



**Mohammed v Butt & another (Civil Case 232 of 2012)
[2023] KEHC 17842 (KLR) (Civ) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 232 OF 2012

AA VISRAM, J

MAY 18, 2023

BETWEEN

AHMED ABDULLAHI MOHAMMED PLAINTIFF

AND

FAZAL BUTT 1ST DEFENDANT

JACKWRIGHT LIMITED 2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff, Mr Ahmed Abdullahi Mohammed, is a businessman who also serves as a Director of various companies. He filed this defamation suit on 18th May, 2012, against the Defendants, Mr. Fazal Butt, who is the Director of Jackwright Limited; the 2nd Defendant.
2. The Plaintiff alleged that on or around January 2012, he took part in a tendering process for the supply of meat on the bone, in which the Defendants also participated. On 3rd April, 2012, following the said process, the 1st Defendant wrote a letter to the Public Procurement Administrative Review Board (PPARB), which he claimed defamed him in the following words:-

“We further put it to the board that we hold a strong suspicion that some of the companies in whose favour our bid bond could have been removed are well known to us and are not duly registered in accordance with the law and are therefore not fit to participate in any tendering process. Some of the Companies are as follows:-

Medabs Enterprises

Habubani enterprises



3. The Plaintiff alleged that the said letter was published to members of the board, officials of the ministry of defence, military officers, and the general public, which publication has exposed him to ridicule, disaffection and odium, and that the allegations are false, unjustified and are defamatory to his character.
4. In particular, the Plaintiff stated that the following words were calculated to mean that the Plaintiff was corrupt, having influenced the tendering process; fraudulent; has no respect for the law, and is not fit to do business; and is a person of low morals. Accordingly, the Plaintiff sought general damages and costs of the suit.
5. The 1st and 2nd Defendants filed their respective Statements of Defence on 18th June, 2012 denying the Plaintiff’s allegations.
6. The 1st Defendant denied writing the letter complained of in his individual capacity, and stated he was accordingly, wrongly joined to the suit.
7. The 2nd Defendant stated that the letter complained of had only been written to parties involved in the tendering process; the communication was privileged; and that the Plaintiff’s case did not disclose a cause of action.
8. When the suit came up for hearing, the Plaintiff prayed that the court adopt his witness statement as his evidence in chief; and further allow his list and bundle of documents be deemed as duly produced and marked as Exhibits 1-4.
9. The Plaintiff called one further witness, PW2, Yunis Ibrahim, who adopted his witness statement dated 20th March, 2019 as his evidence in chief.
10. The Defendants did participate in the proceedings.
11. At the close of the hearing, the court called upon the parties to file and exchange written submissions, which were filed by only the Plaintiff.
12. The Plaintiff submitted that he is entitled to damages because his evidence is uncontroverted, and that the burden of proving the truthfulness of that allegation lay on the Defendants.
13. As regards the appropriate measure of damages, the Plaintiff relied on the case *Livingstone v Rawyards Coal Co.*(1880) 5 App.Cas .25 at 39 Lord Blackburn defined damages as:

“ that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”
14. The Plaintiff prayed that this court be pleased to assess general damages at Kshs.10,000,000/= (Ten Million) to cover both damages for defamation and breach of statutory duty.
15. In support of the above submission, the Plaintiff relied on the decision of the High Court in [*Christopher Orina Kenyariri v Barclays Bank of Kenya Limited & Another*](#) (2018) eKLR in which the damages were assessed at Kshs. 4,000,000/=. The Plaintiff urged this court to consider the incidences of inflation and weakening of the Kenya shilling since 2018 when the said decision was made.



Analysis and Determination

16. I have considered the evidence and the submissions of the parties. The issues which emerge for my determination are as follows:-
- i. Whether the publication was defamatory of the Plaintiff?
 - ii. In the event the above is affirmative, what is the appropriate measure of damages?

Whether the publication was defamatory of the Plaintiff?

17. In order to prove defamation, it must be shown that the words published by the Defendant are defamatory, in that, they have a propensity to lower a person's reputation in the eyes of right-thinking persons. In this regard, The *Black's Law Dictionary* 8th Edition defines defamation as:

“The act of harming the reputation of another by making a false statement to a third person. A false written or oral statement that damages another's reputation”.

18. Further to the above, *Halsbury Laws of England* 4th Edition Vol. 28 at paragraph 22, states that the defamatory words in question must also refer to the Plaintiff. It states the following:-

“The proper purpose of an action of libel or slander is to vindicate the reputation of the person defamed, and accordingly, the proper and the only party to bring the action is the person actually and personally defamed. This is not enough that the words reflect on the persons properly; there must also be imputation against the Plaintiff personally....” (emphasis mine)

19. The test to establish defamation was articulated in the Court of Appeal decision of *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, where the court stated as follows:-

“Speaking generally, a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the Plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See *Gatley on Libel and Slander* (8th edition para. 31).

