



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CIVIL SUIT NO. 1 OF 2011

WELLINGTON SENERWA KALO PLAINTIFF

V E R S U S

- 1. BEN MASAWÉ**
- 2. JOSEPH KIVUVA NZUKI**
- 3. MAGIRI MANENE**
- 4. MACHARIA JOHN NDUNGU**
- 5. RAMADHAN DABALE GOLICHA**
- 6. WILLIAM KHISA**
- 7. VIRGINIA WAYUA ORIGA TUNDU**
- 8. JONATHAN LUANTUNDU**
- 9. JOHN MUSYOKA**
- 10. NGARE MBALUSI CHARLES**
- 11. MARGARET AWINO**
- 12. MUSILA NZAU**
- 13. JOSEPH NUMBA**
- 14. IBRAHIM NOOR HUSSEIN..... DEFENDANTS**

JUDGMENT

BACKGROUND OF THE CASE.

This matter has had a history.

The plaintiff filed this case through a plaint dated 30th September 2011 and filed on 4th November 2011 at the Garissa High Court, against 14 defendants. In 2012 however, the plaintiff filed in the same file a Miscellaneous Criminal Application No. 6 of 2012 in which the defendant was the Attorney General. During the canvassing of the Miscellaneous Criminal Application above, other pending applications filed by the same plaintiff were brought to the attention of the court.

On the 4th of July 2012 Hon. Justice Mutuku delivered a ruling with respect to Misc. Application No. 7 of 2012, and Hola SRM CR. Case No. 24 of 2012. The ruling also covered to Misc. Criminal Application No. 6 of 2012 above mentioned.

In the ruling, the learned Judge noted that Misc. Application No. 7 of 2012 was a Civil Case filed by Wellington S. Kalo (the Plaintiff) against 14 defendants seeking damages for defamation, and that in the same file, the plaintiff filed an application seeking the court's order to transfer Hola Senior Resident Magistrate Criminal. Case No. 24 of 2012. The Court observed that Miscellaneous Criminal Application No. 6 of 2012 was an application filed by the same plaintiff seeking this court's order to stop the Senior Resident Magistrate's at Hola from hearing Hola Criminal Case No. 24 of 2012 for the reason that the Hola magistrate was not gazetted to hear Economic Crime Cases.

The Judge observed that it was difficult for the court to understand why the plaintiff filed Criminal Application No. 7 of 2012 at Hola Court for damages for defamation after having earlier come to the High Court at Garissa with a similar case claiming damages for defamation. The learned Judge then ordered that the Senior Resident Magistrate's Court at Hola was fully equipped to hear the defamation case filed, and directed the Deputy Registrar of this court to write to the parties enclosing the directive, once typed, to enable them take appropriate action.

The plaintiff was not happy with the above ruling and applied for setting aside of the court's orders through a request dated 16th December 2012. The court then, in a ruling delivered on 24th July 2014, reviewed its earlier orders and this matter proceeded to hearing in the High Court at Garissa.

THE PLAINTIFF CASE

In the Plaint dated 30th September 2011, the plaintiff claimed that in a meeting held on the 21st July 2011 at Pumwani (village 10) estate, the defendants uttered words before forty six (46) villagers that he stole or intended to steal farmers cash totaling to Kshs 18,300/= after distributing farm inputs to villagers of village 10. He claimed that the defendants also forwarded the matter to the OCS Bura Police Station with the intention that the said OCS charges him in court for attempting to steal farmers money.

He claimed that the said words of the defendants portrayed him as dishonest and a thief, and that his reputation was lowered because of the said defamatory words. He claimed that the defendants refused or neglected or failed to apologize, despite demand and notice of intention to sue having been served upon them.

The plaintiff therefore prayed for judgment against the defendants jointly and severally for general damages for defamation of character and costs of the suit.

DEFENDANT'S CASE

The defendants filed a joint defence through counsel C.P. Onono and Company Advocates. In the defence, it was averred that the suit was incompetent and bad in law. The defendants stated that they would seek clarity and better understanding of the background of the suit, especially with regard to the way Bura Farmers Irrigation Scheme and the Village Management Teams were governed.

According to them, the plaintiff was the Chairman of village 10 until he was voted out in a general meeting held on 8th September 2011 and that at all material times the 2nd defendant was overall Chairman of the Management Committee.

The defendants sought to bring out how matters in the villages were conducted by the committees. They alleged that the complaints about loss of money, if any, were raised genuinely by members of village 10 and that it was the duty of the defendants to call a meeting of the members of village 10 and as such they could not be blamed as they were not the originators of or publishers of the complaint, and as such no liability could attach to them.

PLAINTIFF'S REPLY TO DEFENCE

On 7th March 2012 the plaintiff filed a reply to the joint defence of the defendants. He averred that he was not under investigations and had not been convicted in any court of law for stealing or intending to steal money from village 10 farmers to justify the defendants calling him a thief.

He also stated that if he included in the payroll names of people who did not work for village 10 farmers, that was corruption and a Criminal matter which should have been reported to the DCIO to investigate. He also stated that the Secretary kept all village 10 farmers record, including master rolls, books, and prepared payrolls. He averred that the 14th defendant was the Treasurer who recommended the signing of the payrolls and the 5th defendant as Headman checked and signed the payroll.

He alleged that payrolls Nos. 1 and No. 3 signed for payment to Saweria Mukeria claimed to be his daughter and Ibrahim Sara Mboya claimed to have died 15 years earlier had been signed by the 14th and 5th defendants.

He stated that the joint defence of the defendants raised no triable issues and was merely calculated to delay fair trial of the case.

Before hearing of the case commenced, the Plaintiff withdrew his case against Ibrahim Noor Hussein the 14th Defendant because, according to him he had died. He also withdrew his case against Virginia Wayua Oringa the 7th defendant because his son was married to her daughter. The withdrawal of the case of the plaintiff against the two defendants was with no order as to costs.

THE PLAINTIFF'S EVIDENCE.

The plaintiff testified as PWI. He stated that he brought the defendants to court because they tarnished his name by calling him a thief. It was his evidence that in the year 2010, he was elected by the farmers of village 10 in Bura Tana Irrigation Scheme as the Chairman of the Farmers Management Committee, now transformed to a Welfare Society.

His functions were to look at the welfare of farmers, guide them and take their complaints to the Government. In his work, he noted problems as farmers were not receiving any assistance. They were also withdrawing from Equity Bank Limited because of financial problems. He thus sat with the committee that is, himself, the Treasurer and Secretary and noted that Equity Bank Ltd did not support women.

As a committee, they decided that since the Government had an economic stimulus program to support those without financial independence, to write the Ministry of Water and Irrigation asking for financing under the stimulus program to cultivate food. It was his evidence that their request was accepted and the Government sent money for all villages in Bura Irrigation Scheme through the General Manager of the National Irrigation Board.

According to him, the said General Manager informed the Scheme Manager who was the 1st defendant, about these arrangements. He stated that the General Manager informed them that the money was to cater for cultivation services for two seasons. They then informed the farmers about this development which meant that farmers no longer needed to go to Equity Bank for financing, as the Government had given the money.

He stated that the money was given to the 1st defendant who unfortunately did not use it for the intended

purpose but used it for his own personal things. It was his evidence that the Government then investigated the matter through the Anti-Corruption Commission and the scheme manager (1st defendant) was demoted and taken to court and also transferred to Ahero Irrigation Scheme. He stated that before the 1st defendant left Bura, he schemed with the 2nd defendant to put him into problems by alleging that he had misappropriated the money of farmers. He stated that the 1st and 2nd defendants called a meeting of people from village 10 and told them that he had stolen their money.

According to him, the meeting was held on 21 July 2011 and was attended by more than 100 people. It was his evidence that at that meeting that he was alleged to have stolen money through fake payroll payments to workers. He stated that about 14 people called him a thief, but the others who attended the meeting kept quiet. The matter was also investigated by the police who found that no theft had been committed.

It was his evidence that arising therefrom, his name was damaged and his family and friends and the public, viewed him as a thief. He however allowed for time for the police to investigate the matter and thereafter on 5th September 2011, wrote a letter to the defendants asking them to apologize otherwise he would take them to court. The defendants did not apologize and as a result, he came to court through a plaint.

He testified that the defendants hired an advocate who filed a Memorandum of Appearance on 30th November 2011, but on 31st November 2012 at 1.00 P.m he was surprised that his neighbour woke him up to tell him that the police were outside his gate. When he came out of the house, he saw the OCS who took him to the police station and later charged him theft of money meant for farmers. He stated that the theft charges were the same allegations levelled against him in July. In his mind, there was a grudge against him as, though he was called a thief, by November 2011, no such report had reached the police, and he was not charged with any offence.

It was his further evidence that on 23rd January 2012, the 2nd defendant went to the police, and after being couched, reported that the plaintiff had committed theft. He maintained that even if his finger prints were taken to Nairobi, there would be no record that he was a thief. He emphasized that it was all a scheme to spoil his name and asked the court to consider that he was an adult, aged more than 64 years, with both male and female children, who were adults and married.

He stated that his name had been spoiled as, after he took the defendants to court, they went and made a report of theft against him to the police. He stated that even if money had been stolen, he would not have been the one to blame as he merely signed the payrolls as a supervisor. He stated that Dabale the 5th defendant, was also a signatory together with the 14th defendant who was now dead. He stated that all three were to sign before money was withdrawn. He also added that there were five signatories to the payments of money.

When cross examined by Joseph Kivuva Nzuki, he agreed that Nzuki was the Chairman of the whole Irrigation Scheme. He stated that when Nzuki went for the meeting in village 10, he was aware that Masawe had called the meeting. He maintained that he was the Chairman of Farmers in village 10. When told that he should have signed as Supervisor only, not as Chairman, he stated that he acted as a Supervisor and Dabale occupied two positions of Chairman and Headman of village 10. He said that he had agreed that Dabale be Chairman and Headman and thought that such was right because they were safeguarding funds. He maintained that no money was lost.

When cross examined by Magiri Manene, he stated that no report was made to the Police about the alleged theft. When told that the defendant only said that the thief should be punished as there was a case against him at Hola, he stated that there was no evidence that he was a thief. He also stated that the 2nd defendant had reported a theft in 2012, but that he was called a thief before then and before the police took him to court. He did not deny that there was a time when Kshs 4,500/= was to be spent, but the expenditure was Kshs 9,000/=.

He stated that though he signed for the expenditure, the report was made to the police after he had sued

the defendants in this case. He maintained that there were five signatories to the payments. He stated that Magiri was the person who stood in the meeting and said he was a thief. He maintained that he was not convicted by any court for theft.

In cross examination by Macharia John, he stated that each of 14 people stood and said that he was a thief. When asked if Macharia asked the Scheme Manager why dead and absent people were in the list of payments he stated that Macharia called him a thief by saying that he used fake payrolls. He could not confirm if the money was from the Government. He stated that the source of the money could only be explained by Ben Masawe (1st defendant). He stated that he was removed as Chairman because of a Scheme hatched with Ben Masawe. He further stated that later farmers realized the truth and elected him as Chairman. He stated that he did not collude with the advocate of the defendants to summon the defendants to court. He stated that the advocate for the defendants had withdrawn from the case and the Judge asked him to serve the defendants in person.

In cross-examination by Ramadhan Dabale he stated that it was true he was charged with theft of money from farmers. He stated that the case was in Hola and that relevant documents were also held in that case. He stated also that he did not ask for the documents. He however read a payroll in court which showed that Dabale signed as Chairman. He denied knowing Sara Mboya Balio. He stated that he did not know the father of Ibrahim Sarah but stated that they had employed Sarah Mboya. He stated that they did not employ the father of Sarah Mboya. He stated that he wrote to the Provincial Police Officer in Mombasa because he thought that the OCS Bura had not taken action in respect of the false allegations that he was a thief. He stated that he wrote that letter before he was arrested.

In cross-examination by William Khisa, he stated that every village ran its own internal affairs. Each had a Chairman, Secretary and Treasurer and also a Headman. He stated that he did not know how much money was to be given to each farm, but maintained that he was to employ people and pay them. He stated that the money in question was paid through Equity Bank and was given to the Scheme Manager 1st defendant, who facilitated payments.

In cross-examination by Jonathan Tundu he stated that he was called a thief in July 2011 and that the first action he took was to write a notice to the defendants asking for apologies. He maintained that if the notice was not delivered, Jonathan Tundu and other defendants would not have engaged Mr. Onono Advocate. He stated that after taking the defendants to court, he was removed as a Chairman in a meeting called by the Scheme Manager.

In cross examination by Ngare Mbalusi he stated that if he called Ngare Mbalusi a caretaker in a letter then he was mistaken. He maintained that Ngare Mbalusi was a leader of farmers. He stated that all he was saying was that Ngare Mbalusi was not entitled to call him a thief. When told that he used money to pay people who did his private work, he stated that payments were made for work done for farmers including his own farm.

In cross-examination by Margaret Awino, he stated that when a village meeting was called, everyone interested was entitled to attend. He stated that the meeting was called by the Scheme Manager and every one had a right to talk. He maintained that Margaret Awino called him a thief and asked that he be removed as Chairman.

In cross examination by Musila Nzau he stated that he saw him in the meeting. When asked to confirm whether he was sure that Musila Nzau was in the meeting he maintained that he saw him. He denied a suggestion that Musila Nzau was not in the meeting. He stated that Musila Nzau attended the meeting as an ordinary farmer and was one of those who called him a thief.

When cross examined by Joseph Numba, he said that Numba was one of those who called him a thief while pointing a finger. He maintained that he was Chairman of farmers of village 10.

PW2 was Rose Muhonja Vitemo. She testified that she was not related to the plaintiff. It was her evidence that on 21st July 2011 between 2 Pm and 3 Pm, she attended a meeting at village 10 at Bura

Tana Immigration Scheme, where she heard people call the plaintiff a thief. She stated that those who called the plaintiff a thief were the Manager called Masawe, Kivuva and Magiri. Also Numba and Margaret Owino and Dabale the Headman, called him a thief. Others such as William Khisa and Ngare Mbalusi and Jonathan Tundu also were present. She identified Magiri in court, Ngare, Dabale, Jonathan Tundu, Margaret and Joseph Numba by pointing at them. She stated that these were some of the people who attended the meeting, and that Ben Masawe was not present in court.

She stated that she was saying the truth and that the defendants called the plaintiff a thief through she did not know what he had stolen. She stated that the plaintiff had not been charged in court. In her mind, the defendants wanted to defame the plaintiff and as a consequence of the defendants' utterance, he was removed from his position as Chairman in the village.

She stated further that when the plaintiff was Chairman, he made sure that money from Government was paid to farmers though she did not benefit from that money. She stated also that the plaintiff complained to the Government about money which was the reason why he was removed as Chairman. According to her, the statements made by the defendants relating to the plaintiff damaged his reputation.

In cross examination by Jonathan Tundu, she maintained that she was not related to the plaintiff and that the plaintiff was not her husband. She stated that she could remember very well that 21st July 2011 was a Thursday. She could also remember that the defendants said in chorus that the plaintiff was a thief. She stated that fourteen people called the plaintiff a thief at a meeting attended by many people, which was held during broad daylight.

In cross examination by Magiri, she agreed that Magiri ploughed farms at Bura and also provided transport. She stated that the scheme manager called the meeting and said that Kalo the plaintiff had stolen money through the payroll. She stated that if she was told that money was lost, she would say that was not true. She stated that Magiri said that the plaintiff should be taken to the police, because he had stolen money through the payroll. She maintained that the plaintiff was not her husband and said that she lived in farm No. 10544. She stated that, after the plaintiff filed the present case, he was charged in the Hola court and wondered why he was not taken to the Hola Court before the filing of this case. She stated that she discovered that the plaintiff was taken to Hola Court in 2012. She stated that Magiri said that the plaintiff would be taken to the office with two flags, which to her meant the Police Station.

In cross examination by Ramadhan Dabale, she stated that the Scheme Manager (1st defendant) called the meeting at 2.00 Pm, and said that Kalo the plaintiff was a thief. She stated that all the defendants stood up and supported the manager. She agreed that the defendants did not call a meeting and that the meeting was called by the Scheme Manager.

In cross examination by Charles Mbalusi, she stated that she knew that Mbalusi was also called Ngare. She admitted being a farmer like Mbalusi. She could not confirm however that the plaintiff had called Mbalusi a caretaker and thus misleading the court. She agreed that the meeting was called by the scheme manager. She did not know that on the 6th of that month, the plaintiff had called a meeting without informing the Chairman and that the Chairman then conveyed a meeting on 21st. She confirmed that Mbalusi was a leader in village No. 10. She stated that the convening of the meeting was announced in the morning of the 21st by the Headman. She confirmed that as a leader, Mbalusi was entitled to talk in the meeting. She admitted that it was good to talk about problems. She said that she did not discuss or talk about water issues.

In cross examination by Joseph Numba, she stated that many people attended the meeting and that many people called the plaintiff a thief. She stated that it was about 2.30 Pm not 11.30 Pm. She stated that the plaintiff was Chairman of village 10 and that overall Chairman was Kivuva. She stated that she could not say whether the plaintiff could write a letter to the Scheme Manager without involving the Chairman.

In cross examination by Margaret Owino, she stated that she came to Bura in 1985 not 1984. She stated that all the defendants insulted the plaintiff by calling him a thief. She confirmed that the meeting was called by the Scheme Manager and not by Kivuva. According to her, when the Scheme Manager said that

the plaintiff had stolen through the payroll, all the defendants supported him.

In cross examination by Joseph Kivuva, she stated that the plaintiff was in charge of the payroll together with other leaders. She stated that in the allegations of theft, the defendants only mentioned the plaintiff and not the other signatories to payments. She stated that it was not logical for a wrong doer to come to court and then later be taken to court as well, on the same issues.

PW3 was John Ndebera Senerwa. It was his evidence that on the 21st July 2011 at 2.00 Pm, he was in village 10 Bura at a meeting, presided by the scheme Manager. At the meeting, he saw leaders such as Magiri, Kivuva, Margaret, Mbalusi and others whose names he could not remember. A statement was used that there was a thief. It was said that Mr. Kalo the plaintiff, was a thief, and that he stole money. When the theft allegation was made, there was confusion and he left the meeting. According to him, those who said that the plaintiff was a thief were in court. They included Magiri, Mbalusi, and Kivuva. The others he did not know their names but were present in court. He maintained that they called the plaintiff a thief.

In cross examination by Jonathan Tundu, he stated that he was not related to the plaintiff. He denied being a son of the plaintiff. He denied being related to the witness (PW2) who had testified. He denied that she was his mother. He stated that by 21st July 2011, he had completed Form 4 and thus attended a meeting. According to him, those who called the plaintiff a thief were many. He stated that Jonathan Tundu was one of those who called the plaintiff a thief during arguments. He stated that Jonathan talked in Kikamba. He did not know why the plaintiff was called a thief. He stated that he did not attend the meeting from the beginning.

In cross-examination by Magiri, he denied that the plaintiff was his father. He agreed that the name in his identity card was John Ndebera Senerwa. He stated that Senerwa was his father who had died. He stated that he knew some of the plaintiffs names, but did not know the others. He maintained that PW2 was not his mother.

In cross examination by Dabale, he stated that if someone said that the plaintiff and PW2 were his father and mother he would be lying. He stated that he did not know the person who called the meeting. He also did not know if the plaintiff called the meeting.

In cross examination by Charles Ngare Mbalusi, he stated that he had forgotten the name of Mbalusi, but he knew him as a farmer in village 10. He stated that if his father said that he was not a farmer, then he could not explain that contradiction. He stated that he was a farmer but did not have an account. He stated that when cabinet ministers were forced to step aside, that fact did not affect their reputation. He did not know the date when the convening of the meeting was notified to people. He was not present when Mbalusi talked to the plaintiff.

When cross examined by Joseph Nduva, he stated that he did not agree that the plaintiff was his father. He also did not agree that he was in school with Nduva's daughter in 2011.

Joseph Kivuva chose not to ask him any questions because according to him, those who testified for the plaintiff were members from the same family.

In cross examination by Margaret Owino, he stated that he did not know if Margaret insulted the plaintiff.

At this point the plaintiff stated that though he intended to call five witnesses, he felt that additional witnesses would just give repetitive evidence. He thus closed his case.

DEFENCE EVIDENCE

During the defence case, Joseph Kivuva Nzuki testified as DWI. It was his evidence that the issue herein had origins from the fact that the plaintiff, who was the supervisor of workers, drew money from the bank together with others to pay workers. Those who worked in village 10 raised complaints including

complaints against the Secretary, who was now dead. According to him, the Scheme Manager then got hold of the payroll and stated that there was a problem in village 10 and invited him to attend a meeting. When he attended the meeting together with others, they found that the payroll included payments to people who did not work and investigations were thus conducted involving the police to establish the truth.

It was his evidence that as Chairman, he and others carried out investigations and found that the complaints were true. He denied that the plaintiff called for money from Government and stated that the plaintiff could not do so as he was not working for the Government. He stated also that the name of Sara Mboya who had died long ago was found in the payroll. He stated that the plaintiff had been charged at the Hola Court and as such farmers decided that he could not continue to be Chairman and was thus removed.

In cross examination by the plaintiff, he stated that in 2010 the plaintiff was elected Chairman of the village 10 for three years but was later removed because he included fictitious names in the payroll. He stated that the payrolls were currently with the police. He stated also that he did not have a copy of the letter the plaintiff wrote calling for the meeting. According to him, the rules of Bura Farmers were such that if one mismanaged money he would be removed from any position of responsibilities. He denied calling the plaintiff a thief. He admitted that he made a report to the police, but stated that he did not know the OB Numbers. He stated that he was not an expert in court matters and could not remember whether he filed a witness statement. When shown a copy of a payroll, he stated that authorization was done by Ramadhan Dabale, Francis Mutuku and Ibrahim Noor. He stated that that payroll was not related to the case herein. He stated that he did not have a copy of his witness statements.

DW2 was William Khisa from village 10 Bura Irrigation Scheme. He stated that he was elected as advisor on farms and how farmers would cultivate land which comprised of 240 acres with each farmer having 3 acres.

He stated that in 2011, they cultivated Kenya Seed Maize at A6 – 36 Acres, A7 – 54 Acres, A8-72 Acres, A9- 36 Acres and A10 – 36 Acres. He stated that every farmer obtained a loan from Equity Bank after a budget was prepared for every farm to include costs of cultivation, seeds, fertilizers, and labour per head. He stated that at that time the budget for labour was Kshs 2,720/= for removal of bad seeds because they wanted to avoid pollination. He stated that their leader was the plaintiff. As the advisor, he was called by the Scheme Manager who informed him that the budget per farm had risen from Kshs 4500/= to Kshs 9,000/= and advised him to go to village 10 and call all farmers for a meeting to be held in 21st July 2011. When he arrived at the meeting, the manager wanted to know why the budget had risen that high.

When they checked the documents signed by the plaintiff they found that payments were made to the plaintiffs children such as John Mavuno, John Senerwa, and Sarah Mboya who had by then died. It was his evidence that the Scheme Manager was the Chairman of the meeting. According to him no child of the plaintiff attended the meeting. Only his wife Rose attended. He stated that Block A2 was to be cultivated in another season as the plaintiff said that the seeds should be for commercial purposes.

He stated that nobody said at the meeting that the plaintiff was a thief. According to him after the meeting the plaintiff went to Hola Court and sued Joseph Kivuva and Ramadan Dabale who he alleged called him a thief. He stated that he talked to the plaintiff who withdrew the case from Hola but learnt later that the plaintiff filed a case in Garissa.

He stated that the plaintiff infact asked to be shown a farm to cultivate to enable him repay the debts he owed to the villagers. He stated that the misappropriated money in question was a loan from Equity Bank which had not been re-paid to date. He stated that the bank was unlikely to give further loans to those who were indebted.

In cross examination by the plaintiff, he stated that the meeting of 27th July 2011 was called by the Manager. He stated that he had not seen the defence which referred to 21st July 2011. He was referred to paragraph 8 of the defence and stated that the names that were wrongly included were the ones he had

mentioned in court. When referred to a payroll of January 2011 he stated that the names of people therein could not be for those who did work in all the farms. On payroll No. 3 of 11th March 2011, he stated that what was contained therein was not legible. He stated however that the plaintiff signed twice as Chairman and supervisor which was wrong. He maintained that the complaint was only in relation to village 10 where the plaintiff was involved. He stated that they still did budgeting for every village. He remembered that he said that the money was sent by Government and Masawe wanted people to borrow from Equity Bank. He stated that Masawe was the Scheme Manager as well as an expert of growing of Kenya Seeds. He stated that he was aware that Masawe was no longer at Bura Irrigation Scheme. He maintained that he merely conducted prayers at the meeting and that the meeting was presided over by Masawe. He denied calling the plaintiff a thief. He stated that the witnesses of the plaintiff talked lies in court.

DW3 was John Macharia a farmer in village 10 at Bula since 1984. He stated that he was a self-reliant farmer and did not rely on loans but monitored carefully the affairs of village 10. He stated that he was not aware of an incident of failure to get adequate harvest. He stated that in the 2011 season farmers experienced a problem of loss of money for farm work and he asked why money was deducted twice for single service. At the office he was informed that an investigation would be conducted regarding village 10. He was later called by Ibrahim to the meeting at village 10 which was to commence at 11.00 am. He went there and waited for the meeting to commence. They were to listen and give their views.

According to him he asked the people from the office how the money was spent and how his name was included in expenditures while no work had been done on his farm. He was informed that leaders kept the records and that even people who had died had been paid. He stated that they did not accuse their leaders. He stated that all 14 people who asked questions or made comments in the meeting including the person who prayed and himself were sued in court by the plaintiff who was his friend. He stated that he received a first notice under his door but was later informed that the case was withdrawn. He was then served with another letter by a process server.

