



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 976 OF 2015

LUCAS AKUNGU OMARIBA.....CLAIMANT

VERSUS

TATU CITY LIMITED.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

JUDGMENT

The Claim herein is filed by the firm of Mulanya & Maondo & Company Advocates on behalf of Lucas Akunga Omariba, the Claimant herein alleging publication of defamatory contents made by the Respondent herein. He seeks the following reliefs:

- i. A declaration that the Publication of the notices informing members of the public that the Claimant had ceased being an employee of the Respondent, being done more than three months after the termination of his services was unreasonable, malicious and done with the intention of publicly humiliating the Claimant.
- ii. General damages and punitive damages for injury arising from the said publication.
- iii. An order that the Respondent publishes an apology and retraction of the public notice in prominent sections of two newspapers with nationwide circulation being the Daily Nation and the Business Daily to run for two consecutive working days.
- iv. An Order for payment of costs for this Claim
- v. Interests on the above sums at Court rates until payment in full.

The Respondent raised a Preliminary Objection to the Court's Jurisdiction to hear and determine the Claim herein dated and filed in Court on 14th June 2018. The Respondent however, failed to file any Response to the Claimant's Statement of Claim.

On 24th January 2018, the Claimant testified that he was employed by the Respondent as a General Manager on or about June 2012 and was later appointed to the position of CEO in August 2013 a position he held until 5th February 2015 when his services were terminated. He further testified that at the time of separation he was earning a monthly salary of Kshs.2,189,000/-.

He testified that his job as CEO of the Respondent entailed coordinating all activities of the Respondent as well as its employees in liaison with all other departments and representatives of the Respondent.

He testified that on 25th February 2015 there was a board meeting which he attended via teleconference. Just after the meeting began he received an email together with an attached letter of termination signed by a Director of the Respondent, one Stephen Jennings.

The claimant testified that the termination was to take effect immediately. He testified that he further received a telephone call from another director, Mr. Hans who informed him not to report back to work, that he would arrange for a meeting later in the day to discuss the way forward.

The claimant testified that he did meet Mr. Hans who was apologetic about what had happened and promised that they would reach an amicable settlement. That Mr. Hans disclosed that the Claimant was not the only employee terminated by the Respondent that it had further terminated the services of the finance manager as well as the Claimant's personal assistant.

The claimant further testified that a few weeks after his termination he had a meeting with Mr.Hans, Mr. Horn and Mr. Reid all directors of the Respondent, together with two (2) other employees whose services had been terminated alongside the claimant. The purpose of the meeting was to discuss an amicable settlement.

The claimant testified that the Respondent failed to settle the matter and he did not hear from the Respondent's directors after that prompting him to send a demand letter dated 29th April 2015 through his Advocate on record for payment of his terminal dues. He further stated that on 4th May 2015 an advert appeared in the Daily Nation Newspaper bearing the heading "*Public Notice*". The notice bore a photograph of the Claimant with his name. It stated that the Claimant had ceased to be an employee of Tatu City (the Respondent). The advert was warning the public against dealing with him and claiming liability. The claimant added that on 15th May 2015 the same advertisement appeared in the Business Daily.

The claimant contended that the advertisements (totalling to three) were made three months after he left the Respondent's employment. That this had never been done for any CEO who worked for the Respondent prior to his engagement.

The claimant testified that he did not see the first advertisement. He learnt about it when he received a call from one of his former classmates who asked him "...*Kwani unakula mbuzi ya watu?*" It was his contention that the advertisements were made in bad faith as he was not transacting any business on behalf of Tatu City, since his services had already been terminated. He added that no advertisement was made in respect of the other managers whose services were terminated together with his.

The claimant testified that the notices placed in the newspaper is that the same were not necessary as all persons he had been transacting with were aware that he had left the Respondent's employment.

He contends that the advertisement was only meant to embarrass him and humiliate him. That no advertisement was place in any newspaper when he was employed by the Respondent. Similarly no advertisement was made when he was promoted to CEO.

CW1 further contended that the impression created by the advertisements was that he was either engaging in fraudulent activities purporting that he was still in the employment of the Respondent or he was a fraudster engaging in risky ventures on behalf of the Respondent which was not the position. The claimant testified that following the advertisement being placed in the dailies he received many calls from many people who were asking whether the articles were true as they were acquaintances who were aware that he was not an imposter as the advertisement was portrayed.

It was CW1's testimony that he did write to the Respondent herein vide his letter dated 15th May 2015 informing them that the public notices were defamatory and he further asked the Respondent to retract them and apologize. CW1 stated that despite this letter no action was taken by the Respondent herein.

CW1 further testified that he had good prospects employment but they fizzled out after the advertisements were placed in the dailies. He further stated that he has been unable to secure employment after the advertisements.

CW1 urged the Court to allow the Claim as drawn.

On cross examination CW1 stated that he was employed by the Respondent from June 2012 and the employment was terminated on 5/2/2015. He further stated that his primary complaint was on the defamatory publication by the Respondent which was made 3 months after he left the Respondent's employment.

The claimant averred that the advertisement placed by the Respondent clearly related to his employment with the Respondent herein. He added that he prays that his claim be allowed as prayed. He further stated that he filed another case for payment of his terminal dues which are yet to be settled.

That the instant case relates to defamation which occurred after he had already filed a claim for unfair termination and non-payment of terminal benefits.

The Respondent having failed to file its defence did not call any witness. Parties thereafter filed and exchanged written submissions on the Claim.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Statement of Claim and his oral evidence in Court.

The Claimant further submitted that the Advertisements published by the Respondent in the Daily Nation on 14th May, 2015 and 15th May 2015 and the Business Daily on 15th May, 2015 were unfair, reckless and malicious as the same were published 3 months after the Claimant had left the Respondent's employment.

The Claimant submitted that the statements made by the Respondent herein were defamatory in nature and relied on the Authority of *Parmiter Vs Coupland, (1980) 6M & W 105 at 108* where a Defamatory statement is defined as that "*which is calculated to injure the reputation of another.*"

The Claimant further relied on the case of *Nation Media Group Ltd & 2 others Vs John Joseph Kamotho & 3 Others (2010) eKLR* where the elements for defamation that must be proved include:

(a) *The Statement must be defamatory;*

(b) *It must refer to the Claimant, i.e. identify him;*

(c) *It must be published i.e. communicated to at least one person other than the Claimant.”*

The Claimant submitted that the Articles were only meant to embarrass him. He further added having received a call from friends and relatives who were wondering what was happening after the publication of the advertisements.

The Claimant further submitted that he was aggrieved by the advertisements posted in the dailies with country wide coverage and is as such entitled to reliefs as sought in his statement of claim. The Claimant relied on the case of **Gideon Mose Onchwati Vs Kenya Oil Co. Ltd & Another (2015) eKLR** where the Court held that:

“The rationale behind awarding damages in defamation actions is to restore or give back to the party injured what he lost save in exceptional circumstances where punitive or exemplary damages may be awarded.”

Similarly, the Claimant also relied on the authority of Windeya J in **Uren Vs John Fair Fax & Sons PTY Ltd 117 C.L. R 115, 150** to support his entitlement to compensation. In which case it was stated:

“It seems to me that, properly speaking, a man defamed does not get compensated for his damaged reputation. He gets damages because he was injured in his reputation. He gets damages because he was injured in his reputation, which is simply, because he was publicly defamed. For this reason, compensation by damages operates in two ways as a vindication of the Plaintiff to the public and as a consolidation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.”

The Claimant urged the Court to award him the sum of Kshs.20,000,000/= as compensation for general and exemplary damages as well as loss of employability as he was at the prime of his career and the defamatory remarks coasted him a great deal as he was unable to secure employment after his separation with the Respondent herein.

The claimant relied on the cases of **Gideon Mose Onchwati Vs Kenya Oil Company Limited (2015) eKLR** and **Dr. Ezekiel Nyangoya Okemwa Vs Kenya Marine & Fisheries Research Institute.**

On the issue of Jurisdiction the Claimant submitted that this Court has Jurisdiction to hear and determine his case by virtue of Section 12 (1) (a) of the Employment and Labour Relations Court Act. He further submitted that this is a dispute that arose from the employment relationship between the Claimant and the Respondent

The Claimant urged the Court to allow the Claim as drawn.

Respondent’s Submissions.

It is submitted on behalf of the Respondent that the Claimant’s services were terminated following a resolution by the Respondent’s board of directors. Further, that some negotiations took place on a without prejudice basis between the Claimant and the Respondent in a bid to resolve the dispute. However, the negotiations were not fruitful.

The Respondent further submitted that the Claimant’s position of having been defamed by the Respondent is not supported by the facts that he has presented to the Court. It is the Respondent’s submission that this Court lacks jurisdiction to entertain this Claim which prompted the Respondent to raise a preliminary objection on the Court’s Jurisdiction. The Respondent relied on the Authority of **Mukisa vs West End Traders (1969) EALR 696.**

The Respondent challenged the Court’s jurisdiction on the ground that the cause of action arose in May 2015 while there was no employee-employer relation existing between the Claimant and the Respondent herein the Claimant’s services having been terminated in February 2015. It is further the Respondent’s submission that the cause of action does not fall within Article 162(2) of the Constitution of Kenya, 2010 and Section 12 of the Employment and Labour Relations Court Act. The Respondent sought to rely on the words of Nyarangi JA in **Owners of Motor Vessel “Lillian” S Vs Caltex Oil (1989) KLR1** where it was stated *jurisdiction is everything, without it a Court has no power to take one more step.*

The Respondent further relied on the cases of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & 2 Others (2012) eKLR** and **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati Vs Republic (2015) eKLR.**

The Respondent distinguished the Authority of **Gideon Mose Ochwati Vs Kenya Oil Co. Ltd & Another (2015) eKLR** relied on by the Claimant on grounds that the matter was heard and determined by the High Court, which Court declined to deal with the Claim by the Plaintiff for unpaid salary as it lacked jurisdiction to deal with the same. The Respondent submitted that similarly, this Court ought not to entertain a Claim for defamation as the High Court has the Jurisdiction to hear and determine the same. It further submitted that the Jurisdiction is not shared between the High Court and the Employment and Labour Relations Court. The Respondent therefore submitted that the Court ought to dismiss the suit with Costs.

The Respondent further submitted that the Public Notices published were not defamatory and are in fact not capable of injuring the Claimant’s credibility, character and reputation. It was further submitted that the statements do not meet the ingredients of defamation as set

out in the case of *Joseph Njogu Kamunge Vs Charles Muriuki Gachari (2016) eKLR* in which the Court stated:

“A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients for defamation are:-

- 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.”

The Respondent further submitted that the Claimant failed to present any evidence to show the effects of the public notices lowered his reputation in the eyes of others. The Respondent relied on the cases of *Miguna Miguna Vs The Standard Group & 4 Others (2016) eKLR*, *Nation News Paper Limited Vs Chesire (1984) KLR 156* and *Mikidadi Vs Khaigan and Another (2004) KLR 496*.

It was the Respondent’s submission that the Court finds that the Claimant has failed to prove that the statements as contained in the public notices were defamatory. The Respondent relied on the Authority of *Registered Trustees of the Sisters of Mercy T/A Mater Masericordiae Hospital Vs Jacinta W. Maina & Another (2014) eKLR*.

In conclusion the Respondent urged the Court to find that the instant suit is void of merit and the same should be dismissed with costs to the Respondent.

