



**Tongi v Wambua (Civil Suit 237 of 2016)
[2022] KEHC 220 (KLR) (Civ) (24 March 2022) (Judgment)**

Clement Nicholas Tongi v Charles Wambua [2022] eKLR

Neutral citation: [2022] KEHC 220 (KLR)

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

CIVIL

CIVIL SUIT 237 OF 2016

SJ CHITEMBWE, J

MARCH 24, 2022

BETWEEN

CLEMENT NICHOLAS TONGI PLAINTIFF

AND

CHARLES WAMBUA DEFENDANT

High Court awards Kshs. 1.5 Million as general damages arising from a defamatory email.

The court considered a claim of defamation in the form of the copying of an email, containing allegedly defamatory statements about a former Chief Executive Officer, to three colleagues. The High Court held that the claim of defamation was proved and awarded damages.

Reported by John Ribia

Law of Torts – defamation – libel – libel via email – where a claimant claimed to have been defamed by an email sent to him and copied to many others – whether a cause of libel could accrue from an email – whether the email by the defendant was false, malicious and defamatory of the plaintiff.

Brief facts

The plaintiff was retained by the United Nations Sacco Limited as its Chief Executive Officer. On December 31, 2015 the plaintiff resigned from employment to concentrate on his personal business. The plaintiff claimed that on or about March 9, 2016, the defendant sent him an email from his private account and copied it to 3 others. It was the plaintiff's testimony that the email sent to his juniors portrayed him in bad light especially since he was a role model to many employees.

The plaintiff's case was that the email was defamatory in that in its ordinary meaning the email meant and was understood to mean that he engaged in fraudulent and unethical conduct during his tenure at the UN Sacco. The plaintiff alleged that the email published was false, malicious and defamatory and sought relief in the form of general damages, exemplary damages and costs of the suit.



Issues

- i. What were the ingredients/elements required in establishing a claim of defamation?
- ii. Whether the email by the defendant was false, malicious and defamatory of the plaintiff.

Held

1. During the hearing, despite service, the defendants neither called any witness, participated in the proceedings nor filed their submissions hence the evidence by the plaintiff remained uncontroverted.
2. The pleadings contained the averments of the parties concerned. Until they were proved, or disproved, or there was admission of them or any of them by the parties, they were not evidence and no decision could be founded upon them. Proof was the foundation of evidence. Evidence denoted the means by which an alleged matter of fact, the truth of which was submitted to investigation, was proved or disproved. Averments were matters the truth of which were submitted for investigation. Until their truth had been established or otherwise they remained unproven.
3. There was no wholly satisfactory definition of defamatory imputation. Three formulae had been particularly influential:
 1. would the imputation tend to 'lower the plaintiff in the estimation of right-thinking members of society generally?'
 2. Would the imputation tend to cause others to shun or avoid the claimant?
 3. Would the words tend to expose the claimant to 'hatred,' contempt or ridicule?
4. The question on what defamation was related to the nature of the statement made by the defendant: words could be defamatory even if they were believed by no one and even if they were true.
5. The law of libel and slander was concerned with the protection of reputation. Defamation protected a person's reputation; that was the estimation in which he was held by others; it did not protect a person's opinion of himself nor his character. The law recognized in every man a right to have the estimation in which he stood in the opinion of others unaffected by false statements that injured his reputation.
6. The ingredients of defamation were:-
 1. The statement had to be defamatory.
 2. The statement had to refer to the plaintiff.
 3. The statement had to be published by the defendant.
 4. The statement had to be false.
7. The alleged defamatory email was sent to the plaintiff by the defendant and copied to other colleagues within the organization.
8. The impugned e-mail was defamatory of the plaintiff's character. The plaintiff was being called upon to refund or pay some monies that had been paid to him in form of kickbacks. There was no explanation from the defendant as to why the email was copied to other parties yet the content was personal. The only logical conclusion was that the defendant was out to inform third parties that the plaintiff had been taking kickbacks from the Sacco's clients. The plaintiff had proved his case on a balance of probabilities.
9. The prayer for Kshs.15 million as damages was excessive. Those who were copied the e-mail were the plaintiff's former workmates. The e-mail was not published in the main media but was copied to a few people. An award of Kshs. 1.5 million would adequately compensate the plaintiff. There was no reason for granting exemplary damages.

Petition allowed.

Orders

- i. *The plaintiff was awarded Kshs.1,500,000 as general damages, costs and interest.*
- ii. *Interest was to be at court rates and was to accrue from the date of judgment.*

Citations

Cases



Kenya

1. *CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)* Civil Application 12 of 1978; [1978] KECA 9 (KLR); [1978] KLR 103; [1976- 80] 1 KLR 835 - (Explained)
2. *Farah, Abdi Mohamed v Nairobi Star Publication Ltd & another* Civil Case 15 of 2013; [2015] KEHC 2525 (KLR) - (Explained)
3. *Kamunge, Joseph Njogu v Charles Muriuki Gachari* Civil Appeal 42 of 2014; [2016] KEHC 5119 (KLR) - (Explained)
4. *Nyagah, Phinehas v Gitobu Imanyara* Civil Suit 697 of 2009; [2013] KEHC 6662 (KLR) - (Explained)
5. *Patani, Selina v another v Dhiranji V Patani* Civil Appeal 114 of 2017; [2019] KECA 480 (KLR) - (Explained)
6. *Swanya, Wycliffe A v Toyota East Africa Ltd & Francis Massai* Civil Appeal 70 of 2008; [2009] KECA 379 (KLR) - (Explained)
7. *Ward, John v Standard Limited* Civil Case 1062 of 2005; [2006] KEHC 2628 (KLR) - (Explained)

United Kingdom

John v MG Ltd [1997] QB 586 — (Explained)

Texts

1. Brown, L., (Ed) (2001), *Cassell's English Dictionary* London: Orion Publishers Co p 394
2. Gatley, JCC., et al (Eds) (1967), *Gatley on Libel and Slander* London: Sweet & Maxwell 6th Edn p 6
3. Hogg, QM., (Lord Hailsham) et al (Eds) (1997), *Halsbury's Laws of England* London: Tolley Publishing 4th Edn Vol 28
4. Milmo, P., et al (Eds) (2007), *Gatley on Libel and Slander* London: Sweet & Maxwell 10th Edn p 8
5. O'Callaghan, P., (Ed) (2013), *Refining Privacy in Tort Law* London: Springer

Statutes

Kenya

1. Constitution of Kenya article 28 - (Interpreted)
2. Defamation Act (cap 36) section 17(4) - (Interpreted)
3. Evidence Act (cap 80) section 3 - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The plaintiff herein, Clement Nicholas Tongi, brought the present suit against the defendant via a plaint dated September 7, 2016. The plaint was filed in court on September 8, 2016 and was later amended on October 9, 2017. The plaintiff claims the following reliefs against the defendant;-
 - a) General damages
 - b) Exemplary damages
 - c) Costs of this suit
 - d) Interest in (a) and (b) above at court rates
2. The defendant failed to enter appearance and or file a defence within the prescribed time and interlocutory judgment was entered on February 7, 2017 as against him. The matter proceeded for formal proof on November 1, 2021.

The Plaintiff's Case;



3. In support of his case, the plaintiff called two witnesses. The facts of the case are that in July 2011, the plaintiff was retained by the United Nations Sacco Limited as its Chief Executive Officer. That on December 31, 2015 the plaintiff resigned from employment to concentrate on his personal business. The plaintiff further claims that on or about March 9, 2016, the defendant sent him an email from his private/personal account and copied to Samuel Olago, Peninah Wairimu Kihuha and Makena Mathiu-Ndolia, whose contents are subject of the present suit. It was the plaintiff's testimony that the email sent to his juniors portrayed him in bad light especially since he was a role model to many employees. The plaintiff alleges that the email published was false, malicious and defamatory and as a result has greatly injured his reputation as a leader in the financial sector in the East African Region, a respected senior banker of good standing and a business development strategist. The content of the alleged defamatory email is reproduced below;

“Dear Clement,

The above matter still refers.

Subsequent to the email written to you on December 22, 2015, you called me on Wed, January 6, 2016 from your phone number 254-723xxxx and acknowledge receipt of the email/contents. We spoke for 64 minutes that day. You also informed me that you had talked with Markben Oluchiri about the matters raised therein.

On the phone, you also informed me that the monies in question had been paid to one Ms Jane Wacuka of phone number 0724 xxxx and Elimu Insurance Agency. You mentioned that she had not passed on any monies to you. You were to come on Monday 11th Jan 2016 to see Mr Olango and possible bring her along to explain to him what had happened.

It has now emerged and been claimed that you had appointed Elimu Insurance Agency operated by the said Jane Wacuka in June 2013 or thereabouts. You made communication between yourself, the Agency and CIC using your gmail account [Particulars Withheld]. You transmitted a copy of the Agent's 2013 Licence (Re Reg; IRA/05/14705/2013 and the Agent's bank details to facilitate processing of the rebates.

Information on how the monies were being shared has been given. While the Board was not to follow up on 2013 and 2014 rebate payments but concentrate on 2015, it is now become necessary to go back to those years.

When Jane was asked to pay back to CIC so that CIC could channel the money through the rightly Board appointed Insurance Agent, she gave her side of the story. The amount paid to her Agency was Kes 257, 254 or thereabouts in respect to 2015. Her case will be dealt with separately with the Insurance Regulatory Authority (IRA).

As these items and transactions border around ethics and possible/probable misuse/abuse of Office, you are now requested to clear matters with the Chairman, Sam Olago but not later than 2pm on Friday, March 11, 2016.

Besides, you are requested to return everything belonging to the Sacco, finalize your appraisal and obtain final clearance. Items to be returned would include but not limited to the Car Decal and UN Ground Pass. The Board Secretary will then advise on your final dues that may be payable to you.

Please cooperate.

Kind regards,



Charles

Hon Treasurer.”

4. The plaintiff claims that the email in its natural and ordinary meaning meant and was understood to mean that he was a beneficiary of monies paid to an insurance company through kickbacks, engaged in dishonest and fraudulent practices, unethical practices in giving out business and a thief. In addition, the plaintiff maintains that the email made him out as a person engaging in unprofessional and unethical practices in his employment with the UN Sacco, using his position as an employee of the UN Sacco for personal selfish gain and lastly, engaged in conduct which was criminal in nature for which an indictment should be preferred, to wit, the Charge of Abuse of Office.
5. In his written statement dated June 6, 2018, the plaintiff states that an audit of the UN Sacco financial account in 2015 by M/s Deloitte East Africa did not find any financial or unethical misconduct on the plaintiff's part. The plaintiff states that despite making the defamatory statements, the plaintiff has failed to avail evidence to prove any of his malicious allegations and despite demand for apology and retraction, the defendant has failed to tender any hence the prayer for damages.
6. PW2 Markben Oluchiri, testified that he worked with the plaintiff at UN Sacco and was aware of the defamatory e-mail sent by Charles Wambua. He testified that just like other people, he got the email through a leakage. It was his further testimony that the email was in relation to alleged commission received by the plaintiff from an insurance company, which information, portrayed the plaintiff as a fraudster out to defraud the UN Sacco.

Plaintiff's Submissions;

The plaintiff has identified the following issues for determination;-

- i) Whether the defendant's publication through email dated March 9, 2016 concerning the plaintiff was defamatory of the plaintiff.
 - ii) Whether the publication through an email dated March 9, 2016 was capable of being construed as defamatory in its natural and ordinary meaning or by innuendo
 - iii) Whether the said publication was true in fact and substance or whether the same was false, malicious, negligent and/or reckless.
 - iv) Whether the said publication disparaged and discredited the plaintiff's reputation and injured his character and exposed him to hatred, ridicule, scandal, odium, or contempt.
 - v) Whether the defendants were justified to make the said publication in its form, manner and style.
 - vi) Whether general and aggravated damages are payable in the circumstances of this case and if so, how much.
 - vii) What is the appropriate orders as regards the cost of the suit.
7. The plaintiff has submitted that the impugned email not only lowered his reputation and personal dignity it also infringed on his constitutional right under article 28 of the Constitution. The plaintiff while defining “defamation” has relied on the provision of section 17(4) of the Defamation Act which provides thus;

‘For purposes of this section, ‘Defamatory statement’ means libel, slander. Slander of title. Slander of goods and other malicious falsehoods.’



8. The plaintiff has also made reference to *Halsbury's Laws of England* 4th Edition Vol 28 definition of defamation which states;

'A defamatory statement is a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule to convey any an imputation on him disparaging or injuries to him in his office, profession, calling, trade or business.'

9. It is the plaintiff's further submission that through his evidence and pleadings, he has demonstrated that indeed the defendant's publication of the email and copying other people and his subordinates in the organization was meant to malign and lower his esteem. He further states that the impugned email published by the defendant herein contained false statements with innuendos meant to achieve ill intended motive. The plaintiff has submitted that he has proved all the ingredients set out by the Court of Appeal case of *Wycliffe A. Swanya v Toyota East Africa Ltd & another* [2009] eKLR. The court held *inter alia*;

"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."

10. Counsel for the plaintiff also made reference to *Gatley on Libel and Slander*, 6th Edition at Page 6 where the author stated that;

'A defamatory statement must be false and it must also be defamatory to the plaintiff, that is to say, the statement must contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts not contained in the statement, as the reader must reasonably be expected to possess.'

11. It is the plaintiff's further submission that the alleged defamatory email published and shared to various people was maliciously intended to lower his dignity and depict him negatively amongst the reasonable persons copied thereon. To this end the plaintiff has referred to the case of *Phineas Nyagah v Gitobu Imanyara* [2013] eKLR where Odunga J. held *inter alia* that:-

Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence,



which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.

