REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 9 OF 2019

CHRISTOPHER RUSANA.....APPELLANT

VERSUS

ROYAL MEDIA SERVICES LTD. T/A CITIZEN TV.....RESPONDENT

[Being an appeal from the Judgment of the Hon. A.A. Odawo (SRM)

dated 19th December 2018 in the orginal Kisumu CMCC No. 69 of 2013]

JUDGMENT

The appeal before me arises from the Judgment which the learned trial magistrate delivered on 19th December 2018, when she dismissed the Plaintiff's suit.

1. The Plaintiff, **CHRISTOPHER RUSANA**, had instituted proceedings against the Defendant, **ROYAL MEDIA GROUP**, Trading As **CITIZEN TV**, following the alleged airing of a story on the 9p.m evening news, on 3rd August 2012.

2. It was the Plaintiff's case that the words broadcast in the story were untrue, false and unverifiable.

3. As the words in question were said to have shuttered the Plaintiff's reputation, he sought General, Exemplary and Aggravated damages for libel.

4. Following the dismissal of the suit, the Plaintiff asked this court to find that the trial court had erred, in law, by failing to allow the Plaintiff to call an expert witness who was to testify on his behalf.

5. It was the Plaintiff's case that the learned trial magistrate ought to have utilized the court's power, so as to compel the expert witness to attend court to give his evidence.

6. As far as the Appellant was concerned, once he had taken out Summons directed at the expert witness, requiring him to attend court, it was thereafter the obligation of the court to compel the witness to attend court.

7. In the circumstances, the Appellant asked the court to set aside the dismissal of the suit, and then order that the suit be re-opened for hearing afresh.

8. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. However, at all material times, I am enjoined to bear in mind the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses whilst they were giving evidence.

9. Each of the parties called one witness.

10. The Plaintiff testified that on the material date, being 3rd of August 2012, the Citizen TV aired a news item at 9p.m, about some demonstrations at Kondele.

11. He said that on the material date there was a demonstration by matatu operators, who were protesting against a police crackdown.

12. However, the Defendant is said to have stated that Small-scale traders had demonstrated against the Plaintiff.

13. As there was no correlation between the demonstrations by the matatu operators and the Plaintiff, it was the Plaintiff's case that the news' item was motivated by malice against him.

14. Secondly, because there was no demonstration by traders, allegedly because of an unprocedural increment of the rates charged by the Kisumu Town Council, the Plaintiff testified that the news item in question was accentuated by malice and bad faith, with the sole purpose of portraying the Plaintiff in bad light, as a poor public administrator who lacked integrity.

15. In its Defence, the **ROYAL MEDIA SERVICES LIMITED** first stated that it was **NOT** the **ROYAL MEDIA GROUP LIMITED**.

16. And in respect of the news item in question, the **Royal Media Services Limited** (RMS) denied having broadcast or aired or published the news item which was the subject matter of the suit.

17. DW1, **NJENGA NJIHIA**, testified that the Defendant did not ever broadcast the tape or clip alluded to by the Plaintiff.

18. In his written Witness Statement **DW1** challenged the Plaintiff to produce in evidence, the alleged tape or clip.

19. When canvassing his appeal, the Appellant drew the court's attention to his application dated 11th December 2015, seeking to compel **RAPHAEL MULWA** to produce the video clip in contention.

20. The Appellant pointed out that the said **RAPHAEL MULWA** had been severally served with hearing notices, to attend court for the purposes of testifying.

21. It was the Appellant's case that he was forced to seek the assistance of the court, because Mulwa adamantly refused to come to testify in court.

22. The Appellant said;

> ***"Raphael Mulwa or any employee from Infotrak Research and Consulting Company's evidence was vital and crucial since the substratum of this case is DEFAMATION based on the CD Clip supplied by them to us."***

23. Notwithstanding the acknowledgement that the video clip was a central pillar of his case, the Appellant closed his case without producing the video-clip in evidence.

24. According to the Appellant, the trial court should have compelled Mulwa to attend Court.

25. The Appellant deems it unfortunate that the trial court locked out his witness, who was meant to produce the critical evidence, by denying the adjournment sought by the Appellant.

26. In support of his appeal the Appellant cited the case of **DAHIR SADIK AUSAAD Vs MODOGASHE CONSTRUCTION LTD. & 3 OTHERS [2016] eKLR**. As the Appellant noted, the learned Judge who determined that case held as follows;

> ***"This Court has powers to issue summons to witnesses to attend a trial. That is done on the application of any party. It is also done after the case has been certified as ready for hearing."***

27. The learned trial magistrate appreciated that she had the requisite judicial authority to issue Witness Summons, and in the exercise of that authority the trial court issued Summons directed at **RAPHAEL MULWA**.

28. Notwithstanding the said Summons, Mulwa failed to turn up in court to give evidence.

29. From the record of the proceedings, it is evident that on 19th October 2018, the suit was scheduled for further hearing. On that date, the Plaintiff expected that Raphael Mulwa would testify in support of his case. However, Mulwa failed to turn up in court.

30. Mr. Emukule, the learned advocate for the Plaintiff informed the trial court that Mulwa was unable to make it to court, because Mulwa was spearheading some research. In the circumstances, the Plaintiff sought an adjournment of the case.

31. The application for an adjournment was opposed. Mr. Karanja, the learned advocate for the Defendant pointed out that the trial court had, previously already given *"the last adjournment"* on the following four occasions;

(i) 19th August 2015;

(ii) 13th November 2015;

(iii) 2nd March 2018; and

(iv) 20th April 2018.

32. After giving due consideration to the Plaintiff's application for an adjournment, the learned trial magistrate expressed herself thus;

> ***"This court has granted adjournments several times. It would appear that the plaintiff is not keen on expeditiously concluding this matter.***
>
> ***In as much as locking out a witness is draconious,***
>
> ***I am of the view that justice cuts both ways. It is unfair to be dragging and stringing the defendant along for all these years. Application for adjournment is hereby denied."***

33. Immediately after the trial court rejected his application for an adjournment, the Plaintiff closed his case.

34. Thereafter, the Defendant called his witness, who then gave his evidence on the same date.

35. When the Defendant had closed its case, the parties filed their respective submissions.

36. In his submissions the Plaintiff urged the trial court to enter judgment in his favour. By making those submissions, the Plaintiff must be deemed to have been convinced that notwithstanding his failure to produce the video clip in evidence, he had still proved his case beyond any reasonable doubt.

37. However, the Plaintiff now appears to be acknowledging that without the video clip which contained the allegedly defamatory statements, he had not yet proved his case.

38. The reason for the Plaintiff's failure to produce the video clip is that the trial court rejected his application for an adjournment on the day when the critical witness failed to attend court.

39. In effect, the basis for the Appellant's complaint herein was the decision to reject his application for an adjournment.

40. That decision was not made in the Judgment that was delivered on 19th December 2018.

41. The rejection of the Plaintiff's application for an adjournment was pronounced on 19th October 2018. Therefore, if the Plaintiff wished to challenge the Ruling dated 19th October 2018, he should have done so.

42. Instead of lodging an interlocutory appeal, the Plaintiff chose to proceed with the trial to its logical conclusion. And when his case was dismissed, the Plaintiff filed an appeal because he was dissatisfied with the Judgment dated 19th December 2018. In his Memorandum of Appeal dated 22nd January 2019, the Plaintiff expressly and unequivocally identified the Judgment dated 22nd January 2019, as the object against which he had preferred the appeal.

43. I find and hold that in the appeal before me there is no basis in law, for challenging the Ruling made by the trial court on 19th October 2019. Indeed, the Appellant has expressly made it abundantly clear that;

> ***"It is against this judgement dated 19.12.2019 that the appellant now appeals."***

44. I therefore find no basis for challenging, in this appeal, the Ruling made on 19th October 2018.

45. In any event, the learned trial magistrate did, on 16th of March 2016 grant orders for the issuance of a Witness Summons directed at **RAPHAEL MULWA**, requiring him to give evidence and to produce in evidence the

> ***"CD clip of the 9.00 O'clock (evening) news on 03/08/2012 by Citizen concerning the false and malicious story entitled the riots by the matatu operators about plaintiff/applicant."***

46. By granting that order, which was sought by the Plaintiff, I find that trial court is now being falsely accused of failing to allow the Plaintiff to call the expert witness of his choice.

47. Secondly, I find no merit in the Appellant's contention that the trial court failed to use its power to summon witnesses to attend court, so that they could present the Plaintiff's crucial evidence. The Appellant did not indicate what specific action the trial court ought to have taken, but which the court failed to take.

48. In my understanding of the relevant procedures, the Plaintiff ought to have extracted the Witness Summons, and then served the same on Raphael Mulwa.

49. If Mulwa was served with the summons and he failed to attend court, in compliance with the said summons, the Plaintiff could then

have moved the court by an application to impose a fine upon the defaulting witness.

50. Unless the court is moved appropriately, it would never know whether or not the witness had been served with the requisite summons.

51. Furthermore, the Plaintiff herein would have been required to demonstrate to the trial court that he had deposited the Witness Expenses in court, in compliance with the orders of the trial court.

52. The Appellant did not satisfy this court that he had served the Witness with Summons, and also deposited the Witness Expenses in court.

53. Meanwhile, I also take note of the contents of *"Exhibit E O – 2"* which was annexed to the Plaintiff's application dated 11th December 2015. The said document is an email message from Raphael Mulwa (the witness), to the Plaintiff's advocates.

54. The pertinent portion of the email reads as follows;

> ***"We usually discard our records after three years unless there is a request from our clients to preserve the information. We have thus been unable to verify the authenticity of the sent clip.***
>
> ***In light of the foregoing, we are not ready to be embarrassed in court during cross-examination and thus decline your request to produce the clip."***

55. In her ruling, in respect to the application for Witness Summons, the learned trial magistrate said that the fear of embarrassment is not a satisfactory reason for a witness to avoid producing any documents.

56. In that regard, I am in agreement with the trial court.

57. But I wish to emphasize the reasons why the witness thought that he could be embarrassed if he attended court.

58. The client had not requested Infortrak to preserve the information. Therefore, the information had been discarded, as was the practice of Infotrak, pursuant to which documents were discarded after 3 years.

59. In the absence of their own records, the witness made it clear that he would be unable to verify the authenticity of the clip: that was the reason which the witness would find embarrassing.

60. In my considered opinion, even if the case were to be re-opened, the witness would still be unable to verify the authenticity of the clip, as their own documents had been discarded.

61. For all those reasons, I find that there is no merit in the appeal. It is therefore dismissed, with costs to the respondent.

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **13th** day of **July** 2021

FRED A. OCHIENG

JUDGE