



REPUBLIC OF KENYA



**Mungai v Nation Media Group Limited (Civil Suit 1449 of 2005)
[2025] KEHC 2430 (KLR) (Civ) (11 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2430 (KLR)

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

**CIVIL
CIVIL SUIT 1449 OF 2005**

**JN MULWA, J
MARCH 11, 2025**

BETWEEN

KIBE MUNGAI PLAINTIFF

AND

NATION MEDIA GROUP LIMITED DEFENDANT

JUDGMENT

1. By a plaint dated 2/12/2005 Kibe Mungai (hereafter called the Plaintiff) sued Nation Media Group Limited (hereafter called the Defendant) for alleged defamation and sought judgment against the Defendant for: -
 - (a) General damages for libel.
 - (b) Exemplary damages.
 - (c) Punitive and aggravated damages.
 - (d) Interest on (a), (b) and (c)
 - (e) Costs of the suit.
 - (f) Any further and or other relief as this Court may deem fit and appropriate to grant.
2. The Plaintiff avers that at all material times relevant to the suit he was an Advocate of the High Court of Kenya, practicing as such in the law firm of Kinoti & Kibe & Company Advocates, a legal affairs columnist with the Sunday Standard a national newspaper and a regular commentator on public affairs.



3. It is the plaintiff's statement of claim that the Defendant, Nation Media Group Limited in its issue of the Sunday Nation dated 5/12/2004 at Page 4 thereof published statements and words that were defamatory, false, scandalous, scurrilous and malicious allegations that remain factually wrong, and gross misrepresentation of the truth therefore demeaning, derogatory, disparaging and libelous of his character and reputation. The impugned article is reproduced here below:-

“Suspicious by former President Moi's loyalist that a powerful figure in the Narc government is behind the move to have him appear before the Goldenberg commission have been fanned by the link among some principals involved. One of the loyalists told the Sunday Nation that Mr. Kibe Mungai, the lawyer who represented the plaintiffs in the High Court Case in which the Moi summons order was issued, works for legal Kamau Kuria and Kiraitu Advocates in which commission assisting Counsel Gibson Kuria is a senior partner.

Justice Minister Kiraitu Murungi was a partner, but quit early last year after president Kibaki named him to the cabinet. Mr. Mungai, like the eight plaintiffs who want Mr. Moi summoned to defend himself among them former Taveta MP Jackson Mwalulu, is a vocal political activist.

The other connection is in High Court judge Joseph Nyamu, who sat on the panel of three judges (the others were Mr. Justices Mohammed Ibrahim and Milton Makhandia) that gave the order. Mr. Justice Nyamu had overturned a commission directive to temporarily remove the inquiry proceedings assisting counsel Kuria and John Khaminwa after the former made a public spectacle over insinuations made by lawyer Pravin Bowry about the counsel's conduct. It may be recalled that commission chairman Samuel Bosire said the High Court ruling was interfering with his team's work.

The plaintiff avers that the scandalous, scurrilous and malicious, allegations contained in the said publications made by the defendant against him were and remains factually wrong and a gross misrepresentation of the truth. Further, the said publication is demeaning of him, derogatory, disparaging and libelous of his character and reputation.”

4. The Plaintiff claims that the publication has caused him a high degree of embarrassment, disparagement and distress and as a result, his character and reputation have been seriously besmirched, scandalized and ridiculed.
5. Additionally the plaintiff avers that the malicious publication and words in their natural and ordinary meaning, imputation and or innuendo, were understood to mean, to the ordinary reader as follows:-
- a. That the plaintiff is a corrupt advocate
 - b. That the plaintiff is corrupt and has committed or is an accessory to offence(s) punishable under the provisions of The Anti-Corruption and Economic Crime Act, 2003 and The *Public Officer Ethics Act*, 2003.
 - c. That the plaintiff has breached his oath as an Advocate to discharge his responsibilities honourably and without fear or favour
 - d. That the plaintiff is not an honourable person and is vindictive and malicious towards innocent persons
 - e. That the plaintiff is a mere peddle of a "nameless" political loyalist pursuing nefarious political schemes through the courts



