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Awuor v Simbi (Civil Appeal E082 of 2023)
[2025] KEHC 5830 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KEHC 5830 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E082 OF 2023

OA SEWE, J

MARCH 21, 2025

BETWEEN

NOLTER AWUOR .... APPELLANT

AND

HELLEN SIMBI .... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Nicodemus N. Moseti, Principal Magistrate, delivered on the 9th August 2023 in Mbita Principal Magistrate's Civil Case No. E037 of 2022)

JUDGMENT

1. The appellant herein, Nolter Awuor, was the defendant before the lower court at Mbita Principal Magistrate's Court, having been sued by the respondent, Hellen Simbi, in Mbita PMCC No. E037 of 2022: Hellen Simbi v Nolter Awuor. The claim was for general damages for defamation, an order of permanent injunction restraining the appellant from defaming her or continuing to defame her, interest and costs of the suit.

2. The respondent had contended that on or about the 23rd September 2022, the appellant published on her WhatsApp messaging platform through her telephone account number 0728699212 words that were defamatory of her. She further averred that upon publishing the defamatory words, the appellant forwarded the same to several other people including her (the respondent), thus causing her anxiety and discomfort. In addition, her business had been shunned and avoided by several of her customers and other right thinking members of the society. She accordingly sued the appellant as aforementioned.

3. The appellant had denied the claim before the lower court and having heard the parties, the learned magistrate found for the respondent and awarded her Kshs. 500,000/= as general damages together with costs and interest. In addition, the lower court issued a permanent injunction restraining the

defendant from further posting and/or publishing and/or circulating defamatory words and/or statement against the respondent.

4. Being dissatisfied with the lower court's decision, the appellant filed this appeal on 25th September 2023 on the following grounds:

   (a) That the learned magistrate erred in law and fact in failing to properly and constructively evaluate the entire evidence on record and thereby holding that the respondent had been defamed by the appellant yet the evidence adduced did not support the respondent's claim.

   (b) That the learned magistrate erred in law and fact by failing to appreciate that vital ingredients of defamation such as whether the defamatory words referred to the respondent and whether the statement was published by the respondent were lacking in the evidence before the trial court and hence the finding of liability against the appellant which he reached could not be sustained.

   (c) That the learned magistrate erred in law and fact in disregarding the appellant's evidence on record that the name of the respondent was never mentioned or published at any given time as the alleged defamatory statement was alluding to Mama Hellen while the respondent is popularly known as Hellen Simbi.

   (d) That the Learned Magistrate correctly stated the respondent's submissions in detail in his judgment before his analysis and determination of the case, but erred in fact and in law by failing to give equal treatment to the appellant's submissions and treating the submissions superficially;

   (e) That the learned magistrate erred in law and in fact when he ignored the uncontroverted evidence of the appellant's witnesses who were also employees to the respondent when they testified that they did not know that the respondent was referred to as Mama Helena.

   (f) That the learned magistrate erred in law and fact by admitting the respondent's testimony that she was known as Madam Hellen and yet there was no independent witness or corroborative evidence to support the said averments that she was also known as Mama Helena.

   (g) That the learned magistrate erred in law and misdirected himself in finding that the appellant was liable in defamation despite there being evidence to the contrary that the telephone account number used to publish the defamatory words does not belong to the appellant.

   (h) That the learned magistrate erred in law and in fact in shifting the burden of proof to the appellant and treated the evidence tendered by the appellant superficially.

   (i) That the learned magistrate erred in law and fact while delivering his judgment and failed to take into account and fully consider the appellant's submissions which he dealt with in a perfunctory and casual manner.

   (j) That the learned magistrate erred in law and fact by awarding an inordinately high amount of damages for compensation amounting to Kshs. 500,000/= which was excessive and exorbitant in the circumstances.

   (k) That the learned magistrate erred in law and in fact in arriving at a decision which was not supported by the evidence on record or at all.

5. Accordingly, the appellant prayed that the appeal be allowed with costs and that the judgment of the lower court be set aside.

6. The appeal was canvassed by way of written submissions, pursuant to the directions given herein on 2nd October 2024. Accordingly, the appellant filed written submissions dated 9th November 2024. In addition to supplying the background information underpinning her appeal, the appellant submitted on the duty of the Court from as expounded in Suluenta Kennedy Sita & another v Jeremiah Ruto (suing as the legal representative of the Estate of Joyce Jepkemboi) [2017] eKLR, namely, that a first appellate court is enjoined to re-evaluate all the evidence adduced before the lower court in order to reach its own independent conclusions, while giving allowance for the fact that it did not have the opportunity of seeing or hearing the witnesses.

7. The appellant then proposed the following grounds for determination:

   (a) Whether the respondent's claim met the threshold for defamation;

   (b) Whether the award of Kshs. 500,000/= was excessive;

   (c) Whether the electronic evidence produced in court was admissible;

   (d) Whether the appellant's evidence was taken into consideration in the Judgment.

8. On whether the respondent's claim met the threshold of defamation, the appellant made reference to Sections 107 and 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya and submitted that the respondent was under duty to prove the ingredients of defamation on a balance of probabilities, namely:

   (a) That the statement complained of is defamatory

   (b) That the statement referred to her;

   (c) That the statement was published by the appellant;

   (d) That the statement is false.

9. It was the appellant's submission that the respondent did not prove that her name was mentioned by the appellant or that the phone number used belonged to her. She therefore contended that the evidence adduced by the respondent was insufficient to support a defamation claim.

10. On whether the award of Kshs. 500,000/= was excessive, the appellant submitted that, since the respondent did not prove her allegation of defamation, the lower court ought not to have awarded her any damages. She contended that no evidence was presented by the respondent to demonstrate that she suffered loss of business as a result of the publication or that her standing in society was injured. The appellant quoted extensively from Selina Patani and Ashit Patani v Dhiranji V. Patani, Civil Appeal No. 114 of 2017 on the aspect of publication.

11. The appellant also submitted on the admissibility of electronic evidence and contended that the respondent failed to demonstrate the origin of the impugned message and therefore breached Sections 78A(3)(c) and 106B of the *Evidence Act*. She also submitted that the respondent did not accompany her electronic evidence with any certificate to make it admissible as provided for in Section 106B of the *Evidence Act*.

12. Lastly, it was the submission of the appellant that her evidence was not taken into consideration in the judgment of the lower court in respect of the cell phone lines registered in her name. Accordingly, she prayed that the appeal be allowed and the judgment of the lower court set aside with costs.

13. The respondent relied on her written submissions dated 15th November 2024. In her view, the two issues for determination herein are;

(a) Whether the elements of defamation were adequately proved before the lower court; and

(b) Who should bear the costs of the appeal?

14. The respondent addressed the Court on the elements of defamation and relied on Halsbury's Laws of England, 4th Edition Vo. 28 at page 23 as well as Winfield & Jolowicz on Tort, 8th Edition at page 255 and urged the Court to find that all the element of publication were proved. The respondent contended that publication was not disputed; and that evidence was presented to prove that she was injured in her reputation. She therefore urged the Court to dismiss the appeal with costs.

15. This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded; while giving allowance for the fact that I did not have the advantage of seeing or hearing the witnesses. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was expressed thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..." (See also Suluenta Kennedy Sita & another v Jeremiah Ruto, supra)

16. The Record of Appeal shows that the respondent, Hellen Adhiambo Simbi (PW1) testified before the lower court on 9th November 2022. She described herself as a businesswoman operating a hotel known as Blue Ridge Hotel with 45 employees. She complained that the appellant made a post on social media on 23rd September 2022 to the effect that she was promiscuous. She made reference to the words set out at paragraph 5 of the plaint that:

> " Dogs disgust me extremely, an old grandmother with elderly children has taken Ben 10 to have sex with her in matrimonial bed and she afterwards pays Ben 10 with the sweat of her workers. Seriously eee Madam Hellen the one for Anoly (Nolter) you will not squander. By the time I am done with you hell be breaking loose. Play around wife to Kevo Kevo."

