REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 182 OF 2018

JOYCE WAMBUI NJUGUNA.....APPELLANT

=VRS=

PAUL IHUNGO KAHENYA.....RESPONDENT

{Being an appeal against the Ruling of Hon. K. M. Njalale - SRM Limuru dated and delivered on the 11h day of December 2018 in the original Limuru Senior Principal Magistrate's Court Civil Case No. 142 of 2013}

JUDGEMENT

By a plaint dated 30th April 2013 the appellant sued the respondent for general and exemplary damages for defamation. Her case was however dismissed with costs to the respondent. Her appeal to this court is premised on the following grounds: -

> **"1. THAT the learned magistrate gravely erred in law by misdirecting herself and or failing to appreciate the import of Section 3 and 4 of the Defamation Act CAP 36 Laws of Kenya.**
>
> **2. THAT the learned magistrate erred in fact and in law in finding that the words uttered by the Respondent was of abusive nature and did not meet the threshold of being defamatory.**
>
> **3. THAT the learned magistrate gravely erred in fact and in law in failing to address and or comprehend the totality of the appellant's case which was the demeaning, highhandedness, unwarranted and unreasonable approach by the respondent in dealing with the appellant who was discharging her public duties.**
>
> **4. THAT the learned magistrate erred in law in failing to protect the appellant from the indignity visited on her by the Respondent and primarily in failing to vindicate the appellant's pain of being called unchaste.**
>
> **5. THAT the learned magistrate failed in her sacred calling as an impartial umpire to adjudicate and arbitrate over the injustices meted out on the appellant by the respondent and also failing to take judicial notice of the reasons behind the previous Ex parte judgement delivered on the 13th May 2015 in favour of the appellant (though set aside to allow inter parties hearing).**
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> **6. The learned magistrate gravely erred in law in failing to address all the serious issues raised by the appellant in her submissions and equally failed to address herself to the authority tendered in support of the appellant's case for whatever its worth.**
>
> **7. The learned magistrate erred by meting out an injustice on the appellant in her judgement when she posited in the tail end of her judgement thus *"To do so would in my view open floodgates for other members of the public who feel aggrieved to bring defamation matters before court instead of possibly filing criminal charges against the alleged perpetrators."***

By the appeal it is urged that this court be pleased to set aside the judgement of the lower court, substitute it with a finding that the appellant proved her case against the respondent and award her damages on all heads as pleaded together with the costs of the suit and of this appeal.

The background of the case is that on the material day the appellant who is employed by the Kiambu County Government as a parking attendant was going about her duties along the Limuru – Kwambera Road near Tea Land Hotel which is owned by the respondent when the respondent arrived and parked his vehicle Registration No. KBL 342B and walked away without paying the parking fee. Just then two Municipal Council officers who were on duty arrived and told a lady at the hotel to pay parking fees for that vehicle and also vehicle Registration KBE 614G which was parked next to it. The lady obliged but paid only for vehicle KBE 614G necessitating clamping of the

respondent's vehicle KBL 342B by the two Municipal Council officers. It was then that the respondent allegedly went to the scene and started hurling insults at the appellant and called her: -

> ***"s******, hana akili, anakaa kama m***, hawezi kumliza, M***** na nitamkanyaga na gari".***

According to the appellant not only were the words annoying and without foundation but they also embarrassed her, demeaned her and injured her reputation before members of the public who were present. At the hearing she called George Migwi Gatonye who testified that on that day he and his colleagues were at their place of work at Iko Hotel next to Tea Land Hotel and that he heard the respondent calling the appellant the words complained of. He confirmed that the appellant was a parking attendant and that as the respondent called her those names he (the respondent) was gesturing at her to unclamp his motor vehicle. He testified that he had known the appellant for 1 ½ years and the publishing of the words complained of by the respondent did not change his perspective of her. He also confirmed that the respondent published the words in the presence of many members of the public and named some of them as Alex, Macharia, Loice and Lucy.

On his part, the respondent conceded he was the proprietor of Tea Land Hotel and also admitted that on 22nd February 2013 at around 9am he parked his motor vehicle KBL 342B right outside his hotel. He testified that a few minutes later he left to Limuru Town only to be called by his wife who informed him that his motor vehicle had been clamped. He rushed back to his hotel and found his wife who told him that the parking attendant had gone to their hotel and requested for parking fees for motor vehicle KBE 614G belonging to a customer but not his car. He stated that he called the parking attendant who had clamped his car and told her the clamping was a mistake as it was her who did not collect the parking fee of Kshs. 30/= from the hotel as she usually did. He stated that he asked her to unclamp the car but she refused and so he decided to go to Limuru Municipal Council offices to file a complaint and to seek the intervention of her superiors. He said he returned with two Municipal askaris who requested her to unclamp the car but she still refused and it was not until 11.30am when a Mr. Kingori intervened that his vehicle was unclamped. He stated that the appellant was evidently not happy with that intervention. He stated that the appellant had worked in that area for quite some time and she therefore knew what vehicle belonged to him. He stated that he had had a dispute with her the previous year and he had reported her to her superiors and that this case was motivated by vendetta to get even. He denied that he hurled insults at her as alleged or that he published the words complained of.

This appeal was canvassed by way of written submissions.

I have carefully considered the grounds of appeal, the rival submissions, the cases cited and the law and as the first appellate court reconsidered and evaluated the evidence in the trial court while keeping in mind that I did not see or hear the witnesses myself.

This being an action for defamation and more especially slander the appellant was required to prove the following on a balance of probabilities: -

> **(a) That the respondent published the words complained of.**
>
> **(b) That the respondent published the words of and concerning her.**
>
> **(c) That the words were defamatory.**
>
> **(d) If the words are not actionable perse that she suffered damage.**

In the judgement the trial Magistrate found it a fact that the respondent published the words complained of and that he did so of and concerning the appellant. The trial Magistrate stated: -

> ***"……. I have found no reason to doubt that the Defendant uttered the said words to the plaintiff as have (sic) been claimed, corroborated and proved……..."*** **(See page 4 of the judgement at page 74 of the Record of Appeal).**

I agree with this finding of fact. This is because the appellant gave evidence which was corroborated by an eye witness and also largely by the respondent himself. The respondent admitted that on the material day there was an incident between him and the appellant. Unlike the appellant whose evidence was corroborated in all material particulars the respondent did not call any witness and the appellant's evidence which was not therefore rebutted was more convincing. The appellant adopted as evidence her statement in which she fully set out the words complained of and it is therefore not correct to state that her evidence in-chief differed with her testimony in cross examination. I am satisfied that the appellant proved her case on a balance of probabilities and that the respondent indeed published the words complained of of and concerning her and her action was not actuated by a vendetta to get even as alleged by the respondent. The trial Magistrate dismissed the appellant's action because in his words: -

> ***"These words however have not met the threshold of being defamatory……***
>
> ***Instead, the words are of an abusive nature. As I have stated above, abusive words do not necessarily have to be defamatory. In this case, it is not a case where there was any imputation on the reputation of the plaintiff. Whereas certain people (like Pw2) may have been surprised by the words uttered by the Defendant, that alone in my view would not meet the threshold of the defamation in order to attach liability on the Defendant for injury caused to the plaintiff…… As stated hereinabove, defamation is not about publication of falsehoods or abuses against a person hence it is necessary to show that the published falsehoods and/or abuses disparaged the reputation of the plaintiff or tended to lower the person in the estimation of right thinking members of society generally. Therefore an injurious falsehood and/or abuse, though actionable may not necessarily be an attack on the plaintiff's reputation so as to elevate it to the tort of defamation. To do so would in my view open floodgates for other members of the public who feel aggrieved to bring defamation matters before court instead of possibly filing criminal***

charges against the alleged perpetrators."

It is my finding that the trial Magistrate misdirected himself on the law. To begin with, each case must be determined on its own facts and merits and that ***"it would open a floodgate for others to bring similar claims"*** is not a ground to dismiss a case if it is proved to the required standard. Secondly, to call a woman ***"m*****"*** and ***"n******"*** which mean prostitute or woman who loiters with intent or woman of loose morals are not mere insults. The words are defamatory firstly because they impute the commission of a criminal offence punishable by a term of imprisonment ***(see Section 154 of the Penal Code)*** and secondly because they impute unchastity upon the woman. It is also evident from the circumstances of this case that the respondent published the words intending to disparage, ridicule and disgrace the complainant in her office. **Section 3 & 4 of the Defamation Act** provide that: -

"3. Slander affecting official, professional or business reputation

In any action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

4. Slander of women

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: Provided that in any such action a plaintiff shall not recover more costs than damages unless the court shall certify that there was reasonable ground for bringing the action."

From the above provisions of the law it is clear that to succeed the appellant was not required to prove special damage. In other words, the slander was actionable *per se.* I find therefore that the trial Magistrate erred in dismissing the action. In the premises this appeal succeeds and the finding of the trial Magistrate that the action was not proved is set aside and substituted with one to the effect that the appellant proved her action on a balance of probabilities and was entitled to damages.

As regards the damages the trial Magistrate did not assess the same although he ought to have done so and it is left to this court to do so. At the trial Counsel for the appellant proposed general damages of Kshs. 350,000/- and aggravated damages of Kshs. 100,000/-. Counsel relied on the case of **Emmanuel Omenda v Safaricom Ltd [2012] eKLR** and also **Abraham Kipsang Kiptanui v Francis Mwaniki & 4 others**.

Counsel for the respondent on his part proposed an award of Kshs. 20,000/- I note that earlier in the ex-parte judgement the appellant was awarded Kshs. 100,000/- general damages and Kshs. 50,000/- aggravated damages.

In the case of **Rose Okinyi v Dinah Kerebi Nyansinga [2020] eKLR** which was on all fours with this case I awarded the appellant a sum of Kshs. 60,000/- as general damages and a similar amount was awarded in the case of **Janel Mithiki & another v Monica Kalingu [2020] eKLR.** The above cases were decided almost a year ago and considering the passage of time I am satisfied that an award of Kshs. 100,000/= as general damages is fair and reasonable.

As regards aggravated damages it was held in the case of **Francis Xavier Ole Kaparo v The Standard & 3 others HCC 1230 of 2004 (unreported)** that: -

"Malicious and/or insulting conduct on the part of the defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors. The plaintiff, who behaves badly, as for example by provoking the defendant or defaming him in retaliation, will be viewed less favourably; a defendant who behaved well e.g. by properly apologizing, will be treated with favour. Damages will be aggravated by the defendant's improper motive i.e. where it is actuated; repetition of the libel; failure to contradict it; insistence on a flimsy defence of justification; and a non-apologetic cross-examination are matters that will aggravate damages."

The above principle was followed by Odunga J in **Emmanuel Omenda v Safaricom Ltd [2012] eKLR** where he held that: -

"Aggravated damages, on the other hand, are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances."

I am not persuaded that in this case there were aggravated circumstances that would entitle the appellant to aggravated damages. There is nothing in the evidence to demonstrate that the defamation was actuated. I shall therefore not award any but had I done so it would have been Kshs. 50,000/-.

In the upshot the appeal succeeds and there shall be judgement for the appellant against the respondent as follows: -

(a) General damages for slander Kshs. 100,000/-.

(b) Interest at court rates from the date of judgement in the trial court.

(c) The costs of the suit in the court below and the costs of this appeal.

It is so ordered.

JUDGEMENT SIGNED AND DATED AT NYAMIRA THIS 24TH DAY OF FEBRUARY 2021.

E. N. MAINA

JUDGE

JUDGEMENT SIGNED, DATED AND DELIVERED ELECTRONICALLY AT KIAMBU VIA MICROSOFT TEAMS THIS 9TH DAY OF MARCH 2021.

MARY KASANGO

JUDGE