Claimant’s Reply Submissions

It was the Claimant submitted that save for the Notice of Preliminary Objection and the Submissions herein, the Respondent did not file a notice of appointment of Advocate or Memorandum of Appearance or its Reply to the Memorandum of Claim. He further submitted that the Advocates currently acting on behalf of the Respondent have irregularly filed the Objection and the submissions. The Claimant relied on the case of *Saki Limited Vs NSSF*. The Claimant further urged the Court to find that the filed documents are improperly on record.

On the issue of jurisdiction the Claimant avers that this Court has jurisdiction to hear and determine this claim by dint of Article 162 of the Constitution of Kenya, 2010 and Section 12 of the Employment and Labour Relations Court Act. He further submitted that the Claim is as a result of an employment relation that existed between the Claimant and the Respondent herein. The Claimant relied on the Authority of *Stanley Mungai Muchai Vs National Oil Corporation (2012) eKLR*.

The Claimant further submitted that he has proved his case on a balance of probability. He further submitted that the Respondent never filed any defence to the Claim and the facts as contained therein remain uncontested to date. The Claimant relied on the cases of *Chispine Otiemo Caleb Vs Attorney General (2014) eKLR*, *Trust Bank Limited Vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001* and *Karuru Munyororo Vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1998*.

In conclusion the Claimant urged the Court to enter Judgment in his favour and award compensation as claimed both general and aggravated damages as observed in the Court Appeal decision in *Miguna Miguna Vs The Standard Group & 4 Others (2016) eKLR*.

Determination

Having considered the facts of this cause, evidence, submissions and authorities cited, the following are the issues for determination:

1. Whether this Court has Jurisdiction to hear and determine this Claim
2. Whether the Public Notices published by the Respondent were defamatory
3. Whether the Claimant is entitled to the reliefs sought.

On Issue Number 1

Both parties have put in lengthy submissions on the issue of this Court’s Jurisdiction to hear and determine this claim. The Claimant argues that this Court has jurisdiction to hear and determine this claim by dint of Article 162 of the Constitution of Kenya and Section 12 of the Employment and Labour Relations Court Act. The Claimant further relied on the case of *Stanley Mungai Muchai Vs National Oil Corporation (2012) eKLR* where Ongaya J. dismissed an objection seeking to challenge the Jurisdiction of the Court in determining matters defamation on the issue of jurisdiction. The Respondent on the other hand argues that this Court has no Jurisdiction to entertain this claim as the matter arose after the employee- employer relationship had ceased. It was further urged by the Respondent that this Court lacks the capacity to entertain this claim by virtue of Section 12 of the Employment and Labour Relations Court Act.

The Respondent’s view is that Section 12 restricts the Court to disputes between Employers and Employees. Such disputes are confined to the contract of employment and that the Tort of defamation cannot be dealt with by this Court. That in my view narrows the jurisdiction of the Court while both the Constitution of Kenya, and the Employment and Labour Relations Court Act, broaden the jurisdiction. Article 162

[2] [a] of the Constitution which contemplates the creation of this Court, defines the material jurisdiction of the Court to include all disputes **relating to employment and labour relations**. The Article does not say contractual disputes, between Employers and Employees; it states all disputes relating to employment and labour relations. Section 12 of the Employment and Labour Relations Court Act refers to Article 162[2][a] of the Constitution and

“the provisions of this Act, or any other written law which extends jurisdiction to the Court relating to employment and labour relations including.....”

In the case of **Hakika Transporters Services Limited v. Kenya Long Distance Truck Drivers and Allied Workers Union [2015] e-KLR**, the Court held the view that Section 12 is inclusive. It is not an exclusive list of the dos and don'ts of this Court. The Court has assumed jurisdiction and determined claims for employment related defamation and malicious prosecution.

Similarly, in Paramount Bank Limited –V- Vaqvi Syed Qamara and Another (2017) eKLR in which the court stated –

“... There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the Employment and Labour Relations Court Act, the court could entertain the dispute in all its aspects and award damages appropriately.”

I am therefore of the view that the matter is properly before this Court and that the Court has jurisdiction to hear and determine the same by dint of the provisions of Article 162 (2) of the Constitution of Kenya, 2010 and Section 12 of the Employment and Labour Relations Court Act.

Whether the Public Notices published by the Respondent were defamatory

The Claimant accuses the Respondent of defamation based on the Publication made in the Daily Nation News Paper on 14th May 2015 and the Daily Nation and Business Daily on 15th May, 2015, both newspapers that enjoy countrywide circulation.

The Claimant in his evidence stated that the averments as contained in the advertisement were defamatory and went on to state that following the placement of the advertisements he received calls from friends who sought to know what transpired between him and the Respondent herein. He added by stating that he received a call from one of his classmates who asked him “*Kwani umekula mbuzi ya watu?*” He further testified that the advertisements were made in bad faith and were geared at embarrassing him and that he has been unable to secure any other employment after his termination from the Respondent's employment. The Claimant however, did not call any witness to ascertain this.

The Claimant with an aim of fortifying his case for damages for defamation cited several cases in support of the same and more specifically on quantum. The cases cited include **Nation Media Group Ltd & 2 Others Vs John Joseph Kamotho & 3 Others (2010) eKLR**, **Gideon Mose Onchwati Vs Kenya Oil Co.Ltd & Another (2015) eKLR** and **Miguna Miguna Vs The Standard Group & 4 Others** among others.

The Respondent on the other hand denied the claim for defamation and relied on the case of **Miguna Miguna Vs The Standard Group & 4 Others (2016) eKLR**, **Simeon Nyachae Vs Lazarus Ratemo Musa & Another (2007) eKLR** and **Registered Trustees of the Sisters of Mercy T/A Mater Misericordiae Hospital Vs Jacinta W. Maina & Another (2014) eKLR**.

The Respondent further submitted that the article published in the Standard Newspaper on 18th May, 2015 titled “*BATTLE FOR CONTROL OF MULTI BILLION TATU CITY GOES INTERNATIONAL*” makes no absolute statement concerning the Claimant and is not attributed to the Respondent. Further the article was written by Moses Machira and not by the Respondent herein.

The Respondent further argues that the advertisement as published in the Daily Nation and the Business Daily was not defamatory as the statements contained therein were indeed true a fact which was admitted by the Claimant in evidence.

In my view to tackle this well we need to look at what is Defamation, its ingredients and whether the Claimant has established that he was defamed.

What is defamation?

Section 194 of the Penal Code provides as follows:

“Any person who by print.....unlawfully publishes any defamatory matter concerning another person with intent to defame the other person is guilty of the misdemeanour termed libel.”

Section 195 defines “**defamatory matter**” as a **matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule or likely to damage any person in his profession or trade by an injury to his reputation**.

The Black's Law Dictionary on the other hand defines defamation as “**the act of harming the reputation of another by making a false statement to a third person**”

What are the ingredients for Defamation?

The ingredients for defamation as listed in the High Court in the decision of *Joseph Njogu Kamunge Vs Charles Muriuki Gachari (2016)* to include:

- 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*

The Claimant has not established all the ingredients as stated above and therefore the Claim for compensation fails.

He has not established that his photograph and the words in the caption are defamatory or that the words accompanying the photograph were false.

In a claim for defamation like the present one, the Claimant ought to prove that some person other than himself found the publication to be defamatory.

The Claimant in this case did not call any evidence to prove that any person who saw his photo and the caption found it defamatory or that there was any damage he suffered as a result of the alleged defamation. In the decision of the Court of Appeal *Daniel N. Ngunia Vs KGGCU Limited (200) eKLR* it was held that:

“...we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege.”

Whether the Claimant is entitled to the reliefs sought

In light of the above reasons and findings the Claimant is also not entitled to aggravated damages for two reasons being first that aggravated damages cannot be granted in a case of breach of a private contract between an employer and an employee and secondly because he did not prove the claims of defamation. The prayer is therefore dismissed.

Each party shall bear its costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE