



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 38 OF 2019

BETWEEN

HENRY ROMANO MUYERA.....1ST APPELLANT

DERRICK OCHIENG.....2ND APPELLANT

AND

JOSECK TANYA KITOTO.....1ST RESPONDENT

REBECCA AYAKO.....2ND RESPONDENT

ROSELYNE KHAKOBI ASIKOYE.....3RD RESPONDENT

(Appeal against conviction and sentence in Maseno PMCC NO. 38 OF 2013

by Hon. R.S. Kipng'eno (SRM) on 27th February,2019)

JUDGMENT

1. JOSECK TANYA KITOTO REBECCA AYAKO and ROSELYNE KHAKOBI ASIKOYE (*Respondents*) sued HENRY ROMANO MUYERA and DERRICK OCHIENG (*Appellants*) in the lower court seeking the following orders:

a. Permanent injunction to restrain them from authoring, uttering, writing, publishing, distributing or continuing to author, utter, write, publish and distribute any other defamatory, slanderous and or libelous statements of and concerning the Appellants

b. General damages for defamation, slander and libel

c. Costs of the suit and interest

2. Appellants denied the claim and after the hearing, the trial court in a judgment dated 27th February,2019 found the Appellants liable and condemned them to pay each of the Respondents general damages in the sum of Kshs. 500,000/-.

The Appeal

3. Aggrieved by the lower court's decision, Appellants preferred this appeal. From the Memorandum of Appeal dated 22.03.19 and filed on 26.03.19, the Appellants assert that Respondent's case was not proved.

SUBMISSIONS BY THE PARTIES

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

Appellants' submissions

5. The Appellants whilst conceding that 1st Appellant wrote the letter complained of and the 2nd Appellant read it out to the church congregation hold the view that evidence by PW4 and PW5 disclosed that the letter did not affect the reputation of the Respondents. The Appellants further asserted that the contents of the letter complained of were true to the extent that DW2 and DW4 confirmed that there was indeed a fight between the 2nd and 3rd Respondents on 21.08.12 which they discovered was related to a love triangle with the 1st Respondent.

Respondents' submissions

6. The Respondents hold the view that there was no truth in the words of the letter complained of.

Analysis and Determination

7. 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.

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

- i. Whether the impugned letter was published**
- ii. Whether the impugned letter was defamatory**
- iii. Whether the general damages of were awardable**

Whether the impugned letter was published

9. The 1st Appellant conceded that he wrote the letter complained of and the 2nd Appellant conceded that he published it to the church congregation in the presence of the Respondents and their families. In view of the admission, it follows that the fact of the publication, the content of the publication and the fact that the publication referred to the Respondents was proved. (See Grace Wangui Ngenye V. Chris Kirubi & Another [2015] eKLR).

Whether the impugned letter was defamatory

10. In the case of Joseph Njogu Kamunge V Charles Muriuki Gacharin [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.**

11. 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."

12. The rule requires that the defendant, (*in this case Appellants*) not only give particulars stating which of the words complained of they allege are justified and true but of the facts and matters they rely on in support of the allegation that the words are true. (See Riley Falcon Security Services Ltd v Nairobi Star Publication Limited [2016] eKLR).

13. The genesis of this claim is stated to be an alleged fight that took place between the 2nd and 3rd Respondents on 21.08.12 at New Apostolic Church Maseno-Lwanda Branch which was denied by the Respondents and their witnesses.

14. Following the alleged fight, the 1st Appellant wrote a letter dated 22.08.12 which was on 23.08.12 published by the 2nd Appellant to the church congregation in the presence of the Respondents and their families. The letter accused the 1st Respondent of having sexual

relationship with the 2nd and 3rd Respondents and other married women.

15. I have considered the evidence on record and no evidence was tendered by the Appellants to prove on a balance of probability that there was indeed sexual relationship between the Respondents or that the 1st Respondent was engaged in immoral scandals with many other people's wives as published in the letter in question.

16. From the wording of the letter, I am persuaded that the language used was deliberate, reckless and disproportionate to the facts. The words complained of, in their natural and ordinary meaning associate the Respondents and particularly the 1st Respondent to adultery not only with the 2nd and 3rd Respondents but with other unnamed people's wives. The words are plain and unambiguous and required no further evidence of their meaning.

17. From the evidence on record, Respondents and their families ceased being members of the church where the letter was published. For the Appellants to allege that the letter did not discredit the Respondents would in the circumstances of this case therefore not be factual.

18. This court holds that a reasonable person would understand the words in the letter complained of in a defamatory sense and the trial court's finding that they were defamatory was therefore well founded.

19. Section 16A of the Defamation Act provides that: -

In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:

Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.

20. In **Butt V Khan (1978) eKLR** it was held that an appellate court should not interfere with the decision of the trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates.

21. I find that the learned trial magistrate's discretion with regard to damages was well exercised and I have no reason to interfere with it.

22. In view of the foregoing analysis, I have come to the conclusion that this appeal has no merit and it is dismissed with costs to the Respondents.

DATED AT KISUMU ON THIS 22nd DAY OF October 2020

T.W. CHERERE

JUDGE

Court Assistants - Ms. Amondi/Ms. Okodoi

For Appellants - Mr. Mbeka for Okeyo Ochiel & Co Advocates

For Respondents - Mr. Maube for Maube Muyeya & Associates