In cross examination he stated that there was an allegation that money was lost. He stated that the plaintiff who was Chairman and authorized payments. He stated that it was wrongly indicated that he was catered for with Kshs 9,000/=. He stated that he did not say that the plaintiff took his money, and maintained that the plaintiff wrongly sued the defendants herein, while the complains were from the whole of village 10. He stated that the plaintiff should have sued those in the office who organized the meeting. He stated that the leadership of the plaintiff made him(Macharia) lose Kshs 9,000/=.

DW4 was Charles Mbalusi a water overseer for National Irrigation Board as well as a farmer and a leader at village 10. It was his evidence that he was a leader of 48 people at Block A2. He stated that Joseph Kivuva was the overall Chairman of Bura Irrigation Scheme.

He stated that during the time in question the Chairman wanted his area to be planted with commercial maize for food while the Manager wanted the area planted with Kenya Seeds for production of seeds. According to him the two types of maize could not be planted in the same area.

He stated that the plaintiff sued the people who sided with the Scheme Manager. He maintained that he did not call the plaintiff a thief or insult him. He stated that he was responsible for water distribution. and that the plaintiff had called a meeting in village 10 for water users and said that the leadership group for water users be replaced as they were not doing a good job. He stated that the plaintiff even wrote a letter as the Scheme Manager over the issue which was wrong, as Charles Mbalusi was the overall Chairman. He stated that he respected the plaintiff.

In cross examination by the Plaintiff he stated that on 21st July 2011 a meeting was called because the plaintiff had written a letter to the manager. He agreed that the meeting was not held on 27th July. He stated also that the agenda of the meeting was for the Scheme Manager to respond to the plaintiff's letter as the plaintiff had written a letter calling for the meeting. He stated that the said letter was in the office. He stated that there was a disagreement between the plaintiff and Ben Masawe (the Scheme Manager) and that the plaintiff wanted to control the cultivation in his area. He stated that part of the problem was

that the plaintiff wanted the area to be planted with commercial maize, while commercial maize could not be planted near seed maize. He denied calling the plaintiff a thief. He stated that he had not been sued in court before but was aware that the problem of the plaintiff was that he had a conflict with Masawe the Scheme Manager.

Other defendants chose to rely on the evidence tendered by their above colleagues.

After the close of the case both for the Plaintiff and the defendants, the parties agreed to file written submissions. The submissions of the plaintiff were filed on 3rd September 2015. The submissions of the defendants were filed on 22nd September 2015. The parties elected not to highlight the submissions. I have perused and considered both sets of submissions. No authorities were cited to me.

ANALYSIS

This is a case of defamation through verbal utterances, called slander. The plaintiff alleges that the defendants defamed him by uttering in a public meeting, that he was a thief and later reporting him to the police. He stated that in a meeting attended by many people from village 10 at Bura Irrigation Scheme the defendants called him a thief. He stated that the effect of calling him a thief was to lower his reputation among the villagers which also made him lose his chairmanship and was further charged in court with a criminal case.

The defendants denied that they called the plaintiff a thief. They admitted attending a meeting where issues of loss or misappropriation of money in village 10 of Bura Irrigation were discussed, and subsequently a report made to the police. They stated that the documents showed that the plaintiff among others had approved irregular payments of money meant to be applied for services rendered to farmers in village 10.

In a case of defamation, a plaintiff is required to prove on the balance of probabilities that a statement about him was published to other persons. Secondly, that the statement was published by the defendant. Thirdly, that the statement was false and malicious and that the defendant knew it was false but still went ahead to publish the same. Fourthly, that the said statement had the effects of lowering his reputation among right thinking members of the community – see the case of ***PHINEHAS NYAGA –VS- GITOBU IMANYARA (2013) eKLR***.

The plaintiff herein has stated that he was called a thief by the defendants. His evidence is that each one of them called him a thief. His witness PW2 Rose Muhonja Vitemo said that the defendants called the plaintiff a thief in chorus response to the statement of the 1st defendant, the Scheme Manager. PW3 John Ndebera Senerwa on the other hand stated that he came to the meeting after it had commenced and left earlier, but heard the defendants call the plaintiff a thief.

I note that both the plaintiff and defendants say that the matter of loss of money meant for farmers in Village 10 was a discussion in a meeting. The meeting was called to discuss loss or misappropriation of money, which was meant for use of services rendered to farmers at Bura Irrigation Scheme. The meeting was called by the 1st defendant, in his official capacity as Scheme Manager.

The plaintiff has not given the specific words each of the defendants called him a thief. None of his two witnesses also gave the exact words used by any of the defendants. Though PW3 denied being a son of the Plaintiff, in my view his name Senerwa is so exact, that I find that he was a son of the Plaintiff.

In a meeting such as the one described, in my view the discussants including the plaintiff could give their views on how the money was lost. What comes out in evidence on both sides is that the Scheme Manager said there was suspicion loss of their money through the payroll and the plaintiff was one of the signatories. People discussed the issue and in various words said that investigations be conducted and the plaintiff be removed as Chairman. That is not the same thing as calling one a thief.

Since the plaintiff has not specifically stated what each of the defendants stated in regard to him, I find

that he did not establish on the balance of probabilities that any of the defendants called him a thief. Merely reporting him to the police after this civil case was commenced did not amount to calling him a thief.

Even assuming that he was called a thief, was that statement a false statement? Again, the fact that this was a public meeting attended by interested people, including the plaintiff to discuss loss or misappropriation of money, one cannot say that such a statement was false or malicious. There was an allegation of loss or misuse of money. The evidence both from the plaintiff and the defendants, was that the plaintiff was among others a suspect. He was a Chairman and a signatory to the expenditure of the said money. He did not deny that he was the Chairman or a signatory. He did not deny that he signed payrolls for the suspect payment. He merely stated in evidence that he authorized payment of the money together with others. In my view, it cannot be said from the facts and evidence, of this case, that any of the signatories could say that such a statement is false.

From the payrolls which were admitted by the plaintiff and relied upon by both sides, though not produced as exhibits, a reasonable man would conclude that money was misappropriated. The matter was even reported to the police and the plaintiff charged in court. In my view, the plaintiff has not proved on the balance of probabilities that the statements made by the respondents, if they were made were false or malicious.

Did the statement or statements refer to him? Indeed from the evidence on record from both the plaintiff and the defendants, the allegation was that the plaintiff was the suspect. The suspicion arose from the complaints by villagers, and were discussed by those who attended the meeting including the plaintiff the Scheme Manager Mr. Masawe. There is also evidence that the issue was reported to the police for action. I thus find and hold that the statements, if they were made and the general discussions at the public meeting referred to the plaintiff, among others.

Was his reputation lowered among rightful thinking members of the community? Indeed the evidence on both the side of the plaintiff and the defendants, was that the plaintiff was charged in a Criminal Case at Hola. He was also removed from his position of Chairman of village 10.

However in my view that alone does not mean that the reputation of the plaintiff was lowered in the minds of rightful thinking members of the community. This is because the plaintiff did not prove on the balance of probabilities that the information or what was said was false.

Secondly, under the Provisions of Article 10(2) (c) the Constitution of Kenya 2010, in my view, a person who accepts a position of leadership and responsibilities is automatically exposed to criticism and probes whether they are administrative or criminal.

For the sake of clarity, the said Article Provides:-

10(2) The national values and principles of governance

include –

(c) good governance, integrity, transparency and accountability,

By accepting to be a Chairman and signatory to the expenditure for the farmers, the plaintiff could not say that, if farmers said, between themselves in their meeting with this Scheme Manager, that they suspected that he had stolen, then he was defamed or his reputation was lowered. With the evidence on record, in my view, the plaintiff cannot say that his reputation was lowered in, the minds of rightful thinking members of the community. The Scheme Manager the 1st defendant cannot also be blamed for calling the meeting of the villagers to discuss the alleged loss of money. He was performing his lawful duty of finding a solution to the allegations of theft or loss of money which he had received from villagers or farmers.

DETERMINATION

Having found as above, in my view the plaintiff has not satisfied the threshold of proving a case of defamation against the defendants or any of them. I will thus dismiss the case.

As for costs I note that the plaintiff sued many defendants, fourteen in number, He however withdrew the case against two defendants with no orders as to costs. In addition the 1st defendant did not attend the hearing of the case. The justice of the case requires that the costs of the suit be awarded to those defendants who attended court and defended themselves up to the last moment. I thus award costs to the defendants, other than the two against whom the case was withdrawn and Masawe (1st defendant) who did not attend the hearing of the case.

Consequently, I dismiss the suit of the plaintiff with costs to the eleven defendants who defended themselves.

Dated and delivered this 9th November 2015.

GEORGE DULU

JUDGE