



**Muchemi v Kuria & another (Civil Suit 536 of 2012)
[2023] KEHC 3853 (KLR) (Civ) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3853 (KLR)

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

CIVIL

CIVIL SUIT 536 OF 2012

JN MULWA, J

MAY 3, 2023

BETWEEN

EVA MUCHEMI PLAINTIFF

AND

PASTOR PAUL KURIA 1ST DEFENDANT

ROYAL MEDIA SERVICES 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 19/10/2012, the Plaintiff sued the Defendants for alleged defamation and sought judgment for:
 - a. A permanent injunction restraining the defendant by himself, his agents or otherwise from broadcasting publishing or being privy to the publication of any matter that is or might be libelous or slanderous to the plaintiff.
 - b. General damages.
 - c. Punitive damages for malicious and deliberate slander.
 - d. Costs of the suit and interest.
 - e. Any further or other relief that this honourable court may deem fit and expedite to grant.
2. The Plaintiffs' claim arose from alleged defamatory remarks uttered by the 1st Defendant in Kikuyu dialect on 4th August 2012 while hosting a programme on the 2nd Defendant's local radio station -



Inooro FM. At paragraph 6 of the Plaintiff, the Plaintiff pleaded an English translation of the alleged defamatory utterances as follows:

“Listeners you have always revenged for me to people who torment my soul, the following number 0713100336 belongs to a person who has tormented my soul for so long. I would ask you to call the number and warn them, ask them not to flash me or call me, tell them I have no interest or business with them, and that I even do not know if the number belongs to a man or woman. That the number has flashed me 80 times today.”

3. The Plaintiff claims that following the above utterances by the 1st Defendant, she was inundated with abusive and vile calls as well as threatening text messages from the listeners of the said radio station and these continued up to the time of filing suit. She contended that the offending words were understood to mean by way of innuendo that she is manifestly lacking integrity; she is a woman of loose morals; she is wicked and evil; she is unscrupulous and a busy body; she is an idler/ a hooker; and that people should go after her in terms of revenge.
4. She averred that the 1st Defendant’s utterances were full of malice, falsehood and only intended to bring her into disrepute as well as injure her reputation. That the said words were calculated to disparage her office, profession, trade and/or business. Further, she contends that as a result of the broadcast, she has suffered and continues to suffer business losses, decline, distress, embarrassment, odium and scorn, hatred, contempt and has deterred respectable persons from dealing with her.
5. The Defendants denied the claim through a joint Statement of Defence dated 26/11/2012. They contended that the said words were uttered in good faith, without malice and were not intended to injure the reputation of the Plaintiff. They also averred that the publication is privileged and constitutes a fair comment on a matter of public interest. Further, it was their contention that under Articles 33 and 34 of *the Constitution*, they are entitled to impart such information to the public.

The Plaintiff’s case

6. During trial, the Plaintiff herein, PW1, Eva Wairimu Muchemi, adopted her Statement dated 5/8/2019 a part of her evidence in chief and adduced her List and bundle of documents filed herein together with an audio clip from Ipsos Synovate in support of her case. She testified that she is a teacher at Plainsview Academy in South B Nairobi and a Kenya National Union of Teachers (KNUT) representative in Starehe. She is familiar with the 1st Defendant having been longtime friends and used to attend the same church. In further evidence, the plaintiff testified of money lending to the Defendant in the year 2002, which the defendant failed to repay, and apparently was the cause of the alleged defamation of 4th August 2012, the subject of this suit.
7. Upon questioning a few of the callers, it was the plaintiff’s case that they had been instructed to warn her via Inooro FM radio by the 1st Defendant. She reported the matter to the Industrial Area Police station on 5th August 2012 via O.B. No. 34/5/8/2012, but she continued to receive degrading phone calls and text messages until 13th August 2012. She later obtained printed copies of text messages from Safaricom for the period beginning 4th August 2012, demonstrating the intimidation, ridicule, and harassment she endured. She also obtained broadcasting records for Inooro FM Radio from Ipsos. Lastly, the plaintiff testified that her reputation suffered extensive injury as a consequence of the broadcast. PW1 produced as exhibit 1, a demand letter dated 14/8/2012 written by her advocates to the Defendants. She also produced as exhibit 2, a receipt for Kshs. 2,900/- from Steadman Group Limited where she obtained an audio clip of the alleged defamatory statements.



8. On cross-examination, the plaintiff stated that she has been a teacher for more than 35 years; that she joined Plainsview Academy in 2006 as an assistant teacher and is still employed there in the same capacity. She stated that she did not hear the defamatory words aired on the 4th August 2012 broadcast but learnt about it from the listeners of Inooro FM who called her. She acknowledged that she had not recorded the exact words uttered in Kikuyu language and that no translation Certificate had been filed in that regard. She asserted that the phone number 0713100336 listed in paragraph 6 of the plaint is a typographical mistake since her phone number is 0723100336.
9. The plaintiff further testified in cross examination that the 1st Defendant was a pastor at their church and that she taught his children at Hospital Hill School; that he was and still is a friend and therefore, she has no documentation to prove the loan nor was the alleged OB filed in court.
10. As regards the business loss suffered, the plaintiff claimed that she used to operate a boutique at Rosina Exhibition on Tom Mboya Street but closed it sometime in 2013 since business dwindled after the broadcast. She did not submit any documentation proving the existence of the business. She further testified that she lost friends following the broadcast as they could no longer trust her hence they are not witnesses in this case.
11. On re-examination, the Plaintiff asserted that the defamatory broadcast affected her integrity as a teacher and a KNUT representative.
12. PW2, George Abworo from Ipsos Synovate – client service stated that his role was to serve a client who had requested for an audio clip to be done on DVD. He recorded the clip from Inooro FM radio station on a compact disk which he produced as exhibit 3. His court attendance was invoiced at Kshs. 8,056/- as per the invoice dated 27/2/2021 adduced as exhibit 3(b). In cross-examination, he stated that he downloaded on 27/2/2021 when payment was made. He also stated that there was no certificate of electronic record accompanying the audio clip as the client did not request for it but the same could be availed if needed. In re-examination, he averred that the audio clip was downloaded on 8/8/2012.
13. PW3, George Kimani Ng'ang'a adopted his witness statement dated 20/4/2021 as part of his evidence in chief. It was his testimony that he holds a diploma in Information and Communications Technology (ICT) with a major in Web Design, Networking and computer servicing. He stated that on diverse dates in 2012, the Plaintiff approached him to help her to retrieve text messages for the period from 4th - 13th August 2012 from her Nokia mobile phone. To retrieve messages from a mobile phone, one requires the software for that particular phone and a cable that connects the phone to the computer. Using the Plaintiff's phone's software, he was able to retrieve 340 text messages in a Comma Separated Version (CSV) format mainly used when a person wants to open a document in any excel application. After retrieving the text messages, he shared the document with the Plaintiff's brother by the name Morris Muchemi in a flash disk for printing purposes. PW3 produced as exhibit 4, a bundle of messages extracted from the Plaintiff's phone.
14. In cross-examination, PW3 stated that he used his desktop computer to retrieve the messages from the Plaintiff's mobile phone although the particulars and working condition of the computer are not stated.

The Defendants case

15. DW1, Pastor Kuria Paul, the 1st Defendant adopted his statement dated 17/11/2014 as his evidence in chief. He testified that he does not recall uttering words to the effect stated; that he has known the Plaintiff since she was a teacher at Hospital Hill Primary School where his children were studying. He denied having received any loan from the Plaintiff and stated that that for quite some time, the Plaintiff



had been harassing and insulting him for no apparent reasons or for reasons better known to her, and stated instances when such insults and harassments took place.

16. For instance, the 1st Defendant testified that about 5 years ago, the plaintiff went to his shop at River Road, Nairobi where she broke the glass counter. Further, that prior to the alleged broadcast of August 2012, the Plaintiff had been texting him, insulting him and flashing his phone incessantly with the intention of annoying him. At one time, she had flashed him about 80 times in a span of one (1) hour which annoyed him greatly. The Defendant reiterated his testimony on cross-examination.

Issues for Determination

17. The court has considered the pleadings, documents and the evidence adduced by both parties; the submissions and authorities cited by both parties. The court flags the issues for determination:-
 - a. Whether the Plaintiff has made out a case for defamation against the Defendants; and
 - b. Whether the Plaintiff is entitled to the reliefs sought in the plaint.

Analysis and Determination

18. According to Black's Law Dictionary, 9th Edition at page 479 defamation is defined as:

“The act of harming the reputation of another by making a false statement to a third person.”

19. Patrick O'Callaghan in The Common Law Series: The Law of Tort at paragraph 25.1 stated that the law of defamation is primarily concerned with the protection of a person's reputation and not his or her character.
20. The elements of defamation were outlined by the Court of Appeal in case of Selina Patani & another v Dhiranji V. Patani [2019] eKLR and Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR 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.
21. The court will start by determining whether the Plaintiff has proved that the alleged publication was made. It is not in dispute that the Plaintiff did not set out in her Plaint the exact words uttered by the 1st Defendant in Kikuyu language. The Plaint only contains an English translation of undisclosed words allegedly uttered by the 1st Defendant. Further, the plaintiff has not provided to the court a certificate of translation of the alleged words and publication in that regard. However, PW2 adduced in evidence a compact disc (CD) containing a recording of the alleged defamatory words uttered by the 1st Defendant on radio Inooro but admitted that the audio clip was not accompanied by a Certificate of Electronic Record. Further, the bundle of offensive and derogatory messages allegedly extracted from the Plaintiff's Nokia Mobile phone by PW3 was not accompanied by a Certificate of electronic record.
22. Sections 78A of the [Evidence Act](#) provides as follows regarding admissibility of electronic and digital evidence:

“(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.



- (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
- (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
 - a. the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - b. the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - c. the manner in which the originator of the electronic and digital evidence was identified; and
 - d. any other relevant factor.
- 4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

23. Further, in order to be admissible in evidence, Section 106B (4) of the [Evidence Act](#) requires that electronic records be accompanied by a Certificate. It stipulates as follows:

- “(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following —
- a. identifying the electronic record containing the statement and describing the manner in which it was produced;
 - b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - c. dealing with any matters to which conditions mentioned in subsection (2) relate; and
 - d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”



24. The provisions of Section 106B have been the subject of discussion in a number of cases. In *Republic v Barisa Wayu Matriguda* [2011] eKLR, a CCTV footage was recorded in a compact disc (CD), and the court observed that:

“...any information stored in a computer which is then printed or copied shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However, section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied.

This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate this CD is inadmissible as evidence.” [Emphasis Mine]

25. In *Nonny Gathoni Njenga & anor v Catherine Masitsa & anor* [2014] eKLR, the court found that the DVDs that the Plaintiff therein sought to rely on were inadmissible in evidence as they were not accompanied by a certificate as required by the *Evidence Act*.
26. Bearing the foregoing authorities among others in mind, the court agrees with the Defendants contention that there is no proof that the alleged publication was made. The requirement for a Certificate of Electronic Record under Section 106B (4) is coached in mandatory terms and the Plaintiff herein cannot be allowed to depart from the clear terms set out under the law. In any event, the Plaintiff was represented by a qualified advocate who was expected to be well versed with the requirements of the law. PW2 stated on cross-examination that he could avail the Certificate if needed but the Plaintiff and/ or her advocate did not deem it fit to seek leave to file the Certificate.
27. Having come to the above findings, the court deems it unnecessary to delve into finding out whether the other ingredients of the tort of defamation have been established, by an in depth interrogation of merits, if any, in the parties cases as stated above.
28. The upshot is that the Plaintiff has failed to prove her case against the Defendants on a balance of probabilities, being the standard of proof in a civil suit. It therefore follows that this suit must fail.
29. Be that as it may, the law requires the court to assess damages it would have awarded had the Plaintiff succeeded in establishing and proving that she had been defamed. The court notes that the Plaintiff did not call any independent witness to support the assertion that the Plaintiff enjoyed a good reputation which was injured as a consequence of the publication. It is also noteworthy that there was no proof of the loss allegedly occasioned to the Plaintiff’s purported business by the said publication. As such, without proof of any injury to the plaintiff’s reputation and loss of business, the court would have had no difficulty in dismissing the claim, and awarding NIL compensation on both general and punitive damages as sought in her plaint dated 19/10/2012.
30. Consequently, this suit is hereby dismissed with costs to the defendants.
- Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 3RD DAY OF MAY 2023.

JANET MULWA

JUDGE.

