



REPUBLIC OF KENYA



**Nyaboke t/a Tomed Traders v Wagunyu (Civil Appeal 132 of 2022)
[2024] KEHC 7422 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 132 OF 2022
SM GITHINJI, J
JUNE 19, 2024**

BETWEEN

EDNA NYABOKE T/A TOMED TRADERS APPELLANT

AND

ESTHER NJERI WAGUNYU RESPONDENT

*(An Appeal from the entire Judgment of the Honourable Nelly
Chepchirchir delivered at Mariakani on 29th November, 2022)*

JUDGMENT

Hon. Justice S.M. Githinji

Mr Kiseu for the appellant

Mr Anayo for the Respondent

1. By a Memorandum of Appeal dated 1/12/2022 the Appellant sought that judgment delivered in Mariakani Civil Suit No. 16 of 2020 by Hon. N. Chipchirchir (SRM) on 29/11/2022, be set aside, and the following reliefs be granted: -
 1. The appeal be allowed.
 2. That the judgment of Hon N. Chepchirchir in MCCC No. 16 of 2020 be varied on the following terms.
 - a. That the judgment by Hon N. Chepchirchir in Mariakani Court Civil Case No. 16 of 2020 be set aside in its entirety and be substituted with a judgment allowing the appellant's claim of Kshs. 110, 926.
 - b. That costs of the suit be awarded to the appellant.



3. That the costs of this appeal be awarded to the Appellant.

The Appellant based her appeal on the following grounds: -

1. That the learned trial magistrate erred in law and fact in wholly disregarding the evidence adduced and the submissions by the appellant herein.
2. That the learned trial magistrate erred in law and in fact by allowing the Respondent counterclaim and awarding Kshs. 300,000 in respect thereof.
3. That the learned trial magistrate erred in law and fact by failing to apply the legal principles governing the tort of defamation thus erroneously awarding the Respondent's counterclaim of Kshs. 300,000/=.
4. That the learned trial magistrate erred in law and in fact by taking into account irrelevant principles and misapprehended wholly the evidence in dismissing the appellant's claim.
5. That the whole judgment was against the law, the weight of the evidence adduced, erroneous and unfair.

2. The background is that on 31/1/2020, the Appellant, who was the plaintiff in the primary suit, filed a plaint seeking judgment against the Respondent for Kshs. 110, 926/-. The Appellant alleged that the Respondent was at all material times an employee at her M-Pesa shop at Mariakani, and that sometime between 1/6/2019 and 21/8/2019, the Respondent stole or misappropriated the amount claimed above, and that there was a criminal case against the Respondent.
3. In her statement of defence dated 6/1/2021, the Respondent denied the allegations averred in the plaint. She raised a counterclaim stating that the Plaintiff's allegations were malicious, ill intended and made in bad faith with the intention of maligning her good name. The Respondent pleaded that she is a respectable person in Mariakani with a full-time job, a lady of high moral standards, God fearing, law abiding citizen and a daughter of a well-known pastor. To her the suit against her was defamatory and that it had caused her immense loss and damage. She listed the particulars of malice and defamation and loss and damage occasioned to her, and sought inter alia general damages for defamation.
4. At the hearing, the Appellant, who testified as PW1, adopted her witness statement as her evidence in chief. She told the court that during the material time, she had travelled and was not able to go to the M-pesa shop for a while. She however called the Respondent who informed her that work was going on well. That when she finally managed to visit the shop, she discovered that the Respondent did not have any money in float or at hand. She took stock and found Kshs. 110, 926/- missing and that the Respondent had sent to herself a lot of money. She produced a statement as PEXH-1.
5. On cross-examination, the Appellant confirmed that she did not have any contract of employment between herself and the Respondent, neither did she have any pay slip that she paid her. She did not also produce the float record book.



6. The Respondent testified as DW1. She stated that she works as an accountant at Hotel Damview. She confirmed that she was indeed arrested on 21/8/2019 and charged with stealing by servant and that the criminal case was terminated on 10/3/2021. She produced a copy of the charge sheet and court order as DEXH-1 and 2 respectively. She added that the case maligned her character as she was branded a thief and put under scrutiny at her place of work. As a result, so she stated, her mother's congregants scattered.
7. The Respondent told the court on cross-examination that she worked for the Appellant for about 2 months during which she was not paid for one month. She confirmed that her mobile number was 0790968662 and she would occasionally use the same agent number to do her transactions.
8. In the end, the trial court found that the Appellant had failed to discharge the burden of proof bestowed upon her to prove her case on a balance of probability. The learned magistrate dismissed the plaintiff's suit and found that the counterclaim was satisfactorily proved. She awarded the Respondent Kshs. 300,000/- as general damages for defamation and costs of the suit together with interest.
9. The court directed that the appeal be canvassed by way of written submissions. However, as at the time of writing this judgment, the Respondent had not complied with the directions. The Appellant filed her submissions on 7/12/2023, which I have carefully read, understood and considered in my finding.
10. It is settled that a first appeal is by way of a retrial and this court as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusion, bearing in mind that it did not see nor hear the witnesses as they testified. (See the *Court of Appeal in Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR). Therefore, having considered the evidence before the trial court, the memorandum of appeal, submissions and authorities presented by the Appellant, I find that the issues for determination are: -
 - i. Whether the Appellant proved her case against the Respondent.
 - ii. Whether the Respondent's claim for defamation was substantiated.
 - iii. Whether the amount awarded by the trial court as general damages for defamation is erroneous.

