REOUBLIC OF KENYA

IN THEHIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.102 OF 2009

CECIL GUYANA MILLER……...PLAINTIFF

VERSUS

THE NATION MEDIA GROUP LITITED……..1ST DEFENDANT

RASNA WARAH……...2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein **CECIL GUYANA MILLER** is an advocate of the High Court of Kenya. He instituted this suit against the Defendants **NATION MEDIA GROUP LIMITED** and **RASNA WARAH** jointly and severally seeking General Damages for Libel, Aggravated and Exemplary damages, costs and interest. In his plaint dated 4th march, 2009 the Plaintiff claimed that an Article published in the Daily Nation on 23rd February 2009 authored by the 2nd defendant Rasna Warah titled *"**YES WIFE BEATERS CANNOT BE ENTRUSTED WITH PUBLIC OFFICE**"* was defamatory of him. The Plaintiff gave evidence on his own behalf relying on his written witness statement and called another witness, **EPHRAHIM MATHENGE**. The Plaintiff relied on a list of Documents filed on 27th May 2011 and a Supplementary List of Documents filed on 8th July, 2015 in support of his case.

2. The Defendants on their part filed a Statement of Defence on 24th June 2009, in which they denied defaming the Plaintiff and urged the Court to dismiss the suit with costs. The Defendants defence was essentially that:

i. The statements complained of were statements of fact, were true in substance.

ii. The statements were fair comment on a matter of Public Interest.

iii. The statements were privileged under sections 9, 10 & 11 of the Defamation Act being a report of words uttered on the floor on Parliament.

iv. The statements were privileged and protected by the provisions of section 28 of the National Assembly (powers and privileges) Act.

*The Defendants called one witness, **RASNA WARAH** the second defendant and the author of the impugned article published by the 1st defendant and relied on a list of documents filed on 19th January 2012.*

PLAINTIFF'S EVIDENCE

3. The plaintiff testified and called one witness.

DEFENDANT'S EVIDENCE

4. The 2nd defendant **RASNA Warah** testified as DW1 and stated that

SUBMISSIONS BY THE PLAINTIFF

5. The Plaintiff's submissions addressed two issues for determination namely:

> *1. Whether the Plaintiff was defamed by the Defendants (i.e. whether there is a liability for defamation).*
>
> *2. The Quantum of Damages payable.*

6. On whether the plaintiff was defamed by the defendant, the plaintiff submitted that the Defendants had not denied publishing the words complained of. That the words that the Plaintiff alleges were defamatory of him are at page 5 of the Plaint and were published in an article in the Daily Nation dated 23rd February 2009. The Article itself is at **Page 6** of the Plaintiffs list of Documents filed on 27th May 2011 and also at **page 1** of the Defendants list of documents filed on 19th January 2012. The words complained of were; "Y**es, wife beaters cannot be entrusted with Public office**" "**does it matter the person in charge of overseeing Kenyans elections beats his wife…….**" "**Yet as any woman will attest, if a man is behaving badly at home he is likely to behave badly in public.**"

7. The plaintiff further submitted that in order to succeed in an action for defamation the Plaintiff needs to prove three things;

> *i. The words complained of must be defamatory of the Plaintiff.*
>
> *ii. The Words must refer to the Plaintiff.*
>
> *iii. The words must be maliciously published.*

Reliance was placed on Winfield and Jolowicz on Torts – 12th Edition.

8. On whether **the words were defamatory of the Plaintiff it was submitted by the plaintiff's counsel that i**n this case the Article makes **a conclusion of fact that** the person in charge of the overseeing Kenyan's elections beats his wife. That the words are not couched as an allegation, but that it is an express conclusion that the person who is in charge of Kenya's elections beats his wife and should not hold public office. The plaintiff submitted that stating that somebody beats his wife is defamatory. That it means that such a person is heartless; he is of violent disposition; has no respect for his wife or the institution of marriage; and that he is a person unfit to hold public office.

Reliance was placed on the Court of Appeal decision in **Civil Appeal No. 226 of 2011 ERIC GOR SUNGU –VS- GEROGE ODINGA ORARO [2014] eKLR** where the Court stated as follows about what amounts to defamatory words:-

> "***The words were defamatory, they imputed, although without specifically naming the Respondent, that he had been named by eye witnesses, who had come or were to appear before the PSC, that the Respondent had a hand in the disappearance and death of Dr. Ouko. Such a pointer and without showing otherwise, was defamatory to the Plaintiff."***
>
> **" …….. Utterances that tend to besmirch ones character are defamatory. The words**

uttered by the appellant were defamatory."

9. On whether the words referred to the Plaintiff it was submitted that the article that bears the defamatory words directly refers to the Plaintiff, Cecil Miller. Further, that the article also makes an inference to the Plaintiff. In addition, that it is in Public domain that immediately prior to the Publication of the offending article, the Plaintiff had been nominated for the post of Chairman of the Interim Independent Electoral and Boundaries Commission (IIEBC) and that his nomination had been rejected by Parliament hence the words therefore refer to the Plaintiff.

10. The Plaintiff also submitted that his witness **EPHRAHIM MATHENGE** specifically testified that as soon as he read the article he knew that it referred to the Plaintiff.

11. On whether the publication was done with malice, it was submitted on behalf of the plaintiff that the words complained of were published with malicious intent and that malice can be found in the publication itself. Further, that the sentence, "**does it matter that the person in charge of Kenya's elections beats his wife**" is malicious in itself. That any ordinary person reading this sentence would form the impression that indeed the Plaintiff who is the person referred to in the article by implication beats his wife.

12. It was further submitted that the defence of privilege cannot lie because a perusal of the Hansard of 19th February,2009 reveals that Hon. Millie Odhiambo only alleged that she had been informed that the Plaintiff was a wife batterer. That she did not make a conclusion to this effect as shown at **page 16 of the defendants list of documents. In addition, it was submitted that** at **page 17** of the defendant's bundle of documents, the Deputy Speaker of the National Assembly ruled that what Millie Odhiambo had said was not in line with the dignity of the House.

13. Finally with regard to the Hansard, it was submitted by the plaintiff's counsel that there is nothing in the Hansard to show that the Plaintiff's nomination was declined because he was a wife batterer. In a nutshell it was submitted that the Hansard record shows that Parliament did not make a finding that the plaintiff was a "wife batterer." That this was an allegation made by one Member of Parliament and that there was no debate on the issue and therefore publishing the article based on the allegation was not only malicious but also reckless.

14. It was also submitted that Malice is also apparent in the fact that Defendants did not bother to contact the Plaintiff to get any explanation or comment from him before publishing the Article and that the Courts have held that failure to make enquiries before Publishing or making the defamatory words is malice. Reliance was placed on the case of **GODWIN MACHIRA V OKOTH [1977] KLR24** where the Court held that :-

> *"**Failure to inquire into the true facts…….. is a fact from which inference of malice may properly be drawn**"* Also in ***J.P MACHIRA V WANGETHI MWANGI & NATION NEWSPAPERS HCCC 1709 OF 1996*** *the Court said at page 14.*
>
> *"**any evidence which shows that the Defendant knows the statement was false or did not care whether it be true or false will be evidence of malice."***

15. The plaintiff also submitted that the Defendants were given an opportunity to correct the story but they chose not to which again is a proof of malice. That the Plaintiff sent a demand letter to the Defendants dated 24th February 2008 giving an opportunity to rectify the story but the Defendants did not do anything. Further, that on 27th February 2009, the Plaintiff took out a full page advert in the **SUNDAY NATION** in which he explained that the allegations of wife battery had never been proved and that further he had never been arrested, charged or convicted with the offence of battery against his wife or any other person, which clarification was made (4) days after the impugned article but that the Defendants chose to do nothing which is proof of malice.

16. The plaintiff further submitted that during his evidence he provided documents to show that

Parliament had in fact cleared him of the allegations of being a wife batterer. hat in his supplementary list of documents at **page 19** is an article in the Standard Newspapers of 31st March 2009 titled **"experts; only politics will delay law review**" in which article there is a portion which says "**The PSC clears city Lawyer Cecil Miller of wife batterer tag that saw him rejected by Parliament but chairman Abdi Kadir Mohammed declines to tender a public apology to him**" This statement is repeated at **page 20 and that at page 22** is an article in the Standard Newspaper of 27th August 2012 accusing the Plaintiff of being a wife batterer. **At page 23** is a demand letter demanding that the Newspaper retracts the story. **At page 26** is a clarification and apology by the standard newspaper. That the standard newspaper made a mistake, owned up to it and apologized but that the Defendant despite being given an opportunity to do so refused to apologize, which is malice. The plaintiff therefore submitted that based on the evidence, the essential ingredients for defamation had been proved.

17. On whether the defendants have any defence to the plaintiffs claim: The Plaintiff submitted that the defence of privilege under National Assembly (Powers and Privileges) Act is not available to the Defendant because whereas Millie Odhiambo made the allegations of wife battery against the Plaintiff in Parliament, the Defendants' article is a not a report of what transpired in Parliament. **It is a comment and/or opinion that categorically concludes that the Plaintiff batters his wife**. That the Defendants did not publish verbatim what transpired in Parliament and that the Article is an opinion on Family Values and Leadership titled "**yes, wife batterers cannot be entrusted with public office".** That the Article is not a Parliamentary report. It is an Article in a daily newspaper and it is therefore not privileged. Further, that the Parliamentary proceedings in question did not conclude that the Plaintiff was a wife batterer and was therefore unfit to hold public office. That the defendants' publication was an opinion by the 2nd Defendant in her Article and the same is therefore not privileged. It was further submitted that the Article was not a proceeding of Parliament within the meaning of the Act. Reliance was placed on the **Civil Appeal no. 226 of 2011, ERIC GOR,SUNGUH V GEORGE ODINGA ORARO [2014] EKLR** where the Court had this to say regarding a statement at a press conference within the precincts of Parliament :-

> *" **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 things 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 act shall be questioned by any Court".***
>
> ***"in our view although the utterances were made within the precincts of Parliament, its car park 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'…..As such the learned Judge was right to find that the statements complained of were not privileged."***

18. That Section 28 of the same Act provides as follows:-

> *" **in any civil or criminal proceedings instituted for publishing any extract from or abstract of any report, paper, minutes, votes or proceedings referred to in section 26, if the court is satisfied that the extract or abstract was published bonafide and without malice, Judgment or verdict as the case may be, shall be entered for the defendant or accused"***

19. It was submitted that the Article complained of is neither an extract or abstract or a report of Parliamentary proceedings. It is a personal comment or opinion on what one person alleged in Parliament and it is therefore not privileged. That the Defendants defence that the words complained of amount to fair comment on an issue of Public interest is not sustainable.The plaintiff relied on **HCCC 1709OF**

1996, JP MACHIRA V WANGETHI MWANGI & NATION NEWSPAPERS where the court held at page 14 cited in **HCCC No. 102 of 2000 DANIEL MUSINGA T/A MUSINGA & COMPANY ADVOCATES NATION NEWSPAPERS LIMITED** that the Defence of fair comment is available if the facts are true and the matter is of Public interest and the opinion is honestly held. That in this case, the facts are not true. That the statement made in Parliament was a mere allegation and the same was subsequently found to the untrue. That the conclusion by the 2nd Defendant that the Plaintiff is a wife batterer was not honestly held as the defendants have not demonstrated that they made any attempts to verify the allegations before publishing the article. It was therefore the Plaintiffs humble submission that the words complained of were defamatory and that the Plaintiff is entitled to damages.

20. On quantum of damages reliance was placed on the case of **JOHN V.MGN LIMITED (1996) 1 ALL ER 35** cited in **HCCC No. 1709 of 1996 JOHN PATRICK MACHIRA VERSUS WANGETHI MWANGI & NATION NEWSPAPERS** where the Court of Appeal held as follows:-

> "***The awarding of damages to the Plaintiff is for the purposes of vindicating him for the wrong done to him. The successful plaintiff in a defamation action is entitled to recover as general compensatory damages such sum as will compensate him for the wrong he has suffered. That sum must compensate him for damages to his reputation; vindicate his name and take to account the amount of the distress, hurt and humiliation which the defamatory publication has caused***"

21. In the **MUSINGA** authority (supra) the High Court added as follows:-

> "***The Court will thus achieve this vindication by awarding damages in form of a monetary award. In so doing the Court will also consider the extent to which the pain and suffering has been aggravated by the Defendants subsequent conduct. Depending on the conduct of the Defendant, the Court may award aggravated damages in addition to general damages……"***
>
> "***The other factor which the Court will take into consideration is the manner of publication and the extent of circulation, the geographical area within which the distribution takes place and the nature of the audience".***

22. Further reliance was placed on **CIVIL APPEAL no. 226 of 2011, ERIC GOR SANGU V GEORGE ODINGA ORARO (2014) eKLR** where the Court of Appeal held as follows on the issue of damages:-

> "***In this matter we are minded to increase the award of 3 million for general damages given to the Respondent to Kshs 5 million. 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 an outstanding advocate at the bar in Kenya"***

23. The plaintiff's counsel further relied on **CIVIL APPEAL NO. 115 OF 2003 THE STANDARD LIMITED V G.N KAGIA T/A KAGIA & COMPANY ADVOCATES** where the Court of Appeal added the following principles in the awarding of damages:-

> ***1. " in situations where the author or publisher of a libel could have with due diligence verified the libelous story, in other words where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages"***
>
> *2.* "***the level of damages awarded should be such as to act as a deterrence and to instill a sense of responsibility on the part of the authors and publishers of libel. Personal rights, freedoms and values should never be sacrificed at the alter of profiteering by authors and publishers***".

24. From the foregoing authorities, the court was urged to consider the following factors in awarding general damages:-

> *1. The Gravity of the allegation or the libel complained of*

2. The size and influence of the particular circulation in which the libel was contained.

3. The effect of the Publication on the Plaintiffs reputation and integrity.

4. The extent and nature of the Plaintiff's reputation.

5. The behavior of the Defendant.

6. The behavior of the Plaintiff himself.

25. For purposes of awarding aggravated damages the court was urged to consider the following:

1. Whether the defendants have offered any apology with respect to the libel.

2. The conduct of the defendant in the suit and in particular the plea of defence of fair comment on a matter of Public interest.

3. The Defendants persistence in defending the libel even after they had received the Plaintiffs version of events.

26. On the gravity of the allegations, it was submitted that the allegations suggest that the plaintiff despite his high level of education and professional calling is involved in acts of domestic violence. That assault of any kind be it domestic or otherwise is a criminal offence under section 250 to 253 of the Penal Code. That the publication alleged that the Plaintiff is involved in criminal activities and is therefore not fit to hold public office and that he belongs behind bars which is a serious libel against the Plaintiff and calls for a high award of damages.

27. On the size and influence of the circulation, the Plaintiffs submission was that the Nation Newspaper has the widest circulation in the country and that it also has a website to enable the circulation to be read word wide.

28. On the effect of the Publication, the plaintiff submitted that his evidence was that the publication had caused him to be shunned by members of the public. That he was shunned at the barbershop and at Karen County Club where he is a member. That his employees at his Law firm avoided him, he became a topic of discussion on radio and other media; his friends avoided him; and that he was forced to take out a full page advertisement in the Sunday Nation but even this advert did not repair his image.

29. On the extent and nature of the Plaintiff's reputation, it was submitted that the Plaintiff is a renowned Lawyer of nineteen years standing at the bar in Kenya. That he runs a big practice in Nairobi and Mombasa which employs over fifteen Lawyers and sixty members of staff. That he has high profile clients including virtually every bank in Kenya, parastatals, multinationals and high profile individuals in the business and political circles.

30. On the behavior of the Defendant, the Plaintiff submits that the Defendants have been most unapologetic right from the time the article was published to the date of trial. The Plaintiff submitted that he had adduced sufficient evidence to show that the standard newspaper had published the same allegations but had tendered a public apology when given the true facts. That therefore this litigation could have been avoided if the Defendant had offered an apology after being given the true facts.

31. Reliance was placed on the case of In the **ORARO v Gor Sungu (supra) where** the Respondent was a senior Advocate and was awarded Kshs. 5,000,000/= in damages by the Court of Appeal. It was further submitted that in the **MACHIRA CASE** (SUPRA) where the plaintiff was also an Advocate, he was awarded Kshs. 8,000,000/= as damages; and in the **MUSINGA CASE** (SUPRA) The plaintiff, who was an advocate was awarded Kshs. 10,000,000; finally in the **KAGIA CASE** (supra) the Respondent who was an advocate was awarded Kshs. 3,000,000/=.

32. From the foregoing submissions the plaintiff submitted that the court should find that the Defendants defamed the Plaintiff and that General damages be awarded to the Plaintiff in the sum of Kshs. 10,000,000/= together with aggravated damages in the sum of Kshs, 2,000,000 together with costs of the suit and interest.

DEFENDANTS' SUBMISSIONS

33. The defendants in their submissions invited the Court to consider the question: what is the article complained of really about? In their understanding of the plaintiff's evidence, it was submitted that the Plaintiff does not take issue with the general theme of the article; and that in fact, to his credit, he agrees with its ideas concerning the place of family values and personal integrity in leadership.

34. According to the defendants, the plaintiff only takes issue with is phrases that he has isolated from the article. They submit that not only does the picking and choosing of parts of a publication fall foul of defamation law, but that those isolated parts do not support the Plaintiff's case in any event hence the plaintiff's suit should be dismissed. It was submitted that the defendants had gone a step further to place the words complained of in their proper context. They contended that the publication complained of was based on privileged proceedings; and that they were a fair comment on matters of public interest.

35. defendants submitted that when read in its entirety the impugned article discernibly contained in the opinion pages of the Daily Nation, the heading of the article is 'Family Values and Leadership' while its title is 'Yes, wife beaters cannot be entrusted with public office.'

36. In their view, the article is an opinion piece by the 2nd Defendant, an avowed student of psychology and women studies who at the time was an editor with the United Nations, concerning the place of one's personal conduct in public life. And that she makes the argument advanced by feminists that one's personal life is a good indicator of how one conducts themselves in public.

37. It was further submitted that in the opening of the article, it appears that it was inspired by utterances that were made in Parliament the previous week by the then nominated Member of Parliament, Hon. Millie Odhiambo. According to the defendants, those utterances were reported to have been made in Parliament concerning the suitability of the Plaintiff to hold the made against the chair of the newly constituted Interim Independent Electoral Commission and that that Member of Parliament is reported to have alleged that the Plaintiff should not hold that office because she had been informed that he was a wife batterer.

38. The defendants submitted that the Plaintiff appeared to agree with the central ideas of the article in his testimony in cross-examination. For instance, that he eloquently articulated his objection to any form of violence, including domestic violence by husbands against their wives. Also, that the plaintiff agreed that leadership begins at home and that one is likely to be a bad national leader if one is a bad leader at home and that the Plaintiff was categorical in his response that wife beaters should not be entrusted with public office.

39. The defendants cited **Gatley on Libel & Slander, 9th Edition, page 652 at paragraph 26.11** in submitting that the plaintiff did not plead any defamatory matter. The said writings state:

> ***"In a libel the words used are the material facts and must therefore be set out verbatim in the statement of claim, preferably in the form of a quotation."***

40. The defendants also relied on **Peter Maina Ndirangu vs. Nation Media Group Ltd[2014] eKLR,** where Waweru J., after quoting the above passage from **Gatley on Libel & Slander**, explained the purpose of setting out the words that are complained of to be defamatory and stated that:

> ***"Thus the particulars of the claim must be pleaded with particularity to enable the defendant not only to understand what it is the claimant alleges or what the words mean, but to enable the defendant to know the exact claim he has to face. In deciding whether a statement bears a***

defamatory meaning, whether in its plain meaning or by innuendo, the court has to construe the very words used or complained of. This is the basis upon which it is a requirement that the exact words complained of not only be pleaded, but be set out verbatim in the statement of claim."

41. With the above in mind, the defendant's counsel submitted that the Plaintiff confirmed in cross-examination that the defamatory words in the article are those excerpted at paragraph 5 of his Plaint.

42. The defendants submitted that it is contrary to the law of libel for a plaintiff to sever, and rely on an isolated defamatory passage in an article if other parts of the article negated the effect of the libel. They relied on the House of Lords decision in **Charleston and another v News Group Newspapers Ltd and another [1995] 2 All ER 313**) where the Court held that a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage.

43. It was therefore submitted that in this case, the Plaintiff had curiously isolated and relied on phrases in the article which he claims to be defamatory, to the extent of excluding passages which actually mention his name and form the context of those isolated phrases. That the excluded phrases in the article relate to what Hon. Millie Odhiambo said in Parliament concerning the Plaintiff. It was submitted that their exclusion is not surprising for the reason that the Plaintiff knew that those words were covered by parliamentary privilege and would not be actionable in defamation. Further, that the plaintiff confirmed that Hon. Millie Odhiambo's statement was made under parliamentary privilege during his cross-examination; that he also acknowledged this in the press statement issued on his behalf by his advocates on 27th February 2009.

44. Therefore, it was submitted that had the Plaintiff included the above parts of the article, they would have thrown a different light on the phrases that he isolated in paragraph 5 of his Plaint. That the excluded parts of the article would have shown that the isolated phrases consisted of expressions of opinions that the Plaintiff himself agreed with (*first and third quoted phrases in paragraph 5 of the Plaint*) and a rhetorical question (*second quoted phrase*), all of which are drawn from privileged utterances made by a Member of Parliament, in Parliament, and form the basis of the article.

45. The defendants also invited the court to consider the words themselves that are set out at paragraph 5 of the Plaint. They submitted that the said were the words the Defendant understood to be what the Plaintiff alleges to be defamatory and required a defence to; these are the very words that the court is enjoined to construe (*see Waweru J.'s decision at paragraph 10 above*). It was submitted that these being the material facts upon which the Plaintiff's cause of action is based it is necessary that they refer to the Plaintiff whether by name or by inference, in order to succeed in an action for defamation.

46. However, it was submitted that is plain that the Plaintiff's name is not mentioned in the words at paragraph 5 of the Plaint. Also, that the Plaintiff has not pleaded any particulars of facts through which those words could be understood by inference to refer to him. Further, that PW2 confirmed on cross-examination that at the time of the publication, the Plaintiff was not in charge of overseeing Kenya's elections.

47. Consequently, it was submitted that a reader of the words in paragraph 5 of the Plaint, which the Plaintiff has specifically identified as being the defamatory words in the publication, would not conclude that they refer to him.

48. In advancing the defences of absolute privilege and fair comment, the defendants submitted that:

i. The Article Complained Of Is Protected by Parliamentary Privilege

49. It was submitted by the defendant's counsel the only mention of the Plaintiff in the article that is the subject of these proceedings relates to what was reportedly uttered in Parliament by nominated Member of Parliament Hon. Millie Odhiambo. That the writer reports as follows:

"Last week, Ms. Odhiambo, a children's rights activist, stunned Parliament by alleging that Mr. Cecil Miller should not hold the chair of the newly constituted Independent Interim Electoral Commission because he was a 'wife batterer."

50. The defendants maintained that the relevant extract of the Hansard debates of 19th February 2009 on the day when Parliament was considering the adoption of the recommendations of the Parliamentary Select Committee on the Chair and Members of the Interim Independent Electoral Commission showed that the matter was being debated I Parliament and that the subject was the plaintiff.

51. It was the defendant's submission that the statement that the Plaintiff is a wife batterer was made in Parliament by Ms. Odhiambo and that that statement formed part of the proceedings of the day and was properly an extract of that day's Hansard. That being so, it was submitted that any publication based on that statement is protected by law namely:

i. Section 11 of the Defamation Act, Cap 36 of the Laws of Kenya which provides that ***"In any action for libel in respect of the publication of any extract from, or abstract of, any parliamentary report it shall be a defence for the defendant to show that the matter in question was in fact an extract from, or abstract of, a parliamentary report and that the publication thereof was bona fide and without malice."***

As read together with,

ii. Section 28 of the National Assembly (Powers and Privileges) Act which provided that **"In any civil or criminal proceedings instituted for publishing any extract from or abstract of any report, paper, minutes, votes or proceedings referred to in section 26, if the court is satisfied that the extract or abstract was published *bona fide* and without malice, judgment or verdict, as the case may be, shall be entered for the defendant or accused."**

52. Therefore, it was submitted that the article complained of, to the extent that it reported on what was stated during parliamentary proceedings, is protected by parliamentary privilege.

53. It was also submitted that the defendants only reported an allegation of what Ms. Odhiambo asserted as a fact that the Plaintiff is a wife batterer hence the publication by the defendants of what was stated in Parliament conveyed a less injurious meaning to the reader of the article; and that it also demonstrates the Defendants'*bona fide* and lack of malice in authoring and publishing it.

54. The defendants submitted that the Plaintiff was at pains to acknowledge the less injurious connotations of the article complained of through the use of the word 'alleged'. And that the Plaintiff's own press statement he, through his advocates, makes it clear that he understood the fact that an allegation and an assertion/conclusion of fact are entirely different. In that press statement his advocates states that '*an allegation remains just that, until proved by relevant and admissible evidence*.' He also says that '*whereas allegations of battery were made in a divorce case in 2003 in which Cecil Miller was a party, the same were not proved and the Divorce Court did not find him guilty of the allegations*.'

55. It was also submitted that PW2, Mr. Ephraim Mathenge, acknowledged the differences in meaning between alleging and stating a fact. That he confirmed that he would not conclude that the Plaintiff's advocates called the Plaintiff a wife batterer on the basis of their press statement in which they reported on an allegation of wife battery that was made in Court. By the same logic, the defendants submitted that a reasonable reader of the article would not conclude that the Defendants have called the Plaintiff a wife batterer on the basis of a report of an allegation of wife battery that was made in Parliament.

56. According to the defendants, **the Article Complained of is a Fair Comment on a Matter of Public Interest**

57. Finally, it was submitted that the article complained of consisted of fair comment on a matter of public interest. Reliance was placed on ***Gatley on Libel and Slander***, *9th Edition, at page 248 para 12.2*

which outlines the elements of the defence of fair comment as follows:

> *i. The defendant must show that the words are comment and not a statement of fact. However, an inference of fact from other facts referred to may amount to a comment;*
>
> *ii. He must show that there is a basis for the comment, contained or referred to in the matter complained of;*
>
> *iii. The comment must satisfy the test of being objectively fair in the sense that an honest or fair-minded person could hold that view;*
>
> *iv. The defendant must show that the comment is on a matter of public interest, one which has been expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern.*

58. It was also submitted that the article complained of meets the requirements of the defence of fair comment for the following reasons *inter alia*:

> *i. It was prominently categorized as an opinion (see top left corner of page 1 of the Defendants' Supplementary List of Documents);*
>
> *ii. The factual bases for the opinions and comments expressed by its author were clearly set out in the article. These included the statements by Hon. Millie Odhiambo in Parliament. In addition, it was contended that the author made reference to the works of writers such as Andrea Dworkins who wrote on the life of the literary legend, Leo Tolstoy;*
>
> *iii. The opinions expressed in the article were objectively fair and even agreeable to the Plaintiff according to his admissions on cross-examination;*
>
> *iv. The public had a legitimate interest in the leadership and integrity credentials of prospective national leaders. This was especially so in relation to the leadership of the Interim Independent Electoral Commission which the Plaintiff admitted was a pivotal institution at the time due to the infamous post-election violence.*

59. In view of the above, the defendants urged the court to dismiss the plaintiff's suit with costs.

DETERMINATION

60. I have carefully considered the pleadings, evidence adduced and submissions as filed, coupled with statutory and case law relied on by both parties' advocates. The main issues for determination in this matter are:

> *1. Whether the impugned publication was defamatory of the plaintiff.*
>
> *2. Whether the defences relied on by the defendants lie.*
>
> *3. Whether the plaintiff is entitled to damages and if so, how much.*
>
> *4. What orders should this court make?*

1. *5. Who should bear the costs of this suit?*

61. On the first issue of whether the impugned article is defamatory of the plaintiff, it is important to answer the question as to what defamation is and its principle elements. The basic of defamation law is to balance the private right to protect one's reputation with the public right to freedom of speech. Anything that injures a person's reputation can be defamatory. **Gatley on libel and slander 8th Edition**

paragraph 4 page 5 defines defamation as:

> ***"Any imputation which may tend to lower the plaintiff in the estimation of right thinking member of society generally……..or to expose him to hatred contempt or ridicule."***

62. Winifield in J.A. Jolowicz and T. Ellis Winfield on Tort 8th Edition at page 254 defines defamation as:

> " ***The publications of a statement which tends to lower a person in the estimation of right thinking members of society generally or which tends to make them shun or avoid that person."***

63. Halsbury's Laws of England 4th Edition VOL 28 paragraph 10 states:

> ***" A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling trade or business."***

64. The above definitions do not impose an obligation on the plaintiff to prove that the defamatory words actually caused him to be shunned or avoided or treated with contempt. What the plaintiff needs to prove is that the publication tended to lower him in the estimation of right thinking members of the society generally.

65. In **Jones V Skelton [1963] 1 WLR 1362 P 1371** the court stated:

> ***" The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only be general knowledge and not fettered d by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words explained of in a defamatory sense."***

66. In **Hayward V Thomson & Others [1982] 1QB 47 at 60** it was stated inter alia:

> ***"One thing is of essence in the law of libel. It is that the words should be defamatory and untrue and should be published of and concerning the plaintiff…."***

67. In **Clerk & Lindsel on tort 17th Edition 1995 page 1018** it is stated that:

> ***" Whether the statement is defamatory or not depends not, as has been pointed out already, upon the intention of the defendant, but upon the probabilities of the case and upon natural tendency of the publication having regard to the surrounding circumstances If the words published have a defamatory tendency it will suffice even though the imputation is no believed by the person to whom they are published."***

68. To prove the tort of defamation, the following elements must be present;

1) The words complained of must be published to a third person.

2) The words must be false

3) The words must refer to the plaintiff.

4) The words must be defamatory.

5) The words must be maliciously published.

69. In the instant case, it is not disputed by the defendants – as shown by the testimony of DW1 Rasna Warah that the words complained of were indeed published by the 1st defendant and the author thereof is the 2nd defendant. I therefore need not delve into whether or not the words were published as the words were indeed published.

70. On the second element that the words must be false, the plaintiff testified and submitted that the allegations that he was a wife batterer were false and that the Parliamentary Select Committee exonerated him after the debate although the Chair of the said Committee refused to apologize. Further, that the Standard Newspaper which had written a similar story based on the allegations by Hon Millie Odhiambo had apologized to the plaintiff but that the defendants herein refused to apologize.

71. On the other hand, the defendants contended that what they published is what was debated in Parliament and not that they knew as a fact that the plaintiff was a wife batterer. On the evidence adduced as whole, there was no proof that the plaintiff was a wife batter.

72. On whether the publication referred to the plaintiff, it was not denied that indeed the words referred to the plaintiff. The court finds that the identification of the plaintiff in the surface of the publication is apparent and any ordinary reader, as testified by PW2 , familiar with the plaintiff, understood the article to be referring to him (the plaintiff) see **CA 226/2011 Eric Gor Sungu Vs George Odinga.** Furthermore, the article mentions the plaintiff's name Cecil Miller. In the case of **Knupffer -v- London Express Newspaper Limited (1944) AC 116; [1944] 1 All ER 495** it was held that words are not actionable as defamatory unless they are published of and concerning the plaintiff. In **Newstead -v- London Express Newspaper Limited (1940) 1 KB 377, [1939] 4 All ER 319** it was held that where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him (See **Morgan -v-Odhams Press Ltd. [1971] 2 All ER 1156**). Such special facts are material facts which must be pleaded in the plaint and must be proved in evidence in order to connect the plaintiff with the words complained of. Such a pleading is often referred to as a "reference innuendo" in contrast to a "true innuendo" where the extrinsic facts only bear on the defamatory meaning. (See **Halsbury's Laws of England, 4th Edition Vol. 28 page 20 paragraph 39**).

73. In the present case, as against the 1st and 2nddefendants, the issue is whether a sensible/reasonable person reading the publication complained of is able to identify the appellant as the person under reference. Where identification is in issue, it is the duty of the court to rule whether or not the words are reasonably capable of being understood to refer to the plaintiff. In determining this question, the trial court must consider whether or not ordinary reasonable persons having the knowledge proved, could understand the words to refer to the plaintiff. If no reasonable person could have reasonably understood the words as referring to the plaintiff, there is no question left for determination; but if the words could reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to, then the trial court has to make a determination whether or not the words did in fact refer to him. (See **Lord Morris of Both-y-Gest in Jones -v- E. Hutton & Co. [19090 2 KB 444 at 454**).

74. In **Mwangi Kiunjuri v Wangethi Mwangi & 2 others [2016] eKLR** the Court of Appeal held that in making the determination whether the statement could reasonably identify the plaintiff, the trial court has to assess the witnesses and their reasonableness and decide whether reasonable persons would reasonably understand that the plaintiff was referred to. The trial court makes this determination as a matter of fact.

75. In this case, I have no doubt that PW2 who worked for the plaintiff for over 17 years and knew him well, and who testified that he read the publication, did identify the plaintiff in the impugned publication. Accordingly, I find that the publication referred to the plaintiff. However, what the defendants contend is that the article was based on privileged proceedings before the National Assembly. They produced a copy

of the Hansard for the material day to fortify their position. They also contended that the publication was fair comment on matters of public interest written by the 2nd defendant an avowed student of psychology and women studies making argument advanced by feminists that one's personal life is a good indicator of how one conducts themselves in public. The defendants also contended that it was not proper for the plaintiff to sever and rely on an isolated defamatory passage in an article if other parts of the article negated the effect of the libel.