17. The respondent testified that the words were defamatory of her and that she was embarrassed and her esteem lowered among her customers, her family, friends and the public. She explained that she is also known as Mama Hellena to her employees and in the village at Rusinga. She also mentioned that she has adult children who are also on social media.

18. She called two witnesses, PW2 being her husband Mark Ogada. His evidence was that he runs Blue Ridge Hotel jointly with his wife; and that PW1 is the Director of the hotel. PW2 confirmed that PW1 is also known as Mama Hellena and that they have 4 children, the youngest being 17 years old. He also stated that they often communicate through social media; and that it was in that process that he came across the post in question which was defamatory of his wife. He added that he was equally embarrassed by the post. Jacob Otieno Onyango (PW3) is a taxi operator. His evidence was simply that PW1 is his aunt and that she is known at home as Mama Hellena. In his witness statement he mentioned that he was shocked to read the allegations by the appellant on facebook.

19. The appellant testified before the lower court as DW1. She adopted her witness statement dated 2nd November 2022 in which she conceded that the relationship between her and the respondent is that of employer-employee. She further stated that the respondent had not paid her salary arrears. DW1

conceded that on the 23rd September 2022, she posted a message on her facebook account to which a few of her friends responded. It was her evidence that she had no control over the reaction of her friends. She added that she did not see how the said post was defamatory of the respondent.

20. Jackline Akinyi Ouma (DW3) likewise adopted her witness statement. She told the lower court she is a former employee of PW1; and that PW1 refused to pay her wages. She conceded that she had a grudge against PW1 because she did not pay her her dues. She further stated that PW1 had an affair with one Kevin since they used to spend quality time together. DW2 further testified that she saw the post that the appellant made on her facebook account; and that she complained that the respondent did not pay her workers their dues. She added that she did not know of any other Hellen apart from the respondent.

21. The appellant's last witness was Philip Oketch Dunga (DW3). He also adopted his witness statement as part of his evidence in chief. He stated that he knew Kevo and was aware that he had a relationship with PW1. He further testified that he was one of the respondent's employees; and that she did not pay him his dues. DW3 further confirmed that he saw the post by the appellant; and that he responded to it and complained that he had worked for long hours. He however denied having posted that the respondent was a woman of bad morals.

22. Having given due consideration to the lower court record, and in particular, the Judgment, the Grounds of Appeal as well as the written submissions filed herein. The twin issues that present themselves for my determination are:

    (a) Whether the respondent proved her case before the lower court to the requisite standard;

    (b) Whether the learned magistrate committed an error of principle in making the awards he made.

    (a) Whether the Respondent proved her case to the requisite standard:

23. In Winfield on Tort, 8th Edition at page 254, Defamation is defined as:

> " ...the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person..."

24. Hence, in Uren v John Fairfax & Sons Pty Ltd (supra) it was held that:

> " ...a man defamed does not get compensated for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

25. In the light of the foregoing, what was the respondent obliged to prove before the lower court? In the case of Wycliffe A. Swanya vs. Toyota East Africa Ltd & Another [2009] eKLR, the Court of Appeal held that:

> " For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-
>
> (i) that the matter of which the plaintiff complains is defamatory in character.

(ii) That the defamatory statement or utterance was published by the defendants. The publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously…"

26. Similarly, in J. Kudwoli & Another vs. Eureka Educational Training Consultants & 2 Others [1993] eKLR, after an exposition of the applicable law and authorities on the subject, Kuloba, J. concluded thus:

> " To summarize the legal position in Kenya, in so far as it relates to the instant cases before me, … I have found the law of defamation in this country to be that for a defendant to be tortiously liable in a suit for defamation the plaintiff must prove on a balance of probability that the matter complained of:
>
> (a) is defamatory
>
> (b) refers to him
>
> (c) was intentionally, recklessly or negligently published of and concerning him
>
> (d) was so published by the defendant, and
>
> (e) was published without lawful justification on an unprivileged occasion."

27. From the summary of evidence set out herein above, there is no dispute that the appellant made the post complained of. She admitted as much and so did her witnesses. Her arguments that she did not know that the respondent was also referred to as Mama Hellena were nothing but an afterthought. I say so because the parties are in agreement that the appellant was, at the material time, an employee of the respondent. The appellant as well as DW2 and DW3 conceded that they had a grudge against the respondent for the reason that she had refused to pay they their dues as her employee. Indeed, in her witness statement dated 2nd November 2022, the appellant stated:

> " Sometime on the 23rd day of September, 2022 I posted a post on my facebook account and to my surprise, a few of my friends made their comments which comments I had no control over since in my statement, there was nothing defamatory about the plaintiff myself having posted whatever was on my mind that day…"

28. DW2 conceded that, in the post in question, the appellant complained that the respondent did not pay her workers their dues. She added that she did not know of any other Hellen apart from Hellen Simbi, the plaintiff. DW3 similarly testified that he saw the post and reacted to it by complaining that he had put in long hours as the respondent's employee. He also made reference to and justified the publication that the respondent was engaged in a love affair with Kevo. Since they were all employees of the respondent it is plain that the posts were published in respect of the respondent and with the intention of reducing her esteem in the eyes of the public.

29. It is manifest therefore that all the requisite elements of defamation were evident from the admissions made by the appellant and her witnesses. They in effect conceded that the message posted by the appellant:

(a) refers to the respondent

(b) was intentionally, recklessly or negligently published of and concerning her

(c) was so published by the appellant, and

(d) was published without lawful justification on an unprivileged occasion."

30. I find no reason to differ from the conclusion reached by the lower court that the post is defamatory of the respondent. It is therefore of no consequence that a certificate was not produced to vouch for the electronic evidence, or that there was no proof that the phone in question belongs to the appellant, granted the posturing taken by the Defence. In respect of admitted facts, such as the ones aforementioned, Section 24 of the *Evidence Act* is explicit that they give rise to an estoppel, and therefore it is not open for the appellant to assert otherwise. In this regard, I agree with the position taken in Jennifer Nduku Lazarus Masau & Cyrus Mutisya Lazarus [suing as the administrators of the estate of the late Mary Mukulu Lazarus (Deceased) v Transfleet Limited & another [2019] KEHC 2539 (KLR) in which the following except from Kyalo Mbobu's The Law and Practice of Evidence in Kenya LawAfrica Publishing (K) ltd pg. 64,

> " According to section 24 of the *Evidence Act*, admissions are not conclusive proof of matters that they admit but they could operate as estoppels. Critics wonder why parliament enacted that provisions knowing that under the common law, admissions constitute conclusive proof of the admitted facts. But essentially, even though they are not conclusive they amount to estoppel. The idea of estoppel in admission is to prevent a person to assert things that are at variance with things they admitted before."

(b) Whether the Learned Trial Magistrate committed an error of principle in making the awards he made:

31. The learned magistrate awarded the Respondent Kshs. 500,000/= as General Damages for defamation. In Butt vs. Khan (supra):

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

32. And in defamation cases, the Court of Appeal held, in C A M v Royal Media Services Ltd [2013] eKLR that:

> " No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in Jones V Pollard (1997) EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future."

33. There is no indication that the appellant has pulled down the post as at the time the appeal was reserved for judgment. Accordingly, I have no quarrel with the award of Kshs. 500,000/= as General Damages. At any rate, the parties did not address the issue in their submissions.

34. In the result, I find no merit in the appeal. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 21ST DAY OF MARCH, 2025.

OLGA SEWE

JUDGE