Analysis and Determination

11. The legal position is that the burden of proof of any fact or allegation is on the party alleging. It was the legal burden of the Appellant to prove her case against the Respondent on a balance of probabilities, the standard in civil cases. Section 107 and 108 of the *Evidence Act* is clear that: -

“ 107. Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

108. Incidence of burden.



The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

12. The Appellant’s case against the Respondent was that the Respondent stole from her the sum of Kshs. 110,926/- while she was under her employment. That the Respondent had deposited the money in bits to her mobile phone number. It was not disputed that the Respondent was at some point employed by the Appellant as claimed. What the Appellant had to prove was that the Respondent stole the said amounts.
13. At the trial court, the Appellant relied on a statement of M-pesa, which I note was not attached in the record of appeal, and I cannot therefore ascertain its contents. However, looking at the oral testimonies, particularly, the Plaintiff’s testimony on cross-examination, it is clear, and the trial court observed it, that the statement’s account holder is dubbed Wendy Communication and Enterprises Edivan Beauty and Saloon, Kaloleni Road. There is no evidence given on the nexus between the statement holder’s name and the Appellant herein.
14. Even assuming that the account said to have lost money was the one exhibited before the trial court, this court was not presented with the said statement to make its own calculations and finding as to whether or not money was stolen. In any event, the criminal case against the Respondent over the same issue was terminated as testified by both parties. The Appellant cannot therefore successfully base her allegations on the said case. Whether or not the Appellant was misinformed about the hearing date in the criminal proceedings does not matter, as what counts is the evidence adduced in this particular case.
15. In the given circumstances, like the trial court did, I find that the Appellant failed to discharge the legal burden of proof on the allegations raised against the Respondent.
16. Turning to the issue of defamation, the Respondent pleaded that the suit before the subordinate court was defamatory to her person and that it has caused her immense loss and damage. She particularized the details of defamation as- portraying her as a thief; claiming that she stole Kshs 110,926/= when she knows or ought to have known the same to be false; instituting criminal proceedings against the defendant based on falsehood; and trying to force the defendant to pay monies she was not aware of.
17. The *Black’s Law Dictionary* defines defamation as “the act of harming the reputation of another by making a false statement to a third person.”

Gatley on Libel and Slander 6th Edition at pg. 6 the learned author stated that; -

“A defamatory statement must be false and it must also be defamatory to the plaintiff, that it is to say, the statement must contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts not contained in the statement, as the reader must reasonably be expected to possess.”

18. The court of appeal in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR restated the elements to be established in such a claim. It stated:

“It follows that a claimant in a defamation suit ought to principally establish in no particular order:

- i. The existence of a defamatory statement;
- ii. The defendant has published or caused the publication of the defamatory statement;



iii. The publication refers to the claimant.”

19. Also, the Court of Appeal in the case of *Wycliffe A. Swanya v Toyota East Africa Ltd & Another* civil Appeal 70 of 2008 [2009] eKLR stated:

“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 defamatory statement or utterance was published by the defendants. 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.
- iv. In slander, subject to certain exceptions, that the plaintiff has suffered special damage.”

20. It is also settled that the test whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but what a reasonable person reading the statement would perceive. In Halsbury’s Law of England 4th Edition Vol. 28 at Page 23, the author opined;

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense”.

21. In the present matter, the Respondent claimed that the entire suit was defamatory to her person. While I agree with the trial court that court proceedings could amount to publication given that they are public documents accessible to all, I am not convinced that the Respondent demonstrated that the suit was defamatory to her person, character, reputation, professional and social standing. I say so because, no evidence was adduced to support her allegations. In my view, the Respondent failed to demonstrate how the suit affected her work or social standing. I say so because even as at the time she testified in Court, she had been hired as an accountant at a different establishment, a clear indication that her reputation had not been injured. Moreover, the allegation that the suit caused her mother to lose members of her congregation does not assist her claim whatsoever. There was no proof of the number of members the mother’s church allegedly had before and after institution of the suit. Her mother, is not her. The claim also appears remote and farfetched.

22. In the given circumstances, I am satisfied that the claim for defamation was not proved to the required standard and the learned trial magistrate erred in allowing the counterclaim. Failure of the criminal case for the stated reason, does not render the complaint malicious.

23. The outcome is that the appeal is partly allowed and the judgment delivered on 29/11/2022 by Hon N Chepchirchir in Mariakani Civil Case No. 16 of 2020 is set aside in the following terms: -

- a. Both the Plaintiff and the Counter-claim are unmerited and are hereby dismissed.



b. Each party shall bear its own costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 19TH DAY OF JUNE, 2024.

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S.M. GITHINJI

JUDGE

In the absence of; -

1. Mr Kiseu for the Appellant
2. Mr Anaya for the Respondent

