



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 123 OF 2018

BETWEEN

DANIEL KARIUKI.....APPELLANT

AND

D.N. OGOTI.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Kisumu CMCC No. 173 of 2015 by Hon. R.Ndombi (SRM) on 30th October, 2018)

JUDGMENT

1. **D.N. OGOTI (*Respondent*)** sued **DANIEL KARIUKI (*Appellant*)** in the lower court seeking the following orders:

- a. Damages for malicious falsehood**
- b. Aggravated general damages for defamation of character**
- c. Costs of the suit**
- d. Interest on (a) (b) and (c)**

2. Appellant filed a statement of Defence and denied the claim.

3. By a judgment dated 30th October, 2018, the trial court found the Appellant liable and awarded the Respondent Kshs. 500,000/- aggravated damages; Kshs. 1,000,000/- general damages, costs of the suit and interest.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision

preferred this appeal on 11.01.2019 and in his amended memorandum of appeal filed on 17.02.2020 raised the following main grounds:

- 1) Particulars of defamation were not pleaded**
- 2) The Respondent's case was not proved to the required standard**
- 3) The defence was not given due consideration**

SUBMISSIONS BY THE PARTIES

5. This appeal was argued by way of written submissions and cited authorities.

Appellant's submissions

6. Appellant concedes that he wrote the impugned letter but denied that it was reckless or defamatory. It was further submitted that no actual damage was proved by the Respondent especially considering that he has continued to rise in his career.

Respondent's submissions

7. It was submitted that the letter complained portrayed the Respondent who was a Senior Assistant Director of Prosecutions in Kisumu as an individual who engages in favoritism and who cannot lawfully procure justice for anyone unless they hail from their ethnic group. It was additionally submitted that malice could be inferred from the language used in the impugned letter (See **James Njagi Joel v Junius Nyaga Joel [2020] eKLR**).

Analysis and Determination

8. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion considering the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA**.

9. I have summarized the issues for determination as follows:

- i. Whether particulars of defamation were pleaded**
- ii. Whether the impugned letter was published**
- iii. Whether the impugned letter was defamatory**

Whether particulars of defamation were not pleaded

10. A party pleading defamation of character must clearly specify the particulars of defamation as provided under **Order 2 Rule 7 Civil Procedure Rules**. This is an important legal point because failure to comply with the said rule renders the claim legally incompetent.

11. I have considered the pleadings that were filed by the Respondent

and he not only provided the particulars of the tort for which he was

seeking damages but also pleaded the particulars of defamation arising from the letter that was written by the Appellant.

Whether the impugned letter was published

12. Appellant concedes authoring the letter complained of, and concerning the Respondent and sending it to IPOA through the office of the DPP Kisumu. In view of that admission, it follows that the fact of the publication, the content of the publication and the fact that the publication referred to the Respondent was proved. (See **Grace Wangui Ngenye V. Chris Kirubi & Another [2015] eKLR**).

Whether the impugned letter was defamatory

13. In the case of **Joseph Njogu Kamunge V Charles Muriuki Gachari [2016] eKLR**, the court reiterated the ingredients of defamation as follows: -

"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: -

- i. The statement must be defamatory.**
- ii. The statement must refer to the plaintiff.**
- iii. The statement must be published by the defendant.**
- iv. The statement must be false.**

14. Order 2 rule 7(2) of the Civil Procedure Rules provides as follows: -

"Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements

of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.”

15. The rule requires that the Appellant to not only give particulars stating which of the words complained of he alleges are justified but of the facts and matters he relies on in support of the allegation that the words are justified. (**See Riley Falcon Security Services Ltd v Nairobi Star Publication Limited [2016] eKLR**).

16. The Appellant in his evidence stated that he felt threatened by the Respondent’s letter to IPOA which was intended to effect his dismissal from work. Whereas his feelings of threat may have been true, the imputation that the Respondent’s letter was informed by ethnicity was uncalled for and unjustified.

17. I am in agreement with the Respondent that the letter depicted him as an individual who engages in favoritism and who cannot lawfully procure justice for anyone unless they hail from their ethnic group. This court therefore holds that a reasonable person would understand them in a defamatory sense and the trial court’s finding that they were defamatory was therefore well founded.

18. The Appellant did not challenge the quantum of damages and I this court has no jurisdiction to determine the issues that have not been raised.

19. In view of the foregoing analysis, I find that this appeal has no merit and is dismissed with costs to the Respondent.

DATED AT KISUMU ON THIS 23rd DAY OF *September* 2020

T.W. CHERERE

JUDGE

Court Assistants - Ms. Amondi/Ms. Okodoi

- Mr. Mutai for the Attorney General for Appellant

- Mr. Omondi for M/s Omondi, Abande & Co. Advocates for Respondent

Order

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic.