Kaniu v Kahwi (Civil Appeal E050 of 2022)
[2023] KEHC 27439 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEHC 27439 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E050 OF 2022

GL NZIOKA, J

NOVEMBER 28, 2023

BETWEEN

JONAH GOODWIN KARUIKI KANIU ..... APPELLANT

AND

ANN WANJIKU KAHWI ..... RESPONDENT

(Being an appeal against the decision of Honourable E. Cherop (RM) delivered on 15th June 2022 in Naivasha Chief Magistrate Civil Case No. 271 of 2020)

JUDGMENT

1. By a plaint dated 26th June, 2020, the plaintiff (herein "the appellant") sued the defendant (herein "the respondent") seeking for orders that judgment be entered against the respondent for:
    a. General and special damages
    b. Costs and interest at court rates
2. The brief background of the case is that the appellant and the respondent were neighbours living in a premises along Kariuki Chotara road. That, on the afternoon of 20th November 2020, the appellant was relaxing in his house when the respondent went to his door in an aggressive and agitated manner uttered defamatory words concerning him and his family. Further, she entered into his sitting room and continued uttering the said defamatory words to wit that:
    a. Wapi hii ghasia ya mwanume (where is this useless lad)
    b. Uma na guuku mumaraya uyu urahurira mwana na njira iriku na mwana wakwa ndahuragwo ni mundu waina mukingo na muthiori (get outside here you prostitute, on what basis would you punish my child? My child cannot be punished by someone with AIDS and prostate cancer)

3. That the words were uttered in front of a group of onlookers who had gathered to spectate, and in no time had spread to Naivasha Town and brought the appellant and his family into disrepute.

4. That, the appellant was a prominent figure in the community as a husband, father, a businessman, a former councillor and the vice chairman of the Council of Elders for Naivasha Sub-County, and therefore the defamatory words irreparable dented his image and his standing suffered.

5. Further, the respondent physically attacked him with slaps to the face, and using a pointed shoe to the chest cavity resulting in a fracture to the 7th left rib, and tenderness and inflammation of the left chest wall.

6. However, the respondent filed her statement of defence dated 31st August, 2020 and denied defaming and assaulting the appellant. The respondent alleged that, the appellant assaulted and injured her son, a minor, and further insulted her in front of her son. That the appellant's conduct was contrary to his assertions that he was a person of good standing and good name.

7. At the hearing, the appellant adopted his witness statement and averred that a number of children were playing football in the compound when they soiled his clothes. That he caught one of the children, who was the respondent's son by the hand reprimanded him and thereafter let him go. At about 6:00pm the respondent appeared in the compound and started hurling insults at him. That, she forced her way into his house and continued insulting the insults.

8. Further, she slapped him twice on the face and hit him with her sharp shoe around the chest before taking another shoe from his shoe rack and continued to assault him. That neighbours, members of the public and the caretaker intervened and prevented the appellant from attacking him further.

9. That the appellant went and reported the matter to the police and was issued with a P3 form and proceeded to a local hospital where a x-ray was done which revealed he had sustained a fracture on his seventh (7th) rib on the left side of his chest cavity.

10. Hilder Njeri (PW2) the appellant's house-help adopted her witness statement to the effect that on 20th February, 2020 the respondent entered the compound and started hurling insults to the appellant. That she witnessed the respondent attack the appellant in his sitting room with slaps, her shoe and another shoe she picked from the appellant's shoe rack. Further she attempted to intervene but her effort was thwarted by the respondent who shoved her aside severally.

11. The respondent adopted her witness statement and denied insulting and attacking the appellant. She stated that she was at work when her house-help called her and informed her that her son was bleeding. She took a boda boda and rushed home and found that her son was nose bleeding. That her son informed her that the appellant had slapped him.

12. That she went and asked the appellant why he had slapped his son, however, the appellant insulted her by calling her a prostitute and told her that her son had dirtied her clothes. That the boda boda rider separated them and she rushed her son to hospital and thereafter reported the matter to the police.

13. (DW2), Gibson Mutahi the respondent's son adopted his witness statement and averred that on 20th February, 2020, he was playing football with his friends when the appellant came and stated that he would whip them and caught him and slapped him.

14. That he returned to the house and after a few minutes he started bleeding and their house-help administered first aid. When his mother came home they went to the appellant's house to inquire why he had assaulted him but the appellant insulted the respondent and a brief argument ensued. Subsequently, he was taken to hospital and treated.

15. (DW3) Mary Kawira who the respondent's house-help stated that the child (DW2) returned to the house crying stating that he had been slapped by the appellant. That when the respondent returned home, they went and confronted the appellant. She denied that there was a fight.

16. Paul Ngugi Nabui (DW4) adopted his statement and averred that he was a boda boda rider and took the respondent to her home. That on entering the compound they found the respondent's son being cleaned. They then went to the appellant's house to inquire why he had slapped the respondent's son. That an argument ensued and that he separated them. He denied hearing any insults.

17. At the close of the hearing the trial court delivered a judgment dated 15th June 2022 and dismissed the appellant suit on the grounds that the appellant did not discharge the burden of proof that, the defamatory words were uttered, and if they were, that his reputation had been tainted in the eyes of right-thinking members of the public. Further, the appellant failed to prove that the respondent had assaulted him and as a result he had sustained a fracture of the rib as alleged.

18. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the grounds that: -

    a. The Honourable magistrate erred in law and fact by completely disregarding the essential the appellant on the defamatory' words uttered by the respondent on the material date stated in the plaint.

    b. The Honourable court erred in law and fact in concentrating on extraneous matters in her judgment and coming to an erroneous decision.

    c. The Honourable court erred in law and in fact by failing to single out the reasons why the court chose to disbelieve the account of events of the plaintiff and his witness and appeared to believe those of the respondent.

    d. The learned magistrate failed to make a single finding that pointed out to the fact that the act of aggression happened not at the respondent's house but rather that of the appellant, this being a clear pointer as to who was the aggressor.

    e. The Honourable magistrates' court for strange reasons seemed to believe that each of the parties had pending cases in the criminal courts while the respondent was clear that she had withdrawn the case she had preferred against the appellant, a very material fact in the appellant's case.

    f. The learned magistrate failed to appreciate even once the standing in society of the appellant as per evidence adduced and what the hurled abuses and allegations of beating a minor portended to such reputation and standing.

    g. The learned magistrate erred in law and fact in assuming the cause of action was exclusively over defamation and in the process failed to address her mind on the claim for damages for physical injuries sustained by the appellant and which allegation was supported by uncontroverted medical evidence.

    h. The learned magistrate erred in law and fact failed to make a finding on costs in favour of the appellant and did not give the reasons for this decision.

19. The appeal was disposed of through filing written submissions. The appellant in submissions dated; 25th October 2022 argued that the trial court in its judgment failed to make a finding on whether the words were defamatory or merely allegedly defamatory.

20. Further, he did not receive a fair trial as the trial Magistrate raised the burden of proof to that required in a criminal case. That, the evidence of the respondent's witnesses contradicted his evidence.

21. Furthermore, the trial Magistrate erred in rejecting his evidence on the injuries sustained by disregarding the P3 form despite the respondent not objecting to its production. He blamed the trial court of backing arguments made for the respondent and cited the case of; Supreme Court Civil Application No. 1 of 2013 Shabbir Ali Jusab vs Annar Osman Gamrai & Another where the Supreme Court stated that there are cases where the court disregards procedural technicalities in favour of substantive justice.

22. However, the respondent's in submissions dated, 1st December 2022 argued that the appellant has failed to address the grounds set out in his memorandum of appeal and instead has analysed the trial court judgment.

23. The respondent submitted that the trial court properly set out the issues of determination in its judgment and made a determination on them. She relied on the case of; Selina Patani & Another vs Dhiranji Patani (2019) eKLR where the court held that a person's own view of his reputation is not material in a claim for defamation. That, there must be evidence from a third party of the effect on the standing and reputation as result of a defamatory publication.

24. Further, that in the case of Alexander Titus Munyi v Lewa Wildlife Conservancy (2006) eKLR the court stated that there cannot be an action on a defamatory statement until and unless the statement is uttered to other persons other than the claimant. She urged the court to dismiss the appeal for being frivolous, mischievous and a waste of time.

25. I have considered the arguments on the appeal. I note that, the role of the appellate court as held by the Court of Appeal in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

26. The Court of Appeal thus observed: -

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

27. In the instant matter, it is pleaded and stated that the respondent hurled abuses at the appellant that attracted the attention of the neighbours living in the premises of more than sixteen (16) tenants. However, none of these tenants testified in support of the same.

28. The appellant further stated that the defamatory words have affected his reputation, being a former councillor, a businessman and chairman of the council of elders. Notably the allegation that the appellant is a businessman who runs a factory that manufactures flour, being a former councillor and vice chair council of elders was not supported by any documentary or corroborative evidence.

29. Further in his evidence in chief the appellant stated that: "other people witnessed the incident". He goes on to state as a result many people began talking about his family. Many people came because the defendant was shouting and members of the public began talking about it.

30. In cross-examination, the appellant confirmed that he did not produce any documentary in support of his standing in the society. He simply remarked "It is known". In further cross-examination he repeated that, several people heard the respondent hurl abuses at him. When challenged as to whether they would testify he stated "I can bring them to testify".

31. As regards the assault issue he relied on the P3 form and stated that he sustained a fracture. He conceded that he did not have a medical report. That, he did not file the assault case after he was sued. He also conceded that, there were two criminal cases for and against each party herein. He did no allude to the withdrawal of any, instead stated that, the case against him was part heard.

32. In dismissing the appellant's case, the trial court stated at paragraph 42 of the judgment that:

> " Aside from PW2 who is the house help, the plaintiff did not call any other independent witnesses (neighbours present) to corroborate his claim. He neither called any other member of the public having intimated that the issue had become the talk of the town."

33. I therefore concur with the finding of the trial court, since the appellant testified that many people heard the respondent hurl the alleged defamatory words, nothing would have been easier to call any of these people to corroborate his evidence. PW2 was his employee on his payroll. There was no way she could give evidence against him. Furthermore, the best the appellant could do was get an otherwise independent witness off his household.

34. As regard allegation of assault, the trial court held that:

> " 59. I have noted that aside the P3 form, there is no X-ray, CT Scan, MRI or bone scan to confirm that the plaintiff sustained any fracture of the rib as indicated in the P3 form.
>
> 60. The P3 form is not sufficient proof that the plaintiff sustained fracture of the 7th rib. The fact that the defence counsel did not object to its production is neither a leeway for the plaintiff.
>
> 61. I do find that the P3 form is not binding on this court and it must be taken in totality with all other evidence including the evidence of the witnesses."

35. Be that as it were, further issues require attention. First and foremost, although there was an allegation of each party herein having sued the other, no evidence in form of the criminal case number, the charge sheet, the proceedings and/or determination thereof was availed. Therefore, the averments to that effect, remains just as such.

36. Secondly, although it was alleged that, the assault case against the appellant was withdrawn, there was no evidence to that effect. It remained just an allegation.

37. Thirdly the appellant had filed a criminal case over the alleged assault. From the evidence adduced, it is clear the case was still pending. Was it therefore premature to have sued for general damages for assault.

38. Assuming the trial court that heard the matter herein held that the respondent was liable and compensated the appellant and then the assault case against the respondent is subsequently dismissed on the grounds of insufficient evidenced. How would one reconcile the two decisions.

39. Further still, the evidence from the appellant and his witness was that he was assaulted, the respondent with her witnesses testified to the contrary. Isn't the criminal case the best suited matter to determine the varying position beyond reasonable doubt. I hold the view that, the appellant struck too early.

40. In any case, if the case had been withdrawn, he was duty bound to avail evidence to that effect. It was not the respondent to adduce evidence for him through cross-examination to that effect.

41. Be that, as it may, I respectfully disagree with the findings of the trial court that, the P3 form produced by consent of the parties was not conclusive evidence of the injuries the appellant suffered. In my considered opinion that was a medical expert report, which the respondent did not object to. It is the business of the doctor filling the P3 form to request for the x-ray to confirm the existence of the fracture before filing the P3 form.

42. The court cannot descend into the arena of questioning how the doctor arrived at the finding in the P3 form which has been admitted in evidence by the parties. Once admitted, it forms part of the record and the evidence therein must be considered as such, unless there is a contrary medical report.

43. The upshot of the aforesaid is that, the appellant's case would have been supported by the finding of the matter in the criminal case. I would therefore not dismiss the claim but term it as premature with leave to re-apply once the issue in the criminal matter is determined. I therefore set aside the finding of the trial court as it relates to the claim of general damages for assault.

44. I uphold the finding on the claim for general damages on defamation due to lack of evidence of loss suffered. I order that each party bear its costs as neither party has fully won or lost the suit.

45. It is so ordered.

DATED, DELIVERED, SIGNED ON THIS 28TH DAY OF NOVEMBER, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Gachiengo for the appellant

Mr. Oumo for the respondent

Ms. Ogutu: Court Assistant