



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 182 OF 2015

WASHINGTON ODERA SIREKA.....PLAINTIFF

VERSUS

GITHAIGA KAMWENJI.....1ST DEFENDANT

SCANIA EAST AFRICA LIMITED.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff, Washington Odera Sireka, instituted this suit vide a plaint dated 15th May, 2015. It is contended that the Plaintiff who was at the material time an employee of the 2nd Defendant, Scania East Africa Limited, as a Stock Control Supervisor was defamed by the Defendants when the 1st Defendant, Githaiga Kamwenji who was the 2nd Defendant's Human Resource Director wrote the following letter dated 8th October, 2014:

“This is to confirm that Scania SACCO has suffered loss of colossal amount of money under your watch. Some of which has been directly attributed to you. Officers from the Co-operative have evidence of your impropriety and are continuing with investigations”

2. It is averred that the said letter was copied to the 2nd Defendant's Managing Director, Finance Director, After –sales Director, Executive Director of Federation of Kenya Employers and the District Labour Officer, Industrial area.

3. It is further stated that by a letter dated 21st November, 2014 printed on the 2nd Defendant's letter-head and addressed to the Plaintiff, the 1st Defendant wrote and published or caused to be written and published the following words:

“You have been found to have been complicit in the theft and misappropriation of Scania SACCO's funds in the sum of Ksh.5,729,307.23. While the aforementioned offence was committed against Scania SACCO...”

4. That the letter was copied to the 2nd Defendant's Managing Director, Finance Director and the District Labour Officer.

5. It is further stated that the 1st Defendant also uttered the said words at the meeting of the Ministry of Co-operative Development and Scania SACCO held on 25th September, 2014.

6. That the words were meant to disparage the Plaintiff in his employment and in the SACCO movement and led to his dismissal from employment with the 2nd Defendant. The Plaintiff prayed for general damages for libel.

7. The claim was denied as per the Statement of Defence dated 7th July 2015. It is stated that the letters were written to the Plaintiff in the ordinary course of employment. That there was no publication of the contents of the said letters and therefore no cause of action arises on the basis of the letters.

8. That the letters contained privileged communication issued in compliance with the mandatory requirements of Section 5(4) (b) of the Employment Act and that therefore no cause of action arises. That the letters merely confirmed the outcome of the investigations carried out on the Scania SACCO's account and conveyed the decision made by the 2nd Defendant and was therefore not defamatory.

9. The Plaintiff testified herein and also adopted his two witness statements as his evidence. He testified that during his term of employment

by the 2nd Defendant, he was elected as the Chairman of Scania SACCO. That the allegations of misappropriation of SACCO funds were made against him by the 2nd Defendant's Internal Auditor and Treasurer of Scania SACCO. That reports were made and meetings held and he ended up being issued with a suspension letter and was subsequently dismissed from employment on grounds of theft of SACCO funds totaling Ksh.5,729,307.23.

10. The Plaintiff further testified that the Inquiry carried by the Commissioner of Co-operatives was unlawful and did not find him culpable and he was not surcharged for any lost money or taken through any judicial process.

11. The Plaintiff testified that the letters in question were defamatory and were aimed at disparaging his name. That the said letters impacted on him negatively and he was unable to secure meaningful employment. The Plaintiff produced the suspension and the dismissal letters as exhibits together with the Ministry of Co-operative Development and Scania SACCO meeting as of 25th September, 2014.

12. The 1st Defendant, Githaiga Kamwenji testified on the Defendant's side. He adopted his witness statement as his evidence and produced his bundle of documents and supplementary bundle of documents as exhibits. He conceded to the writing of the letters in question and to having copied the same to the other officers named therein. He stated that the said officers needed to be informed of what was happening. That the Preliminary investigation into the allegations of impropriety paved the way for the writing of the letter of suspension. That the investigations report and the minutes of the meeting that followed revealed a shortfall of Ksh.6,140,000/= hence, the letter of dismissal.

13. DW1 further contended that over 90% of the 2nd Defendant's employees were members of Scania SACCO and were baying for the Plaintiff's blood and wanted to lynch him. DW1's stand was that the letters in question were not defamatory.

14. Defamation is defined in **Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield on Tort 8th Edition**, thus:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”

A defamatory statement, according to *Gatley on Libel and Slander 8th Edition* by Phillips Lewis paragraph 4 page 5 discredits a man or 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.”

15. This is a suit founded on the tort of defamation. The Court of Appeal in the case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008** set out the elements of defamation thus:

“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 the 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 damages.”

16. It is not in dispute that the Plaintiff was employed by the 2nd Defendant as a Stock Control Supervisor and that the Plaintiff was the Chairman of Scania SACCO at the material time. It is also not in dispute that the 1st Defendant as the Human Resource Director of the 2nd Defendant wrote the letters in question to the Plaintiff and copied them to the officers named therein. The crux of the matter is whether the letters were defamatory to the Plaintiff.

17. The letters in question were written by the 1st Defendant in his capacity as the Human Resource Director of the 2nd Defendant. The letters were written in the ordinary course of duty. The letters gave the reasons for the suspension and the dismissal. This followed reports of misappropriation of the SACCO funds. The Plaintiff was the chairman of the SACCO. The allegations were made against the officers of the SACCO. The letters in question were copied to other officials who were being informed in their official capacity about what was going on. This was therefore privileged communication.

18. I would in the premises agree with the persuasive authorities cited by the Defendants' counsel which include the following:

(a) **Joseph C. Langata v Wilson K Rono & another** further held as follows:

“I agree with the defendants that these officers had a legitimate interest on the matter, and therefore copying the letter to them did not amount to defamation. Even were it to be deemed to be defamatory, there would be a defence of qualified privilege available to the defendants. The 1st Defendant had a duty to communicate the contents of the letter and the recipients as state officers, corresponding interest to receive it.”

(b) **Ruth Njiru James v Njoroge Ndirangu & 3 others** where the court held as follows:

“That in my view, cannot amount to libel as there was privileged relationship in this case and communication and publication in the letter dated 5th May, 2011 was written and published on a privileged occasion.

The employer was under a duty to notify the plaintiff and her union of the decision reached... I find that there was indeed no evidence of malice as the General Manager wrote and signed the letter in the cause of and within the scope of his duties and he could only be sued and successfully so, if it was shown that the letter was defamatory and there was malice to deprive the communication its privilege.”

19. In defamation cases it is the duty of the defence to demonstrate the truthfulness of the position that is stated in the publication complained of. See for example **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR** where the court stated as follows:

“In Hon. Uhuru Muigai Kenyatta v Baraza Limited the court observed the information that cause the defamation, will be assumed to be untrue until the defendant proves otherwise. The learned judge stated:

...while taking defence of justification or qualified privilege in the Defamation Case, the Defendant was required by law to establish the true facts and the Plaintiff has no burden to prove the defence raised by the Defendant...”

20. Malice is one of the elements in a defamation. In the case of **J.P Machora t/a Machira & Company Advocates v Wangethi Mwangi & another [1998] eKLR** the Court stated as follows:

“can be inferred from a deliberate, reckless, or even negligent ignoring of facts’ and that “deliberate lies can also be evidence of malice.”

21. In the case at hand, the two letters followed the report of fraud and the subsequent meeting held on 25th September, 2014 by the Ministry of Co-operative Development and Scania SACCO. Present in the said meeting was the Plaintiff as the then Chairman of Scania, the 1st Defendant as the Human Resource Director of Scania East Africa Ltd the (2nd Defendant) and other officers from Scania SACCO, Scania East Africa Ltd, and the Ministry of Co-operative Development. The meeting was chaired by the County Co-operative Officer. The Scania SACCO Treasurer submitted an audit report which reflected the loss of Ksh.6,140,000/= from the SACCO. Further investigations into the matter were recommended. The Co-operative Officer who chaired the meeting asked the SACCO Executive Committee Members who included the Plaintiff and who were also signatories to the SACCO bank accounts to step aside to pave way for the investigations.

22. The investigations carried out later established loss of SACCO funds. Indeed some of the officials of the SACCO were surcharged for the deficit. Although the Plaintiff was not surcharged, the Inquiry report on page 23 revealed cash drawn from the bank by executive committee members for loans and refunds to members but was not accounted for.

23. On page 26 of the report (Table 3.4) which is in respect of the Plaintiff, a total of Ksh.161,349/= was found to be recoverable from the Plaintiff. The Inquiry Report concluded as follows:

“Poor book keeping was cited as the root cause of unsound financial management which gave room for improper conduct and misappropriation of fund by the management committee. The unreconciled accounts make it difficult to ascertain the true and fair view of the society. The society should endeavor to reconcile their accounts and reconstruct the final accounts with proper balances. However with proper integrity and improvement of governance issues Scania sacco society has the potential for growth.”

24. The foregoing report cites poor book keeping and alludes to integrity and governance issues as the cause of the unsound financial management at the SACCO. I find no malice on the Defendant’s side. The letters and the meeting in question followed a report by the Internal Auditor and reflected the decisions arrived at in the meeting of 25th September, 2014. The investigations carried out command respect as the Inquiry that followed was carried out by the Ministry of Co-operative Development which is an independent body.

25. The Plaintiff was the sole witness in his case. No witness was called to testify in respect of the Plaintiff’s claim for defamation. As stated by the Court of Appeal in the case of **Selina Patani & another v Dhiranji V Patani [2019] eKLR**:

“No other third party was called to testify as to the publication and injury to reputation. As to whether the appellants character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. 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.”

26. With the foregoing, this court arrives at the finding that the Plaintiff’s case has not been proved on a balance of probabilities. If the Plaintiff’s case was successful I would have awarded a sum of Ksh.2,000,000/= general damages. (See for example **Johnson Gicheru v Andrew Morton [2005] eKLR** and **Jones v Pollard 1997 EMLR 233-243**).

27. In the upshot, the Plaintiff’s case is dismissed. Due to the circumstances of the case, each party to bear own costs.

Date, signed and delivered at Nairobi this 24th day of Sept., 2020

B. THURANIRA JADEN

JUDGE