



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL CASE NO. 10 OF 2014

JOSEPH KARISA MWARANDU.....1ST PLAINTIFF

JOHN BAYA MITSANZE2ND PLAINTIFF

MALINDI DISTRICT CULTURAL ASSOCIATION3RD PLAINTIFF

VERSUS

SCORPIO VILLASDEFENDANT

Coram: Hon. Justice Reuben Nyakundi

Gekanana & Co. Advocates for the Plaintiffs

Kiarie Kariuki & Co. Advocates for the Defendant

JUDGEMENT

A fast track Plaint dated 17th March 2014 subsequently filed on 14th April 2014 is the premise upon which the instant suit is based. The Plaintiffs pray for judgement against the Defendant for:

- a. Declaration that the treatment of the Plaintiffs by the Defendant hotel was discriminatory.*
- b. Injunction to restrain the Defendant from further treating the Plaintiffs in a discriminatory manner.*
- c. General damages for:*
 - a. Mental torture and injured feelings.*
 - b. Defamation of character.*
 - c. Breach of constitutional rights.*
 - d. Costs of and incidental to this suit.*
 - e. Interest on (c) and (d) at Court rates.*
 - f. Any other or further relief this Honourable Court deem just to grant.*

The Facts as pleaded by the Plaintiffs

The gist of the Plaintiffs' case is that on 16th April 2013, the 1st and 2nd Plaintiffs were among persons invited to attend a four-day Interfaith Seminar organized jointly by Coast Interfaith Council of clerics and the Catholic Relief Services and held at the Defendant's premises. According to the Plaintiffs, at lunch time on the material day as the 1st and 2nd Plaintiffs were joining the other participants for a meal in the Defendant's Dining, they were restrained from taking lunch by the servants and/or agents of the Defendant on the basis that the traditional attire which they were wearing offended the dressing code of the Defendant Hotel. Additionally, they contend that they were informed their attire offended Public Health Laws and regulations and that the said Plaintiffs disposition was unhygienic in that their hair would drop off and contaminate the meals which other Hotel customers would consume. It is this treatment by the Hotel Management that the Plaintiffs

maintain was tantamount to a breach of their Constitutional rights. Particularly, the Plaintiffs contend that this treatment amounted to discrimination based on their faith, culture and their station in life.

As a result of this alleged breach of Constitutional rights, the Plaintiffs' contend that they endured mental anguish, were treated with utmost contempt and exposed to ridicule by the right-thinking members of the Society. For these transgressions, the Plaintiffs demand from the Defendant an unquantified apology, general damages for breach of constitutional rights and injured feelings, an injunction restraining the Defendant's servants and/or agents from further treating the Plaintiffs in discriminatory manner as well as damages for defamation of character.

The Defence

In its Defence dated 10th June and filed on 12th June 2014, the Defendant asserts that while it is true that there was a seminar taking place at its premises on the dates stated by the Plaintiffs, it could neither confirm its purpose nor invited attendees. The Defendant contends that just like any other hotels, restaurants or private clubs, it has rules and regulations and reserves the right of admission of any person to its premises. It further states that in respect to the dining hall, the Defendant has a dress code which dress code must be adhered to by all persons entering the dining hall. It contends that it is part of the dress code that unless a person is wearing a shirt or T-shirt and a long trouser or a short they cannot be allowed to enter the dining hall to take meals there and that any attire which exposes one's nakedness or partial nakedness is not allowed at all in the dining hall even though the same will be allowed in other parts of the hotel including the swimming pool, the rooms and any other halls where seminars take place.

The Defendant avers that on 16th April, 2013 the Plaintiffs wanted to enter the dining hall without wearing shirts or T-shirts and that their upper bodies above the waist were totally exposed and thus this was the reason they were restrained from entering the dining hall as this was against the dress code.

It is denied that the Defendant's servants and/or agents did allege that the traditional attire offended Public Health Laws and regulations and that the Plaintiffs disposition was unhygienic as alleged in paragraph 10(b) of the Plaintiff.

The Defendant denies that there was breach of the Plaintiffs' constitutional rights as alleged or at all and states that the Plaintiffs were well aware of the Defendant's right to reserve the right of admission to the dining hall with respect the dress code and consequently it cannot be alleged that the Plaintiffs were discriminated as they were treated like any other guests in the hotel and therefore the allegation of mental suffering, treatment with utmost contempt and exposure to ridicule by right thinking member of the society is baseless and is a figment of the Plaintiffs' imagination.

Per the Defendant therefore, the demand for an unqualified apology, general damages and damages for defamation and injunction are baseless and ought not to issue and that conversely, the Plaintiffs' suit ought to be dismissed with costs.

Evidence at Trial

Adopting his witness statement, **Joseph Karisa Mwarandu**, the 1st Plaintiff states that he is an Advocate of the High Court, a Secretary General of Malindi District Cultural Association (MADCA) and a Kaya Elder. He explains that MADCA is a member of Coast Interfaith Council of Clerics (CICC) representing Indigenous Faith in the Coast Region and also the secretariat for **Kaya** Elders. He avers that on several occasions, MADCA is invited to attend forums organized by Coast Interfaith Council of Clerics in collaboration with Catholic Relief Services (CRS). During such forums, it is contended, members of MADCA dress in Mijikenda traditional attire to represent both their culture and their faith.

The 1st Plaintiff avers that on 16th April 2013, together with the 2nd Plaintiff and others, they were invited to attend a Four Day Seminar at the Defendant hotel. That during lunch, he joined the 2nd Plaintiff and the other participants for lunch at the Defendant's dining hall but on reaching the door of the dining hall, he and the 2nd Plaintiff were restrained from entering into and taking meals on account of their dressing in traditional attire and that they were described as being nude.

According to the 1st Plaintiff, the Defendant's servants and/or agents contended that they could not take meals because the traditional attire which we were wearing offended the Defendant Hotel's dressing code, offended Public Health laws and regulations and that their hair would drop into the food which the Defendant's customers would consume.

The 1st Plaintiff avers that they demanded to have a copy of the Public Health laws and regulations barring them from taking meals in their attire in vain. This treatment it is contended by the 1st Plaintiff, was a breach of their constitutional rights as it was tantamount to discrimination on the basis of faith, culture, and station in life. As a result, he further contends, he suffered mental anguish as he was treated with utmost contempt and exposed to ridicule by the right-thinking members of the Society. Based on the foregoing, the 1st Plaintiff demands the reliefs sought herein.

On cross examination, **PW1** confirmed that they were 3 of them dressed in **Kaya** attire which is culturally acceptable and compliant within their community, that's when he was stopped by the supervisor of the defendant's hotel and told not enter the dining room because his attire was not compliant with the set standards of attire during dining hours.

He then raised an objection that he was properly dressed and there was no earlier notice on the acceptable attire for those admitted to take lunch.

He found this act by the supervisor discriminatory and against enjoyment of his cultural rights for reason of just his mode of dressing.

That while the defendant might have their reason, he was not given notice and, in any event, they had been allowed to use the facilities for a cultural event at the hotel.

They were kicked out and asked to find a different mode of dress and this adversely affected his mental state. He is an elder, recognized kaya leader, a senior lawyer and the whole cultural event he was leading went into disarray because of that action.

That the public who him as a Kaya leader and lawyer were perplexed that he was detained without proper reason. That he didn't think that there are any obligations to wear a particular attire, let alone the discrimination against an attire which is culturally recognized.

The 2nd Plaintiff, **John Baya Mitsanze**, states that he is the Secretary of MADCA, a Researcher and a Kaya Elder. His testimony is a reiteration of the rendition of events as given by the 1st Plaintiff and he also seeks from the Court similar reliefs as the 1st Plaintiff.

On cross examination, admitted that that was his first time visiting the hotel wearing his cultural attire. That the kind of attire was a lesa which leaves the chest bare. That is when he was restrained at the entrance to the dining hall because his dress code was not in line with the hotel regulations for visitors who are permitted to dine at the facility. That he and PW1 were discriminated and restrained from entering the dining hall without notice on the kind of dress code to be worn during dining hours.

That he could see Europeans wearing beach shorts but they were still allowed into the dining hall.

