



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 501 OF 2013**

**MANYOTA LIMITED .....PLAINTIFF**

**VERSUS**

**PROTECTIVE CUSTODY LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOASH SHIRANDULA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff herein moved this court vide a plaint dated the 22<sup>nd</sup> November 2013, claiming general, exemplary and punitive damages plus costs of the suit. The cause of action is premised on various email correspondences which were allegedly authored by the 2<sup>nd</sup> defendant about the plaintiff which emails were copied and/or published and/or circulated to several persons.

It was pleaded that, the plaintiff who was at all material times a civil works building contractor, on 2<sup>nd</sup> September 2013 and 19<sup>th</sup> October 2013, undertook some civil work which involved laying of fibre cable for Huawei Technologies Limited, in areas around Kasuku, Lenana, Woodlands road which were undertaken to the satisfaction of its employer (Huawei Technologies Limited)

The plaintiff avers that on 13<sup>th</sup> September 2013, the 2<sup>nd</sup> defendant falsely and maliciously published and/or caused to be published information and/or correspondences and/or a letter contents of which were extremely demeaning to the plaintiff. The contents of the said emails are lengthy and the court does not wish to reproduce all of them here but for purposes of understanding the cause of action, those of the emails dated 13<sup>th</sup> September and 25<sup>th</sup> September 2013 are set as hereunder;

***From: Protective Custody Ltd (Mailto:protectivecustody@yahoo.com) sent Friday, September, 13, 2013 2.01 p.m.***

***To: Abraham Mwangi.***

***Cc: Thomas K. Kyangu; Joseph K. Murgor; Charles O. Arrogo:aakana@protectivecustodyltd.com***

***Subject: Re: CABLE CUT INCIDENCE IN PROTECTIVE HOTSPOT***

**10/9/2013: Nyerere Road**

***On the night of 9<sup>th</sup>/10<sup>th</sup> September, 2013 there was alarm activation but the same was not relayed to our patrol crews for response. The situation would have been rescued if the crews were alerted to respond to the alarm immediately. Whoever is monitoring alarm activations at the control room should be immediately linked to our crews to avoid late/delayed response.***

***We have noted in the recent past cable vandalism has really been aided by Manyota Ltd workers because they are dig terraces, laying fiber cables in the same line with Telkom and it worse when they leave the Telkom Cables exposed.***

**11/9/2013: Lenana Road**

***In the morning of 11<sup>th</sup> September, 2013, Mr. Ondiek of Telkom Orange called one our supervisors Mr. Wafula and reported alarm activations along Lenana Road.***

***Our response team was dispatched immediately and on arrival patrolled the area. While on patrol, crews found one of the Telkom Orange vehicle parked and Mr. Langat/his team checking the terraces.***

*Both parties found cable cut 3 pieces 10 metres each. They established that Manyota Limited Workers were in the area and in the course of their work had exposed the Orange cables leaving them uncovered. When the cables are exposed like that it's prone to attract cable thugs and they get ease time to cut and steal.*

*I propose an urgent meeting between Manyota Limited managers/supervisors and Protective Custody Limited Management to agree on the way forward, with the aim of avoiding the thefts we have experienced of late.*

*In the meantime, it should be communicated to Manyota Limited installers to ensure Telkom Orange cables are not exposed cables are well covered before they leave all the areas they are working in.*

*Lastly, there are several manholes that were left open since beginning of last month despite relevant authority being notified but no action has been taken. These areas are Hill park Hotel, Kiambere junction, Don Bosco, Blue Shield (3) and Oxford . Kindly let action be taken, to avert any further theft.*

*Otherwise, we promise to fight the vice ruthlessly.*

*Joash Shirandula*

**BRANCH MANAGER**

*Protective Custody Ltd*

*P O Box 27998 – 00200*

**NAIROBI**

The contents of the email on paragraph 8 of the plaint read as:

*From: Protective Custody Ltd (Mailto:protectivecustody@yahoo.com) sent Friday, September, 25, 2013 4.33 p.m.*

*To: Charles O. Arrogo*

*Cc: Thomas K. Kyangu; Joseph K. Murgor; Charles O. Arrogo:aakana@protectivecustodyltd.com*

*Subject: Re: CABLE CUT INCIDENCE IN PROTECTIVE HOTSPOT*

*HELLO Sir*

*The above matter refers.*

*On the night of 22<sup>nd</sup>/23<sup>rd</sup> September, 2013 a group of between 25 ac 30 people ambushed Milimani area to vandalize Telkom Orange Cable. The response team spotted them and confirmed that they had already cut the cable. When they realized that crews were ready to combat them, the thugs started throwing stones to scare them.*

*In the attack our response vehicle side mirror was broken. Response crews were also injured but they did not give up fighting culprits. They engaged the culprits and recovered the cable estimated to 80 metres. A van was seen parked at a distance waiting to be loaded the cut cable when our back up vehicle drove towards it, it sped and disappeared.*

*The crews loaded the cable to our pick up of safety and reported the matter to one of Telkom Staff on call within the area. The crews were advised to take the cable to Milimani Telephone Exchange, for it to be restored immediately to the affected area.*

*The cable was taken to Milimani Telephone Exchange loaded on vehicle registration KBJ 660E and it was handed over to Mr. Langat at 0920 hours by myself. The report was booked in the entrance register and both parties signed against the entry.*

*Manyota Limited has extended its underground installations towards Dennis Pritt to Chaka Roads, continuing to exposing Telkom cables. We had proposed to have a meeting with this contractor to come up with the way forward of how exposed areas can be secured before completion of their work.*

*All damages caused by Manyota Limited during their installations, should be coded to them so that we come up with a concrete solution to avert this situation.*

**Mamba Village**

*On 18<sup>th</sup> September, 2013 alarm ¾ activated and crews attended immediately. They found cable 3 metres cut and stolen. They immediately informed one of your staff in charge of the area, who visited there for confirmation.*

*The situation with Manyota limited is not improving at all, most of the cable cuts are results from them exposing Telkom cable while in there contracted duties. The trend is worrying nothing that from September, upto December is the sensitive period where we have been experiencing a lot of cable cuts.*

*As an immediate measure we have accordingly beefed up security with patrols intensified in all areas further our guards have been sternly instructed to be extra vigilant.*

*Having known where the problem is we hope to have a meeting with Manyota Limited representative to establish ways of ensuring the theft trend as a results of the work is controlled.*

*The action plan on the ground is to intensify security in the affected areas and increase surveillance patrols. Also under covers guards have been equipped with communication gadgets to assist in identifying the areas where the cable has been exposed and in case of suspicious characters to raise alarm instantly for quick respond.*

*Spot checked by duty officers will be conducted promptly to reinforce and crack down the rampant trend of cable vandalism.*

*We appreciate the co-operation and support we have with your security teams.*

*Joash Shirandula*

**BRANCH MANAGER**

**Protective Custody Ltd**

**P O Box 27998 – 00200**

**NAIROBI**

The plaintiff pleads that the said words in their natural and ordinary meaning meant and were understood to mean that the plaintiff is a thief, a vandal who was incompetent and undeserving of work and in particular a contract or civil works dealing with cable installation or routing of cables.

The plaintiff avers that the publication elicited a response from Telkom Kenya which response was communicated to the defendants but despite the said response that exonerated the plaintiff, the defendants did not bother to tender an apology. That by reason of the publication aforesaid, which are false, malicious and unwarranted, the plaintiff had been severely injured in his character, credit, commercial reputation and its occupation as a consequence of which its reputation has been gravely lowered in the estimation of the right thinking members of the society and particularly those who trade with it. This has subjected the directors and members of the plaintiff to public ridicule, scandal, odium and contempt. That the defendant's actions were motivated by malice and ill will in that, the defendants knew or ought to have known that the allegations contained in the said publications were false and lacked basis in fact or at all. The particulars of ill will and malice are set out in paragraph 17 of the plaint. It has thus prayed for judgment as per the reliefs sought in the plaint.

The defendants filed a defence on 20<sup>th</sup> January, 2004 in which the plaintiff's claim is denied. They admitted having written the emails dated 13<sup>th</sup> September 2013 and 25<sup>th</sup> September 2013 but avers that the said emails were confidential as between a client and a service provider and that they were written in the normal course of business.

The defendants aver that the said emails were not malicious, defamatory and demeaning of the plaintiff or in any way meant to cast aspersions on the plaintiff in that, they were only copied to the employees of orange Telecom who were in one way or another connected to the theft of the cables. That the 2<sup>nd</sup> defendant acted in the honest belief that it was the plaintiff's employees/workers who were laying cables on the areas where the vandalism had occurred and that the plaintiff had not denied that they were contracted to work along Lenana road where the alleged incident took place. That the contents were not accusatory but the defendants sought an urgent meeting with the plaintiff to sort out issues.

The 2<sup>nd</sup> defendant denied all the contents of paragraphs 9, 10 and 11 of the plaint and avers that the emails were neither defamatory to the plaintiff nor did they impute the plaintiff as a thief, a vandal or as otherwise stated in paragraph 10 and 11 of the plaint. They have urged the court to dismiss the plaintiff's claim with costs.

A reply to defence was filed on the 10<sup>th</sup> February, 2014 in which the plaintiff joins issue with the defendants in its statement of defence and it has reiterated the contents of the plaint. The plaintiff reiterates that the emails were defamatory against it and the defendants had a duty to ascertain the veracity which they never bothered to do. That the emails were solely aimed at portraying it as a vandal and a thief and denied that the same was done in the normal course of business.

At the hearing, the plaintiff called one witness in support of its case while the 2<sup>nd</sup> defendant testified as the only witness in support of the defendants' case.

In his evidence, Kenneth Kuria Njuka, for the plaintiff adopted his witness statement. It was his evidence that on 2<sup>nd</sup> September 2013 and 19<sup>th</sup> October 2013, the plaintiff undertook the laying of fibre cable on behalf of Huawei Technologies Limited along Kasuku, Lenana and Woodlands roads which the plaintiff concluded satisfactorily. That as a result of the long standing relationship they had with Telkom Kenya

on account of being their supplier of products, Telkom forwarded to them various emails correspondences touching on alleged damage of their cables. The emails wanted a confirmation whether their company had been contracted to work on the stated areas where the said damage is alleged to have occurred.

He stated that the contents of the said emails were misleading and aimed at tainting the business reputation of the plaintiff in that they indicated that their employees were seen stealing and vandalizing fibre cable and in particular the email dated the 13<sup>th</sup> September 2013 which made reference to cable cutting incidences and laid blame on the plaintiff. That the information in the emails was circulated to all the Telkom staff dealing with Fibre cables and all the related staff.

That upon noticing that the plaintiff's reputation was being painted in bad light, his co-director Mr. Njuria wrote on 26<sup>th</sup> September 2013 to the Regional Technical Manager of Telkom Kenya seeking clarification why the plaintiff's name was maligned in which letter, he clarified that the contractor on site was prime Telkom which information was relayed to the defendants and copied to the plaintiff.

That the publication painted the commercial reputation in very bad light in the estimation of right thinking members of the society. That the information published was incorrect, false and damaging to the plaintiff's reputation to say the least and that the fines that could have been imposed had the plaintiff been found guilty would have been colossal.

In his evidence, 2<sup>nd</sup> defendant adopted his witness statement filed in court on 11<sup>th</sup> February 2014. He is/was the Nairobi branch manager of the 1<sup>st</sup> defendant.

It was his evidence that the first defendant was contracted by Telkom Orange – Kenya to provide security services on their underground cables and other lines within Central Business District and its environs. That in the year 2013, the incidences of reported Telkom cable vandalism increased dramatically and out of concern, the cable supervisors and himself investigated the cause of the said increase. That they established that other companies were installing underground cables on the same area as those of Telkom Orange and in the process of digging the workers were exposing the underground Telkom Orange cables and once exposed the cables became an easier target for vandalism. In the process of investigations, he was informed one such contractor was the plaintiff and the incidences occurred on 9<sup>th</sup> and 10<sup>th</sup> September 2013 along Nyerere road where cables were vandalized and he was advised by the ground supervisor that the plaintiff's workers were installing the cables on that said area.

He stated that after consultations, they agreed to engage the contractors installing the cables along the said areas where Telkom Orange cables lay, to reduce incidences of exposing their cables and that is what led to the email of 13<sup>th</sup> September 2013. That other incidences occurred including one on 22<sup>nd</sup> and 23<sup>rd</sup> September 2013 at Milimani area where Telkom cables were again vandalized, following which, they wrote the email dated 25<sup>th</sup> September 2013 to Telkom requesting them to raise the matter with the plaintiff and fix a meeting to discuss the way forward. They also managed to recover 80 metres cut cables. He contended that the said emails were written in the normal course of business and they were not in any way malicious, defamatory or demeaning to the plaintiff as alleged in that, they were only copied to the employees of Telkom, he acted honestly and the contents were not accusatory.

After the conclusion of the hearing, parties filed their respective submissions which this court has duly considered.

The plaintiff herein has sued the Defendants for defamation. The tort of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification. **See – 7<sup>th</sup> Edition of Salmond on the law of Torts.**

In the English case of **Scott Vs. Sampson (1882) QBD 491 at page 503, Dave J.** defined the word defamation as;

***“A false statement about a man to his discredit”***

In the well known work of Winfield, it is defined as

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

In the **Black's Law Dictionary 5<sup>th</sup> Edition (1979)** it is defined as:

***“Holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community – Defamation is that which tends to injure reputation to diminish the esteem, respect, good will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings for opinions against him statement which exposes a person to contempt, hatred, ridicule or obloquy---- the unprivileged publication of false statements which naturally and proximately result in injury to another .....*”**

A communication is defamatory if it tends so to harm the reputation of another or lower him in the estimation of the community or to deter third persons from associating or dealing with him.

The ingredients of defamation are now well settled as espoused in the case of **John Edward Vs. The Standard Limited** as follows:

1. The statement must be defamatory.

2. The statement must refer to the plaintiff.
3. The statement must have been published by the defendant.
4. The statement must be false and malicious.

The same principles were also reiterated in the case of **J. Kudwoli Vs. Eureka Educational and Teaching Consultants & 2 others, HCCC No. 126 of 1990.**

Among these ingredients there is no dispute that the statements were authored by the defendants and that they referred to the plaintiff. The only two issues for determination by the court is whether the statements are defamatory and whether they are false and malicious.

From the evidence, the first email was done on the 10<sup>th</sup> September 2013. The subject of the same being;

**Cable Cut Incidence in Protective Hotspot.**

The same was written to Abraham Mwangi by the 2<sup>nd</sup> defendant on behalf of the 1<sup>st</sup> defendant. It was copied to Thomas K. Kyangu, Joseph K. Murgor and Charles O. Arago the relevant part reads;

***“....we have noted in the recent past cable vandalism has really been aided by Manyota Limited Workers because they are digging terraces, laying fibre cables in the same line with Telkom and is worse when they leave Telkom cables exposed. This was said to belong Nyerere Road.”***

On the 19<sup>th</sup> September 2013, another email was done relating to Lenana Road. The contents of the same were that in the morning of the said date, a Mr. Ondiek of Telkom Orange called one of the supervisors of the first defendants namely Mr. Wafula and reported alarm activations along Lenana road. The first defendant dispatched their response team who together with team from Telkom Kenya patrolled the Lenana area.

Both parties found some 3 pieces of 10 meters each cables cut. They established that Manyota Limited workers were in the area and in the course of their work had exposed the orange cables leaving them uncovered and when they are exposed like that they are prone to attract cable thugs and they get easy time to cut and steal. The 2<sup>nd</sup> defendant proposed an urgent meeting between the plaintiff's managers/supervisors and the 1<sup>st</sup> defendant's management to agree on the way forward with the aim of avoiding the thefts that have been experienced then.

