



**Mungatana v Nation Media Group Limited (Civil Case 381 of 2008)  
[2024] KEHC 3380 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3380 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL CASE 381 OF 2008  
AN ONGERI, J  
MARCH 22, 2024**

**BETWEEN**

**HON DANSON BUYA MUNGATANA ..... PLAINTIFF**

**AND**

**NATION MEDIA GROUP LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in this case Hon. Danson Buya Mungatana (hereafter referred to as the plaintiff only) sued Nation Media Group Limited (hereafter referred to as the defendant only) vide plaint dated 22/8/2008 seeking general damages for libel, aggravated and/or exemplary damages and an injunction to restrain the defendant, its agents, servants or whomever from making such or similar defamatory remarks concerning the plaintiff.

2. The defendant filed a defence dated 29/10/2008 denying the plaintiff's claim.

3. The plaintiff averred in his plaint that on or about Tuesday June 24, 2008, the defendant, its said servants, agents and/or employees published and/or caused to be published and disseminated of, concerning and/or against the plaintiff herein in its main daily publication, the following words;

QUOTE{startQuote “}

DON'T TAX MY PAY!

Exclusive: A section of MPs are saying a big NO to (Hon.) Kumya's proposal to tax allowances? The LIST OF SHAME is long ....”

That alongside the said bold headline, the Defendant published, inter alia, the plaintiff's portrait as first in line among the members of the national assembly who are alleged to be opposed to paying taxes.



That further on the 2<sup>nd</sup> and 3<sup>rd</sup> pages of the said Daily Metro publication, the defendant prominently published and/or caused to be published the following words of and concerning the plaintiff;

“Good guys and the bad guys in parliament”.

“A worrying number of MPs have VOWED to defeat attempts to tax their sky-high allowances.

● ● ● MPs interviewed directly by Daily Metro ... OPPOSED the proposal outright ... when it comes before Parliament was tempered by high-profile nay-sayers. These include ...

“... “  
Danson Mungatana ... politicians who have previously painted the image of pro-poor campaigners are determined to shoot down proposal to have the allowances paid out to lawmakers taxed.”

“Listen to Mungatana while voicing his opposition to the proposals: “It is wrong to say we are starting to pay taxes” ● ● ●

“How they VOTED

Yes:

No:

Mungatana

Fence Sitters:

4. Further, in the Daily Nation, Issue No. 15846 the following libelous statements were published as a continuation and in addition to the foregoing;

SHIFT

Mungatana changes stand on taxing of Mps.

Medical services Assistant Minister Danson Mungatana said he supports the proposal to have the MPs allowances taxed. But he said issues had not been understood clearly and had resulted in MPs being portrayed as inconsiderate.”

5. That the words when published in the ordinary and natural meaning were understood and were intended to mean as follows: -
- a. That the plaintiff is a hoax and cannot be trusted with the welfare of his constituents and citizens of Kenya.
  - b. That the plaintiff cannot be trusted to be a man of his word.
  - c. That the plaintiff is a cheat with a jelly fish spine and not fit and unworthy to hold a public office.
  - d. That the plaintiff is a crook, dishonest and lacks the spirit of nation building.
  - e. That the plaintiff has taken advantage of and does not appreciate the plight of the down trodden and special circumstances of need facing the entire country.



- f. That the plaintiff is not fit to be a Government (Assistant) Minister and only seeks leadership position(s) for selfish gains and cannot be relied on to support or advance the government policies.
  - g. That the plaintiff is not worthy of trust as an Assistant Minister within the Government by His Excellency the President who is the Head of State and Commander in Chief of the Armed Forces.
  - h. That the plaintiff cannot be trusted with the leadership of any society.
    - i. That the plaintiff should not be trusted by any right thinking members of the public and particularly the electorate of Garsen constituency.
  - j. That plaintiff is corrupt, greedy and heartless.
6. That the defendant wrote and/or caused to be written and published the aforesaid words/articles maliciously and out of spite and/or without any regard to the accuracy of the said words.

Particulars of Malice

- a. That the defendant knew and/or ought to have known that the said statements were falsehoods, inaccurate and that the same were bound to adversely affect our client's reputation but the defendant deliberately chose to recklessly publish the same.
  - b. That the plaintiff has never been opposed to or expressed any opposition to taxation of the salaries and/or allowances payable to members of the National Assembly or at all.
  - c. That the true and factual position of the plaintiff of the issue of taxation of the salaries and/or allowances of the members of the National Assembly has always been and made available and easily accessible to the defendant.
  - d. That in case of any doubts, the defendant could have with very little effort established the true and factual position but opted not to do so.
  - e. That the plaintiff took it upon himself and made a clarification, but the defendant carelessly opted to dub the same a "shift" of the plaintiff's "previous" position.
  - f. The defendant recklessly, spitefully and maliciously made the statements complained of without any regard to the true position and oblivious of the damage to the plaintiff's character, but only for economic gain/ benefit.
7. As a direct consequence of the said publications, the plaintiff was ridiculed and his reputation, character and standing lowered in the minds of his constituents, peers, and right thinking members of the society.
8. The plaintiff further averred that he suffered damage to his moral and political standing in the eyes of his supporters and the general public.
9. Despite demand for an apology by the plaintiff against the defendant and notice of intention to bring this action, the defendant has remained defiant and hence the present action.
10. The case was heard on 30/11/2023. The plaintiff who is currently the Senator of Tana River adopted his written statement dated 3/7/2023 as his evidence in chief.
11. In it he stated that on the 18/6/2008, a presenter from Daily Metro called him on mobile phone, he identified himself and asked if he was supporting taxation, he informed him that he supported taxation



- and advised if it would be extended to all public servants and private sector. He stated that after the conversation, the following morning he was quoted as opposing yet he was supporting the taxation. He was included in the list of members of Parliament who were opposing the taxation.
12. On 23/6/2008 at 12.00 noon, he held a press conference at Afya House, the purpose was to congratulate KQ for the extremely philanthropic gesture that they had done to Kenyan public and the Ministry by airlifting supplies to violence hit areas at no cost and at the end of it, one journalist from Daily Nation one Mr. John Ngirachu asked him for his opinion on taxation. He reiterated his always clear stand of supporting taxation.
  13. He was shocked to see a publication of 24/6/2008 pg. 35 prominently saying under the title "SHIFT" that "MUNGATANA CHANGES STAND ON TAXATION OF MEMBERS OF PARLIAMENT". He had only been elected 6 months prior to the publication and my constituents were calling me asking why I did not support the motion for taxation and asked if I could retract my statement.
  14. In cross examination the plaintiff said the publication was done in the year 2008.
  15. He said since that time he has held several elective positions and he also served at Kenya Airport Authority chairman and commissioner with COMESA.
  16. The plaintiff said he was elected member of parliament of Garsen in 2013 and currently he is the Senator of Tana River county.
  17. He said the article defamed him since his electorates called him and asked him why he had not supported the motion.
  18. The defendant did not call any witnesses.
  19. The parties submitted as follows; the plaintiff submitted that the publication was false, malicious and defamatory of the Plaintiff with the sole intent to malign the reputation or to injure his character and expose him to hatred, ridicule, scandal, odium or contempt.
  20. That the words as published referred to him and in their ordinary and natural meaning were understood and were intended to mean that the Plaintiff is a hoax and cannot be trusted with the welfare of his constituents and citizens of Kenya, that the Plaintiff cannot be trusted to be a man of his word.
  21. That the Plaintiff is a cheat with a jelly fish spine and not fit and unworthy to hold a public office, that the Plaintiff is a crook, dishonest and lacks the spirit of nation building and that the Plaintiff has taken advantage of and does not appreciate the plight of the down trodden and special circumstances of need facing the entire country.
  22. The said words were understood and were intended to mean that the Plaintiff is not fit to be a Government (Assistant) Minister and only seeks leadership positions for selfish gains and cannot be relied on to support or advance government policies, that he is not worthy of trust as an Assistant Minister within the Government.
  23. The plaintiff further argued that there is no doubt that there is a publication about the Plaintiff. The publications were issued by the Defendant on 19<sup>th</sup> and 24<sup>th</sup> of June, 2008. The Plaintiff has also established that the said publications were to his discredit, and the said publications in their ordinary meaning were construed to taint and malign his reputation.



24. The plaintiff indicated that he suffered damage as the publications caused him embarrassment, caused friction between himself and the Government he was working for and more importantly with his constituents. The Plaintiff's evidence remains uncontroverted as the defendant did not adduce any evidence challenging the same.
25. On the award of damages the plaintiff submitted that soon after the publication he sought an apology and a retraction of the publication in his demand letter. The defendant did not do either and therefore the plaintiff proposed Kshs. 6,000,000 as aggravated damages. In support the plaintiff cited the case of Dr. Christopher Murungaru vs John Githongo in Nairobi HCCS no. 446 of 2006 where the court awarded the Plaintiff aggravated damages of Kes. 5,000,000/-. The Plaintiff added that he is entitled to exemplary damages of Kes. 3,000,000/- as a result of the Defendant's recklessness in publishing a statement which it either knows to be false or which it publishes recklessly, carelessly.
26. On general damages the plaintiff proposed Kshs 20,000,000 under this head and I support relied on the case of Dr. Christopher Murungaru vs John Githongo in Nairobi HCCS no. 446 of 2006 where the High Court awarded the Plaintiff general damages of Kes. 20,000,000 aggravated damages of Kes.5,000,000 and Exemplary damages of Kes. 2,000,000
27. The defendant alternatively submitted that the Plaintiff testified to the positions he previously held and currently holds, which positions are elective in nature. Therefore, there is no evidence adduced to show that the articles had a net effect of avoidance or having others shun him. If anything, there was no motion to have him removed and/or recalled from Cabinet or as a Member of Parliament, cabinet at the time was not reshuffled and there is no proof that his esteem was lowered amongst his constituents. He was re-elected severally and continues to represent the people of Tana River County.
28. The defendant submitted that there was no proof of actual or intrinsic malice by the Defendant in publishing the impugned article. The article was published on a privileged occasion and based on matters of public importance with no knowledge of any alleged falsity.
29. The defendant further submitted that there was no character witness called by the plaintiff to corroborate his testimony on his reputation and the damage he suffered. That in the case of Daniel N. Ngunia vs K.G.G.C.U. Limited [2000] eKLR, the Court of Appeal held that:

“We assume that ground concerned the appellant's claim for damages for defamation. Leaving aside any question of privilege upon which the learned Judge dismissed that aspect of the appellant's claim, we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege”
30. In conclusion it was the defendants argument that the plaintiff has not proved his case to the required standard and therefore the remedies sought ought not to be awarded.
31. It is the duty of the plaintiff to prove his case and the standard required in on a balance of probabilities.
32. The issues for determination in this case are as follows;
  - i. Whether the plaintiff proved his case to the required standard.
  - ii. Whether the defendant has a valid defence against the plaintiff's case.
  - iii. Whether the plaintiff is entitled to the remedy he is seeking against the defendant.



- iv. Who pays the costs of this suit?
33. On the issue as to whether the plaintiff proved his case, I find that the elements for libel which the plaintiff must establish are as follows;
- (1) That the defendant made a defamatory statement to a third person.
  - (2) That the statement was false.
  - (3) That the defendant was legally at fault in making the statement; and
  - (4) That the plaintiff suffered harm.
34. The plaintiff has established that he was defamed. The article portrayed the plaintiff as a “shifty” man who cannot be trusted to be a man of his word.
35. In the writings of Gerald R. Smith in Valparaiso University Law Review Volume 27 No. 1 1992 of Malice and men: The Law of Defamation: page 39-93, it is stated as follows;
- “Reputation is a dignity interest worthy of protection apart from any other harm that might attach. Additionally, specific types of harm resulting from damage to the reputation justify legal protection.
- Reputational image involves the loss of esteem in the eyes of others, a threat to existing and future relations with third persons, a threat to an existing positive public image, and the potential image, and the potential for development of a negative public image for one with no previous public reputation. Loss of reputation may also result in lowered self esteem and personal integrity and may lead to public embarrassment, humiliation, and mental anguish. Defamation Law allows a plaintiff to mitigate those damages by setting the record straight in a public forum.....”
37. The defendant did not call any witnesses. I find that the plaintiff’s evidence was not controverted.
38. The defendant did not deny having published the impugned article as alleged by the plaintiff.
39. The defendant submitted that the article was published on a privileged occasion and based on matters of public importance with no knowledge of any alleged falsity.
40. The defendant did not call any witnesses to testify and they are estopped from adducing evidence through their submissions.
41. I find that the defendant has no valid defence against the plaintiff’s claim.
42. On the issue as to whether the plaintiff is entitled to the damages he is seeking, the plaintiff is seeking general damages for libel and aggravated damages.
43. I find that he is entitled to general damages for libel.
44. There is evidence that after that article he continued to hold elective posts even after the publication and currently he is the Senator of Tana River.
45. For that reason, I award the plaintiff ksh.2,000,000/= as general damages for libel.
46. The plaintiff is not entitled to aggravated damages as the same are awarded in certain circumstances.



47. In the case of Busia Teachers Co-operative Credit and Savings Society Ltd & another v Nation Media Group Ltd [2004] eKLR, it was held that;

“It should be noted that aggravated damages can only be awarded where the publication of an article is actuated by malice. I am of the view that malice can be inferred where the defendant publishes an article while he knows that the same is false or he does not care whether it is true or false which is the case here.”

48. I also find that the plaintiff is not entitled to an injunction since the incident occurred in 2008 and there is no likelihood that the same debate will ever arise again.

49. Judgment be and is hereby entered in favor of the plaintiff against the defendant in the sum of Ksh.2,000,000.

50. On the issue of costs, I direct that each party bears its own costs of this suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22<sup>ND</sup> DAY OF MARCH, 2024.

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**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

<b>NAIROBI HIGH COURT CIVIL case NO. 381 OF 2008</b>	0
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