



**Victory Construction Co Ltd v Standard Limited & another (Civil Suit 819 of 2003) [2024] KEHC 16327 (KLR) (Civ) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16327 (KLR)

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

**CIVIL  
CIVIL SUIT 819 OF 2003**

**CW MEOLI, J  
DECEMBER 16, 2024**

**BETWEEN**

**VICTORY CONSTRUCTION CO LTD ..... PLAINTIFF**

**AND**

**THE STANDARD LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE MUNICIPAL COUNCIL OF NYERI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was filed on 07.08.2003 by Victory Construction Co. Ltd (hereafter the Plaintiff) and is founded on the tort of defamation. The Standard Limited and The Municipal Council of Nyeri (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Defendant) are named as defendants. The Plaintiff seeks inter alia general damages for loss of business reputation, aggravated damages, costs of the suit and interest.
2. The Plaintiff averred that on or about 08.11.1999 the Government of Kenya through the Ministry of Local Government contracted it to construct and rehabilitate Nyeri Urban Roads, and the contract works commenced. However, on 28.01.2003 the Government of Kenya (GOK) terminated the contract for reasons that the source of funding of the project was in doubt and that arrangements were in place to pay the Plaintiff for works already done.
3. It was further averred that on 01.06.2003 the 1<sup>st</sup> Defendant by its newspaper publication namely, "Sunday Standard" at Pg. 5, published a news item, titled "Firm to forfeit Cash" and proceeded to allege that the Plaintiff's contract was terminated for alleged shoddy work and that the contract was "cancelled by the government a few months ago after it emerged that it (the Plaintiff) could never complete the 17km road project". The 1<sup>st</sup> Defendant citing the source of its information as the 2<sup>nd</sup> Defendant through its town clerk, a Mr. Richard Gikuhi. It was further averred that the news item was wholly malicious, without justification, libelous, made in bad faith and had the effect of damaging the



- Plaintiff's business reputation as a contractor. That because of the news item, the Plaintiff's business reputation has been thoroughly dented and its competitiveness in securing contracts adversely affected. All resulting in damage to the Plaintiff.
4. On 23.10.2003, the 1<sup>st</sup> Defendant filed a statement of defence admitting the publication but denying other key averments in the plaint. In the alternative, the 1<sup>st</sup> Defendant averred that the publication was made in honest belief of the veracity of its content as relayed to the 1<sup>st</sup> Defendant's agent by one Richard Gikuhi, on steps that the 2<sup>nd</sup> Defendant was taking regarding the project that had been cancelled. It was further averred in the alternative that if the publication were to be found defamatory of the Plaintiff, the 1<sup>st</sup> Defendant would seek indemnity from the 2<sup>nd</sup> Defendant on the basis that the publication directly emanated from a statement by the 2<sup>nd</sup> Defendant's agent, Richard Gikuhi.
  5. On 22.10.2003, the 2<sup>nd</sup> Defendant filed a statement of defence denying the key averments in the plaint. And terming the suit misconceived, incompetent, bad in law, disclosing no reasonable cause of action, frivolous, vexatious and liable to be struck out.
  6. During the trial, Kirpal Singh Suri testified on behalf of the Plaintiff as PW1. Identifying himself as a director of the Plaintiff he proceeded to adopt his witness statement as his evidence -in- chief and produced documents appearing in the list of documents filed on 21.05.2004 as PExh.1 – 17. It was his evidence that the statement published by the Defendants to the effect that the Plaintiff carried out shoddy works was inaccurate. He stated that the contract between the Plaintiff and the GOK (hereafter the subject contract) was for repair and rehabilitation of several roads in Nyeri town, and that the Ministry of Local Authorities on 28.01.2003 terminated it in accordance with Clause 59.4. He stated that the termination letter by the Permanent Secretary in the ministry did not state that termination of the subject contract was due to shoddy works and asserted that the termination resulted from the withdrawal of funding by the World Bank. He maintained that the Plaintiff eventually completed the works through funding by the GOK.
  7. He further stated that while executing the subject contract, the Plaintiff did not deal with the 2<sup>nd</sup> Defendant or interact with its staff or Mr. Richard Gikuhi, to whom the contents of the publication were attributed. That the Plaintiff having been in existence since 1947 has paved many roads and engaged in civil engineering works. He testified that the effect of the article has been adverse on the Plaintiff's reputation and business. That due to the 2003 article, the GOK and other potential clients have to date not trusted the Plaintiff, or viewed it favorably, resulting in lost business opportunities in the private and public sector. He asserted that the Plaintiff was unable to procure any government contract and that the Defendants never issued an apology in respect of their article. That prior to the article, the 1<sup>st</sup> Defendant neither sought the Plaintiff's comments nor issued a retraction of the article.
  8. During cross-examination, he affirmed that the subject contract was for repair and rehabilitation of roads in Nyeri township. It was his evidence that Gibbs Africa supervised the works. But admitting that a letter by Gibbs Africa shown to him contained criticism of the works, he stated that the offending article mentioned the Plaintiff by name. He reiterated that the Plaintiff lost reputation in the building and construction industry. And that if the Plaintiff had been in breach of the subject contract, it would have borne the consequences prescribed therein. Which contract while executed by the local government was intended for the benefit of the public in Nyeri. He did however affirm that he did not have any evidence of loss of business with the GOK or the Plaintiff's major clients in the material period. And confirming that in 2003 the Plaintiff did not undertake any works in Othaya asserted that since publication of the article, the Plaintiff hardly got GOK business while also experiencing reduced private business.



9. It was his evidence further that the letter by Gibbs Africa was in response to a request for extension of time and pointed out defects and outstanding works. He did confirm that the letter stated that the Plaintiff's performance was inefficient, that he had no document in his possession to counter the assertion. He maintained that the remarks in the letter did not relate to shoddy works and that the subject of the letter was the request for an extension of time, which the Plaintiff was granted.
10. Upon being referred to minutes in respect of a site meeting, he confirmed that they suggested that remedial works were to be carried out, however asserting that the said comments reflected an opinion. Confirming that the matters relating to the road had been in the press previously, he attributed the impugned statement to the town clerk of the 2<sup>nd</sup> Defendant at the time. He admitted that in 2005 and 2007, the Plaintiff was awarded contracts to pave the Kitui – Kangundo Road and Makutano – Tawa Road, respectively, with a combined value of over 1 billion shillings.
11. During re-examination, he iterated that the Plaintiff carried out subsequent works as per the contract terms and did not receive complaints. He asserted that the Plaintiff did not receive any other contracts beyond those admitted during cross-examination. Concerning the site minutes, he stated that the Plaintiff completed the subject contract after remedial works which the supervising consultant gave a clean bill of health. Thus, no shoddy works were undertaken as purported in the article. Reiterating that the reason for suspension of works was due to lack of funds resulting in unpaid certificates worth KShs. 300 million. He stated that any defects referred to during the site meetings were rectified or recommended design changes done as is the norm in the industry. Hence, the rectification of defects is not tantamount to shoddy works, as the contract ordinarily envisages such event.
12. Peter Musango testified as PW2. He identified himself as a civil engineering contractor. He adopted his witness statement as his evidence -in -chief. He said he was familiar with the Plaintiff's business and that his firm and the Plaintiff's firm were members of the Civil Engineering Constructors Association (CECA). It was his evidence that the imputations against the Plaintiff could negatively impact on a contractor in procurement and future projects through reputational risk. That he was aware of the reputational standing of the Plaintiff for over twenty (20) years and that the published statement was damaging to the Plaintiff.
13. Under cross-examination, he stated that his relationship with the Plaintiff arises from membership in CECA and that he had not engaged in any works with the Plaintiff. Admitting that the publication in question did not adversely affect his relationship and or his view of the Plaintiff as a contractor. He stated that cancellation or termination of contracts is usually provided for in contracts and is not a strange occurrence. Confirming that while he did not know the actual date of termination of the subject contract, he was aware that the event occurred prior to the article.
14. His further evidence was that the article was inaccurate as the works carried were not shoddy, even while confirming that he was not involved in the project, thus would not know what works were to be rectified, nor have proof that statements in the impugned publication originated from the town clerk of the 2<sup>nd</sup> Defendant. In re-examination, he affirmed that he was not involved in the subject contract.
15. On the part of the 1<sup>st</sup> Defendant, Amos Kareithi testified as DW1. He identified himself as a reporter with the 1<sup>st</sup> Defendant while at the same time adopting his witness statement as his evidence -in- chief. He produced the documents in the 1<sup>st</sup> Defendant list of documents as D1Exh.1-4. While referring to the letter therein from Sapamo Consultants he stated that it captured the inefficiency and poor uncoordinated method of work on the part of the contractor. And asserted that the article in question was based on his in-person interview with Mr. Gikuhi, at the time the 2<sup>nd</sup> Defendant's town clerk,



