sup>rd</sup> plaintiff on the telephone that the 4<sup>th</sup> plaintiff was still asleep. **Mr. Kamotho** (1<sup>st</sup> plaintiff) then drove to his office, and while there, at about 9.30 a.m., he started receiving calls from friends and political colleagues. He found he had to explain or deny things he thought were politically motivated, in connection with the impugned story put up by the defendants, a situation which continued throughout the day. He felt it was an insult for the defendants to create the impression that his sons were indisciplined. In the evening of 18<sup>th</sup> January, 2001 he became persuaded that he would have to take some action in relation to the story about his sons. He and his family watched the *Nation TV* news bulletin in the evening; and there was still this story about the sons of the Minister for Local Government; about the brats, children of the Minister and he was the only such Minister. He felt compelled to check in the dictionary the meaning of the word "brat", and he felt disturbed by the persistent story coming from the 1<sup>st</sup> defendant. In his words: "Although the people trusted me as a Minister, if my children were behaving like this, I was a very untrustworthy Minister." He observed that as a Minister, he had been entrusted with public responsibilities.

The 1<sup>st</sup> plaintiff averred that he had never used the police to bail out any of his sons from trouble. He made a complaint to the defendants, through his lawyers, but received no apology. He was now seeking compensation from the defendants, "for the abuse and damage caused to me and my family." He was also seeking costs.

When the impugned story was published, **Mr. Kamotho's** youngest son (4<sup>th</sup> plaintiff) had just applied for a visa, and he apprehended that the son might as a result be denied an Australian visa.

On cross-examination, the 1<sup>st</sup> plaintiff said he had not himself listened to the *Changamka* Show in the morning of 18<sup>th</sup> January, 2001, but he later watched the videotape. In his view the usage of the word "brat" to describe his sons had come from an agent of the 1<sup>st</sup> defendant, and this was in the *Changamka* Show. He listened to the news at 11.00 a.m. on that day, and heard the story about a scuffle involving his sons; and scuffle would have meant in his view, that people were fighting and causing a commotion. The colleagues and relatives who called the 1<sup>st</sup> plaintiff were concerned that his sons would have been involved in a commotion. When he saw the video clip later, he was not able to identify those who were at the place in Westlands where the fracas is said to have taken place. He also did not know anything about the Peugeot 405 which was alleged to have been driven recklessly by his son; he said: "We have never owned such a car."

The 1<sup>st</sup> plaintiff admitted that notwithstanding the publication of the impugned story by the defendants, he was still re-elected to Parliament in the national elections of December, 2002.

On re-examination, the 1<sup>st</sup> plaintiff averred that the impugned story had also done him and the other plaintiffs damage by referring to his sons as drunkards – in the *Changamka* Show. These words published were damaging to him, and he thereafter had to explain the behaviour of his sons to anxious callers, throughout the day.

PW4 was sworn and gave his evidence on 18<sup>th</sup> January, 2005. He testified that he is aged 35 ½ years, and is a medical doctor based at the Thika District Hospital. He is also a consultant at the Nairobi Heart Clinic, at the Nairobi Hospital. As at 18<sup>th</sup> January, 2001 he was a Master of Medicine (*M.Med*) student at the Department of Paediatrics, University of Nairobi; and he was a doctor attached to the Kenyatta National Hospital. He had not listened to the *Changamka* Show of 18<sup>th</sup> January, 2005; but he heard of it, and later listened to it on tape. The 3<sup>rd</sup> plaintiff had called him on telephone at 7.40 a.m. to brief him on the story being published by the 1<sup>st</sup> defendant.

On the morrow, PW4 averred, he was at his place of study asked questions by his associates, seeking to find out about his extra-curricular activities. Those inquiring wanted to know whether he had been involved in a commotion at a car park in Westlands on the previous day. As his name is recorded and known as **Dr. Kamotho**, he became the subject of suspicion among his peers. He saw the videotape and heard the audiotape carrying the impugned story. In his perception, the words used of the plaintiffs, in the story, were abusive. The caller on the *Changamka* Show had spoken of three spoilt brats, and the host (3<sup>rd</sup> defendant) then made derogatory comments, of drunken sons of Ministers; and he promised to air more information on this matter subsequently – a promise kept with still more stories about the sons of **Mr. Kamotho**.

The 4<sup>th</sup> plaintiff said he has once been involved in a minor vehicle accident, but he had not called upon his father to bail him out; and he has never used his father to help him in any incident involving the police. He wanted the defendants to make an unqualified apology and to pay damages and costs.

In cross-examination, PW4 testified that his colleagues in the *M.Med.* course, such as **Dr. Mbogua** and **Dr. Kamau** had made comments on the incident which has led to this suit. They asked about the scuffle and wanted to know if the 2<sup>nd</sup> plaintiff was involved in such a thing.

PW4 testified that he had heard on tape the representations of a caller who featured on the *Changamka* Show on 18<sup>th</sup> January, 2001; he was saying he could at that moment see those spoilt brats, the sons of a Cabinet Minister.

He said the publication of the story affected him adversely; for integrity was important to his calling as a medical doctor, and in this regard, perception was critical. The perception which he had earned out of the contested incident herein, was a negative one. The impression had been created that he was an irresponsible person. Although the 2<sup>nd</sup> plaintiff did not for sure know of anyone, or any patient who declined his services on account of the impugned story, it remained the case that much of the therapeutic effect in medical care is based on *trust – being held to a certain level of esteem*. He conceded that he would not be able to name specifically who now, as a result of the defendants' publication, held him in a lower level of trust than before.

PW4 testified that part of the evaluation of his work in the postgraduate course, consisted in continuous assessment; and the credit given here was partly based on how he carried himself. It was therefore necessary for him to work harder, to undo the damage coming from negative publicity – which he did, and passed his examinations.

DW1, **Robert Kioko** was sworn and gave his evidence on 7<sup>th</sup> March, 2005. He testified that he was the Programme Controller at the *Nation F.M.* Radio. He was the presenter of the *Changamka* Show on *Nation F.M.* Radio, at about 7.15 a.m. on 18<sup>th</sup> January, 2001. The programme is a social commentary show, involves social issues, debates on matters of public interest, and takes calls from listeners. He testified that the caller who was aired on 18<sup>th</sup> January, 2001 at 7.15 a.m. had not referred to the plaintiffs by name; he had said there were sons of a Cabinet Minister at a Westlands car park, involved in a scuffle with security guards. The witness said:

“All that was said by the caller. We then did not discuss who it was. We said we had details of the people alleged, which we had recorded.”

The witness had given the said details to the News Manager for verification, by sending a camera crew to Westlands. The camera crew was indeed sent; they did their work; they returned; a television news item was, on that basis, aired.

The witness said that whenever a caller said something, the 1<sup>st</sup> defendant had several ways of control: (i) an 8-second delay mechanism; (ii) the option of dumping the material; (iii) the option of pre-recording the calls; (iv) recording of all things for subsequent verification. On 18<sup>th</sup> January, 2001 at 7.15 a.m., only the audiotape was aired. The witness averred that he had said nothing on the *Changamka* Show that insulted the plaintiffs. He said he did not know the plaintiffs personally; he did not mention their names; he had no reason to want to injure their reputation.

On cross-examination the witness said that in the *Changamka* Show, on 18<sup>th</sup> January, 2001 he had said that the plaintiffs when they were involved in a scuffle at the Westlands car park, had “seemed to be drunk”. He said: “The caller had made the statement, and so I repeated it.” He had been given names — sons of the **Hon. Mr. Kamotho** — but he did not put it out. He had said more information would be given after verification.

As regards the news broadcast by the 1<sup>st</sup> defendant on 18<sup>th</sup> January, 2001 the witness said he had no control over it; it was the responsibility of the news manager. The 11.00 a.m. news bulletin for the first time, made reference to sons of the Hon. **Mr. Kamotho**. The witness said he was not sure this reference to **Mr. Kamotho’s** sons was the first item in the bulletin; but he added:

“As far as I knew it was correct. We finished with *Changamka*, we handed over to the News Manager, and they [News Manager, and his agents] went to the scene. I do not know what information they got from the scene.”

The witness said he had not wanted, in the *Changamka* Show, to go on air with names because “**Mr. Kamotho** was a public figure. Whenever we get information about public figures, we call them first.” The witness had spoken to the News Manager, **Mr. Mutegi Njau** (2<sup>nd</sup> defendant) to advise on how to get **Mr. Kamotho** for his comments. The witness did not say whether this procedure of obtaining comments was followed, and whether **Mr. Kamotho** was contacted; but he learned later that **Mr. Kamotho** had made a complaint through his lawyers. The witness said he could not answer for the content of the *Nation* Radio statement which had identified the “spoilt brats” as the sons of the **Hon. Mr. Kamotho**; for in the *Changamka* Show it had only been said that “a senior Cabinet Minister’s sons were involved; we did not name names.” But he admitted that he had spoken on the *Changamka* Show at 7.15 a.m. of “these sons appearing to be drunk; the caller said so; we repeated; we had no proof; so we said ‘seemed drunk’, and attributed it to the caller.”

On re-examination, DW1 testified that in the *Changamka* Show he had said he had details regarding the incident, and anyone with a query could call; but nobody called to seek those details.

DW2, **Mr. Mutegi Njau** (2<sup>nd</sup> defendant) was sworn and gave his evidence on 7<sup>th</sup> March, 2005. He testified that he had worked with the 1<sup>st</sup> defendant for the past 20 years; in January, 2001 he was the News Manager of the 1<sup>st</sup> defendant; today he is the Investigations Editor of the 1<sup>st</sup> defendant. It is his responsibility to assign duties to reporters; to check stories for veracity; to ensure facts are correct; to screen material for possible libel content. The witness carries these responsibilities for the television and radio bulletins.

DW2 testified that he was not involved in the airing of the *Changamka* Show at 7.15 a.m. on 18<sup>th</sup> January, 2001 because that was not a news item. He averred that the 3<sup>rd</sup> defendant had gone to see him after the *Changamka* Show and had wanted to call the **Hon. Mr. Kamotho** on telephone “for verification” of the story on a scuffle involving his sons which had taken place at a Westlands car park. DW2 then gave the relevant information to the news editor, one **Naim Bilal**, also known as **Makau Nico**. Then at 11.00 a.m. on that day, 18<sup>th</sup> January, 2001 DW2 assigned reporters to go to the scene of the reported scuffle at

Westlands. He asked **Naim Bilal** to call the **Hon. Mr. Kamotho** and then send a team to the scene. This team, which DW2 referred to as the news crew, came back with a report. They said they had visited the scene and taken video photographs; they brought with them a video-tape. The witness testified that “by the time the crew [got to the scene of the scuffle], the plaintiffs were not there. I could not verify whether they were there.” The video-tape did not show any of the plaintiffs. The witness said that the *Nation* news item did not identify the plaintiffs as the persons who had been shown on the tape, as the news crew “did not bring the source of information.”

On cross-examination, the witness restated that in January, 2001 he was the 1<sup>st</sup> defendant’s news manager responsible for radio and television broadcast. He averred that “if [the impugned story] was aired at 9.00 a.m. it could not have been verified, as it spilled over from the talk show, and there had been no time to verify.” He said: “At 9.00 a.m. we published news that we had not verified.” Such reporting, the witness agreed with counsel, was “not responsible journalism.” But he maintained that “it was not reckless; we tried to contact **Hon. Kamotho**; we did not get him; he did not call me.”

The witness acknowledged that he had on 23<sup>rd</sup> January, 2001 received a letter from **Mr. Kamotho** addressed to the News Editor of the 1<sup>st</sup> defendant, seeking an apology and threatening suit. He handed this over to his lawyers. Regarding the happenings at Westlands on the material day the 2<sup>nd</sup> defendant said:

“An accident must have happened [at Westlands, on 18<sup>th</sup> January, 2001]; *but I cannot say Mr. Kamotho’s sons were involved.* I don’t know for certain whether Mr. Kamotho’s sons were involved.”

On re-examination, **Mr. Mutegi Njau** said he had sent the news crew to the alleged accident scene in his capacity as an employee of the 1<sup>st</sup> defendant; “in my personal capacity I uttered no word against the plaintiff.”

DW3, **Ms. Pamela Asighi**, was sworn and gave her evidence on 19<sup>th</sup> April, 2005. She said she was a reporter for *Nation TV* and *Nation F.M. Radio*, a position she had held since January, 2000. She said she very well remembered “the matter regarding **Mr. Kamotho** and his sons.” It took place in January, 2001 and she was at the time a reporter. The News Manager, **Mr. Mutegi Njau** (2<sup>nd</sup> defendant) had sent the witness, sometime between 8.15 and 8.30 a.m. on 18<sup>th</sup> January, 2001 to Westlands. She was told by **Mr. Njau** of an incident involving the sons of Cabinet Minister **Mr. Kamotho**. She did not remember the road in Westlands where she had gone to make the investigation, but said it was somewhere around *Unga House*; and there was a watchman there, near a parking area. The watchman is said to have told the witness that there had been a scuffle involving the sons of **Mr. Kamotho**. The witness said this watchman, who was however not identified by name, told her that the vehicles that had been involved in the accident, had been towed away. The same watchman is said to have told the witness that the police had come to the scene and had taken statements. The witness said: “I asked how it was known those were **Mr. Kamotho’s** sons.” She further said: “I did not get the watchman’s name.” It was **Ms. Pamela Asighi’s** evidence that while she was talking to the unidentified watchman, the police spokesman just came along. In her words: “I saw him. I spoke to him. They [meaning the Police] may have been still gathering information. **Kimanthi** [the police spokesman] came in less than 15 minutes after I arrived. I asked **Kimanthi** to verify. He did not give names but said two sons of **Mr. Kamotho** had been in a scuffle.” The witness said that after receiving information from **Mr. Kimanthi** she had called the 3<sup>rd</sup> defendant and as she trusted **Mr. Kimanthi’s** words, she gave the all-clear for **Mr. Kioko** to run the programme. She said she did not know **Mr. Kamotho’s** sons and even their names were not familiar to her. She said she had no reason to give false information about the plaintiffs. The witness said that while at the scene in Westlands, she had spoken to the unidentified watchman, and she had seen the white Peugeot 405 car, registration No. KAE 790R. She said the *Nation F.M. Radio* report had spoken of a son of **Mr. Kamotho** having been involved in the incident, but **Mr. Kimanthi** had spoken to her about *two* sons of **Mr. Kamotho** being involved.

On cross-examination, the witness said she started working for the 1<sup>st</sup> defendant on 5<sup>th</sup> January, 2000 and

she had all along been a reporter. Her immediate superior was **Mr. Mutegi Njau** (2<sup>nd</sup> defendant), and she did know **Mr. Naim Bilal**, the Radio News Editor. **Mr. Mutegi Njau** was the news manager and decided what went on air. On the morning of 18<sup>th</sup> January, 2001 she was on duty as an “early reporter”, and so **Mr. Mutegi Njau** had sent her to Westlands to verify the information regarding the sons of the **Hon. Mr. Kamotho**. She did not remember whether **Mr. Mutegi Njau** had expressed any doubts about the accuracy of the report about the plaintiffs. She could not remember the name of the building in Westlands where she went. She said it was near a club, “maybe Crooked Guy or something like that.” She said she did not append her name to the report which was aired by the 1<sup>st</sup> defendant, because “on TV it is not necessary to sign off; I can report without my name.”

**Ms. Pamela Asighi** disputed counsel’s contention that she never went to Westlands as she claimed to have done, on the morning of 18<sup>th</sup> January, 2001. She averred that she was indeed at Westlands; but she did not take the name of the watchman; she did not confirm her report; she did not find **Mr. Kamotho’s** sons at Westlands; she did not find the owner of the Peugeot 405 car which had been involved in the alleged accident. She said:

“We were told the Kamotho sons hit somebody else’s car. I don’t know which car was hit, what make, etc. That is why I did not report those details.”

Of the police who the witness said she met in Westlands, she said she had not verified which station they had come from. When questioned about her meeting with the police spokesman who it was known was now deceased, the witness said:

“I know Peter Kimanthi passed away in December, 2004.

I know dead men tell no tales.”

She said the defendants used to be in the habit of confirming their stories with the Police spokesman. She said the 1<sup>st</sup> defendant does not “go on air before confirming with Police.” As she gave this part of her evidence I noticed something which I recorded as follows: “*The witness is getting annoyed and losing her temper*”; and I did caution her against such behaviour.

The witness said she did not “think I checked any facts with **Mr. Kamotho**”. She said, however, that she knew **Mr. Kamotho** very well. Then she said: “*I think only my report was the basis of the newscast. I think my investigation was complete. I relied on information from the Police spokesman. One can run a story from one source only. If I get a final account from the police, that is good enough.*”

The witness said she had gone to Westlands on the morning of 18<sup>th</sup> January, 2001 in the company of a *Nation* cameraman, though she was unable to say who that cameraman was. She said she was the only employee of the 1<sup>st</sup> defendant who knew about **Mr. Kimanthi’s** account on the incident in question. She was unable to give the Court any impression of the road-plan at Westlands. She said: “I am not very clear about those roads.” She said **Mr. Kimanthi** had spoken to her about two sons of **Mr. Kamotho** but did not give their names. In her words:

“We do not always give names. There are cases in which we do not report names. The matter is dependent on the news editor. It was not necessary that the report should be attributed to Mr. Kimanthi. Peter Kimanthi is not an afterthought.”

When reminded that **Mr. Njau** (2<sup>nd</sup> defendant) had not identified the reporter he would have sent to Westlands on 18<sup>th</sup> January, 2001 she said: “I don’t know that **Mr. Njau** did not know the reporter he had assigned this task.”

She said she was the only person in the company of **Mr. Njau** when he had given the instructions to verify the story at Westlands on the material morning. She said that at Westlands, she had not seen **Mr. Kamotho’s** sons; the unidentified watchman told her these young men had fled the scene.

On re-examination, DW3 said the practice at Nation Media is that a report prepared by a reporter goes through the Producer's desk, and from there the newscaster could make any changes. The final copy should be approved by the News Manager — and that was the responsibility of the 2<sup>nd</sup> defendant.

#### IV THE SUBMISSIONS

##### 1. Submissions for the Plaintiffs

Learned counsel, **Mr. Kahonge**, summarised the evidence as showing that the 3<sup>rd</sup> defendant, **Bob Kioko**, had on 18<sup>th</sup> January, 2001 *allowed* a caller by name, **Maina**, to go on air on the 1<sup>st</sup> defendant's *Nation* FM Radio station, with words that injured the reputations of the plaintiffs. Soon after **Mr. Maina's** defamatory remarks were aired, the 3<sup>rd</sup> defendant now adopted the same words and voiced them in a manner which further injured the reputations of the plaintiffs.

Counsel submitted that the intention and innuendo attendant on the impugned words, were that the sons of the as-yet undisclosed Cabinet Minister, were spoilt and irresponsible persons of little social standing. The impression was also given that these sons were of immoral character and were habitual drunkards. The impression was also given, counsel urged, that these sons of the unidentified Cabinet Minister, had committed offences punishable under the law and were now instigating the intervention of their father to bail them out. The utterances of both **Mr. Maina** and the 3<sup>rd</sup> defendant, were recounted in evidence through audio-tape. Although at that stage the plaintiffs had not been identified, confirmation comes later that they were the persons meant, through the bulletins on the 1<sup>st</sup> defendant's radio station at 9.00 a.m. on 18<sup>th</sup> January, 2001 which were giving fulfilment to a promise made by the 3<sup>rd</sup> defendant in the early-morning talk show. *The 9.00 a.m. bulletin specifically mentioned the 1<sup>st</sup> plaintiff as the Cabinet Minister* whose sons had been the subject of negative comment earlier in the morning. Yet more confirmation came at 11.00 a.m., in the *Nation* TV station, when the **Hon. Mr. Kamotho's** son is mentioned as having been involved in a scuffle earlier on at Westlands. The television bulletin, however, did not identify its source of information and did not show any pictures of the plaintiffs (or any of them) at the alleged scene of the scuffle. This matter was the lead story in both the 9.00 a.m. and 11.00 a.m. news bulletins. As a result it became quite clear who were the "spoilt brats, drunkards, irresponsible sons" mentioned in the early morning talk show. The reference was to the sons of the **Hon. Mr. Kamotho**.

Those words were injurious to the **Hon. Mr. Kamotho**; they portrayed him as a person who uses his office to subvert the due process of law where his sons had transgressed the law. His reputation and integrity as a Cabinet Minister was therefore cast in doubt. The evidence of all the plaintiffs showed that they were not involved in the alleged incident; and there has been no credible proof otherwise.

Learned counsel noted from the evidence that the plaintiffs had been shunned by friends in social circles and their usual confidences were impaired, following the publication of the impugned material by the defendants. **James Kamotho** (3<sup>rd</sup> defendant) had to take a whole day off work, as he was "inundated with calls from business associates and friends." Of the 1<sup>st</sup> plaintiff, counsel submitted: "The 1<sup>st</sup> plaintiff, then a Cabinet Minister, had to undergo the indignity and embarrassment of denying calls from colleagues who were taken aback by the publication." Of the other plaintiffs, learned counsel urged: "The 2<sup>nd</sup> plaintiff who is a doctor by profession was also faced with a similar barrage of questions and for the 4<sup>th</sup> plaintiff, a student in Australia but then resident in Kenya, he is to-date still being confronted by friends who believe he was involved in the incident."

Counsel submitted that the impugned publications by the defendants had caused damage to the plaintiffs. Evidence showed that the 1<sup>st</sup> plaintiff's demand for correction and apology had been spurned by the defendants.

Learned counsel for the plaintiffs submitted that the defendants' evidence had been marked by inconsistency and want of credibility. He gave as an example the evidence of DW3, **Pamela Asighi**. This witness allegedly visited the Westlands scene of the accident and scuffle. She, however, testified in Court

that she did not recall the place where the incident took place, or even who was her cameraman for that occasion. She could not even visualise on which road the incident had taken place; she could not name the watchman at the accident scene, but got information from a police officer now deceased, that the plaintiffs had been involved in the accident; she had no recording of the deceased police officer speaking to her; she did not even have the names of the plaintiffs; yet she was breaking a news story, a “scoop”. Counsel wondered how a trained reporter could have missed or forgotten such details, and submitted that **Pamela Asighi** had not been a credible witness. She could not explain how the news bulletin had referred to only one son of the 1<sup>st</sup> plaintiff being involved in the accident, when the deceased **Mr. Kimanthi** had told her that two of **Mr. Kamotho’s** sons had been involved. Counsel perceived it as an opportunistic claim that the Police Spokesman, **Mr. Kimanthi**, had spoken to witness, considering that his name was now emerging for the very first time, and only when it was well known that he had died in December, 2004. It had never been the defendants’ case that they were relying on information received from **Mr. Kimanthi**.

Learned counsel attached significance to the evidence of **Mr. Mutegi Njau** (2<sup>nd</sup> defendant), the 1<sup>st</sup> defendant’s News Manager. He testified that he had assigned a news crew to verify the information on the alleged accident and scuffle. However, when the news crew returned from Westlands, they did not disclose to him the source of the story. It is thus recorded in the record of evidence (of 2<sup>nd</sup> defendant): “News crew did not bring source of info”. This contradicts **Ms. Asighi’s** evidence, which sought to shift responsibility for the form of reporting entirely to the News Manager. DW2 had conceded that at 9.00 a.m. on 18<sup>th</sup> January, 2001 the 1<sup>st</sup> defendant had published news which had not been verified — which, in his words, was “irresponsible”. **Mr. Mutegi Njau** cannot today, say whether any of **Mr. Kamotho’s** sons was involved in an accident and a scuffle at Westlands on 18<sup>th</sup> January, 2001.

Such evidence coming from the overall News Manager, **Mr. Kahonge** submitted, and with justification, in my view, “speaks volumes [on] the defendants’ case in this matter.” He urged that the Court should find that the defendants indeed published unverified information and/or false statements respecting the plaintiffs, and that they thereby practised “irresponsible journalism.”

Learned counsel submitted that **Pamela Asighi’s** evidence was also in departure from the testimony of **Bob Kioko** (3<sup>rd</sup> defendant). She averred that after visiting the accident scene she had reported back to the 3<sup>rd</sup> defendant (DW1). The Court record reads (in report of **Pamela Asighi’s** testimony):

*“I asked Kimanthi to verify...so I called Bob Kioko.*

*I trusted Kimanthi’s word so Kioko ran the programme.”*

Yet **Bob Kioko’s** evidence was that after he finished with the *Changamka* talk show at 7.15 a.m. he handed over everything to the News Manager, who sent out the news crew to the scene. **Bob Kioko** said that it was after the return of the news crew (and this must be understood to mean **Pamela Asighi’s** crew) that the television story was filed — *by that same news crew*. The record shows **Bob Kioko** giving evidence that he did not “know what information [the news crew] got from the scene.”

Counsel submitted, quite convincingly, in my view, that it is to be concluded that **Bob Kioko** had not spoken to **Pamela Asighi** after she is said to have visited the Westlands scene, and he did not broadcast any story based on **Ms. Asighi’s** report.

Learned counsel urged the Court to take the position that the defendants’ evidence was at best untruthful and inconsistent, and that on the basis of the available evidence, the plaintiffs had made out their case on a balance of probabilities.

The next question considered by **Mr. Kahonge** was whether, on the evidence before the Court, the defendants should be held liable. Counsel began from the trite legal principle that the tort of defamation protects a person from untrue imputations which harm his repute with others. The ingredients to be proved are: (i) *the fact of publication*; (ii) *that the words are defamatory*; and (iii) *that the words refer or*

were understood to refer to the complainant. Counsel submitted that the evidence showed that the defendants had published the words complained of in paragraphs 8, 9 and 11 of the plaint. The said words were broadcast on both *Nation* FM Radio and *Nation* TV both of which belonged to the 1<sup>st</sup> defendant and are widely listened to in the country. The 3<sup>rd</sup> defendant had conceded that as host of the *Changamka* talk show, he had allowed one of his regular callers, a **Mr. Maina**, to go on air and publish the impugned words, set out in paragraph 8 of the plaint; and he on his part published those selfsame words, as asserted in paragraph 9 of the plaint; while the 2<sup>nd</sup> defendant, the News Manager, allowed the impugned utterances to be published in the news bulletin at 9.00 a.m. (radio) and 11.00 a.m. (television). Counsel stated, quite correctly, with respect, that in law, everyone who takes part in publishing defamatory matter is *prima facie* liable; and he submitted that both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are liable.

Learned counsel submitted that all the aforesaid broadcasts taken as a whole, identified the 1<sup>st</sup> plaintiff as the Cabinet Minister involved, and though not identifying the other plaintiffs by name, it is not necessary that they should have been referred to expressly. Counsel submitted, and with clear justification in my view, that it is the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs who had been referred to in the impugned publications as the sons of the 1<sup>st</sup> plaintiff. The 1<sup>st</sup> plaintiff testified that he has only three sons, just as **Mr. Maina** and **Mr. Kioko** had stated in their *Changamka* talk show of 18<sup>th</sup> January, 2001. Subsequent broadcasts identified the **Hon. Mr. Kamotho** as the Minister in question; and thus he is entitled to rely on the subsequent publications as identifying him with the defamatory words aired earlier on the material day.

Counsel's argument is, doubtless, sound in law. In *Hayward v. Thompson and Others* [1982] 1QB 47 the following statement of the law was made by **Lord Denning, M.R.** (at p.60):

**“One thing is of the essence in the law of libel. It is that the words should be defamatory and untrue and should be published ‘of and concerning the plaintiff.’ That is, the plaintiff should be aimed at or intended by the defendant. If the defendant intended to refer to the plaintiff, he cannot escape liability simply by not giving his name. He may use asterisks or blanks. He may use initials or words with a hidden meaning. He may use any other device. But still, if he intended to refer to the plaintiff, he is liable. He is to be given credit for hitting the person whom he intended to hit. The law goes further. Even if he did not aim at the plaintiff or intended to refer to him, nevertheless if he names the plaintiff in such a way that other persons will read it as intended to refer to the plaintiff, then the defendant is liable.”**

**Mr. Kahonge** submitted that all the ingredients of the tort of defamation are met as against the **Hon. Mr. Kamotho**, since the impugned words depict him as an abuser of public office and a person wanting in integrity.

With regard to **Mr. Kamotho's** sons, counsel submitted, the *Nation* TV and *Nation* FM Radio bulletins had identified their father as the one whose sons were involved in the incident. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs were the direct subject of the publication, and it is precisely them who were being depicted as brats, irresponsible and criminal drunkards who are in the habit of using their father to evade the due process of the law. So, counsel submitted, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are entitled to rely on the subsequent identification of their father, as a basis for this claim in defamation. Even if **Mr. Kamotho's** sons were not, in the publications, referred to by name, the pejorative words referred to a limited class or group of persons (**Mr. Kamotho's** sons), such that it was readily arguable that the words in question referred to each and all of them — and so each can maintain an action in defamation.

Learned counsel urged that where the class referred to in defamatory publication was so limited and so identifiable, the position in law would be that a *finger of suspicion pointed at each of them*, even if only some of them may have been intended.

**Michael A. Jones** in his work, *Textbook on Torts*, 6<sup>th</sup> ed. thus writes (p.495):

**“As a general rule, defamation of a class is not actionable...The reason why defamation of a**

class is not usually actionable is that the words are not published ‘of the plaintiff’ ....However, if there is something in the words or the circumstances under which they were published which identifies a particular plaintiff or plaintiffs they will be actionable...Similarly, *if the reference is to a limited class or group*, such as trustees or the members of a firm, so that the words can be taken to refer to every member, they will all be able to sue..., as will the directors of a ‘family’ company ...The size of the class, the generality of the charge and the extravagance of the accusation will be taken into consideration...Where a defamatory statement referred to one or more but not all members of a class, without identifying which members were referred to...it is now arguable that all can sue on the basis that the finger of suspicion points at each of them.....”

Learned counsel submitted, quite meritoriously, in my view, that though the 9.00 a.m. and 11.00 a.m. broadcasts of 18<sup>th</sup> January, 2001 only referred to “a son of **Honourable Kamotho**”, unlike the *Changamka* publication earlier, which referred to “sons”, or a class of persons, the singular reference to one of them does not take away their individual entitlement to sue, as the finger of suspicion pointed at each one of them.

Counsel next considered the question whether the cause of action herein was actionable *per se*, or on the basis of proven special damage. He noted from the evidence, the fact that the plaintiffs had been shunned by colleagues or business associates, in the aftermath of the impugned publications; but he submitted that the publication by the defendants was actionable *per se*, as it belonged to the *libel* category. Section 8(1) of the Defamation Act (Cap. 36, Laws of Kenya) provides that *publication in electronic form constitutes publication in permanent form*. Counsel submitted that it was unnecessary for the plaintiffs in the instant case to prove *damage* occasioned by the impugned publications.

Even under the head of slander, counsel submitted, the said publications would still be actionable *per se*, as they bear the implication that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs have committed *criminal offences* punishable by imprisonment — such as affray, or assault.

Counsel then considered the question of remedies, and submitted that the Court has a wide discretion to determine the level of compensation for a person damnified through defamatory publication. In *libel* cases, counsel submitted, damages are considered to be “at large”; and with this open texture, in England the Courts have developed certain criteria to be taken into account. These are considered by **David Price** in his work, *Defamation: Law, Procedure & Practice* (p.161):

**“The amount of damages awarded in respect of vindication and injury to reputation and feelings depends on a number of factors:**

- (1) the gravity of the allegation;**
- (2) the size and influence of the circulation;**
- (3) the effect of the publication;**
- (4) the extent and nature of the plaintiff’s reputation;**
- (5) the behaviour of the defendant;**
- (6) the behaviour of the plaintiff.”**

Counsel submitted that aside from general damages, aggravated damages may be awarded *where the defendant fails to take steps to publish an apology despite requests*; or where the defendants continue to defend an action on the basis that the impugned allegations are true but they turn out to be untrue; or where they publish an article without belief in its truth. These principles, learned counsel submitted, have been applied in the recent past, in a series of defamation cases in Kenya.

In **Abraham Kiptanui v. Francis Mwaniki & 4 Others**, HCCC No. 42 of 1997, **Juma, J** in 1998 awarded a former State House Comptroller the sum of Kshs.3.5 million as general damages, and Kshs.1.5 million in aggravated damages, for publications done by a moderate-circulation newspaper, Target.

In **Hon. Christopher M. Obure v. Tom Alwaka & 3 Others**, HCCC No. 956 of 2003, **Lenaola, Ag. J** (as he then was), in January, 2004 awarded the plaintiff, a former Minister Kshs.15 million as general damages, and Kshs.2 million as exemplary damages for statements published in a low-circulation “alternative media” newspaper, *The Weekly Citizen*. The impugned matter touched on the social life of the plaintiff.

In **Oyaro v. Alwaka t/a Weekly Citizen & 2 Others** [2003] KLR 575 **Onyancha, J** in 2003 awarded the plaintiff, a Manager with the Kenya Ports Authority, the sum of Kshs.3 million for statements published in a low-circulation “alternative press” newspaper, *The Weekly Citizen*.

In **John Patrick Machira v. Wangethi Mwangi & 2 Others**, HCCC No. 1709 of 1996, **Mulwa, J** in 2001 awarded the plaintiff, a senior advocate, the sum of Kshs.8 million in general damages and Kshs.2 million as exemplary damages for statements published in the wide-circulation *Nation Newspaper*, a product of the 1<sup>st</sup> defendant herein.

**Mr. Kahonge** applied the principles in the above cases in proposing suitable recompense for each of the four plaintiffs. He related his assessment to: (i) the plaintiffs’ individual reputations; (ii) the wide circulation of the *Nation* media; (iii) the defendants’ refusal to make corrections to their news reports, apologise or proffer amends; (iv) the conduct of the defendants at the trial.

Learned counsel proposed for the 1<sup>st</sup> plaintiff, as a long-standing former Cabinet Minister, Secretary-General of KANU, Member of Parliament and Secretary-General of the Liberal Democratic Party, the sum of Kshs.15 million as general damages and Kshs.2 million as aggravated damages. For the 2<sup>nd</sup> plaintiff, as a medical practitioner of Kenyatta National Hospital, Nairobi Hospital and Thika District Hospital, the sum of Kshs.5 million as general damages and Kshs. 1 million as aggravated damages. The same was proposed for the 3<sup>rd</sup> plaintiff as a businessman running two companies, and the holder of a master’s degree in business administration, as well as a family man with two children. For the 4<sup>th</sup> plaintiff, a student in Australia, counsel proposed Kshs.1 million in general damages and Kshs.500,000/= in aggravated damages.

## 2. Submissions for the Defendants

Learned counsel **Ms. Ndos**i, for the defendants, on the question whether there is a cause of action against the 2<sup>nd</sup> defendant, contended that “there is no allegation against the 2<sup>nd</sup> defendant at all in the plaint filed on 9<sup>th</sup> March, 2001.” To this contention, learned counsel **Mr. Kahonge** riposted that paragraph 7 of the plaint “clearly discloses that the 2<sup>nd</sup> defendant was at all material times the News Editor and an employee in charge of the news coverage on both *Nation* Radio and *Nation* Television”, a fact which had not at all been in dispute at the trial. And in paragraph 11 of the plaint all the defendants are said to have published the impugned words. **Ms. Ndos**i, however insisted that no cause of action had been shown against the 2<sup>nd</sup> defendant.

Learned counsel for the defendants also contended that the 3<sup>rd</sup> defendant had not “published” impugned words that had in the first place come from a caller by the name **Maina**. But **Mr. Kahonge** replied that non-joinder of **Maina** was of no consequence: because Order I rule 9 of the Civil Procedure Rules does not make misjoinder or non-joinder fatal to a suit. As the dispute focussed on the *Nation Media Group*, its News Editor and broadcaster/reporter, learned counsel submitted, and these persons were authors of some of the publications in question, the Court was properly seized of the task to rule on the controversy so far as it affects the rights of all those coming before it. **Mr. Kahonge** submitted, and I think quite meritoriously, that the non-inclusion of **Maina** was by no means fatal to the suit. In any case, counsel submitted, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants could be held liable for *transmitting or repeating defamatory*

matter; for they allowed **Maina** to go on air, and then repeated his utterances in the news broadcasts at 9.00 a.m. and 11.00 a.m. on the material day.

**Ms. Ndosi** maintained that the impugned words, which are set out in paragraphs 8 and 9 of the plaint, had not mentioned the plaintiffs by name and so did not defame the plaintiffs.

Learned counsel contended that the plaintiffs had suffered no damage as a result of the publication of the impugned matter. She submitted that the 1<sup>st</sup> plaintiff ought to have produced as witnesses those parliamentarians who had expressed concern to him, upon the impugned stories being aired; and moreover, he had not forfeited his political career following on the publication of the matter. Counsel also contended that neither of the other plaintiffs had produced witnesses who had looked askance at them in the aftermath of the impugned news stories. Counsel contended too that all the plaintiffs had remained successful in their callings notwithstanding the airing of the impugned matter. She submitted that the plaintiffs had not proved their case on a balance of probabilities.

Learned counsel, **Mr. Kahonge**, responded by submitting that the plaintiffs had sued not only on the basis of innuendo, but also on the basis of the ordinary and natural meanings of the publications in question. The offending words, such as “spoilt brat”, “spoilt children in the streets”, “children apparently drunk on something” had been used by the defendants and pleaded in the plaint; and those words did not require further proof.

Counsel further submitted that there was no requirement of the law that for every allegation of innuendo, a “third-party witness” was necessary. In **Halsbury’s Laws of England**, 4<sup>th</sup> ed. (1997), Vol. 28 the point is thus stated (para.46):

**“The natural meaning of words for the purpose of the law of defamation is not a question of legal construction, since laymen will read into words an implication more freely than a lawyer. The meaning is that which the words would convey to ordinary persons. The ordinary person reads between the lines in the light of his general knowledge and experience of worldly affairs.”**

Counsel submitted that where the plaintiffs rely on “true innuendo”, as in the instant case, it is not necessary to call witnesses to testify as to the meaning which they understood the impugned words to bear.

Learned counsel, **Ms. Ndosi** submitted that a defamatory word carries an imputation which may tend to cause a person to be hated, despised, ridiculed or shunned, or if such word tends to lower the claimant, in the estimation of right-thinking members of the society (**Gatley on Libel and Slander**, 10<sup>th</sup> ed. (London: **Sweet & Maxwell**, 2004), pp.31 – 40). Relying on broad passages in **Gatley**, learned counsel submitted that defamation published by spoken word is slander and is not actionable except in 4 situations: (i) *where the words impute crime*; (ii) *contagious or infectious disease attributed*; (iii) *adultery or unchastity alleged*; (iv) *disparaging claimant in any office or business*. Counsel submitted that the plaintiffs did not lead evidence in support of any of those exceptions.

This submission does not, however, appear consistent with the material on record. Both in the evidence and in the submissions, the plaintiffs have claimed to have suffered injury in their business/office/professional life, and that they were depicted as persons instigating defeat to the process of criminal justice.

Learned counsel contended that no evidence had been led to show that the alleged damage caused to the plaintiffs by the impugned publications, had been aggravated by any conduct on the part of the defendants: such as more defamatory words published, or evidence tending to establish malice on the part of the defendants. She contended that **Ms. Pamela Asighi** (DW3) had obtained information which was read in the news from a police spokesman which she honestly believed to be true; and that there was no evidence that the news was motivated by the defendants’ belief that they would profit from the reading of the news bulletin — and so there is no basis for an award of aggravated damages.

## V. ASSESSMENT OF EVIDENCE AND SUBMISSIONS

The four plaintiffs tendered evidence to prove the assertions in their pleadings — the tenor and effect of which is that they were, on 18<sup>th</sup> January, 2001 defamed several times by the publication of a news story which referred to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs, the sons of the 1<sup>st</sup> plaintiff, as spoilt brats who in a condition of drunkenness, had driven a vehicle at excessive speed into a parking area and caused damage thereby; had caused a scuffle at the *locus in quo*; had then called in aid the authority of their Cabinet-Minister father, to extricate themselves from the resulting legal complications.

The story had its origin in an early morning talk show, with an unidentified caller, one **Maina**, calling on telephone and claiming that he was that very moment observing the objectionable conduct of the sons of a Cabinet Minister. The presenter, **Mr. Kioko** (3<sup>rd</sup> defendant), then recast and relayed the **Maina** statement. And the 1<sup>st</sup> defendant's radio and television stations then, at 9.00 a.m. and 11.00 a.m. respectively, turned the story into a news item which, this time, identified the **Hon. Mr. Kamotho** in clear terms, as the father of the brats, for general dissemination to the country at large.

The 2<sup>nd</sup> defendant who was the 1<sup>st</sup> defendant's News Manager, testified that at 11.00 a.m. on the material day he assigned reporters to visit the scene of the incident. There is a timing puzzle here. DW2 (**Mr. Mutegi Njau**) said he handed over the matter to one **Naim Bilal**, to verify with the 1<sup>st</sup> plaintiff and also send a news crew to the *locus in quo*. The news crew is said to have returned with a report; they came with a video-tape, and said they had visited the scene. DW3, **Ms. Pamela Asighi** who must have been the head of the news crew, said she had been sent to the scene of the incident by **Mr. Mutegi Njau**, and that she had gone there at about 8.15 - 8.30 a.m. just after the early morning talk show. She also said that while at the scene she had called the talk-show presenter (3<sup>rd</sup> defendant) to authenticate the information regarding the 1<sup>st</sup> plaintiff's sons having been involved in a scuffle at the car park at Westlands. **Mr. Mutegi Njau** did not say the content of the news-crew report — if there was one; he stated that he was not told its content, and that is strange. He also did not say whether the 1<sup>st</sup> plaintiff had been contacted for verification, even though he testified that he had given directions that this be done.

The factual picture presented by **Mr. Njau** raises more questions than it answers. In my assessment, **Mr. Mutegi Njau** did not tell the absolute truth before the Court. However, to his credit, **Mr. Njau** admitted that the content of the radio news bulletin at 9.00 a.m. could not have been verified, and he conceded that this amounted to irresponsible journalism.

Whereas DW3, **Pamela Asighi**, gave evidence that she had called the 3<sup>rd</sup> defendant (DW1) from the scene of the incident after verifying the information regarding the sons of the 1<sup>st</sup> plaintiff, DW1 said something quite different: "*I do not know what information [the news crew] got from the scene*". Such contradiction shows that as between DW1 and DW3, the truth was not being told — and so, little weight is to be attached to the evidence of the two witnesses.

As already stated, **Ms. Pamela Asighi** the head of the news crew that was dispatched to the scene of the incident — potentially a very important witness — did not place credible evidence before the Court. And there are several other reasons why the least weight is to be attached to the testimony of this particular witness. Although she was the person assigned the task of verification of the news story, she said she had spoken to a watchman who was unidentified and who, it would seem, is a fictitious character. Then she repeatedly claimed that the late Police spokesman, **Mr. Kimanathi**, had suddenly come along even though the 1<sup>st</sup> plaintiff's sons were not at the scene, and verily confirmed to her that the trouble-makers had been the sons of the **Hon. Mr. Kamotho**. She claimed that once **Mr. Kimanathi** had verified her story, DW3 called the 3<sup>rd</sup> defendant and gave the all-clear for the news programme to be run. Yet the 3<sup>rd</sup> defendant's evidence was, firstly, that he was only involved in the early-morning talk show at about 7.15 a.m., and thereafter handed over to others; and he also *denied having come to know the outcome of the news crew's verification effort* at the scene of the incident. There are serious doubts about **Ms. Asighi's** verification visit to Westlands; she based her testimony on the words of a deceased police officer and of an unidentified watchman, and then claimed that there was no need to attribute her verification account to

anybody: for “on TV it is not necessary to sign off. I can report without any name.”

**Ms. Asighi's** testimony appeared to have little to do with her personal conviction. It is hardly surprising that during cross-examination she lost her temper. My conclusion from this deportment was that the witness had been under some pressure to testify as she did, but in truth, this was in conflict with her innocent, inner persuasion; and consequently the script revolted her true conviction, embarrassed her, and she reacted by seeking refuge in anger — the object being to parry off more invasive examination.

I have to conclude that the defendants' evidence, in substance and on the most material questions, bore little relation to the truth. This is quite unlike the testimonies of all the plaintiffs, which were internally consistent and, as among all the witnesses, mutually corroborative and reinforcing. From this fact alone, I would say, the plaintiffs' cases have clear merits. Learned counsel **Mr. Kahonge** conducted what in my view, is an excellent analysis of the evidence; but in view of the serious weaknesses in the defendants' evidence, it was apparent that learned counsel, **Ms. Ndos**i was hard put to make cogent submissions on the foundation of the evidence from her clients.

Both counsel made submissions on the applicable points of law. I formed the opinion that the shortcomings in the defence evidence, removed the basis upon which counsel could make convincing submissions on law. The rights of a party, in any case which is dependent on the conduct of parties, must be determined not just on the basis of legal principles, but, perhaps more fundamentally, on the basis of the applicable facts.

From the facts adduced in evidence, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs were, in their standing in society, lowered in the perception of right-thinking people by the defendants in their publications. The first such publication, in the talk show of the early morning of 18<sup>th</sup> January, 2001, set up the groundswell which was built upon, as one *continuous transaction*, by the later publications of 9.00 a.m. and 11.00 a.m. (respectively on radio and on television). The content of the said three phases of publication, taken together, did identify the **Hon. Mr. Kamotho** as the Cabinet Minister whose sons were ill-conducted and had committed acts of a criminal nature, following which they had then resorted to the prominent public standing of their father to go scot-free. No evidence at all has been placed before the Court showing that any of the three sons of the 1<sup>st</sup> plaintiff had been anywhere in the Westlands suburb of Nairobi, let alone in the proximity of the alleged scene of accident and drunken brawl. On the contrary, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs have successfully shown that they were not at all involved in a scuffle at the scene of an accident, when they were drunk, anywhere in Westlands, on the early morning of 18<sup>th</sup> January, 2001.

It follows that all the four plaintiffs were defamed. They were wrongfully exposed in unfavourable light, through electronic newscasting, repeatedly on the material day. Their evidence that they lost esteem in the perception of right-thinking people, as a consequence of the publications, has not been successfully controverted. I therefore find and hold that the plaintiffs were defamed by the 1<sup>st</sup> defendant, and by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who were servants of the 1<sup>st</sup> defendant.

For this injury to character, the plaintiffs are entitled to damages. Learned counsel, **Mr. Kahonge**, 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.

Applying the foregoing principles, I will revise downwards the figures proposed by learned counsel for

the plaintiffs. I base my determination on the following considerations.

I would start with the 2<sup>nd</sup> plaintiff. He is a medical doctor and was at the time of the defamatory publication engaged in further studies towards greater specialisation in his calling. In the practice of medicine, the *confidence* between doctor and patient is all-important; and this confidence is easily injured when the doctor's social or professional reputation is impugned. It must have been quite harmful to the 2<sup>nd</sup> plaintiff when defamatory material was published, in general terms, of and about the sons of the **Hon. Mr. Kamotho**. There were only three sons of the **Hon. Mr. Kamotho**, and a defamation of them in such a general manner, must be regarded as a defamation of each of them individually. The act of defamation took the form of libel, which is actionable *per se*. I therefore did not agree with counsel for the defendants when she submitted that the 2<sup>nd</sup> plaintiff ought to prove specifically the monetary valuation of the harm suffered.

For the 2<sup>nd</sup> plaintiff, **Charles Githii Kamotho**, I will award Kshs.2.5 million in general damages, and Kshs.500,000/= as aggravated damages. For the 3<sup>rd</sup> plaintiff, **James Mwai Kamotho**, I will award Kshs.2 million in general damages, and Kshs.500,000/= in aggravated damages. For the 4<sup>th</sup> plaintiff, **David Waweru Kamotho**, I will award Kshs.1 million in general damages, and Kshs.500,000/= in aggravated damages.

The 1<sup>st</sup> plaintiff was at the time of the impugned publication, a Cabinet Minister and a national politician with a substantial reputation as a public servant. The negative and defamatory publication, without doubt, caused him much injury to his character. For him, I will award 6 million shillings as general damages, and 1 million shillings as aggravated damages.

The plaintiffs will have costs from the date of filing suit; and the same shall bear interest at Court rates until payment in full.

Damages will bear interest at Court rates from the date hereof, until payment in full.

**Orders accordingly.**

DATED and DELIVERED at Nairobi this 1<sup>st</sup> day of July, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: J.B. Ojwang, J.**

**Court clerk: Mwangi**

**For the Plaintiffs: Mr. Kahonge, instructed by M/s. Macharia Kahonge & Co. Advocates**

**For the Defendants: Ms. Ndosi, instructed by M/s. Hamilton Harrison & Mathews, Advocates.**