



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CIVIL CASE NO. 21 OF 2010

JACINTA KASYOKI APPELLANT

VERSUS

VINCENT KALOKI AARONRESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate's Court at Kitui of Hon E. Juma Osoro (S.R.M) in Civil Case No. 108 of 2009 dated 26th January 2010)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, Jacinta Kasyoki had sued the Respondent, Vincent Kaloki Aaron in the lower court for defamation. The Appellant claimed general damages, aggravated and exemplary damages, costs and interests.
2. The claim was denied by the Respondent as per the statement of defence filed.
3. The Appellants case was that at the material time she was working as a primary school teacher and had worked as such for about nine years. That during the period 10/11/2008 and 13/11/2008 she was working as an invigilator in the Kenya Certificate of Primary Education (KCPE) at Ndooni Primary school. That after the examination results came out, the Respondent telephoned her on 1/1/09 at about 1.00 p.m and told her that the results for the English and Kiswahili examination for Ndooni Primary school where she had been an invigilator had been cancelled. That the Respondent blamed the cancellation of the results on her having assisted the pupils to answer the questions.
4. The Appellant further testified that the Respondent who was a fellow teacher at the same school went on spreading the rumours of the examination cheating to all the schools, market places etc. According to the Appellant, the pupils ended up writing similar answers in the English paper due to being taught how to cram by the English teacher. The Appellant further stated that she did not know why the pupils failed in their Kiswahili paper which was taught by the Respondent. The Appellant stated that she had taught CRE in the affected class. That following these rumours, she was summoned and interrogated by the school inspector.
5. The Appellant prayed for damages. She stated that she had lived in that area for almost ten years and was known by the pupils and parents and was a respected teacher but the rumours brought her disrepute.
6. The Respondent on the other hand stated that he was a teacher at Ndooni primary school. He denied

having telephoned the Appellant as alleged and stated he did not accuse her of having assisted the pupils to cheat in the examinations. He also denied having spread any such rumours. The Respondent admitted that the examination results were cancelled but stated that only the head teacher could have followed up the issue. According to the Respondent, the Appellant and her witnesses implicated him for reasons better known to the Respondent.

7. In her judgment, the trial magistrate found the Applicant but had failed to prove her case and dismissed the same with costs.

8. The Appellant was aggrieved by the said judgment and appealed to this court on grounds that can be summarized as follows:

- a. **That the learned magistrate erred in fact and law in holding that the defendant was not liable for the tort of defamation.**
- b. **That the learned magistrate erred in law and fact by totally failing to take into account the evidence of the Appellant witnesses.**
- c. **The learned Magistrate erred in fact and law and in fact in failing to consider the submissions of the Appellant counsel together with the case law in support.**

9. The appeal was canvassed by way of written submissions which I have duly considered.

10. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. See for example **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

11. As held by the Court of Appeal in **Wycliffe A. Syanya –vs- Toyota East Africa & Anor (2009) eKLR;**

“For the purpose of deciding a case of defamation, the court is called upon to consider the essentials of the tort generally and to see whether the essentials have been established or proved. It is common ground that in a suit founded on defamation, the plaintiff must prove:

- i. *That the matter which the plaintiff complains about is defamatory in character.*
- ii. *That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.*
- iii. *That it was published maliciously.*
- iv. *In slander, subject to certain exceptions, that the plaintiff has suffered special damage.*

12. In **Kudwoli –vs- Eureka Education & Training Consultants & 2 others (1993) eKLR** Kuloba, J held as follows:

“The leading English monograph of Gatley on the subject of defamation defines what is defamatory as

“Any imputation which may tend to lower the plaintiff in the estimation of right thinking member of society generally’ per Lord Atkin in Sim –vs- Stretch (1936) 52 TLR 669, at 671) “ to cut him off from society’ (per Wilmont C.J Villers –vs- Mosley (1769) 2 Wils 403 at pp403, 404 or “to expose him to hatred contempt or ridicule (per Parke B. in Parmiter v Coupland (1840) 6M&W 105 at p 108) is defamatory of

him .

In its definition of the wrong of defamation the great treatise of Salmond in the field of tort put forward the following definition:

“The tort consists in the publication of a false and defamatory statement concerning another person without lawful justification”.

13. Gatley on Libel and Slander 9th Edition Sweet and Maxwell 1998 at p8 furthers states:

“In actions of slander, and in actions of libel where the oral evidence of witnesses is the only proof available, though precise words must be alleged in the statement of the claim, the plaintiff does not have to prove that these precise words were in fact published. It is sufficient if he proves a material and defamatory part of them or words which are substantially to the same effect. In such a case, if the words proved convey to the mind of a reasonable man practically the same meaning as the words set out, the variance will be immaterial ... no slander of any complexity could ever be proved if the ‘ipsissimaverba’ of the pleading had to be established”.

14. The evidence of pw1 and pw2 was that the words complained of referred to the Appellant. On whether the said words were published, the amended plaint in paragraph No. 5 and 5a alleges that the words in question were uttered to **Elizabeth Kithiki, Musaya Masengula** and other unknown persons at the **Malani** market.

15. The plaintiff's evidence was that the applicant telephoned her and made the allegations in question. This conversation was between the Appellant and the Respondent only. A communication to the person defamed cannot injure his reputation, for a man's reputation is not the good opinion he has of himself. **(See Gatley on Libel and Slander – Supra)**

16. Although the appellant stated in her evidence that she informed her husband and her children about the matter, it was not the Respondent who published the words to them.

17. Elizabeth Kithiku who is one of the two people specifically mentioned by the Appellant in the plaint as having been informed of the alleged examination cheating testified herein (pw2). It was the evidence of Pw2 that both the Appellant and the Respondent are her in laws. According to Pw2, she was at the Respondent's shop when she heard the Respondent telling his wife about the alleged examination cheating. One **Musanya Masengula** who was also said to have been told by the Respondent about the examination cheating was however not called as a witness. There is also no witness from **Malani** Local Market to show that the words in question were also uttered there.

18. The evidence on record boils down to the words complained of having been heard by pw2 only. The evidence of pw2 also fails to reflect the effect the said utterances had on her. There was no evidence adduced by pw2 to show whether she shunned the Appellant or whether the Appellant's reputation was in her estimation lowered. Moreover, the communication between the Respondent and the wife is privileged communication.

(See “Gatley on libel and Slander” - Supra)

19. It has been submitted by the Respondent's counsel that the plaint is defective in that there are no particulars of the alleged defamation stated in the plaint. I have perused the plaint. The appellant failed to state why he thinks the words complained of were defamation. OVI r6A CPR makes it a requirement for the said particulars to be given in the plaint. The plaint is therefore defective.

20. Another defect in the plaint was the failure to state the utterances complained of in the language that the words were uttered. Paragraph 5 of the plaint reflects the words complained of as follows: ***“Jacinta Kasyoki had assisted and showed the pupils taking the 2008 KCPE examination at Ndooni primary school examination centre and this was the cause of some students missing their examination results”.***

As held by the court of appeal in the **case of Kalumbo –vs- Kibirege EALR 1973**, where the alleged libel is in any language other than English, it must be set out in that language followed by a literal translation into English.

The Appellant's evidence was that the Respondent spoke to her in kikamba mixed with a bit of Kiswahili and English. Pw2's evidence further reflects that she heard the Respondent talking to his wife in Kikamba language.

21. Having re-evaluated the evidence on record, I find no reasons to differ with the findings of the trial magistrate. I find no merits in the appeal and dismiss it with costs to the Respondent.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at **Kitui** this **23rd** day of **April** 2015.

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B. THURANIRA JADEN

JUDGE