The ingredients of defamation were summarized in the case of *John Ward v Standard Ltd*, HCCC 1062 of 2005 as follows:-

“...The ingredients of defamation are:

The statement must be defamatory.

The statement must refer to the Plaintiff.

The statement must be published by the Defendant.

The statement must be false.”



20. Looking at the test as stated above, the first question that comes to my mind is, did the statement refer to the Plaintiff? Reading the letter complained of dated 3rd April, 2012 (“the Letter”), I cannot help but notice that no express reference has been made to the Plaintiff whatsoever.
21. A reading of the Letter reveals that only three entities were mentioned in the Letter. These three entities are ‘Medhabs Enterprises’; ‘Halibani Enterprises’; and ‘Garissa Green Grocers’, which were the subject of a complaint by the Defendants, none of which is the Plaintiff named herein.
22. The Plaintiff, Mr. Ahmed, however chose to sue in his own name, rather than in the name of any of the said entities. He has not explained why in his pleadings.
23. Further, having heard the testimony of Mr. Ahmed, he did not explain this discrepancy at the trial. There was no explanation whatsoever provided by Mr. Ahmed to show what, if any, was his relationship to the named companies. Nor did he show how he was personally defamed by the contents of the letter, which referred to those entities stated above.
24. To my mind, the law is clear in so far as the only party that may bring an action in defamation is the person actually being defamed. I am however, alive to the dictum in the UK case of *Newstead v London Express Newspapers* [1940] 1 KB 377, which our Kenyan courts have quoted with approval, stating that while it is not essential for the Plaintiff to be personally named in a defamatory statement, the same may still be held to refer to him, if the ordinary sensible reader, with knowledge of the special facts could and did understand them to mean him. However, such special facts are material facts, which must be pleaded in the plaint and must be proved in evidence in order to connect the Plaintiff with the words complained of. See the decision of the Court of Appeal in *Mwangi Kiunjuri v Wangethi Mwangi & 2 others* [2016] eKLR.
25. Here, beyond attaching a certificate of registration in relation to Medhabs Enterprises and Garissa Green Grocers as part of his list and bundle of documents, the Plaintiff did not provide any explanation to draw a connection between himself and the said entities.
26. Further, the testimony of Mr. Ibrahim, PW2, provides little further insight in relation to the above issue. PW2 was not a member of the board that allegedly received the Letter. Therefore, while PW2 may have known that the Plaintiff “owned several companies”, including Garissa Green Grocer and Medhabs Enterprises, it is not clear if the parties who allegedly received the Letter would also have connected the Plaintiff to those entities. Nor is it clear what conclusions they would have drawn from a reading of the Letter.
27. I am satisfied that the Plaintiff has failed this part of the test as set out in the case of *Miguna Miguna (Supra)*. I am also of the opinion that this failure is fatal because it relates to who may bring such a cause of action. However, in the event I am wrong, I still do not think that PW2’s testimony satisfactorily showed that the esteem of the Plaintiff had been lowered in his mind, or that having read the Letter, he now thought that the Plaintiff was a ‘corrupt’, ‘fraudster’, who was ‘unfit to do business’, or of ‘low moral character’ as pleaded by the Plaintiff.
28. Having connected the Plaintiff to the entities named in the letter, PW2 simply said that there were ‘whispers’ relating to the Plaintiff and his companies’ credibility. He did not go on to explain with sufficient detail what the import of those whispers were. He only stated that he would “have to see his (the Plaintiff’s) company certificates and licenses” before supplying him. The statement appears to me as too general, and does not meet the threshold set out in the test above.
29. Further, PW2’s said requirements to contract with the Plaintiff (arising out of his knowledge of the Letter) appear to me as no more than standard due diligence. Such documentation is



ordinarily exchanged between contracting parties as a matter of course when entering into commercial agreements. I do not think the statement implies that he had drastically lowered his opinion of the Plaintiff as is required in defamation.

30. Finally, looking at the publication, the words, given their ordinary meaning, and based on the evidence, I do not think that the Plaintiff has discharged the burden and standard of proof to establish that he was defamed by the Defendants.
31. Having failed on the issue of liability, the question of quantum does not arise.
32. I find and hold that the Plaintiff's suit is without merit. The same is hereby dismissed.
33. As the Defendant did not participate in the present proceedings, I make no order as to costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 18TH DAY OF MAY 2023

ALEEM VISRAM

JUDGE

In the presence of;

..... for the Plaintiff

..... for the Defendants

