



REPUBLIC OF KENYA



Lady Lori (Kenya) Limited v Kilimanjaro Sar Limited & another (Civil Suit 42 of 2020) [2023] KEHC 21784 (KLR) (Civ) (3 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21784 (KLR)

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

CIVIL

CIVIL SUIT 42 OF 2020

CW MEOLI, J

AUGUST 3, 2023

BETWEEN

LADY LORI (KENYA) LIMITED PLAINTIFF

AND

KILIMANJARO SAR LIMITED 1ST DEFENDANT

IVAN BRAUN 2ND DEFENDANT

JUDGMENT

1. On 27.02.2020 Lady Lori (K) Limited, (hereafter the Plaintiff) filed this suit that is founded on the tort of defamation, against Kilimanjaro Sar Limited and Ivan Braun (hereafter the 1st and 2nd Defendant/ Defendants). The Plaintiff seeks inter alia a permanent injunction restraining the Defendants and each of them by themselves, their servants, or agents or otherwise howsoever from further publishing or causing to be published words defamatory of the Plaintiffs; general, aggravated, and exemplary damages; interest; and costs of the suit.
2. The Plaintiff averred that at all material times, the 2nd Defendant acted as Chief Executive Officer/ Director and duly authorized officer of the 1st Defendant, and that by written Helicopter Charter Contracts in April and June 2018, the Defendants contracted the Plaintiff to provide aircraft charter services to the Defendants involving its helicopters registration numbers 5Y-SAT, 5Y-NKW and ZS-RIU. That subsequently pursuant to the helicopter charter contract of 08.06.2018 through the agency of FIM Aviation (PTY) Limited for the benefit of the Plaintiff, the Defendants contracted the Plaintiff to provide aircraft charter services to the Defendants involving helicopter Reg. No. ZS-RIU at the Defendants' request at agreed fees as stipulated in the aforesaid agreement. The Plaintiff being the registered owner of the helicopter through its South African Subsidiary.



3. That the 2nd Defendant acting on his own, as agent, official, servant or employee of the 1st Defendant falsely and maliciously informed a Kenyan pilot and other associates that the Plaintiff had fraudulently taken their monies and refused to render services and making a statement to the effect that “Lady Lori (K) Limited has obtained money by fraud from Kilimanjaro SAR Limited and refused to deliver its helicopter for charter.”
4. It was further averred that the said information had circulated in the small Wilson helicopter aviation community in Nairobi and caused the aviation community at Wilson Airport to conclude and form an opinion defamatory of the Plaintiff. That the said statement was malicious and calculated to injure, disparage and lower the standing of the Plaintiff among right thinking members of the aviation society in general; that the statement was malicious, made out of spite and without justifiable cause and had the effect of discrediting the good will and reputation of the Plaintiff.
5. The Plaintiff further averred that contrary to the statement by the Defendants , it had provided the contracted charter service dutifully and diligently but unfortunately the 1st Defendant accrued an outstanding charter fees totaling to USD 19,383 as at 28.10.2018 and which amount the 1st Defendant has neglected, failed and or refused to pay, while by a demand notice repeating the harmful slanderous allegations against the Plaintiff which were copied to strategic institutions within the Plaintiff’s line of business.
6. The Defendants were duly served with summons to enter appearance but failed and or neglected to enter appearance or file defence. An interlocutory judgment was therefore entered against the Defendants on 14.02.2023.
7. Thereafter the matter proceeded to formal proof during which Ian Mimano testified on behalf of the Plaintiff as PW1 and was the sole witness. Identifying himself as a commercial helicopter pilot and CEO of the Plaintiff he adopted his witness statement dated 27.02.2020 as his evidence- in –chief and proceeded to produce the documents in the list of documents of even date as PExh. 1 – 12. The gist of his evidence was that he was seeking damages as the Defendants’ slander caused the Plaintiff loss of business that may take long to recover from, because the aviation business operates on reputation.
8. At the close of the Plaintiff’s case, submissions were filed. The Plaintiff’s submissions contemporaneously addressed the twin issues of liability and damages. Restating the pleadings and evidence before the court, counsel anchored his submissions on the decisions in John Ward v Standard Limited [2006] eKLR as cited in Radio Africa Limited t/a The Star Newspaper v Moses Bifwoli Makari Kimungui [2020] eKLR and Francis Xavier Ole Kaparo v Standard Limited & 3 Others [2010] eKLR as cited in The Nairobi Star Publications Limited v Elizabeth Atieno Oyoo [2018] eKLR. He contended that the Plaintiff company had been in business for over two years but due to the Defendants’ false and malicious statement to the regional aviation helicopter community, the Plaintiff’s name and reputation has been tarnished and its business earnings diminished.
9. He urged the court in awarding general damages for defamation to be guided by the dicta in Jones v Pollard (1997) EMLR as cited in Evans Gicheru v Andrew Morton & Another [2005] eKLR. Counsel further relied on the principles in Gatley on Libel and Slander 12th Ed. Para. 9.18 at pg. 353 in urging the court to award aggravated damages, because the Defendants have never retracted or apologized to the Plaintiff. Addressing the court on costs, counsel relied on the decision in Cecilia Karuru Ngavu v Barclays Bank of Kenya & Another [2016] eKLR to argue that costs ought to follow the events. In conclusion the court was pressed to allow the suit.
10. The court has considered the evidence on record and the Plaintiff’s submissions. The key issue for determination is whether the Plaintiff has proved its case on a balance of probabilities and if so, the



