



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 105 OF 2011

ROBERT THORONJO KARANI.....PLAINTIFF

VERSUS

JEREMY MIRITI BUNDI.....DEFENDANT

JUDGMENT

1. The plaintiff in the present instance instituted a suit by way of the plaint dated 23rd March, 2011 in which he sought for the following reliefs against the defendant:

- a) General damages for libel.
- b) Aggravated damages for libel.
- c) Costs of the suit.
- d) Interest on (a), (b) and (c) above.

2. The plaintiff pleaded in his plaint that he was at all material times a Senior Sergeant of Police seconded to the Kenya Anti-Corruption Commission (“*the Commission*”) while the defendant was at the time the Principal Administration Officer in the Department of Finance and Administration of the Commission.

3. The plaintiff pleaded that on 3rd August, 2010 the defendant made the following defamatory publication by way of an email concerning him:

“Michael,

It is noted with concern that one of the officers in your division, Mr. Robert Karani, picked a commission motor vehicle KAS 618Q Toyota Prado on Sunday 1st August, 2010 from the reception with no authority from the officer in charge of transport. This is against staff rules and regulations.

We are informed that the vehicle broke down in Nyeri with a defective clutch system. This vehicle had just arrived from safari with a commission driver and there was no report/record of clutch problems. This breakdown can only be attributed to improper use/inexperienced handling of the vehicle. We have on several occasions observed that several vehicle defects have occurred when on self-drive by the officer amongst others.

When on safari over weekends/evenings, the driver normally keeps vehicle keys and work tickets at the security reception desk and we do not expect any commission officer to pick a vehicle from the security officers without authority. This action of the officer on a Sunday is questionable. There are vehicles attached to the division and the same could have been used as per the arrangements within the division.

Please inform the security officers not to allow any officer to pick commission vehicles without authority from the officer in charge of transport. By a copy of this email, the SO-Administration is hereby requested to liaise, obtain and compile a report of how/with whose authority this vehicle left Integrity Centre and how the breakdown occurred.

J. Bundi”

4. It was pleaded in the plaint that the aforesaid email publication was copied to various other officials in the Commission.
5. Upon service of summons, the defendant entered appearance and put in the statement of defence dated 25th March, 2015 to deny the plaintiff's claim.
6. In his defence, the defendant admitted the plaintiff's employment with the Commission and the making of the publication, but denied that the same was false and malicious of the plaintiff, or that the words published could in their ordinary sense be understood to bear the meanings pleaded in the plaint.
7. The defendants pleaded the defence of truth by setting out its particulars in paragraph 7 of the defence.
8. At the hearing, both the plaintiff and defendant gave evidence before closing their respective cases.
9. In his chief testimony, the plaintiff stated that he is a retired police officer and proceeded to adopt his executed witness statement and produce his bundle of documents as P. Exh 1- 34.
10. In cross examination, the plaintiff testified that it is not true that he was not authorized to pick the Commission's motor vehicles or that he took motor vehicle KAS 618Q Toyota Prado ("*the subject motor vehicle*") to Nyeri on the material day, where it eventually broke down.
11. According to the plaintiff, he was authorized to drive motor vehicles belonging to the Commission at any time of day in his capacity as a police officer as captured in the Staff Regulations and that in any event, his work ticket shows that he was on duty on the material day.
12. The plaintiff further testified that Lieutenant Michael Kariuki, his immediate supervisor, was the person in charge of authorizing use of motor vehicles and that he is the one who authorized the plaintiff's use of the subject motor vehicle, which vehicle belonged to their department.
13. In re-examination, it was the evidence of the plaintiff that he obtained copies of the emails drawn by the defendant from Lieutenant Michael Kariuki and maintained that the initial email was malicious.
14. The plaintiff gave evidence that on the material day, he drove the subject motor vehicle to Embu Law Courts on official duties and that he and the defendant worked in different departments. The plaintiff added that the defendant was not in charge of transport matters in the Commission.
15. On his part, the defendant began by stating that he has since retired from the Commission. He asserted that he did write the email in question to the Senior Officer in charge of operations in the Commission and that the same was copied to other specific officers in the Commission.
16. The defendant adopted his signed witness statement and stated that upon investigating the matter, he came to discover that the subject motor vehicle had broken down during use and that the email was merely intended to apply as a cautionary measure to ensure proper use of official motor vehicles in future.
17. In cross examination, the defendant stated that the Commission's motor vehicles were placed under the Operations Officer and that there was a transport office whose employees would report to him at the time. According to the defendant, a man by the name Mr. Arasa was the senior officer in charge of transport.
18. It was the testimony of the defendant that he was unaware that the subject motor vehicle was towed to Nairobi and that he sent a man by the name Mr. Kiboi to confirm its condition and ensure its return to Nairobi.
19. The defendant stated that the plaintiff took the subject motor vehicle without authorization and that there had been concerns that a number of motor vehicles had broken down while in the custody of the plaintiff.
20. In his testimony, the defendant stated that he did not contact the plaintiff but got in touch with his immediate supervisor and that he had no knowledge as to whether or not the plaintiff was permitted to drive the subject motor vehicle on the material day.
21. It was also the defendant's testimony that no disciplinary proceedings were lodged against the plaintiff following the publication and that the said publication was in no way intended to defame the plaintiff.
22. In re-examination, the defendant stated that he believes the publication to be true and that it was Mr. Kiboi who was to be assigned with the subject motor vehicle on the material day.
23. The defendant also restated his earlier position that he made no accusations against the plaintiff but was merely taking cautionary measures.
24. Upon close of the trial, the parties filed written submissions pursuant to the directions of this court.
25. In his submissions, the plaintiff contended that not only was the publication defamatory of him, but the same was repeated and copied to other persons not before this court. The plaintiff relied on the case of **Chrispus Keah v Joyce Mburu [1982] eKLR** in which the court held

that a letter copied to other persons fell within the context of publication.

26. The plaintiff further contended that the publication was actuated by malice since he neither worked for the defendant nor interacted with him in any major way, hence he had no basis for making the impugned publication or copying it to persons who were not in charge of the plaintiff. Furthermore, the plaintiff is of the view that the defendant did not follow the laid down procedure for lodging a complaint against an employee as stipulated in the Governance Manual for the Commission marked as P. Exh 34 in his bundle of documents.

27. It was the submission of the plaintiff that as a result of the publication, his reputation was lowered in the sense that his driving permit was temporarily withdrawn. Reference was made to the decision in the judicial authority of **Yobesh Oyaro v Alwaka t/a Weekly Citizen & 2 others [2003] eKLR** that:

“In all actions for libel and in some for slander, the law presumes that the plaintiff has suffered harm. Although the person’s reputation has no actual cash value, the Court will form its own estimate of the harm in the light of all the circumstances of the case.”

28. The plaintiff is equally of the view that the defendant did not plead any defence to support his case.

29. On damages, it was the argument of the plaintiff that given the grave nature of the allegations made against him in the publication coupled with his professional standing in society, an award of Kshs.5,000,000/ would constitute a reasonable award of damages. He cited a few cases for this court’s consideration, including:

a) **Francis Oyatsi v Wachira Waruru & another [2010] eKLR**: in this case, the plaintiff was awarded a consolidated figure of Kshs.3,500,000/ on damages for libel.

b) **Johnson Evan Gicheru v Andrew Morton & another [2005] eKLR**: here, the Court of Appeal awarded a composite sum of Kshs.6,000,000/ for defamation.

30. On his part, the defendant submitted that the plaintiff did not show which words in particular were defamatory of him, neither did he establish that he obtained any authorization from the relevant party for use of the subject motor vehicle on the material day.

31. The defendant also urged this court to restrict itself to the impugned email and to disregard the emails produced as exhibits since only the impugned email of 3rd August, 2010 was referenced in the plaintiff’s pleadings.

32. According to the defendant, there was no hint of malice in his publication.

33. The defendant further submitted that the plaintiff did not bring any independent witnesses to testify as to his reputation, which means there was no proof of defamation.

34. In his submissions, the defendant contended that the email was made in good faith and on the reasonable belief that the plaintiff had used the subject motor vehicle without proper authorization.

35. The defendant further contended that the publication was in no way aimed at tarnishing the reputation of the plaintiff, as can be seen from the words used. The defendant urged this court to consider *inter alia*, the case of **Rumba Kinuthia v Judith A. Achar & another [2016] eKLR** whereby the court reasoned that defamatory words may be inferred from the context of the circumstances in which they were used and the manner in which they are understood.

36. On damages, it was the contention of the defendant that should this court find in favour of the plaintiff, then awards of Kshs.450,000/ and Kshs.100,000/ would suffice on general and aggravated damages respectively.

37. Upon considering the evidence tendered and the contending submissions together with authorities relied upon, I find the following to be the issues arising for determination:

i. Whether the plaintiff has made a case for defamation against the defendant;

ii. Whether the defence of truth/justification is available to the defendant; and

iii. Whether the plaintiff is entitled to the reliefs sought.

38. In addressing the foremost issue, I turn my attention to the case of **Samuel Ndungu Mukunya v Nation Media Group Limited & Another [2015] eKLR** wherein the court aptly laid out the ingredients to be proved in a defamatory claim as follows:

a) The libel must be published by the defendant.

b) The published words must refer to the claimant.

c) The statement as published must be false and defamatory of the plaintiff.

d) The publication was malicious.

39. Upon analysing the pleadings and the evidence placed before this court, it is apparent that it is not in dispute that the email was published by the defendant and that the same made reference to the plaintiff. I am therefore satisfied that the plaintiff has proved the first and second ingredients for defamation.

40. This brings me to the third ingredient to do with whether the publication was false and defamatory of the plaintiff. I note that the defendant in his submissions was of the view that this court ought to only consider the email whose contents were particularized in the plaint. Upon considering this position and further considering the evidence tendered, this court is satisfied that whereas the plaintiff only particularized the contents of the email dated 3rd August, 2010, the subsequent emails were produced as exhibits which makes them supportive of the plaintiff's case. This court therefore has no reason to disregard the other emails.

41. The heart of a defamatory statement lies in its tendency to lower the reputation of the claimant in question. This was demonstrated by the Court of Appeal in the authority of **S M W v Z W M [2015] eKLR** as hereunder:

“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.”

42. The courts have unanimously held that in order to determine whether a statement or publication is defamatory, one must seek to discover the meaning conveyed by the words in question to an ordinary/reasonable person.

43. In his plaint, the plaintiff set out the ordinary meaning of the words associated with the impugned email. The plaintiff also stated that not only did the said email portray falsehoods as concerns whether he had authority to drive the subject motor vehicle on the material day, but that the impact of the email is that his driver's permit was temporarily withdrawn and that his reputation was lowered in the eyes of his superiors.

44. The defendant denied the particulars of defamation pleaded and maintained that the contents of the email were purely of a cautionary nature and that he had no intention whatsoever of bringing harm to the plaintiff's reputation.

45. Upon looking at the impugned email, I note that the same rode on the position that the plaintiff had used the subject motor vehicle without authority and in violation of the established Commission Rules and the email was copied to various third parties, in this case, officials of the Commission.

46. I examined a copy of the work ticket produced as P. Exh 17 whose production I must point out was never objected to by the defendant at the trial. The said work ticket indicates that the plaintiff's use of the subject motor vehicle was not only official but was authorized by virtue of a signature and the plaintiff indicated that it is his immediate supervisor, Lieutenant Michael Kariuki, who made the authorization.

47. The defendant on his part did not bring any credible evidence to counter this position. If anything, the defendant through his oral testimony indicated that he could not tell for sure whether the plaintiff had authority to drive the subject motor vehicle or not.

48. From the foregoing, it is clear that whereas it remains undisputed that the plaintiff used the subject motor vehicle on the material day, there is nothing to show that he drove it as unauthorized.

49. Upon looking at the wording of the impugned email, I note that the same in the mind of a reasonable man could be taken to infer that the plaintiff *inter alia*, acted in violation of the staff regulations and protocols. In my opinion and in answer to the defendant's submission that the plaintiff did not set out the defamatory words, it was not necessary for the plaintiff to specify the words he deemed to be defamatory of him so long as he set out their meaning by way of innuendo.

50. I also considered the impugned email coupled with the subsequent emails produced as P. Exh 1 to 15 and I am convinced that the plaintiff has demonstrated the manner in which the overall communications concerning him would have lowered his reputation in the minds of his superiors.

51. On a similar note, in addressing the defendant's position that the plaintiff was required to call an independent witness to testify as to his reputation, I opine that this is not a threshold the plaintiff was required to meet for his claim to succeed as long as he was able to demonstrate how a reasonable person would receive the defamatory publication. In so finding, I borrow from the Court of Appeal's rendition in the recent case of **Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR** where it held thus:

“By holding that the appellant needed to call witnesses to prove that the story was viewed and read as published, the learned Judge placed too high a standard on the part of the appellant whose duty did not extend beyond the usual standard in a civil case such as the one that was before her to prove the case on a balance of probabilities. We are of the respectful opinion that the appellant proved the case to the required standard.”

52. I am therefore satisfied that the plaintiff has proved that the publication was defamatory.

53. On the ingredient of malice, it is apparent that the plaintiff on the one part testified that not only was the defendant not his immediate supervisor but that the defendant was not in charge of transport in the Commission. The plaintiff further gave evidence that the defendant through the impugned email and the emails to follow cast blame on him for various other motor vehicles that developed problems, thereby

inferring malice.

54. The defendant on the other part stated that he did not personally target the plaintiff and that he did not push for any disciplinary action to be taken against the plaintiff.

55. Upon considering the rival positions, I reason that the defendant; having not denied that he was not the officer in charge of matters transport; did not bring any credible evidence to adequately explain the reason for drawing the email and publishing it to various other officers.

56. Further to this, I note that the defendant in his publication made relatively serious allegations directly against the plaintiff and yet there is nothing to show any reports made or relied upon in that regard, or the manner in which he arrived at the conclusions set out in the initial email and the emails to follow. There is also nothing to show that the defendant ever contacted the plaintiff and/or gave him the opportunity to properly respond to allegations made against him before the temporary withdrawal of his driver's permit at the request of the defendant and on the basis of the emails.

57. In other words, the defendant has not shown by way of evidence that his decision to publish the email was made in good faith and without ill-spite against the plaintiff. I am therefore satisfied that the plaintiff has proved that the defendant acted maliciously against him.

58. In the premises, I find that the plaintiff has proved his claim for defamation against the defendant.

59. On the second issue to do with whether the defence of truth/justification is available to the defendant, having already found that the crux of the publication was false and defamatory, I see no need to dwell on this particular issue.

60. This brings me to the third issue on reliefs sought by the plaintiff. I shall address them under the two (2) heads of general and aggravated damages.

61. On general damages, I considered the sums proposed by the parties and the authorities cited before me. I also considered the plaintiff's pleadings and evidence as to his qualifications and experience: he stated that he was a retired senior sergeant of over 15 years' experience in the police force and produced various academic certificates to show his academic progress during that period.

62. In awarding general damages, I will consider damages previously awarded to persons of equal or close societal standing to the plaintiff coupled with the gravity of the wording of the publication, the extent of circulation and the injury suffered to his reputation as a consequence of the publication.

63. I am of the view that the authorities cited by the plaintiff do not entail persons of close societal or professional standing to the plaintiff and furthermore, the cited cases were decided years ago. I therefore drew guidance from the case of **Standard Limited & another v Jonathan Abraham Chelule [2018] eKLR** where a former senior police officer was awarded a sum of Kshs.3,000,000/ on general damages and the case of **Lilian Okembo v Robert Pukose [2019] eKLR** in which a respectable police officer was granted general damages in the sum of Kshs.2,000,000/.

64. Upon considering the relevant factors listed above and the above comparable authorities, I will award the plaintiff a sum of Kshs.2,000,000/ under the head of general damages.

65. In respect to aggravated damages, I respectfully disagree with the plaintiff's submission that the allegations against him were in the nature of abuse of office. However, I considered the repetitive nature of the publication and the lack of an apology by the defendant. Having done so, I find a sum of Kshs.500,000/ to be a suitable award, leaning on the case of **Standard Limited & another v Jonathan Abraham Chelule [2018] eKLR** where a similar award was made.

66. In the end, judgment is hereby entered in favour of the plaintiff and against the defendant. Consequently, the plaintiff is awarded general damages in the sum of **Kshs.2,000,000/** and aggravated damages in the sum of **Kshs.500,000/**. The plaintiff is also entitled to costs of the suit and interest on damages from the date of this judgment until payment in full.

Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 19th day of June, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant