



REPUBLIC OF KENYA



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**Gatangi v Kungutia (Civil Appeal E028 of 2020)
[2022] KEHC 10596 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E028 OF 2020
EM MURIITHI, J
JUNE 30, 2022**

BETWEEN

SIMON P.M GATANGI APPELLANT

AND

JOEL GIKUNDI KUNGUTIA RESPONDENT

*(An appeal from the Judgment and Decree of Hon. P.M Wechuli
(S.R.M) in Tigania CMCC No. 101 of 2017 delivered on 10/11/2020)*

JUDGMENT

Introduction

1. By a plaint dated December 19, 2017, the respondent herein (the plaintiff in the trial court) sued the appellant herein (the defendant in the trial court) and Michimikuru Tea Company Ltd for slander and sought general damages and costs of the suit. The respondent averred that at all material times to the suit, he was a leaf collection clerk employed by Michimikuru Tea Company Ltd and of respectable status among his colleagues and of good standing among other members of the society. He averred that on December 23, 2016, the appellant unlawfully, and in the presence of more than 30 people in the factory who had come for various reasons, orally uttered the following words in reference to the Respondent:- “wewe ni mwizi wa majani chai na nimefunga namba yako” and he held the appellant and Michimikuru Tea Company Ltd both jointly and severally liable for slander.
2. The appellant and Michimikuru Tea Company Ltd denied the claim by their joint statement of defence dated 8/6/2020 and prayed for the Respondent’s suit to be dismissed.
3. Upon full hearing, the trial court, after dismissing the claim against Michimikuru Tea Company Ltd, entered judgment in favour of the Respondent as against the appellant and awarded him General Damages of Ksh.900,000 and costs plus interests.



The Appeal

4. The appellant filed his memorandum of appeal on 7/12/2020 setting out 7 grounds of appeal as follows:
 1. The learned magistrate erred in law and fact in finding that the Respondent had proved the tort of defamation against the Appellant.
 2. The learned magistrate erred in law and fact in awarding general damages of Ksh.900,000 which were too excessive in the circumstances, when no defamation had been proved by the Respondent.
 3. The learned magistrate erred in law and fact in ignoring the contradictory evidence of the Respondent as to when the alleged defamation took place.
 4. The learned magistrate erred in law and fact by ignoring the submissions by the Appellant that the name of the Respondent was never mentioned or published at any given time.
 5. The learned magistrate erred in law and fact in not finding that paragraph 5 of the plaint by the Respondent contradicted his witness statement.
 6. The learned magistrate erred in law and fact in ignoring established precedent as regards burden of proof in defamation suits.
 7. The learned magistrate erred in law and fact and ignored the totality of the evidence by finding that the respondent had proved defamation against the appellant.

Submissions

5. The appellant in his submissions filed on 26/1/2022 faulted the respondent for failing to prove either being at Michimikuru Tea Factory on the material day or that the words uttered were directed to him. He faulted the trial court for finding that the tort of defamation had been proved against him when the truth of the allegation was not subjected to any investigation. He denied uttering the alleged defamatory words and faulted the trial court for shifting the burden of proof to him in clear breach of the provisions of sections 107,108 and 108 of the *Evidence Act*. He felt that the trial court erred by awarding the Respondent the sum of Ksh.900,000 because he had lost his job yet there was no nexus between the Respondent losing his job and the alleged defamation. He faulted the trial court for considering extraneous factors instead of the evidence tendered by the Respondent and that of the Appellant as well as the submissions filed therewith. He urged the court to revise the inordinately high sum of Ksh.900,000 downwards to Ksh.100,000, in the unlikely event it finds that the Respondent was defamed. He relied on the case of *Veronica Wambui v Michael Wanjohi Mathenge*(2015)eKLR in support of his submissions.
6. The respondent in his submissions filed on 3/12/2021 insisted that the defamatory words were uttered to him by the appellant, and he was brought to public scandal, odium, contempt, considerable embarrassment and distress, and by reason of the words complained of, his reputation was lowered and he was shunned by some of his friends and customers. He accused the Appellant of blocking his tea growers Number TN040311 from the Factory's records as a result of which he suffered financially. He submitted that the award of general damages of Ksh. 900,000 was reasonable and urged the court to dismiss the appeal with costs.



7. The duty of this court as the first appellate court was succinctly summarized by the East Africa Court of Appeal in *Selle and anor v Associated Motor Boat Company Ltd* [1968] EA 123, 126 as follows:

“An appeal to this court from a trial by the High Court is by way of a retrial and the principals 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 that 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.”

Evidence

8. The respondent, PW1 a Manager of MP Tigania East, Gichunge adopted his statement as his evidence in chief.
9. On cross examination, he denied either writing or signing the statement and stated that the name on the verifying affidavit varied with that on the statement. He went to the unit manager’s office and the appellant was in the office that day. He had gone to the appellant’s office, which was inside the factory, on the material day since the appellant had blocked his tea leaves number. It was at the appellant’s office when the appellant referred to him directly as a thief of tea leaves and blocked his number, and he had witnesses. He affirmed that the appellant was talking to him directly and that there were other people at the factory.
10. PW2 Abraham Kaberia also adopted his statement as his evidence in chief. On cross examination, he stated that they were in the unit manager’s office when the appellant referred to the respondent as a thief. The appellant only insulted the Respondent alone and there were many people at the factory.
11. DW1 Simon Peter Munyiri Gatahi, the appellant herein, adopted his witness statement recorded on 27/8/2020 as his evidence in chief. On cross examination, he stated that he could not recall how many kilos of tea leaves were recovered from the respondent. He had met the respondent formally but not in person. He denied using the word ‘mwizi’ and admitted that he only talked about irregularity and falsification which was distinct from theft. He had no record of the tea payments and how many the respondent was to receive, but the same could be procured from the factory. After admitting that the respondent was sacked as a clerk with the union, he stated that it was the factory unit Manager who was in charge of procedures and the respondent appeared before a panel, on a date he could not recall.
12. On re-examination, he stated that disciplinary procedures were done by regional office.

Analysis and Determination

13. The issues for determination are whether the respondent was defamed and/or slandered by the appellant and whether the award of General Damages of Ksh.900,000 by the trial court was exorbitant.
14. *Black’s Law Dictionary* 8th Edition defines defamation as “the act of harming the reputation of another by making a false statement to a third person.”
15. William Shakespeare in Othello underscored the significance of a good reputation when he stated that, “Good name in man and woman, 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.”
16. The ingredients of the tort of defamation were reiterated by J.L.A. Osiemo in *John Ward v Standard Limited* [2006] eKLR as follows: “A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: (i) the statement must be defamatory (ii) the statement must refer to the plaintiff (iii) the statement must be published by the defendant (iv) the statement must be false.”
 17. In *Halsbury’s Laws of England* 4th Edition Vol. 28 at page 23 the authors opined: “In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”
 18. The Court of Appeal in *SMW v ZWM* [2015] eKLR, Karanja, Mwilu (as she then was) & Azangalala JJ.A concisely stated:- “A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”
 19. The Court of Appeal in *Selina Patani & Another v Dhiranji V. Patani* [2019] eKLR Karanja, Odek & Kantai, JJA quoted Patrick O’Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 where it was explicitly stated that: “the law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation as it recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements that injure his reputation.”
 20. Our Constitution recognizes the protection of every person’s reputation from harm and belittling remarks as was observed by G.V Odunga, J. in *Phineas Nyagah v Gitobu Imanyara* (2015) eKLR, as follows: “Under article 32(1) of the Constitution, it is clear that every person has the right to freedom of conscience, religion, thought, belief and opinion and further provides that the freedom to express one’s opinion is a fundamental freedom. Under Article 33 (1) (a) 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 under the Law of *Defamation Act* but has been given a constitutional underpinning as well. In a claim predicated on the tort of defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which public affairs are being administered with the right to protect the dignity and reputation of individuals.”
 21. The respondent pleaded that on 23/12/2016, in the factory in the presence of more than 30 people, the appellant, called him a thief of tea leaves. PW1 testified that after the Appellant, who was the factory manager then, blocked his tea leaves number, he went to the appellant’s office to find out why. It was at the appellant’s office where the appellant referred to him directly as a thief of tea leaves. PW1 on thorough cross examination stated that, “I went to the unit manager. Simon 1st defendant was in the office that day. I saw him. I have witnesses who saw him. I was with 1st defendant in his office.....He then said I am a thief of tea leaves and he blocked my number. He referred to me directly. The office of the 1st defendant is at the factory. There were other people at the factory. He was talking to me directly. I am sure he was talking to me.” PW2 was also in the appellant’s office when he heard the appellant



- refer to the respondent as a thief. PW2 testified on cross examination that, “we were in unit manager office when he called plaintiff a thief. He did not abuse both of us. There were many people.”
22. The appellant in his defence stated that, “I can’t recall how many kilos of stolen tea were recovered from you....That was a disciplinary case. You are asking me about tea but issue is on slanderous words. We did no use the word ‘mwizi.’ I only talked of irregularity. Irregularity and falsification is not the same as theft.”
 23. What can be deduced from the appellant’s testimony is that, the Respondent had allegedly stolen tea and he was subjected to a disciplinary process. The appellant denied calling the respondent a thief but he stated that he talked of irregularity and falsification, which in his view, were distinct from theft.
 24. Nonetheless, the testimonies of PW1 and PW2 were consistent and corroborative that the appellant had, in reference to the respondent, uttered the defamatory words, in the presence of more than 30 people.
 25. On whether defamatory words were uttered deliberately and maliciously, I draw guidance from the Court of Appeal case of *Raphael Lukale v Elizabeth Mayabi & anor* (2018) eKLR where (Nambuye, Ouko & Kiage, JJ.A) held that “malice can be inferred from a deliberate or reckless ignoring of facts. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. Malice may also be inferred from the relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings.”
 26. It is therefore clear that the Appellant, in referring to the Respondent as a thief of tea leaves without any proof or provocation, was malicious and reckless. This court finds that the Respondent proved on a balance of probabilities, that the utterances made by the appellant in the presence of over 30 people, were not only defamatory and malicious, but also referred specifically to him and adversely lowered his reputation.

Exorbitant award of general damages

27. Having found that the respondent proved his case against the appellant, he was entitled to damages in accordance with section 16A of the *Defamation Act*, which provides that, “In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just.”
28. In the English Court of Appeal decision in the case of *John v MG Ltd* [1996] 1 ALL E.R. 35 the Court held that; “The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and take account of the distress, hurt and humiliation which the defamatory publication caused.”
29. The appellant submitted that the award of general damages of Ksh.900,000 was excessive. It must be remembered that the award of damages is purely at the discretion of the trial court and, as stated by per Law JA in *Butt v Khan* (1981) KLR 349, “an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respects, and so arrived at a figure, which was inordinately high or low.”
30. The Court of Appeal in *C.A.M v Royal Media Services Ltd* [2013] eKLR, (Nambuye, Kiage & Gatembu JJ.A), held that “no case is like the other. In the exercise of discretion to award damages for defamation, the court has a wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in *Jones v Pollard* [1997] EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of



the medium in which it is published and any repetition; subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the plaintiff's reputation past and future."

31. In *Habihalim Company Limited v Barclays Bank of Kenya Limited* [2019] eKLR (J. K. Serгон, J.) awarded general damages of Ksh.4,000,000 for slander. In the case of *Rose Okinyi v Dinah Kerebi Nyansinga* [2020] eKLR (E. N. Maina, J.) awarded the appellant a sum of Ksh. 60,000 as general damages for slander. In *Joyce Wambui Njuguna v Paul Ihungo Kabenya* [2021] eKLR, (E. N. Maina, J.) awarded general damages of Ksh. 100,000 for slander.
32. However, in this case, the Respondent submitted that he was unkindly terminated from his employment by Michimikuru tea factory as a result of the defamatory words. The Respondent contended that he has been unable to get a promotion in his current job as a result of the alleged defamatory words. The Appellant recorded in his statement dated 27/8/2020, which he adopted as his evidence in chief that, ".....Previously I was the Factory Unit Manager of Michimikuru Tea Factory Company Limited, the second defendant....I know the plaintiff herein. He was a tea grower as well as a collection clerk employed by the second defendant.....I wish to state that he was taken through the disciplinary procedures and a decision arrived where he was implicated."
33. In his testimony, the appellant stated that, "you were sacked as a clerk with the union.....It is the factory unit manager who is in charge of the procedures."
34. The respondent was subjected to a disciplinary procedure which was chaired by the Appellant, after which he was terminated from employment.
35. This court finds that the appellant's conduct in calling the respondent a thief of tea leaves was deplorable defamation, which injured his character but there is no evidence that the slander directly led to the loss of his employment.
36. The trial court took into consideration, in error as no evidence existed as to the grounds of termination of employment, the fact of loss of employment in assessing the general damages payable to the Respondent stated that, "having considered the nature of the defendant words and the anguish meted to the plaintiff who eventually lost his jobs, I am of the considered view that an award of Ksh.900,000 is sufficient compensation here."

Orders

37. Accordingly, for the reasons set out above, this court thus finds that the award of general damages of Ksh.900,000 to the Respondent was excessive in the circumstances of the case as there is no evidence that the respondent lost his job on account of the defamation herein.
38. The court awards the sum of Ksh.500,000/- in general damages for defamation herein.
39. Costs in the cause.
Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF JUNE, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:



M/S Kibatia & CO. Advocates for the Appellant.
Mr. Joel Gikunda Kungutia Respondent in Person.

