



REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 94 of 2011

JEREMY AGARE DADOHAPPELLANT

VERSUS

NDUGU TRANSPORT COMPANY LIMITEDRESPONDENT

JUDGMENT

The gist of the appellant's ground of appeal contained in the Memorandum dated 18/7/2011 is that the lower court **“misapprehended the entire evidence of the Respondents witnesses and relied on matters that did not form part of the evidence on record thereby arriving at a decision that was wrong in fact and in law”**.

The appellant's suit for defamation was founded on a public notice published in the Daily Nation Newspaper on the 16th July 2009 about the appellant which stated:-

“Jeremy Agare Dado ID NO 23509792 (with accompanying photograph). The persons whose photographs appear above ceased to be employee of Ndugu Transporters Company limited with effect from 14th July 2009. Any business transacted on or after the mentioned date shall not be honoured by the company whatsoever.

Any person with information of their whereabouts should conduct Kondele Police Station, Ndugu Transport Company Limited on 05720277123/4, 0722205606, 0733645756 or the nearest Police Station....”

Prior to these the appellant told the court that he had been employed by the respondent as a driver. His duties included delivering ballast to the respondent's clients using the company's lorry.

On 13th July 2009 to made three deliveries to one of the respondents client, Kovec and returned for that day. The last delivery was made around 10:50 a.m

On 14th July 2009 he made a delivery to Spancon and on his way back he developed chest pain and he called the company advising them to send another driver to take over the driving. The company did sent one Koech to relieve the appellant who went to see a doctor who diagnosed him with pneumonia. The appellant did not report on duty on the 15th and 16th. However on the 16th July 2005 he learned of the said newspaper notice.

The respondent through DW1 told the court that on 13th July 2009 the appellant made a delivery at the Kisumu District Hospital without authorization and later abandoned the respondent's lorry. The said witness further told the court that on the material day he was un well and had gone to Kisumu District

Hospital to seek treatment. At around 10:30 a.m while he was leaving, he spotted the company's lorry discharging ballast and he requested for a lift to work. The lorry was being driven by the appellant.

DW1 told the court that on getting to his place of work he was called by his boss one Mr. Manjit Singh to explain why he had been late for work and he told him that he was unwell and had gone to the hospital for treatment and that the appellant had in fact given him a lift back.

Mr. Manjit sent one Gilbert (DW3) to the hospital who confirmed the above facts and reported the matter to Kondele Police Station. The recipient of the ballast was later traced and he agreed to pay Kshs. 20,000/= for the irregularly delivered ballast. This was DW2 Mark Midianga Arua.

The main issues that this appeal raises as earlier own observed stem from the evidence. The appellants contents that the trial magistrate misapprehended the evidence on record and disregard too the appellant's evidence.

This court as the rule is is enjoined to re-evaluate the evidence afresh with a view of arriving at a fresh and an independent finding.

The basis question to ask is what is defamatory statement?.

Halburys Laws of England 3rd Edition Vol 24 at paragraph 6 defines the same as :-

“A defamatory Statement is a statement which if published of and concerning a person, is calculated to lower him in the estimation of right thinking men or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him, his office, profession, calling, trade or business”.

On the other hand **Gantley on Libel and Slander 9th Edition Sweet and Maxwell at page 307** have stated that the words used must be capable of creating an injurious innuendo in the minds of right thinking men. It says in paragraph 32:13 that:-

“In action of slander and in action of libel where the oral evidence of the witness is the only proof available, though precise words must be alleged in the statement of the claim, the plaintiff does not have to prove that these precise words were in fact published. It is sufficient if he proves material and defamatory part of them or words which are substantially to the same effect. In such a case, if the words proved convey to the mind of a reasonable man practically the same meaning as the words set out, the variance will be immaterial. “The plaintiff is entitled to put before the jury his case that the words proved though not the very words pleaded are words substantially to the like effect.....No slander of any complexity could be proved if the ipsissima verba of the pleading had to be established.....”.

It appears from the above citation that so long as the words used could convey a negative message that is dis-paraging or injurious to the reputation of a person the statement is defamatory.

The Court of Appeal in Kenya see **Development Authority Ltd =vs= B. O. Masese & Co Advocates Civil Application No. 95 of 86** laid down the following principles.

It is common ground than in a suit founded on defamation the plaintiff must prove:-

“(1) that the matter of which the plaintiff complains is defamatory in character.

(ii) That defamatory statement or utterances was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously

(iv) In slander, subject to certain exception that the plaintiff has suffered special damage.”

It is the notice that really angered the appellant. The part that was particularly annoying was where the public were told to report to the next police station if he is spotted. He said that by virtue of the said notice people perceived him as a criminal and he called his witness to attest to this. He further argued that it apparently became very difficult for him to secure employment elsewhere.

The notice was arguably published but was the respondent actuated by malice when it published the said notice?

The appellant told the court that he developed chest pains while he was in the course of his duty and he called the respondents office for assistance. He parked the lorry at a petrol station and went to see a doctor who diagnosed him with pneumonia. The appellant however failed to produce a doctors report or any treatment documents. On 15th and 16th the appellant was not present at his place of work and according to him he was away on sick off. This evidence was never corroborated.

On the other hand DW2 admitted that he received a consignment of ballast from the appellant and he paid him Kshs. 75,000 for the same . On confrontation by the respondent and on the matter being reported to the police at Kondele Police Station, he aggrieved to pay Kshs. 20,000 to the respondent.

Why did DW2 agree to pay a extra amount of money if the consignment was done regularly? Why was it difficult for him to produce the payment receipt for the consignment rather than pay an extra amount?

It is not lost too that DW3 Gilbert testified that he saw the respondent offload the ballast at Kisumu District Hospital and that he actually offered him a lift to work.

I do not see how the respondents action was driven by malice. The appellant's evidence left a lot to be desired. The appellant from the respondent evidence delivered ballast to an unauthorized client who when caught decided to pay for the same. The appellant did not deny this fact. It can not therefore be argued that the notice was propelled by malice but the truth. The respondent was interested in having the appellant apprehended and that would justify why he called on the public to report of his whereabouts to the police. In any event he had disappeared for over 48 hours.

I do find that the respondent plea for justification was merited. The words complained off were honest and accurate.

Consequently, and for the above reason this appeal is dismissed with costs to the respondent.

Dated, signed and delivered at Kisumu this 25th day of March 2013.

H.K. CHEMITEI

JUDGE

In the presence of:

.....for appellant

.....for the respondents

HKC/aao