IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, OUKO & KIAGE, JJ.A.)

CIVIL APPEAL NO. 226 OF 2011)

BETWEEN

ERIC GOR SUNGU……..……...….APPELLANT

AND

GEORGE ODINGA ORARO…… RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Kalpana Rawal, J.) dated 14th July, 2011

in

H.C.C.C. NO. 1250 OF 2004)

****

JUDGMENT OF THE COURT

This appeal follows the judgment of the High Court (**Rawal J,** as she was then) delivered on 14th July, 2011 against the appellant in a defamation claim filed by the respondent. On 18th November, 2004 the respondent filed a plaint in which he averred that the appellant, then a Member of Parliament who was chairing a Parliamentary Select Committee (PSC) that was inquiring into the disappearance and subsequent death of the late ***Dr. Robert J. Ouko***, (***Dr. Ouko***) had defamed him. ***Dr. Ouko*** died while he was the Minister of Foreign Affairs for Trade – National Cooperation of Kenya.

During the PSC's proceedings, it received evidence from some witnesses who made statements tending to implicate the respondent in the deceased Minister's disappearance from his home before his death. The respondent took those statements which were published, to be false and therefore warranting rebuttal by his appearance before the PSC and cross-examining those witnesses. It was pleaded that the respondent, through his lawyers addressed letters to the appellant seeking such an opportunity, without success. So on 1st March, 2004 the respondent addressed a press conference denying the allegations made against him including an appeal to the appellant to be allowed to cross-examine those witnesses. No opportunity was accorded to him. But on Saturday 6th March, 2004 the appellant addressed a press conference of his own from the parking area of Parliament buildings in the following manner:

> ***"I can assure you that we are getting to the bottom of this matter and hence the hullabaloo we are hearing outside there. That is why there is a lot of hustle because they know we are going***

to find the truth and the truth we shall find. I do not want to say anything more, but I have evidence – eye witnesses. There is a concerted effort by people within and outside Parliament, particularly those that have been mentioned to put some spanner in the works so that this thing cannot go on and I can assure you that we are not going to stop. We will go on and nobody is doing to dictate to us in which manner we are going to call witnesses. I can assure them they will be accorded the chance, the opportunity to say what they have to say and we will cruser [sic] them."

These words were carried in the media and the respondent, a lawyer by profession who had once been the deceased Minister's advocate, and also the lawyer for his family when a judicial inquiry popularly known as the "***Gicheru Commission***" was set up by the Government, to look into the circumstances surrounding the disappearance and subsequent death of ***Dr. Ouko***, felt defamed by those words uttered by the appellant. To the respondent those words were not uttered during the course of parliamentary or the committee's proceedings in connection with the inquiry PSC was conducting. So he sued the appellant for libel and slander claiming general damages, exemplary and aggravated damages and a permanent injunction, barring the appellant from further uttering words defamatory of the respondent.

The appellant filed a defence, wherein he denied uttering the words complained of but added that if they were indeed uttered, they were absolutely privileged because they were spoken in the precincts of the National Assembly for and on behalf of the PSC, duly mandated by Parliament. It was pleaded further that the words complained of did not refer to the respondent and that they were not defamatory or maliciously uttered at all. The persons mentioned by the witnesses appearing before the PSC were given opportunity to rebut any allegations and the respondent did give evidence before the PSC. The appellant also pleaded that the words said to be defamatory were justified.

The respondent filed a reply to the defence joining issue with the appellant and rebutting the claims of privilege, justification, specifying by name and malice. The reply reiterated that the defamatory words were spoken not during PSC proceedings. The appellant knew they were false, and uttered them soon after the respondent's press conference on 1st Mach, 2004. That left no doubt that they referred to him.

A set of nine (9) agreed issues were filed and the trial opened. The respondent testified along with his two witnesses, followed by the appellant. During the trial the judge disposed of several interlocutory matters, received various exhibits, and then penned the judgment under review, finding for the respondent. She ordered that the appellant do pay shs. 3 m in general damages, tender a suitable apology to the respondent and also pay his costs.

