



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 102/2015

DHIRAJLAL V PATANI.....APPELLANT

VERSUS

SELIN PATANI.....1ST RESPONDENT

ASHIT PATANI.....2ND RESPONDENT

RAMABEN PATANI....3RD RESPONDENT

JUDGMENT

The respondents filed in the lower court an action claiming general, exemplary and aggravated damages for injury to his reputation against the Appellant. The respondents' claim against the appellant was that on or about the 5th October, 2009, the defendant (Appellant) wrote letters through his advocates (Eboso & Wandago) to the respondents (plaintiffs) in which he caused to be published the following words contained in paragraph 2 and 4 of the said letters which were defamatory to the respondents;

Paragraph 2

Between July, 2006 and march 2009 without lawful authority or any colour of right, by yourselves, personally and through your agents Mamuka Valuers and Jocosh properties collected rent from tenants of Garden Chambers totaling Kshs.10,000,000/- by falsely pretending that you were shareholders or Directors of Garden Chambers Limited.

Paragraph 4.

“This action on your part was criminal in nature and our client has already lodged a complaint with the necessary authorities.”

It was pleaded that the said letters were addressed to all the respondents and was delivered by the clerk of the said law firm to the servants of the first respondent at her place of work all by hand delivery and open. That at all material times, the defendant through his lawyer knew or had reason to believe that the said letter would be read by other persons not intended for the same in their ordinary circle of business as it was in fact done.

The respondents further pleaded that in their natural and ordinary meaning, the said words meant and were understood to mean that the plaintiffs were thieves and as such criminals who obtained monies without authority and legal standing as well as masqueraders.

Further and in the alternative, they pleaded that the words were understood to bear the meaning pleaded hereunder by way of innuendo;

PARTICULARS

a. THAT the plaintiffs are crooked and fraudsters.

b. THAT the plaintiffs misrepresented themselves to the tenants of the building while being strangers.

c. THAT the plaintiffs had no authority to collect rents from a building they owned.

d. THAT the plaintiffs were not straight forward individuals.

That in consequence thereof, the plaintiffs' reputations have been seriously damaged and they have suffered considerable distress, embarrassment and anxiety, and they claim damages.

The defendant filed his statement of defence on the 12th November, 2009. He averred that whereas the 1st and 2nd plaintiffs' father died on 6th June, 2006, the plaintiffs only obtained grant of probate on 3rd October, 2007 and without any authority or colour of right purported to collect rent for the property christened Garden Chambers from 2002. He denied that the letters were published as alleged or at all and the plaintiffs were put to strict proof.

He further averred that the letters were placed in sealed envelopes addressed to each of the plaintiffs and any publication which is denied, was not done by the defendant. That the plaintiffs through their lawyers admitted collecting rent from the said premises when they were neither administrators of their father's estate nor directors of the management company.

The defendant averred that the plaintiffs were not defamed in that the contents of the said letters were true and that the plaintiffs forged and issued receipts to tenants of Garden Chambers purporting that they were issued by the company.

The plaintiffs filed a reply to defence on 19th November, 2009 in which they joined issues with the defendant in his statement of defence save where the same consists of admissions. They denied ever collecting rent from the property since the year 2002 and restated that the letters were published in a defamatory manner. They also denied forging and/or issuing receipts purporting to be from the company save for the genuine receipts that were issued. That they never at any time by themselves or by their lawyers admitted having unlawfully collected any rents from the property.

After the matter was heard, the plaintiffs were awarded Kshs.500,000/- each. The appellant was aggrieved by that judgment and filed this appeal, in which he has listed the following grounds of appeal.

1. The learned Trial Magistrate misdirected herself in failing to dismiss the suit against the appellant.
2. The Learned Magistrate erred in fact and in law by failing to appreciate that the appellant has no case to answer as the evidence tendered by the respondents did not prove defamation.
3. The learned Trial Magistrate misdirected herself in totally disregarding the evidence by the appellant.
4. The learned Trial Magistrate erred in fact by failing to appreciate that the respondents did not prove that there was publication to other right minded persons other than themselves.
5. The Learned Trial Magistrate took into account irrelevant matters and failed to take into account

the fact that the parties were related.

6. The Learned Magistrate failed to give effect to the clear defence of justification that was apparent from the evidence.

7. The Learned Magistrate failed to appreciate that the appellant was not the author of the words complained of as being defamatory.

8. The Learned Magistrate failed to find any malice yet found for the respondents.

The 1st respondent testified on 18th July, 2013 and told the court that the appellant is her uncle and that her late father and the appellant jointly owned Garden Chambers which is a building erected on L.R. No. 209/4355 and L.R. No. 209/4632 in Nairobi. It was her evidence that he sued his uncle because of a letter brought to her shop dated 5th October, 2009 addressed to herself and her mother. The letter was taken to her place of business and given to her workers and was written by Eboso & Wandago Advocates on behalf of her uncle. The letter was saying that she had collected rent amounting to Kshs.10 million from Garden Chambers and that the action was criminal in nature and that the matter had been reported to the police. That the letter was not in an envelop. She denied having collected any rent from Garden Chambers. She stated that she had not been taken to any police station for stealing Kshs.10 million or taken to court or even summoned to a police station. She was annoyed by the letter for having been accused of stealing and she is not a thief and her workers do not know their boss as a thief. She denied having signed any of the receipts allegedly issued to the tenants.

On his part, the 2nd respondent told the court that his uncle the appellant and his late father jointly owned Garden Chambers and it was the appellant who was managing the property. It was her evidence that she received a letter from the appellant's advocates which really affected her reputation. She received it in her employer's office. It was written on behalf of the appellant by his advocate.

He told the court that any correspondences received in the office must go to his boss regardless of whom it was addressed to. His boss called him hurriedly when she received the letter and asked him what kind of a person he is as she had read the letter saying that he had stolen 10 million from the appellant. He said he has never been a director of Garden Chambers. He has never collected rents or appointed agents to do so and he had never been taken to any criminal court to answer criminal charges.

He averred that the effect of his being called a thief has affected his reputation in the face of his employers and he lost the respect that he had built over the years. He denied signing any of the receipts that the tenants had been issued with.

The appellant testified as DW1. It was his evidence that he worked for Garden Chambers as the Managing Director and he was in-charge of collecting rent and management the property. The 1st and 2nd respondents' father was his brother, but he died in the year 2006 and before his death he assisted in the management of the property. That after the death of his brother, he went to collect the rent from the tenants and found some receipts but which were not company receipts. He went and lodged a complaint with the police over the fake receipts as through them they had lost over Kshs.10 million. According to him the receipts had been signed by the 2nd and 3rd plaintiff. He admitted having instructed the firm of Eboso & Wandago Advocates to do the letter to the plaintiffs demanding the money. He stated that in the letter there is no mention of the word "thief". That the respondents were collecting rent without letters of administration. He stated that the letter was hand delivered and at the same time sent by registered post. He said the letters were not defamatory but was just a request to them to return the money.

On cross-examination, he told the court that the letters were delivered by hand and also posted by registered mail. That the sum of Kshs.10 million was for a period of 1, 2 or 5 years but he was not sure. He did not have any evidence to proof that indeed the respondents collected the said rent. That he is not a hand writing expert and he did not have a handwriting expert report to prove that the receipts were signed by the respondents.

In his submissions, the appellant submitted that the letter was not written by himself and it was addressed directly to the respondents and not to a third party. That the letters having been written to the respondents cannot be deemed to have been published to a third party as the general public was not the recipient of the said letter but the respondents were.

It was further submitted that the respondents did not call as a witness the so called worker whom she alleges opened and gave her the letter neither did she prove to the court that the said letter was read by the said worker.

That the 2nd respondent confirmed that indeed the letter was not addressed to his boss but to him personally though it was a practice at his place of work that all correspondences received must go to his boss. That the worker alluded to by the 1st respondent or the employer alluded to by the 2nd respondent were not called as witnesses. No reason was given why they were not called to confirm that they opened the letters, read the contents therein and concluded that the words tarnished the image of the respondents. The appellant urged the court to find that there was no defamation and in support of that contention relied on the cases of **James P. Mureithi Vs. Kenya Tea Development Authority & 2 others (2001)eKLR** and that of **Onesmus Kaberia Vs. Silas Rwito (2010)eKLR**. On whether the alleged words were false and/or malicious, it was submitted that the words were true as the appellant has receipts to confirm that the respondents were correcting rent without authority.

That there was no evidence of malice on the part of the appellant and if the letters were opened, the appellant cannot be prejudiced as the same was beyond his control. The respondents drew the attention of the court to the order issued on the 29th September, 2016 in which the court ordered that the appeal be prosecuted within 90 days failing which it would stand dismissed. That the appellant only hurriedly listed the appeal for hearing on 11th January, 2017, a few days shy of the 90 days deadline and then filed submissions on the 12th day of January, 2017 before directions had even been taken. The directions were finally taken on 18th January, 2017 just four days away from the 90 days deadline.

Going into the substance of the appeal, it was submitted that the subject letters accused the respondents of collecting rents from the tenants of the Garden Chambers. It imputed criminal allegations upon the respondents and asked the court to take the defamation seriously due to the permanent nature of the letters, being a libel. They argued that libel is permanent in nature unlike slander and the case of **Thorley Vs. Lord Kerry** was cited to support this contention.

On whether the statement was published by the defendant, the court was told that the appellant admitted having instructed his advocates to write the letters to the respondents. In writing the letters, the advocates were just carrying out their client's instructions.

It was further submitted that the letters having been delivered unsealed and exposed to, and read by third parties were published. That the appellants did not deny that the letters were delivered by hand and it was the evidence of the appellant that he did not know the state in which the letters were delivered. Even if there is doubt as to whether the third parties read the letters, the appellant communicated false information to Eboso & Wandago Advocates who reduced it into writing before addressing it to the respondents and therefore the instructions are in themselves publication with the advocates being third parties.

On whether the statement referred to the respondents, it was submitted that the letters were expressly addressed to the respondents and that appellant admitted that the letters were so addressed.

On whether the statement was false, the court was told that the respondents denied having collected rent from Garden Chambers and though the appellant pleaded the defence of truth, it was never proved in evidence. That the appellant did not produce any evidence to prove that the respondents signed any of the receipts and the amount claimed in the sum of Kshs.10 million was just an estimate as there was no auditor's report to support that figure.

In contending that the statement was defamatory, it was submitted that the general impression that the words in the letters was likely to create in the minds of reasonable persons was that the respondents are thieves and fraudsters who had stolen Kshs.10million. The letters were read by third parties.

It was further submitted that the letters were designed to impute criminal conduct on the respondents and this is the opinion the respondent's employer and workmates formed. The respondents referred the court to the case of *Shah Vs. Uganda 1971 E.A. 362* where the court held that;

“Any words or imputation which may tend to lower a person or persons in the estimation of the right thinking members or expose a person or persons to hatred, contempt or ridicule have been held to be defamatory, and it is the general impression that the words are likely to create in the minds of reasonable persons which must be considered rather than making a close and precise analysis of the words used”.

It was submitted that malice can be inferred from the contents of the letters as the words were disproportionate to the facts and also from the relationship between the parties considering that there was dispute about rent collection. That the appellant knew the allegations to be false as he admitted in evidence that he had no evidence that the respondents collected the Kshs.10 million. In support of this contention the respondents relied on the case of *J.M. Mutwii Vs Nation Media Group Limited (2016) eKLR* and that of *Nation Media Group Limited & 2others Vs. John Joseph Kimotho & 3 others CA (200)eKLR*.

On damages to be awarded to the respondents; it was submitted that libel is actionable perse and damages are presumed. An extract from *Halisbury's laws of England 4th Edition Vol. 28* on libel and slander was quoted as hereunder;

“If a person has been libeled without any lawful justification or excuse, the law presumes that some damage will flow in ordinary course of events from the mere invasion of his right to his reputation and such damages are known as “general damages”.

The court has carefully re-evaluated the evidence on record and has also considered the submissions by the respective parties. As rightly submitted by the appellant, the grounds of appeal can be merged into one main issue which is; whether the respondents proved that the contents of the demand letter were defamatory against them. It is trite law that for one to prove defamation they must proof the following elements of defamation;

- a. That the libel was published by the defendant.
- b. The words must refer to the plaintiff.
- c. The words were false and malicious
- d. The statement must be defamatory.

What is defamation?

Defamation is defined in the case of *Geoffrey Seijogo Vs. Reverend Patrick Rwabigonyi (1977)* reported in the digest of Odunga thus;

“As a publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally or which tends to make him be shunned or avoided. The defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of the society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are the attack upon the moral character of the plaintiff attributing to high form of disgraceful conduct such as crime,

dishonesty cruelty and so on”

Gatley on libel and slander 8th edition par 4 and 5 defines defamatory as;

“Any imputation which may tend to lower the plaintiff in the estimation of right thinking members of the society generally or to expose him to hatred, contempt or ridicule”.

Winfield in J.A. Jolowicz and T.Ellis Winfield on Tort 8th Edition at page 254 defines defamation as;

“The publication of a statement which tends to lower a person in the estimation of right thinking members of society generally or which tends to make them shy or avoid that person”.

The Halsbury’s laws of England 4th Edition Vol. 28. Paragraph 10 defines defamation thus;

“A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of the society generally or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an importation on him disparaging or injurious to him in his office, profession, calling or business”.

I now proceed to consider the issues in this appeal as herein set out;

a. Was the libel published by the appellant?

The court has carefully perused the letters that form the gist of the alleged defamation. The contents and the wordings of the said letters are the same. The subject of the letters is; Rent Collection totaling to Kshs. 10 million from Garden Chambers Limited. It is written on the letter heads of Eboso & Wandago Advocates who have expressly stated that they act for Dhirajlal Virpal Patani (Appellant herein) who has instructed them to address the respondents as follows;..... then the letters are addressed to the respondents herein. There is no doubt that the letters were written under the instructions given by the appellant herein.

In his evidence he told the court that he instructed his advocates to write demand letters to the respondents. Though in his submissions he denied having written the letters, it is trite that when you instruct an advocate he becomes your agent and whatever he does, is done on your behalf and you are bound by it. I need not labour this point any further.

Did the words refer to the respondents?

The letters dated 5th October, 2009 were addressed to each of the respondents in person and the appellant is on record as having said;

“Before I went to the CID I wrote to the three plaintiffs demanding the money that was lost on the issuance of the fake receipts”.

He further told the court that his advocate informed him the letters were delivered and at the same time sent by registered mail to all the three respondents.

In his further evidence he said;

“Yes, I was informed letters were sent by registered post.

On cross-examination he said;

“Yes, the letters said to be defamatory were delivered and as far as he could remember, three letters were written”.

In my view and from these extracts, there is no doubt that the words referred to the respondents as the letters were addressed to each of them and the evidence on record reveals that they were delivered and received by each of them.

Were the contents of the letters defamatory

The respondents have alleged that the letters were defamatory as they were read by third parties. One element which is essential in the law of libel is that the words should be defamatory, untrue and should be published of and concerning the plaintiff.....in clerk and Lindsell on tort 17th Edition 1995 page 1018 it is stated that;

“Whether the statement is defamatory or not depends not, as has been printed and already, upon the intention of the defendant, but upon the publication of the case and upon 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 importation is not believed by the person to whom they are published”.

The respondents on their part alleges that the letter was defamatory because the contents were not true and they were read by third parties. That the general impression that the words were likely to create in the minds of reasonable persons are that they are thieves and fraudsters who had stolen KShs.10 million. The first respondent said she was defamed as she was said to have stolen money which she did not and her workers who saw and read the letter thought of her as a thief.

On the part of the 2nd respondent, it was his evidence that the letter was read by his boss who asked him what kind of a person he was as his boss had read the letter stating that he had stolen 10 million, yet he did not steal the money. As a result the respect his employer had for him went down.

From the definition of the word defamation, what comes out clearly is that;

“It is a statement which tends to lower a person in the estimation of right thinking members of the society generally or which makes him be shunned or avoided”.

It therefore follows that, what a man thinks about himself does not count in the tort of defamation but rather what the reasonable members of the society think about him. The respondents herein stated that they were defamed in that the contents of the letters were false and that they were read by third parties. It is worth noting that none of the respondents called any evidence to that effect. The alleged third parties were not called in evidence to confirm to the court that indeed the letters were not sealed and that they read the contents of the letters which made them form a negative opinion about the respondents.

In my considered opinion, such evidence was very material in this case because unlike an article that is published in the newspaper, the publication in this case was through letters written to the respondents. It was important for them to go a step further and call the third parties as witnesses to prove that aspect of defamation.

Though it has been argued that the appellant’s advocates and the person who typed the letters were also third parties who read the contents of the letters, the respondents did not discharge their burden on a balance of probability to prove that they were defamed. In any event, communication between an advocate and his client is confidential and there is no evidence that the confidentiality was breached and the court was also not told what the said advocates thought of the respondents after writing the letters, if at all. In view of the foregoing, I find and hold that the respondent did not succeed in proving that the letters were defamatory.

Were the words false and malicious

The respondents alleges that the words were false while the appellant maintains that the contents were true. In defamation, it is trite that where a defendant states that the words are true, it is his duty to prove

the truthfulness of the publication. It has clearly emerged from the appellant's evidence that the Kshs.10 million that he was claiming was just an estimate by the auditors.

The auditor was not called as a witness in the case. The Appellant was not even sure that he had any records by the auditors by the time the letters were written. He did not even have any evidence to prove that the respondents collected the Kshs.10 million that he was alleging they had collected. His evidence was mainly on receipts which he alleged were signed by the respondents yet he did not call a handwriting expert to confirm that indeed they were signed by the respondents. To that extent, the court may conclude that the contents of the letters were not true.

But then again, in the reply to defence, the plaintiffs in paragraph 6 (v) states as follows;

“The plaintiffs deny forging and/or issuing receipts purporting to be from the company save for the genuine receipts had and issued and the defendant is put to strict proof.”

This to me, was an admission by the Respondents that they collected some rent from the tenants of Garden Chambers yet in their evidence they have denied having collected any rent at all. In fact, in their evidence in chief and also on cross-examination they denied ever collecting rent. They are on record as having told the court that it was the appellant who was collecting rent.

In those circumstances, it is clear that the respondent's evidence did not support their pleadings, by denying that they collected rent. With that admission, the court is not able to find malice on the part of the appellant as it is not clear how much rent the respondents could have collected.

It is also worthy noting that the 3rd respondent did not tender any evidence in the proceedings before the Lower Court. I have clearly perused the record and I did not find any authority filed by any of the other respondents to plead and act on her behalf or any other indication that any of them was giving evidence on her behalf. She ought to have testified on the worth of her reputation in order to succeed in the claim.

On the defence of justification, this court finds that it was not material that the learned magistrate did not consider it as the respondents did not prove that they were defamed.

The appellant raised the issue of the court order made on the 29th September, 2016 in which the appellant was ordered to prosecute the appeal within 90 days failing which it stood dismissed. I have quickly perused order 50 rule 4 and its clear that the period between the twenty-first day of December in any year and the thirteenth day of January in the next following, both days included, shall be omitted from any computation of time. Simple mathematics will prove that considering the above computation, the appellant filed his submission within time.

In the end, I find and hold that the appeal herein has merits and is allowed. The judgment of the Lower Court awarding the respondents Kshs.500,000/- each, is set aside and replaced with an order dismissing the suit.

Costs of the appeal are awarded to the Appellant.

Dated, signed and delivered at Nairobi this 16th day of March, 2017.

.....

L NJUGUNA

JUDGE

In the presence of

..... *For the Appellant*

..... *For the 1st Respondent*

..... *For the 2nd Respondent*

..... *For the 3rd Respondent*