



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL CASE NO. 9 OF 2017

LILIAN OKEMBO.....PLAINTIFF

VERSES

DR. ROBERT PUKOSE.....DEFENDANT

JUDGEMENT.

1. The Plaintiff claims against the defendant in the plaint dated 11th August, 2017 is for general damages for defamation, Exemplary damages for defamation of character as well as costs and any other relief of this court. This suit is as a result of the letter published by the Defendant dated 11th May, 2017 and addressed to the Inspector General of Police which according to the Plaintiff contained libellous and defamatory words concerning the Plaintiff. The said letter reads in part,

“..... I also wish to bring to the attention of your office that several incidences have been happening that have paused a threat to my security and the entire supporters caused by my said opponent and no action has been taken by County Commissioner of the police Ms Lilian Okembo who is a close ally of my opponent. They are business partners and have commercial farming at Salama area. Reportedly, many of my supporters have been assaulted and beaten but no action has ever been taken by the police who have been receiving instructions from County Commander.

I request your office to transfer the County Commander and make a reshuffle of Sub County Police Security team so that we can have a smooth and neutral officers at the station.”

2. The Plaintiff contends that the above publication was made maliciously and without any legal basis or truth and was meant to defame and disparage her especially her excellent career at the police force. She stated that her character and reputation was lowered within the members of her profession and those right thinking members of the society.

3. The Defendant denied the allegations in his written defence filed on the 27th February, 2019 where he accused the Plaintiff of not doing much during the 2017 political campaigns in which there were skirmishes orchestrated by the Defendant's opponent and his supporters. He said that in the said incidences his supporters were attacked by those of the opponent and the pistol of his bodyguard was confiscated by the Endebess police station which was under the Plaintiff's jurisdiction.

4. The Defendant pleaded that the letter in question dated 18th May, 2017 sent to the Commissioner of Police was a publication in respect of a matter of public concern and that the article is therefore privileged subject to explanation or contradiction. He went on to state that the same contrary to the Plaintiff's assertion was not actuated by malice and neither were the words defamatory.

5. The Plaintiff testified and called one witness Alwin Sasia Chepyagan. She said that she had worked as a police officer from March 1989 when she was employed as a constable and that she had risen through the ranks until her current position as Assistant Commissioner of Police. She testified that she had worked in various stations within the country and that in all those stations she showed exemplary dedication which earned her awards like Performance Excellence Award in 2016, 2016 Security award outstanding police woman and the head of state commendation, Moran of the Burning Spear given in December, 2018.

6. The Plaintiff went ahead to explain how in her efforts as a diligent police officer she had managed to stem down insecurity within the Trans Nzoia County which earned her accolades from her superiors' .She denied that she was stifling the operations of her juniors and that she worked well with the security teams within the County.

7. In regard to the Defendants' allegations, She denied ever receiving such reports and that she received the letter from her bosses from Nairobi which wanted her to investigate the Defendant's allegations. She further denied engaging herself with any kind of business with the Defendants' political rival as alleged in the letter.

8. It was her contention that the said letter caused her to be transferred immediately from the Trans Nzoia County despite her good work. She felt that the transfer was a demotion as she was now required to work under other officers at the police headquarters. In her estimation, she suffered a lot since that abrupt transfer which caused her not to take care of her diabetic mother who eventually became blind.

9. In totality she accused the defendant of malice and untruthfulness and that the publication had ruined her generally especially career wise.

10. He witness **PW2 ALWIN SASIA CHEPYAGAN** acknowledged that he was a political rival of the defendant in the 2017 general elections. He admitted that at some point there was an altercation between their supporters but the matter was resolved at Endebess police station and each of them were given different timetables and that they pledged to maintain peaceful campaigns.

11. He denied that he knew that Plaintiff and that he only heard her as the County Commander but had never met her in person. He denied that they were business partners nor did any farming together as alleged by the defendants letter.

12. In his defence the defendant admitted authoring the impugned letter to the plaintiff's superiors and copied the same to the speaker of parliament. He denied that the letter was public but that it was confidential. He said that the Plaintiff did not take any action when his bodyguards' pistol was taken away by the OCS Endebess who worked under the plaintiff. He acknowledged in cross examination that he had no evidence that the Plaintiff was a business partner of PW2.

13. Parties were then ordered to file written submissions which they did and this court has perused the same extensively with the attendant attached authorities. The Defendant took the tangent of justification and fair comment in his submission. He said that the facts therein were true as the pistol was withdrawn from his bodyguard and despite his complain to the local police station under the Plaintiff, no action was taken thus necessitating him to write the letter to the Plaintiff's superiors.

14. According to the defendant, the transfer was a matter of routine and that she was not the only one who was affected by the transfer. In any case the Plaintiff was not demoted but continued to retain her position despite the transfer.

15. Having heard the parties orally in court and considered their submissions the twin issues which are germane in this matter are ;

(a) Whether the letter made on 18th May, 2017 was capable of being

construed as defamatory in its natural and ordinary meaning or by innuendo.

(b) Whether the plaintiff is entitled to an award of damages and if so how much.

16. The tort of defamation was well captured in a **1970 British Columbia Court of Appeal** decision of **Murphy verses LaMarsh** where a member of parliament , **Judy LaMarsh** wrote about the plaintiff as follows;

"A brash young Radio reporter, named Ed Murphy (heartily detested by most of the press gallery and the members) had somehow learned that Maurice Lamontagne (then Secretary of State and long-time friend and adviser of the Prime Minister) had purchased furniture but had not paid for it"

17. In finding that there was actionable libel, the British Columbia Supreme Court (appeal dismissed) stated as follows;

"(defamation is where) a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful course of action (he lives on the avails of prostitution), (or) a shameful condition (he has smallpox). Such words are considered defamatory because they tend to bring the man into hatred, contempt or ridicule. The more modern definition (of defamation) is words tending to lower the plaintiff in the estimation of right-thinking members of society generally)"

18. It is now acknowledged that in concluding that the statement is defamatory, it must be shown that the same refer to the plaintiff, it was published by the defendant, and that the same was false. This position is buttressed by the Court of Appeal decision in **WYCLIFFE .A. SWANYA V. TOYOTA EAST AFRICA & ANOTHER (2009) e KLR** which stated that;

"For the purpose of deciding a case of defamation, the court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:

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

(ii) That 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."

19. In applying the said principles to this case, the publication to the Inspector General of Police, which the plaintiff claims defamatory titled, **RETURN OF A PISTOL TO MY SECURITY DETAIL PC AMOS N MARANGACH No. 86270** read in part, ***"....i also wish to bring to the attention of your office that several incidences have been happening that have paused a threat to my security and the entire supporters caused by my said opponent and no action have been taken by the County Commander of police Ms Lilian Okembo who is a***

close ally to my opponent. They are business partners and have commercial farming at Salama area..... I request your office to transfer the county commander and make a re-shuffle of the sub county police security team so that we can have smooth and neutral officers at the station to ensure justice prevails.”

20. The Plaintiff contends that those words as published ,were malicious and intended to paint her as a corrupt person ,impartial ,one not to be trusted with authority ,one who cannot be entrusted with security matters ,one who misdirects his juniors and unprofessional.

21. It is clear from the words that the letter was written to the Plaintiff’s employer as a complaint and the transfers in my view were made on administrative level which the defendant nor the Plaintiff for that matter had no control of. In fact the transfer letter affected generally other gazetted officers.

22. However the last paragraph of the letter stating that the Plaintiff does business with the Defendants opponents needs interrogation. I think the same was not truthful and it was made to spice the complaint. The Defendant admitted in cross examination that he had no evidence of such business liaison between the Plaintiff and PW2, his political opponent.

23. In fact, the Defendant did not demonstrate any iota of evidence to back up this assertion. This in my view was unconfirmed lie which was malicious as the Plaintiff was portrayed as a corrupt senior police officer who shields criminals and other lawbreakers. For that matter she was biased as she could not take any action against the Defendant’s opponents. That she actually favoured him in his political duel with the Defendant.

24. The Defendant had every right as enshrined under Article 33 of the Constitution to free speech but he ought to have done his homework well. In fact one may be forgiven to actually conclude that it was the Defendant’s letter that became a catalyst for the plaintiffs transfer. This conclusion is for the simple reason that it did not take long for the Plaintiff to be transferred after the said impugned letter.

25. It is thus the findings of this court that the published letter to the extent that it referred the Plaintiff as a working or farming partner of PW2 was defamatory .The other portion of the letter referring to the Plaintiffs transfer was and I do not find the same to constitute defamation. The defence of justification and public interest cannot stand as there was no material evidence produced to back up that line of argument that she worked closely with PW2.

26. Consequently what is left for this court is to determine the award that the Plaintiff is entitled. An award in defamation cases are discretionary as was stated by the Court of Appeal in **C A M Vs. ROYAL MEDIA SERVICES LIMITED CIVIL APPEAL NO. 283 OF 2005 (2003) , e KLR ,**

“No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones V. Pollard (1997) EMLR 233-243 include objective features of the libel itself , such as its gravity , its province , the circulation of the medium in which it is published and any repetition ;subjective effect on the plaintiffs feelings not only from the prominence itself but from the defendants conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology ;matters tending to reduce damages ; vindication of the plaintiffs reputation past and future.
“

27. The Plaintiff in her submission prayed for a sum of kshs. 7 million and exemplary damages of kshs. 1.5 million. On his part the Defendant prayed for the dismissal of the suit and stated however that since the court would have assessed damages regardless of the dismissal it urged the court to consider an award of kshs. 1 million as would have been a fair compensation to the Plaintiff.

28. This court taking into consideration the status of the Plaintiff as exemplified by her sterling performance in the police force, and the fact that there was no evidence of compromise of her duties as a civil servant, an award of Kshs. 2 million would be reasonable in the circumstances.

29. I shall make no award in respect to the exemplary damages since it does not meet the threshold set up in paragraph 243 of **Halburys Laws of England** ,namely that ;

“ (1) oppressive, arbitrary on unconstitutional action by servants of government;

(2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or

(3) Cases in which the payment of exemplary damages is authorised by statute.”

30. In conclusion this court hereby makes the following orders;

Judgement is hereby entered for the Plaintiff against the Defendant as follows;

(a) General damages of kshs. 2,000,000.

(b) Interest on (a) above from the date of this judgement

(c) The Plaintiff shall have the costs of this suit.

Dated signed and delivered in open court at Kitale this 5th day of November, 2019.

H. K. CHEMITEI

JUDGE

5/11/19

In the presence of:-

Arunga for the Plaintiff

None appearance for the Defendant

Court Assistant – Kirong

Judgment read in open court.