



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVL APPEAL NO. 450 OF 2012

THE BOARD OF GOVERNORS

KENYA UTALII COLLEGE..... 1ST APPELLANT

THOMAS DUDAH 2ND APPELLANT

VERSUS

BENEDICT OMBIRORESPONDENT

(Being an appeal from the judgment/decree of Hon. Mr. S. N. Riechi Chief Magistrate dated 15th February 2012 and delivered on 3rd August, 2012 in Milimani CMCC 5591 of 2004)

JUDGEMENT

1) By the amended plaint dated 25th October 1993, the Respondent herein sued the Appellants before the Chief Magistrate's court Nairobi seeking for damages for defamation arising from words published by the Appellants. before the Chief Magistrate's court Nairobi. The Appellants denied the Respondent's claim by filing a defence. The suit was eventually heard and determined in favour of the Respondent by Hon. Riechi, the then chief magistrate. The Respondent was awarded kshs.800,000/= as general damages for defamation. The Appellants were dissatisfied hence they preferred this appeal.

2) On appeal, the Appellants put forward the following grounds of appeal:

1. THAT the Learned magistrate erred in law and fact in finding that the statements complained of by the Respondent were defamatory.

2. THAT the Learned magistrate erred in law and fact in finding that the Respondent had discharged his burden of proving that the alleged defamatory statements were made by the 2nd Appellant.

3. THAT the Learned magistrate erred in law and fact in finding that the alleged defamatory statements were made with malice.

4. THAT the Learned magistrate erred in law and fact in failing to find that the defence of Qualified privilege had been established by the Appellants.

5. THAT the Learned magistrate erred in law and fact in failing to find that the defence of

Justification had been established by the Appellants.

6. THAT the Learned magistrate erred in law and fact in finding that the Respondent had established his claim on a balance of probabilities.

7. THAT the Learned magistrate erred in law and fact in assessing and awarding the Respondent damages of kshs.800,000/= together with costs and interest in the circumstances.

3) When the appeal came up for hearing learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions.

4) I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Before considering the merits of the appeal, it is imperative to first determine the preliminary objection raised by the Respondent against the appeal. It is the submission of the Respondent that the appeal should be dismissed because it was filed out of time without prior leave of this court. It is pointed out that judgment of the trial court was delivered on 27th July 2012 whereas the appeal was filed on 29th August 2012. It is the argument of the Appellant that there was inadvertent mistake made by the court showing that judgement was delivered on 3rd August 2012 by Hon. T. W. Wamae in the presence of the parties and hence the appeal was filed twenty six (26) thereafter henceby that time 30 days had not lapsed. After a careful consideration of the rival arguments, I am satisfied that he Appellant cannot be blamed for the mix-up emanating from the court. In exercise my discretion stated under Sections 1A and 1B of the Civil Procedure Act, I will deem the appeal as having been filed out of time with leave of court.

5) Having disposed of the preliminary objection let me now consider the merits of the appeal. Before considering the merits or otherwise of the appeal I first wish to set out in brief the facts leading to this appeal. The Respondent was employed by the 1st Appellant on 22nd October 1975 and served in various capacities until his employment was terminated on 17.08.1990. The Respondent sued the Appellant seeking for damages on the basis that he was defamed by the Appellants in a questionnaire prepared by the Appellants in response to an inquiry made by Lonrho Hotels (K) Ltd, a prospective employer who intended to engage the Respondent's services subsequent to the termination of his employment. The Respondent sued the 1st Appellant in its capacity as his previous employer who allegedly defamed him and the 2nd Appellant as the employee of the 1st Appellant who purportedly authored the alleged defamatory statements. The Respondent alleged that he was defamed by the Appellants after the Appellants allegedly responded to the inquiry from Lonrho Hotels Kenya Ltd during an interview process. The defamatory statement is said to have referred to the Respondent as a person of erratic temper.

6) The Respondent contended that the alleged publication was intended to mean that he was a man of bad reputation and that he was temperamental and lacking in judgment. The Appellants denied being the authors of the offensive words. They further maintained that if at all any such words were authored the same were privileged and amounted to fair comment about the respondent's character hence justified. In the end the trial court entered judgment in favour of the Respondent in the sum of kshs.800,000/=.

7) The Respondent testified and summoned another witness in support of his case before the trial court. The Appellants on the other hand opted to call no witnesses.

8) Having set out in brief, the case that was before the trial court, it is now appropriate to consider the substance of the appeal. The 1st -6th grounds are interrelated. It is a question of determining whether or not the statements complained of were defamatory or not. The trial court determined the issue and came to the conclusion that the Respondent had been defamed. I have on my part re-evaluated the evidence that was presented before the trial court. There is no doubt that the Respondent was an employee of the 1st Appellant for many years. It is also not in dispute the Respondent was eventually dismissed from the employment of the 1st Appellant. It is also not in dispute that the Respondent sued the 1st Appellant for wrongful dismissal and that action was dismissed. The evidence tendered indicates that the Respondent applied for employment with Lonrho Hotels (K) Ltd who in turn requested for letter of recommendation

from the 1st Appellant in respect of the Respondent. It is apparent that Lonrho Hotels (K) Ltd had sent a questionnaire to be filled by the 1st Appellant over the Respondent. The foresaid form was tendered in evidence by the Respondent. The learned chief magistrate formed the opinion that there was no evidence called by the Appellants to show that the Respondent had erratic behaviour and quick temper. With respect, I think the trial court fell into error because there was sufficient evidence already tendered by the Respondent showing the opinion the Appellants had formed about the Respondent. The Respondent had produced the questionnaire filled by the 2nd Appellant on the instructions of the 1st Appellant showing the Respondent had erratic behaviour and high temper. The aforesaid document was admitted in evidence. It is apparent from the proceedings of the trial court that the Appellants had every justification and good reason to hold the view about the Respondent's character. It was not reckless nor careless to do so. The Appellants were merely fulfilling an obligation to fill the questionnaire just like the credit reference bureau reports forwarded to banks and financial institutions. In my estimation there was no apparent malice exhibited by the Appellants. In the case of **Hellen Makone =vs= Francis Kahos and Another (2004) e K.L.R** the Court of Appeal held inter alia that qualified privilege would arise when a prospective employer makes an inquiry to a former employee regarding an employee as long as there was no malice.

9) In the case of **University of Nairobi =vs= Mbutia (1985) eKLR**, the Court of Appeal held that a publication becomes privileged in occasions where the author and the publisher has an interest or legal, social or moral duty to the recipient and the recipient has a corresponding interest and duty to receive it.

10) In the end I see no justification to find Appellants liable for defamation.

11) The last ground of appeal relates to the assessment of damages in which the trial court awarded the Respondent ksh.800,000/=. In a near similar case decided by Majanja Judge i.e **James Omenda Abusa =vs= Ludia Atieno Onyango (2015) eKLR** damages was assessed at kshs.100,000/=. In my view, the award given to the Respondent was way above comparable awards. If the appeal had failed I would have nevertheless adjusted the award from kshs.800,000/= to ksh.200,000/= which in my view appear to be reasonable and commensurate to the nature of damage the Respondent suffered.

12) In the end, I find the appeal to be well founded. Consequently, the appeal is allowed. The judgment of the trial court is set aside and is substituted with an order dismissing the suit. The Appellants to have costs of the appeal and those of the suit before the trial court.

Dated, Signed and Delivered in open court this 12th day of February, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant.

..... for the Respondent.