



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 118 OF 2016

OMAR M. OMAR.....APPELLANT

VERSUS

MSHAALI HAMISI MSHAALI.....RESPONDENT

J U D G M E N T

1. Being aggrieved and dissatisfied with the judgment and decision of the trial court, Hon. N. Njagi SPM, dated the 20/7/2016, the Appellant filed the Memorandum of Appeal dated 9/9/2016 on the same date and set out some 5 grounds of Appeal as follows:-

i. THAT the Trial Magistrate erred in law and fact in holding that the Plaintiff had not proved his case on a balance of probabilities.

ii. THAT the Trial Magistrate erred in law and fact in failing to properly consider and evaluate the evidence before him and arrive at decision in favour of the Plaintiff/Appellant.

iii. THAT the Trial Magistrate erred in law and fact in arriving at a decision which was not supported by the evidence on record or at all.

iv. THAT the Trial Magistrate erred in law and fact by failing to properly consider the exhibits produced by the Plaintiff in support of his case and therefore failed to arrive at a decision in favour of the Plaintiff/Appellant.

v. THAT the Trial Magistrate erred in law and fact by failing to consider the Plaintiff's Reply to Defence and the fact that the Respondent did not adduce any evidence in support of his case.

2. These grounds in sum fault the Magistrate for failing to consider all the materials placed before the court and thereby arrived at a wrong decision which this court as a first appellate court, should right by setting aside and in its place be substituted a judgment for the Appellant with an appropriate award of damages for defamation.

3. The mandate and duty of this court in the appeal is to re-appraise and re-examine the entire record in terms of pleadings and evidence and to come to our conclusion based on such material^[1].

4. The plaintiff's claim was one seeking damages for defamation. The circumstances and fact leading to the claim were pleaded at paragraph 3, 4 & 5 of the plaint in the following words:-

“ Paragraph 3: By the letter dated 8th July 2003, addressed to the Plaintiff and copied to the Assistant Chief, Shimoni Assistant Chief Wasini/Mkwiro and the Chief Rongwe location the Defendant falsely, maliciously and abusively published as regards the Plaintiff the following words, quote. “Mr. Omar you behave like a Green Snake in the grass because you are not sincere and transparent that’s why I asked you that question in a parable”.

Paragraph 4: By publishing the said words the Defendant meant and was understood to mean that:-

- a. The Plaintiff is not sincere and transparent.**
- b. The Plaintiff is like a green snake, which hides itself in green grass and can bite the Defendant.**

c. The Plaintiff is a man of questionable character who cannot intermingle with the members of the Public.

d. The Plaintiff is a dangerous person in fact a criminal and/or has or is engaged in criminal tendencies.

Paragraph 5: The Plaintiff avers that the said words were and are calculated to cause damage to him to embarrass him, injure and discredit the Plaintiff in the minds of the right thinking members of the society”.

5. To that plaintiff the defendant filed a statement of defence 27/01/2004 which denied the publication and the meaning attributed to the words and then mounted a defence of justification together with what the defendant considered three particulars of such justification. On the claim that the Appellant had suffered damage the Respondent denied knowledge of such damage and asserted to have never harboured any intention to cause such damage.

6. After the pleadings closed and the hearing commenced, the Appellant gave evidence and called one witness in support of his case while the Respondent also gave evidence and called one witness on this side. It is evidence as led by the parties this court has to and re-examined in the light of the pleadings to enable the court establish if indeed the decision reached was proper or just wrong.

Evidence by the Appellant as plaintiff at trial

7. In his evidence in chief the Appellant produced a letter dated 8/7/2003 which he said portrayed him as a bad person in the community. He gave evidence that he interpreted the letter to mean that he is not a trusted man and a liar (Mlaghai) and is criminal. He said that as a consequence of the letter the community looked down upon him and considered him stupid. He said the chief informed people about the letter in public as evidence that he was a good man and that his business had not been affected and that he was a respected person.

8. On cross examination the witness said that he would not call the persons the letter was copied to as, his witnesses and that he was told that one of the chiefs talked about the letter in public to the effect that he had committed criminal activities the witness admitted that there had been correspondence between him and the Respondent prior to the letter sued on and that the chief showed to him the letter.

9. PW 2, Abania Mbetu Mtengo gave evidence to the effect that in 2003 he was called by the assistant chief showed him a letter alleging the Appellant not to be a good person yet himself knew him as a very good person teaching muslim religion.

10. On cross examination, the witness said the parties were known to him and were his uncles and that he was called by the assistant chief to be told how bad the Appellant is. To him, when one says the other is like a snake it means he cannot be believed. He also said that save for the assistant chief for Wasini sublocation nobody else shared with him the content of the letter.

Evidence by the Defendant/Respondent

11. The Respondent led evidence to the effect that him and the appellant are related by virtue of their parents themselves being cousins. He said he did invite the Appellant to teach with him in the same school and the Appellant gossiped about him for not being true to the islamic religion. To him the disagreement and misunderstanding started when the Appellant asked his wife for sexual favours but the wife declined. The other incidence was when the Appellant allegedly incited one to divorce the Respondents' cousin without dowry being paid and the ripple effect generated into threats to life and eviction.

12. On the letter the Respondent admitted having written the same to the Appellant while in Moyale and indicated it as copied to three others but did not send it to the persons copied. To him all the chiefs are relatives and if the letter had reached them they would have called both parties for reconciliation. He denied publishing the letter beyond the plaintiff's knowledge and that if it ever reached anybody's notice, then it was the plaintiff who did the publication. To him the letter had done no damage to the Appellant who continued to be a businessman of repute hence he deserved no damages.

13. In cross-examination, the Respondent denied ever making a report of sexual advances on his wife by the Appellant to the police nor did he have anything written on the issue of payment of dowry. He however confirmed that they had issues and no longer had a relationship with the Appellant. The authorship of the letter is not disputed and the witness reiterated that he never delivered its copies to any other person and that he printed only one copy to the Appellant while in Moyale. He denied referring to the Appellant as a snake but meant to say that he was not a good person.

14. DW 2 Fadhili Ali Abdalla gave evidence that having married his second wife and built for her a house on a piece of land given by the wife's uncle one Mohammed Ali Ngunyi threatened to demolish the house for having been erected on his land. The parties met before the Chief and resolved the matter with Mr. Ngunyi asking for forgiveness but the Appellant prodded him to reignite the dispute. To him the parties here were friends having schooled together. About the letter he denied having heard about it being discussed at any formal gathering. He however confirmed that the Appellant was pushing to have him evicted by offering to pay all connected expenses. To the witness the letter was never intended to abuse but to correct each other. He was unable to apprehend how the Appellant could be defamed as what was said was the truth.

15. On cross examination, the witness confirmed having known the two parties since birth and as muslim teachers. He denied having seen the letter before coming to court that day and was not aware if the letter had been delivered to the persons it was copied to. On re-examination, the witness said that Ngunyi told him that it was the Appellant who was pushing for his eviction and that had the Appellant not pushed to his eviction the matter could not have been in court.

16. In a reserved judgment the trial court, the trial court said:-

“There is no evidence that this letter was read or was published by any other person who would be able to tell the Court the opinion that he formed after the reading of the letter. The Plaintiff witness 2, called as a witness was not of much help to the Court.

The Plaintiff has sought general damages for defamation.

But I would wish to point out that the Plaintiff has not demonstrated that this letter was published to the other people. And has not brought any evidence to show those people who read the letter treat him today and how they treated him previously. The Plaintiff cannot just state that he has been ridiculed of his standing in the community has been lowered in any way. The evidence must be brought to Court to show how the letter has affected him in his dealings in the community and his business. The Plaintiff is still a religious teacher. He has not stated that he lost his job or religious teaching because of the letter.

The Plaintiff has not demonstrated that he has lost any business that he has been carrying on before because of the letter written by the defendant. For business, there is no evidence brought to show that he has made any losses because of the letter. The Court would have expected the Plaintiff to show what his profits were before he received the letter and how the profits are now the latter has been read by other people which the defendant denies”.

17. Clearly the trial court took the very correct legal view that there was need for evidence to be led that the letter was published to people who then had their estimation of the plaintiffs’ standing and reputation lowered.

18. In **Joseph Njogu Kainge vs Charles Kariuki Gachari [2016] eKLR** quoting the decision in *John Edward vs Standard Ltd* defined a defamatory statement thus:-

“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 or 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 be published by the defendant.**
- iv. The statement must be false”.**

19. In this matter it is not in dispute that the defendant wrote the letter and delivered it to the plaintiff. The defendant admitted as much in evidence on oath. What is in dispute is whether the letter was published to others and if to those it was published, they had their view of the plaintiff lowered as to a shun him and or avoid him. This requirement of publication and effect of the audience is the all critical element that the reputation of the plaintiff must be shown to have been injured.

20. All that is for the plaintiff to prove as the person who would fail if no evidence at all was led.

21. On publication, the defendant said that although the letter was shown to have been copies to other people, he only printed one copy which he sent to the plaintiff. That evidence was never shaken in the cross-examination by the plaintiff’s counsel. Infact the cross examination touched very little on the delivery and therefore publication of the letter. The evidence by the plaintiff that the chief called a public *baraza* and talked about the letter was at best hearsay because nobody who was present at the *baraza* was ever called to confirm such. The only attempt that would have shown publication is the evidence of PW 2 who said he was called by an assistant chief who wanted to know bad the plaintiff was. However that same witness say “I don’t know how people have viewed him. On his own view, he said “I knew him as a very good person”.

22. It is enough from the plaintiffs evidence to say that for the plaintiff to be viewed as having been defamed it must be shown that the right thinking members of society have had their estimation of him lowered. In this case, no evidence of that damage on his reputation was led. Therefore there was no proven injury to the plaintiffs reputation and standing as much as the letter was shown to have been written by the defendant. The lack of evidence on publication and injury to the plaintiff’s reputation and credit present failure on the part of the plaintiff to prove a critical and important ingredients of the tort of defamation and as the trial court found, no damage or injury was established and the suit had to fail hence the trial therefore cannot be faulted to have come to the conclusion that he reached.

23. The upshot is that Appellant, as plaintiff, failed on his onus to prove damage and publication and being a first appellant court, having reassessed and re-examined the evidence led, I do find that the appeal is lacking on merits on the grounds raised and at all and the same is hereby ordered dismissed with costs to the Respondent.

Dated and delivered at Mombasa this 16th day of March 2018.

P.J.O. OTIENO

JUDGE

[\[1\]](#) **Selle vs Associated Motor Boat Co. [1968] E.A. 123**