



**Onchieku v Kwayera & another (Civil Appeal 134 of 2019)
[2025] KECA 520 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 520 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 134 OF 2019
PO KIAGE, LA ACHODE & GV ODUNGA, JJA
MARCH 21, 2025**

BETWEEN

DANIEL ONCHIEKU APPELLANT

AND

JUMA KWAYERA 1ST RESPONDENT

STANDARD LIMITED 2ND RESPONDENT

*(Appeal from the judgment of the High Court Civil at Nairobi
(Thuranira J) delivered on 29th June 2018 in HCC Suit No. 303 of 2009)*

JUDGMENT

1. Daniel Onchieku, the appellant herein, has asked this Court to have a second look at the evidence in this case and overturn the judgment of the High court at Nairobi, delivered by Thuranira J. on 29th June 2018. The Standard Limited and Juma Kwayera are the 1st and 2nd respondents respectively.
2. The decision of the court originates from a plaint dated 29th May 2009, that the appellant filed claiming damages for defamation against the respondents. The appellant's claim was that the respondent published in The Standard newspaper edition of 15th March 2009 at page 10, a defamatory and libelous publication under the heading, "Now Police dragged into cash Scandal at NSSF." He averred that the newspaper has a wide circulation and the publication caused him distress and injured his reputation before right-thinking members of society.
3. The respondents filed a statement of defence dated 18th June 2009 and denied that the publication was libelous or defamatory. In the alternative it was averred that the publication was true and therefore, a fair comment in a matter of public interest.
4. During the hearing, the appellant was the sole witness for his case, while the respondents called no witnesses for their side.



5. At the hearing the appellant adopted his written statement dated 1st November 2011. In the statement the appellant stated that he is employed by National Security Social Fund (NSSF), as a Record Clerk. On 15th March 2009 at about 9 a.m., his colleague, one Matilda Mwambure called him inquiring about an article she had seen on page 10 of the Sunday Standard newspaper.
6. The appellant rushed out and bought a copy of the newspaper and saw that it carried a defamatory article about him. The following day he went to his employer to enquire what action they intended to take about the article and was disappointed that they would take none. He decided to engage an advocate to seek redress.
7. The appellant stated that since the publication of the article, which was read widely, he has received negative gestures from people whenever he is walking in public. Also, fellow workmates at his place of work, from senior to junior staff have developed a negative attitude towards him. On cross examination, he stated that he was not suspected or interdicted by the NSSF over any loss of Kshs. 10,000,000 as alleged by the article but that as a result of the article, his employer demoted him from the position of Assistant Information Officer to Clerk.
8. The learned judge considered the evidence before her and in a judgment delivered on 29th June 2018, she found that the appellant had failed to prove his case on a balance of probability and dismissed it accordingly.
9. That judgment grieved the appellant sparking this appeal. In the memorandum of appeal dated 5th April 2019 the appellant raised a slew of complaints. We produce the grounds verbatim as follows:
 1. The judge failed to determine that the defendants admitted the libelous article by alleging that they derived the article from the audit report which was never produced in court for cross examination for proper determination.
 2. The judge misdirected herself on the issues and therefore arrived at a wrong decision.
 3. The judge failed to appreciate the fact that the appellant was defamed by libel which article was produced as evidence and the respondent did not contradict the article and admitted of making the same without any particulars or evidence to support therefore arriving at a wrong decision.
 4. The judge contradicted herself in her analysis of evidence by alleging that the appellant did not set out in the plaint the contents of the said Article while the publication was produced as evidence during the hearing and was never objected to nor contradicted therefore arriving at a wrong decision.
 5. The judge failed to remain in the sit of being impartial by descending to defend as she asks in her judgment and “it is necessary for the Defendants to know with certainty the case against them” which the respondents herein were aware of and the reasons why they filed their defence admitting the article alleging justification.
 6. The judge failed and/ or misdirected herself on technicalities to discredit the appellant’s evidence in chief as the publication was produced in court, the particular areas of defamatory in nature were covered clearly particularly the issue that the appellant entered credit to NSSF account with forged KCB advice slip and that the appellant impersonated the KCB staff, which the defendants failed to substantiate, which otherwise their allegation of justification failed to justify before the court and therefore the learned judge arrived at an erroneous decision.
 7. The judge erred in law and in fact in failing to determine correctly the defamatory words used in the article in particular against the appellant, whose name was clearly mentioned in the



article and during the hearing the appellant pointed the exact paragraph and words used against him which were defamatory and the learned judge failed to pick the exact words and as the same article was clearly marked for the judge therefore misdirected herself to arrive at a wrong decision.

8. The judge erred in law and in fact by staying in the seat defending the suit even when the defendants had admitted and never contradicted the appellants evidence not even in cross-examination.
 9. The judge erred in law and in fact in assuming that in any defamation there must be several witnesses on an issue the respondent had admitted justification therefore her mind was prejudiced and therefore arrived at a wrong and impartial decision.
 10. The judge erred in law and fact by failing to admit as evidence the pain, suffering, impairment to reputation and personal humiliation suffered by the appellant.
 11. That the judge wrongly exercised her discretionary power by dismissing the suit with regard to procedural technicalities as opposed to substantive case before her.
 12. The judge erred in fact and in law by failing to acknowledge the wide circulation of the Newspaper and the fact that such sensational stories increase readership hence great defamation caused to the appellant.”
10. The firm of M/s Osoro Juma & Co. Advocates filed written submissions dated 1st March 2024 for the appellant and stated that at paragraph 11 on page 10 of the article in issue, the appellant’s name was specifically referred to as the officer in charge of Rents and Income Department. Counsel urged that the purpose of including the appellant’s name in the article was to tarnish it, since he was not in charge of the said department at NSSF as alleged. That he was transferred from Estate Department to Customer Service Department on 23rd June 2008, while the defamatory words were published on 15th March 2009.
 11. Counsel submitted that they served the respondents with a demand letter which they acknowledged receipt of and stated that they were investigating the matter. It was their view that the respondents did not bother to cross check the information with the appellant before they published it.
 12. It was urged that the judge erred by failing to find that the defamatory words were stated in the plaint at paragraph 4, 5, 6, and 7 and were fully supported by an extract of a cutting of the newspaper in the appellant’s list of documents. Further, that the judge erred in finding that the appellant had not specifically pointed out the part of the article that was injurious to him. That he clearly pointed out the injurious part of the article, especially in paragraph 30 of page 60 of the record where it was stated that he forged a KCB credit advance slip and a letter bearing the KCB logo, to divert a deposit of Ksh. 10 million.
 13. It was also posited that when the appellant was transferred from the management position to customer care services the contemptuous treatment he received from his colleagues and friends affected him. They looked at him as someone who had been stealing from the NSSF yet that was not true, as he had never been charged with offences of forgery or stealing the Kshs 10 Million.
 14. The appellant urged us to take note of the award the learned judge indicated that she would have given him had he proved his case in the trial court and give it to him keeping in mind that the respondents earned profit from selling the newspaper that carried the malicious publication.



15. The firm of M/s Triple O K Law LLP filed submissions dated 25th September 2024 for the respondents and argued that the appellant's suit does not disclose a cause of action against the respondents. That it does not specifically plead the requisite particulars nor was any testimony led during the trial, in respect of the offending publication, or alleged defamatory words.
16. Counsel urged that the appellant's submission that the defamatory words are delineated in paragraph 4, 5, 6, and 7 of the plaint is false. That the paragraphs merely describe the substance of the alleged defamatory words and provide a description and analysis of what the appellant perceives to be defamatory. To prove that the fore stated paragraphs are insufficient, the respondents relied on the decision in *Veronica Wambui v Michael Wanjohi Mathenge* [2015] eKLR.
17. Counsel submitted that during the hearing the appellant simply adopted his witness statement which was silent on the cause of action, or the defamatory words complained of. That the production of the said article as evidence did not absolve the appellant of his obligation to specifically set out the particulars of the libel in his plaint.
18. Counsel contended that the publication was not defamatory of the appellant: that the appellant failed to tender proof that the respondents published false and defamatory words, and that the words referred to the appellant: that the words he is complaining about or that the article, if read as a whole, would be defamatory: and, that he failed to call an independent third party to testify in court about the effect of the written words.
19. On a without prejudice basis, counsel urged that if this Court finds that the respondents are liable for defamation, it should have regard to comparable awards when considering the award for damages, to ensure that the awards granted are certain and predictable. He relied on the decision in *Sylvester O. Magero & 2 Others v Washington Onyango* [2013] eKLR where the High court on appeal, upheld an award of Kshs. 150,000 from the lower court. They equally urged this court to award the appellant Kshs. 150,000.
20. When the matter came before us for plenary hearing, Mr. Osoro Juma, learned counsel appeared for the appellant and Mr. Muthee, learned counsel appeared for the respondent. They both relied on their filed submissions.
21. In addition, Mr. Juma learned counsel submitted that the offending words were quoted verbatim in the reply to the defence. That the respondents did not contradict the plaint. They admitted and said it was privileged information and it was fair comment. Mr Muthee learned counsel reiterated that the alleged defamatory words were not pleaded in the plaint. That the law requires the offensive words to be pleaded with specificity because the words used are the material facts in libel. That a response to the defence is not enough since the respondent cannot respond to it. That the statements of the four witnesses who did not testify are mere papers and of no probative value. He supported the findings of the judgment.
22. This being the first appellate Court, our mandate is to subject the whole evidence to fresh and exhaustive scrutiny and draw a conclusion about it, bearing in mind that we did not have the opportunity to see and hear the witnesses firsthand. This role was espoused in this Court's decision in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect.



Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

23. We have considered the record of appeal, the rival submissions and the law applicable. In our view the main issue for determination is whether the appellant proved that he was defamed by the respondent and if so, what damages he is entitled to.
24. The *Defamation Act* defines defamation as:

A publication without justification, lawful excuse calculated to injure reputation, contempt or ridicule.”
25. That definition and the elements thereof, were expounded in the decision of this Court in *S M W v Z W M* [2015] KECA 602 (KLR), as follows:
 16. The test whether the words are defamatory and whether they refer to the plaintiff is objective.”
26. Therefore, to prove the ingredients of defamation the appellant herein needed to demonstrate that: i) there was a statement spoken or written by the respondent, ii) the statement was referring to the appellant, iii) the statement was false and, iv) the statement was defamatory and as a result the appellant suffered injury to his reputation.
27. In considering whether there is defamation however, we must strike a balance between private interest and public interest. While the right to freedom of expression is enshrined in Article 33(1) of *the Constitution* and Article 34 guarantees freedom of the media, Articles 25 and 33 (3) protect the inherent dignity of every person and the right to privacy. One right should not infringe on the other.
28. The Court re-evaluated the record of appeal and the submissions to determine whether the appellant proved his case on a balance of probabilities. The burden of proof rests with the appellant under section 107 of the *Evidence Act* which provides as follows:
 - 1) Whoever of facts which he asserts desires the court to give judgment as to any legal right or liability dependent on the existence must prove that those facts exist.
29. In dismissing the appellant’s claim in the impugned judgment, the learned Judge rendered herself thus:
 - “ 8. During the hearing of the case the Plaintiff did not specifically point out which parts of the article in question were injurious to his character. The article which was produced as evidence consists of a full page which also includes the photograph of the then Minister for Labour and the NSSF’s head office. The article goes on to give the narrative of another suspect alleged to have stolen more than Ksh.10,000,000/= from NSSF and is said to have colluded with anti- fraud officers to escape from custody. The article then proceeds to talk of other officials implicated in the fraud and interdicted and that is where the Plaintiff is named. It seems the Plaintiff just placed the article before the court and left it to the court to discern what was offensive to him.
 9. The Plaintiff was the only witness who testified herein. Bearing in mind that defamation is an injury to one’s reputation, that it is about what other people think of the person who alleges to have been defamed, evidence must be adduced to show what other people, other than the Plaintiff think. There is no evidence in the case at hand to show that the Plaintiff’s reputation



was disparaged in the eyes of the right thinking members of the society. The Plaintiff's case therefore failed to prove all the ingredients of defamation.

30. In the appeal before us, the respondents run a daily newspaper and its purpose is to publish different types of stories every day for public consumption as it did on 15th March 2009. There is no dispute that impugned statement was published by the respondents on the material date. The more bothersome questions are whether the appellant proved that the article referred to him, and that the article as published was false and defamatory and therefore, injurious to his reputation.
31. The appellant stated that at paragraph 11 on page 10 of the article in issue, his name was specifically referred to as the officer in charge of Rents and Income Department. That the purpose of including his name in the article was to tarnish it, since he was not in charge of the said department at NSSF as alleged. The respondent contended that the appellant failed to tender proof that the respondents published false and defamatory words, and that the words referred to the appellant.
32. The appellant herein, was required to prove that the impugned statement referred to him and that it lowered his reputation in the estimation of right-minded persons in society. It was necessary for him to demonstrate that the content of the article identified him as the subject of that article by name or by inference. The article which was produced in evidence consists of a full page and refers to various officers of the NSSF and the appellant asserted that he was not the person in charge of the Rents and Income Department at NSSF stated in the article.
33. Having considered the plaint, the article in issue and the appellant's evidence in court, we agree with the learned Judge that the appellant simply attached the article to the plaint and left it to the court to deduce on its own the part which might have been defamatory in reference to him. This ingredient of the claim was therefore not prove.
34. We then considered whether the appellant proved that the impugned article was false and defamatory. The test as to whether the statement is defamatory is stated in Halsbury's Laws of England 4th Edition Volume 28 at Page 23 as follows;

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”
35. Therefore, in deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those “who have a greater or special knowledge of the subject matter”. See the Court of Appeal of East Africa decision in *Onama v Uganda Argus Ltd* [1969] EA.
36. The appellant assailed the holding of the learned judge on this issue stating that she erred by failing to find that the defamatory words were stated in the plaint at paragraph 4, 5, 6, and 7 and were fully supported by an extract of a cutting of the newspaper in the appellant's list of documents. In rebuttal the respondent argued that the production of the said article as evidence did not absolve the appellant of his obligation to specifically set out the particulars of the libel in his plaint. Further that the submission that the defamatory words are delineated in paragraph 4, 5, 6, and 7 of the plaint is false since the paragraphs merely describe the substance of the alleged defamatory words and provide a description and analysis of what the appellant perceives to be defamatory.



37. In an action for defamation the actual words or the part complained of must be pleaded by specifically setting them out in the declaration. It is not enough to describe their substance, purpose or effect. See the decision in *Veronica Wambui v Michael Wanjohi Mathenge* [2015] eKLR to which we were referred by the respondent.

38. The Court of Appeal addressed this issue in *Wareham t/a A.F. Wareham & 2 others v Kenya Post Office Savings Bank* [2004] 2 KLR 91 as follows:

We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

39. It was therefore, imperative for the appellant to set out in the plaint, the specific words referring to him. The appellant’s failure to quote in the plaint, the defamatory words that specifically referred to him was fatal to his suit. The import of the failure is that the court had no words to subject to the test of a “reasonable man” to determine whether or not they were injurious to the appellant’s reputation.

40. Lastly, the appellant sought to convince the court that his stature was lowered in the eyes of right thinking folks following the said publication. He stated that since the publication of the article, which was read widely, he had received negative gestures from people whenever he is walking in public. Also, that fellow workmates at his place of work, from senior to junior staff developed a negative attitude towards him. That although he was not suspended or interdicted by the NSSF over any loss of Kshs. 10,000,000 as alleged by the article he was however, demoted from the position of Assistant Information Officer to Clerk.

41. The respondents on their part argued that the appellant’s suit does not disclose a cause of action against the respondents. That it did not specifically plead the requisite particulars, nor was any testimony led during the trial, in respect of the offending publication, or alleged defamatory words.

42. We note that during the hearing the appellant adopted his witness statement which, as stated above, did not disclose the cause of action or the specific defamatory words complained of. There was also no evidence adduced by any independent witness to show that the so called defamatory words caused the witness to think any less of the appellant, so that the injury to his reputation was not just a figment of his imagination.

43. In the end we find, as did the learned trial judge, that the appellant did not prove his case to the standard required. Consequently, we will not embark on addressing the hypothetical question of assessing what would have been the appropriate award had the appeal succeeded, as to do so would amount to nothing more than an academic exercise.

The upshot is that this appeal is found to be without merit and is dismissed with costs to the respondents.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.



P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

