



**Mboya v Business Today Media (Civil Appeal E031 of 2024)  
[2025] KEHC 1414 (KLR) (Civ) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1414 (KLR)

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

**CIVIL**

**CIVIL APPEAL E031 OF 2024**

**RC RUTTO, J**

**FEBRUARY 28, 2025**

**BETWEEN**

**THOMAS OGUNDE MBOYA ..... APPELLANT**

**AND**

**BUSINESS TODAY MEDIA ..... RESPONDENT**

*(Being an Appeal from the Part of the Judgment delivered by Hon Wendy K Micheni  
on 31st January 2024 in CMCC No E 5126 of 2020 Milimani Commercial Court)*

**JUDGMENT**

1. This is an appeal against part of the Judgment delivered in Nairobi CMCC No. E5126 OF 2020. In that claim, the Appellant sued the Respondent for malice and recklessness in their publication of an article printed on 3<sup>rd</sup> November 2019 titled “Media Stars Fired By K24 In Less Than 5 Years. Would Anyone Be Willing To Work At K24 After These Events? According to the Appellant, the words in the article were libelous. The words were;

“Tom Mboya and Belinda Obura who had been poached from Citizen survived this round of mass sacking but they would not be so lucky when the second round came.

After being let go by K24, Mboya turned to the bottle and it almost wrecked his life.”

2. The Appellant therefore sought general damages, in the nature of aggravated or exemplary damages, costs of the suit, and interest.
3. In response to the plaint, the Respondent relied on the defences of justification and fair comment, arguing that the publication referenced a past interview with the Appellant that had been published by



a different media house. The Respondent further contended that the publication was made without malice or any intention to injure the Appellant's character.

4. Upon hearing the parties and considering their submissions, the Trial Magistrate delivered judgment on 31<sup>st</sup> January 2024 in favor of the Appellant against the Respondent as follows: general damages in the sum of Kshs 800,000/=, together with costs and interest from the date of judgment until payment in full.
5. The Appellant aggrieved by part of the judgment, lodged this appeal on 13<sup>th</sup> January 2024 setting out the following summarized grounds of appeal, that the Learned Magistrate erred and misdirected herself in law and in fact: by failing to consider the amount of money lost by the plaintiff when the contract by cascade global was terminated; by completely deviating from the reasoning of the authorities she relied on in arriving at the award of general damages; by failing to consider the fact that the plaintiff suffered not only damage to his reputation but also financial loss amounting USD 40, 000.
6. The Appellant prayed that the appeal be allowed and the award of damages be reviewed upwards. The Appellant also sought the costs of the appeal.
7. The Respondent filed an amended cross appeal dated 9<sup>th</sup> May 2024 on the grounds that the Learned Trial Magistrate erred in law and in fact in awarding Kshs 800, 000/= as general damages which was manifestly excessive, without regard to the financial capability of the Appellant; by disregarding the import of the cross-appellant written submissions which expounded on the law and elaborated on the facts of the case thereby arriving at an erroneous judgment; by failing to appreciate that the cross-appellant was not the original author of the alleged defamatory words but the same was extracted from a previous interview conducted by the Respondent in the cross-appeal; in failing to evaluate the evidence presented by the Appellant showing the discrepancies in the dates of the letters being fronted by the Respondent; in finding that the cross-appellant was liable for defamation basing its judgment exclusively on the timelines and not on the statement that formed the backbone of the matter before it; in awarding general damages to the Respondent in the cross appeal without basing it on any law or fact whatsoever; and by failing to look at the elements that amount to defamation therefore arriving at an erroneous judgment.
8. The Respondent thus prayed for orders that the cross appeal be allowed, judgment delivered on 31<sup>st</sup> January 2024 in Milimani CMCC No. E5126 of 2020 be set aside in totality and the costs and interest of the appeal and the lower court be awarded to it.
9. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 10<sup>th</sup> July 2024 while the Respondent's submissions are dated 10<sup>th</sup> October 2024.

### **Appellant's Submissions**

10. The Appellant gave a brief background of the facts. He asserted that, as a result of the Respondent's publication, he lost his contract with Cascade Global, which engaged him to speak and moderate at town hall meetings and workshops on campaigns against drug, substance, and alcohol abuse. He contended that, despite the trial court correctly finding the publication to be defamatory, it deviated from established case law and principles without justification in its award of general damages and its refusal to grant aggravated and/or exemplary damages. Further, he submitted that the court failed to consider that he lost a contract with Cascade Global worth USD 40,000.
11. The Appellant delimited two issues for determination; first, whether the Appellant's appeal is merited, and secondly, whether the Respondent's cross appeal is merited.



12. On the first issue, the Appellant submitted that the contract termination letter from Cascade Global indicated that the reason for termination was the defamatory words published by the Respondent. The Trial Court acknowledged that the publication was defamatory and interfered with the Appellant's opportunities; however, the awarded damages of Kshs 800,000/= awarded were insufficient.
13. The Appellant relied on the case of *Nation Media Group Limited & 2 others v John Joseph Kamotho & 3 others* [2010] eKLR to submit that, in defamation cases and other actions involving reputational damage, the principle of *restitutio in integrum* incorporates a highly subjective element. In urging the court to award aggravated damages, the Appellant cited the case of *Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others* [2000] eKLR and submitted that the sum of Kshs 800,000/= was inadequate. Further, he contended that malice was evident from the Respondent's confirmation of the truthfulness of the published words before proceeding with the publication.
14. The Appellant further submitted that the court failed to be guided by the damages awarded in the authorities it relied upon in reaching its conclusion. He noted that the cited cases awarded general damages of Kshs 4,000,000/= and Kshs 5,000,000/=:, as well as aggravated damages ranging between Kshs 500,000/= and Kshs 1,000,000/=:.
15. On the second issue, the Appellant submitted that the cross-appeal is without merit, reiterating the arguments in support of his appeal that the general damages awarded were significantly lower than those granted in the cited authorities. Additionally, he contended that the defamatory statement was malicious and had the effect of lowering his reputation and standing in society.
16. The Appellant urged the court to review the general damages award upwards and to grant him aggravated and/or exemplary damages. He further submitted that the cross-appeal be deemed unmerited and be dismissed with costs awarded to him.

### **Respondent's submissions**

17. The Respondent provided a brief summary of the case. Counsel for the Respondent narrowed down the issues from the eight grounds of cross-appeal to two: first, whether the trial court erred in law and in fact in finding the Respondent guilty of defamation and whether the Appellant had substantiated the claim; and secondly, whether the trial court was justified in awarding the Appellant general damages, and if so, whether the amount awarded was excessive.
18. The Respondent submitted that the alleged contract between the Appellant and Cascade Global was fraudulent, as no witnesses from Cascade Global were called to corroborate its existence or its termination as a result of the Respondent's publication. The Respondent argued that this contravened Sections 107 and 109 of the *Evidence Act*, which uphold the principle that the burden of proof lies with the party making the allegation. Furthermore, the Respondent stated that a search conducted in the company register for Cascade Global did not indicate that providing mentorship services to the youth was among its core functions or mandate.
19. The Respondent submitted that during hearing, the following facts emerged; the publication in question was made on 3<sup>rd</sup> November 2019; Cascade Global allegedly awarded the Appellant a contract on 10<sup>th</sup> November 2020, set to commence on 4<sup>th</sup> January 2021; the first letter, which the Plaintiff alluded to be strange, terminated a contract that was supposed to commence on 2<sup>nd</sup> December 2019; and the second letter, dated 20<sup>th</sup> November 2020, which the Plaintiff produced in court, explicitly stated that it was terminating a contract set to commence on 1<sup>st</sup> January 2021. Additionally, the Plaintiff filed the suit on 14<sup>th</sup> May 2020. The Respondent argued that, given these inconsistencies, the court could not justify awarding aggravated or exemplary damages based on unfounded claims. In support



of this argument, the Respondent relied on the case of *Rookes v Bernard* (1964) AC 1129 to assert that the Appellant did not merit an award of exemplary damages.

20. The Respondent further urged the court to consider the defence of qualified privilege, arguing that the article was published in the public interest, without malice, and without any intention to harm the character of the Respondent. The Respondent maintained that the publication primarily sought to expose rogue media houses.
21. On the cross appeal, the Respondent submitted that the published words did not contain any defamatory meaning as alleged by the Appellant, nor were they capable of bearing a defamatory meaning by innuendo. The Respondent relied on the case of *SMW v ZWM* [2015] eKLR to define a defamatory statement. Additionally, the Respondent argued that the publication contained factual information that the Appellant had admitted to during an interview with *The Standard* newspaper in April 2019. Furthermore, during cross-examination, the Appellant confirmed to the court that the statement in question was indeed his own, and his only contention was the accuracy of the timeline regarding his struggles with alcoholism as indicated in the publication.
22. The Respondent submitted that a closer examination of the plaint reveals that the publication did not meet the essential requirements for defamation. Regarding the alleged impact of the publication on the Appellant's reputation, the Respondent, relied on the case of *Standard Limited v Joseph Leo Ochieng and Another*, Civil Appeal No. 189 of 2004, to argue that no independent witness testified at the trial court to demonstrate that the Appellant was viewed positively before the publication and negatively afterward.
23. On the issue of damages, the Respondent contended that the amount awarded was excessive and should not have been granted in the first place. The Respondent further argued that the Appellant's claim regarding the alleged loss of a contract was improperly introduced at the appeal stage, as it had not been pleaded during the trial, and should therefore be dismissed. Additionally, the Respondent submitted that it is merely a blogger with limited financial resources and lacks the asset capability to raise the awarded compensation. It claimed that any increase in damages would cripple its operations and lead to the permanent closure of its business, as it is already struggling with the current award. Consequently, the Respondent urged the court to revise the compensatory damages downwards to Kshs 200,000.
24. The Respondent urged the court to allow the cross-appeal and dismiss the Appellant's appeal.

### **Analysis and Determination**

25. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
26. Consequently, guided by the above, I have considered the appeal and cross appeal, the parties' submissions, and the entire record, I find that there are three issues for determination;
  - a. Whether the Respondent defamed the Appellant.
  - b. Whether the general damages of Kshs 800, 000/= is high or low.
  - c. Whether the Appellant is entitled to aggravated and/or exemplary damages.



**(i) Whether the Respondent defamed the Appellant**

27. The trial court, in finding that the statements were defamatory relied on the principles established in *Miguna Miguna v Standard Group Limited & 4 Others* [2017] eKLR, namely: that the statement must be defamatory, must refer to the plaintiff, must be published by the defendant, and must be false and concluded that the Appellant had established a case against the Respondent.
28. The Respondent, on the other hand, maintained that the statement was not entirely defamatory, arguing that the publication contained elements of truth. Specifically, the issue of alcoholism was confirmed by the Appellant during the hearing. However, both parties agreed that the publication was false to the extent that it misrepresented the timeline of the Appellant's struggles with alcoholism and falsely claimed that it was the reason for his termination from K24.
29. The Respondent's acknowledgment that the publication contained inaccuracies, coupled with the subsequent apology to the Appellant, this confirms that the publication was defamatory, unsubstantiated, and therefore false. The Respondent submitted that the publication was based on an interview with The Standard newspaper, however, this court notes that this argument tends to shift blame to a third party that is not a party to these proceedings. Even so, the Respondent did not seek to enjoin The Standard Newspaper as a party to these proceedings as such it does not absolve them from responsibility, as it published the statement without verifying its accuracy.
30. On whether there was malice in the publication of the article, the same can be deduced from the publication and the facts of the case, as was held in the case of *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR where the court held that:-

“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.”

31. The Respondent herein publish allegations without verifying the accuracy and correctness of the information before publication. There was also sensationalizing of the published information. Failure to substantiate the allegations is clear proof that the publication was actuated by malice. It is therefore my finding that malice was proved against the Appellant.
32. In view of the foregoing, it is my finding that the Appellant proved the tort of defamation against the Respondent and therefore, I see no need of interfering with the trial court's finding on this issue.

**(ii) Whether the general damages of Kshs 800, 000/= is high or low.**

33. In *Butt v Khan* Law, JA stated: -

“... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 either inordinately high or low...”

33. It is the Appellant’s position that the award of general damages of Kshs 800, 000/= is low and also deviates from the reasoning of the authorities that it relied upon for comparable awards. I note that the court relied on the cases of Ken Odondi & 3 others vs James Okoth Omburah t/a Okoth Ombura & Co. advocates, Kisumu Civil Appeal No. 84 of 2009 where a sum of Ksh.4,000,000/= was awarded in general damages for libel and Ksh.500,000/= in aggravated damages, the case of Mwangi Kiunjuri vs. Wangethi Mwangi & 2 others (2016) eKLR where Ksh. 4,000,000/= was awarded in general damages and Ksh.1,000,000/= in aggravated damages and the case of Erick Gor Sungu vs. George Oraro Odinga (2014) eKLR where an award of Ksh.3,000,000/= in general damages at the High Court was enhanced by the Court of Appeal to Ksh.5,000,000/=.
34. The Respondent, on the other hand, argued that the award was excessively high and lacked proper justification. Additionally, the Respondent submitted that it is financially incapable of raising the awarded compensation of Kshs 800,000/= due to limited resources. Therefore, it urged the court to reduce the compensation to Kshs 200,000/= should the court decide to grant any compensation to the Appellant.
35. The Court of Appeal in the case of Johnson Evans Gicheru v Andrew Morton [2005] eKLR while quoting from the English decision of Jones v Pollard [1997] EMLR 233, 243 enumerated the checklist of compensable factors in libel cases as follows:
- “ 1. The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition;
  2. The subjective effect on the plaintiff feelings not only from the prominence itself but from the Defendant’s conduct thereafter both up to and including the trial itself;
  3. Matters tending to mitigate damages, such as the publication of an apology;
  4. Matters tending to reduce damages;
  5. Vindication of the plaintiff’s reputation past and future.”
36. The court is also required to have regard to the status, standing and character of the person defamed as re-stated by the Court of Appeal in Nation Newspapers Limited v Peter Barasa Rabando (2016) eKLR where it was held that:
- “We reiterate that all persons are equal before the law but it would be an Utopian fallacy to assume that a defamatory publication calls for an equal compensation regardless of the status, standing and character of the persons defamed. We dare say that for a person who is not known beyond the local limits of his immediate family, residential and work environment calls for less damages than a person of prominence whose station, position, profession, fame and notoriety may spread beyond county and country. We therefore reiterate as correct what this Court has stated before that the status of a particular person affects the extent of the injury suffered.”
37. In assessing damages in a defamation action, the court must consider the specific circumstances of each case, including the Appellant’s position, profession and standing in society, the mode and extent of



publication, the timing and nature of any apology offered, and the conduct of the defendants from the time of publication to the time of judgment.

38. In this case, the Appellant, as described in the Complaint dated 14<sup>th</sup> May 2020, was engaged in moral advocacy and was nominated as a finalist in the Dear Awards USA 2019 under the Best Motivational Speaker category. This court views the Appellant as a person of good repute and influence in society. The Court also takes note of his profession and position in the media which exposed him to the society. However, the authorities relied upon in determining the award of general damages pertained to individuals of higher societal standing than the Appellant. Nonetheless, I have considered other relevant comparative authorities. In *Kibui v People Limited & another* (Civil Case 616 of 2006) [2022] KEHC 15311 (KLR) (Civ) (11 November 2022) (Judgment) Seron J. awarded a school principal a sum of Ksh.2,000,000/= in general damages for defamation. In *Raphael Lukale v Elizabeth Mayabi & Royal Media Services Ltd* Civil Appeal No 286 of 2016 [2018] eKLR, the Court of Appeal awarded a head teacher a sum of Kshs 1,500,000/= for defamatory statements aired by an FM station with wide listenership among the Luhya community.
39. Considering the cited authorities and the Appellant's standing in society, this court finds that the trial court failed to adequately take into account the Appellant's position. Consequently, upon review, this court increases the general damages from Kshs 800,000/= to Kshs 2,000,000/=.

**(iii) Whether the Appellant is entitled to aggravated damages**

40. The Court of Appeal in the case of *Miguna Miguna v The Standard Group Ltd & 4 others* [2017] eKLR while quoting the case of *John v GM Limited* [1993] QB 586 stated:
- “Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flimsy defence of justification or failure to apologize.”
41. In the case of *Francis Xavier Ole Kaparo v the Standard & 3 others* HCCC No. 1230 of 2004 (UR) as reported in *Vimalkumar Bhimji Deepar Shah v Geryl Otieno & another* [2021] eKLR, it was held that:
- “Malicious and/or insulting conduct on the part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors ...Damages will be aggravated by the Defendant's improper motive.”
42. The Respondent relied on the defence of justification yet there was no evidence that the truthfulness of the publication was investigated prior to its release. Ultimately, the statements in the article were proven to be false, rendering the defence of justification untenable. As a direct consequence of the publication, the Appellant lost his contract, as evidenced by the termination letter dated 20<sup>th</sup> November 2020. Although this termination occurred after the Respondent had publicly apologized in its publication on 26<sup>th</sup> February 2020, the publication nonetheless caused further harm to the Appellant. The Respondent however contends that the letter of termination was fraudulent because the Appellant did not call any person from the company to confirm the existence of the letter. I have perused the court's proceedings and I have not found at any point where the Respondent demanded that the makers of the said letters be called to produce the letter. Furthermore, the legitimacy of the said letters was not questioned to persuade the court of any fraud in the letters as alleged by the Respondent. The said letters were produced as evidence in the proper manner. It was up to the Respondent to disprove its lawfulness.



43. The foregoing notwithstanding, the award of aggravated damages is justified on the basis that the defence of justification was unsubstantiated and publication was malicious. I therefore award the Appellant Kshs 250,000/= in aggravated damages.

**(iv) Whether the Appellant is entitled to exemplary damages**

44. As for exemplary damages, the Court of Appeal in the case of Nation Media Group Limited & 2 others v Gulf Energy Limited (Civil Appeal 503 of 2019) [2023] KECA 1268 (KLR) (27 October 2023) (Judgment) stated as follows:

“For a court to award exemplary and punitive damages, it must be certain that firstly; the article complained of was made with cynical disregard of the consequences that naturally flow therefrom and with the belief that the contents of the article were not true; secondly that the publication was made with a contemptuous calculation of profiting from the same. Carelessness alone in the publication does not justify the award for exemplary damages.”

45. From the record, there is no evidence presented by the Appellant to prove that the Respondent had prior knowledge that the intended publication would be tortious, that it was driven by financial gain, or that the article in question was the sole reason readers purchased the publication for the Respondent’s profit.

46. In Nairobi Star Publication Limited vs. Elizabeth Atieno Oyoo [2018] eKLR, the Court of Appeal expressed itself as follows:

“As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, in paragraph 243 of Halbury’s Laws of England, as follows:

1. Oppressive, arbitrary or unconstitutional actions by servants of government;
2. Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
3. Cases in which the payment of exemplary damages is authorized by statute.”

47. From the evidence on record, there is no indication that the Respondent knowingly published the article with a deliberate, overt, and calculated intent to disparage the Appellant. In these circumstances, this court finds that this case does not warrant an award of exemplary or punitive damages based on the facts presented.

48. In light of the foregoing, I find that the trial court failed to consider all relevant factors in determining a reasonable quantum of damages. Consequently, I dismiss the cross-appeal and allow the appeal as follows:

- a. The General damages of Kshs 800, 000/= is set aside and increased to Kshs 2, 000, 000/=.
- b. Aggravated damages of Kshs 250, 000/= is awarded.
- c. Each party shall bear their own costs of this appeal.

Orders accordingly

**RHODA RUTTO**

**JUDGE**



**DELIVERED DATED AND SIGNED THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025**

For Appellant:

For Respondent:

Court Assistant:

