**Mkok v Mello (Civil Suit 59 of 2019)**
**[2023] KEHC 23045 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23045 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL SUIT 59 OF 2019**

**DKN MAGARE, J**

**SEPTEMBER 20, 2023**

**BETWEEN**

**MICHAEL JESSE MKOK ..... PLAINTIFF**

**AND**

**ROLAND DE MELLO ..... DEFENDANT**

## JUDGMENT

1. The Plaintiff filed suit on 19/7/2019 against the Defendant claiming for damages for libel in exemplary damages and aggravated damages.

2. The Plaintiff is said to be a state counsel with effect from 5/06/2017 and was stationed in Mombasa. The Plaintiff was retained as defence Counsel in the case of Salim Verjee Versus The Attorney General and 3 Others. The Plaintiff was Counsel representing the 1st and 3rd Defendant in that suit while the Defendant herein was 2nd Defendant in that suit. The Plaintiff indicated that at the hearing he was to rely on the entire documentation for the Primary suit.

3. The Plaintiff averred that on 11/6/2019 the Defendant authored and published a defamatory and type written letter titled "suspected corruption at the Attorney General's office, Mombasa." It was addressed to the Attorney Generals' office, the Plaintiff's employer, in Nairobi. The tenor of the entire letter was set out in the Plaint.

4. On my reading of the letter, it is actually a complaint against the Plaintiff, that he, the Plaintiff, was colluding to lose the case at a great expense of the public. The Defendant was a party interested in the outcome of the impugned case.

5. The Plaintiff indicated that letter in its natural and ordinary meaning, the words used, and as an inuendo, meant that the Plaintiff was a common criminal. He set out 10 meanings associated with the words. There is no reason for me to set the same herein verbatim as it will become apparent shortly.

6. The Plaintiff averred that the words were said to be calculated to embarrass and bring the Plaintiff to public odium. He states that the Defendant knew that the letter was likely to be opened by other staff or employees. He reproduced the entire letter in the witness statement dated 19/7/2019.

7. Annexed to the Plaint were 10 documents. The first was the Plaintiff's Identity card and certificate of admission showing that he was admitted to the Role of Advocates on 4/5/2016. He produced the work identity card, CV summons to enter appearance in 1621 of 2014, demand letter, reply to defence, reply to defence proceeding's in CMCC 1621 of 2014. The impugned proceedings, though indicated to be part of the supporting documents were not enclosed. The CV was not supported by any testimonials.

8. The suit that was filed and which subject of defence in question was malicious prosecution. This arose from the primary Criminal file Mombasa CR 849 of 2009. The accused therein had been put on his defence, as having a case to answer. On tendering evidence, he was convicted under Section 215 of Criminal Procedure Code. He was fined Kshs. 7,000 or 3 months' imprisonment on 17/7/2010.

9. The accused appealed to the High Court. Both the trial and conviction were upheld. He further Appealed to the Court of Appeal in CACA 373 of 2012. The Court of Appeal noted that there was a confusion on how the complaint was that is Hamisi Bakari Kodza and not the Defendant herein Roland De Mello.

10. The accused was thus acquitted by the Court of Appeal on a technicality, since the complaint was changed from Hamisi Bakari Kodza PW1 to Roland De Mello. In other words, the Accused Salim Verjee was acquitted on a second Appeal. A second appeal is on points of law.

11. Duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

12. The duty of the second appellate court is different. In the case of Benedicto Kwarula Ingosi v Republic [2014] eKLR, the court of Appeal Onyango Otieno, Azangalala & KantaI, JJ. A, stated as doth: -

> "Being a second appeal we must remember our duty which is not to retry the case or re-evaluate the evidence. Our duty as a second appellate court is not to interfere with concurrent findings of fact by the trial court and the first appellate court unless the findings were bad in law for being perverse which is to say that no reasonable tribunal could on the evidence have arrived at such findings – See the cases of Thiongo v R [2004] 1EA 333 and Muriungi v R [1982 – 1988] 1 KAR 360.

13. This is another way of saying that the issues of fact were settled by the fist 2 courts. An appeal to the court of Appeal is on points of law. This issue should resonate to the legal advisers of the parties on chances of success of their respective cases.

14. On a sad note, though, I realise that there appears to have been a lot of acrimony between the Plaintiff and Salim Verjee. Such controversies tend to suck in a lot of dust and people. The parties should always pick a proper place to stop in their acrimonious tendencies.

