

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT NO. E014 OF 2021

ZADOCK

MAKHANU

KHAEMBA PLAINTIFF

VERSUS

CAROLYNE NAFULA OMONDI 1ST
DEFENDANT

P.C. PETER 2ND
DEFENDANT

DAVID INGOSI 3RD
DEFENDANT

Coram: Before Justice R. Nyakundi
M/s Adongo & Co. Advocates
M/s David Ingosi & Co. Advocates
Mr. Zadock Makhanu Khaemba

JUDGMENT

1. On 27/4/2021, the Plaintiff filed this suit against the Defendants vide a Complaint dated 26/4/2021. The Plaintiff seeks inter alia:

- a) Declaration that the words were defamatory.*
- b) General damages at Court rates.*
- c) Costs be at Court rates.*
- d) Exemplary relief at Court rates.*

2. The Plaintiff contends that the 1st Respondent on 21/4/2021, knowingly, wilfully and without lawful authority called him on phone a quake meaning a terror in the English Dictionary, a fact she knew was false and defamatory, that the 2nd Respondent on the same date also called him on phone a fool of foolish which fact he knew was false, malicious and defamatory and that the 3rd Respondent

called him a masquerader meaning he was not living to his call which fact was malicious and defamatory.

3. The Plaintiff contends that the Defendants jointly and severally assassinated his character because he was given the Power of Attorney in the dispute of Plot No. Kapkoi/Mabonde Block 1/Ex-Prison/554 that all had interest in.
4. The Plaintiff averred that the defamatory libel and serious slander caused his reputation irreparable general damages to the tune of Kshs. 20,000,000/=. The Plaintiff maintained that being in written and by electronic the defamatory words went all over the world making his dear family members and friends hate and despise and ridicule him always. According to the Plaintiff he is man of high repute given the positions he holds in public offices being the proprietor of Khaemba Contractors, holding a Power of Attorney and being Field Officer in ADR, Mediation Centres.
5. The 3rd Defendant on his part on 17/5/2021 filed a Notice of Preliminary Objection challenging the jurisdiction of this Court to herein and determine the suit on ground that the matter is *res-judicata*. The Court however in a ruling dated 29/10/2021 dismissed the 3rd Defendant's Notice of Preliminary Objection.
6. The 1st Defendant on her part filed her Defence dated 30/10/2024, in which she denied the claim in toto. She averred that the 3rd Defendant was her Advocate in *Kitale CMCC No.53 of 2020* and *Kitale Constitutional Petition No. 2 of 2021*. She further averred that in *Kitale CMCC No.53 of 2020*, the Plaintiff tried to act as an Advocate for the Plaintiff in the matter which he was not authorized to do and her Advocate brought it to the attention of the Court and that upon this happening, the Court agreed with her Advocate and struck out the documents filed by the Plaintiff herein and he was barred and warned against acting/masquerading as an Advocate and that thereafter the Plaintiff proceeded to sue her and her Advocate in *Kitale Petition No. 2 of 2021*, which petition was dismissed and the Court held inter alia that the Plaintiff tried to camouflage his actions behind a Power of Attorney and act for a Co-

Plaintiff but he could not deceive the Court therefore the petition was dismissed with costs.

7. The 1st Defendant maintained that if at all comments were made, the same were a fair comment and true based on the fact that the Plaintiff is not qualified as an Advocate. Further, the Plaintiff averred that there is no forum that these comments were published and that they do not meet the threshold for libel. The 1st Defendant maintained that she did not assassinate his character in any way.
8. The matter proceeded by way of viva voce evidence.
9. PW1, Zadock Makhanu Khaemba, testified that on various dates between 15th - 23rd April, 2021, via electronic and written, the Defendants jointly and severally called him a masquerader, fool and quake which words are false and defamatory, that he is a public figure working with Khaemba Contactors, ADR/Mediation Centre and had a Power of Attorney, that the Defendants violated his constitutional rights and that unless these acts of assassination of his character are checked he will suffer irreparably.
10. DW1, Carolyn Nafula Omondi, testified that she met the Plaintiff once when he came to Court in *Kitale CMCC No.53 of 2020*, where she had been sued as a Defendant, that in the matter the Plaintiff had tried to act as an Advocate for the Plaintiff in that matter and that her Advocate brought it to the attention of the Court and, that upon this happening, the Court agreed with her Advocate that the Plaintiff was not qualified to represent anyone as an Advocate and he was barred from acting/masquerader as an Advocate. Thereafter, that the Plaintiff proceeded to sue and her Advocate in Kitale Constitutional Petition No. 2 of 2021 and that thus petition was dismissed and the Court held inter alia that the Plaintiff tried to camouflage his actions behind a Power of Attorney and act for a Co-Plaintiff but he could not deceive the Court therefore the petition was dismissed with costs. She testified that at no point has she ever made defamatory comments against the Plaintiff. Additionally, she stated that it is clear even from his statement that nothing was ever published and if anything, he personally went to show the alleged

message to 3rd parties therefore advertising it himself. She further testified that if at all she made any comments, it was fair comment and true based on the fact that the Plaintiff is not qualified to act as an Advocate.

