



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 285 OF 2017**

**KENBANCO HOUSE LIMITED.....1<sup>ST</sup> APPELLANT**

**A. W. SIGANA.....2<sup>ND</sup> APPELLANT**

**MWANGI MWORIA.....3<sup>RD</sup> APPELLANT**

**MAMICHA KAMAU.....4<sup>TH</sup> APPELLANT**

**- V E R S U S -**

**PATRICK IRUNGU MBUTHIA.....RESPONDENT**

*(Being an appeal from the judgment and decree of hon. D. W. Mburu (Mr.) principal magistrate*

*delivered on 12<sup>th</sup> May 2017 in Nairobi CMCC No. 573 of 2013*

**JUDGEMENT**

1) Patrick Irungu Mbuthia, the respondent herein filed an action before the Chief Magistrate's court, against Kenbanco House Ltd, A. W. Sigana, Mwangi Mworira and Mamida Kamau, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants respectively vide the plaint dated 14.9.2009 in which he sought for damages for defamation arising from a letter written by the appellants and copied to African Registrars dated 15.12.2008. The respondent also sought for an apology, costs and interest.

2) The appellants filed a defence denying the respondent's claim and put forward the defence of qualified privilege.

3) Hon. D. W. Mburu, learned Principal Magistrate, heard the suit and on 12.5.2017 gave judgment in favour of the respondent. In the aforesaid judgement, the learned Principal Magistrate found the contents of the letter dated 15.12.2008 to be false and defamatory to the respondent. The respondent was awarded ksh.2,700,000/= representing both general and aggravated damages plus costs and interest.

4) The appellants were aggrieved hence they filed this appeal and put forward the following grounds:

- i. The learned Magistrate erred in law and fact by failing to consider and evaluate all the evidence that was tendered before him.*
- ii. The learned Magistrate erred in law and fact by finding that the contents of the letter dated 15<sup>th</sup> December 2008 were defamatory and false.*
- iii. The learned Magistrate erred in law by framing issues for determination and failing to consider the issues.*
- iv. The learned Magistrate erred in law by holding that the defence of qualified privilege was not available to the appellants.*
- v. The learned Magistrate erred in law by holding that the respondent had established that his reputation was injured when in fact there was no evidence to support that finding.*
- vi. The learned Magistrate erred in law by awarding excessive damages without any legal or factual justification for awarding such damages.*

**vii. The learned Magistrate erred in law by holding that the respondent was entitled to aggravated damages when there was no legal or factual basis for awarding such damages.**

5) When this appeal came up for hearing, this court gave directions to have the same disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also taken into account the rival written submissions. Though the appellants put forward a total of 7 grounds of appeal, those grounds may be summarised to three main grounds vizly;

**i. Whether the trial court's finding that the letter dated 15.12.2008 was defamatory was supported by evidence.**

**ii. Whether the trial court's finding that the defence of qualified privilege was not available to the appellants was proper.**

**iii. Whether the award on damages was excessive.**

6) On the first ground of appeal, it is the appellants' argument that the trial court failed to consider some of the allegations raised in the letter of 15.12.2008 which were justified by the evidence on record. The appellants further argued that the finding by the trial court that the respondent had presented evidence to show that Nyaga Stock Brokers (NSB) licence had been withdrawn and that the CMA had placed NSB under statutory management was erroneous because there was no evidence tendered by the respondent to establish that assertion.

7) It was also pointed out by the appellant that one of the allegations against the respondent in the impugned letter is that through out his tenure in office, he used the 1<sup>st</sup> appellant's office for his personal use to the extent that the 1<sup>st</sup> appellant's work was always disrupted when the respondent used the 1<sup>st</sup> appellant's computers and other facilities for his private use.

8) It is also pointed out that the respondent was said to be in the habit of inviting many strangers to the respondent's office and allowing them free and easy access to the company facilities including records. The appellant stated that the trial court failed to address the aforesaid issues before arriving at its decision. This court was urged to reverse the finding that the contents of the letter dated 15.1.2008 were defamatory because there was no evidence presented in support.

9) The other point which the appellants raised is the fact that it is only the respondent who testified on his behalf and no evidence was tendered by a third party to show how the respondent's reputation was injured. The appellant's further argued that the trial court ignored the fact that the respondent did not make any attempt to establish what reputation he had prior to the letter being written.

10) It is the submission of the respondent that the trial magistrate outlined five statements in the impugned letter which he held were false averments and thus defamatory. The respondent pointed out that the appellants did not contest the aforesaid findings and that the two statements the appellants are saying to be true and non-discriminatory cannot overturn the five statements already found to be false and defamatory by the learned Principal Magistrate.

11) The respondent also argued that there was no dispute that NSB was placed under statutory management which fact was widely publicised therefore it was not necessary to tender further evidence to prove it, hence the learned Principal Magistrate was entitled to take judicial notice of that fact.

