REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 911 OF 1975

BILDAD ABIUD MBUTHIA.....PLAINTIFF

VERSUS

UNIVERSITY OF NAIROBI.....DEFENDANT

JUDGMENT

The plaintiff, who was formerly employed as an administrative assistant by the University of Nairobi, claims damages from University for libel arising out of an internal memorandum (to which for brevity I will refer as "the offending letter"), dated 11th December 1974, which was addressed to him and signed by Mr M K Ndoria, then the deputy registrar of the University. The letter was dictated by Mr Ndoria to his stenographer and copies were distributed through an office messenger to four other employees, namely finance officer, the assistant registrar (housing), the senior assistant registrar (recruitment) and the university medical officer.

[His Lordship then read out the offending letter, the first paragraph of which contained the libel (which was admitted). The rest of the letter referred to the decision to terminate the plaintiff's appointment and the financial arrangements connected with the termination. The judge then reviewed the evidence concerning the alleged publication of the offending letter to a messenger, concerning the defence of qualified privilege which was claimed in relation to the publication of the offending letter to the stenographer and to the other four employees (three of whom were concerned with the consequences of the termination of the plaintiff's employment), and concerning a meeting between the registrar, Mr Ndoria and the medical officer which was held a few days before the offending letter was written at which the unanimous decision was taken to terminate the plaintiff's employment.]

Harris J continued: On all this evidence I find that publication of the letter to the medical officer was privileged in as much as the letter merely gave expression to a decision unanimously reached at a meeting in which he had participated and that its publication to the office messenger has not been established.

With regard to the publication of the first paragraph of the letter to the finance officer, the assistant registrar (housing) and the senior assistant registrar (recruitment) (and presumably to Mr Ndoria's stenographer), the defendant relies on the decision of the Court of Appeal in England in *Hunt v Great Northern Railway Co* (1891) 2 QB 189. Although counsel for the plaintiff did not seek to distinguish that case from the present nor did counsel for the defendants seek to meet the criticism to which it has been subjected, it is the duty of this Court to consider the case in the later authorities and to distinguish it from the present case if the two are properly distinguishable.

In *Hunt's* case it was held that the defendant railway company was entitled to rely on qualified privilege in a claim by a former employee, a railway guard, for libel arising out of the inclusion of the plaintiff's name in a printed monthly circular addressed to its servants stating that, as was the fact, he had been

dismissed for gross neglect of duty. The test there applied by the Court was that contained in the rule which was stated in the then current edition of *Gatley on Libel* as being that:

> Where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest, the occasion is privileged.

The principle was stated somewhat differently by Lord Atkinson in the House of Lords in *Adam v Ward* [1917] AC 309, 334, where he said:

> It was not disputed, in this case on either side, that privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

Lord Greene MR in *De Buse v MacCarthy* [1942] 1 KB 156, 164, adopted this statement saying of it:

> I prefer that language – referring to an interest or duty to make the communication – to language, sometimes to be found, which refers to an interest in the subjectmatter of the communication. The latter phrase appears to me to be vague and to leave uncertain what degree of relevance to a particular subject-matter the communication has to bear.

Referring to the actual result of *Hunt's* case for the purpose of distinguishing it, Lord Greene MR said (at page 167):

> That decision brings out very clearly, in my judgment, the distinction between a case where there was an obvious interest to make the communication and an obvious interest to receive it, and one such as the present where that cannot be said. The defendant railway company had dismissed a guard in their service on the ground that he had been guilty of gross neglect of duty.
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> They published his name in a printed circular which they distributed among their servants, and they stated that he had been dismissed and gave the grounds of his dismissal. I should have thought it could scarcely have been argued in that case that the occasion was not one which made the communication a privileged one because it was clearly in the interest of the railway company to bring home to its employees the type of action which was regarded by it as a proper subject for punishment by dismissal, and it was also in the interest of the employees to know that.

Similarly, Lord Denning MR in *Egger v Viscount Chelmsford* [1964] 3 All ER 406, 409, found himself unable to accept as correct a statement by Bankers LJ in *Smith v Streatfield* [1913] 3 KB 764 that:

> Qualified privilege in one sense may be said to be the privilege of the individual, in that it arises out of the circumstances in which the individual is placed, but as a defence, it is attached to the publication,

and he observed that:

> All I would say is that the defence of qualified privilege is a defence for the individual who is sued, and not a defence for the publication. It is quite erroneous to say that it is attached to the publication as distinct from the individual.

Considering the respective positions, functions and status of the finance officer, the assistant registrar (housing) and the senior assistant registrar (recruitment), I am unable to see either the interest or duty, legal, social, or moral which the defendant is said to have had in communicating the first paragraph of the offending letter to any of these three gentlemen or the corresponding interest or duty which any one of them had to receive it. I must therefore hold that the defence of qualified privilege put forward in regard to each of them fails.

As to the publication of the offending letter to Mr Ndoria's stenographer acting as his secretary, although no doubt it was her duty in the ordinary course of business to receive the communication from him, the absence of any interest or duty on the part of Mr Ndoria to communicate the defamatory matter to her robs the occasion of the reciprocity to which Lord Atkinson referred and deprives the defendant of an essential basis for its claim to rely upon qualified privilege in regard to this particular act of publication.

[Harris J then considered, in the event that he should be mistaken in thinking that the defence of qualified privilege was not available in respect of the publication of the offending letter to certain persons, the question of malice and ruled that malice on the part of the defendant had been established.]

Turning now to the question of damages, the plaintiff gave evidence to the effect that he had difficulty in obtaining fresh employment after being discharged from the University and was without work from 1st January 1975 until June 1976. During that period he made numerous applications for employment and considered that at least on two occasions his efforts were defeated by reason of information given by the defendant to the prospective employers. The first occasion was when, after he applied to the Advisory, Management and Training Centre in the Kenya Institute of Management, the director of the institute told him that the defendant had stated that the plaintiff has stolen some things. The second occasion was when, after he had applied for a position advertised by the Bureau of Standards, the board of the bureau interviewed him and the director stated that he had been successful; but about two weeks later the director told him that the bureau could not accept him as his record was not good in the University where he had been working. Although the plaintiff's claim is not for wrongful dismissal, nevertheless these incidents are relevant in as much as they may well have resulted from the publication of the first paragraph of the offending letter.

Consideration should also be given to the arbitrary manner in which the plaintiff was treated, being afforded no opportunity to substantiate his denial of any misconduct before the letter was published, and to the subsequent refusal of Mr Ndoria, despite the plaintiff's written request, to withdraw the letter. In addition I have no doubt that the plaintiff's feelings were much injured, an injury which may have persisted to the present time; and injured feelings are as much matter for consideration as an injured reputation: *per* Lord Radcliffe in *Associated Newspapers Ltd v Dingle* [1964] AC 371, 398. Furthermore, the defendant, although rightly conceding through its counsel at the hearing that the letter is defamatory, had made no offer of apology and has expressed no regret and, so far as the evidence shows, has not taken any steps to correct the damaging effect of the letter in the minds of those to whom it was distributed within its walls.

I measure the damages at Shs 40,000 and I award the plaintiff his costs of the action. The damages will carry interest at Court rates as from today and the costs as from one month after taxation.

Judgment for the plaintiff with costs.

Dated and delivered at Nairobi this 27th day of February 1978.

L.G.E HARRIS

JUDGE