



**Ngelechei v Sulunye (Civil Appeal 14 of 2019)
[2023] KEHC 668 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL 14 OF 2019
F GIKONYO, J
JANUARY 26, 2023**

BETWEEN

STEPHEN NGELECHEI APPELLANT

AND

NICKSON SULUNYE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. T. Gesora
(S.P.M) delivered on 21st May 2019 in Narok CMCC No. 25 of 2017)*

JUDGMENT

1. The respondent filed a suit seeking damages for defamation. The respondent's case was that the appellant deliberately and knowingly accused the plaintiff of having received money and livestock from the defendant for the alleged sale of land yet there was no such thing.
2. The appellant was accused of having spread malicious and defamatory sentiments in their neighborhood that; the respondent took the appellant's cattle, the respondent arrested one Edwin Koech in Narok CMCR 549 of 214, the respondent took his land in exchange for the cattle and the appellant also threatened to ensure that the respondent is dismissed from police service
3. The appellant filed a defence in which he denied the claim. He raised the defence of truth in what he told the DCIO and OCS and prayed that the suit be dismissed.
4. The trial court entered judgment for the respondent against the appellant; awarded the sum of Kshs. 1,500,000 in general damages, costs of the suit and interest which award has precipitated this appeal.
5. The appellant in his memorandum of appeal dated 31/5/2019 raised 5 grounds which can be condensed into three that;
 - i. The learned trial magistrate erred in law and in fact by finding against the appellant yet the appellant is not involved in using the mobile phone which was mentioned in this case.



- ii. The learned magistrate erred in law and in fact by failing to consider the established elements as set out by judicial precedents in such cases.
 - iii. The learned magistrate erred in law and in fact by awarding the respondent the sum of Kshs. 1,500,000 in complete disregard of the evidence tabled by the appellant.
6. The appellant in his submissions filed on 15/9/2022 introduced two other grounds that had not been captured in the memorandum of appeal. That;
- i. The learned magistrate erred in law and in fact by holding that there was no sale agreement.
 - ii. The learned magistrate erred in law and in fact by awarding the respondent costs of the suit.

Summary of evidence.

7. The respondent testified and called 2 witnesses. The respondent (PW1) explained that the appellant spoilt his name when he went to the respondent's superiors DCIO and OCPD Olulunga and OCS Melelo and the chief at Olmekeny to say that the respondent had sold him land and that he paid 5 heads of cattle. This issue caused the respondent to be summoned for questioning and had to record a statement (P Exh2). He was again summoned over the issue by OCS Melelo and the chief. He stated that the chief told him that the issue had brought tension which led to the respondent's brother losing an election. A meeting was held where it was found that the appellant had no evidence of the sale of land. For the sake of peace, the appellant was asked to pay the respondent with two heads of cattle and an arbitration agreement was recorded and signed by all parties (P Exh 3). photos of the people at the meeting were produced (P Exh 4) and the cattle the appellant gave (P Exh5). The issue was to end there but the respondent was summoned by DAPC Olulunga after a complaint was lodged to the effect that the respondent had sent AP officers to go and take cattle from the appellant.
8. Earlier the respondent had been threatened by one Edwin Koech and he reported that issue. Koech was prosecuted but they settled the matter out of court. He claimed that Koech and his surety one Stanley Kerich were not happy and are instigating the appellant who was a defence witness in the criminal case in a revenge mission against the respondent.
9. PW1 stated that as a result of the allegations by the appellant, his standing in society has diminished; he cannot shop openly as everyone thinks he is a thief, he cannot be given permission from work, he cannot be promoted as his superiors do not believe in him and he has to do everything through the chief. He, therefore, sought general damages for defamation and the costs of the suit.
10. PW2(Samuel Nzioka) denied that the respondent had ever sent them to the appellant's cattle in 2012 because in 2017 he was not yet at the station. He came to the station in 2017.
11. PW3(Samuel Kimutai Tuwei) testified that the appellant had attempted to procure his testimony against the respondent so that he could get arrested and jailed as revenge against the respondent for having his friend arrested. He offered him Kshs. 4,000/= for such a testimony.
12. In defence, the appellant (DW1) said that the issue began in 2012 when the respondent allegedly sold his(appellant) calf and demanded payment for another Kshs 5000/= for taking care of the cows. Because he did not have the money, the respondent sent police officers to arrest him. One of the police officers was PW2. They took away his cattle claiming that they had been sent by the respondent. He went to seek help from the AP to no avail because his case was a civil case. Four years later he decided to write to the OCPD and DCIO. He stated that the respondent had sold him land in Mau but the government chased them away. That is when the respondent began denying him. He again went to go and speak to the OCPD. He denied that he was attempting to get the respondent to be sacked. Matters



escalated and a meeting had to be called and elders agreed that he be given 2 out of 5 cattle. He denied defaming the respondent.

