



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 53 OF 2005

JOSEPH C. LANGAT..... PLAINTIFF

VERSUS

WILSON K. RONO 1ST DEFENDANT

TEA RESEARCH FOUNDATION..... 2ND DEFENDANT

JUDGMENT

1. This matter has had a rather long sojourn in the courts. It was filed in Nakuru on 25th April 2005. It first proceeded before Musinga J (as he then was) on 2nd October 2007 when the plaintiff, Joseph Cheruiyot Langat, gave his evidence in chief, but was not cross-examined due to constraints of time. On 16th November 2011, directions were taken before Ang'awa J that the matter should start afresh.

2. The matter did not proceed for the following three years for a number of reasons which are in the court record, including the absence of Counsel for the parties. On 15th November 2010, the plaintiff testified again before Hon. Justice G. B. M Kariuki (as he then was), and the matter was again adjourned due to time constraints before the plaintiff had been cross-examined. Again, the parties requested for the matter to start *de novo* when it came up before Sergon J, and the plaintiff testified yet again on 9th June 2014. His second witness testified the following day, and the matter was then adjourned.

3. Following the transfer of Sergon J from Kericho, the matter was placed for hearing before Ong'udi J. When the parties appeared before her on 1st July 2015, the defendants' Counsel sought the transfer of the matter to the Employment and Labour Relations Court (ELRC) on the basis that it pertained to the dismissal of an employee. After considering the matter, Hon. Ong'udi J ruled that the issue of defamation raised in the claim could not be separated from the claim for wrongful dismissal on the basis of false allegations. The court therefore directed that the matter be transferred to the ELRC for hearing and determination.

4. The matter was then placed before the ELRC for directions on 4th February 2016. After considering the matter, Justice D. K Njagi Marete noted that the amended plaint dated 8th June 2005 had brought out a clear case of defamation, and the issue of terminal benefits had only come out peripherally at the prayer section of the pleadings. It was his view that the matter was therefore largely civil and not employment and labour relations in substance and content, and was not sustainable before the ELRC. He therefore re-transferred the suit to this court for hearing and determination. He also directed that the parties were at liberty to separate and build the limb of terminal benefits and pursue it in the appropriate court.

5. The matter then came up before me on 14th November 2016. Mr. Mbeche indicated that the plaintiff had elected to pursue the issue of defamation and abandon the claim for terminal benefits. The parties also agreed to proceed from where the matter had reached. This court was thus able to hear the matter to conclusion, and this judgment relates to the plaintiff's claim for defamation against the defendants.

The Claim

6. The plaintiff was employed as an internal auditor by the 2nd defendant. He was dismissed from employment on 30th August 2004. The plaintiff seeks in this suit general, exemplary and aggravated damages for defamation from the defendants. He bases his claim on a letter dated 28th May 2004 in which the 1st defendant interdicted him from employment. He alleges that in the said letter, the 1st defendant unlawfully, maliciously and without justification printed of and concerning him *inter alia* the following words:

“Following investigations which were recently conducted it was noted that between January 1999 and December 2002, cheques amounting to kshs .21,946.210 meant to pay other organisations mainly suppliers were fraudulently encashed at the Kenya Commercial Bank.

During the investigations, payment vouchers relating to the said cheques amounting to kshs. 19,714,245 were also found

missing. As an auditor, you confirmed that payments were genuine or not and advise the management accordingly. It is highly suspected that you either played as an accomplice to the fraud or acted negligently in this matter by failing to notice the irregularity.

It is further noted that on 12th August 1999, a total of U. S. Dollars 37,500 (approximately kshs.2.9 million) was received from Ruwenzori Commodities Ltd of Uganda as payment for tea cuttings. The money was then kept in a safe at the cash office. Later when the safe was inspected, it was noted that the money had disappeared and at the time of the safe. It was also noted that there was no report indicating that the safe was broken into. Again there was no report indicating that the safe was broken into. Again there was no explanation as to how the keys came into your possession. By implication therefore, it is suspected that you either organized or acted as an accomplice to the disappearance of the money.

Your conduct in these matters amounts to negligence of duty and casts doubt on your integrity in observing the ethics of auditing profession. Negligence of duty is a gross breach of regulations which renders you to disciplinary action in accordance with section D3 of the foundation's C. O. R for the senior staff."

7. The letter was copied to six public officers, namely the Permanent Secretary, Agriculture, the Secretary to the Cabinet, the PS. Governance and Ethics, the Controller & Auditor General, the Inspector General of State Corporations, and the Chairman Tea Research Foundation

8. The plaintiff attributes the words used in the letter, which he considers defamatory and referred to and were understood to refer to him, to the 1st defendant acting in his capacity as director of the 2nd defendant, whom he holds vicariously liable for the acts of the 1st defendant. He avers that the said statements, in their natural and ordinary meaning, meant or were understood to mean that the plaintiff is an incompetent and dishonest individual who is unfit to be entrusted with any public work. By printing and circulating the said words, the plaintiff has been greatly injured and his credit and reputation brought to ridicule, contempt and odium in the eyes of right thinking members of society.

9. He further contends that by the publication of the said statements, the defendants jointly and/or severally intended to mean and were understood to mean that the plaintiff is an extortionist and a criminal, an undesirable person who is not fit to be employed as he cannot be entrusted with public funds.

10. It is his case that the writing and circulation of the said words has greatly injured him in his credit and reputation and brought him to ridicule and disrespect and to be generally shunned by right thinking members of the public. He asserts that by the act of the 1st defendant, the plaintiff lost his employment with the 2nd defendant for which the plaintiff holds the defendants jointly and severally liable.

11. The plaintiff makes further averments in his plaint with respect to the termination of his employment. However, in light of his decision to abandon his claim for termination of employment, I need not set out the averments in this regard. He prays for general, exemplary and aggravated damages for defamation of character and an unconditional apology or damages in lieu thereof, as well as the costs of the suit and interest.

The Plaintiff's Case

12. The plaintiff's claim was presented through three witnesses. PW1, the plaintiff, testified that he was a certified public accountant then in private practice trading as P.A Langat & Associates based in Kericho. Before 2004, he had been employed as the internal auditor for the Tea Research Foundation (the 2nd defendant), which he had joined in 1990 and left in 2004. His duties as internal auditor were to independently examine, evaluate and report on the internal controls. He had started as a junior member of staff then risen to middle management and in 1990 was tasked to establish the internal audit department as a senior staff.

13. According to the plaintiff, the 1st defendant, Dr. Rono, wrote a defamatory letter on 28th May 2004. The said letter damaged his character and led to the loss of his employment. He produced the said letter as Pexh.2.

14. The 1st defendant had, in the said letter, alleged that the plaintiff had failed in his duties. The plaintiff maintained that he was not fraudulent while in the employment of the 2nd defendant, and there was no evidence that he had withdrawn any cash from his employer. It was his testimony that the mandate to withdraw cash lay with the accountant, and the auditor did not keep cash. Further, that the keeping of vouchers was not the responsibility of the auditor. It was his case therefore that the 1st defendant was not justified in making the wild allegations against him to the effect that he had stolen US\$ 37,500, which was in the custody of the cashier. Further, that the keys to the safe were not under his custody.

15. It was also his case that he was not negligent in his duties as an internal auditor. He was interdicted before he was given a letter to show cause, and he relied on the 2nd defendant's Code of Regulations for non – unionisable employees (Pexhb.3) section 3D of which was not followed in his interdiction. He testified that the letter of interdiction was not justified since the Code of Regulations clearly stated the duties and responsibilities of each office.

16. According to the plaintiff, he was given 14 days to respond to the allegations against him, which should not have been done as the questions should have been directed to the relevant officer. He had responded to the claim against him in a letter (Pexh.4). He had expected to be given a chance by the Board of Directors of the 2nd defendant to explain his position in person, but he was not given such an opportunity. He had reported the issue to the Kenya Anti-corruption Commission (KACC) to carry out thorough investigation. On 19th August 2004, KACC had responded in writing (Pexh. 5) thanking him for his letter and stating that it had referred the matter to the Criminal Investigations Department.

17. According to the plaintiff, he was given a letter of termination (Pexh.6) under Condition 6 of the Code of Regulations, and was not given an opportunity to clarify issues.
18. The plaintiff testified that the 2nd defendant had later been audited by the Controller and Auditor General, and the audit report of the 2nd defendant was to be signed by the Director of the Foundation on behalf of the 2nd defendant. The plaintiff produced the audited accounts for the period 1999 to 2003 (exh.7 (a) – (e)) which were signed by the 1st defendant personally and none of which indicated that there was a loss of funds by the 2nd defendant as alleged in the letter of interdiction (Pexh.1).
19. He testified that he was not on duty between July 1999 to 2nd December 1999 as he was at Vision Institute of Professional Studies doing a CPA course. He relied in this regard on a letter from that institute dated 30th November 1999 (Pexh.8.) He had been officially released from duty by the employer (Pexh.9) and had handed over his office to his assistant, one Wesley Korir (Pexh.10).
20. It was his testimony that the letter accusing him of neglect of duty dated 28th May 2004 covered the period he was in college. He referred to the minutes of 15th July 2004 at page 2 of which he alleged that the 2nd defendant admits knowledge of his absence, and in which the 1st defendant had sat as the secretary.
21. The plaintiff denied that he had stolen any money from the 2nd defendant. He alleged, however, that as a consequence of the letter he had lost his job. He had subsequently applied for jobs but to no avail, and that in all the interviews he had attended, the interviewers reacted negatively when he told them that he had been terminated from employment.
22. It was his case, further, that his daughter, who was a pupil at Kericho Tea Primary School, was affected very much when she was told that he was a thief, and he had been forced to transfer her to another school as she was traumatised by the news of his dismissal having apparently reached her classmate. He further testified that he was traumatised when he saw his post being advertised in the newspapers; that by the time the vacancy was being advertised, his employment had not been terminated, but that in the minutes of 11th June 2004, the Board had been informed by the 1st defendant to hire a new auditor, yet he had not yet responded to the notice to show cause served on him.
23. The plaintiff testified that it was not procedural to copy disciplinary matters to third parties, but the letter dated 28th May 2004 was copied to the Permanent Secretary, Agriculture, the Secretary to the Cabinet, the PS. Governance and Ethics, the Controller & Auditor General, the Inspector General of State Corporations, and the Chairman Tea Research Foundation. The termination letter was not copied to all those people.
24. It was his case that as a result of his name being circulated to those offices, he could no longer be appointed to serve in any board, and that the letter of interdiction keeps on resurfacing any time he does a report to a client.
25. The plaintiff confirmed that he was aware of a letter dated 16th May 2004 in which it was alleged that he had been responsible for the loss of Kshs. 2.9 million. He had responded to the Director of the 2nd defendant then, one Jeremiah Ruto. He further confirmed that he was aware of a response to the letter in which he had responded that the money was received by a cashier but was not banked, and that it could not be traced. That he had carried out investigations which showed the allegations with respect to the money were true. He had explained in his letter that he was away from the office on study leave.
26. He also confirmed that there had been a special audit report by the Inspectorate of State Corporations titled **“Report on mismanagement of the Financial Affairs of Tea Research Foundation of Kenya”**. Page 7 of the report at paragraph 4 referred to a Mr. Towett, the plaintiff’s assistant, who alleged that he had received instructions from the internal auditor, who was the plaintiff, Mr. J. C. Langat, and the Administration and Finance Manager a Mr. A. O. Mohammed, to pluck and rewrite the cash-book to exclude the USD 37,500 entry.
27. The plaintiff denied in cross-examination that he had the keys to the safe where the funds allegedly lost were kept. He confirmed that in a memo dated 2nd March 2004 (DMFI 4) which referred to an audit covering the period up to 23rd June 2003 from the Deputy Secretary, Inspectorate of State Corporation, it was recommended that the internal auditor should be surcharged, and that the culprits be charged in court.
28. The plaintiff further confirmed that the letter dated 28th May 2014 is stamped confidential, and it makes reference to investigation. He also confirmed that the Managing Director of the 2nd defendant had power or discretion to suspend officer who had breached the regulations, and he was also mandated to immediately report to the Board of the 2nd defendant to enable the Board ascertain the veracity of the complaints. He denied that the people to whom the letter of interdiction was copied had a legitimate interest in the matter. He had copied his letter responding to the letter of interdiction to all the people to whom the letter of interdiction had been copied, stating that it is not humanly possible to detect all errors as an auditor.
29. Claire Cherotich (PW2), the plaintiff’s daughter, adopted her statement dated 9th June 2014. She stated that she was aged 10 years in 2004. Her classmate, Kevin Kibet, told her that his father, David, had told him that her father had been dismissed because he stole money. She had informed her parents what she had heard.
30. The plaintiff’s third witness, Protus Cheruiyot Sigei (PW3) an accountant working as a Deputy Director of Investment in the Ministry of Finance testified that he had known the plaintiff for over 40 years. He adopted his witness statement dated 9th March 2012 as his evidence in chief. He stated that he had seen the letter dated 28th May 2004 from the 1st defendant at the Inspectorate of State Corporations.
31. The said letter was touching on the plaintiff and made certain allegations of fraud or money disappearing. It further asked the plaintiff to

show cause why disciplinary action should not be taken against him. The letter, which was marked confidential, was addressed to the plaintiff and was copied to various offices in Government which he enumerated. It was his testimony that he was not aware whether other people got access to the letter, but he got the letter as he worked at the National Treasury.

32. Mr. Sigei testified that he knew that the plaintiff was the internal auditor of the 2nd defendant, and that he had other administrative responsibilities. He was also aware that he was the integrity assurance officer at the 2nd defendant.

33. PW3 testified that in the period July – December 1999, the plaintiff was on study leave studying at the Visions Institute of Professionals, a school of accountancy, in Nairobi, and was staying with him at his house, from which he was commuting for the entire period.

34. He further testified that what hit him upon seeing the letter of interdiction were the allegations made against the plaintiff. In view of what he knew of the plaintiff's character, he did not believe he could have done what was alleged, and he still does not believe the allegations.

35. It was his testimony that he was aware that the plaintiff was terminated from employment in August 2004. He had made attempts to look for a job, especially in the early years, but was never successful.

36. It was his testimony further that when he was in an office at the KICC at the Inspectorate of State Corporations, one Joyce Wesonga, an officer of the Inspectorate on whose desk the letter had landed and who knew that PW3 knew the plaintiff, told him about the case of the plaintiff, and she shared the letter with him and he read it. He testified that her opinion was negative against the plaintiff, and she thought that what was in the letter was true. While he did not believe the contents of the letter, he believed that the said Joyce Wesonga believed the contents were true. He was emphatic that the plaintiff was someone he grew up with, and he did not believe that he would do what was alleged in the letter of interdiction.

37. PW3 confirmed in cross-examination that the letter was addressed to heads of six government institutions. One of these institutions was the Inspector General (Corporations). That once it landed at the Inspector General's Office, it was directed to officers in the office. He conceded that the author of the letter would have no control where it lands once it reached the office addressed. He further conceded that the offices to which the letter was copied had a legitimate interest in the matter and would also have a concern in the running of the 2nd defendant.

38. He conceded also that he knew the 1st defendant, and that he knew of no personal difference between the plaintiff and the 1st defendant. He expressed the view, however, that the letter could have been actuated by malice, noting that it was a disciplinary letter yet it was copied to several government institutions before the disciplinary proceedings were over.

The Defendants' Case

39. The defendants relied on the evidence of James Kipkemoi Langat, an employee of the 2nd defendant working as a Human Resources Manager. He had been in employment with the 2nd defendant since April 2010. He relied on his statement dated 1st October 2013 as his evidence in chief.

40. It was his testimony that the plaintiff had left by the time he joined the Institute. However, he had gone through his employment record and noted that the plaintiff had been employed in 1990 as a senior accounts clerk. He had been transferred in 1993 to the audit section and in 1995, he was promoted to internal auditor. He had left the Institute in August 2004 upon termination of service.

41. According to DW1, the plaintiff's services were terminated due to gross negligence of duty. This was because, prior to his termination, there was a special audit/inspection done by the Auditor General which showed that the plaintiff did not discharge his duties diligently as required. That as a result, when these issues were raised in May 2004, it was decided that he should be interdicted at a meeting held on 19th May 2004 by the staff and finance committee. DW1 produced the minutes of the meeting dated 19th May 2004 (D Exhibit 1). That following the meeting, the plaintiff was terminated from employment in August 2004.

42. DW1 further testified that upon termination, the plaintiff raised the issues of unlawful termination and defamation. He claimed that the letter dated 28th May 2004 that placed him on interdiction was copied to various officers in the public service, and as a result he had been defamed by the letters being copied to these offices. According to DW1, the letter had been copied to these offices as they were interested parties and in pursuance of the integrity and accountability programme in the public service initiated by the Directorate of Personnel Management, office of the President.

43. DW1 further testified that a circular dated 14th October 2002 (D exhibit 2) had been issued requiring that integrity assurance officers should be trained. Two officers from the 2nd defendant, one of whom was the plaintiff, had been nominated, trained and issued with a certificate dated 26th October 2002 titled **Public Service Integrity Programme** issued by the office of the President through the PS/Director, Directorate of Personnel Management (D Exhibit 3).

44. Following his training, the plaintiff had written a report to the Director of the 2nd defendant dated 31st October 2002 (D exhibit 4) on the areas covered in the training and what the institute was required to do. The report, according to DW2, indicated that the aim of the training was to sensitize integrity officers on their role and to put measures to achieve the objectives of the programme. It was for this reason that the letter of interdiction of the plaintiff was copied to all the offices named in it.

45. In cross-examination, DW1 stated that he was employed by the Tea Research Institute. This was because in 2013, the research organisations were merged under government regulations and the organisation was now known as Tea Research Institute, but that it was the same as Tea Research Foundation, the 2nd defendant. He denied that Tea Research Institute is a company Limited by guarantee, but

confirmed that Tea Research Foundation is a company limited by guarantee. He maintained that the two were not different organisations.

46. He further confirmed that Tea Research Foundation has a Memorandum and Articles of Association but that it operated as a state corporation. That the Memorandum had 7 subscribers but that the letter of 28th May 2004 was copied to among others, the PS, Governance and Ethics, yet he was not in the Memorandum and Articles of Association of the 2nd defendant, nor was the Inspector General of State Corporations. He maintained, however, that there was justification in sending the letter to the persons it was sent to as the 2nd defendant operated as a state corporation since 1980.

47. DW1 maintained that Kshs. 21,946,210 was fraudulently encashed, and that US\$ 37,500 was lost during the tenure of the plaintiff. He further confirmed that there was a time that the plaintiff was away from the institute for training at Vision Institute; that he was allowed to be away from work for 5 months, but in his view, the defendants were justified in saying that US\$ 37,500 was lost during his watch as he was in charge. That it was his responsibility, even if he was out, to safeguard the resources.

48. DW1 stated in re-examination that Tea Research Foundation was initially formed under the Companies Act. In 1980, it was translated into a state corporation and incorporated under the State Corporations Act. Then, in 2013, an Act of Parliament, the Kenya Agricultural Livestock Research Act 2013 merged four research organisations- Kenya Agricultural Research Institute (KARI), Tea Research Foundation of Kenya, Kenya Sugar Research Foundation and Coffee Research Foundation. to form Kenya Agricultural Research Organisations, and Tea Research Foundation became Tea Research Institute under that organization.

The Submissions

49. In written submissions filed by his Counsel, Mr. Mbeche, the plaintiff reiterated his evidence that the letter dated 28th May 2004 and titled "NEGLIGENCE OF DUTY" was copied to the Permanent Secretary/Secretary to the cabinet, the Permanent Secretary, Ministry of Agriculture, the Permanent Secretary, Governance and Ethics, the Controller and Auditor General, the Inspector General (Corporations), and the Chairman, Tea Research Foundation of Kenya, Board of Directors. The letter made various allegations against him, asked him to show cause why his employment should not be terminated, and it was thereafter terminated.

50. With regard to his claim in defamation, he submits that the letter dated 28th May 2004, was done with malice, was not justified, and was mainly aimed at injuring his reputation as an auditor and integrity officer of the 2nd defendant. He contends that the manner in which the letter was drafted was conclusive and its aim was to injure his reputation, which the 2nd defendant succeeded in doing.

51. After termination of his employment, he was unable to get any employment despite the fact that he tried to seek a job in other organization. He challenges the fact that the letter was copied to parties who should not have received this letter. He notes that from the Memorandum and Articles of Association of the Tea Research Foundation, the 2nd defendant is a company limited by guarantee whose subscribers are listed at page 10 of the Articles and Memorandum of Association and its members are listed at page 12.

52. It is his case that the persons to whom the letter was copied were not supposed to receive copies of the letter. In his view, copying the letter to the said persons was a demonstration of malice on the part of the 2nd defendant. He submits that there was no justification in copying the letter, nor was copying the letter done in good faith. It was also not a case of fair comment and therefore it amounted to defamation.

53. The plaintiff relied on the decision in **Ochieng and Others vs Standard Limited (2004) eKLR** in which the court quoted Lord Wensley's dictum in defining what defamation is as being

"A Publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule".

54. He also relied on the decision in **John Ward vs Standard Ltd (2006) eKLR** in which the ingredients of defamation were outlined as being that the statement is defamatory, it refers to the plaintiff, it was published by the defendant and that it was false.

55. The plaintiff also cited **Winfield and Jolowicz on Torts, 16th Edition, 2002 at page 404**, which defines defamation as a publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him.

56. It is his case that the publication was false in that the plaintiff had handed over his duties to one Wesley Korir and proceeded for training from July 1999 to December 1999. The 2nd defendant was aware of this fact and to suggest in the letter dated 28th May 2004 that the plaintiff did not make a report of the loss or break in of the safe was not only malicious but also false. He submits further that the 2nd defendant knew that he was not at the place of work then and he could not have expected the plaintiff to make a report when he was miles away for training at the Vision Institute.

57. It is his submission further that no evidence was adduced by the defendants to show that any money was lost by way of fraudulent encashment of cheques. Further, nothing was brought to show that the plaintiff was negligent, and the statement by the defendants has no justification and was only aimed at injuring his reputation.

58. The plaintiff referred to his evidence at the hearing that the audit reports from the year 1999 to 2003 did not show that such a substantial amount was lost. That all the audit reports were signed by the 2nd defendant and thus there was no justification to print allegations that were wild.

59. The plaintiff further noted the evidence of his daughter that she was traumatized when a classmate told her that her father had stolen money from the 1st defendant and had been dismissed. His submission was that this demonstrated that what the defendants had done was not confidential as it was supposed to be, and it had critically injured the plaintiff's reputation generally.

60. With respect to the evidence of Protus Cheruiyot Sigei, the plaintiff submitted that the letters sent to various institutions in Nairobi, and more specifically the Ministry of Finance, were not treated as confidential. He submitted that the letter had been openly discussed by the staff in that Ministry and had thus critically injured the plaintiff's reputation. The plaintiff submitted therefore that he was able to prove his case that he was indeed defamed.

61. He discounted the evidence presented by the sole defence witness, noting that the witness had no information with respect to the cheques allegedly fraudulently encashed. Further, the witness was not privy to most of the allegations made by the 2nd defendant, and he was therefore not able to respond to questions put to him. Consequently, the allegations made in the letter dated 28th May 2004 were not substantiated.

62. The plaintiff submitted that he had lost his employment at a young age. He had not, to date, been able to secure any employment due to the defamatory statements made and circulated by the 2nd defendant while acting as Director of the 1st defendant.

63. With regard to the quantum of damages that he sought from the court, he proposed a sum of Kshs 10,000,000. This was on the basis that more than 13 years had elapsed since he lost employment due to the defamatory/malicious statement of the defendants. He was earning a salary of over Kshs 70,000/= and had it not been for the defamatory letter and loss of employment, he could have risen through the ranks.

64. He relied in support on the decisions in **Nairobi HCCC No. 2143 of 1999-Kipyator Nicholas Kiprono Biwott vs George Mbuguss and Kalamka Ltd (2002) eKLR; Nairobi HCCC. NO. 420 OF 2011- Samwel Ndungu Mukunya vs Nation Media Group; Mombasa HCCC. 102 OF 2000- Daniel Musinga T/A Musinga & Co. Advocates and Nairobi HCCC. No. 140 of 2008-Gideon Mose Onchwati vs Kenya Oil Co. Ltd & Another.**

65. In their submissions in response, the defendants deny that the letter dated 28th May, 2004 was defamatory. They assert that it was triggered by allegations of theft of the 2nd defendant's funds and was therefore not motivated by any malice.

66. The defendants argue that the issue for determination in this matter is whether the contents of the letter dated 28th May, 2004 were defamatory. They observe that the letter states that **"...By implication therefore, it is suspected that you either organized or acted an accomplice to the disappearance of the money.**

67. They contend that one key phrase in the letter is **"it is suspected"**. In their view, this phrase does not exclusively single out the plaintiff as the mastermind of the alleged theft but rather communicates a misgiving or doubt as to the veracity of the said allegations. The defendants submit that the succeeding paragraphs of the letter set out the consequences of the alleged negligent conduct of the plaintiff, which would be to be taken through a disciplinary process.

68. The defendants make reference to the evidence of PW 3, whom they perceive as having been called as a witness to the effect of the said letter, but who testified that he did not believe its contents. They submit that the letter was not written in a decided spirit but rather expressed suspicion of the plaintiff's role in the alleged theft. It is their submission therefore that the plaintiff's claim that he was defamed cannot stand.

69. The defendants rely on the decision in **Phinehas Nyagah vs Gitobu Imanyara [2013] eKLR** in which the court defined what constituted defamatory content as follows:

"... Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on.

70. It is their case that nothing in the said letter was defamatory of the plaintiff. The operative words used in the letter, according to the defendants, is that the plaintiff was suspected of having played a role in the loss of the 2nd defendant's funds.

71. The defendants submit, however, that taken in context as emerged from the pleadings and the evidence, the letter concerned loss of the 2nd defendant's funds, which the plaintiff ought to have detected as the defendant's internal auditor. They submitted that the plaintiff had, in cross-examination, admitted that the 2nd defendant's concerns over loss of funds were legitimate, and that it was practically impossible to detect all fraud. In their view, the contents of the letter with respect to loss of funds cannot therefore be deemed to have been a consequence of a malicious plot aimed at tarnishing the plaintiff's character.

72. It is also the defendants' case that the letter was done in an occasion of qualified privilege. It was addressed to the plaintiff's superiors regarding his conduct as an employee of the 2nd defendant. They assert therefore that even if the contents of the letter were in their ordinary sense defamatory, the plaintiff's claim would not lie as it was written in an occasion of qualified privilege. In support of this assertion, the defendants rely on the decision of the court in **Benedict Ombiro vs Board of Governors Kenya Utalii College & Another [2018] eKLR** in which the Court of Appeal held:

***“... that the learned Judge took into consideration factors which in our view, were factors relevant to the appeal before him namely, that the publication was restricted to few persons; that the respondent had a moral duty to give that information to the prospective employer; that the prospective employer also had a moral obligation to receive that information.*”**

73. They also cite **Bedan Moses Kinyangu Mbae vs Robinson Njagi Gachogu [2007] eKLR** in support of the proposition that a presumption of privilege would arise in communications between persons within an employment relationship.

74. It is their submission further that in as much as the plaintiff insists that the letter was copied to persons who were not under any duty to receive it, the 2nd defendant (now Tea Research Institute) is a quasi-public body charged with undertaking research towards development of new tea clones and by extension improving the status of the tea industry in Kenya, citing in support section 31 of the **Kenya Agricultural and Livestock Research Organizations Act** and Schedule Four, thereof.

75. They note that the directors of the 2nd defendant include the Permanent Secretary Ministry of Agriculture, a representative of the Inspectorate of State Corporations and three other persons nominated by the Minister for Agriculture under section 6(1) of the State Corporations Act. It is their case that these nominees are all state officials, representing the various governmental departments listed, and they had a legitimate interest in the running of the affairs of the 2nd defendant. In their view, the plaintiff cannot hide behind the 2nd defendant's Memorandum and Articles of Association to dissociate the 2nd defendant from the various government departments cited in the said letter.

76. The defendants urge the court therefore to find that the contents of the impugned letter were not in any way defamatory of the plaintiff. That the operative word used in the letter was that the plaintiff was suspected of the allegations indicated. Further, that even if the words were defamatory, the sentiments expressed were covered by operation of the doctrine of qualified privilege.

77. However, in the event that the court found in favour of the plaintiff, the defendants urged the court to award nominal damages as the letter was copied to only five persons, and its circulation was therefore limited. The defendants relied in support of this submission on the decision in **Benedict Ombiro vs Board of Governors Kenya Utalii College & Another** supra) where the court held that:

***“... an award of damages in a defamatory claim is meant to compensate the injury suffered by the plaintiff to his reputation; that damages must be commensurate with that injury and that low publication of any defamatory material attracts damages on a lower scale, and also that publication was low and restricted and therefore warranted damages on a lower scale than that accorded by the trial court.*”**

Analysis and Determination

78. I have considered the pleadings and submissions of the parties in this matter, as well as their oral testimony. I believe that the following issues arise for determination:

- a. Whether the contents of the plaintiff's letter of interdiction were defamatory;***
- b. Whether the circulation of the plaintiff's letter of interdiction amounted to publication;***
- c. Whether the contents of the said letter were of and concerning the plaintiff are capable of being construed as being defamatory of the plaintiff in their natural and ordinary meaning or by innuendo;***
- d. Whether the publication was made maliciously;***
- e. Whether the plaintiff's credibility, character and reputation has been injured and therefore whether he is entitled to damages and if so, how much.***

79. It is not in dispute that in order to succeed in the tort of defamation, the plaintiff must establish that the words complained of were published of and concerning him. Secondly, that they were published by the defendants. Thirdly, that they were false. Fourth, that they were defamatory of the character of the plaintiff and finally, that they were published with malice.

80. In **J P Machira vs Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997**, the tort of defamation was defined as being 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 him be shunned or avoided. To be deemed defamatory, the statement must be one which has the tendency to injure the reputation of the person to whom it refers by lowering his estimation in the eyes of right thinking members of society generally, and to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, and dislike. **Gatley on Libel and Slander, 8th edition paragraph 4 p 5** defines a defamatory imputation as follows:

“ a defamatory imputation is one to a man's discredit or which 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.”

81. Defamation is defined in **Winfield on Tort 8th Edition p 254** as follows:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of

society generally, or which tends to make them shun or avoid that person.”

82. In **Halsbury’s Laws of England Vol. 28 4th edition para 10 p7**, a defamatory statement is defined as follows:

“A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.”

83. In order to be deemed defamatory, the statement must be published or communicated to at least one person other than the person defamed. Thus, publication to the plaintiff alone is not enough since defamation is an injury to one’s reputation, what others think of a person and not what the person thinks of himself.

84. Finally, defamation is not about publication of falsehoods against a person. The plaintiff must show that the false statement published disparaged his reputation or tended to lower his reputation in the eyes of right thinking members of society generally.

85. In this case, the statement alleged to be defamatory was contained in the letter dated 28th May 2004. It was a letter of interdiction, addressed to the plaintiff, but copied to six other persons. I have already set out earlier in this judgment the words in the letter that the plaintiff complains of.

86. The plaintiff contends, and on a consideration of the words used in the letter of interdiction, I agree, that the statements, in their natural and ordinary meaning, meant or were understood to mean that the plaintiff is an incompetent and dishonest individual. There would have been no basis for complaining, however, if the letter had only been addressed to him. It was, however, copied to six officers of government. These were the Permanent Secretary, Agriculture, the Secretary to the Cabinet, the PS. Governance and Ethics, the Controller & Auditor General, the Inspector General of State Corporations, and the Chairman, Tea Research Foundation.

87. The defendants do not dispute that the letter was copied to these parties. They argue, first, that the letter was not defamatory as it referred to ‘suspicion’. Secondly, they argue that the publication was on an occasion of qualified privilege.

88. To establish that the defendants had defamed him, the plaintiff called two witnesses. The first was his daughter. She stated that she had heard from a classmate that he had heard from his father that her father had stolen money. She was therefore ‘traumatised’. To be actionable, the statement referred to must lower the reputation of the plaintiff in the eyes of right thinking members of society. To my mind, the evidence of the plaintiff’s daughter does not show that the reputation of the plaintiff was lowered in the eyes of right thinking members of society. There was no evidence to show who ‘David’, the father of the plaintiff’s daughter’s classmate, was, and what his relationship with the plaintiff was.

89. More telling, I believe, is the evidence of PW3, Protus Cheruiyot Sigei. He stated that he had known the plaintiff for over 40 years. He had seen the letter with one Joyce Wesonga at the Office of the Inspectorate of State Corporations. While he stated he thought she believed the things said in the letter about the plaintiff, he did not himself believe the contents of the letter. I understand this to mean that the letter, which had been shown to him and which he had read, had not affected his feelings or regard for the plaintiff. The reputation of the plaintiff, in other words, had not been lowered in the eyes of right thinking members of society.

90. The plaintiff states that he was never able to get a job as a result of the publication to the government officers of his letter of interdiction. I have not, however, found anything in his evidence to support this contention.

91. Then there is the question of the publication itself. The 2nd defendant is a state corporation. While the plaintiff sought to show that it is a company limited by guarantee, and therefore not a state corporation, which would mean that the defendants had no right to copy the letter to the six government officers to whom it was copied, the position is otherwise. **Kenya Agricultural and Livestock Research Organizations Act** defines the former institutions which fall under the ambit of the Act and which are research institutes under the Act. It specifically mentions the institutions involved in the conduct of agricultural research established under the Companies Act, the State Corporations Act and any other written law specified in the Fourth Schedule to the Act. The Fourth Schedule includes the 2nd defendant among the former institutions referred to under section 56 of the Act.

92. Thus, though the 2nd defendant was established under the Companies Act as a company limited by guarantee, it was a state corporation. Its Board was drawn from government ministries and institutions, and the letter of interdiction of the plaintiff was copied to these six institutions. I agree with the defendants that these officers had a legitimate interest in 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, a corresponding interest to receive it.

93. My findings, therefore, are that the plaintiff has failed to establish that the statements in the letter of interdiction were defamatory. The evidence presented did not show that the statement tended to lower his reputation in the estimation of right thinking members of society. On the contrary, his witness was categorical that he did not believe the statement in the letter.

94. Having so found, I would proceed to dismiss this claim, which I hereby do, but with no order as to costs.

95. I am, however, under a duty to assess the damages I would have awarded to the plaintiff had I been satisfied that he had established his claim in defamation. Section 16A of the **Defamation Act** Cap 36 Laws of Kenya provides:

In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.

96. In this case, as the court observed in **Benedict Ombiro vs The Board Of Governors Kenya Utalii College (2018) eKLR** in upholding the decision of the High Court setting aside an award in favour of the appellant by the lower court, the publication was done only once, to a small group of people who were the plaintiff's employers and had an interest in receiving the information, and were entitled to receive it. The situation in this case is unlike that in the case of **Nairobi HCCC No. 140 of 2008-Gideon Mose Onchwati vs Kenya Oil Co. Ltd & Another** in which the defamatory statements were published, as it were, to the whole world through newspapers with nationwide, indeed region-wide, circulation.

97. Indeed, I take the view that the facts of this case are similar to the facts in the case of **Ongoro Oyuga Weda vs Kenya Ports Authority (2018)eKLR** where Rika J observed:

“It was not sent to all and sundry at the 1st Respondent. It was confined to Superiors. There was no malice shown by the 2nd Respondent in writing this letter. It is addressed to Superior Officers of the 1st Respondent, who had legitimate interest and obligation, to know about, and pursue the matter under communication. There are some elements of truth, in the letter communicated to Superiors...” (Emphasis added)

98. I would accordingly have awarded the plaintiff a sum of Kshs 500,000 had he succeeded in his claim.

Dated Delivered and Signed at Kericho this 27th day of February 2019

MUMBI NGUGI

JUDGE