



**Mukolwe v Radio Africa Group Limited t/a The Star (Civil Appeal  
E474 of 2023) [2024] KEHC 13024 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13024 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E474 OF 2023  
TW OUYA, J  
OCTOBER 17, 2024**

**BETWEEN**

**ABIGAEI MBAGAYA MUKOLWE ..... APPELLANT**

**AND**

**RADIO AFRICA GROUP LIMITED T/A THE STAR ..... RESPONDENT**

*(Being an appeal from Judgment and Order of the Chief Magistrate Milimani Commercial Court, Magistrate Court Hon. Opande (PM) delivered on 8th May, 2023 in CMCC 8277 of 2018 Abigail Mbagaya Mukolwe Versus Radio Africa Group Limited t/a The Star)*

**JUDGMENT**

**Background**

1. The Appellant filed a suit by way of plaint dated 17<sup>th</sup> September 2018 being CMCC Civil Suit No. 8277 of 2018 primarily seeking damages for defamation by the Respondent herein.
2. The Respondent being served, filed his Notice of Appointment of Advocates and Statement of Defence. The Respondent's main contention was that the suit did not disclose reasonable cause of action against it.
3. The suit thereafter proceeded for hearing on 29<sup>th</sup> November, with the Appellant and the Respondent's representative, Grace both testifying on oath.
4. Judgment was delivered on 8<sup>th</sup> May, 2023, dismissing the suit. The Appellant being dissatisfied with the outcome of the Judgment delivered on 8th May, 2023 filed a memorandum of appeal on the following grounds:
  - a. The learned Trial Magistrate erred in law and in fact in failing to find that the words published on 1<sup>st</sup> and 2<sup>nd</sup> September, 2018 at page 1, 4 and 5 of the Star Newspaper were defamatory despite there being no denial by the Respondent.



- b. The learned Trial magistrate erred in law and in fact in failing to determine whether the impugned publications were defamatory.
- c. The learned Trial magistrate erred in law and in fact in failing to find the Respondent liable for the defamatory words published on 1<sup>st</sup> and 2<sup>nd</sup> September at page 1, 4 and 5 of the Star Newspaper.
- d. The learned Trial magistrate erred on law and in fact in failing to uphold the evidentiary burden of he who alleges must prove.
- e. The learned trial magistrate erred in law in making a finding of fact based on mere unfounded allegations.
- f. The learned Trial magistrate erred in law and in fact in finding that Radio Africa Group Limited and the Star Newspaper are two separate entities.
- g. The learned trial magistrate erred in law in shifting the burden to the Appellant when the burden was on the Respondent to institute Third Party proceedings against the entity they claim publishes the Star Newspaper.
- h. The learned magistrate erred in law and in fact in failing to take judicial Notice that Radio Africa Group Limited has instituted numerous suits on behalf of the Star Newspaper and defended numerous suits on behalf of the Star Newspaper.
- i. The Learned Trail Magistrate erred in law in failing to apply the provisions of Section 120 of the Evidence Act to the facts of the suit before him.
- j. The learned Trial Magistrate erred in law and in facts in failing to take into consideration the fact the respondent had had through her legal officer prosecuted this matter on behalf of the Star Newspaper by filling an application to dismiss the suit for want of prosecution.
- k. The learned Trial magistrate erred in law and in fact in making a finding against the evidence adduced at Trail and particularly the admissions by the Respondent's witness that the respondent has instituted and defended suits on behalf of the Star Newspaper.
- l. The Honourable Trail Magistrate erred in law in failing to consider and to appreciate that the evidence tendered by the Appellant in respect of the relationship between the Respondent and the Star Newspaper.
- m. The learned magistrate erred in law and in fact by misapprehending the evidence and applying the wrong principles of law on the issue of ownership and publishing of the Star Newspaper.
- n. The Learned Trial Magistrate erred in law and in fact in failing to appreciate the long-established principle of satire decisis, present law thus brining into confusion and thereby deriving an erroneous finding/conclusion, on the issue of ownership pf the Star Newspaper.
- o. The learned Trial Magistrate erred in law and in fact in failing to award general damages for defamation to the Appellant.
- p. The learned Trail magistrate erred in law and in fact in failing to award punitive, aggravated and/or exemplary damages for defamation to the Appellant.
- q. The learned Trial Magistrate erred in law and fact in failing to assess general damages.



- r. The learned Trial magistrate erred in law and fact in failing to assess punitive aggravated and/or exemplary damages.
  - s. The learned magistrate erred in law and in fact in failing to appreciate the Appellant’s pleadings and the evidence tendered at trial.
  - t. The learned trail magistrate erred in law and in fact by failing to take into consideration the fact that the impugned defamatory word was published by the Respondent.
  - v. The learned magistrate erred in fact and in law in failing to consider the Appellant’s submissions in support of her submissions.
  - u. The learned trail magistrate erred in failing to consider the authorities cited by the Appellant in support of her submissions.
  - v. The learned trail magistrate’s decision was unjust, against the weight of evidence and was based on wrong points of fact and wrong principles of law and has occasioned a miscarriage of justice.
5. The Appellant prays for orders that:
- a. The Appeal be allowed and judgment entered on 8<sup>th</sup> May, 2023 dismissing the Appellant’s suit and awarding costs to the Respondent, together with the consequential orders thereto be set aside.
  - b. The Respondent be compelled to retract the libelous and/or defamatory and injurious and/or offensive words/statements raised in the defamatory statements published on Saturday 1<sup>st</sup> September, 2018 and Sunday 2<sup>nd</sup> September, 2018 in the front page and page 4 and 5 of the Star Newspaper under headline “Swazuri’s Deputy In Sh. 400m Probe” in respect of the Appellant.
  - c. The respondent be compelled to issue an unequivocal apology in the same mode, manner and prominence that the said libelous/defamatory words were published on Saturday 1<sup>st</sup> September, 2018 and Sunday 2<sup>nd</sup> September, 2018 in the front page and pages 4 and 5 of the Star Newspaper under headline “swazuri’s Deputy In Sh 400m Probe” in respect of the Appellant.
  - d. A permanent injunction to restrain the Respondent by themselves, employees, agents, servants or business associates from writing, printing, broadcasting, publishing, re-publishing or causing to be printed, written published, republished or broadcasted any words/statements/articles/ utterance in any manner whatsoever injurious/offensive to the Appellant and in particular to the said libelous/defamatory words published on Saturday 1<sup>st</sup> September, 2018 and Sunday 2<sup>nd</sup> September, 2018 in the front page and page 4 and 5 of the Star Newspaper under headline “swazuri’s Deputy In Sh. 400m Probe” in respect of the Appellant.
  - e. A mandatory injunction compelling the respondent to pull down, delete and/or remove from the internet and other online media the said libelous/defamatory words published on Saturday 1<sup>ST</sup> September, 2018 and Star Newspaper under headline “swazuri’s Deputy In Sh. 400m Probe” in respect of the Appellant.
  - f. General damages for defamation
  - g. Punitive, aggravated and/or exemplary damages.
  - h. Costs of this Appeal be granted to the Appellant.



- i. Interest on 6, 7, 8 and 9 above at the court's rate.
  - j. Any other relief that this Honourable court may deem fit to grant.
6. The matter/Appeal was canvassed by way of written submissions. The Appellant has condensed his case into four key issues:

**Whether the words published on 1<sup>st</sup> and 2<sup>nd</sup> September 2018 at page 1,4 and 5 of the star newspaper were defamatory**

7. The Appellant argues that the Respondent caused to be published in print and on its website an article titled "Swazuri's Deputy In Sh. 400m Probe", "affidavit: Former Aide Alleges Illegal Payment Over Expiring Caxton House Lease." "nlc Acting Chairperson Abigael Mbagaya Says The Allegations Are Fabricated By Her Enemies." "swazuri's Deputy Now Under Investigations," National Land Commission Acting Chairperson Abigael Mbagaya Refuted Claims Saying The Allegations Are Fabricated By Her Enemies." See pages 20-26 of the Record of Appeal.
8. That in the said article it was alleged that the Appellant had allocated land to her relatives under Kivaye Self Help Group, that she received a car gift from a salt farm in Kilifi, that she carries out large international money transfers frequently, sacking an aide for receiving Ksh.10M from David Baro Some, she was to receive a Ksh. 10M bribe to help some acquire the lease to Caxton House on Kenyatta Avenue which was due for renewal and which belonged to Sayani Investment.
9. That indeed the defamatory statements were against the appellant and depicted her as a person of low moral integrity standards and who is unworthy of holding a constitutional office.

She cites the authority Halsbury's Laws of England, 4<sup>th</sup> Edition VOL 28 paragraph 10;

"a defamatory statement is a statement which tends to lower a person in the estimation of right-thinking members of society generally or to abuse 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,"

10. That the said publication imputes to any right-thinking members of the society that the Appellant is a criminal who takes advantage of her public office to swindle the public, that she is unscrupulous, calculating, conniving and ill-intending public servant, that she has abused and/or taken advantage of her office and illegally benefited from illegal activities, that she is of low moral standing lacking in integrity.
11. That the words published were injurious to the Appellant's reputation as comments from members of the public could be seen airing their views on the person of the Appellant as demonstrated in the Record of Appeal where he quoted one Ebinino Samwa Anguche stating "the people entrusted with security of public property end up being thieves without any inkling of shame"
12. In considering whether the words published are defamatory, she cites the case of Alnashir Visram v Standard Limited (2016) eKLR

The Appellant argues that she established the threshold in the trial court by proving:

- i. The existence of a defamatory statement;
- ii. The defendant has published or caused the publication of defamatory statement;
- iii. The publication refers to the claimant.



13. The Appellant also imputed malice on the part of the Respondent and relied on the authority of *Phineas Nyaga Vs. Gitobu Imanyara HCCC 697/2009* that malice can be inferred and especially when the language used is overly exaggerated. The Courts 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. That may lead to an inference of malice may also be inferred from the relations between the parties.....

The failure to inquire in the facts is a fact from which inference of malice may properly be drawn.”

**Whether the learned magistrate erred in law and in fact in finding that Radio Africa Group Limited and the Star Newspaper are two separate entities**

14. The Appellant at the trial court sued the Radio Africa Group Limited trading as The Star and averred that the Defendant carries on business as a newspaper publisher both in print and electronic media in and elsewhere in the Republic in the name and style of the Star Newspaper. He argues that he sued the proper party and hence ought to have been held liable.
15. His other argument is that the Respondent admitted to being the head of content of the Star Newspaper and that they indeed published the comments complained about. He also relies on Section 120 of the *Evidence Act*, Chapter 180 Laws of Kenya which provides that:

“When one person has, by his declaration act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of such thing.”

16. The Appellant quotes the trial court for relying on the same information in its Ruling where it stated that:

“It is admitted by the Defendant that the words complained of were published by the Defendant.....”.

17. The Appellant also refers to various correspondences between themselves and the respondent concerning the subject matter and specifically to an affidavit dated 10th December 2021 by one Linda Musita the then Head of Legal at the Respondent company suggesting that the Respondent was indeed the proper party in this matter and had admitted to publishing the defamatory statements.

**Whether the learned magistrate erred in failing to assess and award damages.**

18. The Appellant took issue with the trial court for failing to assess and award damages in view of the evidence that was availed at the trial. He relies inter alia, on section 16 of the *Defamation Act* Kenya which provides that:

“In any action for libel the court shall assess the sum of damages payable in such amount as it may deem just”

19. The Appellant relies further on the Authorities of *v Standard News Paper (2015) KLR*, *Bob Collymore & Another V Cyprian Nyakundi (2015) eKLR* and *Abdulhamd Ebrahim Ahmed v Municipal Council*



of Mombasa (2004) eKLR where courts awarded damages for libel arising out of newspaper publication, internet website and social media publication.

20. The Respondent's case is condensed to one single issue as to whether the trial court erred in dismissing the Appellant's claim against the Respondent. The Respondent argues that it demonstrated in its statement of defence that it was not the publisher and therefore did not publish or cause to be published the article complained of. The Respondent holds the position that Nairobi Star Publications Limited is a separate legal entity from the Defendant by adducing a certificate of incorporation of Nairobi Star Publications Limited as the publisher of The Nairobi Star which is the newspaper that published the article complained of. He also argues that the Appellant did not adduce any evidence to support her claim that Radio Africa Group Limited is the publisher of The Star newspaper. The Respondent relies on the authorities of: *Japheth Wepukhulu v Fred Simiyu* (2020) eKLR together with sections 107(1), (2) *inter alia* on the standard of proof in civil cases which is on a balance of probability and that the burden of proof is on the party that is alleging.
21. The Respondent submits that Radio Africa Group Limited and The Star Publications Limited are two distinct legal personalities and that the Respondent cannot be held liable for a publication carried out by another entity. The Respondent relies further on the authorities of *Mohamed Adan Molly v Linksoft (k)Ltd & Another* (2013)eKLR, *Gatley on Libel and slander 9<sup>th</sup> Edition* (1998) pg173 and *Jacob Mwanto Wangora v Hezron Mwando Kirorio* (2017) eKLR Civil Appeal No. 35 of 2015 all emphasizing that the proper person to be sued is the person who published the defamatory words or caused them to be published.

### **Analysis And Determination**

22. The Court has considered the pleadings, the evidence on record and the submissions on record accompanied by supporting authorities. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 and *Williams Diamonds Limited v Brown* (1970) EA 1.
23. The issue as to whether and when an appellate court can interfere with a trial court finding was settled by the Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”
24. With the above in mind, and with due caution, the court has reviewed the entire evidence and identified the following as the issues for determination:
  - i. Whether the words published were defamatory in nature
  - ii. Whether the publication of the words meet threshold for a case of defamation
  - iii. Whether the publication was undertaken or caused by the Respondent



25. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M’Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited* Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

25. In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 the court noted 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.”

- ii. The court will determine three issues identified above in light of the rationale behind the law of defamation which is the nature of the present claim. 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 neighbor. 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..."

27. The court in *Selina Patani & Another v Dhiranji V. Patani* [2019] eKLR guided that the law of defamation is concerned with the protection of a person's reputation, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that:

".....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."

28. To succeed in his claim therefore, the Plaintiff was required to establish the above ingredients on a balance of probabilities bearing in mind that Respondent on its part denies making the impugned publications with a defence that they are not properly sued in this matter.

29. The first issue is whether the words published were defamatory in nature. This court has considered the content of the impugned publications as quoted in paragraph 7 herein as: "swazuri's Deputy In Sh. 400m Probe", "affidavit: Former Aide Alleges Illegal Payment Over Expiring Caxton House Lease." "nlc Acting Chairperson Abigael Mbagaya Says The Allegations Are Fabricated By Her Enemies." "swazuri's Deputy Now Under Investigations," National Land Commission Acting Chairperson Abigael Mbagaya Refuted Claims Saying The Allegations Are Fabricated By Her Enemies." See pages 20-26 of the Record of Appeal.

30. A defamatory statement is defined in Halsbury's Laws of England 4th Edition Vol. 28 paragraph 10 as:

"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"

31. The Court in the case of *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 17<sup>th</sup> Edition 1995-page 1018."



32. 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 reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

The Plaintiff here pleaded and testified that the published articles were defamatory both in their natural and ordinary meaning, since they could be inferred to mean that she is among other things, an unfit and untrustworthy political leader to members of society.

33. There is no doubt that the content complained of was defamatory in nature in as far as they meet the threshold to the extent of I, II and IV at paragraph 26 above that is; that the statement must be defamatory, must refer to the plaintiff and must be false. It is clearly demonstrated by the Appellant in his evidence that the words published on 1<sup>st</sup> and 2<sup>nd</sup> September 2018 at page 1,4 and 5 of the Star Newspaper, the words referred to the Appellant and were false, facts which are not disputed by the Respondent. This court is convinced that the published statement was false, defamatory and referred to the Appellant.
34. However, III which requires that the statement must be published by the defendant remains to be the bone of contention. This court reiterates that it was the burden upon the Appellant to prove that the person publishing or causing to be published the impugned content was indeed the Appellant. This brings us to issue number three for determination.
35. In addressing the Respondent’s contention that they were not properly sued in this matter, the court notes that the Appellant sued Radio Africa Group Limited trading as The Star. The Respondent’s position on the other hand is that Radio Africa Group Limited and The Star Publications Limited are two distinct legal personalities and that the Respondent cannot be held liable for a publication published and carried out by another entity. The Appellant’s case was that the impugned publication was published by the Star Newspaper. The question for determination therefore is who owned the Star Newspaper as at the time of the said publication?
36. The Respondent has gone beyond denying that the ‘person’ who published the impugned content was entirely a different person from themselves by adducing evidence of certificate of incorporation of The Nairobi Star Publications Limited registered in the year 2007, a copy of return of newspapers by The Nairobi Star whose name and postal address of the publisher is The Nairobi Star Publications Limited, a receipt for initial return of a newspaper for the Nairobi Star dated 3<sup>rd</sup> March 2008 and change of name from The Nairobi Star Publications Limited To The Star Publications Limited dated 15<sup>th</sup> April 2010.
37. Upon considering the foregoing factors, the court is of the view that while it was the Appellant’s case that the impugned publication was published by the Respondent the burden of proof lay upon the Appellant to prove that the person cited as the Defendant in the suit is indeed the person who published or caused the publication even in the absence of the Defendant/ Respondent’s evidence. In the present instance, the Plaintiff/ Applicant ought to have adduced evidence to not only support his averment but also to counter the evidence adduced by the Respondent. It is therefore the holding of this court that the Appellant failed to discharge the burden of proof in as far as the identity of the publisher of the impugned content was concerned. This was the Respondent’s position in their pleadings and during the trial which was not displaced by the Appellants. This court therefore concurs



with the lower court finding that The Star Publications Limited is a totally different entity from Radio Africa Group Limited T/A The Star which was sued herein.

38. Upon reviewing all the material on record therefore, the court finds that the Plaintiff's has failed to prove all the requisite ingredients in order for his claim for defamation to succeed, against the Defendant/Respondent. Consequently, this Appeal is hereby dismissed with orders as follows:
- i. Appeal dismissed with costs of the Appeal to the Respondent
  - ii. Judgment entered on 8<sup>th</sup> May, 2023 dismissing the Appellant's suit and awarding costs to the Respondent upheld

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17<sup>TH</sup> DAY OF OCTOBER 2024**

**HON. T. W. OUYA**

**JUDGE**

ROA 14 days.

For Appellant: Sheunda H/b For Osundwa

For Respondent: Mungai

Court Assistant Miss Amina

