



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL APPEAL NO. 47 OF 2019**

**ROSE OKINYI.....APPELLANT**

**- VRS -**

**DINAH KEREBI NYANSINGA.....RESPONDENT**

**{Being an appeal against the Ruling of Hon. S. K. Arome – SRM – Keroka dated and delivered on the 10<sup>th</sup> day of July 2019 in the original Keroka Principal Magistrate’s Court Civil Case No. 67 of 2017}**

**JUDGEMENT**

By a plaint filed on 30<sup>th</sup> March 2017 the respondent sued the appellants for damages for slander. She alleged that on 26<sup>th</sup> September 2016 at around 5pm while they were at a public place (Keroka Market) the appellants insulted her by calling her “**Malaya, tasa and unmarried**” which words were calculated to damage her reputation as a businesswoman. The suit was vehemently defended but after hearing and considering evidence and submissions from both sides the trial Magistrate found in the respondent’s favour and awarded her a sum of Kshs. 60,000/= **as aggravated and exemplary damages**. She was also awarded the costs of the suit. Being aggrieved by that judgement the appellants have appealed on the following grounds: -

- “1. That learned trial magistrate grossly misdirected himself in law and fact by not making a finding that the plaint as crafted was fatally defective and did not disclose a reasonable cause of action.**
- 2. That the learned trial magistrate erred in law by not making that pleadings did not meet the legal threshold required for a claim of defamation, which in event was not specifically pleaded.**
- 3. That the learned trial magistrate misinterpreted the Kiswahili version of the words allegedly uttered and came to an illogical and wrong conclusion leading to a miscarriage of justice.**
- 4. The learned trial magistrate grossly misdirected himself in awarding exemplary and general damages which were not pleaded for in the plaint as no particulars of General damages are set out in the pleadings.**
- 5. That the learned trial magistrate misapplied the law in making an award against the weight of evidence.**
- 6. That the learned trial magistrate failed to properly address and or consider the appellant’s defence which was totally reasonable.**
- 7. The trial magistrate misdirected himself in law and fact by coming to the wrong conclusion that the words allegedly uttered amounted to defamation which was a flat misinterpretation of the phrases and misapplication of the law as there is no English translation as required under the law for claim of defamation to be sustained.**
- 8. The learned trial magistrate erred in law and fact by concluding that two persons could utter words in unison and hence be held liable jointly and severally which amounts to a misjoinder.”**

The appeal was canvassed by way of written submissions. Counsel for the appellant begun by faulting the trial Magistrate for awarding aggravated and exemplary damages yet the same were not impleaded. He then submitted that the words complained of were not properly pleaded and that in any case they were mere insults and do not amount to defamation. Counsel argued that in her testimony the respondent clearly stated that she had not suffered any damage as her customers continued to patronize her shop and that she had sued only because of her own pain and distress at the abuses (insults). Relying on the case of **Phineas Nyagah v Gitobu Imanyara [2013] eKLR**, Counsel faulted the trial magistrate for what he described as regarding the contents of the plaint as evidence and also for failing to properly evaluate,

analyse and synchronise the evidence hence arriving at an award of damages which was not pleaded in the plaint. Counsel urged this court to quash the judgement of the lower court and set aside the award of damages with costs in the lower court and in this appeal.

For the respondent it was argued that only issues of law fall for consideration in an appeal; that on a careful reading of the trial Magistrate's decision it is clear that the court diligently applied its mind and that the respondent suffered anguish, loss of reputation and lost a good number of customers as a result of the words complained of. Counsel for the respondent therefore urged this court to dismiss the appeal with costs and uphold the judgement of the trial Magistrate.

This being a first appellate court I am entitled to consider and re-evaluate the evidence in the court below so as to arrive at my own independent conclusion – see **Selle v Associated Motor Boat Company Limited [1968] EA 123**. In effect an appeal is in the nature of a retrial the only rider being that unlike the trial court the appellate court does not benefit from seeing and hearing the witnesses and must when considering the appeal make provision for that. Accordingly, the appellate court is not confined to considering only matters of law as submitted by Counsel for the appellant but must also consider whether the facts and evidence support the claim by the respondent. This position avails from the express provisions of **Section 65 (1) (b) of the Civil Procedure Act** which states: -

**“65. (1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—**

.....

**(b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;.....”**

Also in **Selle v Associated Motor Boat Company Limited (supra)** the Court of Appeal acting as the first appellate court observed: -

**“.....In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of a particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

Accordingly this court is entitled to consider the appeal both on the facts and the law.

This being a claim for damages for slander the respondent was required to prove the following on a balance of probabilities: -

- a. That the words complained of were uttered by the appellants of and concerning her.**
- b. That the words were defamatory.**
- c. Whether the words are actionable per se or whether respondent was required to prove that she suffered damage.**

Whether the words complained of were uttered by the appellants and whether they were uttered of and concerning the respondent is a matter of fact and I am satisfied from the evidence that the appellants did in fact refer to the respondent as **“malaya, tasa and unmarried woman”**. The respondent called witnesses who were present when the appellants uttered those words and who corroborated her evidence in all material particulars. I am therefore satisfied that the respondent proved the first issue on a balance of probabilities.

As to whether the words were defamatory the **Black's Law Dictionary Tenth Edition page 1600** defines slander as: -

**“1. A defamatory assertion expressed in a transitory form, esp. speech; esp., 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.”**

On the other hand, a **defamatory statement** is defined as **one tending to harm a person's reputation usually by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person's business**. It is clear from the testimonies of the respondent as well as her witnesses that even after she was called those names her business did not, as submitted by Counsel for the appellants, suffer. In her own words she continued to get customers. My finding however is that the words complained of were not mere insults but were words intended to disparage, ridicule and disgrace the respondent. **“Malaya”** which is Kiswahili for prostitute was intended to paint her as a woman of loose morals. So were the words **“unmarried woman”** especially taken together with the allegation by the appellants that she stole other women's men. It is my finding therefore that even in their ordinary meaning the words were defamatory and were not mere insults.

Are the words actionable per se? it is my finding that the words amount to slander which is actionable per se and the respondent did not require to prove that she suffered damage such as loss of business, loss of reputation, or ridicule. The words imputed to the respondent not just a crime involving moral turpitude as prostitution is indeed a crime in our law but also unchastity of a woman. The appellants uttered the words in a public market and the respondent was humiliated, hurt and distressed. It is immaterial that those who heard their utterances did not believe them or did not act differently towards her. However, while she was entitled to damages, I do not agree with the trial Magistrate's award of aggravated and exemplary damages as exemplary damages are reserved for instances where the court's intention is to punish the defendant(s) and aggravated damages are ordered against a defendant who acts out of improper motive like malice or who insists on a defence of justification or who fails to apologize which is not the case here – (see **Ken Odondi & 2 others v James Okoth Ombura**

**T/A Okoth Omburah & Company Advocates [2013] eKLR Miguna Miguna v Standard Group & 4 others [2017] eKLR).** What the respondent was entitled to were general damages and in my view the award of Kshs. 60,000/= was adequate to compensate her for the humiliation. The same shall now be converted and awarded to her as general damages. She shall also get interest at court rates and the costs of the suit in the lower court. As for the costs of this appeal the order that best commends itself to me is that each party bear their own costs. It is so ordered.

**Signed, dated and delivered in Nyamira this 23<sup>rd</sup> day of April 2020.**

**E. N. MAINA**

**JUDGE**

**This judgement was delivered electronically in view of the Ministry of Health and the World Health Organization's guidelines on combating the Covid-19 pandemic, the Advocates for the parties having consented.**