15. Turning to the case, there were a series of other issues that delayed the matter including a preliminary objection and notice of motion dated 1/10/2019. Parties were apparently not ready to proceed for some time.

16. The Defendant filed Defence, list of witnesses, witness statement and list of documents. Among the documents was a notice against co- Defendants, the Attorney General. The Application filed was to strike out the defence. I have also seen unnecessary letters written to court.

17. The Defendant filed defence on 9/8/2019. I wish to note that there is an unnecessary controversy on whether the Defendant ought to have filed a memorandum of Appearance before a defence. This was necessary in view of Order 6 Rule 2(4) of the Civil Procedure Rules, which provide as follows: -

> " Mode of appearance [Order 6, rule 2.]
>
> (1) Appearance shall be effected by delivering or sending by post to the proper officer a memorandum of appearance in triplicate in Form No. 12 Appendix A with such variation as the circumstances require, signed by the advocate by whom the defendant appears or, if the defendant appears in person, by the defendant or his recognised agent.
>
> (2) On receipt of the memorandum of appearance as required under subrule (1) the proper officer shall stamp and file the original and stamp the copies thereof with the court stamp showing the date on which they were received and—
>
> (a) if they were delivered to the proper officer, he shall return the stamped copies to the person appearing, or
>
> (b) if they were sent by post, he shall send one copy by post to the plaintiff's address for service and one copy by post to the defendant's address for service.
>
> (3) Where the defendant appears by delivering the memorandum of appearance as required under sub rule (1) he shall within seven days from the date on which he appears serve a copy of the memorandum of appearance upon the plaintiff and file an affidavit of service.
>
> (4) Where a defence contains the information required by rule 3 it shall where necessary be treated as an appearance.

18. The Defence properly that was filed on 9/8/2019 denied the allegations and stated that: -

a. The letter dated 19/7/19 was written to the AG as the titular head of the bar and the convener of the advocates complaints commission.

b. The employees in the office are bound by confidentiality and privilege as such cannot amount to libel.

c. The letter indicated as suspected corruption and only investigations will unearth the same.

19. The defendant stated that the letter was a right to free speech which is protected. The suit was filed in contravention of Section 14 of the *Civil Procedure Act*, and as such the court had no jurisdiction. Section 14 of the *Civil Procedure Act* provides as doth: -

> " 14. Suit for compensation for wrong to the person or movables Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts.

20. The Defendant urged me to dismiss the case with costs. I honestly don't see the relevancy of section 14 of the *Civil Procedure Act* to this matter. Though I take cognisance of the fact that the suit of this nature ought to have been field in the chief magistrate's court.

**Evidence**

21. The parties testified and adopted their written witness statements. They are very detailed and I need not repeat the evidence verbatim.

22. The Plaintiff filed supporting documents and Further List of Documents dated 26/8/2016. The Plaintiff filed a letter dated 31/7/2019 Ref AG/ GIV/ HOD/18 received on 30/9/2019 for the Auction of Mr. Mkok within 14 days.

23. The second exhibit was a notice addressed to the AG and acted upon by various officers, including the department of justice, the Solicitor General as a Deputy Chief State Counsel Charles Mutinda to deal. This is the one that resulted in sending the letter. Plaintiff's witness Martin Mwandeje wrote a statement. The statement is of interest read for students of reform and literature. Unfortunately, the said statement the adds no value to the Plaintiffs evidence.

24. Francis Tony Manaly testified and adopted his statement dated 18/12/2020. On cross examination, he admitted that communication from members of the public to the Attorney General is privileged. He confirmed that the Defendant was entitled to complain. He stated that as a result of the complaint people were transferred.

25. His view was that the complaint should have been addressed to the immediate supervisor.

26. The Defendant adopted his statement dated 28/9//2020. He admitted to have authored the letter dated 11/6/2019. It was his evidence that he made a complaint. He did not attach witness statement to the letter. However, he took the impugned letter to the office of the attorney General. The letter touched on the behaviour of the Plaintiff.

27. On cross examination he confirmed that the defendant took the letter directly to the attorney general and was advised where to leave the letter. I noted in the notes that the witness was not a truthful witness since he was evasive. He however agreed that he is in the same rank as the Plaintiff. He stated that they have a suggestion box where the members of the Public complain for better access to the services offered by the office of the Attorney General.

28. On re-examination he stated that he found the letter in the office. The letter was to various people and it was given to the Plaintiff's supervisors. He stated that they depicted him to lack professional ethics, decorum and has no regard to the rule of law. The letter is said to have caused distress embarrassment and public odium. PW2 is said to have said that the Plaintiff was on immoral extortions and was bereft of moral standing professionalism. He analysed some decided cases and gave history as set out in gives history in the statements of 28/9/2020.

29. The Defendant adopted 5 documents in his list dated 28/9/2020. The 2nd document is a letter dated 3/6/2019. This letter is not subject to the claim. The third one is the impugned letter dated 11/6/2019 addressed to the office of the Attorney General. It was received on 13/6/19 at the central RMU.

30. There is a follow up letter dated 29/7/2019. It was received on 2/8/2019. The is also another letter dated 10/7/2019 by the Defendant's advocates responding to the letter dated 3/7/19. The first document is a notice against the Defendant and Hamisi Bakari Kodza in Mombasa CMCC 1621 of 2014.

**Plaintiffs submissions**

31. The Plaintiff did not file submissions by the time of writing this judgment. They were supposed to file weeks before delivery of judgment. Unfortunately, but did filed on the eve of the judgment.

32. He argues that the defendant rendered no defence to the claim and as such prays for all the prayers in the plaint. It is clear that the plaintiff was not prepared for submissions. He did was of the view that the court ought to grant KSh 20,000,000/= as damages for libel, exemplary damages and aggravated damages.

33. I am unable to deal with the rest of the 20 page submissions as they are quotations from various cases, some of which are not named.

**Defendant's submissions**

34. The Defendant filed submissions dated 31/8/2023. They posit that the Plaintiff complained that the letter dated 11/6/2019 was likely to be read by other people that the Plaintiff was spotted in a small restaurant near Mombasa Law Courts with the accused Salim Verjee. The Plaintiff was also seen driving away from court in the company of Salim Verjee. There were collusions between the Plaintiff and Salim Verje whom they all had cases.

35. They state that Francis Tony Manaly who testified and adopted this statement supported the Defendant's version of events. He had seen the Plaintiff and the access in one car. He also said the Plaintiff and Verjee were seen in a canteen near Mombasa Law Courts. He reportedly over heard a discussion over a case in court.

36. They set out three issues:-

    a. Whether the letter of 11/6/2019 is defamation/defamatory.

    b. What Orders should the court make

    c. Who is to bear costs.

37. It is their view that the Court of Appeal stated that the investigations were not properly done. They rely on the case of Hon. Musikan Konubo =vs Royal Media Services Defamation is objective. It does

not depend on the circumstances. Musikari Kombo v Royal Media Services Limited [supra], the court of Appeal (Visram, Karanja & Koome, JJ.A) held as follows; -

> " 24. The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined: "In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense."

38. It is not in doubt the letter referred to the Plaintiff. The question, according to the Defendant, was whether the letter was published and whether the Defendant caused publication of defamatory content. They state that it is within their right to complain when a public servant is suspected of corruption.

39. The Respondent relied on the case of Julius Vana Muthangya v Katuuni Mbila Nzai [2019] eKLR, where Justice C. Kariuki held as doth: -

> " 37. A defamatory statement is defined in Gatley on Libel and Slander 11th Edition at page 38 as; "one which is to the claimant's discredit; or which tends to lower him in the estimation of others or causes him to be shunned or avoided; or exposes him to hatred, contempt or ridicule …." 38. Given the above definition, it follows that for a respondent to succeed in an action on defamation, he or she must prove that the offending statement was not only published but that it exposed him to public ridicule, contempt and hatred or injured his reputation in his office, trade, profession or financial credit. 39. The standard of opinion is that of right thinking members of society. Abusive or offensive words may not be defamatory per se. To be defamatory, the words or statement must be proved to be false and malicious. The burden of proving that the words complained of were in fact defamatory lies on the respondent. It may be significant to note at this point that unlike slander, libel is actionable per se without proof of actual damage."

40. It is their evidence that the Plaintiff delivered the letter to the intended recipient. If it was accessed by other people it was not publication by the Defendant.

41. They state that the letter was not copied to any other person. They thus state that the suit should fail for lack of publication. This is because the letters of the AG are prevailed under the *official secrets Act* and Attorney General Act. The workers in the office are agents of the AG. They rely on paragraph 59 of the cited Julius Vanga case.

