



**Mwilu v Radio Africa Limited & another (Civil Case 296 of 2016)
[2023] KEHC 4055 (KLR) (Civ) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 4055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 296 OF 2016

AN ONGERI, J

APRIL 28, 2023

BETWEEN

PHILOMENA MBETE MWILU PLAINTIFF

AND

RADIO AFRICA LIMITED 1ST DEFENDANT

THE STAR PUBLICATIONS LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff in this case Philomena Mbete Mwilu (hereafter referred to as the Plaintiff only) has filed this suit vide plaint dated November 9, 2016 amended on January 10, 2017 against the two Defendants Radio Africa Limited And The Star Publication Limited (hereafter referred to as the 1st and 2nd Defendants only) seeking general damages for libel and malicious falsehood in connection with the following words published by the two Defendants in reference to the Plaintiff on November 12, 2015 in the Star Newspaper.

Corridors of power

“Did President Uhuru Kenyatta meet the Appellate Judges who cancelled the 50 – 60 per cent pay increase of teachers? Word has it that the head of state met the Judges days before the ruling was made. It is not clear what he told them, but some peddling the rumor believe that the president could have influenced the judgment.”

2. The Plaintiff is also seeking for an order that the Defendants do retract and withdraw the offending words and render a suitable apology in terms acceptable to the Plaintiff to be published by the Defendants in the same prominence as the offending words.



3. The Plaintiff is further seeking exemplary damages for malicious libel against the two Defendants and a permanent injunction restraining the Defendants whether by themselves, their servants or agents or otherwise from further publishing or causing to be published the said or similar defamatory material of and concerning the Plaintiff.
4. The 2nd Defendant filed a statement of defence dated December 19, 2016 admitting the publication made on November 12, 2015 but denying that the same was defamatory of and/or referred to the Plaintiff.
5. The second Defendant further averred in the said statement of defence that the Article published on November 12, 2015 was a fair comment of the public opinion expressed by a party to the appeal.
6. In her evidence before the court, the Plaintiff adopted as her evidence in chief her witness statement dated November 9, 2016 and produced a list of document dated November 9, 2016.
7. The Plaintiff's evidence in brief was that at the material time of the publication she was serving as a Judge of the Court of Appeal of Kenya.
8. The Plaintiff stated in her statements and pleadings that she had an illustrious successful legal practice in the private sector before joining the Bench.
9. She was appointed by the Judicial Service Commission in 2007 as Judge of the High Court of Kenya where she served for 4 years.
10. Subsequently the Plaintiff was appointed to the Court of Appeal where she also served for 4 years before being appointed as Deputy Chief Justice of the Republic of Kenya.
11. The Plaintiff stated in her written statement that as a Judge serving in the Judiciary of Kenya at the time of the publication, she is a symbol of the rule of law and embodiment of the people's collective aspiration for a just society.
12. She further stated that she is a firm believer that the rule of law and access to justice is of utmost momentousness and absolutely indispensable in the effective governing of Kenya as a Republic and that the subversion of the law and denial of justice amounts to and constitutes a direct subversion of *the Constitution* of Kenya and the rule of law.
13. The Plaintiff in her written statement further stated that she was aggrieved by the Defendant's Article that despite her strong belief and views on matters of law, justice and governance and her contribution to the welfare of society through her public and private life, the Defendants without any justifiable cause, wantonly set out to not only disparage her character but also falsely accuse her of subverting the core sanctity of the rule of law.
14. The Plaintiff further stated that because "The Star" has a very substantial circulation within and beyond the Republic of Kenya and on the world wide web, she received many inquiries from concerned and distraught friends locally and internationally.
15. Further that despite her demands for retraction of the Article and an apology, the Defendants have defied all her demands to do so and the Article still stands to her infinite embarrassment and reputational damage.
16. In support of her case, the Plaintiff produced a list of documents including a demand letter addressed to the Defendants dated March 30, 2016.



17. She also said she was not furnished with any notice of the adverse publication nor contacted to give her side of the story.
18. She believes that the Defendants' unwarranted attack on her character and disposition was calculated to strike at the heart of not only all that she stands for but it is also an impish declaration of her unsuitability as a Judge.
19. In her oral evidence in court the Plaintiff said she was part of the five- Judge bench which heard Civil Appeal No 196 of 2015; *Teachers Service Commission v Kenya National Union Of Teachers And Three Others* (Consolidated with Civil Appeal No 195 and 203 of 2015).
20. She said on November 12, 2015, Mr Wilson Sossion the KNUT Secretary General made a press statement alleging that KNUT would seek the disqualification of the bench.
21. The recusal application was filed and the same was dismissed and further that the issue was raised in court during the recusal application.
22. The Plaintiff said that she never met the President before the judgment was delivered and further she said the decision was not influenced by the President.
23. In cross-examination the Plaintiff said there were more than ten(10) Judges of the Court of Appeal and that the case CA No 196 of 2015 was handled by five Judges of Appeal.
24. She said that although her name does not appear in the Article she was one of the five Judges who handled the case. She said the Article depicted her as a corrupt person who is unfit to hold public office.
25. The Plaintiff also said she underwent a competitive process before she was appointed to the position of Deputy Chief Justice. She said the Article tainted her reputation. She said a Judge who has no integrity has no business sitting in the bench.
26. The Plaintiff called one witness (PW 2) Susan Oyatsi who was the Finance Director of the Judiciary who adopted her statement dated November 9, 2016 as her evidence in chief.
27. PW 2 said when she read the Article it affected her perception about the Plaintiff. She said the Plaintiff's name was not in the Article but she inquired from the Plaintiff if she was in the bench that presided over the case.
28. In her statement dated November 9, 2016, PW 2 said she first met the Plaintiff in the year 2000 when she joined the Electricity Regulatory Board where the Plaintiff was her Chief Executive Officer.
29. PW 2 said in the written statement that she later joined the Judiciary in the Finance Department where the Plaintiff was serving as a Judge. She said she had high regard and respect for the Plaintiff's professionalism and integrity.
30. PW 2 said on November 12, 2015 she came across the Article titled "Corridors Of Power" and upon inquiring she learnt that the Plaintiff was among the Judges who sat on appeal and she was disappointed to discover that the Plaintiff whom she held in high regard and esteem was one of the Judges who sat on the appeal the Article was referring to.
31. The 2nd Defendant called two witnesses, Paul Ilado (DW 1) And Kevin Kabue (DW 2). DW 1 adopted his witness statement dated November 22, 2021 as his evidence in chief. In the said statement, DW 2 said he is the head of content at "The Star" publication limited.
32. DW 1 said on September 28, 2015 KNUT released a statement through its Secretary General Mr Wilson Sossion publicly stating that the Executive Arm of Government was interfering with



- the independence of the entire Bench of five Judges in a bid to influence and/or influence it's determination on the dispute in Civil Appeal No 196 of 2015.
33. DW 1 further said in his written statement that an application for disqualification of the entire bench of five Judges including the Plaintiff was made and amongst the grounds for seeking disqualification was that the said bench of five had been directed by the President to rule in a particular way by the President of the Court of Appeal and the President of the Republic of Kenya.
 34. DW 1 said he believed the contents of the Article dated November 12, 2015 were absolutely privileged in so far as they were an accurate report of proceedings in court and are qualified privileged in so far as the same were a fair and accurate report of the press statement of September 28, 2015 by KNUT and related to a matter of great public interest.
 35. In cross-examination, DW 1 said the name of the Plaintiff was not mentioned in the Article. He said the article was published in the column labelled "rumours to the corridors of justice."
 36. DW 1 further said in cross-examination that an application or recusal was made against the five Judges. He said he saw the demand letter but no apology was made because the Article did not mention the name of the Plaintiff or any of the five Judges.
 37. The 2nd Defendant called DW 2 Kevin Kabue who works with "The Star" publication as the IT system administrator. DW 2 said he downloaded the video from KTN news Kenya YouTube channel which he produced in court as an exhibit.
 38. The parties filed written submissions which I have duly considered. The Plaintiff submitted that the impugned article referred to her since she was among the judges who rendered the judgement in Civil Appeal No 196 of 2015 (*Teachers Service Commission v Kenya National Union Of Teachers (knut) And Three Others* (consolidated With Civil Appeals No 195 and 203 of 2015)
 39. The Plaintiff also submitted that PW2, her witness, confirmed that she understood the 2nd Defendant's publication to refer to the Plaintiff.
 40. The Plaintiff further submitted that the 2nd Defendant's description of the legal dispute in the article and more specifically reference to judges reflect a clear and unambiguous nexus with the Plaintiff. To the ordinary person who was privy to the Plaintiff's role as one of the five judges hearing the matter, which the 2nd Defendant admits was a matter of huge public interest, the 2nd Defendant's article left no doubt that indeed the 2nd Defendant was referring to the Plaintiff.
 41. The Plaintiff submitted that her witness PW2 confirmed the same.
 42. The Plaintiff also submitted that the fact that her name is not mentioned in the defamatory statement is not material. She relied on learned commentary in *Halsbury's Laws of England* 3rd edition at page 18 where the author rendered himself as follows;

"---it is not essential that the Plaintiff should be named in the statement, where libel does not expressly refer to the Plaintiff. Some extrinsic evidence must be given to connect it with the Plaintiff, for example, evidence may be given that the Plaintiff was publicly jeered at in consequence of the libel. It is not essential that the words may#should should be defamatory of the Plaintiff in their primary sense: the words may be actionable if published to persons acquainted with the circumstances, even though the existence of those circumstances is unknown to those responsible for the publication".



43. The Plaintiff further submitted that the 2nd Defendant went against the principles set out in *Halsbury's Law of England* 3rd edition that include hatred, contempt or ridicule to the position of the Plaintiff and the circumstances of the publication making others to shun or avoid and lowering her in the estimation of others and injuring her feelings to her office, profession, calling, trade or business.
44. She referred to the principles in *Halsbury's Law of England* 3rd edition at page 19 which states as follows:

“A statement is defamatory of a person of whom it is published, if broadly speaking, it is calculated to lower him in the estimation of right thinking members of the community or to cause him to be shunned or avoided or expose him to hatred, contempt or ridicule; or to disparage him in his office, profession or calling...It is enough that it tends to hold him up to contempt or ridicule.”
45. The Plaintiff also relied on the case of *Ntabgoba v Editor-In-Chief The New Vision newspaper and Another* (2004) 2EA where it as held that a man is entitled to a good reputation.
46. The Plaintiff also submitted that there can be no more damaging accusation against a judge than to accuse her of violating her judicial oath of office by engaging in partisan and biased determination of disputes. It becomes all the more grave if the judge is being accused of meeting the president and accepting to be influenced by him in the outcome of judicial proceedings.
47. The Plaintiff further stated in her submissions that the Defence of absolute privilege is not available to the 2nd Defendant and relied on the case of *JP Mcharia E/a Mabira & Co Advocates v Wangechi Mwangi and Another* (2018) eKLR (para57)
48. The Plaintiff further said that the impugned report is not an accurate reporting of the proceedings in the Court of Appeal but a cavalier insinuation of why the Court of Appeal allowed the appeal by TSC and that at no time did the bench of five judges meet the President.
49. Further that even if the statement was a fair comment of the press statement of the Secretary General of KNUT the 2nd Defendant ought to have contacted the Plaintiff before publishing the speech in the video contained in the 2nd Defendant's bundle of documents.
50. The Plaintiff also submitted that the said impugned report was not a fair and accurate report of the contents of KNUT concerning the appeal in the press statement made by KNUT Secretary General on September 28, 2015.
51. The Plaintiff said DW1 called the Publication gossip, rumour and opinion and therefore the same is not an accurate report of the comments by KNUT.
52. Concerning the video produced by the 2nd Defendant, the Plaintiff said the same does not make any reference to a meeting between the judges and the President and therefore the 2nd Defendant cannot hide in plain sight.
53. She said the said publication is not a fair comment on a matter of Public Interest and said public interest cannot be a justification for publishing defamatory content.
54. The Plaintiff relied on the case of *Micah Cheserem v Immediate Media Services & 4 Others* (2000) eKLR.
55. The Plaintiff also relied on the case of *Musikari Kombo v Royal Media Services Ltd* (2018) eKLR (Para 28).



