



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 12 OF 2014

(FORMERLY HCCA NO 122 OF 2013- MOMBASA)

NYAMBU MWANYEFA.....APPELLANT

AND

ALICE WALI MKOMBOLA.....RESPONDENT

(Being an appeal from the Ruling (sic) of Hon M. Chesang, Ag Senior Resident Magistrate delivered on 15th August 2013 in Wundanyi SRMCC No 6 of 2012 the parties being ALICE WALI MKOMBOLA VS NYAMBU MWANYEFA (sic))

REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT WUNDANYI

CIVIL CASE NO 6 OF 2012

ALICE WALI MKOMBOLAPLAINTIFF

VERSUS

NYAMBU MWANYEFA.....DEFENDANT

JUDGMENT

INTRODUCTION

1. It was apparent from the Record of Appeal that SRMCC No 6 of 2012 Alice Wali Mkombola vs Nyambu Mwaneyefa was filed pursuant to the Appellant's conviction by Hon K.I. Orenge (SRM) in Cr Case No 41 of 2012 Republic vs Nyambu Mwaneyefa where the Appellant herein had been charged under Section 95(1) of the Penal Code Cap 63 (Laws of Kenya) with the offence of creating disturbance in a manner likely to cause a breach of peace. On 26th April 2012, he was ordered to pay a fine of Kshs 8,000/= and in default to six (6) months' imprisonment. The civil suit was filed on 27th June 2012.

2. In her judgment delivered on 15th August 2013 in respect of SRMCC No 6 of 2012 Alice Wali Mkombola vs Nyambu Mwaneyefa, Hon M. Chesang, Ag Senior Resident Magistrate at Wundanyi Law Courts awarded the Respondent herein a sum of Kshs 650,000/= being general damages, costs of the suit and interest thereon at court rates.

3. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed his Memorandum of Appeal dated 13th September 2013 on even date at the High Court of Kenya, Mombasa. The grounds of appeal were as follows:-

a. THAT the Learned Magistrate erred in law and in fact in finding that the Respondent (sic) uttered words that were defamatory of the Appellant(sic).

b. THAT the Learned Magistrate erred in law and in fact in finding that the words uttered by the Respondent (sic) were defamatory and not mere abuse and thus not actionable.

c. THAT the Learned Magistrate erred in law and fact by making an award of general damages which were inordinately so high as to warrant to be interfered with by the court on appeal

4. The matter was subsequently transferred to the High Court of Kenya, Voi whereupon directions on filing Written Submissions were given. However, the parties did not comply with the said time lines. On 2nd November 2015, counsel for the Appellant and counsel for the Respondent filed a written Consent agreeing on new time lines to file their said Written Submissions. The said Consent was recorded and endorsed by the Deputy Registrar of the High Court of Kenya, Voi on the same date.

5. On 16th June 2016, the Respondent fixed an *ex parte* mention date for 28th June 2016 and served the Appellant herein. The Appellant attended court on the said date. However, the Respondent did not attend court on the said date. She did not also file her Written Submissions in this matter.

6. On his part, the Appellant filed his undated Record of Appeal and Written Submissions on 28th June 2016. This court noted that the same were filed outside the time the parties had consented to, on 2nd November 2015. He was required to have filed his Record of Appeal on 1st November 2015.

7. As the Respondent could not continue holding the Appellant herein and the court hostage by her failure to attend court or file her Written Submissions, this court reserved the Judgment herein. It also indicated that it had overlooked the delay by the Appellant in filing his Record of Appeal purely in the interests of justice.

8. The Judgment herein is therefore based on the Written Submissions of the Appellant only, which he relied upon in their entirety. The said submissions were not highlighted.

LEGAL ANALYSIS

9. Before delving into the merits of the Appeal herein, this court felt compelled to make two (2) observations regarding the Appellant's pleadings which it was of the opinion left a lot to be desired. Firstly, a perusal of the Grounds of Appeal seemed to suggest that it was the Respondent who had abused the Appellant herein. However, from the facts of the case herein, it was evident that it was the Appellant herein who was alleged to have uttered defamatory words against the Respondent herein.

10. Secondly, the Record of Appeal was undated. It was also not paginated as is the normal practise making it difficult for this court to easily peruse the documents he had attached. The heading did not also indicate which case the Appeal emanated from, an addition that this court made on its own motion for the sake of good order.

11. Appreciably, this court would have dismissed the Appeal herein as the Appellant herein did not amend his Grounds of Appeal to indicate the correct facts or date his Record of Appeal before the judgment herein was reserved. The saving grace was Article 159 (2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities.

12. The court also opted to overlook the procedural technicalities because the Appeal herein was technically unopposed, the Respondent having failed to file her Written Submissions, and the fact that it found the said Appeal to have been arguable.

