



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Miller JJA)

CIVIL APPEAL NO. 20 OF 1979

Between

UNIVERSITY OF NAIROBIAPPELLANT

AND

MBUTHIA.....RESPONDENT

(Appeal from the High Court at Nairobi, Harris J)

JUDGMENT

This appeal arises out of a suit for damages for libel which was successfully filed in the High Court by the respondent (hereinafter referred to as the plaintiff) against the appellant (hereinafter referred to as the defendant).

At the material time the plaintiff was employed by the defendant as an Administrative Assistant in the defendant's Health Centre his immediate superior being the defendant's medical officer Dr Githahu (medical officer). A Mr. Ndoria was then the Deputy Registrar of the University.

Mr. Ndoria called a meeting on December 3, 1974, which was attended by him, the Registrar and the medical officer, to consider a report by the medical officer concerning the loss of drugs from the Health Centre and also certain allegations which had been made against the plaintiff that he and another employee had been selling drugs outside the University. The meeting reached an unanimous decision that, despite there being no proof of theft by the plaintiff, his appointment should be terminated under the normal provisions of his terms of service as they desired to use him as an example to deter others.

The following letter was then written as an internal memorandum by Mr. Ndoria to the plaintiff on December 11, 1974:-

“Reports have been made to us on loss of drugs from the University Health Centre and allegations have been made against you in connection with the sale of drugs. These matters have been discussed by University authorities and it has been decided that action must be taken to ensure that University drugs should not be permitted to disappear, apparently, mysteriously.

It has been decided that your appointment as Administrative Assistant in the University be terminated in accordance with Clause 6(b) of your Terms of Service with effect from December 11, 1974. Salary will be paid up to and including this date in accordance with

the provisions of Clause 6(b) you will be paid three months salary in lieu of notice. Up to December 11, 1974, you will have a balance of nine days leave for which you will also be paid.”

Mr. Ndoria dictated the letter to his secretary; it was delivered to the plaintiff through an office messenger who also distributed copies of it to the defendant’s Finance Officer, Assistant Registrar (Housing), Senior Assistant Registrar (Recruitment) and the medical officer. The plaintiff was sacked forthwith.

The plaintiff instituted proceedings claiming in his plaint that the defendant wrote a typed letter dated December 11, 1974, in the form of an internal memorandum wherein it falsely and maliciously wrote and published to Mr. Ndoria’s typist and the other named officers of the defendant as well as the messenger who delivered the letter to the plaintiff and copies to the said persons, of and concerning the plaintiff in the way of his employment the words appearing in the first paragraph of Mr. Ndoria’s letter, and by the said words the defendant meant and was understood to mean that the plaintiff feloniously stole drugs of the defendant’s Health Centre and converted the same to his own use by selling them and pocketing the proceeds. The plaintiff was in consequence much injured in his credit and reputation and lost his position of Administrative Assistant through the forthwith termination of his employment by the defendant.

In the words of the learned judge, the defendant admitted, as to which there is no dispute, that the words complained of were defamatory of the plaintiff, denied that they were published to the messenger, admitted that they were published to the four named persons and to the stenographer by whom the letter was typed, but claimed that the publication took place on occasions of qualified privilege and that the defendant was not actuated by malice.

The learned judge pointed out that the issues for determination were those of publication to the messenger, qualified privilege in relation to all the persons to whom the publication was effected, and, if necessary, malice. The publication to the messenger is no longer an issue before us. The only issues before us upon appeal are (a) whether the publication took place only on occasions of qualified privilege (b) whether the defendant was actuated by malice in publishing the words, and (c) damages.

In coming to his decision the learned judge adopted and acted upon the following dictum of Lord Atkinson in *Adam v Ward* [1917] A C 309 at p 334 to which I also respectfully subscribe:-

“It was not disputed, in this case on either side, that a 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 so made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.”

The learned judge said that on the evidence before him he found that the publication of the letter to the medical officer was privileged inasmuch as the letter merely gave expression to a decision unanimously reached at a meeting in which he had participated.

With regard to the publication of the letter to the other three officers the learned judge held that the defence of qualified privilege put forward in regard to each of them failed. The learned judge said that considering the respective positions, functions and status of these three officers, he was unable to see either the interest or duty, legal, social or moral, which the defendant was said to have in communicating the first paragraph of the letter to any of these three gentlemen or the corresponding interest or duty which any of them had to receive it.

The learned judge further found that although Mr. Ndoria’s stenographer was acting as his secretary, and it was her duty in the 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 robbed the occasion of any reciprocity and deprived the defendant of an essential basis for its claim to rely upon qualified privilege in regard to that particular act of publication.

In regard to malice the learned judge said that after Mr. Ndoria had spoken to the plaintiff on the telephone and received a complete denial of the allegation of theft, Mr. Ndoria instead of either accepting that denial or affording the plaintiff an opportunity to meet with the medical officer face to face and refute the allegations, proceeded to write and publish the offending letter having told the court that he (Mr. Ndoria) felt all senior officers should be informed generally of what was going on in the University. The learned judge said:-

“In view of these factors and of his (Mr. Ndoria) admission that the unanimous decision, which was taken at the meeting a few days prior to the writing of the letter and without affording the plaintiff a hearing was to the effect that despite there being no proof of theft the plaintiff should be dismissed as an example to deter others. I find that malice on the part of the defendant has been established.”

The learned judge measured the damages at Kshs 40,000 which sum he awarded the plaintiff.

The defendant has appealed on the grounds that the learned judge erred, first, in holding that the letter was not published on the occasion of qualified privilege to the three officers; secondly, that malice could be inferred from the evidence before the court. Lastly, that the damages awarded were excessive in all the circumstances of the case.

The plaintiff's Notice of Cross-Appeal states that the damages awarded “are far too low and ought to be enhanced.”

Mr. Eastwood for the appellant has argued that in publishing the communication Mr. Ndoria acted in an honest desire to do what he conceived to be his duty inasmuch as the three officers concerned had a reciprocal interest in receiving it – the Finance Officer because there was internal investigation going on about the loss of drugs, the Housing and Recruitment Officers because the former had an interest in retaking possession of the defendant's property as the plaintiff was housed by the defendant, and the latter because he would act during Mr. Ndoria's absence and it was necessary for him to know about the matters with which Mr. Ndoria had been dealing in particular when the member of the staff who was dismissed was suspected of theft, and also to enable him to deal effectively with inquiries from prospective employers of the plaintiff in future; that these three senior officers would in any event have come to know that the plaintiff had been sacked because he was suspected of being a thief, therefore each of them had an interest in receiving the communication and Mr. Ndoria had a corresponding interest to write it.

I am not persuaded. It was not necessary for the proper functioning of these three officers in their job to know that the plaintiff was sacked by Mr. Ndoria because he was suspected of being a thief. It would have sufficed if only the second paragraph of the letter was communicated to them, they had no reciprocal interest in receiving the first part of the letter. Mr. Ndoria conceived his duty wrongly. If Mr. Eastwood's argument is pursued logically the publication of the letter would have been justified in the campus generally because those in the University or some of them including the three officers would have come to know about the plaintiff's alleged perfidy in any case. On coming to know that the plaintiff's services with the defendant had been terminated, the Finance Officer would have stopped paying him emoluments, the Housing Officer would have repossessed the house and the Recruitment Officer would have started to look for another candidate to fill the vacancy.

There has been a change in the mode of conducting administrative, business and executive affairs. Personal assistants and personal secretaries have become an indispensable adjunct to the running of establishments both in the public and private sectors. Look at the new breeds of confidential secretaries, Euro-secretaries, palantypists, short-hand writers – more grandiosely stenographers, copy typists and ordinary one finger typists among whom I may be included also, who have grown up. It has become impossible, at least impracticable for executives in senior ranks to function efficiently without the aid of one of such assistants. As regards a stenographer who is also a private secretary as in the case of Mr. Ndoria, provided the occasion is one in which the communication is both delivered and received in the ordinary course of business and duty respectively the writer or publisher of the communication should be

treated as one person with his stenographer or private secretary who should be taken as merging into the physical personality of the employer as if he were performing the function himself in person instead of physically projecting the stenographer or private secretary to do it as another separate and independent individual. For this purpose, the executive operator and the stenographer or private secretary become one inseparable individual.

I am therefore of the opinion that the defence of qualified privilege fails in the case of the three officers but not in the case of Mr. Ndoria's secretary. It does not affect the result of the appeal that I am not prepared to go so far as to include publication to the stenographer as an act of defamation of the plaintiff. Having reached this conclusion it is not necessary to consider whether there was malice on the part of the defendant.

In assessing the damages the learned judge took into consideration the arbitrary manner in which the plaintiff was then being afforded no opportunity to substantiate his denial of any misconduct before the letter was published, and the subsequent refusal of Mr. Ndoria, despite the plaintiff's written request to withdraw the letter; in addition, also to the much injured feeling of the plaintiff, and, further, although the defendant rightly conceded through its counsel at the hearing that the letter was defamatory, made no offer of apology and had expressed no regret nor, so far as the evidence showed, taken any steps to correct the damaging effect of the letter in the minds of those to whom it was distributed within its walls.

Mr. Eastwood submitted that there can really be no damages awarded for injured feelings. In *Kelly v Sherlock*, [1866] 1 QB 686 at p 698, Blackburn, J referred to injured feelings in estimating the compensation for the plaintiff. In *Associated Newspapers Limited v Dingle* [1964] AC 371 at p 398, Lord Radcliffe said:-

“Injured feelings, it must be remembered, are as much a matter of consideration in assessing damages for defamation as injured reputation.”

For the reasons stated by the learned judge, and, also because the libel was of a gross and offensive character the damages awarded were not excessive. As regards the cross-appeal, without wishing to discourage cross-appeals generally, in particular when it is made upon advice by counsel, I would say that in this instance there was no justification for asking the award of damages be increased.

I would dismiss both the appeal and the cross-appeal with costs to the plaintiff and defendant respectively.

As Law and Miller JJA agree it is so ordered.

Law JA. I have had the advantage of reading in draft the judgment prepared by Madan JA. I agree with it generally. My only doubt relates to the question whether or not qualified privilege attached to the publication of the offending letter to the secretary to whom the letter was dictated. The same point was considered by the Court of Appeal in England in the case of *Bryanston Finance Ltd v de Vries* [1975] 2 All E Rep 609. In that case, Lord Denning MR. held that dictation of a letter by a businessman to his typist, where dictation was the accepted mode of writing the letter, gave rise to an original privilege. Lord Diplock disagreed, saying –

“I am unable to accept the broad and novel proposition of Lord Denning MR. that there is an original privilege arising out of the contractual relationship of employer and employee which automatically attaches to every occasion on which a businessman dictates a business letter to a typist in his office, and can only be displaced by proof of malice.”

The third member of the court, Lawton LJ, doubted whether an employee, going about her ordinary work, had a sufficient reciprocal interest with the employer, to support an occasion of qualified privilege.

The learned trial judge in the instant case held that, in the circumstances of this case, publication of the offending letter to the secretary by dictating it to her did not give rise to an occasion of qualified

privilege, and I see no good reason to differ. The position would have been different if the subsequent publication to the recipients had been privileged, but it was not. Three of the recipients had no reciprocal interest with the writer to receive the defamatory matter communicated by the writer in the first paragraph of his letter, so that no ancillary privilege attached to the publication to the secretary.

Save in this minor respect, I agree with the judgment prepared by Madan JA and I concur in the order proposed by him.

Miller JA. I agree that both this appeal and the cross-appeal be dismissed. I also agree with the order as to costs proposed by Madan JA.

Dated and delivered at Nairobi this 1st day of April , 1980.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

H.E MILLER

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR