



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 152 OF 2016

DAVID KIRUL.....APPELLANT

VERSUS

TONNY KETTER.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable Obina SRM delivered

on 4/10/2012 in Kapsabet Senior Principal Magistrate Court Civil Case No. 271 of 2012).

JUDGMENT

1. The appellant being aggrieved by the decision of the Honorable OBINA (S.R.M) in Kapsabet PMCC NO.271 of 2012 delivered on 21/2/2012 prefers this appeal on the grounds :-

- i. That the learned trial magistrate erred both in law and in fact in pronouncing judgment in favor of the respondent when there was no legal or otherwise basis of doing so in light of there being no sufficient evidence adduced before him.
- ii. That the Honorable trial court lacks jurisdiction to hear the suit since the suit was time barred and leave thereof was not validly granted.
- iii. That the decision of the learned magistrate is against the weight of the evidence tendered in court by both the appellant and his witnesses.
- iv. That the learned trial magistrate erred in law and in fact in pronouncing judgment in favor of the respondent whereas the respondent had not proved appellant's liability on a balance of probability.
- v. That the learned trial magistrate erred in law and in fact by holding that the respondent had suffered loss and damages as a result of the appellant's utterances contrary to the evidence on record.
- vi. That the learned trial magistrate misdirected herself by failing to apply or applying wrong principles on the assessment of damages awardable to the respondent thus awarding damages which were manifestly excessive.
- vii. That the learned trial magistrate erred in law and in fact by failing to consider the evidence of the appellant.
- viii. That the learned trial Magistrate erred in law and in fact in making an award of damages that was manifestly excessive.
- ix. That the learned trial Magistrate erred in law and fact in making an award for damages when the same was not specifically proved.
- x. That the learned trial Magistrate erred in law and in fact by taking into account irrelevant factors thereby arriving at an erroneous judgment.
- xi. That the judgment of the learned magistrate is in the circumstances unfair and unjust.

2. Reason whereof the appellant prays for judgment against the respondent and asks the court for orders that the judgment and the decree of the subordinate court be set aside and be substituted with an order dismissing the respondent's suit with costs.

3. The appellant submitted that the appellant did not utter the alleged defamatory words as claimed in the plaint and that he was not in the

company of PW2 on the day of the incident. That he only recalled having a court battle with the respondent and that might have made the respondent feel bad and hence maliciously filing the suit.

4. The respondent was unable to prove all or any of the elements required to prove a defamation case. They relied on the case of ***Phineas Nyagah vs Gitobu Imanyara(2013)Eklr.*** where the court enumerated the elements of tort of defamation as follows:-

- a. The words must be defamatory
- b. The words must refer to the plaintiff.
- c. The words must be malicious.

5. A defamation claim in its entirety is based on the defamatory remarks alleged to have been uttered and the plaintiff is obliged to state verbatim the words uttered. The defamatory words stated in the plaint, by PW1 and PW2 in his statement and during cross examination do not tally.

6. PW1 clearly stated that the defamatory statements were made in the presence of four people two of whom were strangers which does not qualify to be called public or society and thus it is not true the name was damaged.

7. The alleged utterances were not directed to the respondent. He testified that he was not at the place the defamatory remarks were made and therefore relied on hearsay.

8. The trial magistrate erred in awarding a high sum of Kshs.2,000,000 in damages as there was no evidence available on record. The respondent has not proved that he was shunned, lost his reputation or sustained any other damage that can be directly attributed to result from the alleged defamatory remarks.

9. The respondent submitted that the defamatory words: ‘*man is finished financially, that is why he ran away to south Africa and Australia and that the appellant does not pay workers*’. The words were meant to mean that the respondent is a bankrupt man who is unable to settle his debts and also pay his workers.

10. The words uttered lowered the esteem of the respondent in the society and the learned trial magistrate captured correctly that the respondent was defamed by the appellant.

11. Before the appeal was filed, the appellant had made part payment of the decretal amount of Kshs. 500,000 and thus the appeal is partly compromised.

ISSUES FOR DETERMINATION

The following are the issues for determination;

- a) Whether the plaintiff has proven the ingredients necessary for the tort of defamation.
- b) Quantum of damages payable.

12. In ***Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] Eklr*** the court held;

The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiffs’ reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons.....

Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice The defamatory words must be shown to have been published by the defendant.

The foregoing ingredients of defamation were reiterated in the case of *John Edward vs Standard Ltd* where the court stated 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.*"

13. In Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR the court held;

A defamatory statement is presumed to be false, unless the defendant can prove its truth. Defamation law puts the burden of proving the truth of allegedly defamatory statements on the defendant, rather than the plaintiff.

14. The burden of proving the truth of the alleged statements is therefore on the defendant. The defendant has not proven that the statements made were true, especially pertaining to the alleged bankruptcy and that the respondent was useless. The statement was therefore false.

15. The appellant, in my opinion, have failed to put up a plausible appeal which is within the guidelines set, the defendants committed the tort of defamation.

16. As regards to quantum, *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."

17. The appellant did not suffer severe reputation injury from the defamation. The general damages of Kshs. 2,000,000/- was high in the circumstances, calling for its adjustment to a fair and more reasonable sum of 1,000,000/-. The court therefore settles on the said amount.

Since the appeal has partly succeeded no order is made as to costs.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF DECEMBER, 2019

In the presence of:

Ms Karuga for the appellant

And absence for S.K Kitur for the respondents

Ms Abigael – Court assistant

Ms Karuga :-

We pray for 30 days stay.

COURT:

30 days stay of execution is granted.

SIGNED

S.M GITHINJI

JUDGE