



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 105 OF 2016

[Being an Appeal from the judgement and decree of Chief Magistrate, Hon, Racheal Ngetich delivered on 12th February 2016 in Nairobi CMCC No. 6640 of 2008]

(CORAM: F. GIKONYO J.)

KENYA POWER AND LIGHTNING COMPANY LIMITED.....APPELLANT

VERSUS

LILIAN NKATHA KINOTI T/A MEDIPHARM (K) CHEMIST.....RESPONDENT

JUDGMENT

1. The appellant herein was the defendant in the trial Court. The Respondent was the plaintiff. The Respondent filed a plaint dated 24th October in which she sought orders as follow; General and punitive damages for illegal disconnection of power, general and aggravated damages for defamation, and damages for all the medicines that were destroyed as a result of exposure to high temperatures.
2. The Appellant filed its defence on 8th July 2009 denying the particulars of the illegality and breach in *toto*. The appellant also averred that the Respondent was supplying power to the defaulting co-tenants whose power supply the appellant had cut off.
3. In response to the defence the respondent filed its reply to defence on 6th August 2009 denying the appellant's allegations that she had supplied power to the co-tenants.
4. The matter proceeded for hearing. Two witnesses testified on behalf of the Respondent whereas the Appellant did not call any witnesses
5. The trial court found that he Respondent had proved its case on a balance of probabilities. The learned Magistrate awarded the Respondent Kshs. 324,810/= being the sum of the Respondents medicine worth. Kshs 100,000/= for loss of business and Kshs 500,000/= for defamation making a grant total of Kshs. 924,810/=.
6. Aggrieved by the said determination the Appellant filed memorandum of Appeal dated 10th March enumerating four grounds of Appeal i.e.;
 - a. **That the learned Magistrate erred in law and in fact in finding that the Respondent suffered loss of business.**
 - b. **That the learned Magistrate erred in law and in fact by compensating the Respondent Kshs. 100,000/= (One Hundred Thousand) for the alleged loss of the business that are excessive in the circumstances.**
 - c. **That the learned Magistrate erred in law and in fact by finding that the Respondent had been defamed by the Appellant's actions.**
 - d. **That the learned Magistrate erred in law and in fact by awarding the Respondent an inordinately high amount of damages for compensation amounting to Kshs. 500,000/= (Five Hundred Thousand) that are excessive in the circumstances.**
7. On 2/2/2017 parties files a consent compromising prayers (1) and (2) of the memorandum of Appeal. Therefore the outstanding prayers for this Court's determination are prayers 3 and 4.
8. On 15/7/2019 the Honourable court directed parties to canvass the appeal through written submissions. Both parties have filed their respective submissions.

Submissions of the Parties

9. The appellant submitted that the pleading did not disclose the words and statements complained of hence the elements of defamation were not proven. In particular the appellant submitted that the disconnection had not been selectively done to deprive the Respondent of the use of electricity at her Pharmacy while other rooms in the same premises remained lit. At no point was the Respondent's name mentioned by the appellant agents. The appellants employees did not in any way intend to attack the Respondents repute. Lastly that the Respondent did not prove that as a result of the alleged defamatory words she suffered damage. The appellant relied on the following cited authorities; **Veronica Wambui vs Michael Wanjohi Mathenge [2015] eKLR**, **Gerald Kaura Muthamia vs Cooperative Bank of Kenya [2017] eKLR**, **Joseph Musyoka Kalii vs Musyoka Kulatya [2014] eKLR**, **Musikari Kombo vs Royal Media Services Ltd [2018] eKLR**, **Phineas Nyaga vs Gitobu Imanyara [2013] eKLR**, **Wycliffe. A. Swanya vs Toyota East Africa Ltd & Anor [2009] eKLR**, **James Omenda Abusa vs Lydia Atieno Onyango [2015] eKLR**.

10. The respondent submitted that the Appellants failure to call any witnesses and or file submissions in the trial court violated principles of fair trial because those issues were not canvassed hence the same cannot be raised as a ground of appeal. He also opined that she had disclosed how disconnecting of electricity in her business had lowered her dignity in paragraph 12 of the plaint and she further called a witness to prove this averment. That failure to give particulars of the exact words used is not fatal and is curable under provisions of **Article 159 (2) of the Constitution of Kenya**. That the award of damages was discretionary and in this case the same was sufficient and comparable to decided cases. The Respondent relied on the cited authorities of **Stallion Insurance Co. Ltd vs Ignazio Messina & C.s.p.a [2007] eKLR**, **Joseph Njogu Kamunge vs Charles Muriuki Gacharia [2016] eKLR**, **CAM vs Royal Media Services [2013] eKLR**.

ANALYSIS AND DETERMINATION

11. This being a first appeal the Court is duty bound to re-evaluate the evidence on record and come to its own findings. See **Selle –vs- Associated Motors Co. Ltd (1986) E.A. 123**.

12. **Pw1 (the Respondent)** testified that she entered into a contract for supply of power in her business premises in Kangemi Kachungwa Building. That on 14/10/2008 her power was disconnected despite the fact that she had paid her bills; the appellant gave reasons i.e. the owner of the building and the tenants were in arrears. It was also her testimony that she informed the appellant that she had a separate meter from her co-tenants. She later informed her lawyer to do a demand letter which was responded by the Managing Director of the appellant. The appellant would however reconnect the power after one month.

13. The Respondent told the court that she experience loss and was defamed since her customers could not understand how she could not pay her bills.

14. **Pw2 Rose Nkirote Muriungu** testified that she is a friend of the Respondent and was present when Pw1's electricity was disconnected. That she was informed by the appellants officials that they were getting power illegally and that's why they were disconnecting it. She told the court that she was shocked and feared that if the respondent was getting power illegally then her medicine would also be fake. That the appellant's disconnection of the power from the pole showed that she was using the power as a thief. That before the event she knew the Respondent as a straightforward person, honest and a person of integrity. After that her trust went down. She however saw the Respondent after one year and she explained what happened. Before her explanation she could not trust her.

Some preliminary arguments

15. Preliminary arguments have been made by the Respondent that the appellant's failure to call witnesses in the trial court and to plead a defence to the prayer for defamation prevents them from raising the issue in this appeal.

16. I have looked at the pleadings and from its defence the defendant denied the averments made in paragraph 12 of the plaint. The appellant also had the occasion to cross-examine the respondent's witnesses during the hearing on the matter of defamation. Accordingly, the appellant rightfully presented the issues in the grounds of appeal in the memorandum of appeal.

17. The second argument was by the appellant; to the effect that the Respondent had failed to specify the particulars of defamation in the plaint. I have also looked at the plaint. The prayer for exemplary and aggravated damages for defamation has its bearing on paragraph 12 of the plaint. The same provides as follows-;

12. Further for reasons of the defendant's its servants and or agents action in disconnecting her business premises electricity power, the plaintiff's esteem and dignity has been lowered by her friends, customers and public who now hold her in odium and contempt on the basis that she cannot pay her power bills and as a result the plaintiff has greatly been defamed and claims damages for defamation as well as exemplary and aggravated damages for defamation in that the defendant notwithstanding notice given has refused to offer apology and reconnect her power promptly.

18. The Provisions of **Order 2 Rule 7 (1) of the Civil Procedure Rules** states as follows:

"Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense."

Order 2 Rule 7 (3) also provides that:

"Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters

complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.”

19. The provisions of Order 2 Rule 7 do not prescribe a strict rule that particulars of defamation must be provided in any particular format. From the wordings in paragraph 12 the Respondent clearly stated matters complained of which she believes constituted defamation. She pleaded that the action of disconnection impute that and was perceived by members of the public that the Respondent could not pay her medical bills thus, demeaned her status. The paragraph and reading of the plaint as a whole made out a reasonable cause of action. In this case the Respondent did not plead malice hence there was no obligation in order 2 rule 7. In **Susan Rokih v Joyce Kandie & 6 others [2018] eKLR** the court held;

Though it is true that the plaintiff did not expressly plead malice against any of the defendants and there was therefore nothing to disclose in terms of particulars thereof, my reading of Order 2 Rule 7 (3) leads me to conclude that a plaintiff in an action for libel or slander need not plead malice in the plaint but where malice is pleaded, failure to state particulars on which the claim is made does not automatically render a plaint defective.

20. The Appellant herein was also granted a chance to plead justification and/or fair comment in his defence and the Respondent equally had a right to reply. The trial court was therefore right to consider the averment made by Respondent/plaintiff.

21. A claimant in a defamation suit ought to principally establish in no particular Order:

i. The existence of a defamatory statement;

ii. The defendant has published or caused the publication of the defamatory statement;

iii. The publication refers to the claimant.

See **Musikari Kombo v Royal Media Services Limited [2018] eKLR**

22. The Distinction between libel and slander has been defined in **Gatley on Libel and Slander 11th Edition Pg. 92** as follows;

“Libel is committed when defamatory matter is published in a “permanent” form or in a form which is deemed to be permanent. Defamation published by spoken word or in some other transitory form is slander. In English Law libel is always actionable per se. that is to say the claimant is not required to show any actual damage, and substantial rather than merely nominal damages may be awarded even in the absence of such proof, whereas in slander, with four exceptions, the cause of action is not complete unless there is “special” damage i.e. some actual temporal loss. The exceptional cases are;

(1) Where the words impute a crime for which the claimant can be made to suffer physically by way of punishment.

(2) Where the words impute to the claimant a contagious or infectious disease.

(3) Where the words are calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication.

(4) By a slander of Women Act 1981, where the words impute adultery or unchastity to a woman or girl.

See also **James OmendaAbusa v LudiaAtieno Onyango [2015] eKLR**

23. The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. In determining whether words are defamatory there are two stages, first to decide what they mean and then to decide whether that meaning is Defamatory (See, **Gatley on libel and Slander pg.37**). In this case the plaint did not disclose the defamatory words used by the appellant’s officials. Pw2 only averred that he was informed that the Respondents electricity was disconnected because the respondent’s connection was illegal. The Respondent did not therefore prove the defamatory statement. The author of the alleged defamatory statement is also not known.

24. Besides words written or spoken, other actions or objects may convey an imputation defamation of some person either of themselves or in their context. A mere act may convey a defamatory imputation if it would be so understood by reason of a conventional meaning. In this case the Respondent opines that the appellant’s action of disconnection of electricity had a defamatory imputation. The appellant has alluded to justification of his actions from the fact that the Respondents co-tenants were in arrears. Even though the Appellant wrongfully disconnected electricity to the Respondent’s business premises, there is nothing which shows that the intention of the appellant in disconnecting electricity was to defame the appellant. Their claim of justification is reasonable and their actions were not directed to the appellant but defaulting co-tenants. Hence the two other elements of defamation i.e. the defendant has published or caused the publication of the defamatory statement and that the publication refers to the claimant were not proved by the Respondent.

25. I therefore agree with the appellant that the learned Magistrate erred in law and in fact by finding that the Respondent had been defamed by the Appellant’s actions.

26. Just in passing, General damages serve three functions; to act as a consolation to the claimant for the distress he suffers from the

publication of the statement; to repair the harm to his reputation (including, where relevant his business reputation) and as vindication to his reputation. The respondent is a member of a professional calling and running her own clinic. Thoughtless disconnection would have caused harm to her professional and business reputation. In addition, the Appellant ought not to disconnect electricity for persons who have paid their bills. It is their duty to establish which meter requires disconnection. Careless actions by the Appellant in this case increased the injury to the Respondent's business. These are important considerations in awarding general damages and aggravated damages for inconvenience and illegal disconnections. In a properly argued case, general damages and aggravated damages for inconvenience and illegal disconnection of power are deserved and should be awarded.

27. In the upshot, the appeal herein succeeds in part in prayer 3 of the Memorandum of appeal. The award of Kshs.500,000/= granted as general and aggravated damages for defamation is hereby set aside. All the other awards as made by the trial court remain undisturbed.

28. Each party shall bear the own costs of this appeal.

Dated and signed in Nairobi this 19th day of October 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 23rd day of October 2019

L. NJUGUNA

JUDGE