



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 14 OF 2018 [DEFAMATION]

CORAM: HON. R.E. ABURILI

PASCAL OBONYO AGWENA.....1ST APPELLANT

PETER WERE AJULU.....2ND APPELLANT

EDWARD OCHAYE.....3RD APPELLANT

ROSEMARY OGUTU.....4TH APPELLANT

VERSUS

SIMON JUMA ODIYO.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of Hon. Mr. M. Obiero, PM, Bondo vide Bondo PM's Court Civil Case No. 102 of 2016.
2. In the said case, the Respondent herein Simon Juma Odiyo was the Plaintiff whereas, the appellants herein Pascal Obonyo Agwena, Peter Were Ajulu, Edward Ochaye and Rosemary Ogutu were the Defendants.
3. From the pleadings and witness statement dated 10/10/2016, the Plaintiff alleged that on 19/8/2016 the defendants jointly with other members of Wichlum Beach Management Unit of the plaintiff was its Chairman wrote a letter addressed to Bondo Sub-County Fisheries Office in which they attacked the character of the plaintiff as the Chairman of Wichlum Beach Management Unit.
4. The Plaintiff claimed that the words used in the said letter were defamatory and malicious and that they were meant to attack and injure the character of the plaintiff who is an upright member of the society.
5. The Plaintiff then particularized malice on the part of the defendants and alleged that the impugned letter was circulated widely to various offices and personalities and that as a consequence, the plaintiff, an elected BMU Chairman and businessman suffered serious injuries both on his character and reputation and had caused public shame and rebuke on his reputation.
6. Further, that his business had suffered great loss.
7. The plaintiff prayed for general damages for defamation and costs of the suit and interest.
8. The defendants entered an appearance dated 30/5/2017 and filed a statement of defence jointly. The same is dated 27/6/2017 denying all the allegations leveled against them by the plaintiff as far as the alleged defamation of character was concerned.
9. Concerning the impugned letter, the defendants stated that the same was not defamatory or malicious but that it was a valid and factual complaint made to the right authorities vested with the power to investigate and make recommendations.
10. They denied the particulars of malice or any loss and urged the court to dismiss the plaintiff's suit with costs.
11. The trial magistrate after hearing the parties made his determination on 11/4/2017 allowing the plaintiff's case against the defendants jointly and severally and awarded the plaintiff a sum of Kshs. 600,000 as general damages. He also awarded to the plaintiff costs of the suit and interest from the date of the judgment.

12. Dissatisfied with the judgment and decree of the trial court, the defendants, now appellants filed this appeal through a memorandum of appeal dated 12th June 2018 complaining, quite elaborately and argumentatively that:

a) The Learned Trial Magistrate correctly stated the Respondent's case in detail in his judgment before his analysis and determination of the case, but erred in law and in fact, by failing to give an equal treatment of the Appellant's case, which he dealt with in perfunctory and casual manner, with the result that in his analysis and determination of the case, he ignored the critical uncontroverted testimony of the Appellants, which had demonstrated that the letter complained of to have been defamatory in its contents, was in fact written in good faith without any malice, by the Appellants on the basis of genuine concerns arising from genuine and reasonable incidents, from which the Appellants, as elected representatives of their membership in Wichlum Beach Management Unit were entitled to raise the issues contained in the letter complained of, to the relevant officers to whom the said letter was written to resolve the issue in the proper course of business.

b) As a result of the learned trial magistrate's foregoing error of fact and law, he failed to appreciate that the vital ingredient of malice required in the tort of defamation, was lacking in the evidence before the court, and hence the finding of liability against the Appellants which he reached could not have been sustainable.

c) The learned trial magistrate erred in law and in fact, in failing to appreciate that proof of the ingredient of malice, is an integral part of the ingredients of the tort of defamation, without which there could not have been a finding of liability against the Appellants, with the result that the learned trial magistrate reached an erroneous decision in his judgment.

d) The learned trial magistrate erred in law and in fact in failing to appreciate that even if he was justified in reaching a finding that the contents of the said letter was indeed defamatory as alleged by the Respondent, he failed to appreciate that the Appellants' uncontroverted evidence on record as read with the sworn testimony of the Respondent and his documents produced in evidence, established that the said letter was in the nature of a complaint lodged by the Appellant in their capacity as elected representatives of the membership of their recognized group and the public, on an issue of public issue in relation to the conduct of the Respondent, in his capacity as a person holding public office, where the complaint sought investigation into the allegations of misconduct, and lodged with the relevant office of government in the department of Agriculture, Livestock & Fisheries, under the Directorate of Fisheries, who had a corresponding duty, by law, to undertake such investigations and take appropriate action, for public good, which circumstances, constituted a privileged occasion, in law, which, if considered, the court would not have reached that finding of liability against the Appellants.

e) The learned trial magistrate erred in law and in fact by failing to give a fair consideration of the nature of the defence of qualified privilege presented by the Appellants, both in their Statement of Defense and in their testimony, cross examination of the Respondent and the very documents produced by the Respondent which all established that defence of qualified privilege.

f) As a result of the learned trial magistrate's error in failing to give a fair consideration of the nature of the defense of qualified privilege, he erroneously dismissed the same on account of what he considered to be lack of evidence of any report made by the Appellants to the Police on the alleged criminal activities of the Respondent, yet the nature of the defamatory allegations was not that the Respondent had himself personally committed criminal activities set out in the letter, but that he had been connected to the person who used poison and gave him money, he encouraged theft of nets and engines, he does not listen to his committee members and assembly, and that he had no clear report on CDF finances on building an alleged Police Post, whose purport and meaning could not reasonably be construed as criminal activities on the Respondent's part, where such allegations are not capable of any culpability in criminal law, for construed as proof of any malice for defamation, or would have otherwise negated the defense of qualified privilege.

g) In the alternative, and without prejudice to the foregoing, the award of General Damages made by the court of Ksh. 600,000/= was manifestly too high in the circumstances of this case, contrary to the principles of such awards in similar cases, which constitutes an erroneous exercise of discretion, and ought to be reduced substantially.

13. The appeal was canvassed by way of written submissions adopted by the court as filed by both parties' advocates on the directions of the court on 29/4/2019.

14. This being a first appeal, this court is enjoined by Section 78 of the Civil Procedure to reassess, reevaluate and reanalyze the evidence adduced before the trial court a fresh and arrive at its own independent conclusion bearing in mind that it never heard nor saw the witnesses testify and therefore this court may not attack the demeanor of the witnesses as it is only the trial court that had the advantage of observing them. (See *Abok James Odera 7/A A. J. Odera & Associates V John Patrick Machira 7/A Machira & Co. Advocates [2013] eKLR and Kenya Ports Authority V Kushton (Kenya) Limited (2019) 2EA 212*.)

15. But before delving into the reconsideration of the evidence before the trial court, evaluating and drawing my own conclusions, my attention has been drawn to the memorandum of Appeal dated 12/6/2018 and filed in court on 14/6/2018.

16. This court observes that the impugned judgment was delivered on 11/4/2018 by Hon. M. Obiero, PM, Bondo. That being the case, the question that I must answer is whether the appeal is competently before this court. I say, 'competently' because this court exercises jurisdiction and therefore it must first and foremost determine whether it has the necessary jurisdiction to hear and determine this appeal.

17. Jurisdiction is the power vested in the court by law to adjudicate upon, determine and dispose of a matter.

18. To a court, jurisdiction is important because it forms the basis for the court's power to grant or to refuse the relief sought if the court declines jurisdiction, then the matter will be struck out without reaching the merits of the case and without the court granting the reliefs sought, even if the claimant would otherwise have been entitled to it. In motor vessels '*Lilian S' V Caltex Oil (K) Ltd [1923] 1EA*. Justice

Nyarangi (JA) as he then was explained the importance of jurisdiction as follows: -

“Jurisdiction is everything without it, a court of law has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.” The holding was also appreciated by the Court of Appeal in Mumo Matemu V Trusted Society of Human Rights Alliance & Others where it was observed.

