REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 81 of 2000

CHRISTINE GATHONI ……..……. APPELLANT

VERSUS

ESTHER GITURA …….. RESPONDENT

(An appeal against judgment and decree of the Learned Senior Resident Magistrate,

M.N. Gicheru, Maua, in Maua SRMCC No. 106 of 1997 delivered on 7th July 2000)

JUDGMENT

The respondent filed a claim in the lower court for general damages for defamation. The respondent pleaded that the plaintiff uttered words to the effect that "***you are a wizard and a prostitute.***" The lower court found in favour of the respondent and awarded her Kshs. 20,000 general damages. That judgment aggrieved the appellant who has filed this appeal and has brought the following grounds:-

1. The learned trial magistrate erred in law in delivering his judgment in instalments in the absence of any agreement between the parties and/or their advocates.

2. The learned trial magistrate judgment was against the weight of evidence on record.

3. The learned trial magistrate erred in fact and law in failing to consider the appellant's defence particularly the evidence of DWII, one Patrick Mithika

4. The learned trial magistrate erred in fact and law in failing to find and hold that the respondent's suit was merely conjured to settle business rivalry scores particularly in light of the respondent's notice before action dated 1.8.1997 which the learned magistrate found to have been inconsistent with the pleadings.

5. The learned trial magistrate erred in law in finding for the respondent and awarding her Kshs. 20,000/= in general damages even after finding that no injury or loss was proved.

This is the first appellant court. I am duty bound to evaluate and consider the lower court's evidence and reach my own decision bearing in mind that I did not see or hear the witnesses. The respondent in evidence stated that on 28th July 1997, inquired from the appellant about 4 bags of maize that she could not find. Both the appellant and the respondent were engaged in the business of buying maize elsewhere and selling at Maua market. The respondent stated that the appellant had carried her bags of maize from

Isiolo. On being asked about the missing bags, the appellant responded by saying that the respondent had not lost any sacks of maize. Further, she proceeded to call the respondent a prostitute and a wizard. The respondent said that the utterance of those words had caused her to lose customers. She denied that she was a prostitute by saying she was happily married for 18 years. When the appellant uttered those words, the respondent said that members of public were present. That her customers had thereafter feared her because they thought she was using magic in her business. The respondent said that she had suffered damages. The respondent did confirm under cross examination that she and the appellant had quarreled. The respondent called 2 witnesses who both confirmed that on 28th July 1997 they heard the appellant refer to the respondent as a prostitute and a witch. As a result of those words, they did not want to associate with the respondent since they feared that the respondent could bewitch them. The appellant in her defence denied uttering those words and said that she was surprised to have received a letter of demand from the respondent's advocate. The witnesses that she called did not advance her case because they stated that they were not present at the material time when it was alleged that the appellant uttered those words. The learned magistrate in a considered judgment stated as follows:-

"***Considering the evidence adduced by the parties and their witnesses, I find that the plaintiff has proved her case against that the defendant uttered the words to the effect that she is a prostitute and uses witchcraft in her business. I found the plaintiff truthful. She impressed me as an aggrieved litigant and not one merely out to settle some business rivalry score. I do not believe that she woke up on this particular day and decided to implicate the defendant in this case simply because the defendant had gone to Moyale to buy maize. There were others who also went to Moyale and the plaintiff did not sue them."***

The learned magistrate, when the case concluded, delivered a judgment dated 11th February 2000 and in the concluding sentence said:-

"***I enter judgment for the plaintiff (respondent) in the above terms and award her ½ costs. I invite the counsel for the parties to make submissions on the quantum of damages to be awarded."***

In that judgment, the learned magistrate had found that the appellant had indeed defamed the respondent. The magistrate received submissions on quantum and thereafter by a ruling dated 7th July 2000 awarded the respondent Kshs. 20,000/= general damages. The appellant by ground number 1 of appeal faulted that judgment for having been delivered in instalments. The appellant argued that it offended Order XX Rule IV of the Civil Procedure Rules. That order provides as follows:-

"***Judgments in defended suits shall contain a concise statement of the case the points for determination, the decision thereon, and the reasons for such decision".***

The appellant in her submissions argued:-

"***The style of delivery of judgment by the learned magistrate was erroneous and against the law……."***

I find that although the magistrate's manner of writing judgment by instalment was unusual, it doesn't offend order XX Rule 4 at all. That rule requires a judgment to contain concise statements of the case and points of determination. The learned magistrate's judgment of 11th February 2000 did contain those statements and points. It also had reason for the decision reached by the learned magistrate. The learned magistrate however in that judgment left out the determination of the quantum. He gave his final decision on quantum after submissions were made before him. I cannot find that Order XX Rule 4 prohibits a decision being delivered in a manner followed by the learned magistrate. Ground number one of appeal fails. Ground number 2 also to my mind does fail. The respondent not only gave evidence to the effect that the defamation had on her business and herself but she also called witnesses who corroborated that evidence. The appellant on the other hand denied having uttered those words in evidence. But her evidence was not in tandem with her amended defence. In response to the paragraph where the respondent pleaded that she was defamed, the appellant in the amended defence denied the contents of those paragraphs and put the respondent to strict proof. Further, the appellant in response to those

paragraphs averred:-

*"**Indeed the alleged words are not capable of having the meaning attributed to the same."***

Appellant did not in evidence elaborate on why she pleaded that the words complained of did not have the meaning the respondent attributed to them. The learned magistrate in my mind, properly analyzed the evidence before him. His judgment was in accordance with that evidence and was not against the weight of the evidence. In that regard, the learned magistrate did consider the evidence of DWII. Essentially, this witness evidence related to the carriage of maize from Moyale to Maua. Although this witness stated that he had carried the respondent's maize, he also did state in evidence

*"**Kathoni (appellant) said that she would go with the goods to Maua. She was willing to bring the goods of Gitura (respondent)."***

That statement marches with the respondent's evidence that her maize was carried together with the appellant's maize. It was as a consequence of that that the respondent inquired from the appellant about the missing bags of maize. The second ground of appeal does also fail. On the fourth ground of appeal, the appellant seeks to introduce fresh evidence not adduced in the lower court. The ground states that the lower court failed to find that the case was as a result of business rivalry. There was no evidence adduced before the lower court to show that there was business rivalry or a grudge between the parties. For that reason, the first part of that ground is rejected. The letter of demand which is referred in the latter part of ground four essentially raises the very same issue in this suit. The letter of demand alleged that the appellant had called the respondent a prostitute and a witch. That being so, the latter part of ground four is rejected. On ground five, my response is that the respondent was not obligated to prove damage. It sufficed that the respondent was able to show that the defamation tended to lower her estimation in the eyes of the right thinking members of society. She after all had the benefit of the evidence of two witnesses who said that they began to fear the respondent suspecting that she could use witchcraft against them. Defamation is defined in the book of ***Winfield & Jalowicz on tort 15th Edition as follows:-***

"……***the publication of a statement which reflects on a person's reputation and tends to lower him in the estimate of right thinking members of society generally or tends to make them shun or avoid him….."***

Hon. Mr. Justice Makhandia in the case Civil Appeal No. 51 of 2005 **Gathoni Gathukumi Vrs. Eliphas Mbaya Mtuanyiri** had this to say in a similar claim before him:-

*"**As opposed to libel, slander is punishable perse without proof of damage especially institutes like in this case where the appellant imputes a criminal offence of the respondent that is punishable by imprisonment. What this means therefore is that the respondent was not required to show that he had suffered any loss and/or damage as a result of slander contrary to the submissions of the appellant."***

In Halsbury Laws of England 4th Edition, on slander, the author has this to say:-

"***An oral defamatory statement is actionable perse, that is without proof of special damage."***

Further, it is stated in that book:-

"***A defamatory allegation of sexual misconduct against a woman is actionable perse."***

That quote sufficiently answers the submissions by the appellant that the respondent did not show damage. Further to claim that respondent was a prostitute is to impute a criminal offence. What was before the lower court in this case was a claim that the appellant had slandered the respondent. There were submissions made by the appellant in support of this appeal which are somehow lost to me. The appellant submitted that the respondent was silent on time and to whom the alleged defamatory words were altered. Paragraph 3 of the amended plaint which the appellant herself reproduced in her submissions clearly sets out the date and to whom the defamatory words were uttered. It is as follows:-

"***On or about 28th July 1997, the defendant uttered the following defamatory words concerning the plaintiff before members of public. "Esther Gitura uri murogi na maraya" Esther Gitura you are a wizard and a prostitute."***

It is clear that that paragraph did exactly state what the appellant alleges it did not. There is no requirement in law to state the language the words were spoken or to state whether they were uttered in a market or a church. It suffices that the respondent pleaded that those words were uttered in public and in evidence the respondent infact stated that they were uttered in Maua market. The words of paragraph 3A of the plaint may not have been repeated word by word by the respondent in evidence but I dare said there is no such requirement. The respondent did any way say that she was defamed by the appellant who said that she was a prostitute and a witch. I find that the learned magistrate's judgment cannot be faulted. It was well supported by the evidence adduced before him. For that reason, the judgment of this court is that the appellant's appeal does fail and is dismissed with costs to the respondent.

Dated and delivered at Meru this 25th day of September 2009.

MARY KASANGO

JUDGE