



REPUBLIC OF KENYA



KENYA LAW
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**Miruka v Khaniri & another (Civil Appeal 76 of 2021)
[2023] KEHC 18325 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 76 OF 2021
REA OUGO, J
MAY 26, 2023**

BETWEEN

THOMAS MIRUKA APPELLANT

AND

JOSEPH KHANIRI 1ST RESPONDENT

**TRUSTEES, ST CAMMILUS TABAKA MISSION HOSPITAL 2ND
RESPONDENT**

(An appeal from the judgment of Senior Resident Magistrate, Hon. S.K. Onjoro dated 21st June 2021 arising out of KISII CMCC CIVIL CASE No. 69 of 2017)

JUDGMENT

1. According to the appellant, the genesis of the dispute was on January 15, 2017 when the respondent issued a public notice in the following terms:

“The following persons are not allowed within the hospital premise.

- a. Thomas Miruka
- b. Stanley Ondari alias Moto Kubwa

Note: Whenever either of the two persons is spotted, please alert the police officers and inform the hospital administration urgently to facilitate their arrest.”

2. The appellant on January 15, 2016 went to the respondent hospital seeking treatment and was arrested while sick, blackmailed, disturbed, traumatized and restrained from seeking treatment. The appellant following the incident filed his suit before the subordinate court seeking general damages for defamation. The appellant averred that the utterances in the public notice were malicious and without lawful justification and attacked the appellant’s reputation before the whole community and



the world. The uttering of the defamatory statement in its literal translation meant that the appellant and another were not good people. In their ordinary meaning, the words meant that the appellant, who is a member of the Tabaka community, is of questionable integrity and should not be attended in the hospital whenever he is sick.

3. The appellant averred that by the virtue of the publication he has been morally discredited, seriously injuring his character and disparaged his Christian calling. It was his contention that upon his arrest he was detained at the AP Camp for 5 hours without any action being taken and finally released by the AP Inspector for reasons that no case was established against him. He made a report at Nyamarambe Police Station vide OB No 23/15/1/2017 and proceeded to Hema Hospital on January 24, 2017.
4. The respondent in its defence averred that the appellant was a known nuisance to the hospital by virtue of a sour relationship with the hospital as well as the community. The notice published was without malice and was meant to protect the hospital from malfeasant persons like the appellant. The notice was therefore justified insofar as the appellant was becoming a security threat to the respondent which occasioned the respondent to report the matter to the police vide Occurrence Book No OB/8/7/10/15. They denied that the words complained of in the notice bore no defamatory meaning as alleged by the appellant. They further pleaded that, since the hospital is a Private Mission Hospital it reserves the right to admission. The respondent was of the view that the suit was vexatious, fatally and incurably defective and did not disclose any reasonable cause of action against the respondent.
5. The matter proceeded to a full trial and after the trial magistrate considered the evidence before him, reached the decision that the appellant had not proved his case and the respondent had no malice or intention to lower the estimation of the appellant but was simply protecting itself. The appellant dissatisfied with the finding of the trial court has filed this instant appeal on the following grounds:
 1. That the Learned Trial Magistrate erred in law and fact in disregarding the Appellant's evidence.
 2. That the Learned Trial Magistrate erred in law and fact in disregarding the Appellant's submissions and failing to properly analyse and consider the evidence before him thus arriving at an erroneous decision.
 3. The Learned Trial Magistrate erred in law and fact in making a finding that the Appellant was dismissed for gross misconduct, a finding that was not based on any evidence at all.
 4. That the Learned Trial Magistrate erred in law and fact in making a finding that the Respondents had no malice and did not intend to lower the estimation of the Appellant in the estimation of the right thinking members of the society, which was not the position.
 5. That the Learned Trial Magistrate erred in law in deciding the matter against the weight of the evidence that had been adduced.
 6. That the judgment of the Learned Trial Magistrate has occasioned a failure of justice and/or resulted in a gross miscarriage of justice.
6. The parties were directed to file written submissions and they have both complied.
7. The appellant submits that the two issues to be considered by the court are whether the appellant established the ingredients of defamation and whether there was malice on the part of the respondents. He argued that the public notice issued had the name of the appellant indicated on it, addressed to the appellant and published for the public. It portrays the appellant as a threat to local security therefore tainting his reputation before right thinking members of the society. He placed reliance on the case of *Muskari Kombo v Royal Media Services Limited* [2018] eKLR where the court held that the test



for whether a statement is defamatory is an objective one and not dependent on the intention of the publisher but what a reasonable person reading the statement would perceive. If at all the appellant was a threat to the respondents' security then it ought to have reported the matter at the police station. It is also not in dispute that the publication was published through a notice pinned by the hospital management. It was submitted that there were no steps taken by the respondent to initiate his arrest in the event of an alleged offence. The respondent ought to have reported the matter to the police or issued an internal memo to its staff members that the appellant should be arrested and handed over to the police. Instead, it issued a public notice to taint the appellant's image.

8. The respondent submitted that the appellant failed to prove its case to the required standards. It contends that the notice that was published was not malicious as it was the appellant's character or conduct that necessitated the publication. The notice was intended to protect the interest of the hospital, that is, the security of the hospital as the appellant was hell-bent on committing the following crimes: creating disturbance in the hospital. They supported the finding of the trial court which found that there was no evidence that the appellant's reputation was tainted or demeaned. In any event, the appellant's estimation in society was not lowered as he was able to secure a job with the Kisii County Government.

Analysis and Determination

9. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968) EA 123
10. At the hearing before the trial court, the appellant who testified as Pw1 adopted his witness statement as his evidence in chief reiterating the contents of his plaint. On cross examination he testified that he was arrested at Tabaka Hospital while seeking treatment by Administration Police officers. He testified that the arrest was malicious. Although he was not injured during the arrest, he went to Hema for treatment and his blood pressure was high. At Hema, the medical expenses were paid using NHIF card. He also clarified that he was already working with Kisii County government at the time of the publication of the notice and that his wife worked at the hospital and that they were housed within the hospital precincts. He however conceded to have volunteered at the hospital and prayed for the sick. Geoffrey Omari Ayiera (Pw2) testified that he had taken a patient to the hospital when he saw the appellant in the company of 2 police officers walking towards the notice board. People gathered around the notice board and were shown something in the notice board. He followed the appellant to the police station and he was released after an hour.
11. The respondent in their defence placed reliance on the testimony of Father Rueben Njagi (Dw1). He testified that he is an ordained priest and a certified accountant working at Tabaka Mission Hospital and had worked with Joseph Khaniri who was transferred. He testified that the appellant had an issue with the hospital having been an employee of the Hospital from 1996 to 1998. He brought a lot of chaos and was inciting patients not to pay their hospital bills and was almost fighting the watchmen. The notice was neither malicious nor defamatory.
12. Pauline Kerubo (Dw2) testified that she has worked at Tabaka Hospital as a supporting staff from 1981 and recalled that between the periods of 1996-1998 the appellant worked at the laboratory department. His wife also worked at the hospital as a nurse. They lived in the staff quarters but fought with his wife thereby inconveniencing other neighbours and were asked to move out of the staff quarters. The appellant was dismissed on grounds of gross misconduct as he failed to account for donated blood. John Maina, Dw3, a security officer at the hospital testified that the appellant worked at the hospital



in the lab. They initially lived in the hospital but were later asked to live outside staff quarters due to his constant quarrels with his wife. He testified that the appellant would come back and cause chaos while inciting patients not to pay bills and insisted that the hospital was built on their land.

13. The question before the court is whether the appellant proved the elements of defamation? The appellant was required to prove that the words complained of was defamatory and uttered to someone else other than the person who was said to be defamed; the words lowered the appellant's reputation in the estimation of right minded persons in society; and that the statement was published maliciously, that is, without any justification. The elements of defamation were discussed in the case of [*Elisha Ochieng Odhiambo v Booker Ngesa Omole*](#) [2021] eKLR where the court held as follows:

“65. Thus, to prove defamation, the claimant must establish or demonstrate that the matter complained of was defamatory in nature, that the defamatory statement was uttered to someone else other than the person who was said to have been defamed and that the defamatory statement was published maliciously.

66. In other words, 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 in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. 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.

67. 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.”

14. There is no dispute that the notice was published by the respondents and placed within the hospital premises. It is the evidence of the appellant that the notice was availed to third parties; however, there was no direct evidence from any of the third parties that read the notice. Pw2 who was at the hospital testified that he saw the appellant being arrested by the police officers and they took him to the notice board. People gathered around the notice board area and were shown something on the notice board. Pw2 did not testify as to whether he read the notice. However, he testified that the notice was shown to third parties so that they could understand the reason for the appellant's arrest. The notice was also read by the 2 police officers who arrested the appellant. The notice suggest that the appellant had been involved in some illegality that would warrant an arrest.

15. This court must therefore ask whether the publication was malicious. The respondents' defence was that of justification. In [*Ukur Yatani v Dido Ali Raso*](#) [2021] eKLR the court stated as follows on the defence of justification:

"39. The tort of defamation is anchored on the recognition of the individual's right to his good reputation. Subject to the various defences protecting the balancing of interest between freedom of speech and an individual's



good reputation the law confers a cause of action on any person of whom defamatory matter is published. The defence of justification rests on the premise that the words complained of are true. Hence, a defendant who pleads justification must give particulars of the facts relied on as showing that the defamatory statement is true. In the case of *McDonald Corp v Steel* [1995] 3 All ER 615 it was held that:

“The defendant should not plead justification unless he

- (a) believes the words complained of to be true;
- (b) intends to support the defence at trial;
- (c) has reasonable evidence to support the plea or reasonable grounds for supposing that sufficient evidence to prove the allegation will be available at trial.”

.....

42. By “justification” it means that the respondent has all material evidence to support these utterances. Being a matter touching on security I would only accept the element of justification if the defendant demonstrated what action he as a leader has taken on the same. There is no evidence that he has reported this to the relevant authorities that deal with security matters of this country.”

16. In the case of *Machira t/a Machira & Co Advocates vs. East African Standard* (2001) KLR 638, the Court stated at page 644:

“...A Defendant is permitted to plead justification only where it is clear that the allegations he made and are complained of are true in fact or substantially so. He cannot be allowed to set out a version . . . For him to rely on justification, he must accept the Plaintiff’s version of the statement or a statement which is in sum identical with the Plaintiff’s version.”

17. The defendant did not deny publishing the notice that was placed on its notice board. There was evidence from Dw1, Dw2 and Dw3 that the appellant would cause disturbance at the hospital. The appellant would incite patients at the hospital not to clear their bills and claimed that the hospital was built on their land. This necessitated the administrator of the hospital to make a report at the police station that the appellant had been causing disturbance. The respondents availed a copy of the Occurrence Book Extract indicating that the respondents made a report at Nyamarambe Police Station on October 7, 2015. The extract reads as follows:

“Creating Disturbance: To the station is one Dr Joseph Khiyanini the administrator Tabaka Mission Hospital, who reports that one Tom Miruka entered into the hospital and created disturbance in the room by chasing out some patients saying he wanted to be with his patient George who has been admitted to the hospital for 3 months who is being treated with chronic ulcers. Efforts by the administrator to force him out were fruitless and they called the administration police and on the seeing the police he left. In the ward, he incited patients not to pay any money to the hospital saying the hospital is built on their soil. Now seeks police assistance.”



18. The evidence of Dw1, Dw2 and Dw3 was that the appellant would habitually cause disturbance at the hospital. Dw1 testified that the appellant would even fight the watchmen. It is clear that the respondents had taken the necessary step by reporting the matter to the police and the notice was as a result of the appellant's actions, that is, creating disturbance. The trial magistrate cannot therefore be faulted for finding that the notice was not malicious or founded on falsehood as there was a justification for the notice. Creating disturbance is an offence and the publication by the respondent to have the appellant arrested was justified.
19. Although the appellant claims that he had gone to the hospital seeking treatment, the same is not supported by his pleadings. He was arrested on January 15, 2017 and held at the police station for one hour according to the evidence of Pw2. In his plaint, he then went to the hospital on January 24, 2017 nine (9) days after the incident. The letter from Nyangena that he received treatment on January 15, 2017 was therefore not supported by his pleadings.
20. Having re-evaluated the evidence tendered before the subordinate court, I am constrained to agree with the finding of the trial magistrate that the appellant failed to prove his case to the required standard. Consequently, the appeal is dismissed. The respondents shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF MAY 2023

R.E. OUGO

JUDGE

In the presence of:

Mr. Marita For the Appellant

Respondent Absent

Aphline C/A