12. On damages, the plaintiff has submitted that having proved the defamation claim as against the defendant, he is entitled to compensatory, exemplary and aggravated damages. He further states that the compensation ought to take into account the distress, hurt and humiliation and also compensate him for damages to his reputation as was held in *John v MG Ltd* [1997] QB 586 .
13. The plaintiff submits that a general award of Kshs 15,000,000 is adequate compensation and has urged this court to consider the fact that name and reputation has no monetary value. To justify his claim, the plaintiff has made reference to the case of *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR where the High Court sitting on appeal agreed with the trial court's assessment of damages for defamation at Kshs 1,500,000 and the case of *Abdi Mohamed Farah v Nairobi Star Publication Ltd & Another* [2015] eKLR where Aburili J awarded the plaintiff Kshs 3,000,000 as general damages and Kshs 1,000,000 as aggravated damages.

Analysis and Determination;

14. Having gone through the plaintiff's pleadings and submissions, the issues for this court's determination are;
 - ii) Whether the email by the defendant was false, malicious and defamatory of the plaintiff;
 - iii) What damages, if any, are awardable and who should pay costs?
15. During the hearing, despite service, the defendants neither called any witness, participated in the proceedings nor filed their submissions hence the evidence by the plaintiff remains uncontroverted. In the case of *CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)* [1978] eKLR Madan J. (as he then was) stated:-

“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of “evidence” in *Cassell's English Dictionary*, p 394:

Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

16. Gately on *Libel and Slander* 10th Edition at page 8 has discussed the tort of defamation and stated inter alia that:-

“There is no wholly satisfactory definition of defamatory imputation. Three formulae have been particularly influential: (1) would the imputation tend to ‘lower the plaintiff in the estimation of right-thinking members of society generally?’ (2) would the imputation tend to cause others to shun or avoid the claimant? (3) would the words tend to expose the claimant to ‘hatred’ contempt or ridicule? The question what is defamation relates to the nature of the statement made by the defendant: words may be defamatory even if they are



believed by no one and even if they are true, though in the latter's case they are not, of course, actionable.”

17. Similarly, Patrick O'Callaghan in the *Common Law Series: The Law of Tort* at paragraph 25.1 states as follows;

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 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 that injure his reputation.”

18. Recently, the Court of Appeal in *Selina Patani & another v Dhiranji V Patani* [2019] eKLR cited with authority the case of *John Ward v Standard Ltd*, HCCC 1062 of 2005 where the ingredients of defamation were summarized as below: -

- (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.

19. In the present case the alleged defamatory email was sent to the plaintiff by the defendant and copied to other colleagues within the organization. It is the plaintiff's case that the impugned email in its ordinary meaning meant and was understood to mean that he engaged in fraudulent and unethical conduct during his tenure at the UN Sacco. The alleged defamatory statement has been reproduced in this judgment.
20. As a result of the alleged defamatory email, the plaintiff alleges that his reputation as a leader in the financial sector in the East African Region, a respected senior banker of good standing and a business development strategist has been greatly injured. The plaintiff has stated that despite being cleared of any fraudulent or unethical conduct by an audit conducted by the M/S Deloitte East Africa of the UN Sacco accounts the defendant has failed to tender apology and retraction. Additionally, the plaintiff states that the plaintiff has failed to avail evidence to prove any of his malicious allegations.
21. From the evidence on record, I do find that the impugned e-mail is defamatory of the plaintiff's character. It is evident from the e-mail that the plaintiff was being called upon to refund or pay some monies that had been paid to him in form of kickbacks. There is no explanation from the defendant as to why the email was copied to other parties yet the content was personal. The only logical conclusion is that the defendant was out to inform third parties that the plaintiff had been taking kick backs from the Sacco's clients. I am satisfied that the plaintiff has proved his case on a balance of probabilities.
22. On the issue of quantum, I do find that the prayer for Kshs 15 million as damages is quite excessive. Those who were copied the e-mail were the plaintiff's former workmates. The e-mail was not published in the main media but was copied to a few people. The case of *Abdi Mohamed Farah* (*supra*) offers some guidance on the amount of damages to be awarded to the plaintiff. Given the circumstances of this case, I do find that an award of Kshs 1,500,000 will adequately compensate the plaintiff. I see no reason for granting exemplary damages.
23. In the end, the plaintiff is awarded Kshs1,500,000 as general damages, costs and interest. Interest shall be at court rates and shall accrue from the date of judgment.



DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MARCH, 2022.

S.J. CHITEMBWE

JUDGE

