REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. E001 OF 2021

GEOFFREY ICHABA ITHILI.....APPELLANT

VERSUS

FRANCIS GICHAMUI M'MWENDA....RESPONDENT

(An appeal from the Judgment and Decree of Hon. P.M Wechuli (S.R.M) in Tigania PMCC No. 71 of 2019 delivered on 1/12/2020)

JUDGMENT

1. By a plaint dated 9/8/2019, the respondent sued the appellant for alleged defamation and sought general damages for defamation and costs of the suit plus interest. The gist of the claim was that on 25/7/2019, the respondent was in a public baraza at Kadebene when the appellant, in the presence of over 300 people, uttered in Kimeru dialect in reference to the respondent, the following words:-

> **"uuwe Chief uri mwamba wa miunda ya antu, na nurimii. Na uuni ngakulaani na naara ngawikia utiruta"**

translated to mean: -

> **"You Chief you are a thief of people's lands, and you are cursed. I will curse you, and the place I will take you, you will not save yourself."**

2. It was then pleaded and averred that the aforesaid words were uttered before several members of the public, majority of whom were known to both parties with the knowledge of the appellant that the same were unfounded, untrue, malicious and therefore defamatory. In uttering the aforesaid words, the appellant intended to portray the respondent to right thinking members of the society as a thief with undesirable character and unfit to the lead the society a situation that caused the respondent to be subjected to public ridicule, odium, contempt, embarrassment, immense pain, anguish and loss in that he was shunned and avoided by right thinking members of the society and his credit and reputation were lowered and injured in the eyes of the right thinking members of the society. Despite demand made and notice of intention to sue having been issued, the appellant neglected and refused to apologize and make amends hence the suit.

3. The respondent as the plaintiff before the trial court, **PW1,** a senior chief of Ngare Mare Location, adopted his statement recorded on 25/11/2019 as evidence in chief then stated that on the material day, he was at a public baraza attended by about 300 people. During the said baraza, the appellant, whom he knew, without any provocation hurled and uttered loudly before everyone the defamatory statement. The said words were untrue and demeaning to him and his high esteem was lowered as he lost respect and friends in the society.

4. During cross examination, he testified that they had a baraza at Kandabene in the afternoon in which 3 sub-counties were represented to discuss issues of Njuri Ncheke. The meeting was called by his family and that of Kaberege and both attended in their capacities as members of Njuri Ncheke while some chiefs attended in the capacity of elders. As a consequence of the conduct of the appellant no blood was shed but there was conflict and nobody beat up the appellant. The respondent neither reported to the Njuri Ncheke nor the police but he went to his lawyer since it was a civil case. He confirmed being a family man with his own parcel of land. He had been summoned by Njuri Ncheke before he went to court but he told them it was not their business. He filed the case before he was summoned by Njuri Ncheke, and although he did not have minutes of the said meeting of 25/7/2019, he had witnesses. He admitted that he came from the same sub location with the appellant. In re-examination, he stated that he had the right to choose either to go to Njuri Ncheke or court as he did.

5. PW2, was Douglas Mutabari Ikiao who introduced himself as a farmer an attendee at the meeting. He adopted his witness statement recorded on 25/11/2019 as his evidence in chief. He stated that the appellant had told the respondent in Kimeru that he was the thief of the people's lands, he was cursed and the place he would take him, he would not extricate himself.

6. During cross examination, he stated that around 300 people attended the meeting of 25/7/2019 including chiefs and other leaders were in

attendance and that the respondent has a family with whom he stays in peace and that he continued to work as the chief but people almost fought at the meeting owing to the utterances. He confirmed knowing both the respondent and the appellant but he did not know whether they were friends. He concluded that he had heard the abuses and that the respondent was a respectable person.

7. PW3 Japhet Mutia Mikwa, also adopted his witness statement recorded on 25/11/2019 as his evidence in chief. He stated that he had heard the abuses which were in Kimeru. The appellant told the respondent that, "you chief you are a thief of people's lands. You are cursed. Where I will take you won't be saved,"

8. During cross examination, he stated that the meeting was in the afternoon and there were over 300 attendees. He stated that the meeting for land cases was called by elders and that chiefs were many but he knew the respondent and the assistant chief. When the appellant started hurling the abuses, the meeting stopped. He knew both parties and that it was only the appellant who abused and embarrassed the respondent.