The email further stated that it should be communicated to Manyota Limited installers to ensure Telkom Orange cables are not exposed but instead they should cover them before they leave all the areas they are working in.

Another email was written on 25<sup>th</sup> September 2013 by the 2<sup>nd</sup> defendant to Charles O. Arago and copied to K. Kyangu, Joseph K. Murgor, John Gachie Gachau, Kizito Shakaba and Abraham Mwangi on the same subject of cable cut incidence in protective hotspot. In the said email, the 2<sup>nd</sup> defendant stated that the plaintiff had extended its underground installations towards Dennis pritt to Chaka Roads, continuing to expose Telkom cables. He reminded Telkom of his proposed meeting with the plaintiff to come up with the way forward on how exposed areas can be secured before completion of the work. He further stated that all damages caused by Manyota Limited during their installations should be coded to them so that they come up with a concrete solution to avert that situation.

The last email was written on 18<sup>th</sup> September 2013 touching on Mamba village area after the first defendant found some cables cut and stolen. The 2<sup>nd</sup> defendant wrote in part;

***“The situation with Manyota Limited is not improving at all; most of the cable cuts results from their exposing Telkom cable while in their contracted duties. The trend is worrying noting that the period between September and December is the sensitive period when we have been experiencing a lot of cable cuts.”***

He went further to say that having known where the problem was, we hope to have a meeting with Manyota Limited representative to establish ways of ensuring the theft trend as a result of the work is controlled.

The plaintiff avers that the words contained in the said emails are defamatory, false and that in publishing the same, the defendants were malicious. The plaintiff alleges that in their natural and ordinary meaning and/or by imputations and innuendo they meant that the plaintiff is a thief and a vandal among others. The defendants denied the claim.

Having considered the above, can the said publications be said to be defamatory and were they false.

In paragraph 6 of the plaint, the plaintiff avers that it undertook civil work which involved laying of fibre cable in the areas around Kasuku, Lenana and Woodlands roads. This was done between 2<sup>nd</sup> September 2013 and 19<sup>th</sup> October 2013. In the email dated 11<sup>th</sup> September 2013, the 2<sup>nd</sup> defendant stated that the plaintiff's workers were in the area in the course of their work and they exposed orange cables leaving them uncovered. The other area mentioned in the email is the Milimani area where the plaintiffs were said to have extended its underground installations thus exposing the Telkom cables. This was on 22<sup>nd</sup>/23<sup>rd</sup> September, 2013. As a result of the alleged activities by the plaintiff,

the 2<sup>nd</sup> defendant in his email dated 18<sup>th</sup> September 2013, had suggested for a meeting to be held between the first defendant and the plaintiff to see how the theft trend as a result of the works can be controlled.

Looking at the said emails and the contents thereof, can they be said to be defamatory as alleged by the plaintiff? In their defence, the defendants contend that the emails were only copied to the employees of Telkom Limited who were in one way or the other connected with the theft of the cables. Secondly, the plaintiff has not denied that they were laying cables along Lenana road at the material time when the theft and vandalism was alleged to have taken place. A clear reading of the emails will reveal that the defendants did not accuse the plaintiff of stealing the cables. What is complained about was the exposure of the Telkom orange cables by leaving them uncovered as a result of which they are prone to attract cable thugs who get easy time to cut and steal them.

The defendants proposed to have a meeting with the plaintiff to come up with the way forward on how the exposed areas could be secured before the plaintiff could complete its work so as to curb the theft. The court also notes that even in areas where the plaintiff admitted having laid cables, it was not specifically denied that they exposed the cables laid by Telkom Kenya Limited. The only thing that they have denied is the theft of the cables. I wish to repeat that no allegations of theft were made by the defendants against the plaintiff at all. Similarly, the defendants have also not made allegations of vandalism against the plaintiff and therefore in my view, the emails cannot be said to be defamatory of the plaintiff.

The Plaintiff has heavily relied on the minutes of the meeting that was held on 30<sup>th</sup> October, 2013 between them and Telkom Limited. The said minutes were produced and marked as Plaintiff Exhibit 4.

In the said meeting, the defendants were not represented. In minute 2 it is stated that the plaintiff did not carry out any works along Dennis Pritt and Chaka Roads where the alleged damage to Telkom Cables occurred. The Plaintiff, however, acknowledged having had civil works done along Kasuku, Lenana and Woodlands Roads between 2<sup>nd</sup> September, 2013 and 19<sup>th</sup> October, 2013. Lenana road is named among the areas where the cables were exposed.

The defendants in their defence have relied on the defence of truth, honest opinion and justification. They averred that the letter was done in the normal course of business to their clients, Telkom Kenya Limited.

Section 15 of the Defamation Act which deals with the defence of fair comment states: -

***“In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.”***

The court in the case of **Alexander Vs North Eastern Railways Corporation (1865) 6 B & S 340** held that: -

***“The defendant does not have to show that every single characteristic of the statement made is true merely that it is substantially true.”***

Telkom Kenya Limited complained of cable theft along Lenana Road among other roads. I am persuaded by the defendant's defence that their statement was made in the honest belief the exposure of the cables by the plaintiffs aided the theft and the vandalism and therefore the defendants had a duty to make the communication and Telkom had a duty to receive the said communication.

As to whether there was any malice, it is trite that for the plaintiff to succeed in a claim for defamation, it has to prove malice. On the other hand, malice can be inferred and for it to be inferred, the language of the publication ought to have altered the facts and their meaning and there ought to be animosity. No evidence was led by the plaintiff to prove that there was animosity between it and the defendants. In the case of **Phineas Nyagah Vs. Gitobu Imanyara (2013)** the court held that;

***“Evidence of malice may be formed in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice ---- Malice may also be inferred from the relations between the parties....”***

The court has carefully gone through the evidence on record and the plaintiff has not alleged existence of bad blood between it and the defendants. The only allegation is that they are both clients of Telkom Limited. In my view, there is no evidence that there was business rivalry between them. There was no evidence of malice that was led by the plaintiff or circumstances from which this court can infer malice.

In the circumstances aforesaid, I find that the plaintiff has not proved its case on a balance of probability and the same is hereby dismissed.

However, the law obligates the court to assess the damages it would have awarded the plaintiff had it succeeded in its claim. On quantum, the plaintiff has urged the court to award a global sum of Kshs.10,000,000 to cater for general, punitive and exemplary damages. They have relied on the case of **Evans Gicheru Vs. Andrew Morton & Another (2005) eKLR** and that of **J.P. Machira t/a Macharia & Co. Advocates Vs. Wangethi Mwangi & Another (2001) eKLR** where damages in the sum of Kshs. 6 and 10 million were awarded respectively. The defendants did not address the court on quantum of damages.

In awarding general damages, the court would like to rely on the case of **Jones Vs. Pollard (1997) EMLR 233-243** where a checklist of compensatable factors were enumerated as follows;

***(1) 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 repetition.

(2) *The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both upto and including the trial itself.*

(3) *Matters tending to mitigate damages, such as the publication of an apology.*

(4) *Matters tending to reduce damages.*

(5) *Vindication of the plaintiff's reputation past and future.*

Also relying on the case of *Evans Gicheru* (supra) where the court stated: -

***“In an action of libel the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict was given. It may consider what the conduct has been before action, and in court during the trial.”***

Considering the circumstances of this case including the province and the circulation had the publication been defamatory, a sum of Kshs.500,000/- would have sufficed as general damages. The court would not have awarded aggravated, punitive or exemplary damages as none have been proven. But like the court has stated earlier on in the judgment, no case has been proven against the defendants and therefore the plaintiff's case is dismissed but with no orders as to costs.

It is so ordered.

Dated, delivered and signed at Nairobi this 14<sup>th</sup> day of March, 2019.

.....

L NJUGUNA

JUDGE

In the presence of

..... *For the plaintiff*

..... *for the 1<sup>st</sup> defendant*

..... *For the 2<sup>nd</sup> defendant*