



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 680 OF 2002

JAMES MUCHENE NGEI.....LAINTEIFF

VERSUS

JOSEPH GILBERT KIBE1ST DEFENDANT

BOC KENYA LIMITED.....2ND DEFENDANT

JUDGMENT

1. The plaintiff, *James Muchene Ngei* sued the two defendants, *Joseph Gilbert Kibe* and *BOC Kenya Limited* seeking *inter alia*, general damages for defamation together with costs of the suit and interest.

2. In his plaint dated 22nd April 2002, the plaintiff averred that he was employed by the 2nd defendant on 28th October 1999 as a Financial Controller, a position he held until 9th February 2001 when the 2nd defendant unlawfully summarily dismissed him from its employment. According to the plaintiff, his dismissal was part of a scheme contrived by among others, a *Mr. Stephen Viljoen* aimed at blocking him from ascending to the position of Managing Director in line with the Immigration Department's Kenyanisation Policy which allegedly required that top management positions in the 2nd defendant be filled by Kenyan nationals.

3. From the pleadings in the plaint, it is apparent that the plaintiff's cause of action is premised on a letter dated 23rd April 2001 authored by the defendants addressed to the Department of Immigration, Office of the Principal Immigration Officer which sought to justify a further approval of an entry permit for *Mr. Stephen Viljoen* but which in the plaintiff's view, made scandalous, disparaging and defamatory statements concerning him.

4. Though the entire letter is reproduced in paragraph 19 of the plaint, the plaintiff underlined paragraph 5 thereof which stated as follows:

“... Unrelated to any of the above, Mr. Muchene committed a number of serious offences and after due consideration was summarily dismissed in accordance with Kenyan Labour Law.”

5. The plaintiff asserted that the defendants falsely and maliciously published the above words and statements in reference to him which in their ordinary meaning meant and were understood to mean that he is, *inter alia*, a criminal, a dishonest man of dubious unethical and improper conduct and a person of questionable integrity.

6. It is the plaintiff's case that as a result of publication of the impugned letter, he had suffered mental anguish and indignity; that he had been greatly injured in his reputation and personal credit. The plaintiff further alleged that the publication caused him to be lowered in the estimation of right thinking members of the Kenyan and international society, his peers, friends, family members, business associates and the community in general.

7. In their joint statement of defence dated 17th February 2003, save for admitting having written the aforesaid letter and that the plaintiff was dismissed from the 2nd defendant's employment on 9th February 2011, the defendants denied each and every allegation in the plaint and put the plaintiff to strict proof thereof.

8. At the hearing, the plaintiff was represented by learned counsel *Mr. Koceyo* while learned counsel *Mr. Leshan* represented the defendants. The plaintiff testified in support of his case as the sole witness while the 1st defendant testified on his own behalf and on behalf of the 2nd defendant.

9. In his evidence, the plaintiff adopted his witness statement filed on 19th September 2013 as part of his evidence in chief. He also produced the documents specified in his list of documents filed on even date as *P exhibits 1 to 80*. He narrated how he was employed and later dismissed from the 2nd defendant's employment. He confirmed in his evidence that the only aspect of the letter dated 23rd April 2001 that

was false and defamatory was the claim that he had committed serious offences and that consequently, he had been dismissed from the 2nd defendant's employment with due consideration. In his view, the phrase "serious offences" was too wide and could be interpreted to mean that he had committed criminal offences. He denied having committed a single offence during the period of his employment let alone serious offences.

10. In addition, the plaintiff stated that after his dismissal, the defendants lodged several complaints with various law enforcement agencies implicating him with fraud and sending threatening messages to the 2nd defendant's Managing Director which after investigations were found to be false. He claimed that these actions by the defendants amounted to evidence that in publishing the letter, they were actuated by malice. He reiterated his claim that as a result of the publication, his image and reputation both in his personal and professional capacity had been adversely affected to the extent that he was unable to secure another job.

11. On being cross examined by *Mr. Leshan*, the plaintiff admitted that the letter was only addressed to the Immigration Department and not to any other person or entity. He also admitted that he did not have any evidence to prove that the 2nd defendant had authorized the filing of any complaint against him to the police or that he had failed to secure any other employment as a result of the offending publication.

12. In countering the plaintiff's case, the 1st defendant testified as DW1. He adopted his witness statement dated 22nd July 2019 and further testified that the letter dated 23rd April 2001 contained only statements of fact and was not malicious or defamatory of the plaintiff as alleged or at all. He explained that the letter was written in response to a letter addressed to the 2nd defendant by the Immigration Department which sought information regarding the plans the 2nd defendant had in place to have a Kenyan citizen succeed *Mr. Stephen Viljoen* as the company's Managing Director and in particular the status of the plaintiff; that the plaintiff's summary dismissal was on account of offences categorized as "serious offences" in the 2nd defendant's disciplinary code and that therefore, the letter was a true representation of the status of the plaintiff with respect to the 2nd defendant.

13. When cross examined by *Mr. Koceyo*, DW1 stated that the reference to serious offences in the letter related to offences against the company not criminal offences. He testified that he was not aware that paragraph 5 of the letter had damaged the plaintiff's reputation.

14. In re-examination, DW1 stated that the letter was not copied to the plaintiff or to anyone else and the defendants did not know how the plaintiff had obtained the same.

15. After the parties closed their respective cases, their advocates on record filed written submissions buttressing the different positions taken by the parties in the matter.

16. The plaintiff started off his submissions by pointing out that actions for libel are actionable "per se" meaning that the plaintiff is not required to prove special damage; that damage is presumed by law. For this proposition, he relied on the authority of *Clement Muturi Kigano V Joseph Nyaga, HCC No. 509 of 2008*. He also spelt out the elements of defamation and denied the defendant's claim that the letter in question contained true statements in reference to him.

17. He cited the Court of Appeal decision in *Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others, [2014] eKLR* to make the point that parties are bound by their pleadings and since the defendants had not pleaded any of the defences to actions for defamation which included the defences of justification and privilege, the defences were not available to them.

18. Relying on the authority of *Machira V Mwangi & Another, HCCC No. 1709 of 1996*, the plaintiff urged the court to find that there was malice in the publication of the offending letter since the 1st defendant did not care whether or not its contents were true or false and he never bothered to get his side of the story.

19. The plaintiff further submitted that even before publication of the letter, the defendants' had by their conduct exhibited premeditated malice by harassing and making false complaints of a criminal nature against him to Banking Fraud Investigations Unit and Langata Police Station. He urged the court to associate itself with the reasoning in *Raphael Lukale V Elizabeth Mwayabi & Another, [2018] eKLR* where the court expressed itself as follows:

"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."

20. The plaintiff also made very lengthy submissions concerning his terms of employment, the provisions of the 2nd defendant's Disciplinary Code of 1999 and how the same were allegedly breached in the conduct of disciplinary proceedings prior to his summary dismissal which in my view were largely irrelevant to his claim for defamation.

21. On their part, the defendants submitted that the plaintiff had failed to prove that the defendants had published the offending letter either to the Principal Immigration Officer or to the cluster of persons identified in his plaint who allegedly held him in low esteem after the alleged publication. They urged the court to be guided by the meaning attributed to publication in *Halsbury's Laws of England (1979, 4th Ed, Butterworths) Vol 28* and *Gatley on Libel and Slander (1998, 9th Ed, Sweet & Maxwell)* which I will revert to shortly.

22. It was the defendants' further contention that the words used in paragraph 5 of the letter were not defamatory of the plaintiff and that no reasonable man would ascribe to them the meaning attributed to them in the plaint since they clearly referred to the reason for the plaintiff's summary dismissal in accordance to Labour Laws and there was no mention of the Police, the Director of Public Prosecutions or the court.

23. On the subject of defences, the defendants asserted that they did not need to expressly plead the defence of justification and qualified privilege; that their denial of the particulars of defamation pleaded in the plaint and their pleadings regarding the context in which the letter was written provided sufficient basis on which the defences could be mounted.

24. In their list of agreed issues dated 17th January 2008, the parties framed 13 issues for the court's determination. However, upon a careful analysis of the pleadings, the evidence on record, the parties' rival submissions and the authorities cited, I have distilled only three main issues which in my view arise for my determination in this case. These are:

- i. Whether the plaintiff has proved his claim for defamation against the defendants to the standard required by the law;*
- ii. If the answer to issue no. (i) is in the affirmative, whether any defence to defamation is available to the defendants; and*
- iii. Whether the plaintiff is entitled to the reliefs sought.*

25. Turning to the first issue, I wish to start by pointing out that the law of defamation is designed to protect reputation. This is because reputation is an integral and important part of a person's human dignity. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others safeguarded so that it is not affected by false statements which injure his reputation. That right has attained constitutional recognition in *Article 33* of the *Constitution of Kenya, 2010* which expressly obligates every person to respect the rights and reputation of others when exercising the right to freedom of expression.

26. That said, it is important to understand what constitutes the tort of defamation. Defamation is defined in *Blacks Law Dictionary 8th Edition at page 448* as:

“The act of harming the reputation of another by making a false statement to a third person ...”

27. A defamatory statement is defined in *Halsbury's Laws of England 4th Edition Vol 28 at paragraph 10* as:

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

28. The Court of Appeal has on several occasions pronounced itself on what constitutes a defamatory statement. In *SMW V ZWM, [2015] eKLR* and in *Musikari Kombo V Royal Media Services Limited, [2018] eKLR*, the court expressed itself in the following terms:

“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.”

29. Given the above definitions, it is evident that the test for determining whether or not a statement is defamatory is objective as opposed to subjective. It is based on what an ordinary reasonable man would understand the statement to mean and not the intention of the publisher or the claimant's personal perception of his reputation or character.

30. In order for a plaintiff to succeed in a claim for defamation, he must prove the following three essential elements of the tort. These are:

- i. That the matter of which the plaintiff complains is defamatory in character.***
- ii. That a defamatory statement or utterance was published by the defendant in reference to the plaintiff.***
- iii. That it was published maliciously.***

See: *Wycliffe A. Swanya V Toyota East Africa & Another, [2009] eKLR; Ibrahim J. Onyinkwa & 2 Others V Royal Media Services Limited, [2013] eKLR.*

31. In this case, the plaintiff's cause of action is anchored on the letter dated 23rd April 2007 written by the 1st defendant on behalf of the 2nd defendant. A perusal of the contents of the letter leave no doubt that it was addressed to the Office of the Principal Immigration Officer in reference to the plaintiff. As stated earlier, paragraph 5 thereof alleged that the plaintiff had committed a number of serious offences which led to his summary dismissal in accordance to labour laws.

32. Although it is true that the concluding statement in paragraph 5 indicated that the plaintiff's dismissal from employment was in accordance to labour laws, I am unable to agree with the defendants' submissions that this by itself led to an automatic inference that the serious offences referred to in the letter were work related and not criminal offences. I agree with the plaintiff's evidence that the defendants' failure to disclose the type of offences he had allegedly committed made the statement vague and subject to many interpretations including an insinuation that the plaintiff had committed criminal offences which warranted his summary dismissal.

33. It is not disputed that the plaintiff is a professional accountant who at the time the letter was written was the 2nd defendant's Financial Controller and was among the persons who had been identified as suitable to succeed the company's managing director who was set to

retire. I do not therefore entertain any doubt in my mind that the plaintiff was a respected and accomplished professional and that if the letter was published as alleged, any reasonable man reading it would have understood its paragraph 5 to mean that the plaintiff had been dismissed from employment because he had committed serious criminal offences. Am thus satisfied that any third party to who the letter may have been published would have associated the plaintiff with criminal conduct and to this extent, i am persuaded to find that the statement was defamatory of the plaintiff.

34. Having found as I have above, the question that now begs an answer is whether the plaintiff has demonstrated to the standard required by the law that the offending letter was, as a matter of fact, published by the defendants.

35. For purposes of the law of defamation, publication means communication of the alleged defamatory words or statements to a third party or persons other than the person defamed. In *Halsbury's Laws of England, (1979, 4th Ed Butterworths) Vol. 28 paragraph 60*, publication is defined as follows:

“.... publication is the communication of defamatory matter to a third person. ... merely to write down defamatory words is not to publish a libel. Even to deliver a defamatory statement to another is not to publish it to him if he does not become aware of the defamatory words. Publication consists in making known the defamatory statement after it has been reduced to some permanent form...”

36. On their part, the learned authors of *Gatley on Libel and Slander (1998 9th Ed, Sweet & Maxwell)* at paragraph 6.11 page 135 explained what constituted publication and the threshold for its proof, *prima facie*. They stated as follows:

“The fundamental principle is that the matter must be communicated to a third party in such manner as to be capable of conveying the defamatory imputation about the plaintiff. However, it is not necessary in every case for the plaintiff to prove directly that the words complained of were brought to the actual attention of some third person in this sense. If he proves facts from which it can be inferred that the words were brought to the attention of some third person, he will establish a *prima facie* case.”

37. In this case, though the defendants admitted having written the impugned letter, they denied having published it to the Department of Immigration and to any third party and put the plaintiff to strict proof thereof. It is important to note as stated earlier that the letter was only addressed to the Office of the Principal Immigration Officer and was not copied to the plaintiff or any other person. The plaintiff did not adduce any evidence to prove that the letter was actually sent to the office of the Principal Immigration officer or that the letter reached the said office by any other means and was read by any officer in that office.

38. The plaintiff did not explain in his evidence how he gained access to the letter given that it was not copied to him. He did not claim, for instance, that he obtained a copy of the letter from the Immigration Department or from any source other than the defendant's premises. Such a claim if made could have formed a basis for an inference that the defendants had published the letter. The plaintiff did not also adduce any evidence to prove his claim that the letter was published to his peers, family members, business associates and other members of the public who subsequently held him in low esteem. No third party was called to testify as to publication and damage to reputation.

39. In view of the foregoing, it is my finding that the plaintiff has failed to prove on a balance of probabilities that the defendants published the impugned letter to either the Office of the Principal Immigration Officer or to any other third party. Without publication, defamation or damage to reputation cannot arise since no third party would have become aware of the material alleged to be defamatory. Having failed to prove publication, it automatically follows that the plaintiff has failed to prove damage or injury to his reputation and standing in the eyes of right thinking members of the society.

40. I now wish to comment on the plaintiff's submission that in actions based on libel, proof of damage is not necessary because unlike slander, libel is actionable *per se*. In my view, the fact that libel is actionable *per se* does not exonerate the plaintiff from proving damage to reputation since this is an essential ingredient of the tort of defamation. It only means that the plaintiff is not required to prove special damage.

The Court of Appeal addressed this issue in *Selina Patani & Another V Dhiranji V. Patani, [2019] eKLR* where the court held thus:

”... In principle, defamation is actionable *per se*. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication...”

41. I believe I have now said enough to demonstrate that I have come to the conclusion that the plaintiff has totally failed to prove his claim for defamation against the defendants and I so hold. Having made that finding, I do not think it is necessary for me to deal with the remaining two issues I had earlier isolated for determination as doing so will only amount to an academic exercise and will not serve any useful purpose.

42. For all the foregoing reasons, I am satisfied that the plaintiff's suit lacks merit and it is accordingly dismissed with costs to the defendants.

43. The law however requires me to assess the damages I would have awarded the plaintiff had his claim succeeded. Had the plaintiff proved publication, considering that the impugned letter was addressed to only one person and the plaintiff did not adduce any evidence to show the extent of injury to his reputation, I would have awarded him only nominal damages in the sum of KShs.500,000 had he succeeded in his

claim.

DATED, SIGNED and DELIVERED at NAIROBI this 25th day of June 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Titus Koceyo for the plaintiff

Mr. Leshan for the defendants

Ms Mwinzi: Court Assistant