



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 615 OF 1979

CHRISPUS KEAH.....PLAINTIFF

VERSUS

JOYCE MBURUDEFENDANT

JUDGMENT

This is a claim for damages for libel. The defendant has filed a counterclaim for damages for “loss of business gains” due to the actions of the plaintiff. The plaintiff, Chrispus Keah, at all material times was Personnel Assistant at the Retread Factory of Car & General (Kenya) Ltd. The defendant was proprietor and manager of the factory canteen.

On January 16, 1979, the defendant’s husband, Rafael Mburu, was present in the canteen without the permission of the factory management. A complaint was made about the quality of the tea. Mburu answered it. The plaintiff, in consequence and on the instructions of a Director, wrote to the defendant a letter dated January 19, 1979, in which he said he understood that her husband had addressed the workers briefly on various matters connected with the canteen. He asked her to advise her husband that no visitors were allowed in the factory premises and strong measures would be taken against any outsider who addressed the workers.

In due course, the plaintiff received a copy of a four-page closely-typed letter dated January 29, 1979, addressed to Mr RK Bulley, a director of the company and copied to Mr Seabrook, Retread Manager, Mr Masinde, Personnel Manager, Mr Munyui, Productions Manager, Mr Oyondi, Factory Manager, and Mr O’Toole, Chairman of the company, in addition to the plaintiff, whose letter had been copied to the same persons except the Chairman. The defendant said she handed a copy to the plaintiff but denied sending the letter to any of the other addressees. She tore the others up, she said, when her husband told her not to send them. She was an unsatisfactory witness and I did not believe her. Her defence and counterclaim contains no denial of publication. Indeed, she avers that “the correspondence in question was intended to correct the situation in issue”. She admits she “uttered the allegations in paragraph 5 of the plaint and is ready to substantiate the same at the hearing of the case”.

Only one of the addressees, Mr Oyondi, was called to testify his receipt of the letter but the defendant admitted receiving a reply from Mr Bulley dated February 12, 1979 (Ex 8). She suggested that the plaintiff must have handed him his copy of the letter but this was not put to him in cross-examination and I cannot believe that he would do so. Mr Bulley took action on the letter which it is highly unlikely he would have done if he had simply been shown it by the plaintiff. Nor is it likely that he would have copied his letter dated February 12, 1979 to all the addressees to which the defendant’s letter had been copied unless he had received the original. I am satisfied that the letter was published to Mr Bulley and the persons to whom it was copied.

The letter (Ex 3) contains, *inter alia*, the following passages:

“On Saturday January 13, 1979 my husband went to see Mr RK Bulley in his office since Mr Keah and Mr Jairo, a committee member of the union had advised me on Friday January 12, 1979 that workers are not going to accept vouchers on Monday January 15, 1979 and when I asked Mr Keah about it, he told me that he is not interested with vouchers and he is not gaining anything from them so workers can do whatever they feel like even if they want to go on strike, it is ok to him.

On Monday January 22, 1979, I received Mr Keah’s letter and I went to see him in his office and when I arrived, he asked why my husband went to see Mr RK Bulley instead of seeing him. Before answering him, he told me that I and my husband have never seen a fire burning and it is our time to see it burning. He advised me that I and my husband are going to suffer a lot and he will frustrate us until we close down the canteen and he will give it to somebody else.

He told me that he asked me to be serving him free food from my canteen without any charge and I refused. He advised me that it is high time I realized that he is Assistant Personnel and he will not be counting card vouchers for me free, as Mr David or Mr Khaddhi used to do, and I must give him a tip when counting.

I am just like his employee because he is the only one giving money for buying food for the canteen. Most of the time he is the one who used to do shopping for everything for the canteen. In fact, if my husband can allow me, I can take Mr Keah to the Court of Law so that the court could judge who is right and who is wrong because Mr Keah has damaged my business by the following points:

1. Feeling jealous for what I am paid by the company.
2. Taking food on credit from the canteen and thereafter he does not pay at the end of the month.
3. Borrowing money from me and he does not refund.
4. Paying less money against card vouchers by way of throwing away some vouchers saying that they are many than what he issued to the members of the staff.
5. I would be very glad if Mr Keah could advise me the action which was taken against Car and General staff who poured some hot porridge on me at the canteen because I reported the matter to the Management and they have never written to me.

I remember some times Mr Keah used to refuse paying me my cash for the voucher until it forces me to go and see Mr RK Bulley, Director of the factory. I remember sometimes after the death of our President Mzee Kenyatta, Mr Keah told me like a joke that Kikuyu are finished and they should not expect any more fruits of Uhuru since Mzee was already dead. He told me that he will frustrate me and my husband until the last minute and he advised me that Car and General Company is for Abaluhya not Kikuyu.

His statement showed me that he is frustrating me because of tribalism, although I do not know what tribe he is.

The major problems started when Mr Chrispus Keah asked me whether I will agree whatever money he spends in the canteen to be squeezed at vouchers during vouchers payment and I told him that I am a Christian and I cannot agree to be involved in such dirty things. I told him that I want to remain faithful to the Management until they will feel that I am supposed to leave the canteen but not because I have done a mistake to them.”

The foregoing passages accuse the plaintiff of dishonesty, corruption, inefficiency, disloyalty to his employers and tribalism.

The words used in the letter (Ex 3) are clearly defamatory. The defendant pleads justification. The imputations, she says, are true. She was an unconvincing and unreliable witness and made only a half-

hearted attempt to prove the truth of her allegations. The documentary evidence she produced was of no assistance to her. She called two witnesses, her husband who was not asked about the allegations and one of the canteen workers who testified that he used to take food to the plaintiff in his office but did not know whether or not he paid for it. He said it was on the day of the late President Kenyatta's death (not sometime after) that the plaintiff said that since Mzee had died, he was going to give the canteen to his own people not to Kikuyu. When he was cross-examined as to the language used in this conversation, he became confused. I found him unreliable. The plaintiff denied the allegations. I find that the plea of justification fails.

Mr Kimiti, who appeared for the defendant, submitted that this was a statement on a subject matter in which the defendant and all those to whom it was published had a common interest. There was, I believe, a common interest in the satisfactory running of the canteen on the date the letter was written. It is not known when it was delivered to the addressees except Mr Bulley who received it on February 10. By that date, the defendant had ceased to run the canteen and had no common interest with Mr Bulley. She failed to appear on February 3, 5, 6 and 7 (the 4th was a Sunday) and on February 8, the canteen re-opened in charge of another person put in by the management. Even if the other copies were delivered while the defendant was still running the canteen, it is abundantly clear from the contents and tone of the letter, its timing and the number of persons to whom it was addressed that the defendant was actuated by malice. No previous complaint had been made by her. When asked why she had not complained, she said she was afraid of the plaintiff because of his position. Subsequently, she claimed that she was not afraid of him. There were in fact many officers of the company senior to the plaintiff to whom she could have complained. This defence also fails. The plaintiff has been defamed and is entitled to damages.

The defendant's counterclaim is based on the allegations which she has failed to prove and the fact that the canteen was given to another woman as allegedly threatened by the plaintiff. This is no evidence that the plaintiff was responsible for this. The agreement for running the canteen was between her and the company. It was apparently terminated by the company after she had ceased to operate the canteen. She claims Kshs 150 per day from February 6, 1979. Apart from claiming that she received Kshs 1,200 to Kshs 1,400 per week from canteen vouchers and sometimes made a profit of Kshs 200 per day, the defendant has given no evidence of her outgoings such as the cost of the food and drink she supplied and the wages of her workers nor did she give evidence of any steps taken to mitigate her loss. The counterclaim fails. If it had succeeded any attempt to assess her loss would have been based on mere guesswork.

There remains the question of the quantum of damages to be awarded to the plaintiff. The letter must to some extent have lowered his reputation in the estimation of his employers. An investigation was carried out but he was not informed of the result. A vacancy occurred for which, according to the plaintiff, he was qualified. An employee junior to him was appointed but he may have had better qualifications for that particular appointment. There is no evidence that the plaintiff's promotion was refused because of the defendant's letter nor is there evidence that a reduction in his annual increment from Kshs 500 to Kshs 200 was due to the letter. A demand for an apology was ignored.

Mrs Khaminwa, who appeared for the plaintiff, referred me to only one case on the quantum of damages. This was the Uganda case of *Olowo v Attorney-General* [1972] EA 311 in which a police officer was defamed in a song broadcast over the radio in a language spoken by a limited section of the community and which would have meaning only to those who knew the plaintiff and of a land dispute in which he was involved. His career was not affected. Russell Ag J awarded Kshs 8,000 damages. The libel in the instant case is, I think, slightly less damaging than in that case and taking into account the change in the value of money since 1972, I consider an appropriate award in the present case would be Kshs 12,000.

There will accordingly be judgment for the plaintiff against the defendant for Kshs 12,000 with costs and interest. The counterclaim is dismissed with costs.

Dated and delivered at Nairobi this 4th day of June, 1982.

SIMPSON

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CHIEF JUSTICE