



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 57 OF 2013

WILFRED MBOGO..... 1ST APPELLANT

JAMES GICHOVI MUGO.....2ND APPELLANT

ALBERT MBOGO.....3RD APPELLANT

SAMUEL G. KATHIRIKWA.....4TH APPELLANT

JONAH NJERU.....5TH APPELLANT

JOSHUA N. GACHARIA.....6TH APPELLANT

V E R S U S

NELSON MWANIKI.....RESPONDENT

J U D G M E N T

1. This appeal arises from the judgment and decree of Embu Chief Magistrate in CMCC No. 84 of 2008. In that case the respondent filed a plaint dated 8/08/2008 seeking for damages for libel plus costs of the suit.
2. The case was determined in his favour and judgment entered for Kshs.2,000,000/= plus costs of the suit.
3. The appellants in dissatisfaction of the judgment lodged this appeal setting out sixteen grounds.
4. The summary of the grounds may be stated:-
 - a) That the magistrate failed to appreciate that the appellant was not able to access documents in the custody of the respondent.
 - b) That the appellants were mandated by statute to report or raise such matters as he did to the Commissioner of Co-operatives for investigation and he should not be punished for doing his statutory duty.
 - c) That the magistrate failed to consider that the matters raised by the appellants were investigated and the respondent found wanting for some irregularities and was later removed from office through a vote of no confidence.
 - d) That the magistrate erred in her finding that she had jurisdiction to hear the matter whereas it was the Cooperative Tribunal seized of such jurisdiction to determine disputes between the society, members and former members.
 - e) That the magistrate misdirected herself when she failed to find that the appellant had a bona fide complaint and was not motivated by ill will.
 - f) That the case was not proved against the respondents on the balance of probabilities.
5. The parties argued this appeal by way of written submissions filed by the counsels on record for the parties. Messrs. P.N. Mugo & Co. represented the respondent.
6. The duty of the first appellate court was explained in the case of ***KENYA PORTS AUTHORITY VS KUSTON (KENYA) LIMITED [2009] 2 EA 212*** where the Court of Appeal held:-

On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

7. The issues for determination are:-

- a) Whether the magistrate's court had jurisdiction to determine the case.
- b) Whether the letter by the appellants' dated 5/03/2008 was defamatory.
- c) Whether the case was proved on the balance of probabilities

8. The appellants contended that the court had no jurisdiction to determine the matter which they referred to as dispute between the Society and a member or former member. Defamation is not a dispute arising under Section 76 of the Cooperative Societies Act for determination by the Cooperative Tribunal. The provision only deals with disputes concerning the business of cooperative society. Defamation is a tort or a civil claim determinable only by the courts. The magistrate's court was possessed of jurisdiction to hear and determine the matter.

9. The evidence of the respondent was that on 6/03/2008 he received a letter signed by all the six appellants addressed to the District Cooperative Office which contained the following:-

a) He has a case of Kshs.429,160/= with members in the Provincial Co-operative Officer's office as contained in our letter dated 11/02/2008 and copied to you. It is a pity it was not regarded.

b) He has never explained the over expenditure of Ksh.2,146,919/= which occurred during his tenure in office as Chairman.

c) He was adversely mentioned in the Embu Farmer's Sacco enquiry report Head to the District Members at Nembure. There is reason to believe Kshs.500,000/= he is said to have acquired when he was the Sacco's interim Treasurer is unpaid.

d) At a public campaign rally on 9/12/2007, at Mutunduri, he announced that the Ministry of Co-operative had paid Kshs.2,000,000/= the society (Rianjagi) owned Co-operative Bank which is never reflected anywhere in our books. In answer on 31/01/2008 at our general meeting, he said "it was only politics". This is irresponsible of him.

e) The person in question is partisan in that he is the Coordinator Manyatta Constituency, PNU .

10. The appellants further stated that for the above reasons, they have a strong feeling that the respondent disqualifies himself from being a member of the Management Committee of the society. The District Cooperative Officer was required to act on the letter within 21 days.

11. The respondent caused a demand letter to be issued to the appellants who responded as follows:-

Reference is made to yours under Ref. MN/GFD/08 of 7th March over the above subject.

We wrote to own up all the sentiments contained in "(a) to (e)" and state that we have no apology to make....."

12. The response was authored by all the appellants and signed by the 5th appellant.

13. The respondent testified that he is a teacher by profession who went through the ranks; he was a vice chairman of ACK Church receiving a certificate of founder member, a letter of award from the Bishop, a certificate of appreciation and a certificate of commendation. He offered distinguished services to the people of Kenya and received the Head of State Commendation. He also worked as a vice chairman of ACK Kiangima, a board member of St. Mary's School, Kiangima and the chairman of Rianjagi Society in the year 2008. The respondent produced all the relevant certificates, commendations and letters in this regard.

