



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 73 OF 2015

RUTH RUGURU NYAGAH.....PLAINTIFF

VERSUS

KARIUKI CHEGE.....1ST DEFENDANT

DAVID H. GRAY..... 2ND DEFENDANT

JUDGMENT

1. In her amended plaint filed on 9th March 2015, the plaintiff, *Ruth Ruguru Nyagah* sued the defendants, *Kariuki Chege* (1st defendant) and *David H. Gray* (2nd defendant) for defamation and sought the following reliefs:

a) General damages for libel.

b) Exemplary damages.

c) Special damages.

d) Costs of the suit.

e) Interest on the above.

2. The plaintiff averred that she was an agri-food safety expert and a local and global consultant in agribusiness certification and standards; that on or about 14th November 2003 together with another person not party to this suit, she incorporated *Africert Limited* (the company) and subsequently, the defendants acquired directorship and shareholding in the company. She was appointed the company's Managing Director but she retained her position as a non-executive director and shareholder of the company.

3. A scrutiny of the averments in the amended plaint reveals that the plaintiff's cause of action is premised on two emails allegedly authored by the 2nd defendant on 18th June 2014 and 9th July 2014; an advertisement in the Daily Nation of 11th July 2014 allegedly published maliciously by the 1st defendant and a complaint made to the Criminal Investigations Department (Special Crimes Unit) by the 1st defendant for investigations in reference to her.

4. According to the plaintiff, she resigned from her role as the company's Managing Director in the year 2013 but before then, she had incorporated another company namely, Kencert International Limited (Kencert) which was licensed to offer training and consultancy services; that in April 2014, through Kencert, she bided for a tender that was floated by USAID through its Kenya Agricultural Value Chain Enterprises Project (KAVES Project) for training and traceability for Kenya small holder horticulture farmers. Kencert was shortlisted for award of the tender but before the tender was awarded, the 2nd defendant wrote an email on 18th June 2014 addressed to the directors of the KAVES project in the following words:

“Dear Sirs,

As your Dr. Steve New and Mr. Ian Chesterman are aware, I am a Director of Africert Limited.

As such, I was interested to see your advertisement in the Daily Newspaper dated 25th April, 2014 which I referred to the Ag. CEO of Africert who subsequently advised that she had responded with the company's proposal to participate in the existing project.

We are now informed that you also received a separate, competitive proposal (which has apparently even been shortlisted) from Dr. Ruth Nyagah who is a Director of Africert Limited, listing a number of Africert employees as her support team.

This is obviously a serious case of conflict of interest and her direct involvement in competition with a company of which she is a director (and in fact a founder) is contrary to her undertakings and responsibilities as a director of Africert Limited.

Accordingly, on behalf of the Board of Directors of Africert Limited, I am writing to ask you to investigate and explain.

Yours faithfully D H Gray.”

5. Further, the plaintiff contended that as a follow up to the email, the 2nd defendant authored another email addressed to the acting CEO of Africert Limited in the following words:

“Dear Susan

You will recall that I contacted USAID/FINTRAC re the news that Ruth had put in her own bid for the KAVES project and in fact had been shortlisted (according to what you told us)...I received a rather ‘nebulous’ response from Steve New, but nothing from Ian Chesterman...have you heard any more on this?...should I be chasing up? If so, I would need to have more information as evidence of this reprehensible, underhand, even illegal behavior.

Regards DHG”

6. The plaintiff averred that in their natural and ordinary meaning, the words used in the two emails meant and were understood to mean, *inter alia*, that she was fraudulent; that she is a person who dishonestly undermined companies in which she holds a stake for personal gain and that she was a criminal who ought to be investigated. She asserted that as a result of the publications, she lost the tender with USAID / KAVES which was worth USD 1.2 million.

7. Regarding the advertisement, the plaintiff alleged that the inclusion of her photograph, name and identity card number in the advert and the advise that as she had ceased being the company’s Chief Executive Officer (CEO) on 1st January 2014, she was no longer authorized to transact any business on behalf of the company meant and was intended to mean, *inter alia*, that she was fraudulently transacting business on behalf of the company yet she had resigned; that she was masquerading as a contact person or CEO of Africert Limited and that she was defrauding clients and partners of the company by purporting to act for it. She reproduced the entire advert in paragraph 25 of the amended plaint.

8. Lastly, the plaintiff averred that following an audit of the company in February 2014 by a consultancy firm appointed by the 1st defendant, a malicious complaint against her alleging suspected fraud was lodged with the Criminal Investigations Department (CID) by the 1st defendant; that the complaint meant and was understood to mean that she was a criminal who ought to be kept away from law abiding citizens and that she lacked professional ethics and etiquette.

9. It was the plaintiff’s case that as a result of the aforesaid publications, her reputation as an internationally renowned expert on private standards and as a professional advisor and mentor in the agricultural industry was seriously damaged before right thinking members of society and that consequently, she had suffered great loss and damage.

10. Upon being served with summons, the defendants filed a joint statement in defence dated 7th April 2015. The 2nd defendant admitted having authored the emails dated 18th February 2014 and 9th July 2014 but denied that the words contained therein were defamatory of the plaintiff and that they bore the meaning attributed to them in the amended plaint. The 1st defendant also admitted having made a complaint against the plaintiff to the CID for purposes of investigation into whether she had committed a criminal offence but denied that his action was either malicious or defamatory of the plaintiff.

11. Regarding the publication of the advertisement in the Daily Nation of 11th July 2014, the defendants averred that the advert was published by the company. They denied that its content was defamatory of the plaintiff as alleged and pleaded that the same was true in substance and in fact. The defendants also denied that the plaintiff had suffered any loss or damage as a result of any of the publications and put her to strict proof thereof.

12. At the hearing, the plaintiff testified in support of her case. She did not call an additional witness. Each of the defendants testified in support of the defence case.

13. In her evidence, PW1 started by narrating her academic and professional qualifications. She adopted her witness statement dated 20th February 2013 as part of her evidence in chief. In addition, she claimed that after her resignation as Managing Director of the company on 31st December 2013, she focused on offering consultancy and training services under Kencert through which she put in her bid for the tender floated by USAID/KAVES project. She denied that her bid created any conflict of interest even given her position of director in the company maintaining that the two companies offered completely different services. That Kencert offered training and consultancy services while Africert offered certification services only.

14. Further, the plaintiff restated her claim that the publications by the defendants were malicious and defamatory in that they painted her as a corrupt, dishonest person who lacked integrity and urged the court to find that she was entitled to the reliefs sought.

15. During cross examination, PW1 admitted that in the email of 18th June 2014, the author was seeking confirmation whether she had bided for the KAVES project tender and if she had, her action created a conflict of interest considering that she was still a director of Africert. She also clarified that her cause of action was based on the two emails authored by the 2nd defendant and the advert in the Daily Nation Newspaper.

16. In addition, PW1 admitted that she had not notified the other directors of the company about incorporation of Kencert. She also conceded that she did not have any evidence to prove that as a result of the three publications, she lost her bid for the KAVES tender or that her reputation was diminished in the eyes of any person.

17. Turning to the defence case, the 1st defendant testified as DW1. He adopted his witness statement filed on 8th April 2015 as his evidence in chief and produced a bundle of documents which were marked as D exhibit1.

18. Under cross examination, DW1 denied that he placed the advert in the Daily Nation in his personal capacity and asserted that he did so on behalf of the company solely for the purpose of advising members of the public about PW1's resignation as Managing Director of the company.

In his evidence during re-examination, DW1 maintained that the statements made in the advert were accurate.

19. The 2nd defendant testified as DW2. In his evidence, he adopted his witness statement filed on 13th April 2017 as his evidence in chief.

20. In his evidence under cross examination, DW2 denied that the email of 18th June 2014 was defamatory of the plaintiff. According to him, it was just an inquiry on whether the plaintiff's private bid presented a possibility of conflict of interest.

21. Regarding the email of 9th July 2014, DW2 contended that the email was an internal memo from him as a director of the company to Susan, the company's General Manager.

Upon re-examination, he stated that at the time he made the inquiry in the first email, PW1 was still a Director of Africert and he was not aware that she had incorporated a different company. He insisted that there was nothing defamatory of the plaintiff in the two emails.

22. At the close of the hearing, both parties exchanged and filed written submissions which were highlighted before me on 8th July 2020 by learned counsel *Mr. Nyangau* for the plaintiff and learned counsel *Mr. Kuyo* for the defendants. In their written and oral submissions, both learned counsel buttressed the positions taken by their respective clients as summarized hereinabove.

23. I have carefully considered the pleadings, the evidence tendered by the parties as well as the rival written and oral submissions made on behalf of the parties together with all the authorities cited.

Having done so, I find that though *Mr. Nyangau* submitted at length on the complaint made against the plaintiff to the Criminal Investigations Department regarding her suspected involvement in the loss of funds unearthed by the internal audit conducted by *Njuguna Kioi & Associates Consultants*, as stated earlier, the plaintiff in her evidence abandoned her claim based on this complaint when she confirmed that her cause of action was confined to publication of the two emails authored by the 2nd defendant and the advertisement published in the Daily Nation newspaper.

24. Even assuming that she had maintained that the complaint amounted to defamation of her character, my take is that the claim would not have succeeded in any event since the law imposes a civic duty on all citizens who includes the defendants in this case to report any suspected criminal activity involving any person to the police for investigations and appropriate action. Such a complaint therefore cannot form a basis for an action in defamation.

25. That said, from my analysis of the pleadings, the evidence on record and the parties' respective submissions, I find that only three main issues crystallize for my determination. These are:

- i. Whether the plaintiff has established her claim for defamation against each of the defendants to the standard required by the law.
- ii. Whether the plaintiff is entitled to the reliefs sought.
- iii. What orders should be made on costs?

26. Starting with the first issue, I wish to start by pointing out that the law of defamation is designed to protect a person's reputation from injury or damage arising from false and malicious statements made to third parties.

27. A defamatory statement is defined in *Gatley on Libel and Slander* 11th edition at page 38 as one which is to the "**claimant's discredit; or which tends to lower him in the estimation of others or causes him to be shunned or avoided; or exposes him to hatred, contempt or ridicule....**"

The Court of Appeal in *SMW V ZWM, [2015] eKLR* and in *Musikari Kombo V Royal Media Services Limited, [2018] eKLR* defined a defamatory statement as follows:

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”

28. From the above definitions, it is clear that the test for determining whether or not a statement is defamatory is an objective one. It is not based on the intention of the publisher or the claimant’s opinion of his or her character. It is based on what an ordinary reasonable man reading the statement would perceive of the claimant.

29. The above position was aptly illustrated by the Court of Appeal in Selina Patani & Another V Dhiranji V. Patani [2019] eKLR when the court expressed itself as follows:

“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.”

30. It is now settled law that in order to succeed in a claim for defamation, the claimant must prove to the required legal standard which is on a balance of probabilities, that the words or statements complained of were published by the defendant in reference to him or her; that the words were false and defamatory in that they lowered his or her reputation in the estimation of right thinking members of the society or that they caused him or her to be shunned or avoided. The claimant must also prove that the publication was actuated by malice. See: Wycliffe A. Swanya V Toyota East Africa & Another, [2009] eKLR; Phineas Nyagah V Gitobu Imanyara, [2013] eKLR among others.

31. In this case, the plaintiff claimed in her evidence and submissions that the content of the email of 18th June 2014 was false because it claimed that in her bid for the KAVES project tender, she had listed as part of her support team employees of Africert Limited. The claim that her bid was in direct competition with the one submitted by Africert and that it created potential for conflict of interest was also in her view untrue since her private company and Africert offered completely different services.

32. The defendants denied these claims by the plaintiff and asserted that the email amounted to an enquiry and what was stated therein was factual and accurate.

33. From my examination of the evidence tendered in this case, I find that it is not disputed that at the time the plaintiff placed her bid for the KAVES project tender through *Kencert International Limited*, though she had resigned as Africert’s Managing Director, she was still a shareholder and a director of the company. It is not disputed that the company had also submitted a bid for the same tender and that by the time the 2nd defendant authored the email, the plaintiff had not disclosed to him and the other directors that she had incorporated her own private company and that through it, she had placed a bid for the KAVES project tender.

34. My reading of the email reveals that the email was published to a *Dr. Steve New* and *Mr. Ian Chesterman*. My interpretation of the email is that the 2nd defendant was communicating to the persons it was addressed information that had come to the attention of the company’s directors that the plaintiff had placed a private bid for the same tender that the company had bided for and expressed his opinion that the action by the plaintiff created a conflict of interest on her part. He then requested them to investigate the matter further and offer their explanation.

35. The plaintiff in her evidence conceded that the above is basically what the email was all about but insisted that the claim that Kencert’s bid created a conflict of interest on her part was false since the two companies offered different services.

36. Conflict of interest is defined in *Blacks Law Dictionary 10th Edition* page 363 as a real or seeming incompatibility between one’s private interest and one’s public or fiduciary duties. The plaintiff as a director of Africert owed the company a fiduciary duty to always act in good faith in matters involving the company and not to engage in activities that would entail advancement of her private interest in a way that conflicted with the interests of the company.

37. In my view, whether the two companies offered different services was immaterial. What was material is the fact that the plaintiff had privately submitted a bid for a tender which was to be evaluated against the one submitted by Africert Limited in which she was a serving director.

38. Put differently, the two companies were competing for award of the same tender which definitely created a situation where the company’s business interests conflicted with those of the plaintiff’s private company at a time when the plaintiff was still a director of the company.

39. On whether the email was actuated by malice, there is no indication from the evidence that the email was published maliciously or that the words used were defamatory of the plaintiff either in their plain and natural meaning or by way of innuendo as submitted in the plaintiff’s second set of submissions filed on 15th June 2020. The fact that the plaintiff had not disclosed to her fellow directors about the existence of Kencert and its bid for the KAVES tender negates any hint of malice on the 2nd defendant’s part in publishing the email.

40. With respect to the email dated 9th July 2014, its content shows that it was a follow up to the email dated 18th June 2014. It was addressed to *Susan Mugure*, the then CEO of the company seeking more information regarding the enquiry made about Kencert’s bid for the KAVES project tender. Besides the plaintiff, the email was copied to *Chege Geoffrey Wathigo*, *Betty Ann Mboche* who according to DW1 and DW2 were other directors of the company.

41. The plaintiff in her pleadings and in her evidence was silent on whether the email was copied to other people. She did not therefore

claim that the email was published to people other than directors of the company.

42. Considering that the email was also copied to the plaintiff, I am persuaded to accept the defendant's evidence that the email was published only to the CEO and the directors of Africert Limited and I so find. This finding leads me to the conclusion that the email was not published to anybody outside the company. In the circumstances, it is my finding that the email amounted to internal official communication which was privileged. It could not therefore found an action for defamation: **See - Ruth Njiru James V Njoroge Ndirangu & 3 Others, [2015] eKLR; Emmanuel Mambo Oduory V One Acre Fund, [2020] eKLR.**

43. The other publication relied on by the plaintiff in support of her case is the advertisement carried in the Daily Nation Newspaper edition of 11th July 2014. The plaintiff claimed that the advert was published by the 1st defendant and was defamatory in the sense that it advised members of the public that she was no longer authorized to transact any business on behalf of Africert Limited.

44. Relying on the authorities of **Gideon Mose Onchwati V Kenya Oil Company Limited & Another, [2015] eKLR; Nation Media Group V Gideon Mose Onchwati & Kenya Oil Company Limited, CA No. 88 of 2016,** the plaintiff submitted that the above advise portrayed her as a dishonest person who lacked integrity in the sense that she was capable of holding herself out as a person who was authorized to transact business on behalf of the company when she was not.

45. The defendants denied that the publication of the advert was done by the 1st defendant. The 1st defendant testified that the advert was published by the company and he only authorized it on behalf of the company. The defendants also pleaded justification maintaining that the content of the advert was true.

46. I have perused the said advert. I note that on its face, besides bearing the plaintiff's photograph, name, identity card number, the fact that she had ceased being the company's CEO with effect from 1st January 2014 and the advise stated above, it bears Africert's logo. The opening and concluding paragraphs of the notice show clearly that it had been published by the company.

47. Looking at the content of the advert and considering the plaintiff's concession that she had actually resigned from being CEO of the company on 31st December 2013, I have no difficulty accepting the defendant's claim that the notice in the advert was true and could not therefore be defamatory of the plaintiff as alleged or at all.

48. Even assuming that the notice in the advert was false and defamatory of the plaintiff, having found that it was published at the instance of the company and not by the 1st defendant, the plaintiff could not have succeeded in her claim against the 1st defendant in view of the long established legal principle enunciated in the celebrated case of **Salomon V Salomon & Company Limited, [1897] AC 22** that a limited liability company has a separate legal personality which is distinct from its shareholders and directors.

The legal consequence of the principle is that directors of a company cannot be held individually liable for actions or omissions of a company and vice versa.

In the context of this case, it means that if the advert contained defamatory material in reference to the plaintiff which it did not, the 1st defendant cannot be held liable to the plaintiff since the advert was published by the company.

49. The foregoing notwithstanding, I have read the authority of **Gideon Mose Onchwati V Kenya Oil Company Limited & Another [supra]** and I have also noted the decision of the Court of Appeal in **Nation Media Group V Gideon Mose Onchwati & Kenya Oil Company Limited [supra]** which upheld *Hon. Aburili J*'s decision in the High Court case.

50. I note that though the plaintiff heavily relied on the above authorities to support her proposition that the advise in the notice published in the Daily Nation edition of 11th July 2014 was defamatory as it depicted her as a dishonest person who had potential to impersonate the CEO of Africert Ltd, I find that the authorities are distinguishable from this case because the content of the notice taken out in the **Gideon Mose Onchwati** and in this case are entirely different. In the **Gideon Onchwati** case, the notices in the Daily Nation and in the Standard newspapers contained the plaintiff's coloured photograph, his names and identity card number. The notice in the Daily Nation newspaper in addition contained *inter alia* the following words:

“Kenol/Kobil would like to contact the said person. Any information on his whereabouts should be reported to the Human Resource Manager on 020-249333 or Central Police Station or the nearest police station...Kenol/Kobil cares for you!!.”

51. In the Standard newspaper, the publication reproduced the above words and added the following words:

“As a result of being engaged in unethical and unprofessional conduct and his whereabouts should be reported....”

I have largely reproduced the above notices to make the point that they were on their face clearly defamatory of the plaintiff in that case unlike the notice published by the company in this case.

52. In addition to the findings I have so far made, it is also apposite to note that the plaintiff failed to adduce any evidence to demonstrate that either of the three publications actually damaged or injured her reputation in the eyes of right thinking members of the society. Damage to reputation is the cornerstone of an action for defamation and without it, such an action cannot stand.

53. The Court of Appeal in **Selina Patani & Another V Dhiranji V. Patani, [supra]** emphasized the above legal position by stating as follows:

“..... 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... 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. ...”

54. It must be clear by now that I have come to the conclusion that the plaintiff has totally failed to prove her claim for defamation against any of the defendants to the standard required by the law.

55. Having found as I have above, it logically follows that I am of the view that the plaintiff is not entitled to any of the reliefs sought. It is consequently my finding that the plaintiff's case lacks merit and it is accordingly dismissed.

56. I am however enjoined by law to assess the damages I would have awarded the plaintiff had she succeeded in her claim. In her submissions, the plaintiff proposed an award of KShs.5,000,000 as general damages and KShs.3,000,000 as aggravated damages. The defendants did not propose any amount under the two heads of damages.

57. Considering the plaintiff's qualifications, stature and standing locally and internationally as an agri-food safety consultant and considering also the extent of circulation of the impugned publications, had she succeeded in her claim, I would have awarded her general damages in the sum of KShs.3,000,000.

58. Regarding the claim for exemplary damages, I find that the plaintiff did not adduce evidence to prove the existence of aggravating factors which would have entitled her to an award of exemplary damages. Consequently, I would have declined to make any award on that head.

59. I would not also have made any award on the claim for special damages since none was either pleaded and specifically proved.

60. For all the foregoing reasons, the plaintiff's case is hereby dismissed with costs to the defendants.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of September 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Nyangau for the plaintiff

Mr. Kuyo for the defendants

Ms Mwinzi: Court Assistant