



**Chemno v Nation Media Group Limited (Civil Suit 244 of 2019)
[2022] KEHC 17156 (KLR) (Civ) (22 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17156 (KLR)

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

**CIVIL
CIVIL SUIT 244 OF 2019**

**CW MEOLI, J
DECEMBER 22, 2022**

BETWEEN

HON. DANIEL KIPROTICH CHEMNO PLAINTIFF

AND

NATION MEDIA GROUP LIMITED DEFENDANT

JUDGMENT

1. Hon. Daniel Kiprotich Chemno, (hereafter the Plaintiff) has sued the Nation Media Group Limited (hereafter the Defendant) seeking general damages; exemplary damages; and an order for the Defendant to retract the defamatory article and issue a public apology to the Plaintiff in a manner similar to which the defamatory material was published. The suit is founded on defamation and the Plaintiff avers that on August 25, 2019 the Defendant published or caused to be published false and malicious information concerning the Plaintiff in the Sunday Nation Newspaper of the same date under an article entitled “Former Ruto billionaire allies plot new political union”.
2. It was averred that the information was published with the intention of libeling and embarrassing the Plaintiff in addition to undermining him. That the publication of the said article has injured the Plaintiff in his credit, character and reputation and his person has been brought into contempt causing him loss and damage.
3. On December 23, 2019 the Defendant filed a statement of defence denying the key averments in the plaint and pleaded that in their ordinary meaning or otherwise the words in the article consist of expressions of opinion and are fair comments and fair information upon facts which are of public interest; that the words were published under a sense of public duty and without malice towards the Plaintiff; and in the honest belief that the information published therein was true and fair information on matters of public interest.



4. In his reply to the defence the Plaintiff reiterated averments in his plaint and averred that the subject words and accompanying photo were not published on a privileged occasion and the Defendant is held to strict proof thereof.
5. During the trial, the Plaintiff testified as (PW 1. Having identified himself as the Deputy Governor Uasin Gishu County, he proceeded to adopt his witness statement filed on November 11, 2019. He produced a bundle of his claim supporting documents which include the copy of the Daily Nation Article dated August 25, 2019 (P Exh1), demand letter dated August 26, 2019(P Exh2) and follow up letter dated September 17, 2019 (P Exh3).
6. He stated that he has been a politician for fourteen years and is based in Uasin Gishu County and that the article in has adversely affected his political career in asserting that he was undermining the Deputy President because he and others are influence peddlers. That the article further strained his relationship with the Deputy President and the Governor Uasin Gishu County. He asserted that the Defendant used his photograph and name to purvey the false impression that the Plaintiff was among politicians opposing the Deputy President.
7. Under cross-examination by defence counsel, the Plaintiff admitted the article did not specifically refer to him, but the inclusion of his photograph spoke a thousand words. He admitted that politicians constantly fall out and form new alliances, and asserted that the article influenced voters and his followers in general. That his association with the other individuals in the article has cast him as a dishonest and scheming person, yet he had no association with the persons named in the said article. He maintained that because of the article, voters view him as a double dealer, and one disloyal to the Deputy President, which could ruin his political prospects as a candidate in the upcoming General Election.
8. The Plaintiff asserted during re-examination that he was a senior politician in Uasin Gishu County and that the inclusion of his photograph as read with the first paragraph of the said article casts him as one of Rift Valley politicians opposed to the Deputy President. That the Defendant did not interview him before publishing the article and he has been compelled to publicly dispel the notion created by the article in a bid to mitigate his political losses. He concluded by stating that after publication of the article several people contacted him and that his attempts to get the Defendant to retract the article or apologize were ignored.
9. The Defendant opted not to call any witness.
10. Upon the close of the respective parties' cases, submissions were filed on the matter. Counsel for the Plaintiff anchored his submissions on the provision of Section 2, 7(1), 7(2), 7A(1), 7A(5), 7A(6), 12(1) & 12(2) of the *Defamation Act*, Gatley on Libel and Slander, 11th Edition at pg. 92 and the decision in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR. Counsel condensed his argument into two (2) issues whether the Defendant's publication was defamatory and damages payable by the Defendant for defamation. Submitting on the first issue it was argued that for defamation to succeed one must show whether there is existence of a defamatory statement; whether the Defendant has published or caused the publication of a defamatory statement and whether the publication refers to the claimant.
11. Addressing the court on the first limb while relying on Gatley on Libel and Slander, 6th Edition at pg. 6 as quoted in *Abdi Mohamed Farah v Nairobi Star Publication & Another* [2015] eKLR, Musikari Kombo (supra), *Alnashir Visram v Standard Limited* [2016] eKLR and an article by *Michael Douglas – Defamation Actions and Australian Politics*, Published by University of New South Wales Law Journal in 2021 it was submitted that the impugned article in its ordinary and natural sense portrays the



- Plaintiff as being corrupt and a deserter of his political party which imputation is false as the Defendant neither verified information therein nor sought the opinion and or comment of the Plaintiff before publishing the said article.
12. Submitting on the second limb it was contended that the Defendant admits that it published the said article in a widely circulated newspaper on August 25, 2019. On the last limb counsel cited the English decisions in *Dwek v Macmillan Publishers Ltd* [2000] EMLR 284, *Morgan v Odhmas Press Ltd* [1971] All ER 1156 and *Street on Torts*, 12th Edition at Pg. 527 to argue that inclusion of the Plaintiff's picture and his name among other persons adversely mentioned in the article would to the ordinary reader positively associate the Plaintiff with the adverse material in the article.
 13. It was further contended that the publication was false, reckless, contained factual inaccuracies, damaging to the Plaintiff's character and good standing and taken together with the Defendant's failure to verify facts or issue an apology, imputed malice on the part of the Defendant. The decision in *Alnashir Visram (Supra)* and *Stanbic Bank Limited v Stephen Mutoro & 2 Others* cited with approval in *Phineas Nyagah v Gitobu Imanyara* [2013] eKLR were called to aid in that regard. Further referring to the decision in *Musikari Kombo (supra)*, *Charles Katiambo Musungu v Dorine Lusweti* [2021] eKLR and *Jospeh Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR counsel asserted that the Defendant is estopped from invoking the defence of privilege where it is proved that the publication was made with malice; that the tone of the article entailed a report rather than a fair opinion; and that the Defendant herein had not established the true facts entitling it rely on the defence of qualified privilege.
 14. With respect to the Defendant's defence of fair comment it was argued that the article was neither a fair comment nor based on an honest opinion but statements of facts which the Defendant had an opportunity to inquire into but chose not to. For this proposition counsel cited the case of *Alnashir Visram (supra)*.
 15. On quantum, counsel equally cited the foregoing decision, *Nation Media Group Ltd & 2 Others v John Joseph Kamotho & 3 Others* [2010] eKLR and *Wangethi Mwangi & Another v J.P Machira* [2013] eKLR. Asserting the court's wide discretion in determining the award of damages he urged that in addition to an apology being issued to the Plaintiff, he ought to be awarded a sum of Kshs. 15,000,000/- as general damages and Kshs. 2,000,000/- as exemplary damages.
 16. On the part of the Defendant counsel citing *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* [2009] eKLR submitted that a claim founded on defamation cannot be sustained where the plaintiff fails to establish all the elements of defamation. He contended that the contents of the subject article consisted of an expression of opinion that was fair comment and fair information concerning the regional politics of Kenya which was a matter of public interest and thus the article complained of was published on an occasion of qualified privilege. Addressing the issue of malice, counsel cited that the provisions of Order 2 Rule 7(3) to assert that he who alleges malice must not only plead but also prove it. That no particulars of malice were pleaded in the Plaintiff's reply to defence, while the Plaintiff failed to establish malice on the part of the Defendant. Hence the defence of fair comment by the Defendant remained unchallenged.
 17. Further quoting from Gately on *Libel and Slander*, 10th Edition at Pg. 182-190 and the decision in *Jakoyo Midiwo v Nation Media Group Limited & Another* [2018] eKLR, counsel contended that the subject article referred to a class of people, namely, businessmen and politicians in Rift Valley, and did not specifically refer to the Plaintiff and therefore his claim does not lie. Additionally, counsel relied on dicta in *SMW vs ZWM* [2015] eKLR to assert that for a statement to be considered defamatory it



must have the effect of lowering the reputation of a person in the estimation of right-thinking members of the society, and or cause the individual to be shunned or avoided.

18. Calling to aid the decisions in *Daniel N Ngunia v KGGCU Limited* [2000] eKLR, *Hezekiel Oira v Standard Limited & Another* Civil Suit No 64 of 2011, SMW v ZWM (*supra*) and *Selina Patani & Another v Dhiranji Patani* [2019] eKLR counsel argued that it was the duty of Plaintiff to adduce reliable evidence in proof of the adverse impact of the article to his reputation. That the Plaintiff had failed to discharge the burden of proving how his reputation was disparaged as a result of the publication by either calling a witness and as such the suit ought to be dismissed in its entirety.
19. Concerning damages, the court was urged take into consideration the damage the article complained of has on the Plaintiff's reputation. In the foregoing respect the English cases of *John v MGN Limited* [1966] 1 All ER 35 and *Jones v Pollard* (1997) EMLR as cited in *Margaret Wanjiku Kariuki v Nairobi Star Publications Limited* [2016] eKLR were relied on.
20. Counsel further relied on a raft of decisions including Jakoyo Midiwo (*Supra*), *Royal Media Services Limited & Another v Jakoyo Midiwo* [2018] eKLR, *Ken Odondi & 2 Others v James Okoth Omburah t/a Omburah & Co. Advocates* [2013] eKLR, *Nation Media Group Limited v Daniel Musinga t/a Musinga & Co. Advocates* Civil Appeal 120 of 2008 (unreported) to argue that if the court is unconvinced to dismiss the suit in its entirety, an award of Kshs 2,000,000/- would suffice as general damages. Finally, citing Gatley on Libel and Slander 10th Edition at Pg. 246-250 and the English case of *Manson v Associates Newspapers Ltd* (1965) 2 ALL ER 945 it was submitted that the publication was neither made with a profit motive nor with the intention of hurting or disparaging the Plaintiff's name. In the circumstances there was no justification for exemplary damages was made for it to be awarded by the court.
21. The Court has considered the evidence on record and the parties' respective submissions. 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:

“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...”
22. Actions founded on the tort of defamation bring out the conflict 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 31 protect the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions of the



Defamation Act. In contemplating these competing rights Lord Denning MR stated in *Fraser v Evans & Others* [1969]1 ALLER 8

“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.”

