



**Nyakundi v Momanyi (Civil Appeal E028 of 2021)  
[2024] KEHC 8440 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8440 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E028 OF 2021  
WA OKWANY, J  
JUNE 20, 2024**

**BETWEEN**

**LINET BOSIBORI NYAKUNDI ..... APPELLANT**

**AND**

**MARY MOMANYI ..... RESPONDENT**

*(Being an Appeal from the Judgment/Decree in the Chief Magistrate's Court at Nyamira in CMCC No. 63 of 2020 by the Hon. C.W. Waswa, Resident Magistrate on 22nd March 2021)*

**JUDGMENT**

1. The Appellant herein was the Plaintiff before the trial court where she sued the Respondent seeking damages for defamation and slander. She also sought the costs of the suit. The Appellant's case was that the Respondent made several false and defamatory statements against her without any justification with the intention to ridicule, embarrass and diminish her status and personal integrity.
2. The Respondent denied all the allegations made by the Appellant in her statement of defence.
3. The Appellant presented the evidence of 3 witnesses at the hearing of the case while the Respondent testified and called one witness in her defence.
4. The trial court found that the Appellant did not prove her case to the required as she did not present a certificate of translation. The Appellant's case was consequently dismissed by the trial court.
5. Aggrieved by the decision of the trial court, the Appellant filed the instant appeal and listed the following grounds of appeal in the Amended Memorandum of Appeal dated 19<sup>th</sup> July 2021: -
  1. The learned trial magistrate erred in fact and law in finding and holding that the Appellant herein had neither laid before the honourable court sufficient evidence nor proved that the Respondent uttered or published the impugned defamatory words against the defendant.



2. The trial magistrate disregarded and/or ignored the totality of the evidence tendered and/or rendered before himself and therefore arrived at a slanted conclusion contrary to and in contravention of the evidence on record.
  3. The learned trial magistrate abandoned his judicial responsibility by exercising his judicial decision wrongly by admitting the case for hearing without complying with the provisions of Order 11 of Civil Procedure Rule 2010 when the case was fixed directions contrary to and/or against the Appellant's right to be heard and accorded a fair hearing pursuant to Article 47 and 50 of *the Constitution* of Kenya which are so fundamental that they cannot be fettered by the exercise of discretion and cannot be limited as in accordance to Article 25 of *the Constitution* of Kenya 2010.
  4. The learned trial magistrate having heard the case by and/or on behalf of the Appellant, failed to render himself fully, on all the aspects of the case. Consequently, the judgment of the learned trial magistrate is not only inconclusive but it is omnibus and has therefore occasioned injustice.
  5. The learned trial magistrate failed to appreciate, consider and/or address the salient and pertinent features of the Appellant case and/or pleadings and instead summarily rejected the appellant cases on account of a translation certificate and thereby abandoning his judicial mandate and/or responsibility albeit without any lawful cause and/or basis.
  6. The learned trial magistrate failed to cumulatively and/or extensively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before him and thus arrived at an erroneous conclusion to and in uncontroverted evidence.
  7. The judgment of the trial magistrate does not capture issues for determination thereof and the reasons for such determination. Consequently, the judgment of the trial magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010.
  8. The judgment of the trial magistrate is a nullity ab initio and a mockery of the due process of law and hence ought to be set aside ex-debitio justitiae.
6. The Appeal was canvassed by written submissions as follows: -

#### **The Appellant's Submissions**

7. Counsel for Appellant submitted that the Appellant was prejudiced as the trial court failed to schedule the matter on 19<sup>th</sup> October 2020 for discovery stage and pre-trial stage and instead proceeded to hearing of the matter on 10<sup>th</sup> December 2020 thereby denying the Appellant an opportunity to file and serve the translation certificate which formed the basis for the trial magistrate to dismiss the Appellant's case in its judgment. Counsel urged the Court to find that there was a mistrial in Nyamira CMCC No. 63 of 2020.

