



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL APPEAL NO. 13 OF 2017**

**(FORMERLY; MACHAKOS HCCA NO. 134 OF 2015)**

**JEREMIAH MWANZA.....APPELLANT**

**-VERSUS-**

**JOHN NGUMBA.....RESPONDENT**

**-VERSUS-**

*(Being an Appeal from the Judgment of Hon. R.Koech in the Senior Resident Magistrate's Court at Makueni Civil Case No. 204 of 2013, delivered on 21<sup>st</sup> July 2015).*

**JUDGEMENT**

**INTRODUCTION**

1. The appellant had instituted a suit in the lower Court against the respondent seeking general damages for defamation. His claim was hinged on a letter which he received from the respondent. He also prayed for the costs of the suit.
2. The respondent filed his defence on 10<sup>th</sup> December 2013 and after a full trial, the learned trial magistrate dismissed the suit with costs.
3. Aggrieved by the outcome of the suit, the appellant filed the instant appeal and listed 6 grounds as follows;
  - a. The learned Senior Resident Magistrate erred in law by failing to allow the appellant's witnesses to testify in the lower Court despite the fact that the same were duly filed together with the plaint herein.*
  - b. The learned Senior Resident Magistrate erred in law by failing to consider the contradicting evidence produced by the respondent's DW3 in that the alleged Kshs. 10,000/= was not given to anybody but in testifying, he testified that he witnessed the appellant handing over some money to the Court clerk at Machakos.*
  - c. The learned Senior Resident Magistrate erred in law and misdirected himself on the facts by entering by entering judgment against the appellant by failing to consider that the respondent did not at the hearing thereof produce a written agreement between him and the appellant to indeed prove that he had given the appellant the alleged Kshs. 10,000/=*
  - d. The learned Senior Resident Magistrate erred in law and fact by failing to consider that the respondent did not prove his case on a balance of probability that he had given the appellant the alleged Kshs. 10,000/=.*
  - e. The learned Senior Resident Magistrate erred in law by failing to consider and in fact by making judgment in favour of the respondent when there was no binding agreement for any money given to the appellant by the respondent.*
  - f. The judgment of the learned Senior Resident Magistrate is against the weight of the evidence on record contrary to Law and travesty to justice.*
4. The parties agreed to canvass the appeal by way of written submissions. Accordingly, the submissions were duly filed.
5. I have looked at the evidence on record, the judgment of the trial Court, the rival submissions and the authorities cited therein. I find that the issues for determination are as follows;

a. Whether the appellant's witnesses were prevented from testifying?

b. Which case was before the trial Court?

c. Whether the appellant proved his case on a balance of probabilities?

6. The duty of a first appellate Court as affirmed by the Court of Appeal in the cases of *Abok James Odera T/A A.J Odera & Associates – vs- John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR* and *Mahmud Salim Omar –vs- M.A Bayusuf (2008) eKLR* is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

7. I will proceed to deal with the issues under the distinct heads.

#### **THE APPELLANT'S WITNESSES**

8. I will deal with ground 1 of the appeal under this head.

9. The appellant submitted that his witnesses were not allowed to testify yet he had filed their witness statements. According to him, the right to fair hearing enshrined in Article 50 of the Constitution of Kenya 2010 is not confined to criminal cases only.

10. The record of appeal shows that he testified on 20/11/2014 after which he closed his case. A litigant is entitled to act in person and when one decides to so act, the reasons notwithstanding, it is reasonable to presume that he/she knows how to go about it. A Judicial officer being a neutral arbiter should be slow to descend to the parties' arena lest they are accused of being biased. In my view, an intervention from the bench should happen in clear circumstances and in the interests of justice.

11. Having perused the record, I noticed that on 24/07/2014 when the matter was scheduled for hearing, the appellant indicated that he had 3 witnesses in Court. The file was placed aside. When the matter was called out later, the parties were not in Court and the learned trial Magistrate had no choice but to adjourn the case.

12. The conduct of the appellant does not paint a picture of an illiterate person and/or one who was desperately in need of the Court's guidance. His pleadings were also fairly good and it is possible that he was getting guidance from someone. Nothing in the record indicates that he was prevented from calling his witnesses. He has not even claimed that he had his witnesses in Court and they were turned away. As rightly submitted by the respondent, he did not seek an adjournment to bring his witnesses. He voluntarily closed his case. The learned trial Magistrate was under no duty to show him how to prosecute his case. Consequently, this ground of appeal should fail.

#### **WHICH CASE WAS BEFORE THE COURT?**

13. Grounds 2, 3, 4 and 5 relate to the Kshs. 10,000/= which was allegedly owing from the appellant. According to the appellant, the learned trial magistrate erred by not making a finding on whether the said money was actually owing from him.

14. A look at the plaint reveals that the case before Court was about defamation. The respondent went into great detail to try and demonstrate that there was some history between him and the appellant which might have involved money. There was nothing wrong with that because it was in line with the defence of 'truth' in defamation cases.

15. As rightly submitted by the respondent, the appellant did not file a counterclaim which could have at least made the Court be properly seized of the matter. The learned trial Magistrate did not err in any way by not delving into the merits of this issue. Accordingly, grounds 2, 3, 4 and 5 should fail.

#### **WHETHER THE APPELLANT PROVED HIS CASE ON A BALANCE OF PROBABILITIES**

16. The elephant in the room was a letter dated 10/11/2013 which was sent to the appellant by the respondent. The contents are as follows;

***“Mr. Mwanza,***

***If God is there He will fight for me and I will get my money back. Read I Samwel 17:32-1Kings 21***

***Yours***

***J.Ngumbi”***

***Signed***

17. In *Wycliffe A. Swanya –vs- Toyota East Africa Ltd & another [2009] eKLR* the Court of Appeal observed that:

***“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the***

*plaintiff must prove:-*

*That the matter of which the plaintiff complains is defamatory in character.*

*That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.*

*That it was published maliciously.”*

**Black's Law Dictionary** defines defamation as;

*a. "The act of harming the reputation of another by making a false statement to a third person."*

18. **Gatley on Libel and Slander** authoritatively states that a statement is defamatory of the person of who it is published;

*“...if it tends to lower him in the estimation of right thinking members of the society generally or it exposes him to public hatred, contempt or ridicule or it causes him to be shunned or avoided”*

19. **Winfield on Tort** gives the following definition of defamation:-

*“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tends to make them shun or avoid that person.”*

20. The appellant testified that he learnt from a neighbor called Stephen Muthoka Kalii that the respondent was claiming money from him (appellant). He sent Stephen to tell the respondent that he did not owe him any money. Stephen delivered the message to the respondent who in turn wrote the letter and sent the same Stephen to deliver to the appellant.

21. The appellant was offended when the respondent recommended that he reads some Bible verses. He wanted to know the meaning of those verses. He sent the village elder to inform the respondent that he had read the letter but had not understood its contents.

22. On cross examination, he said that the letter was sent to him and was not copied to anybody else. He also confirmed that his wife was still with him despite reading the letter. He held no position in society and was neither a clan elder nor village elder. He said that he was a businessman in Wote and many customers had stopped going to his business because of the respondent's letter.

23. The appellant did not demonstrate that the contents of the letter lowered him in the estimation of right thinking members of the society. He claimed that he had lost many customers but did not tender any evidence to show what kind of business he was involved in, if at all. I looked at the witness statements and there was nothing in them to show that the appellant was defamed. In my view, a plain reading of the letter does not bring out the meaning alluded to by the appellant.

24. Suppose the contents of the letter were defamatory, was it published? The appellant confirmed that the letter was sent to him and was not copied to anybody else. There was the mention of a third party, Stephen Muthoka Kalii who acted as the contact person between the appellant and the respondent. He was however not called as a witness. He was not even among the people who wrote witness statements in support of the appellant's case. Clearly, the appellant had no intention of calling him as a witness and the Court cannot speculate that the appellant's reputation was lowered in his (Stephen) eyes.

25. Having opined that the letter was not defamatory and there was no publication, the aspect of malice does not arise. The learned trial Magistrate analyzed the case properly and did not err by dismissing it. It is devoid of any merit and is actually an abuse of the Court process.

26. **CONCLUSION**

**i. The appeal has no merit and same is dismissed.**

**ii. Costs to the respondent.**

**SIGNED, DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF APRIL 2018, IN OPEN COURT.**

**C. KARIUKI**

**JUDGE**

.....