



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 442 OF 2010

FRANCIS N. MWAURAPLAINTIFF

VERSUS

BATA SHOE COMPANY KENYA LIMITED....DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendant claiming damages arising from a letter dated 4th December, 2009 addressed to him by the Managing Director of the defendant. In his plaint dated 15th and filed on 28th September, 2010 he cited the said letter and pleaded that the same was defamatory of him as relating to the contents as it was copied to other personalities in addition to his attention. It was his case that the publication was deliberate and damaged his reputation by inferring that he was an unfit person not worthy any trust, and that he did not deserve any respect and repute from the public and private sector.

The defendant denied the plaintiff's allegations in the statement of defence. In a lengthy and detailed statement of defence dated and filed on 10th November, 2010 the defendant set out the chronology of events leading to the termination of the plaintiff's services leading to the filing of the suit, the contents of which however have been denied. Any alleged defamation was expressly denied, and the defendant reiterated it had lost faith in the plaintiff for lack of managerial capabilities, negligence, lack of integrity, poor accountability, lack of business discipline and personal responsibilities.

Justification was pleaded under paragraph 19 of the defence and further that, there was another suit pending before the then Industrial Court being cause No. 757 of 2010 whereby the plaintiff sued the defendant challenging the termination of contract of employment and with particular reference to the letter which led to the present suit.

The plaintiff gave evidence in support of his pleadings while the defendant called two witnesses to oppose the plaintiff's claim. Both parties have filed their respective submissions. The plaint referred to above cited part of the letter leading to the present suit which I deem necessary to recap in this judgement. It read in part as follows,

"4th December, 2009

Francis Mwaura,

Bata Tanzania

Dear Sir,

RE: TERMINATION OF SERVICE

Refer to the discussions held with you on Friday of 20th November, 2009 and also our previous discussions before that details of which you are quite familiar with. As a follow up to those discussions I regret to inform you that the management of this organization has lost faith in you and hence it has decided that your services be terminated as from the date of this letter.....

Yours faithfully

Bata Shoe Company

Nasir Rafiq

Managing Director

CC

Chief Finance Officer

P/F”

Other than the copy to the Chief Finance Officer and the plaintiff's personal file, it is the plaintiffs' case that the defendant knew the said Chief Finance Officer was likely to give the plaintiff a biased view or give room for him to question his character or capabilities to his detriment, because the Chief Finance Officer was his subordinate. Further, the defendant knew in copying the letter to the plaintiff's personal file, the same was likely to be accessible and read by any current and successive employees of the defendant, and will form the basis of inquiry by any future or prospective employer in the ordinary course of business.

As at the time of this communication, the plaintiff had worked for the defendant for 15 years rising from Accountant, Chief Accountant, Acting Chief Finance Officer and then General Manager. He was going by his pleadings a certified public accountant.

The plaintiff was required to adduce evidence to justify his pleadings that the said communication was defamatory and that it has had adverse effect as pleaded and that the defendant had no defence whatsoever.

The thrust of the plaintiff's case is that the impugned letter was typed by a secretary or typist who however was not identified, signed by the Managing Director and published to the Chief Finance Officer, in addition to a copy being placed in his personal file. On the other hand, the defence advanced the case that there was justification in the letter addressed to the plaintiff in that, the operations of the company in Tanzania were not to the expectation of the defendant and the plaintiff as General Manager should take the blame for that deficiency.

The issue of who employed the plaintiff has been raised by the defendant in that the plaintiff was the General Manager of Bata Shoe Company (Tanzania) Company Limited and had signed a supplementary contract with the said employer which is a separate entity from the defendant. As the final determination of this case shall not be anchored on that issue, I leave it to rest at this point.

I return to the cited extract of the letter above and observe as follows,

- a. There had been discussions between the plaintiff and the Managing Director of the defendant on 20th November, 2009.
- b. There had been previous discussions before, the details of which the plaintiff was familiar with.
- c. The letter was a follow up to those discussions.
- d. The history leading to that letter led to the conclusion that the management of the defendant had lost faith in the plaintiff.
- e. His services were terminated from the date of that letter.

I set out the above facts to show that the plaintiff may have been aware of the events that led to that letter.

A “**defamatory statement**” has been defined severally in publications and decided cases. In Black's Law Dictionary 10th Edition at page 507 it is stated as follows,

“A statement that tends to injure the reputation of a person referred to in it. The statement is likely to lower that person in the estimation of reasonable people and in particular to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear or dislike – Also termed defamatory communication.”

See also **Halsbury's Laws of England, 4th Edition Vol 28** page 7 paragraph 10. Some decided cases have also addressed this issue to show that a plaintiff alleging defamation has to show and prove that, the matter complained of is defamatory in character and then it was published or communicated to someone other than the plaintiff, that it was published maliciously, that it was false, that the defendant was legally at fault and that the plaintiff has suffered harm – see **Julius Vana Muthanya vs. Katuuni Mbila Nzai (2019) e KLR, Jacob Mwamto Wambora vs. Hezron Mwando Kirorio (2017) e KLR.**

The plaintiff admitted in evidence that the Chief Finance Officer had a right to see the letter, and also the Chief Finance Officer in Tanzania where he worked. This is because they would ultimately be answerable to the auditors after calculation of the final settlement of his dues. Although he said the letter did not say why the company had lost faith in him, I have already set out the history leading to the said letter which included discussions with the Managing Director. He also admitted that the letter was not published in any newspaper. He is now employed by Safaricom, a leading company in the region, but was not referred to this letter when he attended the interviews.

Before leaving the employment of the defendant, the plaintiff was taken through the statement prepared by the defendant, which included all adverse statements which he confirmed as relating to operations of the company in Tanzania at the time he left. It is instructive to note that he signed the said statement or report and admitted that he was the Chief Executive Officer of the company's operations in Tanzania, and that

the handing over report showed they were operational flaws in Tanzania.

If that be the case, then the plea of justification and good faith on the part of the defendant cannot be faulted. In the case of **Joseph Kamunge vs. Charles Muriuki Gachari (2016) e KLR** the court had this to say,

“A plea of justification means that all the words were true and covers not only the bare statement of facts in the alleged libel and also any imputation which the words in their contents may be taken to convey.”

In that case Mativo J cited the Supreme Court of Nigeria **Digby vs. Finance News Limited.** In the case of **Hon. George Benedict Maina Kariuki vs. Nairobi Star Publication Limitation and Another (2016) e KLR** the court stated as follows,

“The defence of justification is closely related to that of fair comment which the defendants have equally pleaded and relied on. In considering the defence of fair comment the court considers whether a statement was a view a reasonable person could have held.”

I have already observed that the plaintiff admitted his shortcomings in the report that he signed. In that case therefore, any employer placed in the position of the defendant would lose faith in him, and if that were to be included in the letter of termination such as the one complained of by the plaintiff, no cause of action may attach.

The plaintiff alluded to malice in his evidence but it should be remembered that such a plea requires particulars to be stated and this is mandatory under Order 2 rule 7 (3) of the Civil Procedure Rules, where the defendant in the statement of defence pleads privilege and fair comment. The defendant having pleaded the same, the plaintiff was required to file a reply giving particulars of the facts and matters he considers malicious. Going by the pleadings of parties herein, the evidence adduced and law applicable, I am not persuaded that the plaintiff has established his case against the defendant.

Had the plaintiff succeeded in establishing his claim against the defendant, damages would have been awarded after considering the impact of the defamatory communication, and possible injury to the plaintiff. This was an internal communication. There has been no adverse comment or impact on the part of the plaintiff. If anything, there was very limited circulation of not more than three people. No evidence has been adduced that he has been held in contempt or ridicule by anyone. An internal memo is not for public consumption like a newspaper.

General damages under such circumstances would be in the tune of Kshs. 2,000,000/= and if a demand had been made to recant such a publication, and default followed, a sum of Kshs. 100,000/= would have been sufficient as exemplary damages. That is not the position and therefore the suit stands dismissed.

Costs follow the event but the court has the discretion to make orders relating thereto costs. I have considered that the plaintiff worked for the defendant for 15 years before his services were terminated. The defendant is also an international company of great financial means. The order that commends itself in the circumstances of this case is that each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE