



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 150 OF 2016

SECURITY GROUP KENYA LIMITED.....APPELLANT

V.

SAMUEL ITOTIA.....RESPONDENT

(Being an appeal from the judgment and Decree of Hon. C. Obulutsa Senior

Principal Magistrate in Eldoret Cmcc No. 762/2015 made on 21.10.2016)

JUDGMENT

1. The appellant (**SECURITY GROUP KENYA LIMITED**) challenges the finding of the trial court on liability on account of defaming the respondent SAMUEL ITOTIA and giving an amount of for a sum of **Ksh 2,000,000/-** as general and punitive damages. The respondent worked for the appellant as a Regional Branch Manager for four years before tendering his resignation on 19.6.2013 and the resignation was accepted by the appellant taking effect on 21.6.2013. It was the respondent's case that on or about the 24.6.2013 the appellant caused to be published in the Daily Nation newspaper on pg 40 the following word:

“This is to inform all our clients and the general public that the above named person ceased to be our employee with effect from 21st July 2013 and is no longer associated with us. Any transactions he enters in our behalf shall not be honored henceforth and the company will not be liable for such transactions.”

1. It was the respondent's contention that when he sought for employment the same was not published to make their clients aware. In the ordinary meaning the above words meant he could not be trusted, he had lost his job through dismissal, he had conducted himself in a manner not befitting an honest good moral standing man and that he had intentions to transact on behalf of the appellant. In addition to this he averred that the publishing was malicious, false and ill-motivated calculated towards injuring his character. This had exposed him to public ridicule. He had asked the appellant to apologise in the newspaper at their own costs.

2. His prayer was for judgment against the appellant as follows:

a) An order of permanent injunction restraining the defendant by itself, servants, directors, employees or otherwise from publishing or causing to be published or continuing to publish any or every word/ expressions, matters, statements and or notices regarding and touching on anything concerning the plaintiff which may in any way or manner be injurious or prejudicial to the plaintiff.

b) General, exemplary, punitive and aggravated damages against the defendant

c) An order directing the defendant to immediately cause or publish an appropriate apology and or clarification in a prominent part of the newspaper or as the court may direct and for such number of days as the court may be pleased to order at the defendant's own cost.

d) Cost of the suit

3. The appellant denied the allegations contending that prior to his resignation the respondent had incorporated a company called Group 9 Security and it operated in conflict with the appellant's and upon his resignation he approached the appellant's client disguising himself as their employee. This prompted the appellant to publish the notice as a precautionary measure to warn their clients and the general public that the respondent was no longer its employee. It denied that the publication was actuated by malice.

4. APPEAL

5. Aggrieved by the decision the appellant filed an memorandum of appeal setting forth the following grounds:

- i. The trial magistrate erred in law and in fact in arriving at a decision that is not supported by the evidence on record at all*
- ii. The trial magistrate erred in law and in fact in finding that the respondent was defamed when the evidence on record is clear that he did not prove any of the essential elements of defamation on a balance of probability to entitle him to any kind of compensation*
- iii. The trial magistrate erred in law and fact in awarding general damages that were wrong and unfounded.*
- iv. The trial magistrate erred in law and in fact in whimsically making an award of damages that was excessive and highly exaggerated without basing it on evidence and the law.*
- v. The trial magistrate erred in law and in fact, when he in a casual approach to judicial function in his judgment failed to consider crucial parts of the defendant's submission and also misquoting certain crucial elements thereof.*
- vi. The trial magistrate erred in law and in fact when he failed to find that the words published were published with justification and cannot be actionable per se.*
- vii. The trial magistrate erred in law and in fact when he failed to find that the plaintiff having not proved that he was defamed by the defendants, his claim against the defendants would fail.*

It is on account of these that the appellant prays for

- a) The said judgment of trial court be set aside and substituted with an order dismissing the same
- b) Costs of this appeal be awarded to the appellant

6. The parties agreed to dispose off the appeal by way of written submissions.

Appellant's submission

7. Counsel for the appellant argued that the respondent failed to avail witnesses who had called him that he appeared in the Nation dailies. The witness John Njuguna (PW2) only testified that he heard people talk about the respondent while at Paul's Bakery which created a negative notion about him. The appellant maintains it was only safeguarding its business. A case in libel or slander one has to prove that the matter of which the plaintiff complains of was published by the defendant, the publication concerned or referred to the plaintiff, it was defamatory in character and it was published maliciously. The appellants stated that the publication was in relation to one Martin Karimi. The publication was not defamatory in any way, the court was referred to **Gatley on Libel and Slander 6th Edition** who stated as follows,

"A defamatory statement must be false and it must also be defamatory to the plaintiff, that it is to say, the statement must contain whether expressly or by implication, that it is to say, the statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts not contained in the statement, as the reader must reasonably be expected to possess."

This court was referred to **Nation Newspapers Ltd v. Gilbert Gibendi** [2002] eKLR which held that one had to prove total malice and actual damage to his reputation and character in order for the court to assess an appropriate award.

8. It was also submitted that the amount awarded was in excess, as damages should be commensurate to the loss sustained. Counsel submits that there was no documentary evidence demonstrating that the respondent suffered loss due to the publication, and there was no proof of malice implied. That in any event failure to observe section 7 of the Defamation Act, the respondent could not plead the amount in submissions and not the plaint, thus this amount was not to be awarded. In **Douglas Odhiambo & Anor v. Telkom Kenya Ltd** [2014] eKLR a plaintiff is under duty to present evidence to prove his claim.

9. It was the respondent's submission that the article in the natural and ordinary meaning meant that he was corrupt, lacked integrity, was a thief, involved in conspiracy to defraud the appellant, committed crimes. He maintained that he had proved his case unlike the appellant who merely stated that the publication was only to warn and alert its customers. The respondent pointed out that he had voluntarily resigned and therefore the publication was done in malice. He urged this court to be guided by the decision in **The Standard Limited v. Kalamka Limited Nairobi, (2006) eKLR** which gave the principles to be applied by the court in assessing quantum of damages which included,

I. the objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any reputation

II. The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself

III. Matters tending to mitigate damages such as the publication of an apology

IV. Matters tending to reduce damages

V. Vindication of the plaintiff's reputation past and future.

He also referred to **John Patrick Macharia v. Wangethi & Anor (2001) eKLR** do bolster his argument that the court did not err in awarding the amount.

10. The court was urged to dismiss the appeal and uphold the trial court's finding.

ANALYSIS

a) Whether the appellant's publication was defamatory

b) If so how much is adequate compensation

11. As a first appellate Court, this court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that the court did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in **Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123**. This same position had been taken by the Court of Appeal for East Africa in **Peters –vs- Sunday Post Limited [1958] EA 424** where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.

12. A defamatory statement is one that is published without any lawful justification. The respondent in his pleadings claimed that what the appellant caused to be published in the Nation daily newspaper for 24.6.2013 at pg 40 was damaging to his reputation. The said publication appeared at the bottom of the said page as follows:

“This is to inform all our clients and the general public that the above named person ceased to be our employee with effect from 21st June 2013 and is no longer associated with us

Any transaction he enters in our behalf shall not be honored henceforth for such transaction.

Management

Security Group Kenya Ltd.”

13. It is not in dispute that the respondent was an employee of the appellant as evidenced by the letter dated 5.12.2011 which contained the terms and conditions, which the respondent accepted by signing. Clause 10 of the appointment letter states as follows:

“You will not, without consent of the company engage in other businesses which would be in conflict with your duties as a full time employee of this company or occupation except that of the company you will find many promotion opportunities exist for good employees who work diligently and honestly at all times and we hope that you will become one of the successful senior employees...”

This court shall come back to the above caption later in this judgment

14. The respondent testified that his wife **SCHOLASTICA WANJIRU** called to inform him about the publication, as did his brother, and former employer (**WELLS FARGO**) and he further said the allegations that he had a parallel business was not true. On cross-examination he confirmed that he was engaged in security business.

15. **JOHN NJUGUNA (PW2)** a trader within **KAKAMEGA** County and a friend to the appellant testified that while at **Paul's Bakery** in **LUMAKANDA**, he heard people talking about the respondent saying he was a thief.

16. Defamation cases are guided by Order 2 rule 7 of the Civil Procedure Rules provides as follows:

“(1) where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

(2) where in an action for libel or slander the defendant alleges that in so far as the words or matters complained of consist of statements of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

17. The appellant's witness **VINCENT LIPOSHE (DW1)** testified that while the respondent was still in employment with the appellant he incorporated a company by the name **GROUP 9 SECURITY** which he operated in conflict of interest thus breaching clause 10 and 11 of the Employment Contract (Clause 10 has already been reproduced in the earlier part of this judgment). However this was denied by the respondent who in fact attached a business permit for the said company which was owned by Martin Mwenda who was also the appellant's employee. Therefore the appellant was not justified to allege that the company belonged to the respondent.

18. The respondent's case is that the publication was printed with malice and had caused a lot of damage on him. In **J.P Macharia v. Wangethi Mwangi & Anor, Nai** HCC No. 1709 of 1996 (relied by the respondent in the lower court), it was held that 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. The appellant published this to inform the clients since its operations are all over the country. It was upon the respondent to prove his case as held in **Douglas Odhiambo & Anor v. Telkom Kenya Ltd** (supra) where the court stated that a plaintiff was under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.

19. In addition to the above this court finds that the public was to be made aware that the respondent had ceased from working for the appellant, noting that he had given a notice on the 19th June 2013 which had been acknowledged. Clause 8 of the employment contract read as follows;

“Termination of service.

The company shall be entitled to terminate this contract by giving you one month notice or salary in lieu of such notice without necessarily assigning reasons thereto. This is without prejudice to the Company's right to terminate the contract summarily for a lawful cause. If you wish to terminate this contract, you must give the company one month notice of your intention or forfeit your salary for the period of which your notice shall fall short of the stipulated days.”

The appellant owed a duty to its clients to inform them of any changes within the company operations and the respondent being the General Manager the public ought to have known of his resignation. I fail to comprehend how a word of caution to those who would not be in the know that the respondent had left employment and therefore avoid any transaction translates to implying that he is a thief or has criminal tendencies is not clear. It was erroneous for the trial court to hold that the appellant was liable, and the judgement entered be and is hereby set aside.

20. On the issue of damages awardable reference is made to **The Standard Ltd v. Kalamka Ltd** (supra) where the objective of the libel has to be established and the effect of the libel on the plaintiff's past and future. The respondent did not adduce any evidence to prove to the court that indeed his reputation was in jeopardy. In fact he said he was in the security business but did not demonstrate how the publication had any effect on his business. Guided by the above case this court would have awarded a sum of Ksh 400,000/= had the respondent proved his case.

Consequently, the appeal has merit and is allowed. The respondent shall bear the costs of the appeal.

Delivered and dated this 15th day of March 2019 at Eldoret

H. A. OMONDI

JUDGE