42. They state that the Defendant had an interest in defence of MCC 1621 of 2021 in a competent manner.

43. In malicious protection cases, the parties are filed together. The Plaintiff was making it appear that the members of the public should not complaint. Contrary to National Values and Principles of Governance under Article 10 of *the Constitution*.

44. They state that exemplary and aggravated damages cannot issue. They rely on the case of Benaiah Sisungo V Tom Alwaka t/a Weekly Citizen & Another [2007] Eklr.

**Analysis**

45. In defamation one publishes information that is false against another. The plaintiff has to show: -

    a. The information is false

    b. It is about the plaintiff

    c. There is no defence to the defence.

46. The evidence of the Plaintiff's witness was that he saw the said letter in one of the files in the Registry of the office of the Attorney General. The letter was thus not published. The witness did not see the publication but snooping around. Wait, is that even true? The story is simply fiction. The letter never left the office of the Attorney General. It was sent to Mombasa by a senior state counsel to the in charge to have the plaint answer the allegations therein.

47. The letter was not sent to the registries but properly marked for the in charge, ODPP, Mombasa. If the letter was in the hands of the witness, it must have been placed by the plaintiff or illegally obtained. In any other case, it must have been illegally obtained.

48. The impugned letter is in its nature a complaint. The Defendant was a party to a case. The case involved the Attorney General and the Defendant as parties who were likely to be found jointly and severally liable, if one of them is not properly defended. Their liability was joined in the hip. It was thus crucial that the defences be properly done. This was so in the case where the accused who sued for malicious protection in Mombasa CMCC 1621 of 2014 was found guilty both by the subordinate court and the high court.

49. The said person was acquitted on a technicality by the Court of Appeal of who the complainant was. The question the Court Appeal settled was that the complainant was PW1 but an amendment was done to have PW3 as the complainant as it could have brought confusion on the case the Accused was facing. Sending a compliant letter of this nature was not a publication. It was sent to the right parties and I am satisfied on the chain of custody.

50. I do not think the complaint that the complaint should have been sent to the immediate boss or supervisor holds water. A party is entitled to complain and is not bound by internal structures of reporting or complaint handling. It was incumbent upon the Attorney General and The Solicitor General to redirect the letter though channels known to themselves.

51. If there are complaint mechanisms within the office of the attorney general, there must be correction mechanisms on how a misdirected letter is to find itself in the right office. The same applies to complaints placed in the complaint box. The members of the public do not know and don't care who reads. Every complaint addressed to the attorney general can be handled by any of the officers delegated. Under article 156(7), the powers of the office may be performed by subordinate officers. The article provides that: -

7. The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

52. However, those are internal workings of the office, to which members of the public are not expected to know. Receipt of the letter by any officer subordinate to the attorney general is not publication. It is expected that mundane duties such as reading complaint letters are delegated to some officers, who act on behalf of the attorney general. Such officers are deemed to act for the attorney general as one

indivisible office. None of their actions are deemed to separate from the holder of the office of the Attorney General.

53. Though not a company, the office is operated like a corporate entity. The members of the public are not obligated to enquire on which particular officers to deal with. In Bougainville Estate Limited v Kenya Deposit Insurance Corporation (sued in their capacity as Receiver Managers of Imperial Bank Limited (In Receivership) & 3 others [2017] eKLR, justice J.O. OLOLA, Was of the view that: -

> 20. The position under the law of contract as I understand it is that any third party may enforce a contract against a company if the obligations arising thereunder were assumed by the Company or an officer thereof with ostensible authority. This is the doctrine arising under the Rule in Turquand's Case (derived from the case of Royal British Bank –vs- Turquand (1885) E & B 327).
>
> 21. Dealing with the doctrine of constructive notice as provided under the Rule in Royal British Bank –vs- Turquand (supra), the Learned Authors in Palmer's Company Law, 22nd Ed. Vol. 1 provide as follows (page 286): -
>
> > ".....That the parties who had dealings with the company need not inquire into the indoor management but could assume that its requirements had been complied with. The rule in Turquand's case was again subject to exceptions. Even this solution would have been principle that a director or other officer could bind the company if he had ostensible or apparent authority, even though the Board of Directors had not endowed him with actual authority. By this circuitous route English and Scottish company law developed a pattern of legal rules which were acceptable to modern practice and worked, on the whole, satisfactorily."

54. The sending of the letter to the office of the attorney general, being a person entitled to receive the complaint, was not a publication. It does not matter that subsequently, the entire content of the letter was shared within the said office. The Defendant has no control of what the recipient of the letter does with the same. The Defendant never set the letter to Mombasa. Therefore, if there was publication, though I hold there was none, it was not by defendant.

55. The letter was sent by senior principal state counsel, Mr Mutinda on instructions of the solicitor general to the in-charge Mombasa office. The plaintiff had no role in disbursement of the letter. In any case, it was being acted upon and not re-published. The plaintiff was entitled to be served with the complaint in terms of article 47 of *the constitution*.

56. It is not expected that the attorney general will travel to Mombasa to seek the plaintiff and give him the letter of complaint. He must use officers under him and whatever they do, is done by and under his name.

57. The plaintiff was a recent recruit to the public service. He had not developed the thick skin that he must. It is my holding that faced with a serious complaint and with naivety on the workings of the public service, the plaintiff came to court armed with a letter which he mistook as a publication. It is my considered view that the said letter was never published. The letter was written and sent to the relevant office but never published.

58. In Thomas vs. CBC (1981) 4WWR (29) the court defined 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 opinion is that of right thinking person's generally. To be defamatory, an imputation need not have actual effect on a person's reputation. The law looks into its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it. Conveying untruth alone does not render an imputation defamatory."

59. The publication occurs when a document or defamatory media is disseminated. If it is directed to one recipient and he is entitled to receive that information, it cannot be defamation. I dare add, that even a baseless complaint cannot be defamatory, unless it published to persons not entitled to receive. In the case of Elisha Ochieng Odhiambo v Booker Ngesa Omole [2021] eKLR, the court, Justice R.E. ABURILI held as doth: -

"

" 103. On whether the plaintiff should have produced the actual recordings of the radio broadcast from Ramogi FM, the defendant contended strongly that in the absence of actual radio audio broadcast of the alleged published words, there was no evidence of publication or interview or broadcast. On this point, the Court of Appeal in Raphael Lukale v Elizabeth Mayabi & another [2018] EKLR overturning the decision of this court on the question of whether an audio radio broadcast must be produced in evidence to prove publication, held:

> "We have said elsewhere in this judgment that the sole reason why the learned Judge dismissed the suit was the fact that there was no audio recording and/ or certificate of translation of the offending words, hence, in her opinion there was no proof of publication of those words.
>
> The word "publication" is repeatedly used without definition in the *Defamation Act*. Its permanent form has also not been explained. This is important in construing the provisions of section 8 of the Act on wireless broadcasting which provides that;
>
> "8 (1) For the purposes of the law of libel and slander, the publication of words by wireless broadcasting shall be treated as publication in a permanent form." (Our emphasis).

Black's Law Dictionary 9th edition defines publication as "the act of declaring or announcing to the public".

In Pullman v Walter Hill & Co (1891) 1 QB 524, the English Court of Appeal explained what publication constitutes as follows:

"What is the meaning of 'publication'" The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise..... If the writer of a letter shows it to his own clerk in order that

> the clerk may copy if for him, is that a publication of the letter" Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, 'I have shown it to you and to no one else.' I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it" (per Lord Esher, MR). (Our emphasis).
>
> Publication of a defamatory material occurs when the material is negligently or intentionally communicated in any medium to someone other than the person defamed.
>
> The learned Judge insisted that there was no proof of publication merely because the appellant did not produce the audio version of the broadcast in the Luhya language as well as the certificate of translation.
>
> Upon close reading of section 8 aforesaid we find nothing to suggest that all wireless broadcasts are either from recorded tapes or are reduced into some form of a document and that in order for a plaintiff to prove publication of a wireless broadcast he must tape record it and produce the tape record in court as evidence. That proposition is not realistic as it would require people to always have in their possession devices for recording and dwell in constant and vigilant anticipation of being defamed.
>
> The appellant's case was grounded on the fact that he and his four witnesses heard with their ears the words spoken by the 1st respondent and transmitted through the 2nd respondent's Mulembe FM radio station.
>
> The learned Judge in insisting on an audio recording in the original language appeared to have had in mind the provisions of Section 106B of the *Evidence Act* which requires that for a party wishing to rely on a recording, it must be accompanied by a certificate by a person who operated the recording device. That is the admissibility of electronic records. In our opinion this provision does not make it mandatory for parties who wish to prove that some defamatory statement by way of broadcast has been made of them.

60. Windeyer J. In Uren John Fair Fax & Sons Pty ltd 117 CLC 115 at 115 stated. "Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tend to make them shun or avoid that person."

