



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 216 OF 2014

HARRIET MUMBUA NTHANGA.....APPELLANT

VERSUS

S N M.....RESPONDENT

(Appeal against the judgment and decree of Hon. P. N. Gesora delivered on 25th

September, 2014 in Machakos CMCC No. 256 of 2011)

JUDGEMENT

1. The Respondent sued the Appellant seeking damages arising from alleged defamation. She alleged that on 5th January, 2011 at [particulars withheld] Secondary School, the appellant published of and concerning her the following words:

*“S N M wi K**o, M****a, Shenzi, mbwa, a husband snatcher and I am going to remove your v*****.”*

Translated as:

*“S N M, you are a vagina, prostitute, idiot, dog, a husband snatcher and I am going to remove your v*****.”*

2. It was alleged that the words were published in a mixture of English, Kiswahili and Kamba languages and the persons present heard and understood the said words. That the words in their natural ordinary and inferential meaning were meant and were understood to mean that the respondent is a prostitute, lives on the earnings of prostitution, is an idiot, is a domestic animal, is a family breaker and has a loosely hanging vagina that is easy to remove. She stated that in consequence thereof, she who is a teacher by profession and a respected lady has been gravely injured in character, credit and her reputation lowered in the estimation of right thinking persons. That she has generally been brought to public scandal, odium and contempt and hurt feelings and as a result has suffered considerable embarrassment and distress. She alleged that by reason of the publication of the words complained of, she has been shunned by some of her friends as the same was circulated within a wide jurisdiction.

3. The Appellant filed a statement of defence in response thereto. She therein denied the claim. She in particular denied having ever insulted the respondent in the manner alleged or at all and that the respondent falsely claims defamation to unfairly enrich herself and solely embarrass.

4. It was the Respondent’s (PW1) evidence that she was on the material day at around 3.30 pm in the

office together with S M N who was a former student at [particulars withheld] Secondary School. The appellant came in asking why the respondent had not seen her as she demanded. On being told by the respondent that she did not see her because of the appellant's poor rapport with colleagues, the appellant jumped out of the desk and insulted her as pleaded and claimed that the respondent had a love affair with her husband. She stated that students and her colleagues all heard the insults hailed at her. She stated that there had no prior disagreement but that the working environment became hostile when rumours of her having an affair with the appellant's husband spread. She reported the matter to the police and the appellant was charged with a criminal offence with the offence of creating disturbance in Machakos CMCCr. No. 45 of 2011. The respondent however stated that she was not demoted as the senior head of department boarding.

5. S M N (PW2) recounted that he had on the material day gone to [particulars withheld] Secondary School to collect his certificates. At around 3.00 pm, he saw the respondent leave the administration block with a lady headed to her office. On following them, the lady held him and told him to move far. He did not comply and instead stood outside the staffroom. He heard the lady say "*you small woman, you vagina, I can kill you, you are a prostitute, dog and I can pluck your vagina and throw it to the birds.*" He confirmed that the lady is the appellant herein. That the respondent responded to the insults by telling the appellant that she should table the evidence of her calling the appellant's husband. He heard a commotion and peeped and saw what was happening. He stated that some students also came to the scene and peeped through the window.

6. The appellant (DW1) testified that the respondent had sent her a short text message sometime in October, 2010 asking for a meeting with her. On the day material to this suit there was a departmental meeting in which the issue of an illicit relationship between her husband and the respondent arose. It is on that day that the appellant went to see the respondent. When she greeted the respondent, and told her that she was there to see her, the respondent responded by telling her "you witch why have you come here" and started shouting over the allegations. She was on the following day at about 2.30 pm summoned to the Principal's office where she found two police officers who arrested her. She was later charged with the offence of creating disturbance but was acquitted. That she was never summoned by TSC over the matter but on the other hand, the respondent later got a transfer to [particulars withheld] Girls. She acknowledged that there was a classroom next to the staffroom but denied that there were students in the said class at the time of the confrontation. She maintained that the respondent had an illicit relation with her husband but she stated that she has never found them in a compromising situation. She further stated that she was not willing to call her husband as a witness since they were in a healing process. That there were text messages exchanged between them thanking him for the treat he gave her. That because of the message she imagined that there was a love affair between them.

7. The trial court considered the case and entered judgment in favour of the respondent. Aggrieved by the said judgment, the appellant filed this appeal on the following grounds:

- a) That the learned magistrate erred in law and fact in totally disregarding essential and material facts placed before him before making his judgment.
- b) That the learned erred in law and fact in considering extraneous factors which were not material to the suit before making his judgment.
- c) That the magistrate erred in law and fact by totally disregarding the appellant's submissions and precedents before making his judgment.
- d) That the magistrate erred in law and fact by holding the appellant liable for defaming the respondent which was not supported by evidence and against settled principles of law.
- e) That the magistrate erred in law and fact by awarding excessive damages for defamation when the same was not supported by evidence and precedents.

8. Citing **Timsales Limited v. Harun Thuo Ndungu (2010) eKLR**, it was submitted for the appellant

that the respondent although she claimed there were students present and colleagues, she never called them as witnesses to support the allegations. The holding in **Timsales** (supra) was that:

“...where a party fails to produce certain evidence, a presumption arises that the evidence, if produced, would be unfavourable to that party; this presumption is not confined to oral testimony that can also apply to evidence of a tape recording which is withheld.”

9. It was further submitted that PW2's testimony did not testify that the alleged insults lowered his estimation or that of any other right-thinking member of the society towards the respondent. That PW2 did not belittle or even look down upon the respondent. That the respondent did not give evidence of how she was defamed before right thinking members of the society that she was in fact on the contrary promoted to the position of senior head of department boarding. That the ingredients of defamation set out in **John Ward v, Standard Ltd (2006) eKLR** cited with approval in **Joseph Njogu Kamunge v. Charles Muriuki Gachari (2016) e KLR** have not been met since the respondent failed to show that her repute was injured. That the alleged words were not published to the general public having been uttered behind closed doors, the set up was therefore confidential and there were no third parties. That for the aforesaid reason, defamation cannot be inferred. The appellant on this point relied on **Phineas Nyagah v. Gitobu Imanyara (2013) eKLR** where it was held:

“Publication is the communication of the words to at least one other person 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. 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 the society generally. 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 deliberate or reckless or even negligently ignoring facts.”

10. It was submitted that it was apparent that the respondent was communicating with the appellant's husband a fact she is said to have admitted in the criminal case.

11. It was on the other hand submitted on behalf of the respondent that it was clear from the appellant's evidence that she confronted the respondent in an attempt to salvage her marriage. That it is during that confrontation that the appellant uttered the impugned words. That from the appellant's grounds of appeal, it is obvious that she is aggrieved by the quantum of damages and not liability. That the magistrate did not misdirect himself rather he was guided by the principles enunciated in **Nairobi Civil Appeal No. 314 of 2001 Evan Gicheru v. Andrew Morton & Another**.

12. This being a first appeal this court is under duty to re-valuate the evidence, assess it and make its independent conclusion on such evidence bearing in mind that it neither saw nor heard the witnesses. See **Peters v. Sunday Post Ltd (1958) EA.424**. I have carefully considered the pleadings, evidence and the submissions tendered herein. The case of **Joseph Kudwoli v. Eureka Educational and Teaching Consultants & 2 Others HCCC No. 126 of 1990**, sets out the issues a plaintiff in a suit founded on defamation be it libel or slander must prove:

- a. That the matter of which he complains was published or uttered by the defendant;
- b. That it was published or uttered of and concerning the plaintiff;
- c. That it is defamatory in character;
- d. That it was published or uttered maliciously and;
- e. In slander, subject to certain exceptions, that the plaintiff has thereby suffered special damage.

13. The respondent's claim was predicated upon slander. As opposed to libel, slander is punishable per se without proof of damage. It follows therefore that the respondent was not required to show that she had suffered any loss and or damage as a result of slander. It was claimed that the appellant called the respondent a prostitute among other obscene names. That being the case the respondent need not have proved that she suffered any loss or damage as a result of being referred to as aforesaid. The respondent's witness PW2 confirmed that the appellant hailed the said insults and it cannot be said that the respondent failed to bring evidence to that effect. The said witness confirmed further that there were students who in fact came to peep through the window. While the appellant claims that the respondent did not bring the said witnesses, it must be noted that the Evidence Act does not dictate the number of witnesses to be called rather the prudent thing to do is to call a witness who establishes a party's case. In my view PW2 confirmed that the appellant uttered those words and the commotion therein drew the attention of students and PW2 too heard the said words. PW2 in this case was a third party. In the circumstances, I find that the respondent proved her case against the appellant on a balance of probability. As to quantum, this court can only interfere where the trial magistrate misapplied the law. The appellant herein merely stated that the award was excessive and did not specifically establish that the trial court misapplied the law. See **Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v. Lubia & Another (1987) KLR 30** the Court of Appeal held that in order to disturb the quantum of damages awarded by a trial judge an appellate court.

"Must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage..."

and **Butt v. Khan (1977) 1 KAR** the Court of Appeal held as follows:

"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."

14. In the circumstances, I am unable to interfere with the trial court's decision on quantum. In the end I find no merit in this appeal and it is hereby dismissed with orders as follows:

- a) The trial courts judgment is herein upheld.
- b) Costs of the appeal to the respondent.

Dated and delivered at Machakos this 24th day of November, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Muumbi for the Appellant

Ngolya for the Respondent

Kituva - Court Assistant