



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. E026 OF 2020

MANISHA HIRANI.....PLAINTIFF

VERSUS

MITAL VIRCHAND SHAH.....DEFENDANT

JUDGMENT

1. Manisha Hirani (the plaintiff) sued Mital Virchand Shah (defendant) vide the plaint dated 6th July 2020 through the firm of Ombati Ong'au and company advocates claiming damages for defamation. She also sought for an order of injunction to restrain the defendant from further publishing or causing to be published defamatory words against her.

2. By a chambers summons dated 20th November 2020 the plaintiff sought leave of the court to serve the defendant by substituted service. The preferred mode was his last known address which was an email m@dylex.com and WhatsApp No. +97154 xxx xxx. The said application was heard by Justice C. Githua on 14th December 2020 where the leave sought was granted. He was served but did not enter appearance nor file defence. Interlocutory Judgment was entered against him on 15th March 2021.

3. In her testimony during formal proof, she adopted her witness statement in which she states that she diligently worked for the defendant's company (Legacy Forex Bureau) from 1st August 2018 to 31st October 2019. Later the defendant maliciously published a libelous report about her which he caused to be circulated. The report indicated that the plaintiff had stolen Kshs. 63,000,000/= from his company.

4. She averred that the report meant and was understood to mean the following:

- a) She fraudulently converted Kshs. 63,000,000/= from the defendant's company
- b) She is a thief
- c) She is dishonest.
- d) She is an untrustworthy person
- e) She permanently deprived the defendant of Kshs. 63,000,000/=
- f) She engages in criminal activities

5. She stated that the defendant reported her to the Directorate of Criminal Investigations (DCI) who summoned her to their offices. As a result of the defendant's actions she has been looked down by members of the Asian community of Kenya, the shareholders and directors of the defendant's company plus her colleagues in the business community.

6. She further stated that she has been shunned to the extent that getting a job has been a real challenge. To date no charges have been preferred against her. She produced her contract – (Itax returns for 2018 and 2019), copy of the resignation letter, email reflecting resignation and the demand letter (PEXB1-4).

7. It is her evidence that she worked for the defendant as the assistant principal officer, dealing with clients providing taxes. The defendant's

company deals with Forex exchange. Though accused by the defendant of stealing Kshs. 63,000,000/= she denied ever handling cash. At the Directorate of Criminal Investigation (DCIO's) offices at Milimani she saw the report against her and even recorded a statement.

8. The officer at the DCI offices called the defendant who never picked his calls. She stated that the defendant had called Ajay (PW2) among others to tell them of the allegation against her. She recently got a job after staying home for nine (9) months.

9. She called one witness Mr. Ajay Gupta who testified as PW2. He stated that he runs an Information Technology (I.T) company dealing in soft wares and he knows both parties herein. He adopted his witness statement dated 4th June 2020. He averred that on 10th March 2020 the defendant had called him using telephone No +97XXX and informed him that the plaintiff was neither trustworthy nor reliable and had stolen from him a large amount of money. He is aware that the plaintiff worked for the defendant at his company for 1 ½ years during which period no complaints were raised by the defendant regarding her conduct or engagement.

10. He also averred that the Asian Community is closely knitted and utterances such as those by the defendant portray one in very bad light. He confirmed that the said utterances had spread so fast across their community. He has known the plaintiff as a person of sound standing both professionally and socially and commanding mutual respect within the Asian community of Kenya.

11. Mr. Ombati for the plaintiff filed submissions dated 22nd July 2021 with a long list of authorities. He submitted that the defendant's accusation against the plaintiff upon her exit was part of his scheme to frustrate and disparage her. Despite the defendant's unorthodox antics, the plaintiff has never been formally charged with any offence.

12. He cited the case of **J. Kudwoli & another v Euraka Educational and Training Consultants & 2 others [1993] eKLR** where the elements of the tort of defamation were listed as:

- a) That the matter of which he complains was published by the defendant, and
- b) That it was published of and concerning him, and
- c) That it is defamatory in character; and,
- d) That it was published maliciously; and
- e) That in slander, subject to certain exceptions, that he has thereby suffered special damage.

13. Counsel submitted that words imputing a criminal offence punishable by a term of imprisonment are actionable without proof of special damage. He relied on the cases of

- i) Dennis Rosana Oroo v Hezron Otochi Nyambane [2021] eKLR
- ii) Awili v Attorney General [1981] eKLR
- iii) Gray v Jones [1939] I ALLE.R 798.

14. He therefore submitted that the offending utterances by the defendant fall under section 3 of the Defamation Act which provides:

“In any action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.”

Citing 268 and 275 of the Penal code counsel submitted that the nature and character of the defamatory accusations by the defendant are actionable per se.

15. He also referred to the case of **SMW v ZWM [2015] eKLR** where it was stated:

“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.”

He thus submitted that the plaintiff had been affected by the defendant's utterances such that the members of her Asian community looked at her negatively and she took long to get a job because of the said utterances. Also see **Musikari Kombo v Royal Media Services Limited [2018] eKLR**.

16. On the uttered words being malicious counsel contended that the defendant knew they were false. That his refusal to accept the plaintiff's resignation is indicative of the subsequent malice. On this he cited the cases of:

- i) Joseph Njogu Kamunge v Charles Muriuki Gacheri [2016] eKLR

ii) J.P Machira t/a Machira and company advocates v Wangethi Mwangi & another [1988] eKLR

iii) Godwin Wachira v Okoth [1977] KLR 24

iv) Bernard Muinde Mutisya v Gedeon Kithuka Mutua [2019] eKLR

17. Counsel argues that the defendant's actions are a reflection of malice and despite the notice of intention to sue and demand for an apology the defendant has elected to ignore the plaintiff whose evidence remains unconverted. He adds that besides the publication the defendant called PW2 and repeated the said words to him. He argues that the plaintiff's reputation was completely lowered.

18. For the award of damages counsel has referred the court to numerous authorities and suggested Kshs. 8,000,000/= for general damages and Kshs. 2,000,000/= as aggravated damages. Some of the cases cited are

i) Barclays Bank of Kenya v Francis Manthi Masika company advocates [2020] eKLR by Justice Odunga

ii) Mary Koli Kitonga v Ghetto Radio Limited [2020] eKLR by Sergon J

iii) Joseph Njogu Kamunge v Charles Muriuki Gachari (supra)

19. He therefore urges the court to find for the plaintiff and award her both general and aggravated damages.

Analysis and determination

20. I have considered the pleadings in the plaint, the evidence on record and the submissions and the cited authorities. I find two issues to be falling for determination namely:

i) Whether the plaintiff has established that the publication in question is defamatory.

ii) Whether the plaintiff is entitled to the reliefs sought.

21. Defamation has been defined in legal writings and case law. In the Black's law dictionary 10th edition at page 506 it is defined as:

"1. Malicious or groundless harm to the reputation or good name of another by the making of a false statement to a 3rd person.

2. A false written or oral statement that damages another's reputation."

A textbook of the Law of Torts 5th edition 1950 at page 242 states:

"Defamation is the publication or 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."

22. Gately on Libel and Slander 10th edition page 8 states:

"There is no wholly satisfactory definition of defamatory imputation. Three formulae have been particularly influential:

1. Would the imputation tend to "lower the plaintiff in the estimation of right – thinking members of society generally"

2. Would the imputation tend to cause others to shun or avoid the claimant"

3. Would the words tend to expose the claimant to 'hatred' contempt or ridicule. The question what is defamation relates to the nature of the statement made by the defendant: words may be defamatory even if they are believed by no one and even if they are true, though in the latter case they are not, of course actionable."

23. From the above definition it follows that defamation occurs when the defendant publishes to a 3rd person words containing imputation of the plaintiff. The plaintiff's complaint is that the defendant published the words complained of to the DCIO Milimani police station and Mr. Ajay Gupta (PW2). There was no response to the plaint despite the defendant having been served.

24. The words complained of are to the effect that the plaintiff who was a former employee of the defendant had stolen Kshs. 63,000,000/= from the company. The plaintiff's claim falls under slander which is an angle of defamation. It relates more to the spoken word than the written word. Section 3 of the Defamation Act which has been cited elsewhere in this Judgment provides:

"In any action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business."

25. The ingredients of defamation as summarized in the case of **John Ward v Standard Ltd, HCCC NO. 1062 of 2005** are 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.

26. From the pleadings and the evidence of the plaintiff and PW2 it is very clear that the statement complained of was published by the defendant and it refers to the plaintiff. This is supported by the evidence that the plaintiff was employed by the defendant. She sought to resign vide her letter dated 1st September 2019 (PEXB2) and the response she got was that the resignation was not acceptable to the directors (PEXB3). Further, when served with a demand letter (PEXB4), the plaintiff and summons to enter appearance the defendant never reacted nor responded to them.

27. I find that the statement is false for the reason that the defendant reported the plaintiff to the DCI Milimani and she was summoned there and was shown the report and asked to record a statement which she did. She testified that while still at the police station the police officer called the defendant severally but he never picked the calls nor answered back.

28. As mandated by the law, the DCI must have investigated the complaint with no positive results and that is why no formal charges have been preferred against the plaintiff. All this goes to confirm that the statement by the defendant against the plaintiff was false.

29. The remaining element is whether the statement is defamatory. The statement complained of in its natural and ordinary meaning was understood to mean the plaintiff was a thief, dishonest, untrustworthy and has unlawfully enriched herself with the defendant's money (Kshs. 63,000,000/=) and she is therefore a criminal who should not be employed by anyone. With all these imputations and innuendos, against the plaintiff and the fact that the statement is false my finding is that it is a clear defamatory statement. See **Musikari Kombo v Royal Media Services Ltd**(supra)

30. The statement by the defendant has not been justified at all. These utterances by the defendant can only be termed as being malicious. Malicious does not necessarily mean spite or ill will but there must be evidence of malice and lack of a justifiable cause to utter the words complained of. See **Joseph Njogu Kamunge** (supra).

31. From the evidence of the plaintiff and PW2 the defamatory statement has portrayed her in very bad light especially among members of her community. PW2 testified that the utterances by the defendant disseminated very fast within the Asian community which is usually very closely knitted together. The plaintiff also stated that she was shunned for a long time among colleagues and friends especially when she tried to secure a job. I therefore find that the plaintiff is entitled to damages.

32. The rationale behind awarding of damages in defamation actions is for restoration or giving back to the party injured what he/she lost save in exceptional circumstances where punitive or exemplary damages may be awarded. Section 16A of the Defamation Act provides:

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings”

33. In the cases of **Nation Media Group Ltd & 2 others** (supra) it was held that:

“Obviously, reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. See Reynolds v Times Newspapers [2002] 2 LRC 760.”

34. In this case the utterances by the defendant have negatively affected the plaintiff's reputation in her community, among her colleagues and even the family. I find that the plaintiff is entitled to aggravated damages. The reason is that the offending words by the defendant were false. Being falsely accused of stealing Kshs. 63,000,000/= is no mean issue. The defendant has never been apologetic for this wrong doing.

35. Relying on the **Muskari Kimbo** case (supra), **Habihalim Company Limited v Barclays Bank of Kenya Limited [2019] eKLR**, and **Omulo Okoth Vs Sam Nyamweya & 2 others [2020] eKLR** and after considering the evidence and submissions and the law applicable, I enter Judgment in favour of the plaintiff against the defendant as follows:

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|-----------------------|--------------------------|
| a) General damages | Kshs. 5,000,000/= |
| b) Aggravated damages | Kshs. 2,000,000/= |
| TOTAL | Kshs. 7,000,000/= |

c) An injunction to issue restraining the defendant, himself, his servants, agents or otherwise from further publishing or causing to be published defamatory words against the plaintiff.

d) Costs to the plaintiff plus interest at court rates to be calculated from the date of Judgment.

Orders accordingly

DELIVERED ONLINE, SIGNED AND DATED THIS 8TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE