



IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Cockar, Muli & Tunoi JJ A)

CIVIL APPEAL NO. 76 OF 1986

BETWEEN

BERNARD KIARIE.....APPELLANT

VERSUS

THUKU NJOROGE.....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr Justice William Mbaya) dated 17th October, 1985

in

HCC No 2153 of 1979)

JUDGMENT

This appeal arises from the dismissal of a claim for *inter alia* general damages prayed for in respect of sustained injury to the appellant's (plaintiff's) character, reputation and business credit, and the exposure to the suspicion, ridicule, contempt and disesteem of right thinking members of society caused by a false, malicious and reckless verbal publication of defamatory words by the respondent (defendant) concerning the appellant in his capacity as a businessman, in his personal capacity and in the appellant's capacity at all material times as the community representative on Gitaru Water Project (hereafter referred to as the project). The respondent was by virtue of his being the Assistant Chief of Gitaru sub-location an *ex-officio* member of the said project. The defamatory words were published on 27th November, 1978, to the police officers of Kikuyu Police Station and the members of the project including Mr Njuguna Daniel, the current chairman of the project, and Mr Thuku Njoroge, the District Officer of Kikuyu division, who were all attending the General Meeting of the Project. The defamatory words are pleaded were uttered in Kikuyu language and, translated into English, are as follows:

“You should not concern yourselves with Bernard Kiarie because he is going to prison because of having embezzled project's funds. I have even forwarded the books (of account) to the police.”

In para 6 of the plaint are pleaded the ordinary and natural meaning of the words.

The defence filed by the state counsel had pleaded a denial of publishing the said words and in the alternative it had pleaded a fair comment made in good faith and without malice upon a matter of public

interest. No reply was filed to the defence. No comment was made on this omission either by the appellant's advocate or by the learned judge whose attention, it is clear from the record, was not drawn to this omission. The learned judge rejected the evidence of the respondent and his witness (DW1 and DW2 respectively) that the former had not uttered those words or that all that he had said was that he had told that meeting that the report read was for 1970 to 1978 but for the account for 1965 to 1966 they could ask the appellant. He found that the respondent had in fact uttered the words as pleaded in the plaint. However, he also found that the words uttered were a fair comment made in good faith and without malice upon a matter of public interest, namely upon the conduct of the appellant in his capacity as the chairman of the project between 1965 and 1966. In consequence he dismissed the suit.

There are three grounds of appeal. Mr Akhaabi dealt with all of them together. He contended that the defence of fair comment is confined only to an expression of opinion and did not include words which amounted to assertion of facts. Words such as "going to prison" or "embezzled project's funds" constituted assertion of facts. There was no proof of public funds having been embezzled by the appellant, nor was any attempt made to prove such embezzlement. The respondent had admitted during re-examination that he personally did not know if money was missing in 1965 and 1966. In the absence of proof of loss of funds there was no basis for any alleged fair comment. In support of his submissions Mr Akhaabi cited the Uganda High Court decision in *Figueredo v Editor, Sunday Nation* [1968] EA p 501, in which it was held that:

(1) To succeed in a defence of fair comment the defendant must show *inter alia* that each and every statement of fact in the words complained of is true:

(2) To say that the plaintiffs (in the Uganda case) had been convicted of or had committed forgery (a criminal

offence) was not a fact truly stated.

Four of the remaining holdings were to the effect that the words uttered were not statements of truth or were not supported by evidence. Mr Akhaabi referred to the respondent's evidence during re-examination where he said:

I do not personally know money was missing in 1965 and 1966. I was only referring to the fact that no report was made for that period."

Mr Akhaabi strongly urged that the learned judge misdirected himself in accepting the defamatory words as fair comment when there were no proved facts to form a basis for any comment.

Mr Akhaabi conceded that the defence witness (DW2) had said that there was some money collected and missing during that period that is during 1965 and 1966 but, with reference to the events at the meeting, the witness had added that it was not he but the respondent who said that the money was missing. We must observe here that it is clear from DW2's evidence that it was a fact that some money that had been collected during 1965 and 1966 had gone missing. There is also documentary evidence especially Ex B, C and E which clearly showed that the meeting had been convened by the District Officer to discuss loss of funds which was said to have occurred during the period the appellant was the chairman of the project. The learned judge had accepted the above evidence and found that during the period that the appellant was the chairman money had gone missing. In the circumstances he had, therefore, found that the words complained of were fair comment on a matter of public interest which were honest and free from malice or improper motive.

In our view the learned judge did not err when he found that the fact that some money that had been collected during the appellant's tenure of chairmanship had gone missing, and the fact that the loss had not been explained had formed a proper factual basis for a fair comment to be made thereon. That was the reason for the calling of the meeting. The words uttered by the respondent clearly are strong. But where is the malice? Actual malice does not necessarily mean personal spite or ill-will. Lord Campbell CJ in *Dickson v Wilton* (1859) F & F – P 427 said:

“Any indirect motive other than a sense of duty is what the law calls malice.”

The indirect motive most commonly relied on is an intent to injure. The desire to injure must be the dominant motive for the defamatory

publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in a *bona fide* protection of his own legitimate interest – *Gatley on Libel and Slander* 8th Ed paras 765, 766.

What dishonest motive did the respondent have apart from his duty as an assistant chief, in making the comment except that he did so in a matter of public interest? The true test is propounded by Buckley LJ in *Peter Walker Ltd vs Hodgson* [1909] KB at p 259 – that the defendant may succeed upon his defence of fair comment:

“if he shows that that imputationalthough defamatory, and although not proved to have been founded on truth, yet was an imputation in a matter of public interest, made fairly and *bona fide* as an honest expression of the opinion which the defendant held on the facts truly stated, and was in the opinion of the jury warranted by the facts, in the sense that a fair-minded man might upon these facts *bona fide* hold that opinion.”

And in *Figuerado’s* case (*supra*) this is what the learned judge said on p 507 letter “I”.

“The limits of criticism are exceedingly wide. Comments must be published honestly in that it is the expression of the defendant’s real opinion. If the language complained of is such as to be fairly called criticism, the mere circumstances that it is violent, exaggerated, or even in a sense unjust, will not render it unfair.”

On the question of malice Mrs Madahana, state counsel, on behalf of the respondent very properly raised the issue of non-compliance with order 6 rule 6 A (3) of the Civil Procedure Rules which has prescribed that where a malicious publication is alleged in the plaint but not the particulars of facts on which the plaintiff relies in support of the allegation of malice, and the defence pleads fair comment on a matter of public interest and (quote).

“... the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.”

This was a very valid point taken up by Mrs Madahana who submitted that in the absence of particulars of the facts and matters which it was necessary to plead in a reply and from which malice was to be inferred no need arose

for the respondent to offer any evidence to rebut any allegation of malice made in the plaint. We have already earlier stated our concurrence with the finding of the learned judge that some money that had been collected during the appellant’s tenure of chairmanship had gone missing and that the loss had not been explained. That had formed the factual basis for the comment made by the respondent during the meeting which was called in response to complaints regarding the loss of this money. Undoubtedly the words used in the comment are harsh but do they bear malice? No evidence was led to prove any facts or matters from which could have been inferred. Infact it would not have been possible to do so in view of the fact that no reply containing the particulars of such facts or matters from which malice could have been inferred, required under order 6 rule 6A (3) had been filed. Mr Akhaabi, conceded the necessity of filing a reply, but made a valiant attempt to circumvent the omission by submitting that in the absence of any evidence that the appellant had embezzled the money there was no need for any comment to have been made. There is no substance in that submission because there was evidence, accepted by the learned judge, and also by us, that some money that had been collected during the appellant’s tenure of chairmanship had gone missing and had remained unexplained. That constituted a sufficient factual basis for the comment that was made. Having considered this appeal carefully we are satisfied that the learned judge was correct in his finding that the words that were uttered by the respondent in the circumstances

amounted to a fair comment. We, therefore, dismiss this appeal with costs awarded to the respondent.

Dated and Delivered at Nairobi this 6th day of July 1994.

A.M.COCKAR

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JUDGE OF APPEAL

M.G.MULI

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

I certify that this is a true copy
of the original.

DEPUTY REGISTRAR