



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 172 OF 2018

DR SELINA VUKINU AMBE.....PLAINTIFF

VERSUS

FERNANDEZ SAJERO.....DEFENDANT

JUDGMENT

1. In her Complaint dated 20th July 2018 and filed on 23rd July 2018, the Plaintiff sought the following reliefs :-

a. Damages.

b. An injunction restraining the Defendant, whether by himself, his servants or agents or otherwise howsoever from further posting or causing to be posted words defamatory of the Plaintiff.

c. Costs of the suit.

d. Interest on (a) and (c) above.

e. Any such further or other relief as to this Honourable Court would appear fit and just to grant.

2. The Defendant entered Appearance on 14th August 2018. He also filed his Defence of even date on 22nd August 2018. He filed two (2) documents titled List of Witnesses and Witness Statements and a List of Documents and indicated herein that he would seek directions to file the same during the Pre-trial. The Plaintiff's Reply to Defence was dated 2nd November 2018 and filed on 8th November 2018.

3. On 12th March 2019, both parties informed the Deputy Registrar Hon Mbacho that they had complied with the provisions of Order 11 of the Civil Procedure Act Cap 21 (Laws of Kenya). The Defendant indicated that he would not be filing any documents.

4. When the matter came up for hearing on 13th February 2020, the Defendant did not attend court despite having been served with the Hearing Notice for the said date as was evidenced by the Affidavit of Service of Jeremiah Mutika that was sworn and filed on the same date of 13th February 2020. The matter therefore proceeded *ex parte* whereafter the court gave directions on the filing of Written Submissions.

5. The Plaintiff's Written Submissions were dated 9th March 2020 and filed on 23rd March 2020 while those of the Defendant were dated 25th November 2020.

6. The Judgment herein has been written based on the said Written Submissions that both parties relied upon in their entirety.

LEGAL ANALYSIS

7. The Plaintiff's Statement of Agreed Issues were dated 15th January 2019 and filed on 16th January 2019. They were as follows:-

a. Whether the defendant wrote defamatory texts.

b. Whether the defamatory texts in their plain and ordinary meaning referred to the plaintiff.

c. Whether the defamatory texts lowered the estimation of the plaintiff before right thinking members of the society.

d. Whether the plaintiff was entitled to damages.

e. Whether demand and notice to sue was issued.

8. The court determined that the following were the issues that had been placed before it and dealt with the same under the distinct and separate heads shown hereinbelow:-

a. Whether or not the Plaintiff herein had proved her case;

b. If so, was she entitled to damages;

I. PROOF OR OTHERWISE OF THE PLAINTIFF'S CASE

9. Both the Plaintiff and her witness, James Jesse Ambe (hereinafter referred to as "PW 2") adopted their respective Witness Statements dated 13th May 2019 as their evidence-in-chief.

10. According to the Plaintiff, she and the Defendant were members of Green Park Estate Cluster Three WhatsApp group by virtue of having been residents of the said Estate. She testified that on 19th May 2018, the Defendant posted in the WhatsApp group a text with the following words:-

“well... i still believe this could be an alien (inserted an emoji apparently demonstrating what an alien looks like) finding it extremely hard work to co-exist with normal human beings! Who else could pull such a stunt (emoji)”

11. She pointed out that the alleged malicious post by the Defendant was a reaction to her decision to obtain a court order stopping any developments in the Cluster's open grounds until an ongoing case had been heard and determined and that he had sought to disparage her name without any provocation or justification. She testified that she was informed of the texts by PW 2 as she had been barred from accessing the WhatsApp group.

12. Her testimony was that her character and reputation had been injured as in the plain and ordinary meaning, the texts were understood to mean that she was anti-social, mean, abnormal, inhumane, insensitive, lacking candour, self-conceited, arrogant and lacked compassion for others.

13. It was her evidence that the text lowered her image and standing which she enjoyed in her capacity as a consultant with various government agencies and an eminent person of very substantial standing and that she was subjected to ridicule among the seventy (70) members of the WhatsApp group, neighbours, general public and her colleagues in the business community and that she had in fact received calls from friends in the WhatsApp group enquiring on the truthfulness of the contents of the text.

14. PW 2 supported her case and averred that the text was not only false but that it embarrassed the Plaintiff and lowered her estimation before other members of the WhatsApp group. He explained that she was a good mother and parent to their three (3) children and that she had worked in different calibres across the world and not once was her character ever questioned. It was his evidence that the texts were in bad faith and accentuated by malice.

15. The Plaintiff relied on the cases of **Phaneas (sic) Nyagah vs Gitobu Imanyara [2013] eKLR** and **Brian Odhiambo Oluoch [2017] eKLR** amongst other cases to buttress her case.

16. She submitted that she had been able to demonstrate from her evidence that the impugned statement by the Defendant referred to her, that the words were published by the Defendant using his mobile, from her and PW 2' evidence, her estimation was lowered before right thinking members of the society and that the statements were malicious and reckless. She thus urged this court to award her damages as the court had power under Section 16A of the Defamation Act to award such damages depending on the circumstances of each case.

17. On the other hand, the Defendant relied on Para 109 of the **Halsbury's Laws of England Halsbury's Laws of England 4th Edition Volume 28** to argue that the defence of qualified privilege was applicable in the circumstances of the case herein. He submitted that on grounds of public policy, the law afforded protection to a person acting in good faith and without any improper motive who made a statement against another even when that statement was in fact untrue and defamatory. To further buttress his argument on qualified privilege, he also relied on **Gatley on Libel and Slander 8th Edition page 441 Paragraph 442** and the case of **Chirau Ali Mwakwere vs Nation Media Group Ltd & Another [2009] eKLR**.

18. Whilst still relying on the same **Halsbury's Laws of England** at page 23, he was emphatic that in deciding whether or not a statement was defamatory, the court had to consider what meaning the words would convey to the ordinary man and once the meaning had been determined, the test was under the circumstances the words were published, if a reasonable man to whom the publication was made was likely to understand them in a defamatory sense.

19. He added that the evidence of the husband was not sufficient as an independent witness. In this regard, he placed reliance on the case of **Registered Trustees of the Sisters of Mercy t/a Mater Misericordiae Hospital vs Jacinta W. Maina & Another [2014] eKLR**.

20. In **Halsbury's Laws of England**(Supra), a defamatory statement is defined as :-

“...a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt ridicule to convey any imputation on him disparaging or injuries to him in office, profession, calling, trade or business.”

21. In the case of **Phinehas Nyaga vs Gitobu Imanyara [2013] eKLR** it was held that defamation was not about publication of falsehoods against a plaintiff but rather, he must show that the published falsehood disparaged his reputation and lowered him in the estimation of right thinking members of society generally.

22. In the case of **SMW vs ZVM [2015] eKLR** , the Court of Appeal held that in determining the words for purposes of defamation, the court does not employ legal construction but that the words complained of must be construed in their natural and ordinary meaning.

23. Further, in the case of **Ann Wairimu Njogu vs Radio Africa Limited [2017] eKLR**, it was held that malice also had to be inferred from the alleged defamatory statement. The Plaintiff’s case was that the Defendant’s publication was malicious and defamatory and calculated to injure, disparage and lower her esteem among right thinking members of the society and that the same was posted out of malevolence and spite without any justifiable cause. She pointed out that in her Plaint that despite notice of intention to sue having been served, he had refused to apologise and/or publish an apology to all persons who the libel had been published.

24. In the case of **Newstead vs London Express Newspaper Ltd [1940] 1 KB 377 [1939] 4 ALL ER 319**, it was held as follows:-

“Where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him.”

25. This court noted that the message by the Defendant herein showed that the Plaintiff herein had not been referred to by name. The question of her identity and the circumstances under which the message was sent were pertinent issues in determining whether or not the message she had complained about was defamatory.

26. A careful perusal of the chats showed that several members in the WhatsApp group did not appear to know who had obtained the court order stopping the future upgrades that were to be done on the playground. There were comments such as:-

“Aiyah! Court order? From where/who?”

“Aje sasa? Who? What?”

“Well if the person doing it doesn’t have kids they wouldn’t share our interests”

“Whoever does this is of course assuming that 70 residents don’t have a say on how to manage their playground”

“Just a thought- could this person be having an issue that needs counselling?”

27. However, a few people seemed to know who this was as they commented as follows:-

(emoji emoji emoji) it’s always the same person...”

“...we cannot Alloo w (sic) one person to muzzle is a deny our children development that they do need”

“...with what is happening on the ground, I think she is stopping Gems from helping us”

“...I think we need to get ours before she thinks of enjoining us into this.”

“ I think this person belongs to the wrong place. She belongs somewhere else...where homes are a kilometer apart”

“But genuinely, I think it is very unfair for 1 person to act like a b*h”**

“Well she was the same lady chasing kids from the playground and then later started taking pictures and recording kids while they were playing in the playground...”

28. It was not clear from the Defendant’s message whether he knew who this person was or not as his message read as follows:-

“well... i still believe this could be an alien (inserted an emoji apparently demonstrating what an alien looks like) finding it extremely hard work to co-exist with normal human beings! Who else could pull such a stunt (emoji)”

29. As regards whom the person being complained about was, this court was able to ascertain that it was one person and that person was female. Other than those who had prior knowledge of her resisting the upgrading of the playground, none of the other WhatsApp members or this court appeared to know exactly who she was. In view of the fact that the Plaintiff's identity was not clearly discernible from the chats, the onus was on her to satisfy the court that all the members in the WhatsApp group knew the person being discussed was her and that the Defendant's comment lowered her reputation before the seventy (70) members who were in that WhatsApp group.

30. She was also under an obligation to demonstrate how the Defendant's message in particular lowered her reputation in the estimation of right thinking members of the society. Indeed, there were other recommendations that were made regarding how to deal with the court order she was said to have obtained. These comments were as follows:-

“This is so selfish, is there a way we can seek audience and hear whatever the reason is and work out an understanding, just a few people from the cluster, just thinking!”

“ We had suggested earlier (Jonas has minutes) that we immediately start legal process of stopping whoever it is from interfering with the rights and freedom speak to her”

“Am not around but I guess Cluster 3 residents/officials need to attend court on the indicated date to get the full picture”

“Residents Attending the court hearing in multitudes shows she's one voice vs 70...”

“Or we contribute, get a lawyer and also enjoin C3 since its (sic) our grounds under discusion (sic). Then get orders to stop any interference once and for all. Otherwise this nonsense will never stop.”

“ ...Gems has nothing to do with what is happening on the grounds. I think she is stopping Gems from helping us.”

“It's in fairness total rubbish. We must push the person to the shoves.”

“Mmmmh, soo (sic) the pics were meant for evidence in the courts? Aiya”

“ ...See what we've been dealing with all this time. Please let us put an end to this once and for all. please please even if we have to petition our case too.”

31. Unless one was a member of the WhatsApp group, there was no possibility of any third party having known the contents of the chats therein. Any interrogation of whether the Plaintiff's reputation was lowered in the eyes of right thinking members of the society was therefore confined to the WhatsApp group.

32. From the posts in the WhatsApp group, it was evident that the discussion regarding the court order the Plaintiff had obtained regarding the playground was hot and responses came in rapidly. Many members did not seem to have been impressed by the court order. It was not clear to this court whether all the seventy (70) members in the WhatsApp group agreed with the expressed sentiments or if their outlook of the way they now viewed the Plaintiff was negatively affected by the Defendant's post or if it was affected by the numerous posts by the different member therein.

33. The court was further not persuaded that the Plaintiff demonstrated that she was easily identifiable in the WhatsApp group as the person who was referred to as an alien and further infer from the post that she was anti-social, mean, inhuman, insensitive to others, lacking in candour, a crook of the highest order, a self- conceited person with no feelings and compassion to others or a sadist who wished bad luck to others.

34. Indeed, certain members in the WhatsApp group took the view that action needed to be taken against her order so as not to stop development of the playground ground. The Plaintiff's failure to present at least present one (1) witness from the WhatsApp group who would have testified how he or she had been forced to look at her differently as a result of the Defendant's post weakened her case greatly. The evidence of PW 2 who was her husband was not sufficient to have demonstrated that aspect.

35. For a statement to be proved to be defamatory, a plaintiff had to 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. This court was not persuaded that the Plaintiff had proven any of the said ingredients regarding what could be construed to be a defamatory statement.

36. Going further, this court noted from the Plaintiff's evidence that she was no longer a participant in the WhatsApp Group. Her testimony was that PW 2 took the screenshot of the messages that she adduced in court as her evidence.

37. Notably, Section 106B of the Evidence Act Cap 80 (Laws of Kenya) provides as follows:-

Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production

of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

38. Further, in Section 106B(4) of the Evidence Act, it is stated that:-

In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

- a. identifying the electronic record containing the statement and describing the manner in which it was produced;**
- b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;**
- c. dealing with any matters to which conditions mentioned in subsection (2) relate; and**
- d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),**

shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

39. In the absence of adducing in evidence the Certificate envisaged in Section 106B(4) of the Evidence Act, the screenshots of the messages the Plaintiff adduced in evidence and were taken on her behalf by PW 2 were inadmissible in the circumstances of the case herein. In view of the fact that her case was hinged on the screenshot of the Defendant's message, her case had no legs to stand on.

40. Despite the Defendant not have testified to rebut her testimony, the burden of proof continued to lie with the Plaintiff to prove her case as has been stipulated in Section 109 of the Evidence Act that provides that the burden of proof lies with that person who wishes the court to believe in its existence and that he who asserts a fact must prove as stipulated in Section 107 of the Evidence Act.

41. After carefully analysing the evidence that the Plaintiff presented before this court, this court came to the firm conclusion that she failed to demonstrate that her character, reputation and/or profession had been injured or that the Defendant posted the message maliciously when there were several other messages that were posted in the chat. She failed to demonstrate that it was only from the Defendant's message that her reputation had been injured and lowered in the estimation of right thinking members of the society, which in this case was limited to the members of the WhatsApp group as there was no evidence that the chats were shared with third parties.

42. For the foregoing reasons, the Plaintiff's suit had to fail as she had failed to prove her case to the standard that was required in civil cases, being, on a balance of probability.

DISPOSITION

43. Accordingly, having considered the evidence that was tendered by the Plaintiff, this court came to the firm conclusion that her case was merited and in the circumstances herein, her claim against the Defendant herein be and is hereby dismissed.

44. Each party will bear its own costs as the Defendant did not attend court to adduce evidence.

45. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of April 2021

J. KAMAU

JUDGE