56. She also relied on the words of Lord Coleridge CJ in *Bernard & Another v Perriman* (1891-4) ALL ER 965 which were cited in *Samuel Ndungu Mukunya v Nation Media Group Limited & Another* (2015) eKLR as follows;
- “the right to speech is one which is for public interest and 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”.
57. She said that the right to speech does not extend to wrongful acts or libel. She relied on the case of *Joseph Njogu Kamunge v Charles Muriuki Gachari* (2016) eKLR which states the factors one has to consider before claiming that an article was made in public interest.
58. The Plaintiff submitted that the impugned article was actuated by malice. She said a cursory look at the impugned publication renders untenable the claim that the 2nd Defendant was not actuated by malice and in particular the seriousness of the allegations, its implications on the integrity of the Plaintiff and disparaging insinuations as well as gossipy innuendos about the Plaintiff's conduct as a judicial officer.
59. The Plaintiff also said malice can be gleaned from the following circumstances:
- i. That on November 12, 2015, the 2nd Defendant knew that the Court of Appeal had rendered its judgement on November 6, 2015 and no issue regarding meeting with the President was raised.
 - ii. That despite a demand for correction and apology the Plaintiff her counsel made in a letter dated 10/3/2016, the 2nd Defendant failed and/or refused to contradict the said defamatory article.
 - iii. That the Plaintiff had a whole year to make amends to the Plaintiff before the 12 months limitation period for filing the suit and failed to do so and this suit was filed on November 10, 2016 which was 2 days before the expiry of the limitation period.
60. The Plaintiff said that the 2nd Defendant knew the statement was reckless and therefore it was made recklessly as to amount to a willful disregard for the truth and malice is therefore imputed.
61. The Plaintiff relied on the case of *Hon Uhuru Muigai Kenyatta v Baraza Ltd* (2011) eKLR where the court stated that where the Defendant knew that statement as false and published it, that is evidence of malice even though there was no spite or desire for vengeance.
62. She also relied on the case of *Mikidadi v Khalfan & Another* (2004) Eklr where justice Ochieng (as he then was) said where the Defendant fails to contact the Plaintiff before publishing an article, it is a clear manifestation of recklessness.
63. She also quoted the case of *Phineas Nyagah v Gitobu Imanayara* eKLR where justice Odunga (as he then was) said that the failure to enquire in the facts is a fact from which inference of malice may properly be drawn.



64. The Plaintiff also submitted that the 2nd Defendant should have utilized the right to reply to undo the damage caused by the said publication but failed to do so and instead said in their letter of response to the demand letter dated April 14, 2016 as follows;

“ However, we do not wish your client to be aggrieved and we will be very happy to publish a further story to clarify the matter as far as she is concerned. We can also publish a clarification stating that Lady Justice Mwilu did not meet president Uhuru Kenyatta”.

65. The Plaintiff further said that the article tended to lower her reputation in the estimation of ordinary, just and right-thinking members of society. She referred to the testimony of PW2 who said that she was disappointed to find out that the Plaintiff was among the bench of five judges that were referred to in the impugned article.

66. Finally the Plaintiff submitted that her suit discloses a reasonable cause of action and relying on several authorities she asked for damages of Kshs 30,000,000/ and exemplary damages for malicious libel of Kshs 10,000,000/ and also aggravated of Kshs 5,000,000/.

67. The Plaintiff is also seeking a permanent injunctive relief against any future defamatory statements and also an apology and retraction of the offending publication together with costs of the suit.

68. The 2nd Defendant filed written submissions dated 24/6/2022 in which it is stated that in the “Star Newspaper Edition of November 12, 2015, the 2nd Defendant published an article under the column known as “Corridors of Power” reporting matters related to Nairobi Civil Appeal No 196 of 2015 *Teachers Service commission (TSC) v Kenya National Union of Teachers (KNUT) and Others*.

69. The 2nd Defendant said in their written submissions that the said article did not refer to the Plaintiff. The 2nd Defendant relied on the case of *John Ward v The Standard Limited* (2006) eLKR where the court defined the tort of defamation.

70. The 2nd Defendant also relied on the case of *Phineas Nyagah* (supra) on the elements of defamation. The case was also relied on by the Plaintiff.

71. The 2nd Defendant said in the *Halsbury Laws of England* 4th Edition Vol.28 paragraph 22, it is clearly indicated that the Defamatory words must refer to the Plaintiff. The said paragraph states as follows;

“ The purpose of an action of libel or slander is to vindicate the reputation of the person defamed and accordingly the proper and the only party to bring the action is the person actually and personally defamed. This is not enough that the words reflect on the person properly; there must also be imputation against the Plaintiff personally...”

72. The 2nd Defendant submitted that from the reading of the article, there was no direct mention of the Plaintiff by name.

73. The 2nd Defendant submitted that the Plaintiff admitted in her testimony before court that at the time of publication there were more than 10 judges in the Court of Appeal and any of them would have constituted the bench of five judges referred to in the impugned article.

74. Further that PW2 said in her statement in court that upon seeing the article, she got concerned and went to enquire from the Plaintiff if the Plaintiff was among the judges who were hearing Civil Appeal No 196 of 2015.

75. Further the 2nd Defendant submitted said PW2 admitted that she still holds the Plaintiff in high regard and that they are still friends.



76. The 2nd Defendant submitted that if PW2 who works in the Judiciary was close to the Plaintiff and could not tell if the article referred to the Plaintiff, it could have been close to impossible for a layperson to identify the Plaintiff as one of the judges who sat in the bench of five referred to in the impugned article.
77. Further, the 2nd Defendant submitted that the Plaintiff did not prove any reference to innuendo in her suit. Further that she only made reference to the natural and ordinary meaning of the publication.
78. The 2nd Defendant relied on the case of *Hon Mwangi Kiunjuri V Wangethi Mwangi & 2 Others* Civil Appeal No 221 of 2012 where the Court of Appeal held as follows;
- “For the defamation to succeed, the statement must be published of and concerns the claimant”.
79. The 2nd Defendant also submitted that in the case of *Mwangi Kiunjuri* (supra) where the article does not mention the Plaintiff but refers to the Plaintiff in a manner that any sensible reader with knowledge of the special facts could and did understand them to refer to the Plaintiff, then the Plaintiff could file an action for defamation.
80. The 2nd Defendant also submitted that the Plaintiff failed to show how the impugned article brought her into hatred, ridicule or contempt or caused her to be shunned or avoided or how it injured her in her office, profession or calling.
81. The 2nd Defendant relied on the case of *Phineas Nyagah* (supra) in which the court stated as follows:
- “Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehoods disparaged the reputation of the Plaintiff or tended to lower him in the estimation of right-thinking members of society generally. An infamous falsehood may not necessarily be an attack on the Plaintiff’s reputation”.
82. The 2nd Defendant submitted that under section 107(1) of the *Evidence Act*, the Plaintiff has a duty to prove her case to the required standard.
83. Further that the Plaintiff testified that at the time of the publication of the impugned article, she was serving in the Court of Appeal but she has since been elevated to the Supreme Court where she is currently serving as the Deputy Chief Justice.
84. Further, that the evidence of PW2 did not help on this aspect since the Plaintiff and PW2 are still friends and they fellowship together in the same church and they are both in the Catholic Women Association in their church.
85. The 2nd Defendant also raised the following defences:
- i. Absolute privilege.
 - ii. Fair comment subject to explanation or contradiction.
 - iii. Fair comment on a matter of public interest.
86. The 2nd Defendant submitted that on September 29, 2015, the then KNUT Secretary General released a press statement that the executive arm of Government was interfering with the independence of the entire bench of five judges.



87. The Secretary General said he was going to seek disqualification of the entire bench and on 29/9/2015 an application for recusal of the judges was filed which was dismissed and the KNUT lead counsel walked out of court and the case was subsequently determined against KNUT.
88. The 2nd Defendant stated that what they reported in the impugned article was protected by the defence of absolute privilege and the same was also a fair comment subject to contradiction and also a fair comment on a matter of public interest.
89. The 2nd Defendant relied sections 6, 7 and 15 of the *Defamation Act*.
90. The 2nd Defendant submitted in their submissions that the impugned article was not actuated by malice and stated that there was a huge public outcry of possible interference by the Executive arm of Government in the decision of the Court of Appeal.
91. Lastly the 2nd Defendant submitted that their letter dated April 1, 2016 produced as an exhibit, the 2nd Defendant stated that the article was published in good faith and the 2nd Defendant offered to publish a further story that the “Hon Lady Justice Mwilu did not meet president Uhuru Kenyatta” but no acceptance of the offer was received and instead the Plaintiff went ahead and filed this suit.
92. The 2nd Defendant urged the court to dismiss the suit with costs stating that general damages are only awarded where the Plaintiff has proved her case.
93. On the issue of the further injunctive relief sought by the Plaintiff, the 2nd Defendant submitted that an injunction can only be directed on specific acts complained of and not the future contemplated defamations.
94. On that aspect the 2nd Defendant relied on the case of *Janto Construction Company Ltd v Enock Sikolia & 2 Others* (2020) eKLR, where the court said that a Defendant faced with a future injunction on contemplated defamation would be at a loss as to what loss or words or statements that were defamatory that were being restrained.
95. The Plaintiff filed supplementary submissions dated September 21, 2022 in which she said that the same is a rejoinder to the 2nd Defendant’s submissions.
96. In the supplement submission the Plaintiff firmly contended that the impugned article referred to her and further that the 2nd Defendant does not deny that the Plaintiff was among the bench of 5 judges that heard Civil Appeal No 196 of 2015.
97. The Plaintiff repeated her submissions that the impugned article tended to lower her and that the same is a scurrilous attack on her identity, character and reputation and further that the article received wide readership both within the country and outside the country and that it exposed her to public hatred, contempt and ridicule and it caused her to be ridiculed and shunned or avoided.
98. The Plaintiff relied on the case of *Miguna Miguna v Standard Group Limited & 4 Others* (2017) eKLR where the court said that the impugned words must be shown to have construed or capable of being construed by the audience hearing them as defamatory and not simply abusive.
99. The Plaintiff also submitted in the supplementary submissions that the 2nd Defendant did not prove the defences of absolute privilege, qualified privilege and fair comment in a matter of public interest.
100. She relied on the cases of *Mongare t/a Gekonga Advocates & Another v Standard Ltd* (2002) eKLR and *Grace Wangui Ngenye v Chris Kirubi & Another* (2015) eKLR where it was held a comment can only be fair if it is based on correct facts and not falsehoods.



101. Further, that the article to qualify must be a matter of public interest as stated in the case of *Spiller & Another v Joseph & Others* (2010) UK SC 53.
102. In the supplementary submissions, the Plaintiff further stated that her right to protection of her reputation has been aptly captured in Article 33(3) of *the constitution* as follows;
- “In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”
103. Further, that article 259 of *the constitution* enjoins courts to interpret *the constitution* in a manner that promotes its purpose, values and principles and in a manner that advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.
104. I have carefully considered the evidence adduced in this case together with the submissions filed by both parties. I have also had the opportunity to peruse the exhibits and to view the video produced by the 2nd Defendant.
105. I am alive to the fact that I did not see the witnesses testify since I took over this case from my Senior Hon Justice Dr Sergon at final submission stage.
106. It is the duty of the Plaintiff to prove her case to the required standard in civil cases which is on a balance of probabilities.
107. The issues for determination in this case are as follows;
- i. Whether the Article contained in “The Star” on November 12, 2015 was defamatory to the Plaintiff.
 - ii. Whether the contents of the impugned article were fair and accurate report of the proceedings before the Court of Appeal in CA No 196 of 2015.
 - iii. Whether the contents of the impugned Article were a fair and accurate comment of the statement by KNUT as expressed in the press statement made on September 28, 2015.
 - iv. Whether the impugned Article was actuated by malice.
 - v. Whether the Plaintiff is entitled to the remedies she is seeking.
 - vi. Who pays the costs of this suit?
108. On the issue as to whether the impugned article as contained in the Star on November 12, 2015 was defamatory of the Plaintiff, the elements of the tort of defamation were laid out in the case of *John Ward v Standard Limited* [2006] eKLR 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.



109. The Court of Appeal in the case of *Wycliffe A Swanya v Toyota East Africa Ltd & Another* Civil Appeal 70 of 2008 [2009] eKLR stated as follows;

“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the Plaintiff must prove: -

- “(i) That the matter of which the Plaintiff complains is defamatory in character.
- (ii) That defamatory statement or utterance was published by the Defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- (iii) That it was published maliciously
- (iv) In slander, subject to certain exceptions, that the Plaintiff has suffered special damage.”

110. I find there is undisputed evidence that the statement was published by the 2nd Defendant on November 12, 2015 in the Star Newspaper.

111. However, the 2nd Defendant did not mention the name of the Plaintiff. There were five Judges who were handling Civil appeal No 196 of 2015 and none of them was mentioned in the impugned Article.

112. The Plaintiff called one witness, (PW2) who told the court that it was the Plaintiff who disclosed to her that she was among the bench of five judges referred to in the impugned Article.

113. PW2’s evidence was a clear indication that she could not decipher that the Article referred to the Plaintiff until she inquired from the Plaintiff whether she was on the bench of five Judges who were mentioned in the impugned Article.

114. I agree with the decision in the case of *Hon Mwangi Kiunjuri v Wangethi Mwangi & 2 Others* (supra) that for a suit of defamation to succeed, the statement must be published of and concerning the claimant.

115. I find that there were over ten (10) judges of the Court of Appeal as the Plaintiff admitted in her evidence at the material time and it was not possible to tell who among them were in the five bench referred to in the impugned Article.

116. The one who was singled out was the President of the Court of Appeal whom it was alleged was being used by the President of the Republic to influence the bench of five Judges but he has not filed suit against the Defendants.

117. I find that for reasons that the Article did not mention the Plaintiff, she failed to establish that the impugned Article referred to her.

118. The purpose of an action of libel or slander is to vindicate the reputation of the person defamed and accordingly the proper and the only party to bring the action is the person actually and personally defamed. I find that in the current case, there was no imputation against the Plaintiff personally.

119. If someone writes an Article stating that all lawyers are liars, no one lawyer can say that he or she has been defamed unless he or she is mentioned by name or his or her picture is put on the Article or she or he is referred to by innuendo.



120. The Plaintiff in her pleadings and evidence before Court said the Article in its natural and ordinary meaning referred to her but there is no evidence to support that assertion.
121. On the issue as to whether the contents of the impugned article was a fair and accurate report of the proceedings before the Court of Appeal in CA No 196 of 2015, I find that there is undisputed evidence that an application was filed before the Court of Appeal seeking recusal of the five Judges.
122. I find that one of the grounds for seeking the recusal of the entire bench was the allegation of interference by the President of the Republic of Kenya through the President of the Court of Appeal.
123. I find that fair and accurate reports in newspapers of court proceedings enjoy the defence of absolute privilege.
124. Section 6 of the *Defamation Act* states as follows;
- “ A fair and accurate report of any newspaper of proceedings heard before any court exercising Judicial authority within Kenya shall be absolutely privileged.”
125. On the issue as to whether the impugned Article was a fair and accurate comment of the press statement by KNUT made on September 28, 2015, I find that there is evidence that the then Secretary General of KNUT made a press statement on that day touching on Civil Appeal No 196 of 2015.
126. There is evidence that the KNUT secretary General said in that statement that the Executive Arm of Government was interfering with the independence of the entire Bench of five Judges in a bid to influence its determination on the dispute in Civil Appeal No 196 of 2015.
127. The said press statement did not mention the name of any Judge in the five bench and the Plaintiff has not shown that the statement referred to her.
128. I had the occasion to listen to the video produced by the Defendants and it talked about the interference by the executive arm in the appeal.
129. I find that the impugned Article was a fair comment on the said press statement and it therefore enjoys the defence of qualified privilege.
130. On the issue as to whether the publication was actuated by malice, In the case of *Phiness Nyaga v Gitobu Imanyara* [2013 eKLR] Odunga J (as he then was),said as follows;
- “ Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice..... malice may also be inferred from the relations between parties. The failure to inquire into the facts is a fact from when malice, may be properly be drawn.”
131. I find that the Plaintiff whose name was not mentioned has not established that the 2nd Defendant was actuated by malice.
132. The 2nd Defendant could not have inquired from her since her name was not mentioned in the press statement and in the impugned statement.
133. I find that the comment was a fair comment and a matter of great public interest.
134. I find that the impugned Article was a fair comment on a matter that raised great public interest.



135. Denning MR said in the case of *Fraser v Evans* [1969] I QB 349 as follows;

“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. There is no wrong done if it is true or it is fair comment on a matter of public interest.”

136. I am not saying that the statement is true, what I am saying is that the issue of interference by the Executive Arm of government was raised before the five bench in the recusal Application and further that the KNUT Secretary General gave a speech imputing the same before the application for recusal was made.

137. In the circumstances, I find that the defences of absolute privilege, qualified privilege and fair comment on a matter of public interest raised by the 2nd Defendant are valid.

138. On the issue as to whether the Plaintiff is entitled to the remedies she is seeking, I find that the answer is in the negative since the Plaintiff has not established that the impugned Article referred to her.

139. The Plaintiff who was in the Court of Appeal at that material time of the publication of the impugned Article by the 2nd Defendant has since been appointed Deputy Chief Justice and that is evidence that the impugned Article did not in any way curtail her career progression.

140. On the issues as to who pays the costs of this suit, for reasons that 2nd Defendant would have been held liable if the Plaintiff had been named in the impugned Article, I direct that each party bears its own costs of this case.

141. The Plaintiff's suit is accordingly dismissed with no orders as to costs.

142. Had the Plaintiff been named in the impugned Article, she would have been awarded general damages of Kshs 5,000,000.

143. However the Plaintiff's case is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 28TH DAY OF APRIL, 2023.

A. ONGERI

JUDGE

In the presence of:

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant

