



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 165 OF 2018

ATTORNEY GENERAL.....1ST APPELLANT

SAMSON KWACH.....2ND APPELLANT

VERSUS

QUASSIM MUKOYA KUPUONI.....REPOUDENT

(Being an Appeal against the Judgment of Hon. Cheruto C. Kipkorir,

Senior Resident Magistrate (SRM), delivered on 7th November 2018

in Mumias SPMCCC No. 172 of 2011)

JUDGMENT

1. In the suit at the trial court, the appellants had been sued by the respondent for general damages for defamation, special damages for loss of sales at Home Life Agencies and Home Life Cyber Café amounting to Kshs. 50,000.00, exemplary damages for malicious falsehood, an apology and correction from the 2nd appellant, in an equally broad based public meeting and at the same venue, costs of the suit, and any other or further relief that the court deemed fit.

2. The facts of the case are that on the 11th August, 2010, the 2nd appellant, while addressing a public meeting convened by himself, in his official capacity as the District Commissioner, Matungu, provided a list of people suspected to be thieves in the area, and which list contained the name of the respondent. The meeting was held at Bulimbo market, Harambee Shopping Centre. At the time of the incident, the respondent was a retired teacher, a religious leader, a farmer, a businessman and a member of the Bulimbo business community. The respondent complained that following his name being mentioned as a thief, his business suffered, he had to step down as the districts' agricultural stakeholders' chairman and also as the chair of Bulimbo Muslim Academy. He then filed the suit before the trial court, where he was eventually awarded Kshs. 3,000,000.00 general damages.

3. The appellants were aggrieved by the outcome, hence they filed the instant appeal, on 14th December 2018. The grounds of upon which the appeal is premised are that the trial court treated the evidence before it superficially, and thereby came to a wrong conclusion, ignored the principles applicable in defamation, proceeded on the wrong principles in assessing damages, made a highly inordinate sum in respect of damages, and failed to consider mitigating factors.

4. I am alive to my duties as a first appellate court, which is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at my own independent conclusions. (See *Selle and another vs. Associated Motor Boat Company Ltd and others* [1968] EA 32 (Sir Clement de Lestang VP, Duffus and Law JJ)).

5. Although the substantive law on defamation is the Defamation Act, Chapter 36, Laws of Kenya, the said Act does not to define defamation, and, therefore, resort has to be had in legal writings and case law. In *Black's Law Dictionary*, 5th Edition (1979), defamation is defined as:

“Holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community Defamation is that which tends to injure reputation; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. Statement which exposes person to contempt, hatred, ridicule or obloquy... The unprivileged publication of false statements which naturally and proximately result in injury to another... A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or

to deter third persons from associating or dealing with him.”

(See also *Harrap's Dictionary of Law and Society*, (1989) and E Veitch, *East African Cases on the Law of Tort*, 1972, at p 129).

6. The elements of defamation were stated, in *Joseph Njogu Kamunge vs Charles Muriuki Gachari* [2016] eKLR,(Mativeo J) as follows: -

“The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff’s reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.”

7. “Thief” was such a strong word to use, especially in an area where insecurity, relating to theft, was on the rise. Theft or stealing is a criminal offence under section 268 of the Penal Code, Cap 63, Laws of Kenya. It was expected that the 2nd appellant, having been a public servant should have had an understanding of the process to be followed with respect to handing criminal suspects. He became the judge and the jury in the matter. He termed the respondent a thief, without substantiating the truth of the accusations. In any event, whether a person was a thief or had stolen something, was a matter for the courts. No evidence was adduced to substantiate the accusations made.

8. The utterances of the 2nd appellant can be termed malicious, within the holding of the court in *Joseph Njogu Kamunge vs. Charles Muriuki Gachari* [2016] eKLR (Mativo J) where it was said:

“... the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice. The defamatory words must be shown to have been published by the defendant.”

9. It is common ground that the 2nd appellant called the respondent a thief. It is also not in dispute that the utterances were made at a public forum at an open air event in Bulimbo market centre. The said words were, therefore, well published.

10. Were the utterances of the 2nd appellant defamatory as against the respondent? The court, in *J Kudwoli & another vs. Eureka Educational and Training Consultants & 2 others* [1993] eKLR(Kuloba J) said of assessment of what is defamatory:

“The baseline then is this, that a matter is defamatory if it tends to prejudice a person in the eyes of a substantial and respectable group, even though the proportion of society in whom the esteem of that person is lowered may be quite a small minority in the community. When a man is falsely accused of conduct which tends to lower him in the estimation of substantial number of persons, there can be no doubt that the door has been opened to business or social injury, or both; it will not wait for “right-thinking members of society generally.”

11. The respondent testified that he was a former teacher, a businessman, a religious leader and a farmer. He also owned a building, a shop and an ICT information centre. He was also a local leader. His witnesses, Salim Kulundu and Said Midano Okwiri, confirmed that. He was a person of some standing in his local community, and he was forced to step down from some of his positions after that. He was condemned unheard, contrary to his constitutional rights, as enshrined under Article 50 of the Constitution, 2010.

12. In *Nation Media Group Ltd & 2 others vs. John Joseph Kamotho & 3 others* (2010) eKLR,(Tunoi, O’Kubasu and Waki JJA) the court held:

“Reputation is an integral and important part of the dignity of the individual and once besmirched by an unfounded allegation one’s reputation can be damaged forever, especially if there is no opportunity to vindicate one’s reputation. “

13. In assessing damages, in an action for defamation, the court has to consider the particular circumstances of each case, the plaintiff’s position and standing in society, the mode and extent of publication, the apology, if offered, and at what time of the proceedings, the conduct of the defendants from the time when libel was published up to the time of judgment. See *Joseph Njogu Kamunge vs. Charles Muriuki Gachari* [2016] eKLR(Mativo J). I have perused through the record, and I am persuaded that the trial court did take all that into account in the matter before it. I am not satisfied that the appellants have provided substantial arguments to demonstrate that the trial court erred in awarding the damages, and in the assessment of the same

14. I am not persuaded, overall, that the appeal before me is merited, and I do hereby dismiss the same with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF JUNE, 2021

W MUSYOKA

JUDGE