23. 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”.

See also the Court of Appeal definition of a defamatory statement in *SMW v ZWM* (2015) eKLR.

24. Additionally, *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”.

25. In *Selina Patani & Another vs Dhiranji V. Patani* (2019) eKLR’s the Court of Appeal stated 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. The Court restated the ingredients of defamation as follows:

“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.”

26. In this case, there is no dispute regarding ingredient iii). Concerning item ii) it is my considered view that although the body of the article did not specifically mention the Plaintiff, an average person reading the article and seeing the Plaintiff’s photograph and name in one of the quadrants beside the article would associate him with the contents of the article. While the Defendant put up a spirited attempt at the trial and by submissions to challenge this fact, the unqualified admission concerning the publication at paragraph 4 of the defence (in response to the averments in paragraph 4 of the plaint) leaves no room for doubt that the Defendant did not dispute that the article in question referred to the Plaintiff. And subsequent averments at paragraphs 5 to 7 of the defence statement confirm this conclusion. Thus, in my view the statement complained about referred to the Plaintiff among other persons.

27. In my view, this matter turns on the question whether the statements in the article are defamatory and false and or whether they consist of fair comment and were made on an occasion of privilege. It is useful to set out some of the contents of the article complained of. The article carried a picture of the Plaintiff



among other persons and was titled “Former Ruto wealthy allies plot new alliance”. Part of the body of the article stated *inter alia* that:

“The DP has severed links with Mr Buzeki and Dr Langat, among others, who have joined CCM.

For years, several Rift Valley billionaires and politicians were close political and business allies, as well as personal friends of Deputy President William Ruto.

Mr David Langat, Joshua Kulei, Zedekiah Bundotich Kiprop, alias Buzeki, and Silas Simotwo, among others, financially supported his campaigns since 2007 when Ruto supported Opposition leader Raila Odinga’s presidential candidature.

But between the 2013 General Election and now, the once-blossoming friendships have withered and some of them are now plotting to scuttle his presidential bid in favour of other leaders from the region.

Their differences have been blamed on business rivalry, with accusations that the DP and his allies have snatched contracts from them and what they perceive as arrogance of Ruto’s friends.

They blame the Deputy President for allegedly using his office and influence to frustrate their businesses and snatch from them multibillion-shilling tenders in favour of Chinese companies.

The contentious contracts include the standard gauge railway, which was eventually awarded to China Road and Bridge Corporation (CRBC), Jomo Kenyatta International Airport’s Greenfield terminal, which was inexplicably cancelled, the school laptop project and special economic zones, one of which is on the verge of being cancelled.

Besides, there is a general feeling among this group that the deputy president has set some of his foot soldiers on a hate campaign targeting them.

With the relationship effectively dead, the businessmen are coming together to unsettle the DP in his own backyard”.

28. As stated in *Hezekiel Oira v Standard Limited & Another (supra)* 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 tendered to lower his reputation causing right thinking members of society to shun or avoid him or to treat him with contempt. The Plaintiff herein complains that the article imputed that he was a wheeler dealer, corrupt and untrustworthy and has caused damage to his reputation among his followers and political colleagues who consequently shunned him thereby diminishing his political prospects. He disputed the statements in the publication and association with the other persons named therein, terming the article as false and the defence did not controvert the assertions.
29. Were the words in the article defamatory of the Plaintiff? The Court of Appeal 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.”



30. In Musikari Kombo (*supra*) the Court of Appeal 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:

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

31. Defamation therefore involves imputations that tend to cause injury to the reputation of a person, and a successful plaintiff must demonstrate the injury to his reputation or standing as part of the ingredients of defamation, and not merely rely on his own estimation of himself. In *SMW v ZWM* (2015) eKLR, the Court of Appeal observed:

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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).

32. The foregoing was reiterated in Patani’s case (*supra*), where the same Court stated:

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- “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 appellants 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.

33. *Ex facie*, the article complained may seem barely flattering to the persons named therein. However, as stated in Musikari Kombo as to whether the words complained of are defamatory, the test to be applied is that of the reasonable ordinary man; it is not the Plaintiff’s view of himself that matters. He ought to have adduced 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, hatred or even being shunned or that it tended to lower his esteem in the mind of right-thinking members of society.
34. In the absence of such evidence, it is difficult to see how the claim founded on defamation could be sustained, even if the defence of fair comment and privilege were doubtful. The Plaintiff has therefore failed to prove all the necessary ingredients in a defamation case and his suit must fail. Consequently, the suit is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF DECEMBER 2022.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Ligami

For the Defendant: Ms. Jan Mohamed

C/A: Adika

