



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 150 OF 1999

MULEWA KIMANZI APPELLANT

VERSUS

MARY MUTISYA..... RESPONDENT

J U D G E M E N T

The appellant was the defendant in Kitui's PMCC 18/99 where the respondent was the plaintiff. In the lower court the respondent filed the suit against the appellant for General Damages arising out of an alleged assault and defamation. The trial magistrate dismissed the respondent's claim for assault but entered judgement for the respondent for defamation and made an award of Kshs 30,000/- as general damages. The appellant being dissatisfied with the said judgement filed this appeal.

The appellant raised four grounds of appeal in her petition which are that the court did not consider the glaring contradictions in the evidence that the award of Kshs 30,000/- was excessive, that the costs of the suit should not have been awarded to the appellant since the claim for damages for assault was dismissed and lastly that the magistrate's findings were against the weight of evidence adduced. The appeal was opposed and the court will consider submissions of both counsels in the body of the judgement.

Briefly the facts of the plaintiff's case were that on 29.7.1998 the plaintiff was walking on the road, she greeted D.W.2 one Kilonzi Kimanzi. The defendant who is the mother of D.W.2 saw them from her home which is near the road. She came, accosted the plaintiff, mangled her up, and uttered words to the effect that the plaintiff was a fool, a prostitute and had aids. There were many people present including Ngina Singi P.W.3, Sammy Singi and Kavitha Samuel. She claims in the plaint that this injured her reputation as the words were uttered in the presence of right thinking men and one she suffered loss.

The defendant on the other hand denied ever accosting the plaintiff on the road but said that the plaintiff had been married to her son D.W.2 but they separated. On that day the plaintiff came to her home and started to tease the wife of D.W.2. She did not like it and asked the plaintiff to leave. She denied that such an incident as alleged by the plaintiff ever occurred.

The first issue I will consider is who was present at the scene when the alleged defamatory words were uttered. In the plaint, it is pleaded at para 4 that the said defamatory words were uttered in the presence of Ngina Singi (P.W.3), Sammy Singi and Kavutha Samuel amongst other people. P.W.2 Samuel Wambua was not named having been present at the scene. At first this P.W.2 denied knowing who Sammy Singi was. Pressed in cross examination however he says that he used to be known as Sammy Singi. If he was the one referred to as Sammy Singi I believe he could not have forgotten his name. His denial of the name at first must have been with a reason or he may not be the same one as Sammy Singi. P.W.3 who was allegedly present at the scene said he saw Kilonzi, Sammy, Kavutha and Mutunga at the scene. She however denied knowing Sammy Singi. If P.W.2 was Sammy Singi surely P.W.2 would have told the

court that she saw him there. It is a wonder why the plaintiff would call P.W.2 who was not a witness to the incident to testify.

There was a glaring contradiction in the plaintiffs case as to when and where this incident actually took place, if at all. P.W.1 did not state at what time of day the incident took place. P.W.2 says it was at 12.00 p.m. whereas P.W.3 says it was at 4.00 p.m. The difference in time is quite big. If there was a difference, one would narrow it to 20 minutes to one hour but 3 hours difference in time leaves one's mind wondering whether they are referring to the same incident.

P.w.2 testified that the incident took place at Utunine village. P.W.2 and 3 were adamant that it took place at Yanzu village. P.W.2 specifically denied that the incident was at Utunine village but at Yanzu. The question is whether there were two different incidents. They can not be because the defendant was supposed to have attacked the plaintiff from her home. The question is whether this incident ever occurred either at 12.00 p.m. or 4.00 p.m. was it at Yanzu or Utunine and who were present. These were serious contradictions in the plaintiffs case that the magistrate should have considered and made a finding.

If the words were indeed uttered, was the plaintiff defamed? The plaintiff's evidence is that she was called a fool, a prostitute and suffering from Aids which depicted her as a person of loose morals who engaged in indiscriminate sexual affairs for payment and was suffering from a fatal sexually transmitted disease. In her evidence the plaintiff admitted that she spent one night with Kilonzi who paid her 200/-. She agreed that if paid 200/- she would go with any person. P.W.3 also agreed that a woman who sleeps with a man for money is a prostitute. Even if the money was given for her children upkeep as submitted by counsel for respondent that she was married to P.W.2 which she denied, her evidence speaks for itself. She would go with a man for payment. In my view that would amount to a fair comment by the appellant about respondent. Being a person of such a character she had no reputation to protect.

If at all the plaintiff/respondent was alleged to be suffering from aids we have no evidence that she was not.

I wish to point out that neither the P.W.2 nor P.W.3 ever viewed the plaintiff as a person of loose morals and an aids sufferer. There was no evidence that she was now shunned by P.W.2, 3 or any other right thinking member of the public. There was therefore no evidence that she had suffered any loss or damage to warrant an award of damages. The plaintiff is bound by her pleadings which in my view are not supported by the evidence adduced.

In light of the contradictions in the prosecution evidence and my observations above, it is this court's considered view that the plaintiff did not prove her case on a balance of probability. The inconsistencies in her case may go to support the defence case that the incident may not have occurred as alleged by the plaintiff. She was not entitled to get judgement in her favour. Consequently allow the appeal with costs of the appeal and the lower court to the appellant.

Dated, read and delivered at Machakos this 8th day of October 2004.

Read and delivered in the

Presence of

R. V. WENDOH

JUDGE