



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 47 of 2005

JANE WANJERI MWANGI APPELLANT

VERSUS

JANE NYAMBURA GATHIRA RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court at Kangema in Civil Case No. 38'B' of 2003 dated 16th August 2005 by Mr. G. P. Ngare – R.M.)

J U D G M E N T

This appeal is from the judgment of **G. P. Ngare**, Esq. Resident Magistrate in the Resident Magistrate's Court, Civil Case number 38 of 2003 dated 16th August, 2005. In that case the appellant herein who was the Plaintiff in that court sued the respondent herein and who was the defendant in the suit in the subordinate court seeking general damages, costs of the suit, interest and such further or other relief as may be just. The appellant's cause of action was premised on defamation and more specifically slander. She claimed that on or about the 24th April, 2003, the respondent uttered defamatory statements or words of and concerning her without any justification in Kikuyu language in terms following:

“Ndamenire mutumia uyu nitendu ndingihura umaraya toria we ahuraga tondu gwake guturaga arume. He mundurume umwe wetagwo Mugi wair karani wa macani na matuire nake nyumba na ni oragirwo ni AIDS. She told the plaintiff directly. “Onawe ukirie gukua maraya maya” “Ona he mundu ungi witagwo wa gaciku wanjirire athie kwa nyina wa Kienje tondu ni indo ciake. Mutumia uyu ni mumaraya muno tondu muthuri wakwa athugumaga amuroretie tondu ni amwendaga. Muthuri wake ona ndamenyaga muka uria ahuraga umaraya tondu ni amugiriire kamurigo.

Translated in English those words meant;

“I hate this woman because I cannot prostitute the way she does as men are ever at her home. There was a certain man known as Mugi a tea clerk who used to be with her in her house and he died of AIDS.” She told the plaintiff directly. “You are also about to die you prostitute.” “Even there is another person known as wa Gaciku who told me once that he was on his way to mama Kienje's home because she was his property.” This woman is a prostitute in a big way because even my husband urinates facing her as she is after him.” “Her husband does not even understand her ways of prostitution because she has bewitched him.”

According to the appellant the defamatory words were uttered by the respondent at a public place namely the chief's camp at Kahoya where there was a gathering of many people and she uttered them

maliciously knowing that they were false. It was her interpretation that the defamatory words meant and could only be understood by any ordinary reasonable man to mean and were in fact understood to mean that she was a woman of loose and immoral character, constantly unfaithful to her husband with different men, she exchanged sexual favours for money with different men and does not respect her marriage, suffers from sexually transmitted disease i.e. Aids and therefore should be shunned by her community, finally that she is a witch or uses charms. The appellant went on to plead that the words complained of were also capable of conveying innuendoes that she was a person of immoral character, a prostitute and a person suffering from communicable disease which is infectious known as AIDS.

When served with the plaint, the Respondent as expected filed a defence in which she denied the appellant's allegations and specifically pleaded that she did not utter the defamatory words of and concerning the appellant on 24th April 2003 or indeed on any other date. Indeed she averred that it was the appellant who uttered those words about herself.

The case eventually came up for hearing before the learned magistrate. In support of her claim the appellant lined up a total of 4 witnesses whereas the respondent called a total of 3 witnesses, to counter the appellant's allegations.

Before I delve deeper into this appeal, it is essential that I first set out the essential background facts of the case.

The appellant is a farmer at Rwathia village where she resides with her husband whom she has been married to since 1977. She has known the respondent as a neighbour since 1992 but it would appear that their relationship has been nothing but turbulent. On 24th April 2003, the appellant received a letter from the chief, Kihoya Location summoning her together with her husband to chief's office to answer certain allegations levelled against them by the Respondent's husband. It was alleged that the appellant and her husband had interfered with the respondent's husband's fence. Accompanied with some of her witnesses as well as other people, they proceeded as ordered by the chief. During the proceedings, the appellant denied the allegations and when given a chance to speak she stood up and told the chief together with his panel of elders that since 1999 whenever she has met with the Respondent, she has said bad things about her. When asked to repeat the offensive words by the chief, she stated that they were obscene but nonetheless proceeded to repeat them. When the chief heard the words, he stopped her in the tracks as they were too obscene to bear. The Chief then asked her and the Respondents to leave his office. It is at this point that allegedly the Respondent interjected and asked the chief to be allowed to say something. It was then that she uttered the alleged defamatory words reproduced at the commencement of this judgment. Her witnesses **PW2 Lucy Mwendu, PW3, Lucy Wanjiru Ngari, PW4 Joseph Kamau Kuria** who were present at the chief's office confirmed that the Respondent indeed uttered those offensive and defamatory words. However they all stated under cross-examination that the appellant's status in society had not changed much since that day and her family, friends and themselves still regard her in higher esteem as always.

For the Respondent, she explained that on 24th March 2003 they had gathered at the chief's camp where her husband had complained about the appellant. There were many people. That her husband complained about the appellant having damaged his fence which he had just erected. That when the appellant was asked to defend herself, she talked about their tumultuous relationship with the respondent and alleged that the respondent and her people had called her a prostitute and also that she was a lover to one **Mugi** who had died of AIDS. She told the crowd that it was one **Jane Wamaitha** who had told her about it. She denied having uttered the said words. Rather it was the appellant who repeated the offensive words to the crowd.

The area chief testified as the respondent's witness. He denied hearing the respondent utter those words. Indeed he testified that it was the appellant who uttered the defamatory words to the crowd though she incriminated one **Jane Wamaitha** as the person who had reported to her about those words. Though the said **Wamaitha** was in the crowd, she opted to keep quiet. That too was the testimony of DW3 one **Mwangi Gacheru**.

This was then the evidence before the learned magistrate that she was required to act upon. The learned trial magistrate in a well reasoned and detailed judgment evaluated the evidence and came to the conclusion that the appellant had not proved her case as required by law and proceeded to dismiss the same with costs. That order then provoked the appeal before me.

Through **Messrs Waiganjo Gichuki & Co. Advocates**, the appellant lodged this appeal setting out 6 grounds upon which the learned magistrate's judgment could be attacked. These were:-

- 1. The learned trial magistrate erred in failing to give sufficient weight to the evidence of PWs 1, 2, 3 and 4 regarding utterances which formed the basis for the cause of action of defamation and failed to analyse the evidence as required; the learned Resident Magistrate failed even to give any or any sound reasons for not accepting the evidence offered by the plaintiff.**
- 2. The learned Magistrate erred in basing his judgment on the Evidence of DW1 when the record shows that he gave evidence which was contradictory and also contradicted that of DW2 and DW3.**
- 3. The learned Resident Magistrate erred in giving undue weight to the evidence of DW1 without properly analyzing the same in the face of all other evidence on record which contradicted him; the court should have given reasons for preferring that evidence as they are not readily discernible from the record.**
- 4. The trial magistrate failed in his duty to analyse all the evidence on record and give proper and adequate reasons for his judgment.**
- 5. The learned Resident Magistrate erred in making a bold statement that the evidence for the plaintiff was contradictory without giving his reasons for so finding and without stating in which material particulars the evidence was contradictory.**
- 6. The learned trial magistrate erred in importing into his judgment concepts and criteria which are not known to law and cannot be applied in a trial like the one he was handling.**

When the appeal came up for hearing before me on 30th October 2007 it was agreed between **Mr. Gichuki** and **Mr. Mwangi**, learned counsel for the appellant and respondent respectively that this appeal be disposed off by way of written submissions. The court acceded to the request and accordingly respective parties filed their written submissions which I have carefully read and considered.

This is the first appellate court and its powers as such are well defined. It is settled law that as a first appellate court, it is my duty to subject the evidence tendered during the trial to fresh and exhaustive evaluation so as to reach my own conclusion (**Ephantus Mwangi & Another v/s Duncan Mwangi Warutugu (1982 – 88) 1 KAR 278**). However an appellate court will not normally interfere with a finding of fact by the trial court, whether civil or criminal case, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. (**Chemagong v/s Republic (1984) KLR 611**). I will bear these injunctions in mind as I consider this appeal.

For a party to succeed in a defamation suit, it is my understanding that certain essential ingredients must obtain and be proved. It must be proved that the words complained of were defamatory, that they were uttered by the defendant, that they said words referred to and or were understood to refer to the Plaintiff and that there was publication.

In the circumstances of this case, I have no doubt at all that the words complained of if uttered at all were defamatory and slanderous of the appellant to the extreme considering her position in society. She was a married woman with 4 grown up children aged between 20 to 25 years and a leader of the choir in the local church as well. The words being slanderous by virtue of section 4 of the defamation Act, prove of special damages is unnecessary. The said section provides and I quote “..... **In action for slander in respect of words imputing unchastity to any woman or girl, it shall not be necessary to allege or**

prove special damage; provided that in any such action a plaintiff shall not recover more costs than damages unless the court shall certify that there was reasonable ground to bringing the action” Accordingly in this case the appellant need not prove special damage as a result of the slanderous statement. I also agree that the said offensive words meant and could only be understood by ordinary reasonable man to mean and were in fact understood to mean the interpretation assigned to them in paragraph 5 of the plaint and the innuendoes assigned to them in paragraph 6 of the plaint as well.

Did the Respondent utter the defamatory words? My careful reading and evaluation of the evidence tendered and indeed the entire record does not inspire me with that confidence. It is had to imagine that a person not provoked at all by the appellant would out of the blue throw a tantrum and start calling the appellant those unpalatable and unprintable words. If the respondent had any venom she could only have directed the same towards the son(s) of the appellant for they are the ones who had threatened to cut her with a panga after her husband had repaired the fence.

The appellant takes the position that the words were uttered by the Respondent. Conversely, it is the Respondent’s position and contention that in fact it is the appellant who uttered those words regarding herself and therefore there can be no defamation – slander or otherwise. It would appear that the Respondent’s version of events stands up to scrutiny. The appellant merely repeated what she had been told by her friend, **Jane Wamaitha**, a casual labourer employed apparently by the respondent. It is noteworthy that the said **Wamaitha** was present at the said meeting and opted to say nothing, nor was she ever called as a witness by the appellant. In my view the whole case against the respondent was stage managed by the appellant and her witnesses. It is also worth noting that the area chief who was arbitrating in the dispute did not testify that he heard the respondent utter the offensive words. Rather that it was the appellant who repeated the said words to the crowd and said that she had been told of the said words by Wamaitha. The learned magistrate captured the evidence of the chief in these words: “..... **The area chief also testified and stated that it was the Plaintiff who uttered the alleged words. That she stated that one Jane Wamaitha is the one who told her about the words....**” **Indeed the appellant in her own testimony before court stated: “..... The chief told me to say exactly what the defendant had said. They were obscene words. When the chief heard them, he told me not to continue.....**” As correctly observed by the learned magistrate if indeed the chief felt that the words as uttered by the appellant were so obscene as to warrant him to intervene and to stop her from continuing to utter the same, I doubt whether the same chief would have again allowed the Respondent to reiterate the said words and in such detail before the same crowd. Going by the circumstances obtaining at the meeting, I am persuaded that it was the appellant and not the Respondent who uttered the words complained of and in so doing, she was repeating what she had been told by one **Jane Wamaitha** to the crowd. It was the appellant who uttered the slanderous words of herself and about herself. The learned magistrate gave due consideration to the totality of the evidence and was therefore entitled to arrive at the finding that he came to. The learned magistrate subjected the evidence of the witnesses to careful scrutiny. To his mind, “..... **the sequence of events as narrated by the plaintiff and her witness appear to be contradicting one another. The words of the alleged utterances by the three witnesses does not create a flow.....**” The appellant states in one of the grounds of appeal that the learned magistrate did not give any instances of such contradictions and inconsistencies. To my mind what the learned magistrate was saying was that the appellant and her witnesses were not consistent in their testimony regarding the exact offensive words allegedly uttered by the respondent. A careful evaluation of the Appellant’s and her witnesses testimony will leave you in no doubt at all as regards their inconsistency. What the appellant said regarding the offensive words is not what the other witnesses said. If indeed the appellant was present at the scene with all her witnesses they should all be reading from the same script as to what transpired on that occasion. Contrary to the submissions by learned counsel, by the learned magistrate stating that the evidence of the three witnesses does not create a flow, the magistrate was not introducing in her judgment any new concept in the law of evidence. He was not introducing into the trial a standard of proof not recognised by the law. The magistrate was merely commenting on the inconsistencies in the evidence of the appellant and her witnesses. I do not think therefore that the complaint by the appellant that the learned magistrates grasp of the law of evidence was either sketchy or seriously wanting is well founded. I think that the learned magistrate was very much alive to the issues before him for determination. The learned magistrate appreciated the nature of the case before him and he has given his reasoning and has gone on to point out the unbelievable inconsistencies in the evidence

of the appellant and her witnesses which goes further to show why the magistrate deemed and found the chief to be a witness worthy believing.

The appellant faults the learned magistrate for his over reliance on the evidence of the chief in rejecting the appellant's claim. That he implicitly believed what the chief said without comparing it and analysing it along with the evidence of the witnesses on both sides. In my view this complaint is without merit. Between the witnesses who testified on behalf of the appellant and the Respondent, the chief would appear to be the only one who passed credibility and independence test. All those who testified on behalf of both the appellant and the respondents were either relatives or their friends. I do not think that the chief stood to gain anything by falsely testifying against any of the parties. All the parties were his subjects in the location and it was in his best interest to testify on what transpired on that day so as to pacify his subjects. The chief confirmed that he never heard the respondent utter the words complained of. The learned magistrate had no choice in the matter but to believe the evidence of the chief. No evidence to the contrary was forthcoming. Further I may add that the trial court heard, saw and observed the demeanour of witnesses. It is settled law that an appellate court will not interfere with the lower court's findings of fact based on assessment of the credibility and demeanour of witnesses who gave evidence before it unless it was wrong in principle. There is nothing on record that would lead me to hold that the learned magistrate was wrong in his evaluation of the credibility of the chief as a witness.

Before I wind up this judgment, there is one issue which I wish to address. In paragraph 5 of the amended plaint the appellant claims that the offensive words were uttered maliciously by the respondent knowing that they were false. It is trite law that where a party pleads malice, it behoves him and or her to give particulars of such malice. In the case of **Otieno v/s Nation Newspapers Ltd. (2002) KLR 578**, the court held:

“..... In libel actions, the plaintiff is bound to give full particulars of facts and matters which lead to an inference of malice on the part of the defendant. Pursuant to order VI rule 6A of the Civil Procedure Rules Where a party pleads malice particulars be given of facts or matter which would lead to the inference of malice..... Failure to comply with mandatory rules rendered the plaintiff's suit defective and invalid.....”

This is exactly what happened in this case. The appellant having pleaded malice, she should have given particulars. She did not and accordingly her suit was defective and invalid.

In the end, I have come to the inescapable conclusion that though the words complained of were slanderous, they were not uttered by the respondent, they could therefore not be understood to refer to the appellant. By the same token there was no publication therefor.

All in all, I find that the learned magistrate was right in disallowing the appellant's claim. Accordingly this appeal lacks merit and is dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 11th February 2008

M. S. A. MAKHANDIA

JUDGE