13. The Respondent sued the Appellant herein for defamation. In Paragraph 6 of her Complaint, she itemised the particulars of negligence against the Appellant as follows:-

a. Uttering false accusations against the plaintiff.

b. Uttering words that depicted the plaintiff as a lady of immoral character.

c. Portraying the plaintiff as a social misfit within the society.

d. Uttering the word that depicted the plaintiff as a thick in the head (sic), foolish and useless citizen.

14. The Respondent had contended that the said words were uttered in broad daylight in the presence of her employees, tenants and customers which lowered her in the eyes of right thinking members of the public and that she had suffered odium, scorn and ridicule. She also listed several institutions other than her employment as a District Adult Education Officer, Mwatate District, where she held public offices to demonstrate that she was a respected member of the society.

15. In finding that the Respondent had proven her case of defamation against the Appellant herein, the Learned Trial Magistrate rendered herself as follows in her judgment:-

“...Indeed, I agree with counsel for the plaintiff that the words “mjinga” and “Malaya” are defamatory in nature and not just mere abuses, and therefore an actionable tort. I therefore find that the plaintiff was defamed by the slander uttered by the defendant...”

16. In his Witness Statement dated 16th July 2012 filed SRMCC No 6 of 2012 Alice Wali Mkombola vs Nyambu Mwanyefa, the Appellant stated as follows:-

“...I initially used to park the said vehicle at Shimbo Secondary School for 4-5 years but the Plaintiff herein who as claimed is the Chairlady of the School B.O.G wrote to me a notice to cease from parking my vehicle in the school which I did. I asked Alice Wali Mkombola on the day in question why she was complaining yet the vehicle was in no way obstructing the entrance to her premises. An altercation ensued during which Alice Wali Mkombola hurled some abuses at me and I did utter some abusive words at her in the heat of the moment. Anybody who heard any abusive word being hurled must have understood that the words merely uttered as an abuse and nothing more...”

17. Although her witnesses testified of having heard the words, none of them told the Trial Court that they thought of her any less than they did before the Appellant abused her. In fact, this court did not find that any evidence was adduced in the Trial Court to indicate that she lost the company of her friends, the trust and confidence of her family who tended to shun her causing her to suffer psychological trauma, pain, anguish, distress and embarrassment as she had contended in Paragraph 9 of her Complaint. She did not tender any evidence to demonstrate that she had suffered any actual damage.

18. The accusations by the Appellant against her may have been false but they did not in any way reduce her standing in the eyes of right thinking members of the society as they were uttered during an altercation. Rather, it appeared that she had exaggerated the effect of the insults and abuse with a view to justifying why she was entitled to general damages.

19. Evidently, the Learned Trial Magistrate therein narrowed down the Appellant's guilt to his use of the words **“mjinga”** and **“malaya”** against the Respondent herein, the English interpretation being **“fool”** and **“prostitute”** and his threats to beat the Respondent. The words that the Appellant uttered against the

Respondent were abusive and insulting to the Respondent but they were not in any way defamatory.

20. It was this court's finding that the Respondent's reputation was injured and that the Learned Trial Magistrate erred in her interpretation of what constituted defamation and/or slander for the reason that the words were uttered after an altercation regarding parking between the Appellant and the Respondent herein. As such the Appellant's utterances could not be deemed to have been actionable.

21. Notably, the Appellant had already been convicted in a criminal court for the offence of behaving in a manner likely to create a breach of peace. There was no indication that he appealed against his conviction and sentence. If he did, there was nothing on record to show that he had done so. Awarding damages against the Appellant amounted to double jeopardy.

22. Accordingly, having considered the Appeal herein, the Written Submissions and the case law in support of the Appellant's case, the court was persuaded to find and hold that this was a suitable case for it to exercise its discretion and interfere with the lower court's finding for the reason that the Respondent's case was not proven to the required standard of proof, which was proof on a balance of probabilities.

23. It is important to point out that the fact that this court declined to dismiss the Appeal herein on technicalities as the judgment by the Learned Trial Magistrate was misplaced. Indeed, allowing a manifestly excessive award of general damages in the sum of Kshs 650,000/= where it was undeserved would have amounted to a gross miscarriage and travesty of justice. Such an award was unlawful and not befitting the circumstances of the case in the Trial Court.

DISPOSITION

24. For the reasons foregoing, the upshot of this court's judgment was that the Appellant's Appeal that was lodged on 13th September 2013 was merited and the same is hereby upheld. In this respect the Judgment that was delivered by Hon M. Chesang, Ag Senior Resident Magistrate on 15th August 2013 in Wundanyi **SRMCC No 6 of 2012 Alice Wali Mkombola Vs Nyambu Mwanyefa** is hereby set aside.

25. The Respondent shall bear the costs of the Appeal herein and those of the lower court.

26. It is so ordered.

DATED and DELIVERED at VOI this 28TH day of JULY 2016

J. KAMAU

JUDGE