



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
CIVIL APPEAL NO. 215 OF 2008

MBURU NJUGUNA THUNGU.....APPELLANT

Versus

AYUB WAIGANJO NJOROGE.....RESPONDENT

**JUDGMENT**

The Appellant is a farmer and businessman in Kiratina Sub-location in Githunguri of Kiambu District. On 22<sup>nd</sup> August 2006, at a public barasa called by the area Assistant Chief to discuss development in the area, the Respondent is alleged to have told that barasa in Kikuyu language that “[T]he money for CDF [Constituency Development Fund] was released and the cheque given to Mburu Njuguna Thungu for construction of the road from Kagwanja Factory to Kiguno.” The Appellant averred that those words were false, malicious and were motivated by will to injure his reputation. The Appellant also claimed that those words were understood to mean that he is a dishonest, corrupt and fraudulent person as well as a thief.

Before that day the Appellant, besides being a farmer and a businessman in the area, was also a church elder and a lay preacher in his local church. As a result of those utterances, he claimed that his reputation was greatly injured and he has been exposed to ridicule, hate and contempt by right thinking members of society friends and his church flock can no longer trust him with money. That has also affected his preaching. All that has caused him shame, mental agony, loss and damage.

Despite demand the Respondent failed to apologise. The Appellant filed Githunguri PMCC No. 89 of 2006 and sought general and exemplary damages for defamation, costs and interest. Though served the Respondent did not enter appearance or file a defence. After the ex-parte hearing of the case, the trial court found that the Respondent indeed made that utterance about the Appellant but held that that was a mere utterance which did not impact negatively on the Appellants reputation. He therefore dismissed the case with no order as to costs.

Aggrieved by that judgment the Appellant filed this appeal. The seven grounds of appeal gravitate upon on point: that the learned trial magistrate erred and misdirected himself in finding that the utterance was not defamatory of the Appellant. Though served once again, the Respondent has not contested this appeal.

In their submissions, counsel for the Appellant argued that the trial court had no basis of rejecting the evidence tendered by and on behalf of the Appellant of the ridicule and odium as well as the loss the Appellant has suffered. Basing themselves on the High Court decision in **John Joseph Kamotho vs Mutegi Njau & Bob Kioko, Nairobi HCCC No. 368 of 2001** they urged me to award the

Appellant Kshs.600,000/= and Kshs.200,000/= general and exemplary damages respectively.

I have considered these submissions and carefully read the record of appeal.

This being a first appeal, the law obliges me to treat it as retrial of the case, re-evaluate the evidence on record reach my own independent conclusion bearing in mind, however, that having not heard and watched the witness testify to be able to assess their demeanour, I should be slow in reversing the trial court's finding of fact – **Mwanasokoni vs Kenya Bus Service Ltd. [1985] KLR 931.**

I have, with this principle in mind, re-evaluated the evidence on record. In the utterance, the Respondent named the Appellant. There is therefore no question of the utterance having referred to someone else. From the evidence of the Plaintiff and that of his two witnesses it is clear that the Appellant did not receive any payment from the CDF. So the utterance was false this satisfying the second ingredient of the tort of defamation.

With respect, I agree with counsel for the Appellant that the trial court erred in finding that the utterance was not defamatory of the Appellant. The Appellant is a farmer and a businessman. His business is that of selling timber. Not being in the business of road construction, he would have no business being paid any money for the construction of the road from Kagwanja Factory to Kigumo or any other road for that matter.

I have no doubt in my mind that the innuendo in that utterance is clear. Slander, as we know, is a verbal defamatory statement. Unlike libel which is in all cases actionable per se, slander is, except in special cases, actionable only on proof of damages.

The question now is whether or not the Appellant proved the damage the defamatory utterance caused him. The Appellant claimed that as a result of the defamation he has been shunned ceased preaching in his local church and has even been excommunicated. He also claimed that his business has suffered. There is no evidence to support any of these claims. Other than his word, there is nothing to show that the Appellant has been restrained to preach in or excommunicated from his church. There is nothing to show that prior to the slander he used to earn Kshs.10,000/= and Kshs.20,000/= per month from his farming activities and timber sales respectively. There is also nothing to show that that income has dropped or that the defamation led to the closure of his timber business.

Although the Appellant failed to prove damage in any of the above claims, I however, find that he proved damage to his reputation. He testified that he was himself not at the barasa where the utterance was made. He was accosted by some youths at the hotel where he was relaxing and accused of having taken the money intended for road construction. DW 3 saw those youths who were not happy arguing with him. I accept his evidence that though youths could have roughed him up or even beaten him had it not been for the appearance of the area Assistant Chief PW 2. That in my view is clear testimony that the Appellant was ridiculed and held in contempt.

Having found that the Appellant was indeed slandered and has proved damage to his reputation. What damages is he entitled to?

Counsel for the Appellant suggested a sum of Kshs.600,000/= and Kshs.200,000/= general and exemplary damages respectively.

The Plaintiff is not a public figure but in his social set up he is entitled to respect. I find that a sum of Kshs.250,000/= will be a reasonable award as general damages for the ridicule and odium the slander caused him.

Exemplary damages are punitive damages awarded in addition to the actual damages awarded which are awarded in cases of reckless or malicious actions and are intended to punish and serve as a deterrence of such acts. As I have said the utterance was made in a barasa discussing development in the area. It was false. Though demanded of him the Appellant tendered no apology. When served with the summons to

enter appearance, he simply ignored it. All that is, in my view, clear evidence of the contempt in which the Respondent held the Appellant. It is also evidence of the don't care attitude the Respondent has towards the matter which in turn is proof of his recklessness and malice in the matter. Justice demands that such behavior should be punished so that the Appellants ilk are deterred.

In the circumstances I find that the Appellant is entitled to exemplary damages which I assess at Kshs.100,000/=.

In the result I allow this appeal, set aside the trial court's order dismissing the Appellant's case and substitute it with one entering judgment in favour of the Appellant and awarding him Kshs.350,000/= as general and exemplary damages. The Appellant shall also have the costs of this appeal and in the court below.

**DATED and delivered this 26<sup>th</sup> day of July 2011.**

**D.K. MARAGA  
JUDGE**