



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 536 OF 2008**

**POLYCARP OMOLO OCHILO.....PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED..... DEFENDANT**

**JUDGMENT**

The plaintiff herein filed the plaint dated the 25<sup>th</sup> day of November, 2008 in which he has claimed general, exemplary or punitive damages, an unqualified apology by the defendant and costs of the suit, against the defendant.

The plaintiff pleaded that on the 29<sup>th</sup> day of October 2008, the defendant who is described as the publisher and distributor of the “Daily Nation” published the following words of and concerning him

**“An anti-graft body has been asked to pull up its socks.**

***The National Anti-corruption Steering Committee was established in May, 2004 to educate the Public on corruption in a bid to reduce its prevalence.***

***Justice, National Cohesion and Constitutional Affairs Minister Martha Karua signaled her displeasure with the committee’s performance when she told the house that a new chairperson will be appointed before the end of the year.***

***The position is held in an acting capacity by vice-chairperson Polycarp Ochillo, a year after the resignation of chairman Rev. Mutava Musyimi who resigned to contest for the Gachoka Parliamentary seat which he won.***

***“The government has been making efforts to find a suitable replacement” the minister said promising that the seat will be filled by year-end.”***

The plaintiff contends that the said words in their natural and ordinary meaning meant and were understood to mean inter alia that, he was the vice-chair person and acting chair person of the national anti-corruption campaign steering committee; that as the vice chairperson of the committee he was not performing his duties to the standards expected by the government of the Republic of Kenya, that he is unsuitable to lead the committee and that he is incompetent and unworthy of public office.

He avers that the said publication was false, untrue and libelous. The particulars of malice are set out in paragraph 9 of the plaint. He further avers that as a consequence of the said publication, the defendant has exposed him to ridicule, contempt and odium in the estimation of just, ordinary and right thinking members of the society. That he has thus suffered loss and damage which he claims from the defendant.

In the defence filed on 20<sup>th</sup> day of January, 2009 the defendant admitted having published the article but denies that the words were defamatory of the plaintiff as alleged or at all. It also denied that the words complained of refer to the plaintiff and he is put to strict proof.

The defendant averred that the article was about the National Anti- corruption steering committee which is a public body and not about the plaintiff. That in any event, there is nothing in the article which any right thinking and reasonable member of the society would find defamatory of the plaintiff as alleged or at all. The defendant contended that the article was based on report of parliamentary proceedings of 28<sup>th</sup> October, 2008 thereby affording the defendant the absolute defence of parliamentary privilege. That the publication was without malice, was bonafide and made in public interest. The claim of loss and damage is denied.

At the hearing, the plaintiff testified as the only witness and the defendant called one witness. The plaintiff adopted his witness statement

dated 11<sup>th</sup> may, 2015 as his evidence in chief. It was his evidence that, on 29<sup>th</sup> October, 2008, he was going through the daily nation when he came across the article titled “***Karua urges ant-graft team to do better***” and he took interest.

He stated that the allegations in the story were that the position of the chair which the members of parliament felt was incompetent was held by himself which was not true, as he was not the chair or the vice chair at the material time. That according to him, the publication implied that the commission was incompetent and that he was also incompetent.

It was his further evidence that four years later he attended an interview for a position advertised by Judicial Service Commission being that of the Secretary to the Political Parties Tribunal and one of the panelists raised that issue with him, yet, the contents of the same are not true.

Sekou Owino testified on behalf of the defendant. He adopted his witness statement dated the 1<sup>st</sup> day of March, 2019 and filed in court on the 5<sup>th</sup> day of March, 2019. It was his evidence that on or about the 29<sup>th</sup> October, 2019 the defendant featured the subject publication but averred that the same was a true reassertion of the state of affairs as described by the Minister of Justice, National Cohesion and Constitutional Affairs, Martha Karua. He stated that the publication refers to the National Anti Corruption Steering committee which is a public body that is collectively mandated to educate the public on corruption in a bid to reduce its prevalence and that the same was published based on the parliamentary proceedings of 28<sup>th</sup> October, 2008.

It was his further evidence that the publication is not defamatory but a true reflection of the Parliamentary Hansard Publication and as such, the same affords the defendant absolute defence of parliamentary privilege as provided for under the Defamation Act, 2017. He averred that the Article was published in good faith, it is a fair comment and report, bonafide, devoid of malice and vendetta and no defamatory meaning can be inferred or insinuated from the publication. He stated that the publication concerns “corruption” which has been a matter of National and Public concern not only within the Republic of Kenya but also in the global arena and therefore, overrides any claim of private interests.

At the close of the case, both parties filed submissions in support of their respective positions which this court has considered together with the pleadings and the evidence on record.

From the pleadings, the court identifies the following issues for determination;

1. Whether the publication was published by the defendant
2. Whether the same refers to the plaintiff.
3. Whether the publication was defamatory of the plaintiff.
4. Whether the publication was false and malicious.
5. Whether the defence of privilege and fair comment are available to the defendant.
6. Whether the plaintiff is entitled to the orders sought and who should bear the costs of the suit.

The cause of action herein is based on defamation. In Kenya, the law of Defamation is now well settled and it’s governed primarily by the Defamation Act Cap 36 Laws of Kenya which has its foundation in the constitution and in particular Article 33 (3) which states;

***“In exercise of the right to freedom of expression every person shall respect the rights and reputation of others”.***

In a defamation suit the plaintiff must prove the following elements in order to succeed;

- a. The statement was defamatory
- b. It must have been published by the defendant
- c. The words must refer to the plaintiff
- d. The statement was false
- e. The publication was published with malice.

The foregoing position has been restated in numerous judicial precedents to wit; ***Gideon Mose Onchati vs. Kenya Oil Company Limited & Another (Civil Suit No. 140/2008*** and that of ***J. Kidwoli vs. Eureka Educational and Training Consultant & 2 Others.***

The tort of defamation is defined variously with not one agreed single definition that fits all. In the English case of ***Scott vs. Simpson (1982) QBD 491***, Dave J defines it thus;

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

In the well known work of Winfield, the definition is given as follows;

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

Another authority often cited as definitive on defamation is that of Thomas Vs. CBC (1981) 4 WWR 289 as follows;

***“The gist of the torts of libel and slander is the publication of matter usually words) conveying a defamatory imputation 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. The standard of opinion is that of the right thinking person’s generally.”***

To be defamatory, an imputation need not have actual effect on a person’s reputation; the law looks only to its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory”

The law of defamation protects a person’s reputation that is; the estimation in which he is held by others. It does not protect a person’s opinion of himself or his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit and it affords redress against those who speak such defamatory falsehoods. See the case of Musikari Kombo vs. Royal Media Services Limited (Civil Appeal Number, 156/2017.

The test as to whether a statement is defamatory is an objective test. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive.

In Halsbury’s Laws of England, 4<sup>th</sup> Edition, the author opines that;

***“In deciding whether or not a statement is defamatory, the court must consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether under the circumstances in which the words were published; a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense”***

After that analysis, I now proceed to consider the issues for determination as set out hereinabove;

On the first issue, it is not in dispute that the defendant published the article complained of by the plaintiff.

On whether it refers to the plaintiff, the defendant contended that the name in the article is Polycarp Ochillo” and not Polycarp Ochilo” thus submitting that the two names are different.

The plaintiff maintained that the article referred to him and that the names are his. Whereas there is no conclusive evidence on the basis of which the court could base its finding on whether the name in the Article refers to the plaintiff or not, it was his testimony that he was the only person bearing the name “Polycarp Ochilo” in the committee. The defendant did not tender evidence to disprove that assertion and in the circumstances of this case, I find that the name in the article is that of plaintiff. As to whether the contents of the article refer to him and whether they were defamatory of him, that is a different issue altogether.

On whether the publication was defamatory, the plaintiff submitted that the message intended to be passed was that, the committee’s under performance was because of the lack of chairperson, the current acting chair person not performing his tasks up to standard, as a consequence of which, the minister herself had resolved to have a chair person appointed presumably to replace the underperforming acting chair. The plaintiff averred that the minister while addressing the parliament on the 28th October, 2019, made no mention of the name of the plaintiff. That further, the plaintiff was not the vice chairperson in the committee and therefore it was apparent that the inclusion of the name of the plaintiff in the Article, and the prima facie misdirection of the public as to his roles in the committee was intended to not only pass him off as the person in charge of the committee, albeit temporarily, but also the one responsible for the under performance of the committee. The plaintiff asked the court to rely on the case of Miguna Miguna vs. standard Group Limited & 4 others (2017) eKLR in which the court restated that cases of defamation are judged upon the standard of perception of a “reasonable man”.

The plaintiff further submitted that the context and contents in the publication are false and intended to mislead the public. He averred that from the Hanzard the defendant published falsehoods to wit;

1. That whereas it expressly came up during the parliamentary proceeding of 28<sup>th</sup> October, 2008 that the chair of the committee in question had resigned, the defendant maliciously published the contrary instead imputing that the plaintiff was the vice chair person and was acting chairperson in absence of the chairperson.
2. While the minister had defended and even praised the committee, the defendant’s publication reported that the minister was displeased with the committee.

The plaintiff hence argued that in the mind of a reasonable man, in the same circumstances, the publication would definitely be deemed defamatory.

On the issue of whether the publication was defamatory, the defendant submitted that the plaintiff has the burden of proof of actual or

intrinsic malice, ill will or spite of improper motive on the part of the defendant. The defendant cited the case of *Nation Newspapers Limited vs. Gibendi (2002)2KLR* in that regard. It was further submitted that there is no word in the article that directly damaged the character of the plaintiff and reliance was made on the case of *Phineas Nyagah vs. Gitobu Imanyara (2013) eKLR*.

The defendant contended that the title of the article “**PULL UP ITS SOCKS**” referred to the organization as a team and not to the plaintiff as an individual and therefore, the plaintiff had failed to prove that the offending words were made concerning him and had the effect of lowering his standing in the estimation of right thinking members.

The court has perused the Article complained of. The circumstances surrounding the publication were that the then Minister for Justice, National Cohesion and Constitutional Affairs Ms. Karua was responding to a question by Mr. Alfred Sambu who sought to know among other things, why the Government had failed to find a replacement for the chair man and vice chairman of the National Anti-Corruption Steering Committee, one year after the resignation of the former holders and why, since the launch of the District Civilian Anti-Corruption oversight committee over a year ago, nothing had been done to constitute such committees countrywide.

In answering the question M/S Martha Karua told parliament that they have been making efforts to find a suitable replacement for the chairman of the steering committee. She further stated that the vice-chairman has been acting as a chairman since the resignation of the former chairman and therefore, the business of the committee had not been hampered. She then outlined what the committee had done since the launching of the District Anti-Corruption Civilian oversight committees. The minister agreed with Hon. Alfred Sambu that even within the ministry, they had asked the committee to pull up its socks. At the same time the minister stated that she was happy with the survey the committee had recently done on the constituencies Development Fund (CDF). The committee had also launched a website and it has a public awareness programme on television which was also to be launched.

The court has also perused the Article as published by the defendant. In its defence, it has relied on parliamentary privileges provided for in Section 25(2) of the Act which provides that;

**“in any civil or criminal proceedings instituted for publishing any extract from or abstract of any journal referred to in subsection (1); if the court is satisfied that the extract or abstract was published bonafide and without malice, no judgment or verdict, as the case may be, shall be entered for the defendant or accused.**

The defendant also relied on Sections 9, 10 and 11 of the Defamation Action. Under Section 9;

**“In any action for libel in respect of the publication of a parliamentary report it shall be a defence for the defendant to produce to the court a certificate under the hand of the speaker of the National Assembly or the Chairman of the Assembly or of the Chairman of the East Africa Legislative Assembly, as the circumstances of the case may require, that such a report was published by the order or under the authority of the assembly concerned, together with the affidavit verifying such certificate.”**

Section 11 which is on extracts from parliamentary reports provides as follows;

**“in any action for libel in respect of the publication of any extract from, or abstract of, any parliamentary report it shall be a defence for the defendant to show that the matter in question was in fact an extract from, or abstract of a parliamentary report and that the publication thereof was bonafide and without malice”.**

In support of the defence of qualified privilege, the defendant placed reliance on *Halsbury’s Laws of England 4<sup>th</sup> Edition Re-Issue Vol. 28 at para. 109* where the learned author explains the basis of the defence and lists some categories of occasions in which the defence would be applicable thus;

**“On occasions of public policy, the law affords protection on certain occasions to a person acting in good faith and without improper motive who makes a statement about another person even when that statement is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. The principal categories of qualified privilege are;**

- a) Limited communications between persons having a common and corresponding duty or interest to make and receive the communication.
- b) Communications to the public at large, or to a section of the public, made pursuant to a legal, social or moral duty to do so or in reply to a public attack.
- c) Fair and accurate report published generally, of the proceedings of specified persons and bodies.....”

Further, in *Gatley on Libel and Slander 8<sup>th</sup> Edition* the statements to which the defence of qualified privilege should apply are stated to include the following;

- a. Statements made in the discharge of a public duty**
- b. Statements made on a subject matter in which the defendant has a legitimate interest.**
- c. Statements made by the defendant to obtain redress for a grievance.**

*d. Reports of parliamentary proceedings*

*e. Extracts from or abstracts of parliamentary reports, papers, votes or proceedings published by the authority of parliament.*

The plaintiff submitted that the defence of qualified privilege is not available to the defendant and argued that the matter in question was not the publication of a parliamentary report, copies of a parliamentary report or extracts from or abstracts of a parliamentary report.

In the alternative, the plaintiff contended that even if the court were to indulge the defendant and find that the defence is available to them, the defendant has not complied with the mode of production of the copy of the "report" in that a certificate under the hand of the speaker of parliament and an affidavit verifying such certificate was not produced by the defendant.

The plaintiff further argued that the national Assembly Powers and privileges Act does not apply to the defendant. Quoting the long title of the Act, he contended that the application of the Act in question is limited to a very specific set of entities which the defendant is not one of, and their reliance on the Act proceeds from a faulty premise. The plaintiff averred that the publication of the defendant in this matter was not under order of or authority of parliament or any committee of parliament and therefore, reliance on section 24 of Cap 36 would be a misdirection of the law.

The court has considered the defence of qualified privilege as raised by the defendant and the section of the law relied on.

First, the plaintiff contends that there is no certificate under the hand of the speaker of parliament or an affidavit to verify the said certificate. Whereas this is a requirement under Section 9 of the Defamation Act, it is a fact that the report was produced and it forms part of the record. The same was produced in the presence of the counsel for the plaintiff and no objection was raised to its production at the material time. The plaintiff is now raising an objection at the submissions stage, which leaves the defendant in an awkward position as it has no forum to address the same. In my view, this issue has been raised too late in the day, it's an ambush and contrary to the spirit of article 50 of the constitution on a fair trial. The report forms part of the record and the plaintiff is not disputing that there were such proceedings that took place in parliament on the 28<sup>th</sup> October, 2008.

The plaintiff has also submitted that the application of the Parliamentary Powers and Privileges Act is limited to a very specific set of entities to which the defendant is not one of. The court has perused section II of the said Act which is on extracts from parliamentary reports. In its defence, the defendant avers that the Article as published was based on a report of parliamentary proceedings of the 28<sup>th</sup> October, 2008. .

In the long title of the Act, it provides that the Act is to give effect to Article 117 of the constitution and to provide for powers, Privileges and Immunities to the entities set out therein to make provision regulating admittance to and conduct within the precincts of parliament; and for connected purposes. Whereas the court is in agreement with the plaintiff to a certain extent with regard to the activities of the named entities while they are engaged in their official duties, my understanding of section 25(2) of Parliamentary Powers and Privileges Act is that the same is not on the activities of the entities mentioned in the long title but on publishing of any extracts from an abstract of any journal that has been published by parliament. In any event, Section II of the Defamation Act affords a defence to a defendant if he can show that the matter in question was in fact an extract from or an abstract of a parliamentary report and that the publication was bonafide and without malice.

Having said that, I now turn to the contents of the Article as published, vis-a-vis the Hanzard report, both of which I have cautiously perused. It is true that the defendant did not publish the report verbatim as reported in the Hanzard but in my considered view, the Article reflects the proceedings of parliament which took place on the 8<sup>th</sup> October 2008. As earlier stated, in its defence at paragraph 8, the defendant has stated that the article is based on the report of parliamentary proceedings aforesaid. However, the Article mentions the plaintiff's name as holding the position of the chairperson to the steering committee in an acting capacity. It further states that at the material time, he was the vice chair. It is not disputed that the plaintiff was a member of the committee and in fact he held a leadership position in the committee though he was neither acting chair person nor the vice chair person. The Article states that the committee did not have a chairperson at the material time as the chairperson had resigned and the government was making efforts to find a suitable replacement. It is true that the minister in her answer agreed with Hon. Sambu that they had asked the committee to "**pull up its socks.**" At the same time she stated that she was happy with the survey the committee had recently carried out on the constituencies development fund (CDF); that it had also launched a website and it had a public awareness programme on television which was also to be launched.

In my considered view, the article did not attribute blame to the plaintiff in his personal capacity or in his capacity as the alleged chairperson or vice chairperson of the committee. The praise and the blame were attributed to the committee and for the plaintiff to allege that the article portrayed him as incompetent and unsuitable to lead the committee is missing the point. There was no personal blame attributed to him at all and the contents of the article are true, only that, the defendant did not use the exact words that have been used in the Hanzard report.

On whether there was malice on the part of the defendant, it is trite that malice can be express or implied. In the case *Phineas Nyaga vs. Gitobu Imanyara (2013) eKLR* the court stated;

***"Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. This may lead to an inference of malice..... malice may also be inferred from the relations between the parties....."***

There is no evidence by the plaintiff proving malice on the part of the defendant. In any event, the court having made a finding that the article was true in substance there can be no malice on the part of the defendant.

In the end, I find that the plaintiff did not prove his case on a balance of probability but in the event that I am found to be wrong in the finding that I have made, the law obliges me to assess the damages that I would have awarded him had I entered judgment in his favour.

I have considered the submissions by both parties on quantum of damages and the authorities relied on. It is trite that award of damages is

the discretion of the court but the same should be used judiciously. It is also trite that no amount of damages can compensate a plaintiff for lost reputation as the court rightly stated in the case of *Vein vs. John Rairax & Sons Property Limited 177 CLR 115*

**JUDGE**

**In the Presence of**

.....**For the Plaintiff**

.....**For the Defendant**