following public questions on the quality of road works. And after termination of the contract for shoddy works. He asserted that he stood by the statements in the article.

16. During cross-examination, he stated that at the material time he was a reporter residing in Nyeri town where residents had complained about the quality of the Plaintiff's works and had attended some of the briefings after the site meeting. He admitted that he had evidence before Court in respect of the complaints, stating that the minutes exhibited before Court indicated defects requiring correction. He further confirmed that the town clerk issued a statement through the interview he conducted, which was the basis of his article.
17. The witness stated that although he had recorded the interview in his notebook, the said written notes were not exhibits before Court. He maintained regarding the status of the said road construction that the report was factual. Admitting that he had no engineering education, he asserted that the defects in question were obvious even without the cause thereof being determined. Further stating that beyond verbal information by the 2<sup>nd</sup> Defendant's town clerk, no documents were presented to him concerning the Plaintiff's alleged forfeiture of Kshs. 10 million on account of shoddy works.
18. In re-examination, he affirmed that his source of information was the 2<sup>nd</sup> Defendant's town clerk, who ordinarily briefed the press on developments relating to the subject contract. That while the interview was in person he sometimes spoke to his source on phone.
19. On the part of the 2<sup>nd</sup> Defendant, Richard K. Gikuhi testified as DW2. He stated that he was a retired town clerk of the defunct Municipal Council of Nyeri and was a certified public secretary practicing in Nyeri. Adopting his witness statement as his evidence-in-chief, he produced the documents appearing in 2<sup>nd</sup> Defendant list of documents, as D2Exh.1-9. He confirmed that during the material construction, site meetings were held, and that defects were captured in the minutes necessitated that works in respect of certain roads be repeated.
20. He categorically denied issuing any statement or holding an interview with DW1. Stating that the subject contract had been terminated in January 2003. Hence, he had no reason to grant an interview on the matter as of the alleged date of interview on 01.06.2003. It was his evidence that termination was effected under clause 59.4 of the subject contract, and confirmed that there was delay in completing the works; and that the contractor repeatedly sought extension of time despite the 2<sup>nd</sup> Defendant's demand to complete and repeat shoddy work.
21. During cross-examination, he testified that the commencement letter of 27.12.1999 indicated that the completion period of the works was fifteen (15) months. However as of January of 2003, the works had not been concluded. He further confirmed that residents of Nyeri township complained verbally and in writing about the quality of the works. It was his evidence that he had often met DW1 because he lived in Nyeri town but denied in respect of the subject contract that he had discussed the quality of the works in question, prior to or after termination of the said contract. Reiterating however that the works carried out by the Plaintiff were of poor quality, as documented and based on reports by Nyeri residents.
22. Thus, he agreed with statements in article that the material works were shoddy but stated that termination of works pursuant to clause 59.4 of the contract was not due to shoddiness of the works. Moreover, that extension was sought because of scope of work but not due to shoddy works, specifically, an extension was allowed up to 22.05.2001 based on increased works. He reiterated his earlier denials regarding the making of any statement to DW1 leading to the impugned publication.
23. In re-examination, the witness in response to the consultant's letter shown him confirmed that it cited shoddy works and that poor or uncoordinated methods of work by the contractor contributed to the