9. The appellant denied the claim by his statement of defence dated 26/08/2019 denied all allegation by the respondent and asserted that the matter was active before the Njuri-Ncheke, admitted the jurisdiction of the court and prayed for the respondent's suit to be dismissed with costs.

10. In evidence, the appellant adopted his witness statement recorded on 13/1/2020 and essentially asserted that it was the respondent who had insulted him at the baraza at all times, falsely accusing him of master minding divisions among the community members. He then approached the community leaders and launched his complaint the same day. When the respondent learnt of his complaint at the Njuri Ncheke, the respondent moved to court in a scheme of trying to subvert the due course of justice.

11. During cross examination, he admitted being in the meeting which went on till 4.00 pm, but denied abusing the respondent. He stated that he had been called to the meeting as an elder to listen to a land dispute which had remained unresolved, many people in attendance saw and heard the respondent abusing him but the PW2 and PW3 were not present. In re-examination, he stated that the respondent did not honour the summons by Njuri Ncheke.

12. After the conclusion of the trial, the trial court found that the respondent had proved his case on a balance of probabilities, the defence was not believable found the appellant wholly to blame and awarded to the respondent general damages of Kshs 1,000,000 plus costs and interest.

13. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 7/1/2021 faulting the trial court for errors in; failing to consider any of the compelling evidence adduced by the appellant, failing to find that the respondent did not attain the standard required for purposes of proving defamation, disregarding and failing to take into account credible and reliable evidence presented by the appellant that contradicted the respondent's evidence, awarding an exorbitant amount of Ksh.1,000,000 as against the appellant, misdirecting itself on both matters of law and facts as to occasion a miscarriage of justice against the appellant, and failing to do justice before it in the case at hand.

Submissions

14. Upon the directions by the court, the parties filed their submissions in respect to the appeal on 7/9/2021 and 28/9/2021 respectively. The appellant submitted that if the words complained of were used by the appellant, they could have been directed at any other chiefs, who were in the meeting, other than the respondent herein. He faulted the trial court for not giving the proceeding before the Njuri-Ncheke a chance once it was notified of its existence and cited **Dickson Mukwelukeine v Attorney General & 4 others(2012)eKLR and Geoffrey Mutiga Kabiru & 2 others v Samuel Munga Henry &176 others(2015)eKLR** for the position that, "where an alternative dispute resolution mechanism exits, the same should be exhausted before rushing to court, and where this is not done, the court will decline to hear and determine a dispute." He submitted that apart from the contradictory witnesses who testified in support of the respondent's case, there was no tangible or believable evidence tendered in support of the allegedly defamatory words. He faulted the respondent for failing to either submit to the jurisdiction of the elders or honouring the summons to attend and explain his part of the events as they happened. He faulted the trial court for reaching a draconian finding by awarding Kshs 1,000,000 for a matter that was fit for arbitration. He submitted that the respondent's suit did not attain the standard required for a claim in defamation, because he told court that he was still carrying his duties as a chief, therefore no ridicule had befallen him or his family. To bolster that point, he cited **Registered Trustees of the Sisters of Mercy t/a Mater Misericordiae Hospital v Jacinta W. Maina & anor(2014) eKLR and Gatley on Libel and Slander 10th Edition at page 8.**He further submitted that the respondent had failed to adduce any evidence to show that the said words were directed to him specifically, and not any other chief as no name was mentioned, and had the effect of lowering his standing in the estimation of right thinking members. He faulted the respondent for failing to justify why his claim should be exempted from the laid down statutory mechanism of ADR and cited **R v Nairobi City County Government Ex Parte Ndiara Enterprises Limited,(2017) eKLR and Council of County Governors v Lake Basin Development Authority & 6 others (2017) eKLR** to support that point. He submitted that from the evidence of PW2 and PW3, the respondent's reputation was not affected in any way by the purported defamatory utterances and relied on **SMW v ZWM(2015)eKLR,** on the scope of a defamatory statement. In his view, had the trial court put all the evidence into consideration, it would have arrived at a different conclusion adding that the respondent did not adduce any compelling evidence to show that his reputation and character were injured as a result of the purported defamatory statement, as there was no proof that the defamatory remarks were directed specifically to him only, and therefore there was no basis for awarding damages. He cited **Nation Newspapers Limited v Gilbert Gibendi(2002)eKLR**, on the need for some foundation or basis upon which the trial court will award a particular sum. He submitted that there ought to have been proof that the words were construed by the more that 300 attendees as defamatory and not just abusive and relied on **Durden, 276 P.3d at 948-49,** for the proposition that that no recovery should be allowed in the absence of actual injury to reputation. In praying for the appeal to be allowed, he cited **Julius Vana Muthangya v Katuuni Mbila Nzai(2019) eKLR** to support his position that, the respondent had failed to prove to the required standard that the utterances were false and malicious.

15. For the respondent, submissions were offered to the effect that on 25/2/2020, an application by the appellant to have the matter resolved through ADR by Njuri Ncheke was opposed by the respondent, on the ground that he was not amenable to it and that in acknowledging the need to promote ADR, the trial court concluded that it was not its place to compel a party to resort to ADR in resolving a dispute which it had the jurisdiction to hear and determine. He submitted that since the Defamation Act does not provide a statutory Dispute Resolution mechanism for disputes regarding libel and slander, then the parties herein were not bound to explore ADR mechanism but pursue their

dispute in court. Moreover, the provisions of Article 159(2)(c), Order 46 Rule 20(1) of the Civil Procedure Rules and Section 59(c) of the Civil Procedure Act do not make ADR compulsory. In other words, parties are always encouraged to pursue ADR to get an amicable solution and decongest courts, but they are not necessarily compelled to do so unless in contracts with arbitration clauses or where there is a Statutory Dispute Resolution Mechanism. According to him, the trial court, which had jurisdiction to hear and determine the matter, could not compel him to submit to Njuri Ncheke, whose decisions are not binding upon parties and therefore unenforceable. He submitted that PW1, PW2 and PW3 had proved on a balance of probabilities that the appellant uttered the defamatory words in reference to him. He submitted that the appellant had failed to call any witness, because the testimony of such a witness would be adverse to his case and that the failure by the appellant to cross examine PW1, PW2 and PW3 on how they concluded that the slanderous utterances referred to the respondent specifically and not any other chief in the Baraza, meant that he had met the threshold of proving defamation. He submitted that the general damages of Kshs1,000,000 was adequate compensation for the slanderous utterances made by the appellant to the respondent in a public baraza, and urged the court not to disturb it. He prayed for the appeal to be dismissed with costs to the respondent.

Analysis and Determination

16. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. See ***Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR.***

17. It is clear that the determination of the appeal spins around the questions whether the respondent proved his case against the appellant and whether the general damages of Kshs1,000,000 awarded by the trial court were exorbitant.

18. Defamation is defined in the ***Black's Law Dictionary Tenth Edition at page 506*** as a**" Malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person. If the alleged defamation involves a matter of public concern, the plaintiff is constitutionally required to prove both the statement's falsity and the defendant's fault. A false written or oral statement that damages another's reputation."**

19. A defamatory statement is where a shameful action, a shameful character, a shameful cause of action, or a shameful condition is attributed to a man in a manner that tend to bring the man into hatred, contempt or ridicule. The more modern definition of defamation is words tending to lower the plaintiff's character and repute in the estimation of right-thinking members of the society generally.

20. The import of the law of defamation as entrenched under **article 33(3) of our constitution** is protection of every person's reputation from harm by false and belittling remarks. While the freedom of conscience, religion, thought, belief and opinion are decreed and enshrined as fundamental, that right must give regard to other persons right to reputation and invasion of privacy. Article 33 thus uplifts the tort of defamation from the hitherto statutory grounding and gives it a constitutional underpinning. In ***Phineas Nyagah v Gitobu Imanyara (2015) eKLR***, the court held

> **…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. In *Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR,* the court held that "a claimant in a defamation suit ought to establish that there is a defamatory statement; that the defendant has himself published or caused another to publish that statement and that the statement refers to the Claimant."

22. Here, the defamatory statement complained of as having been made in a public Baraza by the appellant in the presence of over 300 people has been contested by the appellant with an allegation that it was him who was insulted. In his evidence he admitted being at the meeting but denied uttering the words but instead asserting to have been the person who was insulted by the respondent. That piece of evidence is of course contra the statement of defence filed and is not by rule permitted or admissible. Not admissible because it portends an ambush against the appellant who did not anticipate it considering the defence filed. While it was contended in the evidence that the plaintiff 2nd and 3rd witnesses were not present at the meeting, such was never pleaded not brought out in the witness statement.

23. To the contrary, PW1, PW2 and PW3 testified that they were present when the said utterances were made and there was never put to them a suggestion that they were imposter just like the evidence by PW2 and PW3 that the said utterances were made in reference to the respondent was not subjected to any cross examination.

24. The defence put forth by evidence would fly if it had been pleaded and had it been supported by additional evidence by the many people the appellant said saw and heard the respondent abuse the appellant. On analysis, I find that the version of the plaintiff of the events of the day are more credible and thus find that the appellant did utter the words in reference to the respondent. In the end, I therefore find that the respondent proved on a balance of probabilities that the utterances made by the appellant in the presence of over 300 people, referred specifically to the respondent.

25. The issue that would remain for determination is whether the trial court was right in determining the words as indeed defamatory, if actionable and damages are payable and whether the damages assessed were exorbitant or just adequate.

26. There was no justification raised on the truthfulness of the words and therefore the next requirement is whether the words were uttered deliberately and maliciously. I draw guidance from ***Raphael Lukale v Elizabeth Mayabi & anor (2018) eKLR***, where the Court of Appeal 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.'

27. I find that the appellant, in referring to the respondent as a thief of people's land without any proof or provocation was malicious and reckless. Having found that the words were indeed uttered and giving the words their usual and ordinary meaning, I find that to be referred to as a thief has the imputation that one has committed an indictable offence. Where such is the case, the tort is said to be actionable ***per se.*** In this appeal the respondent was then serving as a chief, civil servant, subject to constitutional imperatives on integrity and the Public Officers Ethics Act. Such an allegation without doubt is defamatory and injurious. When defamatory and injurious, damages are due for award. On this finding, it follows that the trial court cannot be faulted for finding the appellant liable as he did.

28. Having found that the respondent proved his case against the appellant he was without a doubt entitled to damages in line with **section 16A of the Defamation Act.** The question that begs is what amount of damages would adequately compensate the respondent? It is trite that the award of damages is purely at the discretion of the trial court. The principles under which the court can interfere with the findings of fact by the trial court on quantum were laid out in ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5***, where it was held that, *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. That it must be shown that the trial Court proceeded on wrong principles or that it misapprehended the evidence in some material respect and thereby arrived at a figure which was either inordinately high or low'.*

29. The court takes the learning that no one case is on all fours like the other and therefore, in the exercise of discretion to award damages for defamation, the court has a wide latitude while being guided by the many factors for consideration in the exercise of that discretion as enumerated in many decisions of the court. Those factors include the gravity, its province, the medium in which it is published and any repetition, 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 and the need for vindication of the plaintiff's reputation in the past and the future.

30. Being a discretionary matter, it takes a very strong case of an outright and glaring mistake for an appellate to interfere with an award of damages. An appellate court will only interfere with an award of damages after satisfying itself that, incoming to the decision it did, the trial court made an award that is on the face of it inordinately high or low as to represent an entirely erroneous estimate, by proceeding upon a wrong principle or misapprehended the evidence in some material act respect. See **Samuel Kimani & another v Edward Otieno & another [2017] eKLR**

31. In I have given regard to the decisions cited by both parties in this appeal and at trial and I find nothing as a glaring mistake or error that invites the courts limited room for intervention by reduction of the award of damages

32. In the premises, I am unable to find fault with the trial court's analysis of the evidence on record and the determination it made including the assessment of damages. The upshot is that the appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF NOVEMBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Miss Mwiti for appellant

Mr. Ouma for respondent

PATRICK J.O OTIENO

JUDGE