

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO.195 OF 2002

KISILU MAUNDU..... APPELLANT
VERSUS
DELTA PETROLEUM LTD.....RESPONDENT

Coram : Before Hon. Justice Mwera

Ananda for the Appellant

In person or the Respondent – no appearance.

Court clerk – Sango

J U D G E M E N T

When this appeal came up for hearing Mr. Ananda showed the court an affidavit of service sworn on 20.5.04 to the effect that respondent's general manager, one Kennedy Kawala, had been served with due hearing notice but he did not show up. This Kawala may be taken to be a principal officer of the corporation. So hearing exparte proceeds.

The plaint filed in the lower court on 26.7.2000 averred that the appellant/plaintiff who was once a shop manager of the respondent/defendant, saw in the Daily Nation of 2.10.99 a public notice carrying his photograph inserted by the respondent saying that he was no longer working for the respondent w.e.f. 10.9.99 and any transaction done by him would not be honoured by the respondent. The appellant pleaded that this notice was defamatory of him because in its ordinary meaning the appellant was a dishonest person who could not be trusted and he had left the respondent's employment under criminal and scandalous circumstances. That his public notice was not true because the appellant had continued to work for the respondent e.g. signing its cheques on 24.9.99, long after the 2.9.99. That as a result of that notice the appellant lost credit worthiness and his children were thrown out of schools which once accepted his cheques. That prospective employers spurned him and shop-keepers, hospitals etc shunned him. That members of the public and patrons of social places casually avoided him. So he claimed for damages costs and interest.

The respondent's defence denied defaming the appellant but insisted that from the nature of its operations, the appellant was not performing up to the standard and when his services were terminated it was normal to place the advertisement referred to which was not intended to prejudice the appellant. That the notice did not mean that the appellant was profligate or in any way untrustworthy. It was simply to warn prospective clients/customers of the respondent not to continue transacting with the appellant. All the rest of the claim was denied. And that the appellant had in fact continued to hold himself out as the respondent's employee even after 10-9-99

The trial opened on 15.10.2001 before the learned trial magistrate J.S. Mushelle Esq., Senior Principal Magistrate with Mr. Ananda for the appellant and Mr. Khatib for the respondent. Only the appellant testified on his side.

The defence witness was the said Mr. Kawala and the trial closed. Each witness gave evidence more or less on the lines of the respective pleadings. Both sides finally submitted. The learned trial magistrate did not find the claim proved and he dismissed it with costs on 5.4.2002.

On 5.12.2002 this appeal was brought with eight (8) grounds. Mr. Ananda abandoned grounds 1 and 2

and combined grounds 3, 4 and 5 and 6, 7 and 8. That the learned trial magistrate did not give reasons for his decision and disregarded the appellant's evidence. That the lower court should have found the public notice complained of as defamatory and so found for the appellant. That the appellant's exhibits and circumstances showed that he had suffered loss and damage while his evidence was not controverted at all. That the learned trial magistrate also failed to appreciate and apply the authorities and the law applicable in defamation cases That all in all the lower court decision should be set aside and a judgement delivered for the appellant in the sum of Sh.500,000/- plus other reliefs.

The learned trial magistrate heard and recorded the evidence. He said so in his judgment adding that he had interpreted the import and meaning of the public notice in question. That he had concluded the words merely meant that the appellant was no longer in the employment of the respondent. He added that since the appellant had held a senior post with the respondent its customers were entitled to know that he was no longer so employed. His view was that the words were not defamatory and no malice was intended. It was a necessary caution on the part of the respondent, that if the appellant went on to transact anything after 10.9.99, it had nothing to do with the respondent.

The case of **EAST AFRICAN STANDARD VS. GITAU [1970] E.A. 678** was placed before this court for appreciation. The cases cited in the lower court were not repeated here and no exhibits formed part of the record of appeal (see ground 6 of the appeal).

In this court's view this appeal must fail. The East African Standard case (above) was about a party whose motor vehicle was published in the newspaper. It was unidentifiable it had been reported that it was involved in an accident and its driver could not be found; That nobody had reported the accident. The party (Gitau) got damages of Sh.24,000/- because he produced witnesses who saw the photograph and recognized that the motor vehicle belonged to Gitau. On appeal this award was reduced simply because only a few people recognized the car as belonging to Gitau (respondent). The court there held inter alia that the general impression to be created in the minds of right thinking persons must be the test and not too close an analysis of the words complained of. Mr. Ananda laid stress on this case.

The court has noted that only the appellant testified on his part. There was no one from the schools, hospitals, shops and social places who came and told the learned trial magistrate that the appellant had lost credit and social standing. That he was being denied facilities and shunned. So in whose minds and standing was the appellant defamed? Nobody. Anybody who saw the public notice took it simply as a caution. The learned trial magistrate did not refer to authorities cited before him or the exhibits if any in his judgement.

However having considered the appellant's case there and here it had no merit and his appeal is dismissed.

Judgement delivered on 16th June 2004.

J.W. MWERA

JUDGE