Shiakamili & 2 others v Imbiakha & another (Civil Appeal 9 of 2020) [2023] KEHC 17960 (KLR) (2 June 2023) (Judgment)

Neutral citation: [2023] KEHC 17960 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 9 OF 2020

WM MUSYOKA, J

JUNE 2, 2023

BETWEEN

TIMOTHY SHIAVA SHIAKAMILI ..... 1ST APPELLANT

EBBY MIHESO SHIAKAMILI ..... 2ND APPELLANT

BERNADINE WEKESA ..... 3RD APPELLANT

AND

MAUREEN K. IMBIAKHA ..... 1ST RESPONDENT

JULIUS FELIX KISANYA ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. W. Lopokoiyit, Resident Magistrate, RM, delivered on 26 the November 2018, in Kakamega RMCCC No. 171 of 2017)

JUDGMENT

1. The suit before the primary court was by the respondents against the appellants, for compensation, for defamation, allegedly arising from remarks made on divers dates, in writing, by the appellants, written by the appellants, about and concerning the respondents. The communication allegedly published was that the 1st appellant had chanced upon the respondents engaging in sexual intercourse on October 28, 2016, within the compound of the school where they were working. The suit was opposed. The appellants filed a defence, dated July 4, 2017, where they averred that the impugned statements were accurate, represented what happened on October 28, 2016, and were not motivated by malice; the letters alluded to were written on the basis of information received in course of duty, and were subject to privilege; and that there was a pending suit, before the Employment and Labour Relations Court, filed by the respondents against the appellants, on the same subject matter.

2. A trial was conducted. The appellants and the respondents testified. The respondents called a witness.

3. The 1st respondent denied having sexual intercourse with the 2nd respondent on October 28, 2016, but conceded that she was interdicted over the claim, and appeared before the disciplinary board of her employer. She produced several letters to support her case. The 2nd respondent similarly denied having sex with the 1st respondent, and complained that his name had been tarnished in the eyes of school pupils, teachers, school management, and the general community. The 1st appellant testified that he found the respondents having sex in a classroom, and reported them to his superiors, and later wrote a statement for the purpose of his employer's disciplinary process. The 2nd appellant detailed the steps that she took after the report of the incident was made to her, inclusive of the records generated and the correspondence engaged in. The 3rd respondent testified on the investigations she conducted after the report was made, and how she received a decision from the employer to suspend the respondents for 1 month after finding them guilty.

4. In its judgment, of November 26, 2018, the trial court framed 2 issues for determination: whether the appellants had defamed the respondents, and the quantum of damages awardable, in the event of such defamation. The trial court concluded that the appellants had defamed the respondents, and awarded general damages of Kshs 1, 000, 000.00 and aggravated and exemplary damages of Kshs 200, 000.00.

5. The appellants were aggrieved, hence the appeal. They aver that actions of the appellants were official in nature and they were acting in their official capacity; the court relied on hearsay evidence; the defence of privilege was inappropriately ignored; the court relied on the testimony of a witness who lied to court; the conduct of the appellants was in accord with the Teachers Service Commission Code of Regulations for Teachers; the court ignored the relevant material on record, exhibited bias, and reached unsubstantiated and uncorroborated findings; the court failed to appreciate the circumstances of the matter and made findings whose effect would be to stifle the operations of the Executive within the law and regulations; the court failed to apply the principles relating to the tort of negligence; the court misconstrued the concept of publication of a defamatory statement; the court veered off course and questioned, without jurisdiction, the disciplinary proceedings conducted by the 2nd and 3rd appellants; among others.

6. Directions were given on May 26, 2022, for disposal of the appeal by way of written submissions. Both sides have complied. I have written submissions herein filed by the appellants on August 13, 2022, dated August 15, 2022, and by the respondents on Otober 17, 2022, dated October 14, 2022. I have read through the written submissions and noted the arguments made.

7. This is a case of defamation. The offending words relate to what the 1st appellant claimed he witnessed on October 28, 2016, happening between the respondents, which he then reported to his superiors, and the same was then escalated to the 2nd and 3rd respondents. The suit herein relates to events on November 15, 2016, January 6, 2017, January 27, 2017, April 7, 2017 and April 27, 2017, when utterances were allegedly made, in oral and written form, by the appellants relating to the respondents. The remarks allegedly made on November 15, 2016 were attributed to the 2nd appellant, at a meeting of the Board of Management of the school, where the 1st appellant, the 2nd appellant and the respondents were teachers. The utterances were made orally. The events of January 6, 2017, relate to a meeting summoned at the school by the 2nd and 3rd appellants, where the issue of the events of October 28, 2016 was raised, the respondents were given time to respond. January 27, 2017 was when a notice to show cause letter was written to the appellants by the 3rd appellant, where the allegations relating to the events of October 28, 2016 were repeated. April 27, 2017 was when a disciplinary panel of the respondents' employer met, and deliberated on the matter, and they were subsequently interdicted. There were other proceedings thereafter, which led to the suspension of the respondents, and the filing of the suit at the Employment and Labour Relations Court.

8. I have perused the record herein. The matter herein was handled by the 2nd and 3rd appellants in their official capacity. The respondents appeared before panels, they were interdicted and their employer resolved to sanction them by way of suspension for 1 month, after which they were transferred to other schools. The utterances, that sparked off these proceedings, were found to be true, by the employer, and the respondents were punished for it. The respondents have stated that they are actively challenging the outcome at the Employment and Labour Relations Court. The respondents did not provide any evidence that demonstrated that the offending words were published beyond official channels, to persons other than those who were supposed to hear them, in the course of disciplinary or related official proceedings. There was no evidence that there was publication to school pupils, teachers, school management, and the general community.

9. Since these matters were subject to official disciplinary and related proceedings, the offending words were made under privileged circumstances. That being the case, they could not found a basis for a suit for defamation. Indeed, this is a suit that the trial court should have been reluctant to hear, given that authorities higher than the parties hereto were pursuing the matter. There was a danger of various tribunals coming up with contradictory findings. The trial court herein found the remarks to be untrue, while the proceedings by the parties' employer found them to be true, and punished the respondents for it by suspending them. The finding by the employer's tribunal or panel is subject to active litigation before the Employment and Labour Relations Court, and should that court uphold the decision of the employer's tribunal, then the courts would have taken 2 mutually inconsistent positions. These were matters that were properly before the disciplinary channel availed for employees under their relevant law governing their employment. The trial court herein should not have ventured to deal with the issues prior to that process being exhausted.

10. In view of everything that I have said above, I find that the appeal herein has merit. The alleged publication of the utterances complained about was made under privilege. Consequently, I find that the trial court should have found that the appellants were protected by privilege, and dismissed the suit. I, accordingly, allow the appeal herein. The final orders, in the judgment of November 26, 2018, are hereby vacated, and substituted with an order that Kakamega CMCCC No 171 of 2017 is dismissed. Each party shall bear their own costs, both here and at the court below.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 2ND DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr Erick Zalo, Court Assistant.

Appearances

Ms Edwiq Musundi, Advocate for the appellants.

Ms Nafuye, instructed by KN Wesutsa & Company, Advocates for the respondents.