



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 2869 OF 1997

HELEN MAKONE PLAINTIFF

VERSUS

FRANCIS KAHOS & ANOTHER DEFENDANTS

JUDGMENT

The Plaintiff brings the action for damages and an injunction to restrain the Defendant from publication of the words set out in the Complaint, which the Plaintiff says are defamatory of her.

The first Defendant is a security officer employed by the 2nd Defendant.

It is alleged the Defendants jointly, severally, falsely and maliciously wrote and published to the African Mercantile Banking Company Ltd the following words:-

“The Bank then decided to dismiss her (the Plaintiff) with effect from 17/7/1996 for gross negligence and dishonesty”

These words are contained in a memorandum sent by the Group Security Officers to the General Manager Ambank Limited on the 7/3/1997.

The circumstances in which the Memorandum was written arose from the Plaintiff’s employment by Ambank Ltd (AMBANK) pursuant initially to a temporary appointment of the Plaintiff as an employee of the Bank pursuant to two letters dated the 23/9/1996 and 7/10/1996 superseded by a letter of 28/1/1997 in which the Plaintiff was employed as Head of Internal Audit, subject to the terms contained in that letter.

On the 10/3/1997 the Bank wrote to the Plaintiff informing her that pursuant to their security vetting provision it made it difficult for them to continue her employment. Her employment with the Bank was terminated from the date of the letter.

The Plaintiff had been employed formally by Standard Chartered Bank (Kenya) Ltd commencing as a graduate trainee in 1982 and in 1996 her services were terminated.

The Memorandum referred to above set out the information obtained by the Defendant and is as follows:-

“The Bank then decided to dismiss her with effect from 17/7/1996 for Gross Negligence and Dishonesty to close all the above accounts

as Fraudulent Accounts. She then joined AMBANK on 23rd September 1996”.

The facts which led to the Plaintiff’s down fall are admirably related by Mr. Justice Onyango Otieno (as he then was) in his Judgment in HCCC No.2897 of 1997 a case brought by the Plaintiff against Standard Chartered Bank Limited for wrongful dismissal. In dismissing that case the learned Judge found that the Plaintiff was clearly negligent.

Briefly however, the circumstances on which the Plaintiff’s services with the Standard Chartered Bank Limited were terminated related to two cheques in the possession of a Mrs. Okello both of which were marked “Account payee only not negotiable “ and drawn on a Company Tusker Hardware” Mrs Okello informed the Plaintiff that the company Tusker Hardware was not yet registered where upon the Plaintiff advised her that as she was the sole proprietor the cheque could be endorsed to someone else, so long as UNICEF confirmed the cheque was properly issued which they did.

In the case of the first cheque the Plaintiff agreed to pass the same through the account of one Mohamed Gusuf, and the proceeds were given to Mrs. Okello. The second cheque which Mrs. Okello had and wished to cash was issued to her after the Plaintiff had left the Standard Bank and she asked one of her colleagues to arrange for the encashment of the cheque to be passed through her (the Plaintiff’s) brother’s account which her colleague alleges did. Mrs. Okello together with her husband were charged with intent to defraud “ UNICEF” A charge of which they were both acquitted. The Plaintiff denied that she was negligent as there was no loss of money to Standard Chartered Bank Limited.

All of this is not however an issue I am concerned with as Mr. Justice Onyango Otieno has already made a finding of negligence against the Plaintiff in the case referred to above.

What of course is an issue is whether the Defendants were liable to the Plaintiff in defamation.

The defence filed raised several defences:-

1. The Defendants did not jointly severally falsely and maliciously write and publish to AMBANK the words complained of.
2. That the 1st Defendant was at all times an employee of the 2nd Defendant, I take this as a Defence that the servant is not liable for the fault of the master.
3. That the report in the circumstances was confidential and therefore privileged.
4. That the Defendants were not malavalent but on contrary completed the report in good faith.
5. That the comments contained in the report were true and or amounted to fair comment.
6. That the Defendants had a legal moral and or social duty to communicate the report to AMBANK

The Defendant called the 1st Defendant to give evidence. He was employed as Group Security Officer by the 2nd Defendant and it was his job to vet Senior Managers who were to be employed by banks which were members of the second Defendant.

He was instructed to carry out investigations into the background of the Plaintiff and to produce a confidential report to AMBANK.

In order to get information on the Plaintiff, he saw a Mr. Marete the Security Manager of the Standard Chartered Bank Ltd who gave him the information relating to the Plaintiff which formed the basis of the report.

The words used are in the usual and ordinary meaning defamatory of the Plaintiff.

So far as the 1st Defendant is concerned what he wrote in his report he did so as an employee of the 2nd Defendant and as such he can not be personally liable for the statement made. Although he personally may have been the author of the words complained if he wrote them in his capacity as an employee. The information given to him was received by him from Mr. Merete of the Standard Bank.

Mr. Justice Onyango Otieno found in his Judgment referred to above that the Plaintiff was negligent. This is a finding with which I cannot disagree. He was served of the matter directly and that is not an issue in this case.

The Plaintiff gave evidence of the circumstances surrounding her dismissal from the Standard Bank.

I formed favourable opinion of the Plaintiff who seemed to me to be a person of sincerity intelligent and essentially honest.

What she did in passing cheques for collection in other person's account in any circumstance can only be termed as ill Judged and as has been found by Justice Onyango Otieno negligent I do not think that was negligence so much as motivated no doubt by a foolish desire to help the presenter of the cheque. Be that as it may I do not think that the Plaintiff was in fact dishonest.

Apart from relying on the Judgment of Mr. Justice Onyango Otieno, the Defendant call no evidence to substantiate its Defence of justification and that the words were true in substance and infact.

Turning now to the Defences raised. It is clear that the second Defendant being found by a number of banks to give reports on prospective senior bank employees did so as part of and in the course of its business.

As I have found the words were not in fact true in so far as the word "grossly negligent" and "dishonesty" are considered.

Were they however privileged and does qualified privileged apply? Such a defence will apply even in a case like the present where the words are defamatory. However privilege is destroyed by malice.

In this case Ambank used the service of the 2nd Defendant to make enquiries of the 2nd Defendant, called a security vetting in the Memorandum of the 7/3/1987 (Ex.8). This didn't set out what the first defendant had been told by the representative of the Standard Bank. This statement is not entirely accurate and does not accord with the Plaintiff's evidence that she had ascertained that the two cheques, which were encashed through another account, had been properly issued to the presenter. The criminal proceedings relating to the prosecution of the presenter of the cheque and her husband was not for stealing the cheque but for obtaining it by false pretences. Having recorded what he was told about the facts leading up to the Plaintiff's dismissal it states:

"The Bank then decided to dismiss with effect from 17th July, 1996 for gross negligence and dishonesty and to close all the above accounts as Fraudulent Accounts"

On the strength of this Ambank terminated the Plaintiff's employment with it.

The 2nd Defendant being used for the purpose of giving impartial information to Bank which were its members and a duty to make a report on the Plaintiff as requested.

As was stated by in the case of *London Association for Protection of Trade V Greenlands* {1916} 2 AC.

"And a like rule applies in cases where an association make a

communication to its members respecting the solvency of an individual, whether or not that communication be detrimental to the character of the person specified, provided the communication is made from a sense of duty”

In my view the communication between the 2nd Defendant and Ambank was privileged as there was a right in Ambank to enquire in the circumstances relating to the Plaintiff’s dismissal from the Standard Bank and the 2nd Defendant had a contractual duty to give relevant information to the Ambank.

Was there malice? the 1st Defendant gave evidence that he was instructed to vet the Plaintiff as to her suitability or not for the position she had with Ambank. In order to do so the 1st Defendant instructed Mr. Mereka at Standard Bank who considered the Judgment of Mr. Justice Onyango Otieno and did a police search. The latter revealed no offences against the Plaintiff. In response to a question by me he said, “ If Mr. Groag and Mr. Marete lied to me I would be repeating lies. Apart from making the defamatory remarks as I have found, complained of by the Plaintiff herein he then said the Bank decided dismiss her for gross negligence and dishonesty. This is clearly untrue as the Plaintiff was not dismissed from her employment but her services were terminated by the requisite notice: What the 1st Defendant did was merely to repeat what was told to him by Mr. Marete. In fact one wonders why Ambank employed the 1st Defendant as it could just as well written directly to Standard Bank and get the same reply. I think however it did not do so as it was interested in obtaining a considered opinion of the Plaintiff’s character. No doubt the circumstances leading to the termination of her employment with Standard Bank would have been stated and analyzed as to the motive for her conduct. However this was not done. What then is malice in law?

The most definitive consideration of malice is the statement of Lord Diplock on the case of *Horrocks versus Lowe* {1975} AC page 135 where at page 151 and 152 he stated:-

“Judge and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed.”

Although I accept that what the 1st Defendant was negligent in certain aspect I take the view that what he did he did honestly. The words I have indicated in the passage quoted above fit this case.

In the result the defence of privilege succeeds and I have no alternative but to dismiss this suit with costs to the Defendant.

I have already commented on my impression of the Plaintiff. From the evidence I have heard I am of the view that what the Plaintiff did which led to termination of her employment she did in honest desire to assist a customer. I accept that she had checked that the cheque she assessed to be cleared was properly payable to the payee. I am sure it is an action she never regrets but any future employer should consider the facts in the light of the comments I have made in this Judgment.

If I am wrong however, I assess damages at Shs.500,000/=. Cases were relied upon by Mrs. Guserwa, which showed damages of considerably higher sums. It is for each Judge to assess the damages but I think an inclination towards very high damages should be resisted as it is neither economically sensible nor fair to the Defendant except in the most blatant of cases.

Dated and delivered at Nairobi this 30th day of November 2004

P.J. RANSLEY

JUDGE