



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO 15 OF 2011

JOSEPH NZALU NGEANA APPELLANT

VERSUS

WINFRED KANYAA MUVAKA RESPONDENT

(An Appeal arising out of the Ruling of H.M Nyaberi SRM delivered on 9th February 2011 in the Mwingi Senior Resident Magistrate's Court Civil Case No.290 of 2008)

JUDGMENT

The Appellant has appealed against the ruling of the Honourable Senior Resident Magistrate H.M Nyaberi, delivered on 9th February 2011 in the Mwingi Senior Resident Magistrate's Court Civil Case No.290 of 2008. The learned magistrate in his judgment found that the Appellant had not proved his case in the trial court on a balance of probability, and dismissed it with costs to the Respondent. The grounds of appeal as stated in the Appellant's Memorandum of Appeal filed in Court dated 17th February 2011 are as follows:

1. That the learned magistrate erred in law and fact in failing to consider the testimony of the Appellant and that of his witnesses.
2. That the decision of the learned magistrate is against the weight of the evidence tendered in court by both the Appellant and his witnesses.
3. That the learned magistrate erred in law and fact in relying on the Criminal Case No. 1070 of 2008 which is pending before another court to make his decision.
4. That the learned magistrate erred in law and fact by not considering that the matter complained of were directed to the Appellant and not his wife as the learned magistrate concluded.
5. That the learned magistrate erred in law and fact in finding that the Appellant had not proved his case to the required standard.

The Appellant prays for orders that the judgment of the learned Senior Resident Magistrate be varied or reversed, and for this Court to make any order which ought to have been made in the circumstances, and such further or other orders as the case may require. Lastly, that this Court awards the costs of this appeal and of the subordinate court to the Appellant.

The Facts

The brief facts of this Appeal are that the Appellant who was the original Plaintiff in the trial court filed a suit against the Respondent, the original Defendant, by way of a Plaint dated 2nd December 2008. His claim was that on or about 24th November 2008 at around 6.00 pm, the Respondent caused a disturbance at his business along Hospital Road, Mwingi, and spoke defamatory words to the public of and concerning the Appellant. The specific words alleged to have been said by the Respondent were as follows in Kikamba language:-

“Nditililwa mwaki nundu Ngeana aenda kwikia fitina nikana nitililwe mwaki na ndakambite ala Malaya utindaa aikomya kuu tauni, anothoeye andu ma Kenya Power and Lighting company uki nikana matile mwaki. Na Ngena ni king’ei kya mbui, oite muvaka akavutwa wiani na aika maundu aa nundu ni nidia ti musomu. Ni mundu wa madeni mathei ataitwe kuu kwonthe na ningumufunza isomo mumanye kana nina mbesa”

Further, that these words translated in English language are as follows:

“My power cannot be disconnected because Ngeana is jealousy so that the power can be disconnected. Let him not take me as the prostitutes who sleep with him all over the town. He bought beer to the people of Kenya Power and Lighting Company so that they can come and disconnect the power. And Ngeana is a thief, he steals goats he has been dismissed from job due to stealing and he is doing all this because he is not educated he is a fool. He is a man of debt he has many debts all over. I am going to teach him a lesson so that he can know I have money.”

The Appellant further claimed that these words in their ordinary sense mean that he is known to the Respondent as jealousy person, a prostitute, a thief, an illiterate, unworking person and a person of debts, and he is not fit and acceptable in the society and that he should be avoided. Further, that the words were actuated by malice and or gross negligence and were uttered in public and in presence of the Appellant’s customers, and were used in a defamatory sense with the malicious intention of tarnishing the good name and character of the Appellant before the right thinking members of the society. The Appellant claimed that as a consequence he was humiliated, embarrassed and shunned by not only his business clients and associates, but also the entire community, and he has suffered loss and damages which he claimed from the Respondent.

The Appellant gave evidence during the hearing of the trial, and called 3 additional witnesses. The Appellant testified as PW1 and stated that he was a resident of Mwingi town and a debt collector with Tana River Development Authority, and also owned Nguutani general contractors and engineering company and Nguutani Bar which operated within Mwingi town. He stated that on 24th November 2008 he was called by his wife at around 6.00 pm who asked him to go home. Upon arriving at his house he was informed by his crying wife that the Respondent had uttered the words complained of in Kikamba language, outside his bar in the presence of people.

The Appellant stated that it was a lie that he was a prostitute, a thief and not educated, and that he was later called by his Human Resources Manager about the words, and that members of the public shunned him. He testified that he reported the matter to the police and the Respondent was arrested and charged in Mwingi Criminal Case 1070/2008. He also stated that before filing this suit he served the Respondent with the demand letter.

PW2 was Lungu Ikui who testified that he resided in Mwingi location, and that on 24th November 2008 at 6.30pm he was in Nguutani Bar and heard a commotion outside. Further, that upon checking outside he heard the Respondent say in Kikamba language that the Appellant had caused her power to disconnected, and that the Appellant was a thief who steals goats, a prostitute and a fool. He testified that the Respondent was speaking facing the Appellant’s wife who he knew, but that he did not know the Appellant. He stated that he was later told that the Respondent owned the shop next to the bar.

PW3 was Lenah Mungai Katuta, who testified that she is a housewife in Mwingi, and that both the Appellant and Respondent were well known to her. She stated that on 24th November 2008 at around 6.00

to 6.30pm while she was outside the Appellant's bar, she saw the Respondent, her husband and two people come and check an electricity meter box. Some other two persons also arrived in a motorcycle and asked that the electricity should not be reconnected, and gave the Respondent a letter.

The witness testified that the Respondent then started saying abusive words in Kikamba language to the effect that the Appellant was a thief of goats, was not educated, claimed to be a councilor but was not, and that she was not like the prostitutes he sleeps with. Further, that these words were spoken outside the Respondent's shop and were directed to the wife of the Appellant, who was a distance away. PW3 stated that there were other persons present including Lungu and Mati, and that she was surprised by the Respondent's words as she did not know the Appellant in that light.

PW4 was Vivien Mueni Musau, who testified that she resided in Mwingi town and was a housewife, and operated Nguutani Bar with her husband who is the Appellant. Further, that the Respondent had a business two shops from her bar. She testified that on 24th November 2008 she was seated outside the bar at 6.00 pm, and she reiterated the account given by PW3 about the Respondent coming with her husband and other people in a vehicle, and the happenings at the electricity meter box at the Respondent's shop.

PW4 stated that the Respondent while facing her, then started saying loudly that the Appellant had bribed the Kenya Power and Lighting employees to come and disconnect her power supply. Further, that the Respondent was not a prostitute like the ones the Appellant slept with, that the Appellant was a thief councilor and pretended that he had a job, and behaved like that since he had never gone to school. PW4 testified that there were several people who had gathered including Syombua, Mary Rose and Jona. PW4 stated that she then called her husband who came, and they went and reported the matter to Mwingi Police station the next day, following which the Respondent was arrested and arraigned in Court. PW4 further stated that she testified in the criminal case.

The Respondent filed a Defence in the trial Court dated 18th December 2008, wherein she denied the allegations made in the plaint and stated that the same did not disclose any cause of action against her.

The Respondent also testified during the hearing and called one witness. The Respondent stated that the Appellant was well known to her as he was a neighbor and operated Nguutani bar which was next to her shop. Further, that on 24th November 2008 at 5.30pm she was in her shop when she heard a commotion outside. Upon going outside she saw two officers from Kenya Power and Lighting Company, and people had started coming because of the noise they were making.

The Respondent testified that neither the Appellant nor his wife were present, and that she came to know that her power had been disconnected because it had a shock. She denied uttering any defamatory words as alleged, and stated that the Appellant harbored a grudge against her because he wanted to have an affair with her, and used to give her money, food and underwear.

DW2 was Patrick Muvaka, who testified that he is a teacher at Mwingi Secondary School and the Respondent's husband. Further, that on 24th November 2008 at 6.00pm he was at his wife's shop, and had called an officer from Kenya Power and Lighting to reconnect power, when another officer from the same company came and shouted that the power should not be reconnected.

He denied that the Respondent uttered any defamatory words, and that several people came as a result of the dramatic scene between the Kenya Power and Lighting officers. He stated that the Appellant had a personal vendetta against the Respondent, and that he was aware that the Appellant had been approaching his wife for love affairs, and that the Respondent had repulsed him.

The Submissions

This appeal was canvassed by way of written submissions. The Appellant's Advocates, Musyoka & Muigai Advocates, filed submissions dated 11th November 2011. It was submitted therein that the central issue in the appeal is whether the Appellant was defamed or not. Further, that the words complained of

were that the Appellant was a prostitute, a thief, a man of debts, and uneducated fool. It was submitted that the Appellant and his witnesses attested to the fact that these words were uttered in the presence of a crowd.

However, that the trial court did not make any find of fact as to whether those words were in fact uttered or not by the Defendant. Instead, that after hearing the evidence, the court *suo moto* called for a criminal file pending before the court on a matter arising from the same fact, and found that the words complained of in the charge sheet were directed at the Appellant's wife (PW4), and not at the Appellant himself. Further, that the court then proceeded to conclude that due to the frosty relationship between the parties and their spouses culminated with their proximity of business, the plaintiff had not proved his case on a balance of probability, and dismissed the suit with costs.

The Appellant urged this court to find that the said offending words were indeed uttered and that the Appellant's account was corroborated from the charge sheet in the criminal file. Further, that if this court finds that the said words were in fact uttered, the next issue to be determined is whether they were defamatory of the Appellant. It was submitted in this regard that it is clear that the said words were about and concerned the Appellant, and that it was he who was being referred to as a prostitute, thief, stupid person, uneducated lout.

The Appellant submitted that the trial court erred when it found that the words did not concern the Appellant as they were uttered in his absence and were directed at his wife PW 4. Further, that the fact that the Appellant was not present does not take away the fact that the words uttered were about him.

It was also submitted that the words were defamatory of the Appellant and that it is not a compliment to call a person a prostitute, a thief or stupid person as such persons are undesirable in society. Further, that to refer to a person in those terms is to insult them and that the Respondent uttered them with the intention of hurting the character, reputation and public image of the Appellant.

Lastly, the Appellant submitted that on quantum, the trial court found that it could have awarded sum Kshs.60,000/= general damages. He urged the court to award him damages in the region of that amount, with costs of the suit in the lower court as well as costs of this appeal.

Kinyua Mwaniki & Wanaina Advocates for the Respondent filed submissions dated 11th May 2013, in which they argued that the standard of proof in a case of defamation is higher than the normal balance of probability. It was submitted that the alleged defamatory words complained of stated in the plaint dated 2nd December, 2008 were not repeated by, and differed in material particulars from what the Appellant's witnesses who testified in court. Further, that the words in Kikamba language as stated in the plaint are not in the demand letter which is the basis of the claim.

The Respondent contended that the trial magistrate did not err in law and fact when he looked at the proceedings in the criminal case, as the Appellant in his evidence-in-chief talked about the case. It was also submitted that the record of the trial court was clear that there was a bad blood between the parties as brought out in evidence of PW1 – PW4. The Respondent urged the Court to analyse the evidence and find that the Appellant never proved his case on a balance of probability, especially as his claim was based on slander in his absence.

The Issues and Determination

The duty of this Court as the first appellate court is as stated in the case of **Kenya Ports Authority vs Kuston (Kenya) Limited**, [2009] 2 EA 212, where 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”.

I have carefully considered the evidence and the written submissions made by counsel for both parties. The issues for determination in this appeal are firstly, whether the words complained of were uttered by the Respondent about the Appellant as alleged, and secondly, if the words were uttered, whether they were defamatory of the Appellant.

The law on defamation is contained in our Constitution, in statutes, and in common law. 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 *Defamation Act* provides requirements in relation to slander, and the application of some of the defences available to a claim for defamation while the *Penal Code* provides for the offence of *libel*. The elements for defamation under common law are stated in **Winfield and Jolowicz on Tort, Seventeenth Edition** at paragraph 12-2 page 515. These are that the statement must be defamatory, secondly that it must refer to and identify the claimant and that it must be published by which is meant that it must be communicated to at least one person other than the claimant.

On the first issue, the Respondent has denied uttering the words complained of. In this respect three witnesses testified to hearing the Respondent say the words. PW2 testified as follows in this regard:

“I heard the defendant saying that electricity is being refused from being restored because of the plaintiff. The words were spoken in Kikamba language. He has caused it to be disconnected. She was speaking facing the wife of the Plaintiff (Mueni).

She was seated outside. She further said Ngeana is a thief who steals goats, a prostitute and a fool who doesn't know how to write. Mueni did not respond to her. I went back to the bar. There were about 50 people present”

PW3 on her part stated as follows:

“The defendant started abusing in Kikamba language. She was saying am not a fool to be married with a person who has not been educated. Ngeana is a thief of goats and has not been educated. He says he is a councillor but was dismissed. She should not call me a prostitute whom he sleeps with”

PW4's testimony was as follows:

“The defendant started saying loudly that my husband has bribed KPLC employees to come and disconnect power supply. She said while facing me to pick a phone and call my husband and notify him that the power has been reconnected and he should know she is a woman and half. She said words in Kikamba. She went ahead saying that I tell my husband that she is not like a prostitute whom he sleeps with in town here and she is not of that class. People call him councillor but that he is a thief councillor who steals peoples goats. He pretends that he has a job but he doesn't have one. We behave like that since we have never gone to school..”

It is evident that therefore Respondent uttered the said words complained of even though the exact particulars thereof differs slightly in the accounts by the various witnesses. The trial court also found as much but stated that the said words were not directed at the Appellant but at the Appellant's wife Mueni. As to whether the words were defamatory of the Plaintiff is the subject of the second limb of this judgment, but for now the finding of the Court is that the alleged defamatory words were indeed uttered by the Respondent.

On the second issue as to whether the said words were defamatory of the Appellant, Halsbury Laws of England, 4th Edition Volume 28 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....”

Section 195 of the Penal Code also defines defamatory matter as matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by any injury to his reputation.

Therefore, the issue of whether a statement is defamatory is to be judged by the standard of an ordinary, right thinking member of society and whether it excites in such a member of society adverse opinions or feelings against the claimant. In the present appeal **the common thread in the evidence by the witnesses as to the words uttered by the Respondent were that Ngeana, the husband of PW4, is a thief, sleeps with prostitutes and is uneducated. The ordinary meaning of these words to an ordinary person is that the said Ngeana and husband of PW4 is a person of sexual immorality and has committed an offence. These are clearly words that go beyond vulgar abuse and impute misconduct and undesirable conduct, and are in my view defamatory for this reason. It must be noted in this regard also that slander that imputes a criminal offence that is punishable with imprisonment is also actionable per se.**

The next question then to ask is whether the said defamatory words were published of and concerning the Appellant. This requirement only requires a claimant to be referred to by name or otherwise in the said defamatory statements and should be identified as the person named in the defamatory matter complained of. From the evidence tendered in the trial Court, the said words refer to a “Ngeana” and it was not disputed that the said Ngeana is the Appellant. PW4 expressly testified that the said words were spoken of her husband who is the Appellant. There is no requirement in law that the claimant must be present in person when this reference is made, and the trial magistrate clearly erred in his holding in this respect that the Appellant was not present when the words were spoken, and as such they were not directed at him.

Lastly, as regards the requirement of publication of the defamatory words, the law requires that that the said defamatory words must be published to a third party other than the claimant. The essence of publication is the making the defamatory statement known to a person or persons other than the claimant, and it is this aspect that makes defamation actionable in the sense that it is what causes other persons to think of the claimant in a less favourable manner. In the present appeal PW2, PW3, and PW4 all attested to the publication of the defamatory words by the Respondent, as the defamatory words were spoken by the Respondent in their presence, and they testified to hearing the same as shown in their testimony in the foregoing.

On the issue of damages, it is stated in **Halsbury’s Law of England, 4th Edition Vol. 28**, paragraph 248 at page 127, that damages for defamation are compensatory and are at large, and operate to vindicate the Plaintiff to the public and console him or her for the wrong done. The Appellant had in his submissions in the trial Court sought damages of Kshs 500,000/=, while the trial Court had found that it would have awarded damages of Kshs 60,000/= had the Respondent been found to be liable. Upon appeal the Appellant sought damages in the region proposed by the trial Court. I therefore award the Appellant damages of Kshs 50,000/=.

The Appellant’s appeal herein is accordingly allowed, and the judgment of the Honourable Senior Resident Magistrate H.M Nyaberi, delivered on 9th February 2011 in the Mwingi Senior Resident Magistrate’s Court Civil Case No.290 of 2008 is set aside for the foregoing reasons. The Respondent herein is found liable for defaming the Appellant and shall pay the Appellant Kshs 50,000/= as general damages.

The Respondent shall meet the costs of the appeal and of the trial in the subordinate court.

It is so ordered.

DATED AT MACHAKOS THIS 19TH DAY OF NOVEMBER 2015.

P. NYAMWEYA

JUDGE