REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.22 OF 2009

SYLVESTER O. MAGERO……..……1ST APPELLANT

MUSKIN KOKONYA……...2ND APPELLANT

JOSEPH WASER…….3RD APPELLANT

VERSUS

WASHINGTON ONYANGO…….....RESPONDENT

JUDGMENT

The Respondent filed suit before the subordinate court seeking to be paid damages in respect of a claim that his character had been defamed by the Appellants. The Respondent alleged that the Appellants uttered the words to the effect that he was a member of **"mungiki".** He took issue with this branding. The Respondent averred that by being associated with the outlawed sect, he was being associated with murderers. He averred that as a result of the utterance, his standing as a person of repute in the society had been damaged as he was being referred to by the Appellants as a criminal. The Appellants filed a joint defence to the appeal. They denied the Respondent's allegation to the effect that they had defamed him and put the Respondent to strict proof thereof. After hearing the case, the trial court found in favour of the Respondent. The court found as a fact that the Appellants had uttered words which were injurious to the Respondent's reputation as a businessman. The court awarded the Respondent general damages for defamation in the sum of Kshs.150,000/-. Each Appellant was ordered to pay to the Respondent a sum of Kshs.50,000/-. They were further ordered to pay costs to the Respondent.

The Appellants were aggrieved by the decision and have a filed an appeal to this court. In their memorandum of appeal, the Appellants raised nine (9) grounds of appeal challenging the decision of the trial court. The said grounds may be summarized as thus; they faulted the trial court for making a finding that they had defamed the Respondent yet the evidence supporting the defamation was not established to the required standard of proof. They were aggrieved that the trial court had made the finding that they had defamed the Respondent yet malice was never established as a component of the claim. They took issue with the fact that the trial court had assessed damages based on vague principles of the law. They were aggrieved that the trial court had made the finding that a case of defamation had been made in the absence of evidence from crucial witnesses. They faulted the trial court for failing to properly evaluate the evidence and thereby reached the erroneous determination that the tort of defamation had been proved. In the premises therefore, the Appellants urge the court to allow the appeal, set aside the judgment of the subordinate court and substitute it with the decision of this court dismissing the Respondent's suit with costs.

Prior to the hearing of the appeal, counsel for the Appellants and for the Respondent agreed by consent to

file written submission. The written submission were duly filed. During the hearing of the appeal, this court heard oral rival submission made by Mr. Ashioya for the Appellants and by Mr. Wanyama for the Respondent. This court has carefully considered the said submission. This being a first appeal, it is the duty of this court to subject the entire proceeding before the trial court to a fresh look, reevaluate the evidence adduced before the said court, and reach its own independent determination, always keeping in mind the fact that it neither saw nor heard the witnesses as they testified and therefore giving due allowance in that regard (see **Selle –Vs- Associated Motor Boat Co. Ltd. [1968] EA 123)**.

What are the facts of this appeal? The Respondent was at the material time a businessman atBusia. On 10th July 2007, he testified that he was summoned by the District Commissioner, Busia District. At the office of the District Commissioner, he found the said officer with the OCPD, the Mayor of Busia Municipality, the Clerk to Busia Municipality and the District Criminal Investigation Officer (DCIO). The officers requested him to accompany them to a public meeting which was to be held at the Custom's Yard in Busia. When they reached the venue of the meeting, the District Commissioner announced that he had received a report from the Appellants to the effect that the Respondent wanted to kill the Appellants. The Appellants were present in the meeting. They confirmed what they had told the District Commissioner. The 3rd Appellant told the meeting that the Respondent had gone to his office and told him that he would kill him. To show his seriousness, he had even produced a gun. The 1st and 2nd Appellants told the gathering that the Respondent was a member of "mungiki". The members of the public reacted negatively to this information. The District Commissioner ordered the DCIO to investigate the claims. The Respondent recorded a statement with the police. After the conclusion of the investigations, it was established that the claims made by the Appellants were false. The Respondent testimony in regard to what transpired on the material day was corroborated by the testimony of PW2 Alex OmondiAdhoya and PW3 Michael OkudoOkello. PW2 and PW3 were present at the meeting where the Appellants made the allegation that the Respondent was a member of "mungiki" and had threatened to kill them. They testified that they were surprised with these allegations because they knew the Respondent as a reputable businessman.

In their defence, the 1st and 2nd Appellants denied defaming the Respondent. Whereas they conceded that they were present in the meeting called by the District Commissioner on the material day, they denied uttering words to the effect that the Respondent was a member of **"mungiki"**. In that regard, their testimony was corroborated by DW3 Wabera Joseph Okello, DW4 Joseph Evans Otieno and DW5 JosphatSogoto who while conceding that they were present in the meeting which was called by the District Commissioner, denied the claim by the Respondent that he had been defamed.

Having reevaluated the evidence adduced before the trial court, and taking into consideration the submission made on this appeal, it was clear to this court that the trial court, after evaluating the evidence, chose to believe the testimony of the Respondent and his witnesses. He disbelieved the evidence of the Appellants and their witnesses. This decision was reached after the court had assessed the respective demeanours of the said witnesses. This court cannot therefore fault the trial court for choosing to believe the testimony of the Respondent as contrasted with the evidence adduced by the Appellants. This is unless it is established that the basis of such finding was completely at variance with the evidence generally adduced in the case. This is because the standard of proof in civil cases is that of proof on a balance of probabilities. On preponderance of facts placed before him, the trial court reached the conclusion that the Respondent had established his case to the required standard of proof.

An issue that arose during the hearing of this appeal is whether the Respondent established a case for defamation before the trial court. In **Wycliffe A. Swanya -Vs- Toyota East Africa &Anor [2009] eKLR** the Court of Appeal held thus:

"For the purpose of deciding a case of defamation, the court is called upon to consider the essentials of the tort generally and to see whether the essentials have been established or proved. It is common ground that in a suit founded on defamation, the plaintiff must prove:-

i. ***That the matter which the plaintiff complains is defamatory in character***
ii. ***That the defamatory statement or utterance 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 exceptions, that the plaintiff has suffered special damage."***

In **Kudwoli –Vs- Eureka Educational & Training Consultants & 2 others [1993] eKLR**Kuloba J held as follows:

"The leading English monograph of Gatley on the subject of defamation defines what is defamatory as

"Any imputation which may tend "to lower the plaintiff in the estimation of right – thinking member of society generally" (per Lord Atkin in Sim v Stretch (1936) 52 TLR 669, at p 671) 'to cut him off from society' (per Wilmot C.J in Villers v Monsley [1769] 2 Wils 403 at pp 403, 404) or 'to expose him to hatred contempt or ridicule (per Parke B. in Parmiter v Coupland [1840] 6M&W 105 at p 108) is defamatory of him."….

In its definition of the wrong of defamation the great treatise of Salmond in the field of tort put forward the following definition:

"The tort consists in the publication of a false and defamatory statement concerning another person without lawful justification."

In **Allan Mbugua –Vs- Royal Media Services Ltd [2007] eKLR**, Ibrahim J (as he then was) quoting **"Gatley on Libel and Slander" 9th Edition, Sweet and Maxwell 1998 at p 807**, held as follows:

"In actions of slander, and in actions of libel where the oral evidence of witnesses 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 a 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……No slander of any complexity could ever be proved if the 'ipsissimaverba' of the pleading had to be established' ".

In the present appeal, the Appellants complained that the trial court erred when it found in favour of the Respondent in circumstances where the Respondent had not established to the required standard of proof that he had been defamed. Having re-examined the evidence adduced before the trial court, it was apparent to this court that the Respondent had indeed established to the required standard of proof that he had been defamed. The Appellants made a report to the District Commissioner to the effect that the Respondent was a member of the then dreaded "mungiki" sect which was causing mayhem in the country by indiscriminately killing people and committing criminal acts. They repeated these defamatory statements in a public meeting convened by the District Commissioner in Busia Municipality. The allegations were investigated by the DCIO and established to be false. Although the Appellants denied uttering the defamatory statements, the testimony of the Respondent and his witnesses established that indeed the said defamatory statements were uttered. The statements were uttered in public and therefore published to the members of the public. The publication of the statements was malicious because it was meant to injure the reputation of the Respondent who at the material time was a businessman in Busia Municipality. This court finds no merit in the ground of appeal by the Appellants to the effect that the Respondent had not established his case to the required standard of proof.

As regard quantum, it trite law that in assessing damages, a trial court is exercising judicial discretion. This court will not interfere with the exercise of such discretion unless it is established that the trial court either acted in excess of its jurisdiction or misapprehended the law. In **Nation Media Group Ltd & 2 Others –Vs- John Joseph Kamotho& 3 Others [2010] eKLR,** the Court of Appeal held that:

"Further, it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first

instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitle. This is the principle enunciated in Rook v Rairrie [1941] ALL E.R. 297. It was echoed with approval by this Court in Butt v Khan [1981]KLR 349 when it held as per Law, JA

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

In the present appeal, the Appellants did place any material before this court to persuade it that the award made by the trial court was inordinately high as to attract interference by this court. In this court's opinion, the award made was in fact on the lower side. In the premises therefore, this court will not interfere with the assessment of the damages ordered to be paid to the Respondent by the trial court.

The upshot of the above reasons is that the appeal filed by the Appellants lack merit and is hereby dismissed. The decision of the trial court is hereby upheld. The Respondent shall have the costs of this appeal. The sum of Kshs.150,000/- deposited in court as security pending the hearing of the appeal shall be released forthwith to the Respondent as part payment of the decretal sum due to him. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS8TH DAY OF AUGUST 2013.

F.TUIYOT

JUDGE