



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CIVIL APPEAL NO. 14 OF 2015**  
**(FORMERLY KISII HCCA NO. 26 OF 2010)**

**BETWEEN**

**JAMES OMENDA ABUSA..... APPELLANT**

**AND**

**LUDIA ATIENO ONYANGO..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. C. L. Yalwala, RM in Oyugis Senior Resident Magistrates Court Civil Case No. 74 of 2009 dated 2<sup>nd</sup> February 2010)*

**JUDGMENT**

1. The appellant appeals against the dismissal of his claim for slander against the respondent. He claimed that on 8<sup>th</sup> February 2009, the respondent went to the appellant's homestead and published the following Dholuo words, of and concerning the plaintiff;

*Itamo dhoga kwayo e dalani, nikech idwaro ni mondo gi tho. Bende inegi wuoda. Kendo in ema inego chuora, Duncan Onyango.*

Translated in English, the words were as follows;

*You are preventing my cows from grazing at your homestead, because you want them (cows) to die. Besides, you are also killing my son. You are also the one killing my husband, Duncan Onyango.*

2. The appellant averred that the words were defamatory and in his plaint dated 21<sup>st</sup> April 2009, he pleaded that the words meant or were understood to mean that he was a criminal, that he had no regard to human life and partakes in criminal and or murderous activities, that he conducts and or engages in illicit activities, that he was a dishonest and a social misfit, that he was incapable of being trusted and that he delights and or indulges in killing. Due to injury to his character and reputation, he prayed for general and exemplary damages and an unconditional and or unqualified apology.
3. The respondent, in the defence dated 8<sup>th</sup> May 2009, denied that she trespassed onto the appellant's property and uttered the words which the appellant alleged to be defamatory. In addition, the respondent averred that the appellant being her brother-in-law was actuated by malice and spite against her and that the case was framed to settle family scores and was in fact a personal

vendetta.

4. After the close of pleadings, the matter went to trial and the emerging evidence was as follows. The appellant (PW 1) testified that on 8<sup>th</sup> February 2009 at about 11.00 am while he was in his house with Peris Abila (PW 2), he heard noise from outside and when he went out he saw the respondent shouting and uttering the defamatory words. At that time PW 2 was still in homestead. He denied that the words uttered were true. He instructed his advocate to send a demand letter to the respondent but he never received an apology. PW 2 testified that she was in PW 1's house at about 11.00 am when she saw PW 1 looking outside. She heard the respondent's voice and heard him utter the defamatory words. She understood that the words to refer to the appellant and that they meant the appellant was a witch. Ochieng Kevin Ogal (PW 3) testified that on the material day at 11.00 am, he saw the respondent standing by her fence quarrelling with the appellant. He heard her utter the defamatory words.
5. The respondent (DW 1) also testified. She denied uttering the defamatory words. She stated that on the material day she heard the appellant quarrelling while she was in her house. She denied that she went into the appellant's homestead. She went to find out what happened and she saw that he was quarrelling with his nephew, Jeckoniah Otieno (DW 2), who had taken some livestock into his homestead. The quarrel subsided and her husband who witnessed the incident went back home. DW 2 testified that the incident between him and the appellant took place at about 2.00pm. He stated that at 11.00 am on that day, he was at the lakeshore where he does his business.
6. After analysing the evidence and submissions, the learned magistrate concluded as follows in the judgment;

*In the premises, I hold that though the words uttered by the defendant were defamatory, the same did not contrary to the submission by the plaintiff's advocate attribute the commission of a criminal offence on the person against whom that were uttered. It thus follows that to be entitled to damages in this case, the plaintiff (if he were the one the words were uttered against) would need to prove special damage.*

*The upshot of this judgment is that the plaintiff has failed to prove his case against the defendant on the balance of probabilities. The same is dismissed. Given the that the defendant uttered the words complained of and given, that the same were defamatory though not against the plaintiff, and given that the plaintiff may have been under a honest though mistaken belief that the words were directed at him and had cause him damage, a given that the closed family link between the parties .... the parties hereto shall each bear their own respective costs of this suit*

7. It is the judgment dismissing the claim that precipitated this appeal. Mr Oguttu-Mboya, counsel for the appellant, submitted that the appellant had satisfied all the elements of the cause of action. He submitted that the trial court found that the words were uttered and that they were indeed defamatory and since there was no cross-appeal on this issue, the only issue is whether the words referred to the appellant. He contended that words referred to the appellant. He also submitted that the learned magistrate erred in holding that proof of special damage was required in the circumstances. Counsel urged the court to assess damages after finding in favour of the appellant.
8. Mr Kisera, learned counsel for the respondent, opposed the appeal and supported the judgment of the subordinate court. He submitted that the appellant failed to prove that the words referred to him either directly or by innuendo. He pointed out that when the words were uttered, the appellant was inside his house and the words could not have possibly referred to him as he was there with his wife and PW 2. He also submitted that the appellant failed to prove that he was defamed as the witnesses who testified on his behalf all believed that he was still a respectable person. Counsel contended that as a matter of fact the words were not true as the respondent's son was alive. Mr Kisera supported the learned magistrate's conclusions that the parties were relatives and that there was confirmed bad blood which the court should take into account in coming to its decision.

9. This is a first appeal and the duty of the first appellate court was succinctly summarized by the East Africa Court of Appeal in ***Selle v Associated Motor Boat Company Ltd*** [1968] EA 123, 126 as follows:

*Briefly put they [the principles] are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.*

10. Before I consider whether the appellant proved his case, it is important to recall the elements of the tort of defamation. According to the learned treatise ***Winfield & Jolowicz on Tort (16th edition)*** at page 140, in order to succeed in a defamation claim, a plaintiff must prove that the words which are published of and concerning the plaintiff to a third party are defamatory, that is, they tend to lower or actually lower the character or reputation of the plaintiff in the eyes of right-thinking members of the society and refer to the plaintiff.

11. Slander is a species of defamation where the words are oral or in a non-permanent form. In an action for slander, in addition to proving that the words are defamatory, the claimant must prove actual damage except where the words complained of impute a crime for which the plaintiff can be made to suffer physically by way of punishment, where the words impute that the plaintiff has a contagious or infectious disease; where the words are calculated to disparage the plaintiff in any office, profession, calling, trade or business and where the words impute adultery or unchastity of a woman or girl.

12. The respondent did not cross-appeal against the finding that of the learned magistrate that the words were uttered by the respondent and that they were defamatory. The test whether the words are defamatory and whether they refer to the plaintiff is objective. According to ***Halsbury's Laws of England 4<sup>th</sup> Edition Volume 28*** at Page 23;

*In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense.*

Thus in determining the meaning of words for purposes of defamation the court does not employ legal construction, it will consider the layman's understanding of the same.

13. Even on my own consideration of the evidence, I find that the words were uttered by the respondent and that they were defamatory. Apart from the testimony of PW 1, there was the testimony of PW 2 and PW 3. The respondent's witness, DW 1 was not helpful as he was not present at 11.00 am on the material day when the words were uttered. The question the court asks is what a reasonable person would think of the plaintiff upon hearing the words. The words set out clearly refer to the appellant and according to the witnesses they were directed at him. PW 2 and PW 3 were clear that the words referred to the appellant.

14. As to whether the plaintiff's reputation was injured or lowered, the test is also objective. It does not matter that the witnesses do not believe what was said of or concerning the plaintiff. The words from the point of view of a reasonable person are clear that the appellant is the kind of person who would be involved in witchcraft or murder. At this stage I would also discount Mr Kisera's argument that the words uttered were not true as the respondent's husband and son were still alive. Defamation is not about falsehoods, it is about injury to one's repute. In ***Phinehas Nyaga v Hon. Gitobu Imanyara*** NBI HCCC No. 697 of 2009 [2013]eKLR, the court held that;

[16] *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 society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation.*

15. I now turn to the issue of damages. The defamatory words uttered by the respondent clearly impute the offence of murder which is felony punishable under our law. Thus the slander is actionable per se and the plaintiff is not required to prove special damage. In ***Awili v Attorney General* [1981] KLR 264, 267**, the Court of Appeal citing with approval the case of ***Gray v Jones* [1939] All ER 798** held that, ‘[A]s the words complained of charged the appellant with the commission of a crime punishable by imprisonment [they] were accordingly actionable without proof of special damage.’

16. The learned magistrate did not consider or assess damages even after finding that the appellant's claim was unsuccessful. It is appropriate for the court, even when it dismisses a claim to assess the damages it would have awarded had the claim been successful. In the case of ***Selle v Associated Motor Boat Co.*, (supra at P. 131)**, Law J.A., observed that;

*It is always desirable, in a suit for damages, for the trial judge to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the defendant. Much time and expense can be avoided if this course is followed.*

17. While this court has the power to refer the matter back to the subordinate court to assess damages, I think that given the length of time that has elapsed since the original decision it would be proper for this court to complete the task of assessment of damages. In the subordinate court, the appellant submitted that he was entitled to Kshs. 400,000/- as general damages, Kshs. 200,000/- exemplary damages and Kshs. 100,000/- damages in lieu of an apology. The respondent did not proffer any submissions on the quantum of damages.

18. General damages are generally damages at large and the court looks at the gravity of the slander and is also guided by various decided cases. In ***Johnson Evan Gicheru v Andrew Morton & Another Civil Appeal No. NAI 314 of 2000***, the Court of Appeal particularly Justice Tunoi (as he then was) stated that in assessing damages the court should look at the whole conduct of the defendant from the time libel was published down to the time the verdict is given. Following the case of ***Jones v Pollard* [1997] EMLR 233-243**, he proceeded to provide a list of factors courts should consider in assessing compensation in defamation cases. These include the objective features of the libel itself such as its gravity, its province, the circulation of the medium in which it is published, and any repetition, the subjective effect on the plaintiff's feeling not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages, such as the publication of an apology, matters tending to reduce damages and vindication of the plaintiff's reputation past and future (see also ***Wangethi Mwangi & Another v J.P. Machira t/a MACHIRA and Company Advocates NBI CA Civil Appeal No. 148 of 2003* [2012]eKLR**).

19. The general principles governing the award of exemplary were elucidated in ***Obongo & Another v Municipal Council of Kisumu* [1971] EA 91** where the court held that punitive or exemplary damages could only be awarded where there is oppressive, arbitrary or unconstitutional action by the servants of the government and where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff (see also ***Mikidadi v Khaigan and Another* [2004]eKLR 496** ). Following these principles I find that the appellant has not made out a case for the award of general damages.

20. Bearing the above principles in mind, I find that the slander was grave as it imputed murder. However, I take into account the fact that it was published to a limited number of people who

happened to know the appellant. There is evidence that there was some disagreement between the appellant and the respondent over some family issues. There is no evidence that the slander would be repeated or broadcast further than the limited setting in which it was published. Doing the best I can, I assess general damages at Kshs. 100,000.00. As the respondent did not apologise award Kshs. 20,000.00 as damages in lieu of an apology.

21. Following what I have set out above, I allow the appeal and as a result the judgment and decree of the subordinate court is set aside and substitute it with the following;

- a. Judgment be and is hereby entered for the appellant against the respondent for the sum of Kshs. 100,000/- being general damages and Kshs. 20,000/- being damages in lieu of an apology.
- b. The said sum shall accrue interest at court rates from the date of judgment in the subordinate court.
- c. The appellant shall have the costs of the suit in the subordinate court and of this appeal.

**DATED and DELIVERED at HOMA BAY this 24<sup>th</sup> day of April 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Oguttu-Mboya instructed by Oguttu-Mboya and Company Advocates for the appellant.

Mr Kisera instructed by Omonde Kisera and Company Advocates for the respondent.