



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 145 of 1998

JOSEPH MUIA.....APPELLANT

VERSUS

KASILO MUTUNE

JOHN MUTUA MUTEVU..... RESPONDENT

JUDGEMENT

The appellant Joseph Muia filed civil suit No.73 of 1996 against The respondent who were the defendants in the lower court namely Kasilo Mutune as first defendant and John Mutua Mutevu, the second defendant.

The averments are that on or about 22.11.1995 at Muangi village in Mumela location the defendants herein expressly referring to the plaintiff and knowing the same to be completely untrue of the plaintiff and without any justification and further and before reasonable members of the public known and unknown to the plaintiff uttered of and concerning the plaintiff the following words in Kikamba translated to mean "We have discovered that you Muia you are a wizard and you have ghosts.

After close following we discovered that you are the one who bewitched to death the following people thus Peter Kingelu, Rebecca Twili and Mwau Mino and you brought a witchdoctor called Njoroge who is a Kikuyu". That the said words were highly defamatory of the plaintiffs name who is a church elder and heads several local organizations in the area and as such the plaintiff has been subjected to immense ridicule and is now widely feared by people who otherwise have been respecting him. In consequence thereof he prayed for general damages for defamation, costs of the suit and interest at court rates.

The defendants put in a joint defence denying having uttered the alleged words on or about 22nd November 1995 or any other date or at all and puts the plaintiff into "strict proof thereof, denied the contents of paragraphs 4 of the plaint and states that the alleged words are not defamatory at all and the defendants will pray for the plaintiffs suit to be dismissed for it discloses no reasonable course of action.

The parties were heard by the lower court and a judgement given dated 11.11.98 giving rise to this appeal. The findings of the learned trial Magistrate are that the plaintiff did not call evidence to show that the people feared him, that in cross-examination by Mr. Mutua, the plaintiff told the court that he has been an elder of the Salvation Army and a member of the Board of Governors, Kitheini secondary school. The plaintiff agreed with Mr. Mutua that he did not loose any of those posts even after these word's were uttered. That the plaintiff did not suffer any injuries to his reputation and if he has suffered any then he has not adduced evidence before the court to show this, for the claim of slander to succeed the plaintiff

has to show the loss he has suffered.

2. , That the defendants denied having uttered those words and if the words were uttered on 22.11.95 then D.W.3 and D.W.4 who were allegedly present should have heard them but they did not hear them. That the plaintiff was taken to D.W.5 a sorcerer and it was found out that he was a wizard and the charms were also removed from the plaintiff and he also admitted before D.W.5 that he is a witch. The court saw the photographs, which were taken when the witchcraft was being recovered on the basis of the foregoing the learned trial Magistrate ruled that the claim had not been proved and dismissed the same with costs to the defendants.

The appellant was aggrieved by those findings and he has appealed to this court against that decision citing 3 grounds of appeal namely, that the learned trial Magistrate erred in both law and facts when he failed to appreciate from the evidence that in the first place the first respondent admitted the appellant's claim and having erred as such he erroneously dismissed the said appellant's claim, erred in both law and facts when he failed to appreciate that from the evidence the respondents and in particular the second respondent though having denied the plaintiff's claim went ahead and brought in evidence tending to satisfy his utterances as against the appellant when he had not initially pleaded justification and as such erroneously dismissed the appellants claims, erred in both law and facts when he overruled on the defence evidence without due regard to the evidence of the prosecution. On that basis counsel for the appellant prayed for the said judgement to be quashed and/or set aside.

In his oral submissions the counsel for the appellant reiterated his grounds of appeal and stressed the following points that the first defendant admitted the claim in his evidence and the learned trial Magistrate should not have hesitated to find for the plaintiff in his claim as against the first defendant as the first defendant admitted that he uttered the words complained of, that the learned trial Magistrate did not address his mind to this fact in the whole of his judgement and by going ahead to dismiss the plaintiff's claim as against the first defendant he made an error both in law and fact, that the defendants did not plead justification and so they cannot rely on the evidence that witchcraft was removed from the appellant by D.W.5 who allegedly confirmed that witchcraft had been removed from the appellant, the evidence brought by the second defendant was to justify that the plaintiff/applicant was a wizard but that

cannot hold as they did not plead justification, that the plaintiff called one witness whose evidence was not considered by the learned trial Magistrate as it is shown in the evidence and had he done so he could have found for the plaintiff and ruled that the plaintiff had been defamed, that the learned trial Magistrate having found that the words were uttered but were of little effect then the court should have gone ahead to assess same damages in favour of the plaintiff. On the basis of the foregoing counsel urged the court to allow the appeal.

The respondent's counsel on the other hand has opposed the appeal, that it is wrong to argue that the lower court ignored the plaintiff's case when the judgement shows that the court evaluated evidence of both sides, that the appeal cannot hold as it has not set out the orders to be quashed neither has it asked the court to assess damages neither does it seek costs of the appeal and the court below, that the appellant failed to prove his case on a balance of probability and that is why the claim was dismissed, that the court ruled that there was no publication and no damage suffered and it was right, that the appellant failed to prove any publication and any damage suffered, that the appellant failed to prove to the court to whom the publication was made, how he suffered and who feared him as a result of that publication, the witness called P.W.2 did not say that he heard the second respondent call appellant a witch and that is why the claim was dismissed the appellant allegedly stated that he was Defamed before the assistant chief who was called as D.W.3 and he denied that he did not hear the appellant called a witch by the respondents, D.W.4 who was also named as one of the elders, denied that any defamatory words were ever uttered in his presence, that looking at the evidence as a whole it is clear that no defamation words were uttered and no publication was made to 3rd parties, that the second respondent had no need to plead justification when he had in the first instance denied that he uttered the said words, that the events of 31.10.96 is how the appellant was taken to a sorcerer to determine if he was a witch, this was almost a year later after the alleged utterances and it had nothing to do with the case in issue and 'so the court could not have taken this to be an issue' of justification.

On the basis of the foregoing the counsel for the respondent urged the court to find that the appeal has not been established and it does not lie.

In reply counsel for the appellant stated that the first respondent cannot be said that he did not know what he was admitting as he had been served with the plaint and he knew the claim the plaintiff was putting forward and so it cannot be said that he did not know what he was admitting, that the second respondent was not forced to say that there was witchcraft involved, that the plaintiff's witnesses P.W.2 said he heard the words uttered and he must have heard them and the court should have believed him.

I have re-evaluated the evidence before the lower court in the light of the pleadings of both parties, the findings of the learned trial Magistrate and the submissions of both counsels on appeal as well as the law and this court's finding in respect of the same are as follows:

The cause of action is set out in paragraph 3 of the plaint. The words are alleged to have been uttered to members of the public known and unknown The court's observation on this is that in defamation claims the plaintiff has to specifically plead the identities of the persons to whom he was defamed. The criteria behind this is to prevent a situation whereby a plaintiff is left to go on a shopping spree for possible witness as he wishes. The, plaintiff did not do so and so the pleadings as far as this fact is concerned are defective

In the plaintiff's evidence in Chief P. W. 1 stated that on 22.11.1995 he had elders at his place who had come to assess damage done to His farm by the animals of the second defendant. He does not name who those elders are save that he mentioned an assistant chief who can be identified. It is correctly submitted that the first respondent who was the first defendant was alleged to have uttered words that the plaintiff is a witch because he had bewitched the parents of the second respondent/defendant and he P.W.I was not cross-examined on

this.

He named those who were allegedly present as:

- (i) Assistant chief.
- (ii) Kaunge_sMaundu
- (iii) Mbuko Wambua

For the second respondent:

- (1) Masai Lau
- (ii) Mwololo Mbai

P.W.2 was one of the elders named by P.W.I to have been present when the alleged words were uttered. P.W.I said the elders were to assess the damage done to his crops by the animals of the second respondent while the evidence of P.W.2 is that he had gone to check on a road which passes through the shamba of the plaintiff when he was told by the second respondent that it is the plaintiff who had bewitched the second respondent's parents. P.W.2, further adds-that there were many people. P.W.2's evidence is thus at variance with what P.W.I said as he P.W.I did not mention that there was a road which passes through his shamba which P.W.2 had come to check on. Secondly P.W.2 does not mention about the damaged crops neither does he confirm P.W.I's evidence that the first respondent was also present and made the same utterances.- Secondly, P.W.2 does not mention that P.W.I¹ was present.

It is only in cross-examination by the counsel for the second respondent that P.W.2 mentioned that both defendants were present. He added that it is the plaintiff who had blocked the way that they talked about a Kamba oath, which the plaintiff denied that it was not discussed.

He P.W.1 did not mention that he was told to cleanse the defendants from the oath. At the end of the cross-examination the witness, P.W.2 said that he had never heard the plaintiff having been called a witch by the defendant. It is true that the first defendant stated he admits the plaintiffs claim and they are true,

The second respondent's evidence consists of two portions,

(i) That there was a boundary dispute between him and P. W. 1 and the assistant chief, was present and he P.W.1 was told to remove the oath he had administered to the defendants. The second part of the evidence is that on 31.10.1996 the plaintiff was taken to Willy and witchcraft removed from him. He maintained that he did not call him a wizard. D.W.3 the assistant chief denied hearing the plaintiff called a witch in his presence on 22.11.95. All he was dealing with was a boundary dispute and administration of oath by the plaintiff and destruction of crops.

D. W .5 evidence was confirmed by D.W.4 that he never heard the plaintiff called a witch.

The evidence of D.W.5 relates to events of 1.11.97 when both defendants and plaintiff were taken to Dr. Willy to determine who of them was a witch. The defendants were found to be clean while the plaintiff was, found to be a witch. The process was covered by photographs taken which were exhibited. These events had nothing to do with what transpired on 22.11.1995 save to show that there has been bad blood between the parties herein for long.

The overall on assessment of the evidence herein is that the Plaintiff was defective, as it did not name those to whom the utterances were made.

P.W.I did not name them in his examination in chief and only came up with the story in cross-examination.

P.W.I's evidence contradicted that of the plaintiff, T.W.I and save for the admissions made by the first defendant the contradictions went to destroy the plaintiffs evidence in so far as the claim against the second defendant is concerned Since D.W.3 and 4 denied hearing the utterances and since no other witness was called besides p.W.2 it means that if there was any utterances made the extent of the publication was small as P.W.2 said that he was a local resident and a neighbour. 5. Counsel for the appellant submitted that the defence produced photographs to show that the appellant was a witch and had been taken to a person who detects witchcraft, D.W.5 and did remove same witchcraft from him. That the respondents cannot rely on that evidence as they did not plead justification. Indeed the defence had no plea of justification. However as submitted by the respondents counsel the evidence of removal of witchcraft from the appellant occurred much later in 1996 and 1997 while the events leading to these proceedings were allegedly stated to have occurred in 1995. The plea of justification was therefore not available to the defendants as it could not be pleaded retrospectively. It follows that the defendants were right in not pleading justification.

On the evidence as it stood before the lower court, I agree that it did not support a claim against the second defendant and so the dismissal of the case in his favour was well founded.

As regards the case of the first defendant it is noted from the record that he first defendant did not cross examine the plaintiff and his witness, P.W.2 and when it reached his time to give evidence he said he admits the allegations. It is correct that this aspect of evidence was not considered by the learned trial Magistrate as it was expected of him.

The powers of an appellate court are set out in section 78(1) of the Civil Procedure Act Cap 21 Laws of Kenya

these are:

(a) The power to determine a case finally.

- (b) The power to remand a case.
- (c) The power to frame issues and refers them for trial.
- (d) The power to take additional evidence or to require additional evidence to be taken,
- (e) To order a new trial

(2). Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on court's, of original jurisdiction in respect of suits instituted therein.

That section gives an appellate court power to revisit the evidence on the record before the lower court assess the same and finally determine the dispute. But the court has to be requested to do so. The prayers in the . memo of the appeal are that the lower court judgement be quashed or set aside and nothing more. The court has to been asked to supersede those orders and assess damages due from the first respondent to the appellant.

Counsel mentioned in his submissions that a retrial should have been ordered but there is no prayer for that. As submitted by the respondents counsel a party is bound by his pleading. The appellant is bound by his prayers on appeal. Had there been a prayer that this court do supersede the lower court orders and make such orders as it deem fit then that prayer would have enabled this court to have power to consider that issue of assessment of damages. That request cannot be made from the bar.

That aside if this court had been requested to assess the damages the court would have considered the issue of the extend of the publication which this court has already ruled that the same was confined to P.W.2 who was a neighbour. It is further noted from the evidence and as correctly found by the lower court that there was no evidence that appellant suffered any injury to his reputation as nobody came from the church community to show that he was being shunned in church. It is also on record that he did not loose his position as a Board of governors member of two schools. It means that if any damages were, to be assessed had this court been asked to set aside the lower court orders supersede the same and assess damages the said damages would have been minimal. In view of the foregoing the final orders of this court are that appeal against the 2nd respondent is dismissed with costs to the second respondent both on appeal and the court below.

As for the appeal against the first respondent the same is allowed and the lower court decision in respect of this respondent is set aside. But there will be no assessment of damages as the appellate court was not asked to do so. either is there a prayer for this court to grant any other order that it deems fit to grant. The appellant will only therefore get costs against the first respondent both on appeal and the court below.

Dated, read and delivered this, 17th day of January 2003.

R. NAMBUYE

JUDGE