



**Mamra v Nguu & another (Civil Suit 238 of 2017)
[2023] KEHC 3444 (KLR) (Civ) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3444 (KLR)

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

CIVIL

CIVIL SUIT 238 OF 2017

CW MEOLI, J

APRIL 20, 2023

BETWEEN

NEDDIE EVE MAMRA PLAINTIFF

AND

MICHELLE MWENDWA NGUU 1ST DEFENDANT

DOMITILLA WAMBUI T/A “DEADBEAT DADS AND RANDY

MEN 2ND DEFENDANT

JUDGMENT

1. The suit by Neddie Eve Mamra, (hereafter the Plaintiff) against Michelle Mwendwa Nguu and Domitilla Wambui t/a “Deadbeat Dads and Randy Men” (hereafter the 1st & 2nd Defendant/ Defendants) was filed on November 29, 2017 and is founded on defamation. The Plaintiff sought *inter alia* general damages for defamation; compensatory damages for financial losses; exemplary/aggravated damages; a permanent injunction to prohibit further publications of the same nature; and the costs of the suit.
2. It was averred that at all material times to the suit, the Plaintiff, an Advocate of the High Court of Kenya was legally married to one Mitchell Mamra Kisia (hereafter Plaintiff’s husband) and the couple was blessed with two children. Whereas the 1st Defendant, a paramour to the Plaintiff’s husband, claimed to have had an illegitimate child with the him. The 2nd Defendant was described as the administrator of the Telegram Channel known and marketed as “Deadbeat Dads and Randy Men” and on other platforms, as “Deadbeat Dads and Homewreckers”.
3. That through the aforementioned popular Telegram Channel frequented by more than 6,300 members, the Defendants together with other unknown persons maliciously authored and published



- a post on November 30, 2016 about the Plaintiff and her husband and therein prominently disclosed his name, contacts, place of business and social media handle.
4. In addition to publishing the alleged unsubstantiated post, the Defendants allegedly falsely, maliciously, and with intent to injure and lower the Plaintiff's reputation in society, posted defamatory and disparaging words. Calculated to injure the Plaintiff and cause her embarrassment besides exposing her to ridicule, odium, and contempt in eyes of the Plaintiff's family, professional peers, her clients and public at large. That the publication was available to readers in Kenya, East Africa and the United States of America some of whom contacted the Plaintiff. That as a consequence of the defamatory words, the Plaintiff has suffered immense financial and other losses.
 5. On September 23, 2019 the Plaintiff withdrew the suit as against the 2nd Defendant with no orders as to costs and pursuant to her request, judgment in default was entered against the 1st Defendant who, despite being duly served with summons failed to enter appearance and to file a defence. The foregoing was the state of pleadings and proceedings prior to hearing.
 6. During the trial, the Plaintiff testified as (PW1). Having identified herself as an Advocate of the High Court of Kenya she proceeded to adopt her witness statement dated November 27, 2017 as her evidence-in-chief. She also produced the bundle of documents in the list of documents of even date as PExh.1-6 including a copy of marriage certificate, copy of text messages print outs between the Plaintiff and the 1st Defendant, copy of telegram channel print outs identifying the administrator of the channel, copy of the telegram channel publication of November 30, 2016, copies of email communication and demand letter to Defendants.
 7. Belinda Akello (PW2) testified that she is a partner to (PW1) at the Law firm of Triple A Law Advocates LLP. She too equally proceeded to adopt her witness statement dated November 27, 2017 as her evidence-in-chief. It was her evidence that by claiming that the said firm advised a party not to pay maintenance in respect of a child, the publication impacted the law firm adversely. As a consequence of which, one of the partners in the firm resigned and relocated. She asserted that the firm lost partners, clients and business due to the publication.
 8. Irene Mwendu Kiwool (PW3) on her part asserted that she had known (PW1) since High School in 1999. She equally adopted her witness statement dated November 27, 2017 as her evidence-in-chief.
 9. Hannah Wangui Githuku (PW4) testified that she is an Advocate of the High Court of Kenya having known (PW1) since the year 2004 when the two joined university. She adopted her witness statement dated November 27, 2017 as her evidence-in-chief. She asserted that the Defendants publication became a topic of public discussion and that the article purported that (PW1), who was known to her as a person of integrity, had not acted professionally as an advocate. Thereby subjecting her to disrepute.
 10. The final witness for the Plaintiff was her husband Dr. Mitchel Mamra Kisia (PW5). He too proceeded adopted his witness statement dated November 27, 2017 as his evidence-in-chief.
 11. At the close of the Plaintiff's case, written submissions were filed. The Plaintiff's submissions were anchored on the decision in *John Ward v Standard Limited* [2006] eKLR and addressed the twin issues of liability and damages.
 12. Addressing the court on whether the publication in question established the elements of defamation, counsel relied on *Halsbury's Law of England*, 4th Edn Para 10 at Pg 7, JA Jolowicz and T Ellis Lewis *Winfield on Tort* 8th Edn at Pg 245, John G Fleming, *The Law of Torts*, 7th Edn at Pg 501. He also cited several decisions including *SMZ v ZWM* [2015] eKLR, *Musikari Kombo v Royal Media Services Limited* [2018] eKLR, *Phinebas Nyagah v Gitobu Imanyara* [2013] eKLR, *Safaricom Limited v*



