



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 33 OF 2017

(Appeal arising from the judgment and decree in Mumias PMCCC No. 20 of 2013,

by Hon. S. Nambafu Sindani, Resident Magistrate (SRM), of 3rd March 2017)

REV. PHILIP J. MAKOKHA OPWORA.....APPELLANT

VERSUS

CHRISTOPHER OTIENO MULIRO.....RESPONDENT

JUDGMENT

1. The suit in the primary court was by the appellant, claiming damages for defamation of character and costs. The basis of the suit was that the respondent at a funeral ceremony, while addressing mourners uttered words, whose effect was defamatory of the appellant. The respondent denied liability. A trial was conducted, and the trial court was not persuaded that the words used were defamatory, and dismissed the suit. The appellant was aggrieved hence the instant appeal. The appeal raises only two grounds: that the court only considered the case as presented by the respondent and the trial court did not apply the relevant pertinent judicial principles precedents and trends with regard to defamation.

2. The appellant essentially argues that his case was not considered by the trial court, as the judgment dwelt mainly on the testimony of the respondent. I have gone through the judgment. Pages 1, 2 and 3 were devoted to analyzing the testimony of the appellant and his witnesses; while the defence was considered only at page 3. The trial court considered the fact that the respondent did not mention the appellant by name, and to that extent it cannot be said that he was specifically talking about him. The appellant said that the respondent was pointing at him, and that was confirmed by PW2 and PW3, and to that extent, it would mean that the person being referred to was the appellant.

3. The words uttered according to the appellant are the Kiswahili words set out in his plaint. A thief, a witch, a person misusing his position and wealth to take advantage of other people. When he testified, PW2 did not repeat the words that the appellant had mentioned. Indeed, from the record the exact Kiswahili words used are not recorded. He merely said that the respondent had said that he had conned his uncle to sell him land, and had bribed people to dig the grave at the wrong spot. PW3 testified that the respondent had referred to the appellant as stupid, and a con, and was using alcohol to deceive people to sell land to him. In his testimony the respondent largely denied that whatever the appellant and his witnesses were saying ever happened.

4. The elements of defamation are well settled in such cases as *J. Kudwoli vs. Eureka Educational and Teaching Consultants & 2 Others HCC 126/90* (Kuloba J), and *Wycliffe A. Swanya vs. Toyota East Africa Limited & Francis Massa Nairobi CA NO. 70 of 2008*, that **the key elements of defamation which must be proved are that the matter of which the plaintiff complains is defamatory in character; that the defamatory statement or utterances was published by the defendant, and that defendant's publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed, that it was published maliciously and, in slander, subject to certain exceptions, that the plaintiff has suffered special damages.**

5. The other thing to note is that the tort of defamation which is the subject of these proceedings was slander. A distinction between the two was drawn in *Halsbury's Law of England* 4th edition Vol. 28 on **liberal and slander**, as follows:

“12. A slander for which an action will lie is defamatory statement if made or conveyed by spoken words, sounds, looks, signs, gestures, or some other non-permanent form, published of and concerning the plaintiff to a person other than the plaintiff, by which the plaintiff has suffered actual damage, often referred to as special damage, which he must allege and prove or which is actionable per se.

13. Distinctions between libel and slander. There are two chief distinctions in practice between libel and slander, or broadly

speaking, between written and spoken defamation.

(1) Every actionable libel can be dealt with by either civil action or criminal proceedings, whereas no slander, even though actionable, is as such a criminal offence unless it contravenes the law as being, for example, obscene, blasphemous or seditious, or a contempt of court.

(2) No special damage need be alleged or proved in an action for libel, whereas, unless the defamatory words complained of are actionable per se, no action of slander will lie if the plaintiff does not both allege and prove that he suffered actual damage.”

6. See also *Clement Muturi Kigano vs. Joseph Nyaga [2010] eKLR (Mwera J)*.

7. However, the position stated in *Halsbury's Law of England*, and which the court relied on in *Clement Muturi Kigano vs. Joseph Nyaga [2010] eKLR (Mwera J)*, states the English Common Law position. The Kenyan law on defamation is statutory, based on the Defamation Act, Cap 36, Laws of Kenya, which largely codifies the English Common Law position, except that under statute there is no requirement of proof of special damage with respect to slander.

8. The trial court correctly identified the issues for determination, whether the words uttered were directed at the appellant, and whether they were defamatory. The said words were no doubt directed at the appellant, for he said that the respondent made the utterances while pointing at him. The fact that the respondent pointed at the appellant while making those remarks was repeated by PW2 and PW3. Were the words defamatory? The appellant, PW2 and PW3 were specific that the appellant was described as a con.

9. Applying the test stated in *J. Kudwoli vs. Eureka Educational and Teaching Consultants & 2 Others HCC 126/90 (Kuloba J) and Wycliffe A. Swanya vs. Toyota East Africa Limited & Francis Massa Nairobi CA No. 70 of 2008*, it would be clear that the utterances by the respondent were defamatory. They painted the appellant in bad light. As a conman, and person who was acquiring property from poor villagers using trickery. The defamation was published by the respondent. He was said to have made the utterances in his remarks at a funereal when he was given a chance, in his capacity as Chief, to address mourners. The funeral ceremony was said to have been attended by some five hundred or so people, and, therefore, the publication was to that large crowd. The remarks must have been done maliciously as they related to a topic which had nothing to do with the occasion, a burial. The choice of words used point such malice. It would be my view that the appellant herein was slandered and was entitled to damages.

10. In terms of quantum, the appellant is an ordained minister of the gospel, and the remarks must have embarrassed him in the eyes of the community, even if he plied his trade in Nairobi. The burial was happening in the neighbourhood of his home, and the persons who heard the remarks were immediate neighbours. Being described as a conman, a witch and a person who exploited the poor to his ends, does not bode well for good neighborliness. The trial court should have found for the appellant. He had set up a case that meet the threshold of proof on a balance of probability. I would have assessed and awarded damages at Kshs. 250, 000.00. The respondent was a public official, who used his position to defame a member of the public at a public gathering, and should have known better

11. Consequently, I hereby find that the appeal herein is merited. I shall allow it. The judgment of the trial court is set aside, and it is substituted with a decree that the appellant had established a claim for slander against the respondent, and a judgement is entered therefor for a sum of Kshs. 250, 000.00 general damages. The appellant shall have the costs of this appeal and of the suit at the court below. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE