REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL 156 OF 2003

H. W. NDEGWA ……...……...……. 1ST APPELLANT

FLAMINGO BOTTLERS LIMITED ……..…….....…… 2ND APPELLANT

VERSUS

DAVID ONZERE ……..……..…… RESPONDENT

JUDGEMENT

This is an appeal against the Judgement of the Chief Magistrate Eldoret, Mr. Solomon Wamwayi in CMCC. No. 1272 of 2002 delivered on 2nd January, 2003.

The Respondent herein David Onzere on 18th November, 2002 instituted the suit in the Chief Magistrate's Court against the appellants, H. W. Ndegwa and Flamingo Bottlers Limited. The First Appellant was sued in her capacity as the Human Resources Manager of the Second Respondent. In the said suit the Respondent as Plaintiff sought general and exemplary damages and costs against the Defendants herein for defamation, in this particular case, libel allegedly published between 16th and 18th July, 2002.

After hearing the case the Learned Chief Magistrate found the Defendants liable for libel and accorded general damages in the sum of Kshs. 100,000/= and costs of the suit. Being aggrieved, the Defendants filed this Appeal and raised the following grounds:-

1. The Learned Magistrate erred in law and in fact in holding that the Appellants defamed the Respondent in the course of normal disciplinary proceedings.

2. The Learned Magistrate erred in law and in fact in holding that the First Appellant was personally liable for the acts done in the normal course of his employment.

3. The Learned magistrate misdirected himself in awarding to the Respondent the sum of Kshs. 100,000/= in general damages and costs of the suit.

4. The Magistrate erred in disregarding the defence evidence.

In the Plaint dated 12th November, 2002, the Respondent as Plaintiff pleaded that on diverse dates between 16th July and 18th July, 2002, the 1st Defendant in her capacity as the Human Resources

Manager of the 2nd Defendant wrote about and caused to be disseminated the following words, of an concerning the Plaintiff:-

"David Onzere –

The allegations against you are that:-

On 11th July, 2002, while on night duty, you neglected your role of a Security Guard and colluded with Nelson Njenga (a driver) to defraud the Company of twenty eight (28), 300 ml empty cases of soda. The Disciplinary Panel found you guilty in that on 11th July, 2002, while on duty you neglected to execute your role as security guard and colluded with a driver to defraud the Company of twenty eight (28) 300 ml empty cases of soda.

……

Yours faithfully,

Flamingo Bottlers Limited

H. W. Ndegwa (Mrs)

Human Resources Manager

C.C. Branch Secretary,

Chief Shop Steward

P. file "

The Plaintiff in the suit, the Respondent herein added that the said words in their context and construction referred and were understood to refer to the Plaintiff and the same were in their natural and ordinary meaning and in the context in which they were reported, written and published by the Defendants meant and were understood by right thinking members of the society, especially those who are acquinted with the Plaintiff, to mean inter alia, that:-

(a) That the Plaintiff was guilty of the offence of neglect of official duty contrary to section 128 of the Penal code.

(b) That the Plaintiff was guilty of the offence of theft by servant contrary to section 281 of the Penal Code as read with Section 21 thereof.

(c) That the Plaintiff is a dishonest person.

(d) That the Plaintiff is a criminal.

The Plaintiff further pleaded that the Defendant's actions were motivated by ill will and malice and that the words published were malicious false, harsh and calculated to injure the character of the Plaintiff and cause him pecuniary and moral damage. That by reasons of the aforesaid libelous publication, the Plaintiff's credit and reputation has been seriously lowered and/or diminished in the estimation of right thinking members of society especially those who are acquinted with and know the Plaintiff and the Plaintiff has been exposed to contempt, hatred, ridicule, odium and disaffection and the Plaintiff has suffered damage.

In their joint Defence dated 10th December, 2002, the Defendants admitted the publication of the letter in question but stated, inter alia, that:-

- the words were uttered and published in the ordinary course of business and addressed to the Plaintiff himself and to people within the 2nd Defendant's Company itself and were therefore a privileged publication and utterance.

- the words published as they stand, do not convey a malicious intent nor do they convey disproportionate language in the circumstances they were published and not libelous and defamatory in any way.

- the publication was addressed to the Plaintiff himself and was copied to the Chief Shop Steward of his Union and a copy referred for filing in the Plaintiff's personal file and there is no way therefore the Plaintiff's self-esteem, pride and dignity would be lowered in the eyes of right-thinking members of society who had no access to it as the publication was not meant or intended for general consumption by members of the public.

- the 1st Defendant is an employee of the 2nd Defendant and cannot therefore be sued in her personal capacity.

From the record, this Court noted that on 16th July, 2002 the Finance Manager of the 2nd Defendant 2nd Appellant) wrote a letter of suspension and notice of Disciplinary Hearing to the Plaintiff in the following terms:-

"INITIATING DISCIPLINARY MEETING

Your are hereby notified that you are required to attend a disciplinary hearing on 17th July, 2002 at 2.30 p.m. in the Training Room.

The purpose of this hearing is to investigate complaints against you. The allegations against you are that:-

On the 11th July, 2002 while on night duty, you neglected your role as a Security Guard and colluded with Nelson Njenga (a driver) to defraud the Company of twenty eight (28) 300 ml empty cases of soda.

At this hearing you will be afforded the opportunity to answer the complaints against you. You have the right to be represented by a Shop-Steward or a person from your working area.

You may also call witnesses and present documentary and verbal evidence in support of your case at the hearing. The proceedings will be conducted in English/Kiswahili.

Please be advised that should you fail to attend, the hearing could be conducted in your absence.

Meanwhile you are suspended from duty with immediate effect.

Yours faithfully,

FINANCE MANAGER

CC: Branch Secretary

Ag. ME Manager

Adrian Imbuga

Githeka Kariuki

Paul Mwaniki."

A fully fledged hearing took place on 17th July, 2002 when the Plaintiff was represented by the following representatives of his Union:-

1. Joel Onyango – Branch Secretary

2. Gituid Kariuki – Deputy Chief Shop Steward

3. Mubichi Kirima – Distribution Steward

The Disciplinary Panel ruled as follows:-

"Onzere's Ruling

His actions amount to wilful breach of duty causing loss of company property which falls under Clause 19 (d) of the CBC and the Employment Act, Section 17 (c) and (g) and calls for summary dismissal."

It was upon this decision that the next day on 18th July, 2002, the plaintiff's employer, the 2nd Defendant wrote to summarily dismiss the Plaintiff from his employment. The letter was written by the 1st Defendant in her capacity as the Human Resources Manager and it stated:-

"18th July, 2002,

David Onzere

Flamingo Bottlers Ltd

P.O. box 2762

NAKURU

Dear Sir,

RE: SUMMARY DISMISSAL

This has reference to your suspension letter dated 16th July, 2002 and subsequent disciplinary hearing held on 17th and 18th July, 2002. The Disciplinary Panel found you guilty in that:-

On 11th July, 2002 while on night duty, you neglected to execute your role as a Security Guard and colluded with a driver to defraud the Company twenty eight (28) 300 ml empty cases of soda.

In accordance with parties' CBA Clause 19 (d) and Employment Act Section 17 (c) and (g). Your actions calls for summary dismissal.

You are hereby summarily dismissed from the employment of this organization. Make arrangements to hand over the Company assets in your custody to your immediate Supervisor to enable us process your final dues.

Yours faithfully,

FLAMINGO BOTTLERS LTD

H.W. NDEGWA (MRS)

C.C. Branch Secretary

Chief Shop Steward

P. file. “

The Plaintiff appealed to the Company on 19th July, 2002 but the Company found that there were no grounds to constitute an appeals panel since none of the following grounds were raised in accordance with the Company’s procedures:-

1. Procedural errors or unfairness

2. Mitigating factors

3. Penalty if harsh for the offence charged

On persisting for his appeal to be heard, his appeal was considered where he also made oral submissions. The appeal was rejected.

The record shows that subsequently there was an agreement between the Company as the employer and the Plaintiff’s Union witnessed by the Labour officials where the dismissal for gross misconduct was reduced or commuted to a normal termination with payment of all terminal dues and benefits.

I have considered the Appeal herein, the pleadings proceedings, the evidence placed before the trial Court, and the Judgment and the submissions by Counsel.

First and foremost, it is certain that the 1st Respondent only wrote the letter of summary dismissal dated 18th July, 2002. The letter of 16th July, 2002 of suspension and giving of disciplinary proceedings was by the Finance Manager, whose name was not given. I think that it was improper pleading in a libel suit for different correspondences, articles or publication to be combined to appear to be a single article or publication. Each libelous article and publication constitutes a separate cause of action and the contents must be confined to each article. It is not proper for one to pluck various words, statements etc from several articles or publications and put them together or mix them up and present them as the words complained of. Libel must be strictly proven by proof of the form in which they were contained and published including the dates etc.

Since the Plaintiff was only aggrieved with the letter written and signed by the 1st Defendant the Court ought to have at the very least struck out the portion of words which were lifted from the letter dated 16th July, 2002 written by the Finance Manager, and in respect of which there was no complaint or express pleading. On the other hand the Court ought to have considered whether there was indeed any letter which contained the words complained of in the way it was pleaded in the paragraph 5. The Court would have found that there was no single letter on record which contained <u>all</u> the words complained of and which had been written or signed by the 1st Defendant. In such a case, unless there was leave to amend, the Court ought to dismissed the case if there was no such letter produced in evidence by the Plaintiff. It is no surprise therefore that in paragraph the Plaintiff cleverly used the words “disseminated” instead of “published”.

Be that as it may, this Court will proceed on the basis that the letter which was written and published was the one dated 18th July, 2002 as it is the one which was under the 1st Defendant’s hand and bore her signature.

The first question this Court must ask is whether the words complained of were defamatory of the Plaintiff taking into account the ordinary and natural meaning of the words etc and the context and all circumstances in which they were published.

If one reads the words complained of alone it would appear that the same are defamatory and libelous of the Plaintiff. This would be the case if any individual penned the said words and published them to

another or others. But was this the case here?

I think it is important to establish who was the maker and publisher of the letter in fact and in law. The letter was written using the Company's letter head and written by the Human Resources Manager to an employee who was facing disciplinary action and who was on suspension from his employment pending the outcome of the investigations and hearing of his case. The Company as employer did not deny the capacity and authority of the First Defendant as the Human Resources Manager. The Company did not deny that the letter was not its letter. Defendants defended the suit together and retained one firm of Advocates. I therefore find at this stage that the letter was indeed written and published by the Company and the 2nd Defendant as its Human Resources Manager. As a result was the letter written on a privileged occasion as pleaded by the Defendants in their Defence? In the English case of HUNT –V- GREAT NORTHERN RAILWAY CO. (1891) 2 Q.B. 189, the principle underlying the defence of qualified privilege was explicitly defined. Lord Esher expressed that a privileged occasion:-

"…… arises if the communication is of such a nature that it could be fairly said that those who made it had an interest in making such a communication and those to whom it was made had a corresponding interest in having it made to them. When those two things co-exist the occasion is a privileged one. In order words to found the privilege there must be a reciprocity of interest."

As stated earlier 2nd Defendant was the employer of the Plaintiff who were bound by a contractual relationship of employer and employee. In this case the contract was through the Collective Bargaining Agreement between his employer and the Plaintiff's Trade Union of which he was a member. There can be no dispute that an employer has the right to institute investigations to inquire into the conduct/performance etc of an employee in the course of his employment and performance of his duties. Equally the employer has the right in law to institute disciplinary action against the employee and in an appropriate case to summarily dismiss his employee for any gross misconduct. In this case, the employer invoked provisions of the Collective Bargaining Agreement with the Plaintiff's Union and the Employment Act.

In the light of the foregoing, there existed a privileged occasion when the correspondences herein was initiated. After the suspension and disciplinary hearing the disciplinary panel whose powers and jurisdiction has never been questioned, made a finding and ruling. How else could the employer communicate the finding and its decision other than in a written communication?

All the Defendants were doing in their letter of 18th July, 2002 was to communicate to the Plaintiff the findings of the Disciplinary Panel and its own decision as the employer. The letter of summary dismissal was written to the Plaintiff himself and copied to the Branch Secretary of the Union and the Chief Shop Steward of the Union in the Defendant Company. I think that the Union through its official were entitled and had an interest to be informed of the outcome of the disciplinary proceedings and the decision of the employer. The Defendant company as an employer was under a duty in the Collective Bargaining Agreement to inform the Union of the said outcome (that their member had been found guilty) and the decision (that he had been summarily dismissed for gross misconduct). The proceedings involved the Union whose said officers represented the Plaintiff during the hearing.

I therefore, do hereby hold that there was a privileged relationship in this case and the communication and publication dated 18th July, 2002 was written and published on a privileged occasion. The Defendant Company was entitled to, if not actually under a duty to publish the said communication to the Plaintiff and his Union.

The letter was not strictly for other co-workers, his relatives and neighbours let alone the society at large. In any case there was no publication to the said groups and the Plaintiff did not disclose how it may have reached them.

In view of the foregoing, I do find that the 1st Defendant, the Human Resources Manager wrote and signed the letter in the course of and within the scope of her duties and she could only be sued and

successfully so, if it was shown that the letter was defamatory and there was malice to deprive the communication its privilege.

I have studied the letter complained of and the evidence on record and I find that there was no malice on the part of both Defendants to destroy the privilege attaching to the communication. The letter was not actuated by any malice and this has not been proved.

I therefore do hereby allow this appeal and set aside the judgement of the trial Court delivered on 2nd December, 2002 and the consequential Decree. The Respondent as plaintiff shall pay the costs of the said suit to the Defendants. The Appellants herein shall have the costs of the Appeal to be paid by the Respondent.

DATED AND DELIVERED AT ELDORET ON THIS 12TH DAY OF JUNE, 2007.

M. K. IBRAHIM

JUDGE