



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**Civil Appeal No. 62 Of 2012**

***(An appeal from the Judgment/Decree of the Principal Magistrate, Siakago in SRMCC No. 36 of 2009 dated 14/6/2012)***

**PAUL KARIUKI NJERU.....APPELLANT**

**VERSUS**

**NJERU WARUI.....RESPONDENT**

**J U D G M E N T**

This is an appeal against the judgment of Siakago Principal Magistrate, S.M. Mokuia in SRMCC 31 of 2009 where the appellant sued the respondent for damages for defamation. The trial magistrate dismissed the case with costs. Being dissatisfied with the said judgment the appellant lodged this appeal on the 11/9/2012.

The grounds supporting the appeal are as follows:-

- 1. That the finding of the trial magistrate was against the weight of the evidence.*
- 2. That the trial magistrate erred in not finding that the alleged defamatory words uttered were published without justification.*
- 3. That the trial magistrate erred in not finding that there was sufficient proof that the defamatory words were uttered, published and actionable per se.*
- 4. The magistrate erred in not finding that the respondent admitted uttering the said defamatory words through his witness.*
- 5. The magistrate erred in not finding that the respondent's evidence was contradictory, unreliable and incredible.*
- 6. That the magistrate erred in not finding that the appellant suffered loss and damages as a result of the respondent's defamatory utterances and is therefore entitled to compensation.*
- 7. The magistrate erred in not setting out the points of determination in his judgment, the decision on each point and reasons thereof as required by the law.*

The parties canvassed their appeal by way of written submissions. The appellant was represented by Messrs. Duncan Muyodi & Company while the respondent was represented by Messrs. Kenneth J.N. Githinji & Company Co.

In his submissions the appellant argued that he adduced evidence to the effect that the respondent uttered and published defamatory words against him on the 29/8/2008 and on 11/9/2008. The words were to the effect that the appellant was a wizard for he had bewitched the respondent's son. The said words were spoken in the

presence of the assistant chief of Gikiero sub-location. Other people who were present were named as Joseph Nyaga Mukembo, James Nyaga, Sospeter Ngari, Phylis Rweru and Humphrey Kinyua among others who were at the office of the assistant chief at the material time.

The appellant stated that the assistant chief summoned the respondent and himself in his office with a view of arbitrating on the dispute but no agreement was reached. He produced a letter written by the area assistant chief dated 11/9/2008. It is argued that the respondent's reputation was tarnished by the said words among his parents, relatives and friends. He was ostracized by members of the society and that his reputation as the vice chairman of AFCC Muchonoke church suffered greatly.

The respondent submitted that the appellant ought to have specifically stated the acts of defamation in the plaint. He argued further that the verifying affidavit was defective for it failed to verify the correctness of the claim and is contrary to the Statutory Declaration Act. The respondent submitted that the suit ought to have been filed within six months and it was therefore time barred.

Regarding the evidence on record, the respondent argued that the appellant failed to adduce any evidence to prove that the alleged defamatory words were uttered, published and that he suffered special damage.

The duty of the first appellate court in the case of **KENYA PORTS AUTHORITY VS KUSTON (KENYA) LIMITED [2009] 2 EA 212** the Court of Appeal held that:-

*“On a first appeal from the High Court, the Court of Appeal should 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 witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”.*

The Defamation Act Cap 36 does not define slander and libel. It does not contain any special features for the two forms of defamation. Article 33(3) of the Constitution provides that:-

*“In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”.*

The evidence of the appellant was that the defamatory words were uttered on two occasions. He gave emphasis on the second occasion when the parties were before the area assistant chief for the purpose of resolving of the dispute. He said that he was accompanied by several members of public whom he named in his testimony. He further said that the respondent alleged that he was a witch and that he had bewitched his child namely Humphrey Kinyua. He produced a letter allegedly written by the chief on 11/9/2008. His witness PW2 was present in the assistant chief's office. He told the court that the chief was asking the appellant to seek for forgiveness for it was alleged that he had poured water on the son of the respondent. The appellant declined to seek forgiveness saying that he was not a witch. PW2 said that the appellant was a respected church elder.

The area chief DW1 was called as a witness by the respondent. He testified that he had unsuccessfully

attempted to resolve the dispute between the parties in his office. After listening to the parties he found that the appellant had poured water on the respondent's son using a kasuku container. He admitted that he was the author of the letter dated 11/9/2008 which addressed the dispute between the parties. However, he told the court that he did not hear the respondent utter the alleged defamatory words. He specifically said that the word "witch" did not feature on the fateful day and that his letter does not indicate anything pertaining to witchcraft.

The magistrate found that the words used by the respondent were defamatory but the appellant failed to satisfy the court that he suffered loss and damage as a result of the said utterances.

The following are the issues for determination in this appeal:-

1. *Whether the suit was properly before the court.*
2. *Whether the appellant proved his case on the balance of probability before the trial court.*
3. *Whether the trial magistrate erred in law and in fact by finding that the appellant did not prove that he suffered special damage as a result of the alleged defamatory words.*
4. *Who shall bear the costs of this appeal.*

The cause of action arose on the 29/8/2008 and the suit was filed on the 14/5/2009 which was about 12 months later. Section 4(2) of Limitation of Actions Act provides that:-

*"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. Provided that than action for libel or slander may not be brought after the end of 12 months from such date".*

In view of the above provision, the limitation period for an action for defamation is 12 months. I find that this suit was brought within the period provided for by the law.

On perusal of the verifying affidavit, paragraph 2 states that *"the facts contained in the plaint are true to the best of my knowledge and belief"*. In my opinion, the said words are sufficient to verify the correctness of the contents of the plaint.

Having found that the suit was filed within time and that the contents of verifying affidavit are sufficient. I reach a conclusion that the suit was properly before the court.

The respondent raised the issue of the appellant not having set out the words complained of in the plaint. On perusal of the plaint the following words were set out in paragraph 3 of the plaint:-

*"Nira thitanga Paulo Kariuki niundu wa kundogira mwana wakwa Humphrey Kinyua".*

*"I have accused Paul Kariuki because he bewitched my son".*

In paragraph 5 the appellant set out the following words:-

*"Nirathitanga Paulo Kariuki toondo niurogite mwana wakwa".*

*“I have accused Paul Kariuki because he bewitched my son”.*

The appellant has clearly set out the defamatory words uttered by the respondent in the plaint in regard to the two occasions. It was held in the case of **CHRISTOPHER MUDI & 2 OTHER VS NATION MEDIA, Nairobi HCCC No. 995 of 2002** that in libel and slander cases the very words complained of are the facts on which the action is grounded and must be set out in the plaint.

In the case of **NKALUBO VS KIBIRIGE HCCC 38 of 1972** Court of Appeal in Uganda that 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 plaint bears witness that the appellant has clearly set out the alleged defamatory words in the plaint. He has also translated them from Mbeere language to English as required by the law. The respondent's allegation that the appellant has not complied with the law has no basis.

The main issue for determination is whether the words uttered by the respondent during the two meetings were slanderous and actionable. The appellant testified that the respondent called him a witch in front of the chief and other people who were present. His witness PW2 also said that the respondent said that the appellant had bewitched his son. This was at the time they were in the office of the chief. The presence of other people in the office was not rebutted by the respondent. In view of this fact, it can be said that the words were communicated to other persons other than the appellant.

The appellant alleged that he was a church elder and that the members had shunned him as a result of the utterances by the respondent. However, he did not call any witness to prove that he indeed suffered actual or special damage. The magistrate in his judgment stated that the appellant was under an obligation to prove that he suffered loss and damage in order to succeed in his claim. He found that the appellant had failed to satisfy the court as to whether he suffered any damage.

The appellant was required to prove the following facts in his claim:

- 1. The words must be defamatory in that they must tend to lower the appellant's reputation in the estimation of right minded persons, or must cause him to be shunned or avoided.*
- 2. The words must refer to the appellant.*
- 3. That the said words were published or communicated to other people.*

The appellant relied on two letters dated 16/9/2008 and 11/9/2008 written by the Assistant Chief which allegedly contained defamatory remarks. Although the letters were headed “witches” it was not expressly indicated that anyone was called a witch on any of the two occasions. The letters were written in Mbeere language and were not interpreted in English. For that reason, the trial magistrate in his judgment said that the contents of the letters were unknown.

Slander is in form of the words allegedly spoken by the respondent. In an action for slander the appellant

requires to prove that he suffered damage as a result of the defamatory words. The appellant is required to prove that the words uttered by the respondent were defamatory in that they must tend to lower his reputation in the estimation of right minded person or must tend to cause him to be shunned or avoided.

It was held in the case of ***K L VS STANDARD LIMITED [2014] eKLR*** that mere abusive words may not be defamatory. The speaker of the words must take the risk of his audience construing them as defamatory and not have understood them as merely abusive. The court also observed that the words must be malicious. Malice in this context does not necessarily mean spite or ill will but recklessness itself maybe evidence of malice.

In deciding whether the words are defamatory, the words could reasonably be regarded as meaning, not only to the general public but also to those who have a greater or special knowledge of the subject matter. The proper test is whether reasonable people who knew the appellant would be led to reach a conclusion that the words referred to him and whether his reputation was lowered in society by the said utterances.

The appellant failed to prove that his reputation was affected in any way among the general public, his friends or the members of his church. I reach a conclusion that the magistrate's finding that the appellant did not prove his case on the balance of probability was correct and grounded on the evidence on record.

The judgment of the learned magistrate is hereby upheld.

This appeal is dismissed with costs to the respondent.

It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF JUNE, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Mwaniki for Okwaro for appellant**

**Ms. Kiragu for K. Githinji for respondent**