



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NUMBER 28 OF 2019

PETER NGE'ETHE NGARI T/A P.N.N FUNERAL SERVICES.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED.....1ST DEFENDANT

NJIRAINI M.MACHARIA.....2ND DEFENDANT

J U D G M E N T

1. The plaintiff filed a plaint dated 10th July, 2019 seeking judgment against the defendants for:-

- (a) *Restraining order against the 1st and 2nd defendant from publishing articles stories or any other information in any of its publication which is defamatory of the Plaintiff.*
- (b) *General Damages for libel.*
- (c) *An Apology to the plaintiff with the same prominence as the offending publication.*
- (d) *Costs of this suit and interests.*
- (e) *Any other relief this court may deem fit and just to grant.*

2. The cause of action arose from a publication attributed to the defendants published on 14th June, 2019, through an Article in the Nairobi newspaper a story which was titled as follows: -

NJIRAINI M MACHARIA V P.N.N FUNERAL SERVICES.

My name is Njiraini M. Macharia. I am a florist based in Nakuru since April 2018 until recently in March 2019. P.N.N owes me Kshs.210, 000/=. My supplies by then were based on a gentleman's agreement. However, as time went by the debt accumulated to that much. I have been trying to follow on the amount but to no avail. They have been promising to clear the debt but this has so far not happened.

3. According to the plaintiff the words, phrases and the all the clauses in the above article in their ordinary and natural meaning implied that he was shrewd, unscrupulous and a dishonest business man who never paid his debts as they fell due and who was not creditworthy. That the same was published maliciously and calculated to lower his dignity in the eyes of the right thinking members. He averred that at the time of the publication he did not owe any money to the 2nd defendant and therefore the article was defamatory by innuendo. He pleaded the following particulars of Innuendo; that

- i. He is capable of obtaining goods by false pretense;*
- ii. He is impecunious;*
- iii. He should be shunned by members of the public;*
- iv. He lacks integrity considering his standing in the society and business circles; &*

v. He is not credit worthy.

4. The plaintiff contended that the said publication also destroyed his reputation and subjected him to mental anguish, psychological torture, distress and embarrassment.
5. The claim is denied by the defendants.
6. The 1st defendant through its defence dated 9th August, 2019 averred that the words in the publication consisted of statement of facts, true in substance and they constituted fair comment on a matter of public interest made in good faith, without malice and was not defamatory of the plaintiff by way of innuendo.
7. The particulars of fair comment were set out as hereunder
 - (a) *The 1st defendant did not pass any judgment upon the plaintiff;*
 - (b) *The 1st defendant contacted the plaintiff before publishing the alleged defamatory material;*
 - (c) *The 1st defendant verified the information from the 2nd defendant before publishing the same;*
 - (d) *The plaintiff had not paid the 2nd defendant Ksh. 210,000/= but only paid Ksh.10,000/= after the publication;*
 - (e) *The 1st defendant's publication provided a fair, true and accurate account of the facts given by the 2nd defendant;*
 - (f) *The 2nd defendant's publication was an objective and accurate from the 2nd defendant and was not malicious with no misrepresentation of facts or insertion of false accusation;*
 - (g) *The plaintiff being a renowned enterprise dealt with a great number of people and therefore the 1st defendant published the said information in fulfillment of its statutory role to inform the public of the unfairness done by the plaintiff to its supplier.*
8. It was the 1st defendant's contention that the plaintiff had not suffered any damage to his business nor did he have any good will, reputation, integrity which suffered any damage and or injury. The 1st defendant faulted the plaintiff for failure to disclose to the court that after the impugned publication the plaintiff paid the 2nd defendant Kshs.10, 000/= leaving a balance of Kshs. 200,000/=.
9. The 2nd defendant denied the plaintiff's claim through his statement of defence dated 9th August, 2019. He averred that if indeed the publication resulted in any of the meaning captured in the plaint, then the same was as a result of the plaintiff's conduct towards him. He further averred that the statements contained in the publication were true and were made in good faith as he would demonstrate that the plaintiff owed and continued to owe money to him.
10. He asserted that the words read in context were understood by the general public to mean that: -
 - i. He supplied flowers to the plaintiff;
 - ii. He was to be paid for the products supplied on time;
 - iii. He had made several requests to be paid by the plaintiff;
 - iv. The plaintiff refused to pay him his money on time;
 - v. Being a man of straw, he opted to get assistance from the 1st defendant to push the plaintiff to pay him his money; &
 - vi. That after the 14th of July 2019 publication, the plaintiff paid part of the debt and that he was still following up on the balance.
11. He pleaded that the words in their natural and ordinary meaning were true in substance and in fact.
12. Particulars of truth and justification were set out as follows;
 - (a) *The 2nd defendant was a florist based in Nakuru*
 - (b) *The plaintiff and the 2nd defendant entered into a gentleman's agreement for the supply of flowers.*
 - (c) *The plaintiff owed him Kshs. 210,000/= and only paid Kshs.10,000/= postdated cheque after publication of his story by the 1st defendant.*
 - (d) *The plaintiff had on several occasions promised to pay him the outstanding amount but had failed to do so.*

