



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 53 of 1995

MWIA KISEE APPELLANT

VERSUS

SINOTA MBUSI RESPONDENT

(Being an appeal from the judgment and order of the District Magistrate I in Kitui DMCC

No. 85 of 1994 dated 18/05/1995)

JUDGMENT OF THE COURT

1. The appellant herein MWIA KISEE was the defendant in Kitui DMCC Number 85 of 1994. The Respondent, as plaintiff, sued the appellant for the recovery of Kshs.5,000/= purportedly being general damages for defamation of character. By his plaint dated 19/08/1994 and filed in court on 22/08/1994, the plaintiff claimed that the defendant had reported to the elders that the plaintiff had in the month of June 1994 stolen the defendant's cassava which accusations the defendant could not prove. Judgment was entered for the plaintiff on 18/05/1995.
2. The plaintiff in the said suit gave evidence and also called two witnesses. He stated that he had sued the defendant for the reason that the defendant had called him a thief and had also reported him to the area Assistant Chief on the 25/06/1994 on allegations that he (plaintiff) had stolen the defendant's cassava. He also said that after the hearing of the case by the local elders the plaintiff was ordered to pay the defendant the sum of Kshs.1,500/=. The plaintiff also said that he appealed the ruling of the local elders to the area Chief and that the appeal was allowed on 25/07/1994. He stated further that nonetheless, and despite the outcome of the appeal, the area chief ordered the plaintiff to pay damages to the defendant. The plaintiff said that he filed suit against the defendant in protest to the chief's decision requiring him to pay damages to the defendant. The plaintiff said the defendant's allegations damaged his (plaintiff's) name.
3. PW1 was KISANGA THITU. He testified that he was one of the elders who heard the cassava-theft case between the plaintiff and the defendant at the Chief's office. He said that according to the elders, the defendant's case against the plaintiff was found to be baseless. He produced the written decision of the elders as Exhibit 1.
4. PW2 was NGAMI MUIINDE. She said she was also one of the elders who heard the cassava-theft case between the plaintiff and the defendant. She said that the elders dismissed the defendant's theft claim against the plaintiff and that according to the elders' decision, neither party was to receive any form of payment. She said that the defendant's case was thrown out for lack of evidence.

5. The defendant also testified and called one witness. She stated that sometime in 1994, the plaintiff entered her shamba and uprooted her maize plants. She said that the area Assistant Chief visited the shamba and viewed the damage, and that he ordered the plaintiff to pay the sum of Kshs.260/=. She also said that in or about April 1994, the plaintiff warned her through emissaries not to enter her own shamba. Further, the plaintiff said that in June 1994, the plaintiff dug up her cassava as a result of which the Assistant Chief ordered the plaintiff to pay the defendant the sum of Kshs.1,500/= in or about August 1994. The defendant stated further that instead of paying the amount ordered by the Assistant Chief, the plaintiff appealed to the area Chief, but that the plaintiff's appeal to the chief was dismissed.
6. DW1 was MUNYWOKI MAKUTHU. He stated that he visited the defendant's cassava shamba to assess how much of the defendant's cassava had been harvested by the plaintiff. He also said that after hearing the defendant's complaint against the plaintiff, the elders ordered the plaintiff to pay to the defendant the sum of Kshs.1,500/=:, though the plaintiff never paid the amount. DW1 stated that the plaintiff's appeal to the area chief was dismissed. The plaintiff did not put any questions to this witness.
7. In his judgment, the learned trial magistrate considered the evidence before him and concluded that the defendant's allegations against the plaintiff were baseless and accordingly entered judgment for the plaintiff as against the defendant as prayed in the plaint. The learned trial magistrate also found that by calling the plaintiff a thief, the defendant had slandered the plaintiff and that the tort was actionable per se without proof of specific damages and also found that the slander had been published to the elders, the Assistant Chief and the Chief.
8. The defendant (and now appellant) was dissatisfied with the whole of the said judgment and accordingly appealed to this court. The Memorandum of Appeal duly filed in court on 13/06/1995, sets out three grounds of appeal:-
 - a. The Learned District Magistrate I erred and misdirected himself when he failed to find that the tort of defamation in form of slander was not established by the Respondent.
 - b. The Learned District Magistrate I erred and misdirected himself when he failed to find that the Respondent's case had no basis its appeal having been dismissed by the Locational Chief and he the Respondent being ordered to pay Kshs.1,500/= to the appellant on 1:8:1994 (See the evidence of the Respondent in Chief.) (sic)
 - c. The Learned District Magistrate I erred in law when he found that there was publication, when there was no publication in law, and he further erred when he failed to appreciate that if there was any publication, then the same was to persons who had a duty to hear the same as arbitrators and such publication would be privileged and could not found a cause of action.
9. At the hearing of the appeal, Mr F.M Kalili appeared for the appellant. Mr J.M. Muinde for the respondent did not appear though there was evidence that the firm of J.M. Muinde & Co. Advocates had been duly served with the hearing notice on 30/01/2007 at 10.30 a.m. The appeal thus proceeded ex-parte. Mr Kalili argued that the purported slander was not proved as the alleged slanderous words were not given and further that parties who may have heard the alleged slanderous words were in fact never called to testify.
10. Mr Kalili also argued that even if there was slander as alleged, the same was published on a privileged occasion, namely during a quasi-judicial hearing of a genuine complaint by the defendant against the plaintiff.
11. It is now my duty as the appellate court of the first instance to reconsider the evidence on record and to evaluate it afresh with a view to reaching my own conclusions in the matter (See PETERS VS SUNDAY POST (1958) EA 424. I have already set out the testimonies of both the plaintiff's case and that of the defence case in the lower court. There is agreement that the defendant in the lower court made a complaint to the local administration to the effect that the plaintiff had uprooted and stolen her cassava. The local administration and in particular the area Assistant Chief visited the defendant's shamba and

confirmed that some of the defendant's cassava had been uprooted. It is also not disputed that the defendant's complaint was heard first by the area Assistant Chief and some elders who condemned the plaintiff to pay the defendant the sum of Kshs.1,500/= as damages for the stolen cassava. It is also not in dispute that the plaintiff preferred an appeal to the area chief. Whether or not the area chief allowed the appeal is a matter of dispute between the parties, but since it is not the issue for determination by the court, I will not spend much time on it.

12. The real issue for determination is whether by the events that formed the defendant's complaint against the plaintiff, the tort of slander was committed and therefore proved by the plaintiff in the lower court. Counsel for the appellant was not helpful on this issue because he did not cite any authorities to support his arguments. The case of JOSEPH KUDWOLI VS EUREKA EDUCATIONAL AND TEACHING CONSULTANTS & 2 OTHERS – CIVIL CASE NO. 126 OF 1990 (Msa) offers some help in this regard. The first issue to deal with in this appeal is what amounts to defamation before narrowing down to the definition of slander. In any suit founded on defamation, be it libel or slander, the plaintiff must prove the following:-

- a. that the matter of which he complains was published by the defendant;
- b. that it was published of and concerning him;
- c. that it is defamatory in character;
- d. that it was published maliciously and;
- e. in slander, subject to certain exceptions, that he has thereby suffered special damage.

13. The plaintiff's suit in the lower court was based on slander where he would be required to prove that he had suffered special damage and also that the words spoken of him were not only defamatory but that they referred to him and were maliciously published by the defendant. Unlike in libel, slander is actionable only on proof of special damage by the plaintiff. To borrow a leaf from the KUDWOLI Case (above), the learned judge (KULOBA J as he then was) referred to the English Court of Appeal Case of YOUSOUPOFF VS METRO-GOLDWYN – MAYER PICTURES LTD (1934) 50 TLR 581 at page 584 for a definition of the term defamation and said at page 9 of his judgment that:-

“Any imputation which may tend to lower the plaintiff in the estimation of right-thinking members of society generally” (per Lord Atkin in Sim v Stretch (1936) 52 TLR 669, at P.671) to cut him off from society (per Wilmot CJ in Viliers v Mousley (1769) 2 Wils 403 at pp 403, 404) or “to expose him to hatred contempt or ridicule” (per Parke, B in Parmiter v Coupland (1840) 6 M & W 105, at p.108) is defamatory of him.” Gatley on Libel and Slander, 8th Edition by Philip Lewis, paragraph 4, at p 5.”

14. So, for a matter to be defamatory of a man, it must tend to lower him in the estimation of right-thinking members of society generally and expose him to hatred, contempt or ridicule. A mere assertion of some apparently defamatory words about a person which does not give rise to the above cannot be said to be defamatory of that person. The publication must also be found to be without justification and must be false (see Salmond and Houston on the Law of Torts 19th Edition by RFV Heuston and R Buckley, at p. 153). In brief, the defamatory words must be calculated to injure the reputation of another.

15. The Oxford Advanced Learner's Dictionary defines the word “defame” as to “attack the good reputation of somebody; say bad things about (somebody) and “defamation” as the act of “defaming or being defamed”. The Collins Thesaurus A-Z Discovery defines “defamation” (noun) as “slander, smear, libel, scandal, slur, vilification, opprobrium, denigration, calumny, character assassination, disparagement, obloquy, aspersion, traducement” and defines “defame” (verb) among others, as to “discredit, knock (informal), rubbish (informal), disgrace, blacken, slag (slang) detract, malign denigrate, disparage, vilify, dishonour, stigmatize, bad-mouth (slang), besmirch, traduce, cast aspersions on, speak evil of, cast a slur on, calumniate, vituperate, asperse.”

16. So, whichever way one looks at defamation, whether it be slander or libel, it is a serious matter, a matter so serious that it must be proved with precision if the plaintiff hopes to have judgment in his favour. The defamatory statement must be proved to be intended to make other ordinary decent people in the society shun the person defamed. In essence therefore, and again to quote KULOBA J (as he then was) in the KUDWOLI Case (above):-

“When a man is falsely accused of conduct which tends to lower him in the estimation of a substantial number of person, there can be no doubt that the door has been opened to business or social injury, or both; it will not wait for right-thinking members of society generally.”

17. What then, in light of the above definitions is the position of the respondent (plaintiff in lower court) in this matter? Did he meet the five conditions that there was publication by the defendant; that the publication concerned him; that the publication was defamatory in nature; that it was maliciously published and finally that he suffered special damage as a result?

18. I have carefully considered the statement of claim. I have also carefully considered the evidence that was given both for and against the plaintiff’s claim. I have also considered the law as set out above. In light of the above, I am unable to find that the plaintiff in the lower court proved his case against the defendant on a balance of probabilities. First and foremost, I find that the defendant had a genuine concern when she found that her cassava had been uprooted. I also find that the report to the area Assistant Chief was not made with any kind of malice. At least, the plaintiff did not adduce any evidence to show that the defendant was motivated by malice when she made the report to the area Assistant Chief. What transpired between the plaintiff and the defendant was the normal way of resolving local disputes within the community. I therefore, do not find that there was anything defamatory in what the defendant did. In any event, the plaintiff did not lay any evidence before the court to prove that right-thinking members of the community had shunned him as a result of the report having been made by the defendant to the local authorities. It was only the plaintiff himself alone who said the following:-

“She (defendant) damaged my good name in the right-thinking members of the society.”

Neither PW1 nor PW2 said that the plaintiff’s stature had been lowered in any way in their sight.

19. I also find that the plaintiff failed to prove what special damage he had suffered. By the time of filing plaintiff, the plaintiff had already quantified his claim at Kshs.5,000/=. The question to ask is what basis did the plaintiff have for quantifying his claim at Kshs.5,000/=. He did not adduce any evidence to that effect. The law regarding special damage is clear. The damage must be specifically pleaded and also specifically proved. If anything, perhaps the plaintiff would have claimed the sum of Kshs.1,500/=:, that is if he had paid out the said amount to the defendant as ordered by the local area chief. He did not pay that amount. He therefore could not claim it.

20. In the result, I am satisfied that this appeal has merit. The appeal is allowed. The judgment of the learned District Magistrate I, dated 18/05/1995 is hereby set aside. Costs of this appeal and for the suit in the lower court shall be paid to the appellant.

21. It is so ordered.

Dated and delivered at Machakos this 8th day of February, 2008.

R.N. SITATI

JUDGE