REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 164 OF 2010

SIMON KIMANZI………..…………APPELLANT

VERSUS

KAMBUA KAMWILWA………....RESPONDENT

(An Appeal arising out of the Judgment of T.M. Mwangi SRM delivered on 11th November 2010 in Kitui Principal Magistrate's Court Civil Case No.41 of 2006)

JUDGMENT

The Appellant has appealed against the judgment of the Honourable Senior Resident Magistrate T.M Mwangi, delivered on 11th November 2010 in the Kitui Principal Magistrate's Court Civil Case No.41 of 2006. The learned magistrate in his judgment found that the Appellant had not proved his case in the trial court on a balance of probabilities, and dismissed it with costs to the Respondent. The grounds of appeal as stated in the Appellant's Memorandum of Appeal dated 23rd June 2013 are as follows:

1. The learned Senior Resident Magistrate erred and misdirected himself both in fact and in law when he found that the allegation of adultery did not constitute a defamatory statement against the Appellant and further when he failed to award damages to the said Appellant.
2. The learned Senior Resident Magistrate erred and misdirected himself when he failed to find that the defence evidence did not materially rebut the plaintiff's case and he further erred when he failed to find that the Appellant had established a case against the Respondent on a balance of probability.
3. The learned Senior Resident Magistrate erred in law by failing to assess damages payable to the appellant in the event his case was successful.

The Appellant is praying that the judgment and decree of the learned Senior Resident Magistrate be set aside and the appeal be allowed with costs together with those of the lower court, and that damages be assessed for the Appellant on terms of the submissions filed in the lower court.

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 15th February 2006. The Appellant in the said Plaint claimed that on or about 24th October 2005 at Kanyangi Market, in the office of the chief, while having a cattle trespass case, the Respondent uttered and published of and concerning the Appellant the following words in Kamba language:

"Simon nunanguaa ayenda kukoma nakwa. Nakwa nalea niyo unasitakie ikoani ii"

Further, that these words translate into English language as follows:

"Simon was making sexual advances at me with a view to having sex with me. I declined and that is why he filed this complaint."

The Appellant claimed that the said words were uttered and published in the presence and hearing of Mwany'a Ng'ondu , Kiniu Makiti, Koki Katiwa and Sammy Munyao, and other persons known and unknown to the Appellant. It was averred that the material date was a market day at Kanyangi, and market goers estimated at 100 people heard the said words uttered by the Respondent.

It was further stated that in their natural and ordinary sense, the said words meant and were understood to mean that the Appellant was immoral, adulterous and was prone to having irresponsible sex. As a consequence he felt embarrassed, ridiculed and put to contempt, and his reputation lowered in the eyes of right thinking members of the public. The Appellant therefore prayed for general damages with interest and costs of the suit.

The Respondents filed a defence dated 20th April 2006 in which she denied the allegations stated in the plaint and put the Appellant to strict proof. A brief summary of the evidence adduced before the trial court is as follows. PW1 was the Appellant who testified that he knew the Respondent for over 25 years. Further, that on 29th October 2005 at around 2.30 p.m. he went to the Chief's Office near Kanyangi market to report that the Respondent's livestock had destroyed his crops.

PW1 stated that there were more than 100 people present at the Chief's office as there were elections being conducted for positions in the community policing. He stated that the during her response to the crop destruction case, the Respondent uttered abusive words in Kikamba to him that suggested that he was trying to make sexual advances towards her which were not true. He denied the allegations and testified that the respondent did not apologise for the utterances.

PW2 was Samuel Musyoka Munyao who testified that on 24th October2005 at 2.30 p.m. while at Kanyangi Chief's camp where there were having a community policing election, he recognised the Appellant and the Respondent who were attending to a case. He stated that he heard the Respondent tell the Assistant Chief that if she had made love to the Appellant, then the charges for destruction of crops would not have been brought against her. PW2 testified that he had heard her utter the said statement to the assistant chief Katiwa Mutia. He stated that this happened in the assistant chief's office, and that he was nearby when he heard the statement. He stated there were elders present during the case and that there were over 154 persons from various villages at the venue.

PW3 was Peter Katiwa Mutia, who testified that on 24th October 2005, he was at Kanyangi's Chief's camp attending an election for the youth. He stated that he had seen the Appellant and the Respondent in attendance in a grazing dispute case. PW3 testified that he heard the Respondent say that the Appellant had sexual intercourse with her as a precondition to the Appellant agreeing to end the issue of grazing on his land. He stated that he was present at the meeting when had heard the words, as he was taking back the report of the election to the chief.

The Respondent testified in her defence as DW1, and stated that on 24th October 2005 she had gone to Kanyangi Chief's camp to attend to a grazing dispute she had with the Appellant. She also stated that she arrived to the chief's office before the Appellant, which office was 150 metres from the market, and that she was not aware that it was a market day or that there was an election going on. She further stated that one cannot hear a conversation taking place at the chief's office whilst at the market. The Respondent testified that her case was dispensed with on the said day, and she paid the Appellant the requisite fine. She denied defaming the Appellant.

DW2 was Kilonzo Muema who stated that the Appellant and the Respondent had a case at the Chief's camp in Kanyangi. He stated that he had been called as a witness at the case. He stated that only the matter of the said case went on in the chief's office. He said that the office had 6 people who were parties

in the case. DW2 confirmed that there was a meeting of the youth outside the chief's officer on the same day.

The Submissions

This appeal was canvassed by way of written submissions. The Appellant's Advocates, Kalili & Company Advocates, filed submissions dated 19th November 2015. The Appellant referred to the decisions in **JMM vs Headline Ltd, (2015) eKLR** and **Jakoyo Midiwo vs Nation Media Group Ltd, (2009) eKLR** where the courts defined what is considered as defamatory.

He further submitted that the Respondent's remarks were not qualified as privileged as was put in the case of **Stephen Thuo Muchina vs Wainaina Kiganya & 2 Others, (2012) eKLR.** On assessment of general damages payable he referred to the cases in **Gladys Njaramba vs Globe Pharmacy & Another, (2014) eKLR** and **Hon. Chirau Ali Mwakwere vs Royal Media Services Ltd, Nairobi HCC 57 of 2004.**

In response the Respondents Advocates, Martin M. Muithya Company Advocates filed submissions dated 28th November 2015. Therein she stated that the Appellant had the burden of proving his claim which he did not. Further, that the Appellant had failed to call two crucial witnesses namely Mwania King'ondu and Juma Mundu. It was further submitted that there were inconsistencies in the testimonies of PW1 and PW3 who stated that the words were uttered after the elections held at the assistant chief's office had been conducted. However, that PW2 told court that the words were stated before the elections were conducted.

The Respondent in addition argued that damages were only payable to a successful litigant. Finally, she argued that the ground on qualified privileged should have been raised on the memorandum of appeal and not in the submissions.

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* 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.

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.

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. PW1 testified that the Respondent uttered the following words in Kikamba language in the Chief's Office in his presence:

> "**that the reason for Kimanzi to bring this issue before the chief's office is because he tried to have a love affair with me and when I refused he brought me to the Chief's office"**

PW2 on his part stated as follows:

> **"Kambua told Ass Chief that Kimanzi had informed Kambua that if she had made love to him (Kimanzi) then he (Kimanzi) will not charge Kambua for damage done by cattle on his (Kimanzi's) land"**

PW3's testimony was as follows:

> **"I heard Kambua say that Kimanzi had had sexual intercourse with her as a precondition to Kimanzi agreeing to end the issue of grazing on his land"**

All the said witnesses were at the Chief's office at the time the Appellant and Respondent were having their dispute heard, and it is therefore more probable than not that the Respondent made some allegation of sexual advances by the Appellant, even though the exact particulars thereof differs slightly in the accounts by the various witnesses. It is also noteworthy that DW2 in his testimony confirmed that he saw PW2 and PW3 whom he confirmed he knew, at the Chiefs office on the material day. It is thus the finding of the Court 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...."

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, t**he common thread in the evidence by the witnesses as to the words uttered by the Respondent were that the Appellant had sought sexual favours from the Appellant.** The said defamatory words were published of and concerning the Appellant as he was expressly named by the Respondent, and they were spoken by the Respondent in his presence, and in the presence of PW2 and PW3. **It is also my view that these words did impute some sexual misconduct and immoral conduct on the part of the Appellant, and are in my opinion defamatory for this reason.**

It must be noted in this regard that the Appellant testified that he was a primary school teacher of 28 years standing, and PW2 and PW3 also testified that in addition to the Appellant being a teacher, he is married with a family, with PW2 further stating that he was for this reason surprised by the Respondent's remarks. Therefore to PW2 and PW3 the said statements did affect their thinking of the Appellant.

The only outstanding issue as regards liability therefore is whether the defence of qualified privilege applies, as found by the trial Court. The trial magistrate held as follows in this regard:

> **"If DW1 had uttered defamatory word before the Chief, the defamatory words were qualifiedly privileged. They were not directed to the world at large but to the sub-chief who was under duty to hear them so as to settle the dispute before him"**

The application of the defence of qualified privilege is explained as follows in **Halsbury's Law of England, 4th Edition Vol. 28**, at paragraphs 109 to 110:

> **On grounds of public policy the law affords protection on certain occasion to a person acting in good faith and without any improper motive who makes a statement about another person even when that statement is in fact untrue and defamatory. Such occasion's are called occasion of qualified privilege. The principal categories of qualified privilege are:-**

1. **Limited communications between person having a commons and corresponding duty or interest to make and receive the communication.**
2. **Communications to the public at large, or to a section of the public, made pursuant to a legal, social or moral duty to do so or in reply to public attack;**
3. **Air and accurate reports, published generally, of the proceedings of specified persons and bodies;**

> **Since the common law doctrine of qualified privilege is policy based, it is not possible to list exhaustively all privileged occasion….**
>
> **It is for the defendant to prove that the occasion of publication is one of qualified privilege. To defeat that defence the plaintiff must then prove that the defendant, in publishing the words complained of, was actuated by express malice."**

This Court notes that the defence of qualified privilege was neither pleaded by the Respondent, neither was any evidence led on its application in the trial Court. I accordingly find that the decision by the trial Court as to the application of the defence of qualified privilege was erroneous and prejudicial to the Appellant, as he was not given notice or opportunity to raise any evidence as to whether the statement by the Respondent was actuated by malice, to rebut the application of the said defence.

The Appellant is therefore entitled to damages on account of the Respondent's defamatory statement. It is stated in **<u>Halsbury's Law of England</u>, 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 in his submissions in the trial Court and on appeal sought general damages of Kshs 300,000/=, and exemplary damages of Ksh 100,000/= . The trial Court erroneously did not indicate what damages it would have awarded had the Appellant been successful in proving his case.

I have perused the judicial authorities relied upon by the Appellant namely **<u>JMM vs Headline Ltd</u>, (2015) eKLR** and **<u>Jakoyo Midiwo vs Nation Media Group Ltd</u>, (2009) eKLR** for his claim for damages, and note that in both cases the defamatory statements complained of were in the nature of libels published in newspapers with wide circulation, unlike in the present case which involved slander. I therefore find that the general damages awarded therein of Kshs 5,000,000/= are inapplicable in this appeal, and in line with my previous decision in **<u>Joseph Nzalu Ngeana vs Winfred Kanyaa Muvaka</u>, Machakos Civil Appeal No 15 of 2011** where the facts were akin to those in the present appeal, I find that an award of general damages of Kshs 50,000/= would be reasonable.

I however decline to award any exemplary damages which are normally awarded to punish bad conduct on the part of a defendant. This is for the reason that in **<u>Rookes vs Bernard</u>, (1964) AC 1129** it was held that exemplary damages should only be awarded in two specific categories of cases, namely oppressive, arbitrary or unconstitutional conduct by servants of the government, and secondly, cases in which the defendant's conduct is calculated to make a profit which may exceed the compensation payable to the plaintiff.

The Appellant did not bring any evidence to show that the Respondent's statement were calculated to earn her some profit or undue advantage, and exemplary damages therefore cannot lie

The Appellant's appeal herein is accordingly allowed to the extent that the judgment of the T.M Mwangi, delivered on 11th November 2010 in the Kitui Principal Magistrate's Court Civil Case No.41 of 2006 is set aside, and the Respondent herein is found liable for defaming the Appellant and shall pay the Appellant Kshs 50,000/= as general damages.

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

It is so ordered.

DATED AT MACHAKOS THIS 17TH DAY OF DECEMBER 2015.

P. NYAMWEYA

JUDGE