



**Kiptalam v Gwama (Civil Appeal E004 of 2020)
[2023] KEHC 23426 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23426 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E004 OF 2020
DKN MAGARE, J
SEPTEMBER 19, 2023**

BETWEEN

SAMUEL KIPYATOR KIPTALAM PLAINTIFF

AND

HON FRANCIS GWAMA DEFENDANT

JUDGMENT

1. The Plaintiff filed suits on 21st January 2020 against the Defendant, who the plaintiff describes rather pejoratively, that he is presumed to have sound mind. The Plaintiff is an employee of the County Government of Kwale, while the Defendant is described as the County Executive Chair of the County Government of Kwale. In reality, the Defendant is the member of the County Executive Committee in charge of health.
2. The Plaintiff stated that he was admitted to permanent employment on 24th July 2001. He stated that the Defendant called the Plaintiff and other employees as thieves. The Plaintiff maintained that they were singled out by the Defendant. This is because, there was an item that was lost in the theatre. A meeting was called by the defendant involving all theatre staff to deal with loss of the patient monitor.
3. The Plaintiff pleaded that he is the one who called for the investigations. Thereafter investigations were carried out and he was exonerated by the directorate of criminal investigation.
4. The complaint was that not only did the defendant call the plaintiff as thieves and was summarily transferred to Samburu County Hospital where he said to have disputed the transfer till he cleared his name. A matter was filed in the employment and labour relations court, which found the transfer proper.

Evidence



5. The Plaintiff adopted his statement as evidence in chief. He stated that the plaintiff singled the theatre staff to call as thieves. On cross examination, it came out that the defendant did not single one person for admonition of description as thieves. He complained that the defendant's words put him in public odium. He is taken as a social misfit is a criminal. It was his evidence that his reputation was affected.
6. I have noted that at no point did the Plaintiff plead the exact words that were alleged to have been used by the Defendant and on whom they were directed to. There is also no pleading on publication of the said words and in which form they were published. He claimed general damages, exemplary damages, and aggravated damages for libel and slander.
7. The Defendant filed his defence on 17th May 2023 stated that he was then and this is now the County Executive Committee member in charge of health in the county government of Kwale. He did not dispute paragraphs 3, 4 and 5 of the plaint. However, he stated that he never made the said remarks. He stated that a patient monitor was stolen and as a result a summoned all Theatre staff and discussed the issue of the lost monitor.
8. The defendant enquired from the staff but nobody admitted to have known the whereabouts of the monitor in spite of it being under their care. Regarding the transfer, he stated that it was normal and had nothing to do with the theft of the monitor. It was purely an administrative action, which h was entitled to undertake.
9. He denied the presumptions that was set out in paragraph 10 of the plaint and invited the plaintiff to strict proof thereof. In respect to the audio CD which had been produced as evidence, he stated that the same did not meet the requirements of section 106 (4)B of the Evidence Act. He urged the court to dismiss the case with costs.

Evidence

10. The plaintiff testified and adopted is that witness statement that he was singled out by the defendant and transferred. On cross-examination he stated that he was working in Samburu sub County Hospital. He also stated that he was engaging in private practice. At the start of his testimony, he stated that the words used were "we are thieves." He later changed his testimony that the defendant said that, 'you are thieves'. These words are said to have been spoken in the boardroom with nine people there are in. He named a few people who were present who he could recall.
11. I noted that he was selective in his memory because he was able to remember only those he wished to remember but could not remember whether the defence witnesses were in the boardroom.
12. It is surprising that the Plaintiff knew about 9 people were present. However, a party cannot remember who was present. On further cross-examination he stated that the words were not as he said earlier but "you are thieves." He admitted that as a fact a patient monitor was stolen. He also stated that is actually the one who invited the DCI to be investigated. publication of the words we started that you means that the other staff. they admitted that they the ELRC court found that the transfer was regular.
13. The defendant testified and adopted a statement dated 17th May 2023. he stated that he called a meeting of all staff of the finding out from a nurse on duty in charge home theatre Allen shibu was missing. they were given papers to write what they knew about the monitor and all of them wrote I don't know Mr Andrew Mogeckwu Rocky was instructed to investigate he stated that all the theater staff were all transferred after the loss of the monitor.
14. DW2 Ndurumu Gakii testified and adopted a statement. On closer examination he stated that the County Executive Committee and the defendants did not all stuff this. The matter was not investigated



but the printer was not changed. The defence closed the case. The plaintiff did not file submissions while the defendant did.

Submissions

15. Defence submissions in short were that the plaintiff never proved their case that:
 - a. there was a fake statement or false statement
 - b. they said when they referred to the plaintiff here
 - c. the words publication to third parties
 - d. the statement was defamatory in itself
16. It was the defence submission that the plaintiff was not even sure the ones that were published and the words did not refer to the plaintiff. The plaintiff was at the north pole and witness regarding the words. They further submitted that the defence has shown that the transfer was normal administrative work.

Analysis

17. The issues that arise from the pleadings, are: -
 - a. Whether there was publication of the words complained of.
 - b. Whether the words complained of were defamatory.
 - c. Whether the words refer to the plaintiff
 - d. Whether the defenses set up by the defence are tenable
 - e. Reliefs available
18. The court is at pains to understand the plenty of scares. The scene of these cases sell is a normal employment setup a blend of all ages and all stuff for cold thieves. He was not singled out. He also does not say to whom the publication was made. In the case of Phineas Nyaga =vs= Gitobu Imanyara (2013) eKLR, where Justice Odunga stated as doth, regarding similar subject matter at paragraph 15 as doth: -

“ 15. However, before determining the above issues it is important to set out the various principles of the law of defamation. Under article 32(1) of *the Constitution* every person has the right to freedom of conscience, religion, thought, belief and opinion and provides that the freedom to express one’s opinion is a fundamental freedom. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In a tort for defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals.



19. In the cases of *Wycliffe A Swanya = vs= Toyota EA and another* (2009) eKLR, *Kudwoli and another =vs= Eureka Educational and Training Consultants and 2 Others* (1993) eKLR. From these decisions the Plaintiff posit that the court ought to consider the natural and ordinary meaning of words, which is gotten in the wider of the case.
20. The court must look at the whole publication for context and meaning. The words must also be communicated to someone else other than the Plaintiff. The last authority, calls for the context of the words uttered. Consequently, words must not be taken in isolation but as part of a whole picture. The publication must be viewed whether it is calculated to injure the Plaintiff. This is thus a wholesome test where words which may appear defamatory may be explained away in the same article. This calls for proportionality.
21. What then do you do when the words uttered are not mentioned? The context of this is the loss of a patient monitor which the addressees had sole custody. It is lost in the circumstances where they are either thieves or know the thieves. There is nothing wrong being rightly suspected by the employer. If that were the case, it will be impossible to protect public resources.
22. In the case of *Daljit Singh Dhanjal Versus The Standard Group & Another* (2023) eKLR, stated as doth: -

“It is important to remember the words of Gatley on Libel and Slander, where the learned authors define defamation as follows:

“The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory.”

23. I also know that the plaintiff filed an audio CD. I have not bothered to listen to it because it serves no useful purpose and they are needed by a transcript and a translation of the contents of thereof. Have asked massager to listen to it after listening you cannot identify any person and boys or events. the defence played at the section 106 4B of the [Evidence Act](#) the section provides as follows: -

“106B. Admissibility of electronic records (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible. (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following— (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer; (b) during the said



period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities; (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

- (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—
 - (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this section to a computer shall be construed accordingly.
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
 - (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.
- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information



is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.

24. There's no evidence of someone who recorded the discussion, what is the content of the discussion and the actors. The printer did not identify the parties in the CD it is useless and of no use in evidence. It is absolutely an admission of an exhibit into evidence does not give its property value secondary to the words that were said to have been published. Therefore there was nothing more looking for in the CD.
25. It is important to note that Order 2 Rule 7 of the civil procedure rules provides as follows:
7. Particulars in defamation actions [Order 2, rule 7.]
- (1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.
 - (2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.
 - (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.
 - (4) This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made the defendant.
26. The words are said to be published in a speech they needed to be a transcript of the speech and evidence of right-thinking members of society who had them. there's also the imbroglio of what was spoken to whom they referred and whether anyone thought they referred the plaintive the plenty was also not plated or even stated that this word for false. it's in reality the most patient monitor was stolen and it was agreed that the only patients and staff had access to the same.
27. Given that this was a theatre scenario the possibility that there was stolen by patients tends to fail. I am entitled under Section 60 of the *Evidence Act* to know the natural event of things given the nature of how patient access theatre. There is no possibility that the monitor was stolen by the patients. The wind in and out of operation, leads to the staff as the possible and only Cadbury's who have stolen the code of Thailand monitor. In any case he states that all of them were called thieves there was no identification of anyone who made the printing more of a fuse and rest. Without other people being spared then those words were not defamatory. There is no group information and without any listener there was no likelihood of any character being affected.
28. Any of the staff said that they really could have stolen. The tragedy of the commons is that everyone who works wants to protect public resources but does not want to be accountable. There was no



mistake on the words of the County. The only mistake possible is the failure by the county government to terminate services to those who are responsible for loss of public resources. It is an outcome from the court that an employer cannot ask the whereabouts of resources entrusted to people for fear of being victimized. It is not a good way to manage public resources. Accordingly an authoritative imperative in public dealings and the County ought to have not transferred but impose a drastic action.

29. The case should never have come to court. It is really necessary that people in charge of our public resources are given a free hand to follow goods that have been stolen. It is true that a monitor was stolen the plaintiff among others were present.
30. I find absolutely no merit in this case and I dismiss the same with costs of Kshs. 135,000/=.

Quantum

31. The Court has found no defamation. As such, there were no damages that can be recoverable. The claim for damages for Defamation thus fails.

Determination

32. The court therefore makes the following orders: -
 - a. Suit is hereby dismissed for lack of merit.
 - b. The Plaintiffs to pay costs of Kshs. 135,000/= within 30 days in default execution to issue
 - c. The file is closed.

DATED, ISSUED and DELIVERED at MOMBASA, Virtually 19th Day Of September The Year Of Our Lord Two Thousand And Twenty-Three.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Page 5 of 5 M.D. KIZITO, J.