- Porting Access Kenya Limited [2011] eKLR, and Wycliffe A Swanya v Toyota (EA) Limited & another [2009] eKLR. He asserted that the defamatory statement was published by the Defendants, and was in respect of the Plaintiff. Moreover that, the publication which predominately referred to the Plaintiff and her husband was false, malicious and intended to injure the Plaintiff.
13. It was further submitted that the publication was widely circulated on the Telegram, Facebook and WhatsApp platforms. That the natural and ordinary meaning of the publication was to the effect that the Plaintiff was an incompetent lawyer, unethical, unprofessional, commandeering, manipulative, insensitive and ought to be shunned, which imputations were not true and were intended to disparage the Plaintiff in her professional and private capacity.
 14. Concerning malice and injury, it was submitted that the said publication was made by the Defendant with the knowledge that the same was slanderous or in reckless disregard as to whether they were slanderous. That the Plaintiff's evidence demonstrated the level of injury caused to the Plaintiff as a result of the publication by the defamatory statement. It was further contended that the Defendant declined, failed and refused to set the record straight even after the publication and refused to offer an apology or make amends after a demand was served.
 15. On quantum, counsel anchored his submissions on the decision in Johnson Evan Gicheru v Andrew Morton & another [2005] eKLR which undergirded the principles to be considered in awarding damages in an action for libel. Addressing the court on general damages, counsel emphasized the effect of the offending publication on the Plaintiff as an Advocate of the High Court of Kenya, with an illustrious legal career for the last 15 years, a family person and an avid Christian, in urging an award of Kshs 20,000,000/- under the said head. The decision in Ernest Omondi Owino & another v Felix Olick & 2 others [2021] eKLR was called to aid.
 16. In urging exemplary damages, counsel submitted that the impugned publication was published recklessly and was accessible to millions of readers globally hence its potential to cause extensive damage as compared to libel published to a handful of people. That on the Telegram platform, the channel was aggressively marketed as a shaming platform on Facebook and WhatsApp and the magnitude of the publication cannot be overemphasized.
 17. On aggravated damages, it was contended that the Defendant failed to set the record straight with her so-called "friends" or offer an apology even after the Plaintiff pleaded with her to do so. Placing reliance on the decisions in Abdulhamis Ebrahim Ahmed v Municipal Council of Mombasa [2004] eKLR and Nairobi HCCC No 5 of 2000, Charles Kariuki t/a Kariuki & Co Advocates v The Nation Newspapers Ltd counsel urged the court to award Kshs 10,000,000/- as aggravated damages and Kshs 5,000,000/- in lieu of the apology sought in the plaint. In conclusion, it was submitted that the freedom of expression as guaranteed in the Constitution is not absolute and that the Plaintiff was entitled to the damages sought for her injury.
 18. The Court has considered the evidence on record and submissions made. The court must determine whether the Plaintiff has proved her case on a balance of probabilities and if so, the appropriate quantum of damages awardable. 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 exists.” 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'mairanyi & 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.”

See also the Court of Appeal stated in [Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank](#) [2004] 2 KLR 91.

19. Concerning the objects of the law of defamation, the Court of Appeal stated 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...”

20. Actions founded on the tort of defamation surface the tension 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”. Whereas Article 34 guarantees the freedom of the media, Articles 25 and 31 protects the inherent dignity of every person and the right to privacy. These rights are reinforced by the provisions



of the *Defamation Act*. 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.”

21. In *Selina Patani & another v Dhiranji v Patani* [2019] eKLR’s 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. In that case, the Court of Appeal stated that: -

“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.”

22. To succeed, the Plaintiff herein was required to establish the above ingredients on a balance of probability. The Plaintiff is an Advocate of the High Court of Kenya and spouse to (PW5). The Plaintiff’s case was that on November 30, 2016 the administrator/proprietor of the Telegram Channel known and marketed as “Deadbeat Dads and Randy Men” and in other platforms as “Deadbeat Dads and Homewreckers” published the following statement in which alleged references to the Plaintiff are underlined: -

“Dr. Mitchell Mamra Kisia (PW5) Nairobi Premier Dental Clinic 07203627**. This man has a 9 month old baby with my best friend. He has sworn never to support him. To the extent aliita mtoto nyoka. The wife has also told him never to support the child otherwise she will leave him. My friend has never wanted to take him to court call it love or witchcraft but the minute he was served with a letter from the lawyers he called her all sorts of names to the extent he started insulting his own Flesh and blood..... ended up disowning the boy....

“He has sworn never to support the child. That he will keep appealing the court until the child dies and his wife is a lawyer who is advising him not to pay support. His Facebook name is Mitch Woud Kisia. Daktari chungu mtoto” (sic)

23. At paragraph 9 of her plaint, the Plaintiff pleads the above underlined words as the basis of her cause of action and that the said words referred to her, were false and defamatory and were published by the 1st Defendant. Reviewing the Plaintiff’s evidence, the Court is in no doubt at all that the foregoing ingredients save for one, have been established. Indeed, in the Court’s view, this case turns on the question whether the 1st Defendant has been shown to have published the defamatory statement containing the words about which the Plaintiff complains. The Plaintiff had pleaded that the two Defendants as earlier sued, had jointly authored and published the defamatory publication, and that the 1st Defendant was the author and originator of the words complained of.
24. However, the erstwhile 2nd Defendant, one Domitilla Wambui was specifically alleged to have been the administrator of the Telegram channel marketed as “Deadbeat Dads and Randy Men” or as “Deadbeat Dads and Homewreckers” on other social media platforms on which the offending statements were



published. As earlier observed, Domitilla Wambui was the 2nd Defendant until September 23, 2019 when the case as against her was withdrawn.

25. First, there is no direct evidence connecting the 1st Defendant with the actual publication of the offending words on the medium in question or to the Telegraph channel on which the publication was posted. Nonetheless, it is the Plaintiff's contention that the said publication was based on information purportedly supplied by the 1st Defendant to the said Domitilla Wambui. In support of the contention, the Plaintiff relied on several pieces of evidence. These include the admitted (at least on the Plaintiff's part) amorous relationship between the 1st Defendant and the Plaintiff's husband, (PW5) prior to the publication, leading to the 1st Defendant's claims that a child had been sired between her and (PW5), the invitations or campaign contained in posts on Domitilla Wambui's Telegraph channel for ladies to come forward and expose or "shame" "randy men", "dead beat dads" and "home breakers" (see PExh 3), and conversations between the Plaintiff, (PW5) on one hand, and the 1st Defendant on the other.
26. In particular, the Plaintiff sought to rely on PExh.2 being copies of text messages exchanged between the 1st Defendant and the Plaintiff, PExh.6 being a copy of an email dated December 12, 2016 emanating from (PW5) and addressed to the 1st Defendant. PExh 5 also relied on was supposed to contain copies of recordings of telephone conversations between the Plaintiff and the 1st Defendant on 21st November 2016, or some period prior to the publication. No such recording or related transcript was attached to the list of documents filed with the plaint and presented at the trial. Be that as it may, the Plaintiff's oral evidence regarding these conversations was inter alia that she had informed the 1st Defendant that she and (PW5) were at the time separated, that the Plaintiff had no role in the decisions made by the husband, did not represent him as an advocate or advise him and could not speak for him regarding the 1st Defendant's claims supposedly relating to child up-keep (See paragraphs 10, 12 and 14 (b) of the Plaintiff's witness statement dated November 27, 2017).
27. PExh.2 was comprised of a thread of a text conversation between the Plaintiff and the 1st Defendant carried on after the publication and was relied upon as constituting an admission by the 1st Defendant of her role as the originator and publisher of the offending publication and words. The alleged admission by the 1st Defendant stated that; -

"The deadbeat thing was done by my "friends" after I finally disclosed to them whom my baby's father was...anyway I only got to see the post at 6pm that day after I received an email from your husband" sic. (latter referring perhaps to P.Exh. 6)

28. The above statement is in no way an admission that the 1st Defendant was the originator of the particular publication complained of and responsible for the offensive words contained therein. Or that she and Domitilla Wambui jointly published the offensive words against the Plaintiff. Indeed, the Plaintiff is not mentioned by the 1st Defendant in the so-called admission. Neither are the 1st Defendants so-called friends to whom disclosure is admittedly identified. In the court's view, there is a world of difference between the 1st Defendant's admitted disclosure to her un-named friends of the identity of the father of the 1st Defendant's baby and the assertion that the Plaintiff, a lawyer, was responsible for advising her husband against supporting the 1st Defendant's baby, the latter which is the basis of the Plaintiff's complaint.
29. This case was not about the unflattering imputations made against the Plaintiff's husband in the publication in question and hence matters relating to his alleged siring a child with the 1st Defendant and abandoning the two are not in issue here. Other text messages contained in P Exh. 2 reveal at worst the 1st Defendant's desire to retaliate against the Plaintiff and (PW5) for her perceived predicament.



But without more, it would be a leap of logic to conclude that the 1st Defendant was therein admitting responsibility for the publication of the offending statements concerning the Plaintiff.

30. As regards the email PEXh. 5, it amounts to no more than a less-than-polite accusation by (PW5) against the 1st Defendant concerning the offending posts, authored seemingly soon after the publication in question, and forwarded to the Plaintiff. Coming from a man caught in the middle between his wife and his alleged paramour and her/his alleged child, this email communication barely adds value to the assertion that the 1st Defendant was the author of the alleged publication. Similarly, statements by (PW5) that the 1st Defendant had threatened him prior to or after the publication must be treated with a healthy dose of caution; there was no material support tendered in that regard.
31. Equally, the exact contents of alleged conversations prior to the publication, as between the Plaintiff and the 1st Defendant were not demonstrated, and as verbally described in the Plaintiff's statement, could not be proof before the fact, that the 1st Defendant was responsible for the subsequent publication as contained in the Telegraph Channel of Domitilla Wambui. In the court's opinion, all that the foregoing evidence demonstrates is that the 1st Defendant, embittered by the alleged abandonment of herself and her baby by her alleged ex-lover (PW5), disclosed or discussed her predicament to her so-called friends and to the Plaintiff, in addition to sending out angry messages to the couple. But as to the authorship of the actual publication in question and offending words contained therein against the Plaintiff, it is the court's considered view that no nexus was established. The 1st Defendant has not been shown to be the source of the offending statement and or publication and/or the author thereof.
32. As was held in the cases of John Ward and Selina Patani, (*supra*) a plaintiff in a defamation case must prove that the defamatory statement was published by the Defendant. In this case it appears on all accounts that the defamatory publication was by Domitilla Wambui the administrator of the Telegram Channel known and marketed as "Deadbeat Dads and Randy Men" and other platforms such as "Deadbeat Dads and Homewreckers". *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".
33. Despite the entry of an interlocutory judgment against the 1st Defendant and the matter proceeding by way of formal proof, the burden of proving her case to the required standard lay with the Plaintiff. Such was affirmed by the Court of Appeal in *Karugi & another v Kabiya & 3 others* [1987] KLR 347 where it was stated inter alia 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."
34. No doubt, the offensive statements and imputations against the plaintiff must have caused her great anguish and the court is not without sympathy for her. However, reviewing the material before it, the court finds that the plaintiff failed to prove the essential ingredient of publication of the said defamatory statements by the 1st defendant. Her suit must therefore fail and is hereby dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF APRIL 2023.



C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Odipo

C/A: Carol

