



**RKM v PMN & another (Civil Appeal E016 of 2020)
[2024] KEHC 17234 (KLR) (12 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E016 OF 2020**

**TM MATHEKA, J
AUGUST 12, 2024**

BETWEEN

RKM PLAINTIFF

AND

PMN 1ST DEFENDANT

VNW 2ND DEFENDANT

JUDGMENT

1. From the plaint filed on 3/5/2015, the plaintiffs/respondents alleged that the defendant/appellant sent text messages to the 1st Plaintiff saying “ you will be killed for making love with someone’s wife.”
2. Each of the plaintiffs was married to their respective spouses and the 1st plaintiff was a “Catholic Catechist.” It was pleaded that the purport of the text messages was that the plaintiffs were immoral characters who were not faithful in their messages.
3. It was also pleaded that at the time the defendant appeared before elders and apologized and promised to pay Kshs. 100,000 compensations and even paid Ksh. 30,000 but failed to pay the balance as agreed.
 1. The plaintiffs sought judgment against the defendant for;
 2. Damages for defamation
 3. Costs of the suit
5. The plaint was supported by the joint statement of the plaintiffs - where it was stated that the defendant had sent a message using the phone no. XXXXXXXXXXXX to the 2nd plaintiff’s husband’s one BW no. XXXXXXXXXXXX5. That the message was in Kikamba - saying “PM, the 1st plaintiff while in Kathonzweni rents the lodging and uses your wife body.”That another message was sent by the defendant to the phone XXXXXXXXXXXX of the 1st plaintiff through XXXXXXXXXXXX of the



- defendant saying “tell your people you will be killed because of making love to W’s wife.” That the defendant appeared before elders on 11/10/2014, apologized and agreed to compensate the plaintiffs with Kshs. 100,000 paid Kshs. 30,000 refused to pay rest. That the two now sought damages for defamation.
6. The matter was first heard *ex parte* - but eventually the judgement was set aside and defendant granted leave to file defence.
 7. A statement of defence was filed on 6/11/2019 in which the defendant denied all the allegations on the plaint and put the plaintiffs to strict proof thereof, denied appearing before elders to apologize /making any promise to pay Kshs. 100,000 /paid Kshs. 30,000. He sought that the suit be dismissed with costs.
 8. The defendant denied specifically sending text message as pleaded. That the plaintiffs claim was fraudulent and set out the particulars of fraud.
 9. The defence was accompanied by defendant’s statement where he stated that the 1st plaintiff held a grudge against him for a disagreement at work where the 1st plaintiff had sought his help to cover up an issue where the 1st plaintiff had assaulted a colleague at work.
 10. He also stated that some writing had been found on the floor of the old church building in the Kikamba language stating that Mutinda and Mutindi stay together eating the big fruit - and that the 1st plaintiff suspected he was the author - but other church officials confirmed that those had been written by children.
 11. That the plaintiffs reported to the police that he had threatened them with a panga, that he had sent threatening messages to their phones - that he was arrested, spent a night in the cells, paid cash bail of Ksh. 10,000 the following day – that investigations revealed that the reports were false, his money was refunded and plaintiffs warned - that he was never charged in court of law for any offence. That he learnt about this suit when auctioneers went to his home.
 12. The matter was heard orally where each party adopted their witness statement, and were cross-examined: -
 13. Paul Munywilu Nzioka testified that the defendant sent him a message saying that he always took the 2nd plaintiff to lodgings. That that made him lose his job. He said he reported to the police and investigations were conducted. He marked the forensic report as PMFI -1, he produced an agreement he said the defendant signed to pay him Kshs. 100,000 - paid Kshs. 30,000, refused to pay Kshs. 70,000. He produced a demand letter and the response by the defendant PEX 2, 3 & 4 respectively. He told the court that he lost his job in the church ministry as a catechist because the defendant had spoken his name.
 14. On cross-examination he told the court that he was defrocked by a priest - on allegation that had been made by one Agnes (now deceased) that he had raped her - that that was in 2013, and that she had been arrested, and the claim found to be untrue. That by then the defendant was chairman of their church and his phone no. was XXXXXXXXXXXX. He stated that he was defrocked in 2014 after the defendant sent the alleged messages.
 15. PW2 VN told the court that she sued the defendant because he called her husband and told him that she was having sex with the 1st plaintiff - yet it was the defendant who wanted to have sex with her. That the defendant assaulted her sexually and she reported to her husband and that is when the defendant sent her husband a message alleging that she was having sex with the 1st plaintiff in a lodging. She testified that the police investigated the matter and found that the messages were sent from the phone of the



- defendant and he was arrested - she testified that they agreed before the elders on a settlement because the defamation made her fall out with her husband and be referred to a prostitute at her place of work.
16. On cross-examination she told the court that she did not report the sexual assault to the police, that the defendant called her husband and sent a text - that the text did not mention her name; but that her husband had only one wife, herself - that defendant was never charged in court, and that her hotel business was destroyed due to the defamation.
 17. On re-exam she said that the defendant was granted police bond only, that they sat with the clan and reconciled.
 18. At the end, counsel Mr. Tamata sought summons for DCIO to produce PMFI 1; the report by DCI forensics. Parties were given a hearing date and last adjournment.
 19. When the matter came next for hearing the witness from DCIO was not present and plaintiff closed their case.
 20. The defendant testified - that the plaintiff was catechist in the church, the defendant was the chairman of the church, one Agnes was vice chairperson of the burial committee. The plaintiff was removed from being a catechist following allegations of assault from Agnes. That the alleged texts and phone number used were not made by him and the number was not his.
 21. He stated on cross-examination that the plaintiffs reported to the police that he had threatened to kill them. He said that they reconciled and he agreed to pay Kshs. 100,000 he said the payment was for costs incurred when plaintiff reported to the police. He said he was not ready to pay because the allegations made by the plaintiffs were false. He said he never signed the agreement. That he had made agreement with one Malaki who had sought forgiveness for giving false testimony against him - the defendant.
 22. DW2 & DW3 testified to this issue between the defendant and one Malaki. Each said they did not participate in the proceedings between the 1st plaintiff and the defendant - DW2 said he knew that the defendant called 1st plaintiff on phone and told him some shameful thing, and threatened hi. He said he knew about the allegations made about the plaintiffs by the defendant and the agreement for compensation. He said his view was that defendant should pay Kshs. 70,000 balance.
 23. He said he was present when the agreement for Kshs. 100,000 were made but that Maluki withdrew his testimony on the defamation issue saying it was false.
 24. The defence closed its case.
 25. Parties filed submissions.
 26. The trial court in the judgment delivered on 7/10/2020 found that the plaintiffs' claim was proved - and ordered that the defendant pay each of the plaintiffs, Ksh. 70,000 plus costs and interest.
 27. Aggrieved, the defendant filed this appeal on the following grounds;
 1. That the learned trial magistrate erred in fact and in law by failing to give concise statement of the case, points of determination, decision thereon and reasons for his judgment.
 2. That the learned trial magistrate erred in law and in fact in failing to consider appellant's submissions and thereby ignoring relevant guiding facts to enable him reach a fair and reasoned determination.



3. That the learned trial magistrate erred in fact and in law and contradicted himself in his judgment when he stated that it was not clear which grievance made the plaintiff to come to court however he proceeded to hold that respondents had qualified their reputation had been attacked while there was no sufficient evidence had been tendered in court.
 4. That the learned trial magistrate erred in law and in facts by applying wrong and inapplicable principal of law in defamatory case and which did not form any basis to warrant his determination on general damages for defamatory case.
 5. That the trial magistrate erred in law and fact by failing to appreciate the fact that the respondents had not proved their case on a balance of probabilities as required under the law.
28. The appellant seeks that:
- i. The appeal be allowed and judgment against the appellant be set aside.
 - ii. The orders in favor of respondents be reviewed and/or revised accordingly and judgment be entered in favor of the respondents be dismissed.
 - iii. Cost of the appeal and costs of the lower court be granted to the appellant
 - iv. Any other order this Honorable court may deem fit to grant.
29. Parties canvassed the appeal by way of written submissions.
- I have considered the submissions and the issue for determination is whether the plaintiffs established their claim for defamation.
30. I say this guided by the authorities that on a 1st appeal from the trial court to the High Court - the court is required to conduct the appeal in the way of a retrial - reconsider , re- evaluate the evidence and draw its conclusion keeping in mind that it never saw/ heard the witness. See *Gitobu Imanyara & 2 Others Vs AG [2016] eKLR*.
31. The appellant cited *Phineas Nyagah Vs Gitobu Imanyara Civil Suit No. 697 /2009 [2013] eKLR* with respect to what amounts to malice in a defamation case
32. The appellant argued his appeal on the facts - submitting that the evidence as placed before court did not prove the claim of defamation.
33. For the respondent it was argued that there was evidence from the CID that the defendant was he author of the phone number that sent the defamatory messages, that there was evidence of reconciliation at Kshs. 100,000 and payment of Kshs. 30,000 , that the accord by the trial court was on the basis of the admission by the defendant.
34. I am minded to agree with the court in *Phinehas Nyagah v Gitobu Imanyara [2013] eKLR*
15. However, before determining the above issues it is important to set out the various principles of the law of defamation. Under article 32(1) of *the Constitution* every person has the right to freedom of conscience, religion, thought, belief and opinion and provides that the freedom to express one's opinion is a fundamental freedom. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as



well. In a tort for defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals.

16. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See J P Machira Vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.
17. ...
18. The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. However, in libel, the words cannot be protected as mere abuse since it is presumed that the defendant had time for reflection before he wrote them. Secondly, the words must refer to the plaintiff. Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.

See Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mwangi (supra).

35. The 1st thing the plaintiff need to prove was that the defendant published the words alleged, and that those words were defamatory.
36. Parties are bound by their pleadings - the Plaintiff simply pleaded that a text was sent to the 1st plaintiff that "you will be killed for making love with someone's wife."



37. According to the pleadings these words were sent to the 1st plaintiff's phone himself.
38. There is nothing in those words to name the 2nd Plaintiff- or to say that the 1st plaintiff was having sex with the 2nd plaintiff.
39. The source of the text is not pleaded - from which phone number.
40. There is nothing in the pleadings to show that the text messages were sent to the husband of the 2nd plaintiff, neither is it pleaded that the defendant called the husband of the 2nd defendant.
41. There is no evidence that the words were published to the phone of any other party from the respondent's phone.
42. Hence no evidence of publication to amount to defamation.
43. The particulars of damages suffered are not pleaded in the pleadings.
44. The plaintiffs filed witness statements that have details of phone numbers and extra messages - even to the effect that certain words were in Kikamba language yet none of these things were pleaded.
45. That besides - the plaintiffs did not produce any evidence to prove that any texts were sent from the defendant's phone to the 1st plaintiff's phone or any other phone - the 2nd defendant, husband was not called to testify that he actually received the alleged text or what effect they had in him.
46. There was no evidence that the defendant had published the alleged texts to anyone - any 3rd party to warrant the plaintiff's claim that because of those texts their reputations, jobs, business were injured/ruined.
47. It was alleged that the defendant admitted to the defamation and tried to agree to pay compensation.
48. To support this averment the plaintiffs produced a document headed "Reconciliation between Paul Munywilu Nzioka & Raphael Kalama Mwatika."
49. A casual glance at the document clearly shows that the name "and Veronicah Ndinda W" were added later.
50. Be that as it may the document states - "the above elders after listening to the above parties about"
 1. SMS - threat of murder
 2. Cost
 3. Defamation

They have concluded (sic) that Raphael Kalama Mwatika to pay Ksh. 100,000 to cater for cost only and leave (1) and (3)..."
51. Evidently the document states clearly this was about costs not about threats or defamation. It is also clear that it is the elders who have concluded that the money be paid to cater for costs. It does not say costs with relation to what in particular.
52. In addition other than the heading, nowhere on the page does the name or signature of the defendant appear as being present at the proceedings.
53. The document indicates a direction that the money be paid in 3 installments of Ksh. 30,000, 30,000, 40,000 in October, November, December 2015.



54. On 5/11/2014 there is an entry that the defendant has paid Ksh 30,000 leaving a balance of Ksh70,000, the 2nd instalment to be paid on 10/12/2014. The names of the plaintiffs and their signatures appear but the name and signature of the defendant/respondent do not appear.
55. I noted that the learned trial magistrate in his judgment awarded each of the plaintiff's Ksh 70,000 for defamation apparently based on the alleged agreement. I have already stated that there was no agreement. And the elders passed a conclusion that the sum of Ksh 100, 000 be paid as costs. It does not say they said pay to each of the two plaintiffs, hence even if one was to go by the elders' conclusion, the trial court was in error to award the sum of Ksh 100,000 simply as costs.
56. Of great significant however is what the money is for - it is not for the alleged "SMS- threat of murder", it is not for "defamation" - it is for cost". This cost is not defined what is for and the reason for its payment.
57. The elders did not deal with any issue related to SMS's or defamation and it is therefore not correct for the plaintiffs to submit that the judgment was founded on the admission of the defendant that he had defamed them and agreed to compensate them for the defamation. There was a reconciliation, the elders decreed a payment for costs and declined to deal with any issue related to the issues before this court.
58. Clearly - the document the plaintiff produced did not amount to admission on the part of the defendant that he had defamed them, neither is it an agreement to pay compensation for defamation.
59. From the foregoing it is my considered view that - the plaintiff's did not prove that
 - (i) the defendant sent any text to their phone or any one's phone
 - (ii) that the texts were the ones pleaded
 - (iii) that the texts were defamatory
 - (iv) that they suffered any loss to their reputation.
60. The 1st plaintiff conceded that prior to this case he had suffered a blow to his reputation when Agnes (now deceased) accused him of sexual assault - he was defrocked as a catechist.
61. It is allegations such as these, of sexual impropriety, flying left right and center among people considered to be church leadership - with suspicious so high in the air even writings allegedly made by children - which appear innocent are given sexual undertones , and without proof, attributed to one of the church leaders, that bring calumny to the church space. It is unfortunate that persons given the reigns of spiritual leadership are embroiled in these matters to the extent that the matters cannot be discussed at the church level but must be taken to the elders in the village. So that it is they themselves who end up creating awareness that such allegations are there. I doubt that they have stopped to think about the damage they may have caused to other 'waumini' who include children, their own and those who attend the church who must have heard these stories since when a matter goes to the village court it gets to the public domain, long before it gets here. It is truly sad.
62. Be that as it may, the plaintiffs' claim even to the policedid not have a leg to stand on to warrant any charges against the defendant.
63. In the circumstances I am of the view that the appeal is merited. There is no proof of defamation, no proof of any admission or agreement to pay damages by the appellant.



64. The appeal be and is hereby allowed. The judgment of the subordinate court be and is hereby set aside in its entirety and the plaintiffs' suit dismissed with costs.

65. The appellant will have costs of this appeal.

DATED SIGNED AND DELIVERED VIA CTS THIS 12TH AUGUST, 2024

MUMBUA T. MATHEKA

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-08-12 22:18:12

