



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL NO. 24 OF 2016

BETWEEN

AMEDO CENTRE KENYA LIMITED.....APPELLANT

AND

SOLOMON OUKO ONYANGO.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Judgment and Order of Hon. T. Obutu , PM at the Chief Magistrates Court at Kisumu in Civil Case No. 372 of 2010 dated 18th March 2016)

JUDGMENT

1. This appeal arises from the decision of the subordinate court in which the 1st respondent, as plaintiff, sued the appellant and the Attorney General as 1st and 2nd defendants respectively for recovery of general, exemplary and aggravated damages for false imprisonment and malicious prosecution, special damages and costs. The trial court entered judgment for Kshs. 1,560,000/- as follows:

Kshs. 1,000,000/- general damages for defamation to be paid by the appellant.

Kshs. 500,000/- general damages for malicious prosecution against 2nd Respondent.

Kshs. shs. 60,000/- special damages to be borne jointly and severally by the appellant and 2nd Respondent.

2. The 1st respondent's claim before the trial court was that because of false and malicious complaints made by the appellant to the police, he was arrested without any justifiable cause and charged with the offence of forgery contrary to **section 350 of the Penal Code (Chapter 63 of the Laws of Kenya)** in **Kisumu Chief Magistrate's Court Criminal Case No. 429 of 2008**. The appellant stood trial and was acquitted under **section 210 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. The 1st respondent contended that the prosecution was actuated by malice and gross abuse of process by the Police.

3. The appellant filed a defence in which it denied the 1st respondent's allegations.

4. This being a first appeal, this court is enjoined to evaluate the evidence tendered before the trial court and arrive at its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see

Selle v Associated Motor Boat Co. [1968] EA 123). In order to proceed with this task, it is necessary to set out the salient facts that emerged from the evidence.

5. The 1st respondent testified that he was a businessman dealing in electronics and cereals at Kibuye market. On 1st October 2008, on his way back from Vihiga where he had gone to buy cereals, he received a call from a stranger who wanted to know where he was. He informed the caller that he was on his way back to Kisumu. The caller asked him to stop at the Russia Hospital gate and upon alighting from the vehicle, he met the caller, who testified as DW 1, accompanied by police officers. He was handcuffed and led to Kondele Police Station. On his way, his shirt was torn by an angry mob which was shouting “mwizi mwizi”.

6. After his arrest, the 1st respondent was charged with forgery following which he incurred Kshs. 60,000/- in legal fees. Following the allegations against him, his business collapsed. The 1st respondent told the court that the appellant’s actions were actuated by malice as he had never worked appellant and had nothing to do with the forged documents or stolen goods.

7. The appellant gave its evidence through its employee, Samuel Ndungi Muyanga (DW 1). He told the court that on 1st October 2008 he received a call from a stranger who informed him that the appellant’s goods were being sold in shop owned by one Osano at Kisumu Bus Park. He went to the shop and confirmed that the products were from the appellant’s shop. He reported the matter to the police and two officers were sent to accompany him to the shop. The police officers recovered the goods which included a 21-inch television set and Hi-Fi radio and arrested the owner of the shop.

8. Osano informed the police that the goods were sold to him by Christopher Oturu, the 1st accused in the criminal case, who was in the company of the 1st respondent. Osano informed the police that he could assist them in tracing the 1st respondent. The police left with Osano and returned with the 1st respondent whom DW 1 knew as Isaac Oremo. DW 1 insisted that the 1st respondent’s name was Isaac Oremo and that he was the appellant’s former employee. DW 1 testified that the arrest was after police investigations and that he neither involved himself in the investigations nor controlled the prosecution.

9. Following the judgment, the appellant filed this appeal and advanced 9 grounds of appeal in his memorandum of appeal. The appellant blamed the trial magistrate for condemning it to pay general damages and special damages when it was not responsible for the arrest and prosecution of the 1st respondent. The appellant complained that trial magistrate failed to appreciate the principles for establishing malicious prosecution thereby arriving at an erroneous conclusion and that the trial magistrate erred in law and fact in making a finding on defamation when the same was not properly pleaded nor proved. Mr. Mumma, counsel for the appellant, submitted that the case was not proved on a balance of probabilities as ill-will was not proved on the part of the appellant.

10. On the hand, Ms. Staussi, counsel for the 1st respondent, urged the court to uphold the decision of the lower court. She submitted that the trial court appreciated all the principles applicable to the case in arriving at the decision.

11. Counsel acting on behalf of the Attorney General, Ms Lang’at, supported the appeal and associated herself with the submissions made by the appellant.

12. In the memorandum of appeal, the appellant attacked the findings on the issue of defamation, malicious prosecution and false imprisonment. The trial court found the appellant liable for the defamation claim but dismissed the claim for malicious prosecution and false imprisonment against it. It is worth noting that the 2nd respondent did not appeal against the finding against it. Neither did the 1st respondent cross-appeal against the judgment in order to urge this court to uphold the entire judgment on other grounds or vary the judgment in order to find the appellant and 2nd respondent jointly liable for malicious prosecution.

13. Since the appellant is not aggrieved by the judgment dismissing the claim for malicious prosecution against it, dealing with that aspect of the judgment, in the absence of an appeal by the 2nd respondent, who is the party aggrieved, will amount to an academic frolic. Further, in the absence of an appeal, the 1st respondent will be denied an opportunity to contest the finding by way of filing a cross-appeal. Consequently and for the reasons I have set out, I decline to consider the trial court's findings on malicious prosecution as they are not germane to the appeal.

14. On the issue of defamation, the appellant's case is that the trial magistrate erred in making a finding on defamation when the same was neither properly pleaded nor specifically proved. The elements of the tort of defamation are well settled and were summarised in ***Dorcas Florence Kombo v Royal Media Services Limited*** NRB HCCC No. 85 of 2011[2014] eKLR as follows:

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. 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.

15. For a case of defamation to be made, there must be publication. Publication refers to communication of the words to at least one other person other than the person defamed. It is also necessary to show that the published words disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally.

16. The essence of a defamation case is that certain specific words were used by the defendant that are defamatory of the plaintiff. It is therefore a requirement of the law that the exact or precise words alleged to be defamatory are pleaded to enable the defendant know the case he is facing and to assist the court arrive at a decision as to whether the words are defamatory. This principle, summarised in ***Gatley on Libel and Slander*** at para 2611, is as follows, "The law requires the very words of the libel to be set out in the declaration in order that the court may judge whether they constitute a ground for action". It has been adopted in this jurisdiction in various cases among them; ***Francis Atwoli & 5 Others v Hon Kazungu Kambi & 3 Others*** NRB HCCC No. 60 of 2015 [2015]eKLR, ***Dr Lucas Ndungu Munyua v Royal Media Services Ltd & Another*** NRB HCCC No. 52 of 2008[2014]eKLR and ***Hon. Nicholas Kipyator Biwott v Paul Kibugi Muite & Another*** NRB HCCC No. 1369 of 2003(UR).

17. I have read and re-read the amended plaintiff and it does not state what words the appellant or its agent published. The issue of defamation is pleaded at paragraph 11 of the amended plaintiff which only states that the plaintiff claims damages for defamation and goes out to give particulars of defamation. Furthermore, the evidence before the trial court was that when the 1st respondent was arrested by the police, it is members of the public witnessing the arrest who began shouting "mwizi mwizi". Neither the appellant nor its agents uttered these words. The 1st respondent could not establish a case for defamation and the trial magistrate erred in finding liability and awarding damages.

18. I allow the appeal to the extent that I vary the judgment of the subordinate court and substitute it with an order dismissing the 1st respondent's claim for defamation with costs to the appellant. The appellant shall have costs of this appeal as against the 1st respondent which I assess at Kshs. 50,000/- only.

DATED and DELIVERED at KISUMU this 10th day of April 2017.

D.S. MAJANJA

JUDGE

Mr Muma instructed by Muma Nyagaka and Company Advocates for the appellant.

Ms Staussi instructed by Staussi and Asunah Advocates for the 1st respondent.

Ms Lang'at instructed by the Office of the Attorney General, Kisumu for the 2nd respondent.