



REPUBLIC OF KENYA



KENYA LAW

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**Muriuki v Standard Limited & another (Civil Case 119 of 2010)
[2023] KEHC 21729 (KLR) (Civ) (24 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21729 (KLR)

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

CIVIL

CIVIL CASE 119 OF 2010

AN ONGERI, J

AUGUST 24, 2023

BETWEEN

MEMBA MURIUKI PLAINTIFF

AND

THE STANDARD LIMITED 1ST DEFENDANT

JUDY AGUTU 2ND DEFENDANT

JUDGMENT

1. The plaintiff in this case Memba Muriuki (hereafter referred to as the plaintiff only) filed a plaint dated 1/3/2020 against the two defendants, The Standard Limited and Judy Agutu (hereafter referred to as the 1st and 2nd defendants respectively).
2. The plaintiff was seeking the following remedies against the Defendants;
 - i. Aggravated and or exemplary damages for the tort of defamation.
 - ii. An injunction to restrain the defendants and each of them by themselves, or by their servants and or agents, employees or otherwise howsoever from the publication of the said words or any of them or of any similar words (or any words to the like effect) concerning the plaintiff.
 - iii. An injunction to restrain the defendants, their servants, agents or employees from printing and publishing the said words or any of them or of any similar words (or any words to the like effect) concerning the plaintiff.
 - iv. An apology published in an article of the same size under the same prominent title and picture and on a Friday and in both print and online edition of the standard newspaper.



- v. An order that the 1st defendant do delete from its website the articles and plaintiff's photo forthwith.
 - vi. Costs of this suit.
 - vii. Any such further or other relief that this honourable court may deem fit and just to grant.
3. The plaintiff averred in the said plaint that on January 15, 2010 the defendants falsely and maliciously printed and published or caused to be written, printed and published on page 10 of the issue of the Standard Newspaper an article titled "lawyer In Court Over Threats To Wife" which article was next to the plaintiff's photograph with the following words;

"A Nairobi lawyer charged with threatening to kill his wife presented himself in court. This was moments after Nairobi Chief Magistrate Gilbert Mutembei issued a warrant of arrest for Mr. Memba Muriuki. Muriuki is alleged to have threatened to kill Ms Jacqueline Achieng last year at an unknown place. He faces an additional count of improper use of licensed telecommunication system. The prosecution says that on December 13, last year, he used a safaricom line to send messages to Achieng using threatening and abusive language. On Tuesday, his advocate had told the magistrate Muriuki was ill last week and was on medication and under observation by a Dr. Kinuthia. He requested the magistrate to defer taking the plea to January 18. The prosecutor then asked the court to issue a warrant for his arrest saying it was the accused person's duty to attend court.

Cash bail

Prosecutor Onesmus Towett sought for the forfeiture of ksh.30,000/= cash bail which he had been granted to ensure he attends court. Muriuki, he added was only avoiding coming to court and so, he argued, the cash bail should be forfeited. Mutembei then ordered the case to be mentioned yesterday; and when the prosecution applied for the warrant, he issued it. The warrant was, however, lifted yesterday evening and the advocate was released on a cash bail of kshs.30,000/=. The court will on January 19 give a ruling on whether his firearm will be withdrawn. The case will be heard on February 18".

4. Again on January 23, 2010, the plaintiff stated in his plaint that the defendants printed and published in the Standard newspaper another article titled "Court Allows City Lawyer To Retain Gun" and stated as follows;

"A Nairobi lawyer charged with threatening to kill his former wife has been allowed to retain his firearm. Mr. Memba Muriuki is alleged to have threatened to kill Ms Jacqueline Achieng' on December 13, last year. He faces an additional count of improper use of licensed telecommunication system. The prosecution said he used a safaricom line to send threatening messages to Achieng'. Yesterday, Nairobi Chief Magistrate Gilbert Mutembei dismissed an application by the prosecution to have him surrender his firearm at Central Police Station until the case is finalized. The case will be heard on February 18".

