REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

civ app 41 of 98

MUSEVEKI MASYUKI ……APPELLANT

VERSUS

KASYOKA MBIVU ……RESPONDENT

J U D G E M E N T

The Respondent Kasyoka Mbivu went to Kitui SRMS court and filed civil case no. 37/97 against the defendant Museveki Masyuki. As submitted the plan is home made and it sought general damages, interest and costs. It is averred on an annexed sheet of paper that on 12.3.97 the defendant altered deformation words to the plaintiff while at a Baraza which was held at Kyukini Primary School. The words complained of were you are a fool and a beggar. A fool like you. What would I be saying when talking to you? Because I know your pride arises from begging because you cannot work for yourself but you should know that those things are going to die and you will go looking for casual work at Mbitini.

The defendant put in a defence averring that she denies the allegation/contents in paragraph 4 of the plaint and put the plaintiff into a strict proof thereof, the contents of paragraph 5 which is the annexed. She has denied and the defendant put the plaintiff into strict proof thereof the words complained of were allegedly uttered in the presence of Kivisu, Mutuo Tuli Nganda and Peninah Muthingo. Parties were heard and the learned trial Magistrate gave judgement in favour of the respondent in the judgement dated 31.3.1998 which is the basis of this appeal. The findings of the learned trial Magistrate are that the appellant called the respondent a fool and a useless woman who cannot work and earn a living unless she is provided for by some other people. That according to the plaintiff that was torturment …… because the defendant meant that she is a misfit in the society, that the defendant in her evidence denied calling the plaintiff a useless person who depend on other for livelihood. The learned trial Magistrate formed the issues for determination as

1. whether the defendant did defence the plaintiff.

2. if the answer to the first issue is in the affirmative then questioning of damages.

It was the finding of the learned trial magistrate was satisfied that the defendant and the plaintiff were involved in a quarrel about the well of the plaintiff in which the children of the defendant wanted to water her cattle. The defendants miss witness Kilunda Ivia told the court that both parties were calling each other a number of loose words on the plaintiffs side she was fully corroborated by her witness Kivisu Mativo PW 1 that the defendant called the plaintiff a useless woman who depends on others for

livelihood. In law the defendants words were in …….. and it was published to PW 1 and DW 1 who were present. On that basis the court was set in fixed that the respondent was deferred.

That in dealing with damages the learned trial Magistrate did not want to punish any of then as both of then are just ordinary warrant on a rural area and not sophisticated women on the street and on that basis awarded plaintiff Kshs.4,500/= with costs of the suit.

The appellant was aggrieved by those orders and he has appealed to this court citing 5 grounds of appeal namely that the learned trial Magistrate erred and misdirected himself both in law and in facts by failing to find that the alleged defamatory words in true sense and in their ordinary meaning as pleaded were not defamatory at all, erred and misdirected himself by applying innuendo in the alleged defamatory words when the respondent had not pleaded any other meaning to the alleged defamatory words other than their ordinary meaning in her pleadings and he further erred and misdirected himself by in putting into the words other meanings their in sense in which they pleaded which amounts to a departure from the pleadings erred and misdirected himself both in law and facts by failing to find that as the two women were exchanging abusive words the circumstances under which the alleged defamatory words were uttered favours the conclusion that the words are merely auger and therefore not actionable parse without proof of damage, erred and misdirected himself both in law and facts by drawing the wrong issues for determination and he further erred and misdirected himself by determining wrong issues, erred and misdirected himself both in law and facts by failing to find that the evidence and the pleadings as to where the alleged defamatory words were uttered different and this amounted to a departure from the pleadings contrary to order 6 rule 6 of the CPR. The appellant therefore prayed for the judgement of the learned District Magistrate to be set aside, reversed and or quashed and this appeal be allowed with costs before this court and the lower court.

In his oral submissions to court counsel for the appellant reiterated the grounds of appeal and stressed the following points that the words were not defamatory in their ordinary meaning and they amounted to vulgar abuse as the two women quarrelled and exchanged words, it was wrong for the learned trial Magistrate to hold that there was an innuendo in her the plaintiff did not herself give the meaning of those words, that an innuendo was not pleaded and the learned trial Magistrate should not have introduced it in his judgement, there was no evidence to show that the words pleaded had any other meaning and the suit should have been dismissed on that basis, that by introducing an innuendo it amounted to a departure from the pleadings by the learned trial Magistrate, that the plaintiff did not say that the words meant that she was a misfit in society and yet the learned trial Magistrate went a head to find so, there was no evidence to show that those who were around understood the words to mean what the learned trial magistrate ascribed to it, the finding of the learned trial Magistrate on the innuendo contravened order 6 rule 6(a) of the CPR as the particulars of the innuendo were not pleaded and introduced intra record, that the words were not alterable parse and it was necessary for the plaintiff to prove damage by showing that as a result of the said words they rendered to lower the estimation of the plaintiff in the eyes of right thinking members of the society. (i) they exposed her to ridicule hatred and contempt,

(ii) caused people to show or avoid the plaintiff. (iii) Whether the words were ……. Parse, the issues drawn by the learned Magistrate tended to favour the plaintiff, that no witness came to show that they had started avoid the plaint as a result of the said words, that by the learned Magistrate introducing an innuendo in the judgement the appellant was this abused and denied the opportunity to respond to it.

On that basis counsel urged the court to allow the appeal as prayed. The respondents counsel has opposed the appeal on the ground that the words complained of were abusive and they injured the reputation of the respondent as held by the learned trial Magistrate as they tended to show that the respondent was a parasite, that the words found to have been vulger were alterable as they were found to have caused …… injury to the respondent and they tended to incite society against the respondent, that the words were defamatory in the senses without an interpretation that the appellant participated in the proceedings and she could have raised a preliminary objection if the plaint was defective but they did not do so, that the learned trial Magistrate was to determine whether the words were defamatory or not and he determined so.

In reply counsel for the appellant still reiterated the earlier argument and stated that the submissions of the respondents counsel do not support the judgement which has to be taken as a whole and it cannot be split into a relevant part and in irrelevant part, they maintain that the judgement is based only different claim of an innuendo based on pleadings which were not before the court, that the plaint was complete and it ought to have been taken as it was. I have re-evaluated the findings of the learned trial Magistrate in the right of the evidence adduced in the lower court, the pleadings filed and submissions of both counsels. The findings of this court is that it is trite law that a party is bound by her pleadings. The plaintiff filed a plaint seeking damages for defamation. The words complained of were set out but the plaintiff did not set out what these words meant or how they amounted to defamation. It is worth nothing that the words www.kenyalawreports.or.ke v Page 8 stated in the plaint have not ……. Those that were repeated in the evidence. These contradictions which the learned trial Magistrate did not notice and did not comment upon. No doubt the learned trial Magistrate was faced within uphill task to assign a meaning to the said words himself. That was not what he was expected to do. It was the duty of the plaintiff to assign a meaning to the words and then the learned trial Magistrate was to interpret those words in the light of the meaning ascribed to them by the plaintiff and then determine whether they answer what was being alleged. After satisfying that the words meant what had been interpreted to mean then he would go a head and apply the law of deformation to those words and then determine whether the words complained of are alterable parse i.e. where they amputee a crime and …….. of a woman or whether they are alterable with proof of damage.

In the case of the first category words it is proved that the words complained of were uttered of the plaintiff and are alterable parse the Magistrate or the court marks to assess damages. Where the second category is established the learned Magistrate or the court then goes to establish the effects of these words onto the www.kenyalawreports.or.ke v Page 9 surroundings and their effect on the reputation of the plaintiff and then moves to assess the damages.

The situation displayed here does answer any of the above as no meaning was assigned to the words complained of. 2. The Magistrate did not classify them as to which category they fell. He took what PW 2 ascribed to them to be the basis. This was wrong as PW 2 was not the plaintiff in any case the plaintiff had not pleaded that the words meant that she was a social misfit. It was therefore not within the exhibit of the learned trial Magistrate to turn himself into a magistrate and then start introducing an innuendo which was not pleaded. I agree with the submissions of the learned appellants counsel that the plaint …….. did not say anything about the words which did not have a defamatory meaning ascribed to them and so the same should have been dismissed with costs.

For the reasons given the appeal is allowed. The lower court judgement complained of is set aside and substituted with an order of dismissal of the plaintiffs suit with costs to the defendant in the lower court.

The appellant will also have costs of the appeal against the respondent.

Dated, read and delivered at Machakos this 17th January day of

2003.

R. NAMBUYE

JUDGE