appropriate awardable damages. In that regard, the Plaintiff's pleadings before the court are pertinent. The Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, addressed itself as follows as concerns the foregoing: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

11. To that end, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

12. In *Halsbury's Laws of England 4th Edition Vol. 28 paragraph 10-* a defamatory statement is defined as follows:

“....a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business”.

See also the Court of Appeal definition of a defamatory statement in *SMW v ZWM* (2015) eKLR.

13. Additionally, *Gatley on Libel and Slander 6th Edn.* states that: -

“A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another”.

14. Regarding the rationale behind the law of defamation the Court of Appeal had this to say in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR:

“The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the Common Law Series: *The Law of Tort* at paragraph 25.1 expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation:



'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..."

15. Actions founded on the tort of defamation surface the tension between private interest and public interest. Article 33(1) of [the Constitution](#) guarantees every person's right to freedom of expression including the freedom to seek, receive or impart information or ideas but sub-Article (3) states that in "the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others". Articles 25 and 31 protect the inherent dignity of every person and the right to privacy. The rights enshrined in Article 33 are not limited to natural persons as juristic persons equally enjoy the same rights. These rights are reinforced by the provisions of the [Defamation Act](#).
16. Contemplating these competing rights Lord Denning MR stated in *Fraser v Evans & Others* [1969] 1 ALLER 8; -

"The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed."
17. In *Selina Patani & Another vs Dhiranji V. Patani* [2019] eKLR the Court of Appeal held that the law of defamation is concerned with the protection of reputation of persons, that is, the estimation in which such persons are held by others. In that case, the Court of Appeal stated that:

"In rehashing, we note the ingredients of defamation were summarized in the case of *John Ward v Standard Ltd*. HCC 1062 of 2005 as follows:

 - i. The statement must be defamatory.
 - ii. The statement must refer to the plaintiff.
 - iii. The statement must be published by the defendant.
 - iv. The statement must be false."
18. The court is called upon to determine whether all the foregoing ingredients have been established by the Plaintiff. The suit was undefended, and the Plaintiff was required to adduce evidence in support of the averments in its pleadings in proving its case on a balance of probabilities. A perfunctory perusal of the Plaintiff's evidence does not reveal the date when the purported defamatory statement was made.
19. Be that as it may, the law of defamation protects a person's reputation, that is, the estimation in which he is held by others. Which means that proof of publication by the defendant (ingredient (iii) in *Selina Patani*, supra) in whatever form is necessary. The Plaintiff averred in the plaint that the publication was by the 2nd Defendant on his own and as agent, official, servant or employee of the 1st Defendant falsely and maliciously informing a Kenyan pilot and other associates that the Plaintiff had fraudulently taken their monies and refused to render services, and stating that "Lady Lori (K) Limited has obtained money by fraud from Kilimanjaro SAR Limited and refused to deliver its helicopter for charter."



20. No material evidence was tendered, or witness called in proof of the publication by the Defendants of the statements alleged. Further, upon a perusal of PExh. 1 – 12 produced by the Plaintiff, this court is unable to conclusively identify who published the alleged defamatory statement and when. Without this evidence of the identity of the person responsible for the publication and the date thereof, it would be moot to consider defamation ingredients (i) (ii) & (iv) as set out in Selina Patani (supra). The Court finds that the Plaintiff has not proved that the alleged defamatory statement was published by the Defendants.
21. The court however ventures to add regarding the alleged defamatory nature of the statement that, the Plaintiff bore the duty to demonstrate that a right-thinking member of society who knew it prior, had after reading the said publication viewed the Plaintiff adversely, as asserted in the plaint. As stated in Hezekiel Oira v Standard Limited & Another (2016) eKLR the successful claimant in a defamation cause must tender evidence not only that the publication complained of bore falsehoods, but also that the published words tended to lower its reputation, causing right thinking members of society to shun or avoid it or to treat it with contempt. I also note that the Plaintiff did not plead the particulars of attendant imputation by innuendo arising from the statements in question.
22. PW1 was the sole witness who testified in support of the Plaintiff's case. Defamation involves imputations that tend to cause injury to the reputation of a person. For the plaintiff to succeed, it was obligated to demonstrate that the statement made had the tendency to cause injury to its reputation or standing, as part of the ingredients of defamation.
23. In SMW v ZWM (2015) eKLR, the Court of Appeal observed:

“ 15. 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. (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 (10th 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 libelous and that he/she suffered injury to reputation as a result. ...

19. The trial judge had considered the testimony of witnesses with a view to assessing their credibility and at no point did any of the Appellant's witnesses at trial consider the appellant to have been defamed by the contents of the letter. The witnesses who testified at trial constitute and pass the ordinary reasonable man test as they were not only neighbours but also people known to the disputants. There was no evidence of any public ridicule, hatred or even shunning experienced by the appellant.

The appellant had only testified at the trial court that he felt shy to interact with some of his friends in tea farming. The appellant appears to have had an apprehension of defamation on himself ostensibly based on how he himself considered his standing in the society. That is not what defamation is in law. The appellant himself further testified before the trial court that nothing had changed in his dairy farming business. Moreover, despite being a tea farmer in Gatundu, he had since relocated to his Karen home at the time of these



proceedings where the chances of any possible defamation of him became slimmer based on the existing solitary and liberal lifestyle adopted by urbanites. As elucidated earlier, the test to be applied is that of the reasonable ordinary man, not the appellant or the respondent...” (Emphasis added).

24. The foregoing was reiterated in Patani’s case (supra), where the same Court stated:

“26. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation.

27. The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellant’s character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person’s own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation. (Emphasis added)

See also Daniel N. Ngunia v K.G.G.C.U. Limited (2000) eKLR and Hezekiel Oira v Standard Limited & Another (2016) eKLR.

25. Similarly in this case, the Plaintiff did not tender evidence through a third party that the words in the purported publication complained of caused or had the tendency to cause injury to the Plaintiff’s reputation by way of public ridicule, hatred or that it tended to lower its esteem in the mind of right-thinking members of society. In the absence of such evidence, it is difficult to see how the claim founded on defamation could be sustained.

26. The fact that the suit proceeded by way of formal proof did not take away the onus upon the Plaintiff to prove all the ingredients of defamation.

See Karugi & Anor. v Kabiya (supra). Under section 107 of the *Evidence Act*, the burden of proof lay with the Plaintiff and if its evidence did not support the facts pleaded, it failed as the party with the burden of proof. See Wareham t/a A.F. Wareham (supra). In the circumstances, the Plaintiff’s suit must fail and is dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 3RD DAY OF AUGUST 2023.

C.MEOLI

JUDGE



In the presence of

For the Plaintiff: Ms. Mwasawa h/b for Mr. Sumba

C/A: Carol

