



**Okeyo v Owuor (Civil Suit 2 of 2014) [2024] KEHC 8452 (KLR) (Civ) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8452 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL SUIT 2 OF 2014**  
**JN NJAGI, J**  
**JUNE 20, 2024**

**BETWEEN**

**ERICK OUMA OKEYO ..... PLAINTIFF**

**AND**

**HON JOSHUA ASUMA OWUOR ..... DEFENDANT**

**JUDGMENT**

1. . The plaintiff herein instituted the present suit against the defendant vide a plaint dated 10<sup>th</sup> July 2014 in which he was claiming that the defendant had disparaged his reputation in public rallies in Nyakach constituency and accused him of being responsible for murders and cattle rustling in the said constituency. That the defendant made similar accusations about him in an interview to Ramogi Radio during a popular breakfast show. Further that the defendant conducted an interview with the Daily Nation reporter which was published in the Nation Newspaper of 13<sup>th</sup> November 2013 in which the defendant stated as follows:

“Clearly, there is an all-out war to tarnish my name then finish me. The person circulating the SMS claims that I am organizing a bloody retaliation over the killing of my parents”.

2. The plaintiff contends that immediately after the publication of the said words, the defendant addressed the National Assembly and expressly identified the plaintiff as the person who sent him threatening messages, the person behind killings in Nyakach constituency and the person behind the death of the defendant’s parents. The statement was as follows:

“A few days before that incident took place, I received threats from one of the young people who run security firms. He told me that he is a very good friend of Nyanza PC, Mr. Francis Mutie and Principal Secretary, Mutea Iringo. They said that they must audit me. This is just a civilian who, to the best of my knowledge, never went to school beyond even Form Four



and yet, he has police bodyguards. He is just an ordinary Kenya. Hon. Temporary Deputy Speaker, Sir, I have got messages on my phone which he sent to me. He is called Mr. Eric Okeyo. He has several police bodyguards and he is just a civilian. So, I would really want to know on what account he is entitled to some security services”.

3. The plaintiff contends that the publication made to the newspaper was defamatory to him when considered in light of the accompanying words made in the National Assembly. That as a result of the said publications the reputation of the plaintiff was gravely injured and his business lost lucrative contracts. The plaintiff sued in the present suit wherein he is seeking for prayers that:
  - a. A declaration that the words allegedly published were defamatory to the Plaintiff;
  - b. An order for amends/unconditional apology by the Defendant to be published in a newspaper/Media of wide circulation and in the same manner and prominence in which the Defendant made the defamatory statement;
  - c. A permanent injunction barring the Defendant from making further defamatory comments against the Plaintiff in respect of the fact stated therein;
  - d. General damages for defamation and loss of reputation;
  - e. Costs of the suit.
4. The defendant filed a statement of defence in which he denied the claim in toto. He averred that the newspaper interview did not make mention of the plaintiff while the communication from the National Assembly is privileged. More so that the suit is defective for misjoinder of parties in that the Newspaper has not been sued. The defendant denied the inuendo of the statements ascribed by the plaintiff.
5. The matter proceeded by way of viva voce evidence. The Plaintiff testified as PW1 and called one witness, PW2, who testified as to the character of the plaintiff.
6. The Plaintiff testified that he is the founder and the managing director of Bedrock Security Services Limited, a security company. That he ran against the defendant in Parliamentary elections for Nyakach Constituency in the 2013 elections in which the defendant emerged the winner. That after the elections the defendant embarked on a smear campaign of discrediting and maligning him in the constituency culminating in the complaints herein.
7. The defendant testified as his only witness, DW1. It was his evidence that there was at the time frequent cases of cattle rustling in the constituency that had resulted to the death and maiming of some residents, including his parents. That as the representative of the people he brought up the issue of insecurity in his constituency during parliamentary proceedings, which proceedings are privileged and no action can arise from them. He denied that he disparaged the plaintiff in any manner. He stated that the plaintiff is a bad loser and his is a case of sour grapes as he has not come to terms with the fact that he lost the Nyakach Parliamentary seat to him.
8. At the conclusion of the hearing, counsels for the parties filed written submissions.

### **Plaintiff's Submissions**

9. . The plaintiff submitted that the defendant made public statements that were disparaging to his reputation and casted him as a reckless person who was responsible for murders and cattle rustling in Nyakach constituency. That he did state before the National Assembly that the plaintiff was responsible for the death of his parents. That though the statement made in the National Assembly



was privileged, the one made to the Nation Newspaper was by innuendo defamatory of the plaintiff's character, reputation and integrity and was calculated to lower his reputation in the eyes of the general public.

10. The plaintiff submitted that every person who read the defendant's statement in the newspaper and heard him mention the plaintiff's name in the National Assembly could easily comprehend and understand that the defendant was referring to the plaintiff as the person who was behind the death of the defendant's parents.
11. The plaintiff submitted that the defendant had on several occasions addressed public gatherings in Nyakach constituency and on Ramogi Radio where he uttered words that the plaintiff was the person responsible for violence in Nyakach and sponsor of cattle rustling.
12. It was submitted that the defendant made defamatory words of and concerning the plaintiff. That the same were untrue and malicious. They were disseminated to the general public as a result of which the plaintiff was disparaged and lost business. The plaintiff urged the court to grant the prayers sought.
13. The plaintiff submitted that his witness PW2 testified that the plaintiff was a person of good standing in society. That the statements portrayed the plaintiff as a criminal and a person of questionable character contrary to what PW2 knew of the plaintiff. It was submitted that the reputation of the plaintiff was damaged in the eyes of the members of his constituency, across the country and beyond. The plaintiff urged the court to award him Ksh.2,500,000/= in general damages. He relied on the case of Kipyator Nicholas Kiprono Biwott v George Mbuggus (2002) eKLR where the plaintiff was awarded Ksh.10 million in general damages for libel.
14. The plaintiff submitted that the defendant declined to issue an apology when he was served with a demand letter. That he maintained a defence of qualified privilege and justification throughout the trial. The plaintiff urged the court to award him Ksh.1,500,000/= in aggravated damages. He relied on the case of Abdi Mohamed Farah v Nairobi Star Publication Ltd & another (2015) eKLR where Ksh.1,000,000/= was awarded in exemplary damages.
15. The plaintiff submitted that he is entitled to an apology from the defendant. He asked the court to award him Ksh.2,000,000/= in lieu of an apology. He cited the case of Abdi Mohamed Farah v Nairobi Star Publication Ltd & another (supra). He urged the court to issue an injunction against the defendant.

### **Defendant's Submissions**

16. The Defendant submitted that for a claim of defamation to be substantiated, the following elements must be present:
  - a. There must be publication of the statement complained of being falsehood to person defamed;
  - b. The words complained of must be falsehoods against the person defamed;
  - c. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring facts;
  - d. It is necessary to show that the published falsehood disparaged the reputation of the Plaintiff or tended to lower him in the estimation of the right-thinking members of the society generally. An injurious falsehood may not necessarily be an attack on the Plaintiff's reputation.
17. The defendant submitted that the plaintiff did not tender any evidence as to where the Ramogi Radio show was held nor did he prove that the defendant gave an interview to the press. That no newspaper



reporter was called to corroborate the evidence of the plaintiff. That there was no reference of the plaintiff in the alleged interview.

18. The defendant submitted that there was no evidence tendered on the specific venues and times that the defendant addressed public rallies in his constituency.
19. It was submitted that the plaintiff conceded that parliamentary proceedings are privileged. In any event that there is nowhere in the Hansard report proceedings where it is reported that the defendant blamed the plaintiff for cattle rustling, violent crime or the gruesome murder of his parents. That the plaintiff did not produce the aired parliamentary proceedings.
20. It was submitted that failure to sue the newspaper reporter and the publishers rendered the claim not maintainable. The defendant relied on the case of Jacob Mwanto Wangora v Hezron Mwando Kirorio (2017) eKLR where the court dismissed a defamation suit for failure to call anyone from the newspaper that published the alleged offending story. The case of Abdi Mohamed Farah v Nairobi Star Publication Ltd & another (supra) was also referred in this respect. It was submitted that in this case there was no evidence that the publication was sanctioned by the defendant.
21. The defendant submitted that the plaintiff did not establish any malice on the part of the defendant nor was there evidence that the defendant recklessly and negligently ignored facts in the alleged fabrication as stated in the case of Phineas Nyagah v Gitobu Imanyara (2013) eKLR.
22. The defendant submitted that the plaintiff's case was not proved. He asked the court to dismiss it with costs.

