



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 74 OF 2011

W M APPELLANT

VERSUS

S N N RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Mwingi of Hon. V.A. Otieno (DM II Prof.) Civil Case No. 20 of 2005 dated 21st April 2011)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **W M** was sued by the Respondent **SNN** for defamation. The Respondent's case before the lower court was that the Appellant had accosted him while at **Ukasi Market** and uttered words to the effect that the Appellant was immoral and kept concubines, a homosexual, a brother to thieves and a dirty person who did not clean his anus. That the said words were uttered in public in the presence of the Respondent's business colleagues, customers, friends and members of public thereby injuring the Respondent's reputation. The Respondent claimed for general damages for defamation.
2. The claim was denied by the Appellant. In her amended defence, the Appellant denied having uttered the words complained of and accused the Respondent of having turned against her after she refused his sexual advances.
3. The Respondent filed a reply to the defence and denied having made any sexual advances towards the Appellant.
4. At the conclusion of the case, the trial magistrate arrived at a finding that the Respondent had proved his case on a balance of probabilities. Judgment was entered for the Respondent against the Appellant for Kshs.50,000/= plus costs.
5. The Appellant was aggrieved by the said judgment and appealed to this court on the following grounds:-
 - a. **That the entire evidence on record was not critically examined.**
 - b. **That the evidence from the Appellant's side relating to where she was on the material date and time was not critically analyzed.**
 - c. **That the defence evidence was not considered.**
 - d. **That undue weight was given to the proceedings before the chief's office.**

e. **That the case was not proved.**

6. During the hearing of the appeal, the parties opted to rely on written submissions. I have duly considered the said submissions.
7. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. See for example **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**
8. In a suit founded on defamation, the Plaintiff must prove the following five elements:-
 - a. First, the words complained of, must actually refer to the Plaintiff;
 - b. Second, the words must be defamatory i.e. the words must tend to lower or actually lower the character or reputation of the Plaintiff in the eyes of right-thinking members of the society;
 - c. Third, the words must be published to a third party;
 - d. Fourth, the words must be false i.e. truth is an absolute defence to an action in defamation;
 - e. Fifth, for slander, there must be proof of resultant damage (**Winfield & Jolowicz on tort 16th edition at p. 140.**)
 - i. The Respondent (PW1) testified that he is a businessman dealing with the business of selling clothes at **Ukasi Market**. He described the Appellant as a business lady and a neighbour at his business premises. It was the Respondent's evidence that on 23/11/2004 at about 8.00 a.m., he was at his business premises having a conversation with one of his employees when the Appellant claimed that the Respondent was talking about her. That the Appellant then proceeded to loudly utter words complained of in **Kikamba language**.
 - j. The Respondent further testified that the said utterances were made in public on a market day in the presence of many people. That the Respondent was shunned by his customers and friends. The Respondent reported the matter to the area chief. That the chief summoned the Appellant but the Appellant failed to turn up. That on the second summons the Appellant turned up but denied having uttered the words complained of. That the chief and the elders awarded the Respondent Kshs.11,000/= but the Appellant failed to pay the same. The Respondent then filed suit.
 - k. The Respondent's evidence was corroborated by PW2 **IKM** and PW3 **RMM**. Their evidence was that they were at the scene and heard the Appellant directing the words in question to the Respondent. Both PW2 and PW3 further corroborated the Respondent's evidence that it was a market day and there were many people at the market.
 - l. PW4 **Benjamin Musoo Muli** the chief of **Ukasi Location** produced the proceedings held in his office wherein the Appellant was ordered to pay the Respondent Kshs.11,000/= for the slander.
 - m. In his defence case, the Appellant denied having uttered the defamatory words and stated that she arrived at the market at about 9.00 a.m. and left at about 9.30 a.m. to transport some timber for somebody who had hired her pickup. That her motor vehicle broke down. She returned to the market at 6.00 p.m. The Appellant's evidence is that she did not see the Respondent at the market on the material day. The Appellant also denied having met the Respondent at the chief's office. According to the Appellant, the Respondent also sued two neighbours for trespass after their domestic animals trespassed into his land. She blamed the Respondent of wanting to take other people's properties.
 - n. DW2 **M M** the Appellant's husband and DW3 **Joshua Mwinzi Nzulu** the customer who had hired the Appellant's motor vehicle both gave evidence that corroborates that of the Appellant. DW3 however hired the motor vehicle at 9.00 a.m. according to the Appellant's evidence. DW3 cannot therefore tell what transpired before 9.00 a.m.
 - o. Having evaluated the evidence from both the Appellant and the Respondent, I find the Respondent's case more probable. The Appellant was not a credible witness. It is noted that in her statement of defence, the Appellant has stated that the Respondent made sexual advances to her yet during cross-examination she denied that such a thing happened. It is also noted that the chief's (PW4) evidence was that both the Appellant and the Respondent appeared before him. The chief is an independent witness who produced the record of the proceedings before him. The Appellant's evidence that she did not appear before the chief is not believable. The chief had no reasons to stage manage such proceedings against the Appellant.
 - p. My conclusion is that the Appellant uttered the said words in the market. The said words referred

to the Respondent, were defamatory and were publicized in the market. The Respondent suffered injury. His reputation was lowered before the right thinking members of the society. The Respondent was entitled to damages. The damages awarded were reasonable. I find no merits in the appeal and dismiss the same with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 27th day of **November**, 2014.

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B. THURANIRA JADEN

JUDGE