REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 23 OF 2015

ZAMZAM HUSSEIN ALIGELE.....PLAINTIFF

VERSUS

HON. JOSEPH LEKUTON.....DEFENDANT

J U D G M E N T

1. By a plaint dated 6/11/2015, the plaintiff sued the defendant for alleged defamation and sought for an unconditional apology; general, exemplary and aggravated damages, costs of the suit as well as interest.

2. She pleaded that on or about 16/5/2015 at some ceremony in Laisamis Constituency, Marsabit County, the defendant uttered of and concerning the plaintiff in Samburu words to the effect that *"inyoo eesita ana malayi tene?"* which when translated in English means *"what is this prostitute doing here"*. That he also spoke to the plaintiff in English; *"you prostitute I will finish you"*.

3. The plaintiff pleaded that the words disparaged her character in her profession, as a person and her family to public scandal. That she was injured both as a woman and a leader in a highly conservative pastoralist community. That she had as a result suffered considerable distress and embarrassment and her reputation lowered as a result of the said utterances which were reckless, false and actuated by malice.

4. The defendant denied the plaintiff's allegations in his statement of defence dated 6/9/2016. He counterclaimed for damages against the plaintiff on the allegation that on the said 16/5/2016 at the same function, the plaintiff spoke of and concerning him by uttering in Kiswahili the words to the effect that; ***"wewe ni Malaya na huwa unalala na bibi wa watu"*** which in English translates to ***"you are a prostitute and you sleep with other peoples' wives"***. He therefore prayed for an unconditional apology, general, exemplary and aggravated damages, costs of the suit and interest.

5. At the trial, the plaintiff called 6 witnesses with the defendant calling 7. **Zamzam Hussein (PW1)** was then a nominated MCA from a minority tribe (Somali) in Marsabit County. She recalled that on 16/5/2015, she attended a function where the Marsabit Governor was to open the Sub-County office in Laisamis. Those in attendance included the senator, MCA's, County Commissioner, Chief Officers, ministers in the county government, the defendant and members of the public.

6. After the function, she went to the *Baraza* shed where she found all the women from Merille in Laisamis Sub – County whom she had invited to the function. As she was consulting with them on the gifts to be presented to the guests, the defendant came and said in Samburu; "*Enyoi sita enan malayani tene"* which means *"What is this prostitute doing here?"* He then told her "*You Prostitute I will finish you*".

7. She reported the incident at the Laisamis Police Station where she made her statement together with three (3) other women. She later went to FIDA Nairobi who wrote a letter dated 2/6/2015 complaining about the inaction by the police on the report. The Standard Newspaper of 21/5/2015 reported the incident at page 18 under the title **'MCA: MP called me a prostitute'**. Because of inaction on the part of the police, a demonstration by women from Marsabit was held in Nairobi which was aired by Citizen TV on 24/6/2015 at 9.00 pm.

8. **PW2 Yeponoi Lekoyan,** leader of the **Nashamngai** group recalled that on the material day when they arrived at function, the plaintiff greeted then and asked for the gifts. While there, the defendant came and uttered the words complained of in the hearing of everyone. The defendant again said something to the plaintiff in a language she did not understand.

9. **PW3 Maintaalian Labati** and **PW4 Josephine Arigele** reiterated the testimony of **PW2**.

10. **PW5 Caroline Wairimu Kamau,** a senior legal Counsel at the Federation of Women Lawyers testified that the said Federation wrote a letter on 2/6/2015 seeking an intervention of the police to fast track investigations and or arrest or charge the defendant. She produced the letter as **PExh.3.**

11. **PW6 Eunice Hinga** an Ethics officer at EACC and an appointed investigator confirmed that the Commission wrote a letter dated 2/7/2015 summoning the plaintiff regarding a complaint against the defendant's misconduct as a state officer. She produced the letter in

evidence as **PExh.4.**

12. **PW7 Simon Wanjau Njogu,** an IT expert produced a You Tube link published by Citizen TV on 25/6/2015 which captured the demonstration by the Marsabit women at Nairobi.

13. **On his part, Hon. Joseph Lakuton** (**DW1**) recalled that on 16/5/2015 he attended the subject function as the area Member of Parliament. When he passed the plaintiff and a group of people, he did not utter the words alleged by the plaintiff either in Samburu or English. He only greeted the women in Samburu. That as he was walking away to join his colleagues, the plaintiff shouted at him; ***"Wewe ni Malaya na huwa unalala na bibi za watu".*** However, he ignored her.

14. He was later summoned by the police and recorded a statement at parliament buildings. He also admitted that recorded a statement with the EACC. However, neither the police nor the EACC ever summoned him thereafter.

15. **DW2 Julius Lekorole**, a businessman in Logologo and **DW1's** PA, recalled that he was with the defendant on the material day at the said function. The defendant greeted some Merille women and while they were walking away, he heard the plaintiff shout loudly *"wewe ni malaya na huwa unalala na bibi za watu"*. In cross-examination, he told the court that the words the plaintiff used on the defendant were; "Mkora Malaya unalala na bibi za watu".

16. **DW3 Narumu Lekeriya** recalled that on the material day, she attended the ceremony together with the plaintiff. She was in the company of other women when the defendant approached them and greeted them. The plaintiff then hurled insults at the defendant calling him a prostitute fond of sleeping around with people's wives. In cross-examination, she stated that the plaintiff shouted the words; *"Huyu Malaya ni nini analeta mbele yetu"*.

17. **DW4 Rita Lengepei** testified that she was at the function when the plaintiff insulted the defendant stating *"Huyu chokora Malaya anafanya nini hapa? Analala kwa wanawake was watu"*. The plaintiff continued to insult the defendant in vernacular which she did not understand.

18. **DW5 Amina Mohammed** recalled attending the function on the material day. The defendant came and greeted them. As he moved away, the plaintiff abused him a prostitute. **DW6 Ntaramatwa Orbora** testified that she attended the function on the material day and she heard the plaintiff hurl insults at the defendant.

19. **DW7 Nasotu Lekuram** testified that she was among the group of women who attended the function on that day and she heard the plaintiff insult the defendant a prostitute. **DW8 Habiba Basele** told the Court that she never witnessed any altercation between the plaintiff and the defendant on that day. She also denied ever going to willingly make any statement at Laisamis Police Station.

20. The parties filed their respective submissions which the Court has considered. The issues for determination are; ***whether there was any defamation of either the plaintiff or the defendant, if so, what remedies should be given.***

21. Defamation is defined in the **Black's Law Dictionary Tenth Edition** at page 506 as follows: -

> ***"1. 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. 2. A false written or oral statement that damages another's reputation."***

22. At page 1600, slander is defined as

> ***"A defamatory assertion expressed in a transitory form, esp. speech., false and defamatory words that are said in reference to another, such as those charging criminal conduct, imputing a horrible or loathsome disease, alleging malfeasance or incompetence in reference to the person's professional responsibilities, or otherwise causing special damage to the person's reputation."***

23. In **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR,** the Court held**:-**

> ***"Another authority often cited as definitive on defamation is Gatley on Libel and Slander who wrote this, as was adopted in Thomas v CBC as follows:-***
>
> > *"The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one **to a man's discredit**, or which **tends to lower him in the estimation of others**, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of **right-thinking persons generally**. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory."*

24. The law of defamation is concerned with the protection of every person from harm to their reputation by false and derogatory remarks. This is entrenched in our ***Constitution*** under ***Article 33*** which provides that every person is entitled to the right of freedom of expression but one has to do so in a manner that respects the rights and reputation of others. In this regard, the law of defamation has a constitutional underpinning in this Country.

25. In order to prove defamation, it must be shown that the words are defamatory, in that, they have a propensity to lower a person's reputation in the eyes of right minded persons or they tend to cause the person to be rejected, disliked, ridiculed or avoided by people. In this regard, the words must be shown to have injured one's reputation, character or dignity.

26. The other elements that must be proved are; that the defamatory statement must have been published and that the same must have been referring to the claimant. Publication is dissemination of the defamatory matter to 3rd parties.

27. In **Musikari Kombo v Royal Media Services Limited [2018] eKLR,** the court held:-

> ***"The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:***
>
> > *"The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction …' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods…"*
>
> ***It follows that a claimant in a defamation suit ought to principally establish in no particular order:***
>
> ***i. The existence of a defamatory statement;***
>
> ***ii. The defendant has published or caused the publication of the defamatory statement;***
>
> ***iii. The publication refers to the claimant."***

28. In **Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR,** it was held:-

> ***"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 - See "Defamation Law, Procedure and Practice" by the authors David Price, Koriech Duodu and Nicola Cain, 4th Edition at paragraph 1 - 02."***

29. In this suit, the plaintiff claimed that the defendant approached her when she was in the company of over fifty (50) women whereby he uttered in Samburu language words which in English meant '*what is this prostitute doing here'.* She realized that the defendant was referring to her when she faced him and he proceeded to tell her '*you prostitute I will finish you'.*

30. This was corroborated by the evidence of **PW2, PW3** and **PW4**. The incident drew the attention of a large crowd and even attracted the attention of her fellow political allies some of who apologized to her. That it affected her reputation as she was embarrassed to the extent that she could not stand before the public though she is a public figure. That when she passes through the streets of Marsabit, people make faces even the children point at her.

31. She further contended that it brought shame to her and her family who received calls with regard to this issue and caused a strain in her relationship with her husband. That the Standard Newspaper published an article titled '**MCA: MP called me a prostitute'** on 21/5/2015 at page 18.

32. From the evidence on record, it is clear that after the alleged uttering of the words, the plaintiff was infuriated and did report to the Laisamis Police Station on the same day under **OB No.06/16/2015.** The version of the plaintiff was corroborated by her witnesses. Their testimony on what transpired on the material day remained firm even under intense cross-examination.

33. Apart from reporting the matter to the police, the plaintiff proceeded to both Fida and EACC when she felt that the police were taking no action against the defendant. To show her extreme frustration, she led or participated in a demonstration by women from Marsabit outside the supreme Court, Nairobi.

34. That is a clear demonstration of a frustrated and embittered person pursuing a particular goal. **PW5** and **PW6** corroborated the plaintiff's testimony in this respect. Letters which were written by the two organizations were produced to buttress that position

35. The defendant's position was that the plaintiff's actions were pure political theatrics meant to discredit him as Member of Parliament for Laisamis. He alleged that it is the plaintiff who had called him a prostitute thereby defaming him. His witnesses supported his position.

36. This Courts notes that, apart from the plaintiff's evidence as well as that of her witnesses being consistent and firm, her conduct after the incident is that of a person hurt. She seems to have been badly hurt by the events of the day. That explains her complaint to the police, Fida, EACC and even demonstrating outside, albeit misconceived, the Supreme Court buildings for having failed to get justice from government agencies.

37. The Court believed the testimony of the plaintiff and her witnesses. The defendant himself confirmed that when he reached where the Merille women were, he spoke to them in Samburu language. Both the plaintiff and her witnesses were firm that the alleged defamatory

words were uttered in Samburu language.

38. Accordingly, the Court holds that the defendant uttered the words; *"inyoo eesita ana malayi tene"* meaning, "*what is this prostitute doing here"* at the subject function as stated by the plaintiff and her witnesses.

39. The Court observed the witnesses for the defence. The Court did not believe them as their version seemed to have been rehearsed to paint the plaintiff in the wrong. Furthermore, their evidence was not only contradictory, but also inconsistent. The position they stated in their evidence in chief was shaken and changed on cross-examination.

40. The testimony of the plaintiff and her witnesses was that she is a family woman married to a Major in the Kenya Army. That she has children and that she is a nominated Member of the County Assembly of Marsabit. This evidence was never denied or challenged by the defence. Accordingly, the plaintiff is a leader in the community where she lives and not a prostitute by any means.

41. It follows therefore, that not only were the words false but they were defamatory of the plaintiff. Her version was that she hails from a highly conservative community which cherishes married life. The first element of defamation was therefore proved to the required standard.

42. As regards the second element, the said words were publicized to the more than 50 women who were at the scene who heard the same. It was alleged that after the incident, people were busy discussing about the same. Even small children are said to have known about it.

43. As to who the words referred to, it was obvious that they were directed at the plaintiff. The defendant is said to have directly accosted the plaintiff when uttering the words complained of. There was also evidence that the defendant uttered additional words in English still referring the plaintiff as a prostitute. There is no dispute that the defendant met and accosted the plaintiff while the latter was with Merille women at the function on the material day.

44. In view of the foregoing, I hold that the defendant did utter the words complained of. That the said words were defamatory and they referred to the plaintiff. Accordingly, the plaintiff did on a balance of probability prove her case against the defendant.

45. As for the counter-claim, the defendant alleged that on the material day and same function, the plaintiff insulted him in Swahili by uttering words to the effect that;*"wewe ni Malaya na huwa unalala na bibi wa watu"*. In English, it translates to *"you are a prostitute and you sleep with other peoples' wives"*. In cross-examination, the defendant admitted that he did not actually hear the plaintiff utter those words. That she may have spoken some words which others heard.

46. The Court carefully observed the defendants witnesses when they testified. The Court did not believe them. They contradicted themselves on the actual words that were allegedly uttered by the plaintiff. These varied as; *"wewe ni Malaya na huwa unalala na bibi ya watu", "mkora Malaya unalala na bibi za watu", "huyu Malaya ni nini analeta mbele yetu", "huyu chokora Malaya anafanya nini hapa? Analala kwa wanawake wa watu"*.

47. In any event, the Counterclaim was filed on 7/9/2016. That was clearly over one year from the date the alleged defamation took place. There was no extension of time to lodge the claim out of the statutory period of one year allowed for lodging such claims. **See *section 20 of the Defamation Act, Cap 36 Laws of Kenya.*** The same was therefore time barred and a non-starter.

48. Having found the defendant liable for defamation, the plaintiff is entitled to damages in terms of ***section 16A of the Defamation Act.*** In **Gicheru v. Andrew Morton and Another [2005] KLR** the Court of Appeal held that the latitude in awarding damages in an action for defamation is very wide.

49. The plaintiff prayed for unconditional apology, general damages of Kshs.5,000,000/- and exemplary damages of Kshs.3,000,000/-. Although she had prayed for aggravated damages in her plaint, she never submitted on it. In any event, there were no any aggravating circumstances in this case to warrant such a claim.

50. In **C.A.M v. Royal Media Services Ltd [2013] eKLR,** the Court of Appeal held:-

> ***"No case is like the other. In the exercise of discretion to award damages for defamation, the court has a wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones v. Pollard [1997] EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective 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; vindication of the plaintiff's reputation past and future".***

51. Applying the above criteria, the slander was published to women numbering about 50. The slander was in itself serious as the plaintiff is a married woman in a conservative community. She was a people's representative in the Marsabit County Assembly. The publication was to her constituents. The same was however, not permanent.

52. I will not consider the report at page 18 of the Standard Newspaper of 21/5/2015 as publication of the slander. That publication was by the plaintiff herself. The report stated **"MCA: MP called me a prostitute".** That is a publication that was made by the plaintiff herself to the said newspaper and not the defendant. The same applies to the publication in the Citizen TV of the demonstration by Marsabit women outside the Supreme Court of Kenya. That again was publication by the plaintiff herself.

53. The slander must have injured the plaintiff's feelings. She must have been embarrassed before her supporters and fellow women.

54. However, the plaintiff did not call evidence to show the extent of the damage to her reputation by the slander. In defamation cases, it is not the reputation the victim thinks or holds that he/she commands that matters, it is rather what the reasonable member of the society out there would think of one out of the defamation.

55. In this regard, in a defamation case, apart from establishing that defamatory words were published concerning a claimant, the claimant must show that there are people out there who when they heard of the defamatory words, it affected their estimation of the claimant in one way or the other. That will go towards the estimation of the damages awardable. In the present case, the plaintiff did not offer any such evidence. Failure to show that the defamation lowered ones reputation amongst those who heard it, impacts on the quantum of damages in my view.

56. As regards the quantum of damages, in **Amritral Bhangwaj Shah v. Standard Ltd & Another HCCC No. 1073 of 2004** an award of KShs.6,000,000/- was made to a retired Court of Appeal Judge for libel. In **Jared Omonde Kisera t/a Omonde Kisera & Co. Advocates v. Ken Wachira Waruru & Another HCCC No. 160 of 2001,** an award of Kshs.800,000/- was made to an advocate. In **Mong'are Gekong'a t/a Gekong'a & Momanyi Advocates v. The Standard Ltd HCCC No. 518 of 1999**, an award of Kshs. 1,000,000/- was awarded to an advocate.

57. The plaintiff was a nominated member of County Assembly of Marsabit. The publication of the slander was to about 50 women.

58. Taking into consideration all the foregoing, I award the plaintiff general damages of Kshs.600,000/-. I will not award any exemplary damages as the 3 principles set out in **Rookes v. Barnard [1982] 1 ALL ER 367.** Were never proved.

59 As regards the apology sought, due to the passage of time, I do not think that the same will suffice at this point. In any event, the plaintiff had not made any demand before coming to Court. Had there been a demand, I would have awarded Kshs. 200,000/- in lieu of apology.

60. Accordingly, judgment is hereby entered for the plaintiff against the defendant for:-

a) General damages Kshs.600,000/-.

b) Interest on a) above from the date of this judgment until payment in full.

c) The counterclaim is dismissed with costs.

d) clam for aggravated and exemplary damages is dismissed.

e) Costs and interest thereon are awarded to the plaintiff.

DATED and **DELIVERED** at Meru this 30th day of January, 2020.

A. MABEYA

JUDGE