11. DW2, David Ingosi testified that he is an Advocate of the High Court of Kenya duly admitted to the roll of advocates on 14/10/2003 and practicing in the name and style of David Ingosi & Company Advocates, at Hussein House, 1st Floor in Kitale Town, that he was approached by a client, Carolyn Nafula Omondi, the 1st Defendant herein, to defend her in *Kitale CMCC No. 53 of 2020*; Dennis Wanyonyi Simiyu versus Carolyn Nafula Omondi, where she had been sued, that he was instructed to defend Carolyn Nafula Omondi as an Advocate and as such he prepared pleadings and was ready for hearing, that he attended the Subordinate court at Kitale; while knowing that the Plaintiff in that matter was acting in person and that the Plaintiff herein turned up in court as an advocate appearing for the Plaintiff in *Kitale CMCC No. 53 of 2020*, one, Dennis Wanyonyi Simiyu.

12. He testified that he knew the Plaintiff herein was not an advocate and as such notified the Court that the person before the court pretending to be an advocate had no audience as he was a masquerader and as such he was informed that he had no audience as he had no authority to appear as an Advocate. He stated that the Plaintiff herein had purported act for gain for a "client" in *Kitale CMCC No. 53 of 2020*- Dennis Wanyonyi Simiyu versus Carolyn Nafula Omondi and that pursuant thereto, the Plaintiff filed Kitale HC Petition No. 2 of 2021, against him and his client and upon being served, he filed a Replying affidavit to the petition dated 15/4/2021, on his own behalf through my then advocates D.M. Wanyama and Company Advocates and that the Court made a decision on 20/4/2021 agreeing with them and struck out the suit as the Plaintiff herein had no authority to file suit on behalf of one, Dennis Wanyonyi Simiyu and had no interest in the suit property.

13. He further testified that the court decision gave a seal of approval to my averments since the Plaintiff was masquerading as an Advocate and that having been sued herein as the 3rd Defendant as a result of statements that arose in *Kitale HC Petition No. 2 of 2021* in an affidavit he filed in response to the petition, which is absolutely privileged, and in any case, the High Court agreed with them that the Plaintiff herein was a masquerader; the statements made in the course of proceedings in *Kitale HC Petition No. 2 of 2021* are absolutely privileged. He stated that it is true and justified to call the Plaintiff a masquerader in that the Plaintiff does have any legal documents allowing him to practice law as set out in Sections 12,13,31,33 and 34 of the Advocates Act. Further, that the Plaintiff masquerades as Khaemba Contractor Field Officer of ADR 1, Mediator Centre (sic) or at all. In any case, he stated that the statements referred to the Plaintiff as a masquerader are true in fact and are justified in all circumstances and the high court as a fact ruled that the Plaintiff was not an advocate and as such did not have the locus to appear as an attorney or advocate and that the Plaintiff did not appeal or Review the decision of the High court in *Kitale HC Petition No. 2 of 2021* within the stipulated time and as such the finding that he is a masquerader stands and is binding *in rem*.

Determination

14. Having appreciated the parties' pleadings and evidence on record. The only issue for determination is whether the Plaintiff has proved its case on a balance of probabilities and if so, the appropriate awardable damages.

15. Defamation is defined in the *Halsbury's Laws of England*, 4th Edition, Vol. 28 as follows:

"A defamatory statement which tends to lower a person in the estimation of right-thinking members of the society or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him

disparaging or injurious to him in his office, profession, calling, trade or business.”

16. *Winfield on Tort* gives the following definition;

“It is the publication of a statement which tends to lower a person in the estimation of the right-thinking members of the society generally or which tends to make them shy away or avoid that person”.

17. In **Selina Patani & Another v Dhiranji V. Patani [2019] eKLR** the Court of Appeal reiterated that the law of defamation is concerned with the protection of a person’s reputation, that is, the estimation in which such persons are held by others. The Court stating inter alia that:

*“In rehashing, we note the ingredients of defamation were summarized in the case of **John Ward v Standard Ltd. HCC 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. The burden of proof was on the plaintiff in this case to establish that the words complained of were defamatory to him. The applicable law as to the burden of proof is spelt out in Section 107, 108 and 109 of the **Evidence Act**. The Court of Appeal in **Mumbi M'Nabea v David M. Wachira [2016] eKLR** while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence

advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the **Evidence Act**, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.” The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

*“Whereas under section 107 of the **Evidence Act**, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”*

19. Concerning the rationale underlying the law of defamation, the Court of Appeal had this to say in **Musikari Kombo v Royal Media Services Limited [2018] eKLR**:

“The law of defamation is concerned with the protection of a person’s reputation. Patrick O’Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...' 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 to his discredit' and it affords redress against those who speak such defamatory falsehoods...”

- 20.** A Plaintiff in a case of defamation must prove that the statement complained of was publicized to a third party by the defendant. The **Black’s Law Dictionary 9th Edition** defines publication as –

“The act of declaring or announcing to the public.”

- 21.** In **Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR**, the court cited the case of **Pullman v Walter Hill & Co (1891) 1 QB 524**, and stated that:

Publication of a defamatory material occurs when the material is negligently or intentionally communicated in any medium to someone other than the person defamed....

- 22.** The Plaintiff in this case contends that via telephone the Defendants defamed him by calling him a masquerader, fool and quack. The Plaintiff however did not tender any evidence to show that the said information was publicized to third parties by the Defendants. Further, the defendant did not call any witness who heard the Defendants utter the said words. There was thus no evidence of any publication.
- 23.** The Court should give to the material complained of the natural and the ordinary meaning which they would have conveyed to the ordinary reasonable reader or viewer. The hypothetical reasonable reader or viewer from our lens of this case is not naive but he or she

is also not unduly suspicious for he or she can read between the lines. In fact, this reasonable reader or viewer am making reference to can read an implication more readily than a Lawyer or solicitor. Because he or she is allowed to indulge in a certain amount of loose thinking. But at the same time, he or she must be treated as being a man or woman who is not avid for scandal and someone who does not and should not select one bad meaning where other non-defamatory meanings are available. In defamation cases the court is cautioned not to be too literal in its approach to draw meaning that squarely is to lead into a finding of defamation in a given case while in the true sense the words were never defamatory. The Plaintiff in this case failed to demonstrate that the words so complained of in this suit tended to lower his reputation, character, professional calling etc in the estimation of the right thinking members of the society generally. The test has always is the estimation of reasonable people generally within the field of practice and the community which knows him in terms of his reputation and fame within Trans Nzoia County and elsewhere. This Court had subjected the defamatory meaning to the words pleaded by the Plaintiff and raised the bar to the most injurious meaning so as to establish whether the words were capable of bearing the rubric concept of defamation to make a finding on liability on the part of the defendants. Plainly, the assessment of the reliability of his evidence on oath and the substance of it failed to reveal that the Plaintiff suffered defamation from the words pleaded in the plaint. In the context of this suit and in discerning from the language of the claim, there is nothing closer or near to injure the character and reputation of the Plaintiff.

- 24.** It was the duty of the plaintiff to prove that any defamatory statement alleged to have been made by the plaintiff referred to him. It is trite law that a plaintiff need not be named in a case of defamation if ordinary readers are able to discern whom the statement referred to. In the case of **Hon. Mwangi Kiunjuri v Wangethi Mwangi & 2 others Civil Appeal No. 221 of**

2012 the court while citing with approval the case of **Newstead v London Express Newspaper Ltd (1940) 1KB 377, 1(1939)** said that:-

It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him.

25. The alleged words to have been used by the defendants are masquerader, fool and quack. The Plaintiff did not show that ordinary sensible readers with special knowledge of the facts could only understand the words as to refer to him. This element was therefore not proved.

26. The Plaintiff contended that the words used by the Defendants had the intention of lowering his high reputation in public hence defamatory. The Defendants on the other hand, pleaded justification and submitted that whatever they said was true and accurate.

27. In **Miguna v Standard Group Limited & 4 others (2017) eKLR**, the same court stated the following

“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See Gatley on Libel and Slander (8th edition para. 31).”

- 28.** The question that needs to be answered is whether the words masquerader, fool and quack are capable of being construed as being defamatory in the circumstances. The words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory *per se*. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.
- 29.** Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice. In **Ann Wairimu Njogu vs Radio Africa Limited [2017] eKLR**, it was held that malice also had to be inferred from the alleged defamatory statement. In addition, the defamatory words must be shown to have been published by the defendant. (See the case of **James Njagi Joel v Junius Nyaga Joel [2020] eKLR**).
- 30.** In the instant case, the Defendants tendered evidence alluding to the fact that the Plaintiff, though not an Advocate was masquerading in Court as Advocate for his Co-Plaintiff in *Kitale CMCC No. 53 o 2020*. This evidence was not controverted by the Plaintiff. Further as earlier stated there was no publication of the said words. There was no malice whatsoever in the circumstances of the case herein. It is beyond dispute that the Plaintiff held himself out as someone with legal knowledge duly licenced to represent various litigants before a Court of law in Kitale. In keeping with the integrity and authority of the court the session Judges Hon. Mrima and Hon. Kimaru in various occasions ruled against the Plaintiff relying on an invalid Power of Attorney to give him standing to appear as an advocate or lawyer or solicitor or a paralegal for that matter in the constitutional forums of our legal system to purport to

represent a Plaintiff or a Defendant cited in any of the case dockets set for adjudication under Article 50(1) of the Constitution. In other words, when I consider the spectrum of the facts and its historical context the words so complained of cannot pass the threshold of the sting of a libel or even slander having regard to its overall gravity and the relative significance of any elements of inaccuracy or exaggeration. The context of the words in question has to be taken from the entire publication since the context may have a bearing on the meaning attributed to the words complained of by the Plaintiff. In my considered view on a balance of probabilities I find that the words complained of reported by the Plaintiff are the most accurate reflection of what he did, the historical context of it and the substance in which the Defendants had to raise the sting of the purported defamatory words. I am of the same opinion with the Defendants that the Plaintiff has not made out a case on liability flowing on the so-called words of being called a masquerader or a quack.

- 31.** Generally, defamation requires that the publication be false and without the consent of the allegedly defamed person. Words or pictures are interpreted according to common usage and in the context of publication. Injury only to feelings is not defamation; there must be loss of reputation. The defamed person need not be named but must be ascertainable. A class of persons is considered defamed only if the publication refers to all its members particularly if the class is very small – or if particular members are specially imputed. The advent of electronic communications has even complicated the classification somewhat on categorization of libel and slander as elements of defamation. It should be noted that actual truth of the publication is usually a defence to a charge of defamation, the same case applies to legal privilege arising from a special relationship or position also relieves one of liability. The essential characteristics of defamation being that the statement must be defamatory, that the said statement must refer to the Plaintiff, and that the statement must be published i.e.

communicated to at least one person other than the Plaintiff are all missing in this suit as filed against the defendants.

32. It should not be lost by this Court that fundamental rights of liberty and free speech are controlled and not absolute as per the Constitution 2010 but in the name of control the freedom of speech that pertains to criticism of certain government actions or a private individual in the shoes of the Plaintiff cannot be gagged. This issue of defamation brought by the Plaintiff against the Defendants if it were to succeed it was to give primacy to individual interest in the guise of reputation over supremacy of the larger public interest, for the dominant interest in a constitutional democracy like ours. The court is to give consideration to the collective interest and not the perspective of individualism. That is where the Plaintiff was dragging this court to go but as far as the dichotomy of the tort of defamation in being a public or individual remedy is concerned, this claim is riding on a protocol of suspicion and on the legal landscape of remoteness. I therefore answer the questions raised by the Plaintiff in the negative.

33. The stakes on defamation are higher by dint of our constitutional interpretation. It is easy to criticize rather than actually get into the depth of the elements of defamation for individuals must understand that a healthy criticism fosters creativity and growth more specifically for the Plaintiff he could have used the opportunity to retrospect and reflect on his conduct within the court corridors of Kenya. As a citizen too the Plaintiff has responsibility and is accountable to the public for any step taken of being passionate to practice law and act as a lawyer, as an advocate or a solicitor to the detriment, prejudice and injustice to the would-be vulnerable victims. It is time to revisit himself and his family whether it is worthy dying for unlawful cause rendering his family destitute without companionship, parental responsibilities in the name and style of fighting for justice.

34. As I pen off, to the Plaintiff, we walked together in this adjudication process in a case which I would describe as a rare form of

proceedings in the several decades I have practiced law in our legal system, where the wise counsel of Judges is ignored and you elected to be a martyr for a course you strongly believe in; to practice law in our courts without proper testimonials or licence as per law established. The people you have sacrificed your life for do not believe in you and would never feel for you or your family.

35. For those reasons I find no iota of evidence to establish on a balance of probabilities to rule in favour of the Plaintiff on liability for the claim of defamation as against the defendants. The suit is lost and unfortunately the Plaintiff must meet the costs of this litigation for the benefit and mitigation of the Defendants who have been dragged to a still birth claim of defamation.

**DATED, SIGNED AND DELIVERED VIA AT ELDORET THIS 11TH
AUGUST 2025**

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**R. NYAKUNDI
JUDGE**