Testifying on behalf of the Defendant, **James Iha** avers that he is a resident of Matsangoni, a businessman and a hotelier by profession. His testimony is that he was employed by Scorpio villas in 2007 as a Food and Beverage Supervisor. His duties entailed food production, invitation of clients to the restaurant, explanation of the food being served and supervision of the waiters in charge of both the restaurant and the bar.

According to the Defendant's witness, on 16th April 2013, he was on duty at the hotel and attending the seminar which was organized by Coast Interfaith Council of Clerics and Catholic Relief Services which was taking place at the conference hall. His testimony is that they broke for lunch at around 12.30 pm and all participants went to the restaurant to have lunch. At the entrance of the restaurant, the assistant head waiter namely Feisal Yusuf informed the Plaintiffs, **Joseph Karisa Mwarandu** and **John Baya Mitsanze**, that they were inappropriately dressed and could not be allowed into the restaurant. His evidence is that they were dressed in their Giriama traditional attire which consisted of a kikoi tied round the waist. That they were bare chested and had tied "**matungo**" across their chests.

He explains that upon denial of entry, the Plaintiffs were upset. That he was called to the restaurant by **Feisal Yusuf** to sort out the issue upon which he went to **Mr. Simone Mancini**, the Director of the hotel advising him of what had transpired. Per his testimony, **Mr. Mancini** advised him that the Plaintiffs could not be allowed into the restaurant while being half naked as the hotel had a specific dress code that had to be adhered to by all persons entering the restaurant to dine. He further states that this dress code was that all males entering the dining area had to wear long trousers or shorts and a shirt or tee shirt. This dress code allowed in the restaurant or dining area was applicable to all clients who visited the hotel and was not only limited to the Plaintiffs. As such, he contends, the Plaintiffs cannot allege to have been discriminated against on account of that. **Mr. Iha** further stated that he never heard any person stating that the Plaintiff's traditional attire offended the Public health Laws and Regulations.

On Cross examination, DW1 stated that there is a notice at the reception area concerning the dress code. That only the acceptable dress code was allowed in the dining area particularly during meal times because of the diversity of the visitors the hotel accommodates. That the notice on dress code applied to both males and females and they had sent a member of staff to inform the Plaintiffs about the rules on dress code which they ignored and insisted that they were properly dressed.

Kitsao Lewa also testified for the Defendant. In sum, his testimony was that he is a resident of Malindi and currently a waiter. He averred that on the material date he was working as a waiter at the Defendant hotel attached to the dining. That it was at 12.45pm that they set to serve lunch to the visitors who were having a seminar within the facility. That he heard the supervisor issuing instructions about the dress code to the customers. This was specifically to the ones who wore kikois with a bare chest as they were not in proper acceptable dress code. They were therefore asked to go back to the conference hall. That he had worked for 2 years and in those years there was always notice for the dress code. A man is supposed to wear long pants with a top which may be a t-shirt or a shirt without exposing the nakedness part of his body.

On Cross examination he averred that it was the supervisor who stopped the customers to inform them about the dress code. That the Plaintiff's in this case had their meals in the conference hall other than the usual dining hall. That it was a cultural conference but for the dining hall their dress code was not allowed.

The Submissions

Counsel for the Plaintiffs' identified five issues to which he proceeded to address the court on. These issues are:

- a. Whether the Plaintiffs had been invited by the Hotel Management to attend the Scheduled seminar on the 16th day of April, 2013.*
- b. Whether upon arrival and before start of the seminar the Defendant Management staff had forewarned the Plaintiffs against their attire.*
- c. Whether the 1st and 2nd Plaintiffs were subjected to humiliation, mental fortune, and intrigue.*

d. Whether denial to enter to the dining hall by the Defendant staff amounted to defamation of character and a breach of the Plaintiffs' constitutional rights.

e. Whether the 1st and 2nd Plaintiffs are entitled to any damages.

Reiterating the facts of the case and evidence at trial, Counsel for the Plaintiffs' submits that while it is not gainsaid that management reserves the right of admission, one is allowed to exercise his/her constitutional right and enter into any hotel institution in so far as his behaviour does not offend the other members of the society. It is submitted therefore that the act of preventing the Plaintiffs from entering the dining hall amounted to discrimination, reducing the Plaintiffs to simple creatures of straw and their character was demeaned before the right-thinking members of the society. As such, it is submitted, the Plaintiffs deserve compensation for damages suffered.

