



**REPUBLIC OF KENYA**

**High Court at Garissa**

**Civil Appeal 1 of 2012**

Appeal against the judgement of the learned trial magistrate (J.N. Onyiego, Principal Magistrate) in Civil Case No. 15 of 2010 in the Senior Principal Magistrate's Court at Garissa, 29<sup>th</sup> April 2011.

**MOHAMED NASORO DIMA.....APPELLANT**

**VERSUS**

**MOHAMED OMAR SOBA.....RESPONDENT**

**JUDGEMENT**

**The Suit**

1. Mohamed Omar Sobar, the Plaintiff in the lower court and the respondent in this appeal, instituted a suit claiming general damages for defamation, costs of the suit and any other relief the court may deem fit to grant. In a plaint dated 22<sup>nd</sup> February 2010 and filed on the same date, the respondent described himself as a well known member of a community known as Wailwana who inhabit Tana River District in Kenya. He further stated that he served as a member of parliament of the then Tana River North Constituency from 1974 to 1988; that after his tenure as the area member of parliament he continued to champion development projects for the community; in his capacity as a leader he wrote a letter dated 27<sup>th</sup> October 2009 addressed to the District Social Development Officer, Tana River District complaining about the activities of a local Community Base Organization (CBO) known as Nigateni Community Development Organization, the 2<sup>nd</sup> defendant in the lower court. He felt that the CBO was acting outside its mandate and was leaning towards politics which was against the objectives contained in its certificate of registration. The letter was copied to the 2<sup>nd</sup> defendant among other people as specified in the letter.
2. The District Social Development Officer did not respond to the letter. Instead, the appellant acting on instructions of the 2<sup>nd</sup> defendant through its members during a special meeting convened for that purpose, responded via a letter dated 5<sup>th</sup> November 2009. The letter in reply was copied to several people namely Director of Gender and Social Services, Provincial Gender and Social Services, District Commissioner, Bura, Tana, District Commissioner, Tana River, OCPD Hola/Bura, District Officer Bura, District Officer Madogo, OCS Madogo and OCS Bura. It is the contents of this letter that raises the issues that necessitated this suit. The letter starts by making reference to the letter written by the respondent and continues to give details of the complaint against the record of the respondent. The offending sections of the letter are reproduced here below:

**“We regret to inform you that Mr. Soba is the cause of poverty in the Wailwana Community. He has been misusing the Community for more than 15 years ensuring that they live in extreme poverty so that they have no other option but to succumb to his falsehood in the hope that their economic status will improve. He managed to use the Community to win elections and has therefore been an M.P for 15 years. During that period the Community abandoned their farmland and other**

**economic activities and was hence reduced to beggars as they were throughout engaged in cheap political activities. He suppressed all progress in the field of education resulting in low literacy level which to him was an advantage as the Community members would have no light (sic) and would consider him as the only hope for economic improvement. His appointment as an Ambassador was a blessing to the Community though he abandoned them denying them all opportunities despite his position of advantage as an Ambassador as his absence resulted to the Community engaging in participatory efforts towards self improvement....”**

**“...Mr. Soba’s activities portray him as a non member of the Wailwana Community and he has no position in the Community Leadership but is assuming false responsibility in order to create division and hatred and stall all development efforts being made by Nigateni CBO. He is apparently at war with the Community attempting to block access of the CBO to the Community in order to fulfil his selfish political motives.”**

**“.....On account of the aforesaid we request all the relevant authorities to take necessary action against the politician to bar him from interference with the CBO activities and check his attempts which will not only destroy this marginalized Community but cause insecurity in the Wailwana area.”**

3. The respondent understood those words to mean that he is a liar and political conman; that he has taken advantage of and exploited the poverty and illiteracy of the Wailwana Community for his personal gain; that he has manipulated the poverty and ignorance of the Community for personal gain; that he has suppressed and undermined the efforts of the Community to advance educationally and economically in order to take advantage for personal gain; that he has undermined efforts of the Community to advance educationally and economically in order to leave himself in an exalted position for his benefit; that he has fostered and encouraged the economic marginalization of the Community for political benefit; that he is the cause of poverty of the Community; that he has engaged in divisive politics within the Community for personal gain; that he is a criminal and poses a security threat to the Community.

4. The Respondent asserted that the letter was published to various people and by so doing, the appellant and the second defendant has wrongfully, unlawfully and without justification lowered him in the right thinking members of society.

5. The appellant and the second defendant raised a defence that the respondent wrote the letter to the District Social Development Officer in bad faith and they denied generally the interpretation by the Respondent of the said letter. The defence contains general statements of denial. The Respondent’s case was termed as frivolous; an abuse of the court’s process, misconceived, unfounded, defective and raises no cause of action.

### **The Evidence**

6. The Respondent testified in the lower court that he was a member of parliament for what was known as Tana River North Constituency from 1974 to 1988. During his tenure he initiated and supported various projects including health centres and dispensaries at Mulanjo, Narigi, Bangali, and Mbalambala; construction of schools like Madogo Secondary School, Mororo Primary School, Karati Primary School, and Makele Primary School in Galole; construction of Bangale dam; caused the employment of various residents in government mostly as District Officers; educated some children and served the public diligently. He stated further that due to his good development record, he was appointed ambassador. He contended that he wrote the letter to District Social Development Officer complaining about the activities of the CBO because it had deviated from its objectives of promotion of environmental activities, HIV/AIDs projects and the care of orphans.

7. The Respondent further contended that the appellant authored this letter and defamed him and that the letter, which was not justified, was sent to several people thereby publishing it. Further, upon receipt of a copy of that letter, he instructed an advocate to take up the matter; that the advocate wrote to the appellant on 17<sup>th</sup> December 2009 asking him to apologize and withdraw the letter but the appellant failed

to respond and to take any action as demanded. He called as his witness one George Jashoro Jiro, the District Social Development Officer who confirmed that he had received the letter written by the appellant. He said the letter was copied to several people. The third witness to testify in support of the Respondent's case was one Omar Andal Njilo who said was a retired chief. He told the court that he had resigned from the 2<sup>nd</sup> Defendant (the CBO) because it had brought in politics to the Organization.

8. The appellant and the 2<sup>nd</sup> Defendant filed a joint defence in which it was contended that the CBO was registered in 2005 and it had never deviated from its mandate of promoting education, HVI/AIDs awareness, promotion of peace and other activities aimed at lifting the standards of living of the Wailwana Community. The defence further states that upon receipt of a copy of the letter of complaint by the respondent asking the District Social Development Officer to deregister the CBO for engaging in political activities the members met and deliberated on the course of action to take. The meeting held on 2<sup>nd</sup> November 2009 mandated the appellant to respond to the letter with copies to various people. The appellant attached the minutes of that meeting. He denied defaming the Respondent. He denied knowledge of any development activities by the respondent.

9. One Said Rado testified for the defence and stated that the appellant was authorized to respond to the letter by the Respondent and what the appellant wrote is what he had been authorized to write. He denied defaming the Respondent. Mariam Kibwana too testified that the committee had authorized and approved the letter and that they did not defame the respondent. Ali Salim, defence witness four told the court that their Organization did not engage in politics and that the allegations by the respondent were false; that the group authorized the appellant to write to the Respondent in response.

10. The trial magistrate, as far as I can ascertain, identified the following as the issues for determination:

- i. Whether the 1<sup>st</sup> defendant wrote the letter complained of and if so, whether the said letter was justified
- ii. Whether the contents of that letter were likely to injure the reputation of the plaintiff
- iii. Whether the plaintiff suffered or was likely to suffer any injury, loss or damage
- iv. Whether the contents of the letter were brought to the attention of third parties
- v. Whether the words were justified, true or fair comment

11. The trial magistrate analysed the evidence and was satisfied that the 1<sup>st</sup> defendant wrote the letter; the letter was defamatory; the reputation of the respondent was injured and he suffered damage as a result; the contents of the letter were brought to the attention of third parties (were published) and the defence of justification, truth and fair comment were not available to the 1<sup>st</sup> defendant. He found in favour of the respondent and awarded him Kshs 450,000 and costs of the suit. The respondent had sought damages in the tune of Kshs 4,000,000 which the court declined to award.

### **Grounds of appeal**

12. The appellant is aggrieved by the outcome of the case and has preferred this appeal. In his memorandum of appeal, the appellant has raised the following grounds of appeal:

- i. The learned trial magistrate misconstrued the facts and thereby erred in law in concluding that the Plaintiff/Respondent had been defamed by the 1<sup>st</sup> defendant/appellant.

- ii. The learned trial magistrate erred in law and fact in concluding, without any evidence, that the words contained in the alleged defamatory letter were libellous and likely to injure the Plaintiff/Respondent before right thinking men in society (sic).
- iii. The learned trial magistrate erred in finding that the alleged defamatory letter was authored by the 1<sup>st</sup> Defendant/Appellant.
- iv. The learned trial magistrate erred in opining and concluding that the 1<sup>st</sup> Defendant/Appellant had without legal justification written the alleged defamatory letter and was hiding behind the 2<sup>nd</sup> Defendant as having authorized him to do so.
- v. The learned magistrate erred in law and fact in extricating 1<sup>st</sup> Defendant/Appellant from the 2<sup>nd</sup> Defendant and finding against him in his personal and individual capacity.
- vi. The learned trial magistrate erred in finding that the allegations used in the letter in issue had not been proved to be true, correct, fair comment and privileged or otherwise.
- vii. The learned trial magistrate erred in holding that the Plaintiff/Respondent had proved his case on a balance of probability.

### **Submissions**

13. Both counsel made written submissions and left the matter to the court to give a judgement. Counsel for the appellant argued grounds numbers 1, 2 and 7 together. In summary counsel submitted that the respondent did not lead evidence to prove that the words were defamatory to him; that members of Wailwana community and society in general shunned or looked down upon him as a consequence to the publication of the alleged defamatory letter. He further submitted that the trial magistrate grossly erred in law and fact by finding that the words contained in the alleged defamatory letter were libellous and likely to injure the respondent before the right thinking members of society.
14. Grounds 3, 4 and 5 were argued together. The issue touching on these grounds is the appellant did not act in his personal capacity but in his official capacity as secretary to the 2<sup>nd</sup> defendant. It submitted that the appellant wrote the letter under instructions of the 2<sup>nd</sup> defendant as shown in the minutes of the meeting dated 2<sup>nd</sup> November 2009. It is further submitted that the 2<sup>nd</sup> defendant is a legal person by virtue of Article 260 of the Constitution 2010 which defines “person” to include a company, association or other body of persons whether incorporated or unincorporated. Counsel further invokes the provisions of Article 22 of the Constitution that every person has the right to institute court proceedings. Counsel faulted the trial court for holding that the 2<sup>nd</sup> defendant is not a legal person when the organization is an association or body of persons with a right to sue or be sued and that the trial court ought not to have held the appellant personally liable. In respect of ground number 6 it was submitted that the trial court shifted the burden of proof to the appellant by stating that the allegations in the letter had not been proved to be true, correct, fair comment privileged or otherwise.
15. On behalf of the respondent it was submitted that the joint defence was a mere denial of liability and completely lacks any legal or factual specifics; that the appellant never invoked the provisions of the Civil Procedure Rules to claim contribution or indemnity from the 2<sup>nd</sup> defendant; that the appellant did not file any known defence in defamation cases and he cannot bring the defence of qualified privilege at this stage; that the appellant is twisting facts to show that the respondent was defamed amongst the Wailwana community when this is not what the respondent’s case stated; that the respondent’s claim is based on a letter and all the ingredients of defamation were proved; that none of the grounds of appeal are supported by the pleadings or proceedings in the lower court. Counsel asked the court to dismiss the appeal with costs for lack of merit.

### **Determination of issues**

16. Black Law's Dictionary 8<sup>th</sup> Edition defines defamation as **the act of harming the reputation of another by making a false statement to a third person** (emphasis added). A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided: **see Gatley on Libel and Slander (10<sup>th</sup> edition)**. A plaintiff in a defamation case must prove that the words were spoken/written; that those words refer to him/her; that those words are false; that the words are defamatory or libellous and that he/she suffered injury as a result, that is, his/her reputation was injured as a result. In the case before me, it is not disputed that the letter in issue was written; that it refers to the respondent and that it was published. My apprehension of the contested issues is as follows:

- i. Whether the words contained in the letter in issue were defamatory/libellous of the respondent.
- ii. Whether the respondent's reputation was injured.
- iii. Who authored the letter in issue and therefore who is liable.
- iv. Whether any defence in defamation is available to the liable party.

17. The above issues capture the grounds of appeal raised by the appellant. Issue one and two will address grounds numbers 1, 2 and 7; issued three will address grounds numbers 3, 4 and 5 while issue number four will address ground of appeal number 6.

18. The respondent testified on his long record of service in the public sector first as the Member of Parliament from 1974 to 1988 a period of about 14 years, thereafter as an ambassador. He also narrated his track record as a development conscious leader and what he did to ensure he uplifted the economic status of the community he represented. Indeed Ali Salim who testified as defence witness number four told the court that the respondent served the communities he represented as Tana North Constituency, as it was known then, without discrimination. He also narrated the projects he initiated in various sectors. In brief he was a prominent member of society and a leader. His evidence on the track record was not controverted. In his evidence the respondent endeavoured to show that the contents of the letter are false. I am alive to the contention by the appellant that there is no evidence from any other person on the injury caused to the respondent and therefore there is no evidence proving defamation. I have looked at the authority relied on in respect of this point **George Mukuru Muchai v. The Standard Limited HCCC No. 2539 of 1997**. I want to distinguish this case from that one in that the circumstances were dissimilar. The defendant in that case was not the author of the defaming words and there was no malice proved. I have considered the evidence and submissions. As stated above, there is no dispute that the letter was written. There is no dispute that the letter refers to the respondent; that it was published by giving copies to the District Gender and Social Development Officer with copies to the 2<sup>nd</sup> defendant and other offices identified in the proceedings and in this judgement. The respondent tendered evidence to prove that the words were false and I have stated that the evidence was not controverted.

19. The contents of the letter in their natural and ordinary meaning portray the respondent as selfish in pursuit of personal gain; as misusing the community for selfish gain; someone who suppressed education and economic progression of the community; one who causes divisions among the members of the community and by innuendo the respondent is portrayed as a saboteur of economic development of the Wailwana Community. It is not controverted that the respondent served as a Member of Parliament for 14 years and if indeed he was what the letter says he was, he would not have managed to serve even one term in my view. Evidence to the contrary is lacking. The defendants did not adduce evidence to prove any of the allegations they made in that letter.

20. Libel is actionable per se. Carter-Ruck on Libel and Slander (4<sup>th</sup> Edition) it is stated that ***"An action for defamation is essentially an action to compensate a person for the harm done to his reputation. In all actions for libel and in some actions for slander the law presumes that the plaintiff has suffered harm and in these actions, usually described as actions per se, the actual sum to be***

*awarded as damages are said to be ‘at large’*”. See also HCCC No. 15 of 2001 Busia Teachers Co-operative Credit & Savings Society Ltd & Another v. Nation Media Group Ltd. In brief the respondent’s reputation was injured.

21. Who authored that letter? I want to take the view that the appellant was acting on specific instructions of the 2<sup>nd</sup> defendant. The minutes of the Special Nigateni Meeting held on 2<sup>nd</sup> November 2009 show that the meeting was convened specifically to deal with the letter dated 27<sup>th</sup> October 2009 written by the respondent to the District Social Development Officer and copied to the 2<sup>nd</sup> defendant. The meeting was chaired by Saidi Rado who is indicated as the Vice Chairman and was attended by the appellant as the Secretary of the 2<sup>nd</sup> defendant, Abdalla Odo as the Treasurer and other 15 members. The letter was read and explained to the members and discussed at length. The unanimous resolution was that the Secretary, appellant, writes a response to the respondent. The appellant wrote the letter and tabled it before another special meeting of the 2<sup>nd</sup> defendant during their meeting held on 5<sup>th</sup> November 2009. The purpose of this meeting is to confirm the contents of the response. The letter was read and contents explained by the appellant. The members agreed the contents were okay and the mandated the appellant to dispatch the letter. That meeting was chaired by Saidi Rado Vice Chairman and was attended by almost the same members as in the first meeting including the Treasurer.

22. Who is the 2<sup>nd</sup> defendant? It is a Community Based Organization registered under the Ministry of Social Services. It owns a certificate of registration and has office bearers. It also has a constitution which defines its objectives, membership, structure and how to run the affairs of the Organization. To my mind this is an organization that bears recognition by law and operates in a formal and organized manner. All this leads to my conclusion that the appellant was not acting in his personal capacity but in his official capacity. The dispute in the lower court was not a private dispute between the respondent and the appellant. It was a dispute brought against the 2<sup>nd</sup> defendant as an organization and the appellant as the secretary of that organization. The organization has office bearers, has assets and liabilities. To me the real author of the letter in issue is the organization through its officials and members. The trial magistrate erred in holding the appellant personally liable for the libel. My view is that the 2<sup>nd</sup> defendant is liable by actions of its secretary since he acted under specific instructions of the 2<sup>nd</sup> defendant through the meetings specified above.

23. What defence, if any, is available to the defendants? I have carefully read the pleadings of the defendants and the evidence adduced in court. The defence contains mere denials. Some excerpts from the evidence of the appellants, namely “.....**We did not abuse him in that letter. We did not in any way defame him. We did not call him a criminal and a threat to the community**”. Other witnesses also reiterated that they did not defame the respondent. The tort of defamation has specific defences available to a defendant. These include justification, truth, privilege and fair comment. The burden of proof shifts to a defendant to prove any of these defences in line with the phrase “**he who alleges must prove**”. The defendant must prove that the defamatory matter is substantially true for the defence of justification. For a defendant to rely on qualified privilege he/she must prove that the subject matter and its context was in advance of public interest or that the words were a fair comment on a matter.

24. The appellant and the 2<sup>nd</sup> defendant did not plead any of the defences available. In their evidence they did not prove that the words were true, were justified, were a fair comment or that they were privileged in making them. Indeed all the defendants and the witnesses said was that they did not defame the respondent. It seems that the defendants did not appreciate the impact of the words contained in the letter they authored.

25. To conclude this matter, I find that the case was proved on a balance of probability. The defendants did not have any defence available. They did not adduce evidence in support of any available defence in defamation. Having carefully considered the grounds of appeal relied on, rival submissions and the applicable law it is my finding that the appellant cannot be held personally liable for defamation. As explained above he was acting on specific instructions by the committee and the contents of what he drafted was discussed and given an okay. Again as explained above, the 2<sup>nd</sup> defendant is an organization

that is registered and recognized. I will lay the blame squarely on the 2<sup>nd</sup> defendant and find, which I hereby do, that the evidence is in support and proves that the respondent was defamed and his reputation injured, not by the appellant in his personal capacity but in his official capacity. The 2<sup>nd</sup> defendant is therefore liable.

26. In view of the above, I hereby set aside the judgement against the appellant and instead enter judgement in favour of the respondent against the 2<sup>nd</sup> defendant. I will not disturb the award of damages which remains at Kshs 450,000 plus costs of the suit. Orders accordingly.

**S. N. MUTUKU**  
**JUDGE**

Dated, signed and delivered this 18<sup>th</sup> day of April 2013.