- f. That the plaintiff is a corrupt advocate engaged in a wide conspiracy with a "powerful figure in the Narc Government" to subvert the course of justice and manipulate the legal process to achieve their "bad intentions"
 - g. That the plaintiff is guilty of the offence of conspiracy to defeat justice under Section 117 of the *Penal Code* (Cap 63)
 - h. That the plaintiff is unworthy of public trust in his position as an Advocate, le commentator and public affairs critic.
 - i. That the plaintiff has no integrity as a person and lacks professional credibility.
 - j. That the plaintiff has induced judicial officers or conspired with them to act contra the Judicial Service Code of Code and Ethics published in Legal Notice No. 50 of May, 2003.
 - k. That the plaintiff is guilty of professional misconduct and should be struck out from Roll of Advocates.
 - l. That the plaintiff has breached the professional rules and etiquette prohibiting an Advocate from becoming the mouthpiece of his clients.
 - m. That the plaintiff is in a conflict of interest position that compromises his role as an advocate of the High Court of Kenya
6. For the foregoing, the plaintiff sought compensatory reliefs stated at paragraph 1 above.
 7. The Defendant filed its statement of defence dated 20/5/2005 in which it admitted to publication of the impugned Article but denied that the article was libelous of the Plaintiff, or that the published words were as a result of malevolence, spite, ill-will or malice and were without due regard to the consequences. In the alternative and without prejudice to the averment in the defence, the Defendant averred that
 8. as far as the said words in the publication is concerned, they consisted of opinions and were fair comment on a matter of public interest.
 9. The suit proceeded to full hearing during which only the Plaintiff called evidence in support of the averment in his plaint.

Plaintiff's Case

10. PW1 was the plaintiff, Kibe Mungai. He adopted his witness statement dated 26/3/2012 adding that he was admitted to the bar as an advocate of the High Court of Kenya in 1998, commenced his practice at the firm of Kamau Kuria Kiraitu Advocates, later joined the Human Rights Organization – People Against Torture – and subsequently formed the firm of Kinoti Kibe & Co. in 2003 as a partner to date.
11. He continued to testify that in 2004 he was instructed by some citizens to file a judicial review application in respect of the Goldenberg Inquiry seeking to quash some rules of procedure with respect to the inquiry; That a three (3) judge bench judgment was delivered in respect of the judicial review application stating that all mentioned persons in the inquiry ought to be called to testify, including the former later President H.E Daniel T. Arap Moi. He went on to state that the Sunday Nation of 5/12/2004 carried out an article on the issues however he was never contacted by the Defendant before publication of the article.
12. It was his evidence that the article was malicious and highly defamatory of him in three (3) ways – firstly, that he was an activist fighting the former President whereas he was not an activist or a



politician; secondly, the article alleged a conspiracy with Senior Advocate Kamau Kuria, Hon. Kiraitu Murungi, Hon. Justice Nyamu and that he was a member of a conspiracy group to defeat corruption which amounts to serious crimes under the Penal Code and corrupt under various statutes; thirdly, an insinuation that as an advocate he was acting in contravention of the Law Society of Kenya Act, and was guilty of professional misconduct.

13. In addition he stated that all of the above were false and offensive and continuous to date, given that on constitutional matters he keeps being called upon by various litigants and parties, which he does as an advocate. In summation, it was his evidence that he had a good relationship with all newspapers. He adduced the documents appearing in his list and bundle of, and supplementary list of documents as PExh.1 – 5.
14. On cross-examination, PW1 maintained that the article was in respect of the judicial review matter he was handling and that he was not assisting Kamau Kuria Advocate, as the latter was a member of the commission of inquiry. It was his evidence that the judicial review application was filed by the firm of Kinoti Kibe & Co Advocates wherein the Defendant was not a party to the said proceedings. He asserted that the only link between himself and the Goldenberg Scandal was that he acted in the judicial review application as an advocate and was never implicated in the scandal.
15. The Plaintiff continued to assert that the ordinary meaning to ordinary members of the society was that he was a corrupt advocate and despite the powerful figure having not been named in the article, it could be read and linked to the Hon. Kiraitu Murungi, then a partner in the law firm of Kamau Kuria Kiraitu Advocates. He testified that the article was widely circulated, that he was a vocal political activist when he was not, and touched on his personal character as it named him alongside others who were linked to a political conspiracy.
16. In re-examination, the Plaintiff iterated that the article was defamatory as he was linked to a judgment he was not party to, and the innuendo created was that he was promoting a political agenda involving the prosecution of former President H.E Daniel T. Arap Moi. He continued that the impugned article was injurious given that as an advocate it would be unethical, and would be liable to disciplinary proceedings.
17. PW2, Mr. Jackson Mwalulu on his part began by identifying himself as a journalist and former MP for Taveta Constituency and proceeded to adopt his witness statement dated 21/9/2022 as his evidence-in-chief.
18. It was his evidence that upon reading the article in question, he was caught by surprise as it had errors, insinuations and lies touching on the plaintiff whom he knew from the University of Nairobi; that he was one of the applicants in the judicial review matter having instructed him to prosecute it on their behalf and never knew him as political activist but a professional Advocate.
19. On cross-examination, PW2 repeated that he had instructed the Plaintiff to act for him in the judicial review matter. He testified that having worked for Kamau Kuria Advocate was not defamatory but that when read together with the article it appeared to impute that Justice Nyamu and the plaintiff were involved in a conspiracy, and that he was not aware whether the plaintiff was charged with any criminal but only that he was working with the firm of Kamau Kuria Kiraitu Advocates.
20. In re-examination, PW2 maintained the article insinuated that the judge mentioned therein was alleged to have been involved in the conspiracy whereas Hon. Kiraitu Murungi, was a minister at the time, hence the link. It was his evidence that the article did not constitute a fair comment on the issue as it was imbalanced and imputed that the Plaintiff was involved in a conspiracy meaning that he was corrupt and unprofessional.



As earlier stated, the Defendant opted and or failed to call any evidence.

Analysis and Determination

21. The Court has carefully considered the respective parties' pleadings, the plaintiffs and his witness evidence, and the Defendant's lengthy written submissions as well as the cited authorities.

At the heart of this Court's consideration, is whether the Plaintiff has proved his case on a balance of probabilities and if so, the appropriate damages to be awarded. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* [1987], KLR 347 the Court of Appeal stated that: -

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

22. Having captured the guiding legal principle, the broad issues that fall for determination are:
- a. Whether the Plaintiff has made out a case for defamation against the Defendant;
 - b. Whether the defence of fair comment is available to the Defendant; and
 - c. Whether the Plaintiff is entitled to an award of damages, and if so, the quantum.

Whether the Plaintiff has made out a case for defamation against the Defendant?

23. The rationale behind the law of defamation was spelt out by the Court of Appeal in the case of *Musikari Kombo v Royal Media Services Limited* [2018] KECA 801 (KLR), wherein it rendered thus;

“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 temporary sanction ...'”

Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person 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...”

24. Further, Black's Law Dictionary, 9th Edition at Pg. 479 defamation defines the tort of defamation as:

“The act of harming the reputation of another by making a false statement to a third person.”

It must also be remembered that when it concerns the tort of defamation, there exists competition between the private and public interest. The Kenyan constitutional dispensation at Article 33(1) guarantees the freedom of expression by way of seeking, receiving or imparting information. Corollary



to the forestated, is sub-Article (3) which provides that in exercise of the right of freedom of expression, every person shall respect the rights and reputation of others.

25. Considering these competing rights Lord Denning MR stated in the English case of *Fraser v Evans & Others* [1969] 1 ALL ER 8 that-

“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.” (emphasis added)

26. The Court of Appeal in the case of *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* [2009] KECA 379 (KLR) stated that in a suit founded on defamation the plaintiff must prove the following elements:

- 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, the plaintiff has suffered special damage.

27. In the instant case, it is undisputed that the Defendant published the article in question in print via the *Sunday Nation* on 5/12/2004. It is also uncontested that the article specifically mentioned the Plaintiff by name and referenced him as a lawyer who represented plaintiffs in a High Court case in which summons were issued to the former late President H.E Daniel T. Arap Moi; that the Plaintiff at the time worked for the firm of Kamau Kuria and Kiraitu Advocates in which the Goldenberg Commission assisting counsel, Gibson Kuria is a senior partner.

28. At this juncture, I find it is useful to set out in extenso the contents of the article complained about. The printed article published on 5/12/2004 read in part as follows: -

“Suspensions by former President Moi’s loyalist that a powerful figure in the Narc government is behind the move to have him appear before the Goldenberg commission have been fanned by the link among some principals involved.

One of the loyalists told the *Sunday Nation* that Mr. Kibe Mungai, the lawyer who represented the plaintiffs in the High Court Case in which the Moi summons order was issued, works for legal Kamau Kuria and Kiraitu Advocates in which commission assisting Counsel Gibson Kuria is a senior partner.

Justice Minister Kiraitu Murungi was a partner, but quit early last year after president Kibaki named him to the cabinet.

Mr. Mungai, like the eight plaintiffs who want Mr. Moi summoned to defend himself among them former Taveta MP Jackson Mwalulu, is a vocal political activist.

The other connection is in High Court judge Joseph Nyamu, who sat on the panel of three judges (the others were Mr. Justices Mohammed Ibrahim and Milton Makhandia) that gave the order.

Mr. Justice Nyamu had overturned a commission directive to temporarily remove the inquiry proceedings assisting counsel Kuria and John Khaminwa after the former made



a public spectacle over insinuations made by lawyer Pravin Bowry about the counsel's conduct.

It may be recalled that commission Chairman Samuel Bosire said the High Court ruling was interfering with his team's work.

These suspicions could be far-fetched but it is such perceptions that are shoring up the view that there is more than meets the eye in the matter”

29. With the above excerpt in mind, in *S M W v Z W M* [2015] eKLR, the Court of Appeal succinctly stated: -

“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.”

30. 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. Also, in *Onama v Uganda Argus Ltd* [1969] EA the East African Court of Appeal stated as follows:

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

32. As to the defence of fair comment, it has since been settled that a comment based on falsehood cannot qualify as fair comment as was addressed by the Court in *Nation Media Group Limited & Another v Alfred N. Mutua* [2017] KECA 177 (KLR). The Court therein observed that; -

“28. To sustain the defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is on a matter of public interest. [See *Gatley on Libel and Slander*, 8th edition, 1981 (Sweet & Maxwell) at paragraph 692 at page 291].

29.

30. In *Mong'are t/a Gekong'a & Momanyi Advocates v Standard Ltd* (above) this Court stated,

“that comment can only be fair if the basic facts upon which the comment is premised are correct. A comment which is based on lies or falsehood cannot be designated as fair.”

And in *Grace Wangui Ngenye vs. Chris Kirubi and another*, Civil Appeal No. 40 of 2010 [2015] eKLR this Court reiterated that a fair comment must be based on facts that are true or substantially true; and that a fair comment is a commentary, an expression of opinion based on true or substantially true facts.



31. An exposition of what Lord Phillips, the President of the Supreme Court of England described as “the outer limits of the defence” of fair comment is set out in the Supreme court of England decision in *Spiller & another vs. Joseph & others* [2010] UKSC 53. In that case, Lord Phillips adopted with approval what the Court of Final Appeal of Hong Kong characterized as the five “well established” “non-controversial matters” in relation to the defence of fair comment. First, the comment must be on a matter of public interest. Second, the comment must be recognizable as comment, distinct from an imputation of fact. Third, the comment must be based on facts, which are true or protected by privilege. Fourth, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded. Fifth, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views.”

33. Premised on the aforementioned authorities, can it be concluded that the publication tarnished the Plaintiff’s reputation in the eyes of reasonable members of society and or that the same was based on fair comment?
34. The impugned article was produced as PExh.1. The article was subtitled “Ex-leader doesn’t think Kibaki’s keen on the idea”. 30. The Plaintiff by his evidence confirmed that he was an Advocate of the High Court of Kenya having commenced his practice upon admission at the firms of Kamau Kuria Kiraitu Advocates and later established the law firm of Kinoti Kibe & Co. in 2003 as a partner.
35. That said, ex facie reading of the impugned article it imputes a powerful figure within the then Narc Government was behind the move to have the former late President H.E Daniel Moi summoned to appear before the Goldenberg Commission wherein the Plaintiff acted as for some of the litigants who had moved the Court seeking that the named persons in the commission of inquiry, be summoned. Notably, the impugned article employed the use of words and phrases such as “... Suspicions by former President Moi’s loyalist that a powerful figure in the Narc Government is behind the move...”, “Mr. Kibe Mungai works for legal firm Kamau Kuria and Kiraitu Advocates in which commission assisting counsel Gibson Kuria is a senior partner”, “...Mr. Mungai, like the eight plaintiffs who want Mr. Moi summoned to defend himself.”, “Mr. Mungai...is a vocal political activist”, “The other connection is in the High Court judge....who sat on the panel of three judges.....that gave the order” and “These suspicions could be far-fetched but it is such perceptions that are shoring up the view that there are more than meets the eye in the matter”
36. The article in the court’s opinion appears to encapsulate, as earlier noted, that the plaintiff was acting as counsel in *Republic v Judicial Commission of Inquiry Into the Goldenberg Affair & 3 others Ex Parte Mwalulu & 8 others* [2004] KEHC 1337 (KLR) where the applicants thereto had sought orders by way of summon to issue in respect of persons mentioned in the Goldenberg Inquiry, among them being the late President, for purposes of having them appear before the Goldenberg Commission to which the Plaintiff testified was false insinuation, actuated by ill-will and spite. It seems that the Plaintiff read malicious intent by the said publication of which he viewed that other than being intent on tarnishing his name, it was equally aimed at portraying him as a corrupt or unscrupulous advocate promoting a political agenda as against the former late President, regard to the itemized imputation or innuendo connected or understood at paragraph 7 of the plaint.
37. PW2 confirmed having instructed the Plaintiff to act as counsel in *Republic v Judicial Commission of Inquiry Into the Goldenberg Affair & 3 others Ex Parte Mwalulu & 8 others* [2004] KEHC 1337 (KLR) wherein he was one of the litigants; he further confirmed that the decision emanating from the



bench elicited public debate and political controversy about the political consequence of summoning a former President to testify before a commission of inquiry; that upon reading the impugned article he was surprised as to the numerous errors it contained; that there was an unfair allegations of a conspiracy between himself, the Plaintiff and others; and purported to use Courts to achieve political mischief by the Plaintiff.

38. The purpose of defamation proceedings is to protect 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. In the court's view where there is inaccuracy or error as in the impugned article as testified to by PW2, upon reading of the same, particularly as appertaining to the Plaintiff's work history between the firms of Kamau Kuria Kiraitu Advocates, and Kinoti & Kibe & Co Advocates, such can not be held as having been defamatory hence could not defeat the defence of fair comment by dint the wording of Section 15 of the *Defamation Act* that provides in part that the defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved. To that end, it is the court's finding that PW2's evidence fell short on establishing the defamatory characteristics of the impugned article on the Plaintiff's character and profession.
39. On the case of the Plaintiff, the innuendo as stated at paragraph ...of the plaint sta PW1 did not set out in explicitly consistency how the article defamed him whereas this Court cannot possibly construe from the reading the article how the same was defamatory of PW1, if not serving the purpose of commentary on a matter that was of public interest at the time.
40. Consequently, juxtaposing the ingredient of defamatory facets of the article alongside the defence advanced by the Defendant, the Court is not convinced that the article in question was defamatory. Meanwhile, it must be remembered that the ingredients of defamation as set out in *Wycliffe A. Swanya* (supra) are conjunctive, to mean, where the Plaintiff fails to prove the defamatory characteristic of the impugned article, it would be moot to consider whether the same was published malicious and or whether the damages are awardable.

Whether the Plaintiff is entitled to an award of damages, and if so, the quantum

41. Palpably, the Plaintiff being the party with the burden of proof, he failed to discharge the said burden. Had the Plaintiff proved upon a balance of probability that the impugned publication was defamatory I would not have hesitated, guided by the above principles, to assess the appropriate damages under the several subheads to each of the plaintiffs. There being no basis upon which I may assess such damages, I proceed to dismiss the Plaintiff's case in its entirety.

Disposition

42. Accordingly, the Plaintiff's suit is dismissed with costs to the Defendant.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 11TH DAY OF MARCH 2025.

.....

JANET MULWA.

JUDGE