On the question of damages, it is submitted that the Plaintiffs' are deserving of damages for mental torture and injured feelings, defamation of character, breach of constitutional rights as well as costs of and incidental to this suit. Reliance is placed on the cases of **Abdi Mohamed Farah -Vs-The Nairobi Star Publication Ltd. & Dominic Wabala-Hccc No.15 Of 2013 And Phinehas Nyagah -Vs Hon. Gitobu Imanyara – Hccc No.697 Of 2009** for the conclusion that this Court ought to award general damages of Ksh. 7,000,000.00/= and 4,000,000.00/= to the 1st and 2nd Plaintiffs respectively; exemplary damages to the tune of Ksh. 1,000,000.00/=; special damages of Ksh. 6,530 as well as costs of the suit and interest on the sums.

For the defence, five issues were to be submitted upon; to wit:

- 1. Whether the denial of entry into the dining hall of the 1st and 2nd Plaintiffs was discriminatory.*
- 2. Whether the 1st and 2nd Plaintiffs' right to dress in the Mijikenda cultural attire is absolute.*
- 3. Whether the notification by the dining hall supervisor to the 1st and 2nd Plaintiffs not to enter the dining hall amounted to defamation.*
- 4. Whether the Plaintiffs have proved their claim as against the Defendant on a balance of probability.*
- 5. Whether the Plaintiffs are entitled to the prayers sought in the plaint and who shall bear the costs of this suit.*

Tackling the issue of whether the denial of entry into the dining hall of the Plaintiffs' was discriminatory, Counsel refers to the **Black's Law Dictionary Pocket Edition (1996)** for a definition of discrimination and submits that discrimination implies distinction, exclusion, restriction or preference. Reference is also made to Article 27 of the Constitution of Kenya 2010 which provides for equality and freedom from discrimination and it is contended that the exclusion of the Plaintiffs from the Defendant's dining area did not amount to discrimination. Rather, it is submitted that it was a reasonable action. This point is supported by **RM =Vs= Attorney General {2006} eKLR**.

Advocate for the Defendant submits that while the Plaintiffs' right to hold the Mijikenda culture is absolute, the right to manifest it by dressing in the Giriama cultural attire is subject to certain limitations. That the denial of entry was for a legitimate purpose; there was an accepted dress code that was allowed within the said dining hall and this dress code was placed at the Defendant's reception. Therefore, it is submitted, the dress code was applicable to all guests who were men and as such, the Plaintiffs denial of entry into the dining area while not properly dressed was reasonable and not discriminatory.

As for whether the notification by the assistant head waiter to the Plaintiffs' not to enter the dining hall amounted to defamation, it is submitted that it did not. Referring to **Black's Law Dictionary Pocket Edition (1996) and Winfield and Jolowicz on TORT, 12th Edition** for the definitions of Defamation and slander, it is submitted that the elements of defamation are that the words must be defamatory in that they must tend to lower the Plaintiff's reputation in the estimation of the right minded persons, or must tend to cause him to be shunned or avoided. The words must refer to the Plaintiff and the words must be maliciously published.

It is submitted that the notification by the head waiter was not defamatory as it was not intended to lower the Plaintiffs' reputation or cause them to be shunned. That the Plaintiffs' did not offer any evidence of publication and neither did they show the words were maliciously uttered. In support Counsel cites **George Mukuru Muchai =Vs= The Standard Ltd {2001} eKLR**.

Addressing whether the Plaintiffs have proved their claim as against the Defendant on a balance of probability, it is submitted that they have not. That they have failed to prove that their being denied entry into the dining hall due to the way they were dressed amounted to discrimination and that the Plaintiffs have failed to prove all the necessary ingredients of defamation.

On whether the Plaintiffs are entitled to the prayers sought in the plaint and who shall bear the costs of this suit, it is submitted as regards general damages that these are discretionary and since the Plaintiffs have failed to prove their case on a balance of probability they are not entitled to any award in General Damages. The authority relied upon here is **CAM v Royal Media Services Limited Civil Appeal No. 283 of 2005 {2013} eKLR**

It is further submitted that the two cases cited by the Plaintiffs of **Phineas Nyagah =Vs= Gitobu Imanyara {2013} eKLR And Abdi Mohamed Farah =Vs= Nairobi Star Publication Ltd & Anor {2015} eKLR** are distinguishable as in both the causes of action are on libel and not slander. In closing, it is submitted that there is no basis whatsoever for the reliefs sought by the Plaintiffs' hence the suit should be dismissed with costs to the Defendant.

The Law and Analysis

I have appreciated the facts, the evidence and the arguments advanced by respective Counsel. To my mind, the nub of this suit rests on whether the action of the Defendant in denying the Plaintiffs entry into the dining area in the circumstances explained herein is tantamount to discriminatory treatment and whether such action is defamatory.

The Plaintiffs' claim is that the basis upon which they were denied entry into the dining area of the Defendant is discriminatory in the sense that they were attired in their traditional Giriama dress, which being part of their culture, should not have occasioned their denial of entry to partake of lunch in the dining area of the Defendant where the rest of the participants in a seminar in which they were a part were allowed to enter without issue.

On the other end of the spectrum, the Defendant is clear that it has a dress code specifically for the dining area; which code specifies the attire allowed in the dining area. That notwithstanding the fact that the Plaintiffs' attire is part of their culture as they contend; in as far as being allowed entry into the eating area is concerned, everybody, including the Plaintiffs', had to abide by the dressing code as stated in the Defendant's request.

I would be remiss not to point out that the exactitude of the Plaintiffs' precis on violation of constitutional rights is short on detail, contrary to what is wont of a claim for a violation of Constitutional rights. Be that as it may, I'm guided by the view of the Bench in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others {2013} eKLR** to find that what is in contestation per the Plaintiffs' pleadings is the violation of their rights to equality and freedom from discrimination as expressed in Article 27 (4) and (5) of the Constitution of Kenya, 2010. In the **Mumo Matemu** case, the court opined:

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

On the back of the preceding, I turn to definitions. What is discrimination? The Black's Law Dictionary, 10th Edition definition relevant to the context of the issues at hand is that it is:

“the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or disability.”

Alternatively, it is

“Differential treatment; especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured”

The Constitution of Kenya, 2010 at Article 27 provides for equality and freedom from discrimination.

“(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

Direct and indirect discrimination as severalized in the case of **Nyarangi & Others vs Attorney General {2008} KLR 688** is:

“Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of Griggs vs. Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in a job application was found “to disqualify negroes at a substantially higher rate than white applicants”.

The Court of Appeal in **Mohammed Abduba Dida v Debate Media Limited & another {2018} eKLR** quotes the case of **Kedar Nath vs State of W.B. (1953) SCR 835 (843)** where it is stated that;

“Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view.”

Per the Zimbabwean case of Harksen v Lane NO and Others {1997} ZACC 12; 1998 (1) SA 300(CC); 1997 (11) BCLR 1489(CC) (Harksen) at para 48 to succeed on a claim of unfair discrimination the following are the considerations:

“They are: -

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:-

(i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.....

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause of the ...Constitution.

In **Nelson Andayi Havi v Law Society of Kenya & 3 others {2018} eKLR** coterminous with the anterior authorities, the court isolated what ought to guide it in deciding whether a law is discriminatory. While the Plaintiffs’ gravamen here concerns Hotel policy on dress code, I believe that the formulation of the courts in the leading instances is illustrative of the best approach to follow. The court in the **Havi case** formulated a tripartite identification process which begins by ascertaining whether the law in question differentiated between different persons and if so if the purpose for such differentiation is legitimate. In tandem, the court then considers whether that differentiation is indicative of discrimination before finally deciding whether such discrimination, if found to be so, is unfair. It held:

“90. In determining discrimination, the guiding principles are clear. The first step is to establish whether the law differentiates between different persons.^[57] The second step entails establishing whether that differentiation amounts to discrimination.^[58] The third step involves determining whether the discrimination is unfair.”

In the **Nelson Havi case**, at para 94 the court concludes:

“...mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.”

The hotel policy in this instance sets out that for one to be allowed into the dining area, they must abide by a dress code. This code, as appertains to men, entails that they must all wear long trousers or shorts and a shirt or tee shirt in order to enter the dining area. This rule is applicable to all men and not specifically aimed at the plaintiffs. It does not apply to one category of men while leaving out another but is applied wholly on all men desirous of taking a meal within the precincts of the Defendants dining hall. Ostensibly, the rule is to prevent anyone from showing their nakedness within the dining area. For me, this is a legitimate purpose and I find that that the hotel policy does not differentiate between different persons. In so finding, it is therefore my position that the Plaintiffs’ have not proven to this Court that they were discriminated against.

I now address myself to the issue of defamation as alluded to by the Plaintiffs’. In **Wycliffe A. Swanya V. Toyota East Africa Limited & Francis Massa Nairobi CA NO. 70 of 2008**, the Court of Appeal stated that:

“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 utterances was published by the defendant and that defendant’s 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.”

The Court in **Richard Otieno Kwach V The Standard Limited & David Makali Nairobi HCCA 1099 of 2004**, noted that ‘words are defamatory if they involve a reflection upon the personal character or official reputation of the plaintiff....’

Clark & Lindsell on Tort 17th Edition, London Sweet & Maxwell 1995 at page 1018 paragraph 21-42 states:

“Whether the statement is defamatory or not does not depend on the intention of the defendant but on the probability 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. The mere intention to vex or annoy will not make a language defamatory which is not so in its own nature. Words apparently defamatory may be proved by evidence of the circumstances to have been understood in another and involvement meaning.”

Miguna Miguna v Standard Group Limited & 4 others {2016} eKLR

“116. In an action for defamation, the actual words complained of and the substance must be proved by the plaintiff. And it is not sufficient to show the defendant made defamatory statements. The plaintiff must give particulars of the facts and matters from which the malice is to be inferred. He must show to court that the defendant acted maliciously. In my humble view, words are not defamatory per se, there has to be a statement of fact or expression of opinion or imputation conveyed by them, which will have the effect of defaming an individual and lowering him in the eyes or estimation of right thinking members of the society generally.

117. The question which must be answered is that albeit there was publication and broadcast of the words as pleaded and testified on by the plaintiff and conceded by the defendants, is there evidence to prove that the plaintiff was defamed and that therefore his character, reputation, profession and dignity suffered by being lowered in the estimation of right thinking members of the society generally, that he was exposed to public scandal, opprobrium, odium, contempt and that he had experienced diminution of his stature and character as an advocate of repute in the legal profession, an author, consultant etc? and or that he has suffered a general or actual loss in his business and calling, and serious injury to his dignity and self confidence by the broadcast made by the defendants?”

Taking cue from the above, it is evident that for an action for defamation to pass muster, not only must the Plaintiffs prove the substance of the words uttered by the Defendant were defamatory, but they must also give particulars of the facts and matters from which malice on the part of the Defendant is to be inferred. In this instance, from the Plaintiffs’ evidence, there are no specific words or utterances complained of. What is contended is that the action of denying them entry into the dining hall of the defendant amounted to defamation of character. This alone does not suffice in an action for defamation.

The Plaintiffs’ have further not offered any explanation as to the malice imputed by the Defendant’s actions in denying them entry to the dining area. They merely contend that their denial of entry into the dining area was defamatory on their character before the right-thinking members of the society. The Defendant is clear that the denial of entry was based on the Plaintiffs’ dress code, which was not permitted for the dining area. Furthermore, according to the Defendant, which assertion was not denied by the Plaintiffs’, they were allowed into all other area of the Hotel and it was only at the dining hall that they were denied entry, on the basis of hotel policy. I find therefore that the Plaintiffs’ did not offer any evidence to impute malice on the part of the Defendant.

While the onus was upon the Plaintiffs’ to adduce evidence to prove that the Plaintiffs were defamed and that therefore their character, reputation, profession and dignity suffered by being lowered in the estimation of right thinking members of the society generally, they have not laid before the Court any evidence in support of this assertion.

All in all, the Plaintiffs’ claims have failed to meet the threshold for a matter to be considered defamatory. They have also failed to prove that the Defendant acted in a discriminatory manner.

In the grand scheme of things therefore, this suit fails and the Plaint dated 17th March 2014 is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 2ND DAY OF OCTOBER 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Gekanana advocate for the plaintiffs
2. Ms. Kapore advocate for the defendant