



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 438 OF 2014

DENNIS NDWIGA NTHUMBI.....PLAINTIFF

V E R S U S

G4S KENYA LIMITED.....1ST DEFENDANT

STANDARD GROUP LIMITED.....2ND DEFENDANT

JUDGEMENT

1) Dennis Ndwiga Nthumbi, plaintiff herein, filed this compensatory suit for defamation against G4S Kenya Ltd and Standard Group Ltd, the 1st and 2nd defendants respectively vide the plaint dated 11th December 2014. In the aforesaid plaint, the plaintiff sought for judgment against the defendants jointly and severally as follows:

- a) Unconditional apology to the plaintiff.*
- b) General damages*
- c) Exemplary damages*
- d) Aggravated damages*
- e) Costs of the suit*
- f) Interest on (b) (c) and (d) above*
- g) Any other or further relief that this Honourable Court shall deem fit to grant.*

2) The defendants each filed a defence denying the plaintiff's claim.

3) Before delving deeper into the merits or otherwise of this dispute, let me set out the brief background of this dispute. The plaintiff was an employee of the 1st defendant and at the time of leaving employment he held the position of **Head of secure journey and Events Security Management**.

4) The plaintiff is said to have resigned from the 1st defendant's employment on 28.10.2014. The 1st defendant caused a notice to be published in the 2nd defendant's daily news paper of 24.11.2014 to the effect that the plaintiff had ceased being an employee of the 1st defendant and that he was not authorised to transact any business on behalf of the 1st defendant. The notice was accompanied by the plaintiff's passport photograph. The plaintiff being of the opinion that the notice was defamatory of him, filed this action.

5) In the same publication, a similar notice was published in respect of another former employee of the 1st defendant namely **Sammy Okwemba** who similarly filed a separate action claiming damages for defamation vide Nairobi H.C.C.C no. 439 of 2014.

6) On 8th May 2018 this court was moved to have this suit heard and determined a test case for H.C.C.C. no. 439 of 2014.

7) When this suit came up for hearing, the plaintiff's case was supported by the testimonies of two witnesses. The **first** to testify is **Dennis Ndwiga Nthumbi (P.W.1)** who told this court that he resigned from the 1st defendant's employment vide the email of 28.10.2014 and his notice of resignation was accepted. PW1 said he was shocked to learn that the 1st defendant published a notice accompanied with his

prominent passport size photograph. He produced as an exhibit in evidence a copy of the notice containing the following words:-

This is to notify the general public that the above named persons ceased to be employees of G4S Kenya Limited effective 12th November 2014. G4S Kenya will not be held liable for any transaction purported to be carried out by the two either jointly or separately on behalf of G4S.

The public is advised to check with the company for clarification on any transaction by the two.

8) PW1 claimed that the publication of his photograph alongside the aforesaid words in the entire article was actuated by malice and was calculated to disparage his character. PW1 further stated that the publication portrayed him in bad light in the security where reputation is everything.

9) The plaintiff also summoned George Glenn Ogola (P.W.2) to testify in support of his case. PW2 confirmed that he was aware PW1 had resigned from the employment of the 1st defendant. PW2 also stated that PW1 was his immediate boss while they were both in the employment of the 1st defendant. He averred that there was an alleged investigation in the department where the plaintiff was the head and they both resigned about the same time. PW2 claimed that he was under investigation at the time PW1 was under investigation too, but the 1st defendant did not put up any advertisement about him like it did to the plaintiff.

10) The defendants summoned one Boniface Ngungu (D.W.1) to testify in support of their defence. DW1 stated that he is the Human Resource Manager at the 1st defendant's company. DW1 gave the details of the rise of the plaintiff from a sales executive as of 4.2.2008 to the position of **Secure Journey & Events Manager**. He stated that P.W.1's duties included managing financial/resources and dealing with clients both current and prospective.

11) DW1 also stated that in the course of employment the plaintiff was requested to account for missing funds and instead of responding he opted to resign from the 1st defendant's employment but investigations continued even after his departure.

12) DW1 further stated that the 1st defendant put up the notice to inform clients of the plaintiff's disengagement with it and to make them aware that the plaintiff had no authority to transact business on its behalf. DW1 also stated that the advertisement was based on existing facts and was not actuated by malice.

13) At the close of evidence, learned counsels appearing in this matter were invited to file and exchange written submissions. I have considered the evidence presented by both sides plus the rival submissions and the authorities cited. Two main issues commend themselves for determination of this court. First, is **whether the publication complained of was defamatory of the plaintiff**. Secondly, whether the plaintiff is entitled to damages and if so what the quantum.

14) On the first issue, it is the submission of the plaintiff in the professional field of security, reputation precedes the person and a publication like the one the defendants published calls to question the integrity, trustworthiness and professionalism of the plaintiff. The plaintiff submits that the publication is defamatory of him. It was pointed out that the article in its natural and ordinary meaning was understood to mean that the plaintiff as a manager is corrupt, unsecured liability on behalf of the 1st defendant, is untrustworthy and is unfit to hold office.

15) It was further argued that the notice and the accompanying photographs were calculated to disparage and did disparage the plaintiff's character as a person and a professional. The plaintiff also stated that he had a good tenure at the 1st defendant's company. The plaintiff is of the further submission that the 1st defendant was not justified to plaster his face on the newspapers with a disclaimer but instead actuated by malice.

16) It is the submission of the 1st defendant that the publication was not defamatory but the same contained factual statements. The defendants' further submission is that the plaintiff's claim that the notice portrayed him as corrupt, untrustworthy and unfit to hold office is misleading and is meant at importing other interpretations to the plain and unambiguous content of the publication.

17) Having considered the evidence, the submissions and the authorities cited, it is apparent that the defendants do not dispute publishing the offending notice. The question to be answered is whether the publication is defamatory. In order to determine the issue the publication must be critically examined. It is clear from the publication that the public was informed that the plaintiff whose photograph appeared alongside the notice had ceased to be an employee of the 1st defendant. This fact is admitted by the plaintiff.

18) Secondly, the information which came out of the publication is that the plaintiff having ceased being an employee of the 1st defendant, was not authorised to transact any business on behalf of the 1st defendant.

19) The third point which was clear is that the 1st defendant would not be liable for any transactions purportedly carried out by the plaintiff on behalf of the 1st defendant.

20) The fourth message communicated by the publication is that members of the public were free to check with the 1st defendant for clarification on any transaction by the plaintiff.

21) A plain reading of the notice will not in anyway infer that the plaintiff was being referred to as corrupt, untrustworthy or unfit to hold office, in my view the words used therein were plain unambiguous. The aforesaid publication did not in any way damage the reputation of the plaintiff.

22) I also find no evidence of malice on the part of the defendants. I am persuaded by the evidence of DW1 that the 1st defendant may have been prompted to cause the notice to be published by the abrupt resignation of the plaintiff from the employment of the 1st defendant. There was no manifestation of malice on the part of the defendant.

23) The second issue is **whether the plaintiff is entitled to damages and how much if any**. The plaintiff having failed to establish that he was defamed, is not entitled to claim any damages.

24) However the law requires the trial court to determine the quantum of damages it would have awarded had the action been unsuccessful.

25) The plaintiff has urged this court to award him as follow:

General damages ksh.15,000,000/=

Aggravated & Exemplary damages ksh.5,000,000/=

The plaintiff cited the following cases:

Samuel Mukunya =vs= Nation Media Group Ltd & Another (2015) eKLR where this court awarded ksh.15,000,000/= for general damages.

Daniel Musinga T/A Musinga & Co. Advocates =vs= Nation Newspaper (2005) 1KLR 587 in which this court awarded the claimant ksh.10,000,000/= as general damages.

The defendants did not deem it fit to submit on quantum.

26) The plaintiff is a security expert while the claimants in the above cited authorities were advocates of the High Court in private practice who later on joined the bench as judges. If the plaintiff had turned successful I could have awarded him a sum of ksh.4,000,000/= as general damages.

27) On aggravated and exemplary damages, the plaintiff urged this court to award him ksh.5,00,000/=.

The plaintiff cited two cases.

Johnson Evan Gicheru =vs= Andrew Morton & Another (2005) eKLR in which the court of appeal awarded ksh.6,000,000/= and in the case of **Biwott =vs= Mbuguss & Another (200) 1KLR 321** in which this court awarded ksh.10,000,000/= for aggravated damages.

In the case of **Ken Odondi & 2 other =vs= James Okoth Ombura J/A Okoth Omburah & Co. Advocate (2013) e K.L.R** the Court of Appeal restated the considerations to be taken into account before making an award on exemplary and aggravated damages in part as follows:

.....so the respondent was not only entitled to general damages for defamation but also entitled to exemplary damages to punish the appellants who defamed him and refused to retract the offending article or apologise.

28) Applying the above stated principles, I do not think the plaintiff's case meets the set criteria. Therefore even if the plaintiff had succeeded I could have denied him the award on exemplary/ aggravated damages.

29) In the end, I find that the plaintiff has failed to prove his case on a balance of probabilities. Consequently, this suit is ordered dismissed with costs being given to the defendants.

30) This being a test to Nairobi H.C.C.C no. 439 of 2014, the later Suit suffers the same fate as this.

Dated, Signed and Delivered in open court this 28th day of February, 2019.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant