

.....REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E656 OF 2023

VIOLET JUMBA OKINDA.....APPELLANT
VERSUS
NATIONAL COUNCIL OF NON-GOVERNMENTAL
ORGANIZATIONS.....1ST RESPONDENT
KEVINNAH LOYATUM.....2ND RESPONDENT

**(Appeal from the judgement and decree, of Hon. PK Rotich
(Mr.), Senior Principal Magistrate, SPM, delivered on 21st
June 2023, in Milimani CMCCC No. 3040 of 2015)**

JUDGEMENT

1. The suit, at the primary court, was by the appellant, against the respondents. The issue was around a report published by the 1st respondent, dated 30th April 2014, which according to her, carried material which touched on her, which injured her reputation and character, as it characterised her as a thief, untrustworthy, a fraud, corrupt, lacking in basic common sense, and unfit to hold public office. She sought damages for defamation, and exemplary and aggravated damages.
2. The respondents resisted the claim. They denied that the statements were made recklessly and without justification, and that they were understood to mean that which was alleged by the appellant. The 2nd respondent denied being the author of the impugned publication. They raised the

defence of justification and truth, pleading that the appellant had opened an account without authority, had solicited funds without approval, had opened accounts with persons who were not officials of the 1st respondent and directing that funds be deposited into those accounts, assuming the role of the Chief Executive Officer contrary to the prevailing rules and regulations and without authority.

3. An oral hearing was conducted. The appellant testified and called a witness. The 2nd respondent testified, together with another witness. Judgment was delivered, on 21st June 2023. The suit was dismissed, on the basis that the statements in question were made in the course of employment, and was not actuated by malice, but was based on the truth.
4. The appellant was aggrieved, hence the appeal herein. The grounds being that the trial court erred in finding the appellant had failed to prove her case; the decision was wrong and contrary to the evidence adduced; the pleadings, evidence, submissions and caselaw were not considered; finding that the publication was true and justified, among others.
5. Directions were taken on 2nd May 2025, for canvassing by way of written submissions. None of the parties complied with the directions, despite urgings by the court to do so, on 3 occasions.
6. The only issue, for me to determine, is whether the appeal herein is merited.

7. What constitutes defamation, whether in the form of libel or slander, is publication of material, which conveys defamatory information. An imputation that goes to the discredit of a person, or tending to lower the estimation of the person in the eyes and minds of others, or to expose them to hatred contempt or ridicule, or to injure their reputation in office, trade or profession, or to injure their financial credit. The standard is that of right-thinking persons generally. The focus is on the tendency to injure reputation, as opposed to actual injury to it. See *Gatley on Libel and Slander*, 13th Edition, Thomson Reuters.
8. The principal elements of defamation are well established. The statement must be shown to be defamatory, must refer to the plaintiff, must have been published by the defendant, and it must be false.
9. The impugned statement was contained in a report generated by the 1st respondent. The report made a reference to the appellant, informing the committee about her removal from office, over an account she had opened, in the name of the 1st respondent, without knowledge and approval of the Board, which led to disciplinary measures. It was communicated that the appellant had been suspended, pending approval by the general assembly, which subsequently agreed to the removal.
10. Although the plaintiff complains of the publication of that report, it is not disclosed to whom the report was made available. The issue was not with what was said at the meeting, where the remarks were made by the 2nd respondent, but rather the remarks contained in the report,

about what was said at that meeting. The issue should have been with whom the report was shared, who had access to it, and who, upon reading it, would have thought less of the appellant.

11. To that extent, although a statement was made, concerning or referring to the appellant, by name, it was not pleaded that the said statement was published, in terms of being circulated, and if it was circulated, it was not disclosed, in the plaint, the persons to whom it was so circulated. For it was such persons, to whom it was circulated, that evidence could be gotten, on whether the contents lowered their estimation of the appellant. All there was, was that there was a report, which referred to the appellant, but there was no averment about its circulation, and to whom.
12. Secondly, the evidence adduced, I note that witness statements were filed of the appellant, Brigitte Kitenge, Abner Mogire, Joseph Kirui and Jackline Ambogo. At trial evidence was taken from the appellant, Joseph Kirui and Jackline Ambogo.
13. In her witness statement, the appellant gave a background of a campaign, going back to 2012 and 2013, aimed at mudsling. That statement made no reference, whatsoever, to the report of 30th April 2014, and on whether it was circulated to anyone. In her oral testimony, in court, on 7th March 2023, she also made no mention of the report of 30th April 2014, and its circulation. She talked about reports in the *Star* and *People* newspapers, of 2nd April 2014 and 21st March 2014, but those reports pre-dated the report of 30th

April 2014, and could not have been based on it, neither were those newspapers reports pleaded in the plaint.

14. I see, in the record of appeal, a witness statement by Joseph Kirui, but the copy is so faint, and in such small font, that I am unable to read it. Joseph Kirui informed the court that he was party to the opening of the disputed account, and it appeared, from his testimony, that he was not an officer of the 1st respondent. Jackline Ambogo wrote, in her statement, about how the police raided her office, and conducted a search. She said nothing about the report, dated 30th April 2014, in that statement. When she took to the witness stand, on 7th March 2023, she made no reference to the said report, whatsoever, yet the same was meant to be the basis of the suit.

15. There was, therefore, no evidence on the circulation of the alleged defamatory report. Publication is not about the material being carried in some media. It is about the media being circulated to some audience. It is not about the material being in some document or media, but the circulation of that document or media, or its exposure to persons other than the makers. That evidence did not come out.

16. Was the material defamatory? Was it false? The offending statement talked about the appellant opening a suspicious account, and of being suspended and removed from office. There was material on that. The appellant did open an account, which Joseph Kirui spoke about. There was material that the appellant was suspended, and removed from office. She talked about it, in her witness statement, of

25th May 2015. The report was about things that had in fact happened. It was not false or untruthful, to that extent. The only issue would be with the opening of the account being described as suspicious. However, that of itself could not be defamatory. The report was a narration of events that had happened, and which were factual.

17. In view of the above, therefore, I am not persuaded that the trial court fell into error. The pleadings, by the appellant, were poor, to the extent that it was not alleged that the offending report had been circulated. A hearing conducted, based on such weak pleadings, had no hope of yielding a positive result. The evidence tendered also fell below the standard required, of proof on a balance of probability. The evidence adduced did not reach the threshold, to require the shifting of the legal and evidential burden to the respondents.
18. Consequently, it is my finding that the appeal herein has no merit. It is for dismissal, and I hereby dismiss the same, with costs to the respondents. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN
CHAMBERS, AT BUSIA, ON THIS 5TH DAY OF NOVEMBER
2025.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

**Ms. Wambugu, instructed by Christine Oraro & Company,
Advocates for the appellant.**