REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 24 of 2006

GEOFFREY NGUNJIRI NJUGUNA ..... APPELLANT

VERSUS

MOSES GICHOHI ..... RESPONDENT

(Appeal from original Judgment of the Chief Magistrate's Court at Nyeri in Civil

Case No. 642 of 2004 dated 9th March 2003 by Mrs. E. J. Osoro – SRM)

J U D G M E N T

This appeal arises out of a suit for damages for libel which was successfully filed in the subordinate court by the respondent (hereinafter referred to as the plaintiff) against the appellant (hereinafter referred to as the Defendant).

At the material time, the Plaintiff was a businessman engaged in transport and road works. He was and I belief he is still a neighbour of the Defendant. For a long time there has been a dispute involving access road to their respective parcels of land being **Tetu/Unjiru/820** owned by the Defendants mother, **Eunice Wanjiru Njuguna**, and **Tetu/Unjiru/821** is owned by the Plaintiff.

The Plaintiff received a letter dated 30th May, 2005 authored by one **Godfrey Ngunjiri Njuguna** on behalf of **Eunice Wanjiru Njuguna** addressed to the District Lands Registrar, Nyeri District and copied to ministers for lands and settlement, Roads, Public Works and housing, Internal Security, Director Anti-Corruption Authority, Provincial Commissioner Central Province, District Commissioner Nyeri, Provincial Lands Registrar Nyeri, District Officer, Nyeri Municipality, the Chief Mukaro Location, Sub-chief Mununga ini sub-location and the Plaintiff. The said letter contained the following pertinent paragraph:

"..... That Mr. Gichohi is an unscrupulous and corrupt civil servant of Nyeri Provincial General Hospital and trader (Kenya Bar – Nyeri) and who has used all ways and means at his disposal to sway, use and misuse the D.O. Nyeri Municipality, the Provincial Physical Planner, the Provincial lands officer, the District Lands Registrar – Mr. Gutu, the local chief and sub-chief and any other officer whom he can manipulate ....." Stung by these offending words in reference to him, the plaintiff instituted proceedings claiming in his plaint that the Defendant without any colour of right wrote the said defamatory letter and had it published to the named officers to whom the letter had been copied to of and concerning the plaintiff in the way of his business. He claimed that by the said words the Defendant meant and was understood to mean that the plaintiff had been guilty of tampering with public officers contrary to section 107 of the Penal Code, that the plaintiff had been guilty of abuse of office contrary to section 101 of the Penal Code, that he was dissolute and of corrupt character and finally that he was unfit to associate with respectable persons. The plaintiff was in consequence much injured in his credit and reputation.

The Defendant as expected denied the Plaintiff's claim. He denied authoring the letter nor publishing it. He also averred that he was non-suited. Finally and in the alternative, the Defendant pleaded justification and qualified privilege.

Having heard the plaintiff and the defendant, the learned Senior Resident Magistrate found for the plaintiff and awarded him Kshs.150,000/= general damages and Kshs.100,000/= exemplary damages making a total award of Kshs.250,000/=. The findings of the learned magistrate as well as the award provoked this appeal. In a memorandum of appeal drawn by **Nderi & Kiingati advocate** for the Defendant, the defendant has faulted the judgment of the learned

Senior Resident Magistrate on the following grounds:-

1. That the learned trial magistrate erred in law and in fact in finding that the defendant was the author of the letter dated 31.5.2004.

2. The learned trial magistrate erred in law and in fact in making a finding that the said letter had been published.

3. The learned trial magistrate erred in law and in fact in holding that the plaintiff had proved elements of defamation (libel) as required by the law.

4. The learned trial magistrate erred in law and in fact in finding that the defendant had raised defence of justification and ought to have proved it and not taken any other defence available.

5. The learned trial magistrate erred in law and in fact in failing to uphold the defendants defence and submissions that no case had been made out by the plaintiff.

6. The learned trial magistrate erred in law in awarding exemplary damages when none had been sought or prayed for.

7. The learned trial magistrate erred in awarding Kshs.150,000/= as general damages an amount which was inordinately high as to present a fair estimate a finding not supportable by evidence.

8. The learned trial magistrate erred in law and in fact in awarding Kshs.100,000/= in exemplary damages.

9. The learned trial magistrate erred in not considering the appellant's various defences.

The Plaintiff's case seem to be that he is the registered owner of land parcel **Tetu/Unjiru/821** which neighbours the Defendant's land parcel **Tetu/Unjiru/820**. At some point in the past the two parcels of land were one. However following subsequent subdivision the plaintiff was denied access to the main road. In his own words "**my land was closed in and it became land locked."** He talked to the Defendant's father regarding the issue to no avail. He thereafter approached various Government offices in his efforts to have an access road from his suit premises through that of the Defendant. As a result of the plaintiff's activities bad blood developed between him and the defendant which culminated in the defendant sending the offending letter. It was the case of the plaintiff therefore that the offending letter was published to various people and government agents with whom he had business dealings as a consequence whereof his business had suffered. He wrote a demand letter to the defendant through his advocates seeking for an apology. However no apology was forth coming and hence the suit.

In his defence, the defendant admitted knowing the plaintiff and that they were neighbours. He also admitted to the existence of a land dispute between the plaintiff and himself. However he denied authoring the offending letter. He claimed to have only seen it in court and had nothing to do with it. He therefore prayed for the dismissal of the suit.

When this appeal came up for hearing before me, the appellant's counsel, **Mr. Nderi** and the Respondent's counsel, **Mr. Nganga** agreed to have the appeal heard by way of written submissions. The court acceded to the request and accordingly, respective counsel filed their written submissions, together with authorities which I have carefully read and considered.

I am aware that as a first appellate court, it is my duty to subject the evidence tendered during the trial to fresh evaluation so as to determine whether the decision reached by the learned magistrate should stand. See **Gudka v/s Dodhia (1982) KLR 376**.

The learned Senior Resident magistrate pointed out and correctly so in my view that the issues that called for her determination was:

(i) "Whether the words complained of in their internal (sic) sense or innuendo are defamatory.

(ii) Whether the Defendant authored the offending letter or not

(iii) What quantum of damages to be awarded if the words are defamatory ....."

I have looked at the offending letter just as the learned magistrate did and I have no doubt at all that the offending words

are libellous. The words in their natural meaning portray the plaintiff as a cunning character who moves from one office to another influencing decisions through corrupt means. There is no need to infer any innuendo to the words as by their natural meaning they portray the plaintiff in not so good light. Even the appellant in his submissions does admit that indeed the letter is libellous.

However did the Defendant author and publish the letter? I entertain some doubts on this aspect of the matter. The plaintiff conceded that he received the letter printed and signed by a person going by the names of the defendant who apparently had written the said letter on the instructions of and on behalf of one, **Eunice Wanjiru Njuguna**. There is no evidence however that the Defendant authored the said letter. The plaintiff did concede in his evidence that he had never corresponded with the defendant as to know his signature. It was incumbent upon the plaintiff to prove by cogent evidence that it was the Defendant who authored the letter in view of the strong denial regarding authorship of the letter by the Defendant. The only evidence tending to connect the defendant with the letter is the postal address on the letter. The defendant did admit in cross-examination that the address on the face of the letter belonged to his place of work. However I do not think that this alone is sufficient to connect the defendant with the authorship of the letter. It is very much possible that the said letter could have been authored by someone else using the said address. The plaintiff did not say which mark he identified as belonging to the defendant to specifically associate him with the letter. Accordingly the plaintiff's assertion that the Defendant authored the letter was merely speculative especially considering the existing hostilities between the parties.

Further the letter is alleged to have been authored on behalf of **Eunice Wanjiru Njuguna**. The author was therefore a mere agent. Can an agent be held liable for the actions of the principal? I do not think so in the circumstances of this case. In my view there was no reason why the said **Eunice Wanjiru Njuguna** was not sued or at least enjoined in the proceedings. The defendant if at all was merely her mouth piece. She ought therefore to have been enjoined in the proceedings as she was alive and kicking.

In a claim based on libel it is of critical importance that the plaintiff prove to the satisfaction of the court that the defamatory words were published and or made known to the third parties. In my view the plaintiff was unable to breach this threshold. Throughout his testimony, the plaintiff did not at all prove that the letter reached the parties to whom it was allegedly copied to hence publication. He did not say that he found the offending letter with any other person except himself. He could at least have had any of the people to whom the letter was copied to as his witnesses. They would have been able to say, yes I received a copy of the offending letter and since then I have down graded my relationship with the plaintiff. In the absence of any evidence regarding receipt of the defamatory letter by any other person apart from the plaintiff, it cannot be said therefore that the letter was published. The plaintiff in failing to called any of the 11 or so people that the letter was copied to as witnesses, he was merely asking the court to assume that because the letter produced was a copy to him, the other copies must necessarily have been sent out to and reached the respective addressees. This assumption has no basis at all. Courts of law do not act on assumptions and speculations. It is trite law that inspite of how weighty a defamatory matter is, if only communicated to the plaintiff there can be no action founded on it as there would not have been publication. In the circumstances of this case therefore, the learned magistrate was wrong in coming to the conclusion that the defamatory letter was published. This finding had no basis either in evidence, law or even by implication.

The respondent has raised the issue of the defendant in his defence having raised the defence of justification. Accordingly he is deemed to have admitted authoring the letter. It should be realised that this defence was raised in the alternative and without prejudice to the other defences raised. Further even if it was to be admitted that the defendant authored the letter, the plaintiff's claim would still fail for want of publication. The case cited by the respondent in support of his contention that it is not necessary for the plaintiff to have called as a witness any of the addressees to whom the letter was copied to is clearly distinguishable from the circumstances obtaining in this case. In the case of **Keah v/s Mburu (1982) KLR 131** one of the addresses was actually called and he testified. This is not the case here!

Finally on the issue of damages, I note that the learned magistrate awarded exemplary damages. It is instructive that the same had not been specifically sought for in the plaint as required by law. See **Biwott v/s Clays Ltd (2000) E.A. 334** and **Mikidadi v/s Khalfan & Another (2004) 2 KLR 496**. The learned magistrate therefore erred in making such an award. Exemplary damages are meant to compensate the plaintiff for additional injury going beyond that which followed from the words alone. The factors which tend to increase or exgravate damages are:

(a) Manner of publication and extent of circulation,

(b) Defendant's subsequent conduct

(c) Failure to apologise

(d) Defendant's actual malice

(e) Justification

None of the aforesaid circumstances obtained in this case to warrant the award of exemplary damages by the learned magistrate.

It is therefore the judgment of this court that the appeal be and is hereby allowed. Judgment and decree of the subordinate court is set aside. The defendant shall have the costs of this appeal as well as costs in the subordinate court.

Dated and delivered at Nyeri this 31st day of January 2008

M. S. A. MAKHANDIA

JUDGE