REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU Civil Appeal 124 of 2005

GRACE ACHOLA OMBIDI …..…… APPELLANT

-VERSUS-

REUBEN DALI & 17 OTHERS …… RESPONDENTS

Coram:

Ali-Aroni, Judge.

Mr. K'owinoh Advocate for the Appellant

The State for the respondents

Mr. George Diang'a Court Clerk.

JUDGMENT

The appellant lodged an appeal on the 9th of April, 2009 against the judgment of Learned Magistrate Hon. H. I. Ong'udi, Senior Principal Magistrate delivered on 28th September 2005. The appeal seeks to have the court set aside the judgment and re-assess damages payable to the appellant on 7 grounds namely:

1. The learned trial Magistrate erred in law in dismissing the appellant's case while the plaintiff had proved her case on a balance of probabilities.
2. The learned trial Magistrate erred in Judgment for the plaintiff while the defendant had not offered any defence to controvert the appellant's evidence. (sic)
3. The learned trial Magistrate erred in law and fact by relying on the provisions of the T.S.C Regulations while the same had been dealth with and was therefore Res-Judicata.
4. The learned trial Magistrate erred in fact and law in dismissing the appellants case on the basis of no-production of the certified copy of the letter while unchallenged contents thereof had been admitted in evidence.
5. The learned trial Magistrate erred in law and fact in dismissing the appellant case and holding that the non-knowledge of persons who had received the letter was fatal to the appellants case. (sic)
6. The learned trial erred in law and fact in failing to asses damages payable to the appellant in the event that she was wrong in her findings on liability while the same was clearly copied to the said persons.
7. The learned trial magistrate's judgment is against the weight of evidence.

The appeal was opposed.

The appellant argued that the court erred by making reference to the fact that the appellant did not comply with the requirements of the Teachers Service Commission Regulations as this had been dealt with earlier. That the letter dated 15th January, 1997 produced in evidence, and the meeting, it discussed was not denied and therefore the court should not have disregarded the same. The letter formed the basis of the appellant's case. That indeed due to the said letter the appellant was transferred and as a result she lost her allowances. Further that the court ought to have assessed damages even if the appellant was to loose the case. Counsel for the appellant relied upon two authorities NDIRITU –VS- ROPKOI & ANOTHER (2005 1 EA 334 AND MUMENDE –VS- NYALI GOLF & COUNTRY CLUB (1991) KLR 15.

In opposing the appeal, counsel for the respondents contended that the letter of complaint was not properly produced in court. Further that as an employee of the Teachers Service Commission, the appellant failed to seek the consent of the Attorney General in accordance with the Teachers Service Commission Regulations. He also submitted that their was no proof of any damage suffered by the appellant as a result of the said letter of 15th January 1997 as indeed the letter was confidential and no defamation could be imputed. The court did not have to assess damages as the exercise would have

been superfluous.

I have considered submissions by learned counsel for both parties and submissions made. The brief facts of the case are that at the material time the parties were all teachers except the 1st defendant who was a headmaster. All the parties served at Joyland Special School for the physically handicapped.

On the 21st of March, 1997 the appellant filed suit against the 17 respondents for defamation arising from a letter written by the 1st defendant and signed by the other defendants on the 15th of January, 1997, which letter sought for the plaintiff's transfer for;

" a) Constant disagreement with staff members.

b) Unprofessional dressing.

c) Disrespect to the Headmaster.

d) Disrespect to the Education Officer.

d) Loose talk."

The appellant stated in the plaint that the said words were calculated to disparage her in her profession as a teacher and due to the publication she was greatly injured in her credit, character, reputation as a teacher, and she had been brought into public scandal, odium, hatred, ridicule and contempt. Further as a result of the said letter she was transferred from the Joyland School to another.

On the 24th of April 1997 the respondents filed a defence denying the particulars of defamation, but was admitting that the 1st defendant wrote a letter on 15th January, 1997 asking for the appellant's transfer. It was stated further that the said letter was confidential and private. The defendants cited Regulation 69 of the Teachers Service Commission, which they said, rendered the appellant's case incompetent.

The appellant was the only witness in support of the case for defamation. On the part of the defendants, the 1st defendant was the only defence witness. He did not submit himself for cross - examination.

The first issue to consider is whether the Learned Magistrate erred in law in dismissing the appellant's case, as indeed I can only disturb the judgment of the Learned Magistrate if the same was not based on sound evidence or on misapprehension or if the Learned Magistrate acted on wrong principles. In NDIRITU –VS- ROPKOI & ANOTHER (supra). The court of appeal stated in part:

> " A first appellate court is not bound by the findings of fact made by the trial court and is under a duty to re-evaluate the evidence and reach its own conclusions. The appellate court should however be slow to differ with the trial judge and should only do so with caution. ----the court will however interfere where the findings of fact are based on no evidence, or on misapprehension of evidence, or where it is shown that a judge acted on wrong principles."

In her evidence the appellant states that the letter subject matter was copied to the Teacher Service Commission, Provincial Education Officer and Municipal Education Officer, and that all the defendants signed the same. She claims that as a result of the said letter, she was transferred and lost her allowances. She states further that the Teachers Service Commission asked her to withdraw the suit, which she did not and as a result she was interdicted. At the time of giving evidence on 20th of April, 1998 the appellant was still on interdiction.

In her judgment the Learned Magistrate observed that the appellant was an employee of the Teachers Service Commission and governed by the Teachers Service Regulations which required the appellant to seek consent to sue from the Attorney General before filing a suit. The Learned Magistrate found also that the appellant did not show how she had suffered as a result of the letter and that the transfer was normal as the appellant's employer had not told the appellant that she would not be transferred.

In evaluating the evidence before the court, I will not consider the evidence of 1st defendant, the only defence witness as he abandoned his defence half way and was not subjected to cross – examination. I do agree with the Learned Magistrate that the evidence of the said witness therefore, is of no value. In EDWARD MANYA –VS- NATHANIEL DAVID SCHULTER & ANOTHER. Court of Appeal case No. 23 of 1997. The Court of Appeal stated:

> " The Respondent did not give evidence and so the only explanation as to how the accident happened was the

person put forward by the appellant and his brother ---"

--- The allegation in the defence is not evidence and remains so forever."

The import of the above is that the evidence of the plaintiff remained unchallenged, but was she defamed?

HALSBURY LAWS OF ENGLAND, 4th Edition Vol. 28. Butterworth's, London 1997 at paragraph 42 defines defamation as:

> " --- a statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally or if it exposes him to public hatred, contempt, or ridicule or if it causes him to be shunned or avoided.
>
> A person's reputation is not confirmed to has general character and standing but extends to his trade, business or profession."

The appellant testified to the fact that due to the said letter she could not get a promotion. She also stated that her character had been injured.

However, the appellant did not adduce evidence of how her character was injured. In my view mere statement in the plaint is not enough. The appellant also failed to prove her assertion that she could not get a promotion due to the said letter. Transfer from one school to another in my view cannot be an injury as such. Transfers are normal for teachers working under the Teachers Service Commission. In relation to allowances for teachers, these are paid depending on the school, or area of hardship a teacher works. It is not an automatic entitlement. There is no evidence that, if transferred to an area where allowance is payable, she will not be entitled to the same due to the said letter.

The appellant also failed to prove that the letter lowered her in the estimation of right thinking members of the society or indeed even her employer. She was merely transferred. The interdiction is as a result of an alleged breach of Teachers Service Regulation and not due to the letter complained of.

I do agree with counsel for the respondent that the mere fact that the Learned Magistrate did not assess damages is no reason for this court to disturb her judgment.

For the reason stated above, I uphold the judgment of the Learned Magistrate and decline to disturb the same. I therefore dismiss the appeal with costs.
Dated and delivered on 29.01.2010 at 11.00 am.

ALI-ARONI
JUDGE

In the presence of:

…… present for Appellant

……..…..…….present for Respondent

AAA/hao