61. It seems to me that properly speaking a man defamed does not get compensation for his damaged reputation. He gets damages because he was publicly defamed. For this reason, if there were suspicious the same be reported to the Hon. Attorney General, who was the employer. The complaint could not be published. The Plaintiff did not get hold of the letter.

62. The said letter was channelled through the Attorney General. It initiates disciplinary proceedings. It was not published to the members of the public. I have evaluated the evidence and note that the truth is somewhere between the Plaintiff's word that there were no suspicious of corruption and the Defendants ascertainment of suspicion of corruption. The defence evidence was not shaken. Neither was the Plaintiff's evidence shaken. When a point is neither proved nor disproved, it is deemed disproved. In the case of Kenya Anti-Corruption Commission V David Onsare Rogit & 3 Others [2012] eKLR, justice G.V. Odunga, as then he was stated as doth: -

> "Where service of summons is asserted by one party and denied by the other, both the assertion and the denial being on solemn oath taken before a Commissioner for Oaths the Court cannot but be left in a quandary in the absence of cross-examination of the deponents to the contradictory affidavits. In those circumstances the Court is constrained to decide

the matter on the basis of fundamental rule of evidence, which is codified in Section 3 of the *Evidence Act* Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved".

Accordingly, I find that since the fact of service is neither proved nor disproved, it is therefore not proved."

63. Even if the letter was said to be published, there was no prove that the letter was false. The defendant and his witnesses gave cogent evidence on the compromising nature of the plaintiff with the accused. It was stated on oath and not shaken that the plaintiff and the accused in the matter the plaintiff was defending met in a small restaurant next to Mombasa law courts. They could as well be discussing weather or even el nino. However, the evidence does not look hopeless.

64. This is coupled with phone calls, that resulted in adjournment of the case. Only one person stood in the best position to tell us whether that was not true, the plaintiff. The evidence of the phone calls was credible and was not shaken. The plaintiff had special knowledge on his phone. Phone logs will have sufficed. The call were specifically not denied by the Plaintiff. Under Section 112, the Plaintiff had the burden of proof in respect to matters within their special knowledge, which he did not discharge. The said Section provides as doth: -

"

" 112. Proof of special knowledge in civil proceedings-
In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

65. Faced with the scenario, the plaintiff had a probable cause to initiate a complaint that could lead to disciplinary proceedings against the employer. The plaintiff maintains that he was transferred on the basis of the complaint. Transfer itself is not a bad thing. The Plaintiff has no property in his office in Mombasa. Secondly, given that he has no fixed cases, the plaintiff should not be bothered by transfer, unless there is something he knew much more than he was willing to divulge.

66. Further, if it is the letter that led to the transfer, then the employer must have found the complaint credible. This is the basis for a probable cause. The Plaintiff is a public servant. His conduct in court must be beyond reproach. If he was careless on how he related to the accused, he called the complainant upon himself. There was no proof that the complaint was false.

67. In the circumstances, there is no basis to state that the Defendant had no probable cause to initiate disciplinary proceedings. There is no malice that can be attributed to the authorship of the letter. The second aspect is the publication. A letter of complaint, addressed to a specific authority is not defamatory, even where the contents are false.

68. It was the duty of the Attorney General in two aspects to receive the said letter. The first aspect is that of the Plaintiff's employer. All complaints from members of the public are to be dealt with without fear of recrimination.

69. Secondly other than the Plaintiff being an employee of the Attorney General, he is an advocate. The Attorney General is entitled to deal, either directly seen to have been escalated to the Solicitor General then to Mr. Mutinda who wrote to the Mombasa head to require the Plaintiff to answer. The letter came to the hand of the Plaintiff from the initial recipient.

70. The presence of the impugned letter in Mombasa cannot be attributed to the Plaintiff. Further, the officers who handled did so by virtue of office. There was copy to other bodies. The attorney general is

also entitled, no just as the employer to receive complaints relating to the conduct of advocates. That is why the complaints commission is domiciled in that office.

71. The third respect in which there was no publication, the letter was sent to Nairobi by the Plaintiff in person. He handed it over as per the standard operating procedures set out in that office. The letter could be proof of publication.

72. The tenor of the letter is a legitimate complaint requiring a solution. I heard the Plaintiff, stating that he was transferred as a result of the letter.

73. This can be seen in 2 aspects. If it is true that he was transferred as a result of the complaint, it is prima facie evidence that the employer believed and found the complaint against the Plaintiff to be legitimate and actionable. He should thank the hearing that his punishment was only transfer.

74. Secondly there is no property in a work station. Unless the complaint was true, there was no need to complain about a transfer from Mombasa. There is no property in a work station. There are no clients in the office of the Attorney General. Transfer within the public service is at the discretion of the employer.

75. It is not necessarily punishment. It is not an adverse action. It is not actionable. In the circumstances the claim is much ado about nothing. The best cause of action is to answer the complaint. It is easier to attach phone records during the time of alleged convergence with the accused. In the case of Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR,

> " 80. Therefore where the decision to effect the transfers is informed by other motives other than the legally recognised principles, the Court may well be entitled to interfere. I therefore associate myself with the position adopted by Vyas, Yash in his article "The Independence of the Judiciary: A Third World Perspective published in Third Legal Studies: Vol. 11, Article 6 where he states at page 138 that:
>
> "A judge may sometimes be transferred from one jurisdiction to another. In many countries, prior consent of the judge whose transfer is proposed is not necessary. But any transfer by way of punishment is not permitted. Transfer with an oblique motive or for an oblique purpose, such as not toeing the line of the executive or for not rendering decisions unpalatable to the executive, amounts to a punishment. Such transfers are likely to be struck down by the courts, because they amount to interference with the independence of the judge concerned or of the judiciary."

76. No such evidence was led. I hold and find that the plaintiff failed to prove his case to the required standards. In the circumstances I dismiss the case with costs.

**Quantum**

77. The court is obligated to assess damages upon dismissing a case, however hopeless the case is. In the case of Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR, the court repeated the oft held principle

regarding assessment of damages even if he court being under duty to assess damages, even if the case is dismissed. This was succinctly put forth as thus: -

> " Turning to issue No. 2, the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:
>
> "The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment"

78. This was a case of defamation. The same had been proved, there was a need to show the effect of the publication. Only PW2 is said to have seen the letter. He did not believe the contents. In cases where the profession and reputation are at stake, then the court is entitled to award damages even where there is no prove of damages.

79. In the case of Barclays Bank of Kenya Limited v Hellen Seruya Wasilwa [2021] eKLR, S. Chitembwe J stated as doth: -

> " In the case of Shiraku V Commercial Bank of Africa [1988] KLR 67 it was stated as follows:
>
> "To wrongly dishonour any cheque is to do some injury in fact. If that is right, then it is not necessary to plead and prove damages. But in ordinary circumstances, the damages will be quite modest. They will be more than nominal damages but not so greatly more as to be excessive."
>
> I do find that the Respondent is entitled to nominal damages which should not be so low as to amount to no compensation for the harm caused and not so high as to amount to severe punishment to the appellant who breached the contract. The term "nominal damages" was defined in the case of Kanji Naran Patel v. Noor Essa and Another, (1965) E.A. 484 while referring to the case of The Mediana (1900) AC 116, as follows:
>
> "'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damage that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

80. Justice D.O. Ogembo, in Jacob Kipngetich Katonon v Nation Media Group Limited [2017] eKLR, awarded nominal damages of Ksh 200,000/= for a publication in a newspaper with the widest circulation in Kenya.

81. In Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR, the court of Appeal, Onyango Otieno, Azangalala & Kantai, JJ. A), held as doth: -

> " So the respondent was not only entitled to general damages for defamation but was also entitled to exemplary damages to punish the appellants who had defamed him and refused to retract the offending article or apologise. In the English Court of Appeal decision in the case of John v MG Ltd. [1996] I ALL E.R. 35 the Court held:
>
> "The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....
>
> Exemplary damages on the other hand had gone beyond compensation and are meant to "punish" the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize".

82. There was nothing to retract. The plaintiff was given a right to explain. There can therefore be no aggravated or exemplary damages. Only one person is said to have seen the letter that he did not believe. In the circumstances only nominal damages are available. I will have awarded Kshs. 20,000/= as nominal damages had the plaintiff succeeded.

**Determination**

83. I make the following orders: -

a. In the circumstances, I find that the Plaintiff's suit lacks merit and is dismissed with costs of Kshs. 75,000/= to the Defendant.

b. The same be payable within 30 days in default execution to issue.

c. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF SEPTEMBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

Kipchumba and Elkinyton for Defendant

No appearance for the Plaintiff

Court Assistant - Brian