



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Oira v Quarcoo (Civil Case 373 of 2010)
[2023] KEHC 1253 (KLR) (Civ) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1253 (KLR)

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

CIVIL
CIVIL CASE 373 OF 2010

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

HEZEKIEL OIRA PLAINTIFF

AND

PATRICK QUARCOO DEFENDANT

JUDGMENT

1. The plaintiff in the present instance lodged a suit against the defendant vide an amended plaint dated December 11, 2012 and sought for the following reliefs:
 - a) General damages
 - b) Aggravated damages
 - c) Costs and interests at Court rates.
2. The plaintiff pleaded in his plaint that on or about June 8, 2010, the defendant wrote the following letter to the plaintiff

“Mr Hezekiah Oira Corporation Secretary Kenya Broadcasting Corporation Nairobi

June 8, 2010

Dear Mr Oira

World Cup Partnership - Flagrant Breach Of Agreement

I write as a follow up to our meeting later yesterday afternoon to discuss progress on our World Cup partnership.

In the meeting which we requested, we asked for clarification of rumours



party for a grossly undervalued rates.

that KBC had in breach of our agreements sold the same rights to a third

You admitted and confirmed that KBC has signed, in flagrant disregard of our exclusive agreement, a third party contract to give the rights to exploit the World Cup to Royal Media Group for a mere Kes 500,000.

You are fully aware that we signed an agreement on December 22nd 2009

with yourselves and that you received full payment of all right fees amounting to Kes 26 million for the joint and exclusive exploitation of broadcast rights of the World Cup 2010 from yourselves.

Our contract, attached for your ease of reference, which was drafted by yourself and signed by Mr David Waweru, Managing Director for KBC and duly witnessed clearly and specifically stated "Unless a specific provision is made in this MOU to the contrary no other person other than the parties to it shall have any rights under it or be entitled to enforce it?"

I am extremely surprised that you have knowingly, deliberately and willfully breached the terms of our agreement by selling the rights to a third party.

You are fully aware that we paid you the substantial rights fee and have invested the last 6 months in advertising, print radio and TV airtime, management, sales and creative time as well as event and organizational costs to promote the World Cup on our side.

You are also fully aware that the exclusivity was granted with your knowledge that Radio Africa expected from the exclusivity substantial competitive, programming and financial benefits from the World Cup and was the sole basis for our negotiation.

The selling of the rights are not only a breach of our agreements but also a breach of current broadcast regulations as you have encouraged and committed an act aimed at transferring rights to a third party who has no right to access them under our current agreement.

You indicated that you had come under "political pressure" to breach the agreement. I am not just concerned that you will sign an agreement and not keep it but will also do that in complete secrecy.

At the re-launch of KBC on June 8, 2010, you indicated to me in passing that you had been requested by and been under pressure from senior officials in Government to give Royal Media Limited and its affiliates the rights to the World Cup. I responded clearly that such an action on your

part will breach the contracts and would only assent to it, if we had our licensing fees refunded and compensation discussed. I heard nothing formally until our meeting yesterday.

I am surprised at the actions of KBC in this regard.

Action Required

We request that the following action be effected by yourselves within the next six (6) hours in view of the fact that the World Cup starts today

1. You make available to us and our lawyers, copies of all undeclared agreements signed with third parties around the World Cup



2. You refund by the 2pm today the full Kes 26 million paid to your by us for the exclusive rights.
3. You agree we air the World Cup under the same rights, price and terms you have granted and intend to grant other third parties, given that you have by the agreement signed with us made our audiences believe that we will air World Cup and by your behavior will grossly damage the credibility of our brands.
4. You agree to pay substantial damages for the breach of this agreement.

We look forward to hearing from you formally on this matter.

Yours faithfully

Patrick Quarcoo

CEO"

3. The plaintiff further pleaded in his plaint that the contents of the said letter were false and untrue and the words and innuendos contained therein were defamatory of the plaintiff in extreme.
4. The plaintiff pleaded in his plaint that the said letter was copied or published to:-
 - i. David Waweru, Managing Director, Kenya Broadcasting Corporation
 - ii. Charles Muoki, Chairman, Kenya Broadcasting Corporation,
 - iii. Amb Muthaura, Head of Public Service.
 - iv. Dr Alfred Mutua, Government Spokesman.
 - v. Prof. Githu Muigai, Mohammed & Muigai Advocates
 - vi. Caroline Waiyaki, KMK Advocates.
 - vii. William Pike, Chief Executive, The Star Publications Limited.
5. It is pleaded in the plaint that the plaintiff is an entirely dishonest person, morally bankrupt, unreliable, capable of willfully breaking a contract irrationally and according to the whims of politicians, cheap and corrupt, and unworthy of holding a senior position with Kenya Broadcasting Corporation, according to what the defendant intended and was understood to mean by those to whom they were published and by the general public in the said letter.
6. It was also pleaded in the plaint that the defendant was motivated by extreme malice when he wrote the aforementioned letter regarding a matter that had a specific avenue for redress, which he chose not to pursue, and copied it to several senior KBC and government officials as well as an officer in the private sector.
7. It was further pleaded that due to the defendant's letter and subsequent aggressive and malicious campaign against him generally, his employer, Kenya Broadcasting Corporation, suspended him on June 23, 2010, and fired him on September 6, 2010.
8. The plaintiff pleaded that the plaintiff was charged in Anti-Corruption Case No 18 of 2011 after the defamatory contents of the defendant's letter dated 8 June, 2010 were made public. Nevertheless, there was insufficient evidence to link the plaintiff to the claims brought against him, and as a result, the court exonerated him.



9. The defendant entered appearance upon service of summons and filed its statement of defence on August 20, 2010 to deny the plaintiff's claim.
10. The defendant stated that, the letter was addressed to the plaintiff herein in his official capacity as the Corporation Secretary and thereby the legal advisor and liaison of Kenya Broadcasting Corporation and as being the officer of KBC who first informed the defendant of the details of the breach of the contract. He is a stranger to any internal KBC procedures that may dictate who may or may not receive correspondence on behalf of the said Corporation.
11. The defendant further stated that there can be defamation in him addressing the letter to the plaintiff, therefore he is a stranger to any allegations of suspension of the plaintiff's employment and that if at all the plaintiff was suspended from his employment, the same is not attributable to any vigorous or malicious actions of the defendant as pleaded or at all.
12. At the hearing of the suit, the plaintiff testified while the defendant testified also and called one other witness in support of their respective cases.
13. The plaintiff who was PW1 adopted his signed witness statement as her evidence in chief and stated that he is an advocate of the High Court of Kenya having been admitted in July 1990.
14. The plaintiff testified that he first met the defendant in December 2009 and at that time he had come to sign an agreement between Kenya Broadcasting Corporation where he was then working as a corporation Secretary and Radio Africa Ltd which the Board had directed but I raised an objection and declined to draft the agreement but his Deputy drafted the agreement.
15. The plaintiff further testified that the agreement reflected the contents of the offer and acceptance and in March 2009 KBC acquired none exclusive broadcast rights over FIFA World Cup which took place in South Africa and that the rights were no exclusive and such rights could not be sold.
16. The plaintiff stated that the Memorandum contained an arbitration clause in event of any conflict that may arise from the agreement including the construction of terms and conditions stipulations and provisions be referred for arbitration under the *Arbitration Act*.
17. The plaintiff further stated that Given that KBC did not grant Radio Africa any rights they merely invited them to conduct marketing activities based on the transmission of all broadcasts and that he had not sold any rights to a third party, the fact that the entire incident was personalized suggested that he had for reasons that could not be explained single handedly and maliciously sold the rights.
18. The plaintiff testified that the aforementioned letter claimed that he had transferred rights because they were non-exclusive rights and that he had broken broadcasting laws, both of which he did not. It also claimed that the letter's contents were intended for an audience other than KBC and had been planned to damage his reputation.
19. The plaintiff further stated that his contract was terminated as a result of the letter; he attempted to run for office in his village constituency but was unsuccessful due to the 70 million that the defendant obtained for the KBC World Cup rights; her daughter had to transfer schools as a result of the ridicule surrounding the KBC story; and, on top of all of that, he was arrested and charged, with one of the charges being that he had given Radio Africa a contract for World Cup rights without proper documentation.
20. In cross examination, the plaintiff stated that his complaint relates to the defendant's letter of June 8, 2010, addressed to him as the company secretary, that the letter did not raise pertinent matters



pertaining to the MOU, and that it should have been directed to the corporation's accounting officer (KBC).

21. DW1, Velma Kwanga adopted her executed witness statement and stated that the corporation secretary office is currently vacant and the former is now the current Managing Director and that she currently attends Board meetings to represent the Company Secretary.
22. The witness produced the original minutes of Board dated March 13, 2009 certified by Miss Margret Ochieng on April 13, 2018.
23. In cross-examination, the witness stated that current acting Corporation secretary Mr Paul Njiraini was not there in 2009 and that from the minutes the plaintiff was the company secretary.
24. DW2 Patrick Quarcqo the defendant stated that he is the Chief Executive Officer of Radio Africa Limited for the past 19 years and that he has adopted his statement as his evidence in chief.
25. The witness further stated that he signed the Memorandum of understanding between KBC and Radio Africa Limited dated 22nd of December, 2009 which was originally drafted by the legal department of KBC and subsequently modified by the then Company Secretary who is the plaintiff.
26. The witness testified that the plaintiff had protested in a letter dated June 8, 2010, that the defendant had addressed the letter to him as the corporation secretary rather than in person.
27. In cross-examination, the witness stated that his main complaint is that the plaintiff had given out rights which were exclusively rights and that the letter was addressed to the plaintiff in his capacity as the corporation secretary.
28. The witness further stated that the said letter had been written before the agreement had taken place and that he wrote it based on rumours and copied it the Managing Director, KBC and other senior people in the government.
29. In re-examination, the witness stated that he wrote the said letter hoping the matter would be solved and that the objective of the said letter was met and that Kenya Broadcasting Corporation settled the claim.
30. Directions were given that this suit be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions and was able to identify four main issues falling for determination to be as follows;
 - i. Whether the defendant's letter dated June 8, 2010 was defamatory
 - ii. Whether the defence of fair comment and justification are holding /applicable in this matter
 - iii. Whether the letter dated June 8, 2010 was malicious
 - iv. Whether the plaintiff is entitled to damages.
31. The plaintiff submitted that in the aforementioned letter, the defendant accused him of having acknowledged and confirmed that KBC had entered into a contract with Royal Media Group under which KBC granted Royal Media the right to exploit the World Cup for Kshs 500,000/= . As a result, the defendant turned personal and claimed that he had drafted the MOU that the KBC Managing Director signed on behalf of KBC and that he had witnessed.



32. The plaintiff further submitted that the defendant concluded his letter by stating that he was surprised the plaintiff had knowingly, deliberately, and willfully violated the terms of the MOU by selling the rights to a third party. He also noted that he had not only addressed the plaintiff in his personal name but also in his personal capacity in each and every paragraph of the letter.
33. On the other hand, the defendant submitted that considering the letter in its appropriate context, it cannot have been written of or about the plaintiff; rather, it is a complaint about KBC's behavior. As a result, the letter cannot be used to support the plaintiff's claim of defamation.
34. The Court of Appeal in *Wycliffe A Swanya v Tunyuta East Africa Limited & Francis Massai* Nairobi CA No 70 of 2008 set out the essential components which a plaintiff must prove in order to succeed in an action on defamation. The plaintiff must prove the following;
- i. That the matter complained of is defamatory in character.
 - ii. That the defamatory utterances or statement was person defamed.
 - iii. That it was published maliciously.
 - iv. In slander subject to certain exceptions, that the plaintiff suffered special damages.
35. On the first issue, I borrow from the *Black's Law Dictionary*, 8th edition definition of the term 'defamation' as follows:
- “the act of harming the reputation of another by making a false statement to a third person.”
36. The ingredients of a defamatory claim were laid out by the Court of Appeal in the case of *Raphael Lukale v Elizabeth Mayabi & another* [2018] eKLR and are that:
- 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.
37. In respect to the second and third ingredients which I wish to begin with, from my evaluation of the oral evidence tendered by and on behalf of the plaintiff, I established that the said letter in question was written by the defendant and made reference to the plaintiff. In its pleadings, the defendant admitted to writing the said letter and did not deny that the same related to the plaintiff herein.
38. I am therefore satisfied that the plaintiff has established the two (2) referenced ingredients on defamation.
39. This brings me to the first ingredient to do with whether the impugned publications are defamatory of the plaintiff.



40. At the heart of a defamatory statement lies its tendency to lower the reputation of the claimant in question. This was the position held by the Court of Appeal in the authority of *S M W v Z W M* [2015] eKLR and restated in the case of *Joseph Njogu Kamunge* [2016] eKLR thus:
- “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.”
41. The legal position is that in order to determine whether a statement or publication is defamatory, one must seek to understand the meaning conveyed by the words in question to an ordinary/reasonable person.
42. It is perhaps important to point out at this juncture that there are two kinds of defamation namely, libel and slander. Libel consists of a defamatory statement in a permanent form like in a printed or written form while slander is defamation by word of mouth.
43. Turning to publication basically means the communication of the defamatory statement, words or information to a 3rd party other than the person allegedly defamed.
44. In this case, the plaintiff in its plaint pleaded that the defendant meant and were understood to mean to those to whom they were published and to the public generally that the plaintiff is a completely dishonest person, morally bankrupt, one who cannot be relied on, a person who can deliberately breach a contract irrationally and not worthy of being an advocate, cheap and corrupt and a person unworthy of holding a senior position with Kenya Broadcasting Corporation.
45. On the other hand, the defendant stated that there cannot be defamation in him addressing the letter to the plaintiff and therefore he is a stranger to any allegations of suspension of the plaintiff's employment and that if at all the plaintiff was suspended from his employment, the same is not attributable to any vigorous or malicious actions of the defendant as pleaded or at all.
46. Upon considering the same alongside the contents of the said letter in question, I am convinced that the plaintiff has demonstrated the manner in which the aforementioned letter could be inferred in the mind of the ordinary man and consequently lowered their reputation in the minds of members of the public.
47. This is because the defendant's intention was to deliberately make any right thinking person would impute that the plaintiff was doing so for purposes of gaining a benefit and consequently corrupt and not worthy of being a lawyer and the words, the imputations and innuendos, were extremely defamatory of the plaintiff and greatly injured him in his reputation and character.
48. I am satisfied that though the plaintiff did not set out verbatim the words published concerning them, they were able to set out the title of the said publications and describe in fair detail the nature of the said letter meant, as well as particularize their meaning in the ordinary and natural sense.
49. Upon considering the aforementioned particulars of defamation and innuendo pleaded in the plaint and in the absence of any contrary evidence, I conclude that the words published would ordinary sense be taken to have the meaning pleaded in the plaint.
50. Concerning the reputation of the plaintiff, credible evidence was tendered to support the claim that following the said defamatory letter, his reputation was negatively affected.
51. Further to the foregoing, I am alive to the existing legal principle that in instances of libel, the law presumes damage so long as a party has shown that the defamatory material was written or printed or in



some permanent form. This was the position taken by the court in the case of *Peter Maina Ndirangu v Nation Media Group Limited* [2014] eKLR cited in the plaintiffs' submissions, where the court stated that in an action of libel damage suffered need not be proved. Such position was restated in the case of *Alnashir Visram v Standard Limited* [2016] eKLR.

52. In the premises, I am satisfied that the plaintiff has shown that the said letter in question is defamatory of the plaintiff.
53. On the ingredient touching on malice, the court in the case of *Phinebas Nyagah v Gitobu Imanyara* [2013] eKLR was of the view that malice is not restricted to spite or ill will but may extend to reckless actions drawn from the publication in question.
54. The plaintiff submitted that if the defendant wanted the plaintiff punished for breaching the MOU, a feat he knew the plaintiff could not achieve because he was not a party to the MOU and which MOU provided a means of redress, it is abundantly clear that the defendant could have only been actuated by malice, his words, deeds and falsehoods demonstrate the contrary. That the events that followed the publication of the letter to the persons to whom it was copied or published mentioned above demonstrate that the defendant achieved his malicious intentions.
55. On the other hand, the defendant submitted that he drafted the letter to express a reasonable worry about a potential investment and that he had a sincere confidence in the accuracy of what was said in it, no evidence has been shown to support any of these heads of malice, therefore no malice has been established.
56. Upon considering the nature, frequency and circumstances of the said letter coupled with the impact namely that this contract was terminated as a result of the letter; he attempted to run for office in his village constituency but was unsuccessful due to the 70 million that the defendant obtained for the KBC World Cup rights; her daughter had to transfer schools as a result of the ridicule surrounding the KBC story; and, on top of all of that, he was arrested and charged, with one of the charges being that he had given Radio Africa a contract for World Cup rights without proper documentation.
57. It is my view that the plaintiff has proved malice against the defendant. It is noteworthy that malice was not refuted by the defendant by way of evidence.
58. In respect to the ingredient to do with whether the publication was false, the court in the case of *Joseph Njogu Kamunge* [2016] eKLR reasoned that a defamatory statement is presumed to be false unless and until the same is shown to be true by a defendant.
59. In view of the foregoing, I am satisfied that the plaintiff has established a claim for defamation against the defendant on a balance of probabilities.
60. This brings me to the second issue touching on whether the plaintiff is entitled to the reliefs being sought.
61. On general damages, the plaintiff testified that he has been at all material times an advocate of the High Court of Kenya.
62. On general damages for libel, I considered the professional standing of the plaintiff who going by his testimony and supporting evidence, is an advocate of the High Court of Kenya with a well of experience in the legal field. I also took into account his evidence that he was once the Corporation Secretary of KBC and also at some point run for a political seat.
63. I also considered the case of *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR in which the Court of Appeal upheld an award of Kshs 5,000,000/= made under this head,



64. The more recent case of *Michael Kamau Mubea v Nation Media Group Limited & 2 others* [2019] eKLR in which this court awarded a sum of Kshs 7,000,000/= on general damages to a plaintiff who was both a lawyer and a journalist.
65. I therefore find the award of Kshs 3,000,000/= to be reasonable for the plaintiff, in the circumstances.
66. On aggravated damages, I considered the repetitive nature of the publication and the lack of an apology by the defendant. Having done so, I find a sum of Kshs 300,000/= to be a suitable award to each plaintiff, relying on the case of *Standard Limited & another v Jonathan Abraham Chelule* [2018] eKLR where a similar award was made under that head.
67. In the end and having considered the evidence before this court and the law applicable, I hereby enter judgment in favour of the plaintiff and against the defendant in the manner hereunder:
- i. General damages Kshs 3,000,000/=
 - ii. Aggravated damages Kshs 300,000/=
- Total Kshs 3,300,000/=
- iii. The plaintiff shall have costs of this suit and interest from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**

