



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 231 OF 2012

ABDI ABDULLAHI..... PLAINTIFF

- VERSUS -

FAZAL BUTT.....1ST DEFENDANT

JACKWRIGHT LIMITED.....2ND DEFENDANT

JUDGMENT

Abdi Abdullahi, the plaintiff herein has sued the defendants herein via a plaint filed on 18th May, 2012 and is seeking the following reliefs:

a) General Damages

b) Costs

The contention by the plaintiff is that on 3rd April, 2012 the 1st defendant wrote a letter to the Public Procurement Administrative Review Board in which he stated:

“We further put it to the board that we hold a strong suspicion (sic) that some of the companies in whose favour our bid bond could have been removed are well known to us and are not duly registered in accordance with the law and are therefore not fit to participate in any tendering process. Some of these companies are as follows; -

a) Medabs Enterprises.

b) Habibani enterprises

c) Garissa Green Grocers”

The plaintiff's case is that the contents of the said letter were defamatory and lowered the plaintiff's esteem in the eyes of right thinking members of the Nanyuki and Isiolo Business Community. **PW1, ABDI ABDULLAHI**, the plaintiff herein stated that the letter dated 3rd April, 2012 produced as P.Exh 1 was indeed defamatory since in its ordinary meaning it meant that the plaintiff was working in an illegal company and removed his bid bonds. He further testified that the letter sent to the Public Procurement Board was also circulated to Isiolo and Nanyuki business people and was read by many people including his other clients. **PW1, ABID ABDULLAHI**, maintains that he runs a legitimate company and produced a Certificate of Registration dated 26th March, 2008 as P.Exh 2. He further averred that the defendants' letter affected his business as he was unable to acquire products on credit.

In his testimony, **PW2, YUNIS IBRAHIM**, confirmed that he was supplying the plaintiff with cattle from Wajir and Isiolo. He further testified that he knew the 1st defendant who was also a businessman in Isiolo and Nanyuki. He confirmed that it was the 1st defendant who circulated a letter at the Isiolo Market stating that the plaintiff's business was not lawful. **PW2, YUNIS IBRAHIM**, further testified that he used to give the plaintiff between 100 to 200 heads of cattle on credit. However, after receipt of the alleged defamatory letter and the oral allegations against the plaintiff, he became suspicious of the plaintiff's business and insisted on cash transactions.

Plaintiff's Submissions:

The plaintiff submit that he is entitled to damages more so because his evidence is uncontroverted. He further submits that as per the **Black's Law Dictionary, 9th Edition;**

“damages are the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong”.

While according to **McGregor on Damages, 17th Edition**;

“damages in vast majority of cases are the pecuniary compensation, obtained by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and in sterling.

The plaintiff submits that there is no precision in calculating general damages and that the court in exercising its discretion is expected to consider the facts of the case before it. Reference has been placed in the case of **LIVINGSTONE VS RAWYARDS COAL CO. (1880) 5 App. Cas. 25 at 39** where Lord Blackburn defined damages as;

“that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

Further reference was placed on the remarks by Lord Halsbury L.C in *The Medina* [1900] A.C 113 at 116;

“How is anybody to measure pain and suffering in monies counted? Nobody can suggest that you can by arithmetical calculation establish what is the exact sum of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. But nevertheless the law recognizes that as a topic upon which damages may be given.”

The plaintiff has submitted that an award of Kshs. 10,000,000 will be sufficient to cover for both damages for defamation and for breach of statutory duty. In support thereof, he has cited the case of **CHRISTOPHER ORINA KENYARIRI VS BARCLAYS BANK OF KENYA LTS & ANOTHER [2018] eKLR** where damages was assessed at **Kshs.4,000,000** and the case of **JOSEPH NJOGU KAMUNGE VS CHARLES MURIUKI GACHARI[2016]eKLR** where the trial court awarded the plaintiff Kshs. 1,500,000.

Defendants’ Case:

The 1st defendant in his statement of defence filed on 19th June, 2012 denied writing the alleged defamatory letter in his individual capacity and stated that he would raise an objection to his being joined in the suit. The 2nd defendant on the other hand admits that the alleged defamatory letter was part of privileged documents lodged with the Public Procurement Administrative Review Board (PPARB) where it had lodged a complaint.

A perusal of the record however indicates that both defendants did not participate in the hearing of the suit nor filed any submissions. I have perused the file and it is evident from the numerous affidavit of service that the defendants were indeed served.

Analysis and Determination:

During the hearing, despite service, the defendants neither called any witness, participated in the proceedings nor filed their submissions hence the evidence by the plaintiff remains uncontroverted. In the case of **CMC AVIATION LTD V KENYA AIRWAYS LTD (CRUISAIR LTD) [1978]eKLR** wherein Madan J. (as he then was) rendered himself thus: -

“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of “evidence” in *Cassell’s English Dictionary*, p 394:

Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

The issues for this court’s determination are;

- i. Whether the letter dated 3rd April, 2012 was false, malicious and defamatory of the plaintiff;**
- ii. What damages, if any, are awardable and who should pay costs?**

Gatley on Libel and Slander 10th Edition at page 8 states: -

“There is no wholly satisfactory definition of defamatory imputation. Three formulae have been particularly influential: (1) would the imputation tend to ‘lower the plaintiff in the estimation of right-thinking members of society generally? (2) would the imputation tend to cause others to shun or avoid the claimant? (3) would the words tend to expose the claimant to ‘hatred’ contempt or ridicule? The question what is defamation relates to the nature of the statement made by the

defendant: words may be defamatory even if they are believed by no one and even if they are true, though in the latter's case they are not, of course, actionable."

Similarly, Patrick O'Callaghan in the **Common Law Series: The Law of Tort at paragraph 25.1** states as follows;

"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."

Recently, the Court of Appeal in **SELINA PATANI & ANOTHER V DHIRANJI V. PATANI [2019] eKLR** cited with authority the case of **JOHN WARD -V- STANDARD LTD, HCCC 1062 of 2005** where the ingredients of defamation were summarized as below: -

- (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.**

In the present case the alleged defamatory letter was addressed to the Public Procurement Administrative Review Board by the 1st defendant on behalf of the 2nd defendant. It requested the Board to investigate the legality of three companies that were competing for a tender by the Ministry of State for defence for the supply of Fresh Meat (beef) on Bones to Isiolo Units, together with the 2nd defendant herein. The alleged defamatory statement is as reproduced below;

"We further put it to the board that we hold a strong suspicion (sic) that some of the companies in whose favour our bid bond could have been removed are well known to us and are not duly registered in accordance with the law and are therefore not fit to participate in any tendering process. Some of these companies are as follows:-

- d) Medabs Enterprises.**
- e) Habibani enterprises**
- f) Garissa Green Grocers"**

According to the plaintiff, the alleged defamatory letter was maliciously circulated in Nanyuki and Isiolo Business Communities by the defendants thus lowering his reputation within his business network. He further contends that the alleged defamatory letter affected his business prospects for growth. This was supported by the testimony of PW2, YUNIS IBRAHIM, who stated that following the receipt of the alleged defamatory letter he became suspicious of the plaintiff's business and insisted on cash transactions only with the plaintiff.

A perusal of the Board's decision at page 18 reveals that the Board did address the complaints in the alleged defamatory letter and cleared the plaintiff's company. In its determination, the Board held that;

"With regard to this allegation, the Board has perused all the original bid documents and has established that all the bidders, including the three named by the Applicant had attached copies of Business Registration Certificates or Certificates of Incorporation, as required under Paragraph 3 of the Tender Documents."

From the foregoing, I find that the plaintiff has proved that he was defamed by the defendants through their letter dated 3rd April, 2012 to the Public Procurement and Review Board and which they later circulated to the business community in Isiolo and Nanyuki. With the aforesaid, the court is now left to determine the issue of damages.

An award of damages in defamation case is discretionary. This was succinctly put by the Court of Appeal in **C A M V ROYAL MEDIA SERVICES LIMITED CIVIL APPEAL NO. 283 OF 2005[2013] eKLR** when it stated that:

"No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones V Pollard (1997) EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future."

The plaintiff submitted a sum of Kshs. 10,000,000 for general damages taking into account the prejudice and damage to his business, the rate of inflation and the weakening of the shilling. Counsel for the plaintiff cited the case of **CHRISTOPHER ORINA KENYARIRI VS BARCLAYS BANK OF KENYA LTS & ANOTHER [2018] eKLR** where damages were assessed at **Kshs. 4,000,000** and the case of

JOSEPH NJOGU KAMUNGE VS CHARLES MURIUKI GACHARI [2016]eKLR where the trial court awarded the plaintiff Kshs. 1,500,000.

In **KEN ODONDI & 2 OTHERS V JAMES OKOTH OMBURAH T/A OKOTH OMBURAH & COMPANY ADVOCATES [2013] eKLR** the Court of Appeal awarded the appellant ksh 4,000,000/= general damages for libel and Kshs. 500,000/= aggravated damages. **While in SANKALE OLE KANTAI V NYAMODI OCHIENG NYAMODI & ANOTHER [2012] eKLR** the court awarded the plaintiff Kshs. 800,000 for damages and in **RADIO AFRICA LIMITED & ANOTHER -V- NICHOLAS SUMBA & ANOTHER [2015] eKLR** the sum of Kshs. 3,000,000 was awarded as general damages for defamation.

The plaintiff is a businessman and a director of Habibani Enterprises which has been in business since 26th March, 2008 when the business was registered. The letter imputed criminality on the part of the plaintiff which affected its reputation and the plaintiff's public standing. After considering the authorities cited by the plaintiff and relying on the decided cases, I award the plaintiff Kshs. 3,000,000 as general damages as against the defendants jointly and severally.

I will not make any award on exemplary damages because they were neither pleaded nor proved. According to **Duncan and Neill on Defamation (2nd Edition, 1983)** which was cited with approval in **JOHN VERSUS MGN LTD (1996) 2ALL ER35 AT PAGE 52:-**

“Exemplary damages can only be awarded if the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless whether his action was tortious or not, and decided to publish because the prospects of the material advantage outweighed the prospects of the material loss. What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chance of economic, or perhaps physical, penalty.”

Regarding costs, it is trite that costs follow the event and as such the costs in this suit are awarded to the plaintiff against the defendant, together with interest.

In the end, the plaintiff is awarded KShs.3 million as general damages, costs and interest. Interest shall accrue from the date of judgment.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2022.

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S. CHITEMBWE

JUDGE