



**Mshindi & another v Ngenye (Civil Appeal 603 of 2019)
[2024] KECA 1332 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1332 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 603 OF 2019
F TUIYOTI, LA ACHODE & PM GACHOKA, JJA
SEPTEMBER 27, 2024**

BETWEEN

TOM MSHINDI 1ST APPELLANT

THE STANDARD GROUP LIMITED 2ND APPELLANT

AND

GRACE WANGUI NGENYE RESPONDENT

*(Being an appeal from the judgment and decree at the High Court Nairobi
(Mabeya. J) delivered on 24th February 2016 in Nairobi HCC Case No. 795 of 2005)*

JUDGMENT

1. Tom Mshindi and The Standard Group Limited, the 1st and 2nd appellants respectively, are aggrieved by the judgment of Mabeya J, rendered in Nairobi High Court Civil Case No 795 of 2005 in favour of Grace Wangui Ngenye, the respondent. The appellants have thus, come before the Court of Appeal seeking to have the proverbial second bite at the cherry in this first appeal.
2. The chronicle of this appeal begins with a plaint dated 27th June 2005, that the respondent filed against the appellants collectively, claiming that on 16th June 2005 they falsely and maliciously published defamatory words against her, at page 16 of their issue no. 27363 of the daily newspaper. That again on 17th June 2005, they published at page 14 of issue No 27364 further defamatory words concerning the respondent. The respondent averred that the publications caused severe injury to her credit, character, professional reputation, as a wife and a mother and brought her into public scandal, ridicule, odium, contempt, and opprobrium.
3. Consequently, the respondent prayed for permanent injunction restraining the appellants jointly and severally from publishing any falsehoods against her and for general damages, aggravated and/or exemplary damages and costs of the suit.



4. In rebuttal, the appellants filed a joint statement of defence dated 3rd August 2005 and admitted that the words complained of were published on the days mentioned in the plaint. However, they denied any allegations of malice and falsity, and averred that the words were true in substance and in fact. They further averred that the words constituted fair and accurate report on a matter, or matters of public interest, namely, the events and situations obtaining at Machakos Law Courts at the time. They denied that the respondent had suffered any damage because of the publication, or that they were liable for any injury to her credit, character or professional reputation, among others.
5. During the hearing, five witnesses testified for the respondent. The appellants did not present any witnesses.
6. The respondent (PW1) told the court that she joined the Judiciary as a District Magistrate II, and moved up the rank to becoming a judge of the High Court in 2012. That in 2005 there was an agitation by magistrates for better pay and better terms of service, which resulted in herself and several magistrates being interdicted. However, following investigation she was reinstated vide a letter she received on 15th June 2005, advising her to resume duty on 16th June 2005.
7. It was her evidence that the appellants published on 16th and 17th June 2005 in the Standard Newspaper, articles to the effect that lawyers had boycotted her court because of her high handedness and arrogance, and the litigants in that court were stranded. She stated that the reports were false since on 15th June 2005 she was not on duty, and on 16 June 2005, she attended to the two matters listed before her. On 17th June 2005 the acting head of station wrote to the Registrar of the High Court clarifying that the report about the boycott was untrue and her advocate wrote to the appellants on the same date informing them about the falsity. However, the appellants failed to publish a retraction, correction, or apology.
8. It was the respondent's testimony that the publication caused her a lot of anguish, embarrassment and public ridicule amongst her friends, relatives, colleagues, and litigants who appear before her. Shortly after the publication, she was among forty magistrates transferred, country wide. She told the court that although the reports in the article indicated that the information emanated from L.M. Wambua Advocates the then Chair of the local Bar, she did not sue him since she could not authenticate that report.
9. John Ndambuki Muli, Executive Assistant in the Machakos Court, testified as PW2 and stated that the respondent did not appear in the cause list of 15th June 2005. She appeared in the one of 16th June 2005. One advocate, Peter Gicheha Kamau testified as PW3 and confirmed that on 16th June 2005 he appeared before the respondent, for three accused persons and he did not notice any court boycott or see any stranded litigant. He was thus, surprised to see the articles on the boycott of the respondent's court.
10. Andrew Mwangi Kihara PW4, uncle to the respondent's husband, narrated to court that a neighbor drew his attention to the article of 16th June 2005. He made his own inquiry from the respondent's husband who assured him that all was well, but because of the anxiety in the entire family, he traveled to Nairobi from Murang'a to seek clarification.
11. Julius Chege Macharia PW5, is the respondent's husband. He told the court that he received calls from friends and relatives seeking clarification on the newspaper articles. Some friends and relatives trooped to his house to inquire about the story and ever since those publications, he and the respondent have lived under a cloud of suspicion from their relatives and friends.



12. Upon the close of the parties' case, the learned judge considered the matter before him and entered a judgement for the respondent against the appellants jointly and severally. He awarded the respondent:
 - a. General damages Kshs. 5 million
 - b. Aggravated damages Kshs. 2 million
 - c. Damages in lieu of apology kshs.1.5 million Total – Kshs. 8.5 million
13. Chagrined by the judgement of the superior court, the appellants filed the instant appeal on the following grounds:
 1. That the learned judge misdirected himself by holding the defendants liable.
 2. That the learned Judge erred in fact and law in finding that the plaintiff had proven her case and further erred in holding the publications were malicious.
 3. That the learned judge misdirected himself and erred in law by relying on hearsay evidence.
 4. That the learned judge erred in his analysis of the evidence
 5. That the learned judge erred in awarding excessive general damages of Kshs. 5,000,000 aggravated damages of Kshs. 2,000,000 and damages in lieu of apology of Kshs. 1,500,000.”
14. This appeal was disposed of by way of written submissions. The firm of C.W. Githae & Company Advocates filed written submissions dated 10th August 2020 on behalf of the appellants while the firm of Karuru Mwaura & Company Advocate filed theirs dated 2nd September 2020 on behalf of the respondent.
15. The appellants submit that the publications consisted of fair comment under Section 15 of the Defamation Act, and the publications were justified, made in good faith and without malice under Section 14 of the Defamation Act. They urge that the publications consist partly of allegation and partly of expression of opinion. As proof of fair comment they submit that

there was a magistrate's strike in agitation for better terms of service, the respondent was among the magistrates who were suspended by her employer. Hence, the publication related to matters of great public concern and interest, and it was the duty of the journalist to bring to light and publish comments and reactions of the people concerned on an issue of great interest and importance like this one.
16. It is urged that the respondent did not prove that the publication injured her credit, reputation, character, occupation or calling. This, they assert, is borne out of the fact that the respondent had since the time of publication of the articles progressed in her career, profession, and/or occupation. Further, that PW4 testified that the article did not change the way he perceived the respondent and that it was not true that the two publications increased their sales as no evidence was led of the appellants' sales record before or after the articles.
17. Regarding damages, the appellants cite this Court's decision in Kenya Tea Development Agency Limited vs Benson Ondimu Masese t/a B.O. Masese & Co Advocates (2008) KLR 149, where the judges endorsed the principles that were drawn from Jones vs Pollard (1997) EMLR 233- 243 in determining the quantum of damages as: the objective features of the libel itself, subjective effect on the plaintiff's feelings, matters tending to reduce damages, and vindication of the plaintiff's reputation past and future.



18. It is urged that as a matter of law and fact, there is no inference of malice on the part of the appellants from the wording of the article. There is no evidence on record that the publication was actuated by malice, or was deliberately done to disparage the respondent, malice being a subjective element that must be established as a fact by admissible evidence.
19. They further urge that the learned judge failed to appreciate the provisions of Section 7A and 6A (1) of the Defamation Act that provide for a right to reply. That the respondent was not denied the right to reply, which if she did exercise was to be published free of charge and given similar prominence as the articles responded to or the items complained of.
20. They also rely on Kenya Tea Development Agency Limited supra and the Standard Ltd vs Alnashir Visram C.A NO.89 of 2017 where this Court reduced the amount of general damages awarded in the superior court from 10 million to 1.5 million in the first case and from 18 million to 12 million in the second decision, where exemplary damages were also reduced from 8 million to 3 million. They contend that in the circumstances of this case a composite award of Kshs. 1.5 million would be fair and reasonable solatium to the respondent.
21. In rebuttal, the respondent argues that the defence of justification and fair comment presupposes that facts as pleaded are accurate and admitted as such. It is contended that the story as published was not based on comment but was a news report. That the appellant did not seek the truth from the Chief Magistrate, the Executive Officer, or the respondent, but maliciously concocted and published falsehoods against the respondent.
22. It is submitted that the respondent brought witnesses who narrated the agony and emotional distress occasioned to her by the false story published by the appellants. The publication is not denied and was proved to have been false by the evidence tendered, which showed that there was no boycott of the respondent's court. Further that no litigants were stranded at Machakos Law Courts on 15th or 16 of June 2005, as alleged in the appellants' publication. Thus, they urge that the learned judge correctly found that the publication was false, and malicious and the respondent was injured in her character.
23. On quantum, it is submitted that the court has unfettered right by dint of Section 16A of the Defamation Act to assess damages payable in such an amount as it deems just. That the publications are still on the appellants' website, and they have declined to apologize, or retract the falsehoods they published. That by the appellants' defence of justification and fair comment, it means that they still stand by the truth of what they published without evidence in support thereof.
24. It is urged that the assessment of damages by the judge was on a sound footing as the appellants' publications were so grievous and well-aimed, to terminate the respondent's budding career as a Judicial Officer and destroy her confidence as a mother, a wife, a daughter, and a member of the society. The respondent relies on the decision of the Court of Appeal for Eastern Africa in Civil Appeal No. 9 of 1975; Kitto vs Chadwick & Another (1975) E.A 141, where it was held that:

“...where the allegations made are false and the same are not disputed by correspondence or evidence and in the absence of any attempt to show some belief in the truth of the allegations, then malice is established and there is no sustainable defence”.
25. The respondent also relies on this Court's decision in Wangethi Mwangi & Another vs J.P Machira T/ A Machira & Company Advocates (2012) eKLR, where an award of kshs 8,000,000 as general damages, kshs. 2,000,000 in aggravated damages and kshs. 200,000 from the High court was upheld in this Court. The Court held in the said decision that as long as the trial court remained within the parameters of established principles, the exact quantum awarded is left to the discretion of the trial Judge.



26. The respondent posits that the appellants filed an incomplete record of appeal, necessitating them to file a supplementary record of appeal which they urge the Court to consider. It is also submitted that the appellants filed an application for review of the impugned judgment, which was heard and dismissed by the superior court, a fact which was left out conveniently by the appellants' submissions. That Order 45 Rule (1) (a) of the Civil Procedure Rules, 2010, estops the appellants from hopping from the option of appeal intimated by a Notice of Appeal filed out of time on 9th March 2016, to review and after it fails, coming back to file the instant appeal out of time.
27. We have considered the record of appeal and rival submissions before us. Our duty as a first appellate court is to subject the whole evidence to fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we did not have the opportunity to see and hear the witnesses firsthand, and give allowance therefor. 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.”
28. Upon considering the record, we collapsed the grounds of the appeal into three issues for determination as follows:
- i. Whether the appellants are rightfully before this Court.
 - ii. Whether the respondent proved the claim of defamation against the appellants and
 - iii. Whether the award by the superior court is justifiable.
29. The starting point is to answer the pertinent question to wit, whether the appellants are rightfully before this Court. The appellant first sought to challenge the impugned judgment by filing an application to review it in the superior court. At page 177 – 187 of the supplementary record of appeal appears the ruling by L. Njuguna J on the application for review. In the application, the appellants sought to review the orders given in the impugned judgment on the grounds that their submissions were not considered when the Judge wrote the judgment. In dismissing this application, the court held that :
- “His failure to file written submissions in the circumstances, of this case, in my view, cannot constitute a sufficient reason for a review especially considering that no reason was given for failure to file the same on time.”
30. The legal position of review and appeal is provided in Section 80 of the *Civil Procedure Act* and Order 45(1) of the Civil Procedure Rules. The two provisions are replicas of each other. Section 80 of the *Civil Procedure Act* provides that:
- “Any person who considers himself aggrieved— a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”



While Order 45 (1) of the Civil Procedure Rules provides:

Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

31. The Court of Appeal addressed the question whether the applicant can file for review of a judgment, and after it is dismissed, proceed to file an appeal on the same judgment in the case of *Gerald Kithu Muchange vs Catherine Muthoni Ngare & Another* (2020) eKLR. The Court pronounced itself thus:

“The applicant was aggrieved by the judgment of the trial court. Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry, and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of *Martha Wambui v Irene Wanjiru Mwangi & Another* (2015) eKLR, the court stated that “From the above provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...”

32. We associate ourselves fully with the reasoning in *Gerald Kithu Muchange supra* and find that having exercised the right to a review, the appellants lost the right of appeal against the same judgment and decree.
33. We however, proceed to examine what the fate of the appeal would have been if it was properly before this Court. Did the respondent prove the claim of defamation against the appellants? The words that the respondent complained of as being defamatory are found in paragraphs 5 and 6 of the plaint and were carried in the issue of 16th June 2005 as follows:

“Operations at the Machakos Law Courts were yesterday paralyzed after Lawyers boycotted having their cases heard by two reinstated Magistrates.

Led by the Machakos Law Society of Kenya Branch Chairman L.M Wambua, the over 70 lawyers said the decision to re-deploy magistrates Grace Ngenye and Peter Muriuki to the law courts was objectionable.



Ngenye and Muriuki were among magistrates suspended three months ago for participating in a strike to press for better pay.

They were last week ordered to report back to their former stations, a move that lawyers in Machakos have rejected.

Yesterday, the lawyers said they would boycott the two magistrates' court until they were removed.

Wambua was flanked by the LSK Branch vice-chairman Henry Nyakweba, Treasurer Anne Thoronjo and Secretary Janet Mutua and over 70 members.

He said that the two magistrates had threatened they would "teach the Machakos Lawyers a lesson" sparking the current stalemate.

The LSK officials said that the magistrates had shown open arrogance towards lawyers and litigants during the hearing of cases.

"We have agreed to pay the price of delayed justice to protest the way the two magistrates have handled our members" said the LSK officials.

The litigants with cases scheduled for hearing yesterday at the two magistrates courts were stranded as their cases failed to take off.

The Machakos Court has been facing a staff crisis following the suspension of five of its magistrates. This prompted the government to re-deploy two magistrates Okello and John Muiruri from Nairobi to hear fresh pleas.

Former Machakos Chief Magistrate Grace Manyasi was last week retired in public interest after participating in the strike, a move the Machakos Lawyers have termed as regrettable.

The Lawyers urged Chief Justice Evans Gicheru to visit the law courts and address their grievances.

And in the issue of 17th June 2005 the following was reported:

Machakos Advocates Stalemate Continues

Proceedings at two Machakos Courts were paralyzed for the second day yesterday after lawyers refused to have their matters heard by two reinstated magistrates.

Litigants with cases pending before magistrates Grace Ngenye and Peter Muriuki were stranded outside the two courts.

The Advocates claiming that Ngenye and Muriuki are harassing them, want the two magistrates to leave.

The Magistrates were last week reinstated after being suspended for involvement in a strike to press for better pay.

But yesterday, the Machakos lawyers led by LSK Branch Chairman L.M Wambua and the society steering committee, said the lawyers would continue boycotting the two courts until the magistrates were removed.

Our resolve is final. "We are ready to face the consequences until the two leave," said Wambua. Yesterday, only three magistrates at the law court, Timothy Okello, Gladys Ireri and John Muiruri conducted their sessions. The lawyers began their



boycott on Wednesday vowing they would not have their cases heard by the two magistrates.

34. The *Defamation Act* defines defamation as:
- “A publication without justification, lawful excuse calculated to injure reputation, contempt or ridicule.”
35. When considering whether there is defamation however, we must strike a balance between the right not to be defamed and the right to freedom of expression as enshrined in Article 33(1) of *the Constitution*. One right should not infringe on the other.
36. In their defence the appellants urge that the publications were justified and were fair comment under Section 14 and 15 of the *Defamation Act*. On the other hand, the respondent argue that these sections are not available to the appellants since the story as published was not based on comment, but was a news report based on falsehoods that the appellants maliciously concocted and published against the respondent.
37. Section 14 and 15 of the *Defamation Act* provide that:
- “14. In any action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges.
15. In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.”
38. The superior court in dismissing the defence of justification and fair comment pronounced itself thus:
- “In view of the foregoing, for the defence of justification to succeed; the defendant must show that the defamatory statements or the words complained of are substantially true as one cannot complain about a true statement even if it harms his reputation; the defendant must also prove that comments and inferences drawn from the facts are true. It is irrelevant in a defence of justification that the Defendants intention is malicious. That which is true, however damaging it maybe, is unassailable. However, it is on the Defendant to justify the substantial truth of the allegations.
- As regards fair comment, it is a defence that seek to protect the Defendant’s right to criticize a claimant. Provided such defendant act fairly, honestly and base his comments on true facts. It is a defence that seeks to support the right to freedom of expression but in a controlled environment. The statement or comment must be in public interest, that is, in matters which the public is generally legitimately interested on or concerned; must be honest and fair and must be based on true facts.”



39. The Supreme Court of Canada succinctly set out the requirements for a statement to be regarded as fair comment in the case of *Wilradeolia v Simpson* (2008) SCC 40, as follows:

- “ a. The comment must be on a matter of public interest.
- b. The comment must be based on fact.
- b. The comment though it can include inferences of fact must be recognizable as a comment.
- c. The comment must satisfy the following objective test: could any person honestly express that the opinion on the proved facts.
- d. Even though the comment satisfies the objective test, the defence can be deflated if the plaintiff proves that the defendant was actuated by express malice”

The defence of fair comment will therefore, avail where comments are made and not statements of fact. The comments so made must be on matters that are of public interest and the facts upon which the comments are based must be true, or substantially true.

40. We observe that it is not contested that the words complained of were published by the appellants and they were about the respondent. We also note that from the evidence before the High court, the boycott of the respondent’s court as published was not true. It was a figment of the publisher’s imagination. Further that the story as published was not a commentary, it was a news report based on facts whose factual truth the appellants could not demonstrate.

41. Consequently, the appellants cannot plead fair comment based on the facts available, nor can they plead justification since the words published were not true in substance and in fact. With due diligence and little effort the appellants would have established the truth before rolling out the paper. Thus far we agree with the superior court in its reasoning and find that the publications were not justified, and they were not fair comments.

42. The final issue for our determination is whether the award by the superior court is justifiable. An award of damages is a matter of judicial discretion by the trial court and the appellate court should be slow to interfere with that discretion. This has been stated in the decisions of this Court times without number. In *Butt V Khan* (1981) KLR349 this Court stated thus:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to present an erroneous estimate; it must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low.”

43. In the more recent case of *Gicheru V Morton and Anor* (2005) 2 KLR pg 333 the Court restated this principle as follows:

“In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled.”



- 44. In assessing damages the most important factor is the seriousness of the libel. The more closely it impacts the core attributes of the respondent’s personality, personal integrity or professional reputation, the more injurious it will be found to be. A successful claimant in a defamation claim is entitled to recover as general damages, a sum which will compensate them for the wrong suffered. That is, taking into account the damage to their reputation, the distress suffered and the need to vindicate their good name.
- 45. In the case before us we find the words the learned trial Judge used in granting the award apt and we quote them in extenso as follows:

“... I note that the plaintiff in this case was at the material time an Acting Senior Resident Magistrate and had served several stations within Kenya. I have considered that despite her being defamed, she continued to rise in her professional career up to the level of the judge of the High Court of Kenya as at the time she testified before me. I saw her testify and she seemed deeply wounded. She exhibited tendencies of being worried of those who appear before her to date. I have taken into consideration the foregoing awards, the passage of time since they were made and their own peculiar circumstances as well as the principles enunciated in the case of CAM v Royal Media Service Ltd (supra). I have also taken into consideration the fact that although the publication was permanent and not only defamed the plaintiff at the time but that it continues to do so as the Defendants refused to retract the same. I think it is wrong for one to publish defamatory material of another, profit therefrom the “story that sells” at the expense of another with the hope that the damages to be awarded will be a pat on the arm. Once the reputation of that other has been lost, it is so lost forever. This, the court has to take into consideration.”

- 46. From the excerpt above we are satisfied that the learned Judge considered all the factors necessary before awarding both general and aggravated damages. We note the impact the publication had on the respondent’s personal and professional reputation. We have also considered that the publication was permanent and continued to defame her as the appellants refused to apologise, retract, or pull the publication down from their website, even after the respondent and her advocate communicated the factual situation on the ground.
- 47. From the foregoing analysis, we agree with the finding of the learned Judge that the claim of defamation was proved and further, that the award of general and aggravated damages given was justified and we find no basis for interfering with the judgment.

Accordingly, this appeal is dismissed with cost to the respondent.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

F. TUIYOTT

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

L. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

