



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 177 OF 2016

BENARD ONYONKAAPPELLANT

VERSUS

NATION MEDIA GROUP LIMITEDRESPONDENT

(Being an Appeal from the Judgment of the Principal Magistrate Honourable H. O. Barasa in Eldoret Civil Case No. 426 of 2015, dated 18th December, 2016)

JUDGMENT

The appellant filed a plaint dated 12th June 2015 seeking compensation for alleged defamation by the respondent as a result of a publication on 2nd October 2014. The respondent denied the claim and judgment was delivered on 8th December 2016 dismissing the suit.

APPELLANT'S CASE

The appellant filed a memorandum of appeal citing the following grounds of appeal.

- a) The magistrate erred in law and in fact in holding that the case had not been proven to the required standard.
- b) The magistrate erred in dismissing the suit.
- c) The magistrate erred in holding that had the case succeeded he would have awarded the appellant kshs. 50,000/- in damages which is disproportionately low.
- d) The magistrate erred in law and in fact by failing to hold that the appellant's case was unchallenged and hence the case ought to have succeeded.
- e) The decision as a whole is legally untenable and it ought to be set aside.

There are no submissions on record for the appellant.

RESPONDENT'S CASE

The respondent submitted that the appellant's only evidence in support of his case was a newspaper cutting of a publication that he produced and a demand notice to the respondent. The trial court analysed the evidence before it well, cognizant of the ingredients necessary to prove defamation and relied on the case of John Edward v Standard Limited in setting the requisite elements. Two of the required elements, that the statement must refer to the plaintiff and that the statement must be published by the defendant were not contested by the respondent. However, the other two; that the statement must be defamatory and must be false were contested by the respondent. The court analysed the evidence and concluded that the appellant had not proven that the published words were not a true account of what transpired in court. Having failed to prove that the publication complained about was false, there was no basis upon which the court could make a decision as to whether the words published were defamatory.

The appellant and his witnesses did not offer any testimony on how the publication affected his business and therefore the hypothetical assessment of general damages of Kshs. 50,000/- was generous in the circumstances.

The burden of proving the case falls on the plaintiff and the appellant's concern should be only whether he proved his case to the required standard. It matters not whether the defendant offered any testimony.

ISSUES FOR DETERMINATION

- a) Whether the trial court erred in finding that the case had not been proven to the required standard.
- b) Whether the proposed award of kshs. 50,000/- was disproportionately low
- c) Whether the trial court erred in failing to hold that the appellant's case was unchallenged and thus ought to have succeeded

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE CASE HAD NOT BEEN PROVEN TO THE REQUIRED STANDARD

In JOHN WARD – VS- STANDARD LIMITED [2006] eKLR Osiemo J. stated-

“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.”**

A perusal of the records and the proceedings shows that the plaintiff failed to prove that the statements were defamatory or false and as a result the ingredients for the tort of defamation were not satisfied. The trial court did not err in finding that the case had not been proven to the required standard.

WHETHER THE PROPOSED AWARD OF KSHS. 50,000/- WAS DISPROPORTIONATELY LOW

In John v MGN Limited [1966] 2 ALL ER 35 P47, cited with approval by the Court of Appeal in Nation Media Group Ltd & 2 others V John Joseph Kamotho & 3 others [2010] eKLR it was stated:

“in assessing the appropriate damages for injury to reputation the most important factor is gravity of the Libel: the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the publication is also very relevant: a libel published to millions has greater potential to cause damage than libel published to a handful of people. A successful litigant may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place.”

The Appellant failed to demonstrate the extent to which the publication injured or affected his business. Therefore, the hypothetical assessment of damages was not disproportionately low. Further, the appellant has not provided what he expected the assessment of damages to be.

WHETHER THE TRIAL COURT ERRED IN FAILING TO HOLD THAT THE APPELLANT'S CASE WAS UNCHALLENGED AND THUS OUGHT TO HAVE SUCCEEDED

The burden of proof rests with the plaintiff and does not change, whether the defendant challenges the case or not. In Peter Maina Ndirangu t/a Express Service Agency v Standard Group Limited [2016] eKLR the court held;

“The Defendant did not adduce any evidence at the trial. This however, did not absolve the Plaintiff from his duty to prove his case on a balance of probability. All it did was to make the Plaintiff's task of proving his case on a balance of probabilities easier because the case is one-sided and the court does not have to compare the case of the Plaintiff with any other evidence from the Respondent but burden and standard of proof remained the same.”

The Appellant failed to satisfy the burden of proof thus the trial court was correct in its findings. Consequently, this appeal fails with costs to the Respondent

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of October, 2019

In the absence of:

Mr. Momanyi for the appellant

Mr. Mburu for the respondent

Ms Abigael – Court assistant