



**Mwau v Nation Media Group Ltd & 2 others (Civil Case 108 of 2005)
[2024] KEHC 8739 (KLR) (Civ) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 108 OF 2005
AN ONGERI, J
JUNE 27, 2024**

BETWEEN

JOHN HARUN MWAU PLAINTIFF

AND

NATION MEDIA GROUP LTD 1ST DEFENDANT

WILFRED KIBORO 2ND DEFENDANT

WANGETHI MWANGI 3RD DEFENDANT

JUDGMENT

1. The plaintiff in this case, John Harun Mwau (hereafter referred to as the plaintiff only) sued Nation Media Group Limited, Wilfred Kiboro and Wangethi Mwangi (hereafter referred to as the 1st, 2nd and 3rd defendants respectively) seeking the following prayers
 - i. Exemplary or aggravated damages
 - ii. General damages for defamation.
 - iii. Special damages as prayed hereinabove.
 - iv. A permanent injunction to restrain the defendant whether by themselves, their servants, agents, authorized representatives or any other person or authority connected therewith be restrained from further making, printing, broadcasting, televising or publishing defamatory and libelous statements against the plaintiff and or any other matter relating to the plaintiff whatsoever.
 - v. Costs of the sit and interest on (i) and (ii) above.



2. The plaintiff avers in the plaint dated 1/2/2005 amended on 6/10/2006 that on 30th January, 2005 the 1st defendant in its Sunday nation newspaper at page 7 published the following words of and concerning the plaintiff:

“The Sh.6b drug haul suspects at a glance

Bobby Macharia

The General Manager of Pepe Inland Container Depot, a soft-spoken man, worked as a stores manager with a leading supermarket chain before being employed by Mr. John Harun Mwau. He managed a number of businesses for Mr. Mwau, including a store on Standard Street that sold wholesale goods from Dubai, before helping establish the inland port about five years ago.”

3. The plaintiff further avers that the foregoing publication is false and defamatory of the Plaintiff as it implied, implies and would imply to the ordinary member of the public and to those who know or knew the Plaintiff that:

- i. The Plaintiff is linked to the alleged Sh. 6 billion drug haul.
- ii. The Plaintiff is a drug-haul suspect.
- iii. The Plaintiff is linked to one of the drug haul suspects, one Mr. Bobby Macharia.
- iv. The Plaintiff has employed the said Mr. Bobby Macharia to manage his businesses.
- v. The Plaintiff has business dealings with the said drug suspect.
- vi. The Plaintiff is involved in drug haulage.
- vii. The Plaintiff knows something about the alleged drug haul.
- viii. The Plaintiff is guilty of a criminal offence under the Narcotic Drugs and Psychotropic Substances Act, 1994.

4. Further, to those who know or knew the Plaintiff, the said false and defamatory words mean, meant and were understood to mean that:

- i. The Plaintiff is involved in dubious drug dealings.
- ii. The Plaintiff is a drug-haul suspect.
- iii. The Plaintiff associates with criminals, drug suspects and drug-peddlers.
- iv. The Plaintiff is untrustworthy and lacks integrity.
- v. The Plaintiff is a (dishonest) drug dealer.

5. The said publication, besides being false, was actuated by malice, ill will, spite and went outside the known parameters of objective and responsible journalism or publication.

Particulars of malice and falsity of the Publication

- i. The Defendants knew or ought to have known that the Plaintiff has no relation whatsoever to the said Bobby Macharia.
- ii. The Defendants knew or ought to have known that the Plaintiff has never had any dealings whatsoever, business or otherwise, with the said drug suspect.



- iii. The Defendants knew or ought to have known that the Plaintiff has had or has no link whatsoever to the alleged cocaine haul or any (seized) drug container(s).
 - iv. The Defendants conspicuously and emphatically published the said article at Page 7 of their weekly newspaper having wide national and international coverage and circulation.
 - v. The Defendants deliberately, maliciously and conspicuously published the Plaintiff's names and identity directly in relation to and juxtaposed against the offending words described as foregoing.
 - vi. The conspicuous, emboldened and emphatic publication of the words: 'The Sh. 6b drug haul suspects at a glance' which words were intended to cause the deepest injury to the Plaintiff.
 - vii. The Defendants deliberately omitted to identify the leading supermarket chain that allegedly employed the said Mr. Bobby Macharia prior to his alleged employment by the Plaintiff.
 - viii. The Defendants have never taken the trouble to confirm from the Plaintiff the veracity, truth or falsity of their publication.
6. The defendants are aware that the Plaintiff is an honorable, respectable and law-abiding citizen and businessman both locally and internationally and the defamatory articles are calculated and intended to portray the Plaintiff as a drug suspect or as a person who is involved in drug haulage or associates with drug-peddlers, drug suspects and/or criminals.
 7. That the Defendants' acts of causing to be published matters that they knew to be false, defamatory, malicious, libelous were meant to scandalize, humiliate and vex the Plaintiff.
 8. Further, the said words in their natural and ordinary meaning meant and were understood to mean;
 - i. That the Plaintiff is a crook.
 - ii. That the Plaintiff is a criminal and drug trafficker.
 9. The Defendants with clear intention to scandalize, injure and defame the Plaintiff printed, broadcast, and published false, malicious and defamatory matter against the Plaintiff as set out hereinabove.
 10. The Defendants' intention was to defame and injure the reputation of the Plaintiff beyond salvage by exposing him to hatred, contempt, ridicule and with the sole purpose of causing him damage and injury to his personal reputation, business reputation and generally.

Particulars of the defendants' libelous malicious spiteful and scandalous acts

- i. The Defendants knew very well that by maliciously printing, broadcasting and publishing the defamatory and libelous material they would injure the Plaintiff's image, reputation and standing in society and the Plaintiff continues to be so injured to date.
- ii. The Defendants knew or ought to have known that by printing, broadcasting and publishing the words complained of, it would discredit the Plaintiff's image, reputation and character in the estimation of right thinking members of the society.



- iii. The Defendants knew or ought to have known that the matters complained of were false, untrue and defamatory.
11. The Defendants intentionally, deliberately and maliciously manufactured and made false facts and used libelous, strong and emphatic language calculated to cause the deepest injury to the Plaintiff.
12. The words complained of in their natural and ordinary meaning were further understood to mean.
 - a. That the Plaintiff has no sincerity and integrity.
 - b. That the Plaintiff should be shunned and avoided by all right thinking members of the society.
 - c. That the Plaintiff is dishonest and immoral.
13. By reason of the aforesaid publication by the Defendants, the Plaintiff has been greatly injured in his credit, reputation, character and has consequently suffered loss and damage.

Particulars of Loss And Damage

- i. Injury to personal reputation.
 - ii. Loss of business and business reputation.
 - iii. Loss of business profits.
14. By reason of the aforesaid, the Plaintiff's reputation and integrity, both personal and businesswise, has been seriously injured and he has suffered considerable distress, agony, mental torture, humiliation and embarrassment and the Plaintiff has also been brought into public scandal, odium, suspicion and contempt; the Plaintiff claims damages against the Defendants.
 15. The defendants filed a defence dated 8/3/2005 denying the plaintiff's claim.
 16. The defendants averred in their defence that in so far as the said words consisted of allegations of fact they are true in substance and in fact and in so far as they consisted of expression of opinion they are a fair comment made in good faith and without malice on matters of public interest, namely the need to inform the public on the ongoing prosecution of suspects in the drug trafficking affair.
 17. The defendants cited the following particulars under Order 6 and 6A of the [Civil Procedure Rules](#):
 - a. It is a fact that Mr. Bobby Macharia has been arrested and arraigned in court in connection with the Kshs. 6 billion drug haul discovered in Nairobi and Mombasa in December 2004.
 - b. It is a fact that Mr. Macharia was at the material times a general manager of Pepe Inland Container Depot.
 - c. It is also true that Mr. Macharia used to work with a leading supermarket chain in the country before moving to Pepe Inland Container Depot.
 - d. It is a fact that prosecution of the drug haul suspects are matters of public interest.
 - e. It is also a fact that the Nation Media Group had a moral duty and obligation to inform members of the public of the ongoing prosecution of suspects implicated in the drug haul.
 18. The Defendants relied on Section 15 of the [Defamation Act](#), Cap 36 Laws of Kenya.
 19. The suit proceeded for hearing on 19/11/2023. The plaintiff testified as PW 1 and called one witness (PW 2) Otieno Oluoka Nahason.



20. The plaintiff adopted his witness statement dated 20/2/2015 in which he stated that he is businessman, trained fraud specialist and a politician and a former Member of Parliament for Kilome Constituency.
21. He said that he is the founding chairman of the Party of Independent Candidates of Kenya (PICK) and was also the first Director of the defunct Kenya Anti-Corruption Authority and a presidential candidate in the 1992 Kenyan general election. He also vied for the senatorial position for Makueni County in the 2013 general elections.
22. The plaintiff said he is an honest, indigenous and hardworking Kenyan businessman of local and international repute carrying out business locally and abroad.
23. Further that he is a law abiding citizen and a person who has never been knowingly involved in any criminal activities of whatsoever nature, whether directly or indirectly. He said he is a person of high moral character and good conduct.
24. The plaintiff said he was awarded his first national honour in the first roll of honours created in independent Kenya in 1969, when he was conferred with the award and honour of the Head of State Commendation (HSC).
25. Subsequently, he has been awarded the awards and honours of Order of the Grand Warrior (OGW), Member of the Burning Spear (MBS), and Chief of the Burning Spear (CBS) and, in respect of the Police Service; he has also been awarded the Long Service and Good Conduct Medal as well as the Force Colours.
26. The plaintiff said he is a family man with a wife and children, a prominent business person, a leader, politician, a Fellow of the Chartered Institute of Arbitrators (FCI Arb), a Certified Fraud Examiner (CFE), an Environmental Lead Expert and consultant, and an ISO 27001 Information Security (ISMS) Lead Auditor and Implementer.
27. He said he is also an internationally recognized and acclaimed sportsman having represented Kenya in various Olympic Games since 1968 in Mexico, various Commonwealth games and other numerous international and local championships.
28. The plaintiff said that the Defendants knew that the Sunday edition of their publication has broad and worldwide coverage and that any material circulated therein which is defamatory of me would deeply injure him.
29. He said that the Defendants knew or ought to have known that the consequences of worldwide portrayal of him as a drug trafficker and a criminal are grave, particularly the denial of visa and restriction of entry into Western countries/capitals.
30. Further, that the Defendants knew or ought to have known that he was not a shareholder in the cocaine depot through which cocaine was allegedly smuggled and that no drugs were discovered at the said container depot.
31. Further, that the Defendants knew or ought to have known that in any event, the containers that were cleared through the said depot never contained any drugs at all.
32. In cross-examination, the plaintiff said he was the founding director of the Kenya Anti-Corruption Commission and that he became an MP of Kilome from 2007 to 2013 and he is also a prominent businessman both locally and outside the country.
33. The plaintiff said he has filed several defamation suits against the defendants.



34. He further said that the impugned article talked about Bobby Macharia being his employee.
35. In re-examination, the plaintiff said he was involved in Nakumatt supermarket but Bobby Macharia was not an employee of Nakumatt supermarket.
36. He said the article linked him to Bobby Macharia and by innuendo he was linked to the law of drugs.
37. He said it was Bobby Macharia who was charged and not himself.
38. PW 2, Otieno Aluoka Nahashon also adopted his written statement dated 15/5/2023 as his evidence in chief.
39. He stated in the said statement that he has known Honourable John Harun Mwau for a very long time, dating far back to the early 1990s while studying at the University of Nairobi and he was one of the student leaders in SONU.
40. PW2 said that as far he could remember, he knew Hon. John Harun Mwau as a law-abiding person and stickler for the rule of law. He recalled very well that while serving in SONU, the student leaders including Hon. Kabando wa Kabando, Moses Kuria and him were suspended from the University unfairly, unlawfully and unjustly. Most people treated them as pariahs but when he learnt of the injustice meted upon them, he appointed an advocate for them who successfully challenged the decision of the University, and enabled them to complete their education.
41. PW2 confirmed that after plaintiff helped them during the expulsion from the University and they were reinstated back to school PW2 regarded the plaintiff as a mentor, and often visited his office for advice as he was a knowledgeable man, with a keen sense of helping others. He always advised PW2 and others to stick to the law and to live by the law, as before the law, they were all equal, and it is the law that protects all people.
42. PW2 said that sometimes in the year 1998, Hon. John Harun Mwau was appointed by his excellency, President Daniel Toroitich Moi to head the Kenya Anti-Corruption Commission. He founded the Authority from scratch. Due to his integrity and dedication to his work, complaints were made against him that he did not have the powers to charge corrupt persons in Court. This led to a tribunal being formed to remove him from office.
43. PW2 stated in his statement that he recalled that the Tribunal was chaired by a judge of the Court of Appeal and two High Court judges, and that Honourable Mwau appeared to defend himself before the Tribunal against some of the best lawyers at the time, some of whom have become Judges. The proceedings of the Tribunal were held in public at the KICC, and PW2 together with other members of the public attended the said proceedings.
44. PW2 said he was surprised and shocked, when the Sunday Nation of 30th January, 2005 wrote the impugned article.
45. PW2 said that the inclusion of the name of Hon. John Harun Mwau together with the names of the drug haul suspects meant that he was in some way connected/ associated to the Shs.6 billion drug haul, and that he was a drug haul suspect, he was involved in drug haulage and/or associates with drug peddlers, drug suspects and/or criminals in the Shs.6 billion drug haul.
46. The publication completely destroyed and ruined PW2's view of Hon. John Harun Mwau, especially as a law-abiding person who is not involved in any crime and stickler for the rule of law, and left PW2 extremely disappointed in him considering the seriousness of the imputation created in the



article. There is no doubt that the said article caused PW2 to lower the plaintiff in his estimation as a conscientious, law abiding and hardworking businessman.

47. In cross examination he said he came across the impugned article which linked the plaintiff to Bobby Macharia.
48. He said the name of the plaintiff appeared in the profile of Bobby Macharia and the plaintiff was therefore linked to the drug haul.
49. He said that the article was about the drug suspect but it mentioned the name of the plaintiff.
50. The defendants did not call any witnesses. The parties filed written submissions as follows; the plaintiff submitted that in the article of 30/1/2004, the plaintiff was referred to by his names Mr. John Harun Mwau and Mr. Mwau. It was alleged that the drug suspect was running a number of businesses for the plaintiff. The implication created was that the plaintiff was connected to the haul since the alleged Bobby Macharia is only running businesses for the plaintiff and the real culprit was the plaintiff.
51. The plaintiff argued that the allegation made by the defendants are defamatory as they linked the plaintiff to the Kshs. 6 Billion drug haul. Naming a person A as a drug suspect and stating that he runs business for another person B when the alleged crime was committed in the course of business insinuates that B is also guilty or linked to the crime. There is no doubt that drug trafficking is a serious crime and any person associates with it would be destroyed in his estimation by the ordinary right-thinking members of the society.
52. The plaintiff submitted further that the defendant made the defamatory statements to third parties. The publication containing the complained of statement is a newspaper with nationwide circulation. The publications are admitted. The Sunday nation newspaper was sold circulated and distributed nationwide.
53. The plaintiff submitted that he testified on oath that he is a law-abiding citizen with a clean record and that he has never been involved in any criminal activity whether directly or indirectly in Kenya or in any other part of the world.
54. That the culprits in the Kshs. 6 billion drug haul were arrested and charged in Milimani Chief Magistrate Criminal Case No. 3165 of 2004 and in it the plaintiff was not mentioned even once as an accused person or a person of interest. In fact Bobby Macharia was never charged in the aforementioned case.
55. It was the plaintiff's position that the defendants' failure to verify the suspects in a matter that was already on court and to mention the plaintiff falsely in connection with the same was false, untrue and malicious. The defendants further did not seek comment or clarification from the plaintiff which further showed malice on their part.
56. The plaintiff submitted that all those who were charged in Milimani Chief Magistrate Criminal Case No. 3165 of 2004 were found guilty and convicted. In spite of that, the defendants refused to issue a retraction, apology, correction or even an offer of amends. The plaintiff argued that the defendants' defence of fair comment ought to fail. They did not set out the truth of any of the defamatory imputations pleaded by the Plaintiff or even lead any evidence to show which defamatory imputation was true. It is only the defamatory imputation that can be justified and not the literal meanings of words as stipulated in *Gatley on Libel and Slander*.
57. The sting of the defamatory imputation was to link, connect or associate the Plaintiff to the Kshs. 6 billion drug haul, since it is alleged that the person who was running business for him was a suspect.



Bobby Macharia was not charged and the defendants did not produce any evidence to show the suspects charged in relation to the drug haul were in any way connected to the plaintiff.

58. Finally, on quantum the plaintiff submitted that considering that the Plaintiff was named by his full names, he was lowered in his reputation by those who knew him and those who did not. Due to the prominence of the publication and the circulation, the Plaintiff is entitled to a higher award of damages. The plaintiff proposed general damages of Kshs. 15,000,000 and exemplary damages of Kshs. 3,000,000. In support cited among others, *William Kabogo Gitau-v-The Standard Group* (Civil Appeal No. 74 of 2011) where the Court awarded general damages of Kshs 12, 000, 000 and exemplary damages of Kshs 1, 000, 000,
59. I have considered the evidence adduced herein together with the rival submissions.
60. It is the duty of the plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities.
61. The issues for determination in this case are as follows;
- i. Whether the plaintiff proved the tort of defamation to the required standard.
 - ii. Whether the defendants have a valid defence against the plaintiff's claim.
 - iii. Whether the plaintiff is entitled to the remedies he is seeking against the defendants.
 - iv. Who pays the costs of this suit?
62. On the issue as to whether the plaintiff proved his case to the required standard, the following are the elements of defamation.
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.
63. I find that the impugned article talks about the drug suspects and not the plaintiff.
64. The plaintiff has not proved that the defendants called him a drug peddler.
65. The impugned article contained the following words;
- “The Sh.6b drug haul suspects at a glance
- Bobby Macharia
- The General Manager of Pepe Inland Container Depot, a soft-spoken man, worked as a stores manager with a leading supermarket chain before being employed by Mr. John Harun Mwau. He managed a number of businesses for Mr. Mwau, including a store on Standard Street that sold wholesale goods from Dubai, before helping establish the inland port about five years ago.”
66. I find that the words referred to Bobby Macharia who was the General Manager of Pepe Inland Container Depot and not the plaintiff .
67. On the issue as to whether the defendants have a valid defence, I find that the defendants did not deny that they published the impugned article.



68. The defendants having admitted that they published the article, this court must consider if they have a valid defence.
69. In paragraph 4 of their defence, the defendants stated that the article is a fair comment made in good faith without malice on matters of public interest, namely the need to inform the public on the ongoing prosecution of suspects in drug trafficking affairs.
70. I find that it is not denied that Bobby Macharia was arrested and arraigned in court and further that he was known to the plaintiff.
71. I find that it is a fact that Mr. Bobby Macharia had been arrested and arraigned in court in connection with the Kshs. 6 billion drug haul discovered in Nairobi and Mombasa in December 2004.
72. It is a fact that Mr. Macharia was at the material times a general manager of Pepe Inland Container Depot.
73. It is also true that Mr. Macharia used to work with a leading supermarket chain in the country before moving to Pepe Inland Container Depot.
74. It is a fact that prosecution of the drug haul suspects are matters of public interest.
75. It is also a fact that the Nation Media Group had a moral duty and obligation to inform members of the public of the ongoing prosecution of suspects implicated in the drug haul.
76. I find that the defendants have a valid defence against the plaintiff's case.
77. The defences of justification and fair comment available to the defendants in the circumstances of this case.
78. In Civil Appeal No. 286 of 2016 *Raphael Lukale v Elizabeth Mayabi & Another* [2018] eKLR the Court of Appeal observed as follows;

“The respondents claimed that the defence of justification was available to them. That defence is (*sic*) justification available if the truth in the offending statement is proved. On the other hand, fair comment, on which the respondent also relied, is proved if the statement complained of is an expression of opinion made as fair comment.”

79. I find that the plaintiff did not deny that he knew Mr Bob Macharia and that the said Bob Macharia was charged in connection with drug trafficking.
80. I find that the plaintiff is not entitled to the remedies he is seeking since he has not proved his case.
81. Had the plaintiff proved his case to the required standard, he would have been entitled to general damages of Kshs.5 million.
82. However, the plaintiff did not prove his case and the same is dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF JUNE, 2024.

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A. N. ONGERI

JUDGE

