**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, ODEK & KANTAI, JJA)**

**CIVIL APPEAL NO. 114 of 2017**

**BETWEEN**

**SELINA PATANI.....1ST APPELLANT**

**ASHIT PATANI.....2ND APPELLANT**

**AND**

**DHIRANJI V. PATANI.....RESPONDENT**

***(Being an appeal from the judgment and decree of the High Court of Kenya at***

***Milimani Law Courts (L. Njuguna, J.) dated 16th March 2017* in HCCA No. 102 of 2015)**

*******************

**JUDGMENT OF THE COURT**

1. The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: Defamation protects a person's reputation; that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements that injure his reputation.

***(See*** Patrick O'Callaghan in the ***Common Law Series: The Law of Tort at paragraph 25.1)***.

2. The appellants filed suit for defamation against the respondent before the Magistrates Court by a plaint dated 21st October 2009. The particulars of the defamatory claim were that on or about 5th October 2009, the respondent wrote letters through his advocates (***Eboso & Wandago Advocates***) to the appellants in which he caused to be published the following words the subject of defamatory claim:

> **"Between July 2006 and March 2009 without lawful authority or any colour of right, by yourselves personally and through your agents Mamuka Valuers and Jocosh Properties collected rent from tenants of Garden Chambers totaling Ksh. 10,000,000/= by falsely pretending that you were shareholders or Directors of Garden Chambers Limited.**
>
> **This action on your part was criminal in nature and our client has already lodged a complaint with the necessary authorities."**

3. In the plaint, it is contended that the letter containing the complaint statements was addressed to all the appellants and was hand delivered by the clerk of the law firm representing the respondent to servants of the appellants at their place of work and had been openned. It is contended that at all material times the respondent and or his advocate knew or had reason to believe that the letter would be read by other persons not intended in the ordinary course of business and it was in fact done.

4. The appellants contend that in their natural and ordinary meaning, the offending statement was meant to and was understood to mean that the appellants were thieves and criminals who had obtained monies without authority and legal standing and they were masqueraders. The particulars in support of the defamation were itemized to the effect that the appellants were crooked and fraudsters; they misrepresented themselves to tenants of the building while being strangers; the appellants had no authority to collect rent from the building and that the appellants were not straight forward persons.

5. In his defence, the respondent averred that the letters were in sealed envelopes addressed to each of the appellants personally; publication of the contents of the letter was denied and if any publication took place the same was done by the appellants; that indeed the appellants admitted collecting rent from the building when they were neither administrators of the Estate of their deceased father nor directors of the Management Company.

6. Upon hearing the parties, the trial magistrate entered judgment for the appellants against the respondent and awarded general damages in the sum of Ksh. 500,000. In entering judgment for the appellants, the learned magistrate in a judgment dated 13th February 2015 expressed as follows:

> ***"Now, the defendant did not deny that the letters were hand delivered to the plaintiffs only stating that they were letters also sent via registered post. He told the court he did not know the state in which the letters were delivered. The plaintiff's claim then as regards the mode of delivery of the letters is not rebutted in evidence. I accept as such and find that indeed their contents were exposed and hence published to third parties. Indeed if it were the intention of the defendant that only the plaintiff access the contents of these letters why were the letters not delivered to them personally?***
>
> ***The 1st and 3rd plaintiffs testified that the words expressed in these letters damaged their reputation portraying them as thieves. That in my view would be a natural consequence of any right thinking person in society regarding those letters. Having considered the contents of….the letter dated 5th October 2009, I find the contents of the letters in their natural and ordinary meaning do portray the plaintiffs as dishonest and deceptive persons at best and fraudsters and thieves at the very worst, reference to their alleged conduct as criminal certainly cements my finding on this. I find the said letters would lower the reputation of the plaintiffs in the eyes of right thinking members of society…..***
>
> ***Taking into account the fact that no witness was called to give evidence as to whether the defamation injured the plaintiffs, I will award to each plaintiff a sum of Ksh. 500,000/= in general damages. The same will attract interest at court rates from the date of the decree."***

7. Aggrieved by the judgment of the magistrate's court, the respondent lodged a first appeal to the High Court. The learned Judge upon hearing the parties set aside in entirety the judgment of the magistrate's court and dismissed the appellants' suit. In setting aside the judgment, the court stated:

> **"…the respondents herein stated that they were defamed in the contents of the letters that were false and that they were read by third parties. It is worth noting that none of the respondents called any evidence to that effect. The alleged third parties were not called in evidence to confirm to the court that indeed the letters were not sealed and that they read the contents of the letters which made them form a negative opinion about the respondents.**
>
> **In my considered opinion, such evidence was very material in this case because unlike an article which is published in the newspaper, the publication in this case was through letters written to the respondents. It was important for them to go a step further and call third parties as witnesses to prove that aspect of defamation…..I find and hold the respondent did not succeed in proving that the letters were defamatory. …In the end, I find and hold the appeal herein has merits and is allowed. The judgment of the lower court awarding the respondents Ksh. 500,000/= each is set aside and replaced with an order dismissing the suit."**

**GROUNDS OF APPEAL**

8. Aggrieved by judgment of the High Court setting aside the magistrate's decision, the appellants have filed the instant second appeal urging the following grounds:

> ***"(i) The judge misdirected herself in completely disregarding the appellants' case and did not address her mind to the real ingredients of defamation.***
>
> ***(ii) The judge erred and wrongly found that a witness must appear to prove how the words were defamatory and by this she completely introduced a new meaning to "reasonable thinking members of society" by imputing that they must be known people.***
>
> ***(iii) The judge erred in law when she stated a defamed person must go a step further and call a third party to court to prove defamation.***
>
> ***(iv) The judge erred when she considered extraneous matters."***

9. At the hearing of the instant appeal, learned counsel ***Mr. Gachie S. Mwanza*** appeared for the appellants while learned counsel ***Ms A. O. Ameyo*** appeared for the respondent. Both parties filed written submissions and cited authorities in this matter.

**APPELLANTS SUBMISSION**

10. Upon rehashing the background facts, the appellant submitted that libel is actionable *per se* and the Judge misinterpreted the law regarding defamation when she held that failure to call third parties as witnesses meant that the appellant had failed to prove damage; it was urged that the finding is not in consonance with the definition and nature of the tort of libel. Counsel cited the case of **Kagwira Mutwiri Kioga & another -v- Standard Chartered Limited & 3 others [2015] eKLR** where it was held that the trial court erred in stating that failure to call an independent witness was fatal to a defamation case. It was urged that the learned Judge erred and mistook the tort of libel

for slander by requiring the appellants to prove damage by way of evidence; that it was never in doubt the words complained of referred to the appellants. It was further submitted that the Judge erred and misinterpreted the evidence on record to mean the appellants admitted collecting rent from the tenants of Garden Chambers; it was urged that the appellants never admitted to having unlawfully collected the rent. The appellants submitted that the Judge erred in finding that malice was not proved on the part of the respondent; that there was willful failure on the part of the respondent to make inquiry; and that the respondent knew the words complained of were not true.

11. Submitting on the quantum of damages, counsel cited the case of **Radio Africa Limited & another -v- Nicholas Sumba & another [2015] eKLR** where the sum of Ksh. 3 million was awarded as general damages for defamation. The case of **Nation Newspapers Limited -v- Daniel Musinga t/a Musinga & Co. Advocates [2005] eKLR** was cited to support award of damages to the tune of Ksh. 10 million. The appellants concluded their submission by urging us to set aside the judgment of the High Court and uphold the judgment by the magistrate's court.

**RESPONDENT'S SUBMISSION**

12. The respondent in his written submissions urged us to confirm the learned Judge's decision and determination. It was urged that the Judge carefully re-evaluated the evidence on record and succinctly identified the elements of the tort of defamation; that the Judge correctly found the words complained of were about the appellants and the impugned letters were addressed to each of the appellants and were received by each of them. As to whether the statements in the impugned letters were defamatory, counsel submitted that the Judge considered the applicable law and correctly held that the appellants failed to prove defamation as no third party who read the letter was called to testify; that no one testified of any negative imputation or reputation on the part of the appellants ensuing from reading the impugned letters.

13. The respondent submitted that the Judge did not err in finding that a witness must appear to prove the impugned words are defamatory. Citing ***Section 107*** of the **Evidence Act**, it was urged that whoever wants a court to believe the existence of any fact in issue must lead evidence to prove its existence; that in the instant matter, the burden of proof lay with the appellants to call witnesses and prove their reputation had been damaged by the offending letters. Counsel concluded by urging us to uphold the judgment of the High Court.

**ANALYSIS and DETERMINATION**

14. We have considered the written submission by the parties and the authorities cited. As this is a second appeal, we are enjoined to consider only matters of law; we cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.

15. This appeal raises two cardinal issues: first is whether the impugned letters were actually published to a third party; and second, whether the appellants led evidence to prove their reputation was damaged as a result of the letters being published to a third party.

16. In Gatley on Libel and Slander, proof of libel is the production 10th Edition, Para. 32.5 it is stated that of the document itself. In the case of Clement Muturi Kigano -v- Hon. Joseph Nyagah HCCC No. 509 of 2008 the plaintiff's action failed for failure to produce the alleged defamatory statement as evidence of publication. In the instant matter, the impugned letters dated 5th October 2009 were produced and tendered in evidence. This aspect of the appellants claim for libel was established.

17. The next legal issue is whether as a matter of law the Judge erred in considering the ingredients of the tort of defamation. We have analyzed the judgment of the High Court and are satisfied that the Judge correctly identified and considered the elements of the tort of defamation. The Judge cited **Winfield and Jolowitz on Tort, 8th Edition page 254** as well as excerpts from **Halsbury's Laws of England, 4th Ed. Vol 28 paragraph 10** thereof. In rehashing, we note the ingredients of defamation were summarized in the case of **John Ward -v- Standard Ltd**, **HCCC 1062 of 2005** as follows: -

*(i) The statement must be defamatory.*

*(ii) The statement must refer to the plaintiff.*

*(iii) The statement must be published by the defendant.*

*(iv) The statement must be false.*

18. Central to this appeal is whether the learned Judge erred in arriving at the determination that the appellants did not lead any evidence to prove publication of the impugned defamatory letter to a third party. It is the appellants' case that the letters were hand delivered to their offices in unsealed envelopes. Conversely, the respondent avers that the letters were delivered in sealed envelopes.

19. In law, to constitute a cause of action, the alleged defamatory statement should be published to a third party. If the statement complained of has only been made to the person the letter is addressed to, this will not suffice. If a defamatory statement is placed in the hands of a clerk so that he is in a position to learn its contents those contents, are published to the clerk no less than any other person to whom the document is given. In her evidence, the 1st appellant testified that the letter was delivered to her shop and she was given the same by her workers; that the letter was not in a sealed envelope. The 2nd appellant testified that she received the letter from her employer's office; that any correspondence received in the office must go through her boss regardless to whom it is addressed; and that her boss had read the letter.

20. In **Huth -v- Huth (1915) 3KB 32,** the defendant, ***Captain Huth***, sent an allegedly defamatory letter in an unclosed envelope through the post to his four children. The letter contained an implication that the children were illegitimate. The letter was taken out of the envelope and

read by a butler in breach of his duties and out of curiosity. At trial, the claim was dismissed on the basis that there was no evidence of publication of the libelous information. On appeal, it was held that it is not right to treat a letter in an "ungummed" envelope as though it were an open letter. Such a letter required some act by a person before they could be read and the Court could not presume that such letters would be opened in the ordinary course of business. Therefore, the defendant could not be taken to have known that the letter would have been taken out of the envelope and there was accordingly no evidence of publication of the libel in the case.

21. The burden to prove publication is on the claimant, in this case the appellants. Nevertheless, in certain cases the law will presume publication to a third party unless evidence to the contrary is forthcoming. In **Huth -v-Huth** (supra), at **39**, ***Lord Reading*** expressed that such a presumption arises where the document is put in the way of being read and understood by those through whose hands it passes in the ordinary course of events. For instance, if it is a postcard, it will be presumed, in the absence of evidence to the contrary, that others besides the person to whom it is addressed will read and have in fact read what is written thereon. However, the presumption can be rebutted and the onus of doing so rests with the defendant. If an unsealed letter is sent through the post, no presumption of publication arises - see ***Huth -v-Huth Case*** **(**supra).

22. In **Carter-Ruck on Libel and Slander, 4th ed. Butterworth's at page 66** it is stated:

> **"Sometimes, for one reason or another, a letter gets into the hands of some other person other than the person for whom it was intended. The question then arises as to whether the writer or sender of such a letter is liable for this publication. Broadly speaking, the rule is that the sender of a letter is only liable for the publication of its contents to the person to who it was addressed unless, at the time of sending the letter, he knew or ought to have known that it was likely to be opened by other persons."**

23. In this matter, the impugned letter dated 5th October 2009 from Eboso & Wandago Advocates addressed to the appellants was dispatched and hand delivered. In dispatching a letter containing matter defamatory of the addressee, there are three important considerations:

> *(i) The method of delivery – the communication should be in a sealed envelope.*
>
> *(ii) The mode of address – this should be to the named addressee and marked personal.*
>
> *(iii) Knowledge on the part of the writer of the recipient's procedure for opening letters. If the writer knows that all communications howsoever addressed are opened by the addressee's secretary, there is no method of communicating in writing a matter defamatory of the addresses which would preclude publication to a third party. –* (See **Carter-Ruck on Libel and Slander, 4th ed. Butterworth's at page 66)**

24. In the instant matter, there is no evidence on record that the respondent had knowledge of the procedure for receiving communication at the 2nd respondent's office. In **Pullman -v -Walter Hill & Co (1891) 1 QB 524,** the English Court of Appeal explained what publication constitutes as follows:

> **"What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise……. If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, 'I have shown it to you and to no one else.' I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it"** (*per* Lord Esher, MR).

25. In this matter, the learned Judge held that there was no proof the impugned defamatory letter was publicized and read by a third party. The Judge observed no third party was called to give evidence that the letters were not sealed. Whether a letter is sealed or not sealed is a question of fact. Being a second appeal, we are precluded from delving into matters of fact. Guided by case law on publication of a defamatory letter to the addressee, we find no reason to interfere with the finding of facts in the absence of evidence on record from a third party who claim to have read the defamatory letter.

26. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation.

27. The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellants character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation.

28. We have considered the other grounds urged in this appeal, for instance, that the Judge erred in finding that the appellants had made an admission for collecting rent. Having determined that there was no proof of publication of the impugned defamatory letter and no evidence of injury to the reputation of the appellants, we find the other grounds of appeal have no merit. For the foregoing reasons, this appeal has no

merit and is hereby dismissed with costs.

***Dated and delivered at Nairobi this 19th day of July, 2019***

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

**.....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**