



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. 30 OF 2017

BETWEEN

LUCY AWUOR MUGA.....APPELLANT

AND

WILSON WERE.....RESPONDENT

(Being an Appeal from the judgment and decree in Oyugis Senior Principal Magistrate's SPMCC No. 115 of 2014 by Hon. J.P Nandi – Senior Resident Magistrate)

JUDGMENT

1. Lucy Awuor Muga, the appellant herein, was the defendant in Oyugis Senior Principal Magistrate's CMCC No. 115 of 2014. She had been sued for general and exemplary damages for defamation and unconditional apology. The respondent averred that she made defamatory utterances against him. The learned trial magistrate made a finding in favour of the respondent and awarded him Kshs.200, 000/= general damages.

2. The appellant was aggrieved by the said judgment and filed this appeal. She was represented by the firm of G.S. Okoth & Company Advocates. She raised six grounds of appeal as follows:

- a) The learned trial magistrate misdirected himself on several matters of law and fact.
- b) The learned trial magistrate erred in law of evidence in deciding the case against the weight of evidence and in admitting unsigned documents as evidence contrary to Section 70 of the Evidence Act.
- c) The learned trial magistrate erred in law of tort in deciding that the appellant is liable for defamation of character of the respondent when there is no proof that the complaint made by the appellant is false and malicious.
- d) The learned trial magistrate erred in law in failing to appreciate the constituent elements of the tort of defamation of character.
- e) The learned trial magistrate erred in law in holding that the police officer investigating the complaint was correct in deciding not to charge the respondent for the charge of attempted rape whereas the Sexual Offences Act provides for various offences with which the respondent could have been charged so as to enable a court of law to establish the veracity of the complaint.
- f) The learned trial magistrate erred in law in failing to note that the respondent did not adduce any evidence on his character which is alleged to have been defamed.

3. The appeal was opposed by the respondent through the firm of M/S Oguttu, Ochwangi & Ochwal Advocates. The respondent contended that the appeal lacks merit.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The complained words were allegedly uttered in Dholuo as follows:

Chief ma Lowa Kakwajuo ne onuanga kaluokora ei aora ne obiro ka owuodho gi dier ngenye, kendo kotingo siruari mara buor ei yuothe, kochopo e dho pi to olokore kongiya kae to ochako puoyo nyime kogoyo koko ni adwaro ngony. Kae to ochwero kodhi nya didek. Bange to awuok gi ngwech agoyo nduru, kaeto achwanyo ra ekite ma agora piny.

The utterances were translated as follows:

Chief Lower Kakwajuok came and found me at the river and he was walking with his back towards me, while carrying his brown shorts at his armpit. Upon reaching next to the river bank, he turned and faced me and at that time he started shaking his penis and shouting that he wanted a fuck. Then after he ejaculated three times. After that I started running while screaming and then I slid on a stone and fell down.

The respondent contended that these utterances were defamatory. Were these words uttered as alleged and did they amount to slander?

6. A statement of Brenda Awuor Onyango to the effect that on 6th day of March, 2014 the appellant went to her home and informed her what the respondent had done to her at the river, was produced. Previously on 5th day of March, 2014 Melda Achieng Amwata (PW2) testified that the respondent had reported the same to her. Melda was the area assistant chief.

7. The learned trial magistrate was correct in finding the allegations were unfounded and were made to third parties. In the case of **George Mukuru Muchai vs. The Standard Limited [2001] eKLR** it was held:

In my view the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complaint and not how he/she himself/herself feels the words portray about him/her.

8. Earlier the ingredients of defamation were summarized in the case of **John Ward vs. Standard Ltd , HCCC 1062 of 2005** as follows:-

...The ingredients of defamation are:

The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false.

9. I have read the statements of the appellant and her witnesses that she had recorded with the police. They are rife with contradictions. One such witness is Wilfred Elijah Kobilu. In his statement with the police, this witness stated that the appellant told him that the respondent had approached him while holding his private parts and she ran away. However, in the statement that was filed in this case, he said that the appellant screamed that somebody was attempting to hold her and have sex with her by force. When he went to the scene, he saw the respondent hurriedly crossing the river towards his shamba. In his statement to the police he had said he knew the man to be Were from the description given by the appellant.

10. In her statement to the police, she recorded that when she met with Wilfred Elijah Kobilu and Ishmael she described the man who had approached her naked and from the description, the duo concluded that it was the respondent who was in the habit of wearing shorts. In this statement she never said the two saw the man she contended was the respondent.

11. When the matter went before Chief John Opee, the appellant said the man did not cross the river. This contradicted what her witnesses indicated. This contradiction coupled with obvious ones, raised a red flag on the issue of credibility of the appellant. If indeed the man she claimed to be the appellant conducted himself in the manner she described, there was no time for her to wait and count how many times he had ejaculated. On ejaculation, it appears greatly exaggerated if she said he did it once that could make sense. However three times in what appeared to be within few minutes does not add up. Naturally time is required for a build up after an ejaculation before the next.

12. I therefore find that the learned trial magistrate was justified to dismiss the contention by the appellant. This was certainly fiction which was not smartly thought out.

13. I am equally satisfied that the appellant did not adduce evidence to link the respondent to the man (real or imagined) at the river.

14. The allegation by the appellant imputed that the respondent indecently exposed himself and wanted to rape her. Defamation where a criminal offence has been alleged no damage is required to be proved. **Clerk & Lindsel On Torts at 22-51** state:

...slander must, in order to be actionable without proof of special damage, impute (1) criminal offence punishable corporally i.e. by punishment with at least imprisonment in the first instance, or...

15. The upshot of the foregoing analysis of the evidence on record is that the appeal lacks merit. I dismiss it with costs.

DELIVERED and SIGNED at HOMA BAY this 29th day of June, 2021

KIARIE WAWERU KIARIE

JUDGE