REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 393 OF 2011

HON. JULIUS NDEGWA KARIUKI................PLAINTIFF

VERSUS

THE STAR..1ST DEFENDANT

IBRAHIM ORUKO................................ 2ND DEFENDANT

OLIVER MATHENGE............................3RD DEFENDANT

JUDGEMENT

The plaintiff brought this suit against the defendants herein claiming damages for libel, alongside aggravated, punitive and exemplary damages for the same reasons, costs and the suit. This follows a publication of some report in the 1st defendant, at the instance of the 2nd and 3rd defendants, which the plaintiff considered libellous.

The defendants in their joint statement of defence denied the plaintiff's claim, and pleaded public interest and qualified privilege. The plaintiff testified in support of his pleadings and so did the defendants by calling 2nd and 3rd defendants. Thereafter, parties made their submissions and cited some authorities which I have noted.

The article complained of had the heading **"Orengo signed Lamu Land allocation deal".** This was followed by words cited in the plaint as follows, **"The document further shows that the Office of The President and Lamu West MP Julius Ndegwa then a councillor in Lamu, at one point approved some allotments."**

In his pleadings the plaintiff said that those words were untrue, defamatory and lacked any evidence linking him to any illegal approval and allocation of land in Lamu. It was his case that, the defendants did not seek his side of the story at the time of publishing the article, contrary to the code of conduct for journalists. He further stated that, in publishing the offensive article, the defendants were negligent and reckless, considering the matter was still under investigation.

The plaintiff also inferred malice on the part of the defendants, and that in the ordinary and natural meaning, the words were understood to mean *inter alia*, that the plaintiff engaged in dubious and corrupt practices, lacked honesty and integrity, was unsuited for public office and had a criminal disposition. It was also his case that, the words portrayed him as a principal participant in the illegal allocation of land in Lamu, and was guilty of criminal offences, including office fraud or conspiracy to defraud.

Particulars of malice were also set out, and as a consequence of the said publication, his reputation and character were gravely injured, in the estimation of right thinking people and subjected him to public scandal, odium, ridicule and contempt.

The minutes of the Lamu County Council meeting held on 22nd November, 2011 featured in these proceedings. Minute No. 24/2011 related to requests for allocation of land for sugarcane farming by several companies. The records of those minutes show resolution No. 51 CCL/2011 was proposed by Councillor Omar Ali Salim Basaida and that the plaintiff seconded the proposal.

During the hearing, the plaintiff admitted that the proposal could not have been passed without it being seconded. He also admitted that, by seconding the proposal, he approved what councillor Omar Ali Salim Basaida had proposed. There was evidence that the issue of land is sensitive in the Coastal region, and that the propriety of the allocations in Lamu had been questioned by the President, the National Land Commission and the Cabinet Secretary for Lands. There was also material to show that, some of those allocations had been revoked on the grounds that they had been done illegally.

The plaintiff was duty bound to prove, by evidence, the publication was defamatory. This is a subject that has been addressed in several decided cases. In the case of **S M W vs Z W M (2015) e KLR** the court of Appeal held as follows,

“…..a statement is defamatory of the person of whom it is published if it tends to lower him or her in the estimation of right thinking member 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.”

This issue was also addressed in the case of **Musikari Kombo vs. Royal Media Services Limited (2018) e KLR** in the following words,

> **“The test for whether a statement is defamatory is an objective one. It is not dependant on the intention of the publisher but on what a reasonable person reading the statement would perceive.”**

See also **Gatley on Libel and Slander 9th Edition page 7**. See also Halsbury’s Laws of England 4th Edition Vol 28 page 23.

In the **Micah Cheserem case (Supra**) the court said,

> **“There is no wrong done if it is true…..there are some things which are of such public concern that the newspapers, the press and indeed everyone is entitled to make known the truth……this is an integral part of the right of speech and expression. It must not be whittled away.”**

On the defence of qualified privilege it was the duty of the defendants to prove that the words so published lacked any element of malice – see **Phinehas Nyaga vs. Gitobu Imanyara (2013) e KLR. Odunga J** had this to say,

> **“Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.”**

It is also true that it is not open for the media to publish unsubstantiated report which may result to injury or distraction of another person’s character and reputation. Whatever the case however, it behoves any litigant complaining about a publication to meet the threshold set by both statute and decided cases. Returning to the fact of this case the plaintiff was duty bound to establish by evidence that the publication by the defendants led to injury to his reputation on the basis that what he participated in was not true.

The plaintiff did not deny that he sat in that meeting. He did not deny that he seconded the proposal forming the basis of his claim. In effect the minutes were true. The subject of land has been accepted to be sensitive not only in the coast region but countrywide. Any publication thereof is of public interest.

The plaintiff did not call any evidence to show that as a result of the publication he had been shunned by anyone. He did not show how his character and reputation had been damaged. The court cannot go out to look for evidence to compensate for the deficiency of a litigant’s testimony. I am not persuaded that the plaintiff has proved any allegation raised in the plaint.

On the other hand the defendants have established that there was truth in the publication, it was not malicious and was not intended to injure the reputation of the plaintiff. If anything, the publication was in the public interest. The plaintiff’s suit therefore against the defendants cannot succeed.

If, however, the court were to find in his favour, damages awardable would be in the tune of Kshs. 2 million for the tort of defamation and in the absence of any apology, a sum of Kshs. 100,000/= would have been sufficient to cover exemplary damages. That is not the case however, and the plaintiff’s suit stands dismissed with costs to the defendants.

Dated, signed and delivered at Nairobi this 5th day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE