



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 123 OF 2015**

**BERNARD MUINDE MUTISYA.....APPELLANT**

**VERSUS**

**GEDION KITHUKA MUTUA.....RESPONDENT**

**(Being an appeal from the judgement and decree of the Honorable C. Kisiangani RM in Machakos CMCC 467 of 2012 delivered on 4.5.2018)**

**BETWEEN**

**BERNARD MUINDE MUTISYA.....PLAINTIFF**

**=VERSUS=**

**GEDION KITHUKA MUTUA..... DEFENDANT**

**JUDGEMENT**

1. The Appellant herein sued the Defendant in Machakos CMCC 467 of 2012 for general damages for defamation. According to the plaintiff, on or about 15<sup>th</sup> April, 2012, the Respondent published defamatory words in Kamba language whose English translation was:

***“I want you to demand your money from me so that you can also pay me money which you appropriated with the head teacher to your own use.”***

2. According to the Appellant these words were intended to mean that the plaintiff along with the head teacher misused the defendant’s money; that the Appellant is a thief/corrupt, a thief and untrustworthy; and that the Appellant is irresponsible. It was pleaded that the words were uttered in the presence and hearing of many people in particular **Simon Muthiani Ngumbi, Francis Kitulu Muthungu and Elizabeth Nthangu Muinde**. It was the Appellant’s case that as a result the plaintiff’s reputation was put into ridicule, disrespect and contempt in the eyes of the right thinking members of the local society from where the Appellant hails. The Appellant therefore claimed damages.

3. In his defence, the defendant denied the publication and translation of the words complained of; he denied the allegation that the appellant’s reputation was put into disrepute and challenged the jurisdiction of the court on the ground that the occurrence took place in Kyaume within Makueni District.

4. After hearing the matter, the learned magistrate found that the appellant ought to have proven the damage that he suffered as a result of the lowered reputation and having failed to do so he failed to prove his case on a balance of probability and dismissed the suit with no order as to costs.

5. It is that decision that has provoked this appeal in which the Appellant challenges the findings of the learned trial magistrate regarding the finding of the failure to prove his case while the Respondent has taken issue with the decision to deny him the costs of the case.

6. In his evidence the Appellant testified that he was a businessman operating a kiosk and selling livestock. On 15<sup>th</sup> April, 2012 he was in his said kiosk between 7.15pm to 7.20pm when the Respondent, his neighbor, went there and uttered words pleaded in the plaintiff in *Kikamba* language in the presence of the said **Simon Muthiani Ngumbi, Francis Kitulu Muthungu and Elizabeth Nthangu Muinde**. The Appellant took the said words to mean that he was a thief and untrustworthy person with no respect in the society. The Appellant denied that he was a thief and being a businessman, the said utterances spoilt his name hence the suit for compensation. According to the Appellant, from his

records, the Respondent had taken goods on credit for Kshs 120/- though he did not produce the record. He denied that he had squandered money with the head teacher of Kyayoni Primary School. It was his case that though he was still running the kiosk, his customers had reduced from that day though he did not produce any accounts to prove this. In his evidence although the customers were still going to his shop they were not as frequent as they used to be. The Appellant lamented that by being said that he squandered money the Respondent labelled him a thief yet he was a teacher in church. He however stated that he was still the chairman of the school. The appellant however stated that the Respondent some people to him to seek forgiveness.

7. PW2, **Elizabeth Nthangu Muinde**, the Appellant's wife testified that on the said day at 7.30pm he was in the said kiosk where she had gone to pack and carry the stock when the Respondent went and told the Appellant words to the effect that "*pay me my money that you squandered with Mailu*". According to the witness the said words meant that the Appellant was a thief or that he misappropriated the Respondent's money. It was her evidence that the Respondent was her teacher in 1993, He testified that those who were present were **Simon Muthiani, Nzoloi Mutua, Nzula and Mutinda** amongst other passer byes. In cross examination she stated that **Simon Muthiani** and **Daniel Musembi Kikuvi** were not there but **Nzoloi Mutua, Mwoka Ngula and Mutinda Wambua** were there. She stated that the kiosk was still in operation though not as profitable as it used to be. According to her the Appellant was the chairman of the school. She however stated that there was nothing in asking for repayment of a debt.

8. PW3, **Simon Muthiani Ngumbi**, testified that on the said date at around 7.30pm, Sunday, the Respondent went to the Appellant's kiosk, stood behind the appellant and said that the Appellant should ask for his money then the Respondent would ask the Appellant to pay the money he squandered with the headmaster. According to him those utterances were meant to portray the Appellant as a thief. He said that he was unaware if the Appellant's business was doing well and that he has gone there to buy paraffin. He stated that at that time he was taking tea at the Appellant's shop where tea is sold. According to the witness, other people present were **Nzoloi Mutua** who bought cigarettes and left, **Francis Kitulo** who was buying cigarettes, the Appellant's wife, **Mutinda Wambua** and **Mwoka Ngula** who were both taking tea.

9. At the close of the Appellant's case, the Respondent testified that the suit was malicious since during that period he was in Mombasa and came home on Monday. However, on 15<sup>th</sup> April, 2012, he was in Mombasa and was not aware of the reason he was sued. In his view at one point he was the Plaintiff's wife's teacher and she complained that the Respondent gave her heavy punishment hence that could have been the basis of the grudge. In cross-examination he reiterated that on the day of the alleged offence he was in Mombasa and that he returned on a Wednesday having left Mombasa on 20<sup>th</sup> April, 2012.

10. In her judgement the learned trial magistrate found that the teacher referred to in the offending statement was not disclosed and that the words in question did not name the Appellant. It was further found that it was not proved that the words the Appellant's reputation and character in the eyes of right thinking members of society. Accordingly, the court proceeded to dismiss the suit but with no order as to costs.

### **Determination**

11. I have considered the evidence and the submissions made on behalf of the parties herein.

12. However, before determining the above issues it is important to set out the principles guiding the law of defamation. In my view, defamation is rooted in our Constitution since under article 32(1) of the Constitution every person has the right to freedom of conscience, religion, thought, belief and opinion. This Article makes it clear that the freedom to express one's opinion is a fundamental freedom enshrined in the Constitution. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has a constitutional underpinning.

13. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. **Gateley on Libel and Slander, 8<sup>th</sup> Edition** at page 15 paragraph 31: "The gist of the tort of Libel and slander is the publication of a matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right thinking people generally."

14. Slander is defamatory matter that is in transitory form. It is only actionable on proof of special damages save for exceptional cases where it imputes a serious crime, disease, or attack on professional ability. See **Khasakhala vs. Aurali and Others [1995-98]1 E.A. 112.**

15. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Therefore, defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. This must be so because an injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See **J P Machira Vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**

16. There are two kinds of defamation; slander and libel. Slander is where a person orally or verbally utters defamatory words of and concerning another person whereas libel is where a person writes of and concerning another person defamatory statements or words. Slander and libel are therefore different forms of defamation. Libel consists of a defamatory statement or representation in permanent form and as opposed to slander, libel is punishable *per se* without proof of damage and the actual sum to be awarded is "at large". Although a person's

reputation has no actual cash value, the Court is free to form its own estimate of the harm taking into account all the circumstances.

17. The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. In this case the Court found that the words uttered meant that the Appellant misused some money with the head teacher. It was found that the statement imputed that the Appellant was a fraudster.

18. Secondly, the words must refer to the plaintiff. However, the court found that there was no reference to the Appellant. The Appellant called witnesses who testified and stated that the said words were addressed to the Appellant. As stated above, the speaker of the words must take the risk of his audience construing them as defamatory and in this case the witnesses construed the words as defamatory and were made in reference to the Appellant. To my mind there is no requirement that the words must mention the Plaintiff by name as long as they are directed at the Plaintiff. In this case all the witnesses stated that the utterances were directed at the Appellant.

19. Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself. The language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement, was false or did not care whether it be true or false will be evidence of malice. See **Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mangi** (supra). In the absence of any explanation as to why the said words were uttered one can only say that they were recklessly uttered and therefore were uttered maliciously.

20. To prove defamation, it is necessary for evidence to be adduced to show what third parties thought about the plaintiff as a result of the said publication. In this case the Appellant was the chairman of the school in question. It was contended that he, in conjunction with the head teacher were squandering the money. The Appellant testified that as a result of the said utterances, his customers reduced. However, none of the witnesses called by him stated that as a result of the said utterances they formed a dim view of the Appellant's character. Where no such evidence is adduced as happened in this case, there would be no basis upon which the Court would be entitled to find that the plaintiff was defamed unless the case falls under the category which is said to be actionable *per se*. There is, however, no tangible evidence on record that the Appellant's business was ruined as a result of the said publication apart from bare allegations.

21. Therefore, whereas I agree that the basis of the dismissal of the Appellant's case on the ground that there was no evidence that the words uttered were in reference to the Appellant and that the said words were defamatory and were maliciously uttered, was erroneous, there was no tangible evidence that any damages resulted from the publication of the defamatory matter apart from bare averments. That will however not do in defamation based on slander as opposed to libel. In effect while it is true that the utterances made by the Respondent against the Appellant amounted to a publication of falsehoods against the Appellant, there was no evidence apart from bare allegations that the published falsehood disparaged the reputation of the Appellant or tended to lower him in the estimation of right thinking members of society generally. This being a slander, it was necessary for the Appellant to prove the damages that resulted from the said utterances in order to be entitled to an award.

22. On that ground I agree with the learned trial magistrate that the Appellant did not prove that he was entitled to any award.

23. Before concluding this judgement in cases of defamation, it must always be remembered that award of damages in defamation cases measure something so intrinsic to human dignity as a person's reputation and honour as these are not marketplace commodities. Unlike businesses, honour is not quoted on Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur. There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of as reputation, on the one hand, and determining as sum of money as compensation, on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award, and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank. This is not to underrate the part monetary awards play in our society. The threat of damages will continue to be needed as a deterrent as long as the world we live in remains as money oriented as it is. Moreover, it is well established that damage to one's reputation may not fully be cured by counter-publication or apology; the harmful statement often lingers on in people's minds. So even if damages do not cure the defamation, they may deter promiscuous slander, and constitutes a real solace for irreparable harm done to one's reputation. See **Albie Sachs, J in Dikoko vs. Mokhatla 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC)**.

24. Regarding costs, since there was evidence that the words uttered by the Respondent were defamatory in nature and the Respondent only escaped from liability due to lack of tangible evidence that they occasioned the Appellant any loss, I agree with the decision of the learned trial magistrate that that decision was sound.

25. In the premises, both the appeal and the cross-appeal fail and are dismissed with no order as to costs.

26. It is so ordered.

**Judgement read, signed and delivered at Machakos in open Court this 18<sup>th</sup> day of December, 2019.**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

**Miss Nzilani for Mr Kamollo for the Respondent**

**CA Geoffrey**