- situation. Further that despite several extensions of the contract period, the project was not completed, and the subject contract was terminated in January of 2003.
24. At the close of the hearing, directions were taken on filing of submissions.
  25. Counsel for the Plaintiff opened his submissions by restating the pleadings and evidence before the Court. Addressing the question of liability, he stated that it was common ground that the Plaintiff was awarded the subject contract by the GoK through the Ministry of local government to construct the Nyeri urban roads. And that the subject contract was terminated by the Government due to suspension of funding under the convenience Clause no. 59.4.
  26. Citing the decisions in *Agnes Zani v Standard Group Limited* [2019] KECA 66 (KLR), *C A M Royal Medial Service Limited* [2013] eKLR and *SMW v ZWM* [2015] eKLR counsel summarily contended that the publication was of and concerning the Plaintiff, was factually incorrect, untrue and therefore defamatory of the Plaintiff. Reiterating that the subject contract was terminated due to suspension of disbursements and lack of funding and not due to shoddy work as asserted in the publication. It was further submitted that as result of the publication the Plaintiff's business has been adversely affected.
  27. Concerning damages, counsel submitted that the article published by the 1<sup>st</sup> Defendant was evidently defamatory of the Plaintiff and the only dispute is between the Defendants as to the alleged source of the defamatory information. Asserting that the Plaintiff is entitled to an award of damages against the Defendants, counsel reiterated that the publication was defamatory; talked about the Plaintiff; and false. As to quantum of damages for loss of business to the Plaintiff company, counsel cited the decision in *Johnson Evan Gicheru v Andrew Morton & another* [2005] KECA 307 (KLR) to urge an award Kshs. 40,000,000/- as reasonable and fair compensation. The Court was therefore urged to allow the suit with costs.
  28. On the part of the 1<sup>st</sup> Defendant, counsel having restated the evidence submitted that it was undisputed that the impugned article was based on information received from the Nyeri Municipal County Town Clerk; and thus the 1<sup>st</sup> Defendant was obligated to publish the article on account of the cancelation of the contract by the procuring entity; that the article neither targeted the Plaintiff nor was it published maliciously but was merely to inform the general public regarding the cancelation of the contract for the rehabilitation and repair of roads, within Nyeri town; and that the Plaintiff did not prove any losses allegedly resulting from publication of the article.
  29. Concerning whether the impugned article was defamatory, counsel relied on the decisions in *Wycliff A. Swanya v Toyota East Africa Ltd & Anor* [2009] eKLR and *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR to submit that the burden of proving defamation rests with the Plaintiff to demonstrate that indeed his reputation was lowered, and that the publication had the effect of having others shun and or avoid it and that the publication was malicious. It was further posited that the defamatory article must be read in its entirety, asserting that the focus of the article was the termination of the contract. In addition, the fact that the roads upon which the Plaintiff was undertaking works were unusable due to the said works, which were of poor quality. Counsel pointing out that there was no evidence adduced to demonstrate that the Plaintiff was shunned and or avoided by anyone because of the publication.
  30. Addressing the application of the defence of qualified privilege, counsel cited the provisions of Section 7(2) of the Civil Procedure Rules (CPR), the decisions in *Makone v Kahos & Another* [2004] eKLR, *Musikari Kombo v Royal Media Services Limited* [2018] KECA 801 (KLR) and *Simeon Nyachae v Lazarus Ratemo Musa & Another* [2007] KEHC 885 (KLR). To support his contention that the Plaintiff failed to prove malice, ill-will, spite or any improper motive on the part of the publisher. Asserting further that the impugned article was factually correct, because, the Plaintiff's works were



of sub-standard quality as confirmed by the Defendants' witnesses, and therefore the Plaintiff's suit ought to be dismissed.

31. In the alternative and without prejudice to the earlier submissions, counsel argued that in awarding damages the Court ought to consider the damage the article complained about had on the Plaintiff's reputation. Counsel maintained that the article complained of did not in any way cause reputational damage to the Plaintiff. Submitting on the award of aggravated damages, it was posited it is only awardable where the conduct of the 1<sup>st</sup> Defendant exacerbated injury to the Plaintiff, which was not the case in this matter.
32. Relying on the decision in *Hezekial Oira v Standard Limited & Another* [2016] eKLR, counsel asserted that the impugned publication was neither made with the intention of making profit nor with the intention of hurting or disparaging the Plaintiff's name. Hence an award of aggravated damages is not applicable in the matter. However, if the Court was inclined to award general damages the sum of Kshs. 200,000/- was proposed as adequate, counsel citing *Jacob Kipngetich Katonon v Nation Media Group Limited* [2017] eKLR and *Kennedy Bitange Mageto & 4 Others v Macloud Malonza & Another* [2011] eKLR in that regard. In conclusion, the Court was urged to dismiss the suit or award damages as submitted and exercise discretion in awarding costs.
33. For his part, counsel for the 2<sup>nd</sup> Defendant, having restated the pleadings and evidence before the Court submitted on the twin issues of liability and damages. Concerning liability, counsel posited that Plaintiff failed to link the 2<sup>nd</sup> Defendant with publication and in the absence of proof of a formal statement or press conference by the DW2, the offensive publication could not be attributed to the 2<sup>nd</sup> Defendant. Moreover, there was no evidence to demonstrate that the Plaintiff's image and standing was damaged as a result. That the Plaintiff's own evidence had confirmed that despite the publication, he had subsequently won two (2) tenders in respect of other road works. It was further submitted that malice could not be attributed to the 2<sup>nd</sup> Defendant as it did not publish the article in question and that the duty of verifying the publication fell on the 1<sup>st</sup> Defendant.
34. Counsel reiterated that despite the Plaintiff pleading loss of business, no letter of regret or such other evidence was tendered. It was further reiterated that the Plaintiff had failed to prove that the 2<sup>nd</sup> Defendant published the article and or that the said article was false, given the nature and quality of works undertaken by the Plaintiff. Counsel equally urged the Court to decline making an award on aggravated damages while asserting that an award of Kshs. 200,000/- would be sufficient compensation in the event the Court found in favour of the Plaintiff.
35. The Court has considered the evidence on record and submissions by the respective parties. 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. 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 in this regard: -

“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.”

36. 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 concerning the burden that: -

“ [T]he 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.”

37. As earlier noted, the Plaintiff’s suit was founded on the tort of defamation, and here it is apposite to state the rationale behind the law of defamation. In that regard, 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...”

38. Actions founded on the tort of defamation often expose the tension between private interest and public interest. Although the publication in dispute was prior to the promulgation of [the Constitution](#) of Kenya 2010, the rights and freedoms, presently in Article 33(1) of [the Constitution](#) existed in some form and tenor under the retired constitution and the [Defamation Act](#). Article 33(1) above 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”. Article 34 guarantees the freedom of the media while Articles 25 and Articles 31 protect the inherent dignity of every person and the right to privacy.

39. So far as defamation is concerned, the said constitutional rights are reinforced by the provisions of the [Defamation Act](#). Contemplating these competing rights and resultant tension, Lord Denning MR stated in *Fraser v Evans & Others* [1969]1 ALL ER 8 that;-

“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.” *Gatley on Libel and Slander* 6<sup>th</sup> 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”.



40. 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.”

41. Here, the impugned publication was purportedly published on 01.06.2003. With respect to the 1<sup>st</sup> Defendant, there is no dispute in this case regarding ingredients (ii) and (iii) above as 1<sup>st</sup> Defendant readily admits to publishing the article in question in its statement of defence and appeared to concede to the issue during the trial. What it disputes, is whether the article as published is defamatory and false and or whether the defence of truth or fair comment as per Section 14 and 15 of the *Defamation Act* are available. The said Defendant also contends that the publication was made in the honest belief of the statement by an agent of the 2<sup>nd</sup> Defendant.

42. On the part of the 2<sup>nd</sup> Defendant, it principally denies ingredient (iii), in addition to ingredients (i) and (iv) and asserts that the defence of truth or fair comment are available to it. As I understand the thrust of the 2<sup>nd</sup> Defendant’s defence via its defence statement and evidence, especially the written statement of DW2, it is that while the said Defendant was not responsible for supplying the information contained in the article to DW1, it asserts the truth of statements concerning the poor quality of the works by the Plaintiff, long delays and consequent penalties to the Plaintiff.

43. In the court’s considered view, the liability of the 2<sup>nd</sup> Defendant largely depended on the Plaintiff demonstrating that the said Defendant was indeed responsible for publishing to DW1 the alleged offending statements contained in the 1<sup>st</sup> Defendant’s publication. The Plaintiff did not tender any credible evidence on this score and apparently relied on the fact that the article cited an employee of the 2<sup>nd</sup> Defendant, namely DW2, as the source of information in the article. DW1 in his evidence asserted that DW2 gave an interview during which he gave the information later published in the article. However, when pressed to produce evidence of the interview by way of recordings or notes, he admitted that he had neither. On his part, DW2 strongly refuted this evidence and denied he ever gave the subject interview or information to DW1. Thus, in the end, it was one man’s word of mouth against the other man’s denial.

44. The onus however rested on the Plaintiff to create a nexus between the publication and the 2<sup>nd</sup> Defendant. This, he failed to do, and in the circumstances, no liability can attach against the 2<sup>nd</sup> Defendant for the publication, the case against the said Defendant having failed the fundamental threshold, namely, proof of publication. By extension, the 1<sup>st</sup> Defendant’s portion of defence based on alleged honest belief in information supplied by the 2<sup>nd</sup> Defendant’s agent cannot stand in the circumstances.

45. Now moving to the twin disputed questions whether, as regards the 1<sup>st</sup> Defendant, the alleged publication was false and defamatory, some basic facts were not disputed. It is common ground that in the material period, the Plaintiff was a construction company that had been engaged via the subject



contract by the Ministry of Local Government to carry out rehabilitation works on several urban roads in Nyeri town; that the commencement letter of 27.12.1999 indicated that the completion period of the works was fifteen (15) months; and that the works had not been completed as of 28.01.2003 when the GOK terminated the said contract.

46. It is further undisputed that regarding these matters, the 1<sup>st</sup> Defendant published an article in the “Sunday Standard” newspaper on 01.06.2003 at Pg. 5 thereof entitled “Firm to forfeit Cash” which the Plaintiff viewed as false, malicious and without any justification. (See Para. 9 of the Complaint).

It is useful at this stage to set out in extenso the contents of the publication complained of. It read as follows: -

“A construction firm which was contracted to rehabilitate Nyeri town roads three years ago now stands to lose close to Sh10 million for its alleged shoddy work.

At the same time, the municipal council will receive Sh3 million to patch up the badly tattered roads in an emergency kitty from the Kenya Roads Board.

The town clerk, Mr. Richard Gikuhi, said consultants were expected today to determine how much Victory Construction company should forfeit for failing to complete the project.

The town clerk said Victory’s contract was cancelled by the government a few months ago after it emerged that it could never complete the 17-km road project.” (sic)

47. To ascertain whether the words referring to the Plaintiff were defamatory, the test to be applied is that spelt out in the case of the *Onama v Uganda Argus Ltd (1969) EA* by the East African Court of Appeal was that:

“In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those “who have a greater or special knowledge of the subject matter”.

48. The Court stated in *Elizabeth Wanjiku Muchira v Standard Ltd [2011] eKLR* that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the “probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published.”

See *Clerks & Lindsell on Tort 17<sup>th</sup> Edition 1995*-page 1018.”

49. Ex facie, the article published on 01.06.2003 asserts that the Plaintiff was at the risk of forfeiting Kshs. 10 million on account of alleged shoddy work and inability to carry out the works to completion. The latter statement being attributed to DW2. The article includes words and phrases such as “stands to lose close to Sh10 million for its alleged shoddy work”, “patch up the badly tattered roads”, “to determine how much Victory Construction company should forfeit for failing to complete the project” and “contract was cancelled by the government after it emerged that it could never complete the 17-km road project”.

50. The Plaintiff evidently viewed the key words and phrases in the article such as “alleged shoddy work” “forfeit for failing to complete the project” and “could never complete the ..... project” as false, malicious and defamatory. However, no particulars of defamatory imputation or malice were pleaded in the plaint as required under Order 2 Rule 7 of the Civil Procedure Rules despite the defence proffered by the 1<sup>st</sup> Defendant.



51. The Plaintiff was particularly irked by the assertion of "alleged shoddy works" and went to great lengths in his evidence to show how the statement was malicious, false and defamatory. However, as earlier noted, he failed to plead the particulars showing the defamatory, false and malicious imputations in his plaint. That said, the words "alleged shoddy works" bear an implicit caveat or qualification that the author is not asserting the truth of the statement. Indeed, the entirety of the article appears to comprise of a commentary on the subject contract.
52. 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".
53. The Court of Appeal in *Musikari Kombo* (supra) stated that: -
- "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."
54. At the hearing the Plaintiff's witness (PW1) denied the purport of the article and primarily asserted that it was false to impute that the contract in question was terminated on account of the Plaintiff having carried out shoddy work. He further stated that the article had an impact on the Plaintiff's reputation and business. He admitted during cross-examination that he had not tendered proof of loss of business and that in 2005 and 2007 the Plaintiff won contracts for the paving of the Kitui – Kangundo Road and the Makutano – Tawa Road, respectively, which were worth over 1 billion shillings. PW1's brief written statement is mostly taken up with the falsity of the publication and loss of business. It hardly addresses the defamatory aspects thereof.
55. Equally the written statement of PW2 merely stated that the publication conveyed a portrait of the Plaintiff that was contrary to his view of it, that such statements had "the propensity" to dent the credibility of the Plaintiff and "deny" it of business opportunities. In his oral testimony, PW2 sounded hypothetical by merely stating that the contents of the publication "could" damage the credibility of a contractor and affect its business. While admitting that he was not involved in the subject project and that the publication did not affect his relationship and or his view of the Plaintiff as a contractor.
56. As rightly contended by the 1<sup>st</sup> Defendant, to prove defamation, the burden rested with the Plaintiff, to demonstrate the tendency of the publication to lower its reputation in the eyes of the right-thinking members of society. The onus was on the Plaintiff to demonstrate that an ordinary reasonable person who knew the Plaintiff before or as of the date of publication of the articles would upon reading the said publication, view the Plaintiff differently. Or demonstrate that the article, whether believed by such reader or not, had the tendency to lower the reputation of the Plaintiff in the reader's eyes.



57. The sum total of the evidence by PW1 and PW2 appears weak on the aspect of the defamatory nature of the publication. In the court's considered view, the weakness of the Plaintiff's case fundamentally stemmed from its pleadings. The plaint was sketchy and without necessary particulars of the libelous imputations of the publication. The plaint, as was the case with the evidence of the Plaintiff, was focused on the falsity of the publication and alleged resultant loss of business, only mentioning the alleged libel in passing.
58. Moreover, the evidence by DW2 further dented the credibility of the Plaintiff's evidence; the said defence witness demonstrated through his written and oral testimony and documentation that indeed the works carried out by the Plaintiff were wanting, marred by unrectified defects and delays leading to cancellation of the contract and liability for penalties (and not forfeiture as described in the article) against the Plaintiff. This evidence puts to doubt the assertions by the Plaintiff regarding the publication being false and defamatory.
59. As stated in Hezekiel Oira (*supra*) 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 his reputation, causing right thinking members of society to shun or avoid him or to treat him with contempt.
60. In *S M W* (*supra*), the Court of Appeal observed that: -
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).
61. In the absence of proof to the required standard of the defamatory effect of the publication on the Plaintiff, it is difficult to see how a claim founded on the tort of defamation could succeed, whether the defenses of truth or fair comment raised by the 1<sup>st</sup> Defendant were sustainable or not. The court



has already found that the Plaintiff failed to prove the basic ingredient of publication, hence liability, against the 2<sup>nd</sup> Defendant.

62. Consequently, the Plaintiff has failed to prove all the ingredients of defamation to the required standard against the two Defendants. The Plaintiff's suit must fail and is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF DECEMBER 2024.**

**C. MEOLI**

**JUDGE**

In the presence of:

Mr. Kandere for the Plaintiff

Mr. Ngechu for the 1st Defendant:

Mr. Wahome for the 2nd Defendant:

C/A: Erick

