Mungatana v Standard Limited (Civil Suit 1318 of 2005)
[2024] KEHC 15574 (KLR) (Civ) (5 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15574 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 1318 OF 2005

CW MEOLI, J

DECEMBER 5, 2024

BETWEEN

HON DANSON MUNGATANA ..... PLAINTIFF

AND

THE STANDARD LIMITED ..... DEFENDANT

JUDGMENT

1. On 02.11.2005 Hon. Danson B. Mungatana, (hereafter the Plaintiff) filed this suit which is founded on the tort of defamation, against The Standard Limited (hereafter the Defendant). The Plaintiff seeks inter alia general damages for libel, exemplary damages, punitive and aggravated damages, interest and costs of the suit.

2. The Plaintiff averred that at the time of filing suit he was the Member of Parliament (MP) for Garsen Constituency, the Assistant Minister Land and Housing, an advocate of the High Court of Kenya and the founding member of a political pressure group known as the Third Progressive Force (TPF). That between 20.05.2005 and 18.08.2005 the Defendant published statements and words in the "Palaver" Column of "The Standard" newspaper, that were defamatory of the Plaintiff. It was further averred that the scandalous, scurrilous and malicious allegations contained in the said publication by the Defendant against him were factually wrong and a gross misrepresentation of the truth, had the effect of demeaning him, were derogatory, disparaging and libelous of his character and reputation. That by reason of publication of the said words which were false, malicious, unwarranted, published out of malevolence, spite, malice and ill-will, the Plaintiff was severely injured in his character, personal credit and reputation. Consequently, his reputation was gravely lowered in the estimation of right-thinking members of the society generally, his fellow MP's, rank and file in government, constituents, friends and colleges in the legal fraternity therefore has been subject to public ridicule, scandal, odium and contempt, for which damages were sought.

3. On 13.12.2005, the Defendant filed a statement of defence denying the key averments in the plaint. In the alternative, the Defendant averred that in so far as the words in the publications consists of facts that were true in substance and in fact, and in so far as they consist of facts that they were true in substance and in fact, and in so far as they consist of opinions, they were fair comment on a matter of public interest, namely that the public has a right to know of any transactions involving parliamentarians and political leaders.

4. The foregoing formed the state of pleadings prior to hearing of the suit.

5. During the trial, the Plaintiff testified as PW1. He began by identifying himself as an Advocate of the High Court of Kenya and the Senator of Tana River County. He proceeded to adopt his witness statement dated 26.10.2023 as his evidence-in-chief and produced the documents appearing in his list of documents dated 22.11.2011 as they appear, as PExh.1 – 7. It was his evidence that the gist of his complaint against the Defendant, is that the latter used its column called "Palaver" to ridicule him, Kalembe Ndile and Kivutha Kibwana in their positions as politicians, which ridicule was intended to serve extraneous political objectives or to boost their circulation. Further that the series of articles intended to create a narrative that negatively impacted the persons named and to enable the Defendant sell its Newspapers while damaging his reputation as a politician.

6. During cross-examination, he stated that the fact of the material being defamatory was not just based on his view, given that many of his constituents having read the article raised it with him. He confirmed not having procured any witness in that regard. It was his evidence that the publication of 20.05.2005 does not mention the name of any person whereas he could not recall if by the said date the TPF had organized any rallies, but did so thereafter. He stated that the TPF was not a registered party or association, but a movement intended to become a political party eventually. He maintained that the movement was visible in the public arena as the members appeared in the media and publicized its agenda. He affirmed that the movement did not translate into a political party meanwhile that TPF ceased to exist after the 2007 General Elections.

7. It was his evidence that the TPF has not sued in regard to the defamatory articles. However, his name was expressly mentioned in the article relating to the TPF. He stated that the movement's agenda at the time was to ensure that the country was not split between the two (2) key political parties in contention. That the purpose was achieved by voicing the sentiments that there should be no infighting in government by advocating for peace. However confirming that the said infighting ended after the 2007 General Elections. He went on to state that, at the time, he had no intention of joining LDP which was the opposition party and that it was untrue that he advised people in his constituency to arrest anyone joining LDP or the opposition. He however confirmed advising his constituents, even to date, not to join any opposition party because of the marginalized state of Tana River County. That at the time, the said County faced challenges arising from elephant attacks on people and their crops and to get Kenya Wildlife Service (KWS) to act, he raised the issue often in public but denied he incited constituents to kill elephants. He confirmed having been re-elected as MP for Garsen Constituency and that as of the date of the trial, he was serving as the Senator of Tana River County. It was his evidence that the article did not affect his election and that his complaint was that the publication demeaned him.

8. In re-examination, he asserted being a founding member and leader of the TPF which existed at the time of publication in issue. He stated that his images were included in the publication and his reputation was negatively impacted because of the publication.

9. On the part of the Defendant, the Maureen Nasike testified as DW1. She identified herself as a legal officer with the Defendant and proceeded to adopt her witness statement dated 13.03.2024 as her

evidence-in-chief. In cross-examination, she confirmed the publication and that at the time the Plaintiff was the MP for Garsen Constituency. She asserted that the statements in the publication were factual and made in good faith. Explaining that the Defendant usually obtained comments on subjects of their articles before publication and that the same was done in respect of the impugned publications. However, she did not tender any such before Court. On re-examination, she maintained that the publication was fair comment on a matter of public interest because the Plaintiff being a public officer was the subject of public scrutiny and denied that the article was published maliciously.

10. At the close of the hearing, directions were taken on filing of submissions. Only the Defendant complied, when the matter came up for compliance. The Plaintiff on his part filed an application dated 22.10.2024 seeking principally to suspend the filing of final submission and that the Court be pleased to re-open his case limited only to adducing additional testimony of one witness. The Court will address the Plaintiff's motion later in this judgment.

11. That said, the Defendant's submissions addressed the twin issues of liability and damages. Addressing the Court on whether the publication was defamatory of the Plaintiff, counsel anchored his submissions on the decisions in Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR Musikari Kombo v Royal Media Services Limited [2018] eKLR, Wycliffe A. Swanya v Toyota East Africa Ltd & Another [2009] eKLR and S M W vs. Z W M [2015] eKLR. To support the submission that the test whether an article is defamatory is a subjective one. It does not depend on the intention of the publisher but rather on how a reasonable person reading the statement would perceive it. That an examination of the words used in the Defendant's publication, would not yield a defamatory sense because they were factual and true.

12. Further a reasonable person would recognize that the words were merely opinions coupled with political satire relevant to the publication, as routinely expressed by the newspaper outlet on various public interest topics pertaining to public figures. Particularly, it was an opinion that the leaders of the TPF pose no threat to the late President Kibaki's political ambitions. While calling to aid the English decision in Fraser v Evans & Another [1969] 1 ALL ER 8 and Canadian decision in WIC Radio Ltd v Simpson [2008] SCC 40 cited with approval in Jacob Mwanto Wangora v Hezron Mwando Kirorio [2017] eKLR it was posited that the publication by the Defendant was based on and constituted inference of fact with no intention of malice.

13. On whether the publication was malicious, counsel cited the decision in Phinehas Nyagah v Gitobu Imanyara [2013] eKLR to submit that in the instant matter, there is no evidence to suggest that the Defendant acted out of spite or ill-will towards Plaintiff. That the relationship between the parties prior to and after the publication did not indicate any animosity or ulterior motive that would support a finding of malice, as confirmed by the Plaintiff during cross-examination. That a reasonable inquiry into the facts was conducted before publishing the statements whereas the opinions expressed were based on observable events and public information, demonstrating a responsible approach to reporting. Further, there was no indication that the Defendant acted recklessly or disregarded the truth. It was further argued that it was insufficient for the Plaintiff to merely assert that the publication was malicious, without evidence proving that the statements, based on their language construction, were inaccurate and that the information published lacked veracity. The provisions of Section 107 of the *Evidence Act* and the decision in Samuel Ndung'u Mukunya v Nation Media Group Limited & another [2015] eKLR were called to aid in that regard. Regarding whether the publication was intended to lower the Plaintiff's estimation in the eyes of the right-thinking members of the society, the Defendant summarily submitted that the Plaintiff did not adduce evidence to demonstrate the manner in which the publication has tainted his image or the manner in which he has suffered harm. Therefore, the

Plaintiff failed to establish the requisite ingredients to sustain a claim of defamation as against the Defendant.

14. On quantum, counsel argued that the Plaintiff has failed to properly plead the claim for defamation as required under Order 2 rule 7(1) of the Civil Procedure Rules (CPR) and as such was not entitled to general damages for libel. While placing reliance on the decisions in Luisa Marigu Mugo v Nguyo Joseph Kingori & another [2019] eKLR and S M W (supra) counsel posited that the Plaintiff has failed to advance his claim and that any orders as to damages would amount to unjust enrichment. Especially as no proof of any loss occasioned by the actions of the Defendant was tendered by the Plaintiff. Concerning aggravated and exemplary damages, counsel cited the decisions in John v MGN [1996] ALL ER as quoted by the Court of Appeal in Riches v News Group Newspapers Ltd [1985] All ER and Mikidadi v Khaigan & Another [2004] eKLR as cited with approval in Sankale Ole Kantai v Nyamodi Ochieng Nyamodi & another [2012] eKLR to submit that the Plaintiff has made no effort to prove that the Defendant has enjoyed any material advantage and is thus not entitled to an order for exemplary damages. In conclusion, it was submitted that the Defendant having made the publication as fair comment on occasion of truth and justification, and the Plaintiff having failed to prove malice on the Defendant's part, the Plaintiff had not justified an award for aggravated or exemplary damages and the same should be dismissed

15. As earlier noted, when the matter came up for compliance aimed at confirming filing of submissions as earlier directed by the court, the Plaintiff's application dated 22.10.2024 was on already on record. The motion was expressed to be brought inter alia pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA). The grounds on the face of the motion were amplified in the supporting affidavit sworn by the Plaintiff. The gist thereof being that he had just learnt that the matter was coming up for mention to confirm filing of submissions and he wished to adduce additional evidence by calling one (1) witness. That despite his instructions and statement to erstwhile counsel, he had since established that said counsel failed to file and adduce the additional evidence which was crucial to the determination of his case on merit. He goes on to depose that he would be highly prejudiced should the opportunity to adduce additional evidence be disallowed. Stating that he ought not to be prejudiced by mistake of erstwhile counsel and that the Defendant would not be prejudiced if the motion was allowed in the interest of justice.

16. The Defendant opposed the Plaintiff's motion by way of grounds of opposition dated 28.10.2024.

17. The motion was canvassed orally before the Court. Counsel for the Plaintiff reiterated the affidavit material in support of the motion. In urging the Court to find that mistakes of counsel are common and in deserving cases ought to be overlooked by Court, counsel relied on the decisions in Joseph Wekesa v Hilds Wanjiru [2013] eKLR and Sheikh Hauliers v Highland Hauliers [1998] eKLR. Counsel asserted that no prejudice will be suffered by the Defendant as they will have an opportunity to cross-examine the witness and emphasizing the Plaintiff's readiness to file the witness statement and expedite the hearing given the age of the suit. It was further pointed out that the Plaintiff had changed counsel severally and that it is only fair for the Plaintiff's right to fair hearing under Article 50 of *the Constitution* to be given effect. Citing the decision in Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd [2015] eKLR, counsel submitted that this Court has discretion to allow re-opening of a case except that it ought not prejudice the opposing party which is unlikely here.

18. On the part of the Defendant, counsel relied in toto, on the grounds in opposition filed in response to the Plaintiff's motion. He pointed to the age of the matter and late timing of the Plaintiff's motion after the defence case was closed and submissions filed. Equally relying on Samuel Kiti Lewa (supra), counsel contended that allowing the motion would obviously prejudice the Defendant. Besides, the Plaintiff has not demonstrated that the evidence was not previously available to him and or evinced

alleged instructions to erstwhile counsel with regard to calling a second witness. Citing the decision in Kagwira Mutwiri Kioga & another v Standard Chartered Limited & 3 others [2015] eKLR counsel posited that in the absence of a character witness there is no reason to re-open the case. He urged the court to find that litigation ought to come to an end.

19. In a brief rejoinder, Counsel for the Plaintiff submitted that this is a final opportunity for the Plaintiff so that his case is determined on merit pursuant to Article 50 of *the Constitution*.

20. In an extempore ruling, this Court not being persuaded of its merits dismissed the Plaintiff's motion while reserving reasons to be given in the judgment as follows. The Plaintiff's motion is properly predicated on Section 3A of the CPA, in light of the relief being sought, namely, re-opening of the Plaintiff's case limited to only adducing additional evidence of one (1) witness. As to the purport of Section 3A, the same was reasonably addressed by Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR.

21. Regarding the applicable principles, the Court of Appeal in *Wadhwa (As Legal Representative of the Estate of Deshpal Omprakash Wadhwa) v Mohamed & 4 others (Civil Appeal 33 & 148 of 2019* (Consolidated)) [2022] KECA 25 (KLR) cited with approval the decision of Kasango, J. in the case of Samuel Kiti Lewa Vs Housing Finance Co. Of Kenya Ltd [2015] eKLR. The Court of Appeal stated that: -

> "……Kasango, J. cited a Uganda High Court, Commercial Division in the case of Simba Telecom –V-Karuhanga & Anor (2014) UGHC 98 which had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case Smith –versus- New South Wales [1992] HCA 36; [1992] 176 CLR 256 where it was held: "If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."

41.The Ugandan Court in the case Simba Telecom (supra) held thus:

"I agree with the holding in the case of Smith Versus South Wales Bar Association [1992] 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not."

22. In the case of Raila Odinga & 5 others v IEBC & 3 other [2013] eKLR the Supreme Court stated as follows on the correct legal position where the Court considers whether to admit or reject additional evidence:

> " [T]he parties have a duty to ensure they comply with their respective time lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the Court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended

to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence."

23. Further, this Court concurs with the rendition of Mutungi, J. in Odoyo Osodo v Rael Obara Ojuok & 4 others [2017] eKLR wherein he stated that: -

> " [T]he Court's discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought."

24. There is no dearth of decisions relating to re-opening of a cases and or adducing of additional evidence. Nevertheless, it is trite that granting of such a motion is discretionary and it is relevant to inquire into why the re-opening is sought, the delay (if any) and the reasons additional evidence is sought to be introduced. Here, the Plaintiff stakes his plea to re-open the matter and adduce additional evidence on mistake of erstwhile counsel. However, upon a review of the affidavit in support of the motion, there is no evidence in respect of the alleged instructions to erstwhile counsel to present the said additional witness statement in respect of the matter. The Plaintiff has further not exhibited in his affidavit the statement of the said additional witness to enable the Court to prima facie interrogate its relevance to the matter. Since 30.10.2023 when directions for the prosecution of the matter within six (6) months were issued and 14.03.2024 when the Plaintiff's case was eventually heard, the latter had ample time to seek leave to present the said additional witness evidence via a written statement. In any event in a suit filed in 2005 and heard almost twenty (20) years later, it appears unfathomable that the Plaintiff only came to the realization of the said additional witness evidence so late in the day as he claims.

25. Thus, the Plaintiff's motion, coming after the trial and filing of the Defendant's submissions appears a mischievous attempt to seal gaps in his case, to the prejudice of the Defendant, who has already tendered his evidence and filed submissions. Further, it has not been demonstrated that the Plaintiff despite diligent efforts was unable to procure the said additional evidence or witness prior to hearing of his case. It may well be that the Defendant's submissions have jolted the Plaintiff into this last ditch action rather than the alleged mistake of erstwhile counsel, itself unproven. Therefore, in the circumstances of this case, in granting the Plaintiff's motion the court would effectively be opening the door to allow the Plaintiff to steal a march on the Defendant, thus violating the Defendant's equal right to a fair and expeditious hearing. Hence, the reason the court's decision declining to exercise its discretion in favour of the Plaintiff by allowing his motion.

26. Returning to the main issues for determination in the suit, the Court has considered the evidence on record and Defendant's submissions. The key issue for determination is whether the Plaintiff has proved his case on a balance of probabilities and if so, the appropriate awardable damages. The Court of Appeal in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, addressed itself as follows in this regard: -

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and

determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

27. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated concerning the burden that: -

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

28. As earlier noted, the Plaintiff's suit was founded on the tort of defamation, and here it is apposite to state the rationale behind the law of defamation. In that regard, the Court of Appeal had this to say in Musikari Kombo v Royal Media Services Limited [2018] eKLR: -

> " The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:
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> "The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..."

29. Actions founded on the tort of defamation often reveal the tension between private interest and public interest. Article 33(1) of *the Constitution* guarantees every person's right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-Article (3) states that "In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others". Article 34 guarantees the freedom of the media while Articles 25 and Articles 31 protect the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions of the *Defamation Act*. Contemplating these competing rights Lord Denning MR stated in Fraser (supra); -

> " The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed." Gatley on Libel and Slander 6th Edn. states that:-

"A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another".

30. In Selina Patani & Another vs Dhiranji V. Patani [2019] eKLR the Court of Appeal held that the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that: -

> " In rehashing, we note the ingredients of defamation were summarized in the case of *John Ward v Standard Ltd. HCC 1062 of 2005* as follows:

i. The statement must be defamatory.

ii. The statement must refer to the plaintiff.

iii. The statement must be published by the defendant.

iv. The statement must be false."

31. Here, the impugned publications were published on 20.05.2005, 27.05.2005, 14.06.2005, 20.06.2002, 21.06.2005, 13.07.2005 and 18.08.2005. There is no dispute in this case regarding ingredients (ii) and (iii) above as Defendant readily admitted to publishing the articles in question in its statement of defence, and appeared to concede to the issues during the trial. The key issues in dispute are whether the articles as published are defamatory and false and or whether the defence of truth or fair comment as per Section 14 and 15 of the *Defamation Act* are available to the Defendant. This Court proposes to deal with these issues concurrently.

32. It is common ground that as of the dates of publication, the Plaintiff was a MP for Garsen Constituency, the Assistant Minister Land and Housing, an advocate of the High Court of Kenya and the founding member of a political pressure group known as the Third Progressive Force (TPF). And that the Defendant published a series of articles in "The Standard" newspaper under the "Palaver" column between 20.05.2005 and 13.08.2005 which the Plaintiff viewed was disparaging of his character and person.

33. I find it useful at this stage to set out in extenso the contents of the publications complained of. The printed version published on 20.05.2005 read as follows: -

> " The Progressive Third Forces. Where is the plebeian unit these days? No longer do they hold rallies in which they used to fulminate against the Government, and they do not even call themselves by this name these days. Palaver predicted that this is a unit that has a cancerous quality. Denied medication of attention and presidential responses, the cancer might be in the terminal stages now and it will eventually eat the entire unit up. This is the fate that meets units that sprout out of desperation and political diarrhea" (sic)

34. The article published on 27.05.2005, read as follows: -

> " The now moribund Third Progressive Force of Danson Mungatana, Koigi Wamwere and Kivutha Kibwana never ceases to amaze Kenyans. They still struggle to understand what it really was. But one reader sums it up in a rather interesting way. He says that it should be called Third Retrogressive False Start. Mhh!" (sic)

35. The article published on 14.06.2005, read as follows: -

> " There they go again. After long days if silence the despicable Third Progressive Force has awoken up to take refuge in the blankets of dreams, once again. After failing to leave any impression whatsoever, the force now claims that it will transform itself into a political party in 2007. Kiogi Wamwere and Danson Mungatana, the TPF's dim lights are warning the President to bruise himself for a bruising political battle if he does not change his leadership style. If the read that, he must have had a hearty laugh at their expense. These people threaten like dockside bullies and stomp like wounded buffaloes. They are all sound and fury that signifies nothing. They certainly will meet the same fate that they have met all the days if their shaky existence...they will be serially ignored by Kibaki" (sic)

36. The article published on 20.06.2005, read as follows: -

> " Danson Mugantana, he of the Third Retrogressive (oops, Progressive) Third Force was reported in one of the daily newspapers on Friday as tell constituents to arrest and castrate anybody who is spreading rumors that he has defected to the Liberal Democratic Party. Some leaders!" (sic)

37. The article published on 21.06.2005, read as follows: -

> " So Charity Ngilu aka Mama Rainbow, wants to be the Country's prime minister when a new constitution is put in place? Quite good thought. So serious is she in this that she has sought the support of the Third Retrogressive (oops, progressive) Force of the Ndiles, Kibwanas, Wamweres and Mungatanas. It is curious how some people identify the destination they want to get to but have serious problems choosing the vehicle to take them there. Some, like Ngilu jump into wheelbarrows to take them on a 6,000-kilometer journey" (sic)

38. The article published on 13.07.2005, read as follows: -

> " Danson Mungatana of the third retrogressive force is back; this time he has a quarrel with elephants. He wants the Kenya Wildlife Services to kill stray elephants and has actually asked his people to kill those that attack them. (Palaver remembers that not too long ago, Mungatana was reported as asking people to castrate those spreading rumors that he would be decamping to LDP) KWS says it is going to transfer the elephants but Mungatana wonders what kind of (religious) conversion a transferred elephant undergoes to prevent it from attacking people again. A progressive question, one might say" (sic)

39. And, finally the article published on 18.08.2005, read as follows: -

> " Whatever happened to the Third Retrogressive (oops, progressive) Force of Kivutha Kibwana, Koigo wa Wamwere, Kalembe Ndile and Danson Mungatana? Palaver guesses the answer. Some loose ensembles like these ones thrive on attention. Starve them of it and their leaves and branches start falling off one by one. When Kibaki failed to recognize the group by answering to any of their wild claims, they quickly started reversing into oblivion. This is what happens to noisemakers. They can only exist when there is someone to lend them an ear" (sic)

40. On the question whether the words referring to the Plaintiff were defamatory, the test to be applied is that spelt out in the case of the Onama v Uganda Argus Ltd (1969) EA by the East African Court of Appeal was that:

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

41. The Court stated in Elizabeth Wanjiku Muchira v Standard Ltd [2011] eKLR that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the "probabilities of the case and upon the 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 not believed by the person to whom they are published."-Clerks & Lindsell on Tort 17th Edition 1995-page 1018."

42. The respective printed articles published between 20.05.2005 and 18.08.2005 appear ex facie to be some form of political commentary laced with satire, as argued by the Defendant. The articles employed words and phrases such as "The now moribund Third Progressive Force", "They are all sound and fury that signifies nothing", "it should be called Third Retrogressive False Start" "the Third Retrogressive (oops, progressive) Force" "arrest and castrate anybody who is spreading rumors that he has defected to the Liberal Democratic Party", "kill stray elephants and has actually asked his people to kill those that attack them" and "Some loose ensembles like these ones thrive on attention".

43. The gist of the articles appears comprise of barbs thrown to critic members of TPF or the TPF itself, which the Plaintiff admitted was not a registered party or association but a movement intended to become a political party. Nevertheless, the commentary by the author of the said articles equally employs words and phrases such as "arrest and castrate" and "kill stray elephants ....that attack them" which the Plaintiff views as defamatory in their natural and ordinary meaning and or by innuendo as pleaded in paragraph 7 of the plaint.

44. In Halsbury's Laws of England 4th Edition Vol. 28 paragraph *10* - a defamatory statement is defined as follows:

> " ....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".
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> See also the Court of Appeal definition of a defamatory statement in SMW (supra).

45. The Court of Appeal in Musikari Kombo (supra) stated that: -

> " The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined:
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> "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."

46. As rightly contended by the Defendant, the Plaintiff did not adduced evidence to demonstrate that the words in the publications were defamatory and had the effect of lowering his reputation in the eyes of right thinking members of society, as pleaded in his plaint. The onus was on the Plaintiff to demonstrate that an ordinary reasonable person who knew the Plaintiff before or as of the date of publication of the articles would upon reading the said publication, view the Plaintiff differently. Or in other words, to demonstrate that the articles, whether believed by such reader or not, had the tendency to lower the reputation of the Plaintiff in the reader's eyes. As stated in Hezekiel Oira v Standard Limited & Another [2016] eKLR the successful claimant in a defamation cause must tender evidence not only that the publication complained of bore falsehoods, but also that the published words tended to lower his reputation, causing right thinking members of society to shun or avoid him or to treat him with contempt. Equally, in the court's view, the Plaintiff's evidence did not seriously address the false nature of the articles.

47. That said, the only witness who testified in support of the Plaintiff's case was the Plaintiff himself. Defamation involves imputations that tend to cause injury to the reputation of a person. Thus, a successful plaintiff must demonstrate the injury to his reputation or standing as a component of the ingredients of defamation, and not merely rely on his own estimation of himself and his own perceptions regarding the effect of the alleged defamatory statements to that estimation.

48. In SMW (supra), the Court of Appeal observed that: -

> " 15. Black's Law Dictionary 8th Edition defines defamation as the act of harming the reputation of another by making a false statement to a third person. (emphasis added). 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: see Gatley on Libel and Slander (10th edition). A plaintiff in a defamation case must prove that the words were spoken /written; that those words refer to him/her; that those words are false; that the words are defamatory or libelous and that he/she suffered injury to reputation as a result. ...

19. The trial judge had considered the testimony of witnesses with a view to assessing their credibility and at no point did any of the Appellant's witnesses at trial consider the appellant to have been defamed by the contents of the letter. The witnesses who testified at trial constitute and pass the ordinary reasonable man test as they were not only neighbours but also people known to the disputants. There was no evidence of any public ridicule, hatred or even shunning experienced by the appellant.

    The appellant had only testified at the trial court that he felt shy to interact with some of his friends in tea farming. The appellant appears to have had an apprehension of defamation on himself ostensibly based on how he himself considered his standing in the society. That is not what defamation is in law. The appellant himself further testified before the trial court that nothing had changed in his dairy farming business. Moreover, despite being a tea farmer in Gatundu, he had since relocated to his Karen home at the time of these proceedings where the chances of any possible defamation of him became slimmer based on the existing solitary and liberal lifestyle adopted by urbanites. As elucidated earlier, the test to be applied is that of the reasonable ordinary man, not the appellant or the respondent..." (Emphasis added).

49. The above holding was reiterated in Patani's Case (supra), where the same Court stated that: -

> " 26. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury, or damage suffered to their reputation.

27. The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellant's character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellant's reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation. (Emphasis added)

See also Daniel N. Ngunia v K.G.G.C.U. Limited (2000) eKLR and Hezekiel Oira v Standard Limited & Another (2016) eKLR.

50. Similarly, in this case, the Plaintiff did not tender evidence through other witnesses that the words in the article complained of caused or had the tendency to cause injury to his reputation by way of public ridicule or even being shunned, or that it tended to lower his esteem in the eyes of right-thinking members of society. This despite averments in his pleadings that his estimation before right-thinking members of the society generally, his fellow MP's, rank and file in government, constituents, friends and colleges in the legal fraternity was lowered. While the publications seem to be patently unflattering of the persons named therein, the test to be applied is that of the reasonable ordinary man; it is not the Plaintiff's view of himself that matters, as stated in Musikari Kombo (supra).

51. In the absence of proof of the defamatory, never mind the false nature, of the alleged offensive publications, it is difficult to see how a claim founded on the tort of defamation could succeed, whether or not the defences of truth or fair comment raised by the Defendant pursuant to Section 14 and 15 of the *Defamation Act* were sustainable.

52. As held in the case of Wareham t/a A.F. Wareham & Others (supra), if the evidence tendered by a plaintiff does not support the pleaded facts, the plaintiff being the party bearing the burden of proof should fail. See also Karugi & Another v Kabiya & 3 Others (supra). In the result, the Court finds that the Plaintiff has failed to prove all the necessary ingredients of defamation to the required standard. The Plaintiff's suit must fail and is hereby dismissed with costs to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 5TH DAY OF DECEMBER 2024.

C. MEOLI

JUDGE

In the presence of

For the Plaintiff: N/A

For the Defendant: Mr. Okiring

C/A: Erick