



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 483 OF 2006

KENNEDY BITANGE MAGETO.....1ST
PLAINTIFF

GEOFFREY ONTIERI.....2ND
PLAINTIFF

PETER ODUNDO.....3RD
PLAINTIFF

LIVINGSTONE KINYANJUI NGUGI.....4TH
PLAINTIFF

JOHN LEWIS JOGO.....5TH
PLAINTIFF

-VS-

MACLOUD MALONZA.....1ST
DEFENDANT

HARAMBE CO-OP SAVINGS & CREDIT SOCIETY LTD.....2ND
DEFENDANT

JUDGMENT

The five Plaintiffs have filed this suit and are claiming damages (compensatory, exemplary and aggravated) against the two Defendants jointly and severally in respect of a defamatory publication made

on 10th and 11th May, 2005 in three daily Newspapers i.e. Daily Nation, The Standard and Kenya Times. The publication has been set forth in paragraph 16 of the Plaint; which reads:-

“This is to inform the General Public that the persons whose photographs appear here below ceased to be members of and employees of Harambee Sacco Society Limited. They are therefore, not authorized to transact any business on behalf of the society, its members and/or stakeholders”.

It is alleged in the Plaint that on 20th April, 2005 all the Plaintiffs were unlawfully, unprocedurally and without any justification expelled from the Harambee Sacco Society, the 2nd Defendant herein.

The plaint further alleges in paragraphs 12 and 13 thereof that the publication was made recklessly by the Defendants and with indifference as to the veracity of the publication and whether the same was injurious to the Plaintiffs and thus they seek exemplary damages. That the unwanted, malicious, unprecedented and grossly libelous publication was widely disseminated and the Plaintiffs, as a result thereof, have been gravely and severally downgraded in the estimation of right thinking members of society generally and, in particular, those who knew them.

The Defendants, in their Statement of Defence dated 6th April, 2009, denied that the expulsion of the Plaintiffs from membership of the 2nd Defendant was unlawful and without justification and stated that the publication in question was truthful and factual. They also deny that the publication was malicious and that the Plaintiffs have suffered any loss or damage.

The following issues thus arise from the pleadings:-

(1) Whether the expulsion of the Plaintiffs’ membership from 2nd Defendant was unlawful and without justification.

(2) Was the publications made in three newspapers by the Defendants were defamatory to the Plaintiffs.

(3) Whether the Plaintiffs suffered damages as a result of such publications.

(4) Whether prior demand for unconditional apology was ignored by the Defendants!

(5) Who pays costs?

All the Plaintiffs are civil servants and members of the 2nd Defendant and by virtue of such membership were entitled to ask for loan. Apart from 4th Plaintiff, the others did not hold any post in the 2nd Defendant society. As per the evidence on record, the two of the aforesaid Plaintiffs (1st Plaintiff and 4th Plaintiff) attended the Annual General Meeting of the 2nd Defendant on 20th April, 2005. They were hounded out of the meeting after the 1st Defendant during his speech asked the members that the Plaintiffs are creating problems and what could be done in that respect. He mentioned their names in his speech.

The letters dated 3rd May, 2005, informing of their expulsion, were received by all of them after the impugned publication. It is on record that their expulsions were nullified by the orders of the court and they are all restored to their membership of the 2nd Defendant.

The 1st, 2nd, 4th and 5th Plaintiffs gave evidence. The 3rd Plaintiff did not adduce any evidence, as it was agreed that his case shall be abided by the evidence of the 2nd Plaintiff.

It is evident that all the Plaintiffs filed suits in the court challenging their expulsions and were successful. In the premises, I do not think that this court can now proceed to deliberate on this issue of lawfulness or otherwise of their expulsion and thus I decline to do so. The Plaintiffs have not produced any details of the case filed, its proceedings or judgment. The Plaintiffs were not challenged on the evidence that their expulsions were nullified and that they are reinstated to the membership of the 2nd defendant. It is thus imperative on the court to accept that their expulsions were unlawful and unjustified.

It is also not in dispute that the letters informing of their expulsions were dated and written before the publication in question.

The words of the publication as per the Plaintiffs did lower them in the estimation of their superiors, peers and members of society. It is on record that all the Plaintiffs have given evidence to the effect that on the date of the publications, their respective superior officers asked them about the reason of the publication. Similarly, they were asked by their peers similar questions. They had to explain to them to prove their innocence. Their respective evidence to that effect was not questioned.

On the other hand, the Defendants' contention is that the Plaintiffs were expelled in fact at the AGM of the 2nd Defendant by the resolution of the members although the same was not on Agenda of the meeting which was circulated, that they were informed officially of their expulsion and before the notice was published.

As per the Defendants, what was published was to intimate to the members of the 2nd Defendant the fact of their expulsion. Thus the publication was neither false nor malicious.

Defendants also emphasized that the Plaintiffs failed to call any witness to substantiate their evidence on damage to the reputation of Court of Appeal, case of **Daniel N. Ngunia –vs- KGGCU Ltd. Nakuru (CA No. 281/1998)** was relied upon wherein it was held namely:-

“Leaving aside any question of privilege upon which the learned judge dismissed that aspect of the appellant’s claim, we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege.”

I have considered the evidence and submissions before the court and do note the following:-

- (1) The Plaintiffs were expelled at the AGM of the 2nd Defendant held on 20th April, 2005.***
- (2) According to the Plaintiffs, the decision was nullified when they filed the suit.***
- (3) The Plaintiffs have not produced the judgment to show whether apart from the nullification of the expulsions any further remedy like damages was sought for and if so, whether the same was granted.***
- (4) The Plaintiffs were sent letters dated 3rd May, 2005 intimating the resolution of their expulsions.***
- (5) The publication was after the said letters of intimation.***
- (6) The Plaintiffs have not called any witness to substantiate their assertions that their esteem and***

reputation, socially or professionally were impaired.

(7) I note the above factor specifically as the Plaintiffs have emphasized on the words i.e. “They are therefore not authorized to transact any business on behalf of the society, its members and/or stakeholders”.

(8) As at the date of publication, it was true that the Plaintiffs have ceased to be members of the 2nd Defendant.

I shall thus rely on the observations of the court in *Martin Tindi Khaemba –vs- Standard Newspaper (2008) eKLR*, namely:-

“Truth is a complete Defence to any defamatory statement of fact, whatever the motives for its publication, and however, its revelation is unjustified or contrary to the public interest.”

In this case, the Plaintiffs have failed to prove that their expulsions was not a fact as at the date of publication.

In the premises, considering all the aforesaid circumstances and observations, I do find that the Plaintiffs have failed to prove on balance of probability that the publication was defamatory to them as per the trite principles of law of defamation.

However, if I am wrong in finding so, I shall state that I would grant the award of Kshs.200,000/= to each Plaintiff as damages, because the libel is actionable per se and the damages are at large because the reputation of a person cannot be measured in cash.

I shall also find it difficult to accept that the Defendants were actuated by malice. The publication was true in all substantial aspect thereof. Moreover, there is nothing shown by the Plaintiffs that the Defendants deliberately published any falsehood for ulterior reason. I would not have thus awarded any exemplary or aggravated damages.

The Plaint is thus dismissed.

In the circumstances of this case, is shall not make any order on costs.

Dated, signed and delivered at Nairobi this 17th day of **May, 2011**

K. H. RAWAL

JUDGE

7.05.2011