12) The respondent further argued that he had no obligation to adduce evidence on a matter of local notoriety. The respondent also stated that he did not bear the burden of proof that he had a reputation which was damaged or that the defamatory words lowered or tendered to lower the respondent's reputation in the eyes of right thinking members of the society. The respondent is of the submission that he satisfied all the elements required to establish the tort of libel therefore the trial magistrate cannot be faulted.

13) Having re-evaluated the evidence presented before the trial court and have considered the rival submissions. It is not in dispute that the appellants wrote the letter dated 15.12.2008 on the 1<sup>st</sup> appellants letter-head which letter was signed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants being the 1<sup>st</sup> appellant's chairman, vice chairman and secretary respectively. The aforesaid is copied to the African Registrars.

14) In the aforesaid letter the respondent pointed out the points which he thought were offensive to him. One of the allegation said to be defamatory is that the letter proposes to let the shareholders know of six incidences to support the board's decision not to present the plaintiff as a candidate for election of directors. It is noted in the letter that should the respondent consider the board's action to be unfair in any way, he would be at liberty to appeal at the floor of the A.G.M for the members/shareholders' consideration. The question which must be answered is whether the contents of the aforesaid letter were in their natural and ordinary meaning understood to mean the respondent was of questionable moral standing, a thief, a dishonest person hence unfit to hold office.

15) The respondent further contended that the contents of the letter are disparaging of him and indeed false. The appellants as expected pleaded that the letter was not written out of malice or without justification. Therefore according to the appellants the letter never contained any derogatory and defamatory statements.

16) Faced with the above competing arguments, the learned Principal Magistrate found the respondent to have established his claim on a balance of probabilities.

17) For the tort of defamation by way of libel to succeed the following elements must be established:

**i. The libel must be published by the defendant.**

**ii. The published words must refer to the claimant.**

*iii. The statement as published must be false and defamatory of the plaintiff.*

*iv. The publication must be communicated to at least one person other than the claimant.*

*v. That publication must be malicious.*

18) It is apparent from the record that the respondent was the only witness who testified in support of his case before the trial court while the appellants tendered the evidence of five (5) witnesses in support of their defence. I have already outlined the fact that the learned Principal Magistrate had found that the letter dated 15.12.2008 was found to be defamatory of the respondent. The respondent stated in his evidence that on 19.12.2008 he visited the offices of African Registrars whereupon he met a gentleman he did not name who told him that he read a letter he could not comment. The respondent failed to tender evidence showing that the publication was made to a third party who upon reading the publication formed a low opinion of the respondent.

19) In other words the respondent failed to summon an independent witness to give evidence in respect of the respondent's reputation before and after the offensive publication. Consequently I am of the humble view that the respondent failed to prove that he was defamed by the publication.

20) With respect, I agree with the appellants' submission that the trial Principal Magistrate fell into error when he found the case in favour of the respondent yet he had failed to prove his case on a balance of probabilities.

21) The second ground is whether the appellants were denied the right to rely on the defence of qualified privilege. It is the submission of the appellants that the letter dated 15.12.2008 was published to African Registrars, the 1<sup>st</sup> appellant's secretaries therefore the communication was qualified privileged and could not form a basis of an action. The respondent on the other hand is of the submission that the appellants failed to establish the defence of qualified privilege.

22) In the case of Chirau Ali Mwakwere vs= Nation Media Group Ltd & Another (2009) eKLR this court restated what constitutes privileged occasion or communication as follows:

**“An occasion is privilege where the person who makes a communication has interest or duty, legal, social or moral to make it to the person to whom it was made and the person to whom it is so made had a corresponding interest to receive.”**

23) Having considered the rival submissions and having re-evaluated the evidence presented in support of the appellants assertion, I find that the appellants have failed to discharge the burden of proof that the occasion in which the impugned letter was published was a privileged one. The respondent further failed to tender evidence to prove malice on the part of appellants. In the end I find no merit in this ground.

24) The third and final ground is in respect of the amount awarded as general damages. The appellants aver that the award is manifestly excessive. It is also said that there is no justification to make award on aggravated damages.

25) The respondent on the other hand is of the submission that the awards were not excessive but were reasonable in the circumstances of this case.

26) A close scrutiny of the proceedings filed before the trial court will show that the appellants did not make any submissions on quantum to guide the trial court in assessing damages. With respect I agree with the submission that the respondent, that the awards on general and aggravated damages should not be disturbed. The record shows that the learned Principal Magistrate correctly applied the requisite principles in assessing damages. If the appeal had failed I could have affirmed the awards proposed by the trial court.

27) In the end, this appeal is allowed. Consequently the judgment/ decree of the trial court is set aside and is substituted with an order dismissing the suit in its entirety with costs to the appellants.

**Dated, Signed and Delivered in open court this 2<sup>nd</sup> day of May, 2019.**

**J. K. SERGON**

**JUDGE**

**In the presence of:**

**.....for the Appellant**

**.....for the Respondent**