“It is trite that jurisdiction of any court provides the foundation for its exercise of judicial authority. As a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order.”

19. Because of the significance of jurisdiction, a court of law must determine the question of jurisdiction upfront before embarking upon matters of the merits of the case. This is because, to proceed with a matter to its merits where there is no jurisdiction is a waste of time as the eventual decision will be of no consequence. Thus, where a court takes upon itself to exercise jurisdiction, which it does not possess, its decision amounts to nothing.

20. In the instant case, the court must interrogate whether this appeal was filed within the statutory period of 30 days as stipulated in **Section 79G of the Civil Procedure Act** and if not, then whether this court has jurisdiction to hear and determine an appeal which is filed out of time without first obtaining leave of court to extend time as stipulated in the proviso to **Section 79G of the Civil Procedure Act**.

21. In **NicholasKiptoo Arap Korir Salat V IEBC & 7 Others [2014] eKLR**, the Supreme Court held that an appeal filed without leave could not later on be deemed as properly on record. Albeit the above appeal related to election petitions where stringent timelines are set by the Election Act, the case is relevant as far as time for filing of any other appeal is concerned save that in cases like the instant one, a party can obtain leave to enlarge the set timelines unlike in election petitions. Thus, where such time frames are not adhered to, then a party must first obtain leave of court without which the court is deprived of jurisdiction to hear and determine a stale appeal.

22. **Section 79G of the Civil Procedure Act** stipulates: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order provided that an appeal may be admitted out of time if the appellant satisfied the court that he had a good and sufficient cause for not filing the appeal in time.”

23. In this case, the court is not dealing with any application for leave to file an appeal out of time. It is dealing with an appeal that ought to have been filed within 30 days from the date of judgment delivery in the lower court which was on 11/4/2018, and instead of the appeal being filed in the High Court by 12th May 2018, the same was filed in Court on 14/8/2018 vide Receipt No. 8552150 of Kshs. 1500/= by the firm of Owiti Otieno & Ragot Advocates for the appellants.

24. The appellants were ably represented by an advocate of their own choice at the trial proceedings before the subordinate court. Upon the judgment being delivered on 11/4/2019, the trial court granted 30 days stay of execution and on 5/7/2018 a ruling on bill of costs was delivered taxing the Respondent’s bill against the appellants at Kshs. 132,060/=.

25. It was not until 14/6/2018 when the appellant filed this appeal and in the memorandum of appeal dated 12/6/2019 there is nothing to indicate that the appeal was being filed out of time pursuant to an order of this court extending time.

26. There is also nothing in the appellant’s submissions to show that after filing the appeal out of the statutory period of 30 days, the appellant ever sought and obtained leave of court enlarging such period as stipulated in the proviso to **Section 79G of the Civil Procedure Act**.

27. For reasons that the appeal herein was filed more than two months (60) days from the date of judgment delivery in the lower court without leave of court, and as the appellant did not seek extension of time to deem the appeal as duly filed within the stipulated 30 days period, I have no hesitation in finding and holding that this appeal is incompetent. The court’s jurisdiction is divested from hearing and determining an incompetent appeal.

28. The appeal is amenable to striking out in limine without delving into its merits as the court will be wasting judicial time and resources in determining the merits of an incurably incompetent appeal. The appellant did not bother to invoke the unfettered discretion of the court to seek for extension of time within which the appeal should have been filed.

29. In the circumstances, I have no hesitation in striking out and I hereby strike out this appeal which is not properly before the court.

30. As the Respondents were not vigilant enough to raise this issue before the appeal was heard and reserved for judgment, and as I have not determined the merits of the appeal, I order that each party shall bear their own costs of the incompetent appeal.

Dated, signed and Delivered at Siaya, this 26th day of June 2019.

R.E. ABURILI

JUDGE