



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 96 of 1998

TITUS MBITHUKA APPELLANT

VERSUS

MULOVI MWANGANGI RESPONDENT

JUDGMENT

1. By his Amended Complaint in **Kitui SRMCC No. 207/96**, Mulovi Mwangangi averred that on 9/10/1996, at Mutha market, Titus Mbithuka uttered the following words:-

“We Mulovi, you are a thief because you stole my goat and I have now gone to get the police to arrest you.”

2. He averred further that the words were uttered on a busy market day and there were many people who were selling livestock and these people included Ndungi Muasya and Kyusya Mwangangi who were all known to the said Mulovi Mwangangi. He averred that in their ordinary meaning those words were understood to mean that:-

- i. “That the plaintiff has committed an offence prescribed in the penal code of Kenya attracting penal consequences.**
- ii. That the plaintiff is not a fit person to live in the society.**
- iii. That the plaintiff steals people’s goats.**
- iv. That the plaintiff is a thief.”**

3. That the said Mulovi was subjected to ridicule, odium, embarrassment and public scandal and the public shunned him and his esteem was lowered in the eyes of right thinking members of society. Further, that since he was engaged in the business of selling goat meat at his butchery in Mutha Market as

well as Mutomo Market, the said business suffered adversely and he demanded damages and costs of the suit.

4. In the Amended Defence dated 9/9/1997, the present Appellant, Titus Mbithuka denied uttering the allegedly offensive words and denied being at Mutha market on the dates alleged. Having so said, he admitted that he made a report to the police about theft of his goat and having so done, it was upto the police to independently investigate the matter. That indeed investigations thereto had commenced and were still pending and therefore the claims by the present Respondent were wholly unfounded and that the claim was premature.

5. The evidence tendered in support of the two varying claims was that:

PW1, Mulovi Mwangangi repeated his assertions in the Amended Plaintiff and denied stealing any goat from the present Appellant who was the Assistant Chief for Kalia Katune sub-location in Muthaa Location and therefore his word was taken seriously in the area.

PW1 added that he was arrested on the material day but was released at 3 p.m on the same day because the Appellant's goat had been recovered at the home of one John Mbuti where it had been taken when it strayed into another flock including the Respondent's amongst other traders in the market.

PW2, Ndungi Muasya confirmed that he was present at Mutha market when the Appellant called the Respondent a thief at the stock yard in the presence of many other people.

PW3, Kyusya Mwangangi, an uncle of the Appellant and like PW2, was present when the Appellant called the Respondent a thief in the presence of many other people. That the Respondent was then arrested by two police officers but the goat was later recovered from the home of one Mbuti.

6. For his part, the Appellant said that on 25/9/1996 at Mutha Market, he bought a goat as a present for an agricultural function from one Kaindi Mulu. He and one Makau tethered the goat to a tree and left but when he returned a while later, the goat was not there. He informed Makau and then got another goat from one John Mbiti. On 27/9/1996 he reported the loss of the goat to the police and on 6/10/1996 the police called him to identify a goat they had recovered and he recognized it as the one that had disappeared. He did not take it and that on 9/10/1996, he left his home at 6.00 a.m. and proceeded to Machakos together with Daniel Kiusya and later with Daniel Munyasya. He denied that he uttered the offending words and denied telling the police that the Respondent was a goat thief.

7. DW2, Holenti Makau was the one who accompanied the Appellant to Mutha Market on 25/9/1996 and was also present when the loss of the goat was made to the police subsequently. He knew nothing of the events of 9/10/1996.

8. DW3, Daniel Munyasya said that on 9/10/1996, he travelled to Machakos with the Appellant and that they arrived there at 7.00 p.m. He did not know the Respondent but confirmed that Wednesdays as was 9/10/1996 were market days at Mutha Market and that **“on 9/10/1996 the defendant passed through Mutha Market”** and boarded the vehicle to Machakos at that market.

9. In his judgment, the learned Resident Magistrate, K Ogolla Esq found that the case was proved on a balance and awarded the plaintiff Kshs.20,000/= as general damages plus costs.

10. The grounds of Appeal are as follows:-

a. The learned Resident Magistrate erred in law and fact in finding that the Respondent had proved this case on a balance of probabilities against the appellant when there was no adequate evidence to support the claim of defamation.

b. The learned Resident Magistrate erred in law and fact in awarding the Respondent a sum of Kshs.20,000/= as general damages for defamation when the same was excessive under the circumstances.

c. The learned Resident Magistrate erred in law when he failed to consider the evidence of the appellant and his witness and especially the testimony of the witness who was with the appellant on 9/10/96 on his way to Machakos.

d. The learned Resident Magistrate erred in law when he failed to consider that the appellant had made a genuine claim to the police about the loss of his goat and did not even mention the Respondent as a suspect.

11. I have taken into account the submissions made and I should start by referring to the general definition of the transient form defamation as opposed to publication in libel. Whatever the form however, one is reminded one of the words of Iago in Othello by Shakespeare when he said:

“Good name in man and woman, dear Lord, Is the immediate jewel of their souls,

who steals my purse steals my trash; tis something, nothing;

Tw’as mine, tis his, and has been slave to thousands;

But he that filches from me my good name, Robs me of that which enriches him

And makes me poor indeed.”

That which robs a person of a good name are words which;

i. by imputation would lower the plaintiff in the estimation of right thinking members of society generally;

ii. the imputation would cause others to shun or avoid him;

iii. the words would expose the plaintiff to hatred, contempt or ridicule (see generally **Gatley on Libel and Slander, London, Sweet and Maxwell**).

12. In this case, I have carefully considered the record and although the Appellant denies being at Mutha Market on 9/10/1996 and uttering the offending words, in fact there cannot be doubt that he was there. I say so because neither DW2 nor DW3 were helpful in their attempt at corroborating the Appellant’s evidence. Comparably, the Respondent’s witnesses were consistent and clear and their evidence was unshakeable. Further, when the Respondent was arrested at Mutha market on the material date, it could only be because the Appellant actualized his threat to report the Appellant to the police. PW2 was his uncle and I cannot see why a respected Assistant Chief would have his uncle framing him for words he never uttered. In fact his position as such Assistant Chief certainly influenced the speedy arrest of the Respondent and I have no doubt that the words reproduced above were indeed uttered in the presence of many people including PW2 and PW3 on 9/10/1996 at Mutha Market.

13. Were the words defamatory? Like the trial magistrate, when an Assistant Chief, the prime law enforcer and the face of government on a busy market day calls a butcher, a thief and of a goat at that, the utterances would lower the Respondent’s reputation in the eyes of all the goat sellers present and PW2 confirmed as much as did PW3. The Respondent in fact said that the imputation would be that he sells stolen goat meat at his butchery and I agree with him. He was certainly exposed to ridicule and contempt and the defamation was properly proved on a balance of probabilities.

14. As to quantum of damages awarded to him, the law as I understand it was properly set out in **Butt vs Khan (1981) KLR 349** when the court stated as follows:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a

figure which was either inordinately high or low”

15. In this case, I have been shown nothing to warrant the invocation of the power to disturb the award of Kshs.20,000/= and I uphold it.

16. Since I see no merit in the Appeal, I hereby dismiss it with costs to the Respondent.

17. Orders accordingly.

Dated and delivered at Machakos this **15th** day of **October** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Kimeu h/b for Mr Kalili for Respondent**

Mrs Nduva h/b for Mrs Wambua for Appellant

ISAAC LENAOLA

JUDGE