14. The respondent further stated that as a result of the publication of the letter he suffered damage to his character and was entitled to general damages. He was called a thief and the public lost confidence in him. Some of the appellants wrote to the Vicar in Charge of the church asking him to stop the respondent from conducting official church functions but the request was declined.

15. The defence by the appellant was that they wrote the letter to the District Cooperative Officer after the respondent called off an annual general meeting (AGM) at Rianjagi Society because he had erred in practice. Further that the respondent was mentioned in an enquiry report and wanted him to explain the expenditure of Kshs.2,146,919/=. It was further stated that the respondent was partisan in politics despite holding an elective post under the Cooperative Societies Act. The appellants further stated that the letter was written in good faith seeking clarification on certain issues for the benefit of all the members.

16. Defamation is committed when the defendant publishes to a third person words or matter containing an untrue imputation against the reputation of the claimant. A libel is actionable *per se* for the law presumes that some damage will flow from it. This is based on the fact that the claimant is presumed to have and to enjoy an unblemished reputation and it is up to the defendant to rebut that, either by proving the truth of the defamation or mitigating damages that the claimant had a general bad reputation.

17. The Defamation Act Cap.36 does not define slander or libel. Libel consists of a defamatory statement in permanent form and is punishable *per se* without proof of damage. It does not contain any special features of the two forms of defamation. Article 33 (3) of the Constitution provides that:-

In exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

18. The law of defamation is underpinned in the constitution. Article 32(1) provides that every person shall have the right to freedom of conscience, religion, thought, belief and opinion and every person has an obligation to respect those rights.

19. In the case of ***KL VS STANDARD LIMITED [2014] eKLR***, the court stated:-

... a defamatory statement is one which has a tendency to injure the reputation of a person to whom it refers by lowering his/her estimation of the right thinking members of society and in particular cause him to be regarded with feeling of hatred, contempt, ridicule ... A typical example is an attack upon the moral character of the plaintiff attributing him/her any form of disgraceful conduct such as crime, dishonesty, cruelty and so on.

20. In the same case (***KL VS STANDARD LTD***) the term publication was defined as *the communication of the words to at least one other person other than the person defamed. The words must be maliciously published.*

21. The appellants did not deny writing the letter dated 5/03/2008. When the respondent sent a demand letter, the appellants further admitted the contents and stated that they had no apology to make. The defence of fair comment was raised by the appellants. The burden of proving that the letter was written in good faith is on the appellants. This defence is based on fundamental rights of free speech and writing and is of vital importance to the rule of law. The appellants did not adduce any evidence to show that the relevant subject was one of public interest and that there was a basis for the comment.

22. The appellants admitted that they wrote the letter because the respondent called off the meeting that had been convened to clarify some issues. This was kind of a retaliatory attack against the respondent which had no trace of honesty or good faith.

23. The allegations made against the respondent was that he had misappropriated funds of the society in an unexplained expenditure of over Kshs.2 million during his tenure as the chairman of the Society. It was also alleged that he had a case of Kshs.429,160/= with members of the Provincial Cooperative Office. Further that the respondent was mentioned in an inquiry report among other allegations. The issue herein is to determine whether the allegations contained in the letter were defamatory.

24. Although the appellants in their letter referred to certain records on which they based their allegations, no document was produced to demonstrate that the respondent had misappropriated any funds of the Society or had any case under investigations by the Provincial Cooperative Officer or by the Society itself. There was no evidence that the Society had reported any case of misappropriation of its funds to the relevant authority. The allegations which were published to a third party portrayed the respondent as dishonest, untrustworthy and a criminal. The allegations were published to the District Cooperative Officer and to the Vicar in Charge of the church where the respondent served as the vice chairman.

25. The publication of the said allegations exposed the respondent to hatred, contempt and ridicule thereby lowering his reputation in the estimation of right minded persons in society. Due to the publication the respondent testified that he was shunned and avoided by members of the respective institutions where he served.

26. The allegations tended to injure the respondent's reputation causing feeling of contempt, fear and dislike among friends, neighbours and in society he lived. In libel it is not a requirement that the respondent proves that he suffered any business or professional loss. The learned magistrate was satisfied that the statement contained in the letter was defamatory and rejected the defence of the appellants as wanting.

27. It is my finding that the respondent proved his case against the appellants on the balance of probabilities and that the judgment was based on cogent evidence.

28. The respondent was awarded general damages of Kshs. 2 million which in my considered opinion was reasonable. It is important to note that the appellants did not raise any issue on the quantum of damages.

29. I find that the appeal lacks merit and it is hereby dismissed with costs to the respondent.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF JUNE, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. M. Njage for Respondent

All Appellants present except Mr. S. Kathirikwa

(4th appellant)