



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 833 OF 2007**

**HALKANO MOLU.....PLAINTIFF**

**VERSUS**

**KENYA BROADCASTING CORPORATION.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In his Complaint dated and filed on 20<sup>th</sup> December 2017, the Plaintiff sought judgment against the Defendant for the following reliefs:-

- a) An order that the defendant do give a full apology, make amends and withdraw the offending words with apology to be published in the same manner as the offending words.**
- b) A permanent injunction restraining the defendant from broadcasting or publishing any further or similar defamatory material of and concerning the plaintiff.**
- c) General damages for slander and exemplary damages for malicious slander.**
- d) Costs of the suit.**

His List and Bundle of documents were filed on 7<sup>th</sup> October 2008.

2. The Defendant's Statement of Defence was dated 23<sup>rd</sup> January 2008 and filed on 25<sup>th</sup> January 2008.

3. The Plaintiff's Witness Statement and that of his witness, Yusuf Abdalla Idarus (hereinafter referred to as "PW 2") were filed on 8<sup>th</sup> March 2012 and 23<sup>rd</sup> February 2018 respectively. The Witness Statement of Kennedy Osir (hereinafter referred to as "DW 1") on behalf of the Defendant was filed on 23<sup>rd</sup> September 2016.

4. His Written Submissions were dated 8<sup>th</sup> March 2018 and filed on 11<sup>th</sup> March 2019 while the Defendant's Written Submissions were dated and filed on 25<sup>th</sup> April 2019.

**LEGAL ANALYSIS**

5. The Plaintiff's case was that in a broadcast titled "**Matter of Justice**" aired by the Defendant herein at 7.00pm and 9.00pm on 15<sup>th</sup> August 2007, the following statements concerning him were made:-

**"Meanwhile a Credit Manager with the Kenya Commercial Bank Limited, Halkano Molu was arraigned before the Chief Magistrate charged with forging a letter from the bank purporting it to be genuine. The letter that was dated 29<sup>th</sup> May, last year was purportedly issued to Oraro & Company Advocates demanding for the recovery of over 70,000,000/= at the center of the dispute between the bank and Benjoh Amalgamated Company. Molu was released on a cash bail Kshs 50,000/= and the case against him will be heard on 11<sup>th</sup> September this year."**

6. He averred that the words complained of were defamatory, they tended to lower his reputation in the estimation of right thinking members

of the society and that the statements were false and made malicious. In this regard, he relied on the cases of Grace Wangui Ngenye vs Wilfred D Kiboro & Another [2009] eKLR, SMW v ZWM [2015] eKLR, Sim vs Stretch [1936] 2 All ER amongst several other cases where the courts herein set out the test of what entailed a defamatory statement.

7. He also placed reliance on the definition of “defamation” in Halsbury’s Laws of England Vol 28 paragraph 10 and Gatley on Libel and Slander 12<sup>th</sup> Edition at page 7.

8. He was emphatic that the words complained of were not only false and malicious but that they were also defamatory to him because he was not charged with forgery but rather, he was charged with the offence of making a document without authority contrary to Section 357(a) of the Penal Code, which were very distinct offences.

9. He submitted that from PW 2’s testimony, it emerged that his perception of him changed and considered him as a dishonest man. He stated that PW 2’s evidence was that forgery was a serious offence in banking and he did not want to be associated with a banker who had been accused of such an offence.

10. He pointed out that the statements injured his career as a banker amongst his peers, friends, family and social circles. He was categorical that his reputation was injured by the misreporting and not by the report that he was arraigned in court. In this regard, he relied on the case of Simon Nyachae vs Lazarus Taremo Musa & Another [2007] eKLR wherein it was held that there must be evidence that a statement that has been made must have been meant to injure reputation and character.

11. He submitted that failure by the Defendant to enquire into the correct facts led to an inference being made that the statements that were made were malicious.

12. It was his submission that the defence of justification would not be available to it because the statements were not only false and malicious, they were also negligent.

13. He placed reliance on the case of Hon Uhuru Muigai Kenyatta vs Baraza Ltd [2011] eKLR where it was held that the onus on proving that a statement has been made is true, rests on the defendant to make a fair publication.

14. He asked this court to award him general and exemplary damages and relied on the cases of Hon Uhuru Muigai Kenyatta vs Baraza vs Baraza Ltd (Supra) and John vs MG Ltd [1995] 2 ALL ER to buttress his argument. He did not, however, propose any quantum that should be awarded to him or furnish any comparable cases that would guide this court in awarding comparable damages.

15. On the other hand, the Defendant denied that the statements that it made were defamatory, false or malicious as the Plaintiff had contended for the reason that the same were in the public domain having been proceedings in an open court. It was therefore its averment that the publication would not have changed the public’s opinion of him.

16. It pointed out that during Cross-examination, the Plaintiff had told the court that he was not aware that “**making a letter without lawful authority**” carried a more severe penalty, that he admitted that he did not lose his job and that the proceedings were terminated about a month later.

17. It stated that PW2 had testified that DW2 shunned the Plaintiff because he had been charged in court and not because of the report that he had been charged of forgery.

18. It submitted that the Plaintiff did not prove that the statement that was made lowered his reputation in the estimation of right thinking members of the society or that the same was malicious for the reason that the Plaintiff confirmed that save from the use of the word “**forgery**”, all the facts in the statement were factual.

19. Its argument was that it was entitled to the defence of qualified privilege where a defendant must have fulfilled the test of responsible journalism as was held in the case of Bethwell Allan Omondi Okal vs Royal Media Services Ltd [2016] eKLR.

20. It also placed reliance on the cases of Kagwiria Mutwiri Kioga & Another vs Standard Limited & 3 Others [2015] eKLR and Mwangi Kiunjuri vs Wangethi Mwangi & 2 Others [2008] eKLR where the common thread was that journalism is not devoid of mistakes but that it must be demonstrated that a defendant acted without malice and that what was reported was substantially factual.

21. It also relied on the provisions of Section 14 of the Defamation Act Cap 36 that provides as follows:-

**In any action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the reputation of the plaintiff having regard to the truth of the remaining charges.**

22. It was its submission that the broadcast was made on only one (1) day and that its broadcast was not accentuated by malice but rather it could only be hailed as responsible journalism.

23. According to Halsbury’s Laws of England Vol 28 paragraph 10, defamation has been 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 injuries to him in his office, profession, calling, trade or business.”**

24. This was on all fours with the definition of “defamation” given in **Gatley on Libel & Slander 12<sup>th</sup> Edition at page 7.**

25. This court carefully looked at the statement that was made by the Defendant and noted that the Plaintiff was not concerned about the coverage of him having been arraigned in court but rather by the Defendant’s broadcast that he was charged with forgery instead of making a letter without authority and that PW 2 viewed him as a dishonest person when he heard the broadcast.

26. As was correctly pointed out by the Defendant, the Plaintiff told this court that he was not aware that the offence of “**making a document without authority**” carried a stiffer sentence than that of forgery. He testified that he suffered loss of reputation until the *nolle prosequi* was entered thus discharging him from the offence.

27. This court found and held that the Plaintiff did not demonstrate that the reason that his reputation suffered or why he lost friends was because it was broadcast that he was charged with the offence of forgery and not with the offence of making a document without authority.

28. In any event, the Defendant’s broadcast of him having been arraigned in court for whatever offence was not *per se* defamatory. The onus was on him to have demonstrated the following:-

**1. that the statement was defamatory in nature;**

**2. that the statement was false and malicious;**

**3. that the statement lowered him in the estimation of right thinking members of the society;**

**4. that the said members shunned him due to that statement.**

29. This was also the test that was set out in the case of **Wycliffe A Swanya vs Toyota East Africa Ltd & Another [2009] eKLR**

30. This court formed the opinion that the Plaintiff’s complaint that the Defendant’s broadcast that he was charged with forgery and not making a statement without lawful authority was splitting hairs. It would, however, have taken a different view had the Defendant reported that the Plaintiff had been charged when he had not been charged with any offence or if he had been said to have committed a more serious offence than the one he had been charged with.

31. Notably, Section 349 of the Penal Code (Laws of Kenya) Cap 63 provides as follows:-

**Any person who forges any document is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.**

32. Further, Section 357 of the Penal Code stipulates that:-

**Any person who, with intent to defraud or to deceive—**

**a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or**

**b) knowingly utters any document or electronic record or writing so made, signed or executed by another person,**

**is guilty of a felony and is liable to imprisonment for seven years.**

33. Considering the two (2) offences, the Plaintiff would have suffered more prejudice if he had been charged under Section 349 of the Penal Code and it was reported that he had been charged under Section 357 of the Penal Code. He did not demonstrate what prejudice he suffered due to the said broadcast.

34. Save for the interchanging of the offences or wordings in the broadcast, he admitted that all the other facts were correct. In the mind of this court, he suffered more damage to his reputation due to the arraignment in court and not the offence he had been charged with as they were both under Chapter XXXV – Punishment for forgery. The report of the arraignment was, however, factual and in the circumstances it could not be said that the same was defamatory.

35. Journalists are not lawyers and they cannot be expected to differentiate offences that are closely related. It was clear to this court that there was no malice in the broadcast that was made once and in the course of normal journalism.

36. This court was not satisfied that there was any unintentional defamation or it was malicious because the Defendant reported the facts as they were save for interchanging a word that caused the Plaintiff no harm in the eyes of right thinking members of the society, who unless they had legal knowledge would not have known the difference in the two (2) offences. It was however, satisfied that the Defendant was able to demonstrate that it was entitled to the defence of qualified privilege.

37. Having considered the evidence that was adduced by the parties herein, this court was not satisfied that he had proved his case on a balance of probability and in the circumstances, his claim only lent to it being dismissed.

**DISPOSITION**

38. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's plaint that was dated and filed on 20<sup>th</sup> December 2017 was not merited and the same is hereby dismissed with costs to the Defendant.

39. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF OCTOBER 2019**

**J. KAMAU**

**JUDGE**