REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MERU

CIVIL DIVISION

CIVIL APPEAL 28 OF 2003

DR. ALI WARIO ……...…… APPELLANT

AND

DR. JOHN NG'ONDU ……..……. RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Mr. Njeru Ithiga in Meru CMCC No. 567 of 1994 delivered on 25th March 2003)

JUDGMENT OF THE COURT

The appellant herein, Dr. Ali Wario was the defendant in Meru CMCC No. 567 of 1994. By his plaint dated 5.8.94 and filed in court on 10.8.94 the plaintiff/respondent sued the defendant claiming general damages and an apology to the plaintiff for alleged slander. It was averred by the plaintiff at paragraph 3 of the ;plaint that on 18.7.94 at about 2.30 pm, within the premises of Nyambene Chemist, the defendant (appellant) who worked as a pharmacist at the said chemist without reasonable cause or justification uttered defamatory statements concerning the character of the plaintiff, a director of Nyambene Chemist. That the defendant uttered the following words:-

"Kuna pesa ambazo zimeibiwa kutoka hapa, Wameru ni wezi, lazima iwe ni wewe Daktari ambaye umeiba pesa hizo." It was averred further that those words which were directed at the plaintiff, in their natural and ordinary meaning meant and were taken to mean that the plaintiff is a criminal in stealing activities, and that as a result of the said words, the plaintiff had been exposed to ridicule, contempt and/or odium.

The defendant filed his defence on 18.8.94 and denied ever uttering the alleged words concerning the plaintiff's position of a director or in his profession. At paragraph 5 of the defence, the defendant pleaded as follows:-

"5. The defendant avers that on the day in question some money was found missing from the chemist shop and after the plaintiff was asked about the same in the usual conduct of the business, he went out and came back with the money which the plaintiff returned, but which the plaintiff took later on."

The defendant denied any wrong doing.

The plaintiff's case was that apart from running a clinic, he was also a director in the business known as Nyambene chemist's shop. That he knew the defendant who worked at Nyambene Chemist as a pharmacist. The plaintiff was a co-director of Nyambene chemist with one Hon. Abdallahi Wako. The defendant also doubled up as the accounts person for Nyambene chemist. Other employees at the chemist

were said to be Ali, Naomi, Jackie, Karambu and two other ladies making a total of six employees.

The plaintiff testified that on 18.7.94 at about 2.30pm, both himself and the defendant were at the chemist in the section where dangerous drugs were kept. The employees were at the counter while others namely Samuel Marangu and Gerald Murerwa were in the same place with plaintiff and defendant. At the time there were about 5 customers at the counter. When the defendant checked the drawer where he normally kept the money, he found Kshs. 1,000/= out of the Kshs. 10,000/= missing and that is when the defendant insisted that it was the plaintiff who had taken the money. That is when the defendant is said to have uttered the words that the plaintiff complained of in his plaint. That the words were heard by Samuel Marangu and Gerald Murerwa.

When the plaintiff was cross-examined, he testified further that it is true he went and brought to the defendant some Kshs. 1,000/= but that that money had nothing to do with Karambu's money which had got lost earlier. The plaintiff also testified that when he wrote a demand letter to the defendant (P exhibit 1) he did not specifically mention the Kshs. 1000/= but only spoke of a certain amount of money.

The plaintiff called Solomon Bundi Rintari who testified as PW2. He stated that on 18.7.1994 at about 8.30pm, (he must have meant 2.30pm) he was at Nyambene Chemist where he had gone to purchase some drugs for the plaintiff's clinic where he worked as personal assistant to the plaintiff. That while he was there, he heard the defendant shout that the plaintiff had stolen Kshs. 1000/= from the drawer in the following words:- "You have stolen Kshs. 1000/= from the drawer. You Merus are thieves.", and that at that time there were other people in the chemist. He also testified that he had never known or even heard that the plaintiff was a thief.

In cross-examination PW2 testified that the defamatory words by the defendant against the plaintiff were uttered in the Kiswahili language.

The defendant admitted in his defence that the plaintiff was one of the codirectors of Nyambene chemist. He testified that on 18.7.94 he was with the plaintiff in one of the smaller inner rooms at the chemist where he worked both as pharmacist, accountant and administrator. The plaintiff then went into that room and gave to the defendant the sum of Kshs. 1000/= which the defendant had found missing when he checked the drawer where he had kept some Kshs. 15,000/=. Later the plaintiff demanded back the Kshs. 1000/=. That it was only DW2, Jarso Erema, who heard the exchange of words spoken between the defendant and the plaintiff. That no member of the public or other employee of Nyambene chemist heard the words as alleged by the plaintiff.

DW2, Jarso Erema stated that he worked at Nyambene chemist as a cleaner. That the defendant at some point asked him about some money which was missing. He then saw the plaintiff give some money to the defendant. He never heard the conversation between the plaintiff and defendant.

In his judgment, the learned trial magistrate reached the conclusion that the offending words that depicted the plaintiff as a thief were indeed uttered by the defendant and that the said words were heard by the employees of Nyambene chemist and that this lowered the plaintiff's estimation and reputation. That the plaintiff was portrayed as a dishonest and criminal doctor and that he was thus entitled to the reliefs sought. The learned trial magistrate awarded the plaintiff a sum of Kshs. 200,000/= as compensation.

He also found that the plaintiff was entitled to an unqualified apology by the defendant plus costs of the suit.

The appellant appealed and set out 13 grounds of appeal, the gist of which is that the whole of the learned trial magistrate's judgment was without any legal basis and was not supported by any evidence. The appellant also complained that the learned trial magistrate failed to consider and evaluate the various legal issues involved in the case thereby occasioning injustice to the appellant.

It was submitted on behalf of the plaintiff that the offensive words were uttered by the appellant and that the said words were heard by among others PW2. On the other hand, it was submitted on behalf of the

defendant that no such offensive words were uttered as claimed and that all that the defendant did was to ask the plaintiff if he had seen the money. That on being so asked, the plaintiff went out and came back with the Kshs. 1000/= and gave it to the defendant although later on, the plaintiff took the money back lest it should be construed to mean that he was admitting that he had stolen the money.

It was also contended on behalf of the defendant that even if the alleged words were uttered, which was denied, then the defendant was justified in uttering them since he was in charge of the accounts of the business.

The issues that are for determination in this appeal are:-

(a) Were the words complained of uttered by the defendant about the plaintiff in the circumstances as alleged?

(b) Were the said words spoken of the plaintiff in his personal capacity or in his capacity as a doctor and as a director of Nyambene Chemists?

(c) Were the alleged offensive words heard by employees of Nyambene Chemists?

(d) If the words were uttered, was the defendant justified in uttering the same, and

(e) Was the plaintiff exposed to ridicule, contempt and odium as a result of the said words? I have carefully considered the evidence and the law. I have also considered the written submissions so ably made by counsel for both parties during the trial. I have also considered the learned counsel's submissions during the hearing of this appeal. I have considered all the authorities cited to the court by both counsels, both during the trial in the lower court and on appeal.

I commend counsel for their diligence and research and I am greatly indebted to all the three counsels for this input.

After carefully considering the pleadings, submissions, the evidence and the authorities cited to me, I have reached the conclusion that the finding reached by the learned trial magistrate to the effect that the words complained of were indeed uttered by the defendant and that they were heard by the employees of Nyambene Chemist and that this lowered the plaintiff's estimation and reputation had no legal basis and was not supported by the evidence on record.

Some definitions and general principles on the law of defamation will shed some light on the issue. In the case of Nicholas Kipyator Kiprono Biwot v. Hon. Paul Kibnugi Muite & Another – HCCC No. 1369 of 2003, which was one of the authorities cited to me by counsel for the appellant, the court (J.G. Nyamu J) delved into the law of defamation at great length and I find that authority to be lightly persuasive on the issue before me. Quoting from JP Aggrwal's pleadings in India – Principles and Precedents with over 1000 model forms, 2nd Edition 1993 Vol. 1 at page 102, defamation is defined:-

"as a publication which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule and even without executing such strong feeling as hatred, contempt or ridicule, a statement may amount to defamation if it tends to lower a person in the estimation of right thinking people generally or tends to make them shun or avoid him."

In the same Biwot case (above) the learned judge also referred to the recommendations of the Faulks Committee in England of what defamation means:- "The defamation shall consist of all the publication to a third party of a matter which in all circumstances would be likely to affect a person adversely in the estimation of reasonable people generally (C and 5909 Para 65). To make a statement defamatory there should be publication to a third party and such publication should be of such a nature as likely to cause appreciable injury to a person's reputation." (Underlining is mine for emphasis).

In the present case, the plaintiff alleged that the defendant uttered words against him to the effect that the

plaintiff was a criminal engaged in stealing activities. That the words spoken in the Kiswahili language were:-

“Kuna pesa ambazo zimeibiwa kutoka hapa, Wameru ni wezi, lazima iwe ni wewe daktari ambaye umeiba pesa hizo.”