This appeal based on ten (10) grounds was argued by way of written submissions which were highlighted. The grounds were that the learned judge erred by finding that the claim had been proved; the words complained of were privileged having been uttered within the precincts of the National Assembly, in the course of proceedings as per sections 4 and 12 of the National Assembly (Powers & Privileges) Act hereinafter, ***'the Act'***; the words did not refer to the respondent and they were not defamatory; the learned judge failed to analyze the appellant's defence and awarded excessive damages as well as directing that the appellant do offer a suitable apology to the respondent.

A cross-appeal was filed contending that the learned Judge erred when she found that the words complained of were not uttered with a malicious intent. The damages awarded were inordinately low and the judge did not award aggravated and exemplary damages; she also failed to grant the permanent injunction as prayed. We were thus asked to allow these prayers.

Mr. A. B. Shah, learned counsel, who appeared with **Mr. Anthony Njoroge** for the appellant, adopted the script of their written submissions, combining them with their response to the respondent's submissions. On the other hand, learned counsel, **Mr. J. Kemboy,** opposed the appeal and maintained that the respondent's cross- appeal should be allowed.

Mr. Shah opened with the contention that the words complained of were uttered in the precincts of Parliament by the appellant in connection with the PSC inquiry he was chairing. The appellant had been

faced with various hurdles in the execution of his duties, including lack of accommodation and other facilities. Other people including one ***Mr. Biwott*** and ***Mr. Ogondi,*** like the respondent, had been mentioned adversely by witnesses appearing before the PSC. The press conference on 6th March, 2004, was not specifically meant for the respondent alone and he was not mentioned in the said statement. That the appellant wrote to the Speaker of the National Assembly about the problems he was facing in his work and told the respondent's lawyers on 4th March, 2004 that he would have an opportunity before the PSC to defend himself.

We heard that the respondent filed an originating summons, ***HC Misc. CC No. 1179/2004*** against the Speaker of the National Assembly, along with all members of the PSC, seeking that the PSC should not continue with its inquiry unless the respondent was allowed to cross-examine the witnesses who had made adverse statements against him. That cause is still pending. If the respondent should have waited for his turn at the PSC, he could have found that some two witnesses who had testified, one **Mukhwana** and another **Mbajah** were found to be liars and perjurers, while two other witnesses called, **Selina** and **Owiti,** did not mention the respondent's name before the PSC. Further, it was submitted that the respondent was given full opportunity to rebut adverse statements made against him and he was happy that PSC recommended that ***Mukhwana*** be charged with perjury. So it was a misdirection for ***Rawal, J***. to find that the statement in issue did impute defamatory connotations against the respondent. He was not mentioned at all. In any case anything and everything said within the committee either by the appellant or its members was privileged and so it was a misdirection for the learned judge to create a nexus between the alleged offending words and the respondent. Several cases were cited with emphasis on **Muriuki Karne Muriuki vs Wachira Waruru & Anor HCCC 28/2003**.

Moving to the case of **Prebble v Television New Zealand [1995] 1 AC 321, *Mr. Shah*** emphasized the absolute privilege accorded to proceedings in Parliament. That the courts should not allow any challenge to be made against utterances made within the precincts of Parliament in performance of its legislative and other functions. Such utterances are privileged, giving members of Parliament and committee members freedom to speak without fear. To stress this point of privilege, another case, **R vs. Rule [1937] 2 All ER 772** was brought to our attention to support the contention that the appellant was entitled to utter the words which 'offended' the respondent. However, Mr. Shah conceded that, the privilege did not extend to members of Parliament or committee members when not engaged in matters of the House. It is confined to proceedings in Parliament or the committee. Before moving to submit on the cross-appeal ***Mr. Shah*** informed us that the appellant abandoned the ground of justification in the High Court. Nonetheless, the learned judge proceeded to make a finding on privilege. And that the appellant admitted uttering the words in issue.

As for the cross-appeal, we heard that the injunction sought by the respondent was not granted by the High Court. And the apology as ordered by the court was not tendered to the respondent because it was not demanded. And that aggravated and exemplary damages were not awarded because the learned judge found that the words complained of were not uttered with malice. There was no guilty knowledge on the part of the appellant that he was committing a tort. It was added that the appellant did not say that the respondent murdered ***Dr. Ouko*** - his client. The award of shs.3m for general damages was thus sufficient.

Mr. Shah had intimated to us initially that the cross-appeal was filed in contravention of Rule 19 of the Rules of this Court but then he argued its merits, we believe, when he realized that that cross-appeal was filed on 21st June, 2013, more than 30 days before this hearing.

Mr. Kemboy opposed the appeal and stated that the cross-appeal was filed 30 days before the hearing of the appeal commenced, which was within the Rules. Counsel told us that the words were uttered outside the precincts of Parliament, not during the formal sittings or proceedings of the PSC. They related to the respondent and they were defamatory, false and malicious. It was immaterial who the appellant intended the words to refer to, if a reasonable person understood them to refer to the respondent. The respondent called two witnesses, ***Mary Alice Onyula*** and ***Jenaro Kibet*** who testified that they understood the questioned words to refer to the respondent. And that the appellant had in cross-examination confirmed that the words uttered if false referred to the respondent.

Counsel submitted further that the ***National Assembly (Powers and Privileges) Act***, [the Act], gave protection and immunity to utterances made by members during parliamentary proceedings and not outside the proceedings. The appellant did not utter the defamatory words here while engaged in either parliamentary or committee proceedings. So the privilege under the Act did not apply.

As for the apology, ***Mr. Kemboy's*** position was that such was a direct consequence of culpability in making a false statement. The learned judge found the appellant to have uttered false words against the respondent and was bound to retract the words complained of. He uttered the words immediately after the respondent's press conference of 1st March, 2004 even adding that his committee was not a place to sanitise people's names.

Mr. Kemboy submitted that the learned Judge ought to have found that the appellant's utterances were malicious, taking into account the content of the defence, the conduct of the appellant and the time and effect of the offending publication. The appellant neither apologized nor showed remorse. Instead he insisted in his letter of 4th March, 2004 that he had a right to utter the words complained of. The theory of the disappearance and death of ***Dr. Ouko*** was ultimately discredited at the "***Gicheru***" Commission and the appellant conceded as much during his evidence at the trial. But when sued, the appellant persisted in the theory even claiming that he had eye witnesses, who never came forward to testify that the respondent was in any way linked to the disappearance of ***Dr. Ouko***.

Addressing us on the award of shs.3m general damages, ***Mr. Kemboy*** said that this sum was inordinately low considering that the utterances were false and the social and psychological effects on the respondent in that they alleged that he had played a part in the death of his friend and client. The effect also impacted on his professional standing and was widely publicized. The cases of **Gicheru vs Morton & Another [2005] 2 KLR 332, John vs MGM Limited [1997] QB 586** and **Standard Media vs Kagia & Co. Advocates [2010] eKLR** were cited as regards the principles governing this kind of suit and how the courts should approach awards in damages. When approaching an award made by the High Court and assessing damages for injury of reputation, Counsel proposed that we substitute the sum of Shs.3 m with a global figure of Shs.10 m as an award for general damages to the respondent. And because the High Court found the appellant to have been reckless in his utterances, aggravated damages should be ordered as well as the permanent injunction which was pleaded.

In determining this appeal we have set out the pleadings of the parties, and gone over the evidence recorded, the submissions tendered in the light of the grounds of appeal, the cross-appeal and the many cases cited before the High Court and also here. We noted that utterance of the words said to be defamatory was not denied. But the appellant contended that they were privileged because they were uttered in the precincts of Parliament and that they did not refer to the respondent. So the High Court should not have found for him. The learned Judge did reproduce the specific provisions of the National Assembly (Powers & Privileges) Act (Cap 6) and also reproduced definitions of words, such as precincts of Parliament and privilege, from various sources. We may not need to reproduce these here. We will combine some ground and not necessarily deal with them in the series they were laid out in the memorandum.

In these proceedings, we are mindful of the principle that this being an appeal from the High Court, it is before us by way of a retrial. We are not bound to follow the trial judge's findings of fact if it appears that she failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally (See **Selle & Anor vs. Associated Motor Boat Co. Ltd & Ord [1968] EA123**.

Beginning with the ground of absolute privilege, attendant to words spoken or written in the precincts of Parliament and that the same shall not be questioned in any court, the learned judge referred to and reproduced sections 4 and 12 of the Act in the light of the words complained of. She had no problem with what constitutes the precincts or what goes for proceedings therein. It was not in dispute that the words herein were uttered in the car park of Parliament on a Saturday afternoon and not during the proceedings of Parliament or the PSC. The words touched on the subject PSC was inquiring into - the death of ***Dr. Ouko*** and in respect of the evidence that was being placed before it. After ***Rawal, J***.

appreciated the principle of privilege as contained in the Act, the words complained of and the time they were uttered, she said:

> ***"The principle and the statutory provision of absolute privilege have to be given a strict interpretation and the statement made in a car park of the building of the National Assembly cannot be covered under either of the two aforesaid provisions."***

The two sections of the Act referred to read as follows:

> ***"4. No Civil or Criminal proceedings shall be instituted against any member for words spoken before, or written in a report to the Assembly or a Committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.***
>
> **……..**
>
> ***12. No proceedings or decisions of the Assembly or the Committee of Privileges acting in accordance with this Acts shall be questioned in any Court."***

In our view, although the utterances were made within the precincts of Parliament, its car park, that was not a proceeding in Parliament or the PSC. The PSC was not sitting on that Saturday afternoon before whom the utterances were made. They were made to the press or media in the presence of journalists, reporters, correspondents and the general public. The Judge did not find such audience and place to be what the Act intended. The covered functions are the proceedings or decisions of the Assembly or Committee of Privileges. Proceedings of the PSC are proceedings of the Assembly. PSC members selected by the National Assembly were the ones conducting the inquiry into the death of ***Dr. Ouko***, not the press and the public or the chairman (the appellant) alone. As such the learned Judge was right to find that the statements complained of were not privileged. Being made in the National Assembly car park did not lie as a privileged spot. The privilege is not enjoyed by virtue of the geographical location of the spot from which utterances are made, but in connection with or in the business of the Assembly. The interpretation of privilege as set out by the Act should be restricted to this much, lest members of Parliament who may, for their own private motives and reasons, go into the precincts of the National Assembly and make any wild and unjustified remarks about anybody and anything simply because there is protection in the grounds of the Assembly. So it is necessary that the privilege and protection be confined to business of the House. Reading **Halsbury's Laws of England, (4th Edn. RE issue, Vol. 34 para 1008**) opens by stating that in the Bill of Rights (UK), freedom of speech and debates or proceedings in Parliament are not to be impeached or questioned in any court of law or place out of Parliament. That protects the freedom of debates from external interference or control:

> ***"Notwithstanding the declaration of principle in the Bill of Rights, problems of definition remain, especially in connection with the phrase 'proceedings in Parliament'. On the parliamentary side an attempt was made at a limited definition in a select committee report of 1938-39. The committee was of the opinion that the term 'proceedings' covered both the asking of a question and giving written notice of it. It included everything said or done by a member in the exercise of its functions as a member in either House or in a committee, as well as everything said or done there in the transaction of parliamentary business. It would be unreasonable to conclude, in the view of the committee, that the only acts within the scope of a member's duties in the course of parliamentary business are those done in the House or in a committee which it is sitting. However, when a member was in fact threatened with a libel action in respect of a letter he had written to a minister in connection with a matter of public policy, the House of Commons, rejecting the advice of the Committee of Privileges, decided that the letter was not a proceeding in Parliament."***

The treatise goes on to say that in the UK, a comprehensive definition of this phrase, proceedings in Parliament, has so far not been crafted out. But with the passage of the Defamation Act 1996 (UK), it is provided that a person faced with some limited actions of defamation in relation to proceedings in Parliament may waive the right of the protection by law of his privilege, otherwise the overall privilege

remains.

In our case the appellant went out into a car park and proceeded to remark on the fate of people who had been mentioned adversely during the sittings of PSC of which he was Chairman, hence the present matter. The utterances were not in a proceeding before the PSC in order to enjoy the statutory privilege. This privilege is for the National Assembly and for one to enjoy it, one must be engaged in a proceeding before the House or its committee. Apparently the appellant was on his own, remarking on things that were before the PSC but without the PSC being in session. The remarks could not be taken to be incidental to or for the inquiry – a proceeding before Parliament's Select Committee. And as in the case of the UK MP (above) who faced a libel action because of a letter he wrote to a minister, we do not agree that the appellant be considered to have said what he said on a proceeding before the PSC. Accordingly, grounds 2 and 3 in the memorandum must fail.

Then the ground that the learned judge was in error to find that the words complained of were uttered outside Parliament and not within the precincts of the Assembly. The definition of "precincts of the Assembly" contained in Section 2 of the National Assembly (powers and Privileges) Act (Cap 2):

> ***"precincts of the Assembly" includes the Chamber, every part of the building in which the Chamber is situate, the officers of the Assembly, the galleries and places provided for the use or accommodation of members, strangers, members of the public and representatives of the press and any forecourt, yard, garden, enclosure or open space appurtenant thereto and used or provided for the purposes of the Assembly.***
>
> ***Provided that any part of the building, forecourt, yard, garden, enclosures or open space may, by an order signed by the Speaker and published in the Gazette, be excluded from the foregoing definition, either generally or for specific purposes, and either temporarily or permanently."***

Our understanding of that finding is that although the words were uttered in the car park of the National Assembly, they were not covered by the privilege and protection accorded by law to proceedings of Parliament. And without that protection these words were as good as uttered outside Parliament where they enjoyed no privilege. Otherwise as a fact they were, in the geographical sense, uttered within the precincts of the National Assembly which include:

> ***"…any forecourt, yard, garden, enclosure or open space apartments thereto and used or provided for the purposes of the Assembly."***

This ground too, must fail.

The other ground argued is that the learned judge was wrong to find that the words complained of referred to the respondent and that they were defamatory. The judge considered these 2 points together. She reviewed the claim vis-à-vis the defence; the contents, purport, and tenor of letters exchanged between the respondent's lawyer and the appellant before the impugned press conference of 6th March 2004, soon as it followed the one by the respondent on 1st March, 2004. The Judge went further and appreciated the case law and treatises placed before her; the unsuccessful attempts the respondent made to be accorded the right to cross-examine the witnesses including one ***Mbajah***, the brother of the deceased whose testimony was later found to be false or perjured. From the evidence of the respondent, his witnesses and the appellant and that other people like ***Biwott*** were mentioned, she concluded that the words uttered pointed to the respondent:

> ***"The defendant has not tried to prove that the contents thereof were true and fair in respect of the plaintiff. With all efforts at my disposal, I cannot find otherwise and do hereby find that the defendant did utter defamatory statement of the plaintiff which put him to contempt and disrespect."***

On our own assessment of the utterances of the appellant which the respondent considered defamatory,

they were meant and they related to the respondent. He had addressed a press conference on 1st March, 2004 to the effect that the statements by the witnesses before the PSC about him were false and he wanted that committee to give him an opportunity to cross-examine those witnesses. The appellant did not respond even after the respondent's lawyers on 3rd March, 2004 put all that in writing. And when the appellant replied on 4th March, 2004 he insisted that his committee was investigating the death of ***Dr. Ouko*** as mandated. Individual reputations did not matter and the PSC was not a platform to sanitise peoples' reputations. The letter from the respondent's lawyers, ***M/s Kaplan & Stratton*** was clear about whom the complaint was – ***Mr. George O. Oraro***, the respondent and ***Mr. Paul Gondi.*** The reply of 4th March, 2004 from the appellant quoted those two and when he gave his press statement on 6th March, 2004 he referred to hullabaloo from outside there and how that could not stop the PSC in its tracks. There may have been ***Biwott*** and others also complaining above adverse evidence being adduced against them in connection with ***Dr. Ouko's*** death. But they had not gone out there to complain. Only the respondent had done so by his press conference of 1st March, 2004. The appellants' utterances were not about the frustrations he and his committee was faced with in their work. The respondent, of course, was not in Parliament. He was outside Parliament but complaining about the goings on before PSC. With all these we agree with ***Rawal J.*** that the press conference of 6th March, 2004, subject of this appeal pointed to and was defamatory of the respondent. His 2 witnesses (***Onyula*** and ***Kibet***) told the judge that when they read that statement they each concluded that the respondent was the target. We also likewise conclude.

The words were defamatory, they imputed, although without specifically naming the respondent, that he had been named by eyewitnesses, who had come or were due to appear before the PSC, that the respondent had a hand in the disappearance and eventual death of ***Dr. Ouko***. Such a pointer and without showing otherwise, was defamatory of the respondent. There was a statement tending to a serious criminal act, the death of ***Dr. Ouko***, as something that the respondent had to do with. All turned out to be false (as per the discredited evidence of ***Mbajah, Mukhwana***) but still the appellant persisted in it. Utterances that tend to besmirch one's character are defamatory. The words uttered by the appellant were defamatory. And with that, we dispose of grounds 5 and 6 of the appeal. We dismiss them.

In grounds 7 and 8 the appellant contended that the learned judge considered irrelevant matters or overlooked relevant ones and that she did not analyse and properly appreciate the defence, the evidence of the appellant and his exhibits. These points did not appear to come out clearly in the submissions. But on our perusal of the very long evidence-in-chief by the appellant as well as the cross-examination, we were unable to find the merit in these claims. ***Rawal, J***. not only referred to evidence of both parties and even quoted from it. She then proceeded to view both, side by side with the authorities, and then drew her conclusions on each aspect. These grounds must fail and we dismiss them.

The last ground in the memorandum touched on damages and also that ***Rawal, J***. directed that an apology had to be tendered. These points are intertwined with the grounds in the cross-appeal and so we will deal with them together.

Beginning with the general damages award of shs.3m, the appellant considered it as excessive in the circumstances of the case. What each side said about this has already been alluded to above. While the appellant wishes the award for general damages to be revised downwards, the respondent wishes that it be raised. As set out in the ***Gicheru*** case, and many other cases before it (supra):

> ***"In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convicted that the amount awarded was extremely high or so very small as to make it, in the judgment of the Court an entirely erroneous estimate of the damages to which the appellant is entitled."***

In this matter we are minded to increase the award of shs.3m for general damages given to the respondent to shs.5m. In doing so we have considered, among other things, the status of the respondent as a senior lawyer in this society. ***Mr. Oraro*** was and still is definitely an outstanding advocate at the Bar in Kenya. The defamatory words herein implied that the respondent had been involved in heinous criminal acts, participating in the disappearance and eventual death of ***Dr. Ouko***, then a minister of Government. That

he had been named by eye witnesses who could testify before the PSC implicating him to the effect that the respondent, who was once ***Dr. Ouko's*** friend and lawyer and later represented the deceased Minister's family in the "***Gicheru***" Commission, had turned against all that and betrayed ***Dr. Ouko*** in death. The publication of the defamatory words was broadcast far and wide - on the radio, TV and print media. Not only did these words pain the respondent but also caused much concern to his family, friends acquaintances and professional colleagues. Yet they were false because first the appellant was not able to summon any witnesses or a credible one, who claimed that they had seen the respondent engage in the alleged act. And those who showed up were found to be liars or perjurers. Thus the respondent deserved a higher sum in general damages than the trial judge awarded. We accept that before the Judge arrived at the sum she awarded, she correctly reminded herself that the factors to be considered, while arriving at the quantum of damages are defined without being exhaustive. The damages to be assessed are at large and the court has to take the circumstances of a given case as a whole. Perhaps the Judge should have stated those circumstances to limit our disposition to interfere with the sum she awarded. We have stated the circumstances and with respect, put them all together to justify the enhanced award of general damages we have given. In doing so, we have added some cases relevant and applicable in the award of general damages for the sake of comparison.

In ***Wangethi Mwangi and Another vs J. P. Machira [2013] eKLR*** case otherwise popularly referred to as the "***Machira***" case, ***Mr. Machira*** an advocate was awarded shs.8m general damages and shs. 2 million aggravated damages by the High Court. The appellant and the respondent (***Machira***) did not have a client-advocate relationship, but the former's media house did publish an article considered defamatory of the latter. After considering authorities cited and principles applicable in assessing general damages by the trial court and the course the court should take if asked to enhance or lower the award, the High Court's decision was upheld and the appeal was dismissed. We have considered this "***Machira***" case in the light of the fact that the appellants were condemned to pay damages because they had published a photograph showing ***Mr. Machira*** in a kind of physical confrontation with his client. In the present case, a criminal act was imputed to the respondent in that he had participated in the course that led to the death of his client and friend. In the "***Machira***" Case this Court upheld the High Court awards both in general and aggravated damages. However, we are of the view that Kshs.8 m and 2 m was on the higher side.

The other case we considered, again by a lawyer who sued on account of being defamed, is the **Standard Ltd. vs. G.N. Kagia** (above), which goes by the popular name as the "***Kagia case***". ***Mr. Kagia*** also an advocate was awarded shs.5 million in general damages and shs.1 m as exemplary damages. The lawyer had complained that the appellant media house had published an article imputing that his was one of the law firms that were in the practice of ripping off their clients. After due recourse to the principles applicable in the assessment of damages for defamation and the relevant case law, this Court set aside the High Court award and substituted it with a composite one of shs.3m. We are of the mind that had ***Rawal, J.*** taken course to refer to decided cases with comparable awards, she could have given a higher sum in the case of the respondent and that is what we have done.

Next we move to the non-award of aggravated damages. While the respondent argued in his cross-appeal that this kind of damages ought to have been awarded because the appellant made the defamatory statements with malicious intent and persisted in them, even as the suit coursed its way through the High Court without so much as an apology, the appellants' position was that it was not shown that the appellant had a guilty mind that he was committing a tort and/or that he was reckless in doing so.

On malice ***Rawal, J***. said:

> ***"However, considering the facts before this court, I cannot say that the defendant was really actuated with malice as per [the] law when he uttered the statement and I do find so. However, it cannot be denied that it was reckless which could impute malice."***

While the appellant asserted that the impugned statement was not uttered with a malicious intent and the learned judge had so found, the respondent's position was that the judge had in fact stated that the recklessness on the part of the appellant when he uttered the defamatory statement, "*could impute malice*". The respondent maintained that that phrase simply meant that the appellant had a malicious

intent. Much as we are equally not so clear about what the judge meant, we are nonetheless of the view that the appellant may not have had the knowledge that he was committing a tort (defamation) but he was reckless in his statement. The tussle here is whether aggravated damages ought to issue or not. Both sides appear to have abandoned the issue of exemplary damages. On this point, the learned judge said:

> ***"The court also has the power to award aggravated damages if the facts of the case show malicious attributes in the statement."***

We have already noted that the Judge found that although the appellant was not actuated by malice in uttering the defamatory statement, however it could not be denied that it was reckless which could impute malice. So with the attribute that could impute malice being found in this statement of the appellant, we are minded to say that the learned judge should have given an award for aggravated damages against the appellant who had not only failed to feel remorseful when it transpired that the statement was false, but also that he persisted in his insistence on his statement throughout the trial of the case. We have considered whether the general damages we have enhanced sufficiently cover in compensation for the respondent's situation and come to the conclusion that aggravated damages ought to issue. And we put this award at shs.4m.

The respondent had pleaded for a permanent injunction to issue against the appellant so that he could not, in future, repeat the defamatory statements. The learned judge does not appear to have addressed this prayer, quite probably by oversight. The respondent still insists on it even after about ten years following the event. It was not stated whether after that passage of time the appellant was still disposed to utter the statements complained of and of which he was found liable. However, we grant that the sought injunction be and is hereby put in place.

On the apology, the respondent told us that one was ordered by the court but the appellant did not tender it. The appellant on his part argued that an apology was not demanded and so it ought not to have been ordered. We note that the plaint filed did not include an apology as a prayer and neither was it pleaded that the trial court would grant such other relief as it deemed fit. No correspondence contained a demand for an apology from the appellant. Even as we think that the learned judge made the order from the circumstances of the whole case and that the circumstances of this case warranted one, and much as it could not cost the appellant anything to tender it, we conclude that a formal order for an apology lacked a basis and is therefore set aside.

In the end we dismiss the appeal herein with costs to the respondent and allow the cross-appeal, with the following orders:

i. ***The High Court award of sh.3 million in general damages, is set aside and substituted with one of shs.5 million.***
ii. ***An award is made for aggravated damages to the tune of sh. 4 million.***

iii. ***A permanent injunction to issue against the appellant as prayed in the plaint.***

iv. ***The High Court order for an apology is set aside.***

v. ***Costs of the appeal and cross appeal to be borne by the appellant.***

Dated and delivered at Nairobi this 31st day of January, 2014

J. W. MWERA

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JUDGE OF APPEAL

W. OUKO

……..

JUDGE OF APPEAL

P.O. KIAGE

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR