



REPUBLIC OF KENYA



**KENYA LAW**  
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**Obudho t/a Obudho & Co Advocates v Kimeto & another (Civil Case 138 of 2008) [2023] KEHC 21678 (KLR) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21678 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE 138 OF 2008  
RN NYAKUNDI, J  
AUGUST 10, 2023**

**BETWEEN**

**GEORGE OBUDHO T/A OBUDHO & CO ADVOCATES ..... PLAINTIFF**

**AND**

**GEORGE KIPRONO KIMETO ..... 1<sup>ST</sup> DEFENDANT**

**THE STANDARD LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide a plaint dated October 14, 2018, the plaintiff instituted this suit against the defendants seeking the following reliefs;
  - a. An order for an unreserved apology in the print media to the offending article.
  - b. General, exemplary, punitive aggravated damages.
  - c. Costs and such other relief as the court may deem just and expedient to grant.
2. The plaintiff's claim is that on or about the 16<sup>th</sup> day of July 2008, the defendants jointly caused an article dubbed 'I have been a victim of conmen' to be published in The Standard Newspaper at page 16 which article read thus;

I read a story in The Standard last Thursday that touched on fake documents in Nairobi. I was a victim between November and December last year. A Mr. David Kola approached me and said his parents were selling a piece of land at Kapseret, six kilometres from Eldoret town. The land looked good and I thought I should buy it. So, I asked him to introduce me to his parents and the next day he brought woman called Jennifer to my office saying she was his step mother and a man called Bernard, his step brother. They said their father was unwell. I was given "his" number and he said he would do with what we agreed with his sons since his daughter had been hospitalized and the bill was too high. The father, a Mr.



Koech, he said he was in Kitale with his first wife. We agreed I would pay Kshs 2 million for ten acres. I asked for original documents because they had photocopies. I used the copies for search and it came out clean (I have search copy).

Before they left, the old man called and asked to be advanced Kshs 50,000 through his lawyer (Obudho and Company Advocates). The lawyer said he knew them and sent the money to the 'the first' with a document indicating it was initial deposit for the land. After three days, Koech, Jennifer, Kola and a sister came with an original title deed, identity cards and pin numbers, which the lawyer found to be in order. But the old man said he did not have a bank Account and asked to be paid half the amount in cash. The lawyer did not object, so I withdrew Kshs 950,000 for the lawyer who paid them.

Days later, the old man called and asked me to take the balance to the lawyer. By the time I discovered I was dealing with con men, I had paid sh. 1.8 million. I had visited the farm and found a Mr. Koech (not the one I dealt with) tilling it. When I called the first Koech, He said he was in Nakuru. I later went to a police station and helped them arrest the 'wife'.

The following day she was discharged and given a bail of Kshs 1 million. They brought another fake title deed for surety and missed two court mentions. Even after a warrant of arrest was issued, I had to struggle and find them in their rural home, this time with his son Bernard. They were taken to court and police were given three days to ascertain the sureties. They took two months and the story sill goes on. I am paying a loan for a piece of land I do not own. I need help from Justice Minister Martha Kama.

(George Kimeto, Eldoret)

3. The 1<sup>st</sup> and send defendant filed their defences to the claim and the matter proceeded for hearing. The plaintiff called one witness in defence of his case. The parties prosecuted the suit vide written submissions.

#### **Plaintiff's Case**

4. Learned counsel for the plaintiff filed submissions on May 29, 2023. He cited Gatley on Libel and Slander as adopted in *Ernest Omondi Owino & Another vs Felix Olick & 2 others* (2021) eKLR, stating that the defamatory statements were published by the 2<sup>nd</sup> defendant and the article as extracted in the plaint has not been denied by the defendants. That this information was conveyed to members of the public and for those who knew the plaintiff concluded that he was a conman and connived with the sellers of the property to defraud the defendant. He cited the case of *Zamzam Hussein Aligele v Joseph Lekuton* (2020) eKLR on the definition of a publication, urging that the application was defamatory, false, untrue and lowered his reputation in the eyes of the public. He reproduced the publication and submitted that that from the extract, it can be inferred that;
  - i. The plaintiff knew the seller of the property prior and had connived with them to swindle the 1<sup>st</sup> defendant.
  - ii. The plaintiff was acting for the seller alone in the transaction.
  - iii. The money was given to the plaintiff who transmitted it/handed it over to the seller, and;
  - iv. The plaintiff who was an advocate of the high court of Kenya could not be trusted and can only be trusted at one's own risk.
5. Counsel submitted that the 1<sup>st</sup> defendant confirmed that the plaintiff was acting for both parties during cross examination and that he paid the seller in the presence of the plaintiff. Further, that in



his evidence, he stated that he had met the 1<sup>st</sup> defendant and performed some transactions before and therefore, it is clear that contents of the publication were untrue, defamatory and had the propensity to lower his reputation in the eyes of right-thinking persons. He cited the case of *Musikari Kombo vs Royal Media Services Limited* (2018) eKLR in support of his submission.

6. Counsel submitted that the publication made reference to Obudho & Company Advocates as the law firm had participated in the transaction and further, that the plaintiff confirmed that at the time he was the proprietor of the firm. The name of the firm was cited and made reference to the entity associated with the plaintiff. Citing the case of *Abmednassir Abdullabi vs Star Publications Limited* (2019) eKLR and invited the court to make a finding that he had established the ingredients and is entitled to damages.
7. Counsel submitted that he was an advocate of proper standing, married with a family and as a result of the publication, his reputation was damaged significantly. Further, that while damages cannot restore his reputation, it can console him for the injuries suffered and repair the harm to his reputation as a vindication of his reputation. He relied on the case of *Samuel Ndungu Mukunya vs Nation Media Group Limited & Another* (2015) eKLR, *Wilson Kalya & Another vs Standard Limited & 2 others* (2002) eKLR and *Nation Media Group Ltd & 2 others vs John Joseph Kamotho & 3 others* (2010) eKLR in support of his prayer for damages. The plaintiff sought damages as follows;
  - a. General damages.....Kshs 6,000,000/-
  - b. Aggravated damages.....Kshs 6,000,000/-
  - c. Damages in lieu of apology.....Kshs 500,000/-

#### **1<sup>st</sup> Defendant's Case**

8. Counsel for the 2<sup>nd</sup> defendant filed submissions on June 12, 2023. Counsel urged that the only issue for determination is whether the plaintiff has proven the ingredients for defamation as summarized in the case of *John Ward vs Standard Ltd*, HCCC 1062 of 2005 as follows;
  - i. The statement was defamatory
  - ii. The statement must refer to the plaintiff
  - iii. The statement must be published to the defendant
  - iv. The statement must be false
9. Counsel urged that the plaintiff failed to demonstrate all the ingredients of defamation were present and further, invited the court to note that during the hearing of the plaintiff's case, he only relied on one witness, being himself to substantiate the claim. He stated that central to the tort of defamation is the injury to reputation and character as was held by Odunga J in *Phineas Nyagah vs Gilbert Imanyara* (2013) eKLR. He submitted that for the plaintiff to have proven injury to his reputation he ought to have called a third party to testify on the same as his own opinion of his reputation of character is of minimal value in defamation proceedings. To buttress this point, he cited the case of *Selina Patani & Another vs Dhiranji V. Patani*. He urged the court to dismiss the suit with costs.

#### **2<sup>nd</sup> Defendant's Case**

10. Counsel for the 2<sup>nd</sup> defendant filed submissions on June 9, 2023. It is the defendant's case that the burden of proof was upon the plaintiff to prove the allegations contained in his pleadings, a burden



he failed to dispense. Counsel relied on the case of *Nation Media Group & Another vs Hon. Chirau Mwakwere* – Civil Appeal No. 224 of 2010 on the requirements to succeed in a claim for defamation.

11. Counsel submitted that the plaintiff has failed to establish the existence of a defamatory statement. The plaintiff failed to satisfy the principles of law to establish the tort of defamation as he failed to call an independent witness to prove that the published words were defamatory. In support of this submission, counsel relied on the case of *Daniel N. Ngunja vs KGGCU Ltd* (2000) eKLR. Further, that the plaintiff did not adduce any evidence to prove that the words complained of tendered to lower his estimation in the eyes of right-thinking members of the society.
12. The 2<sup>nd</sup> defendant submitted that the words complained of did not in any way injure his reputation or professional standing. He cited the case of *Simeon Nyachae vs Lazarus Ratemo Musa & another* (2007) eKLR to buttress his submission. He urged that it is prudent to note that the plaintiff was disbarred and struck off the roll of advocates on September 18, 2017 pursuant to an order of the Disciplinary Tribunal in Disciplinary Cause Number DTC/108 of 2011 and has never been reinstated. Counsel submitted that the fact that the plaintiff was struck off the roll of advocates goes to show that the plaintiff's practice was beleaguered by dishonesty, unprofessionalism and hence least fit to practice law as an advocate of the High Court of Kenya.
13. Counsel submitted that in seeking aggravated and general damages, the plaintiff has alleged that the publication was malicious but has failed to particularize the malice. Further, that it is evident that the article published by the 2<sup>nd</sup> defendant was in fact true and not the contrary as it relied on evidence vide the record of sale agreement executed by the 1<sup>st</sup> defendant and the vendor. It is upon the plaintiff to prove that the statements published were false.
14. The 2<sup>nd</sup> defendant averred that the publication was a fair comment made in good faith without malice. He cited *Gayley on Libel and Slander* and the case of *Grace Wangui Ngenye vs Chris Kirubi and Another* (2015) eKLR in support of this averment. He maintained that in so far as the publication consists allegations of fact, the same are true in substance in so far as they consist of an accurate report were made in good faith and without malice. Counsel urged that it is clear that the 2<sup>nd</sup> defendant accordingly only detailed the set of events as relayed by the 1<sup>st</sup> defendant including stating the extent of the involvement of the plaintiff as disclosed therein. The 2<sup>nd</sup> defendant distanced itself from the liability as evidenced by the exclusion clause appearing on the same page the publication was contained. The 2<sup>nd</sup> defendant therefore only gave a true account of what had happened. Further, counsel urged that the plaintiff did not at any time challenge the set of facts.
15. It is the 2<sup>nd</sup> defendant's case that the alleged article was published in good faith, in public interest and without malice or intention to injure the plaintiff. He urged that under articles 33 and 34 of the *Constitution* the public is entitled to know and have information about major events and occurrences in the court and such duty is on the media. He cited the case of *New York Times vs Sullivan* 376 US 254 (1964) in support of this submission.
16. The 2<sup>nd</sup> defendant urged the court to dismiss the suit with costs to the defendants.

### **Analysis & Determination**

17. The main thrust of the claim arising out of the pleadings evidence and submissions is on proof of the tort of defamation. It is well settled that the burden bearer in cases of this nature is the plaintiff who must prove his case on a balance of probabilities against the defendants and this burden remains throughout the trial. It is then if and when he establishes proof of defamation on the part of the defendants the burden shifts to the defendants to give an answer or explanation as to how they came



to defame the plaintiff. It is a defence which must be sufficient to displace the prima facie evidence that reasonable care had been taken not to publish defamatory words or statements. That allocation of burden is premised in Section 107.

i. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

ii. When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person

108. The burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all were given on either side.

109. 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.

18. I wish to lay some stress in regard to the concept of balance of probabilities as captured in *In Re H (Minors) Sexual Abuse: Standard of Proof* (1996) AC 563, 586D-H “ The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent occurred and, hence the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

19. For a court to make a proper founded and reasonable conclusion on a claim of this nature, any answer to the issues raised by the plaintiff must be tested on that balance of probabilities. It is a statutory test quantified by probative evidence both oral or documentary containing information about the tort of defamation entitling the plaintiff an award of damages weighted as aggravated or general on account of the allegations confronting the defendant.

1. Whether the plaintiff has proved his case on a balance of probabilities

### **Whether the plaintiff has proved his case on a balance of probabilities**

20. The requirements to prove the tort of defamation have been discussed extensively in our courts. The Court of Appeal in the case of *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* Civil Appeal 70 of 2008 [2009] eKLR stated:

“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-

- (i) That the matter of which the plaintiff complains is defamatory in character.
- (ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
- (iii) That it was published maliciously
- (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage.”



21. The first issue for consideration is whether the statement was defamatory. The Court of Appeal in *S M W vs. Z W M* [2015] eKLR stated as follows:-

“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.”

22. 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* 4<sup>th</sup> 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 word 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. Thus in determining the meaning of words for purposes of defamation, the court does not employ legal construction, it will consider the layman's understanding of the same. The question is not what the defendant intended. The mere fact that the hearers understood the language in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding it. The words complained of should be considered in their natural and ordinary meaning

“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.”

23. I have considered the alleged defamatory statement and it is clear that it was published. As to whether the statement was defamatory, I note that the statement mentions the firm of Obudho and Company advocates. The nature of the statement is that it alludes that the 1<sup>st</sup> defendant sent money to the firm which accepted the money on behalf of one Mr. David Kola. The defendants refer to a sale agreement in their defence statement. The 2<sup>nd</sup> defendant stated that the sale agreement was drafted by the firm of the plaintiff and further, that the 2<sup>nd</sup> defendant merely reported the events as explained by the 1<sup>st</sup> defendant. From my reading of the statement, it is my considered view that the same was not defamatory in any shape or form. It is undisputed that the same was published by the 2<sup>nd</sup> defendant but I find no justification for the allegation that the publication was actuated by malice.
24. The plaintiff called himself as the only witness to prove that the statement lowered his reputation in the eyes of the society. He admitted that he prepared the sale agreement on behalf of the parties and therefore this lends credence to the defence of the defendants. His evidence as to the damage caused to his reputation, including allegations that he received calls from colleagues and friends is not corroborated by any of the said colleagues who called him. In his statement he alleged that even his wife had expressed herself as to the damage the article had caused. It is my considered view that he failed to prove that his reputation was damaged beyond a balance of probabilities as had he called a third party to testify as to the damage of his reputation, I would be inclined to consider the same as cogent evidence on the same. The standard of testing the evidence by the plaintiff is whether the statement complained of will reflect him badly in the eyes of reasonable, fair persons. It is also true in the tort of defamation for the evidence to demonstrate that the words used would reasonably lead persons



known or acquainted with the plaintiff are more likely to believe the plaintiff is the person to whom the words are making reference. Again as it is settled in a defamatory action encrypted message meaning, interpretation, threshold, usage is that of a reasonable person whether he would find it defamatory.

25. The defendants raised the defence of fair comment and justification in their defence to the claim. In *Samuel Ndung'u Mukunya vs. Nation Media Group Limited & Another* (2015) eKLR the court observed;

“If the words complained of contain allegations of facts the defendant must prove such allegations of facts to be true. It is not sufficient to plead that he bona fide believed them to be true. The defence of fair comment does not extend to cover misstatement of facts, however bonafide.”

26. On the defence of justification and fair comment *Carter-Ruck On Libel and Slander* 5th edition at page 54 noted the following;

“in order to succeed upon a plea of justification, the Onus lies upon the defendant to prove that the whole of the defamatory matter complained of, that is to say, the words themselves, and any reasonable inference to be drawn, from them are substantially true..... on the other hand, for the defence to be successful, it is not necessary that every “t” should be crossed and every “I” dotted; it is sufficient if the substance of the libellous statement is justified. As much must be justified as meets the sting of the charge and if anything, be contained in the charge which does not add to its sting, that need not be justified.”

27. Further the same writer opines;

“The defence of Justification cannot succeed unless the defendant proves that the expression of opinion was based upon the facts..... if the facts upon which the comment purports to be based does not exist, the comment cannot be fair..... there are two qualifications to the general rule. In the first place where the facts commented upon are contained in a privileged document such as a parliamentary paper or a report of judicial proceedings, the defendant’s comments upon the fact set out in such reports is entitled to protection as fair comment even though the facts contained in the privileged document or referred to in the judicial proceedings, turns out to be untrue.”

28. Despite denying knowing the parties to the transaction, the plaintiff testified in court that he did indeed draft the sale agreement on behalf of the parties which they executed in his presence. In his cross examination he admitted the truthfulness of the statement save for the receipt of any monies. However, a reading of the statement implies that the money was paid to the fraudsters in cash and that a ‘lawyer’ was given the money to pay them. The article did not mention the plaintiff by name and as such it is my considered view that he was not implicated in the dealings as the ‘lawyer’ in the proceedings could have been the plaintiff or an associate under his firm. The principle applicable on the tort of defamation in which an appropriate balance between the human right to freedom of expression guaranteed in Article 33 of the *Constitution* and the need to protect individual reputation is widely recognised even in International Human Rights Instruments. The right to freedom of expression does not extend to:-

- a. Propaganda for war
- b. Incitement to violence
- c. Hater speech, or



- d. Advocacy of hatred that
    - i. Constitute ethnic incitement vilification of others or incitement to cause harm or
    - ii. Is based on any ground of discrimination specified or contemplated in Article 27(4)
29. The implication of it is that everyone has a right to hold opinions without interference. The Right to freedom in our constitution includes the freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice. The exercise of that right by every citizen in Article 33 may wear this can be shown to be necessary to be subject to restriction on specific grounds as established in our constitution and International Law, including the reputation of others. Purposive interpretation of this right tells us that courts should ensure that a statement is deemed to be defamatory only its publication causes substantial or serious harm to reputation thereby excluding nominal or minor harms. In this respect the tort of defamation being advanced by the plaintiff is to afford redress for unjustified injury reputation. In retrospective the impugned Article dated 16<sup>th</sup> July 2008 made reference to many characters and individuals to a land transaction at Kapseret in Eldoret town. The conveyance seemed to have hit a snag if the expressions in the statement by the first defendant is anything to go by as later reported by the second defendant. The specific words alluded to the plaintiff read as follows: “ Before they left the old man called and asked to be advanced shs 50,000 through his lawyer (Obudho and Company Advocate). The lawyer said he knew them and sent the money to the “the first” with a document indicating it was initial deposit for the land”
30. By a successive action in defamation the plaintiff’s legitimate expectation includes that this court grants remedies for the injured reputation to be remedied. In essence one of the key parameters for this court is to establish from the evidence tendered that the individuals in the aforesaid law firm suffered financial loss or any individual person has thought the worse of them as a result of the publication complained of in the suit. There are of course many defamatory things which can be said about individuals which could not be said about companies, but the rule is it is not at all difficult to think of statements, which seriously are injurious to the general commercial reputation of professional service entities and other commercial enterprises. Should a company be entitled to sue in its own right? I am of the considered opinion to answer this question in the affirmative only if it can prove financial and reputation loss. In the first instance, the good name of a company or a Coporation as that of an individual is a thing of value. In analysing the evidence presented by the plaintiff I hold the view that the purported libel has not been shown to lower it in the eyes of the public and even its own staff to make people less ready to deal with it, less willing or less proud to work for it. My appreciation of this cause of action hinges within the borderline of the defence of privilege in the usual sense available when the defamatory statement alleged was published by the print media. A limiting measure must as a worthy purpose on the tort of defamation is what all reasonable citizens would agree to be compellingly important. The justifiability of it is as expressed in the persuasive dicta by Lord Diplock in a well-known passage in *Horrock v Lowe* (1975) AC 135, 149:
- “The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises tht they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kind is published on a privileged occasion. It is not actionable even though it be defamatory and



turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which give rise to it is misused.”

31. As shown above, the jurisprudence of the court so far provides interpretative guidelines to Civil Courts in respect of the tort of defamation and the use of the privileged defence. It is not an absolute privilege for the print media to raise it as a shield to allow publication of when defamatory statements to injure the reputation of individuals or companies. The solution is for the court to have regard to all the circumstances when deciding whether the publication complained of was privileged because of its value to the public or it is one maliciously published to injure the reputation of individuals or for that matter legal entities like companies.
32. In answering the question provided in the plaint on a proper degree of protection for the plaintiff on the expressed matters in the Standard News Papers dated 16<sup>th</sup> day of July 2008 the interests of those whose reputations are stated to have been injured falls below the standard of proof on a balance of probabilities to warrant this court inform itself on liability and subsequent assessment of damages.
33. In the premises, I find that the plaintiff has failed to prove the tort of defamation to the required standard. The suit is hereby dismissed with costs.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 10<sup>TH</sup> DAY OF AUGUST 2023**

.....

**R. NYAKUNDI**

**JUDGE**

