REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO 19 OF 2016

(AS CONSOLIDATED WITH CIVIL APPEAL NO 18 OF 2016)

(Being an appeal from the Judgment and Decree of Hon.V. W. WANDERA, CM,

delivered on the 8th June 2016 in Kitale CMCC No. 418 OF 2012)

BUSINESS POST MEDIA SERVICES.....APPELLANT

VERSES

NATHANIEL KIPKORIR TUM.....1ST RESPONDENT

HOSEA SITIENEI.....2ND RESPONDENT

AND

HOSEA SITIENEI.....APPELLANT

VERSES

NATHANIEL KIPKORIR TUM.....1ST RESPONDENT

BUSINESS POST MEDIA SERVICES.....2ND RESPONDENT

JUDGMENT

1. For the purposes of this appeal this court did made an order that the two appeals be consolidated since though they were filed separately they relate to the same parties and similar course of action. The **1st Appellant** shall be **HOSEA SITIENEI** and the **2nd Appellant** shall be **BUSINESS POST MEDIA SERVICES**.

2. The grounds raised in the appeal are similar in nature, namely challenging the decision of the trial court in awarding the appellant general and exemplary damages as well as costs. Before looking at the said grounds it shall be worthwhile to summarise the evidence as presented during trial and thereafter consider the merits of the appeal.

3. As stated above, the Respondent at the lower court sought general damages, exemplary and aggravated damages, apology and retraction, costs of the suit, interest on the above at courts rates and any other relief of the court.

4. The basis of the defamation suit was a publication by the Second Appellant of an Article in its **December/January 2008** issue pursuant to an interview it conducted with the 1st Appellant and which the Respondent found it to be defamatory. The said article stated in part;

> **"SEEDS OF LEADERSHIP.** ***What do you do when you are appointed chief executive and your predecessor refuses to hand over and secretaries refuse to open the office for you? Hosea Sitienei broke down doors ,evicted the old team, fired the secretaries and got on with the job……How do you rescue a strategic State Corporation that has been privatized illegally and tottering on the brink of collapse?.....Kenya Seed Company Limited ,the entity in question……led by Nathaniel Tum , the Managing Director ,they had acquired a significant shareholding ,nearly 70% of the company through what the government termed "illegal privatization"……Tums team refused to hand over the company and locked up the headquarters building ……..even***

more bad news was on the way ..Kenya Seed Company was indebted to the tune of kshs. 1.5 billion. It owed Kenya Revenue Authority (KRA) a whopping kshs. 793 million in unpaid tax, interest and penalties dating back to 1999. The firm was not servicing its loans and it owed farmers, suppliers and the staff pension scheme millions of shillings.'" what we are looking at was a company on the brink of insolvency ", he says.

> ***"Kenya seeds, the auditors noted, had serious corporate governance problems. Its operation and financial reporting systems seemed to have been crafted with the purpose of concealing of important information from external auditors. And after 20 years of Mr Tums supreme reign, a culture of patronage pervaded the organisation ……. procurement was solely done by the Managing Director and his Deputy with little input from the line managers……on the business front, the company's performance was dismal."***

5. The Appellants each filed separate defence denying the allegations in the plaint and stated that the said publication was justified based on the prevailing circumstances. They prayed for the suit to be dismissed with costs.

6. The matter then went on trial where the Respondent testified and called three witnesses. The Respondent stated in his testimony that he had been the Managing Director of Kenya Seed Company, hereinafter referred to as the "Company" for a period close to 18 years. That he was dismissed through a radio announcement. He said that he has held various public positions of influence in and out of the country and he was an advocate of the High Court of Kenya, member of Certified Public Secretaries and a consultant among other high position.

7. He said that the allegations made in the said publication greatly injured him and his reputation and was thus in the eyes of the right thinking members of the society considered as a criminal and a fraudster and corrupt among others. He went ahead and produced several minutes of the Board of Directors of Kenya Seed Company which showed that the company during all the period he was heading made profits.

8. **PW2 WILLIAM NDOMBI KUNDU** testified on behalf of the respondent. He said that he knew the respondent having worked at the Kenya seed company for 30 years and his last post was as a manager in charge of Marketing. He said that the respondent was a member of many other associations and he was visionary leader. He said that when he read the post he was saddened as the issues therein did not refer to the person he knew.

9. **PW3 ANTHONY LUCAS** stated also that he was shocked when he read the article which portrayed the respondent in a very different perspective. He said that he had been dealing with the Respondent in several businesses including purchasing fuels and farm implements and that he had known him to be a very strict man.

10. **PW4 ZAKAYO KIPKONGA CHERUIYOT** was working for Kenya Seed Company as its Company Secretary between 1991 and 2003 when the respondent was the managing director. He said that he was shocked when he read the article and according to him the affairs of the company ran very well during his tenure as demonstrated by the filling of annual returns between that period.

11. The first appellant on his part testified that he was appointed by the Minister of Agriculture to head the company as its Managing Director and when he came he found the offices locked and the District Commissioner assisted in having him access the offices. He did not deny giving interview to the 2nd Appellant but he said that the same was based on the audit report prepared by the auditor general. He further stated that it was not him alone who was interviewed but also other line managers whose report is contained in the article. The said managers were not apparently sued by the Respondent.

12. He said that he knew the Respondent having worked with him at Moi University when he was the Finance Manager and the Respondent the Chairman of the Council. He said that he did not have any issues with the Respondent. He confirmed that indeed the company's offices were burned when he was still new at the office and that some people were charged with arson but the court acquitted them for lack of evidence.

13. He also said that the Respondent and others were also charged with abuse of office but they were later discharged for lack of evidence.

14. The 2nd Appellant did not offer any evidence. In its defence it raised the fact that the article was justified and truthful and that it was a fair comment in the interest of the public.

ANALYSIS AND DETERMINATION.

15. The matter when it came up for hearing was ordered to be disposed off by way of written submissions. The parties have since filed the same and this court has perused them together with the attached authorities. The same need not be reproduced herein so as to save on time and space. Suffice to state that the applicants essentially read from the same script namely that the decision of the trial court ought to be dismissed with costs.

16. The Respondent on his part has vehemently opposed the appeal and argued that the trial courts findings should not be disturbed.

17. The trial court found in favour of the Respondent and awarded him kshs.3 million as general damages, kshs. 500,000 as aggravated damages as well as costs and interest.

18. The issues which are well captured by the Appellants and which are largely contained in their grounds of appeal can be summarised into two, namely, **liability and quantum**. Their grounds of appeal generally gravitated around the two and this court finds it necessary to handle this appeal in that manner.

19. The Court of Appeal in the case of **Wycliffe A Swanya v. Toyota East Africa Ltd & Another, Civil Appeal No. 70 of 2008 (2009) e KLR** stated as follows on this tort of defamation;

> ***"For the purpose of deciding a case of defamation, the court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the Plaintiff must prove:***
>
> ***(i) That the matter of which the Plaintiff complains is defamatory in character.***
>
> ***(ii) That defamatory statement or utterances was published by the Defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.***
>
> ***(iii) That it was published maliciously.***
>
> ***(iv) In slander, subject to certain exceptions, that the Plaintiff has suffered special damage,"***

20. The words must thus lower the Plaintiff's reputation in the estimation of the right thinking members of the society and that the Plaintiff must be shunned or avoided by other people.

21. The evidence by the Respondent suggest that as a result of the publication he was avoided by other persons and he did call his three witnesses to state as much. The three witnesses apparently knew him and he had in fact worked with PW2 and PW4 who were actually under him. The 3rd witness was his business associate.

22. It emerged during trial that the two namely PW2 and PW4 had been charged together with him with an offence of abuse of office and they had been acquitted.

23. There is no doubt that it was the second Appellant who published the article having interviewed the 1st Appellant. It is also not in dispute that the 1st Appellant was appointed by the Minister of Agriculture to take over from the Respondent and that there was no handing over / takeover of the office. It took intervention of the District Commissioner for the 1st Appellant to access the office which in my view and understanding was simply a break in.

24. It was not also in dispute that 4 months after the 1st Appellant took over the office, a fire gutted the company's offices and although some people were charged none of them were convicted for lack of evidence.

25. It appears in my view that the basis of the article by the appellants emanated from the outcome of Audit by the ***Inspectorate of State Corporations*** based at the Office of the President dated May, 2004 and which heavily indicted the Respondent. The impugned article came almost 4 years later after the government report.

26. The Respondent in his defence produced several audits reports produced during the company's AGM which gave it a clean bill of health and which demonstrated that the company was in a good financial position contrary to the findings by the Inspectorate of State Corporation.

27. Looking at the contents of the article can one say that the words therein are false and therefore defamatory? Is it true for instance that the doors to the offices had to be broken into or the 1st Appellant gained entry forcefully?

28. The above was well articulated by the parties during trial. The 1st Appellant said that it took the intervention of the District Commissioner for him to gain entry into the office. On his part the Respondent stated that they had broken off for the Christmas holiday and that is why the doors to the offices were locked.

29. Whichever way one looks at it, there was no handing over of the offices and that the only way the 1st Appellant gained entry to the offices was use of force through the provincial administration for lack of a better word. In his defence the 1st Appellant stated that he was instructed by the Ministry to take over the Respondent's position and he had an official letter.

30. That position was factual and in my considered view I do not find it defamatory at all. The same was so admitted by the Respondent and it appears that the takeover was so to speak hostile. The 1st Appellant was not executing his own orders but that of the Ministry that directed him.

31. The next issue was whether there was privatization of the company? From the evidence on record including the report by the Auditor General it appears that there was no question that the Respondent had bought the company's shares whether by himself or his associates. This position was found true by the Court of Appeal in the case of **Republic Vs. Attorney General & 15 others Exparte Kenya Seed Company limited & 5 others (2010) e KLR** where it stated inter alia that;

> ***"The sale went ahead anyway, that agreement notwithstanding, and the new majority of shares reportedly 66.8% of the subscribed 3,370,000 new shares worth over kshs. 90 million, ended up with the Managing Director, his three children and a company in which he and his wife are stakeholders. What ensued thereafter were Board room wars between GoK and some Kenya Seed Company members which came to ahead in December 2003, with the decisive action taken by GoK and protested by the ex parte Appellants when criminal charges were preferred against them and a new board appointed to office."***

32. The courts, both the High court and the Court of Appeal upheld the government decision which essentially found that the Kenya seed company was a public entity. It is therefore true that there was transfer of shares to the respondent and others who included members of his family.

33. It is clear therefore that the Respondent attempted to privatise a public entity and this called for the government intervention.

34. Was the company indebted to a tune of kshs. 1.5 billion? Did it owe KRA a sum of kshs. 793 million in unpaid taxes, interest and penalties? That position was captured by the state auditors in their report and in my view not challenged. Despite the production of the annual audited accounts of the company by the respondent there was no major challenge to the assertion by the 1st Appellant that he did negotiate with the KRA and paid off the liability less the interest.

35. The report by the Auditor General Corporation clearly explained other anomalies carried out during the tenure of the Respondent for example that there were serious procurement anomalies in the company as there were no proper rules and regulations as provided under the Exchequer and Audit Act. This vacuum was used by the officers of the company to loot it of millions of shillings.

36. As indicated earlier it appears that whatever interview the 1st Appellant gave to the 2nd Appellant and which led to the publication of the article was generally based on the report by the auditor. It further appears that the 2nd Appellant did interview other line managers of the company in compiling its report. Those managers were not been sued.

37. The Inspectorate of State Corporations is established under the State Corporation Act CAP 446 Laws of Kenya which the 1st Appellants contributed to its report by facilitating them to undertake the audit. Did he have any hand in its findings? I do not think so. Its report to the extent that it was never challenged remain valid for all intent and purposes. Whether it was implemented or not was not for the 1st Appellant to explain.

38. There was no evidence that the 1st Appellant participated in any way whatsoever in the preparation of the said audit report which returned a damning report against the Respondent and his administration at the company.

39. Then there was the question of fire alluded earlier. The same was factual and I do not find anywhere where the appellants and in particular the 1st Appellant said that the Respondent was culpable.

40. In light of the above findings can one conclude as the trial court did that the words as published by the 2nd Appellant were malicious and thus injure the reputation of the Respondent? I do not think so. The above position is buttressed by the fact that the witnesses called by the respondent were his *buddies* and workmates who worked under him and did business together. In fact, PW2 and PW4 were his senior officers namely Marketing Manager and Company Secretary respectively. They had been charged together in the criminal offence where they were acquitted of the abuse of office charges.

41. I respectfully do not think that they would have given any objective opinion concerning the character of the respondent. The auditor's report touched on some areas they were in control like marketing and the related and any objective person would not expect that they will give adverse evidence against the Respondent.

42. PW3 gained from the Respondent as they were business partners although there was no documentary evidence.

43. To the extent that the essence of the publication emanated from the auditor's general report I find that the words were not defamatory and the Appellants absolved from any liability. The words published were fair comment and on a matter of public importance. There were other newspaper publications which were produced as evidence and clearly this was an issue of public notoriety.

44. There was evidence of the respondent's malfeasance at the company including the illegal privatization which forced the government to intervene. The handing over was not smooth a fact admitted by the respondent as well as the arson attack on the company premises. All these issues were factual and within the public domain and I respectfully don't think that the Appellants jointly and severally made them up. In any case there was no dispute that the Respondent was at the helm of the company.

45. The 2nd Appellant cannot be said that the publication it carried was malicious in the circumstances or at all. The company was a public company and to that extent the defence of privilege advanced by the 2nd Respondent ought to have been considered by the trial court.

46. **Section 7 of the Defamation Act** provides under **Section one** thereof as follows;

> **"Subject to the provisions of this section, the publication of any such report or the matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice."**

47. Clause 4 of Part I of the Schedule to the said Act ought to be read together with the above section. The same states that;

> **"A notice, advertisement or report issued or published by or on the authority of any court within Kenya or any judge or officer of such court or by any public officer or receiver or trustee acting in accordance with the requirements of any written law".**

48. The report by the inspectorate was sanction by the Minister of Agriculture as provided under **Section 7 of the States Corporation Act**

cap 446 Laws of Kenya and thus it is authorised to be published by a public officer as stated in clause 4 above.

49. In a nutshell, the publication by the 2nd Respondent emanated from the audit report and all reference to it are privileged information.

50. I think this court has stated much to show that the trial court was in error and it referred to other extraneous factors more so the company's annual audit report which in my view did not bring out the real issues which bedevilled the company. The trial court did not find for a fact that the issues raised in the report were factual and they all pointed out the tenure of the Respondent.

51. There was no liability in essence proved against the Appellants. The said words were not defamatory as they were factual and privileged. There was no evidence or an attempt at least on record to indicate that the Respondent attempted to challenge in any way the auditor's report.

52. On the question of quantum, had this court found for the Respondent, it would have sustained the amount awarded by the trial court. The same in my view was not excessive considering the authorities relied on and the respondent's stature in the society. The amount of kshs. 1,500,000 proposed by the Appellants was too low in the circumstances compared to the authorities cited. In any case the trial court did not consider such extraneous matters when it reached the amount.

53. In the premises, the appeal is allowed to the extent that the trial courts judgment and decree is hereby set aside together with all the consequences.

54. The appeal is hereby allowed with costs to the Appellants both in this appeal and at the lower court.

Dated, signed and delivered in open court at Kitale this 18th day of December, 2019.

H. K. CHEMITEI

JUDGE

18/12/19

In the presence of:

Wanyama for 1st Respondent

Sabatia holding brief for Chesoo for Applicant

Court Assistant – Silvia

Judgement read in open court