



REPUBLIC OF KENYA



**Nation Media Group Limited v Njuru (Civil Appeal E132 of 2021)  
[2023] KEHC 225 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 225 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E132 OF 2021  
JM NGUGI, J  
JANUARY 26, 2023**

**BETWEEN**

**NATION MEDIA GROUP LIMITED ..... APPLICANT**

**AND**

**JOSEPH MUYA NJURU ALIAS JOSEPH MUYA ..... RESPONDENT**

**RULING**

1. The respondent instituted a suit against the applicant before the lower court seeking damages for defamation for various articles published by the applicant. In a Judgment dated November 5, 2021, the learned trial magistrate found in favour of the respondent and awarded him damages of Kshs. 6,000,000, costs of the suit and interest.
2. The applicant was dissatisfied with the judgment and timeously preferred an appeal vide its memorandum of appeal dated November 25, 2021. The applicant has now filed the instant application dated July 20, 2022 (“the application”). The Application seeks the following orders:
  1. Spent
  2. This honourable court be pleased to certify that the application (sic) herein raises substantial questions of law and forthwith refer the case to her Lordship (sic) the Chief Justice for appointment of a three (3) judge bench pursuant to article 165(4) of *the Constitution*.
  3. The honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders if granted.
  4. The cost of the application be in the cause.
3. The application is supported by the grounds on the face of it and the affidavit of John Gatenjwa Kagucia- Advocate. The reasons he gives for seeking the empanelment of a 3-Judge Bench to hear the applicant’s appeal are that he believes that it raises substantial questions of law with serious legal



ramifications of public interest. Counsel contends that the matter is complex and/or difficult thus raising substantial questions of law concerning the laws of defamation, worthy of reference for the setting up of a three-judge bench.

4. He further contends that the issues raised in the application are of general public importance as they concern the application by the courts, of laws relating to the tort of defamation viewed against the constitutional right of freedom of expression.
5. According to him, this is an issue concerning the delicate balance between a citizen's right to privacy, protection from attacks on his honour and reputation and the right to enjoyment of freedom of expression and the right to transmit and receive information. He considers that the matter is grave from a societal and legal standpoint considering what he terms as "hefty awards against the media and the resultant threat to media sustainability in light of its duty to educate and inform."
6. Counsel contends that the matter indirectly affects substantial rights of parties and transcends the circumstances of the case and it is necessary to strictly comply with the relevant constitutional provisions, statutory provisions and universally accepted standards regarding laws of defamation.
7. It is also his contention that the application calls for discussion for affirmation of sound law on defamation in recognition of the fact that while the court should abide by the doctrine of precedent, it is nevertheless in consideration of significant weight to be free to depart from previous decisions.
8. He contends that general caselaw presents contradictions regarding proof of defamation in particular, the essence of publication and principles to be applied and that there needs to be clarity on the principles governing the award of aggravated damages in defamation cases. He says that the issue is whether the courts are holding the laws of defamation to the universally settled standards of proof when adjudicating on defamation cases and whether some findings in our case amount to bad law or have charted a new legal direction
9. It is also his contention that the appeal raises the issue of whether one testimony of a plaintiff in a defamation matter suffices to assess if the spoken or written words are defamatory, further demonstrating the need for clarity on the principles governing defamation law.
10. Counsel for the applicant also filed submissions dated July 20, 2022 in which he relies on *Evangelical Mission for Africa & another v Kimani Gachihi & another* [2014] eKLR and *Okuya Omtatab Okoiti & another v Anne Waiguru – Cabinet Secretary Devolution and Planning & 3 others* [2017] eKLR and the principles set out therein.
11. He reiterates that the question of law raised herein is of general public importance and substantially affects the rights of the parties. He argues that general caselaw presents contradictions regarding proof of defamation in particular the essence of publication and principles to be applied. He makes an analysis of four cases. First, *Wycliffe A. swanya v Toyota East Africa limited & another* [2009] eKLR in which he submits that the court held that a plaintiff in defamation must prove that first, the matter of which he complains of is defamatory in nature and that the defamatory statement or utterance was published by the defendant and that publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
12. He compares this with *Miguna Miguna v Standard Group Limited and 4 others* [2017] eKLR in which it was held that the test whether the statement is defamatory is an objective one and is not dependent on the intention of the publisher but is dependent on what a reasonable person reading the statement would perceive of it. He further compares it to *George Mukuru Muchai v The Standard Limited* [2001] eKLR where it was held that the most important ingredient in defamation is the effect of the spoken or written words in the mind of third parties about the complainant and not how he



- himself feels the words portray him. Lastly, the applicant compares it to *Daniel N. Ngunia v KGGCU Limited* [2000] eKLR where the Court rejected a claim for defamation on the basis that only the Appellant testified in his claim.
13. The Applicant maintains that the matter falls within Article 165(3) (b) or (d) of *the Constitution* since, it raises an issue of fair trial with regard to the fundamental right of freedoms of expression.
  14. The single issue for determination is whether Appeal herein raises substantial questions of law to warrant the empanelment of a multi-judge bench under article 165(4) of *the Constitution*.
  15. Article 165 (4) of *the Constitution* states as follows:

Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice
  16. The guiding authority as cited by the applicant is *Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR in which the Court of Appeal adopted four principles for the certification of a matter under article 165 (4). The Court analysed previous decisions of the High Court on the subject and those of the Supreme Court on article 163(4) (b) of *the Constitution* and arrived at these principles:
    - i. For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
    - ii. The applicant must show that there is a state of uncertainty in the law;
    - iii. The matter to be certified must fall within the terms of article 165 (3)(b) or (d) of *the Constitution*;
    - iv. The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”
  17. In determining the application before me, I must confine myself to the applicant’s memorandum of appeal which in this case contains the applicant’s case, vis a vis the principles set out above. First, in the said memorandum of appeal, the applicant protests the finding of the Learned Trial Magistrate that the articles it published were defamatory, as well as the quantum of damages. There is nothing disclosed in the memorandum of appeal that directly implicates the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened. In its submissions sparsely states- that “the appeal raises an issue of fair trial with regard to the fundamental right of freedom of expression.” It also alludes to the fact that article 50 of *the Constitution* is a “peremptory norm from which there can be no derogation....” Without further explanation, I find the association between the defamation suit and the two fundamental rights mentioned to be too attenuated and oblique to justify the exceptional measure of certifying the matter fit for empanelment of a multi-judge bench at the appellate stage.
  18. The failure to concretely and specifically demonstrate how fundamental rights and freedoms or constitutional interpretation is implicated in this appeal is, in my view, exacerbated by the failure by the applicant to demonstrate why the supposed conflict in the legal treatment of the various elements of the tort of defamation is not one which can plausibly and satisfactorily be resolved at the Court of Appeal



by a three or five judge bench. Indeed, the Applicant does not explain whether this supposed disparate treatment of the elements of defamation by different courts has been addressed by the Court of Appeal. As raised it would seem that the issue is more of the Lower Court's application and interpretation of well-established principles on the law of defamation.

19. I am persuaded by the reasoning in *Harrison Kinyanjui v. Attorney General & another* [2012] eKLR that the principles for empanelment of a Multiple-Judge Bench must be applied in a way that would not burden judicial resources to the extent of jeopardising the value of obtaining justice without delay under article 159(2)(b). I am not convinced that the reference of this matter to the Chief Justice for the empanelment of a multiple-Judge Bench would achieve that purpose in this particular case.
20. In the circumstances, the application dated July 20, 2022 is hereby dismissed. Costs shall be in the appeal.
21. Orders accordingly

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JANUARY, 2023.**

**JOEL NGUGI**

**JUDGE**

**DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**HILLARY CHEMITEI**

**JUDGE**