#### **The Respondents' Submissions**

8. Counsel for the Respondent submitted that the Appellant failed to file a Reply to the Defence in accordance with Order 6 Rule 9 (1) which meant that she admitted the denials in the statement of defence. Counsel cited *Denmus Oigoro Oonge vs. Njuca Consolidated Limited* (2012) eKLR in this regard. Counsel also submitted that the Appellant bore the burden of proving the defamatory words by bringing an expert translator for the trial court to comprehend the level of degradation imposed on



her by the said defamatory words. It was also submitted that the Appellant ought to have tried as much as possible to reproduce the defamatory words as stated by Gatley in *Libel and Slander*, 11<sup>th</sup> Edn. At 28.17, page 973 where it was stated that if the exact words cannot be pleaded, the words must at least be set out with reasonable precision. On the issue of a mistrial, Counsel submitted that it was the duty of the Appellant to comply with the requirements of Order 11 before presenting the case to the trial court to admit the matter for hearing and not for the trial court to ensure compliance. Counsel urged the appeal to be dismissed.

9. The duty of a first appellate court was espoused in the case of *Kenya Ports Authority vs. Kusthon (Kenya) Limited* 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

10. I have considered the grounds of appeal and found that the only issues for determination are whether the failure to produce the translation certificate warranted a dismissal of the suit and whether the appeal is merited.

### **Analysis and Determination**

11. Patrick O'Callaghan in the Common Law Series: *The Law of Tort* at paragraph 25.1. set out what the law of defamation entails thus: -

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods...”

12. The Court of Appeal in *S M W vs. Z W M* [2015] eKLR held thus: -

“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.”

13. In *John Ward vs. Standard Ltd, HCCC 1062 of 2005*, the court outlined the ingredients that a claimant must prove in order to succeed in an action for defamation as follows: -

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



14. In the present case, the Appellant contended that the Respondent uttered the defamatory statements at her in the presence of her children, customers, shoppers and other bystanders. The said words were uttered in Ekegusii language. In her Statement which was adopted as her evidence in chief, the Appellant stated that the statements referred to her as a witch and a prostitute.
15. PW2, Bonface Mitaki Nyakundi, testified that he recorded the altercation on his phone. He stated that he reproduced the recording into a CD which he wished to produce and play before the court.
16. A perusal of the trial court's proceedings however reveals that no exhibits were produced during the trial. I find that it would have been prudent for the Appellant to produce the alleged recording for the court's consideration.
17. I note that the Plaintiff pleaded as follows concerning the alleged defamatory words, a translation thereof, at paragraph 4 of the Plaint:-

“You witch woman, you have troubled people in your village until you have now finished them. Do not bring your witchcraft from your village to trouble or torment us here in the market. Take your witchcraft somewhere else, you have tormented me for many days.

I have never seen an elderly woman like you with white pubic hair abandoning her home to go search for men in Nairobi. This woman is not upright. I have never seen an elderly woman with this character.”

18. The trial court found that failure to provide a translation certificate verifying the meaning of the alleged uttered words meant that the Plaintiff did not prove her case on a balance of probabilities. The trial court relied on the decision in Raphael Lukale vs. Elizabeth Mayabi & Another [2016] eKLR. I however note that the above decision was, on appeal, overturned by the Court of Appeal when it held as follows: -

“We have said elsewhere in this judgment that the sole reason why the learned Judge dismissed the suit was the fact that there was no audio recording and/or certificate of translation of the offending words, hence, in her opinion there was no proof of publication of those words.

The word “publication” is repeatedly used without definition in the *Defamation Act*. Its permanent form has also not been explained. This is important in construing the provisions of section 8 of the Act on wireless broadcasting which provides that;

“8

- (1) For the purposes of the law of libel and slander, the publication of words by wireless broadcasting shall be treated as publication in a permanent form.” (Our emphasis).

Black's Law Dictionary 9<sup>th</sup> Edition defines publication as “the act of declaring or announcing to the public”.

In *Pullman v Walter Hill & Co* (1891) 1 QB 524, the English Court of Appeal explained what publication constitutes as follows:

“What is the meaning of ‘publication’” The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If



there was no publication, the question whether the occasion was privileged does not arise..... If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter" Certainly it is, showing it to a third person; the writer cannot say to the person to whom the letter is addressed, 'I have shown it to you and to no one else.' I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it" (per Lord Esher, MR). (Our emphasis).

Publication of a defamatory material occurs when the material is negligently or intentionally communicated in any medium to someone other than the person defamed.

The learned Judge insisted that there was no proof of publication merely because the appellant did not produce the audio version of the broadcast in the Luhya language as well as the certificate of translation.

Upon close reading of section 8 aforesaid we find nothing to suggest that all wireless broadcasts are either from recorded tapes or are reduced into some form of a document and that in order for a plaintiff to prove publication of a wireless broadcast he must tape record it and produce the tape record in court as evidence. That proposition is not realistic as it would require people to always have in their possession devices for recording and dwell in constant and vigilant anticipation of being defamed.

The appellant's case was grounded on the fact that he and his four witnesses heard with their ears the words spoken by the 1<sup>st</sup> respondent and transmitted through the 2<sup>nd</sup> respondent's Mulembe FM radio station.

The learned Judge in insisting on an audio recording in the original language appeared to have had in mind the provisions of Section 106B of the *Evidence Act* which requires that for a party wishing to rely on a recording, it must be accompanied by a certificate by a person who operated the recording device. That is the admissibility of electronic records. In our opinion this provision does not make it mandatory for parties who wish to prove that some defamatory statement by way of broadcast has been made of them.

In this case the appellant did not seek to produce any audio evidence. As a matter of fact he relied on oral evidence of witnesses who heard the broadcast by the 1<sup>st</sup> respondent. This was direct evidence as defined in section 63(2)(b) of the *Evidence Act*. Publication in a permanent form conveys the meaning that the defamation is libel as opposed to slander which is in a non- permanent form. See: Gatley On Libel and Slander 11th Ed At Paragraph 3.9, like our section 8(1) confirms that;

".....for purposes of the law of libel and slander the publication of words in the course of any programme included in a programme service shall be treated as publication in the permanent form."

.....The appellant in our considered opinion pleaded the words complained of with reasonable precision and the 1<sup>st</sup> respondent largely agreed with the English translation of those words.

From the totality of the foregoing there cannot be any debate that the defamatory material portraying the appellant as a dishonest person was published."

19. Applying the decision in the above case to the present case, I find that a certificate of translation was not necessary in this case since the said words complained of were pleaded in the exact form that they



were allegedly uttered and the Respondent did not contest the correctness or accuracy of their English translation. It is my finding that the said translation was a true reflection of the statement allegedly uttered by the Respondent. I therefore find that trial court erred in finding that the failure to produce a certificate of authentication was fatal to the Appellant's case.

20. The next issue for determination is whether the words the Appellant complained of were or could be understood to be defamatory. I have considered the ordinary meaning of the words in question and I note that besides being vulgar, they could be interpreted to mean that the person against whom they are uttered as an evil an evil and immoral person who is unfit to live with others in the society. I find that the said words were defamatory in nature.
21. The next issue for determination is whether the defamatory statements referred to the Appellant. I note that the Appellant testified that the she was at the market where she had an argument with the Respondent's younger sister when the Respondent emerged from her father's shop and joined in the fray by pointing at her with agitated gestures while hurling the defamatory words at her. I note that the Appellant's testimony was not impeached on cross-examination.
22. PW2, Boniface Mitaki Nyakundi and PW3, Joshua Morara, were present at the scene and testified that they witnessed and heard the Respondent abusing the Appellant in Ekegusii language.
23. The Respondent vehemently denied the allegation that she uttered the defamatory words. She however confirmed that she was at the market on the material day and that she had a disagreement with the Appellant over a customer. She explained that their disagreement was reported to the market committee before the Appellant filed the suit before the trial court.
24. DW2, Monica Nyakerario Nyachoti, confirmed that the Appellant and the Respondent disagreed over a customer as the Respondent accused the Appellant of 'poaching', intercepting or diverting her customers. According to DW2, the root cause of the disagreement was a customer who opted to buy cabbage from the Appellant instead of the Respondent.
25. From the above summary of the evidence of both parties, I find that it is not in doubt that the parties herein had a disagreement which was so heated or deep that it was reported to the market committee for their intervention. The circumstances of this case, when taken in totality, paints a picture of two parties who have long standing differences despite the fact that they do business in the same place. DW2 testified that the Appellant always intercepted their customers.
26. My analysis of the evidence from both sides leads me to conclude that the differences between the Appellant and the Respondent led to a melt-down when the Respondent uttered the words complained of to the Appellant in the full glare of the people present at the scene which was a market.

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

27. Having found that the statements complained about were defamatory and that they were uttered by the Respondent in reference to the Appellant, I have no difficulty in finding that the statements were false as the Respondent did not plead justification or claim that his description of the Appellant was accurate. I further find that the words complained about had the effect of embarrassing and ridiculing the Appellant in the eyes of other traders and market goers thereby ruining her reputation before the



right-thinking members of her society. I find that all the ingredients of the tort of defamation were proved on a balance of probabilities.

28. The next issue for my consideration is the award of damages for the tort of defamation. It is trite that an award of damages in a defamation suit is discretionary. The Court of Appeal in *C A M vs. Royal Media Services Limited Civil Appeal No. 283 of 2005*[2013] eKLR, stated 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.”

29. The Appellant sought exemplary and punitive damages against the Respondent. In *John vs. MG Ltd.* [1996] I ALL E.R. 35 the Court held as follows: -

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.....

Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.” (emphasis added)

30. In the present case, I find that the altercation between the Appellant and the Respondent happened at the heat of the moment and could have been precipitated by long standing business rivalry. In the circumstances of this case, I am unable to find that the Respondent acted out of malice or improper motive. I therefore find that the case do not warrant an award for exemplary and punitive damages as it was not stated that the Respondent repeated the offensive words elsewhere. I have however considered the fact that the said defamatory statements were made in the presence of a big audience within a market set up.
31. I find that the Appellant is entitled to compensation for the injury and damage occasioned to her reputation. This Court has also noted that the said offensive words were not only careless but also vulgar especially taking judicial notice of the fact that people alleged to be witches in this region are in most instances ostracized by the society and even eliminated. The court is of the view that it must discourage the use of such careless and abusive language.
32. In *James Njagi Joel vs. Junius Nyaga Joel* [2020] eKLR the court, on appeal, upheld an award of Kshs. 80,000/= damages for defamation. I note that the Appellant proposed an award of Kshs. 1,000,000 damages for defamation before the trial court while the Respondent did not make any proposal on damages. Taking a cue from the above cited case, I find that an award of Kshs. 100,000 will be adequate compensation for defamation in this case.
33. In conclusion, I find that the instant appeal is merited and I therefore allow it in the following terms: -



- i. The judgment of the trial court is hereby set aside and in its place, I enter judgement in favour of the Appellant by finding that she proved her case of defamation by the Respondent on a balance of probabilities.
- ii. The Appellant is awarded damages in the sum of Kshs. 100,000/=.
- iii. In addition to the award for damages, I direct that the Respondent shall tender a public apology to the Appellant for the said defamatory utterances.
- iv. I award the Appellant the costs of the Lower Court case and this appeal which I hereby assess at Kshs. 25,000.
- v. I award the Appellant interest on costs and damages at court rates till payment in full.

34. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 20<sup>TH</sup> JUNE 2024.**

**W. A. OKWANY**

**JUDGE**

