



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 112 OF 2009**

**Consolidated with**

**HIGH COURT CIVIL CASE NO. 110 OF 2009**

**STEEL STRUCTURES LIMITED .....PLAINTIFF**

**VERSUS**

**ROYAL MEDIA SERVICES ..... 1<sup>ST</sup> DEFENDANT**

**FRANKLIN MACHARIA .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted the suit against the Defendants under two separate files. The two cases were consolidated on 16/10/2014 as the cause of action was the same and arose from the same circumstances. The Plaintiff prayed for damages for defamation, aggravated, exemplary and punitive damages, costs and interest.
2. The 1<sup>st</sup> Defendant, Royal Media Services Limited was sued as a news broadcaster while the 2<sup>nd</sup> Defendant was sued as a journalist who was working for the 1<sup>st</sup> Defendant.
3. The Plaintiff's claim against the Defendants was that on or about the 16/9/2008, the Defendants maliciously, falsely and without any justification aired a news item on the 7.00 p.m. and 9.00 p.m. **Citizen Television** that the Plaintiff company locked out its injured workers without any payment or compensation; that the Secretary General of **COTU** Francis Atwoli had been chased away from the Plaintiff's premises; that Mr. Atwoli threatened to take the Minister for Labour there to witness the suffering of workers; that the media was not allowed into the factory's operations section where workers were said to have been injured; that there was questioning of what was being hidden inside the premises and that a worker was interviewed who stated that he had agonized for long and was not taken to hospital for a week after his fingers were cut.
4. It was further pleaded that the same clip was repeated during the 9.00 p.m. news where it was alleged that the injured worker with chopped off fingers had been sacked without compensation; that Mr. Atwoli called on the government to address the plight of workers or have the company's trading licenses cancelled and a comment was made that the reception accorded to Journalists and workers' representatives was a sign of how bad things were inside.
5. It was further pleaded that the said publications have injured the Plaintiff's reputation and brought the company to public scandal, odium and contempt before the right thinking members of the society. That the said publication was driven by malice, malevolence and spite.
6. The claim is denied as per the separate statements of Defence filed by the Defendants. It was pleaded that the words complained of were published in good faith, in public interest and without malice. That the publication is privileged, fair comment, justified and was made on matters of public interest. That the matters published were true in substance and were published pursuant to the freedom of speech guaranteed under Article 79 of the Constitution.
7. PW1 Francis Kithusi Njenja, the Human Resource Manager with the Plaintiff Company testified. He referred to the words complained of and stated that the words depicted the Plaintiff as a company that does not have safe working conditions; does not consider the plight of its workers; is a profit making outfit whose ends justify the means; has no mechanism to address the plight of workers; has violated the laws of the country and should not be allowed to do business in Kenya or be associated with the right thinking members of the society.
8. PW1 further testified that the said words meant or were understood by way of innuendo to mean that the Plaintiff exploits people for its

own profit; has no regard for human life, welfare or wellbeing; has unfit work environment and ought to be closed down, is hiding acts of violation of human rights on its employees; and does not respect due processes or Ministry of Labour officials.

9. PW1 described the Plaintiff as a company that prior to the publication complained of enjoyed good reputation as a leading manufacturer and fabricator of steel structures. That the publication in question has exposed the Plaintiff to ridicule, odium and contempt by the right thinking members of the society. That as a consequence thereof, the Plaintiff has suffered in its reputation. It is the evidence of PW1 that the words complained of were published maliciously, without any justification, verification, were untrue and were aimed at tarnishing the Plaintiff's reputation.

10. Referring to the visit to the factory by the Secretary General of COTU, Mr. Atwoli who was in the company of COTU officials and the Media, PW1 further testified that after a brief introduction in the conference room, the aim of the visit was stated to be familiarization with the factory. That PW1 protested the presence of the media as the premises was a Private company and the media personnel went to the reception and he was left with Mr. Atwoli and the COTU officials.

11. PW1 further testified that when he saw the news aired on Citizen Television that evening, the clip of the visit was accompanied by a comment by the 2<sup>nd</sup> Defendant that Mr. Atwoli had been denied entry into the factory. That the clip also showed a person with amputated fingers which was also accompanied by a comment by the 2<sup>nd</sup> Defendant. That Mr. Atwoli was also shown saying that the company did not mind the safety of workers and should be closed.

12. PW1 produced two video recordings of the news item. The clips were played in court. It was pointed out that the first clip was of a construction site which was not related to the Plaintiff but that the Plaintiff's signboard with the Plaintiff's name and logo was shown. That the workers at the construction site had no protective gear and were working on open machines. That the news reporter also talked of a strike but the strike had nothing to do with the Plaintiff. That other companies not related to the Plaintiff company were also aired in the said clip and reflected an injured person and lack of protective equipment in the factories, with the 2<sup>nd</sup> Defendant reporting and also stating that there were more issues hidden from the public.

13. PW1 further stated that one of their former workers by the name Bernard Guto had been at their premises and was one of the workers shown in the clips. PW1 stated that the said injured worker had been referred to the Labour Offices and insurers and was taken to hospital but had not yet been compensated as he had not recovered.

14. The 2<sup>nd</sup> Defendant Franklin Macharia (DW1) testified on behalf of the Defendant. He described himself as a Journalist who worked for the 1<sup>st</sup> Defendant at the material time. He stated that he covered the visit by the COTU Secretary General at the Plaintiff's premises. His contention was that the story was factual. That the request by Mr. Atwoli to access and inspect the premises was denied and that the worker whose fingers were amputated while working at the Plaintiff's factory was also interviewed.

15. Defamation is defined in **Winfield in J.A. Jolowicz and T. Ellis Lewis – Winfield on Tort 8<sup>th</sup> Edition**, thus:

**“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person.”**

**A defamatory statement, according to Gately on Libel and Slander 8<sup>th</sup> Edition by Phillips Lewis paragraph 4 page 5 discredits a man or 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.”**

16. The Court of Appeal in the case of **Wycliffe A Swanya v Toyota East Africa Limited & another Nairobi CA No. 70 of 2008** set out the elements of defamation thus:

**“It is common ground that in a suit founded on defamation the plaintiff must prove:-**

**(i) That the matter of which the plaintiff complains is defamatory in character.**

**(ii) That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.**

**(iii) That it was published maliciously.**

**(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages.”**

17. From the above evidence from both the Plaintiff and the Defendant, it is not in dispute that Mr. Atwoli the Secretary General COTU visited the Plaintiff's premises in the presence of COTU officials and Journalists.

18. The Plaintiff's own evidence established that access into the factory was denied. PW1's evidence was that access was denied to the members of the press and further reflects that the COTU officials were left with him in the conference room. This gives credence to the evidence by the Defence that access to the operating area was denied. PW1 also conceded during cross-examination that one of the Plaintiff's former workers by the name Bernard Guto whose fingers were amputated while on duty and had not yet been compensated was also captured in the clip.

19. By and large, this court's view is that the clips in question substantially reflected the truth. There was therefore no malice or recklessness. (See for example **Hon. Uhuru Muigai Kenyatta v Baraza Limited [2011] eKLR**; **Phineas Nyagah v Gitobu Imanyara 2013 eKLR**).

20. As stated in **Carter-ruck on libel and slander 5<sup>th</sup> Edition** at page 54:

**“In order to succeed upon a plea of justification, the onus lies upon the Defendant to prove ‘that the whole of the defamatory matter complained of, that is to say, the words themselves, and any reasonable inference to be drawn from them are substantially true. On the other hand, for the defence to be successful, it is not necessary that every “t” should be crossed and every “I” dotted; it is sufficient if the substance of the libelious statement is justified. As much must” be justified as meets the sting of the charge and if anything contained in the charge which does not add to its sting that need not be justified.”**

21. In any action for defamation in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to the facts alleged or referred to in the words complained of.

As stated by the Court of Appeal in the case of **Nation Media Group Ltd & another v Alfred N. Mutua [2017] eKLR**

**“28. To sustain the defence of fair comment, the appellants were required to demonstrate that the words complained of are comment, and not a statement of fact; that there is a basis of fact for the comment, contained or referred to in the article complained of; and that the comment is on a matter of public interest [See Gatley on libel and slander 8<sup>th</sup> edition 1981 (Sweet & Maxwell) at paragraph 692 at page 291].”**

22. The complaint regarding another construction site and other workers who appeared on the clip with the Plaintiff's signboard in the background is not anchored in the pleadings herein.

23. PW1 was the only witness who testified on behalf of the Plaintiff. No independent witness was called in support of the assertion that the Plaintiff enjoyed a good reputation which suffered as a consequence of the publication.

24. As espoused by the Court of Appeal in the case of **Selina Patani & another v Dhiranji V Patani [2019] eKLR**:

**“No other third party was called to testify as to the publication and injury to reputation. As to whether the appellants character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication.”**

25. With the foregoing, this court finds the Plaintiff's case has not been proved on a balance of probabilities.

26. If the Plaintiff's case had succeeded, I would have awarded Kshs. 4,000,000/= as damages for defamation, Kshs. 500,000/= for exemplary damages and Kshs. 500,000/= as aggravated damages. The total would have come to Kshs. 5,000,000/=. Having found the Plaintiff's case not proved on a balance of probabilities, I dismiss the same. Taking into account the circumstances of the case, each party to bear own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY, 2021**

**B.THURANIRA JADEN**

**JUDGE**