5. The plaintiff further stated that his wife is not Jacqueline Achieng and further that these articles portrayed him as a person with several wives and an immoral and an unsafe and dangerous person.
6. The defendants filed a defence on May 5, 2010 denying the plaintiff's claim and raised the defence of absolute privilege on the basis that the words were a fair and accurate report of court proceedings.



7. The case proceeded viva voce evidence. The plaintiff who testified as PW 1 produced his written statement dated April 18, 2013 as his evidence in chief.
8. The plaintiff stated in his written statement that the 1st defendant was and is the printer and publisher of a newspaper called The Standard, which has a large circulation throughout Kenya and other countries and the 2nd defendant was its reporter.
9. On the January 15, 2010, the defendants falsely and maliciously wrote, printed and published or caused to be written, printed and published on page 10 of the issue of the Standard Newspaper and its online edition of the day concerning me in an article titled “Lawyer In Court Over Threats To Wife” which article was next to my photograph and the wording is as per the plaint.
10. The plaintiff said that again on January 23, 2010 they printed and published in the Standard Newspaper another article titled “Court Allows City Lawyer To Retain Gun” at page 8 of the aforesaid Newspaper of January 23, 2010 the words as in the plaint.
11. The plaintiff said in cross-examination that he was charged in court with threatening to kill one Jacqueline Achieng. He said the said Jacqueline Achieng was not his wife and the article brought a breakup his family resulting in separation from his wife.
12. The plaintiff admitted in cross-examination that he had a relationship with Jacqueline Achieng which resulted into a child being born.
13. He also said he was convicted with the criminal offence but he was acquitted on appeal at the High Court by Justice Kimaru.
14. The defendants called the 2nd defendant as a witness. She testified as DW 1. The 2nd defendant Judith Ogotu said at the material time of this case she was working as a journalist.
15. DW 1 said she used to file stories from court. She adopted her statement filed on October 26, 2021 as her evidence in chief.
16. In her written statement DW1 said that she was a former reporter of the 1st Defendant Company and that she was fully aware of the matters in dispute between the plaintiff and the Defendants.
17. She said that she was aware that the Plaintiff was in January 2010 arraigned and formally charged before the Chief Magistrate Mr. Mutembei at the Resident Magistrate’s Court at the Nairobi law courts.
18. Further she was aware that the Plaintiff was charged with two counts of criminal offence.
19. She said that it was stated in the charge sheet that the Plaintiff without lawful excuse uttered a threat to kill one Jacqueline Achieng, while count 2 of the charge read that the Plaintiff by means of a licensed telecommunication system sent threatening and abusive messages to Jacqueline Achieng’ contrary to the law.
20. DW1 attached the charge sheet in court file No. 42 of 2010 pertaining to the case reflected that the complainant was one Jacqueline Achieng.
21. She said that what she captured was an accurate reporting of the proceedings before a legally constituted court, and that the story touched on a matter of public interest, being, a criminal matter.
22. In cross –examination DW 1 said she reported what she heard in court. She admitted she filed both articles and maintained they were accurate reports of the proceedings in court.



23. The plaintiff submitted that on January 15, 2010 the defendants falsely and maliciously wrote, printed and published or cause to be written and published on page 10 of the issue of the Standard Newspaper and on its online edition the same day defamatory words concerning the plaintiff in an article titled “lawyer In Court Over Threats To Wife” and also placed a photograph of the plaintiff next to it.
24. Subsequently on January 23, 2010 the defendant printed and published another article called “Court Allows City Lawyer To Retain Gun” on page 8 of the Standard Newspaper of January 23, 2010 and on its online edition.
25. The defendants did not deny that they published the two impugned articles.
26. The plaintiff submitted that the said words were in the natural and ordinary meaning defamatory in that they depicted the plaintiff as,
 1. Having a wife called Jacqueline Ochieng
 2. Threatening his wife
 3. Capable of threatening his wife
 4. Has several wives
 5. Being immoral
 6. Is of dishonorable conduct
 7. Is not law abiding
 8. Is a criminal
 9. Is not a respecter of persons and in particular women.
 10. Is a murderer
 11. Is unsafe or dangerous person
 12. Is not a proper person to hold a fire arm.
27. The plaintiff submitted that Jacqueline Achieng was not his wife and therefore the article was false. He submitted that he is not a criminal and has never been charged with threatening to kill his wife.
28. The plaintiff submitted that the words were defamatory and they referred to him as his photograph was published and that the said words were published by the defendants.
29. The defendants did not deny publishing the words, their defence was that the same were an accurate report of the proceedings of the court in terms of Section 6 of the *defamation Act* and therefore they were privileged.
30. The plaintiff said the report did not fit in the four point test in the case of *J. P. Machira T/A Machira & Co. Advocates vs Wangethi Mwangi & Another* (2018) eKLR.
31. In the JP Machira case(supra), the court said that for the report to qualify for the defence of absolute privilege it must;
 - a) Be a report of proceedings heard before a court exercising judicial authority.
 - b) It must be a fair report of those proceedings.
 - c) It must be an accurate report of those proceedings.



