



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 28 OF 2014

SIMON MWAGO.....PLAINTIFF

-VERSUS-

KELLEN MAINA.....DEFENDANT

JUDGMENT

1. Simon Mwago who is the plaintiff herein, filed a suit against the defendant by way of the plaint dated 12th February, 2014 and sought for reliefs in the nature of:

- (a) A permanent injunction restraining the defendant from defaming or in any way libeling the plaintiff;**
- (b) A plaintiff approved retraction of the defamatory statement by way of an apology published in the same manner as the defamatory material;**
- (c) General damages for libel;**
- (d) Exemplary damages;**
- (e) Costs of the suit;**
- (f) Interest on (a), (b) and (c) above at court rates.**
- (g) Any further and/or further reliefs as this Honourable Court may deem appropriate to grant.**

2. The plaintiff pleaded in his plaint that he was at all material times the Financial Director of Rentokil Initial Kenya Limited (“the company”) whereas the defendant is a former assistant accountant in the company.

3. The plaintiff pleaded in his plaint that on or about the 29th day of November, 2013 at about 3.18 pm the defendant maliciously and falsely caused the following defamatory words to be published concerning the plaintiff by way of an email addressed to Alan Ridley, Paul Hocking and D. Rakoro:

“The previous email had threatened to reveal the payroll details of the employees of the company and show the relationship between Rentokil and Resonate essentials a company owned by Simon which supplies safety gear to Rentokil. The company also fits tracking devices on vehicles and buildings...Late last year 2012 my husband saw Simon and Christine Makena (sales department) entering a guest house in Nairobi West in the afternoon. Immediately he called my husband on phone and told him that he wanted to talk to him so that he will not tell me about the encounter. The next morning when Simon came to work he called me in his office and asked me whether my husband had told me any crucial information and I said no. I denied because if I said yes immediately I would have been fired last year. So Simon has been holding a grudge against me because he was worried that I would tell other employees.”

4. The plaintiff further pleaded in his plaint that on or about the 20th day of June, 2013 the defendant while using a pseudo name caused the following defamatory words to be published concerning him and to third parties:

“Dear Gentlemen,

As part of a global company, Rentokil Kenya Ltd is not managed in a professional manner with modern day HR practices. The

management in Kenya has failed in many arrears. The Finance Director, Simon Mwago, fires employees at will. He sleeps with ladies at will. Those who expose the affairs are fired. A lady staff was fired because of being suspected of revealing sex affairs and other bad things. This matter is in court.

Service technicians are being overworked, underpaid, denied overtime dues and leave days by their manager who is John Ndhama.

When employees resign, they are chased away and forced to return petty things like T-shirts. They are not given testimonial letters either. Colleagues are not allowed to talk to former Rentokil employees.

A lady who had been working in initial division had severe health problems because of sanitact powder and the doctors report suggested that she be taken to another department. She was forced to either continue in that department irrespective of her health or leave. In other words, she was fired.

Most employees work on casual basis against the lab our laws in Kenya. Employees work under fear, YVC is also conducted under fear and intimidation.

Now we need the UK bosses to come and manage this place. THE EMPLOYEES ARE SUFFERING SILENTLY.

We will make the whole of Kenya and the world know about these bad things through the ministry of labour, Human Rights organizations and media if you don't take action now."

5. It was pleaded in the plaint that the words published were not only actuated by malice/ill spite but were false and would in their ordinary sense be taken to mean that the plaintiff is inter alia; unethical, dishonest and unworthy of his position.
6. It was further pleaded in the plaint that as a result of the referenced publications, he has suffered disrepute and embarrassment both personally and professionally, in addition to suffering loss and damage to his character.
7. Upon service of summons, the defendant entered appearance and put in her statement of defence dated 24th March, 2014 to resist the plaintiff's claim. More specifically, the defendant while admitting to authoring the publication on 29th November, 2013 denied that the same was false, malicious and/or defamatory of the plaintiff.
8. The defendant further denied making the publication of 20th June, 2013 using the pseudo name 'Jane Malasa.' Moreover, the defendant denied the meanings attributed to the publications and also denied the averments by the plaintiff concerning injury to his reputation as a result of the said publications.
9. At the hearing of the suit, the plaintiff testified and called one (1) witness while the defendant relied on her oral testimony.
10. The plaintiff who was PW1 made reference to the first email publication indicated hereinabove and stated that the same was sent to him from the company's UK office where it had originally been received. He further stated that one of the persons to whom the email was addressed was his immediate boss at the time.
11. It was the evidence of the plaintiff that the contents of the email are false since his company known as Resonate essentials is not engaged in any business with the company for policy guideline reasons. The plaintiff also gave evidence that it is not true that he was engaged in a romantic relationship with his junior as intimated in the impugned email. He subsequently produced the email of 29th November, 2013 as P. Exh 1.
12. The plaintiff stated in his evidence that following the email, the UK office of the company issued instructions for investigations to be carried out in the Africa office and that he was suspended during that time. The plaintiff disclosed that upon conclusion of the investigations, nothing wrong was discovered and he was reinstated to his position as Finance Director. He stated that he was forced to disclose the reason for his suspension to his family members and that his wife deserted him and went back to her parents' home; resulting in a tedious reconciliation process to bring her back to the matrimonial home.
13. The plaintiff further disclosed in his evidence that the impugned publications similarly had a negative impact on his professional life by causing a loss of trust among his colleagues and a strain in his work relationships.
14. During cross-examination, the plaintiff testified that previously, the defendant had left employment with the company following her dismissal as at 25th February, 2013 for the reason that she was found to be in possession of a payroll file against company policy. The plaintiff admitted to having personally fired the defendant and that she sued the company for wrongful dismissal.
15. The plaintiff further testified that before the second email of 29th November, 2013 was sent out, there had been communications between him and the defendant. He then stated that he did not have any evidence to show that he was suspended/sent on compulsory leave upon investigations into the management of the company, or to show the results of such investigations.
16. In re-examination, the plaintiff gave evidence that the defamatory emails came months after the dismissal of the defendant from employment with the company and that though he authorized the defendant to write to the UK office regarding her sentiments, he did not authorize her to defame him.

17. Christine Makena who was PW2 adopted her signed witness statement as evidence and denied any intimate involvement with the plaintiff and stated that she is married.

18. In cross-examination, the witness testified that she worked for the company for a period of 11 years as at the time of her testimony and that according to the impugned email of 20th June, 2013 the defendant indicated that it is her husband who allegedly saw the plaintiff and PW2 visit a guest house with the intention of becoming intimate with one another. The witness further testified that she is not aware as to the reason behind the termination of the defendant's employment. She restated her evidence during re-examination. This marked the close of the plaintiff's case.

19. In her defence, the defendant adopted her signed witness statement as evidence and produced her bundle of documents as D. Exh 1-13. The defendant went on to state that she worked for the company until 23rd February, 2013 when she was dismissed from employment, reason being she had been sending offensive emails which threatened to disclose information regarding the company's payroll.

20. The defendant stated that she challenged the dismissal at the Employment and Labour Relations Court and that judgment was delivered in her favour on the same and that the company paid her dues.

21. It was the evidence of the defendant that she wrote the email of 29th November, 2013 to merely give her employment history and explain the reason behind her dismissal.

22. It was also the evidence of the defendant that in the communications preceding her dismissal, she had disclosed the relationship between the company and Resonate essential, the latter of which is owned by the plaintiff; whereby Resonate essentials was supplying safety gears to the company.

23. The defendant testified that her husband witnessed the plaintiff and PW2 meeting at a guest house in Nairobi West and that her husband had written a witness statement describing the events in detail.

24. The defendant further testified that the day after the alleged meet-up, she was summoned by the plaintiff, who then inquired whether her husband had mentioned anything in particular to her and that she answered in the negative. The defendant; however; denied making the publication of 20th June, 2013 and also denied the particulars of defamation set out against her.

25. In cross-examination, it was the evidence of the defendant that she did not know the accuracy of the previous emails sent out by herself before her dismissal but that she was restating their contents in her email of 29th November, 2013 and that she believed the information conveyed by her husband to be true without verifying it.

26. It was equally the evidence of the defendant that at the time of writing the impugned email of 29th November, 2013 she had ceased being an employee of the company but that her dismissal case was still pending in court at the time.

27. In re-examination, the defendant testified that the impugned email was simply a report of the averments made to her by her husband and restated that she did not defame the plaintiff.

28. Upon close of the hearing, this court gave directions for the parties to put in written submissions. The plaintiff through his submissions dated 10th July, 2020 contended that the elements associated with the tort of defamation were set out by the Court of Appeal in the case of **Musikari Kombo v Royal Media Services Limited [2018] eKLR** and are as follows:

“It follows that a claimant in a defamation suit ought to principally establish in no particular order:

i. The existence of a defamatory statement;

ii. The defendant has published or caused the publication of the defamatory statement;

iii. The publication refers to the claimant.”

29. The plaintiff contended that it is not in dispute that the impugned emails were published by the defendant and with reference to the plaintiff.

30. Under the third element, it was the submission of the plaintiff that the test of what constitutes a defamatory statement was espoused by the court in the above-cited case of **Musikari Kombo v Royal Media Services Limited [2018] eKLR** with reference to the case of **S M W vs. Z W M [2015] eKLR** where it held that:

“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.”

31. According to the plaintiff, the words published by the defendant in the two (2) emails referenced hereinabove are defamatory in the sense that they could in their plain/ordinary meaning or by innuendo be taken to have the meanings listed in the plaint and in the mind of the reasonable man.

32. The plaintiff went on to submit that he had shown the manner in which the publications injured his reputation both personally and professionally, and that his evidence remains uncontroverted.

33. It was further the argument of the plaintiff that though the defendant averred that the publications made are truthful, she did not bring any evidence to support her averments or to show that she sought to verify the information before making the impugned publications.

34. On the reliefs being sought, the plaintiff conveyed his apprehension that unless restrained, the defendant is likely to make publications of a similar nature concerning him and therefore urged this court to grant a permanent injunction against her, with reference to the case of **Nelson Havi v Headlink Publishers Limited [2018] eKLR** where the court awarded similar injunctive orders.

35. The plaintiff also urged this court to award general and exemplary damages in the respective sums of Kshs.5,000,000/ and Kshs.1,000,000/ and cited inter alia, the case of **Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR** where the Court of Appeal awarded general damages of Kshs.5,000,000/ and aggravated damages of Kshs.1,000,000/; and the case of **Johnson Evan Gicheru v Andrew Morton & another [2005] eKLR** in which the Court of Appeal awarded Kshs.6,000,000/ on general damages for libel.

36. In reply, the defendant through her submissions dated 27th July, 2020 denied making the email publication of 20th June, 2016 or sending the same to the third parties indicated in the said publication. While admitting to the publication dated 29th November, 2013 the defendant restated her earlier position that the same was sent only to three (3) people including her advocate and there is nothing to indicate that any of the persons shared its contents.

37. The defendant further restated that in the aforesaid email, she was simply reiterating the contents of her previous emails and that there is nothing to prove that she did not receive the information contained in the email from her husband; that in any event, her husband also signed a witness statement before this court.

38. The defendant is of the view that the plaintiff has not demonstrated that the publication was actuated by malice.

39. It was the contention of the defendant that she was merely reporting what happened between her and the plaintiff, and that all those events took place in the presence of a third party named Mr. Mugambi.

40. The defendant concluded her submissions with the argument that from the foregoing, the plaintiff is not entitled to any award of damages and that his suit should be dismissed. Reliance was placed on the case of **Ibrahim Mukhtar Abasheikh v Royal Media Services & another [2020] eKLR** where the court dismissed the plaintiff's suit for defamation.

41. Upon careful consideration of the pleadings, the evidence tendered before this court in its totality, the rival submissions and the respective authorities quoted, I find the following to be the key issues for determination and which I shall immediately thereafter proceed to address.

42. The *first* issue is on whether the plaintiff has made a case for defamation against the defendant.

43. In order to establish a defamation claim, a plaintiff is required by law to prove certain specific elements which were laid out in the case of **Samuel Ndung'u Mukunya v Nation Media Group Limited & another [2015] eKLR** and are as follows:

a) That the libel must be published by the defendant.

b) That the published words must refer to the claimant.

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

d) That the publication was malicious.

44. The above elements were reaffirmed by the Court of Appeal in the recent case of **Musikari Kombo v Royal Media Services Limited [2018] eKLR** cited in the plaintiff's submissions.

45. Concerning the first and second elements, from my analysis of the pleadings and evidence on record and as concerns the email publication of 29th November, 2013 it is not in dispute that the same was written by the defendant and that reference was made to the plaintiff. However, in respect to the email publication dated 20th June, 2013 there is nothing to indicate that the same either originated from the defendant or can be traced to her, though it is apparent that reference has been made to the plaintiff therein. I therefore find that the first two (2) elements have been satisfied as relates to the email of 29th November, 2013.

46. The third element to the tort of defamation concerns itself with whether the publication was defamatory of the plaintiff. The legal stance is that a defamatory statement lies with its tendency to lower the reputation of the claimant in question, as seen in the case of **S M W v Z W M [2015] eKLR** quoted in the plaintiff's submissions and where the Court of Appeal described a defamatory statement using the following words:

"...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."

Thus, in determining the meaning of words for purposes of defamation, the court does not employ legal construction, it will consider the layman's understanding of the same. The question is not what the defendant intended. The mere fact that the hearers understood the language in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding it. The words complained of should be considered in their natural and ordinary meaning: see Gatley on Libel and Slander (8th edition) paragraphs 88-93."

47. Upon reading and examining the impugned email publication of 29th November, 2013 a copy of which was produced as an exhibit by the plaintiff, I find that the words used and highlighted in the plaint can be taken in their ordinary meaning to infer that the plaintiff is dishonest, unethical and known to contravene the guidelines and policies of the company. I also note that the plaintiff vehemently denied the allegations that he had an intimate relationship with PW2 or that his personal company (Resonate essentials) was engaged in business with Rentokil contrary to the company's policies.

48. While it may be true that the plaintiff did not adduce any evidence to corroborate his testimony concerning investigations into the allegations made against him or that he was forced to take compulsory leave as a result of the impugned publication or that his marriage and work life suffered, it is noteworthy that this being a case for libel, damage suffered is presumed by law. This means that it is not a requirement for a party to prove damage in cases of libel, a position which was succinctly stated by the Court of Appeal in the case of **Selina Patani & another v Dhiranji V. Patani [2019] eKLR** in this manner:

"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. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation."

49. In contrast, from my analysis of the evidence tendered by the defendant, I observed that she did not adduce anything to show that the words were not intended to have a defamatory impact. I note that the impugned publication was made following her departure from the company pursuant to a dismissal.

50. Further to the foregoing, the defendant in her testimony stated that she did not verify the authenticity of the contents of the publication before making it and that she received the information largely from her husband. It is noted that the said husband was neither called as a witness nor was his witness statement produced as evidence for this court to rely on it. Put another way, the defendant did not bring any credible evidence to show the truthfulness of the publication, which therefore leads me to the conclusion that the plaintiff has reasonably demonstrated that the impugned publication was not only false but defamatory of him.

51. On the subject of malice which constitutes the fourth element, the court in the case of **Phinehas Nyagah v Gitobu Imanyara [2013] eKLR** appreciated the following:

"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."

52. Upon examining the evidence tendered before me, I took note of the fact that there were some allegedly offensive emails sent by the defendant prior to her dismissal from employment with the company but which emails were not availed to this court. Be that as it may, I will reiterate there is nothing to indicate that the defendant sought to confirm the veracity of all the information pertaining to the impugned publication before choosing to publish the same concerning the plaintiff, or that she made any efforts to call her husband as a corroborating witness to shed light on the facts indicated therein.

53. Furthermore, it is admitted by the plaintiff that the impugned email came months after she was dismissed from employment.

54. In view of the foregoing circumstances, I am inclined to draw an inference of malice on the part of the defendant.

55. Consequently, I am of the opinion that the plaintiff has demonstrated on a balance of probabilities the ingredients attached to the tort of defamation against the defendant in respect to the email publication of 29th November, 2013.

56. This brings me to the *second* issue to do with whether the defence(s); if any; pleaded in the defence are available to the defendant. From my study of the statement of defence, I did not come across any particular defence pleaded therein. Be that as it may, I note that the defendant in her oral testimony stated that the impugned email constituted true facts but did not bring any credible evidence to support this statement as she ought to have done. In the premises, I am of the view that the defence of truth/justification was unavailable to the defendant.

57. The *third* and final issue concerns itself with the reliefs sought in the amended plaint.

58. Having found in favour of the plaintiff, I now turn my attention to the reliefs sought in the amended plaint in the following order.

(a) A permanent injunction

