Nation Media Group Limited v Simon (Civil Appeal 521 of 2019)
[2026] KECA 713 (KLR) (25 March 2026) (Judgment)

Neutral citation: [2026] KECA 713 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 521 OF 2019

SG KAIRU & AO MUCHELULE, JJA

MARCH 25, 2026

BETWEEN

NATION MEDIA GROUP LIMITED ..... APPELLANT

AND

DAVID MUGAMBI SIMON ..... RESPONDENT

(An appeal against the judgment and decree of the High Court at Nairobi (J.K Sergon, J.) dated 23rd November 2018 in HCCC NO. 477 OF 2007)

JUDGMENT

1. Before the superior court, David Mugambi Simon (the respondent) instituted a suit against Nation Media Group Limited (the appellant) alleging defamation arising from an article published in Taifa Jumapili on 18th June 2006. It was alleged that the said publication was further published in the Daily Nation on 19th June 2006 with the heading "Poor Ties That Bind". In paragraphs 4, 5, and 6 of the plaint, the respondent pleaded that the words published were defamatory and, in their ordinary and natural meaning, were understood to imply that he was a dangerous gangster who engaged in criminal activities while armed with loaded pistols; that his conduct was so grave that he deserved the death penalty; and that he associated with other dangerous gangsters and was capable of participating in raids both during the day and at night. For completeness, we reproduce paragraphs 4 and 5 of the plaint, as follows:

> " MSHUKIWA ANASWA
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> Mshukiwa (meaning the plaintiff) wa genge hatari akisindikizwa na polisi baada ya msako mkali ambapo mmoja (meaning the plaintiff shown in the photograph) alinaswa na wengine wawili kutiwa mbaroni katika barabara ya Accra, Nairobi, jana (meaning 17th June 2006) Pia bastola na risasi tano zilipatikana."

"4. On the inside page of the issue of the Taifa Jumapili of 18th June 2006 the defendant printed and published or caused to be written and published or caused to be written and published the following words contained in Kiswahili language which are defamatory of the plaintiff.QUOTE

5. The said words in English read:

1. In his evidence, the respondent testified that he was a businessman dealing in chemicals and seeds, trading as Mukeu Distributors. Relying on his written witness statement, he stated that on 23rd May 2006 at about noon, he left his lorry parked opposite Kamukunji Police Station and proceeded to Accra Road, in the company of one Njeru, to collect old newspapers from a shop. While there, they witnessed people shooting at each other and fled into a church, where they were later retrieved and arrested. During cross-examination, the respondent testified that although the publication did not mention his name, it carried his photograph and stated that he had been arrested. He maintained that the publication damaged his reputation. He confirmed that during a police operation on Accra Road, he was arrested as a suspect but was later found to be innocent. In re-examination, he reiterated that he subsequently sued the police in Constitutional Petition No. 3 of 2009, in which judgment was entered in his favour.

2. PW2 testified that after reading the publication in the Daily Nation, he asked the respondent to vacate premises he had rented to him because he believed the publication to be true. PW3 and PW4 testified that upon reading the publication in Taifa Jumapili, they were shocked to see the respondent portrayed as a gangster.

3. In defence, the appellant denied that the words complained of were defamatory. It was contended that the publication addressed matters of significant public interest, specifically relating to insecurity and the government's efforts to combat it. The appellant asserted that the publication was based on facts, namely that on 17th June 2006, the Kenyan police conducted an operation along Accra Road in Nairobi; that three suspected gangsters were arrested on the material day; that the respondent was among those arrested; and that the police recovered a pistol and two rounds of ammunition. The appellant did not call any witnesses during the trial.

4. The present appeal arises from the judgment of the High Court (J.K. Sergon, J.) delivered on 23rd November 2018. In that judgment, the court entered judgment in favour of the respondent. The learned judge held that although the impugned publications did not expressly mention the respondent by name, it was evident that the photograph appearing alongside the accompanying words in the caption referred to the respondent. Secondly, the court noted that no evidence had been tendered to demonstrate that the three suspected gangsters mentioned in the publication had in fact been arrested, or that the respondent was among those alleged gangsters arrested on the material day when the police purportedly recovered a pistol and ammunition. However, the respondent had adduced evidence showing that he had been arrested on 23rd May 2006, and that the incident had been recorded in the Occurrence Book at Central Police Station, Nairobi. The respondent further produced evidence demonstrating that he had subsequently sued the police and obtained a favourable judgment in Petition No. 33 of 2009. On the basis of this evidence, the superior court concluded that the impugned publications had injured the respondent's reputation. With regard to damages, the court awarded the respondent Kshs. 3,000,000/=, taking into account that the defamatory publications had appeared in Taifa Jumapili on 18th June 2006 and in the Daily Nation on 19th June 2006. The court found that any reader of the said publications would have formed the impression that the respondent was a dangerous individual who carried firearms and was capable of robbing members of the public in

broad daylight. Consequently, the court held that the respondent's reputation and business interests had been gravely damaged.

5. Aggrieved by the above decision, the appellant raises the following grounds of appeal:-

> " 1) The learned judge erred in law in finding that the publication was defamatory of the respondent.
>
> 2. The learned judge erred in law and in fact in finding that the words of the publication were false and defamatory.
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> 3. The learned judge erred in fact and in law in finding that the respondent had proven that his reputation had been destroyed by the publication.
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> 4. The learned judge erred in fact and in law in failing to consider that the publication was a true representation of the events that were taking place at the material time.
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> 5. The learned judge erred in law in failing to consider that the publication was based on qualified privilege and was not motivated by malice.
>
> 6. The learned judge erred in law in finding that the respondent was entitled to an award of damages amounting to Kshs. 3,000,000/="

6. When this appeal came up for hearing on 2nd April 2025, on the virtual platform, learned counsel Mr. Angwenyi was present for the appellant, while learned counsel Ms. Ngeresa was present for the respondent. Parties had filed their written submissions dated 23rd September 2021 and 10th June 2024, respectively. The appellant's counsel highlighted his submissions.

7. Learned counsel for the appellant, submitted that this appeal arises from a defamation claim based on publications appearing at pages 19–20 of the Record of Appeal. The Memorandum of Appeal raises six grounds, which counsel grouped into three issues for argument: whether the publications were substantially true (grounds 1–4), whether they were protected by qualified privilege (ground 5), and whether the award of Kshs. 3,000,000 in damages was proper (ground 6). Counsel addressed only the first issue orally and relied on written submissions for the others.

8. On the issue of substantial truth, counsel submitted that the trial court erred in finding that the appellant had not proved: the existence of a police operation on Accra Road, that gangsters were arrested, and that the respondent was among those arrested. Counsel argued that such evidence was unnecessary as the respondent himself had admitted these facts in his witness statement, testimony in chief, and during cross- examination, and further corroborated by his brother. Specifically, the respondent admitted he had been arrested during a police operation on Accra Road following a confrontation between police and a gang, and that he was taken to court as a suspect.

9. Counsel further submitted that minor inaccuracies in the publication, such as an erroneous arrest date, did not defeat the defence of justification. He relied on section 14 of the *Defamation Act* and the principle that if the gist or sting of the libel is true, slight errors will not materially affect the plaintiff's reputation. Counsel emphasized that the core fact of the respondent's arrest was true and that discomfort with the publication does not render it defamatory. Counsel also addressed the trial court's reliance on the respondent's successful suit against the police, submitting that the fact of arrest remained, as it was necessary for the respondent to prove in that case.

10. The appellant's counsel referred us to the decision in Charterhouse Bank Ltd (under Statutory Management -vs- Frank N. Kamau [2015] KECA 655 (KLR) for the proposition that the appellant's failure to call evidence did not relieve the respondent of the burden of proving his case on balance of probabilities. It was further submitted, while relying on Gatley on Libel and Slander, 9th Edition at paragraph 11.8, that the incorrect date appearing on one of the publications did not materially affect the substantial truth of the remainder of the justification. This was because slight inaccuracies will not defeat the defence of justification where the substance of the libel is true.

11. On the issue of qualified privilege, the appellant's counsel submitted that, in the respondent's own words, "a battle had taken place in broad daylight in the heart of the Central Business District of Nairobi," and that it was therefore in the public interest for the media to inform the public what had transpired, the action taken by the police and whether any arrests had been made. It was argued that the press had a duty to report on such matters of public interest and that the respondent failed to prove malice on the part of the appellant in relation to the contents of the publications. Reliance was placed on Reynolds -vs- Times Newspapers Ltd [2001] 2A.C 127 which affirmed that the media had an obligation to communicate information on matters of public interest and that the public had a corresponding right to receive such information.

12. Lastly, the applicant's counsel addressed us on the award of damages of Kshs.3,000,000/=, stating that the amount was excessive given the respondent's limited public profile. We were referred to Nation Newspapers Limited -vs- Peter Baraza Rabando [2016] KECA 122 (KLR) where it was held that a person who is not widely known beyond his immediate family, residential and work environment may attract a lower award of damages than a person of greater importance. The appellant, therefore, urged us to reduce the award to Kshs.1,000,000/=.

13. In opposition to the appeal, it was submitted on behalf of the respondent that it had been proved in the trial court that the impugned publications were reckless, negligent and malicious. It was contended that the appellant had not called for evidence, and therefore had failed to establish the truthfulness of the publications. Further, that, the appellant had not interviewed the respondent to verify the accuracy of the publications. Consequently, it was argued, the defences of justification or qualified privilege were not available to the appellant.

14. On damages, it was submitted that this Court ought not to interfere with the award of Kshs.3,000,000/= merely because it might have awarded a higher or lower sum. Rather, interference would only be justified if it were demonstrated that the superior court applied the wrong principles or misapprehended the evidence. For those principles, we were referred to Nation Media Group Ltd & 2 Others -vs- John Kamotho & 3 Others [2010] eKLR and Ken Odondi & 2 Others -vs- James Okoth Omburah T/A Okoth Oburah & Company Advocates [2013] eKLR.

15. This is a first appeal. Our duty is to reconsider the evidence that was tendered before the superior court, evaluate it and draw our own conclusions while bearing in mind that we did not have the benefit of seeing and hearing the witnesses and make allowance for it (See Kiruga -vs Kiruga & Another [1988] KLR 348). We emphasize what this Court has previously reiterated that it is not proper for us to substitute our own findings for that of the trial court, unless there is no evidence to support the findings or unless the trial Judge can be said to have been plainly wrong.

16. Bearing these principles in mind, we have considered the recorded word, the impugned judgment, the grounds of appeal and the rival submissions. We seek to determine whether the trial court was wrong in finding that the appellant had defamed the respondent. If we find that the finding of the court on defamation was justified, we shall re-examine the evidence to see if the award in damages was the correct estimate in the circumstances.

17. In a defamation action, the law seeks to protect the reputation of the person concerned in the estimation of right-thinking members of the society around him (see Musikari Kombo -vs- Royal Media Services Ltd [2018] eKLR). This Court in Selina Patani & Another -vs- Dhiranji V. Patani [2019] eKLR stated as follows regarding the ingredients of defamation:-

> "In rehashing, we note the ingredients of defamation were summarized in the case of John Ward -vs- Standard Ltd HCC 1062 of 2005 as follows:
>
> 1. The statement must be defamatory.
> 2. The statement must refer to the plaintiff.
> 3. The statement must be published by the defendant.
> 4. The statement must be false."

18. In this case, it was common ground that the Taifa Jumapili of 18th June 2006 and the Daily Nation of 19th June 2006 each carried the respondent's photograph in between the two police officers with the story that he was a suspect who had been arrested by police following a hunt for a dangerous criminal gang on Accra Road in Nairobi; one member having been shot down and two including him, having been caught; and a pistol and five rounds of ammunition recovered. This was the substance of the story accompanying the respondent who was in the hands of the police officers.

19. It was common ground that Taifa Jumapili and Daily Nation were newspapers published by the appellant and were read by the whole world, as it were.

20. The respondent testified that he had gone for his business on Accra Road in Nairobi. He had gone to pick loads of old newspapers. Suddenly, he saw people exchanging live fire using guns. He escaped into a church. Police begun to search the area and ended up in the church. The three police officers interrogated him, and arrested him. He was taken to Central Police Station and his name entered in the occurrence Book. He was later released.

21. The fact of the matter is that there was a shootout between the police and a gang of criminals on Accra Road in Nairobi. Criminals who can engage the police in a shootout are dangerous people. When the respondent testified, he stated as follows:-

22. In short, the respondent admitted that he was in the area during the shootout between police officers and this dangerous and armed gang which had been terrorizing members of the public in the area. Police arrested him suspecting that he was a member of the gang. They took him to Central Police Station, and released him later when it was found that he was not a member of the gang. When the appellant published the story of his arrest as a suspected member of this dangerous gang, this was an accurate reporting of the happenings of this day. It was an accurate account of the incident. The story was factually correct.

23. The superior court found that the appellant had not tendered evidence to show that there was a police operation along Accra Road; there was no evidence to show that three gangsters were arrested; and there was no evidence that the police recovered a pistol and ammunitions. On the whole, the court found that the publication was untruthful and defamatory of the respondent. The court observed that, the appellant not having calling evidence, what the respondent and his witness had told the court was believable and had established the claim.

24. We are aware that the burden of proof under sections 107, 108 and 109 of the *Evidence Act* rested on the respondent as the owner of the defamation claim (see Mumbi M'Nabea -vs- David M. Wachira

[2016] eKLR). The non-calling of evidence by the appellant did not, however, relieve the respondent of his obligation to prove his case on balance of probabilities (see Chapterhouse Bank Limited (under Statutory Management) -vs- Frank N. Kamau (Supra)). The appellant had pleaded that it was a fact that there was a police operation on Accra Road and that it was during the incident that the respondent was arrested. We have shown in the foregoing that the respondent testified regarding the circumstances that led to his arrest as a suspect following the shootout between police officers and the armed gang. We find that, in view of the respondent's own admission as to the accuracy of the story that the appellant had published, there was no need for the appellant to testify.

25. The appellant had pleaded that the –

> " words complained of contain issues of great public interest namely the public has a right to know if any insecurity matters and efforts by One, the story carried out by the appellant was not false. It was an accurate story. Two, the respondent admitted to there having been an insecurity incident in the area. We find that the public was entitled to know about it. What was important was for the appellant, as responsible newspaper, to make sure that the story they carried was substantially accurate, and done in good faith with the sole intention of informing the public. We find that, on this occasion, the appellant discharged its duty responsibly. No negligence and no malice were established by the respondent against the appellant.

26. These are the reasons why we find that the trial court was not justified in finding that the appellant had defamed the respondent. We allow the appeal with costs to the appellant, and set aside the judgment and decree of the learned judge. In its place, the respondent's claim is dismissed with costs.

27. We apologize for the delay in delivering this judgment due to the unfortunate death of the Hon. Mr. Justice Fred Ochieng who was part of this bench. The decision being unanimous, this judgment is delivered by the remaining members of the bench under Rule 34(4) of the Court of Appeal Rules.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.