



**Kaikai & another v Kenya National Union of Teachers (Civil Appeal E242 of 2024) [2024] KEHC 16804 (KLR) (Civ) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16804 (KLR)

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

**CIVIL**

**CIVIL APPEAL E242 OF 2024**

**BM MUSYOKI, J**

**SEPTEMBER 16, 2024**

**BETWEEN**

**LINUS KAIKAI ..... 1<sup>ST</sup> APPELLANT**

**ROYAL MEDIA SERVICES LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KENYA NATIONAL UNION OF TEACHERS ..... RESPONDENT**

*(Being an appeal from judgement and decree of Honourable B.M. Cheloti in Milimani Chief Magistrate Commercial Courts civil case number 69 of 2023 dated 2-02-2024)*

**JUDGMENT**

1. On 18-11-2021 the 1<sup>st</sup> appellant published in the 2<sup>nd</sup> appellant's television station broadcast the following text;  

‘On my kicker tonight, I read with horror some news that the Teachers Service Commission (TSC) has embarked on a punitive teachers transfer program targeting critics of TSC and critics of the teachers’ unions.
2. TPG we are told is made up of young teachers who are frustrated with what they term the ineffectiveness of teachers’ unions that include the once powerful KNUT.....
3. I had stated then as I do tonight Knut was and remains on its death bed courtesy of the ruthless anti-union practices adopted by Nancy Macharia and the TSC. And so it should not surprise at all that the lobby group TPG is in trouble and on the receiving end of the same tactics that brought the once powerful KNUT to its knees.....



4. The assault of lobby group TPG and struggling to death of KNUT ranks in the same league as the recent acts of arson. As crooked students burn dormitories and class-rooms schools, TSC has formed the habit of making huge bonfires using trade unions, lobby groups, and even individual teachers considered critics of TSC...?’
5. The respondent considered the above text defamatory, and proceeded to file civil suit for damages. The suit was initially filed by the respondent in this court vide HCCC number E023 of 2022 which was later transferred to the Chief Magistrate’s Court by Honourable Justice C. Meoli on 20-04-2023. At the subordinate court, the matter was registered as civil suit number 69 of 2023. The matter was heard and determined and judgement rendered on 2-02-2024 by Honourable B.M. Cheloti where she found the above quoted text defamatory of the respondent and awarded it a sum of Kshs 5,000,000.00 as against the appellants in addition to some orders of injunction.
6. I have read the judgment of the lower court and I discern therefrom that the magistrate did not take time to analyse or evaluate the evidence of the witnesses. If she did, the same is not recorded in the judgement. After stating what the witnesses said before her and what the tort of defamation entailed, the honourable magistrate made the following holding;

‘I am of the opinion that the publication was not done in good faith therefore did not qualify as a fair comment of public interest, qualified privilege and justification. The publication did affect the plaintiff by lowering their reputation in the estimation of right-minded persons, the teaching community as well as members of the public at large. From the foregoing, I find that the plaintiff have argued their case beyond balance of probabilities and had met all the key ingredients required to satisfy the threshold required for the tort of defamation to succeed.’
7. The court then went on to award damages of Kshs 5,000,000.00 and injunction orders as shown in paragraph 20 of the judgement. A court delivering judgment has the duty to analyze evidence of the parties before coming into a conclusion and give reasons for the decision. This is a requirement of the law under Order 21 Rule 4 of the Civil Procedure Rules and for good reasons because it enables the consumers of the decision of the court understand the basis of the court’s decisions. It is not enough for the court to simply state the law and fail to draw a correlation of the parties’ evidence with her decisions.
8. The above coupled with what I state in the paragraph that follows in respect of how the proceedings were taken, give me a challenge in writing a meritorious judgment in this appeal. However, if it were for lack of the reasons of the lower court only, this court would not find it hard to write a meritorious judgment as this is a first appeal in which case, I am called upon to analyse, examine and evaluate the evidence produced before the lower court afresh and reach my own independent conclusion.
9. The matter before the lower court took off for hearing on 10-11-2023. The respondent’s sole witness Collins Henry Oyuu testified and adopted his statement dated 2-02-2022. He was cross examined and re-examined and immediately thereafter, Miss Tusiime for the respondent stated that, that was the close of the plaintiff’s case. What is recorded thereafter is the cross examination of a witness who is not identified. There is no record that the witness whoever it was, took oath or adopted any statement. The honourable magistrate’s signature (in the original handwritten proceedings) that follows after the cross examination is shown to have been made on 9-11-2023. The same applied to the signature appearing after the re-examination. Talking of the dates of the signature, it would interest anyone that on 30-05-2023 the magistrate signed off the date as 13-10-2023. I have confirmed that the typed proceedings made attempts to make corrections of the dates but the handwritten proceedings have not



been corrected which should call into question the magistrate's state of mind or concentration during the proceedings.

10. After re-examination of the defence witness, Mr. Munyori for the defendant told the court that, that was the close of the defence case then the magistrate signed and put the date of 10-11-2023. I do not know whether I should attribute the mix-up of the dates to an honest mistake, pressure of work or simply lack of concentration by the magistrate. But the failure to record the evidence in chief of the defence witness must go beyond mistake, confusion or pressure of work. It is a serious issue which needs to be addressed noting that the judicial officer is a high-ranking Principal Magistrate. Of more concern to me is that, the magistrate in her judgment made reference to the defence witness adopting his statement. This is what the magistrate said at paragraph 7 of her judgment;

‘DW1, Linus Kaikai adopted his witness statement dated 7-03-2023 as his evidence in chief. He produced the list of documents dated 7-03-2023 as exhibits.’

11. I have gone through the record of appeal and the original lower court file and I am not able to see the witness statement or the list of documents referred to by the magistrate in her judgment. It beats my comprehension where the documents the magistrate referred to were filed. If the appellant's advocates had such documents, why are they missing from the record of appeal? I am not mapped to the Chief Magistrate's Court which would have enabled me to verify from the case tracking system whether these documents were filed. But even with the verification, the same would not cure the defect of the proceedings caused by the failure by the magistrate to record the evidence in chief of the appellant's witness. I would not even tell whether the said witness took oath.
12. In view of the above, I find the integrity of the proceedings in the lower court wanting. The proceedings are highly compromised, suspect and incapable of forming a basis of any appeal. I find and hold that the trial before the magistrate court was marred by incurable irregularities and the judgement emanating therefrom is a nullity.
13. I have come to a conclusion that the order which commend itself to me is an order for retrial. Honourable Justice W. Musyoka restated the circumstances in which an appellate court can order a retrial in *SM vs HGE (2019) eKLR* where he held that;

‘Where a trial process is wholly deficient or unsatisfactory, the appellate court should declare a mistrial, and order a retrial. An appellate court can order a retrial where the hearing by and the judgment of the trial court were so unsatisfactory as to amount to a complete mistrial. One other factor would be unsatisfactory state of the trial court record [see *Chandaria vs Njeri (1982) eKLR*]. The appellate court can also declare a mistrial where the proceedings were conducted by the trial court in an irregular manner [See *MMO vs FAH (2017) eKLR*]. It would also be the case where the trial court failed to allow a party a chance to be heard on their defence as that would amount to a miscarriage of justice and a mistrial, and such would be a proper case to remand the matter to the court for the party to be properly heard [See *Jane Murugi Karanu vs Gabriel Gikonyo Ndirangu (2008) eKLR*]. Where a trial court or tribunal determined a matter without giving an opportunity to either party to be heard [See *Duncan Kamau Kiriro vs Japheth P. Kimotho (2013) eKLR*].

14. I find the case before me to fall within the categories of the cases defined above and exercise of the powers granted to this court by Section 78(1)(e) of the [Civil Procedure Act](#) Chapter 21 of the Laws of Kenya, I make the following orders;
  1. The judgment and decree in Chief Magistrate's Courts at Milimani Commercial Courts civil case number 69 of 2023 dated 2-02-2024 is hereby set aside in its entirety.



2. The matter is referred back to the Chief Magistrate's Court for re-trial before a magistrate other than Honourable B.M. Cheloti Principal Magistrate.
3. I make no orders as to costs of this appeal.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