### **Analysis And Determination.**

23. Defamation is defined in the Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 28 as follows:

“A defamatory statement which tends to lower a person in the estimation of right-thinking members of the society or 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.”

24. . Winfield on Tort gives the following definition;

“It is the publication of a statement which tends to lower a person in the estimation of the right-thinking members of the society generally or which tends to make them shy away or avoid that person”.

25. In Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR the Court of Appeal set out the elements of defamation 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.”

26. A defamatory statement is thus one which tends to disparage a person in the eyes of right-thinking members of society as to expose the person to hatred, contempt or ridicule.
27. The test for determining whether or not a statement is defamatory is an objective one. The test is based on what an ordinary reasonable person reading the statement would understand the statement to mean and not the intention of the publisher – see the Court of Appeal decision in the case of *Miguna Miguna v The Standard Group Ltd & 4 others* [2017] eKLR.
28. The burden of proof was on the plaintiff in this case to establish that the words complained of were defamatory to him. The court has to interrogate the evidence and determine whether the elements of defamation were met. These are: Whether the statement refers to the plaintiff; whether the statement was published; whether the statement was defamatory, whether there was malice and whether there is any defence to the publication.

### **Whether there was publication of the statements**

29. A plaintiff in a case of defamation must prove that the statement complained of was publicized to a third party by the defendant. The Black’s Law Dictionary 9<sup>th</sup> edition defines publication as –  
“The act of declaring or announcing to the public.”
30. . In *Raphael Lukale v Elizabeth Mayabi & another* [2018] eKLR, the court cited the case of *Pullman v Walter Hill & Co* (1891) 1 QB 524, and stated that:  
Publication of a defamatory material occurs when the material is negligently or intentionally communicated in any medium to someone other than the person defamed....
31. The plaintiff herein complains that the defendant defamed him at public rallies, at Ramogi Radio, with Daily Nation newspaper and at the National Assembly. As for the defamation at public rallies and Ramogi Radio, there was no evidence where the incidents took place. The plaintiff did not call any witness who heard the defendant uttering the words complained of at the mentioned places. There was thus no evidence of publication of the alleged defamatory words at those places.
32. The plaintiff produced a newspaper cutting in which the defendant stated that there was a person circulating SMSes about him. The same however did not refer to the plaintiff as the person who was doing so. The plaintiff then did not prove that the defendant had published defamatory words about him to third parties in public rallies, at Ramogi Radio nor with the Daily Nation newspaper.

### **Whether the statements referred to the plaintiff**

33. It was the duty of the plaintiff to prove that any defamatory statement alleged to have been made by the plaintiff referred to him. It is trite law that a plaintiff need not be named in a case of defamation if ordinary readers are able to discern whom the statement referred to. In the case of Hon. *Mwangi Kiunjuri v Wangethi Mwangi & 2 others Civil Appeal No. 221 of 2012* the court while citing with approval the case of *Newstead v London Express Newspaper Ltd* (1940) 1KB 377, 1(1939) said that:-  
...It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him.



34. The newspaper interview in this case stated that: Clearly, there is an all-out war to tarnish my name then finish me. The person circulating the SMS claims that I am organizing a bloody retaliation over the killing of my parents. The plaintiff did not show that ordinary sensible readers with special knowledge of the facts could only understand the words as to refer to him. This element was therefore not proved.

#### **Whether the statements complained of were defamatory to the plaintiff**

35. The Plaintiff submitted that the accusations by the Defendant in various political rallies and interviews had the intention of lowering his status in the public hence defamatory. The defendant on the other hand, pleaded justification and submitted that whatever he said was true and accurate.

36. In *Miguna Miguna v Standard Group Limited & 4 others* (2017) eKLR, the same court stated the following

“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See *Gatley on Libel and Slander* (8th edition para. 31).

37. The question is whether the statements uttered by the defendant in the newspaper and at Parliament were capable of being construed as defamatory. As has been observed above, there was no evidence to prove that the statement published in the Daily Nation newspaper referred to the plaintiff. There was no mention of the plaintiff in the article. The plaintiff has not shown the words in the article that had the tendency to bring him into hatred, contempt or ridicule. I find no evidence that the said statements were defamatory to the plaintiff.

38. The plaintiff contends that the defendant named him in parliament as the person who was behind insecurity in Nyakach constituency. He however conceded that statements made on the floor of the National Assembly are privileged. Section 12 of the *Parliamentary Powers and Privileges Act* grants Members of Parliament Immunity from legal proceedings for their utterances on the floor of the House. No action therefore lies based on a statement made in Parliament. The statement cannot be used to augment another statement made outside parliament. There was thus no evidence that the statements complained of were defamatory to the plaintiff.

39. A plaintiff for defamation must prove that the publication was done with malice. Malice can be inferred by failure to inquire the facts with the Plaintiff before publishing the statement. In *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR, Mativo J. (as he then was) held that:

Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice.



40. . Malice can be express or implied from the circumstances and to the relationship between the parties before the publication. This was the position of the court in *Phinehas Nyaga v Gitobu Imanyara Civil Suit No. 697 of 2009* wherein Justice Odunga (as he then was) held as follows:

“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts... Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the Defendant in the course of the proceedings... the failure to inquire into the facts is a fact from which inference of malice may be properly drawn. Any evidence which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.”

41. There was no evidence of malice in the statement made by the defendant in this case.

42. . In view of the foregoing, I find no evidence to support the case for the plaintiff that he was defamed by the defendant. The suit is thus for dismissal.

### **Damages**

43. It is a requirement of the law that where the court dismisses a claim for general damages, it should assess the amount of damages it would have awarded the plaintiff had the suit succeeded.

44. The general principles in award of damages for defamation were stated by the Court of Appeal in [\*James v Ndirangu & 3 others \(Civil Appeal 282 of 2016\)\*](#) [2022] KECA 82 (KLR) to be as follows:

On an appropriate award for damages, the guiding principle is that the rationale behind an award of damages in defamation actions is to restore or give back to the injured party what he lost, save in exceptional circumstances where punitive or exemplary damages may be awarded. In its assessment, the trial court’s duty was to look at the whole conduct of the respondents from the time the libel was said to be published to the time the matter was heard in court....

We are alive to the principle that an award of damages should be fairly compensatory in light of the nature of the injury to reputation and that an award must appear realistic in the circumstances. In the English Court of Appeal decision in the case of *John vs. MG Ltd* [1996] 1 ALL E.R. 35 the Court held that;

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and take account of the distress, hurt and humiliation which the defamatory publication caused.”

45. The factors to be considered in awarding damages for defamation were re-stated by the Court of Appeal in *Nation Media Group & Another v Hon. Chirau Ali Makwere C.A. No. 224 of 2010 (UR)*, where the Court cited *Tunoi J.A in Johnson Evans Gicheru v Andrew Morton & Another* [2005] eKLR where guidelines in assessing damages were set out as stated in the case of *Jones v Pollard* [1997] EMLR 233 that:

1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.
2. The subjective effect on the plaintiff’s feelings not only from the prominence itself but from the defendant’s conduct thereafter both up to and including the trial itself.
3. Matters tending to mitigate damages, such as the publication of an apology.



4. Matters tending to reduce damages.
46. The court has also to have regard to the status, standing and character of the person defamed as re-stated by the Court of Appeal in *Nation Newspapers Limited v Peter Barasa Rabando* (2016) eKLR where it was held that:
- We reiterate that all persons are equal before the law but it would be a Utopian fallacy to assume that a defamatory publication calls for an equal compensation regardless of the status, standing and character of the persons defamed. We dare say that for a person who is not known beyond the local limits of his immediate family, residential and work environment calls for less damages than a person of prominence whose station, position, profession, fame and notoriety may spread beyond county and country. We therefore reiterate as correct what this Court has stated before that the status of a particular person affects the extent of the injury suffered.
47. The plaintiff in this case is a prominent businessman. In *Johnson Evans Gicheru v Andrew Morton & another* (2005) KLR the appellant who was a judge was awarded Ksh.2,000,000/- in general damages and Ksh.250,000/- in exemplary damages for a libel published in a book. I would have awarded the plaintiff herein a sum of Ksh.2,000,000/= in general damages for defamation and Ksh.500,000/= in aggravated damages had his suit succeeded.
48. The upshot is that the plaintiff has not proved his case on the usual balance of probabilities. The suit is dismissed with costs to the defendant.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 20<sup>TH</sup> JUNE 2024.**

**J. N. NJAGI**

**JUDGE**

In the presence of;

Miss Ochieng HB for Mr. Ataka for Plaintiff

Mr. Okeyo for Defendant

Court Assistant – Jarso

30 days R/A.

