



REPUBLIC OF KENYA



**Ngonze v Ng'ang'a (Civil Suit 82 of 2017)
[2024] KEHC 11261 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 82 OF 2017
DKN MAGARE, J
SEPTEMBER 26, 2024**

BETWEEN

DANIEL MUTISO NGONZE PLAINTIFF

AND

PETER GIKONYO NG'ANG'A DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide the plaint dated 22/8/2017 seeking the following reliefs:-
 - a. Damages for libel.
 - b. Exemplary damages.
 - c. Aggravated damages.
 - d. Interest on (a), (b) and (c) above.
 - e. Cost of the suit.
2. The suit arises from alleged defamatory publication by the defendant on 18/1/2017 in the following words:

“It is shocking to see the level of judicial misuse of the power of the defendant lawyer exercising extra power given by the magistrate to insult and make threat right to my face with the presence of the magistrate pretend not to be seeing.

The Defendant lawyer is coaching his client to lie so that they can defraud me money whereas the lady is married to another man with a baby. (Out of judicial ethics).



The Defendant (Nazi) and his lawyer are having an affair with the blessing of the magistrate, which compromises the case.”

3. It was pleaded that the publication was copied, dispatched and delivered to the Office of the Director of Public Prosecution, Mombasa Law Courts Chief Magistrates, Presiding Magistrate of Tononoka Children Law Courts, Defendant’s lawyer Apollo Muinde & Gonze Advocates and M/s Kiume Kioko & Co. Advocates.
4. It was also stated that the publication was meant to and indeed defamed the plaintiff as it imputed to the right-thinking members of the society that the Plaintiff as an advocate:
 - a. Is deficient of legal decorum.
 - b. Has no regard for the rule of law and natural justice.
 - c. Lacks professional ethics.
 - d. Is an extortionist.
 - e. Has no morals.
 - f. Lacks professionalism.
 - g. Should be shunned and avoided.
 - h. Is guilty of dishonest conduct.
 - i. Is unfit to practice as advocate.
5. The Defendant entered appearance and filed defence on 28/9/2017 denying the particulars of defamation as pleaded in the plaint. It was averred that the contents of the letter dated 18/1/2017 were not malicious and defamatory as they were true.

Evidence

6. PW1 was the Plaintiff. He relied on his witness statement dated 22/8/2017 and supplementary witness statement dated 19/10/2020 which he adopted in evidence. He also relied on his bundle of documents and supplementary list of documents respectively dated 22/8/2017 and 13/2/2021 which he produced in evidence.
7. In cross examination, it was his case that he was married with two children. That the defendant lodged a letter to the DPP and copied to agencies and other people as well as served to advocates in the manner pleaded in the plaint. It was his further case that the letter dated 18/1/2017 depicted him as lacking in ethics and etiquette.
8. PW2 was Rachael Ruo. She adopted her witness statement dated 15/10/2020. It was her case on cross examination that she worked with Ngoze advocates until 2011 as Secretary. Further, the witness stated that she worked at Apollo Muinde Advocates when the children case was filed. That she did not live with the father of her two children. Further, she testified that it was not true that Nazi Munga and Ngoze had an affair.
9. PW3 was Fredrick Ouma. He adopted his witness statement dated 3/11/2020. He stated in cross examination that he knew Ngoze for a long time to be of impeccable character. He stated that he was not aware of the children court proceedings.
10. The defendant called DW1, one Ruth Wanjiru. She adopted her witness statement dated 26/4/2018.



11. DW 2 was the defendant. He adopted his witness statement dated 28/9/2017 and also relied on his bundle of documents dated 26/4/2018 and 27/10/2020. He testified that he was the Plaintiff in the children's case. He admitted that he wrote the letter of complaint and stated that the defendant and his lawyer in the children case had an affair. That he copied the letter to the defendant's lawyer and his deceased lawyer. That the ODPP responded via their letter dated 26/1/2017.

Analysis

12. The issue before me for determination is whether the impugned words contained in the letter dated 18/1/2017 by the defendant, in the circumstances of this case, were defamatory as published as to entitle the plaintiff to the reliefs.
13. The Court has perused the lengthy witness testimony. Parties have to try as much as possible to confine their evidence within the purview of their pleadings. Pleadings found causes of action and in this case defamation. The testimonies were more of rumors, greatly extraneous and devoid of a scintilla of relation with the defamatory suit before me. I do not know why parties went wild into a world of difference with what was pleaded before the court. One would expect that in a defamation case, the parties state defamation as a matter of fact and produce evidence of publication or defenses to defamation as opposed to details of what happened prior to the alleged defamation and those who were involved in the defamation, in terms of numbers. Numbers cannot prove or disprove defamation. A party must stick to the conditions that found or defend defamation.
14. I understand that the fundamental rationale of the protection against defamation is of constitutional and human rights imperative. I therefore inevitably proceed with a rider to balance the provisions of Articles 33, 34 and 35 of *the Constitution*. The said provisions respectively deal with the fundamental right to the freedoms of expression, media and access to information. Consideration also is to be inevitably granted to Article 28 in respect of the inherent dignity of every person which dignity must be respected and protected.
15. The freedom of the media is guaranteed by Article 34 of *the Constitution* as follows:-

“Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).”
16. Consequently, under Article 33(2) and 33(3) of *the Constitution*, every person has the right to freedom of expression which does not extend to, among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4) and that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.
17. On the right to access information and the freedom of expression, Lord Denning MR stated in *Fraser v Evans & others* (1969) All ER 6:

“There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment in it. This is an integral part of the right of speech and expression. It must not be wished away.”



Lord Coleridge, CJ in *Bernard & another v Perriman* (1891-4) ALL E.R 965 had previously stated that:

“The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed.”

18. What then is defamation? As succinctly put by this court in *S M W vs. Z W M* [2015] eKLR:-

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

19. Windeyer J. In *Uren John Fair Fax & Sons Pty Ltd* 117 CLC 115 at 115 stated.

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tend to make them shun or avoid that person.”

20. On the other hand, Halsbury’s Laws of England defines a defamatory statement as:

“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.”

21. It was held in the case of *John Patrick Machira Vs Wangethi Mwangi & Another Nairobi HCCC No. 1709 of 1996* that: -

A defamatory publication is the publication of a statement about a person that tends to lower his reputation in the opinion of right thinking members of the community or to make them shun or avoid him

22. It follows that the common thread in the definition for a defamatory statement or utterance is one which if published tends to lower the estimation of the person it refers to in the opinion of the right-thinking members of the community and may cause them to shun the person.

23. Notwithstanding, my duty is also to establish whether the Plaintiff proved his case on a balance of probabilities within the meaning of Section 107 of the *Evidence Act* as read with Order 2 Rule 7 (1) of the Civil Procedure Rules.

24. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”



25. Further, in *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person... The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

26. Consequently, the words leading to the controversy in this case were stated as to be contained in typed written letter titled *Misconduct At Totonoka Children Court Case Number 120* addressed to the Director of Public Prosecutions Mombasa as follows:

“It is shocking to see the level of judicial misuse of the power of the defendant lawyer exercising extra power given by the magistrate to insult and make threat right to my face with the presence of the magistrate pretend not to be seeing.

The Defendant lawyer is coaching his client to lie so that they can default me money whereas the lady is married to another man with a baby. (out of judicial ethics).

The Defendant (Nazi) and his lawyer are having an affair with the blessing of the magistrate, which compromises the case.”

27. In this case, the alleged defamatory content is said to have been published by serving or sending the letter to the Office of the Director of Public Prosecutions and also annexing it to a supplementary affidavit filed in the Children’s Court.

28. In the case of *John Ward v Standard Limited* [2006] eKLR the court stated as follows: -

“A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -

The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false.”

29. Subsequently, the Court of Appeal in *Nation Media Group & Another vs. Hon. Chirau Mwakwere – Civil Appeal No. 224 of 2010* stated that a Claimant in a defamation suit ought to principally establish in no particular order:

- i. The existence of a defamatory statement;
- ii. The Defendant has published or caused the publication of the defamatory statement;
- iii. The publication refers to the Claimant.



30. In the Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined as follows:

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

31. Whereas the position of the plaintiff is that the words were defamatory, referred to the plaintiff and were published, the defendants' case is that the words constituted an opinion without any malice and were not defamatory. On the face of the words, the Plaintiff's case is that anyone who read the caption, would understand the letter to mean as alleged against the plaintiff as an advocate of the High Court.

32. As was held in the case of *Onama v Uganda Argus Ltd* [1969] EA 92, the Learned Judges of the Eastern African Court of Appeal set out inter alia that:

“In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to general public, but also to all those who have greater or special knowledge of the subject matter.....”

33. The letter was addressed to the Director of Public Prosecution's office- Mombasa and copied to the Presiding Magistrate, Tononoka Children's Court and to Apollo Muinde & Ngonze Advocates and Kiume Kioko & Co. Advocates. In my evaluation of the words, they were capable of portraying the Plaintiff herein as lacking in morals and professionalism by engaging in extra-marital affairs with his client and also colluding with the judicial officer to compromise justice.

34. However, the question is whether :-

- a. the words as pleaded were published and
- b. were also malicious.

35. The letter was shared with the advocates for the parties, the DPP and the judicial officer in relation to the children's court case. The letter to the DPP was in a nature of a complaint to a public office, in relation to what the defendant indicated was with the court. The director of public prosecution is established under Article 157 of *the Constitution*. The said Article provides as follows: -

“ 157.

- (1) There is established the office of Director of Public Prosecutions.
- (2) ...
- (3)
- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.”

36. The powers given to the Director of Public Prosecutions, means that he can receive information from all and sundry and thereafter direct the Inspector General of Police to investigate. It therefore



- means that a letter directed at The Director of Public Prosecutions cannot amount to defamation. It is expected that the director works with other officers. Any information received by the Director of Public Prosecutions or his officers in a manner suggesting a complaint cannot be said to be defamatory.
37. It does not matter that the complaint was baseless. The Director of Public Prosecutions deals with all kinds of criminal conduct and spurious reports. He is not expected to hold the subjects or accused persons in any other way other than persons of interest against whom investigations can be ordered.
38. This was a complaint of misconduct in a case in court, Children Case No. 120 of 2016. The parties copied had an interest in the case. These were the court itself, the Chief Magistrate Mombasa, the advocates for both parties in the children's case. The communication to the plaintiff's advocates was serving the opposite party and in effect service to the plaintiff. It does not amount to defamation. The letter did not leave the hallowed sanctum of the court and the Director of Public Prosecutions. The person who received the information from the office of the Director of Public Prosecution did not receive it in the course of publication by the defendant but from the plaintiff. The defendant cannot be liable for the re-publication by the plaintiff.
39. In any case the witness, PW3 did not believe the allegations. It is my considered view that the allegations were more of insults than defamatory.
40. Communication to the defendant's advocate is called instructions. The communication to court was first as part of hearing and secondly a complaint against the court. The court was entitled to be informed of the complaint made in the case.
41. The matters contained in an affidavit filed in court are absolutely protected. A person cannot be sued for pleadings and documents filed in court.
42. The question of malice is next. Did the Plaintiff prove malice? Malice in defamation is a term of art. It is not the same as bad faith. It should be seen from the recklessness with which a defendant spreads or publishes defamatory material. In this case only parties to the case and the courts were copied. Sometimes parties get excited and copy all and sundry. In this case, no unnecessary party received the communication.
43. The circumstances of the case do not show malice. The said letter was also shared with the plaintiff and the plaintiff did not receive contents of the letter from third parties. As was held in the case of *Phineas Nyagah v Gilbert Imanyara* [2013] eKR is relevant where the court held:
- “Malice here does not necessary mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice maybe found in the publication itself if the language used is utterly beyond or disproportionate to the facts.
-malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely.”
44. The pleadings and evidence relied on by the Plaintiff does not show publication and malice. The words were an opinion and emanated from the children court matter. On the face of the words, it appears the Defendant misbehaved in relation to children court. This is however not an issue before this court.



45. Having found no publication and malice on the part of the Defendant, I equally find no basis to award general damages. As to the General Damages for defamation, the Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 stated that:
- “...General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it...”
46. Assessment of damages is exercise in discretion. In the case of *Butler –V- Butler* (1984) KLR 225 the court held: -
- “The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, and in the result arrived at a wrong decision.”
47. Nevertheless, the court is duty bound to assess damages even when the suit is dismissed. In *Lei Masaku versus Kalpama Builders Ltd* [2014] eKLR, the court noted as follows: -
- “It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.”
48. The letter though not published has limited circulation within privileged circles. If this was defamatory, then it could have effect but limited. There was no republication. The matters alleged, were serious. The court could have awarded Ksh. 500,000/=. This takes cognizance of the fact that the Plaintiff is an advocate of the High Court.
49. The nature of damages for this kind of cases fall into a category known as damages per se, in that the false statements which law presumes to be harmful to a person's reputation and as a result there is no need to prove damages. There are four heads falling under these kind of defamation: -
- a. Defamation regarding commission of a crime or criminal conduct.
 - b. Defamation regarding a person's profession, calling, business, or trade.
 - c. Defamation about a contagious, infectious, or repugnant disease or condition.
 - d. Defamation on sexual misconduct or against chastity.
52. The case fell under defamation regarding a person's profession, calling, business, or trade. There is no need to prove damages. However, without proof of actual damages, the court will award nominal damages. There was evidence that the plaintiff and defendant were involved in a physical scuffle. The defendant reported while the plaintiff did not find any need to report. I watched the demeanor of both parties in court. The defendant, came out as truthful and has a lot of candour. The plaintiff on the other hand left a lot unanswered. The facts that were denied by the defendant remained unchallenged.



The plaintiff on the other hand denied certain occurrences and used the same in his case, including the attendance in court on the material day when they had an altercation in court.

52. The Halsbury's Laws of England, Third Edition vol. II, defines nominal damages as follows:

“388. 388. Where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal...”

52. In *Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya* [2015] eKLR, The court stated as follows; -

“As for nominal damages, in the decision in *Gibbons versus West Minister Bank Limited* [1939]3ALLER 577, It was held inter alia that

“The plaintiff not being a trader was entitled only to nominal damages in respect of the wrongful dishonor of a cheque by her bank.”

Grabbe JA. in the case of *Kanji Naran Patel versus Noor Essa and another* [1965]EA484 at page 487 paragraph G-I had this to say:-

“Nominal damage is a technical phrase which means that you have negated anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damage does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages but may also be represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances and it certainly does not in the smallest degree suggest that because they are small, they are necessarily nominal damages.

In the earlier case of *Beumont versus Great head* [1846] 2C.B. 494, Maule, J. [1846] 2C.B. at P.499) spoke of nominal damages as a sum that may be spoken of but that has not existence in point of quantity” and as a “mere peg on which to hang costs.”

52. Given the circumstances, it is difficult to see the loss, other than nominal damages. It is expected that the plaintiff could have acted with more circumspection. It is always warned against wallowing in a cesspool where a thousand pigs have wallowed. The defendant took peremptory strides, reporting and complaining against physical attack by the plaintiff.

13. The plaintiff did not find it necessary to make any report, if he was attacked in court. However, what happened could only amount to affray. I am unable to understand why the police eschewed the case necessitating a letter to the Director of Public Prosecutions.



13. The evidence of PW2 was comic. How will a secretary know who the boss sleeps with? In the English case *Edgington v. Fitzmaurice* (1885) 29 Ch D 459, the Court of Appeal, Bowen LJ once wondered loudly as doth: -

..... but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else?

13. She was not aware of the letter or made aware by the defendant. It shows even the inner sanctum of the Plaintiff's circle did not get wind of this. In the circumstances, a nominal award of Ksh. 100,000/= could have sufficed.

13. The suit is however, not merited. It is consequently dismissed. Costs follow the event. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

“

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation....

...Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

52. Costs are due even where the success is minor. I dismiss the suit with costs. However, the defendant was acting in person. He shall have disbursements of Kshs. 35,000/= as he is not entitled to instruction fees.

Determination

52. In the upshot, I make the following orders:
- i. The suit is dismissed.
 - ii. The defendant shall have the costs. However, given that the defendant was acting in person, I award disbursements of Kshs. 35,000/= payable in 30 days, in default execution do issue.
 - iii. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE



JUDGE

In the presence of: -

Mr. Ngonze the Plaintiff

No appearance for the Defendant

Court Assistant – Jedidah

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