REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASES NOS 126 & 135 OF 1990 (CONSOLIDATED)

J KUDWOLI

JACKLINE AGOYA ……PLAINTIFFS

VERSUS

EUREKA EDUCATIONAL AND TRAINING CONSULTANTS

MAN GRAPHICS LTD

STANDARD LTD …….....DEFENDANTS

JUDGEMENT

On December 11, 1990, High Civil Case No 126 of 1990 and High Court Civil case No 135 of 1990, in which J Kudwoli and Jackline Agoya, respectively, were plaintiffs, each suing Eureka Educational & Training consultants (first defendant), Man Graphics Ltd (second defendant), and Standard Ltd (third defendant), in those positions in both of the two suits, were consolidated by consent.

In the two consolidated suits each plaintiff claimed damages, apology and costs and interest, on account of defamation alleged to have been committed by each of the defendants against the two plaintiffs.

By their respective plaints which were identical in every material respect, the plaintiffs averred that the first defendant published a magazine known as *Health Digest* which was printed by the second defendant and distributed by the third defendant, in which, in its January – February 1989, was printed and published on the front cover a large photograph of the two plaintiffs together in a wedding but with their eyes blacked out, by which the defendant meant and were understood to mean.:

(i) that the plaintiffs were undergoing a wedding ceremony, and in respect of Jackline Agoya, that she was doing so with an old man; and

(ii) that both were persons of criminal or dubious character.

Kudwoli was said to be a well-known personality in Mombasa and Kenya, having worked in Mombasa in a senior position for many years with the Kenya Ports Authority. The many people who saw the photograph and knew him as a married man were said to have thought that either he had matrimonial problems and had divorced his wife or, alternatively, that he was committing bigamy. Jackline Agoya, too, was said to be a well-known personality in Kenya and particularly in Mombasa and Nairobi. In her case, the many people who saw the photograph and knew her were said to have thought that she was

engaged in criminal activities, that being the reason for her eyes being blacked out. Kudwoli, too, was said to have been thought of as engaged in criminal activities because of the eye blacking out in the photograph.

It was said in the plaints that by reason of the publication of the photograph the two plaintiffs had been lowered in the estimation of right-thinking members of the society generally and had been brought into public scandal, odium and contempt. By reason of the publication the plaintiffs were said to have undergone mental and physical distress and embarrassment. And yet, despite demand made and notice of intention to sue given, the defendants refused to admit liability and persisted in that failure or refusal.

Messrs J V Juma & Co Advocates filed the suit for Kudwoli, and Messrs Musyoka Annan & Co Advocates sued for Jackline Agoya; and to both suits Messrs Mohammed & Muigai Advocates filed joint defences for the first and second defendants, and Messrs Daly & Figgis Advocates filed separate defences in the two suits for the third defendant. In Kudwoli's case the joint defence of the first and second defendants was that while the first defendant was the publisher of *Health Digest* the magazine was not printed by the second defendant, and that the January-February 1989 issue did not have printed on its cover a large photograph of the plaintiffs together in a wedding and with eyes blacked out. And without prejudice to that the first and second defendants averred that even if a photograph of the plaintiff was published it was not defamatory; they never imputed the plaintiff undergoing a wedding ceremony or that he was a criminal or a person of dubious character.

In Jackline Agoya's case the first and second defendants erected a joint defence in which the second defendant denied being a distributor of the magazine, and both defendants denied printing and publishing on the front cover of the magazine a large photograph of the lady together with a man in a wedding but with the eyes blacked out. Again without prejudice to that denial the two defendants pleaded that even if a photograph appeared it was not understood in the two senses attributed to it by the plaintiff. In both cases the first and second defendants made no admissions of the fame of the plaintiffs in Nairobi, Mombasa or Kenya; and they said they were strangers to what other people thought of the plaintiffs.

For the third defendant one common defence was put up in both cases. Admitting that it distributed the magazine in issue, the third defendant's line of defence was that it neither printed nor published the magazine, and no cause of action against the third defendant was disclosed. It was further pleaded that as a mere distributor of the magazine in the ordinary course of business, first, the third defendant did not know that the magazine contained the libel complained of, secondly, it did not know that the magazine or its cover was of a character likely to contain any such libel, and thirdly, such want of knowledge was not due to any negligence on the part of the third defendant. That being the case the third defendant was an innocent disseminators of the magazine. Without prejudice to all that, the third defendant denied the photograph being that of the plaintiff, that it was or was capable of being recognized as being that the plaintiffs or that it was recognized, and that it was defamatory of the plaintiffs. The third defendant denied the meanings attributed to the photograph by the plaintiffs, and any injury and character or reputation assigned by the plaintiffs. Finally, it was the third defendant's standpoint that the plaintiff was given notice under section 16(1) of the Defamation Act that evidence would be given that the plaintiff was offered a written offer to publish an apology which the plaintiff ignored and instead filed the suit.

At the hearing of the suit, evidence was given by the two plaintiffs and certain witnesses called on their behalf, and it was undisputably proved that the issue of the *Health Digest* magazine of January – February, 1989 carried a photograph of the two plaintiffs with their eyes blacked out; that the said issue was printed, published and distributed by the defendants, respectively; that in the photograph the person on the left hand side was the plaintiff in High Court Civil Case No 126 of 1990, and the lady on the right hand side was his daughter jackline Agoya, the plaintiff in High Court Civil Case No 135 of 1990. These facts were true and nothing contradicted them. I find them as such.

It was also not in dispute at all, that the photograph in question was taken of the two plaintiffs on the occasion of Jackline Agoya's wedding to her present husband, and that Joseph Kudwoli, her father and the plaintiff in High Court Civil Case No 126 of 1990, was actually going to hand her over in marriage to her bridegroom, Francis Agoya. It was in evidence, that the picture was taken on August 6, 1988, the said

wedding day. It was further proved without contradiction, that his picture was taken of the plaintiffs, without their being aware, without request and without their permission. Again, this court accepts these facts as true, as there is no contrary evidence or falsification of the same.

The plaintiffs said, and they called witnesses to say, that some people who knew the plaintiffs told the plaintiffs, after seeing the published photograph, that anybody seeing the photograph would understand it to mean that Joseph Kudwoli (the plaintiff in High Court Civil Case No 126 of 1990) was getting married to his own daughter, Jckline Agoya (the plaintiff in High Court Civil Case No 135 of 1990), because, as the plaintiff Kudwoli put it in his evidence in chief, "the photograph did not carry any explanation of the picture", except for the relative caption which read, "The many knives that cut the marriage bond", and the words

> "Our cover picture:-
>
> Weddings are occasions of great joy to everybody – the bride and groom, parents, relatives and friends"

appearing on the second page of the magazine, under the cover picture. The said magazine was produced as an exhibit, without any objection, and was admitted as a part of the evidence in the case. I saw on the cover of it, all those things, and, in addition, and apart from the title of the magazine, its price, date of the issue, its laudatory and self – praise as "The unique magazine that cares for youth health" there were printed on its cover the other topics to be found in the inside page of the magazine, namely:

"All about depression and related disorders.

.Breast cancer – what every man and woman should know.

.The pros and cons of sex education.

.Human parts in the post.

.You and your eyesight.

.Food additives – Genuine or cover – up?"

These topics are printed across the picture complained of, but without hindering its view of it. Indeed, after I saw the plaintiffs in the witnesss-box and looking at the picture on the cover and page 2 of the magazine, I was satisfied that the picture was of these two plaintiffs, and that anybody who knew them would easily identify the picture as that of the plaintiffs.

The plaintiffs reasoned in evidence giving, that because of the blacking of their eyes in the picture, the magazine meant to damage their reputation in the community and among persons who knew the family of the plaintiffs. They opined, as they gave evidence, that pictures with blacked out faces are usually associated with criminal activities. They expressed the view that the picture damaged their reputation in so far as it suggested that the plaintiff in High Court Civil Case No 126 of 1990 was marrying another young lady when in fact his wife was still alive, and had married under a monogamous system of marriage. It was said that the most damaging part of the publication was a suggestion that a father and a daughter were getting married to each other. My view on these opinions and interpretations of the picture will appear a little later; for now let me finish with the summary of the evidence on the plaintiffs' side.

The plaintiffs testified that the background in the picture was a backyard of church grounds, and the picture was taken after the plaintiffs had left their car together, at Saint Paul's Catholic Church of the University of Nairobi. Joseph Kudwoli was going to "give away the bride" (his daughter, Jackline Agoya), but Joseph said, in answer to a question put to him in the cross-examination, that "it would not be obvious from the picture whether the girl had already been given away by the father". He added. "The wearing of the veil over the face in itself alone would not tell the stage reached in the ceremony of

marriage". I looked at the picture and saw a wedding veil net over the face of the lady Jackline.

Marck Radoli, the second witness called for the plaintiffs' side, a very close family friend of the plaintiffs, and in whose own wedding Kudwoli had been the best-man and to whose children Kudwoli had been a god-father of three of them, and who had attended some of the traditional Luhya marriage ceremonies concerning Jackline, said in evidence, that he had been shown the magazine by Kudwoli, and he was struck by the dark patches across the face of the picture of the two plaintiffs. He also opined that black marks gave him a very bad impression, because whenever he has seen pictures with faces blacked, they have been pictures of criminals whose identity was being hidden. He did not know the plaintiffs to be criminals, and certainly they were not. He said that without the blacking across their faces, he would have obviously understood the picture to be showing Kudwoli giving away his daughter Jackline in marriage. "But with those marks, I understood the picture to mean that the plaintiffs were doing something dishonourable or criminal."

Jackline Agoya, too, gave evidence, very much the same in substance, as that which I have already summarized above, and I hope it is not any suggestion on my part that I have not considered it by not expressly setting it out separately in this judgment. She, too, says her reputation was damaged, and, in addition, says that at the time when she saw the picture she was expecting a baby, and the picture upset her.

The other important pieces of evidence related to the social standing of the plaintiffs in society, both past and present, and, in the case of Kudwoli, his plans to go into business. I intend not to lessen their high standing and great contribution to this country when I say that their evidence brings them out as important citizens of this country, held in high esteem by those who know them. As Mr Sereje aptly put it in the course of his submissions, these two plaintiffs "are people of high character and highly respected".

At the close of the evidence on the side of the plaintiffs the court called on the defendants to give their evidence, upon which their lawyers said that they did not wish to offer any evidence and that they did not have witnesses to call. The advocates for the defendants preferred to, and did, make submissions on the basis of the evidence given for the plaintiffs. Between them, Mr T C Noad and Mr Githu Muigai, for the defendants, submitted that no case was made out for defamation. It was submitted that in order that photographs be defamatory they must go beyond injuring feelings; that photographs are in the public domain, there being no privacy in a photograph and that one does not have to give permission for his picture to be taken or published. This argument was in response to the plaintiffs' complaint that they had not invited or authorized any person to take their photograph at the wedding in question, and that the plaintiffs had not been aware that the photograph was being taken or published. Mr T C Noad and Mr Githu Muigai further argued that it is not the plaintiff's impression that matters, unless the picture is defamatory in law. They added that although a picture may be defamatory, this is unusual; and that in the instant case no imputation would be found in the picture, of bad character. The two learned advocates said that blackening faces is not always an indication that the picture is of a criminal. They stated that in the present case the blackening was only to avoid embarrassment; but I wish to discount and ignore this statement at once, because it is a statement of fact which can lack an evidential function not one that could be stated from the bar without opportunity having been given to the plaintiffs to challenge it factually.

Continuing with their submissions, Mr T C Noad and Mr Githu Muigai said that in this case the publication was not defamatory. In particular, Mr Githu Muigai stressed that blackening out a face in a photograph does not necessarily imply criminal activity; it merely shows that authority had not been obtained from the person whose picture is published. He said that journalistic tradition and practice is that blackening faces is only to hide identity , without any suggestion of criminality. Again, there was no evidence on journalistic tradition and practice in this country. Nor was there any authority, principles, established usage, on journalistic tradition and practice, such that the court may take judicial notice of on account of journalistic notoriety on this aspect.

In the particular case of the third defendant, Mr T C Noad submitted that the third defendant was not liable. He said that the essence of libel is participation in and authorization of the publication of the

defamatory matter. He said that a printer or distributor is not covered by the Defamation Act to made them liable; and that if they are covered, their inclusion amongst persons who may be liable is out-dated and the position must be re-examined to see whether a printer or distributor should be liable. He said that he knew of no authority in Kenya making a printer or distributor liable.

In all, the two learned advocates said that the publication does not carry the innuendos referred to in the plaint; and that an apology having been offered, section 16 of the Defamation Act comes in.

For the plaintiffs Mr Sereje argued that the plaintiffs had made out their cases on a balance of probability that the picture was defamatory and actuated by malice; that the evidence on the side of the plaintiffs was not contradicted; that the defendants had not called evidence to contradict that of the plaintiffs. It was Mr Sereje's case, that right-thinking members of society would draw the inference that the picture complained of was of persons going through a wedding ceremony. He submitted that the embarrassment hidden by the blackening was of something bad, namely, the inference that the plaintiff in Civil Case No 126 of 1990 was committing the criminal offences of bigamy and incest. Mr Sereje stated that there was malice because the publishers never attempted to clarify with the plaintiffs about any relationship between them. As regards the persons liable, Mr Sereje said that all persons concerned in the commission of a tort are liable, and that publishers, printers and distributors, are all liable jointly and severally. He said that a distributor makes a libel worse by making it spread in the course of the distribution.

On apology and offer of amends, Mr Sereje said that a plaintiff has a discretion either to accept it or to reject it and proceed with a suit to recover damages. He said that no apology was put in the magazine, and that offer of amends was not enough as required by section 13 of the Defamation Act. This being the case, Mr Sereje suggested that each plaintiff should be awarded general damages in the sum of Shs 200,000, citing the case of *Godwin Machira v Okoth* [1977] Kenya L R 24 in which Shs 1,000,000 was the award made.

The agreed issues which were framed and signed by the advocates on both sides were eight in number. They were these:

1. Is the photograph complained of that of the plaintiffs?

2. Was the photograph recognized as being of the plaintiffs?

3. Was the printing and publication of the said photograph defamatory of the plaintiffs?

4. Did the printing and publication of the said photograph infer or carry the innuendoes referred to in the plaints?

5. Is any cause of action disclosed against the third defendant who was a distributor without knowledge of the libel without being negligent, being an innocent disseminator of the magazine?

6. Were the plaintiffs offered an apology, and if so, what is the effect of such offer?

7. Are the plaintiffs entitled to damages, and if so, how much, and against which of the defendants?

8. What orders should be made as to costs and interest?

With great respect to the learned advocates for both sides, I consider that these agreed issues fairly represent the matters in controversy and I respectfully adopt them as issues which arise for the court's decision. With a lot of respect to these learned advocates again, I wish to say that on the evidence given, I find as a fact proved on a balance of probability, that the photograph complained of was that of the plaintiffs and was recognized as being of the two plaintiffs. I saw it; I saw the plaintiffs in the witness box; and Mark Radoli, too, the second witness to be called by the plaintiffs testified as to the identity; and it was clear that the photograph was of these plaintiffs and they were recognized as the people

photographed. Indeed, there was no serious or any challenge by the learned advocates for the defendants in the course of their submissions; but even if they had done so, the court was satisfied on this aspect. So, the court decides and answers the first two issues in the affirmative. I answer them, "Yes".

While the first two issues may be answered on factual material, the third and fourth issues present legal questions, and may be answered only after bringing to the fore the relevant law on the issues. The two issues may, for convenience, be examined together; and they raise, in the first place, the very basic and primary questions, both definitional and analytical.

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

1. that the matter of which he complains was published by the defendant, and

2. that it was published of and concerning him, and

3. that it is defamatory in character; and,

4. that it was published maliciously; and

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

Of the two types of defamation – libel and slander – the matter complained of in this case is a libel. For this reason the court is not concerned with slander and will not consider the fifth of the above stated elements of libel and slander. Suffice it to mention here, that whether defemation consists of libel or slander, a plaintiff must prove the requisites common to both namely that the words or other matter in question (a) are defamatory (b) refer to him and (c) were maliciously published by the defendant. For the most part libel and slander are governed by the same principles, but three important differences between them exist namely:

(1) libel is an actionable tort and also a criminal offence, whereas slander is a civil injury only;

(2) libel is actionable *per se* but slander is, save in special cases actionable only on proof of actual damage, and

(3) libel is defamation crystallized into some permanent form, while slander is conveyed by some transient method of expression.

Both libel and slander however protect the interest in one's reputation. As no question arises in this case touching on the nature of and distinctions between libel and slander, the court will not go beyond this brief mention of those aspects of defamation law. What is necessary for the present case is to consider what defamation is, or what a defamatory matter is in our law of defamation.

To attempt to answer the question "What is defamation?' or to define the expression "defamatory matter", is to embark upon a voyage to juristic and scholastic perdition. Well-intended ambitions of eminent judges and legal scholars of profound erudition to define these terms have resulted in many a formulae for describing or defining them without rendering any wholly satisfactory definition or description. In the English case of *Scott v Sampson* (1882) 8 QBD 491 at p 503, for intance, Cave J defined the word "defamation" as "a false statement about a man to his discredit", and that is the definition preferred by Scrutton, LJ, in the English Court of Appeal case of *Youssoupoff v Metro – Goldwyn – Mayer Pictures Ltd* (1934) 50 TLR 581 at p 584. The leading English monograph of Gatley on the subject of defamation defines what is defamatory as:

"Any imputation which may tend "to lower the plaintiff in the plaintiff in the estimation of right – thinking member of society generally' (per Lord Atkin in *Sim v Stretch* (1936) 52 TLR 669, at p

671) 'to cut him off from society' (per Wilmot C J in *Villers v Monsley* [1769] 2 Wils 403 at pp 403, 404) or 'to expose him to hatred contempt or ridicule (per Parke, B, in *Parmiter v Coupland* [1840] 6 M & W 105, at p 108), is defamatory of him.": *Gatley on Libel and Slander*, 8th edition by Philip Lewis, paragraph 4, at p 5.

Dealing with the subject of a defamatory imputation the same excellent work states:

> "A defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others or to expose him to hatred contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit" : *ibid*, paragraph 31, at p 15.

The well-known work of Winfield gives the following definition of "defamation":

> "Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person": J A Jolowicz and T Ellis Lewis, *Winfield on Tort* 8th Edn, at p 254.

In its definition of the wrong of defamation the great treatise of Salmond in the field of torts puts forward the following definition;

"The tort consists in the publication of a false and defamatory statement concerning another person without lawful justification": *Salmond and Heuston on the Law of Torts* 19th Edn, by RFV Heuston and R A Buckley, at p 153.

The outstanding Australian work on the law of torts by Fleming says that a defamatory statement may be defined as one which

> "tends to lower a person in the estimation of his fellow men by making them think the less of him": John G Fleming *The Law of Torts*, 7th Edn, at p 501.

It is there explained, that such defamatory statement frequently takes the form of an imputation calculated to bring the plaintiff "into hatred, contempt or ridicule", but that it is not necessary that the words have the tendency to excite feelings of disapprobation, provided they cause him to be shunned and avoided by his fellows (*ibid*, at pp 501-502). Street states the classic definition of a defamatory statement rendered by Parke, B, in *Parmiter v Coupland*, [1840] 6 M & W 105 at 108, as that.

> "which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule",

and points out that the inadequency of this definition is now generally recognized, especially in so far as it does not embrace injury to trading reputation; noting further, that also a plaintiff may be made a laughing stock by, say, a cartoon and be annoyed thereby, and yet not have his character or reputation impaired. It is also there noted that the definition is inexact in that the ridicule must be substantial enough to reflect on reputation; and we are referred to *Emerson v Grimsby Times and Telegraph Co Ltd* (1926) 42 TLR 238, and *Blennerhasset v Novelty Sales Services Ltd* (1933) 175 LT Jo 393, for that observation. The authoritative textbook also notes that Lord Atkin had, in *Sim v Strech* [1936] 2 All E R 1237, at p 1240, proposed the following test (though not as a formal definition): "Would the words tend to lower the plaintiff in the estimation of right – thinking members of society generally? As the same book points out, this test certainly cures some of the defects of Baron Parke's definition in *Parmiter's* case. But the expression "right – thinking" members of society " is obviously ambiguous: Harry Street, *Law of Torts,* 8th Edn by Margaret Brazier, at p 388.

The authoritative statement on English law generally set out in a work of all-time respect, deals with the definitional problem this ways:

> "A defamatory statement is a statement which tends to lower a person in the estimation of right

> thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business": 28 *Halsbury's Laws of England*, 4th Edn, paragraph 10, at p 7.

Another important English book more recent than the other works I have cited, after quoting a number of judicial definitions, points out the shortcomings of each one of them, and says that in many cases the question whether words are defamatory cannot be decided by reference to a wholly objective standard but will depend to some extent on the occupation of the plaintiff; pointing out that words should not be regarded as defamatory unless they involve some lowering of the plaintiff's reputation or of the respect with which he is regarded; Sir Brian Neill and Richard Rampton, *Duncan and Neill on Defamation* 2nd Edn (1983), paragraphs 7.04, at pp 30, 31, and 7.06 at p 32.

Writing on wrongs and their remedies , an eminent old writer defined defamation as a false and unprivileged publication which exposes any person to hatred, contempt, ridicule, or obloguy or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation; and that all publications imputing to another disgraceful, or fraudulent, or dishonest, conduct, or which are injurious to the private character or credit of another, or tend to render a man ridiculous or contemptible in the relations of private life, is defamatory: C G Addison, *A Treatise on the Law of Torts*, 5th Edn, by Lewis W Cave, at p 149.

I have read many other books, each attempting to define defamation or a defamatory statement. Among them is the monumental work, *Clerk & Lindsell on Torts*, 16th Edn, chapter 21, pp 1086-1087, paragraph 21-07.Dictionaries, too, have been consulted. For example, the *Oxford Dictionary* defines defamation as "the uttering of reproachful speeches or contumelious language of any one with an intent of raising an ill fame of the party thus reproached", and *The Concise Oxford Dictionary* version defines "defame" as "attack the good fame of, speak ill of". *Webster's International Dictionary* defines defamation as "a bringing into disrepute, dishonour (or) disgrace" *Collins' Dictionary of the English Language* defines defamation as "the injuring of a person's good name or reputation"; and the 1960 edition of *The Caxton Encyclopaedia*, Vol 2, p 304 col 2, defines it as "The publication of a statement tending to discredit a person in the eyes of reasonable members of society generally". Each law dictionary carries its definition of defamation. For example, *Black's Law Dictionary*, by Henry Campbell Black, 5th Edn (1979), defines defamation as:

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

In a clear and straightforward definition *Harrap's Dictionary of Law and Society*, (1989) defines defamation as follows:

> "Publication of untrue statements which have a tendency to lower a person in the estimation of right-thinking members of society or to cause people to shun that person".

Mozley & Whiteley's Law Dictionary, 10th Edn (1988), by E R Hardy Ivamy briefly defines defamation as a "general term for words either spoken or written, which tend to injure a person's reputation"; and in the fifth meaning of libel, it states that all matter that "tends to degrade a man in the opinion of his neighbours, or to make him ridiculous, will, if published" amount to defamation. Curzon defines defamation as

> "The publication of a statement which tends to lower a person in the estimation of right-thinking

member of society",

while libel as

> "the publication in permanent form of a statement which tends to expose a person to hatred, ridicule or contempt"; L B Curzon, *A Dictionary of Law,* 2nd edn (1983).

A Concise Dictionary of Law, 2nd Edn (1990), reprinted 1992, intended primarily for those without a qualification in law, and devoid of technical jargon, defines defamation as

> "The publication of a statement about a person that tends to lower his reputation in the opinion of right-thinking members of the community or to make them shun or avoid him".

In the course of providing a basic vocabulary in simple English using a limited number of words, the *English Law Dictionary* by P H Collin, 1987, says that to defame is to write or say things about the character of someone so as to damage his reputation, and defamation is the act of ruining someone's reputation by maliciously saying or writing things about him. P G Osborn in his famous dictionary defines defamation as

> "the publication of a false and derogatory statement respecting another person without lawful justification. A defamatory statement is one exposing him to hatred, ridicule or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession or trade": *Osborn's Concise Law Dictionary,* 7th Edn (1983), by Roger Bird.

In a law dictionary very much consulted by both the courts and scholars, defamation is

> "the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person". The Earl Jowitt, *The Dictionary of English Law,* Vol (1959).

An important work defining words and phrases, has under the title "defamation", the definition of a defamatory statement. It says that a defamatory statement

> "is a statement which, if published of and concerning a person, is calculated to lower him in the estimation of right-thinking men or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office profession, calling, trade or business: John B Saunders, *Words and Phrases Legally Defined*, 2nd Edn (1969)

In the vocabulary works of others, defamation is

> "Publication of a false statement without lawful justification, tending to lower a person in the estimation of right-thinking people generally, or tending to make them shun or avoid him; a statement tending to bring a person into hatred, ridicule, or contempt". Hon Sri Justice M C Desai, A Subramanyam Aiyar and Jagdish Lal (ed), *Venkataramiaya's Law Lexicon,* in 4 volumes, vol 1, 2nd Edn (1980).

Wharton, on the other hand makes a general note that defamation is a "general term for words spoken (slander) or written (libel) to the prejudice of a person's character, in such wise as to support an action by such person against the speaker or writer". A S Oppe (ed), *Wharton's Law Lexicon,* 14th Edn.

Writing generally on East Africa, it has been said that in a plaint of defamation the plaintiff alleges that the defendant published some matter concerning the plaintiff, and that

> "the publication by the defendant has injured his reputation by exposing him to hatred, contempt and ridicule and has thus suffered damage in his profession or his trade": E Veitch, *East African*

Cases on the Law of Tort, 1972, at p 129.

Citing in support of his definition a decision of the High Court of Uganda, Spry in his helpful book on the subject states:

> "A Statement is defamatory if it is likely to lower the person of whom it is made in the estimation of ordinary, just and reasonable men": Sir John Spry, *Civil Law of Defamation in East Africa*, 1976, paragraph 12, at p 6.

In the case cited, it is put this way:

> "a statement is defamatory of the person of whom it is published if it is calculated to lower him in the estimation of ordinary, just and reasonable men"; per Phadke Ag J, in *Odongkara v Astles* [1970] E A 375, at p 376, affirmed by Spry, V-P, Law, J A and Duffus, P *ibid*, at pp 380-383.

In a case which went on appeal to the former Court of Appeal for East Africa, from the High Court of Kenya, it was stated that words are defamatory when they

> "would tend to lower the reputation of the plaintiff in the opinion of right-thinking persons": per Spry, Ag P, in *East African Standard v Gitau* [1970] EA 678, at p 681.

In another Ugandan case, the High Court of that country also said:

> "any words or imputation which may tend 'to lower a person or persons in the estimation of right-thinking members of society' or expose a person or persons to 'hatred' contempt or ridicule' have been held to be defamatory": per Youds, J, in *Shah v Uganda Argus*, [1971] EA 362 at p 364.

As all can see from these sample definitions, judges, jurists, textwriters and lexicographers, have been at pains to define the word "defamation" or the expression "defamatory statement". Many of these authorities always caution that no definition which has been formulated is sufficiently comprehensive to cover all the cases. Each definition is said to have its own flaws. But as I can see, although many of these and other definitions vary somewhat in phraseology, they are harmonious in meaning. Rough – and – ready and even old-fashioned these common law definitions may be, but they are in practice both serviceable and elastic. They serve at least as a mnemonic of a vast body of law laying down basic essential requirements to be proved in order to justify a holding that one has taken away the fair fame of another. For myself, I understand these many and other dictions and turns of expression to mean that "defamation" is the culpable publication to a third party, without justification, on an unprivileged occasion, of matter concerning another person , which, in all the circumstances of the publication, contains an untrue imputation likely to appreciably diminish good affections held for him by reasonable people in a respectable and considerable segment of the community.

I have avoided the classic definition put forward by Baron Parke in *Parmiter v Coupland* [1840] 6 M & W 105 at p 108, that defamation is a publication which is calculated to injure the reputation of another by exposing him to "hatred, contempt or ridicule". The drawback about that definition is that certain matter may damage one's reputation without exciting in reasonable persons feelings as strong as hatred, contempt or ridicule. It is unnecessarily too narrow, for some suggestions may be very injurious to the reputation of a businessman, which no one can connect with hatred, ridicule, or contempt. Nor would allegations of insanity or of an infectious disease contracted without any fault of the alleged patient, or of insolvency not due to discreditable conduct, though such allegations are plainly defamatory. Insanity, in the usual situations, is a misfortune and not a fault, calling for pity or sympathy rather than hatred, ridicule or contempt. Similarly, an imputation of a contagious or repulsive disease, makes the person said to be suffering from it to be an object of pity or sympathy, and not to be hated, ridiculed or held in contempt, except, perhaps where the disease is associated with a personal vice. Likewise, insolvency and indebtedness may occur without any element of misconduct; delay in paying or inability to pay a debt may be the result of misfortune, for which hatred, ridicule or contempt would be out of place; and yet to impute such delay or inability to a man would tend to injure his credit in a financial sense, which the law

protects as part of his reputation (which is an aspect of affection).

I have not taken Cave, J's definition in *Scott v Sampson* [1882] 8 QBD 491 at p 503, that defamation, consists in false statements to a person's discredit", because the word "discredit" is incapable of precise explication. I am aware that this way of defining a defamatory statement was preferred by Scrutton, LJ in *Youssoupoff v Metro – Goldwyn –Mayer* (1934) 50 TLT 581 at p 584; but its impreciseness and narrowness would limit its application in many other situations.

Definitions which hinge on dishonesty, immorality, dishonourable conduct, or some serious defect of character, are pegged to instances only; for many are the cases of defamation where there is no imputation of moral faults. As all know, something may be defamatory of a trade, business man, or a professional man, without imputing any moral fault or defect of personal character. If what is imputed is lack of qualifications, knowledge, skill, capacity, judgment or efficiency in conducting one's trade or business or professional activity, there is nothing to do with dishonesty or immorality or other dishonourable conduct, without more. The inclusion of instances when actions have succeeded has produced examples (not definitions) of defamation. That way, we see examples like things which tend to expose one to public hatred, shame, obloguy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one, to deprive one of the confidence and friendly intercourse in society. The list is long and is still growing or changing as society's attitudes keep shifting from age to age. We see instances of diminishing esteem, respect, goodwill or confidence in which one is held, or things exciting adverse, derogatory or unpleasant feelings or opinions against him. All these and many other epithets seen on the books involve the idea of disgrace, and the bottom-line is a tendency to injure reputation in the popular sense under affections. Defamation is hydra-headed; an imputation may be defamatory without falling within any of the specific heads set out in the known legal literature. The defamatory character of a matter may arise from and affect a particular characteristic or activity of the plaintiff. The form of the defamatory matter is not important, so long as the defamatory meaning is conveyed. If a communication tends so to harm the reputation of another as to lower him in the estimation of reasonable members of an important and respectable portion of the community, or to deter such third persons from associating or dealing with him, it is defamatory.

The difficulties which abound in the law of defamation do not end with the definition of the tort. One important problem to be solved in any case of defamation is the question of the standard of opinion by which defamation is to be determined. It is a difficult problem because that which is defamatory in the eyes of one segment of the population may be laudatory in the eyes of another, and a matter of complete indifference to a third. The difficulty is not made any easier by the fact that at different points of time and place there is always a remarkable change in public opinion, which makes it imperative for the law of defamation, of necessity, to keep pace with public opinion as reflected in the public prints, general habits as well as in legislation. The law must be adapted to the continuing development of our beliefs and opinions.

The view taken in England, and echoed by some courts in East Africa without stopping to think about it, seems to be that an action for defamation will not lie if the matter complained of tend only to damage a man in the eyes of a particular class or section of the community (*Clay v Roberts* [1863], 8 LT 397; *Miller v David* (1874) LR 9 CP 118; *Mycroft v Sleight* (1921) 90 L J KB (NS) 883. There, the test is whether the matter complained of would tend to lower the reputation of the plaintiff in the opinion of right-thinking persons generally. The position in England is put this way:

"Words are not defamatory, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right-thinking men generally.

> To write or say of a man something that will disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right-thinking man is not actionable within the law of defamation": per Greer, LJ, in *Tolley v Fry* [1930] 1 K B 467 at p 479.

If the words only tend to bring the plaintiff into odium, ridicule or contempt with a particular class or section of society they are not defamatory. The view of the community as a whole must be considered; an imputation of conduct which is merely distasteful or objectionable according to the notions of certain people is not defamatory: *Gatley on Libel and Slander*, 8th Edn by Philip Lewis, paragraph 41 at p 21, and paragraph 45 at p 23: and for identical wording of the test in one East African country, see Sheridan, J, in the High Court of Uganda case of *Kiwanuka v Obote and another*, Case No 315 of 1965, reported in Veitch, *East African Cases on the Law of Tort* (1972) page 146 at p 147, quoting and adopting *Gatley* and the English cases cited therein ; also see Youds, J, in *Shah v Uganda Argus*, [1917] EA 362 at p 364, again in the High Court of Uganda.

The phrase "right-thinking" has unfortunately come to have an ambiguous meaning; and faced with that ambiguity, the Australian courts discarded the "right-thinking" test . There the criterion commanding the widest support seems to be, the reaction aroused in citizens of "fair average intelligence" (per Graffith, CJ, in *Slatyer v The Daily Telegraph Newspaper Co Ltd* [1908] 6 CLR 1 at p 7), or "ordinary decent folk in the community, taken in general" (per Jordan CJ, in *Gardiner v Fairfax* (1942) 42 SR (NSW) 171 at p 172); see John G Fleming, *The Law of Torts,* 7th Edn (1987), at pp 502, 506.

But these cases give no indication of just what proportion of the community must share an opinion to classify it as "general". The rule of right-thinking members of society "generally", seems to be based on the unsubstantiated theory that a consensus of moral opinion exists in a given country like Kenya. Perhaps it existed in the infant stages when the rule was first formulated, such as when every Englishman was a Roman Catholic in his faith, or when the Victorian reputed high moral standards and practices held sway over the land; and generally the subjects of the English crown were thought to have the same general outlook, and dissent would render one an outlaw. There exist no statistical studies in Kenya to show that a general consensus of opinion is necessary to make matter imputing a particular conduct to the plaintiff actionable. It is also clearly wrong to say that the men to whom the publication is made must be "right-thinking"

people. A court cannot be called upon to make a definitive pronouncement upon whether the views of different segments of the coummunity are right or wrong, sound, or morally justifiable. The artificiality and pretentions which the test of "right-thinking" persons engenders are easy to see. As the cases of *Morgan v Lingen* (1863), 8 LT 800, and *Youssoupoff v Metro – Goldwyn – Mayer Pictures Ltd* (1934) 50 TLR 581, show, if a person is called insane, or is said to have been raped, the statement, if false would be defamatory of the person of whom the statement is published; but no "right – thinking" persons can think less well of the unfortunate lunatic or victim of rape.

In the United States of America which has a common law tradition such as ours, derived from the English one, Mr Justice Holmes, one of the greatest legal luminaries in the common law world, speaking for a unanimous Supreme Court expressed what was probably the first judicial opinion in America on the question. With how many people must the plaintiff's reputation be damaged in order for a representation to be actionable? In answer thereto the American Supreme Court held that it is beside the point whether or not a consensus of opinion condemns the thing of which the plaintiff is alleged to have done: *Peck v Tribune* Co, (1909) 214 US 185. According to that case, a published matter is actionable of an important and respectable part of the community. To me that conclusion is a practical answer to the question of how many persons must share in the hostile feeling created towards the plaintiff, to make the defendant's words or other matter actionable under this branch of the law. And there is further persuasive authority for this approach.

In *Munden v Harris* (1910) 153 Mo App 652, it was held that an infant five years of age may be libeled by the publication of a matter which would render him liable to the ridicule of his fellows and associates. The fact that the plaintiff's standing might not be hurt in the estimation of other portions of the community (although consisting of reasonable and right-thinking men), because of his tender years, does not excuse the defendant. Said the court in another case:

> "it is not essential that all who read the publication should be alike affected": *Van Wiginton v Pulitzer Publishing Co* (1914) 218 Fed 795, at p 797.

Meaning, that it is not necessary that a publication shall cause or tend to cause all reasonable persons, or even all the reasonable readers or hearers of the matter, to regard the plaintiff with hatred or contempt or in any other diminished light: it is sufficient to constitute defamation if it does so affect, or if it is calculated to affect, a substantial number of reasonable persons. The use of the word "public" or "generally" should not imply that every reasonable person must share in the hostile feeling. (*Morley v Post Printing & Publishing Co* (1928) 84 Colo 41 at p 48.

Obviously, therefore, a general consensus of opinion against a particular conduct is not necessary to make words imputing such conduct to the plaintiff actionable. With the greatest respect to the English and Ugandan cases which rely on the "right-thinking" test which, incidentally, is yet to be subject to an appellate court's close scrutiny in a pertinent case, one must qualify that test in the following way, namely, it is fine – it will be defamatory if most reasonable people would shun, avoid, etc , a man because of the matter complained of; but that is the upper limit: they need not be right-thinking; they may be wrong-thinking but reasonable people, and they need not be all the reasonable people or reasonable people generally. The bottom line, however, is that if substantial and respectable segment of the community would think less well of a person, provided that their reaction is not plainly anti-social or irrational, then the matter complained of is defamatory.

The baseline then is this, that a matter is defamatory if it tends to prejudice a person in the eyes of a substantial and respectable group, even though the proportion of society in whom the esteem of that person is lowered may be quite a small minority in the community. When a man is falsely accused of conduct which tends to lower him in the estimation of substantial number of persons, there can be no doubt that the door has been opened to business or social injury, or both; it will not wait for "right – thinking members of society generally." In holding this view I believe it is a view supported by eminent legal scholars like the late Professor Harry Street in England (see his *The Law of Torts*, 8th by Margaret Brazier, at p 389); Professor William L Prosser in America in his masterpiece, *Handbook of the Law of Torts,* 4th Edn, at pp 743-744, who, after discussing the different approaches to the standard of opinion to be taken as a test, suggests a possible reconciliation and arrives at the conclusion I have proposed above – a conclusion adopted as a true solution by *The Restatement of the Law of Torts*, Vol 3 (1938) 559 and noted in the great work of Gatley (see *Gatley on Libel and slander*, 8th Edn by Philip Lewis, at paragraph 45, page 23, fn 67).

So, there are two approaches to the question of the standard by which defamation is to be determined. One is to inquire whether the plaintiff has been damaged in the minds of right-thinking members of society generally. The emphasis here is usually of normalcy: the eccentric albeit of considerable size, are disregarded. Inherent in this standard is a quantitative as well as an ethical element, for it seems to be assumed that "right-thinking" people are in a majority. But as the sages of the law say, liability is not a question of a majority vote. So, the second approach presents itself, namely, that it is enough that the plaintiff be lowered in the esteem of any substantial and respectable group, though a minority – the test this court proposes to prefer.

True, essentially the index groups indicated by these tests differ only as to number; for under either test the plaintiff cannot succeed in his defamation suit if the group in whose eyes he is injured is deemed not substantial or if it is antisocial. Under one test there is demarcation of a general community; in the other segment is chosen from the broad community delimited. In both tests, however, there is setting of bounds, and this delimitation brings to the fore its collision with the objectives of a defamation suit. The social purpose underlying a suit for defamation is to protect members of society against irresponsible or malicious utterances which are false and damaging to the plaintiff's name. This being the aim, then by definition the action should be available whenever the plaintiff's reputation has been disparaged by a false statement even in the extreme case where the esteem lost be that of but one man, and he a moron, a lunatic, or a murderer. The twin quantitative and ethical limitations developed by the courts, however, closely curtail the operation of the basic policy of defamation law. What valid objectives justify these crippling restrictions?

Something may be said for the numerical limitation, especially under the second approach which I have preferred as the right standard. At the outset, it is clear that administrative considerations must set a lower

limit to the number of men whose opinion may be deemed legally significant. If a plaintiff is damaged in the regard of only a very few, whose opinion is of no particular importance to him, even if they are "right-thinking" men, the matter must be considered *de minimis*. It would be administratively impossible for the courts to give redress every time a gossip spread falsehood to a few acquaintances. Essentially, however, this limitation turns upon the significance of the damage done, and merely states the platitude that the judiciary cannot concern itself with minor social frictions when serious clashes abound.

Where the group under consideration approves of illegal or antisocial acts, or the nonfeasance of judicially approved acts, the courts have always refused to recognize as legally damaging the factual injury caused by the false utterance or other untrue matter. To permit the injured plaintiff to recover would be contrary to the public interest in that it would penalize a law-abiding citizen and give comfort to the law violator. It would impede law enforcement for the benefit of the anti-social. So dangerous would be the impact that the factually injured plaintiff must be sent away without redress, and the spreader of injurious false rumours be dismissed scot-free.

On principle, the position preferred by this court that the publication must tend to hurt the plaintiff in the rating of an important and respectable segment of the community, and that the defendant's words or publication need not injure the reputation of the plaintiff in the eyes of the whole community generally, is clearly proper, because no matter what character is imputed to the plaintiff, not everyone right-thinking in the community generally, will be prejudiced against him. On the other hand, it would be unreasonable to hold that words are actionable if they are derogatory in the view only of a single individual or a very small group of persons, since it is common knowledge that certain individuals have such peculiar notions as to lead them to sneer at a person whom everyone else praises.

So, although in determining whether a false matter can amount to defamation it is rare for a court to articulate its reasons for choosing one community segment rather that another, this court has found it necessary to expound its reasons for taking the more realistic view that a plaintiff recovers only if the matter tends to lower him in the esteem of any substantial and respectable group of reasonable men, whether they are "right-thinking" or "wrong-thinking", and whether "generally" or as a portion of the community. I am articulating these reasons because the standard of opinion proposed here is a deliberate departure from that stated in the English law found in the standard works common in our libraries and sometimes taken for granted as necessarily representative of the Kenyan law, without analysis.

The question of the standard of opinion which I have just considered is one. Another central question in a suit for defamation is one of the interpretation of the matter complained of. One must discover the meaning of the matter alleged to be defamatory before moving on to decide whether such matter is defamatory or refers to the plaintiff. The importance of the meaning of the matter in a defamation suit is self-evident, and is of cardinal significance at many stages. The meaning determines whether or not the matter is defamatory and, therefore, whether or not there is a claim at all. If it is defamatory, the nature of any defence to be put forth depends on whether in its correct meaning the matter is an assertion of a fact or an expression of opinion; for if it is a statement of fact, justification as a defence succeeds only if the matter is true; if it is an expression of opinion, fair comment as a defence saves the defendant from liability only if the matter is fair comment on a matter of public interest. If the plaintiff succeeds in the suit, the assessment of damages depends substantially on the gravity of the defamation, which also hinges on the meaning of the matter complained of.

Because different people may interpret the same matter in a number of different ways, the proper interpretation of a particular matter alleged to be defamatory often gives rise to difficult questions of construction. The ascertainment of the meaning of words and other things complained of as defamatory has been the source of much confusion and difficulty. Difficult as it may, it is often important, however, to decide the exact imputation conveyed by the matter complained of. On the part of whom must the matter tend to give rise to the lowering of the plaintiff's reputation?

In answering that question, the law has set an objective test. The test, according to the authorities, is whether, under the circumstances in which the matter was published, reasonable men to whom the publication was made would be likely to understand it in a defamatory sense. (Lord Selborne, LC, in

Capital and Counties Bank v Henty [1882], 7 App Cas 741, at p 745). It is not enough for a plaintiff to show that by some persons the matter was understood in a defamatory sense, or to refere to him. The standard of understanding is that of a reasonable man, having the intelligence, knowledge, education, experience and prejudice of the average man in the class of people to whom the matter was published.

Who is this reasonable man? Often presented as a mythical being described in a number of judicial and literary metaphors, like "the man in the street", or "the man who takes the magazine at home and in the evening pushes the lawn mower in his shirt sleeves", a reasonable man is really a cool, level-headed and collected man who acts and reacts in appropriate perspective. He is not a reasonable man he who is so lax or so cynical that he would think none the worse of a person whatever was imputed to him. He is not a reasonable man he who is so censorious as to regard even trivial accusations as lowering another's reputation. He is not one who is so hasty as to infer the worst meaning from any ambiguity. He is not unusually suspicious or unusually naive. He does not always interpret the meaning of words as a lawyer for he is not inhibited by a knowledge of the rules of construction. When he reads a newspaper he

> "is not expected to analyse it like a Fellow of All Souls" (*Salmond & Heuston on the Law of Torts*, 19th Edn by RFV Heuston and R A Buckley, at p 162; also see *Winfield on Tort* 8th edn by J A Jolowicz and T Ellis Lewis, at p 255; and Lord Reid in *Lewis v DailyTelegraph Ltd* (1964) A C 234, at p 258).

This standard rules out extremes at either pole; embracing neither a genius nor an idiot, neither a fanatic nor a faddist, neither a walking encyclopaedia nor an illiterate. He is simply a fair-minded person, and not one with a morbid or unduly suspicious mind which must discover defamatory imputations in everything published. One with an impervious intellect is excluded. The test of reasonableness which guides and directs the court in deciding whether the matter carries a defamatory imputation requires invoking ordinary intelligence, not the intelligence of persons setting themselves to work to deduce some unusual imputation might succeed to discover. In applying this test

> "the judge ought not to take into account any mere conjectures which a person reading the document might possibly form" (per Lord Selborne in *Capital and Counties Bank v Henty* [1882] 7 App Cas 741 at p 744; and see per Brett J in *Hunt v Goodlake* (1873) 43 LJ CP 54 at p 56.

The court will reject meanings which can only emerge as the product of some strained or forced or unreasonable interpretation (see Lord Morris in *Jones v Skelton* [1963] 1 WLR 1362 at p 1370). And

> "It is unreasonable that, where there are a number of good interpretation the only bad one should be seized upon to give a defamatory sense to the document" (per Brett, LJ, in *Capital and Counties Bank v Henty* [1880] 5 C P D 539, at p 541).

If words conveyed a defamatory imputation to those to whom they were published , but would not have done so to a reasonable man, they are not defamatory. There mere fact that the hearers or readers understood the matter in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding it (de Villiers, CJ, in *Rudd v De Vos* [1892] 2 C T R 384; *Gatley on Libel and Slander*, 8th Edn by Philip Lewis, paragraph 92, 1t p 47).

All the authorities which I have seen emphasise the test to be of a reasonable understanding of the matter complained of. The matter must be taken in the sense in which it is reasonably understood under the circumstances, and it is to be presumed to have the meaning ordinarily attached to it by those familiar with the language or other mode of communication used. No artificial and unreasonable construction placed upon innocent matter by the evil –minded can add a defamatory meaning not fairly to be found in the light of the circumstances. On the other hand, if there are listeners or readers who reasonably understand the words in a defamatory sense, the fact that there are others who will unreasonably give an innocent meaning will not prevent defamation. It is for the court to determine whether the matter is reasonably capable of a particular interpretation, or whether it is necessarily so. In construing the matter presented, the court may take into account any fact which is generally known, the meaning of slang expressions in common use, or the meaning of historical, fabulous or allegorical terms if they are a matter

of common knowledge; the knowledge and experience of worldly affairs beneath ivory towers: the court applies the knowledge and temperament of the ordinary man, the reasonable man of normal intelligence (*Gatley on Libel and Slander*, 8th edn, paragraph 98 at pp 52-53; Prosser, *Law of Torts*, 4th Edn, at p 747).

In looking for the meaning of the matter complained of, there is always one rule to follow. It is this, that it is necessary to consider not only the very matter of which the plaintiff complains alone; it is necessary to take into account the context of the matter as a whole, and the mode of the publication. The entire writing, conversation, or picture, must be construed in its setting as a whole. Thus, a plaintiff cannot be permitted to select an isolated passage or a picture in a publication out of its context and complain of that alone if other parts or the rest of the publication throw a different light on the matter seized upon. You must look at the whole of the publication to see whether it was calculated to injure the plaintiff's reputation. You must see whether, taking the whole altogether, you reasonably think the publication likely to depreciate the plaintiff's character or business interest. The defamation contained in one part may be negatived or explained away by what appears elsewhere in the publication. In one part of a publication something disreputable to the plaintiff may be found stated; but that may be removed by the conclusion or some other material in the rest of the publication. However disparaging at first blush, a publication may reveal its complete innocence if explained in the light of the circumstances attending its publication. For example, the meaning of oral words can never be divorced from the speaker's gestures, tone of voice and expression of countenance. As Lord Justice Sankey recalled by way of illustration, a lady who in a West End drawingroom in England who accused an English noble lord of being a thief, would not be liable when it was told that she had said, with a charming smile "Lord X, you are a thief, you have stolen my heart" (*Broome v Agar* (1928) 138 L T 698, at p 702).

That is to say the question is always whether the whole publication, taken together, is injurious to the reputation of the plaintiff. The defamatory sting of a matter may be removed by that which surrounds it. If the material contains a defamatory imputation, the inquiry is whether that effect is overcome by contextual matter of an emollient kind so as to eradicate the hurt and render the whole publication harmless. As the wise say, the bane and antidote must be taken together (Alderson, B, in *Chalmers v Payne and another* [1835], 2 Cromp M & R 156, at pp 158-159).

A publication may be defamatory upon its face, or it may carry a defamatory meaning only the reason of extrinsic circumstances or facts passing beyond the general knowledge of those who may receive it. Some words or pictures may mean nothing or are innocent to one having only a general knowledge. Extrinsic facts coming to light may cause the matter to give a meaning to those who know them which is not the one appearing on the face of it.

Accordingly, there are two positions recognized in the law of defamation. One is to provide for technical or slang meanings or meanings which depend on some special knowledge possessed not by the general public but by a limited number of persons. The other is with regard to some special meaning produced by some extrinsic facts or circumstances. The special meanings so produced are called innuendoes. An innuendo is a defamatory barb hidden below a deceptively bland surface of an apparently innocent matter published. It is a secondary meaning derived either from the matter itself, or conveyed by additional, extrinsic information. The principles which govern innuendoes are:

(1) that the expression "innuendo" carries three types of meaning, namely,

(a) a special meaning, additional to the natural and ordinary meaning, which a word bears because of some extrinsic facts or circumstances;

(b) a special meaning, additional to the natural and ordinary meaning, which a word bears because the word has some technical or slang or local meaning or some other meaning which is not known to an ordinary person;

(c) the meaning which a word bears, being a word which has only some technical or slang or local meaning or some other meaning which is not known to ordinary people.

(2) that the Court decides an innuendo meaning as a question of fact by attributing to the words the meaning which the Court considers they would convey to reasonable people who have the necessary knowledge or were aware of the extrinsic facts or circumstances which gave the words a special meaning;

(3) That the plaintiff who seeks to rely on an innuendo meaning has to plead and prove the facts or circumstances which gave the words a special meaning; he has also to prove that the words were published to one or more persons who knew these facts or circumstances;

(4) That evidence is admissible where the meaning attributed is relied on to show the sense in which the person to whom the words were published understood the words; but such evidence is not conclusive;

(5) That the words must be considered in their context.

See *Duncan and Neill on Defamation* 2nd Edn, paragraphs 4.17-4.23, at pp 17-20; and *Gatley on Libel and Slander*, 8th Edn, paragraphs 105, 110, 111, 121. In short, the function of an innuendo is merely to explain the words, or whatever be the published matter, in the light of the facts. No mere claim of the plaintiff can add a defamatory meaning where none is apparent from the publication itself in the light of the addition or extrinsic matter. It always remains a question for the court whether the meaning claimed might reasonably be conveyed and so understood. In determining whether the matter carries a defamatory meaning the court will construe the published matter fairly and see what meaning reasonable people may get. The court will not consider what persons setting themselves to work at great pains to deduce some unusual meaning might succeed in deducing Morris, LJ, in *Morris v Sanders* [1954] 1 WLR 67, at p 74; Lord Selborne, LC, in *Capital and Counties Bank v Henty* [1882] 7 App Cas 741, at p 745). No judge ought to take into account mere conjectures which a person reading the document might possibly form. The court will reject those meanings which can only emerge as the product of some strained or forced or unreasonable interpretation. It is not enough to show that by some living soul the matter complained of may be understood in a defamatory sense. And it is unreasonable that where there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document (Brett, LJ, in *Capital and Counties Bank v Henty* [1880] 5 C P D 539 at p 541)

From all the books I have studied for the purposes of deciding this aspect of the case, I have found the following rules helpful guides in applying the test of reasonableness.

The first rule is that all the matter complained of must be looked at together in its context, and not to look at merely particular parts of the publication. The bane and the antidote must be read together. The context and the whole publication of which the alleged defamation forms apart, and any documents referred to therein must be considered.

The second rule is that if the person or persons to whom the matter was published did not understand the matter in a defamatory sense or did not understand it to refer to the plaintiff, the defendant is not liable.

The third rule is that where a plaintiff relies on an innuendo, he must set forth in the plaint, and prove, the special or secondary meaning of a defamatory character, which the matter complained of conveyed to the publishee. He must also prove the facts and circumstances which turned the innocent – looking matter into firebands and death.

The fourth rule is that the plaintiff sustains the burden of pleading and proof, that the defamatory meaning attaches to him. He need not, of course, be named, and the reference may be an indirect one, with the identification depending upon circumstances known to the hearers or readers; but the understanding that the plaintiff is meant must be a reasonable one.

I now move to consider the other essential element which must be established in a suit for defamation. As the interest protected by the law of libel and slander is reputation, the foundation of a suit for defamation is, and it is essential to tort liability for libel or slander, that the defamation was communicated to someone other than the person defamed. This essential element of communication is given the technical

name of “publication”. It is the essence of tortious defamation that there be the communication of the disparaging matter to someone other than the person defamed. No action can be maintained for defamation unless there be a publication. “Publication” means the communication of, or making known, the defamatory matter to a third person, not the person defamed. And in order to bring a suit against a particular defendant it is necessary to prove that it is the defendant who published the matter, or that in the circumstances the defendant was responsible for the publication.

I am stating this particular requisite (of publication) as what constitutes the cause of action in defamation suits, rather broadly. I should put a rider, that publication constitutes a cause of action in only libels and slander actionable *per se*, but in the case of slander not actionable *per se*, the cause of action is the damage and not the publication (*Bree v Marescaux* [1881] 7 QBD 434, at pp 436 – 437).

An aspect of publication which must be stressed is that the publication must have been made by any act of the defendant which conveys the defamatory meaning of the matter to the third party who understands the meaning of the matter he perceives. The matter must be seen, felt, or heard by at least one other person than the person defamed, and in addition, it must be intelligible to the recipient of it. For this purpose, a publication in a language which the publishee does not understand, or a publication carried in a vehicle not perceivable by the third person, is not actionable. For example, the deaf talked to in a language not understood by the deaf, or the blind to whom a publication is presented in a medium not perceived and understood by the blind, or a publication not realized to be referring to the plaintiff, cannot form the basis of a defamation suit. Likewise, printing and publication signs not intelligible without being explained by some key, cannot of themselves found tortuous liability. So, if one writes a defamatory letter and gives it to a third person to read, or if a picture is taken and markings made to it and then given to a third party who does not understand or interprete the message, there would be no publication of the defamatory matter. In a concise way of putting things, a publication is not sufficient unless it is made to a person who understands the defamatory significance of the matter complained of, and who also understands that the matter refers to the plaintiff. (*Sadgrove v Hole*, [1901) 2 KB 1).

Bearing these observations in mind one should see the word “publication” as a “communication”, and denoting the fact that one person has brought an idea to the perception of another. The meaning of the publication is that which the recipient correctly or mistakenly, but reasonably, understands that it was intended to express.

Another essential element of the cause of action for defamation is that the defamatory meaning attaches to the plaintiff; it must make reference to the individual plaintiff. So, the plaintiff must not only prove that the defendant published the matter and that it is defamatory: he must also identify himself as the person referred to. He need not, of course, be named, and the reference may be an indirect one, with the identification depending upon circumstances known to the recipients, and it is not necessary that every publishee understands it, so long as there are some who reasonably do; but the understanding that the plaintiff is meant must be a reasonable one, and if it arises from extrinsic facts, it must be shown that these were known to those who heard, read or saw the matter. The plaintiff must always establish some reasonable personal application of the matter to himself. Mere conjecture is not enough. The test on the identity of the person defamed, ie, whether the matter complained of and which does not specifically name the plaintiff, refers to him or not is this: is the matter such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read or see or hear the matter knew all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless be described so as to be recognized; and whether that description takes the form of a word-picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that a person hearing or reading or seeing the alleged defamatory matter would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him (Isaacs, J, in *David Syme v Canavan* (1918) 25 CLR at p 238; *Lawrence v Newberry* (1891) 64 LT 797; *Shah v United African Press* [1961] E A 93).

The plaintiff must be reasonably understood to be the person defamed. It is the circumstances in which a matter is communicated which give it colour, meaning and thrust: they may combine to make a matter,

seemingly innocuous in itself, an infamous defamation of a person who is caught and pointed to by those circumstances (Clement, J A, in *Fraser v Sykes* [1971] 3 W W R 166; 19 DLR (3d 75). Where the plaintiff is actually named in the libel no difficulty can arise. But where the libel does not *ex facie* refer to the plaintiff, the plaintiff must provide extrinsic evidence to connect the libel with him. Evidence is also admissible of relevant surrounding circumstances which would or might lead those who saw or heard the defamatory matter to conclude that the plaintiff was the target (*East African Standard v Gitau* [1970] EA 678; see also *Onama v Uganda Argus Ltd* [1969] E A 92).

Even if the ordinary members of the public who see the defamatory matter in its context would not regard it is referring to the plaintiff, nevertheless it will be held to refer to the plaintiff if it has been published to readers who as a result of special facts or special knowledge would reasonably understand it to pin-point the plaintiff. Just as extrinsic evidence is admissible to import a defamatory meaning to something otherwise innocent, extrinsic evidence is admissible to connect the plaintiff with the person referred to in the publication. But the mere fact that a plaintiff calls witnesses to prove that; in their opinion, the matter referred to the plaintiff will not gain him a judgment if the court is not satisfied that a reasonable person would think so (see *Gatley on Libel and Slander*, 8th Edn, by Philip Lewis, paragraphs 283, 293, 1307-1308). Thus, the issue as to the identification of the plaintiff is to be decided by an objective test.

I now come to an aspect of the law of defamation which to any thoughtful mind must be a disturbing anomaly in the principles of torts and the foundation of tortious liability, including the aims of the law of torts. I am referring to the law relating to the state of mind of the person who publishes a defamatory matter, and I am particularly pained by the way books have presented it with regard to unintentional, free-from –recklessness, innocent defamation. It is in this respect that I propose that the courts of Kenya consciously write their own chapter on the law of libel and slander. I shall presently give my reasons for consideration, but let me firstly attempt to summarise the supposed position on the point.

Obiter dicta abound, and books of high respect on the law in some common law jurisdictions re-echo them as the law, that at common law liability for defamation is strict; it being usually stated that the liability at common law is absolute, that if the statement is in fact defamatory, it matters not whether the defendant could have taken steps to discover that the statement was defamatory. It is not necessary to prove that the defendant either intended to defame or could have avoided it by exercising reasonable care. On the aspect of the law concerning the ascertainment of the meaning of words and other matter complained of, you find *dicta* that

> "A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if i in fact he did both". Lord Loreburn, L C in *E Hulton & Co v Jones* [1910] A C 20 at p 23.

And shortly, that

> "Liability for libel does not depend on the intention of the defamer; but on the fact of defamation": Russell, L J, in *Cassidy v Daily Mirror Newspapers* [1929] 2 K B 331, at p 354

That way, the courts in those cases and in many others which I need not name here, have said that the meaning intended to be conveyed by the defendant is irrelevant. With regard to reference to the plaintiff, the common law is said to be that, the intention of the defendant is or should be regarded as irrelevant on the issue of identification in the same way as where the meaning of the words complained of has to be decided. This is how it is put:

> "it is immaterial that the defendant did not intend to refer to the plaintiff, or did not even know of his existence": *Gatley onLibel and Slander*, 8th Edn, paragraph 292, at pp 128-129, and the cases there cited.

The common law appears to adopt a relatively lenient attitude only with regard to innocent dissemination of defamatory matter, but then, even there, only to a limited extent: only towards one who has taken a subordinate part in the dissemination, such as a newspaper distributor or librarian or a bookseller, that is

to say, a mechanical distributor, if he can prove certain conditions to have existed. Regarding publication, intention and care play or role. The defendant is liable for unintentional publication of defamatory matter unless he can show that it was not due to any want of care on his part. But where the publication was neither intentional nor due to any want of care on the defendant's part, he will not be liable for it: *Gatley*, op cit, paragraphs 234, 235. The rule is that if the defendant intended that the defamatory matter should be published to a third party, or ought to have foreseen such publication, he is liable, but not otherwise (*Huth v Huth* [1915] 3 K B 32 at p 38).

The present state of the common law as found in the English cases and English reference works may, therefore, be stated very simply like this: that except as to the element of publication to a third person, a defendant is held strictly responsible for innocent conduct, without proof that he intended the consequences or was at all negligent with respect to them. That is to say, the plaintiff does not have to prove that the defendant:

(a) intended, by words or conduct, to make a particular statement,

(b) intended that it shall be understood to refer to the plaintiff,

(c) intended it to convey a defamatory meaning,

(d) intended that the meaning shall be false, ie intended to lie,

(e) intended to cause damage to the plaintiff's reputation.

The plaintiff need not prove negligence or malice in these things. Intention and negligence are relevant only with regard to the element of publication. "The question is not what meaning was intended but what reasonable men would understand to be the meaning", said Phadke, Ag J, in *Odongkard v Astles* [1970] EA 374 at p 377, in the High Court of Uganda. The plaintiff "need not prove malice on the part of the defendant unless it is ruled that the words were published on a privileged occasion", put in Mfalila, J, in *Rwekanika v Binamungu* [1974] EA 388, at p 390, in the High Court of Tanzania. In England, since the famous case of Artemus Jones, known as *E Hulton & Co v Jones* [1909] 2 KB 444; (1910) AC 20, malice is no more than a formality of pleading; innocence is generally no defence; and the doctrine there is that a man publishes defamatory matter at his peril; and the masters of the law on the subject in that country say so (see, for example, *Salmond and Heuston on the Law of Torts*, 19th Edn, at p 159; *Duncan and Neill on Defamation*, 2nd Edn, paragraph 4.07), for the statement that the meaning intended by the publisher is irrelevant for the purpose of construing the words; and paragraph 6.05, for the statement that for the purpose of deciding whether the words would be understood to refer to the plaintiff, the intention and knowledge of the defendant are irrelevant; and of course, the following authoritative statements on interpretation:

> "The meaning in which the defendant intended the words to be understood, though material on the question of damages, is immaterial in determining whether the words are defamatory or not. The question is not what the defendant intended, but what reasonable men, knowing the circumstances in which the words were published, would understand to be the meaning": *Gatley on Libel and Slander*, 8th Edn, paragraph 89, on the intention of the publisher;

and

> "Not only is it irrelevant to the liability of the publisher that he did not intend that his words should convey any imputation defamatory of the plaintiff, but if they only convey such an imputation by reason of extrinsic facts known to those to whom the words are published; it will be irrelevant that the publisher did not himself know these facts": *ibid*, paragraph 91;

and on the intention to refer to the plaintiff being immaterial:

> "it is immaterial that the defendant did not intend to refer to the plaintiff, or did not even know of

his existence": *ibid*, paragraph 292.

So, in England, ignorance of the defamatory implication and unintentional references to the plaintiff, are no defence to an action for defamation. Negligence on the part of the defendant need not be shown; nor need reckelessness. Motive is also immaterial in determining liability, except where the occasion is one of qualified privilege or one where fair comment is available (see *Clerk & Lindsell on Torts* 16th Edn (1989), paragraph, 21 – 04, at p 1083). Indeed, according to *Morgan v Odhams Press Ltd* [1971] 1 W L R 1239, the question is not whether the defendant intended the defamatory statement to refer to the plaintiff, but whether any person to whom the statement was published might reasonably think that the plaintiff was the person referred to. I have underlined the words " any person" to show that according to that case it need not be a reasonable person reasonably believing that the plaintiff was the person referred to. That is how it has usually been put in the books; but now any hasty but sensible reader is the norm in England.

As I said a little earlier on, the foundation of the doctrine that the law of defamation does not discuss the question of intent or negligence or recklessness, has been thought to be *Hulton & Co v Jones* [1910] AC 20, which is taken to have established the doctrine that a man publishes defamatory matter at his peril. That is to say, that in the law of libel and slander, the courts are to act on the basis of strict liability. Under the myth of absolute or strict liability a man acts at his peril. Unfortunately, this is one of those epigrammatic phrases which are so simply expressed that they appear bristle with ambiguities. In fact, its very simplicity lays it under suspicion.

What is meant when it is said that a man acts at his peril? Some people may take it to signify that everyone must take the risk of any act of his turning out to be an unlawful one because the law says it is so, though when he did the act he knew nothing of the law on that point. To understand it that way is only another way of saying that ignorance of the law is no excuse. In that sense all men act at their peril. But that is not the usual interpretation of the phrase. It seems to suggest that whatever a man does will, if it injures someone else, make the doer guilty of a breach of the law; and that means, that one is liable for every conceivable harm which he inflicted on another person.

Clearly, such a proposition peddling the notion of strict liability is simply ridiculous. Life would not be worth living on such terms, and it never has been lived on such terms in any age. If a man always acted at his peril, the whole community would be in prison but for three practical obstacles. No one could be outside to build the prison; no one could be there to send people to it; and no one could be there to keep the others in the goal.

Perhaps it is mediaeval man who generally acted at his peril, and probably for reasons then supportable by the level of technological development attained then. "Ancient law" it has been said in 12 *Selden Society*, at p 7, "could not discuss the question of intent because it had not the machinery wherewith to accomplish enquiry". But even the barest glimpse at English mediaeval law proves the existence of such a number of qualifications on any theory of absolute liability that they make the maxim little better than a trap to the student (adapted from Percy H Winfield, "*the Myth of Absolute Liability*" (1926) 42 L Q Rev 37).

But then, one understands why mediaeval law would have in it the theory of strict liability. The close you study Anglo-Saxon law the less likely you are to get from it any clear principles underlying it. You find a system of rules dealing with a number of glaring evils in an unsystematic fashion, without troubling itself with theories of liability. Rulers in those rough times made laws much as wild beasts eat hurriedly, when and how they can, careless of what the food is so long as it fills them for the moment, in peril of losing it or their own lives to any stronger animal (*ibid*, atp 38).

As we all know, the law to-day distinguishes classes of cases which may be generalized as (1) cases where the source of harm is pure misadventure, as where a customer is handling a supposed unloaded gun in a gun-store, and it goes off and injures the clerk; (2) cases where no design to injure exists, but a culpable want of care is found; (3) cases where no design to injure exists, and yet no inquiry into the actor's carefulness is allowed because he has undertaken unusual risk and extreme danger; and (4) cases where actual design to produce the harm exists.

Primitive Germanic law knew nothing of these modern refinements. It made no inquiry into negligence, and it raised no issue as to the presence or absence of a design or intent. It did not even distinguish between accidental and intentional injuries. The distinctions of to-day stand for an attempt at a rationalized adjustment of legal rules to considerations of fairness and social policy. The indiscriminate liability of primitive times of which *Hulton & Co v Jones* is a similitude stands for an instinctive impulse, guided by superstition , to visit with vengeance any visible source, whatever it be – human or animal, witting or unwitting – of the evil or injurious result.

As you endeavour to realize the nature of the primitive cannons of strict liability, you must take into account the essentially superstitious and irrational spirit which pervaded the jural doings of primitive society. The notion of strict or absolute responsibility for one's action was only one of the vehicles of the expression of superstition and irrationality. The other characteristics of primitive culture in England were the propitiation of deities by gifts and sacrifices; the appeal to a decision of the deity or of chance in litigation (as by the subjection to ordeals, or engaging in formal combat). These beliefs and doings give the tone to the times; and in the light of these you should understand that the notion of strict liability for harmful results was determined largely by instincts of superstition, and why the people were satisfied with merely finding the visible source for the harm and following out their ideas of justice upon it.

In the field of responsibility for tortious acts, too, you find numerous manifestations, all akin. The doer of a deed was responsible whether he acted innocently or inadvertently, simply because he was the doer; the owner of an instrument which caused harm was responsible, because he was the owner, though the instrument had been wielded by a thief; the owner of an animal was responsible because he was associated with it as owner; a mere instigator of a wrong was not liable, because the evil was sufficiently avenged by taking the prime actor; and where several co-operated equally, a lot was cast to select which one should be held amenable; and one who harboured or assisted the wrong-doer, even unwittingly, was guilty because he had associated himself with one tainted with the evil result (adapted from John H Wigmore, "*Responsibility for Tortious Acts: Its History*" (1894) 7 Harv L Rev 315).

For these and many other refutational bases, it is becoming increasingly recognised that strict liability has no place whatever in civil remedial justice. It smacks of barbarism to punish people despite the fact that there is no reason for blaming them at all. I know that at the last ditch the proponents of strict responsibility seek to meet this objection by pointing to a supposed conflict between the interests of individuals and the interest of the public at large, maintaining that this conflict must be necessarily solved by subordinating the individual, even if this entails injustice. There is no need to answer such a contention at length. Suffice it to say that it has not been proved that strict liability is a necessary instrument of social regulation. Less drastic methods would achieve the same ends as are aimed at by the doctrine of strict responsibility. Strict liability is prima facie objectionable, therefore, because it envisages the punishment of innocent people, and its imagined utility is not supported by any available evidence. It is a bad doctrine, based on the battle-cry of an eye for an eye; but an eye for an eye would make the whole world blind.

The effect of applying the idea of strict liability to defamatory matter is to place pictures, objects of sculpture, curricatures, the printed, written or spoken word, and all defamatory matter, in the same category of acts done at peril, together with the use of explosives, the keeping of wild or dangerous beasts, or water artificially stored. The outstanding cases in which absolute liability has been imposed have been those where the defendant maintains upon his land some highly dangerous agency or conducts a perilous business, and those involving the liability of owners of animals *ferae naturae* such as tigers, lions, gorillas, elephants, buffalos, which are obviously of a dangerous or vicious disposition towards mankind, by nature. But in these other fields of the law of torts the instances where liability is imposed without culpability are exceptional. There, that one acts at his peril is justified only by balancing the great risk of injury to others from the defendant's act, against the relatively small social advantage in having such acts done. There it is because one has consciously engaged himself in harmful extrahazardous activities. It, therefore, makes sense to approach the matter with a rule that one who recklessly or negligently or as a result of an abnormally dangerous activity, is liable for resultant harm. The conduct of the actor either must involve an unreasonable risk of invading another's interest, or must be caused by an abnormally dangerous activity. There seems, however, no such reasons for the general imposition of

absolute liability for defamation. In general, authors, publishers, printers and distributors, are not beasts *ferae naturae*: they are neither tigers, lions, wolves, buffaloes, rhinoceroses, sharks, leopards, crocodiles, elephants, nor serpents wasps and bees. They do not harbour abnormally dangerous things, conditions or activities any more than the makers of and dealers in, matches, electricity and the kerosene stove.

The strict liability doctrine has been said many times to be confined to things or activities which are "extraordinary" (Kekewich, J, in *National Telephone Co v Baker* [893]) 2 Ch 186; Farwell, LJ, in *West v Bristol Tramways* [1908] 2 KB 14), Wright J in *Noble v Harrison* [1926] 2 KB 332 or "exceptional" (Lord Buckmaster, in *Rainham Chemical Works v Belvedere Fish Guano Co* [1921) 2 AC 465, 471), or "abnormal" (Farewell, LJ , in *Barker v Herbert* [1911] 2 K B 633, 645), and not to apply to the "usual and normal" (Wright, J, in *Noble v H arrison* [1926] 2 K B 332, 342; Fletcher Moulton, LJ, in *Barker v Herbert* [1911] 2 K B 633). There must be "some special use bringing with it increased danger to others, and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community" (Lord Moulton, in *Richards v Lothian* [1913] AC 263, 280; Lord Wright, in *Sedleigh – Denfield v O'Callaghan* [1940] A C 880, 888; Scott, LJ, in *Read v J Lyons & Co* [1944] 61 TLR 149, 153; Bramwell, B, in *Nichols v Marsland* (1875), LR 10 Ex 255, 259; Wright, J in *Blake v Woolf* [1898] 2 Q B 426. 427).

Railway trains and motor-cars, pulleys and cranes, dangerous and fatal to thousands every year as they undoubtedly are, are to-day the usual, customary phenomenon on the railway-lines, streets, roads, building sites, factories and other industries in our daily nation lives, for which there is no strict liability. They are not abnormally dangerous activities or things. In the same way, I do not see any good reason for regarding the communication of ideas in writing, spoken word, picture or howsoever, as an ultrahazardous activity, attracting strict liability. It might be said that in the case of a newspaper libel the courts are dealing with something perhaps more like a tiger or an explosive, because a defamatory statement in a newspaper is undoubtedly highly dangerous because it circulates so rapidly and so widely in the community. That may be true of countries where the reading of newspapers is for everyone part of daily routine just as one having his omelette and sausage every morning, this cannot obtain in a country where illiteracy is one of the greatest scourges of the nation, gobbling a big chunk of the people's common wallet, and where a common ignorance of current affairs and a general disinterestedness in post-school non-compulsory reading are widespread affliction in the land.

But even if all or many people read newspapers, there is a sufficient social advantage in having news reports made, topical issues discussed, social evils brought to the open, and solutions to problems suggested, to prevent the application of the principles of the wild animal and ultrahazarouds activity cases. The law of torts has grown up historically in separate coaches and bogies, and beasts have travelled in bogies of their own: I shall not lift authors, publishers, printers and distributors, from their own coaches of normal activity, bundle them together with vipers and apply to them strict liability – a doctrine which does not seem to adapt to an expanding civilization. If among animals I must group authors, publishers, printers and disseminators, then I would rather place them in the compartment of animals *mansuetae naturae*.

The effect of strict liability in defamation of course is to exert the greatest conceivable pressure on its chief victim, the press, to ensure that what is published is not defamatory or is at all events true. But its hazards are glaring. What looks perfectly innocent on its face, and therefore does not prompt caution, may turn out to be defamatory in the light of some undisclosed background. The opportunity for extortionate suits is great, and it is an open secret that plaintiffs, frequently take maximum advantage of it. The result is that while the law of libel and slander provides a useful restraint upon irresponsible journalism, it is achieved at the expense of an unduly heavy burden upon innocent and careful writers and publishers.

However inevitable the doctrine may have been in bygone times, strict liability at the present day is an unjust anachronism standing against the mainstream of current legal thought and development of remedial justice, and stands on technicalities of the most oppressive kind. The dissenting judgment of the Lord Justice Fletcher Moulton, in the English Court of Appeal, in *Jones v E hulton & Co* [1909] 2 KB 444, states the objections to the *novel* law laid down by his brethren in the majority decision so fully and pointedly that had it not been for the fact that this law report is not always easy to find, especially in most

upcountry court libraries, I would not have attempted to repeat them in any form of my own, and I would have only commended the judgment to the best attention of the profession. But because there may be those who may not readily have access to the cases, I beg to be excused to adapt and adopt the reasoning in that judgment.

The law as to the innuendo illustrates very forcibly the importance which the law ascribes to the intention of the defendant. If the words were spoken of an concerning the plaintiff, the defendant is responsible for them in their obvious meaning. But if the plaintiff asserted that they bore any other meaning than that which they would obviously bear, he must allege that the defendant meant them in that sense, and must prove it by evidence admissible against the defendant, usually, no doubt, from the libel itself and the circumstances of its publication. But nothing that could not be brought home to the knowledge of the defendant would be admissible to support the issue, because it depended on intention: it would be an attempt to make a man liable for something other than the obvious meaning of his words, and that can only be done by showing that he intended the words to have that meaning.

The limitation of the action of defamation to cases where the defendant has spoken or written the words "of and concerning the plaintiff" is an example of the wisdom of the common law. It constitutes the protection of the innocent individual from being held guilty of defaming others of whom he has never intended to speak, and also from being himself defamed. On the one hand to hold a person responsible for every application that his words may bear in the minds of persons who either possess knowledge that he does not possess or are ignorant of that which he knows would be to put on him a burden too heavy to be borne. But on the other hand it constitutes the protection of the individual from being defamed, because it nullifies all attempts to libel by language which as a matter of construction cannot refer to the plaintiff, but which persons reading between the lines would understand to refer to him by reason of the surrounding circumstances. This is one of the most common forms of libel. No name is mentioned, or some name other than that of the person really want is substituted. The surrounding circumstances are intentionally misdescribed. The reader, must reject or alter part of that which is written. But all these devices are in vain to shelter a libeller, because the issue is not whether the language is, as a matter of construction, applicable to the plaintiff, but whether the writer intended it to refer to the plaintiff, and if he did so he is responsible if any one can discover his intention, however much in words he may have striven to conceal it. This great and beneficial amplitude of the remedy is, however, only possible because the law makes the intention to refer to the plaintiff the critical issue. If a man is to be liable for the interpretation put by any person on his words, he must be entitled to require that it should be an interpretation of his words as they stand. He cannot be held responsible for what people may think to be his meaning after rejecting such portion of his ords as may not agree with the interpretation. If a man who, judged by the language actually used by him, has not referred to the plaintiff may such portion of that language as they may think fit rejected as being a mere blind by each set of readers, and the rest alone used for the purposes of identification, and is to be held liable according to the result of this process, then we have actually attained in our system of legal procedure to the absurdity expressed in the well-known farce where a magistrate or police officer solemnly warns the suspect "any statement you may make will be taken down, suitably altered by me to incriminate you, and used against you".

In *Hulton & Co's* case, it was held that it is immaterial whether the defendant intended the defamatory matter to refer to the plaintiff or not, and that if persons who know of the existence of the plaintiff might reasonably think the matter referred to him, the plaintiff is entitled to succeed. It was held that you may accidentally libel a man whose very existence you do not know. In that case, the only connection of the words with the plaintiff was the identity of the name Artemus Jones. The courts held that if the persons who knew the plaintiff might suppose the plaintiff to be meant, they were to find for the plaintiff. It is obvious that this would make a defendant equally liable to any other person of the name of Artemus Jones. If this be the law, then a person who makes a statement about Juma which is perfectly true, but which if not true would be libelous, can be made liable to every person of the name of Juma except the person of an concerning whom the words were written. It would be no defence to say that the writer intended another Juma and that it was true of him, because the court in *Hulton & Co* said expressly that the defendant's intention is immaterial. The consequence is that persons seeing in libel who did not know of the existence of the Juma to whom the statement referred, but who knew of the existence of some other persons of that name, would be able to come and give evidence to support the plaintiff,s case.

The same consequences might be true in many cases where the words were not defamatory of the person of whom they were spoken. An erroneous application may render innocent matter defamatory. That Masinde devotes himself to spreading the doctrines of the *Dini ya Musambwa* might constitute a serious charge of hypocrisy if erroneously applied to an eminent Seventh Day Adventist adherent of the same name; and even a harmless domestic announcement that Elizabeth had just had a baby might make a man liable to a grave charge of having accused a person of want of chastity if readers are at liberty from the similarity of name to apply to a lady who was at the time a widow. It would indeed be a calamity if our law of defamation burdened ordinary speech or writing with such a chaos of responsibilities.

Indeed, a holding that such responsibilities may arise from the use of a name gives occasion for even deeper and more fundamental considerations. A man has no monopoly in his name. If there had been one or more persons bearing a particular name, such as Mwarania, in existence at the time when the plaintiff adopted that very name, they could not prevent him from doing so. Nor does his assumption of that name in any way interfere with the right of any other person to take that name if it should please him so to do. The law will prevent persons from using assumed names for the purpose of fraud, but that is all. And in a precisely similar way the possession or assumption of a particular name by one or more persons does not interfere with the right of any writer to use the name for one of his characters. The innocent use of a particular name by a writer for such a purpose is as legitimate an act as the innocent assumption of it as his own name by a person dissatisfied with that given him in baptism. And the fact that a writer does so use a name does not warrant his words being taken to refer to any more than the plaintiff signing his name as Wamalwa would make him guilty of forgery of the name of a person who had always borne that name. The fact that the name Wamalwa is used in an article no more warrants the conclusion that the writer referred to a plaintiff called by that name than would the use of the name by the plaintiff warrant the conclusion that he was passing himself off as some other person of the same name if there chanced to be one. A different law cannot apply to the innocent use by a writer of an ordinary and of an extraordinary name, unless we are to be guilty of the supreme absurdity of saying that the more pains a man takes to avoid causing annoyance to any person by the accidental use of his name, the more damning is the evidence against him in an action of defamation if by chance he has picked upon the same name as has unknown to him, been previously adopted an like grounds by some individual.

But the most serious aspect of the doctrine of strict liability is when you 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 this country 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 and 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 decision in *Hulton & Co's* case clearly indicates that in that case he would be liable for defamation. One cannot see how a person could guard himself against such a liability or what defence he could raise. It is clear law that no omission of the name, or statement that it is a hypothetical case, 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. It could not therefore protect an innocent man under the *Hulton* doctrine that intent is immaterial.

How and why *Hulton* came to be decided the way it was decided is not altogether clear, especially considering that the old-style pleading never failed to assert that the offensive matter had been published or "uttered with malice". Indeed, my careful study of the law of libel from the earliest times to the present, shows that *Hulton* went against the weight of very clear authority to the contrary, and it had no legal basis. I say this on solid authority founded on sound principles. Two centuries before *E Hulton & Co v Jones* [1910] AC 20, it had already been clearly established that in defamation suits liability is dependent on intent. I found this position stated in 1794. This is how the Lord Chief Justice, Lord Kenyon put it in that year.

> "That in order to constitute a libel, the mind must be in fault, and show a malicious intention to defame, for, if published inadvertently, it would not be a libel": *The King on the prosecution of Sermon v Lord Abingdon* (more commonly cited as *Rex v Lord Abingdon* 1 Esp 226, at p 228 [1794].

And some forty-two years prior to that statement of the law, in 1732 after verdict for the plaintiff in an action for a libel, the judgment was arrested, because it was not laid that the libel was of or concerning the plaintiff. This was in the case of *Lowfield v Bancroft & Al* 2 Str 934 [1732]. The holding there was that an intention to defame the plaintiff had not been placed before the court. Again, about sixty-two years before *Hulton*, the English House of Lords had, in 1848, made the position abundantly clear; for in that year, we find Lord Cottenham, saying that if the plaintiff is able to prove to the satisfaction of the court

> "that the party writing the libel did intend to allude to (the plaintiff), it would be unfortunate to find the law in a state which would prevent the party being protected against such libels": *Le Fanu v Malcomson* [1848] 1 HLC 637.

To my mind, no language could more clearly express the view that the issue which the court has to decide is to whom the libel was intended to refer. The opinion of Lord Campbell, the other member of the House of Lords, is to the same effect. He says, "if those who look on knew who is aimed at, the very same injury is inflicted". This clearly shows that he considered the question to whom the defamatory matter is intended to refer, or, as Lord Campbell expressed it "the person who is aimed at", is the question of fact to be determined on the evidence laid before the court.

That intention to defame and to defame the plaintiff is a necessary ingredient in the successful prosecution of a defamation suit is also clear from opinions found in the case in East Africa. A good example in the High Court of Kenya case of *Dogra v Baclays Bank* [1974] EA 540 at p 542. Two innuendos were pleaded. One of them was that by the words "refer to drawer" the defendant bank meant that plaintiff had drawn a cheque upon an account which he knew or ought to have known was not in credit to the amount of that cheque, and that it was unsafe to give credit to him. Holding that gravamen of the innuendo had not been proved, Rudd, J found that the defendant had not intended such understanding to be taken. The learned judge explained the various reasons for writing the words :refer to drawer". He thereby acted on the principle that the intention of the defendant must be considered.

In another Kenya case, *Daily Nation v Mukundi and another* [1975] EA 311 at page 316, Mustafa, Ag V-P in the then Court of Appeal for East Africa, pointed out that when the defendant publisher accepted an item for publication, it had the right "and indeed the duty to see whether such item contains seditious or libelous matters", and if it fails in that duty "it always publishes at its own risk". This suggested some culpable omission – recklessness or negligence on the defendant's part.

The element of fault was brought out clearly by Muli, J (as he then was), in the Kenya case of *Godwin Wanjuki Wachira v Okoth* [1977] Kenya LR 24, at pp 27, 31. "I may go further and held that failure to check the court records to ascertain the true position may very well be negligence on their part…the defendants must be deemed to have acted reckelessly in publishing the distorted story… I hold that the author published the defamatory statement complained of…with reckless indifference as to whether it was just or unjust."

Elsewhere, too, the law runs counter to the *Hulton* decision. An Alabama decision in the United States of America, laid down that a defendant will be held liable in a suit for defamation if he acted neither recklessly nor with knowledge that the words were libelous: *Jones v R L Polk & Co* 67 So 577. A number of American decisions consider an intention to apply the defamatory matter to the plaintiff essential (eg *Smart v Blanchard* 42 N H 137; and *Smith v Ashley* 52 Mass (11 Met) 367). As to the defamatory character of the words, in an early New York case it was decided that where a hidden defamatory meaning is sought to be attributed to words in themselves innocent, and on their face containing no such sense, by extrinsic facts outside and independent of the publication itself, the knowledge of such facts must be shown by averment and proof to have existed in the breast of the defendant at the time of publication: *Caldwell v Raymond* 2 Abb Prac (NY) 193.

In fairness to the learned judges in the Court of Appeal and the House of Lords in the English case of *Jones v E Hulton & Co* [1909] KB 444, affirmed *sub nom E Hulton & Co v Jones* [1909] AC 20, I am able to say, after closely studying that case and widely reading about it, that it is later writers who have misrepresented the actual holding in that case. I do not find the facts in that case supporting the supposed proposition. Look, the House of Lords unanimously affirmed the judgment of the majority of the Court of Appeal. The judgments are short, and the sum of them is agreement with Farwell, L J. To his judgment, therefore, one must look if you wish to understand what the House of Lords decided. On looking at Farwell, L J's judgment, you soon find that the learned Lord Justice put a very important qualification to his decision. He brought out and emphasized the element of recklessness. It is material that the defendant in that case neither knew nor cared whether there was a real Artemus Jones or not, and took no pains to find out, or to make it clear that his words did not refer to any real person. Clearly, therefore, the decision in that case was based on the recklessness or even spite of the defendants. Dr Stallybrass, a distinguished editor of the tenth edition of Salmond's eminent works, *The Law of Torts,* always said that in fact, this was the opinion of Lord Hewart who was counsel for the plaintiff at all the three stages of the action. The plaintiff had been a contributor to the defendants' paper for twelve years and his name was well known in the office of the defendants, although not to the actual writer of the article. The managing director admitted in cross-examination that he had read the article in proof and thought at first reading that it referred to the plaintiff. So, when the defendants let out the defamatory matter, it was a clear case of failing to exercise reasonable care; they were either negligent or reckeless; and that is the reason why they were held liable. That being the reasons and factual basis of the decision, one does not find any truth in saying that *Hulton* is authority for the supposed doctrine of strict liability. The case was decided on the ground of fault.

And if there will be those who still consider *Hulton* as an authority for that supposed doctrine, I only say this to them. It is a case which was decided contrary to earlier decisions which I have noted above. Also important to note is the fact that the House of Lord's unanimous affirmation of the decision of the Court of Appeal was in an unreserved judgment. The House did not take time to consider the points. It is significant that after *Hulton v Jones* the English House of Lords made it a rule of practice never to deliver an unreserved judgment. (See *Salmond & Heuston on the Law of Torts* 19th Edn (1987) by RFV Heuston and R A Buckley, at p 160, fn 68.)

As it stands, Farwell, L J does not tell us exactly how prudent he thinks a writer ought to be. Will timid novelists take refuge in the conventional Caeser, Shylock, Doris, Okonkwo, and the rest? Or will some litigious Mogaga bring actions against the publishers of all the textbooks which impute criminal offences or bankruptcy to his shadowy namesake? If a paragraph were published to some such effect as "There is Karanja running hard with a constable after him and a crowd calling 'Stop thief!" who would suppose it is our good neighbour Karanja of Korokocho who could never run at all? No sane person would believe it to be published of and concerning the Chief Justice by that name even though six clerks from the offices of the courts were to swear that they thought it referred to him. Yet, the *Hulton* case is said to have decided that what was intended is immaterial. It is difficult to find any logical or reasoned legal principle for punishing in damages a man whose conscience is absolutely void of offence.

There is something fundamentally and terribly wrong about cases which are *Hulton v Jones* – based. They all say that the intention of the writer or publisher is not material, his meaning not mattering. All that matters is the meaning put on the material complained of by the readers or hearers. Indeed, not all readers or hearers, but only some of the them. If only one or a few of them, out of some odd piece of information, or by some quirk of their own, put a secondary meaning to the matter and find some defamation, the plaintiff can recover damages no matter how innocent the author or publisher may be of any intention to defame anyone. The unsoundness in principle of these conclusions is not far to search. Libel always was and still is a crime. *Mens rea* (a guilty mind), or a guilty intent, is an essential ingredient of every offence unless some statute expressly excludes it as a pre-requisite. A charge for a crime, and the pleading in a civil suit, always allege that the matter was published falsely and maliciously of and concerning the complainant or the plaintiff. How can a publication be said to be "of and concerning" the plaintiff when the defendant did not know of the existence of the plaintiff? How can the defendant be said "falsely and maliciously" to have had a guilty intent when he was innocent of any intent to defame anyone?

In direct consequence of *Hulton v Jones*, there have been cases on secondary meanings giving absurd results. Notable among them are cases like *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 K B 331, and *Morgan v Odhams Press* [1971] 1 WLR 1239, and all the cases about "true" and "false" innuendos, such as *Lewis v Daily Telegraph Ltd* [1964] AC 234. Professor Sir William Holdsworth in the *Law Quarterly* Review of January 1941, called the *Hulton v Jones* approach "A chapter of accidents in the law of libel", which, according to Lord Denning, has since that time grown from a chapter to "a whole book" of accidents, and a "pile-up like on a motor-way" of absurdities (The Right Honourable Lord Denning, Master of the Rolls, *What Next in the Law,* (1982) at p 213).

For these reasons I join Lord Denning in calling for the courts to take *Hulton v Jones* and the cases founded on it, by the scruff of the neck and throw it out of the courts and start afresh (ibid). In Kenya I suggest that we do not adopt the supposed doctrine of strict liability in defamation suits. It has also been written in the books that the English case of *Cassidy v Daily Mirror Newspaper Ltd* [1929] 2 K B 331, is an authority for the proposition that one may be liable for a statement which he does not actually know to be defamatory; but, as noted in one respected work, neither *Cassidy* nor any other relevant case has ever decided that a defendant who has taken all possible steps to ensue the accuracy of his statement, and who could not by any reasonable inquiries have conceivably found that his statement was defamatory, is liable in defamation. The defendants who have been held liable have been at fault – by negligence, recklessness or intention. Their methods of going about things have been found blameworthy. This view is supported by Russell, L J's statement in the *Cassidy* case at page 354, regarding the defendants, "They are paying a price for their methods of business". Again there, the defendants had taken no steps whatever to find out whether Mr Corrigan was already married to the lady Cassidy. (*Street on Torts*, 8th Edn (1988), at p 395).

The result produced by the English cases after *Hulton & Co v Jones* [1910] AC 20 was that liability for an imputation defamatory of the plaintiff does not depend on the intention of the person responsible for the publication of the matter complained of either with regard to reference to the plaintiff or with regard to knowledge of facts which make the matter innocent on the face of it defamatory of the plaintiff. That is what the books say. Such a position produces hardship, especially for writers and publishers, who may find themselves at the mercy of any unscrupulous person whose name happens to be the same as that of a fictitious character. But as I said, in the English Court of Appeal in *Jones v Hutlon* [1909] 2 KB 444 at pp 480-481, Farwell, LJ, based his decision on the ground that the proprietors of the newspaper had acted recklessly in publishing the article which was likely to be understood to refer to the plaintiff, and the judgment of Farwell, LJ was expressly approved by Lords Atkinson and Gorell in the House of Lords: [1910] AC 20, at p 25. As recklessness or negligence of the proprietors in publishing the article in question was the true *ratio decidendi* the decision is not authority for the supposed doctrine of strict liability, and is not inconsistent with the requirement of intent or recklessness as an essential requirement in defamation.

From the cases prior to *Hulton v Jones*, in England, and from the American and Kenyan cases which I have cited in this connection, taken together with the true *ratio decidendi* in *Jones v Hulton* affirmed *sub nom* by the House of Lords, and bearing in mind the fact that the House of Lords' judgment was short and unreserved for consideration, I propose the following to be the true legal position in Kenya. In Kenya intention, negligence or recklessness is a necessary element which must be established by the plaintiff before a suit for defamation may succeed, against the defendant. If the defendant did not intend the matter to be defamatory or to refer to the plaintiff, and he was neither negligent nor reckless, he will not be liable in a suit for defamation. If a man acts recklessly, not heeding whether he will or will not injure another, he cannot be heard to say that he did not intend to hurt. He will on the other hand, hav ea good defence should the surrounding circumstances show that he never intended to injure the plaintiff, that he was in no way reckless and could not have known that what he wrote might *per infortunium* apply to the plaintiff. In other words, a defendant will escape liability if he was not reckless, and could not have known that what he wrote might apply to the plaintiff; and that means that if he was negligent, although *bona fide*, he has no defence. There is no general right not to be damaged, irrespective of the defendant's fault. There is only a general right not to be damaged intentionally or carelessly without just cause. As Pollock put in a book review ([1910] 26 LQR 421) "a man who willfully or negligently causes temporal damage of any kind is liable unless he can show justification or excuse" – a position vindicated by Lord Wright in *Lindsey C C v Marshall* [1937] AC 97, at p 121. These truths have always been at the foundation of

tortious liability , and cannot be ignored in a rash to strict liability conclusions.

The hazards presented by the doctrine of strict liability, some of which I have alluded to above, make it imperative for Kenya to have a principle that to make out a case of defamation a plaintiff must show an injury to his reputation, and a culpable relation to that injury on the part of the defendant. Some appropriate culpable relation between the defendant and the injury to the plaintiff's reputation must be established by the plaintiff before the defendant is given the burden to relieve himself from liability by establishing some excuse, such as the truth or privilege. Culpability is found only when one has acted below a clear standard of due care. Negligence and recklessness, unless there are countervailing considerations of social policy, most nearly approaches the popular conception of justice, for when a court says a man has acted negligently or recklessly, it is merely saying in artificial words that he has so conducted himself that he in justice should bear the loss (see "*Law in Science and Science in Law*", 12 Harv L Rev 443, at p 458). Grounds of social policy must be invoked to justify holding a man liable who ha acted reasonably. There are no social considerations to justify absolute liability in defamation cases, and I hold that in Kenya there is no theory of liability at peril, Scotch courts have hesitated at developing strict liability (see *Wood v Edinburgh Evening News Ltd* 1910 Scotch Sess Cas 895). South Africa, despite its primitive, barbaric and abhorrent apartheid, and repressive criminal law, is more forward-looking on this aspect than the English position based on *Hulton and Cassidy* (see Colman, J, in *Hassen v Post Newspapers (PTY) Ltd* [1965] 3 SA 562 at p 575).

In holding the opinion that in Kenya there is no defamation without intention, negligence or recklessness on the part of the defendant, I hope to keep alive the trend set by the legislature itself to mitigate the burden imposed by the misreading of *Hulton*. The legislative set off to cure the hardships by permitting retraction and apology as a suitable means of redressing innocent defamation. Another legislature ameliorative measure is to permit newspapers to publish an apology for any libel printed without actual malice or gross negligence. (see section 12 and 13, Defamation Act (cap 36)). There is no suggestion by the legislature that courts are stopped from developing the common law in the interests of justice, and that the Defamation Act in this respect is a complete inelastic code. Indeed, the Act's objective is to "consolidate and amend the statute law relating to libel" (long title to the Act); it is concerned with neither codification nor the common law. And I am not alone in regarding the defendant's intention, negligence or recklessness, as relevant. In addition to the authorities which I have referred to, you find Lord Denning, M R , also taking the view that the intention of the defendant is a relevant circumstance. Speaking in the context of identification of the plaintiff he said:

> "If the defendant intended to refer to the plaintiff, he cannot escape liability simply by not giving his name… if he intended to refer to the plaintiff, he is liable" (*Hayward v Thompson* [1982] QB 47, at p 60).

This shows that intention of the defendant is relevant on the issue of identification, and there is no reason why it should not be relevant where the meaning of the matter complained of has to be decided. By sections 12 and 13 of the Defamation Act there has been a fundamental relaxation of strict liability in connection with publication. It is difficult to see any reason for distinguishing between that which is intentionally or negligently published but accidentally defamatory, and that which is intentionally defamatory but accidentally published. Moreover, strict liability in defamation is further undermined by its contradiction by the striking contrast between the recognition of negligence as an element in the part of the law of libel which protects innocent dissemination by one who takes a subordinate or secondary role in publication, and the part of the law supposedly backed up by *Hulton v Jones*. For these reasons, I recommend that *Hulton v Jones* has no place in Kenya unless it is understood to have been decided on the basis of recklessness or negligence; and I propose not to approve of it unless the Court of Appeal for convincing reasons and in justice, decides to make it a part of the law of Kenya in its supposed holding, ignoring the fact that negligence and recklessness was the true *ratio decidendi*. Let us not overlook the fact that for a long time, there has been open refusal, or at the least something of an undercurrent of rebellion against the strict liability rule, and a tendency to hold that at least negligence is essential to the cause of action in defamation suits. I have already demonstrated this trend in the cases which I discussed earlier in the judgment.

An important question in this case is the question of who is liable if I find for the plaintiffs? The law on liability is stated to be, that liability affixes on participation or authorization of publication of the defamatory mater. As one book puts it, every person who takes part in the publication of defamatory matter is *prima facie* liable in respect of that publication (*Duncan & Neill on Defamation*, 2nd Edn by Sir Brian Neill and Richard Rampton, paragraph 8.12, at p 38). Examples are given, such as, that where a libel is published in a newspaper, or book, or magazine, everyone who has taken apart in publishing it, or in procuring its publication, or has submitted material published in it, is *prima facie* liable. These include the author, editor, publisher or vendor. But just as the law frees from liability in conversion lowly people like carriers and warehousemen without notice, so, too, in defamation it exempts lending libraries and booksellers who had no reason to suspect that the works lent or sold contained a libel (Tony Weir, *A Casebook on Tort,* p 381). In other words liability is somewhat different in the case of a person who has only taken a subordinate part in disseminating a work which contains a libel, eg by selling, distributing or handing to another a copy of that work. Accordingly, the traditional position is that there is no liability for publication where a person who played a secondary part was innocent of any knowledge of the defamatory matter contained in the works, and there was nothing in the work or the circumstances under which it came to him or was published by him which ought to have led him to suppose that it contained libel or slander, and when the work was disseminated by him, it was not by any negligence on his part that he did not know that it had defamation in it (Romer, LJ, In *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170, at p 180). As Denning, L J (as he then was) put it in *Goldsmith v Sperrings* [1977] 1 WLR 478, at p 487:

> "Common sense and fairness require that no subordinate distributor… should be held liable for a libel contained in it unless he knew or ought to have known that newspaper or periodical contained a libel…a subordinate distributor has never been held liable to a plaintiff except when prior knowledge of the libel has been brought home to him".

This seems to emphasise the position that where the publication was neither intentional nor due to any want of reasonable care on the part of the defendant, he will not be liable for the defamation in the work so published.

As Scruton, LJ, said in *Bottomley v F W Woolworth & Co Ltd* (1932) 48 TLR 521, it is difficult to state exactly the principles on which newsvendors, circulating libraries, archives and other institutions of that kind who did not themselves write the libels, but sold or otherwise passed on to other books and documents which in fact contain libel, are freed from responsibility. But it may be said broadly, that one principle is that in defamation intention and negligence are important considerations. The bottom-line is always to ask two questions" (a) the question whether the defendant knew and (b) the question whether the defendant ought to have known, that is to say, whether there was negligence on the part of the defendant in carrying on his business in respect of the publication of the defamatory matter. For it is quite impossible that such secondary dealers should be expected to read every matter they collect and avail to others unless there is reasons for it, such persons need not examine every work which they get. To these people, the defence of innocent dissemination is available.

Books say that the people to whom the defence of innocent distribution is not available are authors, editors, publisher and printers. These are taken as the principle actors: the author publishes to the publisher; the publisher and the author jointly publish to the printer; but as the printer returns the work to the author or publisher, I do not know to whom he publishes unless he distributes it to a third party. According to Lord Esher, MR, however, a printer is liable for a libel contained in the work he prints, and he defence of innocent publication is not available to him (see his judgment in *Emmens v Pottle* (1885) 16 QBD 354, at pp 356 – 357). But in this conclusion, I respectfully observe, Lord Esher, MR, overstated the position. The correct rule which I prefer is this, that any publisher or disseminator of a libel is protected by the defence of innocent dissemination, and he will not be responsible for that publication unless he knew or ought to have known the defamatory contents. In this connection, I respectfully approve of Bridge, LJ's dictum that "any disseminator of defamatory matter is liable to the party defamed, subject to the defence of innocent dissemination" (*Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at p 505). Liability is on the basis of reasonable care or want of it, not on the basis of the position one takes in the chain of events.

As we formulate the principles of our law, we must take into account practicality, business interests and technological advancement. In many cases, from a business point of view it may be impossible to go through certain publications in order to ascertain there is no libellious matter in them, and the material may be generally sold hot from the press and the defendant cannot possibly exercise any effective supervision over the contents (eg see, *Trimble v Central news* [1934] AD 43). As we apportion liability, as we seek to answer the question as to who is liable, as we seek intention and determine the degree of care a defendant should exercise in the field of publication, we must not forget that we are in a computer age. In publishing, the advent of new information carriage and processing technologies has vitally changed the dynamics and *modus operandi*. A number of contemporary scientific prophets perceived and predicted and it has come to pass in this very country of ours, that information and other published matter, are no longer preserved as alphabetical imprints or pictures, but rather as holes in punch cards, magnetic fields on tapes, or discs, electrical impulses moving through the memory core of a computer, and radiations generated in vats of complex chemicals. This springs from the scientific revolution of recent decades, called the Cybernetic Revolution which in its infancy amplified, but has to a large extent replaced, man's nervous systems. They perform feats almost staggering to the imagination. We are not far from robotics, in the field of publishing.

In my extra-judicial writings and publishing, I have had the privilege of observing modern printing, conveyance and related handling of matter which is eventually disseminated to the public. You find that to-day, extraordinarily complex information – handling and processing tasks are performed in response to relatively simple instructions understood by virtually all the machines in the printing assembly lines. Sophisticated programmes have been designed to edit raw data, to perform different operations in sequence with the contours of each step dictated by the results of the preceding process. Humans only see the finished product at the end of the line, only to write the delivery note and invoice.

Sometimes the printer receives only the dark negatives. His job is to produce the magazine out of them. The former practice of physically seeing what it is you were handling, is a matter of primitive technology of a by-gone age. Judicial formulations rendered before the Cybernetic Revolution must be re-examined afresh, and liability saddled on he who, in the circumstances, intentionally did wrong, or acted recklessly or with negligence.

And as to upon whom the burden of proof lies, let me say this. It lies on the person who alleges a wrong done by the other – he who seeks to make the other liable. A libel in a document is not like a fire, nor is it an itching blood-sucking flea obvious to its carrier. So it must be positively proved that the defendant knew of it or ought reasonably to have known of it. Like Lord Denning, MR, I put the burden of proof on the plaintiff (see *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566, at p 572; and the *Restatement* bears this out: see *Restatement, Torts* 1965 Supplement, section 581, comment).

There is one other important matter of a general nature in defamation suits, which is relevant to this case. It is this: a suit in defamation should not be lightly entertained. We do not to inculcate and encourage into people a culture of hypersensitivity, unreasonable litigiousness, and a rush for gold-digging in imaginery judicial mine-fields. A plaintiff in a defamation suit should be a person of reasonable fortitude. It is not unreasonable for the law to expect people to have a certain toughness of hide to withstand heat beyond mere vulgarisms, for many are untruths about us all. These suits may be protracted, with a number of interlocutory applications, in the course of which the reputation of the plaintiff may be subjected to the scrutiny of both the court and the public. By bringing a suit for defamation a plaintiff in fact draws the public's attention to matters which might otherwise have gone unnoticed. Even if at the end of the day he is paid compensation, his reputation may not be reinstated to any reasonable degree.

Defamation suits used to be of significance as a means to clear one's name. This was necessary in times when access to the print and electronic media was a preserve of only the few privileged ones. The plaintiff probably had no other convenient way of meeting a lie about him with a rebuttal of equal or more circulation in the same or alternative medium of communication. Newspaper correspondence, press conferences, appearances on television, radio announcements, replying articles in magazines, are now so easy methods of answering a falsehood that defamation suits should be the exception rather than the rule.

I take this standpoint because defamation is one branch of the common law which closely affects what is perhaps one of the most important and necessary of civil rights and political freedoms, that of fresh speech and criticism. Its operation at all times affects the existence of a free press. It is further a branch of law which has gone somewhat astray from first principles owing to the twist given to the substantive law by some decided cases. It is thus in the forefront of the queue for law reform, to pluck off it the influences on it of its origins back in the sixteeth century, and its derivatives from the criminal processes in the abhorrent court of the Star Chamber. I hold this general view on the law of defamation as one reasonable way of defining the proper accommodation between the law of defamation and the freedoms of speech and press protected by the Constitution of Kenya.

In free debate in an enlightened society such as that in present day Kenya, erroneous matter though not always worthy of protection, is inevitable. As Jams Madison pointed out in the *Virginia Resolutions of 1798*, some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press and discussion of topical issues. Punishment of every error that appears runs the risk of inducing an overly cautious and restrictive exercise of the Constitutionally guaranteed freedoms of speech and press. A rule of strict liability that compels a publisher or broadcaster or author to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.

Punishing every falsehood does not mean that only false speech will be deterred. In the course of attempts to be accurate you may be gagged, or you may suppress important matter. Who wants a stifled society? The broadly and elastically couched language of the Constitution itself requires that we protect some tolerable degree of falsehood in order to protect speech that matters. I am especially anxious to assure to the freedoms of speech and press some breathing space essential to their fruitful exercise. To this end the court extends a measure of strategic protection of freedom of expression. The level of constitutional protection appropriate in the context of defamation is this, namely, that a plaintiff will recover for injury to reputation only on clear and convincing proof by him that the defamatory falsehood was made with knowledge of its falsity or with a reckless disregard for the truth and reference to the plaintiff. Liability for defamation depends on the intention of the defendant. Proof of negligence in these maters will also make the defendant liable. There is no tortuous liability for fair information. I hope that this standard administers an extremely powerful antidote to the inducement to the media self-censorship of the supposed common-law rule of strict liability for defamation, and also exacts a correspondingly high price from the victims of defamatory falsehood, to thwart gold-diggers. Liability is only for proven fault. (see Justice Powell, in *Elmer Gertz v Robert Welch, Inc* 418 US 323, at pp 325, 340, 342).

To summarise the legal position in Kenya, in so far as it relates to the instant cases before me, and not touching on the rest of the law of defamation not concerned with the facts in these two cases, I have found the law of defamation in this country to be:

> 1. That for a defendant to be tortiously liable in a suit for defamation the plaintiff must prove on a balance of probability that the matter complained of
>
> (a) is defamatory
>
> (b) refers to him
>
> (c) was intentionally, recklessly or negligently published of and concerning him
>
> (d) was so published by the defendant, and
>
> (e) was published without lawful justification on an unprivileged occasion.
>
> 2. That “defamation is the culpable publication to a third party, without justification, on an unprivileged occasion , of matter concerning another person, which, in all the circumstances of the publication, contains an untrue imputation intended and likely to appreciably diminish the good affections held of him by reasonable people in a respectable and considerable segment of the community, ie in the estimation of an important and respectable part of the community – a

substantial number of reasonable persons, whether they are right-thinking or wrong-thinking, provided their reaction is not plainly anti-social or irrational.

3. That a reasonable person is a level-headed, fair minded, collected and cool person of ordinary intelligence; he is neither a genius nor an idiot, a fanatic nor a faddist, a walking encyclopaedia nor an illiterate; he is not too lax or cynical or censorious, hasty, unusually suspicious or unusually naive; he is not a laureate, nor should he be one with an impervious intellect or a prince of the odd.

4. That a defamatory meaning discovered only as a result of a sustained search of it, or one taken out of context, or one which is taken only after ignoring innocent and non-defamatory meanings, will not be taken into account in assessing the question of liability. There must be a reasonable justification for bringing to the fore the defamatory meaning.

5. That it is for the court, and not what the witnesses say, to determine whether a matter is reasonably capable of a particular interpretation, and in determining this point the court considers all the relevant factual position and circumstances before it; it is not right to consider the very matter of which the plaintiff complains only; it is necessary to take into account the context of the matter as a whole; nothing should be considered in isolation of the whole; and where they are present, the bane and antidote must be taken together.

6. That a defamatory meaning may appear plainly in the matter complained of, or by the innuendo given by the apparently harmless matter and which the plaintiff must plead and prove in the context. No mere claim of the plaintiff can add a defamatory meaning where none exists; the innuendo must be portrayed on a fair construction as a reasonable person would do, avoiding mere possible conjectures by some living soul.

7. That in order to hold a defendant tortiously liable, it must be proved that he communicated the defamatory matter to someone other than the plaintiff or the originator of the matter complained of, and that the matter was intelligible to its recipient.

8. That the matter published was published of and concerning the plaintiff, for a matter is not actionable unless it is made and published or and concerning the plaintiff and it is defamatory of him. The reference to the plaintiff is an essential requirement to be satisfied by the plaintiff, but the understanding that it is the plaintiff who is meant to be referred to must be a reasonable one, having regard for all the circumstances relevant to the case.

9. That for the reasons which I have set out for discounting the *obiter dicta* based on the supposed rule in the English case of *Hulton & Co v Jones* [1910] AC 20 and its derivatives, the law of Kenya on the state of mind of the defendant is different from the law in England on that point as expressed in the unreserved judgment of the English House of Lords. In Kenya the doctrine of strict liability does not apply in defamation cases, and no man publishes at his peril. In this country liability for defamation depends on the intention of the author or publisher; and negligence or recklessness on the part of a defendant will render him liable. There is no liability for defamation without a culpable relation to injury.

10. That mere participation in the production and dissemination of defamatory matter is not enough to hold one liable; but having regard for the scientific revolutions of our time it must be shown that the defendant knew or ought to have known of the contents and either intentionally, recklessly or negligently participated in the dissemination of the defamatory matter.

11. The burden of proof lies on the plaintiff, and it is upon him to employ all the discovery devices available under our procedural law to marshal and present the necessary evidence. It would be an unbearable burden, and contrary to our notions of justice, to call upon the defendant to prove the negative of what is alleged against him, and to let he who alleges to get remedies without proving what he alleges.

12. That suits for defamation should be lightly entertained; Kenyans should not be persons of reasonable fortitude, with a toughness of hide, eschewing a culture of hypersensitivity, unreasonable litigiousness, and a crop of self-destructive gold-diggers; there must be no other reasonable, expeditious, and inexpensive and efficient way of clearing ones name, before seeking legal redress by a suit in defamation.

13. That suits in defamation while useful as protecting good reputation, are enemies of the freedom of speech, a free press, constructive discussion and flow of ideas, civil rights and political freedoms, enshrined in our Constitution. Without a careful handling of these suits, we shall not be far from establishing a gagged society no one would like to have in this country. We need free debate; we want an enlightened population or vibrant debaters of issues, topical affairs and ideas. Private reputation should be subordinated to these greater constitutional considerations.

Now, from the general survey and search for the law relevant to the instant case, back to the particular facts of this particular case before me. As I said early in this judgment the picture which has been the occasion of his suit is that of the two plaintiffs. It is on the cover page and page 2 of the magazine. On the cover page there are many title headings of subjects contained in the magazine. Amongst them and in fourth position is one appearing as "The many knives that cut the marriage bond". There is nothing about it to show it relates to the photograph. Then at page 2 where the photograph appears there is under the picture the caption words:

"Our cover picture –

Weddings are occasions of great joy to everybody – the bride and groom, parents, relatives and friends."

There is nothing offensive about those words, whether taken alone or with the picture and title on the cover. At pages 10 – 17 is the story entitled "The many knives that cut the marriage bond". There is no picture of the plaintiffs. Opening with a quotation of the Biblical injunction. "Therefore, what God has joined together, let no man put asunder", the article discusses some of the various forces which bring about marital disharmony and probably break marriages. Based on interviews with psychiatrists, marriage counsellers, lawyers and church leaders, the article identifies certain causes of problems in marriages, and discusses each of these causes. It looks at lack of communication between couples, different types of cruelty (physical, mental or emotional), unfaithfulness resulting from dissatisfaction coupled with neglect or abandonment of one's marital responsibilities, irresponsible misapplication and mishandling of family finances and resources, morbid jealousy and unfounded feelings of insecurity with resultant suspicions and false accusations, influence of bad companionship and slavish apeing of false friends and attempting to live an unaffordable lifestyle, living under a spell of one's own parents, unreasonable phoebia for one's parents-in-law and other relatives-in-law, and disagreement over the number or gender of children or their general performance. The article which occupies some eight A4-size pages of three columns each, concludes with suggestions on how to avoid problems which are caused by marriage partners themselves. The suggestions include a realization that no marriage is a bed of roses and, therefore, tolerance and a showing of both good and bad must be cultivated, and timely resolution of issues arising between marriage couples is an advantage. Where necessary seek marriage counselling services from experts to save the marriage, not with a view of breaking it up.

That is essentially all there is in this issue of the magazine, relevant to the case before the court. There is not the slightest reference in the article of the picture of the plaintiffs. The article is on a general topic, discussing problems of marriages generally. There is no discussion of the marriage of Kudwoli or of his daughter's Jackline Agoya. There is no mention or insinuation that either of them had done anything. Indeed, once you get down to reading the article there is nothing to bring your mind back to the picture – it is completely unrelated to the discussion in the article and you simply forget you ever saw it at all. And as you finished reading the article you find no reason to look at the picture. You are left with no impression or feelings about the picture.

A fair minded reader would understand the picture as a device used by the publishers merely to whisk the

reader quickly to the topic of marriages in the inside pages of the magazine. Another reasonable understanding of the picture is that marriages are sometimes celebrated with flamboyance, as the gorgeous dressing in the picture shows, and that the expenses which a father goes into making himself smart at least for the occasion of handing over his daughter in marriage are themselves enough to justify his daughter to ensure the success of the marriage. One reasonably gets the impression that the picture was to capture the high expectations of a father of his daughter in marriage. The day of giving one's daughter to a husband is great to all concerned. Hence, the caption below the picture on page 2 explains clearly why the picture was used on the cover, namely,

> "Weddings are occasions of great joy to everybody – the bride and groom, parents, relatives and friends".

Read that caption; look at the pictures; and read the article on marriage problems generally and how to overcome them. You take all these things together, and tell me whether there is any reference, however remotely, to any of the plaintiffs. You can reach the conclusion that there was reference to any of the plaintiffs and in a libelous way only by deviating from rectitude and by being perverse. The picture was used to provide a wedding scene, to give the feature article a matrimonial setting, as an opportune environment within which advice on marital relationships generally were being discussed in the magazine. None of the plaintiffs was the subject of the discussion; and nothing was introduced to connect either of them to the subject.

A lot of breath was expended on the blackening of the eyes of the plaintiffs in the picture. The plaint averred, the plaintiffs repeated, and their witnesses swore on the Bible, that by blackening the eyes the magazine meant to damage the plaintiffs' reputation in the community and amongst persons who knew them. They reasoned and opined that pictures with blackned-out faces are usually associated with criminal activities. Where this conclusion and opinion came from remains unknown. No pictures associated with wrong –doing or crime, and having faces or eyes blackened out, were put in evidence. This was something that required factual evidence. It is not something that has assumed such notoriety as to call for courts to take judicial notice of such allegation. Not even a single instance was placed before the court as illustrative of the allegation. It would be dangerous for a court to hold that whenever you see a picture with a face or eyes blackened the person pictured is a criminal or otherwise associated with some vice, immorality or depravity. When a newspaper, magazine or book marks a picture in it with a blackening across the eyes or face of the person pictured, it is merely indicating that the identity of the person in the picture is not important for the present purpose. It is simply saying, forget the person and concentrate on the accompanying story. Such blackening does not indicate the reason why the picture appears in the publication. The reasons may be many, including the most plausible of reasons; and if so, it is not right to ignore the good and harp on the negative ones only. In the instant case, it is not unreasonable to say that the picture was there only for the majestic and meticulous dressing apparel in which the plaintiffs adorned themselves on the wedding of Kudwoli's daughter and on the occassion of Kudwali handing over his daughter in marriage. It was a picture to support the caption that weddings are occasions of great joy to everybody including the bride, groom, and parents – and Kudwoli was a parent, Jackline a bride. For this purpose their identity was unimportant. That is probably one reason why the eyes in the picture were blackened.

It is only a morbid mind, one inclined to perceive and dwell only on unwholesome or horrible thoughts, which can interpret the picture as suggesting that Kudwoli was re-marrying bigamously or at all, and that not only was he committing bigamy but that he was marrying his own daughter Jackline. Surely, what is there in the picture to suggest any of these horrors? No evidence was placed before the court to explain the position a woman or a man should be in when marrying or when handing and being handed over in marriage. In this picture the lady is on the left of the man. The face is veiled in a net. There is no particular emotional expression. Evidence was necessary to show that according to the chosen marital ceremonial rites, this picture depicted a particular stage reached in the process of solemnizing the marriage. As plaintiff Kudwoli himself said in evidence he was going to give away the bride (Jackline),the picture cannot tell whether the girl had already been given away, and the wearing of the veil over the face would not tell the stage reached in the marriage ceremony. Then, unless we are a sick society of moral decadence, from where do we get these weird allusions in the plaints?

The Court, on a reasonable view of the picture in question, has not found any of the innuendoes averred in the plaints. The plaintiffs' witness, Mark Radoli, was too enthusiastic in the witness-box to talk about what he understood the picture to mean. He said that whenever he had seen pictures with faces blacked they have been pictures of criminals. He did not instance a single picture of that kind. He did not say where such pictures had been seen by him – whether in other issues of this magazine, other magazines, books or newspapers. There may be publications whose tradition is to black out faces of pictures of criminals or persons in dishonorable states. Other publications may have different ways of portraying such persons. For others blacking faces may be used for something else. It would be wanting in caution to impute dishonourable or criminal conduct to anybody whose pictures has the face blacked, without considering the nature and reputation of the publication in which the picture is carried. No reasonable man reads publications rashly. For these reasons the court does not find Mr Radoli's understanding reasonable.

On the facts of this case, the court found as a fact that the publishers and distributors participated in the publication of the magazine to third persons. But there was no evidence that they were liably tortious disseminators. One is liable as a tortious disseminator only when he has participated in the publication of a defamatory matter with intent, negligently or recklessly, as regards the defamatory nature of the matter and as regards reference to the plaintiff. It is the job of a plaintiff to prove these requirements. The plaintiff in this case did no discharge that burden.

As to the printer, evidence must be adduced by the plaintiff to the satisfaction of the court on a balance of probability that the printer knew the contents of the documents he printed, that he knew them to be defamatory and defamatory of the plaintiff ; or, that according to the printing system used at his establishment, had the printer acted without negligence or recklessness, he would have known the contents of the document and their defamatory nature and their reference to the plaintiff. For, as I have already said, the level of technological advancement in the printing industry to-day is such that ocular perception and manual involvement in the whole or most printing process and production may be absent or minimal. You may ask how a plaintiff will know and prove different printers' systems of printing. There is no trouble about knowing what printers use. The various devices of discovering and inspecting under order 10, and where necessary, arrest and attachment before judgment under order 38, of the Civil Procedure Rules are faithful servants, only under-utilised or unreasonably ignored by suitors in this country.

In the case of a printer, it is also necessary for a plaintniff to prove that the printer published the matter to a third person. When a printer returns the printed matter to the publisher or author, he does not thereby publish it in the legal sense. Publication is communication to a person other than the one from whom the matter emanated. Of course publication to the plaintiff is not publication for purposes of defamation. In normal cases, if the defamatory matter is carried in a written document such as a magazine, newspaper, journal or a book, a series of publications will consist of:

(1) a publication by the author to the publisher when the matter is submitted for publication;

(2) publication by the author and publisher jointly to the printer for printing;

(3) publication by the author, publisher and distributor of the printed work to the public (and if the printer goes beyond handing back to the publisher or author, he, too, would be participating in the publication to third persons).

In case (1) the author alone is liable;In case (2) the author and publisher are jointly liable;and in case (3) the author, publisher, distributor (and exceptionally, printer) are jointly liable. In all the cases, it is the plaintiff's responsibility to prove the respective roles of participation in the publication by the parties, and the state of mind of each participant.

In the instant cases the plaintiffs have not presented to the court evidence sufficient to affix liability on any of the defendants with regard to the state of mind of the publisher and distributor, and the publication by, and state of mind of the printer.

Having found no defamatory matter of, and concerning the plaintiffs, I need to go in to the question of apology; but if I had found defamation, I would have been satisfied that apology was offered, regard being for intent rather than the form it should take, without being enmeshed in insubstantial technicality.

Bearing in mind the state of the law, and applying the relevant law to the particular facts of these two consolidated cases, I answer the issues in these cases as follows:

1. The first issue was whether the photograph complained of was of the plaintiffs. I say "yes, it was".

2. The second issue was whether the plaintiffs were recognized in the photograph. I answer in the affirmative.

3. The third issue was whether the photograph was defamatory of the plaintiffs. The answer is, it was not (a) defamatory, and (b) of the plaintiffs.

4. The fourth issue was whether the photograph carried the innuendoes complained of; and I answer this issue in the negative.

5. The fifth issue was whether there was a cause of action against the third defendant. There was not.

6. The sixth issue was on offer of apology. The answer is that an apology was offered, unreasonably refused, and the refusal without reasonable cause excused the defendants and rendered the plaintiffs mere thin-skinned gold – diggers not to be assisted by a court of justice according law.

7. The seventh issue was whether the plaintiffs were entitled to any damages against any of the defendants. They are not entitled to any damages; but if I had found for the plaintiffs, then due to their conduct in refusing an apology, and due to the offer of the apology, and because the plaintiffs participated in the publication by calling their relatives or friends to see the picture, I would have expressed my disapproval of the plaintiffs' unreasonably uncompromising mercenary litigious stance, by awarding to Mr Kudwoli a contemptuous sum of Shs 10 (Ten) which would have been as little as one shilling had it not been for the fact that he was shown to have been an important citizen who has played, still plays and intends to continue playing, important roles in the society. For his illustrious daughter with a good education and a well-married housewife whose husband works with the Treasury, I would, for the same reasons, have awarded her Shs 5 (Five), which would have been fifty cents had I not taken into account her being a university graduate with a Bachelor of Arts in Economics., who was expecting a baby and was upset by the picture, and her husband was unhappy with her. Damages would have been against the publishers only.

8. the final issue was on the question of costs and interest, and having regard for the reconciliatory approach by the defendants I do not think they would like to see this matter protracted any longer on account of pursuing costs, and I do not think they would like to demean themselves by going after plaintiffs who have been unreasonable in the pursuit of legal remedies; and the plaintiffs although they have lost the forensic battle should be shown magnanimity (that rare quality of mind or unjust in the vanguished). So, each party is to bear its own costs. That being the case, the question of interest does not arise.

The upshot of this judicial odyssey in the law, principles, evidence, arguments and issues, is that the two suits are dismissed, and each party bears its own costs.

Orders accordingly.

Dated and Delivered at Mombasa this 11th day of March, 1993

R.C.N KULOBA

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JUDGE