In his evidence in chief, the plaintiff stated that the words that were spoken by the defendant were the following:-

“Ni wewe umeiba hii pesa …….. Nyinyi Wamweru ni wezi. Na wewe ni mwizi.”

And that the two gentlemen who were there with the warring parties, namely Samuel Marangu and Gerald Murerwa heard those words. He also added that “none of the customers or even the other employees heard those words.”

First of all, it is not clear from the pleadings and the evidence which words were uttered by the defendant. In the plaint, it is shown that the defendant specifically used the words “….. lazima iwe ni wewe daktari ambaye umeiba pesa hizo” yet in his own testimony, there is no reference to the word “daktari” as being among the words that were said to have been uttered by the defendant. This contradiction in what is alleged to have been uttered by the defendant goes to the root of the facts upon which the plaintiff’s claim was based. It is my considered view that the alleged defamatory words were never uttered by the defendant or alternatively if any words were uttered, they were not defamatory words, for if they were, if the defendant had specifically stated

“…….lazima iwe ni wewe daktari ambaye umeiba hii pesa ……”, there is no way the plaintiff would not have remembered those very words when he was giving his evidence in chief. As was stated by Lord Coleridge, CJ in the case of Harris V. Warren (1879(4 CPD 125 at page 128,

“In libel and slander, the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged which is the fact on which the case depends.”

It is my finding in this case that if the learned trial magistrate had carefully considered the pleadings and the evidence before him, he would have reached the conclusion that the plaintiff did not prove the facts on which his case rested. On this ground therefore I would allow the appeal.

Secondly, it was concluded by the learned trial magistrate and alleged by the plaintiff that the alleged defamatory words were heard by the employees of Nyambene Chemist.

This is what the learned trial magistrate said in part of his judgment:-

“I find as a fact that the offending words that depicted the plaintiff as a thief were indeed uttered by the defendant and that they were heard by the employees of Nyambene Chemist and this lowered the plaintiff’s estimation and reputation.”

Let us look at the evidence again. The plaintiff stated that he and the defendant were in the inner room of the chemist where dangerous drugs were stored. That the only other people with the parties who are said to have heard the words were Samuel Marangu and Gerald Murerwa. According to the plaintiff also, anybody who may have been at the counter at the material time could not have heard the words. Neither Samuel Marangu nor Gerald Murerwa who were said to have heard the words were called as witnesses to corroborate the evidence of the plaintiff that these two people heard the defamatory words that were allegedly uttered by the defendant against the plaintiff and which words were meant to disparage the plaintiff. Why were these two key witnesses to the plaintiff’s case not called? I have come to the conclusion that either none of them was present at Nyambene Chemist at the material time or if they were, they did not hear the alleged words or finally that no such words were uttered. I have also concluded that if the two had been called, then their evidence would not have supported the plaintiff’s

case. The only witness called by the plaintiff was PW2, Solomon Bundi Rintari who said he worked at the plaintiff's clinic as personal assistant to the plaintiff. He said that at the material time he was at Nyambene chemist where he had gone to buy drugs for the clinic.

He said he was at the counter and that he heard the defendant abuse the plaintiff in the following words:-

"You have stolen Kshs. 1000/= from the drawer. You Merus are thieves."

and that the utterances were in the Kiswahili language. If indeed PW2 was at the counter as stated, then, according to the evidence of the plaintiff, PW2 could not have heard the utterances by the defendant against the plaintiff. In any event, even if PW2 heard those words, he cannot be said to have been an employee of Nyambene chemist because he was in that chemist at that time as a customer. The conclusion I have reached on this issue is that even if the defendant uttered the alleged words, no one else apart from the plaintiff and the defendant heard those words. In effect therefore, there was no publication of the alleged defamatory words to a third party. Without publication to a third party, the plaintiff cannot be said to have been exposed to ridicule, contempt and/or odium in his person and profession. The only person who testified and who said he was a utility employee at Nyambene Chemist was DW2, Jarso Erema. According to him, he only remembers the defendant asking the plaintiff about the money. He also saw the plaintiff give the defendant some money, but said that he did not hear the conversation between the two. The fact of the plaintiff giving out money (and Kshs. 1000/= to be exact) is not denied. It would seem to me that that is virtually all that went on between the plaintiff and the defendant – the plaintiff being asked if he had seen the Kshs. 1000/= and the plaintiff going out and coming back with that money which he handed to the defendant.

Another interesting fact comes out from further scrutiny of the plaintiff's evidence.

During cross-examination, the plaintiff revealed that after all, Samuel Marangu and Gerald Murerwa were infact not employees of Nyambene Chemist, so that even if they had heard the words, they could not have been said to have heard those words in their capacity as employees of Nyambene Chemist. Those two, just like PW2 were the plaintiff's own employees. It is unfortunate for the plaintiff, but I do believe that PW2 must have only been told what to say by the plaintiff, and that PW2 was not at the chemist shop at the material time. I also find that both Marangu and Murerwa were either not at the chemist at all, or if they were there, they never heard the alleged defamatory words.

The defendant's learned counsel have also contended that the appeal should succeed since the alleged defamatory words which were said to have been uttered in the Kiswahili language were never translated into the English language as required by law. In the case of Nkalubo V. Kibirige (1975) EA 103, it was held, inter alia, that where the alleged libel is in any language other than English, it must be set out in the language followed by a literal translation into English. This was the same principle that was applied in the earlier case of De Souza V. Zenith Printing Works, Kenya CC 149 of 1959 – unreported.

In this particular case paragraph 3 of the plaint is the one that sets out the alleged defamatory words. This is what the plaintiff averred:-

"3. That on 18.7.94, at around 2.30pm, within the premises of Nyambene Chemist the defendant a pharmacist at the said chemist without reasonable cause or justification uttered defamatory statements concerning the character of the plaintiff, a director of Nyambene Chemist in the following words:-

"Kuna pesa ambazo zimeibiwa kutoka hapa, Wameru ni wezi, lazima iwe ni wewe Daktari ambaye umeiba pesa hizo."

It is not in dispute that those words are not followed by a literal translation into the English language. The plaintiff attempted at paragraph 4 of the plaint to give the meaning of those words but not to give their literal translation into the English language.

The plaintiff admitted during cross-examination that no such translation was given. If the learned trial

magistrate had viewed paragraph 5 of the plaint in light of order 6 Rule 3 (1) of the Civil Procedure Rules he would have found that paragraph 5 of the plaint which did not contain a literal translation of the alleged defamatory words into the English language, could not stand, for a pleading must stand or fall on its own and the court is not allowed to venture out of the pleading in question, whether it be a plaint or defence. The learned trial magistrate's findings presupposed that the plaintiff's claim as per paragraph 5 of the plaintiff could stand. For this reason, I do find that the learned trial magistrate erred in both law and fact in reaching the conclusion that he did. He who alleges must prove. The plaintiff in this case did not prove the allegations he made against the defendant.

The other issue remaining for determination is whether the plaintiff sued on the basis that the defamatory words were uttered against him as a professional or whether the words were uttered against him as a member of the Ameru Community. In the case of Knupper V. London Express Ltd (1942) A.C. 116, it was held that words making allegations of a defamatory character about a body of persons cannot be actionable by an individual member where he was not named. In this case, and according to the plaintiff's evidence, the defendant made disparaging remarks touching on the Ameru people in general, calling them thieves. Infact both the plaintiff and PW2 confirm in their testimonies that the plaintiff was not named by name, nor was he even named by his profession. It cannot therefore be said that the plaintiff could have brought this action on the basis of the mere wild allegation by the defendant against the Ameru as a people. In the earlier case of O'brien v. Eason & Son 47 Ir. LT 266, the court ruled that comments of an alleged defamatory character made on an ancient association called the Ancient.

Order of Hibermains did not entitle an individual member of the order who was not named nor in any way referred to maintain an action in libel. The facts in the present case are very much similar to those in the O'brien case (above). In part of his evidence in chief the plaintiff said the following:- "These other persons did not say anything to the allegations at the time. Later, however, they told me that defendant could have abused me individually but not the entire Meru Community."

So that the plaintiff's grievance was that he had been abused as a member of the Meru Community. Having already found that the plaintiff was not named as such, the alleged defamatory words were not actionable by the plaintiff against the defendant.

Having found as I have that the plaintiff did not prove his claim against the defendant, I do not find it necessary to address in any detail ground number 4 of the Memorandum of Appeal. I however agree with the learned trial magistrate that the defence of justification, though canvassed during the submissions was not pleaded. There is no single paragraph in the defendant's defence alluding to the defence of justification. It was during re-examination that the defendant stated that he was justified in inquiring about the missing money as it was part of his work to do so.

In the result and for the reasons that I have given, I would allow this appeal and I hereby do so. The judgment of the learned trial magistrate on liability and all consequential orders made thereon are set aside. The award of Kshs. 200,000/= to the plaintiff as general damages is set aside. The appellant shall have the costs of this appeal.

He shall also have costs of the suit in the lower court. It is so ordered.

Dated and delivered at Meru this 27th day of July 2005.

RUTH N. SITATI

JUDGE

27.7.2005