



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 30 of 1998

(From the Original Civil Suit 219 of 1996 of the Senior Resident Magistrate at Kitui)

POLINA KAVENGI NGONZI..... APPELLANT

VERSUS

MUTONGOI KIMANZI..... RESPONDENT

Coram: J. W. Mwera, J.

Mbiti Advocate for Appellant

Musyoki Advocate for Respondent

C.C. Muli

JUDGEMENT

These are 2 appeals heard and determined together — No.30/98 and No. 31/98. 20 They arose from one suit in the lower court at Kitui.

The present appellant Polina Ngonzi was the plaintiff. She claimed damages for defamation claiming that the defendant (Respondent in C.A.30/98) on 13.9.96 at Mithini River,

"8. The defendant uttered the words that the plaintiff was the thief and said she defendant had felt the magic powers attack her on behalf of the plaintiff, who went and reported the matter to the sub chief (who) called them on 17th September 1996 and referred them to the chief."

The plaint by Polina went on to claim that the chief later referred the matter to Kitui Police Station for investigations and report by 26.10.96.

A little recap of what preceded this action: the appellant Polina, the Respondent, Mutongoi (CA.30/98), with others formed a group to graze their goats in turns. When it came to the turn of Polina and she had in her care for grazing the goats of Mutongoi and others, on 3 occasions Mutongoi's goats, one at a time got lost or went missing. So the group got together to look into the mystery. They resolved that Mutongoi

employ any means including traditional ones to unravel the mystery of losing a goat each time Polina was grazing in her turn.

It is gathered from the pleadings, evidence and submissions here that it was found necessary or appropriate and Polina did not object that a traditional doctor administer a ceremony called "Kyuma" by the river side during which on its completion there could be signs and indicators as to who the person responsible for the loss of the 3 goats was. Indeed from the evidence, the "thief would be found from among those who were subjected to the said "Kyuma." Polina took part in the rite. Apparently the medicineman or doctor found her the thief but may that await appreciation of the proceedings. Her suit was that all this on the instigation of Mutongoi led to the grazing group to think and consider Polina a thief - a thing which led her esteem in the said group to be lowered. So she prayed for general and special damages, costs and interest against Mutongoi, who it had been claimed:

"..... Published the words that the ordeal "Kivyu" caught her (the Plaintiff)..... "

This was followed by a defence and counterclaim. The defence denied that Mutongoi instigated the "Kyuma" or "Kivyu" rite/ceremony/ordeal by the River Mithini. That it was an open and voluntary exercise in which Polina participated as she, like the rest of the grazing group, were eager to find out who was taking Mutongoi's goats one over 3 occasions when it was Polina's turn to graze. That these goats did indeed disappear while under her care. That because Mutongoi reported this loss of her goats to Kitui Police Station, she all the time suspected Polina to be responsible.

Mutongoi maintained that Polina was still responsible to explain the whereabouts of her three goats. That Polina was thus under liability to compensate Mutongoi for lost goats. This was the basis of the counterclaim. The value of 3 goats was put at Sh.4500/= and claimed against Polina. In sum Mutongoi desired the Learned Trial Magistrate to throw out Polina's suit and uphold her own claim.

The reply to the defence and defence to their counterclaim was very brief. Mutongoi had to strictly prove her counterclaim. Polina her husband Daniel Ngonzi (P.W.2) and one Patrick Musewa (P. W.3) testified in support of the suit. Six witnesses plus Mutongoi spoke against the suit but for the counterclaim.

The Learned Principal Magistrate dismissed both Polina's suit as well as the counterclaim by Mutongoi. Consequently both appealed. Polina in C. A. 30/98 and Mutongoi in C.A.31/98 Mr. J. Mbiti raised 9 points to consider for Polina while Mr. Musyoki had two only for Mutongoi.

10 On the first day of trial Mr. Musyoki came late to court. Mr. Mbiti having argued C.A. 30/98 to be upheld while he was of the view that Mutongoi's No.31/98 had no merit and had to be thrown out got Mr. Musyoki to apply and both parties were agreed that he should respond to C.A. 30/98 while arguing C.A. 31/98 as a cross-appeal on behalf of Mutongoi. Submissions were appropriately closed and now this determination follows.

The court anxiously perused the pleadings, proceedings including the process of the seemingly intricate "Kyuma" or "Kivyu" ordeal to reveal those responsible." It ended with the judgement of the Learned Trial Magistrate. Mr. Mbiti argued his points globally in the same way Mr. Musyoki did. 20

Mr. Mbiti 5 points covered aspects like the Learned Trial Magistrate's finding that police investigations in the lost goats was not placed before him; that when pursuing the loss of her goats Mutongoi had to respect laws of the country (not quite clear); that Mutongoi called Polina a thief in her defence and counterclaim. There was issue taken up with the efficacy of the traditional ordeal and how the Learned Principal Magistrate appreciated it. That the lower court was wrong to hold that Polina suffered no loss or damage i.e. that imputation of criminal involvement was actionable per se. A comment was made about justification in defamation and that with all evidence in there was no need for the end report of police investigations in the goat loss mystery. Accordingly Polina was entitled to her reliefs as sought.

In C.A.31/98 the 2 grounds referred to the unexplained loss of Mutongoi's goats while they were in the care of Polina and a need that the latter had a duty to compensate the former.

Both counsel argued more or less in the vein of their respective cases.

The short conclusion of these appeals begins with C.A. 30/98 by Polina. It has no merit. She did not prove that Mutongoi called her a thief in the presence of right thinking members of her society or group and that from then on her peers considered her in less esteem than before. At least nobody testified including Polina herself as to when and where Mutongoi called her a thief. To get relief for slander, defamatory remarks must be made and the same published to people who as a result hold the defamed person in less repute than before. Indeed they should even begin to shun and avoid her because of the said defamatory words. There is nothing of the sort here. All the grazing group members concerned about the 3 times loss of Mutongoi's goats during the grazing turn by Polina agreed to the use of any means, including traditional ones, to get to the bottom of the matter. Polina's evidence in relevant parts before the Learned Trial Magistrate:

"I was told that I was required by the defendant at the Mithini River for Kivyu ceremony to determine who had stolen the 3 goats. At the river I found the village elder Kalua Kabandi, the defendant and another lady and the man to administer "Kivyu ceremony."..... The ceremony was scaring; the defendant took the oath on my behalf. The oath declared I was the thief of the goats."

In cross-examination Polina said:

"The village elder summoned me to the river for the ordeal. I stayed there and witnessed the ceremony without being forced. I did not panic when it came (to) my turn to participate. I did not go there to clear my name. The witchdoctor did not force me to stay at the scene. I did not fear (for) any of his powers over me. I felt free at the time. Kalua Mutema and Kabandi Musyina were present. The defendant said it was me who stole her goats. The medicine man declared I was the thief and the defendant took it up from there."

From this kind of evidence by Polina this court as well as the lower court concluded, it cannot be said that Mutongoi called her a thief and least of all before anybody.

In fact further on in cross examination Polina said:

"The ordeal was conducted on behalf of all members as a fact of investigation as no thief had been known at the time of the ordeal. So of the members of the group were not present..... The defendant branded me a thief as a result of findings of the Kivyu ordeal."

Need more be added to the conclusion that Mutongoi is not the one who called Polina a thief? Now this ordeal is not known in our civil laws. It is however used by those who want to do so to resolve disputes. Once they submit themselves to such oaths or ordeals, the results are all their own and should not be brought to courts for recording or enforcing. There is no provision for such modes to resolve disputes in our civil laws and so they remain with the participants. For instance Polina cannot bring to a civil court a finding by the traditional medicine man that she was a thief and pin the same on Mutongoi since Mutongoi was the complainant before the "Kivyu" administrator. Polina had to prove that Mutongoi called her a thief before right-thinking members of her 10 community, which members have now shunned her on that account. This was not the case her and the Learned Trial Magistrate was right to dismiss Polina's suit. It cannot even be said that Mutongoi referred to Polina as having stolen her goats. Pleadings cannot constitute a claim for defamation.

The issue of referring the loss of goats to the police was not unjustified at all Mutongoi if she suspected that Polina was responsible for the loss of her 3 goats, by all means she was justified to report to the police to investigate. Why not? True, police did not produce the outcome of their investigations but that does not mean that Mutongoi was wrong to refer her complaint to them. However it looks like without reporting to the police station on 26.10.96, Daniel Ngonzi (P. W.2) advised his wife to sue Mutongoi and she did so on 11.11.96.

Accordingly the appeal No. 30/99 is dismissed with costs.

As for C.A. 31/98 this court is of the view that the Learned Trial Magistrate gave the counterclaim an extremely short shrift in his judgement. The counterclaim prayed for Sh.4500/= the value of the 3 goats at Sh.1500/=, which got lost and it was not denied, when Polina's turn came to herd the goats of the group. It was claimed that she either stole them, converted them to her own use or disposed of them without Mutongoi's consent or authority. Polina did not explain how the goats went missing while the herd was under her care. In such circumstances it cannot be discounted that Polina had a duty to carefully graze Mutongoi's goats and then return them all to her. If they got sick or were eaten by wild animals Polina had a duty to tell Mutongoi so and no doubt she could understand and accept the explanation. Or if a thief stole them from the herd, that could be explained. But here is loss of 3 goats each on a different occasion and Polina did not even seem bothered so much as to offer an explanation. It is in the circumstances fair that she should compensate Mutongoi for these goats. It was not disputed that Sh.1500/= per goat was reasonable and a total sum of Sh. 4500/= ought to have been awarded.

In sum the lower court's decision to dismiss the counterclaim is reversed and Mutongoi is awarded Sh.4500/=. Her appeal No. 31/98 thus is allowed with costs.

The order for costs in the lower court remains as the Learned Trial Magistrate made it and it was not a subject in any of the 2 appeals now disposed of.

Orders:

1. Civil Appeal 30/98 dismissed with costs -
2. C.A. 31/98 allowed with costs
3. The order of costs in the lower court remains undisturbed.

Judgment accordingly.

Delivered on 5th October 2000.

J. W. MWERA

JUDGE