76. On the other hand, the plaintiff maintained that the words were defamatory since they were a conclusion of fact that the person overseeing Kenya's elections beats his wife. Further, that the words were not couched as an allegation but an express conclusion that the plaintiff was a wife beater hence he should not hold public office hence the words were defamatory. PW2 testified that he read the impugned article and that he considered it defamatory because he knew the plaintiff and his family very closely. He had known the plaintiff for 17 years as a responsible family man. After the publication, he shunned the plaintiff. He wondered whether the plaintiff could have been a wife batterer as alleged in the article. That many people called him seeking to know from him whether the plaintiff was a wife batterer.

77. The plaintiff testified that after the publication, he was shunned by his close friends and associates. That he is a reputable advocate who has a large and respectable clientele including banks. He is also involved in many charity works and that the publication painted him in bad light as a wife batterer.

78. Calling one a wife batterer who cannot be trusted with being in charge of Kenya's elections is no doubt, on the face of it defamatory. Wife battery is a domestic violence crime and attracts custodial sentence. In my opinion, the article, in so far as it referred to the plaintiff as a wife batterer is defamatory of him. Any right thinking member of the society reading the article would have no hesitation concluding that the plaintiff, as a matter of fact, is a wife batterer, and would tend to shun or avoid him. And it matters not that the publisher or author is repeating what another person said by saying *"alleged."*

79. On the fourth element of whether the publication was maliciously published, the plaintiff averred that malice can be read in the article itself especially the words *" does it matter that the person in charge of Kenya's elections beat's his wife?"* Further, that the article was not only malicious but reckless. Further, that the defendant did not bother to contact the plaintiff to get any explanation or comment from him before publishing the article; and that failure to inquire into the facts before publishing defamatory words is malice as was held in **Godwin Machira V Okoth** (supra).

80. It is worth noting that a publisher enjoys qualified privilege if there is no malice. Malice can be inferred from the publication itself or from the defendant's conduct before, during the trial, and even after the trial of the suit, pending judgment.

81. In this case, the plaintiff avers that the defendants were actuated by malice in publishing the article because they have not justified the publication. The plaintiff set out particulars of malice at paragraph 8 of his plaint.

82. I have examined each of the particulars of malice. I however find nothing in evidence adduced to suggest that the defendants have haboured any animosity against the plaintiff or his profession and there is no reason or motive disclosed for the defendant to undermine the plaintiff or his family through deliberate false or negative publication. The publication, though appearing defamatory, fails to show either intrinsic or extrinsic malice on the part of the defendants.

83. In the opinion/commentary published, I am unable to find that the defendants' state of mind was actuated by spite or ill will in publishing the article or that the publication was actuated by the defendant's desire for wide readership.

84. Although there was no evidence that the defendants did seek out the plaintiff before publishing the article, I find that the article which was dedicated to family values and leadership as authored by

Rasnah Warah was a general commentary relating to leadership and family values, which are no doubt issues espoused in our new constitutional order.

85. In my humble view, the rhetoric question of *"does it matter that the person in charge of overseeing Kenya's election beats his wife?* Which question does not require an answer was not an assertion that the plaintiff beats his wife and that he should not be entrusted with overseeing Kenya's elections, taking into account the context in which the article was written namely, that immediately thereafter the author poses another general rhetoric question of "*whether we care if any of our leaders and politicians exhibit violent behavior towards their family members,"* and the source of all those rhetoric questions being an outburst statement made in Parliament by Honourable Millie Odhiambo claiming that she could not support the plaintiff herein holding the position of chair of the newly constituted Independent Interim Electoral Commission (IIEC) because he was a *" wife batterer."*

86. In my humble view, the fact of the defendant's article asserting that *" yes wife batterers cannot be entrusted with public office"* is not an assertion that the plaintiff was a wife batterer. The plaintiff himself in his evidence and press statement by his advocate conceded that he upholds family values and that he would not vouch for a wife batterer to hold a leadership position.

87. From the Hansard report, this court indeed finds that the rejection of the plaintiff for the position of chair of IIEC was due to allegations by Hon Millie Odhiambo that the plaintiff was a wife batterer. That allegation may not have been true as shown by the subsequent clearance of the plaintiff by the Parliamentary Select Committee (PSC) on those allegations. Thus,this court is unable to find on the evidence adduced and in the context in which the opinion article was written, that an article claiming that the rejection of the plaintiff due to allegations in Parliament that he was a wife batterer would be malicious reporting by the media.

88. Taking into account the freedom of expression and journalistic privilege as well as the role of media in a democratic society; the court cannot ignore an opinion that comes in the wake of a national debate on good governance and moral aptitudes in the Kenyan society and a move to educate Kenyans on serious issues relating to domestic violence, which make it probable that the broadcast was an excusable comment arising from Parliamentary debate and therefore enjoying Parliamentary privilege.

89. The defendants did not, in my humble view, have to write an apology for authoring the article because they did not assert that the plaintiff was a wife batterer. They were commenting on what a Parliamentarian had asserted on the floor of the House of Parliament during Parliamentary proceedings. The distinction this court makes with the **Gor Sungu V George Oraro** (supra) case is that in that case, the defendant Hon Gor Sungu had addressed the media outside the House (in the Parliament Gardens) to the effect that the plaintiff was involved in the murder of Robert Ouko. The court rightly found that the defendant was not protected by absolute Parliamentary privilege.

90. In this case, I reiterate that what the defendant Rasna Warah was writing was a commentary on an allegation that was made of and concerning the plaintiff on the floor of the House of Parliament. Accordingly, I find that the plaintiff has not proved malice on the part of the defendants in publishing the impugned article.

91. In the words of Warren Buffet, "It is acknowledged that it takes 20 years to build a reputation and five minutes to ruin it." Nonetheless, the threshold test for determining whether words are defamatory is a low one. In the persuasive Canadian case of ***Cherneskey v. Armadale Publishers Ltd*., 1 S.C.R. 1067,** Dickson J., while dissenting on the issue, which concerned the defence of fair comment, expressed at p. 1095, his view of what constitutes a defamatory statement:

> ***"The law of defamation must strike a fair balance between the protection of reputation and the protection of free speech, for it asserts that a statement is not actionable, in spite of the fact that it is defamatory, if it constitutes the truth, or is privileged, or is fair comment on a matter of public interest, expressed without malice by the publisher. These defences are of crucial importance in the law of defamation because of the low level of the threshold which a statement***

must pass in order to be defamatory. The virtually universally accepted test is that expressed by Lord Atkin "after collating the opinions of many authorities" in Sim v. Stretch [(1936), 52 T.L.R. 669.], at p. 671. He stated that the test of whether a statement is defamatory is: "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" In the earlier case of O'Brien v. Clement [(1846), 15 M. and W. 435.] at p. 436 Baron Parke said that, subject to any available defences, "[e]verything printed or written, which reflects on the character of another" is a libel. It is apparent that the scope of defamatory statements is very wide indeed. … This is the reason why most defamation actions centre on the defences of justification, fair comment, or privilege. It is these defences which give substance to the principle of freedom of speech."

92. According to Bryan G. Baynham Q.C. and Daniel J. Reid, 2009 **("The Modern-Day Soapbox: Defamation In The Age Of The Internet"** , unlike many other torts, defamation claims have a relatively "low" initial threshold – almost any negative statement concerning an individual, corporation or group has the potential to be "defamatory". In balancing freedom of expression with protection of reputation, courts have avoided raising this initial threshold, instead expanding existing defences (qualified privilege) and creating new ones (responsible communication on matters of public interest).

93. The above exposition leads this court to determine the question of whether the defences of absolute privilege and fair comment on a matter of public interest are available to the defendants.

94. In this case, it is not in dispute that according to the Hansard Report, which was produced in evidence, Honourable Millie Odhiambo withdrew her support for the plaintiff's bid to be considered as Chairperson of the IIEC on the ground that she had been informed that the plaintiff was a wife batterer.

95. Section 11 of the Defamation Act Cap 36 as read together with Section 28 of the National Assembly (Powers and Privileges) Act clearly insulates a defendant from liability for publishing any extract from or abstract of, any parliamentary report, as long as the publication was bona fide and without malice.

96. Freedom of speech and debates of proceedings in Parliament ought not to be impeached or questioned in any court of law or place out of Parliament. **Blackstone** in his **Commentaries on the Laws of England, 17th Edition [1830] volume 1 page 163** states as follows concerning Parliamentary privilege:

"the whole of the law and custom of Parliament has its origin from this maxim- "that whatever matter arises concerning either House of Parliament, ought to be examined*, discussed, and adjudged in that House to which it relates, and not elsewhere,"*

As Lord Browne Wilkinson indicated, the privilege in question is not merely a means of protecting free speech in Parliament. It is a constitutional constraint based on what Sedley (as he then was) aptly described as "a mutuality of respect between the two constitutional sovereignties." it reflects the conception of the separation of powers between the legislature and the judiciary.

In Adams v the Guardian Newspapers (2003) Scott CS 131.

It was stated that Parliamentary privilege is not, (unlike absolute privilege) a defense arising under the law of defamation; it is rather, an issue going to the jurisdiction of the court."

Lord Browne put it this way..." the wider principle encapsulated in Blackstone's words quoted above prevents the courts from adjudicating on issues arising in or concerning the House, via whether or not a member has misled the House or acted from improper motives. The decision of an individual member cannot override that collective privilege of the House to be the sole judge of such matters."

97. One implication of Parliamentary privilege is that it prevents a court from entertaining any action against a member of the legislature which seeks to make him legally liable for acts done or things said by him in Parliament: in particular, an action for defamation cannot be brought against a member of Parliament based on words said by him in the house. The principle is however of wider scope. In **prebble Lord Brown-Wilkinson cited (at page 333)** a provision of Australian legislation as containing "the true principle to be applied":

> ***"In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made concerning proceedings in Parliament, by way of, or for purpose of - questioning or relying on truth, motive, intention or good faith of anything forming part of those proceedings in parliament; (b) otherwise questioning or establishing the credibility, motive ,intention or good faith of any person :or(c) drawing or inviting the drawing inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament."***
>
> ***Lord Browne-Wilkinson expressed the same principle in his own words at page 337, in terms which draw a significant distinction:***
>
> ***"....their Lordships are of view that parties to litigation, by whomsoever commenced , cannot bring into question anything said or done in the House by suggesting whether by direct evidence , cross-examination, inference or untrue or misleading. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception... However , their Lordships wish to make it clear that this principle does not exclude all references in court proceedings to what has taken place in the house...A number of the authorities in the scope of article 9 betray some confusion between the right to prove the occurrence of parliamentary events and the embargo on questioning their propriety. In particular, it is questionable whether Rost v Edwards was rightly decided.***
>
> ***"...if the defendant wishes at the trial to allege the occurrence of events or the saying of certain word in parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course".***
>
> ***The distinction drawn by Lord Browne Wilkinson is reflected in the terms of article 9 itself: it confers on "proceedings in parliament" a special protection from "impeached or questioned".***

98. Based on the above exposition, I do not find that in writing an opinion on the allegations/assertions by Honourable Millie Odhiambo on the floor of the House of Parliament, the defendants had effectively sided with Honourable Millie Odhiambo and presented those accusations of wife battering against the plaintiff as true. The plaintiff, in my humble view, on the evidence available did not prove that the defendants in publishing the opinion based on Honourable Millie Odhiambo's statement in Parliament, were practicing journalistic zealotism and or that they had the desire or motive to defame the plaintiff. I further do not find that the publication was made recklessly.

99. On whether the defence of fair comment on a matter of public interest is available to the defendant, the plaintiff submitted that the words complained of were not reasonably capable of being construed as fair comment but that they were statements of fact, rather than expression of opinion.

100. The defence of fair comment or honest opinion allows the media to express opinions, even though those opinions may be critical of someone and harmful to their reputation. Opinions are matters of evaluation not truth so readers can decide to agree or not. However, opinion must be clearly comments not assertions based on provable facts set out in the story and they must be honestly believed.

101. In the present case, I find that the article clearly states, with reasonable precision that it is a comment based on what had transpired in Parliament and not a statement of fact. Any reasonable reader of the impugned article would in my view, distinguish between what is a report of and concerning a person and what is comment. I am unable to find any imputation of fact, bearing in mind that the

comment, in general terms, indicated the facts on which that comment was being made which is, that the Honourable Millie Odhiambo declared that she could not support a wife batterer.

102. PW2 Mr. Ephraim Mathenge in his evidence, acknowledged the differences in meaning between alleging and stating a fact. He confirmed that he would not conclude that the Plaintiff's advocates while addressing the media in an attempt to clear the plaintiff's name called the Plaintiff a wife batterer on the basis of their press statement in which they reported on an allegation of wife battery that was made in Court. Iam in agreement with the defendant's submissions that by the same logic, the a reasonable reader of the impugned article would not conclude that the Defendants called the Plaintiff a wife batterer on the basis of a report of an allegation of wife battery that was made in Parliament by Hon Millie Odhiambo.

103. I further do not find the defendants were offering in their article, to prove that the plaintiff had behaved in a manner reported by Parliamentary proceedings or suggested by Honourable Millie Odhiambo, but were seeking in their defence to prove that the reported allegations had been made.

104. Albeit reproducing an allegation which turns out to be untrue and defamatory is no defence under the repetition rule as was explained in **Lewis Vs Daily Telegraph Ltd [1964] AC 234 by Lord Devlin at page 283 & 284** that:

> ***" I agree off course, that you cannot escape liability for defamation by putting the libel behind the prefix such as " I have been told that…….or it is rumored that ….and then asserting that it was true that you had been told or that it was s in fact being rumoured. You have, as Horridge J said in a passage that was quoted with approval by Greer LJ in Cookson V Harewood*** **[1932] 2 KB 478 N, 485N** ***to prove that the subject matter of the rumour was true."***

105. In the instant case, I am unable to find that the defendants in the impugned opinion said ***" I think or believe what Honourable Millie Odhiambo said about the plaintiff that he is a wife batterer is true."*** As earlier stated, the defendant, under the statutory defence of Parliamentary privilege, cannot be liable for making comments on what was alleged or asserted in Parliament even if those assertions or allegations were not true, unless it is shown that the defendant was actuated by malice, spite or ill will or unless there was an overtyping of the story.

106. In my humble view, to ask this court to find liability on the part of the defendants would be, in my view, to urge this court to investigate whether the allegations or assertions made by Honourable Millie Odhiambo that she had been informed that the plaintiff is a wife batterer and that she could not support a wife batterer, were true or not, which exercise would go against the principle that Parliamentary proceedings enjoy special protection from being impeached or questioned in a court of law.

107. In the end, I find that the plaintiff's claim has not been proved to the standard required, on a balance of probabilities. I proceed to dismiss the claim.

108. In the event that I am to be found to have erred in my determination of the defendant's liability in libel, Iam obliged to assess damages that I would have awarded the plaintiff had he succeeded in his claim against the defendant on liability.

109. In John v MG Ltd. [1996] I ALL E.R. 35 the Court held that:

> ***"The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation; vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....***
>
> ***Exemplary damages on the other hand had gone beyond compensation and are meant to "punish" the defendant. 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".

110. The plaintiff asked for shs 10,000,000 general damages and shs 2,000,000 aggravated damages.

111. On the claim for general damages, the case of **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR** is instructive. The Court of Appeal cited several decisions that set out factors to be considered in awarding damages in defamation cases. Tunoi, JA (as he then was) in **Civil Appeal No. 314 of 2000 Johnson Evan Gicheru v Andrew Morton & Another [2005] e KLR 1** had this to say on assessment of damages:

" In action of 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. It may consider what his conduct has been before action, after action, and in court during the trial: PRAUD V GRAHAM 24 Q.B.D.53, 55.

In BROOM V CASSEL & CO [1972] A. C. 1027 the House of Lords stated that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily and even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charges. As Windeyer J. well said in UREN V JOHN FAIRAX & SONS PTY.LTD. 117 C.L.R. 115,150:

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

112. In this case, to arrive at what I would consider fair and reasonable award the I have drawn considerable support in the guidelines in **JONES V POLLARD [1997] EMLR 233.243** and where a checklist of compensatable factors in libel actions were enumerated as:-

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.

113. In the Gicheru case (supra) the Court of Appeal interfered with an award of damages and enhanced it. That was on 14th October, 2005.

114. In the Court of Appeal on 29th March, 2012 in **Civil Appeal 148 of 2003 Wangethi Mwangi & Another v J. P. Machira t/a Machira & Co. Advocates (**UR) the court delivered itself thus in the course of the judgment:

"We think that while the "Gicheru" judgment will continue to be a useful guide as regards the

level or quantum of damages in similar situations, it was never intended to be a yardstick cast in concrete for all time and for this reason we think that peculiar facts of each case should continue to be the hub upon which the awards gravitate or revolve, provided that the Court remains alert to other relevant considerations such wider public interest goals, juridical basis for awards, including any pressing public policy considerations a sense of proportionality and the need for the courts to always recognize that they are often the last frontier of the need to ensure that truth is never sacrificed at the altar of recklessness, malice and even profit making. 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."

1. Justice Tunoi, in the judgment cited above, had this to say of the many authorities referred to by counsel where awards of general damages in defamation cases had ranged from Kshs. 1,500, 000/= to Kshs. 30,000,000/=:

> ***"...My considered opinion of the awards so made is that they lack juridical basis, they may be found to be manifestly excessive and should not at all be taken as persuasive or guidelines of awards to be followed by trial courts, since the trial judges concerned appeared to have ignored basic fundamental principles of awarding damages in libel cases ..."***

115. From the above plethora of authorities, factors to be considered in assessment of damages in defamation cases include seriousness of the defamatory statement, identity of the accuser, breadth of the distribution of the publication, republication of the libel, failure to give audience to both sides of the picture and not presenting a balanced review, desire to increase one's professional reputation or to increase ratings of a particular program, conduct of the defendant and the defendants counsel through to the end of trial, absence of retraction or apology and failure to establish a plea of justification See **Leenen V Candian Broadcasting Corporation.**

116. For aggravated damages to issue, the court must find that the defendant was motivated by actual malice, established through intrinsic evidence. However, the publication as impugned herein was a mere commentary and though not removed or withdrawn, there was no evidence that the publication was clearly aimed at the defendant obtaining the widest possible publicity in the circumstances that were most adverse possible to the plaintiff. Furthermore, there is no evidence of republication of the same to publicize the issue or to disseminate it further. In the premises, I would not award any aggravated damages in the circumstances.

117. Taking into account the seriousness of the alleged defamatory words, those of wife battery, which in the recent past has become common place in Kenya and noting that wife battery is a criminal offense attracting custodial sentence if one is found guilty, depending on aggravating circumstances, and taking into account the plaintiff's social status being a prominent advocate with a large clientele; there being no apology or retraction, or a republication thereof, and the publication being commentary/opinion not an overtyped headline I would in the circumstances of this case and guided by the above established principles and case law including the decision in **Ken Odondi & 3 Others -v- James Okoth Omburah t/a Okoth Ombura & Co. Advocates, Kisumu Civil Appeal No. 84 of 2009** where a sum of Kshs.4,000,000/= was awarded to the plaintiff who was a prominent advocate, and the case of **Eric Gor Sungu vs. George Oraro Odinga** (2014) eKLR where the Court of Appeal enhanced an award to 6,000,000 in 2014, had the plaintiff in this case proved his case against the defendants; I would have awarded him Kshs 7,000,000 general damages for libel as adequate solatium together with costs and interest.

118. In the end, I find that the plaintiff has failed to prove on a balance of probabilities that the

impugned article was maliciously published. I also find that the publication enjoys Parliamentary privilege in view of it being an opinion and commentary on Parliamentary proceedings.

119. I dismiss the plaintiff's suit and order that each party shall bear their own costs of this suit

Dated, signed and delivered at Nairobi this 19th day of September 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mr Wena for the plaintiff

Mr Mwangi for the Defendants

CA: Adline