IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G. B. M. KARIUKI, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 164 OF 2016

BETWEEN

MIGUNA MIGUNA.....APPELLANT

AND

THE STANDARD GROUP LIMITED..... 1ST RESPONDENT

THE STANDARD LIMITED.....2ND RESPONDENT

JAMES SMART.....3RD RESPONDENT

CYRUS OMBATI.....4TH RESPONDENT

THE KENYA TELEVISION NETWORK (KTN)....5TH RESPONDENT

(An appeal from the Judgment and Order of the

High Court of Kenya at Nairobi (Aburili, J.)

dated 12th February, 2016

in

H.C.C.C. No. 196 of 2013)

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JUDGMENT OF THE COURT

The appellant, Miguna Miguna, filed suit at the High Court of Kenya, Nairobi, against the five respondents – The Standard Group Limited (the 1st respondent), The Standard Limited (the 2nd respondent), James Smart (the 3rd respondent), Cyrus Ombati (the 4th respondent) and The Kenya

Television Network (KTN) (the 5th respondent). The plaint is very long and winding - running into 14 pages.

It was stated in the plaint that the 1st respondent was a corporation carrying on media communication, news publication, distribution and dissemination. The 2nd respondent was stated to be a corporation that carried out business of radio, electronic and print news and communication including online publication of the same. Of the 3rd respondent, it was said that he was a news reporter, reader, servant and an agent of the 1st and 5th respondents. The 4th respondent was also said to be a news reporter, servant and agent employed by the 1st and 2nd respondents. The 5th respondent was described as a corporation carrying on the business of a television network. It was further stated that the 2nd and 5th respondents were wholly owned subsidiaries of the 1st respondent and that the operations of the 1st, 2nd and 5th respondents were carried out from the same premises and headquarters and that they were very tightly intertwined to the extent that they appeared to be a single business entity or enterprise.

It was stated in the material part of the claim in the plaint that in the 9 p.m. and 11 p.m. news broadcasts of 18th February, 2013 the 1st, 3rd and 5th respondents broadcast and published the following words, statements and expressions on the 5th respondent's television network which broadcasts were false and defamatory of the appellant. The following words, statements and expressions on the 5th respondent's Television Network, which were said to have been false and defamatory of the Plaintiff were as follows:

> ***"The controversial writer and political activist Miguna Miguna is back in the news once again. Miguna has been questioned by the police in the city for allegedly assaulting his house help. Miguna's house help told the police she was assaulted and later chased away from the controversial former Civil Servant's Runda residence. Miguna on his part, claims the house help was not a victim of assault but an agent of powerful forces out to have him killed. Miguna who is a former aide to Prime Minister, Raila Odinga, told journalists in his compound, he had learnt that the woman had been paid One Million Kenya Shillings by two bodyguards of two ministers to poison him".***

It was further alleged in the plaint that the said broadcasts referred to and were understood to refer to the appellant directly in connection with an alleged criminal activity which had not occurred and which it was said the 1st 3rd and 5th respondents knew or ought to have known that the appellant had not been accused of or questioned about by the police as asserted in the publication. The appellant alleged that the said statements in their natural and ordinary meaning or alternatively by way of innuendo or implication meant and were understood to mean and were capable of meaning that the appellant was a criminal; that he was violent; that he was dishonest; that he was unprincipled; that he was unprofessional; that he had committed an offence under the Penal Code; that the appellant thrived on controversy and that the appellant had been questioned by the Kenya Police over allegations that he had assaulted his house help. It was stated that the news broadcast was read by the 3rd respondent an employee of the 1st and 5th respondents. The appellant further alleged in the plaint that the 1st, 3rd and 5th respondents in the said broadcast deliberately omitted relevant facts including the fact that it was the appellant who had reported to the police that there was a conspiracy to assassinate him. The appellant, therefore, averred that the said respondents had slanted and crafted their broadcast and publication with malicious intent in order to make their news sensational and in order to portray the appellant negatively with a view to causing serious injury to his name and reputation. The appellant further averred that the words and statements in the said broadcast by the said respondents were understood to mean and were capable of meaning that the appellant was a person who thrived on media attention and controversy and that the claim that his life was in danger was another attempt to be in the limelight when in fact it was the respondents who had invaded the appellants home on the material day. The apellant offered various particulars of defamation and particulars of loss and damage in the plaint.

It was alleged further in the plaint that in the Standard Newspaper, Standard Online, Standard Digital and the Standard Mobile all owned, published, printed and distribued to readers and viewers globally by the 1st and 2nd respondents on 19th February, 2013, published words that were still accesible to viewers and

readers at the time of the hearing – the 4th respondent authored and published in the print media, electronic, online and mobile versions of the 1st and 2nd respondents news publications the following statements and words of and concerning the appellant in an article titled "*Miguna In Assault Drama With House Girl*":

> ***"Police have questioned Miguna Miguna after his house girl claimed he had assaulted and dramatically chased her from his Runda home in Nairobi. However, Miguna outrageously claimed he kicked out the girl after learning she was planning to poison him. He also claimed his life is in danger and asked police to provide him with 24-hour security. Miguna ... told journalists he learnt the house help had been paid Sh. 1 Million by bodyguards of two ministers to poison him. Miguna has written two books in which he has made unsubstantial accusations against the PM. The woman walked to Runda Police Station yesterday morning and claimed Miguna had assaulted and chased her out of his compound. She said the former aide had even refused to allow her to pick her clothes. It was then that a team of CID Officers was sent to the compound to establish the truth of the matter ... Police were reluctant in seeking his statement regarding the house girl's claims until when journalists, who had been tipped off of the report, decided to go to Miguna's house, few kilometres away from the station. And after he recorded his statement with CID Officers, Miguna gained confidence and invited journalists into his compound saying he has used his hard-earned money to build it".***

It was alleged in the plaint that those statements were false and that in their ordinary meaning or by innuendo the words were understood to mean and were capable of meaning that the apellant was a criminal, was violent, was irrational and outrageous, was dishonest and had been accused of physical assault, was being investigated by police for physical assault, that the appellant manipulates the justice system and has no regard for the rule of law, that he is corrupt, is a coward, is boastful and arrogant. The appellant averred that the said statements were not true, they were not correct, they were not objective, they were not balanced or fair and that the report was not accurate of the happenings at the appellant's residence on the 18th of February, 2013. The appellant,therefore, stated that the statements and words were false and were only contrived and calcuated to portray him in a negative light with an intention of defaming him. Again, particulars of defamation were given.

The rest of averments in the plaint appear to be evidentiary in nature which should not appear in a pleading. For all these, the appellant prayed for general damages Kshs.10 Million, special damages, compensatory damages, exemplary damages, aggravated damages, costs of the suit, pre-judgment and post-judgment interest and unequivocal retraction and an apology acceptable to the appellant in such conspicous manner as the publications and in terms to be approved by the appellant; delition and/or removal of all posts publications and broadcasts of the offending statements that were still published in the respondent's website, in the Facebook and in Twitter accounts or walls.

The respondents delivered a defence which generally denied the appellant's claim. The respondents in their defence stated *inter alia* that the report published as set out in the plaint was in essence the content of a statement given by the appellant himself on events that had taken place at his residence. The respondents stated that the appellant had issued a written statement on 18th February, 2013 "*Raila Odinga is trying to kill me*", and that the appellant stated that his house help had confessed to being offered 1 million shillings to poison him; that a report of the same had been made by the house help at Runda Police Station and the appellant and 2 others had recorded statements at the same police station. The respondent denied that the words published had the meaning ascribed to them by the appellant and that they could be understood to mean what the appellant alleged. The 1st and 5th respondents denied invading the appellant's home and denied that they had portrayed the appellant as a person who thrived on media attention. The respondents denied causing the appellant agony, distress or embrassment and denied that the appellant had suffered any injury to character or reputation. It was stated in the defence that no demand or intention to sue had been served on the respondent and that the appellant had not availed himself the right of reply reserved by law. For all these, it was prayed that the appellant's claim be dismissed.

Various documents were filed with the pleadings by the parties which included a List of Documents filed by the appellant. Amongst these was a letter dated 18th March, 2013 by a firm of advocates to the Chief Executive Officer of the 1st respondent. This letter complained of the publications stated in the plaint which the letter said were defamatory of the appellant and various demands were made including a demand to cease such publications and to delete all records of the publications. It was further stated that proceedings would be taken in court. The suit was filed on 28th May, 2013 over two months after that demand letter and it is, therefore, surprising that it is claimed in the defence that no demand letter had been served. That takes care of that aspect of the defence where it is alleged that the appellant did not avail himself of the right of reply set out in law. The letter was detailed in content and demanded delition and retraction of the publications, an apology and admission of liability. The only response that this letter elicited from the respondents was a letter which stated that investigations were being carried on the complaints by the appellant. No substantive response followed.

The suit was heard by Aburili, J. and in a judgment delivered on 12th February, 2016, the learned Judge dismissed the suit finding it to have no merit. The learned Judge further held that had she found for the appellant an appropriate award for general damages for defamation would have been all inclusive sum of Kshs 5 million. Those findings provoked this appeal which is drawn by the appellant where 46 grounds of appeal are taken. Some of these are not grounds of appeal at all. They are descriptive of events that took place and steps that were taken or not taken to prepare the appeal. The memorandum of appeal is split into subjects. The first part refers to "*there was inordinate delay in providing the appellant with 5 copies of certified judgment and proceedings for purposes of this appeal*". 5 "*grounds*" follow. They are not grounds of appeal at all. The second part "*Errors of Law, Errors of Fact and Mixed Law and Fact in the Judgment*". Grounds 6 – 46 then follow.

We shall only pick those grounds that appear relevant and that require our consideration.

The Learned Judge is faulted and said to have erred by incorrectly applying the law and legal test on the case and issues before her and thereby arriving at an errenous finding of facts. The learned Judge is also said to have ignored relevant case laws; to have incorrectly applied a standard of proof; that the learned Judge erred in not finding that the publications were actuated by malice; that the learned Judge erred in holding that the appellant required to prove his good name and character; that the learned Judge erred in not finding liability against the respondents; that the learned Judge erred in placing a higher standard to prove defamation than the standard required in law; that the learned Judge erred in holding that other publications that were not pleaded in the plaint were irrelevant to the suit before the court; that the learned Judge was wrong to cap general damages at Kshs. 5 Million had she found in favour of the appellant; and that the learned Judge was wrong in the way that she had conducted the proceedings. For all that and again in the relevant part, we are asked to set aside the judgment of the High Court and asked to rule in favour of the appellant and award general damages, aggravated damages, exemplary/punitive damages and costs of the appeal to the appellant.

This is a first appeal from the decision of the High Court and it is our duty to re-appraise the evidence and re-analyze the same to arrive at our own and independent conclusion as is envisaged by ***Rule 29*** of this Court. We remind ourselves that we do not have the advantage that the trial Judge had of hearing and observing the demeanour of witnesses. We must respect findings of the learned Judge but are free to depart from the same should we find that the trial judge's findings are not based on the evidence adduced. A judicial enunciation of this duty of a 1st appellate court was recognized in the often cited case of ***SELLE –VS- ASSOCIATED MOTOR BOAT &CO [1968] E.A.*** where the predecessor of this Court pronounced itself thus:-

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take***

account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally ".

The parties filed written witness statements which were produced before the trial Judge as part of the evidence.

The appellant testified and while adopting his written statement filed in court stated that he was an Advocate of the High Court of Kenya and also a Barrister at law in Canada. He held a Masters Degree in law and a Bachelor of Arts Degree in Political Science and a Doctoral Law Degree from Osgood Law School. Also that he was a Certified Mediator, Publisher and Commentator and he made his living through writing and offering consultancy services to clients in Kenya and abroad. He further testified that he served as an Advisor to the Prime Minister of Kenya and at the hearing, he had written two books one which was launched just before the hearing. He stated that from the year 2010 the 1st and 2nd respondents had engaged in consistent persistent deliberate defamation of him and that editors of the same had published over 50 articles disparaging and attacking him. He had registered a complaint with the Media Council and the respondents were found culpable, and were ordered to pay money to him but they had not done so. Further, that when he launched his first book, the respondents pubished articles attacking his integrity and that he had, after the launch of his book, tried to exercise a right of reply but the respondents had refused to publish what he had written. He further stated that after publishing his book on 16th February, 2013 the following day, on 17th February, 2013, he had an interview with Jeff Koinange on a television network called K24. And that thereafter, he went home where he stayed without his family who were abroad because of constant threats by people he did not name. He stayed with a nephew, Hesbon Otieno, a gardener and a house help Millicent. After dinner and after some reading and after spending some time on the computer he went to bed but early the following morning and after receiving a text from his nephew, he summoned his nephew upstairs from his bedroom. His nephew told him that some people had engaged Millicent to poison him through food or drink. He terminated Millicent's services immediately but retained her mobile phone. He called the Officer Commanding Police Division Runda who came with officers to his house. While he was making a statement with the police about the information he had received on threats to his life, he received a telepheone call from the 3rd respondent who told him that he had been informed that he, the appellant, was under arrest. He turned on his televison on the 5th respondent's network and was surprised to watch news that said he was under arrest for assaulting his house help. He called the 3rd respondent and told him that he was at home and he was not under arrest at all. The news continued to be carried for the next 24 hours. He testified further that although he had informed the 3rd respondent who was the news anchor on that day, the 3rd respondent continued to carry the item on the alleged arrest of the appellant. Further, that he spoke to the editor of the 5th respondent Mr. David Ohito, but this did not change things.

The appellant issued a written statement to the media denying allegations about his arrest but the respondents did not report on that statement. The publication of the words that were set out in the plaint were carried in the issue of 1st and 2nd respondents as new stories and was aired by the 5th respondent during prime time news. All these forced the appellant to write a demand notice to the respondents demanding that the publication be stopped and an appropriate apology be given and the only response this elicited was a letter stating that investigations were being conducted but nothing more came from the respondents.

For all these, he asked for the damages we have already spoken to. The appellant called as a witness, Hesbon Otieno Elisha, the appellant's nephew, who testified that the appellant's house help had confided to him that the appellant's former bodyguards at the Prime Minister's office one Odhiambo and one Anyul had been engaged to poison the appellant. He testified that after informing the appellant of what he had learnt, the appellant dismised the house help from emloyment and that there was no incident involving the appellant and the house help on that or any other day.

The respondents called the 4th respondent as a witness. He was a journalist with the 1st and 2nd respondents whose role was to write stories on crimes and investigations. He stated that on the material

day, an unnamed police officer from Runda Police Station called the newsroom and reported that the appellant had assaulted his house help and that he, the witness, called the Officer Commanding Police Division and confirmed that the appellant had called saying that there was a problem at his house. He in company of other journalists went to the appellant's house where they found a police motor vehicle outside but the gate was closed. They remained outside and that when police were leaving, the appellant came out of the gate and addresed the media telling them that the former Prime Minister had sent them to malign his name. Also, that his house help had been sent to poison him and that he had "*thrown her out*". Further, that immediately after that, the appellant roughed them up ordering them to leave. The 4th respondent further testified that the appellant later sent a statement to the newsroom through email saying that Raila was trying to kill him which was received by the news editor. He confirmed that the media house had the statement that the appellant sent but that no report was made on it by the respondent's at all. In cross-examination, he confirmed that he was not in the management of the 1st respondent and did not decide what was published and not published.

He also confirmed that he did not verify the news before publication and that through his Twitter and Facebook accounts, he saw the news spreading about the appellant's arrest.

That was the totallity of the oral and documentary evidence that was produced before the trial Judge who, as we have stated, found the claim unmeritorious and dismissed it hence this appeal.

The appeal came up for hearing before us on 24th May this year when the appellant who is a lawyer appeared in person while the respondents were represented by learned counsel Mr. Syphrine Mayende. The appellant adopted written submissions he had filed and in a highlight of the same, he submitted that the words complained of set out in the plaint were broadcast during prime time TV broadcast by the 5th respondent at 9 pm and 11 pm on 18th February, 2013 while the 2nd respondent carried the story in its issue of 19th February, 2013. According to the appellant, it was only the 4th respondent who testified at the hearing and because he was a reporter and not the editor, his evidence could not be taken to be on behalf of the other respondents. The appellant faulted the learned Judge for holding that he – the appellant – had to prove his good status; that he had to prove that he was an Advocate of the High Court of Kenya and a Barrister in the Courts of Canada; that he had to prove that there were people who watched the news on 18th February, 2013; and that he had to prove that the news of 19th February, 2013 had been read by newpaper readers.