13. On cross examination, DW1 agreed that he had said that the respondent came and took his cattle. He confirmed that there was no written agreement on the land the respondent allegedly sold him. He confirmed that he told OCS, OCPD and DCIO about the respondent because he had committed offences against him. Later the respondent was found to have been innocent he got his 2 cattle.
14. He called DW2 (James Kerorei) an assistant chief who testified that the appellant had complained that the appellant had taken 5 heads of cattle for the sale of land. Tension then arose because of the issue and the appellant was inciting hostilities against the Ndorobo. There was no evidence of sale of land. To solve the issue each had to back down on his claim. The respondent gave 2 cattle and tension was pacified.

Directions of the court.

15. The appeal was canvassed by way of written submissions. Both parties filed written submissions.

Appellant's submissions

16. The appellant submitted that there existed an oral agreement for sale of land between the appellant and the respondent. That the respondent returned the three cows to make partial repayment of the debt he owed the appellant in recognition of an oral agreement. The appellant relied on section 3(1) (3) of the *law of contract*, *Ali Abid Mohammed v Kenya Shell & Company Limited* [2017] eKLR and *William Muthie Muthami v Bank of Baroda* [2014] eKLR.
17. The appellant submitted that evidence both oral and documentary was never controverted and challenged in any manner by the respondent.
18. The appellant submitted that the respondent was not defamed, but his actions of reporting the matter to the OCP and OCS were in an attempt to pursue justice. He argued that the respondent has not stated the defamatory words in particularity. The actions of the appellant of reporting the respondent to the relevant authorities are not per se defamatory in their ordinary meaning. The appellant relied on the cases of *Davis v Boenheim*, 110 A.D. 3d 1431 (N.Y. 2014), *Harrison Kariuki Mburu v National Bank of Kenya & Credit Reference Bureau Africa Ltd* HCC No 97 of 2012 and *Zadock Makhanu Khaemba T/A Khaemba Contractor v John Bororio & Another* [2020] eKLR. Order 2 rule 7 of the 2010 *Civil Procedure Rules*.
19. The appellant submitted that the magistrate did not demonstrate how he arrived at the amount of Kshs. 1,500,000 which is unreasonable and bad in law.
20. In the end the appellant submitted that the instant suit is fatally defective and does not disclose a cause of action. He prayed that this court should set aside the judgment of the trial court and strike out the plaintiff's suit with costs.

Respondent's submissions.

21. The respondent submitted that the learned magistrate considered all the four ingredients for the tort of defamation. The appellant had made allegations that the respondent had sold him land in exchange for livestock. The trial magistrate held that based on facts that there was no sale agreement between the appellant and the respondent. DW2, the area chief stated that after investigations were conducted there was no evidence of any sale agreement. The appellant made the statements knowingly that there had



- been no transaction between him and the respondent which was defamatory in nature. The respondent relied in the case of *Selina Patani & Another v Dhiranji V Patani* [2019] eKLR.
22. The respondent submitted that the learned magistrate also established that the respondent had reported the false allegations to Olulunga police station, DCI, OCPD and OCS Narok which offices and officers in charge were superior of the respondent who is an administration police officer. This therefore shows that the appellant published and made defamatory statement to an audience being the DCI, OCPD and OCS Narok.
 23. The respondent submitted that the learned magistrate basing on PW3's testimony which was not rebutted by the appellant established that the main goal of the appellant in making the complaints against the respondent to his superiors was to have his image tainted leading to termination of his employment.
 24. The respondent submitted that the learned magistrate was guided by section 3(3) of the *law of contract act* which provides that a contract for disposition of land to be in writing. The appellant in his testimony conceded having not entered into a written agreement of sale of land with the respondent. He did not testify to him being in possession of the alleged land that he had bought from the respondent and neither was the position brought to court by any of his witnesses.
 25. The respondent submitted that the learned trial magistrate was also guided by the evidence of DW2 who stated that as part of the elders who had handled the matter locally had done investigations and did not find any proof of an agreement for sale of land between the appellant and the respondent. The appellant did not call any witness to testify to having witnessed to an agreement between himself and the respondent. All these point to no existence of an agreement of sale whether oral or written between the appellant and the respondent. Therefore, the learned magistrate did not err in law and in fact by holding that there was no sale agreement between the appellant and the respondent. The respondent relied in the cases of *Daudi Ledama Morintat V Mary Chrittine Kiarie & 2 Others* [2017] eKLR, and *Anne Jepkemboi Ngeny v Joseph Tireito & Another* [2021] eKLR
 26. The respondent submitted that the learned magistrate did not err in law and in fact in awarding the respondent Kshs. 1,500,000 as damages. The statement that the respondent complained of being defamatory is that which the appellant alleged that the respondent had sold him land in exchange of five livestock, the appellant asking PW3 to be a witness against the respondent and fabricate false accusations against him. The testimony of PW3 was not contested or rebutted by the appellant herein. Malice was therefore established on the part of the appellant. The appellant reported the issue to Melelo police station, OCS, OCPD and DCIO at the same time. He did not wait for investigations and decision of one body before approaching another. By making the defamatory statements before the respondent's bosses, the appellant foresaw the dismissal of the respondent from his employment. DW2 in his testimony in court stated that the appellant was through his statements malicious and causing hostility in the area. The respondent therefore submitted that the statements made by the appellant were not in pursuit of justice but rather malicious statements aimed at injuring the respondent's image in his profession.
 27. The respondent submitted that the trial court did not err in law and in fact by awarding the respondents Kshs. 1,500,000/= as damages. The learned magistrate established that the appellant had defamed the respondent, quantified the damages to the respondent at a tune of Kshs. 1,500,000. in the present case the award of Kshs. 1,500,000 was reasonable award considering that the appellant occasioned the respondent ridicule, mistrust and damage of image before his superiors who have viewed him as a con person. The award as in comparison to other case laws decided is not inordinately too low or high. The respondent relied on the cases of *Mursal & Another v Manese (Suing as The Legal Administrator of*



Dalphine Kanini Manesa Civil Appeal E20 of 2021., *Kivati v Coastal Bottlers Ltd* Civil Appeal No. 69 of 1984.

28. The respondent submitted that the learned magistrate acted in his discretion in awarding the respondent costs and interest of the case and by actin in his discretion did not err in law or in fact. Section 27 of the *Civil Procedure Act* provides for costs. It provides that the issuance of costs of and incidental to all suits shall be in the discretion of the court. the provision further states that costs of any action, cause or other matter or issue shall follow the event.
29. In the end the respondent submitted that the trial court considered all the ingredients of the tort of defamation, established that the appellant defamed the respondent awarded damages of Kshs. 1,500,000/=. The learned magistrate evaluated the evidence on record and came into a conclusion that the elements of defamation had been met. The respondent urged this court not to interfere with the findings of facts and law by the trial court. the appellant has not demonstrated that the decision arrived at was done without any evidence or no misapprehension of evidence of that the court acted in wrong principles in its findings. The respondent relied in the case of *Mwanasokoni v Kenya Bus Service Ltd* [1982-1988] 1 KAR.

Analysis and Determination

Duty of court

30. Under Section 78(2) of the *Civil Procedure Act*, the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein.
31. Accordingly, the first Appellate Court should re-evaluate the evidence and make its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & Anor v Associate Motor Boat Co. Ltd* 1968 EA 123.

Issues

32. In this appeal, the court should determine;
 - a. Whether the Respondent established the necessary ingredients to prove the tort of defamation.
 - b. Whether there are grounds to interfere or set aside the award of Kshs. 1,500,000/=.

Whether the tort of defamation was proved

33. 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 ... ”

34. In order to succeed in a claim for defamation, the plaintiff ought to principally establish- but in no particular order:
 - i. The existence of a defamatory statement-was malicious;
 - ii. The defendant has published or caused the publication of the defamatory statement;
 - iii. The publication refers to the claimant; and
 - iv. For slander, proof of resultant damage.
35. Defamatory statement, publication or act is underpinned by malice. Malice for purposes of defamation “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” ([Joseph Njogu Kamunge v Charles Muriuki Gachari](#) [2016] eKLR)
36. In proving that the words or publication or act was defamatory, the plaintiff ought to show that they lowered the plaintiff’s reputation in the estimation of right-minded persons in the society. The words complained of must be shown to have injured the reputation, character or dignity of the plaintiff.
37. Proof of any lawful defense or defenses to defamation lie with the defendant. For instance, the defendant who claims, must prove that the defamatory statement is substantially true in case of the defense of justification. Where a defendant intends to rely on qualified privilege, he/she must prove that the subject matter and its context was in advance of public interest or that the words were a fair comment on a matter.
38. See [Musikari Kombo v Royal Media Services Limited](#) [2018] eKLR
39. The Distinction between libel and slander has been defined in Gatley on [Libel and Slander](#) 11th Edition Pg. 92 as follows;

“Libel is committed when defamatory matter is published in a “permanent” form or in a form which is deemed to be permanent. Defamation published by spoken word or in some other transitory form is slander. In English Law libel is always actionable per se. that is to say the claimant is not required to show any actual damage, and substantial rather than merely nominal damages may be awarded even in the absence of such proof, whereas in slander, with four exceptions, the cause of action is not complete unless there is “special” damage i.e. some actual temporal loss. The exceptional cases are;

 - (1) Where the words impute a crime for which the claimant can be made to suffer physically by way of punishment.
 - (2) Where the words impute to the claimant a contagious or infectious disease.
 - (3) Where the words are calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication.



(4) By a slander of Women Act 1981, where the words impute adultery or unchastity to a woman or girl.

40. See also [James Omenda Abusa v Ludia Atieno Onyango](#) [2015] eKLR
41. The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. In determining whether words are defamatory there are two stages, first to decide what they mean and then to decide whether that meaning is Defamatory (See, Gatley on [Libel and Slander](#) pg.37).
42. In this case, PW1 averred that the appellant spread malicious and defamatory claims by alleging that the respondent took his herds of cattle, unlawfully arrested one Edwin Koech in Narok CMCR 549 of 2014, he bought his parcel of land in exchange for the four cattle and threatened to ensure the respondent is dismissed from the police service.
43. Apart from publishing these claims within their locality, the appellant also made several reports to the DCIO, OCPD, OCS and the chief on the same matters. The nature of the publication and the reports was malicious and defamatory as they portend that the respondent is a thief or con.
44. Besides, a mere act may convey a defamatory imputation if it would be so understood by reason of a conventional meaning. In this case the Respondent opines that the appellant's action of reporting to various of his bosses on matter which imputed criminal conduct upon the respondent had a defamatory imputation.
45. The respondent has shown that the publication lowered his reputation in the estimation of right-minded persons in the society. The nature of the publication complained of has injured the reputation, character or dignity of the respondent.
46. In any event the respondent claimed inter alia, that the defamatory matter and reports to his superiors was meant to disparage him before them and even have him sacked, and so under section 3 of the [Defamation Act](#), it shall not be necessary for him to allege or prove special damage.
47. The publication also opened the respondent to criminal prosecution which added to the damage upon the respondent.
48. I need not over-emphasize the invaluable jewel; good name of a person; this was best described thus: -
“Good name in man and woman, dear my lord, Is the immediate jewel of their souls: Who steals my purse steals trash; 'tis something, nothing; 'twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, and makes me poor indeed.” — William Shakespeare, Othello
49. A defamatory matter is presumed to be false. The appellant has claimed justification, in which case he must prove the words published are true in substance and in fact. He has alluded to justification of his actions on the basis that the Respondent had committed offences against him. The appellant did not show or prove the offences the respondent allegedly committed against the appellant. The evidence show he was on a revenge mission; which made him move with malice to dent the person and character of the respondent.
50. I do not find any proof of any agreement for or sale of land. His claim of justification is therefore, unfounded and unreasonable. Reports to all the respondent's bosses was not in quest for justice but to advance his malicious acts, personal ego and aggrandizement. Hence the elements of defamation



i.e. the defendant has published or caused the publication of the defamatory statement and that the publication refers to the claimant were proved by the Respondent.

51. I therefore agree with the respondent that the learned Magistrate did not err in law and in fact in finding that the Respondent had been defamed by the Appellant's actions.

Any grounds to interfere with the award of Kshs. 1,500,000/=.

52. One of functions of general damages is to repair and vindicate the harm to his reputation caused by the defamatory publication. The respondent is employed as an administration police officer; a disciplined profession. Thoughtless reporting to his superiors would have caused harm to his professional reputation. In addition, the Appellant ought not to instigate tribal conflicts. Careless actions by the Appellant in this case increased the injury to the Respondent's reputation. These are important considerations in awarding general damages for defamation. I find that the general damages awarded by the trial court was properly anchored in evidence and the law. There is nothing upon which exercise of discretion by the trial court should be interfered with by this court.

53. In the upshot, the appeal herein is dismissed for want of merit.

54. The respondent shall have the costs of the Appeal. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 26TH DAY OF JANUARY, 2023.

F. GIKONYO M.

JUDGE

In the presence of:

1. Ms. Cheruto for the Respondent
2. Mr. Kasaso – CA
3. Appellant - absent