13. He averred that he would rely on **Section 14 of the Defamation Act Cap 36 Laws of Kenya.**

14. He concurred with his co-defendant that the plaintiff had not suffered any damage to his reputation and business and neither did the plaintiff have such reputation and integrity worthy of loss. He similarly faulted the plaintiff for failing to disclose to the court that after the impugned publication he paid him Kshs. 10,000/= leaving a balance of Kshs. 200,000/=.

PLAINTIFF'S CASE

15. In his testimony the Plaintiff adopted his statement dated 10th July 2019 as his evidence. He told the court that on the 14th June 2019 while reading the Nairobi Newspaper he came across the said article. That the publication was made without verifying the truth from him and was made maliciously. He stated that he was seeking the courts intervention because the unlawful action by the defendants **'might result in irreversible damage to my reputation in the society which will be most unfair'**.

16. He told the court that he was a business man carrying on the business of selling caskets, flowers and transporting people and that he knew the 2nd defendant as he used to supply him with flowers.

17. He testified that the defendants herein defamed him by publishing in the newspaper that he owed the 2nd defendant Ksh.210, 000/= yet it was only Kshs.10, 000/=. He said he wrote a cheque dated **22nd June, 2019** of Kshs.10, 000/= to the 2nd defendant and that the publication that he owed the 2nd defendant Kshs.210, 000/= was unsupported. It was his testimony that after the said publication his lawyer wrote a Demand Letter to the defendants dated 17th June, 2019 and neither of the defendants contacted him to verify the issue but the 1st defendant still proceeded to put the story in the Nairobi Newspaper stating that he had paid Kshs.10, 000/= to the 2nd defendant leaving a debt is Kshs.200, 000/=.

18. That as a result of the said publication his business had deteriorated and he could no longer take loan as it was believed he could not pay his debts.

19. He testified that he had never given the 2nd respondent his email address and the one that had been used to write to him did not belong to him. That his lawyer wrote a demand letter to the respondents but only the 1st respondent responded stating that they would investigate the claims. He produced a copy of the newspaper page with the publication and the letters.

20. He testified that as a result of the publication his work was affected, his suppliers stopped supplying on the basis that he did not pay his debts, that he could not access loans, that his name was completely spoilt, that he had suffered loss and damage he sought damages for the spoiling of his name, compensation for loss of business, and costs of the case.

21. On cross examination he stated that the newspaper article had not mentioned his name but his company's name. That he had sued because the company was his. He did not have any evidence in court that the Company was his. He said he was not aware that even if the company was his he could not sue in his name.

22. He said that the company has only two directors i.e. himself and one Hannah Wangui Ngethe. He did not have any resolution from the company to file this case.

23. He testified that the publication was on the 14th of June 2019 and he paid the sum of Kshs. 10,000 to the 2nd respondent vide a cheque dated 22nd June 2019. He said he did so because he was paying the 2nd defendant weekly basis. He could not produce any evidence to support this position.

24. Shown records kept by one Teresia who he conceded was his employee, he objected to the same saying that he did not keep any records of the transactions between him and the 2nd defendant. He testified that he had three suppliers but did not keep any records.

25. Referred to his plaint he confirmed that he averred that at the time of the publication he did not owe the 2nd defendant any money.

26. He denied the email address that was used to reach him was his or was on his website insisting that his was different.

27. On re-examination he told the court that the money he paid was for work done that week and had nothing to do with the 2nd defendant's claim. He said he had not been shown anything to show the source of his email address. Shown the document allegedly kept by his employee as record of the transactions with the 2nd defendant he denied the same. He did not call any witnesses.

DEFENDANTS' CASE

28. The first defendant called Yvonne Kawira. She adopted her witness statement filed on 3rd October 2019 as her evidence. She testified that she was a journalist with the 1st defendant. She caused to be published the article subject of this case on 14th June, 2019 in the Nairobi Newspaper about the P.N.N Funeral Home. That the publication fell under the banner and section "DEFENDER" which section played the role of complimenting the office of the Ombudsman by publishing legitimate complaints from the members of the public and trying to resolve them amicably. She stated:

"The defender seeks to improve service delivery by tackling a diverse range of issues related to specific instances of maladministration which includes aspects such as unreasonable delay, administrative injustice, oppressive, unresponsive, unlawful,

prejudicial and unfair conduct, impropriety, abuse of power, discourtesy, inefficiency, manifest injustice, incompetence, ineptitude, unfair treatment and misbehavior in office among others”

29. That the Defender had the approval of the office of the Ombudsman when it launched in 2015.
30. She stated that when she received a complaint from the 2nd defendant she forwarded the same to the Plaintiff's email address [particulars withheld] on 7th June, 2019. That the plaintiff was therefore given an opportunity to give his side of the story however he chose not to respond.
31. That the 2nd defendant did inform her of the postdated cheque the plaintiff had made to him and that she caused to be published that development. That she harbored no ill will against the plaintiff but had published the story as a genuine claim from the 2nd defendant. That the 2nd defendant informed her of the accumulated debt of Kshs. 183, 000/= from a transaction contained in a book in custody of the plaintiff. It was her testimony that she caused the impugned publication without malice and was meant to compel the plaintiff to settle what was owed to the 2nd defendant
32. On cross examination she adduced no evidence to prove that email address [particulars withheld] belonged to the Plaintiff. She testified that it was for the legal department of the 2nd defendant to conduct investigations. That she had verified from the 2nd defendant that he was owed money by the plaintiff. She confirmed the second publication was made after the 1st defendant had received a demand letter from the Plaintiff.
33. The 2nd defendant was DW2. He testified that the plaintiff was his client and he supplied flowers to him. That they were both in the juu kali sector and the plaintiff would pay when he got the money. That there was no contract and they acted on what he termed as a gentleman's agreement. That the relationship started April, 2018 (it ended in May 2019) when he started supplying flowers to the plaintiff on mutual trust. That when the debt accumulated to the amount in question the plaintiff offered to pay in cheques of Kshs. 50,000 but failed to do so. He was forced to terminate the business. Then he saw the email address of the DEFENDER in the newspaper and decided to write to them. That he wrote to them and they published the exact words of what he wrote to them. He said soon after the publication the plaintiff paid him Kshs. 10,000/=. He said he could not sue him as he could not afford the legal fees. That they would record the supply and the cost of the same in a book and he would be paid on a later date. On 31st May 2019 he wrote an email to the 1st defendant to assist him to recover his outstanding debt from the plaintiff.
34. That when the 1st defendant published the content of his email on its newspaper on 14.6.2019 the plaintiff paid him Kshs. 10,000/= and remained with Kshs. 200,000/= which he was hoping he would also clear but to his surprise he was served with these proceedings on allegation that he defamed the plaintiff. He stated that there was absolutely no malice or ill will as against the plaintiff all he wanted was to be paid his money to enable him run his business.
35. On cross examination, he stated that he had by chance been able to take a picture of a document that showed the written statement of what was owed to him. He said he had never written to the plaintiff a Demand Letter. He said his weekly supply was worth Kshs. 15,000/=. He also confirmed he did not have proof that the plaintiff owed him Kshs. 200,000/=
36. He also said that he wrote to the newspaper what was in his heart. He said he did not think it would be in the paper. He said he complained about PNN Funeral Services. He said that his father had also tried to settle the matter out of court in vain

SUBMISSIONS

37. Parties agreed to file written submissions.
38. The Plaintiff filed his Submissions on 27th July, 2021. The defendant filed Submissions and List and Bundle of Authorities on the 28th October 2021.
39. The plaintiff submitted on the following issues;
- ***Whether the story was defamatory;***
 - ***Was the publication justified;***
 - ***Did the publication constitute a fair comment?***
 - ***Extent of the damages payable to the plaintiff.***
40. On the first issue, the plaintiff submitted that defamatory publication must convey a defamatory imputation. That the court of appeal while quoting GATLEY on Libel in the case of **Joseph Njogu Kamunge Verses Charles Muriuki Gachari** stated as follows: -

*"The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one **to a man's discredit**, or which **tends to lower him in the estimation of others**, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of **right-thinking persons generally**. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a*

defence to an action brought on it; conversely untruth alone does not render an imputation defamatory."

41. The plaintiff argued that the dictum of the Court of Appeal in this case formed the basis upon which the court would weigh the publication by the defendant. The court was urged to consider the publication in the context in which it was made. To the plaintiff the story, in the plain language, was to be understood by any right thinking members of the society that the plaintiff was shrewd, unscrupulous and a dishonest business man who never paid his debts when they fell due and one who was not credit worthy. That the tendency was to lower his reputation in the eyes of the suppliers and the society at large and thus defamatory.

42. On the second issue, the plaintiff submitted that the plaintiff relied on **Section 14 of the Defamation Act**, that the publication was justified. That by raising that defence the defendants meant that the information published was factual. Relying on the case of **Joseph Njogu Kamunge vs Charles Muriuki Gachari [2016] eKLR**, the plaintiff argued that the defendants were bound to lead evidence as to the truthfulness of the statement as is required by **Section 107 of the Evidence Act**. On the third issue, the plaintiff submitted that the 1st defendant at paragraph 9 of its defence pleaded that the publication consisted of a fair comment. The plaintiff argued that for the defence of fair comment to succeed, the defendant had to lay a factual basis for the same because a comment can only be fair if it is based on facts. For this proposition the plaintiff relied on **Nation Media Group Limited & Another vs Alfred N.Mutua [2017] eKLR** where the court observed that:-

“To sustain the defence of fair comment, the appellants were required to demonstrate that the words complained of are comment and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is on a matter of public interest”

Mong’are T/A Gekonga & Momanyi Advocate Vs Standard Ltd this court stated that;

“That comment can only be fair if the basic facts upon which the comment is premised are correct. A comment which is based on lies or falsehood cannot be designated as fair”

43. It was submitted that the plaintiff was never contacted on the truthfulness of the statement and no evidence was provided to show that the plaintiff owed the defendant money.

44. On the fourth issue, the plaintiff argued that in assessing the damages payable in an action for libel, the court looks at the conduct of the defendant before, during and after the action for libel. He relied on the case of **Joseph Njogu Kamunge vs Charles Muriuki Gachari [2016]eKLR** quoting the case of *Broom vs Cassel* stated as follows:-

“The house of Lords stated that in actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily and even highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charges.”

45. The considerations made by the court are both objective and subjective. The plaintiff thus argued that in the instant case the libelous publication was grave. That the intention of the 2nd defendant was to have the publication get the widest possible readership, to whip up emotions against the plaintiff for their commercial gain and bring down his business.

46. On the foregoing the plaintiff prayed that the court awards damages as follows: -

General damages for libel	Kshs.5, 000,000/=
Exemplary damages	Kshs.2, 000,000/=
Damages in lieu of apology	<u>Kshs.1, 000,000/=</u>
Total	<u>Kshs.8, 000,000/=</u>

47. In support of the above position the plaintiff relied on the cases of;

(i) **Abdi Mohammed Farah vs Nairobi Star Publication Ltd & Another [2015] eKLR**. where the Court awarded a sum of Kshs.20, 000,000/= in damages.

(ii) **Hon Martha Karua vs Nation Media Group Limited 2010 eKLR** where the court awarded a sum of Kshs. 3,000,000/= for damages for libel Kshs. 1 million exemplary damages and Kshs.5 million as damages in lieu of an apology.

48. The plaintiff further sought for an apology with the same prominence as the offending publications.

49. The defendants filed their submissions on 28th October 2021. They submitted on the following issues;

- i. *Who is the proper plaintiff in the present case?*
- ii. *In the alternative, is the failure to file a board resolution sanctioning the suit fatal?*
- iii. *Have the elements of defamation been met?*
- iv. *Was the publication justified as a fair comment?*
- v. *Was the case proved to the required standard?*
- vi. *Are the reliefs sought merited?*

50. With regard to the first issue, the defendants submitted that P.N.N Funeral Services is a limited liability Company and therefore the plaintiff (Peter Ng'ethe Ngari) had no authority to bring this suit. That a company is a separate legal entity which can sue in its own name. To support this proposition, the defendants relied on the cases of Moir vs Wallersatiner [1975] 1 ALL ER 849 & Edwards vs Halliwell [1950] ALL ER 1064 which were cited with approval in the case of Yussuf Abdi Adan & Another vs Hussein Ahmed Farah & 3 Others [2017] eKLR.

51. On the second issue, the defendants argued that should this court find that the plaintiff is a company then this suit is improperly before court for want of a resolution to sue. To support this position, the defendants relied on the case of Affordable Homes Africa Limited vs Ian Henderson & 2 Others, HCCC No.524 of 2004 where the court struck out with costs the Preliminary Objection on grounds that there was no board resolution sanctioning the commencement of the suit on behalf of the company.

52. The defendants similarly placed reliance on the case of Directline Assurance Company Limited vs Tomson Ondimu [2019] eKLR where the court observed that institution of a suit on behalf of a company must be instigated by way of a resolution.

53. The defendants thus urged this court to be persuaded by the above authorities since there was no evidence on record to prove that the plaintiff had the requisite authority to institute this suit on behalf the company.

54. In answering the third issue, the defendants cited the case of Brian Odhiambo Oluoch vs Standard Chartered Bank Ltd [2017]eKLR where the court stated that to succeed in a claim for defamation, a party must establish the following ingredients;

- i. The matter to which the plaintiff complains about was published by the defendant.
- ii. The publication concerned or referred to the plaintiff.
- iii. That it is defamatory in character
- iv. That it was published maliciously and
- v. That in slander, subject to certain exceptions, that the plaintiff has thereby suffered damage.

55. The defendants relied further on the case of Phinehas Nyagah vs Gitobu Imanyara [2013] eKLR where the court found that elements of the tort of defamation are that the words must be defamatory in that they tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided, the words must refer to the plaintiff and that the words must be malicious.

56. The defendants submitted that the impugned publication was not defamatory because it was merely a cry for help of a young entrepreneur who had no funds to institute a suit for recovery of the sums demanded. That it was irrefutable that the 2nd defendant sold flowers to PNN Funeral services and was not paid the same to date. That Peter Ng'ethe Ngari did not deny there was a business relationship between the company and the 2nd defendant but denied he was indebted to the 2nd defendant. That Peter Ng'ethe Ngari's evidence in that regard did not controvert the 2nd defendant's evidence that he was owed money by P.N.N Funeral Services.

57. The defendants stated that the authors of Halsbury's Law Of England 4th Edition Vol.28 opined at page 23 that: -

“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”

58. Guided by the above opinion, the defendants submitted that Peter Ngethe Ngari neither suffered any damage to his business nor did he have any good will, reputation, integrity which suffered any damage and or injury as no independent person was called to testify in regard to his alleged injured reputation.

59. In arguing that the impugned publication did not refer to Peter Nge'ethe Ngari, the defendants relied on Gatley On Libel & Slander, 11th Edition at Page 211 where it states that:-

“No writing whatsoever is to be esteemed as libel unless it reflects upon a particular person. It is an essential element of the cause of action for defamation that the words complained of should be published ‘of’ the plaintiff”

60. The defendants also relied on the case of **Ahmed Sheikh Adan vs Wangethi Mwangi & Another [2018] eKLR** which cited with approval the **9th edition** of the above book and stated that a defamatory statement must identify and refer to the plaintiff. In the present case, hence the words published by the 1st defendant mentioned no person other than P.N.N Funeral services.

61. It was the defendants’ submissions that the innuendo was not proved. In arguing so, the defendants relied on the case of **Jakoyo Midiwo vs Nation Media Group Limited & Another [2018] eKLR** where the court with regard to the definition of innuendo stated that:-

“...Black’s law Dictionary, 9th Ed. At page 860 defines innuendo as an oblique remark or indirect suggestion usually of a derogatory nature. In defamation law, an innuendo is the plaintiff’s explanation of a statements’ defamatory meaning when that meaning is not apparent from the statement...”

62. That equally the Court of Appeal in **Nation Newspapers Limited vs Lydia Chesire [1984] eKLR** observed that an action for libel by innuendo depends for its success on the proof by the plaintiff that special circumstances, or as it is frequently put, extrinsic facts, are known to persons who read the offending publications.

63. To that end the defendants contended that Peter Ng’ethe Ngari pleaded innuendo supposedly from the whole article and brought out the meaning he thought could be implied from the publication but failed to point to this court any special circumstances that would extrinsically lead a person to imply derogatory/offending statement from the publication.

64. The defendants argued that the publication was made in good faith without malice since the language used in the publication was not disproportionate to the facts and it largely contained the 2nd defendant’s email to the 1st defendant which brought out his plea. That the subsequent article by the 1st defendant that Peter drew post-dated cheque of Kshs. 10,000/= on his personal account in favor of the 1st defendant ousted malice as it repeated the first publication and noted true developments on the case which was a clear indication of good faith and fulfillment of the promise to the public.

65. With regard to the fourth issue, the defendants cited the provisions of **section 15 of the Defamation Act** and the case of **Kimani Ngunjiri vs Standard Group Limited & 3 Others Civil Case No.102 of 2016** where the court stated that for fair comment to succeed it must be shown that the statements constituted a comment and that there must be a factual basis for making the comment.

66. That the publication herein constituted fair comment since the comments made by the 1st defendant was based on the fact that the 2nd defendant was owed money by P.N.N Funeral Services.

67. With regard to the fifth issue, the defendants argued that the plaintiff in a defamation case is duty bound to prove his case. For this proposition the defendants relied on the cases of **Daniel N. Ngunia vs. K.G.G.C.U Limited Civil Appeal No.28 of 1998 & Selina Patani & Another vs Dhiranji V.Patani [2019]eKLR.**

68. That the plaintiff failed to prove essential elements of defamation and that no independent person was availed to tender evidence on injury to his reputation.

69. On the last issue, the defendants contended that no relief is available to either the plaintiff or Peter Nge’the Ngari as this case was not proved. That the prayer on exemplary damages and damages in lieu of apology was not pleaded in the Plaintiff.

70. They urged the court to dismiss the suit with costs to the defendants.

ISSUES FOR DETERMINATION

71. Having carefully considered the pleadings in this suit, the Witness Statements, the documents produced as exhibits, the evidence as tendered during the trial as well the Written Submissions on record, in my view the following issues fall for determination; .

