Case Number:	Civil Appeal 174 of 2018
Date Delivered:	20 Dec 2019
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Roselyn Naliaka Nambuye, Wanjiru Karanja, Sankale ole Kantai
Citation:	Agnes Zani v Standard Group Limited [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	HCCC 405 of 2014
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & KANTAI, JJ.A.)

CIVIL APPEAL NO. 174 OF 2018

BETWEEN

AGNES ZANI.....APPELLANT

AND

STANDARD GROUP LIMITED .....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Njuguna, J.) dated 13th *October, 2017* in **H.C.C.C. No. 405 of 2014)**

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JUDGMENT OF THE COURT

In the plaint filed at the High Court of Kenya at Nairobi and in evidence before the trial judge the appellant, **Dr. Agnes Zani,** described herself as a mother, a Senator and a University Don who holds a PhD in Sociology from the University of Oxford, a Masters Degree in Sociology and a Bachelors Degree in the same discipline from Oxford University. She also holds an under graduate degree from University of Nairobi. For a long time she had taught as a lecturer at the University of Nairobi in social education and ethics which entailed teaching students on professional roles and how to conduct themselves both in individual and social circles. She had taught various courses at the said University and had even been chair of the Department of Sociology and Social Work. She testified that she taught students on how to conduct themselves and being able to say the truth, to be fair in carrying out professional roles and how to be good citizens. She belonged to a political party Orange Democratic Movement where at the material time she held a senior post in that political party.

The complaint that led her to file suit against the respondent, **Standard Group Limited,** related to an article that appeared in the issue of the Standard on Sunday published on 9th March, 2014 publication which the respondent did not deny. In that article under a headline **"Revealed: The inside story of ODM's 'Men in Black'"**, various things were stated which we shall discuss in this judgment.

The appellant testified before the trial judge that that article was defamatory of her when it stated **"How the men in black were mobilized ……. 11.30 p.m. the group accompanied by Zani, relocated to Ngong Hills Hotel on the same road."**

It was stated in the plaint that “men in black” referred to in the said article were a notorious group of men who engaged in criminal acts that led to disruption of the Orange Democratic Movement national elections that were slated to take place at the Kasarani Sports Stadium on 28th February, 2014. The appellant stated that the writing, printing and publishing of the said words by the respondent was in reckless disregard of whether or not they were true or without taking any other sufficient steps or precautions to establish whether they were true. It was averred in the plaint that the natural and ordinary meaning of the said words meant and were understood to mean that the appellant was an unethical, unprofessional, unscrupulous woman leader who condoned unethical and criminal practices and was involved in planning of criminal activities; that she was a woman leader and a Senator in Kenya who engaged in illegal undesirable and anti-social activities in disregard for the law; that she engaged in acts of facilitating crime and was an untrustworthy person of unreliable moral fibre who was unfit to hold positions she then held in the society; that she was a woman leader who connived with male criminal suspects deep in the night to plan and facilitate the commission of criminal and illegal activities. It was averred that by publishing the said words the respondent intended the same to be consumed by the society generally and that the respondent knew or ought to have known that the words would reach the appellant’s family, friends, political colleagues, supporters, students and professional colleagues in the academia which it did as a matter of fact. It was also averred that by publishing the said words the respondent calculated to increase circulation of the said newspaper with a view to making a profit from the sale of the same. It was further averred that the respondent was actuated by extreme malice and spite against the appellant in writing, printing and publishing the said words which were not only false but were also defamatory of the appellant and were intended to injure her in her political career, professional standing and family life. In particulars of malice it was averred that the respondent wrote, printed and published the said words with reckless disregard as to whether or not they were false, defamatory or injurious to the appellant and that the respondent wrote, printed and published the offending words without taking any sufficient precautions or steps to establish whether they were true. Further, that in publishing the said words the respondent was indifferent as to whether the information it was imparting to the whole world was true or not and did not care for the appellant’s reputation and calling which was the mainstay of her professional standing in academia, her role as a mother, her role as a national woman leader in Kenya. The appellant stated that her reputation, image, credit, integrity and status as a mother and an accomplished academic, a national woman leader, a Senator in the Republic of Kenya, a political leader, a contender for the position of Secretary General of the Orange Democratic Movement political party and as a person had been substantially damaged by reason of the respondent’s wide circulation of the said publication within the Republic of Kenya and globally. She said that she had suffered monumental distress, mental agony, anguish and very substantial loss and damages in her various roles in the society,reputation and calling and in her family life for which she sought compensation. She said the respondent had failed and refused to publish an apology and for all that the appellant prayed for a permanent injunction restraining the respondent by itself or its agents from publishing any further or similar defamatory material concerning her; general damages for libel and for publishing words tarnishing the appellant without taking any sufficient step or precautions to establish whether they were true; exemplary damages for malicious libel for publishing words concerning the appellant; aggravated damages arising from the respondent’s refusal to offer an apology when the appellant demanded one and costs of the suit.

