

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: KIAGE, MUCHELULE, KORIR,

JJ.A.) CIVIL APPEAL NO. 634 OF 2019

BETWEEN

PETER NDAA.....APPELLANT

AND

HEZEKIEL WANG'OMBE GICHOHI.....RESPONDENT

*(An appeal against the judgment and decree of the High Court at Nairobi
(L. Njuguna, J.) dated 21st February*

2019 in

HCCC NO. 136 of 2006)

JUDGMENT OF THE COURT

1. On 31st May 2004, a consent was recorded in the case of **Kenya Anti-Corruption Commission -vs- Kamlesh M.D. Pattni & 16 Others** which was in the High Court in which the appellant, Peter Ndaa, and the respondent, Hezekiel Wang'ombe Gichohi, were appointed as the joint receivers/managers of the Grand Regency Hotel with effect from 7th June 2004. They were taking over from one Gitari T. Njeru. On 18th June 2004, the High Court adopted the consent as an order of the court.
2. On 8th July 2004, both the appellant and the respondent jointly wrote a letter to the manager, Cooperative Bank of

Kenya, Kimathi Street in Nairobi, informing him of the change of

signatories. On 2nd October 2004, the respondent wrote a letter to the Bank stating that, following a consent order dated 3rd September 2004, the appellant was no longer a joint receiver/manager. The purported consent had removed the appellant as a joint receiver/manager and one Mathew Mungai Njuguna had been appointed in his place.

3. When the appellant got to know about the letter of 2nd October 2004, on 4th October 2004 he wrote a letter to the Bank, with copies to twelve other recipients, saying the following, among other things:-

“Please take note that the said Mr. Gichohi has not only made a fraudulent misrepresentation of the existence of a court order which he did not attach to the letter under reference but has gone ahead and forged my signature on page 3 of the said letter to give credence to his criminal and fraudulent acts. I take Mr. Gichohi’s criminal conduct as one that warrants immediate investigations. ”

4. In a subsequent memorandum dated 4th October 2005 addressed to the respondent and all the Heads of Departments of Grand Regency Hotel, the appellant wrote as follows, among other things:-

“Following your forgery of my signature on 2nd October 2004, the Bank accepted middle position in which both receivers and a manager signed the cheques. The existence of the third signature not only ensured authenticity of the cheques issued, but also ensured integrity and transparency of the

respective transactions. The

Bank accounts have since been operated well till early April 2005 when you cancelled Mr. Kagambi's signature on cheques without consulting me. This is surprising since any person with noble intentions would wish to maintain integrity and transparency especially in light of the pending investigations refraud "

5. By a plaint dated 13th February 2006, the respondent sued the appellant seeking general and exemplary damages, costs and interest, claiming that the letter and memorandum had been maliciously written concerning him and the contents had defamed him. That he had been portrayed as a fraudulent individual capable of forging signatures, a criminal involved in criminal acts, was a liar and untrustworthy and did not respect the High Court and the law in general. It was claimed that the respondent had been greatly injured in his credit, character, reputation, occupation and profession and had been brought into hatred, ridicule, contempt and had suffered damage, hence the suit.
6. The appellant filed a statement of defence in which he denied ever publishing the words complained of in the plaint. He stated that, in the alternative and without prejudice, even if he had published the said words, the same were not defamatory of the respondent and would not be understood to bear any meaning that was defamatory of the respondent as alleged. Further, and in the alternative, it was pleaded that if the words were published, the same were published

on an occasion of privileged

communication. It was denied that the respondent had been seriously injured in his credit, character and reputation, or had been disparaged in his occupation and profession. It was, lastly, denied that he had suffered any damage.

7. The suit was heard by Njuguna, J. (as she then was). The respondent testified as did the appellant. Following submissions, the learned Judge considered the evidence and the law. The learned Judge indicated the issues for determination to be as follows:-
 - (a) whether the publications by way of letter dated 4th October 2004 and memo dated 4th October 2005 by the appellant were false and malicious;
 - (b) whether the publications were defamatory of the respondent;
 - (c) whether the letter and memo were published on an occasion of qualified privileged communication and in the honest belief that the statements therein were true;
 - (d) whether the respondent was entitled to damages, and if so, how much; and
 - (e) who was liable to repay the costs of the suit.
8. The learned Judge found, in a judgment delivered on 21st February 2019, that the appellant published the letters and memo of the respondent; the words were false and malicious; the words were defamatory of the respondent; and that the malice contained in the letter dated 4th October

2004 rebutted

the defence of qualified privilege. The court awarded Kshs.600,000/ in general damages to the respondent, and Kshs.200,000/ as exemplary damages. Then costs and interest.

9. The appellant was aggrieved by the decision and appealed to this Court on the following grounds:-

“1) That the learned judge erred in both law and fact in failing to appreciate the defence of qualified communications as raised by the appellant herein.

2) That the learned judge erred in both law and fact in awarding the respondent herein the sum of Kshs. 600,000/- in general damages and Kshs. 200,000/- in exemplary damages without any evidence or at all by the plaintiff on the damage allegedly suffered.

3) That the learned judge erred in both law and fact in awarding the respondent herein manifestly excessive damages.

4) That the learned judge erred in law by failing to appreciate the principles laid down in determining liability in a case of defamation.

5) That the learned judge erred in law by failing to appreciate the principles laid down in making an award on general damages for defamation.

6) That the learned judge erred in both law and in fact in disregarding and or failing to accord the necessary consideration to the evidence tendered by the appellant.”

10. When this appeal came up for hearing, learned counsel Ms. Njueni was present for the appellant. The firm of Muthoga Gaturu & Company Advocates was not present for the

respondent despite being served. No submissions were filed by the firm. Learned counsel for the appellant had filed written submissions which she highlighted.

11. Learned counsel Ms. Njueni submitted that the learned Judge erred by holding the appellant liable for libel arising from the correspondence to the Bank in response to the respondent's earlier communication. She argued, first, that the appellant's publication was neither false nor malicious. The respondent had unilaterally written to the Bank purporting to remove the appellant as a joint receiver and joint signatory without his knowledge or consent. The respondent also relied on an alleged consent dated 3rd September 2004 which the appellant had not signed, which was partly executed by a person no longer a joint receiver, and which had not been adopted as an order of the court. Learned counsel argued that, as court-mandated joint receivers, they could only be removed by a court sanctioned consent, the respondent's response was, therefore, written to clarify the true position after the Bank sought his clarification.
12. Secondly, learned counsel contended that the appellant's statements were not defamatory; that the reference to forgery arose from the respondent's use of appellant's signature without his authority, a matter which, counsel maintained, had not been denied in evidence.

13. Thirdly, learned counsel submitted that the publication was made on an occasion of qualified privilege. As joint receiver and bank signatory, it was argued, the appellant had a duty and corresponding right to correct erroneous information that had been communicated to the Bank concerning his status.
14. Fourthly, learned counsel submitted that the respondent had failed to establish injury to his reputation; that the respondent had failed to prove that he had been injured in his character, esteem, his record as a law-abiding citizen, his social standing or that the publications had caused him considerable loss and damage.
15. We have considered the record of appeal, the grounds of appeal and the submissions made on behalf of the appellant. Our responsibility is to reconsider the evidence, evaluate it and draw our own conclusions on facts and law, while bearing in mind that we did not see or hear the witnesses as they testified (see **Selle & Another -vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123**). We will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles as was held in **Jabane - vs- Olenja [1986] KLR 661**.
16. We consider the issues for determination to be whether the learned Judge erred in finding that the publications by way of

letter dated 4th October 2004 and memorandum dated 4th

October 2005 were false and maliciously done; whether the publications were defamatory of the respondent; whether the publications were published on occasion of qualified privileged communication and in the honest belief that the statements therein were true; and whether the awarded general and special damages were manifestly excessive in the circumstances.

17. It is not in dispute that the respondent in letter dated 2nd October 2004 to the Manager Cooperative Bank of Kenya, and copied to the Deputy Registrar of the High Court, stated that following a consent order filed in the High Court on 20th September 2004, the appellant had ceased being a joint receiver and manager and had been replaced by one Mathew Mungai Njuguna; that, as a consequence, his signature could not be used to operate the accounts of Grand Regency Hotel; and the Bank was directed not to honour any cheques by the Hotel which he had signed. The truth of the matter is that no such consent had either been signed by the appellant or filed at the High Court. The letter dated 2nd October 2004 was not truthful. It was not true that the appellant had ceased to be a joint receiver/manager, and it was not true that he could not sign the cheques drawn by the Hotel. To say that any cheques that he had signed should not be honoured by the bank was false. The learned Judge observed that, because the respondent was a 'layman' who was blaming his advocates for the state of

circumstances leading to the letter, his conduct should be

excused. We find differently. The respondent testified that he was an accountant of 47 years who had served in various firms as managing director. He had served before as receiver manager in various companies and was a member of Certified Public Accountants of Kenya. He was not a 'layman'. It was quite basic that, before penning the letter dated 2nd October 2004, he confirms the information regarding whether the appellant was still joint receiver/manager and whether the consent referred to had indeed been filed. The appellant had not signed the alleged consent, and therefore the signature on the said consent was a forgery.

18. The appellant's letter of 4th October 2004 has to be seen in light of the respondent's letter dated 2nd October 2004. We have no hesitation in finding that that when, in the letter of 4th October 2004, the appellant stated that the respondent had misrepresented the facts, and had forged his signature in the purported consent, this was substantially accurate. Forgery is a criminal conduct that ought to be investigated. That is all that the appellant was informing the Hotel and the Bank, and all those concerned.
19. The memorandum of 4th October 2005 merely recreated what the appellant had stated in the letter of 4th October 2004: that his signature had been forged to get the bank refuse to honour his continued dealing with the accounts of

the Hotel. He termed the respondent's conduct as lacking in integrity and

transparency. In our considered view, the appellant was merely protecting his position and reputation as a joint receiver/manager of the Hotel who had authority to transact on its behalf.

20. In **Alnashir Visram -vs- Standard Limited [2016] eKLR**, it was stated that -

“Defamation is the publication of a statement which tends to lower a persons’ reputation or character in the estimation of right-thinking members generally and which makes them shun and avoid him. The burden of proof lies on the claimant to establish that the published words or statements as published of and concerning the plaintiff are defamatory of him or her. The claimant must prove, on a balance of probabilities that the words complained of were published of and concerning him; that they were published by the defendant; and they were false; and that they were defamatory in character of the claimant tending to lower him in the estimation of right-thinking members of society generally, making them shun or avoid him. Finally, the claimant must prove that the publication was done with malice.”

21. In **Isaac Rutto -vs- Elizabeth C. Langat and Standard Limited [2025] KECA 1278 (KLR)**, this Court stated as follows:-

“Malice can be founded where there is failure to inquire into the facts. Any evidence, which shows that the defendant knows that the statement was false or did not care whether it be true or false will be

evidence of malice. See

Godwin Wachira -vs- Okoth [1977] KLR 24; and J.P. Machira -vs- Wangethi Mwangi and National Newspapers, Civil Appeal No. 179 of 1997.

22. In a defamation case, it is fundamentally important that the words complained of must be false. This is why defamation is basically the publication of a false statement about the plaintiff that tends to harm his reputation.
23. We have found that the respondent had himself published false information about the appellant, and the appellant, in the letter of 4th October 2004 and memorandum of 4th October 2005, was not only complaining about the false information but also seeking to correct the impression held by those the respondent had addressed of him. In our estimation, there was nothing false or malicious in the words or tone complained of in the publications.
24. We must, consequently, find that the learned Judge erred when she found that the appellant's publications of the respondent were false or malicious or that they, in any way, damaged the reputation of the respondent in the eyes and minds of right-thinking members of the society generally. The appellant did not defame the respondent.
25. That being the case, we allow the appeal and set aside the judgment and decree of the High Court dated 21st February

2019. In its place, there shall will be a judgment dismissing with costs the respondent's suit against the appellant.

26. The costs of the appeal shall be borne by the respondent.

Dated and delivered at Nairobi this 30th day of April 2026.

P. O. KIAGE

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR.