



**Mungatana v Standard Limited (Civil Suit 1319 of 2005)
[2024] KEHC 8180 (KLR) (Civ) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8180 (KLR)

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

CIVIL

CIVIL SUIT 1319 OF 2005

CW MEOLI, J

JUNE 27, 2024

BETWEEN

HON. DANSON B. MUNGATANA PLAINTIFF

AND

THE STANDARD LIMITED DEFENDANT

JUDGMENT

1. Hon. Danson B. Mungatana (hereafter the Plaintiff) brought this suit against the Standard Limited (hereafter the Defendant) seeking general, exemplary and punitive/aggravated damages. The suit is founded on the tort of defamation. The Plaintiff averred that at all material times, he was the Member of Parliament (MP) for Garsen Constituency, as well as the Assistant Minister for Land and Housing and an Advocate of the High Court of Kenya. In addition, that at all material times he was one of the founding members of a political pressure group known as the Third Progressive Force (TPF).
2. It was averred further that the Defendant published the following articles said to be defamatory of the Plaintiff, in the Palaver Column of the Standard Newspaper:
 - i. In the Tuesday issue dated 4.01.2005 the Defendant published the following words:

“Danson Mungatana has moved from ecstasy to despair with frightening speed. It would appear that his enemies in the Liberal Democratic Party, whom he vanquished almost single handedly in the Kisauni by-election, were wined and dined at State House parties to which he was denied access. No point spending energy wooing the loyal wife, eh?”



- ii. In the Friday Issue dated 4.02.2005 the Defendant published the following words:

“ And where is Mungatana and his Third Force Brigade? The last that was seen of them, they were holding hands in a church, seeking divine help for their political banishment. They give form and shape to the concept of losers.”
- iii. In the Wednesday Issue dated 13.04.2005 the Defendant published the following words:-

“ The description of Italian writer Dante Alighieri’s descent from the seventh to the eighth circle of hell in “the Divine Comedy” involves a poet being transported on the wings of the monster Geryon. In a translation of Henry Wadsworth Longfellow, Dante describes the sensation of not knowing whether he was at rest or in motion after losing visual points of reference: Onward he goeth, swimming slowly, slowly/ Wheels and descends, but I perceive it only/By wind upon my face and from below.” This must be what the Third Progressive Force club of Danson Mungatana and company must be feeling. They do not know if they are at rest or in motion.”

3. The Plaintiff averred that the above-cited publications constituted a misrepresentation of the facts and were therefore untrue and that they were actuated by malice and tainted his reputation and character both in a political and professional capacity. Further that in their natural and ordinary meaning, the said words meant and were understood to mean that the Plaintiff was inter alia, a weak and politically unfit leader; irrelevant to the political space by virtue of having lost the trust and confidence of the then Head of State and other leaders; and that he had lost his sense of direction and focus in leading his constituents.
4. The Plaintiff went on to aver that the Defendant’s actions in publishing the impugned articles was driven by ill-will, since the Defendant ought to have known that the said articles contained malicious falsehoods, and that the Plaintiff was a respectable politician and Advocate by profession.
5. On 13.12.2005 the Defendant filed its statement of defence admitting to making the impugned publications but denying the key averments relating to the particulars of defamation. The Defendant also pleaded the defence of fair comment on a matter of public interest, in respect to the impugned articles pursuant to the following particulars:

“Particulars Of Fair Comment

- i. It is a fact that the Plaintiff is a Member of Parliament
- ii. It is a known fact that the Plaintiff and the Liberal Democratic Party may not have been in an amicable position with each other at all times.
- iii. It is a fact that the Kisauni by-elections did indeed take place.
- iv. It is a fact that the parties/festivities at the state house do indeed take place and the Plaintiff was not always present.
- v. It is a fact that the Plaintiff and the First Lady are acquaintances.
- vi. It is an opinion that the Plaintiff and his acquaintances do attend Church services together.
- vii. It is an opinion of the Defendant that the Plaintiff was undergoing “political banishment.”



- viii. It is an opinion of the Defendant that the Plaintiff is a “loser.”
- ix. It is an analogy to compare Hon. Mungatana’s position with that of the Italian writer Dante Alighieri’s writings and is thus an opinion held by the Defendant.”
6. The Defendant further denied the averments in the plaint relating to the injury and or loss allegedly suffered by the Plaintiff as a result of the publications.
7. During the trial, the Plaintiff testified as PW1. He proceeded to adopt his witness statement dated 26.10.2023 as his evidence-in-chief and thereafter produced his bundle of documents dated 20.03.2012 as P. Exh.1-3. Stating that he was an Advocate of the High Court by profession, and currently the Senator for Tana River County, he testified that each of the impugned publications contained misrepresentation of facts and portrayed him in a bad light. That the circumstances surrounding the publication of the first article dated 4.01.2005 (P. Exh. 1) are that in by-elections held following the death of the late Karisa Maitha, MP Kisauni constituency, the Plaintiff supported the winning candidate Anania Mwamboza and that, the Defendant misrepresented the facts by stating that despite this, the Plaintiff was denied entry into State House. That in respect of the second impugned article dated 4.02.2005 (P. Exh. 2), the Plaintiff was portrayed as a leader without principles, followed by the third impugned article dated 13.04.2005 (P. Exh. 3) which ridiculed him. It was his evidence that the Defendant failed and/or neglected to make corrections concerning the impugned publications despite demand and that the publications were intended to injure his political reputation.
8. In cross-examination, the Plaintiff admitted that because he was a public figure, his life is subject to scrutiny having occupied the political space since 2002 and serving in various elected political positions. Upon being referred to the events captioned in P. Exhibit 1, the Plaintiff confirmed that he assisted the winning candidate in the Kisauni Constituency by-election against candidate of his party, the Liberal Democratic Party (LDP). And that by virtue of his friendship with the former President, the late Mwai Kibaki, he attended various functions at the State House. Stating further that prior to the publication of the impugned articles, he had attended a variety of political rallies and events, including church functions but denied, as purported in the second impugned article, that the events cited therein occurred in church.
9. He maintained that the impugned articles were designed to paint him as a loser, with the aim of tainting his image in the eyes of members of TPF. In the circumstances disagreeing with the suggestion that the impugned articles consisted of mere opinions and asserting that the said articles were deliberately intended to tarnish his political standing. And further that, malice could be inferred from the impugned publications despite the natural and ordinary meaning in the impugned publications. That notwithstanding, the Plaintiff won in elections subsequent to the said publications, but this did not mean that his reputation did not suffer injury as he had fielded various calls from colleagues regarding the publications.
10. During re-examination, the Plaintiff asserted that the TPF was operational at the material time, contrary to the inaccurate statements and misrepresentations of fact in the publications by the Defendant. He further restated his earlier testimony that the publications injured his reputation, given their wide circulation. This marked the close of the Plaintiff’s case.
11. Maurine Nasike testified for the Defendant as DW1. Identifying herself as a Legal Officer at the Defendant company, she proceeded to adopt her witness statement dated 15.03.2024 as her evidence-in-chief.



12. Under cross-examination, the witness testified that the impugned publications comprised fair comment and not mere assertions. Stating during re-examination, that the publications were in no way actuated by malice or ill will. This marked the close of the Defence case.
13. At the close of the trial, the parties were directed to file written submissions. However, at the time of writing this judgment, the Defendant had not complied with the court's said directions. In the circumstances, the court will proceed to set out the contents of the Plaintiff's submissions.
14. Submitting on whether the claim for defamation has been proved, the Plaintiff's counsel started off by defining what constitutes a defamatory statement or publication. Citing the case of *Miguna Miguna v The Standard Group Limited and 4 Others* [2017] eKLR, *Gatley on Libel and Slander, 6th Edition* and *Wycliffe A Swanya v Toyota East Africa Ltd & another* [2009] eKLR, counsel for the Plaintiff contended that the necessary ingredients of defamation had been established in this case. Counsel submitted that the words contained in the impugned articles in their natural and ordinary meaning, imputed that the Plaintiff was an unworthy and unfit political leader who has lost all sense of direction that he could not be trusted to hold any political position and was shunned by the Presidency as well as right thinking members of society.
15. He further submitted that the Defendant acted maliciously by referring to the Plaintiff by name, and in neglecting to publish an apology for the misrepresentation, thereafter. Counsel here relying on the decision in *Juma Mikidadi v Ali Khalfan & Another* [2004] eKLR. It was similarly argued that as a result of the defamatory publication, the Plaintiff's personal and professional was lowered.
16. Regarding quantum, the Plaintiff's counsel submitted that the damages awardable for defamation lie with the discretion of the court, citing the decision in *C A M v Royal Media Services Limited* [2013] eKLR. Counsel therefore proposed the sum of Kshs. 15,000,000/- as general damages, relying on the decision in *Chirau Ali Mwakwere v Nation Media Group & Another* [2009] eKLR where the court awarded a sum of Kshs. 8,000,000/- as general damages, the sum of Kshs. 1,000,000/- as exemplary damages. Hence in respect of exemplary damages, the Plaintiff's counsel proposed, citing the decision of *Henry Obwocha v Head Link Publishes Ltd* [2014] eKLR, a sum of Kshs. 3,000,000/- on the premise that the Defendant acted recklessly in publishing the impugned articles. Overall, counsel proposed a total award of Kshs. 20,000,000/- , citing *Nicholas Biwott v Dr. Ian West & Another* (HCCC No. 41068 of 1994) where the court made a global award in the sum of Kshs. 30,000,000/- for defamation.
17. The Court has considered the pleadings, the evidence and submissions on record. The applicable law as to the burden of proof is spelt out in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.” The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:



“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

18. Much earlier, the same court in *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 had observed that:-

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

19. Concerning the rationale underlying the law of defamation, the Court of Appeal had this to say in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR:

“The law of defamation is concerned with the protection of a person’s reputation. Patrick O’Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: ‘As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...’ Defamation protects a person’s reputation that is the estimation in which he is held by others; it does not protect a person’s opinion of himself nor his character. ‘The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit’ and it affords redress against those who speak such defamatory falsehoods...”

20. Actions founded on the tort of defamation often surface the tension between private interest and public interest. While Article 33(1) of *the Constitution* guarantees every person’s right to freedom of expression including the freedom to seek, receive or impart information or ideas, sub-Article (3) states that “In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”. Similarly, while Article 34 of *the Constitution* guarantees the freedom of the media, Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. These



rights are reinforced by the provisions of the [Defamation Act](#). Contemplating these competing rights Lord Denning MR stated in [Fraser v Evans & Others](#) [1969] 1 ALLER 8:-

“The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed.”

21. In [Selina Patani & Another v Dhiranji V. Patani](#) [2019] eKLR the Court of Appeal reiterated that the law of defamation is concerned with the protection of a person’s reputation, that is, the estimation in which such persons are held by others. The Court stating inter alia that:

“In rehashing, we note the ingredients of defamation were summarized in the case of [John Ward v Standard Ltd](#). HCC 1062 of 2005 as follows:

- i. The statement must be defamatory.
- ii. The statement must refer to the plaintiff.
- iii. The statement must be published by the defendant.
- iv. The statement must be false.”

22. To succeed in his claim therefore, the Plaintiff herein was under duty to establish the above ingredients on a balance of probabilities. The Defendant on its part admitted to making the impugned publications and further admitted that indeed the publications referred to the Plaintiff herein. That being the case, the key matters for determination are whether the publications were defamatory and false and if so, whether the defence of fair comment would stand.

23. Starting with the first question whether the publications were defamatory, a defamatory statement is defined in [Halsbury’s Laws of England 4th Edition](#) Vol. 28 paragraph 10 as:

“...a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business”.

See also the definition of a defamatory statement in [SMW v ZWM](#) (2015) eKLR by the Court of Appeal.

24. In [Elizabeth Wanjiku Muchira v Standard Ltd](#) [2011] eKLR the court held that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the

“probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published.”-[Clerks & Lindsell on Tort 17th Edition](#) 1995-page 1018.”

25. In [Musikari Kombo](#) (*supra*) the Court of Appeal stated that:

“The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury’s Laws of England 4th Edition Vol. 28 at page 23 the authors opined:



“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.”

26. Clearly therefore, defamation involves publications which to an ordinary and reasonable man would view as conveying a defamatory imputation therefore tending to cause injury to the reputation of the subject. Consequently, for a plaintiff to succeed in his claim, he must demonstrate the tendency of the offending statement to injure his reputation or standing and in that regard, it is not his opinion of himself that matters but that of the ordinary person. This was the position taken in *SMW v ZWM [2015] eKLR*, the Court of Appeal holding that:

“Black’s Law Dictionary 8th Edition defines defamation as the act of harming the reputation of another by making a false statement to a third person. (Emphasis added). A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right-thinking members of society generally or if it exposes him/her to public hatred, contempt, or ridicule or if it causes him to be shunned or avoided: see *Gatley on Libel and Slander (10th Edition)*. A plaintiff in a defamation case must prove that the words were spoken /written; that those words refer to him/her; that those words are false; that the words are defamatory or libelous and that he/she suffered injury to reputation as a result...

The trial judge had considered the testimony of witnesses with a view to assessing their credibility and at no point did any of the Appellant’s witnesses at trial consider the appellant to have been defamed by the contents of the letter. The witnesses who testified at trial constitute and pass the ordinary reasonable man test as they were not only neighbours but also people known to the disputants. There was no evidence of any public ridicule, hatred or even shunning experienced by the appellant.

The appellant had only testified at the trial court that he felt shy to interact with some of his friends in tea farming. The appellant appears to have had an apprehension of defamation on himself ostensibly based on how he himself considered his standing in the society. That is not what defamation is in law. The appellant himself further testified before the trial court that nothing had changed in his dairy farming business. Moreover, despite being a tea farmer in Gatundu, he had since relocated to his Karen home at the time of these proceedings where the chances of any possible defamation of him became slimmer based on the existing solitary and liberal lifestyle adopted by urbanites. As elucidated earlier, the test to be applied is that of the reasonable ordinary man, not the appellant or the respondent...”

27. The Court of Appeal in *Selina Patani & Another v Dhiranji V. Patani (supra)* discussing the burden thrust upon a plaintiff in this regard stated:-

“The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation.



The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellant's character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation."

28. The Plaintiff here pleaded and testified that the published articles were defamatory in their natural and ordinary meaning, since they bore the imputation that he was, among others, an unfit and untrustworthy political leader; that he had lost the confidence of the then President ; and that his actions in the material period portrayed him as a desperate and rudderless leader. That as a result, the Plaintiff's reputation and standing were lowered, in the eyes of right-thinking members of society. On its part, the Defendant vehemently denied that the impugned articles could be interpreted in a defamatory sense.
29. In the present instance, the Plaintiff ought to have adduced evidence through other witnesses to support his averment that the words published either caused or had the tendency to cause injury to his reputation in the manner pleaded and resulting in his public ridicule or ostracization. Save for his testimony, the Plaintiff did not call any additional evidence to support the claim for defamation. In any event, it was the Plaintiff's testimony that he continued to hold various elective political positions despite the Defendant's publications.
30. In the absence of such evidence, the court is of the view that the Plaintiff failed to prove that the publications were defamatory. This finding is sufficient to dispose of the matter without considering the remaining issues, namely, whether the statements in question were false and or whether the defence of fair comment was sustainable. The Plaintiff having failed to prove a key ingredient of defamation, his claim against the Defendant must fail. Accordingly, the Plaintiff's suit is hereby dismissed with costs to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 27TH DAY OF JUNE 2024.

C. MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Mwangi

For the Defendant: Mr. Ogutu

C/A: Erick