Mr. Miguna faulted the learned Judge's appreciation of the whole case and thought that the learned Judge was biased against him. He submitted that once he had shown that the publication was intentional, was false and was made without justification, he had proved defamation. He did not have to prove direct intention as he had shown in his direct evidence that the news had been carried the whole day and had not been either withdrawn or his evidence controverted.

The appellant submitted further that he had not been questioned by police and that it was he who had called the police and reported that there was an attempt on his life. Further, that the broadcast by the 5th respondent began even before the 4th respondent and other reporters visited his home and that none of the respondents bothered to verify whether the publication they were to carry was factual in fact or at all. According to him, he had a right as a private citizen not to be represented falsely and that although the respondent had a constitutional right to make report on events, those events had to be factual. He therefore asked us to set aside the judgment of the High Court and grant the reliefs set out in the memorandum of appeal and particularly that we grant him general damages in the sum of Kshs. 25 million and above.

Mr. Mayende, learned counsel for the respondents, in adopting written submissions and also those filed before the High Court, submitted that the appellant had not discharged the burden to prove his case at the trial. He cited various cases to show that the words complained of were not defamatory. Further, that the appellant had to prove loss of reputation to be entitled to judgment. He did not deny that the respondents had published the words complained of in the issue of the 2nd respondent and the broadcast of the 5th respondent. According to counsel, because there was use of the word *"allegedly"* in the report it entitled

the respondents to publish without verification. According to counsel the appellant had not proved the case as required by law and had also not proved that the respondents had acted maliciously.

In a brief reply, the appellant submitted that because of the defamation he had lost two job offers.

We have considered the whole record of appeal, the memorandum of appeal, the list of authorities produced and the law and we come the following determination of this appeal.

The learned Judge framed 5 issues which she found to be relevant for her determination. These were:

> ***1. Whether the words in the impugned newspaper article and ordinary meaning defamatory of the plaintiff's character, reputation, professional and social standing.***
>
> ***2. Whether the article published by the defendants on 19th February, 2013 and the live broadcast by the 5th defendant as hosted by the 3rd defendant of and concerning the plaintiff was false, reckless and malicious.***
>
> ***3. Whether the plaintiff is entitled to general, aggravated, exemplary and punitive damages for defamation.***
>
> ***4. What orders should the court make?***
>
> ***5. Who meets the costs of the suit?***

Having analyzed those issues, she found that the appellant had not proved his case and the respondents were entitled to publish the words complained of and that the case had not been proved to the required standard.

The respondents did not deny that the 2nd respondent had published the report complained of or that the 5th respondent had aired the report in its news broadcast at 9 and11 p.m. on 18th February, 2013. The defence filed by the respondents stated *inter alia* that the words published were true and were not capable of having or carrying the meanings ascribed to them by the appellant.

The said report carried in the 9 and 11 p.m. news by the 5th respondent and published as a news report by the 2nd respondent reported that the appellant had been arrested and questioned by police for assaulting his house help. In evidence before the trial Judge, the appellant testified that after receiving information from his nephew that the appellant's house help had been recruited by named people to poison him through food or drink he immediately terminated her services and called the Officer Commanding Police Division, Runda Police Station, who went to the appellant's house in company of other police officers to carry out investigations. There was no evidence before the trial Judge that the house help had made a report at the said or other police station at all. The 4th respondent, in evidence before the trial Judge, stated that an unnamed police officer from the said respondent's newsroom had telephoned and reported that the appellant had assaulted his house help. He further stated that:

> ***"... I called the OCPD, Mr. Patrick Mwakio of Gigiri and he confirmed that the plaintiff had called saying there was a problem at his house...".***

The learned trial Judge after analyzing this and other evidence held that although the appellant had proved to the required standard that the words complained of had been published by the respondent:

> ***"... this Court does indeed and has in the past encouraged responsible, accurate and mature reporting and or broadcast by the media. However, a court of law is not a theatre where parties gather to fight the press by allowing every such claim of defamation where there is no proof that the claimants had any good character and or reputation capable of being lowered in the estimation of right thinking members of the society generally. In this case, and from the plaintiff's submissions, the plaintiff assumed that his good character was in the public domain***

and therefore, the court should take judicial notice of that fact...".

A claimant in a defamation suit ought to establish that there is a defamatory statement; that the defendant has himself published or caused another to publish that statement and that the statement refers to the Claimant - See "***Defamation Law, Procedure and Practice***" by the authors ***David Price, Koriech Duodu*** and ***Nicola Cain,*** 4th Edition at paragraph 1 - 02.

The evidence before the learned Judge which was not challenged by the respondents was that the 5th respondent carried the news and statements complained of in the 9 and 11 p.m. news of 18th February, 2013 and that the 2nd respondent published a report on the same the next day 19th February, 2013. The said news and report named the appellant as a person who had assaulted his house help, had been arrested and investigated by police for a criminal offence of assault. The respondents did not deny publication; they did not plead privilege and when challenged by the appellant, they did not offer proof of the truth of the report at all. The appellant submitted before the trial court and before us that the words as published, in their ordinary meaning, meant or were understood to mean that he was a criminal, a violent man who was dishonest and thrived on controversy and that he had assaulted his house help for which he had been arrested by police.

The learned Judge held as we have seen, that the appellant had not proved that he had any reputation or any reputation that the court should protect.

Author Patrick O'Callaghan while discussing the subject of defamation in *"Common Law Series: The Law of Tort"* at paragraph 25.1 says:

> ***"The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: "As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ..." Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods...".*** (emphasis added).

It was held in ***Knupffer v London Express Newspaper Limited [1944] 1All ER 495*** that:

> ***"The only relevant rule is that in order to be actionable, the defamatory words must be understood to be published of and concerning the plaintiff".***

This Court while dealing with an appeal in a defamation case held in ***SMW v ZWM [2015] eKLR***:

> ***"A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided"***. (emphasis added).

It has been held in various cases in Kenya and elsewhere that the test whether a statement is defamatory is an objective one and is not dependent on the intention of the publisher but is dependent on what a reasonable person reading the statement would perceive of it - See the English case of ***Mortgage & Investment Society Limited v Odhams Press Limited [1941] KB 440***.

In the 4th Edition Vol. 28 of Halsbury's Laws of England, the following statement appears at page 23:

> ***"In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense".***

The *"reasonable man"* was explained in ***Winfield & Jolowiez*** on Tort 8th Edition at P. 255 as:

> ***"The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard".***

Tunoi, J.A., in ***Johnson Evan Gicheru v Andrew Morton & Another [2005] eKLR*** held that in an action for libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. Further, that the trial court may consider what the defendants' conduct has been before the action, after the action and in court during the trial.

In the matter before the trial court, the appellant proved to the required standard that the words were published of and concerning him by the respondents. We are of the respectful opinion that the learned Judge fell into error when she held that the appellant had failed to prove that the words complained of had been aired and viewed by other persons. It was the appellant's evidence that the 2nd respondent was a newspaper with national and international publication and that the 5th respondent was a television station that televised news nationally and had an international audience. By holding that the appellant needed to call witnesses to prove that the story was viewed and read as published, the learned Judge placed too high a standard on the part of the appellant whose duty did not extend beyond the usual standard in a civil case such as the one that was before her to prove the case on a balance of probabilities. We are of the respectful opinion that the appellant proved the case to the required standard. A reasonable man watching television telecast by the 5th respondent on that day or reading the report that was published by the 2nd respondent the next day would have understood that the appellant had assaulted his house help for which he had been arrested by police and should be charged in court with a criminal offence. The respondents carried those reports without establishing in any way whether the reports were true in fact or at all. Should they have carried out their duties as required, they would have found that it was the appellant who had made a report against his house help and that the house help had not made a report against the appellant to the police at all.

The learned Judge also held that the appellant had failed to prove his "*good character*" and that the appellant was wrong to assume that the trial court would take judicial notice of who the appellant was. This was not a fair finding at all.

The appellant testified before the trial Judge that he was an Advocate of the High Court of Kenya; that he was a Barrister at Law in Canada; that he was a Certified Mediator, Publisher and Commentator who earned a living by offering consultancy services to clients in Kenya and abroad. This evidence was not challenged in any way at all by the respondents. The appellant did not have to prove any of that evidence through production of any documents or certificates at all in the absence of a requirement by the respondents to do so. The appellant's profession or standing should have been questioned by the respondents. We have perused the record and did not see any evidence of such challenge or requirement by the respondents. In that case, the trial Judge should have taken that evidence as given - that the appellant was an Advocate of that court and that he held the other positions that he stated to hold. Holding otherwise as the trial court did was wrong in the circumstances.

We have come to the conclusion that the trial court was wrong to hold that the appellant had not proved the case as required in law. The appellant proved to the required standard that the respondents aired through a telecast and published in their newspaper reports of and concerning the appellant defamatory statements and that those reports and publications were false and were untrue. The respondents did not claim privilege and when called upon to withdraw the offending publications did not do so. In the premises, the appellant was entitled to judgment and we so hold. Having so held, the appellant is entitled to damages and we have jurisdiction to determine the same.

In submissions before us, the appellant asked us to award damages of "*over Ksh. 25,000,000/=".* In the Memorandum of Appeal, the appellant asks us to set aside the judgment of the High Court and substitute thereof an award of general damages; aggravated damages; exemplary/punitive damages and costs.

The learned Judge held that had she found for the appellant she would have awarded:

> ***"... an all inclusive figure of Kshs. 5,000,000/- ...".***

She did this after reviewing several cases that she found to be similar to the case that was before the court.

In ***Butt v Khan [1981] KLR 349*** it was held that an appellate court should not interfere with the decision of the trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates.

We have perused the cases that were cited before the trial court and are of the considered opinion that the trial Judge did not proceed on a wrong principle of law at all in making the award of Kshs. 5,000,000/- as general damages. The award was based on a correct appreciation of the law and we should not interfere with the Judge's discretion in that regard.

As stated in this judgment, the appellant prayed before the trial court and also before us that he should be awarded exemplary, aggravated and punitive damages. The learned trial Judge did not consider that aspect but awarded an all inclusive sum in general damages. The appellant as we have seen, proved his case to the required standard. He also established through evidence that he had required the respondents to withdraw the publications and apologize to him. This was before action was commenced. This court as recently as 2nd June, 2017 discussed in detail factors to consider in awarding damages for defamation. That was *in* ***Nation Media Group & Another v Hon. Chirau Ali Makwere C.A. No. 224 of 2010 (ur)***. The Court cited Tunoi, J.A. in ***Johnson Evan Gicheru*** (supra) where guidelines in assessing damages were set out as stated in the case of ***Jones v Pollard [1997] EMLR 233***:

> *1.* ***The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.***
>
> *2.* ***The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself.***
>
> *3.* ***Matters tending to mitigate damages, such as the publication of an apology.***
>
> *4.* ***Matters tending to reduce damages.***
>
> *5.* ***Vindication of the plaintiff's reputation past and future.***

The court also cited a passage from the case of ***Wangethi Mwangi & Another v J. P. Machira t/a Machira & Company Advocates [2012] eKLR*** setting out additional guidelines as follows:

> ***"In addition, the awards should also be geared where circumstances permit to act as a deterrence so as to safeguard and protect societal values of human dignity, decency, privacy, free press and other fundamental rights and freedoms, including rights of others and personal responsibility without which life might not be worth living. The category of considerations will no doubt change as our societal needs change from time to time. In this regard, we think that courts must strive to strike a proper balance between the competing needs in the special circumstances of each case".***

In the case before the trial Judge, the defamatory statements were aired by Kenya Television Network during prime time news of 9 and 11 p.m. and were published in the issue of The Standard of 19th February, 2013, a newspaper with a national spread and is also published online to readers in Kenya and abroad. The words portrayed the appellant as a violent person who had assaulted his employee and who

had been arrested by the police.

In ***John v MG Limited*** ***[1997] QB 586***:

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

This Court found in the ***Nation Media Group v Chirau Ali Mwakwere*** (supra) that an award of Kshs. 1,000,000/- aggravated damages was fair in the circumstances.

In the case before the trial court, the respondents were required to withdraw the publication and offer an apology but they did not do so. We are of the respectful opinion that the appellant was entitled, in addition to general damages awarded, to an award for aggravated damages which we now award at Kshs. 1,000,000/- which we find to be fair in the circumstances.

In sum, therefore, we allow the appeal and award to the appellant general damages for defamation at Kshs. 5,000,000/- and additional award of Kshs. 1,000,000/- aggravated damages, both sums to bear interest at court rates from the date of the judgment of the High Court. The appellant will also have costs here and below.

These, then, are our orders.

Dated and delivered at Nairobi this 28th day of July, 2017.

G. B. M. KARIUKI, SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.