- d) It must not contain any blasphemous, seditious or indecent matter.
32. The plaintiff submitted that the onus of proving the above is upon the defendants.
33. The defendants on their part maintained in their submissions that the publication was a fair and accurate report of proceedings of the court and that the same was justified.
34. The defendants relied on the case of *Emmanuel Mambo Oduory vs National Council For Law Reporting & 2 Others* where the court commented on Section 6 of the *Defamation Act* as follows;’
- “ to qualify for the protection of absolute privilege under Section 6..., a report must have the following characteristics:
1. It must be a report of proceedings heard before a court exercising judicial authority.
 2. It must be a fair report of those proceedings.
 3. It must be an accurate report of those proceedings and
 4. It must not contain any blasphemous, seditious or indecent matter”.
35. The defendant submitted that the report emanated from a criminal case where the plaintiff was charged.
36. The defendants submitted that the report was fair and accurate although not verbatim.
37. The defendants relied on *Gatley on libel and Slander* 9th Edition page 312 – 313 where it is stated as follows;
- “it is not necessary that the report should be verbatim..... an abridged or condensed report will be privileged, provided it gives a correct and just impression of what took place in court..... It is sufficient to publish a fair summarized account”.
38. The defendants submitted that the privilege accorded for publishing reports of court proceedings does not concern itself with the truthfulness of the allegation but to whether such allegations were in fact made and that the report fairly and accurately captured them.
39. The defendants said in their submissions that the allegation that the plaintiff had threatened his wife were made in the proceedings where the plaintiff was charged.
40. Further, the defendants relied on the judgment of the trial court being criminal case no. 42 of 2010 where it was shown that an allegation was made that Jacqueline Achieng was the plaintiff’s wife.
41. The defendants submitted that as long as what they published arose from the course of court proceedings, they are entitled to the defence of absolute privilege and therefore they are excluded from liability.
42. The defendants submitted that the plaintiff alleged that the publication of the impugned statement led to the divorce from his legally married wife but the plaintiff did not call any witness to testify on the said issue. They said the said allegations remain speculation and rumors.
43. I have considered the evidence adduced in this case together with the rival submissions. It is the duty of the plaintiff to prove his case to the required standard in civil cases and that is in a balance of probabilities.



44. The issues for determination in this case are as follows;
- i. Whether the impugned words are defamatory to the plaintiff.
 - ii. Whether the defendants have a valid defence against the plaintiff's claim.
 - iii. Whether the plaintiff is entitled to the reliefs he is seeking against the defendants.
 - iv. Who pays costs of this suit?
45. On the issue as to whether the impugned words are defamatory, the following elements of defamation must exist;
1. That the statement was defamatory.
 2. That the statement referred to the plaintiff.
 3. That the statement was published by the defendants and,
 4. That the statement was false.
46. I find that the words referred to the plaintiff and they were published by the defendants.
47. However, I find that the statement is false in the sense that the plaintiff was not charged with the threatening to kill his wife.
48. The woman the plaintiff was charged with threatening to kill was not his wife.
49. The defendants raised the defence of absolute privilege on the basis that the words were a fair and accurate report of court proceedings.
50. Having raised the defence of absolute privilege, the burden of prove shifts to the Defendants to prove the same.
51. The defendants did not produce the proceedings in the criminal case and it has not been shown that the said issue was said openly in court.
52. The defendants have relied on the charge sheet and the judgment of the court and the said judgment does not state that Jacqueline Achieng was the plaintiff's wife.
53. I find that the Defendants were duty bound to report accurately what was captured during the proceedings or to give an abridged or condensed report for it to qualify to be privileged.
54. If the said Jacqueline Achieng was the wife of the plaintiff, the same would have been stated in the charge sheet.
55. I find that the defence of absolute privilege is not available to the defendants in the circumstances of this case.
56. In the case of *Khasakhala v Aurah* (1995-1998) 1EA 112 in which the court stated at pages 118-119 the court stated as follows;

“The defendants were reporting proceedings in a court of law. As such they were entitled to absolute privilege under section 6 of the [Defamation Act](#), Chapter 36 laws of Kenya. This is not qualified privilege requiring explanation and contradiction and therefore proof of malice. But absolute privilege under section 6 will only be enjoyed by a defendant who



has made a fair and accurate report in his newspaper provided that such a report does not contain blasphemous, seditious or indecent matter”(emphasis added).

57. It was the duty of the Defendants to report what was said accurately even if they did not have a duty to verify the truth of the said allegations, suffice to show that the report was a fair and accurate account of what transpired during the court proceedings.
58. I find that although Jackline had a relationship with the plaintiff, she was not his wife and the said issue was not said in the criminal proceedings.
59. In *Gatley on Libel and Slander* 9th Ed pg 319 para 13.44, it is stated that;

“Privilege will, of course attach to the publication in a newspaper of a document read out in open court and filed as an exhibit in an action or to a fair and accurate statement of the contents of such document, but privilege will not attach to the publication in a newspaper of the contents of pleadings, affidavits, or other papers filed in civil proceedings and not brought up in open court.” (emphasis added).
60. I therefore find that the defence of absolute privilege is not available to the Defendants since the report was not accurate.
61. On the issue as to whether the plaintiff is entitled to the reliefs he is seeking, I find that the plaintiff is entitled to general damages for the tort of defamation but not to the injunctive reliefs.
62. The reason being that the defendants’ report of the court proceedings cannot be injuncted as long as it complies with Section 6 of the *Defamation Act*.
63. Section 6 of the *Defamation Act* provides as follows;

“A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged; provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter.”
64. The duty of the defendants was to comply with Section six in order to be protected.
65. However, I find that the defendants are liable for defamation. I have considered the authorities relied upon by both parties on quantum of damages, I find that in this case, the plaintiff was charged in court and although Jackline was not his wife, the plaintiff admitted that he had a relationship with her.
66. I award the plaintiff ksh.1,000,000 as general damages for the tort of defamation.
67. The 1st defendant is vicariously liable since the 2nd defendant was reporting on behalf of the 1st defendant.
68. I find that the plaintiff is not entitled to the injunctive reliefs he is seeking for the reasons that the report was emanating from court proceedings but the only mistake committed by the Defendants was that they did not capture the said report accurately.
69. This court therefore admonishes the Defendants to report court proceedings fairly and accurately if they want to avail themselves the defence of absolute privilege under Section six of the *Defamation Act*.
70. On the issue of costs, I find that the plaintiff was convicted with a criminal offence of threatening to kill one Jacqueline and the conviction was set aside on appeal.



- 71. For the reason that the plaintiff was actually charged in court and the defendants would not have been held liable for defamation had they reported the incident accurately, I direct that each party bears its own costs of this suit.
- 72. Judgment be and is hereby entered in favor of the plaintiff against the 1st defendant in the sum of Kshs. 1,000,000.
- 73. Each party to bear its own costs of this suit.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 24th day of August, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

- for the Plaintiff
- for the 1st Defendant
- for the 2nd Defendant

NAIROBI HIGH COURT CIVIL CASE NO. 119 OF 2010	0
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