- 1) ***Whether the publication is defamatory as alleged.***
- 2) ***Whether the publication was done by the defendants.***
- 3) ***Whether the publication was false and malicious.***
- 4) ***Whether the publication referred to the plaintiff.***
- 5) ***Whether the plaintiff suffered any loss or damage as a result of the publication and if so, whether he is entitled to the reliefs sought.***
- 6) ***Who is to bear the costs of the suit***

ANALYSIS AND DETERMINATION

1. **Whether the publication is defamatory as alleged**

72. The burden of proof lies with the Plaintiff to prove his case on a balance of probabilities as stipulated in **Section 109 of the Evidence Act** which provides that the burden of proof lies with that person who wishes the court to believe in its existence and that he who asserts a fact must prove, as stipulated in **Section 107 of the Evidence Act**.

73. In this case therefore the plaintiff has the burden of proving that the alleged material was published and were defamatory to him.

74. The elements of the tort of defamation were laid out in the case of **John Ward vs Standard Limited [2006] eKLR** as follows: -

- The statement must be defamatory.
- The statement must refer to the Plaintiff.
- The statement must be published by the Defendant.
- The statement must be false.

75. **Clerk & Lindsell on Torts 20th Edition, Sweet and Maxwell 1998 at page 1093** states that the law protects every person's right to possess a good name and a person who communicates to a third party a matter which is untrue is guilty of a legal wrong and the remedy is a claim for defamation.

76. **Halsbury's Laws of England 4th Edition Vol. 28** defines 'defamation' as follows: -

"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."

77. In **Gatley On Libel and Slander 6th Edition at Pg. 6** the learned author stated that –

"A defamatory statement must be false and it must also be defamatory to the plaintiff, that it 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."

78. The Court of Appeal in the case of **Wycliffe A. Swanya vs 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."

79. In **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR** the court held;

"A defamatory statement is presumed to be false, unless the defendant can prove its truth. Defamation law puts the burden of proving the truth of allegedly defamatory statements on the defendant, rather than the plaintiff."

80. It is not in dispute that the 2nd defendant was a florist and used to supply flowers to the plaintiff. The plaintiff admitted that he paid Kshs.10, 000/= to the 2nd defendant after the story was published. He clarified that he paid the plaintiff not because of the impugned story but because he used to make payments to him on a weekly basis. He however did not tender any documentary evidence to prove this position.

81. The 2nd defendant produced a cheque of Kshs.10, 000/= evidencing that the plaintiff paid him after the story in the newspaper was published.

82. The plaintiff did not refute that his relationship with the 2nd defendant was based on mutual trust. He stated that he did not keep any records of the business transactions between him and the 2nd defendant. Hence either way there nothing to confirm or rebut the amount owed, whether Kshs. 210,000/= of Kshs. 183,000/= as per the document exhibited by the 1st defendant. The plaintiff's position that he used to pay the 2nd defendant on a weekly basis, was not supported by any evidence. The only inference to be drawn is that the plaintiff paid the 2nd defendant the amount herein after the story was published by the 1st defendant.

83. The defence of justification applies in the circumstances There is evidence that the plaintiff owed the 2nd defendant money. After the publication of the story he paid Kshs.10, 000/= by cheque. This rendered some truth to the publication.

Whether the publication was done by the defendants

84. It is not disputed that the article was published by the 1st defendant. DW1 told the court that she was the author of the article that was published by the 1st defendant. She also stated that she relied on the complaints reported by the 2nd defendant to write the article.

85. The 2nd defendant on his part admitted he registered his complaints with the 1st defendant via email who in turn published the same in their newspaper.

Whether the publication was false and malicious

86. The Court of Appeal in **Raphael Lukale vs Elizabeth Mayabi & Another [2016] eKLR** while dealing with the issue of malice stated that: -

“Malice can be inferred from a deliberate or reckless ignoring of facts. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. Malice may also be inferred from the relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings.”

87. In **Phinehas Nyaga vs Gitobu Imanyara [2013] eKLR** the Court discussed malice as follows: -

“ ... 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.”

88. It is the 1st defendant's case that publication fell under the banner and section called the “DEFENDER” which section played the role of complimenting the ombudsman office by publishing legitimate complaints from the members of the public and trying to resolve them amicably.

89. The 1st defendant upon receipt of the 2nd defendant's complaint sent an email to the plaintiff but it never received any response. The 1st defendant admitted that it relied on the 2nd defendant's word concerning the owed debt and it published the article in an attempt to compel the plaintiff to pay the 2nd defendant the outstanding debt. The plaintiff admitted he had a debt of Kshs.10, 000/= which he paid the 2nd defendant.

90. The payment of this money after the story was published by the 1st defendant, a clear indication on their part that the information had reached the plaintiff and he was acting accordingly hence the acknowledgement. Those do not seem to be the actions of a malicious person. The language used by the 1st defendant in its publication was not utterly beyond the facts. Even though there is no evidence on record about the plaintiff's correct email address there is demonstration by the 1st defendant that they made an attempt to inquire into the facts of the complaints raised by the 2nd defendant by sending an email to the plaintiff before publishing the impugned article.

91. The 2nd defendant after receiving Kshs.10,000/= from the plaintiff apprised the 2nd defendant who in turn published the same. These actions by the defendants do not demonstrate or reek of malice.

92. Further there is no evidence on record to show the publication disparaged the plaintiff's reputation and lowered him in the estimation of right thinking members of the society generally. the plaintiff did not show that the alleged publication disparaged his reputation and lowered him in the estimation of right thinking members of the society generally. No one came to testify to that alleged fact.

Whether the publication referred to the plaintiff

93. It is undisputable that the statement in the publication expressly referred to P.N.N Funeral Services and not the plaintiff herein. During hearing the plaintiff stated that P.N.N Funeral Services is his company and that the company has two directors, himself and his wife. He did not adduce any evidence to prove that he is either the director or the owner of the company He also conceded he had no authority to institute this proceeding on behalf of the company

94. Order 4 rule 1(4) of the Civil Procedure Rules provides:

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

95. The *Halsbury’s Laws of England/Fourth Edition at page 429* stipulates that;

“A company, not being a physical person, can only act either by resolution of its members in general meeting, or by its agents. It is not the agent of its member and a member as such is not the agent of the company, the company being a separate entity or legal person apart from its members, who are not even collectively, the company”.

96. In **Philomena Ndanga Karanja & 2 Others vs Edward Kamau Maina**, ELC No. 1411 of 2014;

“I have considered the rival submissions, and it is obvious that the suit herein was filed without the resolution of the Board. The 1st plaintiff tried to justify that position. However, it is trite law that where a suit is instituted for and on behalf of a company, there should be a company resolution to that effect”.

97. The plaintiff did not demonstrate in evidence how PNN Funeral Services was related to his person and how the mention on PNN Funeral Services in the Article could be related to him by members of the public. He produced no evidence to support his claim that the mention of PNN Funeral Services meant that it was he who was being mentioned.

98. The authorities cited herein above state clearly that defamation must be of the plaintiff. The article did not mention Peter Ngethe Ngari.

99. Further without proof that he was either the director or the owner of the company and as such it is evident that the publication did not refer to him.

Whether the plaintiff suffered any loss or damages as a result of the publication and if so, whether he is entitled to the reliefs sought.

100. The plaintiff submitted that the publication was defamatory and intended to lower him in the estimation of right thinking members of the society. He did not produce any evidence to support the assertion that his business had collapsed, that his supply chain had closed and that he could not access loans because of the said publication the plaintiff failed to prove he suffered any loss and he is not entitled to the reliefs sought.

Who is to bear the costs of the suit

101. The statutory provision that governs costs is found under **Section 27 of the Civil Procedure Act** which states as follows:

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or the Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order . (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

102. Costs follow the event.

103. In the upshot, I find that the plaintiff failed to prove his case on a balance of probabilities. The same is dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 7TH DAY OF APRIL 2022.

MUMBUA T MATHEKA

JUDGE

CA Edna

Githui & Co. Advocates:

Limo & Njoroge Advocates: