



REPUBLIC OF KENYA



KENYA LAW
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**Mutuku v Mutuku (Civil Appeal E078 of 2023)
[2025] KEHC 9399 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E078 OF 2023**

TM MATHEKA, J

JUNE 20, 2025

BETWEEN

JACINTA NDIWA MUTUKU PLAINTIFF

AND

LYNESTER MUMO MUTUKU DEFENDANT

*(Appeal from the judgment of the learned trial magistrate Hon. L .K
Mwendwa PM in SPM CC 91/2020 Tawa delivered on 8/8/2023)*

JUDGMENT

1. By a plaint dated 4/9/2020, and supported by her statement of the same date the plaintiff/appellant filed a suit against the defendant /respondent seeking judgment against her for Kshs. 15,500, damages for injuries slander, nuisance and conversion, interest at court rates from the date of filing of the suit until payment in full.
2. Her case was that on diverse dates up to 6/3/2020 the defendant continuously and without cause engaged in slandering and demeaning the plaintiff in the presence of children and neighbours and without just cause/colour of right, confiscated her stock in trade namely charcoal, and had refused to return the same.
3. It was her averment that she had suffered loss of stock in trade valued at Kshs. 15,500 and suffered loss of business of Kshs. 14,000 for one month.
4. She further avers that the action of the defendant had injured the plaintiff's character in the eyes of right thinking members of the society.
5. In her statement she told the court that the defendant had caused her a lot of distress at her place of residence, had continuously continued to demean her in the eyes of the neighbours and children by



making utterances that she (plaintiff) owed her (defendant) money, then proceeded to confiscate her charcoal.

6. In her defence – the defendant denied any wrong doing on her part, and put the plaintiff to strict proof of the claims. The defendant averred that the events of 6/3/2020 were reported to the police and Mbumbuni Police Station who investigated the case and found the plaintiff's claim baseless.
7. That it was confirmed that the plaintiff owned the defendant money for goods received, and unpaid electricity bills leading to disconnection.
8. The defendant specifically denied confiscating the plaintiff's charcoal and contended that the plaintiff did not deserve any of the orders sought and urged the court to dismiss the suit.
9. The matter was heard – the plaintiff testified and called one witness – Nicholas Mutisya Mangati – The defendant testified and called 2 witnesses - a police officer from Mbumbuni Police Station who produced the OB entry for 16/6/3/2020; and one Abednego Mutuku and the husband to the defendant.
10. Upon hearing the matter the trial court found that the plaintiff had failed to prove her case and dismissed the suit with costs.
11. Aggrieved, she filed this appeal and set out 6 grounds of appeal Viz:-
 - a. Whether the trial magistrate erred in law and in fact by dismissing the appellant's case.
 - b. Whether the trial magistrate erred in law and in fact by stating that the appellant failed to prove her case on injurious slander.
 - c. Whether the trial magistrate erred in law and in fact by stating that the appellant did not provide particulars of the injurious slander against her.
 - d. Whether the trial magistrate erred in law and in fact by stating that the appellant failed to prove the loss of business income from the confiscated charcoal.
 - e. Whether the trial magistrate erred in law and in fact by stating that the appellant did not prove her case on a balance of probabilities.
 - f. Who is entitled to the costs of this appeal?
12. The appeal was heard by way of written submissions.
13. For the appellant it was submitted on the 1st issue that the appellant claimed that the respondent had called her a prostitute in front of neighbours and children – that the words were false, publicized and tarnished her reputation. She cited *Wycliffe Swanya Vs Toyota East Africa Ltd* (no citation);
14. On the second issue it was submitted that she had been defamed . she cited Black's law dictionary 8th edition definition of defamation 'the fact of harming the reputation of another by making a false statement to a 3rd person'.

She also cited *John Ward v Standard Limited* [2006] eKLR on the definition of defamatory statement. It was stated as follows;

“A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling.

The ingredients of defamation are:



- (i) the statement must be defamatory
- (ii) the statement must refer to the plaintiff
- (iii) the statement must be published by the defendant (iv)the statement must be false”

15. She relied on Richard Otieno Kwach vs the Standard Limited & David Makali NBI HCCA 1099/2004 to the effect to the effect that words are defamatory of they are a reflection of the personal character on official reputation of the plaintiff.

16. She relied on SMW VS SNW [2015] eKLR

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided”

17. Arguing that the respondent had raised technicalities with regard to the manner in which she had drafted her pleadings she relied on Article 159(2) (d) provides as follows

“in exercising judicial authority, courts and tribunals shall be guided by the following principles:- a)

b)

c)

d) Justice shall be administered without undue regard to procedural technicalities.”

And Anchor Limited v Sports Kenya [2017]eKLR, it was held that

“One workable and pragmatic definition of a technicality has been bequeathed to us by the learned Honourable justice Richard Mwangi, in Kenya Ports Authority V Power & Lighting Co. Limited (2012) eKLR and another one supplied by the learned Hon Justice C.W Githua. In James Murithi Ngotho & 4 others V Judicial Service Commission (2012) eKLR: both decisions substantively say that procedural technicality is a lapse in form that does not go to the root of the suit. In the former case, Justice Mwangi defined a technicality thus:- Combining the meanings of these words, “procedural technicalities “may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.”

She also relies on Gatangi vs Kungutia (Civil Appeal E028/2020) [2022] KEHC 10596 KLR (30/6/2022) Judgment And Section 4 of the Defamation Act Cap 36 Laws of Kenya on slander of women states that: -

“In any action for slander in respect of words imputing unchastely to any woman or girl, it shall not be necessary to allege or prove special damage.”



18. On issue 3 it is submitted that the respondent called the appellant a prostitute and argued that the trial court relied on a technicality in dismissing her case. The appellant relied on *Anchor Ltd Vs Sports Kenya Ltd* [2017] eKLR on the meaning of technicality – “a lapse in form that does not go into the root of the suit”
19. On the 4th issue it was submitted that the appellant had a shop where her charcoal was confiscated from.
20. On 5th issue – it was submitted that the appellant had discharged the legal burden of proof. – see- *Evans Nyakwana vs Cleophas Bwana Ongaro* [2015] eKLR.-*William Kabogo Gitau Vs George Thuo & 2 others* [2010] eKLR on the burden of proof in Civil Cases.- *Muiruri Maina Vs Maina (Civil Suit 1/2015)* [2022] KEH 181 29(KLR) 15 Dec 2022) judgment on the general damage for slander at Kshs. 2,000,000.
21. The 6th issue was on costs – it was submitted that this court be guided by Section 27 of the [Civil Procedure Act](#) and *DGM Vs EWG* [2021] eKLR where it was stated that:

“By virtue of Section 27 of the [Civil Procedure Act](#), it is trite law that the issue of costs is a discretionary award that is awarded to a successful party. In the case of *Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others* (2013) eKLR which cited with approval the words of Murray C J in *Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR)* at 227 that it stated:”

“It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

Section 27 of the [Civil Procedure Act](#) provides: -

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”
22. For the respondent the following issues were set out from determination.
 - a. Whether the appellant’s appeal is fatally defective?
 - b. Whether the appellant proved her case of defamation by the respondent?
 - c. Whether the appellant proved her case of special damages?
 - d. Whether the appellant proved her case to the required standards?



23. On the 1st issue it was argued that the appeal is defective fatally – that despite the appellant getting time from the court to file supplementary record of appeal, the appellant failed to do so – and the record of appeal was absent of – all the pleadings from the subordinate court, submissions from both sides, and decree.

The respondent relies on order 42 rules 13(4) of Civil Procedure Rule which states;

“before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party:

- a. The memorandum of appeal
 - b. The pleadings
 - c. The notes of the trial magistrate made during the hearing
 - d. The transcript of any official shorthand, types notes, electronic recording or palantypist notes made at the hearing
 - e. All affidavits, map and other documents whatsoever put in evidence before the magistrates
 - f. The judgment, the order or decree appealed from and, where appropriate, the order (if any) giving leave to appeal.”
24. That these requirements are mandatory in nature. The court was referred to *Trans Mara Sugar Co. Ltd Vs James Omondi Obidho* [2020] eKLR where the court stated

“24 the record of appeal is therefore incomplete. In the words of the Supreme Court in Civil Application No. 20 of 2014 *Bwana Mohamed Bwana* (supra) “such an appeal would be incomplete and hence incompetent”

Having said so, there is no competent appeal for consideration. The appeal is therefore struck out with costs.

25. On whether the appellant proved her case - it was submitted that the appellant did not set out the particulars of the alleged slander. It is argued that the appellant's complaint is in breach of the provisions of order 2 rule 7 (1) of Civil Procedure which mandates that:

“Where in an action for libel or slander the appellant alleges that the words or matter complained of were used in a defamatory sense than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.”

The respondent argued that this was a mandatory requirement and relied on *Gerald Kaura Muthamla v Co-operative Bank of Kenya Ltd* [2017] eKLR

“14 turning to the issue of defamation is what I agree with the respondent’s contention that the party pleading defamation of character must clearly specify the particulars of defamation as provided under order 2 rule 7 Civil Procedure Rules. This is an important legal point because failure to comply with the said order (if any) giving leave to appeal.”

On the reliance by the appellant on Article 159 of *the Constitution* the respondent relied on *Abdul Aziz Juma V Nikisubu Investment & 2 Others ELC Suit No. 291 of 2013* where the court held that:- “Article



159 of *the Constitution* was never intended to override clear provisions of statute unless such revisions of the statute had been found and held to be unconstitutional Acts of parliament... make provision for the application of the law and *the Constitution* demands of the courts to protect *the Constitution*, the law and the Act enacted by parliament. In my view, Article 159 of *the Constitution* cannot be resorted to where there are clear and express provisions of the law.”

26. On whether appellant proved the special damages – it was submitted that the appellant did not prove this claim at all. The respondent relied on the definition of loss of business in *Grace Anyona Mbinda V Jubilee Insurance Company Limited* [2021] eKLR where the Honourable Court relied on the Court of Appeal in Civil Appeal No. 283 of 1996, *David Bagine Versus Martin Bundi* as follows: “We must and out to make it clear that damages claimed under the title “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase “doing the best I can”. These damages as pointed out earlier by us must be strictly proved.”
27. It was argued that the appellant wanted the court to act on speculation contrary to sections 107, 108, 109 of the *Evidence Act*.
28. I have carefully considered the evidence on record, the submissions. The duty of this court as a first appellate court is settled – to review, re-assess the evidence to draw its own conclusions always alive to the fact that the court neither saw/heard the witnesses.
29. To my mind the issues that arise are:
 - i. Whether the appeal is competent
 - ii. Whether the appellant established defamation
 - iii. Whether appellant established loss of business.
 - iv. Who is to bear the costs.
30. On the 1st issue the record of 31/7/2024 shows that the two Advocates who bear similar surnames Kyalo were present before Deputy Registrar. One told the court that they had filed the supplementary record – and the other one said I confirm and the matter was then placed before me for admission of the appeal and directions.
31. On 30/9/2024 both counsel appeared and had already agreed on the directions on the appeal. It can only mean that the respondent’s counsel had been served and hence – agreed to the directions for the appeal.
32. On whether defamation was proved – it is evident from the evidence of the plaintiff and PW2 spoke about the bag of charcoal being taken away. There is nothing in the testimony of the plaintiff to support the allegation of defamation as demonstrated in the various authorities that she cited herself.
33. There is no evidence of any specific words uttered by the respondent that involved the personal character of the appellant in a public place that were false – - yes, she stated that the respondent insulted her “Malaya, “handicap” and then laughed at her but none of this was pleaded or testified to by witnesses.
34. PW2 said that on 6/3/2020 he was at plaintiff’s place when he heard someone take charcoal from outside – then he heard plaintiff ask – Mumo – why are you taking my charcoal then he, and appellant’s husband stepped out and he (husband) asked the respondent the same question. He testified that the



- respondent proceeded to keep the charcoal to her house while uttering the insults ‘you are a prostitute I am the one who helps you and if it were not for me you would be thieves ‘ .
35. He said he did not talk to her but completed his business with the husband of the appellant and left .
 36. It is not worthy that nowhere in the plaint does the appellant mention the words stated in the testimony - those words are not in the plaint – as he words allegedly uttered by the respondent.
 37. Even in the appellant’s statement the word ‘Malaya/prostitute’ does not appear – no specific word is mentioned in the plaintiff’s pleadings or her own statement. She is bound by her pleadings.
 38. In addition PW2 stated that the respondent was responding to the question asked by the husband to the plaintiff/appellant when she uttered the word prostitute – she was not talking to the appellant.
 39. The appellant was expected to plead the particulars of defamation, then prove them. She did not do that.
 40. She was also required to establish how that specific utterances had injured her reputation. No children were called to testify, and the testimony of Nicholas PW2 is not supported by her claims as he did not testify to her character or reputation.
 41. It is my view that the appellant did not establish that words she alleged were uttered, and that they injured for reputation in any way.
 42. Regarding the charcoal; The respondent does not deny taking the charcoal - she has given context to the dispute – and told the court that police took the charcoal as exhibit. That upon investigation the appellant was told to collect her charcoal from the police station but she refused to do so. Of great importance is that the appellant did not prove the alleged loss of business or how she arrive at Kshs. 15,000 or Kshs. 14,000. She did not demonstrate the alleged loss by way of evidence and the same is untenable.
 43. The appellant did not prove defamation to the required standard neither did she prove loss of business, In the circumstances, the appeal has no merit and is dismissed with costs.
 44. On costs – the same will follow the event.

DATED SIGNED AND DELIVERED VIA CTS THIS 20.6 .2025 MUMBUA T MATHEKA

JUDGE

Mwiwa Court Assistant Ms Kyalo for appellant

Mr. Kilonzi for B Kyalo for respondent

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

