



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 7 OF 2018

(An appeal arising from the judgment and decree of the Hon. CAS Mutai, Principal Magistrate (PM), in Butere PMCCC No. 34 of 2014 of 2nd February 2017)

HABIL NANJENDO BUSHURU.....APPELLANT

VERSUS

ALEX MUTULI.....RESPONDENT

JUDGMENT

1. The suit at the trial court was initiated by the respondent herein against the appellant, for general damages for slander arising from words that the appellant allegedly uttered at a funeral on 30th November 2013, of and concerning the respondent. The appellant entered appearance and filed a defence, in which he denied liability, asserting that he was not at the place where it was alleged he made the offending remarks.

2. The trial court took oral testimony from the respondent and his three witnesses. The appellant did not testify nor call any witnesses. The case, as presented by the respondent, was uncontroverted, and it was on the basis of that that the trial court found in favour of the respondent, and awarded damages at Kshs. 200, 000.00.

3. The appellant were aggrieved by the outcome and lodged this appeal. His principal argument being that there was no proof of the words allegedly uttered, the testimonies were inconsistent and that his defence was disregarded. He seeks that the judgment of the trial court be allowed, and the prayers sought in his defence allowed.

4. According to the plaint on record, it is pleaded that the appellant, had uttered the words, particularized in paragraph 7 of the plaint, at a funeral that was conducted on 30th November 2013. The testimony given at the trial that tallied with the pleading in the plant relating to the slander, was by Harrison Ramoiya Otieno, a brother of the deceased employee of the respondent. He stated that the appellant made remarks to the effect that the respondent had taken police officers to assault the deceased, and when he died they smeared poison on his mouth. His words, as quoted by the witness, and recorded by the court, were:

“I have discovered that something bad has happened in my ward. Mutuli took administration policeman and they beat up their employee. When he died they smeared poison on his mouth. That child is now dead.”

5. The respondent told the trial court that he had a telephone conversation with the appellant on 29th/30th November 2013, where the appellant told him that he had instructed police officers to beat his employee to death. His first witness, James Otota Obuche, talked of events that happened on 7th December 2013, when he overheard a conversation between some individuals, who included the appellant, discuss about the death of an employee at the respondent’s residence. The wife of the respondent was the next witness. She testified that when Harun, the employee in question, died, the appellant telephoned her and asked for the respondent’s telephone number which she gave to him. A brother of the deceased employees later came and uttered threats. She said they were warned to keep off from the employee’s burial.

6. The question to ask is whether the words reported by the witness were the words pleaded in the plaint. I have gone through paragraphs 7 and 8 of the plaint, and I note that the testimony of the witness largely tallied with averments with the pleadings. It should not be expected that the witnesses state orally word for word what is pleaded or particularized in the plaint. There was sufficient ground upon which the trial court could conclude that the said words were uttered by the appellant, since he did not take with witness stand to denounce that evidence. The witness to the said words being uttered was a brother of the deceased, the person that the respondent allegedly murdered.

7. The other ground raised by the appellant is that the trial court awarded damages without legal or factual justification as no case was made out. James Otota Obuche testified as an eyewitness. He was at the funeral where he heard the offending words being uttered by the appellant, his testimony was not controverted. No evidence was led to establish that he was not at the funeral, or that the appellant was not in attendance, or did not address the mourners. Pamba Hosea, the fifth witness, was also there and said he saw the appellant and heard him make the remarks. The two were also clear on how those remarks impacted on their view of the respondent. The other witnesses gave a

general background surrounding the whole affair, which placed the appellant at the scene. I am not persuaded that there was no factual or legal background to the award of general damages.

8. The other ground was that the testimonies of the witnesses were inconsistent. I have gone through the written submissions filed by the appellant, and I have not seen any incidents pointed at to demonstrate that the testimony was inconsistent. I have also perused through the record of the trial court, and I have not seen any incident of inconsistency.

9. The final ground was that his defence was not considered. The written statement of defence gives an indication of the case that a defendant would be presenting at the oral hearing. At the trial the defendant is expected to breathe life to the averments made in his defence. A written defence is not a statement under oath, and the averments made in it are not evidence, and cannot be given any weight until the defendant expounds on them at the oral hearing. The appellant did not testify nor call any witnesses. Life was not breathed to his defence, and the same, therefore, remained a dead letter on record. There was nothing for the trial court to consider in it.

10. Overall, I am not persuaded that there is any merit in the appeal before me. I accordingly dismiss it, with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE