

IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA

CORAM: DZAMEFE SENYO J.A (PRESIDING)

MENSAH BRIGHT J.A.

BARTELS-KODWO J.A.

SUIT NO: H1/105/2021

30th March, 2023

HON. DR. DOMINIC AKURITINGA AYINE

_____ **PLAINTIFF/APPELLANT**

VERSUS

EVRON HUGHES

_____ **DEFENDANT/RESPONDENT**

JUDGMENT

BARTELS-KODWO (JA):-

INTRODUCTION

This is an appeal from the decision of the High Court, Accra dated 17th June 2019 which decision dismissed the Plaintiff/Appellant's (hereinafter called "the Appellant") action brought against the Defendant/Respondent (hereinafter called "the Respondent").

BACKGROUND

The Appellant, a politician, Member of Parliament for Bolgatanga East, former Deputy Minister of Justice, a former lecturer at the School of Law at the University of Ghana and Managing Partner at Ayine & Felli, brought the instant action against the Defendant alleging defamation by the Defendant.

By a writ of summons and accompanying statement of claim, the Appellant sued the Respondent seeking the reliefs reproduced *verbatim* below;

- i. A declaration that the publications pleaded at paragraphs 9 to 11 of the statement of claim to the effect that the Plaintiff is corrupt, a thief and fraudulent are defamatory to the Plaintiff.
- ii. General damages for libel against Defendant for publishing the aforesaid words of and concurring in Plaintiff in his facebook posts.
- iii. An order of the Honourable Court directed at the Defendants to publish a retraction and an apology with the same prominence as the defamatory words in the Facebook posts.

- iv. An injunction restraining the defendants whether by themselves, their servants, or agents or otherwise from authorizing permitting and/or causing to be published the same or similar words defamatory of the plaintiff.
- v. Costs including lawyer's fees.

In his statement of claim the Appellant alleged that on the 21st of December 2015, the Defendant published a Facebook post under the caption "Re: Ameri Transaction" in which *"the Defendant stated "I aver that I have reasons to believe that the Amerideal was cooked with the ingredients of deceit and theft with the primary intention to defraud the state""*. The Appellant also stated that the Respondent made the following statements *"it is my assertion that the initiation, structuring and execution of the deal were calculated to give effect to a fraudulent conspiracy involving hundreds of millions of Dollars. Simply put, it is my assertion that some people decided to steal from the Republic and created the Ameri deal as the turbine to power this grand theft. They sat down (or stood somewhere), discussed their intention to steal, planned how to steal it, and put it into effect."*

The Appellant also stated that the Respondent further posted that the Appellant was involved in the deal and that the Appellant *"advised and okayed"* the deal. It is the contention of the Appellant that the said publications are false and were published with the sole object of creating public disaffection for the Appellant exposing him to public ridicule, contempt and odium since he advised the Government of the Republic of Ghana on the agreement in question in good faith and competently. The Appellant contends that by stating that the agreement in question was *"cooked with the ingredients of deceit and theft with the primary intention to defraud the state"* the Respondent meant and was understood to mean that the Appellant is engaged in or involved with crooked practices lacking in integrity.

The Appellant further alleged that after the publication of the allegedly defamatory words he received several phone calls from his constituents, lawyers, party members and members of the general public, the import being that the publications of the Respondent had reduced his reputation in the minds of right thinking members of Ghanaian society.

In his statement of defence, the Respondent on his part admitted publishing the words set out by the Appellant in his statement of claim but added that the words represent a selected fraction of the statements or publications by the Respondent and that the Appellant selectively took out those words in order to prevent the Court from being able to perceive and ascertain the true effect and the substance of the publications by the Respondent. The Respondent contended further the Facebook posts brought before the Court nor the words selected by the Appellant were made concerning the Appellant, and that the defamatory meaning ascribed to the Respondent's statements by the Appellant were a figment of the Appellant's imagination.

Importantly to his defence the Respondent contended that the words complained of were directly referencing a transaction by the government of Ghana and not descriptive of the Respondent or any actions that he took. The Respondent then contended that the words complained of were comments on matters of public interest being that they were about a contract entered into by the government of Ghana with a foreign company. The Respondent also invoked the defences of qualified privilege and fair comment.

Following trial, the High Court held in favour of the Respondent and refused all reliefs sought by the Appellant. The High Court held, critically, that the statements made by the Respondent were not made in direct reference to the Appellant. The Court also concluded that the Appellant did not plead innuendo nor lead sufficient evidence to the effect that the offending posts had referenced him by innuendo.

Consequently, the Court below held that the Appellant had failed to make a prima facie case against the Respondent. The Appellant, dissatisfied with the judgement of the High Court, has caused the notice of appeal instituting the instant appeal to be filed at the Registry of this Honourable Court.

GROUND OF APPEAL

The sole ground of the appeal as canvassed in the notice of appeal is that the decision of the High Court below is against the weight of the evidence adduced at the trial.

ARGUMENTS OF THE APPELLANT

After giving the background and the summary of the case, the Appellant relayed to this Honourable Court, the summary of his evidence produced before the High Court. The Appellant then contended by reference to paragraphs 14, 15, 16, 17 and 20 the Respondent's witness statement, that the Respondent himself had admitted that the statements espoused in the posts were made concerning the Appellant.

The Appellant then stated that he had testified in Court that the statements were defamatory and that he had suffered damage as a result of the posts.

After summarizing the evidence of the Respondent, the Appellant recounted the judgment of the High Court and contended that as far as the issues of sarcasm and innuendo are concerned, *"the court below completely missed the point"*.

The Appellant submitted that his case was not grounded on innuendo, thus the failure to plead same should not have impacted his success at establishing a case against the Respondent. The Appellant, citing **Atkin's Encyclopedia of Court Pleadings in Civil**

Proceedings 2nd Ed. Vol 15, 'submitted that his case was grounded on the literal and inferential meaning of the words complained about.

The Appellant further contended that the High Court erred when it concluded that the Respondent's posts were in reference to several other persons involved in the AMERI deal and not the Appellant alone. The Appellant more specifically took issue with the conclusion by the trial judge that the mention of the Appellant's name in the facebook posts did not make him the target of the publication. The Appellant contended that when several people are targeted by a malicious or defamatory publication, any one of them may act to clear their name in a defamatory suit, and that the fact that the others referenced do not do so, does not defeat the action of the one who does act to clear his name by court action.

On the issue of whether the publication was made of or concerned the Appellant, the Appellant contended that the Respondent admitted so much on cross examination during the trial. The Appellant then refers to **Halsbury's Laws of England 5th Edition Volume 32 paragraph 540**, and says that words are actionable when they reference the claimant, where the claimant is referred to by name or otherwise clearly identified, and adds that those words are actionable even if the words are intended to refer to some other person.

The Appellant then repeats selected portions of the publications made by the Respondent. The selected portions are worth repeating at this juncture and read, *"I aver that I have reasons to believe that the AMERIdeal was cooked with the ingredients of deceit and theft with the primary intention of to defraud the state"* and *"it is my assertion that the initiation, structuring, and execution of the deal were calculated to give effect to a fraudulent conspiracy involving hundreds of millions of dollars. Simply put, it is my assertion that some people decided to steal from the Republic and created the AMERI deal as the turbine to power*

this grand theft. They sat down (stood somewhere) discussed their intent to steal, planned how to steal it, and put it into effect.”

Notably, the above passage does not reference the Appellant, however counsel for the Appellant has a response to this concern. On page 20 of his 27 page written submission to this Court, the Appellant states, *“It is well known that Plaintiff was the Deputy Attorney General of the Republic of Ghana at the time and as legal advisor to the government, played a leading role in the execution of the agreement over which the comments complained of came about, a fact known to the Defendant at the time the comments were made.”* This, according to the Appellant is sufficient evidence that the comments were made concerning the Appellant.

The Appellant then cites paragraph 542 of **Halsbury’s Laws of England 5th Edition Volume 32** and says that it is possible for a declarant, by their declaration, to defame a claimant, whose existence the declarant is not even aware of, by way of an unintentional reference. The Appellant asks whether the statements made by the Respondent were defamatory of him, the Appellant and answers in the affirmative.

The Appellant cited the Singaporean case of **Golden Season Pte Ltd v. Kairos Singapore Holdings Pte Ltd** where the Singaporean court held that it was important to consider the added context of other social media posts when deciding whether a post was defamatory or not. The Appellant urged this Honourable Court to follow the court in case and consider other posts of the Respondent, and concluded that if this was done, this Court would come to a different conclusion about whether or not the defamatory content referenced the Appellant.

ARGUMENTS OF THE RESPONDENT

The Respondent on his part, in the written submission filed on his behalf contended that the trial court did not err in finding against the Appellant. The Respondent contends that the trial court found that the statements in question did not refer directly to the Appellant. The Respondent also concludes that once the trial court concluded that the allegedly defamatory statements were not referring to the Appellant, the court was under no obligation to consider the remainder of the elements in the defamation action.

The Respondent states that the Appellant failed to lead evidence to establish that the statements made were made in reference to the Appellant in the High Court, which is why, according to the Respondent, he has been unable to point same to this Court in his written submission.

The Respondent contended that the Appellant failed or abandoned his *“duty to prove his ground of appeal”*. The Respondent expounded on this point by saying that the foremost or primary obligation of an appellant who relies on the omnibus ground is to *“demonstrate the trial judge’s factual errors by pointing out the pieces of evidence which were ignored, overlooked, or wrongly considered or evaluated in arriving at the final decision to dismiss the action”*. The Respondent contends that it is only after an appellant has performed this obligation that the duty or obligation of an appellate Court to consider the appeal by way of rehearing applies.

Additionally, the Respondent argues that the Appellant merely reproduces or repeated arguments that did not find favour with the trial Court, without establishing why the trial Court had erred in finding against him on those arguments.

The Respondent reminds the Court that according to **Section 11 of the Evidence Act, 1975 (NRCD 323)**, the burden of establishing his case lay at the feet of the Appellant and that the Appellant failed to discharge that burden. The Respondent states that it is

untrue that the Appellant went unchallenged on his allegations against the Respondent on cross-examination. The Respondent referred to a lengthy exchange between the Appellant and counsel for the Respondent on cross examination and stated that they represented a significant challenge by counsel for the Respondent against the contentions or allegations of the Appellant on cross-examination.

LAW AND ANALYSIS

The Supreme Court in the case of the case of **Owusu-Domena v. Amoah [2015-2016] 1 SCGLR 790**, held that for a party to be successful in an action for defamation, the claimant must plead and lead evidence to support the following elements;

- a. That there was a publication made by the Defendant;
- b. That the publication was made about the Plaintiff;
- c. That the publication must have been capable of being defamatory in the ordinary sense or is defamatory given the surrounding circumstances;
- d. That the publication was made with intent to damage the reputation of the Plaintiff or with malice, if the Defendant pleads qualified privilege or fair comment as a defence, and;
- e. That there was actual damage to the reputation of the Plaintiff.

In this suit, it is the second element that is in contention. The major issue arising out of this appeal is whether the Respondent's defamatory publication was made about the Appellant. While the Appellant has gone to great lengths to demonstrate both to this Court and the Court below that the defamatory statements were made in reference to him, the Defendant has contended that the words were not made in reference to the Appellant.

It is trite that in an action for defamation, a plaintiff must establish that the words used in the publication were; (i) capable of a defamatory meaning and (ii) the words were actually defamatory.

In the case of **Sim v. Stretch** [1936] 2 All ER 1237 Lord Atkin, speaking on behalf of the English House of Lords, held that the test for whether words were capable of a defamatory meaning was stated thus: *"would the words tend to lower the plaintiff in the estimation of the right-thinking members of the society generally?"*

In determining whether the words are actually defamatory, Sir Kofi Kumado, writing in his *magnum opus*, **The Law of Torts in Ghana**, states as follows, *"The second element in the common law of defamation is the interpretation of the words to determine whether they are actually defamatory. The words must be construed in their fair and natural meaning as reasonable, ordinary people will understand except where innuendo is pleaded. The words must be interpreted in context. The plaintiff cannot select out of a passage which, read as a whole, is not defamatory."*

A plaintiff in a defamation action cannot succeed in the action without leading evidence to establish that the defamatory statements made by a defendant were made in reference, either directly or by innuendo, to that plaintiff. If it is such a plaintiff's case that the words by themselves do not directly defame the plaintiff, but that taken together with additional context in the mind of the reader, the words take on a defamatory character, it is the obligation of the plaintiff to allege that the defendant has used innuendo to defame him. The law is clear that when innuendo is alleged, same must be specifically pleaded and established. See the case of **University of Cape Coast v. Anthony** [1977] 2 GLR 21-43.

The publication complained of in Exhibit A, mentions the Appellant by name. It says that he was involved with the deal, but then it also states that the Respondent notes that

the Appellant *“advised, and okayed the deal... as a legal advisor to the government of Ghana (GOG), and had/have no personal interests in it whatsoever”*. It goes on to describe the agreement in question as *“cooked with the ingredients of deceit and theft with the primary intention to defraud the state”*, and as *“a fraudulent conspiracy, involving hundreds of millions of dollars.”* Finally, the post states, *“... it is my assertion that some people decided (sic) to steal from the Republic and created the AMERIdeal as the turbine to power this grand theft. They sat down (or stood somewhere), discussed their intent to steal, planned how to steal it, and put it into effect.”*

From the text of Exhibit A, it is clear that while the Respondent does not directly accuse the Appellant, but makes what can be described as innuendo about the extent or nature of the involvement of the Appellant in what the Respondent himself described as a “fraudulent conspiracy”. A similar pattern can be seen in Exhibit B2.

There, the Respondent writes in his Facebook post that the deal in question was tainted with fraud, theft and that the deal caused financial lost to the state, was the result of *“willful, criminal negligence, conspiracy; fraud theft (sic); racketeering; money laundering, and a whole host of crimes”*. However, once again, in the parts of the post that make direct reference to the Appellant, he is described by the Respondent as *“my fellow Vandal, a lawyer extraordinaire, in fact a practitioner of the noble profession of public interest law”*. He also states that the Appellant appended his signature to a *“most odious, deleterious contract”* but stated that he suspected that the Appellant did so *“either under duress or his signature was forged”*.

Again, the direct references made to the Appellant are not themselves defamatory, and they may even be described as flattery without the context. Once again, the statements made by the Respondent may lend themselves to innuendo, as the Appellant stated on

cross-examination which can be found at page 157 of the Record. There this exchanged ensued between the Appellant and counsel for the Respondent;

“Q. In the same paragraph, I believe the defendant describes you as a fellow vandal, a lawyer extraordinaire, practitioner of the noble profession. Is that so?”

A. That is correct but I must say that he was saying so with the tongue in cheek.

...

Q. Going by what you have just read to the court, would you not agree with me that the defendant if for anything at all regarded you as a person of such pedigree that he would not expect that you would not [sic] be involved in such a deal?

A. My Lord, it is patently clear that the post was a sarcastic one and that the defendant did not mean well when he described me in those flowery terms.”

From the above, it is apparent that the Appellant did not consider the direct references to him, in and of themselves, as defamatory. He believes that the combined effect of the words published by the Respondent, when read between the lines, imputed criminality, fraud and deceit on his part. This is what is known as innuendo.

The High Court found correctly that the Appellant did not plead innuendo. Without such a pleading, the Court is not permitted by law to read between the lines and put together a meaning alternative to what the words published by the Respondent mean in their ordinary sense.

Failure to plead innuendo is therefore fatal in this case in the view of this Court. This Court therefore rules in favour of the Defendant and the judgment of the High Court in this case will go undisturbed. The Appeal is thus dismissed.

(Sgd.)

JANAPARE A. BARTELS-KODWO (MRS.)

(JUSTICE OF APPEAL)

(Sgd.)

Dzamefe, (J. A.)

I agree

SENYO DZAMEFE

(JUSTICE OF APPEAL)

(Sgd.)

Mensah, (J. A.)

I also agree

P. BRIGHT MENSAH

(JUSTICE OF APPEAL)

COUNSEL:

- ❖ **Nuhela Seidu for Appellant**
- ❖ **Ama Oduma-Annan for Respondent**