



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 81 OF 2011

MICHAEL JUMA OTIENO.....PLAINTIFF

MARTIN LURTHER OMONDI OCHOLLA.....DEFENDANT

JUDGMENT

1. The plaintiff filed suit against the defendant through a plaint dated 21st February 2011. The plaintiff prays for judgment against the defendant for:-

- a. General damages for libel
- b. Aggravated and/or exemplary damages
- c. Costs of suits
- d. Interests on a and b above
- e. Any further relief the Court deems fit to grant in the circumstances

2. The plaintiff alleges that on or about 2nd August 2010 the defendant intentionally falsely, maliciously and spitefully wrote an email to Betty Okero who in turn forwarded it to Micheal Arum, which e-mail contained the following words:-

“...Michael Juma Otieno had over time presided over institutional decay and was not willing and ready to accept reforms that had been deemed necessary. We are constrained to let you know that some of the reasons that led to him being discharged of his duties included fraud, theft and financial indiscipline...”

“...Documentary evidence reveals that his e-mail escapades are diversionary and are meant to portray him as a selfless person whose mission was to inject accountability and transparency in CEPAD.

Michael Juma Otieno mismanaged and embezzled funds in several occasions as evidenced by the following:-

- 1) Cheque No. 100370 dated 27th October, 2009 amounting to Kshs. 652,885 meant for social audit is not properly accounted for and even the auditors raised queries on the same.**
- 2) Cheque No. 100336 dated 1st September, 2009 amounting to Kshs 45,000 has no records for usage.**
- 3) Cheque No. 100354 amounting to Kshs. 180,000 has no records on how it was spent.**
- 4) Cheque No. 100353 amounting to Kshs 140,000 dated 21st October, 2009 has no records on**

how it was spent.

5) Cheque No. 100339 dated 8th September, 2009 amounting to Kshs. 160,800 has no records on how it was used.

6) Cheque No. 100228 dated 19th December, 2008 amounting to Kshs. 765,000.

“...thus creating a lacuna that was effectively exploited by Michael Juma Otieno to defraud the Social Auditors, CEPAD, and OSIEA. He even ignored to use the services of Assistant Programs Officer who was available...”

“After conducting a background check to confirm reasons for his exit from other places where he had previously, we found out that he had worked for Securicor Kenya (now G4S) as a Security Officer before being summarily dismissed for embezzling money meant for salaries of fellow Security Officers. He was also dismissed from Total Security Limited Mombasa and Riley Security on similar grounds. One wonders how he used to ferry (if any) large sums of money from the bank to the filed without police escort.”

“Michael Juma Otieno used to direct the accountant (there are records on this to tailor or cook records against the internationally accepted accounting standards. He had a habit of delaying accounting for up to three months, making it difficult to update accounting records. Further, while our Finance Policy stated that payments above Kshs. 5,000 were to be made in cheques, Michael Juma Otieno used to have cheques drawn in his name, bank then in his own account, and pay the clients or service providers from his account. Through this, he defrauded the organization and clients a lot of money.”

“Sally Kesa, his wife and later divorced. Sally served as Assistant Programme Officer with the organization (her duties were heavily biased on petty cash control) Michael Juma Otieno further instructed another Assistant programme Officer, Maureen Achieng, to send Sally Kesa, his wife salary for 4 month Through MPESA, money transfer system after she had left CEPAD.

1) Samuel Otieno his brother who served as an accountant

2) Fredrick Juma his brother who served in the capacity of accountant

3) Bernard Otieno his brother who was in charge of Information Technology

4) Michael Amollo his first cousin-Computer Technician and Office Assistant

“...CEPAD board finds it unpalatable for Michael Juma Otieno to be first person to complain of working with people who are related in one way or another while he employed his own relatives, and later on found it hard to work with them for one reason or another. The same people viciously left CEPAD in a huff after he frustrated them one after the other...”

“...In this arrangement that he had intended to be as secretive as possible, he had been accompanied by his group of friends from far as Siaya (his village) and Kisumu Districts...”

“...He was motivated by his lone ranger attitude to deny them the opportunity to participate in the key processes thereby reducing them to mere passengers who wouldn't have a clear grasp of how field assignments are managed...”

“...his misconduct could be seen in the extent of personalization of the organization with his personal details appearing on organization documents such as letter heads, receipts, rubber stamps, publications. He even opened a postal address, purporting it before the organization, in Siaya and used the same to communicate with the partners, yet this was not known to the staff and board. He presided over fraud in the form of faking the signatures of the Chair of the

Board for his own designs...”

“...As the Head of CEPAD Secretariat, MICHAEL JUMA OTIENO used to delete the financial information from the office e-mail address and transferring the same to this own personal e-mail address to deny other staff the information. He could not even convey the information to them after reading them. So he ran the secretariat as though it were his own personal property and private freedom...”

“...by Michael Juma Otieno and ignore him for what he is-agent provocateur.”

3. The defendant failed to enter appearance and or file a defence within the prescribed and interlocutory judgment was entered on 25/5/2012 against the defendant. The matter proceeded for formal proof on the 5th of February 2014. In support of his case the plaintiff called 3 witnesses. The plaintiff testified that the email document no. 27 which was sent to members of the **Centre for Peace and Democracy** portrayed him as a thief, fraudster, arrogant, had no values, a lone ranger, a dictator who orders staff member to falsify documents and that he forges people's signatures to withdraw money from banks, nepotistic as he employees brothers and relatives; that he was involved in malpractices allegations he refuted. He testified that he was a secretary of the institution but also volunteered as the head of the secretariat under the title team leader positions and he did not earn a salary but resigned when he got a job at Group 4 Securicor services and served as a district manager; that the night before pay day he fell ill and only went to work in the afternoon as by then there were no mobile phones and the driver did not go for him; that when he went to work he was suspended for failing to turn up and he was dismissed on that ground; that prior to that he was working at Total Security as branch manager for one and a half years but was terminated due to a disagreement with the Managing Director on recruitment and policies issues; that books of accounts were kept by a professionally trained accountant and the account had three signatories him, the chairman, defendant and the treasurer; that the years in issues are 2006 and 2009 and the auditors verified all expenditures; that in all the three institutions he was not accused of theft nor was he charged with theft; that he was informed by one Michael Otieno and Beatrice Abiero that they received the email sent by the defendant; that the defendant tried to intimidate him to resign; that all this this made him suffer socially, financially, psychologically and socially and many people even his relatives no longer trust him and view him as a fraudster and thief; that since 2010 he would met the requirements for jobs but would not get the positions as he had been portrayed as a fraudster in the emails; that the said implication was done maliciously and deliberately to remove him and obtain money as there was no proof of the allegations levied against him.
4. PW2, Samuel Omondi and PW3 Bernard Owino both brothers to the plaintiff testified that their name had also been trampled on in the said damning email and denied having worked for the said institution.
5. The plaintiff adduced a copy of the email he claims was defamatory and a balance sheet for the year ended 31st December, 2008 and financial statements for the year 2009.
6. The plaintiff in his written submissions reiterated the pleadings in his plaint and his testimony and the two witnesses. The plaintiff submitted that the defendant's emails carried an innuendo by persons who read it that the plaintiff had been dishonest which was not true and that the same created a general impression that the plaintiff was dishonest and an unreliable person and imputed expressly or impliedly were defamatory to the plaintiff and intent on injuring the credibility of the plaintiff. It was submitted that the evidence adduced disclosed a civil wrong libel, which is defamatory and actionable. The plaintiff assessed damages at 6.5 million and urged the Court to allow the orders sought by the plaintiff in the plaint.
7. A libel is a defamatory statement *..... made in writing or printing or some other permanent form*. The elements of the tort of defamation are that the words must be defamatory, the words must refer to the plaintiff and the words must be malicious. The words must be defamatory in that they must tend to lower the plaintiff's reputation in the eyes of right-minded persons, or must tend to cause him to be shunned or avoided. The burden of proof is upon the person alleging that the said words to be defamatory to show that a reasonable man would have understood them as such.
8. Were the words in the said email defamatory? The said email implies that the plaintiff was

discharged from his duties due to fraud, theft and financial indiscipline. The said email though not sent to the plaintiff in person had been forwarded to the plaintiff by a concerned colleague who had shown her concern of the effects of the damning email stating, ***“What a mess this is.....I am not sure you would like to be linked to this it may just mess up for you at SACUM when it comes to funding”***. Though the plaintiff didn't deem it necessary to call the writer of the above email, it is indeed clear the effect of the email had on other people who read it. As such I find that the said email was defamatory and lowered the plaintiff's character before other right thinking members of society.

9. The defamatory words the plaintiff complains of are in an email from the defendant to other development partners as headed in the said email. The email appears to have been sent to several members as the titled refers; ***“TO OUR DEVELOPMENT PARTNER”***, in my view this constitutes publication as the communication of the words was to other persons other than the person defamed and the said publication was done by the defendant who authored the said defamatory email. It is necessary to show that the published falsehood lowered the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society.
10. Were the said words published in the said email malicious? Odunga J. in ***Phinehas Nyagah v Gitobu Imanyara [2013] eKLR*** quoted the case of ***Godwin Wachira vs. Okoth [1977] KLR 24***; where it was held that, ***“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice.....”***

Further

...the failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.”

11. Having analyzed the pleadings and the plaintiff's witness testimony and exhibit evidence. I find that the said email was libelous and therefore defamatory. This now takes me to analyse the award in damages as sought by the plaintiff. ***Halsbury's Law of England 4th edition Vol. 28 on Liberal and Slander***, state that; ***“Damages in libel: If a person has been libeled without any lawful justification or excuse, the law presumes that some damage will flow in ordinary course of events from the mere invasion of his right – to his reputation and such damage is known as “general damage.”***

Section 16A of the Defamation Act Cap 36 Laws of Kenya provides:

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”

In ***UREN V JOHN FAIRFAX & SONS PTY. LTD, 117 C.L.R 115, 150: Windeyer J. held that;***

“It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solace rather than a monetary recompense for harm measurable in money.”

From the reading of the said defamatory email the plaintiff was in a field that in one way or the other

involved sourcing for donor funding for various projects and as such I find the imputation of him as a thief and fraudster to other colleagues might greatly jeopardize him. I therefore find an award of Kshs.2,000,000/- would be fair and adequate. I therefore enter judgment for the plaintiff against the defendant and the sum of Kshs. 2,000,000/- together with costs and interest from the date of the judgment.

Orders accordingly.

Dated, signed and delivered this **26th** day of **September** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk