



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Patel & another (Civil Appeal 507 of 2019)  
[2023] KEHC 4103 (KLR) (Civ) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4103 (KLR)

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

**CIVIL**

**CIVIL APPEAL 507 OF 2019**

**AN ONGERI, J**

**MAY 8, 2023**

**BETWEEN**

**WAMBUI MWANGI ..... APPELLANT**

**AND**

**TONY MOCHAMA ..... 1<sup>ST</sup> RESPONDENT**

**SHAILJA PATEL ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. A. M. OBURA  
(SPM) in Milimani CMCC no. 399 of 2015 delivered on 5/8/2019)*

**JUDGMENT**

1. The Appellant in this appeal was sued by the 1<sup>st</sup> Respondent in Milimani CMCC No 399 of 2015. The 1<sup>st</sup> Respondent was seeking mandatory injunctive orders against the Appellant who was the 1<sup>st</sup> defendant and Shailj Patel who was the 2<sup>nd</sup> defendant to stop them from publishing defamatory statements against the 1<sup>st</sup> Respondent.
2. The Appellant was also seeking general damages for defamation, punitive, aggravated and exemplary damages and a written apology from the Appellant and Shailja Patel.
3. The Appellant filed a defence against the 1<sup>st</sup> Respondent's suit denying the allegations.
4. A brief summary of the evidence adduced before the trial court was as follows;

The 1<sup>st</sup> Respondent who testified as PW 1 before the trial court said the Appellant made false allegations that he sexually assaulted the 2<sup>nd</sup> Respondent on 20/9/2014 when he visited the home of the Appellant.



5. The 1<sup>st</sup> Respondent said that the Appellant began a hashtag on twitter being #stoptonymochama to invite re-tweets calculated to put pressure on the organizations where the 1<sup>st</sup> Respondent worked for to relieve the 1<sup>st</sup> Respondent of his duties thereby putting him at the risk of losing his scholarship in funding opportunities and employment and to subject him to police investigations.
6. The 1<sup>st</sup> Respondent further said he had been invited to the home of the Appellant by one Clifton Gachagua, a poet who had convened the meeting. He said he noted the presence of the 2<sup>nd</sup> Respondent when she contributed to the discussions.
7. The 1<sup>st</sup> Respondent also said when the meeting was over, the participants stood and hugged one another goodbye and when he approached the 2<sup>nd</sup> Respondent to hug her, she declined and shouted “Back Off” and he obliged.
8. The 1<sup>st</sup> Respondent said thereafter they took photographs and left. On 22/9/2014 the 1<sup>st</sup> Respondent said he was surprised that he was trending on social media on allegation that he had sexually molested the 2<sup>nd</sup> Respondent.
9. The 1<sup>st</sup> Respondent confirmed that he had alcohol but denied in cross-examination that he was drunk. He said the tweet retweeted on 20<sup>th</sup> and 23<sup>rd</sup> September 2014 but he did not sue those who retweeted.
10. The 1<sup>st</sup> Respondent called one witness Wanjeri Nderu (PW 2) who was present at the meeting as a silent observer. She said the participants had been asked to carry their own drinks but it was the 1<sup>st</sup> Respondent and herself who had alcoholic drinks.
11. The 2<sup>nd</sup> Respondent testified as DW 1. She said the 1<sup>st</sup> Respondent indecently assaulted her at the event. She said the 1<sup>st</sup> Respondent approached her as she was coming out of the kitchen and told her that she was a genius and that he wanted to do anthology with her.
12. The 2<sup>nd</sup> Respondent said the 1<sup>st</sup> Respondent pushed his groin next to her from behind and grabbed her while rubbing his left arm unto her left breast and breathing heavily over her neck and face. She said he also squeezed her breasts.
13. The 2<sup>nd</sup> Respondent said she went to the bathroom and locked herself to get composed before she returned to the meeting.
14. The 2<sup>nd</sup> Respondent said in cross examination that she reported the matter on the 5<sup>th</sup> day since she opted for restorative justice through the writer’s community. She said the tweets related to various women including the Appellant and another victim who opted to remain anonymous.
15. The 2<sup>nd</sup> Respondent said the incident occurred in a secluded place and nobody saw the 1<sup>st</sup> Respondent touching her and further that she smiled in the photographs taken thereafter so as to end the meeting with professional dignity.
16. The Appellant testified as DW 2 at the trial court. She said the 1<sup>st</sup> Respondent had sexually assaulted her in 2008 and later in 2010 but she did not report those incidents due to the trauma surrounding sexual abuse.
17. The Appellant said she was not at her house on 20/9/2014 but she became aware when the 2<sup>nd</sup> Respondent informed her about it and further that the tweets were based on her own experience and what the 2<sup>nd</sup> Respondent and another victim had said.
18. The Appellant denied that she published any defamatory statements and she prayed for the dismissal of the suit.



19. The Appellant pleaded the defense of truth and justification.
20. The trial court entered judgment in favour of the 1<sup>st</sup> Respondent and issued mandatory injunctions restraining the Appellant and Shailja Patel from contacting, writing or causing to be published any defamatory statements against the 1<sup>st</sup> Respondent to the public, his employers, scholarship and fund providers and supporters.
21. The trial court also awarded the 1<sup>st</sup> Respondent general damages of Kshs 8,000,000 and punitive, aggravated and exemplary damages in the sum of Kshs 1,000,000 together with costs and interest at court rates.
22. The trial court ordered the Appellant to furnish the 1<sup>st</sup> Respondent with a written apology within 14 days of the delivery of the judgment on 5/8/2019.
23. The Appellant who was aggrieved with the said judgment filed this appeal on the following grounds;
  - i. That the trial court erred in law in subjecting the Appellant's defense of truth and justification to a standard of beyond reasonable doubt (grounds 1, 2 and 3 of the memorandum of appeal)
  - ii. That the trial court erred in law and in fact in finding that the Appellant defamed the 1<sup>st</sup> Respondent without considering the evidence before the court (grounds 4, 5, 6, 7, 8 and 9 of the memorandum of appeal)
  - iii. That the trial court erred in law in granting prayers that were incapable of being enforced (grounds 10, 11, 12 and 13 of the memorandum of appeal)
  - iv. That the trial court erred in law in granting damages that were manifestly excessive and without laying any basis or foundation thereof in the body of the judgment (grounds 14, 15 and 16 of the memorandum of appeal)
24. The Initiative for Strategic Litigation in Africa (ASLA) made an application to be enjoined as *amicus curiae* at appeal stage and the court in its ruling dated November 11, 2022 allowed the application.
25. The appeal was canvassed by way of written submissions which I have duly considered.
26. The Appellant submitted that the 1<sup>st</sup> Respondent failed to prove his case on a balance of probabilities and that it is evident from the judgment of the trial court at paragraphs 31 and 32 that the trial court based its finding on the fact that the DPP did not find enough evidence to support the 2<sup>nd</sup> Respondent's claim.
27. Further that the Appellant relied on the defense of truth and justification and stated that the 1<sup>st</sup> Respondent had sexually molested her twice before. The Appellant relied on the case of [\*Raphael Lukale Vs Elizabeth Mayabi & ANo\*](#) (2016) eKLR.
28. The Appellant said in her submissions that the 2<sup>nd</sup> Respondent was also categorical that the 1<sup>st</sup> Respondent sexually abused her and the fact that the police did not prefer charges against the 1<sup>st</sup> Respondent does not mean that there was no sexual abuse. She said the trial court erred in failing to consider the defences of truth and justification pleaded by the Appellant and the 2<sup>nd</sup> Respondent.
29. The Appellant also submitted that the 1<sup>st</sup> Respondent's evidence did not meet the threshold set out in the definition of defamation in that the 1<sup>st</sup> Respondent did not adduce evidence that any harm was occasioned to his office, profession, calling, trade or business.



30. Further, that the 1<sup>st</sup> Respondent did not evince any threat or loss of his scholarship, funding or any employment. Further that the 1<sup>st</sup> Respondent did not exhibit any correspondence from his sponsors or employer to show that he was cautioned or reprimanded over the said tweets. The 1<sup>st</sup> Respondent stated that he still works at the Standard Media Group and further that he did not call any witness to say how his reputation was damaged and therefore the 1<sup>st</sup> Respondent did not prove his case on a balance of probabilities.
31. The Appellant submitted that the prayers granted by the trial court were incapable of being enforced in that they lacked specificity and were so wide as to completely obliterate the Appellant's freedom of speech.
32. The Appellant also submitted that the award of 8,000,000 was manifestly excessive and further that an award of general damages was meant to compensate the plaintiff and not to enrich him.
33. Finally, the Appellant also submitted that an award for exemplary and punitive damages are only granted in special circumstances. The Appellant relied on the case of *South Nyanza Sugar Company Limited vs John Jowi Ayuka* (2019) eKLR where the court held that the object of exemplary damages is to punish and to deter.
34. The Appellant filed supplementary submissions in which she stated that judgment was entered against her and the 2<sup>nd</sup> Respondent jointly and severally and that the decree holder was at liberty to execute the judgment against any of them and the fact that the 2<sup>nd</sup> Respondent opted not to appeal did not diminish her chances of success in the appeal.
35. The Appellant further submitted in the supplementary submissions that the 1<sup>st</sup> Respondent's submissions are replete with allegations of new facts that were not presented in the trial court and further that new evidence may only be adduced with leave of the court.
36. The Appellant reiterated in the supplementary submissions that her defence of truth and justification gave her a first-hand account of being a victim of the 1<sup>st</sup> Respondent's abuse and further that the law is cognizant of the nature of sexual offences that the same normally happen in private and the shame and stigma associated with sexual offences is the reason Section 124 of the *Evidence Act* provides that the court can rely on only the evidence of the victim to convict.
37. The 1<sup>st</sup> Respondent also filed written submissions opposing the appeal. The 1<sup>st</sup> Respondent submitted that the Appellant was not present in the meeting in which the alleged incident took place and that the victim who is the 2<sup>nd</sup> Respondent did not appeal against the judgment of the trial court. The 1<sup>st</sup> Respondent said the evidence of the Appellant is based on what she was told by the 2<sup>nd</sup> Respondent.
38. The 1<sup>st</sup> Respondent also submitted in writing that despite being told to apologize within 14 days of the date of the judgment, the Appellant has continued to call the 1<sup>st</sup> Respondent a "Sexual violator" and this act of defiance shows that she is unapologetic.
39. The 1<sup>st</sup> Respondent submitted that the Appellant admitted in the trial court that she tweeted and that the tweets read far and wide and this clearly inputs malice.
40. Further that to prove the tweets were clearly malicious, the Appellant tagged all the 1<sup>st</sup> respondent's supporters, employers, sponsors and all his clients and fans and she intentionally decided to destroy the 1<sup>st</sup> Respondent's hard earned reputation.
41. The 1<sup>st</sup> Respondent also submitted that the trial court found that he established his case on a balance of probabilities as it is stated in paragraph 32 of the judgment and further that the fact that the police



investigated and found that there was no case was just one of the many issues the trial court considered before it arrived at its decision.

42. The 1<sup>st</sup> Respondent further submitted that PW 2 was at the meeting and said at no time did the 2<sup>nd</sup> Respondent leave the meeting except when she went for her books. He submitted that the incident never took place.
43. On the issue of quantum of damages, the 1<sup>st</sup> Respondent said the same were not excessive but were in consonance with other damages.
44. The 1<sup>st</sup> Respondent submitted that the offences of rape and sexual assault are serious and they attract a penalty of 10 years imprisonment which may be enhanced to life imprisonment and the argument that the damages awarded are excessive is not tenable.
45. The 1<sup>st</sup> Respondent also submitted that the trial court found that the aggravated damages were well deserved in this case since the Appellant has refused to apologize to the plaintiff.
46. The 1<sup>st</sup> Respondent also submitted that the Appellant and 2<sup>nd</sup> Respondent came up with the hashtag #stoptonymuchama and made it to go international and became a trending topic and that they gained immensely at the expense of the 1<sup>st</sup> Respondent and that the same was geared towards popularizing the #metoo campaign in Kenya.
47. The 1<sup>st</sup> Respondent also submitted that the injunction order issued was deserved and that it was meant to prohibit the Appellant and the 2<sup>nd</sup> Respondents from publishing and continuing to publish defamatory statements against the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent denied the allegation by the Appellant that the same was meant to gag the Appellant and deny her freedom of expression.
48. Although The Initiative For Strategic Litigation In Africa (ASLA) made an application to be enjoined as *amicus curiae* at appeal stage and the court in its ruling dated November 11, 2022 allowed the application, this court was not able to consider their submissions for reasons that they were not party in the Trial court.
49. This being the first appellate court my duty is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the finds of the trial court. In [Selle v Associated Motor Boat Co](#) [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

50. The issues for determination in this appeal are as follows:



- i. Whether the 1<sup>st</sup> Respondent proved his case to the required standard in civil cases.
  - ii. Whether the Appellant had a valid defence against the 1st Respondent's claim.
  - iii. Whether the remedies granted by the court were capable of enforcement.
  - iv. Whether award of damages was manifestly excessive.
51. On the issue as to whether the 1<sup>st</sup> Respondent proved his case to the required standard, the law requires that he who alleges a fact is under a duty to prove the same. The 1<sup>st</sup> Respondent was duty bound to prove his case to the required standard in civil cases.
52. The elements of the tort of defamation are now well settled. For a litigant to succeed in a claim of defamation, the following elements must be proved in the affirmative;
- a. That the statement tends to lower the Plaintiff's reputation in the estimation of right-thinking members of society generally either in their natural and ordinary meaning or by innuendo;
  - b. That the statement refers to the Plaintiff;
  - c. That the statement was published by the Defendant;
  - d. That the statement is false and/or malicious.
53. The Court of Appeal in the case of *Wycliffe A. Swanya vs Toyota East Africa Ltd & Another* Civil Appeal 70 of 2008 [2009] eKLR stated 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
  - (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage.”
54. The 1<sup>st</sup> Respondent in his pleadings and evidence in the Trial denied that he sexually molested the Appellant and Shailja Patel whom he sued for defamation.
55. The 1<sup>st</sup> Respondent said that the Appellant began a hashtag on twitter being #stoptonymochama to invite re-tweets calculated to put pressure on the organizations where the 1<sup>st</sup> Respondent worked for to relieve the 1<sup>st</sup> Respondent of his duties thereby putting him at the risk of losing his scholarship in funding opportunities and employment and to subject him to police investigations.
56. The Appellant maintained that said the 1<sup>st</sup> Respondent had sexually assaulted her in 2008 and later in 2010 but she did not report those incidents due to the trauma surrounding sexual abuse.
57. The 2<sup>nd</sup> Respondent Shailja Patel who testified as DW 1 in the Trial court also said that the 1<sup>st</sup> Respondent indecently assaulted her at the event in the Appellant's house on the material day.



58. She said the 1<sup>st</sup> Respondent approached her as she was coming out of the kitchen and told her that she was a genius and that he wanted to do anthology with her.
59. The 2<sup>nd</sup> Respondent also said the 1<sup>st</sup> Respondent pushed his groin next to her from behind and grabbed her while rubbing his left arm unto her left breast and breathing heavily over her neck and face. She said he also squeezed her breasts.
60. The 2<sup>nd</sup> Respondent said she went to the bathroom and locked herself to get composed before she returned to the meeting.
61. The Appellant was not present at the meeting although it was held in her house.
62. The 2<sup>nd</sup> Respondent said in cross-examination that she reported the matter on the 5<sup>th</sup> day since she opted for restorative justice through the writer's community. She said the tweets related to various women including the Appellant and another victim who opted to remain anonymous.
63. I find that there is evidence which is not disputed that after the meeting, the 1<sup>st</sup> Respondent attempted to hug the 2<sup>nd</sup> Respondent but she declined and shouted "Back Off" and he obliged.
64. This was an indication that all had not gone well between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent during the course of the meeting and the Trial court ought to have believed her testimony that she touched inappropriately by the 1<sup>st</sup> Respondent.
65. The 2<sup>nd</sup> respondent explicitly explained what transpired and it is not likely that she was lying.
66. In her supplementary submissions the Appellants said in criminal cases, Section 124 of the *Evidence Act* states that in cases of sexual nature, the court may rely on the evidence of the complainant alone to convict the offender if for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.
67. In the current case which is a civil suit, the Trial court ought to have believed the testimonies of the Appellant and Shailja Patel (the 2<sup>nd</sup> respondent who was DW1 at the trial) since the standard of prove required in civil cases is much lower.
68. The 1<sup>st</sup> Respondent called one witness at the trial, Wanjeri Nderu (PW 2) who said that she was present at the meeting as a silent observer. She said the participants had been asked to carry their own drinks but it was only the 1<sup>st</sup> Respondent and herself who had alcoholic drinks.
69. The evidence of 2<sup>nd</sup> respondent (Shailja Patel) was that nobody witnessed the incident.
70. The Trial court ought to have believed Shailja Patel and the Appellant that there is stigma associated with sexual violence and that was the reason they did not take action immediately.
71. Section 124 of the *Evidence Act* Cap 80 of the Laws of Kenya which the Appellant referred to provides in the proviso as follows;

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." [Emphasis added].
72. The said Section takes cognizance of the fact that violations of sexual nature normally take place in private and it is not easy to have witnesses to corroborate the victim's testimony.



73. In the circumstances, although the tweet was published by the Appellant and it referred to the 1<sup>st</sup> Respondent, I find that the 1<sup>st</sup> Respondent did not prove that the allegations were false and therefore he did not establish all the elements of defamation.
74. There is also no evidence that the 1<sup>st</sup> Respondent was questioned by police over the allegations or that the tweet affected his scholarship or employment.
75. On the issue as to whether the Appellant had a valid defence against the 1<sup>st</sup> Respondent, the Appellant raised the defence of truth and justification.
76. The Appellant said in her evidence before the trial court and her submissions before this court that she had also been a victim of sexual molestation by the 1<sup>st</sup> Respondent previously.
77. She said that although the 2<sup>nd</sup> defendant Shalja Patel opted not to appeal, she opted to exercise her right of appeal since the judgment was jointly and severally entered against both of them.
78. Although nobody saw the 1<sup>st</sup> Respondent touch the 2<sup>nd</sup> defendant inappropriately the trial court ought to have taken cognizance of the fact that such acts are not committed in plain sight.
79. I find that the Appellant had a valid defence of justification which the court ought to have accepted.
80. There is evidence that the tweets related to various women including the Appellant and another victim who opted to remain anonymous.
81. In the case of *Associated Leisure Ltd v Associated Newspaper Ltd* (1970) 2 All ER where Lord Denning MR. adopted and/or restated the rule that;
- “A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial may properly be taken in aggravation of damages”.
82. In the current case the Appellant, Shailja and the anonymous victim tweeted about their firsthand experience with the 1<sup>st</sup> Respondent and I find that the Trial Court ought not to have ignored their defence of truth and justification.
83. On the issue as to whether the remedies granted by the court were capable of being enforced, I find that here is evidence that there were parties who took up the story whom the 1<sup>st</sup> Respondent ought to have sued but he did not.
84. In the circumstances the remedies of mandatory injunction granted are incapable of being enforced.
85. On the issue as to whether the award of damages was manifestly excessive, I find that the 1<sup>st</sup> Respondent did not prove his case to the required standard and he is not entitled to any damages.
86. I find that even if the 1<sup>st</sup> Respondent proved his case, the amount of damages awarded totaling 9 million were excessively high in the circumstances of this case.
87. I find that the appeal herein is meritorious and I accordingly allow it and set aside the judgment and decree issued by the trial court with costs to the appellant.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8<sup>TH</sup> DAY OF MAY, 2023.**

.....  
**A. N. ONGERI**



**JUDGE**

**In the presence of:**

..... for the Appellant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

