



REPUBLIC OF KENYA

High Court at Meru

Civil Case 23 of 2009

YAHYA KIMATHI MUKANGU.....APPLICANT

VERSUS

P. C. KIMATHI.....1ST RESPONDENT

ATTORNEY GENERA.....2ND RESPONDENT

J U D G M E N T

The appellant was the plaintiff before the trial court. The appellant sued the respondents herein seeking general damages for defamation ,costs of the suit and interest. The respondents on the other hand denied liability and sought the appellant’s suit to be dismissed with costs. The trial court after hearing the suit dismissed the appellant’s suit with costs to the respondents.

The appellant being aggrieved by the decision of the Senior Resident Magistrate preferred this appeal and listed in his appeal six(6) grounds of appeal being as follows:-

- 1. That the judgment of the learned trial Magistrate is against the weight of evidence.***
- 2. That the learned trial Magistrate erred in law and in fact in finding that the words complained of were not uttered.***
- 3. The learned trial Magistrate erred in law and in fact in finding that the words complained of were not defamatory.***
- 4. The learned trial Magistrate erred in law and in fact in holding that the plaintiff had not served the necessary notices under the relevant Act.***
- 5. The learned trial Magistrate erred in law and in fact in finding that the plaintiff had not proved his case on the required standard.***
- 6. The learned trial Magistrate erred in law and in fact in allowing himself to be influenced by extraneous matters when arriving at his judgment.***

That on 13th October, 2011 court gave direction that the appeal be determined by way of written submissions. That the appeal was set down for highlighting but when the same came up for highlighting the advocates opted to rely on their written submissions. This court has considered submissions by Mr. M. Rimita, learned Advocate for the appellant and Mr. C. N Menge learned State Counsel for the

respondents. It has also read the pleadings, proceedings, judgment and Memorandum of Appeal and considered the parties opposing positions.

The appellant under grounds No.1, 2 and 3 of the Memorandum of Appeal, faults the trial court in failing to find and hold that the words complained of were uttered and were defamatory. According to the appellant the words complained of were uttered by the 1st respondent at Chogoria Police Post, at the report office when he was making his report to P.C. Kathurima. There were no other people at the time. P.C. Kathurima, who gave evidence as DW2, denied having heard the 1st appellant utter the words complained of. DW2 testified that the appellant told them that his daughter had been bewitched by people in Chogoria and that he had consulted a witchdoctor who named the 1st respondent. That 1st respondent in response is said to have told the appellant he is a Christian and he does not believe in witchcraft. PW2 on the other hand testified that on 10/4/2006 he passed through Chogoria Police Post and heard the appellant being insulted and called a devil worshipper and witch.

PW3 averred that on 10/4/2006 he met the appellant arguing with 1st respondent. That they later called the appellant a devil worshipper. PW4 testified that on 13/6/2007 at 2.00p.m. he was called to settle a matter between the appellant and 1st respondent.

The evidence of appellant's witness is contradictory and full of inconsistencies. None of the witnesses mentioned the words complained of being published in the presence of each other. None mentions that both of them were at the scene at the time the words were uttered. PW2 testified the words were uttered at the Chogoria Police Post whereas PW3 contradicts PW2 by stating that he met parties arguing as he was walking on the road. The appellant in his testimony never mentioned that the words complained of were uttered in presence of PW2 and PW3. The appellant's evidence is clear that the words complained of were spoken once. It is therefore not possible for PW2 and PW3 who were not together at the same time to have heard the words complained of. Further PW2 has added that the appellant has even called a witch which the appellant never mentioned or pleaded. The witness other than mentioning the appellant was called a devil worshipper, they did not mention the other words pleaded in the plaint and said to have been uttered by 1st respondent. Further NO.81664 PC Anne Napuyu, who gave evidence as DW4, who was as of 11/4/2006 attached to Ntumu Police Station as a report Officer did not hear the 1st respondent utter the words complained of.

From the evidence adduced by the appellant, his witnesses and the respondent and his witness, it is clear that the appellant failed to satisfy the court that the 1st respondent uttered the words complained of. I therefore find and hold that the trial Magistrate made no error in law and fact in his finding that the appellant did not prove on balance of probability that the 1st respondent uttered the words complained of.

The appellant under ground No.4 of his Memorandum of Appeal averred that the trial Magistrate erred in law and in fact in holding that the appellant had not served the necessary notices under the relevant Act. The appellant testified that he gave notice to Attorney General before filing this suit. He produced the notice dated 25th July, 2006(P.Exhibit No.1). The notice of intention to sue is addressed to Maj-General Hussein Ali, Commissioner of Police, and copied to Amos Wako, Attorney General and Supreme Council of Kenya. The notice was served by way of postage as per certificate of posting registered postal Article dated 10/8/2006.

I have gone through the court judgment and I have been unable to find that the trial Court held that the plaintiff had not served the necessary notices under the relevant Act. Be as it may, S.13 and 13A of the Government proceedings Act provide:-

13. All documents required to be served on the Government for the purpose of or in connexion with any civil proceedings by or against the Government in accordance with the provisions of this Act shall be served on the Attorney-General.

13A. (1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those

proceedings.

(2) The notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars -

(a) the full names, description and place of residence of the proposed plaintiff;

(b) the date upon which the cause of action is alleged to have accrued;

(c) the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;

(d) a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;

(e) the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

The notice of intention to sue is clear how it ought to be served. Order 5 Rule 9(1) (2) (3) and 4 of Civil Procedure Rules states:-

9. (1) The provisions of this Order shall have effect subject to section 13 of [the Government Proceedings Act](#), which provides for the service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government.

(2) Service of a document in accordance with the said section 13 shall be effected—

(a) by leaving the document within the prescribed hours at the office of the Attorney-General, or of any agent whom he has nominated for the purpose, but in either case with a person belonging to the office where the document is left; or

(b) By posting it in a prepaid registered envelope addressed to the Attorney-General or any such agent as aforesaid,

And where service under this rule is made by post the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof.

(3) All documents to be served on the Government for the purpose of or in connection with any civil proceedings shall be treated for the purposes of these Rules as documents in respect of which personal service is not requisite.

(4) In this rule, “document” includes writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications.

Any document required to be served upon the Government can be served by delivery of document by hand, posting or any other approved mode of service. Having stated that the trial court did not make any finding on service of the notice to the Attorney General, I believe I have said enough on that ground and I will leave it at that as nothing comes out of the same.

The appellant under grounds Nos 5 and 6 of the Memorandum of Appeal which were argued together, the appellant argued that the learned Magistrate allowed himself to be carried away by extraneous matters and as a result found the appellant had not proved his case. The appellant did not disclose in his submission what were the extraneous matters that were relied upon by the trial court. I have gone through the trial court’s judgment and have found that the trial court apprehended the facts of the case and applied proper law in reaching its decision. The trial court found that the words complained of were not proved to have been uttered by the 1st respondent and that there was no publication. The court also found the

appellant failed to call evidence to show that he had suffered damage and injury to his reputation as a result of the defamatory words. The trial court's findings were based on evidence adduced before it and not on extraneous matters. I find no merits in the grounds of appeal and same are dismissed.

The upshot is that the appeal is found to be without any merits and the same is dismissed with costs of appeal to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF NOVEMBER, 2012.

J. A. MAKAU
JUDGE

Delivered in open court in presence of:

1. Mr. Nyenyire for appellant
2. Mr. Menge for the respondent(absent)

J. A. MAKAU
JUDGE