



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 134 OF 2007

MICHAEL WACHIRA.....APPELLANT

Versus

GEORGE M. NDIRANGURESPONDENT

(Appeal arising from the Judgment of Hon. M.K.K. Serem

Senior Resident Magistrate Nyeri in Civil Case No. 412 of 2005)

JUDGMENT

1. By a plaint filed on 8th June 2005 the appellant sued the respondent for general damages for defamation in respect of an alleged defamatory words uttered spoken and published by the appellant to one Francis Mugo to the effect that the

“my investigations have revealed that my late father was murdered by my uncle Kingori after being financed by my paternal uncle Wachira.”

2. It was pleaded that the said words complained of in the natural or ordinary meaning meant and were understood to mean that the appellant was a person of no good morals, a murderer, a person of dissolute and questionable character, a criminal who should be taken out of respectable society member and that by the said words the appellant's reputation had been seriously compromised, has suffered considerable distress and anxiety and his credit impeached in the eyes of the right thinking members who had constantly chided his company.
3. On 8th August 2005 the respondent filed a defence in which he denied uttering the words complained of and stated that the said Francis Mugo was the appellant's farm hand and was likely induce to make the allegations. He further denied uttering and publishing the words complained of to one Joseph Wanjohi and Njagi Bogo.
4. Based upon the said pleadings the matter proceeded for hearing and it was the appellant's case that the respondents father who was his brother was killed in November 2004 and that on 11th May 2005 the respondent told one Francis Mugo that he is the one who financed the killing of his father and that many people heard the story. Under cross examination by Miss Mwai the appellant testified that nobody else told him about the issues except Francis Mugo and therefore he did not know where the other people got the information from.
5. P.W.2 Francis Mugo in support of the appellants case stated that he worked as a casual to the appellant and that the respondent on 10th May 2005 told him that the appellant had killed his father and he informed the appellant uncle the information and under cross examination he testified that he was alone with the respondent when he was given the information.
6. In his defence the respondent denied uttering the words complained of and that on the alleged date he was in Murang'a for a funeral of his mother in law and that he was in partnership with the

- appellant and other people which partnership collapsed for which the appellant had held a grudge against him. Under cross examination he stated that he had a grudge with the appellant and P.W.2 over an alleged sale of fertilizers to his deceased father and that he had been in good terms with the appellant since 1996.
7. In support of his defence D.W.2 Paul Njage Mbugu denied having spoken to P.W.2 and stated that he never spoke with the respondent. He further confirmed that P.W.2 had wanted to sell the fertilizer of the deceased to him which action the respondent stopped.
 8. Based upon the said evidence the trial court dismissed the appellant's case as based on hearsay and rumors and found that the case was actuated by malice and dismissed the same with cost to the respondent.
 9. Being aggrieved by the said judgment the appellant filed the appeal and raised the following grounds of appeal

1.The learned trial magistrate erred in fact and in law in holding that the words complained of were not uttered in the presence of the plaintiff.

2.The learned trial magistrate erred in failing to appreciate the law of defamation especially the ingredients thereof thereby arriving at the wrong finding of law and fact.

3.The learned trial magistrate erred in failing to appreciate the plaintiff's case as set out hence arriving at the wrong conclusion.

4.The learned trial magistrate erred in holding that the plaintiff's case was based on hearsay.

5.The learned trial magistrate erred in failing to assess the quantum of damages when it was necessary to do so.

6.The learned trial magistrate erred in accepting the defendant's testimony which comprised of a departure from the pleadings.

7.The learned trial magistrate erred in failing to find that the basis of the defence was an after thought without any basis.

8. The learned trial magistrate erred in finding that the plaintiff's case was based on malice.

SUBMISSIONS

1. Directions were given that the appeal be determined by way of written submissions which have now been filed.

Appellants submissions

On behalf of the appellant it was submitted that the trial court properly outlined all the four issues for settlement from the evidence and pleadings of the parties being whether the words uttered by the respondent and directed to the appellant, whether they were published to the members of the public and were slanderous and that the loss not necessary to award the issue is to whether the appellant had suffered any loss.

2. It was submitted that the trial court fell into error at the point of analysing the facts, the evidence vis a vis the pleadings of the parties and that in his defence the appellant departed from his pleadings which lead to the trial court to reach a finding not supported by pleadings, it was submitted that the court fell into error by failing to assess the liability likely award had the appellant succeeded and in support of the award the case of NAHASHON OLUOCH V KENYA TIMES MEDIA TRUST LTD & ANOTHER (2006) eKLR in respect of personal integrity and

honour was relied upon.

Respondents Submissions

3. It was submitted that the court was right in dismissing the appellants case since it was not proved to the required standard as the appellant failed to prove that the words were published and that he suffered loss.

ISSUES

4. From the pleadings, proceedings and submissions herein I have identified the following issues for determination:

a) Did the appellant prove his case against the respondent on a balance of probability.

b) Did the trial court fall into error while analysing the fact and evidence and pleadings.

- c. ***Did the court fall into error in not assessing general damages.***

1. In answering issue number one, to prove a claim in respect of slander as was stated by SITATI J. IN MWAI KISHE V SINOTA MBUSI (2008)eKLR he must prove:

a) That the matter he complains was published by the defendant.

b) It was published and of concerning him.

c) That it is defamatory in character.

d) It was published maliciously.

e) If slander subject to certain exceptions that the loss thereby suffered special damages

2. It must be publication of a statement which reflects on a persons reputation and tends to lower him in the estimate of right thinking members of society generally or tends to make him shun or avoid him.
3. Based upon the evidence tendered I agree with the trial court that there was no proof of publication since DW2 Paul Njage Mbugu who was alleged to have heard the utterance denied the same in his evidence further the appellant did not tender any evidence to prove that his reputation had been lowered amongst right thinking members of society. Defamation is not what the appellant thinks of himself but what rightful members of society thinks of him. I therefore find no fault with the trial courts finding of facts and would therefore not disturb the judgment herein.
4. However the trial court ought to have assessed the damages which he would have awarded to the appellant had he succeeded in proving his case but this is an irregularity which did not affect the validity of the judgment.
5. Had the appellant succeeded and based upon his submissions of the lower court I would have awarded a sum of Ksh. 400,000/- in general damages as submitted.
6. In the final analysis I find no merit on the appeal herein and dismiss the same with costs to the respondent.

Dated signed and delivered at Nyeri this 16th day of May 2014.

J. WAKIAGA

JUDGE

16/5/2014

Coram: Before Justice J. Wakiaga

Court clerk - Ndungu

Miss Mwai for the respondent

Mr. Kingori for Mr. Nderi for the appellant.

Court: Judgment read in open court in the presence of the above named.

J. WAKIAGA

JUDGE