REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Appeal 150 of 2007

AMEDO CENTRE (K) LIMITED.....APPELLANT

=VERSUS=

JACKSON SIMIYU.....1ST RESPONDENT

ALBERT JUMA.....2ND RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate A.M. Obura – R.M.

delivered on 29th August 2007

in SRMCC No. 13 of 2003 at Kwale Law Courts)

JUDGEMENT

This is an appeal by the Appellant **(AMEDO CENTRE (K) LIMITED)**, who was the Defendant in **SRMCC NO. 13 OF 2009 JACKSON SIMIYU–VS-AMEDO CENTRE (K) LIMITED**. In that case the learned trial magistrate entered judgement in favour of the Plaintiff (the Respondent herein) in the sum of Kshs.200,000/- plus costs and interest at court rates. The Appellant was aggrieved by the decision of the trial court and appealed to the High Court relying on the grounds set out in the Memorandum of Appeal dated 13th September 2007.

A brief recital of the facts before the lower court are as follows. The Plaintiff was a police officer **IP. JACKSON SIMUYU LUKORITO F/NO. 230233.** He approached the Defendant **AMEDO CENTRE (K) LIMITED** and proceeded to buy on hire purchase terms a sewing machine consisting of the machine head, table and battery at a cost of Kshs.72,000/-. This sum was to be repaid by way of monthly deductions from the Plaintiff's salary by way of the check-off system to be implemented by his employer. The deductions were to be in the sum of Kshs.4,800/- per month for 15 months. The first few deductions were duly made. However from the 2nd to 6th months that is from June 2001 to October, 2001 the Plaintiff's employer for some undisclosed reason failed to remit the necessary deductions to the Defendants. The defendants proceeded to initiate deductions against one of the Plaintiff's guarantors one **ALBERT JUMA** (the third party).

While deductions were being made from this guarantor he went to the Plaintiff's house in Kwale with a man who introduced himself to **PW2 ANTHONY SIMIYU** the Plaintiff's son as an officer from Amedo Centre at Mwembe Tayari. The two took away the sewing machine head in the absence of the Plaintiff and returned it to the Amedo Centre where **PW1 MORRIS WAKULO** of **AMEDO CENTRE** confirmed that the machine head was received on 21st December 2001. The matter seemed to have ended there.

In his Plaint dated 10th December 2002 the Plaintiff claimed that the act to taking away the sewing machine head from his house amounted to an unlawful repossession which act caused him embarrassment and defamed him in the eyes of his peers. In their defence dated 20th February 2003 the Defendants deny having repossessed the machine head. They do however admit having received back the machine head from the third party who was merely attempting to extinguish his guarantor's obligation. Meanwhile the Defendant continued to receive the monthly deductions from the Plaintiff's salary until the full sum of Kshs.72,000/- was recovered in December 2002.

In his suit the Plaintiff made a claim for defamation and loss of business. As stated earlier the trial court found in favour of the Plaintiff and awarded a sum of Kshs.2,500/- per month for loss of business from December 2001 (the date when the machine was allegedly repossessed) to the date of judgment. The trial court also found that the Plaintiff's reputation had indeed been defamed and awarded damages on this limb in the sum of Kshs.200,000/- hence this present appeal. It was agreed by consent that the appeal be disposed of by way of written submissions. Both parties duly filed their written submissions and the matter is now pending the decision of this court.

The grounds of appeal raised by the Appellant may be summarized into two broad areas.

1) Appeal against damages awarded for defamation and

2) Appeal against the award for loss of business

ANALYSIS OF THE EVIDENCE

The existence of the hire purchase agreement between the parties is not in any doubt. A copy of the Hire Purchase Contract was produced as an exhibit **Pexb1**. The fact that a total sum of Kshs.72,000/- was paid to the Defendant through deductions from the Plaintiff's salary was also not in doubt. The Plaintiff availed copies of his payslip from November 2001 to December 2002 showing that deductions of Kshs.4,800/- were made each month. **DW1** for the Defendant conceded in his evidence that the Defendant company was paid in full. It is not entirely clear from the evidence on record why for a period of five months no deductions were made from the Plaintiff's salary. This is what led the Defendants to commence recovery against the third party as guarantor. However it would appear that the deductions from the Plaintiff's salary later re-commenced. Similarly the Defendant refunded the third party in full and indeed that may be the reason why this third party did not bother to participate in the suit.

Although the Plaintiff in his evidence claimed that the recovery of the machine from his house was a repossession, it is curious that the Defendants would only ***'repossess'*** the machine head but leave behind the table and the battery which also formed part of the items covered by the hire purchase agreement. It also does not make sense for the Defendant to repossess and retain the machine yet they were still receiving payments for the same (first from the guarantor and later from the Plaintiff himself). This lends credence t0 the Defendant's claim that they did not reposess the machine, rather that it was the guarantor who being bitter about the deductions from his salary independently collected the machine head and took it back to the Plaintiff's office in Mwembe Tayari in an attempt to stop the deductions. In my view this was the more likely scenario. If the intention of the Defendant was to repossess the machine then they need not have had the guarantor accompany them to the Plaintiff's house. They would have come on their own. I find that the removal of the machine from the Plaintiff's possession as not an act of repossession by the Defendants but was actually done by the guarantor third party acting independently.

WAS THE PLAINTIFF ENTITLED TO THE AWARD OF DAMAGES FOR DEFAMATION

The Plaintiff argued in his evidence that the Defendant's action in ***'repossessing'*** the machine and in proceeding to recover by way of installments from his guarantors who are his juniors defamed him. He went on to argue that by implication the Defendant's actions were construed to mean that he was a conman, was unable to meet his financial obligations and was not creditworthy. Defamation may be defined as any intentional false communication, either written or oral, that harms a persons reputation and causes him to be held in low esteem by right thinking members of society. In order to be actionable the

statement so made must be false. Truth is an absolute defence to defamation. In order to establish a case for defamation it must be shown that:

(1) The statement was defamatory

(2) The statement made referred to the defamed person

(3) The defamatory statement was published to a third party and

(4) The defamatory statement was false

Have these conditions been proved to exist by the Plaintiff.

Firstly as I have found earlier the action to recover the machine head was not taken at the instigation of the Defendants. Secondly the Plaintiff concedes that from the 2nd to 6th month no deductions were made from his salary. As such he was technically in default of the hire purchase agreement in which circumstances the Defendant was justified in pursuing the guarantor for payment. It was the Plaintiff's duty to ensure that the monthly payments were made. He did not explain why for five months no payments were made. In the absence of proof of malice therefore the Defendant's actions in receiving payments from the guarantor was justifiable. In order to prove defamation there must be shown to have been a publication (i.e. a communication) of the defamatory statement to a third party. The Plaintiff told the court that apart from himself only his two guarantors were aware of the existence of his hire purchase agreement with the Defendant. He further stated that when the machine was taken away from his house his colleagues and fellow police officers ***'sympathized'*** with him. Sympathy is not proof of defamation. I have no doubt that the whole incident was indeed embarrassing to the Plaintiff given his position as a senior police officer, however the only conclusion that right thinking members of society would draw is that he had failed to pay for the machine. This was in actual fact the true position as the Defendant had not received payments for a full five months.

In their written submissions the Appellants have argued that the Respondent was not entitled to any damages for defamation as his claim was time barred. They have cited S. 4(2) of the Limitation of Actions Act Cap 22 which provides:

"4(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

Provided that an action for libel or slander may not be brought after the end of twelve months from such date"

This being a preliminary point ought to have been raised by the Appellants earlier during the trial. However points of law and issues of jurisdiction need not be specifically pleaded and may be raised at any point during a trial or at appeal. The evidence is that after a brief period of default the Plaintiff's regular deductions resumed in November 2001. The machine was taken away from his home on 21st December 2001. Thus the defamation complained of occurred on and prior to December 2001. The Plaint was filed on 17th January 2003 which was more than 12 months **after** the alleged defamation had occurred. Therefore under Section 20 of the Defamation Act which amends S. 4(2) of the Limitation of Actions Act the Plaintiff claim for defamation was infact time barred and ought not to have been entertained by the trial court. As such I do find that the trial court erred in awarding damages for defamation. The award of Kshs.200,000/- has no basis in law and is therefore set aside.

WAS THE PLAINTIFF ENTITLED TO AN AWARD OF DAMAGES FOR LOSS OF BUSINESS PROFITS

In his evidence the Plaintiff told the trial court that he had purchased the sewing machine in order to enable his wife to carry out a tailoring business. In his evidence at page 27 line 12 **PW1** states:

"I bought the sewing machine for my wife. She was making clothes and selling. At the end of the month we would get between 5000/- and 6000/- when the machine was repossessed I lost business"

No evidence was adduced to prove the Plaintiff's claim that the sewing machine was being used for business purposes. The Plaintiff's wife who was supposedly using the machine did not testify in court. No Business Permit or license was produced. Neither were any documents e.g. receipts, bank statements etc produced to prove that a profit of 5000/- was being realized. In her judgement at page 68 line 10 the learned trial magistrate observed thus:

" The Plaintiff told the court that he suffered loss of business. It was admitted by the Defence witness that the machine was for business purposes. However there is no evidence before court that the Plaintiff's wife who was the beneficiary of the item was a qualified tailor or that she was making any profit at all in the said business …"

Firstly it was erroneous of the trial court to find that the Defendants had conceded that the machine was being used for business. No such concession was made by **DW1**. The only role of the Defendants was to sell the machine. They had no business in enquiring about the purpose to which the machine would be used. Secondly despite expressing clear reservations about the fact that any business was being conducted the trial magistrate inexplicably proceeds to award a sum for loss of business. How can one suffer loss for a business that has not been proved to exist? Once again I find that the award for loss of business profits has no basis in law and must be set aside.

Before I conclude I must address a certain anomaly which I note exists in this matter. **DW1** conceded that the Appellants Amedo Centre Limited have been paid in full for the sewing machine purchased by the Respondent. Yet after the machine was returned to their premises on 21st December 2001 the Defendants appear to have taken no steps to return it to the Respondent. The sewing machine fully paid for by way of deductions from the Respondent's salary remains in their custody. It is only fair and just that the Respondent receive what he has paid for. As such I do hereby order the Appellant to deliver back to the Respondent at their own cost, the sewing machine in question. Finally this appeal is successful in its entirety. The judgement and awards made by the trial court are hereby set aside. I further direct that each party pay their own costs for this appeal.

Dated and Delivered in Mombasa this 14th day of September 2012.

M. ODERO

JUDGE

In the presence of:

Mr. Njoroge for Respondent

Mr. Shimaka for Appellant