



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.189 OF 2010

GEORGE ONYANGO ONYANGO.....APPELLANT

VERSUS

MICHAEL ABUNGO OLALO.....RESPONDENT

[Being an Appeal from the Judgment of Resident Magistrate's Court at Siaya by: S.O. TEMU – R.M. In Civil Case No.51 of 2006.]

J U D G M E N T

1. On 3.1.106 the respondent filed suit at the lower court claiming inter-alia damages for defamation from the appellant. The trial court after hearing all the parties awarded him Kshs.200,000/- together with costs. This prompted this appeal.
2. Before moving further it would be worthwhile to set the evidence as presented by the parties during trial. The respondent told the court that on 6.10.06 the appellant reported at Ugunja police station that he the respondent wanted to kill him. He was then called and detained at the station for 3 hours. According to him the appellant had told the police that the respondent had told mourners at the funeral of the respondent's son that it was the appellant who had killed both his wife and the son. He thus argued that those remarks had spoiled his character and the respondent should be compensated. On cross-examination he said that the appellant did not tell him personally that he wanted to kill him.
3. **PW2 PC FRANCIS NGURSISHI** produced the OB report of 6.10.06 which showed the entry No.11 in respect to a report by the appellant about threats of being killed by the appellant.
4. **DW1**, the appellant told the court that he knew the respondent and infact his uncle had sued him over a land issue. He heard that during the burial of his son the respondent had alleged that the appellant had killed both his son and the wife. This prompted him to go to the police station at Ugunja and reported the threat.
5. On 6.10.2006 the appellant got a phone call from his son **Jairus** that an anonymous caller had informed him that the respondent was planning to kill his father by hiring thugs. This prompted him to report to the police. At the station the police officer spoke with **Jairus** via a phone call who confirmed the same.
6. **DW2 JAIRUS GEORGE OTIENO** the appellant's son confirmed that indeed he received an anonymous telephone call on 6.10.06 who informed him that the respondent planned to hire thugs to kill his father. This promoted him to call the appellant and gave him the information.

7. **PW3 CELINE AUMA OKUMU** told the court that she was at the funeral of the respondent's son in April 2006 when the respondent told the mourners that it was the appellant who had killed his wife and son.

8. **PW4 JOYCE OGOLA ARUTHA** was equally at the above stated funeral when the respondent uttered those words to the mourners.

9. The appellant's memorandum of appeal has 5 grounds which can be summarised as follows:

- a. **whether there was any evidence of defamation;**
- b. **whether the trial court applied the right principles in arriving at the decision;**
- c. **whether the respondent was entitled to any damages.**

10. Those are the issues raised in the lengthy written submissions by the parties herein which I have perused them carefully. Both parties have submitted for and against the appeal.

11. This court being the first appellate court is bound to examine the issues afresh with a view of arriving at a new finding all together taking into consideration the fact that it was not able to witness the demeanour of the parties and there respective witness.

12. The complaint dated 1.11.06 simply states in paragraph 3 that:

“On or about 6th October 2006, the defendants falsely and maliciously filed a report with Ugunja Police Patrol Base at Ugunja Town that the plaintiff was planning to kill the defendant.”

It went further to state in paragraph 6 that:-

“The false and malicious reports were understood in their ordinary and natural meaning to mean that the plaintiff was a murderer and an otherwise evil person unfit to live and co-exist with ordinary members of his society.”

13 The question is whether these words as pleaded in the complaint suggest or shows that the respondent was defamed. If indeed those words were pleaded are they defamatory? In his evidence in chief the respondent merely stated what he told the police. His beef with the appellant was the report he made to the police that he wanted to kill him.

14. **HALSBURY LAWS OF ENGLAND 4TH EDITION VOL 28 BUTTEWORTHS LONDON 1997** at paragraph 42 defines defamation as:

“... a statement is defamatory of the person of whom it is published if it tends to lower him in the estimates of right thinking members of society generally or if it exposes him to public hatred, contempt or ridicule or if it causes him to be shunned or avoided...”

15. Does mere reporting of threats at the police station amount to defamation? A closer look at the OB would bring out clearly whether there was any defamation. The report stated as follows:

“Report of threat: To the patrol base is one Councilor by the name George Onyango Onyango report that today at 15.30 hours his son JAIRUS GEORGE OTIENO rang through a mobile phone informing him that one person rang him while in Mombasa telling him that one by the name ABUNGU is planning to eliminate his father but hid his mobile number that's when he rang councilor and came to report this matter, the person rung at 9.00 hrs.”

16. Can the above words made to the police be considered defamatory? I do not think so. The simple reason is that it was the duty and responsibility of the appellant to report any threat to his life. For instance if he had failed to report and indeed his life was threatened, wouldn't he have been blamed both by the police and his son? In any case it is the duty and responsibility of the police to receive information

and investigate.

17. My above conclusion is premised on both evidence of PW3 and PW4 who heard the respondent blaming the death of his wife and son on the appellant earlier on. Clearly there was bad blood between the two of them and any such threat to his life was worth reporting.

18. Nor can the words be termed malicious. I don't think so. The same was well put in the case of **RWENIKE VERSUS BINA MUNGU [1974] E.A.. 388**, where **MFALILA J** held that:

“firstly, while it is true that certain categories of defamation turn on the falsity of the statement published this particular one does not, so that the falsity or truth of the report made to the police station was not relevant to the liability of defamation. This liability turned exclusively on the person or absence of express malice, because the occasion in which they uttered or published the defamatory words at the police station was qualified privilege. It is settled law that statements made in aid of justice are privileged qualifiedly and in this category falls all information given to the police in order to detect crime.”

19. I wouldn't agree more. In any event DW2 explained how he had a lengthy phone conversation with police officers at Ugunja and explained to him how he received the information in respect to the threats to his father.

20. The other issue to consider is whether the plaint clearly carries such defamatory words. Earlier on I reproduced what I considered the relevant portion of the plaint which would imply that there was such a defamation. Order 2 rule 7 of the Civil Procedure Rules seemed to demand more:

Rule 7(1) therefore states:

“wherein an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.”

21. A closer look at the plaint does not carry this peremptory requirements.

All that the respondent pleaded were general words without specifically pleading what and which he considers to be slanderous as envisaged by the above cited rule. Consequently and in light of the above findings, the trial court clearly came to a wrong conclusion both in law and facts. The report made to the police was qualified privilege. If we were to criminalise all the reports made to the police then the ordinary folks will think twice before making any threatening information to the relevant law enforcers. In any case the appellant's witnesses clearly and incontrovertibly stated the threats made by the respondent against the appellant. Infact, I dare to say, it is the respondent who was clearly aggrieved. There were no malicious words at all capable of defaming the respondent.

22. The upshot therefore is that the appeal is allowed with costs both in the lower court and in the high court to the appellant. The judgment of the lower court is set aside.

DATED, SIGNED AND DELIVERED THIS 26TH OCTOBER, 2015.

H. K. CHEMITEI

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