

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: WARSAME, JOEL NGUGI & ODUNGA,

JJ.A) CIVIL APPEAL NO. E009 OF 2020

BETWEEN

JEAN NJERI KAMAU.....APPELLANT

AND

ASSOCIATION OF ACTION

AID INTERNATIONAL.....1ST

RESPONDENT ACTION AID INTERNATIONAL

KENYA BOARD.....2ND

RESPONDENT WILLIAM NTOINA.....

3RD RESPONDENT

(Being an Appeal from the judgment and decree of the High Court of Kenya at Naivasha Mwongo, J.) dated 5th August, 2020

in

HCCC No. 9 of 2018

Formerly

HCCC No. 278 of 2018)

JUDGMENT OF THE COURT

1. This is a first appeal from the High Court judgment dismissing the appellant's claim for general, aggravated and exemplary damages for (i) breach of confidentiality, (ii) defamation and (iii) injurious falsehood. The claims arose from the 3rd

respondent's appearance before the National Police Service Commission (NPSC) Selection Panel (Panel) on 2nd December, 2011 during recruitment of the

Chairperson for NPSC. The complaint centred on the 3rd respondent's disclosure to the Panel of an internal audit draft report by the 1st respondent and draft Board minutes by the 2nd respondent, and on alleged defamatory statements said to have been made or published thereby. The appellant further contended that the 1st and 2nd respondents consented to, facilitated or were vicariously liable for the 3rd respondent's actions.

2. The appellant and the 1st respondent had earlier executed a Separation Agreement dated 25th May, 2011. Clause 4.1 provided that ***"The terms hereof are confidential between the parties and may not be divulged to any third party without the other party's prior written permission."***
3. During the hearing at the High Court, the appellant testified to her employment with the 1st and 2nd respondents; the breakdown of relations; negotiations culminating in the Separation Agreement; and her subsequent consultancy. She said the 3rd respondent — then a member of 2nd respondent's Board — appeared before the Panel and tabled the Lenre Amao AAI (1st respondent) internal audit report (draft for management response) and draft AAIK (2nd respondent) minutes of 6th May, 2011. She contended that those documents were confidential and their disclosure violated the Separation Agreement and internal policies, defamed her, and precipitated adverse media coverage. She produced emails

concerning the separation negotiations; the

Agreement; newspaper cuttings; and correspondence with the 1st and 2nd respondents and the Panel.

4. Her intended corroborative witness, Lydia Gachoya, a Selection Panel member, was ruled incompetent and non-compellable under section 24, NPSC Act. The Court expunged her witness statement and related material from the record.
5. DW1, Elizabeth May Wakilo, a former Board member of the 2nd respondent and then Board member of the 1st respondent, testified for the 1st and 2nd respondents. She explained the governance relationship between the 1st and 2nd respondents; confirmed the internal nature of the audit report and minutes; and stated neither the 1st nor the 2nd respondent authorised their disclosure to the Panel. She pointed to the 2nd respondent's Open Information Policy and Governance Manual, which impose confidentiality duties on Board members. She produced letters sent to the Panel after learning of the disclosure: the 1st respondent disavowed authorising any external use of the audit draft; the 2nd respondent authenticated the documents' genuineness but clarified that the 3rd respondent acted in his private capacity and the 2nd respondent would not make official submissions.
6. DW2, the 3rd respondent, testified that he appeared before the Panel as a private citizen responding to a public invitation; that the date coincided with a Board retreat for the 2nd respondent at Maasai Lodge (which was held on 2nd – 3rd December, 2011)

for

which he was reimbursed travel expenses to attend the retreat, not to appear before the Panel; and that neither the 1st nor the 2nd respondent authorised him to make submissions on their behalf. He was also resolute that he had not defamed the appellant.

7. After a full hearing, the High Court (*Mwongo, J.*) dismissed the suit, holding, in substance, that:
 - i. Clause 4.1 of the Separation Agreement protected only the terms of the Separation Agreement as between its signatories; it did not extend to the internal audit report or Board minutes;
 - ii. The doctrine of privity of contract defeated any attempt to enforce Clause 4.1 against the 3rd respondent, who was not a party to the Separation Agreement;
 - iii. While the 3rd respondent's disclosure contravened the internal confidentiality policy of the 1st and 2nd respondents, any claim thereunder belonged to the two respondents, not the appellant;
 - iv. The defamation claim failed for want of pleaded and proven actual defamatory words and for lack of proof of publication causing injury;
 - v. There was no proof that the 1st and 2nd respondents facilitated or authorised the 3rd respondent's Panel appearance; and

- vi. The proposed testimony of Lydia Gachoya (a panelist) was barred by section 24 National Police Service Act; and a ruling to that effect by the High Court was not appealed.
8. The appellant was aggrieved and has appealed to this Court. The appeal was argued by way of written submissions. Additionally, on 6th October, 2025, during the plenary hearing before us, Mrs. Rotich, learned counsel, appeared for the appellant; Mr. Obura, learned counsel, for the 1st respondent; and Mr. George Ogembo, learned counsel, appeared for the 3rd respondent (also holding brief for counsel for the 2nd respondent). They each provided brief oral highlights.
 9. The appellant argues that the learned Judge artificially separated the Separation Agreement from the Open Information Policy and Governance Manual. She contends that “terms” in Clause 4.1 should be read purposively to include the events and documents that led to the Agreement (including the audit draft and minutes) and that disclosure by a Board member bound by the 2nd respondent’s confidentiality agreement also breached the Agreement. She further submits that the 3rd respondent acted with the consent or sponsorship of the 2nd respondent (relying on reimbursement records and timing), that the 1st and 2nd respondents reacted belatedly, and that the media publications demonstrate reputational injury. She faults the court for not awarding damages despite finding a breach of confidentiality

under the 2nd respondent's policy; and maintains that the defamation claim was proved.

10. The 1st respondent supports the judgment. It submits that Clause

4.1 secures only the written terms of the Separation Agreement and cannot be stretched by parol evidence to cover other materials or negotiations; and that privity bars imposing that clause on the 3rd respondent. The 1st respondent reiterates that it did not authorise the 3rd respondent's appearance; that it appropriately wrote to the Panel disavowing any external reliance on the audit draft; and that the appellant failed to identify the actual defamatory words or prove publication causing injury. The exclusion of the panelist's evidence is said to be final as it was never appealed.

11. The 3rd respondent contends that no confidentiality contract existed between him and the appellant; that any duty ran to the 1st and 2nd respondents via internal policy. He underscores that the parties' agreed issues did not include a freestanding "breach of confidentiality" tort/contract claim by the appellant against him; and, in any event, the trial judge correctly found that there was no privity and no authorisation by the 1st and 2nd respondents. On defamation, the 3rd respondent urges the claim collapses because the actual words pleaded were never proved to be in the documents or uttered by him; and the Panel Chair later indicated the materials would not influence the Panel's decision,

— that indeed, the appellant ranked second in the interviews.

12. As a first appellate court, we must reconsider the evidence, evaluate it and draw our own conclusions while bearing in mind we did not see or hear the witnesses: ***Selle v Associated Motor Boat Co. [1968] EA 123***. We will not interfere with factual findings unless based on no evidence, on a misapprehension of the evidence, or the judge acted on wrong principles: ***Jabane v Olenja [1986] KLR 661***.
13. After keen consideration of the record of appeal, grounds of appeal, the written submissions by the parties as well as the parties' advocates' oral highlights, we have determined that the appeal presents these three core questions:
- i. How far does Clause (4.1) of the Separation Agreement reach? Does the confidentiality clause protect only the *terms* of the written Separation Agreement between its signatories, or does it also shield the internal audit draft, draft Board minutes, and the pre-agreement deliberations?
 - ii. Who is bound by the Separation Agreement and who may enforce the 2nd respondents' Open Information Policy and Governance Manual? Was the 3rd respondent bound by the Separation Agreement or otherwise liable to the appellant for a policy-level confidentiality breach; and did the appellant prove that the 1st and 2nd respondents authorised, facilitated, or were vicariously liable for his Panel appearance?

- iii. Was defamation proved? Did the appellant plead and prove the actual defamatory words, their publication and causation of injury so as to warrant an award of damages?
14. We will examine these three issues in *seriatim* below. We, also, briefly touch on the exclusion of the panelist's evidence.
15. Clause 4.1 of the Separation Agreement protects "***The terms hereof are confidential between the parties and may not be divulged to any third party without the other party's prior written permission.***" Clause 5 is a classic "entire agreement" clause. The document deliberately omits the underlying disputes and instead settles them in full and final terms. Nothing in the Separation Agreement integrates the internal audit draft or draft minutes, nor any "without prejudice" negotiations, by reference or directly.
16. To import those materials into the Separation Agreement would contradict the Agreement's text and the parol-evidence rule. The High Court was right to confine Clause 4.1 to the written terms as between the appellant and the 1st respondent (and, on the facts of this case, the 2nd respondent, only to the extent that it was a signatory or expressly bound). On our own re-evaluation of the evidence, we reach the same conclusion.
17. Separately, the 2nd respondent's Open Information Policy and Governance Manual imposed internal confidentiality on Board members. The 3rd respondent, as a Board member, should not have shared the internal documents externally; but any claim

for

that breach is for the 2nd respondent to pursue, not the appellant's in her personal capacity. We conclude that the trial learned Judge's distinction between contractual confidentiality (Agreement-based) and institutional confidentiality (policy-based) was sound, and we have no reason to depart from it. The appellant could not purport to pursue the breach of confidentiality agreement on behalf of the 1st and 2nd respondents.

18. The appellant's claim against the 3rd respondent under Clause 4.1 of the Separation Agreement is further defeated by lack of privity: the 3rd respondent was not a party and undertook no contractual obligation to her under the Agreement. Nor was any basis laid for an implied term binding him to the appellant. We easily find that the High Court did not err in this regard.

19. On the argument that the 1st and 2nd respondents authorised and/or facilitated the 3rd respondent to appear before the Panel, the burden lay with the appellant to prove that the 1st and 2nd respondents facilitated and/or authorised the 3rd respondent to attend the meeting of the Select Panel and divulge the information. The letters in the record show that the 2nd respondent authenticated the documents' genuineness while categorically stating that the 3rd respondent did not act for it. Similarly, the 1st respondent wrote to the Panel to disavow external reliance on the internal audit draft. The reimbursement forms show travel by the 3rd respondent

around 1st - 2nd December, 2011 to attend a Board retreat for
the 2nd respondent

at Maasai Lodge — not a mandate to appear before the Select Panel or to speak for the 1st and 2nd respondents. No minute, letter, email, or instruction links the 1st and 2nd respondents to the 3rd respondent's Panel appearance. We, therefore, uphold the finding that the 3rd respondent appeared in a private capacity and was not authorised or facilitated to do so by the 1st and 2nd respondents.

20. We also uphold the learned Judge's conclusion that the 1st and 2nd respondents could not be found liable on the doctrine of vicarious liability. There is no proven relationship of employment/agency between the 3rd respondent and the 1st respondent, nor proof that his acts were in furtherance of the 1st and 2nd respondents' business. In the absence of those elements, liability cannot attach to the 1st and 2nd respondents.

21. In any event, given the record in this case, we are doubtful that a case for defamation could be made out. In defamation, a party must identify the specific words complained of, show publication to a third party, establish that the words are defamatory of and concerning the party, and prove causation of injury (and, where necessary, falsity and fault). Where the claim is libel, the allegedly defamatory words in the document must be set out or pinpointed.

22. In the present case, the appellant advanced broad imputations (tribalism, incompetence, and so forth), but at trial she did not identify, where in the draft audit report or draft minutes

those words appear, nor prove any oral utterance by the 3rd respondent

to that effect. The High Court could not find the pleaded words in the documents; and neither can we. The court is not permitted to trawl through voluminous materials to construct a defamatory sting which the appellant has not pleaded and proved.

23. On publication and causation, the record includes newspaper articles, but the chain of republication from the Panel to the press

— and its legal attribution to any respondent — was not proved. Moreover, the Panel Chair later announced that the documents would not be used in the Panel's assessment. The appellant, in fact, ranked second overall in the selection process. We are, therefore, of the view that the appellant failed to establish link between any actionable publication to the respondent. Given the failure to prove the primary elements, it is unnecessary to reach defences (privilege, justification, public interest). The claim for injurious falsehood — a tort focused on false statements causing economic loss — fails for the same evidential deficits.

24. Finally, we make the finding that the trial court's ruling excluding the Selection Panel member under section 24, NPSC Act was not appealed. It stands and cannot be impugned collaterally in this appeal.

25. The upshot is that we find no error warranting appellate intervention in this appeal. The appeal is,

accordingly, dismissed. 26. In the circumstances of this case, and considering the parties' prior relationship and the public setting of the events, we direct

that each party shall bear its own costs in the High Court and on this appeal.

27.It is so ordered.

Dated and delivered at Nakuru this 10th day of December, 2025.

M. WARSAME

.....
JUDGE OF APPEAL

JOEL NGUGI

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR