



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 11 OF 2020

DENNIS ROSANA OROO.....APPELLANT

VERSUS

HEZRON OTOCHI NYAMBANE.....RESPONDENT

{Being an appeal against the Judgement of Hon. B. M. Kimtai (Mr.) – SRM Keroka dated and delivered on the 18th day of December 2018 in the original Keroka Principal Magistrate’s Court Civil Case No. 222 of 2012}

JUDGEMENT

This appeal which was filed pursuant to leave granted by this court to the appellant on 9th July 2020 challenges the judgement of the trial Magistrate which found the appellant liable to the respondent for defamation and awarded the respondent general damages in the sum of Kshs. 100,000/=, exemplary damages of Kshs. 50,000/=, costs of the suit and interest. The appeal is premised on grounds that: -

- “1. The learned trial Magistrate erred in law and fact by introducing and relying on extraneous matters hence arriving at unjust judgement.**
- 2. The learned trial Magistrate erred in law and fact by failing to appreciate that the plaintiff’s case and evidence failed to meet the threshold in defamation cases hence arrived at a wrong conclusion.**
- 3. The learned trial Magistrate by awarding damages erred in law and facts by failing to appreciate that the damages had not been proved.**
- 4. The Learned trial Magistrate misdirected himself in completely disregarding the Appellant’s case by failure to address his mind the ingredients of defamation.**
- 5. The award in damages was wrong an or excessive.”**

When the appeal came before me for directions on 8th October 2020 I directed that the appeal be canvassed by way of written submissions and gave either side fourteen days to file. The appellant’s submissions were duly filed on 26th October 2020 but by 24th November 2020 those of the respondent had not been received precipitating this court to extend time by another thirty days. Despite being served with a notice on the same day Counsel for the respondent has to-date not filed his submissions hence and this court has prepared this judgement without having the benefit of the same. Nevertheless, I have in addition to considering the submissions on record also considered the evidence in the lower court as is my duty as the first appellate court so as to arrive at my own independent conclusion. I have done this while keeping in mind that I did not see or hear the witnesses who testified – *(See Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123)*.

The respondent’s case against the appellant was premised on words the appellant is alleged to have uttered at a public meeting chaired by the District Commissioner Borabu Sub-county. Both in his statement and testimony, the respondent alleged that during the meeting which was attended by many members of the public the appellant insulted him and said he was a thief as he had misappropriated a sum of Kshs. 5 million which had been allocated by the CDF for construction of a hospital. He stated that he “was the chair of overseeing committee for the construction of the hospital” which was to cost Kshs. 150 million. He confirmed he had been given Kshs. 5.3 million which he had exhausted. He denied having misappropriated the funds and contended that the allegations by the appellant were all lies and also defamatory. It was also his evidence that he had been appointed to the committee as a representative of the business community and the words had affected his business.

While conceding he was in the meeting the appellant denied that he uttered the words complained of and stated that he merely posed a question regarding the hospital project. He conceded however that the meeting was attended by members of the public. He called a witness

by the name Thadeus Nyanchwa (Dw2) who testified that he too was at the meeting. Dw2 stated that when a question was asked about the hospital project the appellant opined the respondent was best placed to answer it. He contended that he did not hear the appellant utter the words complained of. During re-examination he was categorical that he did not hear any insults.

In his submissions, Counsel for the appellant contended that the respondent's claim against the appellant was not proved and the trial Magistrate used extraneous facts to find the appellant liable. Counsel contended that the Learned Magistrate imported extraneous facts into his judgement that led to his arriving at an erroneous finding. Counsel further submitted that the law of defamation is concerned with protection of reputation, to wit, estimation by others but not a person's character or opinion of himself. Counsel also faulted the trial Magistrate for awarding damages in absence of proof of damage. Counsel urged this court to re-evaluate the evidence to come to its own conclusion. Counsel cited several cases in support of his submissions and this court has perused the same.

Defamation occurs when the defendant publishes to a third person words containing an untrue imputation against the reputation of the plaintiff. Slander is not always actionable per se and the person complaining must prove damage save for certain specified categories. **Section 3 of the Defamation Act** provides: -

“In any action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.”

In this case the respondent stated, and it was not disputed, that he was the chairman of the committee which had been tasked to oversee the hospital project. The words complained of were to the effect that he had in his capacity as chairman of the committee embezzled Kshs. 5 million entrusted to him for the project. The words complained of if indeed they were published were clearly calculated to disparage him in his office as chairman of the project and therefore in view of **Section 3 of the Defamation Act** it was not necessary for him to prove special damage. It is also trite that words imputing a criminal offence punishable by a term of imprisonment are actionable without proof of special damage.

Be that as it may to succeed the respondent required to prove that the appellant in fact published the words complained of and that the said words were published of and concerning him. This is because as correctly submitted by Counsel for the appellant defamation protects a person's reputation and his reputation is not his opinion of himself but the estimation in which others hold him. As in most civil claims the burden of proof is on a balance of probabilities. In this case there was no admission by the appellant that he spoke or uttered the words complained of. He even called a witness who negated that the words were spoken. It therefore behoved the respondent to adduce evidence to prove on a balance of probabilities that the appellant spoke or published those words and that he did so in the presence of other people. From the record of the lower court the respondent was the only witness in his case. He did not adduce any evidence to prove that anybody else heard the words although he asserted they were spoken in a public meeting and in effect therefore there is no evidence at all of publication of the defamatory words let alone that they were spoken of and concerning him. Indeed, the appellant denied publishing those words and called a witness who as I have stated was undisputedly present at the meeting and who vehemently denied that the appellant spoke the words. The evidence of the appellant coupled with that of his witness rebutted that of the respondent and it was that evidence that ought to have been believed. It is clear from the judgement that the trial Magistrate was influenced into believing the respondent simply because he was **“the chair to hospital construction committee and because he had thrown a file to the defendant that the county had not shared equally the stalls that had been constructed in the said centre.”** It is this statement that Counsel for the appellant contends is extraneous. I agree with Counsel because nowhere in the respondent's pleadings, statement or testimony did he allege that the appellant threw a file at him. The trial Magistrate clearly erred by allowing an extraneous matter to influence his findings and decision in the case. The long and short of it is that the respondent did not prove his case on a balance of probabilities. Accordingly, this appeal is allowed and the judgement of the lower court is set aside in its entirety and replaced with a finding that the respondent's claim is dismissed with costs. The costs of this appeal are also awarded to the appellant. It is so ordered.

Signed, dated and delivered electronically at Nyamira this 28th day of January 2021.

E. N. MAINA

JUDGE