The respondent delivered a statement of defence where the claim was denied and it was stated that the article was published for the benefit of the public and with no malice or any intention against the appellant. It was denied that the article was published with reckless regard of whether or not the words were true. At paragraph 5 of the defence it was stated:

“In addition and in reply to paragraph 6 of the plaint, the defendant avers that the information was acquired from a dependable source and the same relates to a matter of public interest which gives an accurate account of the events that transpired during the Orange Democratic Movement (ODM) national elections on 28*th February, 2014.”*

It was further stated in the defence that the information on elections of Orange Democratic Movement elections was covered by all media houses and was a matter of public interest. It was further stated that the respondent had taken reasonable and sufficient steps to establish the truth and credibility of the information as published in the said article. At paragrapah 10 of the defence:

"Further and in reply to paragraph 8 of the plaint, the defendant avers that the repondent is read widely by members of the public who in turn have cast a legal, social and moral responsibility and/or duty upon the defendant to follow up and publish details therein."

It was further stated in the defence that before publishing or writing the said article the respondent had carried out investigations and relied on a credible source and that there was nothing that had happened between the appellant and the respondent to warrant the alleged malice. It was alleged that the appellant had not suffered any loss of reputation as she was still holding a position of a nominated senator under the Orange Democratic Movement party and for all that the suit should be dismissed.

The suit was heard by **Njuguna, J.** who after consideration found no merit in the suit and dismissed it in a judgment delivered on 13th October, 2017. The appellant was dissatisfied with those findings and filed this appeal premised on the memorandum of appeal drawn by **M/S Otieno Ogola and Company Advocates** for the appellant where 7 grounds of appeal are set out. In sum the appellant takes issue with the judge for concluding that the appellant failed to prove any malice on the part of the respondent in publishing the said article when the respondent had not obtained the appellant's views on her movements before the publication of the impugned words; that the judge erred in fact and in law in her conclusion that the appellant did not prove damage to her reputation and that in defamatory proceedings a party does not necessarily have to prove damage to reputation but to prove that publication was injurious to the their character; the appellant faults the judge for finding that the article published by the respondent was substantially true; that the judge misapprehended and failed to apply the law on proof of defamation; that the judge erred in law and fact in finding that the offending publications were not defamatory of the appellant; that the judge erred in awarding costs to the respondent; and finally that the judge erred in her assessment of general damages that would have been due to the appellant had the suit succeeded. We are asked to allow the appeal and set aside and vacate the judgment of the High Court, give damages to the appellant and award costs to the appellant accordingly.

This is a first appeal from a decision of the High Court in its original jurisdiction and it is our duty to re-aprraise the evidence on record and reach our own conclusions in the case – that is what **rule 29** of the rules of this **Court** – **"Power to re-appraise evidence and to take additionalevidence"** – speaks to. There is a plethora of case law on this issue such as the oft-cited case of **Selle v Associated Motor Boat Company Limited [1958] E.A. 123** where the power of the court on first appeal was restated as follows:

"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 demeanour of a witness is inconsistent with the evidence in the case generally."

Let us see what evidence was placed before the trial judge which, as we have seen, did not persuade her on the merits of the appellant's case thus dismissal of the same.

The appellant had filed a witness statement as had her two witnesses, **John Kipkurui Chepkwony Rono** and **Evans Umidha**

Oruenjo (the latter is an advocate of the High Court of Kenya). All the three testified before the trial judge and adopted their witness statements.

We have already set out in substance the evidence that the appellant led in support of her case. In addition she testified that she campaigned in various parts of Kenya as she was standing for the position of Secretary General of Orange Democratic Movement party and that on 28th February, 2014 when elections were to take place she was at the elections venue at Kasarani Sports Stadium when, at a point where she had stepped out to eat some food, she was informed that chaos had erupted in the elections hall. She went to the hall to see what was happening and was surprised to find ballot boxes strewn all over the floor and the hall was in total disorder. She was disappointed and wondered what was happening. She called members of the National Elections Board to a meeting to undertand what was happening. She denied being involved in disrupting the elections. She testified that she did not read the article complained of but that when her friends called her she looked for the article and read it. She further stated that on the evening before the elections she had just arrived from Lamu county where she had been campaigning and had arrived in Nairobi around midday when she retired home until the following day when she went to Kasarani Sports Stadium. She stated that the respondent did not reach out to her to ask her what had happened on the material day. Because of the concern expressed by her friends and her colleagues and also her own take of the article that had been published, she instructed a lawyer to demand an apology and retraction of the publication by the respondent but that the respondent did not retract or apologize. She produced the demand letter as part of the evidence. According to her:

“The publication is a blur to my identity and character now and in the future. I would dread if I went for an interview and this article is referred to.”

In cross-examination she denied that the “men in black” were either members of the party or persons appointed by the party or persons known to her at all.

John Kipkurui Chepkwony Rono who worked for a Public Relations Media Company testified that he read publications of the respondent regularly and that the respondent published newspapers that were respected in the public domain. He had known the appellant for more than 5 years and knew her as distinguished scholar and family friend. He read the article published on 9th March, 2014 and what caught his attention was the fact that what had been published was a story about the appellant mobilising hired goons called men in black whose purpose was to disrupt elections at Kasarani Sports Stadium. He believed the story. According to him it portrayed the appellant as a person who associated herself with rogue members of the society. After reading the atricle he did not believe in the moral character of the appellant.

The other witness called in supprt of the appellant’s case **Evans Umidha Oruenjo,** a lawyer who was member of the Orange Democratic Movement party and an active member of the youth committee of an organization called NASA was at the elections venue on the material day and he testified that as they were waiting to vote some men entered the elections venue and disrupted the sitting so elections were not held. He had read the article which claimed that the disruption of elections was organized by the appellant. After reading the article he looked at the appellant differently and he started seeing her as a person who was not peaceful and who could not engage in democratic polls. According to him after the article was published the public perception of Orange Democratic Movement party was negative as it was seen as a party full of hooligans. According to him his party hoped to win elections in Kenya but they did not wish to do so using men in black but would use people of integrity. He stated:

“The plaintiff could not be appointed as Secretary General because it was widely believed that she had something to do with disruption of the elections while the opponent was not blamed. The story in the Standard affected her reputation.”

That was the case made in support of the appellant’s case and the respondent did not call any evidence.

In the judgment we have referred to the learned judge identified as issues for her determination whether the article was published by the respondent; whether the article referred to the appellant; whether the article was false and malicious and whether the article was defamatory of the appellant. Upon analysis the judge found that the article was neither malicious nor defamatory of the appellant. The judge dismissed the case and in assessing damages that would have been awarded had the suit succeeded the judge found that a sum of Shs.1,500,000 for general and exemplary damages would have been reasonable.

The appeal came up for hearing before us on 25th September, 2019 when learned counsel **Mr. Willis Otieno** assisted by learned counsel **Miss Leah Chimbonga** appeared for the appellant while learned counsel **Miss Mitchel Kosgey** appeared for the respondent. Both parties had filed written submissions and lists of authorities which they adopted and what was left was a highlight of the same.

In submissions it was Mr. Otieno’s case that the judge was wrong to hold that the published article was substantially true when the respondent had not led any evidence to prove that the appellant had organized men in black to cause chaos at the said elections. According to counsel the judge had misunderstood the issue for her determination which was whether the appellant had organised men in black to cause chaos at elections of Orange Democratic Movement. He cited the case of **Kenneth Nyaga Mwige v Austin Kiguta and 2 Others [2015] eKLR** for the proposition that a defendant has to tender formal evidence to challenge the defamatory claim and that failure to do so was fatal to the defence. He also cited the case of **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR** for the proposition that the burden is on the defence to prove that defamatory words were true. Counsel also cited the case of **Miguna Miguna v The Standard Group Limited And 4 Others [2017] eKLR** where this Court held that the burden of proving truthfulness of publication is on the defendant and can only be discharged by calling credible evidence to court. It was further held in that case that a court cannot arrive at a finding of truthfulness of a publication without such credible evidence. Counsel submitted that to import criminal conduct on the part of the appellant by the respondent was defamatory. According to counsel the appellant was vying to be elected as Secretary General of Orange Democratic Movement and she failed to be elected due to the chaos that resulted after men in balck invaded the elections hall. On whether the article was malicious it was learned counsel’s submission that malice was proved because the respondent did not care to find out truthfulness of the allegation. He cited the case of **Joseph Njogu Kamunge** (supra) in support of his submission that failure to seek clarification from a party can demonstrate malice. Also the case of **Musikari Kombo v Royal Media Services [2018] eKLR** for the proposition that failure to verify information demonstrates malice on the part of the person publishing the information. According to counsel as the appellant's views were not sought by the respondent the article was malicious and the respondent was liable. Counsel finally submitted that assessment of damages by the judge was too low. He invited us to interfere with that assessment.

Miss Kosgey referred to her written submissions and submitted that the judge was right to find that the article was true. According to her the appellant had not been defamed and had not been shunned by her friends or colleagues. Counsel ended her submissions by stating that the respondent had after that publication published positive articles of Orange Democratic Movement party and so there was no malice on the part of the respondent. Counsel submitted that the appellant was not entitled to any damages as there was no defamation.

In a brief reply it was Mr. Otieno’s submission that what the men in black did was criminal and to associate it with the appellant as the person who organized the disruption of the elections was defamatory.

We have considered the whole record and the submissions made. The learned judge considered the case before her and reached the conclusion:

“I have considered the evidence of the plaintiff and that of her witnesses. No evidence was put forth to prove malice on the part of the defendant. I am persuaded by the submissions of the defendant that there was no malice proved on its part by the plaintiff yet the law placed a duty on the plaintiff to prove malice on a balance of probabilities.”

In reaching that conclusion the judge had considered the definition of defamation as a tort in the **7th Edition of Salmond on the Law of Tort** where defamation is defined:

“The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification.”

Let us now visit the impugned article to see whether the judge reached the correct conclusion in her assessment of the case before her.

As we have seen the article was under the headline “Revealed: The Inside Story of the ODM’s Men in Black”. The article ran from page 6 - 7 of the Standard on Sunday of 9th of March 2014. It talked of organized chaos and spoke of 3 senior party officials from Nairobi who had met two days before the ODM elections and assembled an army of 100 youths to disrupt voting and prevent the Joho-Namwamba team from taking over leadership. There are photographs of various party officials and leaders published as part of the article including that of the appellant. The article spoke of the top leadership of ODM party organizing some men to disrupt elections. It spoke of an elaborate plan to disrupt the elections if the Hassan Joho-Ababu Namwamba team was going to win. It said that top leadership of the party had assembled an army of close to 100 youths from Nairobi's Eastlands and Kibera under the stewardship of some named officials and that the idea of disrupting the elections was mooted after the party leader had met delegates two days before the election date. The article gave fine details of how the chaos was organized and how the men in black were appointed; dressed up in new uniforms and given strict instructions on how to disrupt the polls should a desired result not be achieved. There was a photographic caption of the disrupted polls venue and time when events took place were given. The caption stated:

“7 p.m. more than 30 young men joined Ndolo, Aladwa and Ondiek for supper at 3D restaurant on Elegeyo Marakwet road.

11. p.m. the group relocate to Greenhouse on Ngong road whereby they briefly meet the candidate for the Secretary General nominated Senator Agnes Zani.

11.30 p.m. The group accompanied by Zani relocates to Ngong Hills Hotel on the same road” and the article continues to give times for various events that were alleged to have happened.

It is the appellant's case that she did not organize the chaos that took place at Kasarani Sports Stadium where elections of ODM party were disrupted. It is also her case that she did not organize men in black who disrupted those elections.

As we have seen the respondent did not call any evidence to rebut the appellant's case.

The words published by the respondent were not denied. The respondent stated in the defence that it relied on a credible source to publish the said article. That source was not named and no evidence was called in support of the allegation.

Looking at the words that were published by the respondent they speak of a shadowy group called men in black whose sole purpose was to cause chaos and disrupt elections of a political party. It is alleged that the men met at Greenhouse on Ngong road at 11 p.m. in a meeting organized or attended by the appellant. It is said that at 11.30 p.m. the men in black accompanied by the appellant relocated to Ngong Hills Hotel on Ngong road.

The appellant testified on oath that she was not in those places at those times as she was at that time travelling to Nairobi from Lamu where she had been campaigning for the then upcoming elections for the said party. The appellant's witnesses testified that they read the impugned article and the same had made them change their view on who the appellant was in the society.

Looking at the words published by the respondent there can be no doubt that the same were defamatory of the appellant. The words in the article directly associate the appellant as the organizer or as a member of the shadowy group called men in black whose sole purpose was to disrupt elections of the said party and engage in what amounted to criminal acitivity. Evidence was placed before the trial judge that the men in black actually disrupted elections when they ensured that the elections did not take place. The respondent had a duty if indeed it believed that the words it published were true to lead evidence that the appellant was associated in any way with the men in black who disrupted the said elections. The respondent was also duty bound to find out from the appellant her position in regard to the men in black who disrupted elections at Kasarani Sports Stadium. As held in various cases including those cited by the appellant before us the respondent had a duty to tender evidence to challenge the claim of defamation by the appellant. The burden lay on the respondent and without any evidence being placed before her it was wrong for the judge to find that the words published were not defamatory of the appellant. Author **Patrick O'Callaghan** while discussing the subject of defamation in **"Common Law Series: The Law of Tort"** at paragraph 25.1 which we quoted in the case of **Miguna Miguna v The Standard Limited and 4 Others [2017] eKLR** the learned author 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 neighbor. 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."

It was held in the case of **Knupffer v London Express Newspaper Limited [1944] 1 ALL 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."

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

"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."

If more is required, in the 4th Edition Volume 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 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 Page 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."

The appellant and her witnesses gave credible evidence that the article was published; that it concerned the appellant and that upon reading it the two witnesses called for the appellant held her in a negative manner as her reputation had been lowered by the said publication. There was defamation of the appellant and the judge should have so held. The article depicted the appellant as a person who engaged in underground activities; a person who met hooligans in the cover of darkness to organize how legally arranged elections should be disrupted. There was evidence that the elections were indeed disrupted and did not take place because some men wearing dark or black suits entered the elections hall and created chaos leading to the elections being called off. The appellant testified that she had nothing to do with those activities. When the appellant, through her lawyers, stated the true position to the respondent and demanded an apology and retraction the respondent failed to retract the article or to apologize. The respondent talked (in the defence) of relying on a credible source to make the publication but it did not call any evidence to support that position. The appellant was named in the article; her alleged activities were given in detail and her photograph was published in the article. All elements of defamation were established by the appellant – it was proved that there was a defamatory statement; that the respondent had published that statement and it was proved that the published statement was of and concerning the appellant – see **"Defamation Law, Procedure and Practice"** by the authors David Price, Koriech Doudu and Nicola Cain, 4th Edition at paragraph 1 -02.

It was wrong for the judge to dismiss the suit in the face of all that evidence and that part of the judgment is hereby set aside.

The judge, on damages awardable, analysed the matter before her and found that an award of Shs.1,500,000 would have been appropriate in general and exemplary damages had she found in favour of the appellant. The appellant has asked us to interfere with that finding.

In assessing general and exemplary damages that would have been payable to the appellant at Shs.1,500,000 the learned judge referred to the Engish case of **Jones v Pollard (1997) EMLR 233 - 243** where she enumerated the factors to be considered in assessing damages. The judge identified such factors to be the objective features of libel itself such as gravity, its province, the circulation of the medium in which it is published and any repetition; the subjective effect to 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; matters tending to mitigate damages such as the publication of apology; matters tending to reduce damages and vindication of the plaintiff's reputation past and future. The judge noted the appellant's station in life but found the caption or article was small and not conspicuous.

The judge did not refer to any local cases to reach her determination.

As we have already observed in this judgment the publication of the article was prominent and covered two pages of the respondent's Standard on Sunday of 9th March, 2014. It had the photograph of the appellant and gives a detailed description of what was alleged to have occurred at 11.00 p.m. and 11.30 p.m. when the appellant allegedly met with the men in black. It is therefore not true as found by the judge that the article was not conspicuous. The article was published prominently at pages 6 and 7 of the newspaper of that day and the appellant's photograph is published in the article and she is named, not once, but twice. We have also noted that the appellant through her lawyers demanded an apology and retraction of the article but that demand was not met.

It was held by this Court in the case of **Butt v Khan [1981] KLR 349:**

"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."

Was the award of Shs.1,500,000 for general and exemplary damages reasonable"

As we have seen the appellant is an accomplished scholar who taught at the University of Nairobi. She holds various professional qualifications including a PhD in sociology. She is a mother and holds a senior political position and was serving as a Senator at the time of the publication and at the hearing. Witnesses testified on how she was defamed and what they thought about her after the defamation. The appellant demanded an apology and retraction but the respondent did not heed the demand.

In **Miguna Miguna** (supra) the respondent was found liable for publishing defamatory matter of the appellant and an award of Shs.5,000,000 was made in respect of general damages. A further sum of Shs.1,000,000 was awarded as aggravated damages.

In **Nation Media Group v Hon. Chirau Ali Mwakwere Civil Appeal No. 244 of 2010** (unreported) **Tunoi, JA** citing **Johnson Evan Gicheru v Andrew Morton and Another [2005] eKLR** outlined guidelines that apply in assessing damages as set out in the case of **Jones v Pollard** (supra) which we have spoken to.

In **Wangethi Mwangi and Another v J. P. Machira t/a Machira & Company Advocates [2012] eKLR** additional guidelines for assessing damages were given by this Court 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 out a proper balance between the competing needs in the special circumstances of each case."

And 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."

In the **Nation Media Group** (supra) case an award of Shs. 1,000,000 was made in respect of aggravated damages.

We think in the circumstances of the case that was before the trial judge that an award of Shs.1,500,000 for general and exemplary damages was too low as not to represent the circumstances of the case.

As we have seen in the **Miguna Miguna** (supra) case a sum of Shs.5,000,000 was awarded for general damages for defamation and an additional Sh.1,000,000 was made in respect of aggravated damages. The awards were made by this Court on 28th th of July, 2017. We think that those awards are representative of the awards that the judge should have made in this case. In sum therefore we set aside the finding of the judge dismissing the suit and substitute thereof an order allowing the case against the respondent. We award the appellant **Shs.5,000,000** in respect of general damages and award **Shs.1,000,000** for aggravated damages. The appellant will have costs here and in the High Court.

Dated and delivered at Nairobi this 20th Day of December, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR