IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A.)

CIVIL APPEAL NO. 88 OF 2016

BETWEEN

NATION MEDIA GROUP ……. APPELLANT

AND

GIDEON MOSE ONCHWATI ……..…… 1ST RESPONDENT

KENYA OIL COMPANY LIMITED ……..…. 2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi **(Aburili, J.)** *dated* ***2nd July, 2015***

in

HCCC NO. 140 OF 2008)

****

JUDGMENT OF THE COURT

By this appeal the appellant **Nation Media Group Limited** (NMG), challenges the judgment of the High Court of Kenya at Nairobi (R. E. Aburili, J.) by which it was found to have defamed **Gideon Mose Onchwati**, the first respondent herein (Onchwati) and in consequence condemned to pay to him Kshs. 3 Million general damages and a further Kshs.12 Million being exemplary damages.

In his plaint filed before that court on 11th April, 2008, and amended on 19th May, 2009, by which he sued the appellant and **Kenol/Kobil Limited** later renamed Kenya Oil Company (KOC), the 2nd respondent herein which had been his employer, Onchwati set out the antecedents and context of the matters complained of as follows;

> ***"4. The plaintiff was employed by the 1st defendant on a probationary basis for a period of one year from April, 2006 to March, 30th, 2007;***
>
> ***5. The plaintiff tendered his resignation through email and a letter, from the 1st defendant?s company effective 30th March, 2007, which the 1st defendant refused to acknowledge or recognise;***
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> ***6. After his resignation at the end of the month of March, the 1st defendant refused to pay the plaintiff his salary for the said month of March, 2007, which amounted to Kshs.72,000/=;***
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> ***7. On the 13th of April, 2007, the 1st defendant caused to be carried in the 2nd defendant?s newspaper, the Daily Nation, on page 25 a publication prominently placed in the said paper and headed NOTICE with the 1st defendants logo prominently displayed. The notice had the plaintiff?s coloured photo, name and identity card number;***
>
> ***8. After informing the public that the plaintiff is no longer an employee of the defendant, the notice carried on with the following defamatory words:-***
>
> > ***"Kenol/Kobil would like to contact the said person. Any information on his whereabouts should be reported to the Human Resource Manager on 020-249333 or central Police Station or the nearest police station.? "***

This was followed by the 1st defendant?s advertisement of themselves stating **"Kenol/Kobil cares for you!"** And the plaintiff will at the hearing of this suit rely on the whole of the said advertisement for its tenor and import."

Onchwati went on to plead that the words complained of in their natural and ordinary meaning portrayed him to be;

a) wanted by the police

b) of questionable integrity

c) a criminal

d) in hiding from the law

He also asserted that the advertisement as carried was false, reckless and malicious and proceeded to state particulars of malice including that the publication was false since he had resigned from KOC's employment, and that it was likely to lead to his loss of employment with Motorola Incorporated.

Onchwati also accused KOC and Nation Media Group (NMG) of publishing the words pretending them to be factual, failing to verify or ascertain the correctness of the information even from him or his contacts, and of making a reckless, malicious and injurious attack on his unblemished character, integrity and repute which they persisted in by refusing to apologize or make amends, all of which founded a basis for exemplary damages.

He pleaded further that he was by those publications placed in jeopardy with the police; lost his employment with Motorola; was brought into odium and lowered in the estimation of right-thinking members of society and suffered untold duress and suffering. He was forced to move the court for anticipatory bail to forestall arrest at a cost of Kshs.100,000 and his family suffered, too, with his wife suffering brain haemorrhage leading to hospitalization and surgery costing Kshs.700,000. Moreover, his request to NMG that they carry a rebuttal notice at his own cost was rebuffed.

That claim was resisted by defences filed by KOC and NMG. In its statement of defence, NMG countered that in so far as it carried a paid up advertisement notice by KOC, it was an innocent disseminator and not liable. It was therefore erroneously enjoined in the suit. It also denied the meanings ascribed to the words complained of, and that their publication was malicious and had caused damage to Onchwati's reputation or loss of his employment. NMG also averred that it would take out a notice of claim against its co-defendant for indemnity in the terms offered by KOC and accepted by it against any liability that may arise from the carrying of the advertisement. It did, in fact, issue such notice against KOC dated 17th June, 2009, and filed on 22nd June, 2019.

The case was heard before the learned Judge with Onchwati testifying in full and was cross-examined. Neither defendant offered any evidence and so the learned Judge had only Onchwati's testimony, the submissions of counsel for the parties and the authorities cited, when writing the impugned judgment in his favour.

In this appeal NMG complained that the learned Judge erred in; finding that the publications were defamatory and that it knew they were; holding that a statement of defence supported by witness testimony or documentary evidence is nothing; holding that answers given in a plaintiff's cross-examination cannot be a basis for a defendant's case; finding the publications were actuated by malice; relying on e-mails and Face book conversations to assess Onchwati's credibility, character and reputation; awarding damages that were manifestly and inordinately high; failing to take account of Onchwati's status in society in assessing damages; and in finding that NMG had failed to demonstrate issuance of notice of claim against KOC.

On those bases NMG prayed that we set aside the judgment and instead dismiss Onchwati's suit with costs.

Before the hearing of the appeal, Onchwati filed a motion on notice dated 25th May, 2017, in which he had a single prayer, namely;

"THAT the Notice of Appeal filed on 7th July, 2015, be deemed to have been withdrawn pursuant to Rule 83 of the Court of Appeal Rules."

That application was expressed as brought under **Article 159** of the **Constitution**, **Section 3A** and **3B** of the **Appellate Jurisdiction Act** and **Rules 82(1)** and **83** of the **Court of Appeal Rules**. The main ground on which it was founded was that NMG had failed to institute an appeal within the appointed 60 days from the lodging of the notice of appeal.

At the plenary hearing of the appeal we directed that the parties address us on the motion alongside the appeal itself on which, in accordance with directions of case management, they had filed written submissions.

In submissions filed by Mohammed Muigai Advocates, NMG condensed its grounds of appeal into four complaints namely;

(i) That the public notices were not defamatory;

(ii) The judge failed to consider its statement of defence, submissions and Onchwati?s testimony in cross-examination;

(iii) Publication not actuated by malice;

(iv) Damages manifestly and inordinately high.

It was submitted that the meanings Onchwati ascribed to the words published were more relevant to the publication, not by the NMG, but rather by the Standard Newspaper, which related to and questioned his integrity as well as ethical and professional conduct. NMG contended that its notices did no more than inform the public that Onchwati was no longer KOC's employee and that KOC wanted to contact him and was calling upon members of the public who might have information on him to contact KOC. Essentially, therefore, the submission was that the notice was just factual with no defamatory element.

NMG complained that the learned Judge failed to consider Onchwati's answers during cross-examination in which he conceded that the meanings he ascribed to the publications were more aligned to a different publication. Faulting the learned judge for misapplying this Court's decision in ***JOHN WAINAINA KAGWE -vs- HUSSEIN DAIRY LIMITED [2013] eKLR,*** NMG contended that failure to call a witness on the part of a defendant does not invariably lead to the success of a plaintiff's suit, as the plaintiff can be thoroughly discredited in cross-examination, for which it cited another decision of this Court in ***CHARTER HOUSE BANK LIMITED (UNDER STATUTORY MANAGEMENT) - vs- FRANK N. KAMAU [2016] eKLR***. We were urged to correct the learned Judge's holding on the consequences of not calling a witness, which has grave ramifications and undermines the rules of natural justice.

NMG's counsel next asserted that its publication of the notice regarding Onchwati was not actuated by malice. They cited ***GATLEY ON LIBER & SLANDER, 9th Ed*** at ***816*** for view that *"the strongest evidence of malice is proved in most cases by proof that the defendant had no honest belief in the truth of the defamatory statement."* They urged that it had not been proved that NMG suspected the words to be untrue and refrained from taking steps that would have turned their suspicions into certainty, as held in ***JOHN -vs- MGN [1996] 2 All ER 35.*** They contended that the learned Judge must have used the more detailed publication by *The Standard* to impute malice on NMG.

On quantum of damages, counsel charged that the learned Judge failed to consider Onchwati's social status which is a relevant consideration as held by this Court in ***NATION NEWSPAPERS LIMITED -vs- PETER BARAZA RABANDO [2016] eKLR,*** and contended that he was not known beyond the limits of his immediate family, friends and work environment. Citing ***MARGARET WANJIRU KARIUKI -vs- NAIROBI STAR PUBLICATIONS LIMITED [2016] eKLR,*** where *"the renowned Bishop and former Assistant Minister"* was awarded cumulative damages of Kshs.3 Million for an allegation that she had been banned from conducting marriages, they submitted that the cumulative damages granted of Kshs.15,500,000 were inordinately and manifestly high.

Addressing the exemplary damages of Kshs.12,000,000 counsel referred to ***JOHN -vs- MGN*** (Supra) in support of the contention that carelessness alone does not justify an award under the head. Rather, the publisher's conduct needs to be so reprehensible (or wicked) as to be deserving of punishment or motivated by mercenary considerations, as mere publication of a newspaper for profit is not enough, nor is carelessness alone, however extreme. They contended that public notices boost no sales unlike salacious publications that would prompt the public to buy a newspaper.

They urged us to allow the appeal and set aside the judgment.

Also urging us to interfere with the judgment Miss Onyango, learned counsel for KOC, who submitted that the words complained of were not defamatory of Onchwati within the meaning of what is defamatory as contained in **HALSBURY'S**

LAWS OF ENGLAND, 4TH ED VOL 28 at **P23,** the ingredients of which, as held by this Court in ***RAPHAEL LUKALE -vs- ELIZABETH MAYABI & ANOTHER [2018] eKLR***, must be proved by the plaintiff.

Regarding the granting of damages, it was submitted that while damages are discretionary, this Court may interfere where it is shown that the trial court made a wrong decision having misdirected itself, for which ***MBOGO & ANOTHER -vs- SHAH [1968] EA 93,*** was referred to. The error and misdirection, according to counsel, is that the learned Judge lumped the publication by NMG together with the one by *The Standard* ,which was more detailed and serious.

As to the exemplary damages that were awarded, it was submitted that they did not lie since it was not proved that the alleged tortfeasors calculated to make a profit that would well have exceeded the compensation payable to the plaintiff, and that compensatory damages were inadequate to punish outrageous conduct so as to show disapproval and deter repetition. Reliance was placed on ***BARAZA LIMITED & ANOTHER -vs- GEORGE ONYANGO OLOO [2018] eKLR*** and ***THE NAIROBI STAR PUBLICATION LIMITED -vs- ELIZABETH ATIENO OYOO [2018] eKLR.***

KOC also faulted the Judge for not considering Onchwati's social status as held in ***NATION NEWSPAPER LIMITED -vs-PETER BARAZA RABANDO*** (Supra) and observed that not a single authority was relied on by the learned Judge in making such a high award in exemplary damages. ***MUSIKARI KOMBO - vs- ROYAL MEDIA SERVICES LIMITED [2018] eKLR*** and ***MIGUNA MIGUNA -vs- STANDARD GROUP LIMITED [2017] eKLR,*** both with awards of Kshs. 5 Million general damages and Kshs. 1 Million for aggravated damages, were cited in aid.

Finally, the learned Judge was castigated for making an award of Kshs.500,000 in lieu of an apology when, as shown by ***KEN ODONDI & 2 OTHERS -vs- JAMES OKOTH OMBURAH & COMPANY ADVOCATES [2013] eKLR***, referred to by the learned Judge, a failure to apologize falls within the realm of aggravated damages, not a separate claim. It was urged that we interfere with the amount of damages, reducing the same to Kshs.500,000 general damages only.

In submissions filed by Madahana & Company Advocates, Onchwati contended that the publications complained of were defamatory as they had a tendency to injure his reputation in the estimate of right-thinking members of society, causing him to be regarded with feelings of hatred, contempt, ridicule, fear and the like, typically by attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on and the advertisements *"fell on all fours."* To counsel, *"the reaction of the person reading the advertisement was that Onchwati must have done something criminal to be „put? in the newspapers, and people did not need any more information to come to that*

conclusion. And to them, they did not need to plead innuendo."

Further, the fact that NMG chose to rely on an indemnity when Onchwati put them into the picture that he had voluntarily resigned from KOC showed they did not believe in the truth of the publication. Their refusal to carry Onchwati's counter publication added to the proof of their liability. They cited ***DAILY NATION -vs-MUKUNDI & ANOTHER [1975] EA 311*** where, at **P 316 Mustafa, Ag. VP** expressed the view that a publisher had *"a duty to see whether such item (accepted for publication) contains seditious or libellous matters,"* failing which "*it always publishes at its own risk."*

On whether the public notices were actuated by malice, counsel cited ***PHINEHAS NYAGA -vs- GITOBU IMANYARA [2013] eKLR,*** to assert that the failure to inquire into the facts may lead to an inference of malice being properly drawn. She defended as correct the learned Judge's assessment and reasoning on the point.

Regarding damages, counsel submitted that Onchwati's status in society was clear from his witness statement which he adopted as evidence in chief. He stated:-

> ***"I am 32 years old, born on the 1st of January, 1979 in Nyamira County. By occupation, I am currently (for 4 months now) the Product Operations Manager in charge of all Africa BlackBerry services Technical Operations at Emitac Mobile Solutions LLC, a global strategic technology partner for Blackberry service provision, activation and support. Prior to this role, I was the Product Marketing and Business Development Manager for West Africa (3 years) and the Devices and Software Manager (close to 3 years) for East and Southern Africa at Nokia international, a global leader in designing, development and manufacturing of mobile devices and related services."***

Contending that damages are a matter of judicial discretion ***C A M -vs- ROYAL MEDIA SERVICES LIMITED [2013] eKLR***, and a publisher's failure to exercise due diligence to verify the truth of what is published, or is reckless and negligent are taken into account ***STANDARD MEDIA -vs- KAGIA & COMPANY ADVOCATES [2010] eKLR,*** counsel submitted that the learned Judge *"was well within range"* in awarding Kshs.3 Million, General damages. She also justified the award of Kshs.500,000 in lieu of an apology as follows;

> ***"1st respondent/plaintiff testified that he had been working with another company and was dismissed directly out of the published adverts by the appellant. 1st respondent/appellant was known beyond the country as he was employed by an International Organization. His friends and former classmates in South Africa read about it and even people he had not been in touch with Notoriety cause of his position as school captain in a famous National School as Mangu School.***
>
> ***He was occasioned loss of employment, acute personal embarrassment, forced to hide, forced to seek court intervention, forced to grovel at the feet of the appellant for chance to mitigate damages and still live with the stigma.***
>
> ***The publication of the Advert which was on prime days a Friday and Monday and a feature at that was reached by many people and it was observed by the trial court that no amends by the appellant by way of an apology were made. The follow up publication or repeat publication added insult to injury already caused to the 1st respondent?s/plaintiff?s character, credit and reputation as it was prominently made by the appellant?s even after the 1st respondent sought to clarify the issue.***
>
> ***Up to the time of trial no attempt was made to mitigate the damage, hence the sum of Kshs.500,000/= awarded in lieu of an apology being any other relief the court deems fit to grant."***

Regarding the award of Kshs.12 Million, counsel made the curious submission that it was for *aggravated damages* due to repeated statements over and over again by NMG even when no evidence was forthcoming of his misconduct necessitating the publications. She went on to cite authorities on exemplary damages and to assert that the placing of the notices, which were paid up adverts in the business section of the newspaper revealed a motive to boost sales. It was submitted that the award of Kshs.12 Million was justified and should not be dismissed.

Before we go into the merits of the appeal, we wish to dispose of the notice of motion seeking to strike out the appeal. The fact that we have already gone so deep into analysis of the appeal in the manner we have done should signal our non-persuasion that the motion is merited or else we would have engaged in an exercise in futility, yet we are not in the habit of acting in vain.

Mrs. Madahana for Onchwati asked us to strike out the record of appeal because it was filed or lodged on 4th May, 2016, when it should have been lodged by 5th April, 2016. She therefore urged us to deem the notice of appeal to have been withdrawn upon expiry of the requisite time on the said 5th April, 2016.

In opposition to that application both **Mr. Mwangi,** learned counsel for NMG, and **Miss Onyango** for KOC, argued that the application was incompetent in so far as it was brought more than a year after the record of appeal was served yet, by *dint* of the *proviso* to **rule 84,** an application to strike out a notice or record of appeal for default of taking an essential step, or failure to take such step within the prescribed time, should be made within thirty days of service of such record of appeal. To them, the motion was brought under **rule 83** in a bid to escape the strict time lines imposed by **rule 84**. Moreover, they argued that as the appeal was in fact instituted by the lodgement of the record of appeal *albeit* late, it was not open to Onchwati to fall back on rule 83 to seek a striking out of the notice of appeal.

With great respect, we think that under Rule 83, the Court may *suo moto* or upon being moved, make an order that a notice of appeal not followed by institution of an appeal within the appointed time is deemed to be withdrawn. When an appeal has in fact been instituted, whether within or without time, it would be an absurdity for the notice of appeal to be deemed to have been withdrawn for non-institution of that which has already been instituted. In such a scenario, the provision that must come into play is **Rule 84** which now allows a person affected by an appeal to move the Court to strike out the record of appeal for having been lodged out of time. Where a record of appeal has been lodged this is the rule that must be engaged, and within the thirty (30) day timeline imposed in the provision thereto.

That being our understanding of these two rules which apply sequentially, it must follow that Onchwati's notice of motion is misconceived. It seeks to deem the notice of appeal as withdrawn for non-institution of an appeal within time, instead of seeking a striking out of the record of appeal actually filed, for having been filed out of time. For that reason the same is dismissed, but with no orders as to costs.

Turning now to the appeal proper, we remind ourselves that this being a first appeal, we proceed by way of a re-hearing with express obligation to re-appraise and re-evaluate the entire evidence with a view to making our own independent inferences and conclusions. This we have faithfully done, while cognizant that we are not possessed of the advantage the learned Judge had of hearing and observing the witnesses as they testified before her, for which we make due allowance. See **Rule 29(1)** of the **Court of Appeal Rules**; ***SELLE & ANOTHER -vs- ASSOCIATED MOTOR BOAT COMPANY LIMITED & ANOTHER [1968] EA 123.***

The first issue we need to determine is whether the notices published by NMG of, and concerning Onchwati, were defamatory so as to found liability in libel. ***Black?s Law Dictionary 10th Edition*** defines defamation as malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person; while the learned author ***P. H. Winfield,*** in his ***A Textbook of the Law of Tort 5th Ed. 1950*** at ***P 242*** calls it the publication of a false and defamatory (sic) 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. Indeed, such publications tend to subject the person concerned to public shame, ridicule, humiliation or odium and cause his reputation to diminish and plummet and the person is thereby demeaned and injured in the eyes of the public generally.

We have looked at the public notice boldly and prominently carried in white against a red background by the *Daily Nation* newspaper of Friday 13th April, 2007, and again on Monday 16th April, 2007. The notice carried Onchwati's photograph in live colour with his name and national identity card beneath it. The narrative informed the public that he had ceased to be an employee of KOC and was therefore not authorized to transact any business on behalf of that organization. The organization then declared that it would like to contact *"the said person"* and requested that *"any information on his whereabouts"* be reported to its Human Resource Manager on a number provided or, in bold print, *"the Central Police Station or the nearest Police Station."*

Now, people join organizations as employees and leave them all the time. Only in very few cases does the on boarding of a member of staff get to be announced to the public generally. More rare, indeed, is the announcement of job transitions in the sense of someone having left his place of employment. In Onchwati's case, even assuming that there was a legitimate need for the public to be informed that he had left KOC, and we really cannot see what that need was, the notice went way beyond merely conveying a departure from employment. Rather, it painted Onchwati in a decidedly negative light. He was an individual who was no longer authorized to transact any business on behalf of KOC, and with that indication the public were essentially being placed on notice that he might hold himself out as authorized to so transact, when he was not. It gave the impression that he was a dishonest person, lacking in integrity and likely to hold himself out as being what he was not.

That was not all. By stating that they were seeking to contact *„that person?,* KOC was saying essentially that the man left employment surreptitiously and they needed to follow up some unresolved issues with him. It conveyed the message that he was in hiding. People do not go into hiding unless they have something to hide. The final nail in the coffin was the plea to the public to, as it were, blow the whistle, or snitch, or tell on him should they see him. And to whom? The Central Police Station or the nearest police station. No doubt the picture painted of Onchwati was unflattering. He was portrayed as a fugitive from the law. He was a law breaker of some sort that the police would be interested in. The notice was vintage defamation and it placed a scarlet mark and stain on Onchwati's reputation and character. We think, with respect, that the learned Judge properly reasoned that the notice was defamatory of Onchwati and that she was within rights to find proved the various meanings that Onchwati ascribed to the words, and the publication generally.

Much as the notice was prepared and submitted for publication by KOC and NMG had no role in the formulation of its content, in so far as NMG published the notice, it became fully culpable in defamation. We are in no doubt whatsoever that whereas a free press is an indispensable prop and aid to a democratic society, publishers are not possessed of a *carte-blanche*, nor do they enjoy a licence to harm and injure the reputation of others at will. We hold to be still true the view of the former Court in ***DAILY NATION -vs- MUKUNDI & ANOTHER*** (Supra) that when a publisher accepts an item for publication, it has a duty to see whether such item contains libellous matters, and that if it fails to discharge that duty, then it always publishes at its own risk.

There is nothing on the record before us to show that NMG made any or any serious attempt to ensure that the public notice was not defamatory of Onchwati. In fact, on a proper analysis of the evidence, it would seem that it had more than a mere inkling that the notice was libellous of its subject. That notwithstanding, it went ahead to publish the notice even when it was brought to its attention by Onchwati that the notice was false and misleading. Instead of trying to protect Onchwati from defamation, NMG consciously elected to protect itself from the likely consequences of the libellous publication by requiring and obtaining from KOC an agreement for full indemnity. That kind of conduct on the part of NMG, compounded, in our way of thinking, by their refusal to carry a rebuttal notice that Onchwati offered to fully pay for, all go to indicate malice, as was expressed in ***PHINEHAS NYAGATH -vs- GITOBU IMANYARA [2013] eKLR,*** malice may be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Moreover, a failure to inquire into the facts is a fact from which inference of malice may properly be drawn and any evidence which shows that the defendant knows the statement was false and did not care whether it was true or false will be evidence of malice. See also ***GODWIN WACHIRA -vs-OKOTH [1977] KLR 24.***

The totality of own consideration of the record leads us to the conclusion that the learned Judge was perfectly entitled to find and hold that liability for defamation had been established.

On quantum, however, we find that we are unable to agree with the learned Judge's approach and we must respectfully interfere. We do so fully alive that awards of damages lie in the discretion of the trial court and we should be slow to interfere. It is, however, a judicial discretion to be exercised judicially and judiciously on sound principle, not arbitrarily or whimsically. In ***MBOGO -vs- SHAH*** (Supra), it was held and has been repeated countless times that an appellate court should not interfere with the Judge's exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion, and that as a result there has been mis-justice.

Where the discretion is in respect of an award of damages, an appellate court interferes only if it is shown that the trial court proceeded on

wrong principle or misapprehended the evidence in some material respect and thereby made an award so inordinately high or low as to represent an entirely wrong estimate. See ***THE STANDARD LIMITED -vs- G. N. KAGIA [2010] eKLR, BUTT -vs- KHAN [1981] KLR***.

It is worth recalling the purpose of an award of damages in a defamation claim as famously expressed by the Lord Chancellor; Lord Hailsham of St. Marylebone in ***CASSEL & COMPANY LIMITED -vs- BROOME & ANOTHER [1972] 1 All ER 801,*** which we adopted in ***NATION NEWSPAPERS LIMITED -vs- PETER BARAZA RABANDO [2016] eKLR.*** Said the law Lord;

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

Awards necessarily vary from case to case but it is expected that similarly situated persons, subjected to defamation that is relatable, should be compensated by awards that are close. There should not be wide variations in awards when all things are considered. That is why the entry point for interference on appeal is where an award is inordinately so high or so low as to be, *ipso facto*, an entirely erroneous estimate. In the instant case we are alive to what we said in the ***NATION MEWSPAPERS LIMITED -vs- PETER BARAZA RABANDO*** case (Supra), that when assessing damages courts have to be pragmatic and realistic enough to acknowledge that an award will be influenced, in no small measure, by the social standing of the individual defamed.

Bearing all of these considerations in mind, was the learned Judge justified to award Onchwati damages under various heads bringing the total to Kshs.15,500,000? With great respect, we think not. We have considered a number of awards made by this Court which were cited before us and they all, without exception, are far less than a half of what the learned Judge awarded. In both ***MUSIKARI KOMBO -vs- ROYAL MEDIA SERVICES LIMITED [2018] eKLR,*** and ***MIGUNA MIGUNA -vs- STANDARD GROUP LIMITED [2017] eKLR,*** cited by KOC, the awards were Kshs.5,000,000 general damages and Kshs.1,000,000 aggravated damages bringing the total to Kshs.6,000,000. Those cases involved well-known public figures with national, even international repute.

Under the head of general damages, the learned Judge awarded Kshs.3 Million and we note that in the submissions filed on his behalf, Onchwati's advocates state expressly that it was "*well within range,"* for the court to have awarded him Kshs.3,000,000 as general damages. That is a submission we readily accept.

The bulk of the learned Judge's award fell under the head of exemplary damages for which she granted some Kshs.12,000,000. Now, exemplary damages are awardable in very rare instances where the conduct of the defendant is deserving of punishment, and they are meant to vindicate the law. They have nothing to do with compensating the plaintiff. This Court in ***THE NAIROBI STAR PUBLICATION LIMITED -vs- ELIZABETH ATIENO OYOO [2018] eKLR,*** addressed the issue as follows, and we agree;

> ***"As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, in paragraph 243 of Halbury?s Laws of England, as follows:-***
>
> ***(1) Oppressive, arbitrary or unconstitutional actions by servants of government;***
>
> ***(2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or***
>
> ***(3) Cases in which the payment of exemplary damages is authorized by statute."***

See also ***JOHN -vs- MGN LIMITED*** (Supra).

We are not satisfied from our perusal of the record, and from the submissions made before us, that there is anything in the conduct of NMG, far from laudable though it was, that was so callous, reprehensible, steeped in impunity or actuated by mercenary considerations, that it called for the extreme measure of punishing it by way of exemplary damages. The same did not lie and we would set aside that head and the sum of Kshs. 12,000,000 in entirety. It is hardly surprising that Onchwati's counsel was unable to place before us any case law that would have justified any award of exemplary damages in the circumstances of this case, less still in the excessive sum of Kshs.12,000,000 awarded.

In an attempt to justify the award of Kshs.12,000,000 counsel for Onchwati chose to baptize it as *"aggravated damages"*, abandoning, without saying so, the exemplary damages head that the learned Judge had expressly and deliberately, assigned for that sum.

The two heads of damages are wholly different and distinct, and not interchangeable. One is compensatory, while the other is punitive, and the considerations justifying either are quite different although, in appropriate cases, they may all be present and damages under both heads could be recovered.

Counsel for Onchwati is in our estimation correct to say that he was deserving of aggravated damages. The matters the learned Judge considered as justifying exemplary damages such as insisting or publication of the notices despite being made aware that they were false, and refusing to carry Onchwati's paid up clarification or rebuttal, as well as refusal to apologize and insistence in their defence in the face of clear evidence of harm call for aggravated, as opposed to exemplary damages. Such are the matters the English Court of Appeal spoke to thus;

> ***"Aggravated damages will be ordered against a defendant who acts out of improper motive where it is actuated by malice; consistence on a flurry defence of justification or failure to apologize."***

As to the quantum of aggravated damages, none of the authorities from this Court cited before us have a figure above Kshs.1 Million, but in the circumstances of this case where NMG appear to have been emboldened in carrying the defamatory notices by the comfort they derived from the indemnity they had agreed and obtained from KOC, we think that an award of Kshs.1,500,000 under this head is called for.

Regarding the award of Kshs.500,000 made by the learned Judge in lieu of an apology, which the learned Judge justified as falling under the prayer for *"any other relief the Court deems fit,"* we have no difficulty or hesitation holding that it was misconceived and did not lie. Refusal to apologize is one of the matters to be considered in an award of general damages as such or under aggravated damages. It is not a stand-alone item of award, and we therefore set it aside.

In the premises, this appeal partially succeeds. The award of Kshs.3,000,000 general damages is upheld and Onchwati shall have a further Kshs.1,500,000 being aggravated damages.

The two awards of Kshs.12,000,000 exemplary damages and Kshs.500,000 in lieu of apology are set aside.

The parties shall bear their own costs of this appeal while Onchwati shall have the costs of the High Court suit.

Orders accordingly.

DATED and delivered at Nairobi this 11th day of October, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR