



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 112 OF 2011**

**FLORENCE A. MBURU.....1ST PLAINTIFF**

**STEPHEN OJWANG.....2ND PLAINTIFF**

**VERSUS**

**DOMINIC C. COGO.....1ST DEFENDANT**

**THE CHURCH OF JESUS CHRIST OF LATTER DAYS.....2ND DEFENDANT**

**JUDGMENT**

1). By their amended plaint dated 28-7-2011the plaintiffs prayed for judgment against the defendants for the following reliefs:

a) General and punitive damages.

b) Publication of written unconditional apology. c) Costs of the suit.

Interest on (a) and (c) above and any other relief of the court.

2). The genesis of the dispute between the plaintiffs is that on the 26th May 2011, 3rd May 2011, 3rd June 2011and 6th June 2011the defendant jointly and severally made false and malicious written and oral publication against the plaintiffs namely that the 2nd plaintiff had abandoned his legal wife together with the family and cohabited with the 1st plaintiff who was a widow.

3). In their testimony the plaintiffs argued that the said libelous words were baseless and did not have any justification. The 2nd defendant on 6th June 2011expelled the 2nd plaintiff from its fellowship which went further to injure their character and integrity and has caused them anguish and suffering.

4). The 1st plaintiff (PW1) testified that she was a business lady operating a shop at Kilimani Centre within Kisumu Town. She is a widow having lost her husband in the year 2001. on 25-5-2011one Pastor Okula came to her place of work and delivered a letter to her which was unsealed and which she thought it was a water bill. Upon reading it she realised that it belonged to the 2nd plaintiff and it stated that he had abandoned his legal wife and was cohabiting with a widow. The letter was summoning the 2nd plaintiff to answer to the allegations to his church (2nd defendant) committee.

5). She concluded that the widow mentioned in the said letter was her as she had sublet a portion of her shop to the 2nd plaintiff who operated a driving school. She delivered the letter to the 2nd plaintiff who

requested her company as a witness on the appointed day.

6). On 3rd June 2011, they attended the meeting and the 1st defendant asked her how many times she had slept with the 2nd plaintiff. On cross examination the 1st plaintiff admitted that her name was not indicated in the letter as the widow the 2nd plaintiff was cohabiting with neither was she summoned to attend the meeting by the defendants.

7). In his testimony the 2nd plaintiff admitted having been given the letter by the 1st plaintiff. He said that the letter was defamatory having destroyed his relationship with his wife and son who was university student and who viewed him as an adulterer. However, when cross examined he admitted that the meeting held with the defendants was confidential and that each person was invited to state his case at a time. This position was also held by the 1st plaintiff.

8). The defence denied that the words complained of were really defamatory. They argued that being a member of the church the 2nd plaintiff had subscribed to their faith and therefore he was under the scrutiny and authority of the church.

9). The 1st defendant in opposing the plaintiff's allegation testified that they received complaints from the 2nd defendant's wife through one Stephen Okila to conduct investigation with a view of taking a disciplinary action in line with the church's regulations and rules. He further issued the letter complained of through the said Okila. He testified that at the meeting, which was confidential everyone was called to testify individually. When cross examined he said that the 2nd plaintiff did not sign the letter to signify receipt but it was never a requirement to do so.

10). Stephen Okila DW2 told the court that he received a complaint from Nancy Ojwang the 2nd plaintiff's wife that he had deserted her and the family and that they were cohabiting with a widow. He reiterated what the plaintiff and the 1st defendant said in terms of delivery of the letter to the 2nd plaintiff. He said that he gave the 2nd plaintiff the letter in person. He attended the disciplinary meeting where the 2nd plaintiff was excommunicated.

11). Both parties filed written submissions in support of their case. I have perused the same together with the attached set of authorities. The issues to be determined is whether:

**a) the plaintiffs have made out a case for a tort of defamation;**

**b) the plaintiffs deserves damages.**

Blacks Law Dictionary 8th Edition defines defamation as:

**"The act of harming the reputation of another by making a false statement to a third person. A false written or oral statement that damages another's reputation".**

12). In essence defamation tends to lower a person in the eye of the right thinking members of the society and makes him to be generally shun or avoided. The defamatory words must refer to the plaintiff and there ought to be a publication of the defamatory statements:

13). Halisbury Laws of England 4th Edition Vol. 28 at paragraph 22, the defamatory words must refer to the plaintiff. The same states:

"The proper purpose of an action of libel or slander is to vindicate the reputation of the person defamed, and accordingly the proper and the only party to bring the action is the person actually and personally defamed. This is not enough that the words reflect on the persons properly; there must also be imputation against the plaintiff personally.....".

14). While the name of the 2nd plaintiff is clearly indicated in the letter, the 1st plaintiff's name was not. The letter simply stated "a widow". It is therefore the defendants case that she does not qualify as a

claimant for defamation.

15). However, Crawshaw J. A in Shah -VS- United Africa Press Ltd [1961] EA 93 at 99 says:

"The test of whether words that do not specifically name the plaintiff refer to him or not is this. Are they said as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words knowing all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may nevertheless be described so as to be recognised....if in the circumstances the description is such that a person hearing or reading the libel would reasonably believe that the plaintiff was referred to, that is sufficient reference to him..... The question is whether the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant..... if upon the evidence the family are of the opinion that ordinary sensible readers, knowing the plaintiff, would be of opinion that the article referred to him the plaintiff's case is made act".

16). In the case at hand and anybody reading the letter identify the widow mentioned therein as the 1st plaintiff? It may be relevant at this juncture to reproduce a portion of the letter, exhibit PW1. The same states:

"The Mission Presidency is considering a formal disciplinary council in your behalf including the possibility of disfellowship or excommunication, because you are reported to have abandoned your legally wedded wife with family and cohabited with another woman who is said to be a widow.....".

17). There is no doubt that both plaintiffs work under the same premise. The 1st plaintiff has sublet a portion of her shop to the 2nd plaintiff who runs a driving school. Does it mean that they are cohabiting with each other? Are they living as "husband" and "wife".

18). I believe that there are several widows living within Kisumu town and it becomes very difficult to believe that the 1st plaintiff imagined that she was the only widow the 2nd plaintiff was capable of cohabiting with. I find that their relationship was purely business and during the trial there was no evidence to suggest that the 1st plaintiff was the widow referred to. The 2nd plaintiff's estranged wife was not called to testify. Further the minutes of the disciplinary meeting were not tendered by either party.

19). Further and as defined above the words complained of ought to be published. Gantley on libel and slander 11th Edition at paragraph 6.1 has stated that:

**"In order to constitute published, the matter must be published by the defendants to (communicated to) a third party. It is not sufficient that the matter has been merely communicated to the third party. It is also necessary that it be communicated in such a manner that it convey the defamatory. Meaning and that persons acquainted with the claimant could understand it to refer to him".**

20). Though DW2 testified that they handed the letter to the 2nd plaintiff in person the 1st plaintiff maintains that the letter was handed to her while at the shop. It was her evidence that the letter was unsealed and she actually thought it was a water bill and she opened it. Neither party called a witness to corroborate this. The test therefore is whether the 1st plaintiff was a 3rd party. The letter was in my opinion handed to her and not a third party.

21). On the part of the 2nd plaintiff, several questions arise; is it possible that DW2 just handed the letter to the 1st plaintiff without even saying a word and walked away? Didn't they inform her to whom the letter belonged? Was DW2 in the habit of delivering service bills to the 2nd plaintiff to make her reach the assumption that the letter was a bill? Why would DW2 in his right state of mind deliver an unsealed letter? The above queries raise doubt on whether the letter was handed over to the 1st plaintiff.

22). The onus of tipping the balance to their advantage fell on the plaintiff's shoulders. It is my finding that the plaintiffs should have called evidence to dispel with the doubts and this shows that the 1st plaintiff was the third party to whom defamatory prohibition made concerning the 2nd plaintiff.

23). The other issue was the meeting attended by the plaintiff. Was there a publication? The two plaintiffs did attend the meeting out of their own volition. The 2nd plaintiff was granted an option of inviting witness. He chose to take the 1st plaintiff. The panel reserved the right to ask any question that deemed necessary. The 2nd plaintiff cannot cry foul when he is the one who invited the 1st plaintiff as his witness.

24). **In Alexander Titus Munyi -VS- Lewa Wildlife Conservancy [2006] eKLR Mutungi J** state as follows:

"The evidence on record clearly shows that the publication/communication was by the appellant himself. He is the one who informed his wife and his church friends about the letter, not the respondent. It would be a harsh proposition that the appellant can hold the respondent liable for defamatory statements or material interlocutory published by the appellant himself".

25). Equally, the meeting as earlier stated was confidential and according to the church by laws. The parties were called in one by one and no other persons were allowed in and there was therefore no publication to 3rd parties but to themselves. Gantley (Supra) has stated:

"Defamation protects a persons reputation and his reputation is not the good opinion he has of himself but the estimation in which others hold him. Defamatory statement about the claimant communicated to the claimant alone may injure his self esteem but it cannot injure his reputation".

26). The upshot of the above analysis is that the plaintiff failed to prove publication which is a key ingredient. Neither did the 2nd plaintiff bother to call any other witness to establish the same.

27). In the premises and for the reasons given above I do not find that the plaintiffs established their case on a balance of probabilities. The same is dismissed with costs.

**Dated, signed and delivered at Kisumu this 18th day of February, 2015.**

**H.K. CHEMITEI**

**JUDGE**