



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 149 OF 2001

CORPORAL FRANCIS CHERONO NGENY.....1ST PLAINTIFF
JACOB MUGUN 2ND PLAINTIFF
STEPHEN MARITIM 3RD PLAINTIFF
THOMAS KIMAGUT SEREM 4TH PLAINTIFF
JOSEPH KIRWA BUSIENEI 5TH PLAINTIFF
JACOB BUSIENEI 6TH PLAINTIFF
MALAKWEN LELGOT..... 7TH PLAINTIFF
WILLIAM KEINO 8TH PLAINTIFF
JENEFFER KURGAT 9TH PLAINTIFF
EGLA MARITIM10TH PLAINTIFF
ALICE SEREM 11TH PLAINTIFF
DAVID SUGE 12TH PLAINTIFF

VS

SAMMY KIPROP KILACHDEFENDANT

JUDGMENT

1. In their amended plaint dated 24th July, 2014, the twelve plaintiffs herein sued the defendant for defamation. They sought the following reliefs;

- (a) Damages for libel
- (b) Exemplary damages
- (c) Costs of the suit

(d) Interest on (a) and (b)

(e) Such further or other relief as the court would deem fit and just to grant.

2. The plaintiffs' cause of action is premised on a letter dated 19th September 2000 allegedly written by the defendant to the chairman of the Nandi District Security Committee. The letter was copied to the OCPD Nandi, O.C.S Nandi, D.C.I.O Nandi, D.O Kaptumo Division, P.C Rift Valley and the defendant's personal lawyer. The letter was a lengthy one but to paraphrase its contents in summary, it claimed that there was a group of people who were members of A.C.K Church Koyo Parish who were anti-development who had threatened to assassinate the defendant. The addressee of the letter was asked to investigate the matter through those people's chairman one CPL *Francis Cherono Ngeny* (the 1st plaintiff). The letter was to be kept by the security committee in case something happened to the defendant.

3. The letter proceeded to disclose the identity of the persons the author had in mind. They were named as follows;

(i) *CPL Francis Cherono Ngeny*

(ii) *Jacob Mugun*

(iii) *Stephen Maritim*

(iv) *Thomas Kimagut Serem*

(v) *Joseph Kirwa Busienei*

(vi) *Jacob Busienei Former Assistant Chief – Kapsaos*

(vii) *Malakwen Ielgoi*

(viii) *William Keino*

(ix) *Jeniffer Kurgat*

(x) *Egla Maritim*

(xi) *Rev. Philemon Tenai*

(xii) *Alice Serem*

(xiii) *David Suge*

4. The record shows that the people named in the letter save for *Rev. Philemon Tenai* are the plaintiffs' in this case. It is the plaintiff's contention that the letter contained untrue and malicious allegations which were defamatory of the plaintiffs. It is their case that the words used in the letter in their natural and ordinary meaning meant and were understood to mean that;

(i) The plaintiffs were killers,

(ii) That they intended to kill the defendant and were at an advanced stage of doing so,

(iii) That they were a danger to peace and stability,

(iv) That they were anti-development and had or wanted to frustrate useful projects,

(v) That the first plaintiff was not a fit and proper person to be employed by the Government of Kenya as a police corporal,

(vi) That they were hypocrites and did not deserve to belong to the ACK church,

(vii) That they aided and abated the commission of crimes and ought to be apprehended.

5. The plaintiffs contend that as a result of publication of the letter, they have been greatly injured in their credit, character and reputation and they had been brought into hatred, ridicule and contempt. And that despite demand being made and notice of intention to sue being given, the defendant had refused and or neglected to tender amends, to apologize and to admit liability for libel.

6. In his statement of defence dated 18th September 2001, the defendant denied liability as alleged and contended that the words used in the letter were true in substance and in fact; that the words were published on an occasion of qualified privilege. He prayed that the suit be dismissed with costs.

7. In support of their case, nine of the plaintiffs testified. They called one independent witness *PC Samuel Maina* who testified as PW11 on behalf of the Officer Commanding Kapsabet Police Station. His role was only to produce in evidence a copy of the offending letter. He produced it as P Exhibit 2.

8. The court record shows that seven out of the ten witnesses testified before three different judges between 29th January, 2003 and 19th September, 2007. These are *Hon. Etyang J* (as he then was); *Hon. Dulu J* and the late *Kaburu Bauni J*. I took over the case on 21st January, 2015 and heard the evidence of PW8 – PW11 and thereafter the defence case.

9. It is perhaps important to observe in passing that the witness who testified before *Etyang J* (the 1st plaintiff) was not recalled when the hearing started afresh before *Dulu J* and continued before his successors. There was an error in the numbering of witnesses so that the record wrongly reflects that 11 witnesses testified on behalf of the plaintiffs' while in fact only ten witnesses testified.

10. In their evidence, the plaintiffs testified that the letter authored by the defendant contained falsehoods as none of them had threatened or intended to kill him. They were all in agreement that the letter was not addressed to them or anybody else but was addressed to the Chairman of the District Security Committee; that they only became aware of the letter when it was shown to them by the 1st plaintiff; that they were all members of the ACK church Kapsaos and after publication of the letter, their reputation was defamed as they were shunned by the churches congregation, members of their families and members of the public. They however did not call any member of the public or independent evidence to substantiate those claims.

11. PW7, PW8 and PW9 claimed that as a result of the publication, their farming businesses were adversely affected since their produce dropped. Again, they did not avail any evidence to support these assertions. PW2, PW5 and PW9 testified that before the publication, they held various leadership positions which they continued to hold even after the publication. All the plaintiffs' implored the court to award them damages for defamation and costs of the suit.

12. To counter the plaintiffs' claim, the defendant testified in support of his case and did not call other witnesses. He admitted having authored the impugned letter. He claimed that he had received a threat to his life from the 1st plaintiff allegedly because he had built a dispensary on land belonging to the church. The threat was communicated to him by a senior elder who is now deceased one *Samson Yonget*. He immediately reported the matter to his area chief; the police; the District Officer Kaptumo and when no action was taken, he decided to report the matter to the District Commissioner who was the Chairman of the Security Committee. The District Commissioner then instructed him to reduce the complaint into writing since he could not act on verbal allegations. This is why he wrote the letter which according to him was not meant for public consumption.

13. According to the defendant, he wrote the letter to enable the District Security Committee to

investigate the death threats made against him and not because he intended to disparage the plaintiff's reputation. He denied the plaintiff's claim that the letter alleged that they were murderers. He strongly denied the plaintiff's allegations that he wrote the letter maliciously with the aim of damaging their reputations because they were his political opponents. He maintained that the claims made in the letter were true and accurate. He urged the court to dismiss the suit with costs.

14. After both parties closed their respective cases, they each filed written submissions buttressing their different positions in the matter. Those of the plaintiffs were filed on 7th December, 2016 while those of the defendant were filed on 10th March, 2017.

15. I have considered the evidence adduced by the parties in this case in its entirety together with the written submissions made by their advocates on record as well as the persuasive authority cited by the plaintiff's counsel namely **Francis Xavier Ole Kaparo V The Standard Limited & 3 Others Nairobi Civil case No. 1230 of 2004** which mainly dealt with the principles the court should apply in the assessment of damages in defamation cases.

16. Having considered the evidence and the rival submissions, I find that since the defendant has admitted having authored the impugned letter, only five key issues emerge for my determination in this case. These are;

- (i) Whether the plaintiffs have proved that the offending letter was published.
- (ii) If the answer to (i) above is in the affirmative, whether the content of the said letter was defamatory of the plaintiffs.
- (iii) Whether the defence of qualified privilege was available to the defendant.
- (iv) Whether the plaintiffs are entitled to the orders sought.
- (v) What orders should be made on costs?

17. The Court of Appeal in **Wycliffe A. Swanya V Tunyuta East Africa Limited & Francis Massai Nairobi CA No. 70 of 2008** set out the essential components which a plaintiff must prove in order to succeed in an action on defamation. The plaintiff must prove the following;

- (i) That the matter complained of is defamatory in character.
- (ii) That the defamatory utterances or statement was published or communicated to someone other than the person defamed.
- (iii) That it was published maliciously.
- (iv) In slander subject to certain exceptions, that the plaintiff suffered special damages.

18. It is perhaps important to point out at this juncture that there are two kinds of defamation namely, libel and slander. Libel consists of a defamatory statement in a permanent form like in a printed or written form while slander is defamation by word of mouth.

19. Turning to the first issue, publication basically means the communication of the defamatory statement, words or information to a 3rd party other than the person allegedly defamed.

In this case, it is not disputed that the offending letter was addressed to the chairman of the District Security committee and was copied to the area District Officer (D.O), Officer Commanding Police Division Nandi (O.C.P.D), Officer Commanding Station (OCS) Nandi, District Criminal Investigation Officer Nandi (D.C.I.O); Provincial Commissioner Rift Valley Province (PC) and the defendant's lawyer.

20. The letter specifically disclosed the names of all the plaintiffs and claimed that they belonged to the group of persons in the ACK church Koyo parish who inter alia were anti-development and wanted to assassinate the defendant. The plaintiffs did not however adduce evidence to prove that the letter was received by all the people or the bearers of the offices to which it was copied. Their evidence taken as a whole proves that the letter was received by the Nandi District Commissioner who was also the Chairman of the District Security Committee and the O.C.S. The plaintiffs in their evidence stated that they visited the area OCPD to whom the letter was copied but he did not have a copy of the letter. Nothing was said about all the other people to whom the letter was copied. As stated earlier, the defendant did not deny having authored the said letter. In the circumstances, I find as a fact that the letter was published to the chairman of the Nandi District Security committee and the area O.C.S of and concerning the plaintiffs.

21. I must hasten to add that in law, publication of a defamatory statement whether in spoken or written form would still be proved even if it was communicated to a single person other than the person defamed. The extent or scope of its communication is only relevant in the assessment of quantum of damages and not to proof of publication.

22. Having made the above finding, the next question for my consideration is whether the plaintiffs have demonstrated on a balance of probabilities that the letter injured their reputation and character in the eyes of right thinking members of the society.

Before embarking on an analysis of this issue, it is important to remind ourselves of the legal definition of the tort of defamation.

23. Defamation has been defined in *Blacks Law Dictionary 8th Edition at Page 448* as;

“the act of harming the reputation of another by making a false statement to a third person”

It is also defined in *Winfield & Jalowicz 15th Edition* as “ .. ***a publication of a statement which reflects on a person’s reputation and tends to lower him in the estimate of right thinking members of the society generally or which tend to make them shun or avoid that person....***”

A defamatory statement is defined in *Gatley on Libel and Slander 11th Edition* at page 38 as “***one which is to the claimant’s discredit; or which tends to lower him in the estimation of others or causes him to be shunned or avoided; or exposes him to hatred, contempt or ridicule***”

24. Given the above definition, it follows that for a plaintiff to succeed in an action on defamation, he or she must prove that the offending statement was not only published but that it exposed him to public ridicule, contempt and hatred or injured his reputation in his office, trade, profession or financial credit. The standard of opinion is that of right thinking members of society. Abusive or offensive words may not be defamatory *per se*. To be defamatory, the words or statement must be proved to be false and malicious. The burden of proving that the words complained of were in fact defamatory lies on the plaintiff. It may be significant to note at this point that unlike slander, libel is actionable *per se* without proof of actual damage.

25. In this case, I find that the offending letter contained statements which *inter alia* claimed that the plaintiffs were anti- development and had threatened to kill the defendant. Any objective person to whom the statements were published especially the claim that the plaintiffs had threatened the life of the defendant would have no difficulty in taking the statement to mean that the plaintiffs were persons who were capable of murder and were therefore not law abiding and responsible citizens. The publication of the statements would disparage the plaintiffs’ reputation; expose them to hatred and contempt and cause them to be shunned or avoided by right thinking members of the society. But like I have stated earlier, such statements would only be defamatory if they were proved to be false and malicious.

26. In defamation cases, malice does not necessarily mean spite or ill will. Evidence of malice may be found in the language or tone of the publication if it is utterly beyond or disproportionate to the facts or it can be inferred from a deliberate or reckless ignorance of the facts- See: *JP Machira Vs Wangethi*

Mwangi and Nation Newspapers Civil Appeal No.179 of 1997; Godwin Wachira V Okoth (1977) KLR 24.

27. A close scrutiny of the said letter reveals that it was in the main communicating a complaint which the defendant wished to have investigated by the Nandi Security Committee regarding information he had received that the plaintiffs led by the 1st plaintiff were planning to assassinate him owing to their differences arising from the construction of a dispensary on land owned by the church.

28. The defendant in his evidence testified that after receiving the information, he reported the matter to the chief and the D.O Kaptumo; the 1st plaintiff was summoned to attend a hearing before those administrators but he refused to honour the summons; that the chief directed him to include the names of the other plaintiffs as they were also against his development activities; that he reported the matter to the D.C in his capacity as the chairman of the entire Nandi Security Committee; that the DC refused to act on his verbal complaint and it was because of his instructions that he reduced it into writing.

29. These allegations by the defendant were not controverted by the plaintiffs. Apart from their denials, the plaintiffs did not adduce independent evidence to prove that the aforesaid statements were false in substance.

30. Unlike in the case of defamation founded on printed publications in newspapers or live media broadcasts where media companies are expected and required to investigate the truth or falsity of information they receive or seek the views of the person affected before publishing it, this case presents a completely different scenario.

31. This is a case of an individual citizen who had received information regarding a threat to his life by known persons. The defendant, just like any other citizen had both a legal and civic duty to report his apprehension regarding the threat to his life or any reasonable suspicion concerning plans to commit criminal offences to the security personnel in charge of his area for investigations.

32. The nature of the information in this case in my view was such that the defendant could not have had capacity to investigate it on his own or seek the views of the plaintiffs' first to establish the truth or otherwise of the allegations before reporting the same to the security organs for appropriate action. I say so because as an individual, the defendant could not have had the capacity or the machinery required for that purpose. And it was only after investigations by the police or other members of the security committee that the truth of the matter would have been established.

33. The fact that the security committee through its chairman does not appear to have carried out any investigations on the defendant's complaint before the instant suit was filed is a matter which cannot be visited on the defendant. His duty ended the minute he reported the matter to the authorities.

34. From the evidence of the plaintiffs, they appear to have rushed to court immediately the letter was leaked to them. They should have waited for the relevant authorities to investigate the matter for its truth or otherwise to be established so that if it was found to be false, they would have a basis to complain that the defendant falsely and maliciously published defamatory statements concerning them.

35. Given the wording and tone of the letter and the steps the defendant took before publishing it; the fact that the letter was addressed to the chairman of the security committee and copied only to members of his team and not to members of the ACK church Koyo parish where the plaintiffs and the defendant worshipped or to members of the public as a whole leaves no doubt in my mind that in drawing the letter, the defendant was not actuated by malice. It is apparent that his only interest was to have the information investigated. I thus find that the plaintiffs have failed to prove to the required standard that the publication was false and malicious. This finding leads me to the conclusion that the evidence in this case falls short of establishing on a balance of probabilities that the statements made in the offending letter were defamatory of the plaintiffs.

36. In the event that am wrong in this finding, I wish to examine the defence of qualified privilege raised

by the defendant with a view to establishing whether it was available to him in this case. The defence of qualified privilege is a common law defence which developed after the House of Lords decision in Reynolds V Times Newspapers Limited [2001] 2 AC 127 which introduced the duty-interest test or the right to know test in publications on matters of public concern. The defence was considered in Chirau Ali Mwakere V Nation Media Group Ltd & Another (2009) eKLR where Khamoni J (as he then was) defined a privileged occasion as follows; **“An occasion is privileged where the person who makes a communication has interest or a duty, legal, social or moral to make it to the person to whom it was made and the person to whom it is so made had a corresponding interest to receive it”**.

37. In Halsbury’s Laws of England 4th Edition Reissue Vol 28 at Para 109, the learned and distinguished author explains the basis of the defence of qualified privilege and lists some categories of occasions in which the defence would be applicable. He asserts as follows:

“On grounds of public policy, the law affords protection on certain occasions to a person acting in good faith and without any 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:

- (1) Limited communications between persons having a common and corresponding duty or interest to make and receive the communication,**
- (2) 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.**
- (3) Fair and accurate reports, published generally, of the proceedings of specified persons and bodies....”**

In Gatley on Libel and Slander 8th Edition page 441 paragraph 442 the statements to which the defence of qualified privilege should apply are stated to include the following;

- (1) Statements made in the discharge of a public or private duty.
- (2) Statements made on subject-matter in which the defendant has a legitimate interest.
- (3) Statements made by the defendant to obtain redress for a grievance
- (4) Reports of parliamentary proceedings.
- (5) Extracts from, or abstracts of, parliamentary reports, papers, votes, or proceedings published by the authority of parliament.

38. It is not disputed that the defendant at the time of the publication was the plaintiffs’ area councilor. As an individual citizen and as the area councilor, he had a legitimate interest in being security conscious and he had an obligation to look out for his own security and safety. He also had both a legal and civic duty to report to the security committee whose membership included senior police officers threats he had received on his life or any planned suspected criminal activity in his area of operation and the security committee had a corresponding duty to receive such complaints for investigations as part of its mandate of maintaining law and order.

In view of the foregoing, I am persuaded to find that the letter was published on an occasion of qualified privilege.

39. The defence of qualified privilege, just like the other statutory defences of absolute privilege, justification and fair comment on a matter of public interest are complete defences to an action founded on defamation. In the premises, it is my finding that the plaintiffs are not entitled to the reliefs sought in this case.

40. For all the foregoing reasons, I have come to the conclusion that the plaintiff's suit lacks merit and it is hereby dismissed with costs to the defendant.

It is so ordered.

C. W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of July, 2017.

In the presence of:-

Mr. Lobolia -Court clerk

No appearance for the plaintiffs and the defendant.