



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 614 OF 2016

JACOB MULU MUTUAAPPELLANT

-VERSUS-

JUBILEE INSURANCE CO. LTD.....RESPONDENT

(Being an appeal from the original proceedings and Judgment of the Senior Resident Magistrate Honourable I Orenge at Milimani commercial Courts, Nairobi in CMCC 7485 of 2013 which said Judgment was delivered on the 28th day of September 2016)

JUDGMENT

1) Jacob Mulu Mutua, the Appellant herein, filed an action against Jubilee Insurance Co. Ltd the Respondent, before the Chief Magistrate's court, vide the plaint dated 28th November, 2013 whereof he claimed damages for breach of contract and for defamation. Hon Orenge. Learned Senior Resident Magistrate heard the suit and had it dismissed.

2) The Appellant being aggrieved, preferred this appeal and put forward the following grounds:

i) THAT the learned trial Magistrate erred and misdirected himself in delivering a Judgment which was wholly against the weight of evidence.

ii) THAT the learned trial Magistrate erred and misdirected himself in law and fact in delivering a Judgment in favour of the Respondent when it had not adduced any evidence in support of its allegation that the Plaintiff's illness was as a result of the consumption of alcohol.

iii) THAT the learned Magistrate erred and misdirected himself by failing to note that although the Appellant admitted to be an occasional consumer of alcohol his illness had nothing to do with alcohol consumption.

iv) THAT the learned Magistrate erred in Law and in fact by failing to take into consideration that the Appellant's reputation, character and standing among his family members and friends were gravely damaged by the Respondent's agents publication.

v) THAT the learned Magistrate erred in Law as in fact in failing to appreciate that the Respondents actions were malicious, careless and reckless and they were only meant to form a basis for refusal to pay Appellant's medical bill.

vi) THAT the learned Magistrate erred and misdirected himself in delivering a Judgment in favour of the Respondent when the doctor had denied having recommended that the illness was alcohol related and more so when no employee or agent of Respondent gave evidence in support of its claim.

vii) THAT a Supplementary memorandum of Appeal will be filed herein upon the receipt of certified copies of the proceedings and Judgment of the learned Magistrate.

3) When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent ordered to have the appeal disposed of by written submissions. At the time of writing this Judgment, the Appellant was the only party who had filed his submissions.

4) I have re-evaluated the case that was before the trial court. I have also considered the appellant's submissions. The appellant's case before the trial court was supported by the evidence of two witnesses. Jacob Mulu Mutua (PW1) told the trial magistrate that he was taken ill on 28th August 2013 and was thereafter admitted at Agha Khan University Hospital, Nairobi. PW1 said that upon being discharged his medical Insurer, the Respondent herein declined to settle the medical bill on the basis that his ailment was caused by alcoholism which was not covered by the Insurance policy.

- 5) PW1 further stated that the medical report was made public thus injuring his reputation. He also averred that there was no evidence indicating that the disease was alcohol related.
- 6) Maggie Muthoka (PW2) stated that the appellant was her younger brother. PW2 stated that when he presented the Appellant's medical card to settle PW1's medical bill, the insurance company (Respondent) declined to pay claiming that the Appellant's insurance policy did not cover alcohol related illnesses.
- 7) PW2 stated that the Appellant's relatives were embarrassed. She said she was shocked by the allegation that the Appellant's ailment was due to alcoholism yet there was no evidence to prove that.
- 8) PW2 further averred that the family was forced to raise funds to settle the Appellant's medical bill which stood at ksh. 258,666/=.
- 9) The Respondent summoned, Dr. Leonard Mzee (DW1) to testify in support of its case. DW1 told the trial court that he examined the Appellant and found that his liver to be high 570 units per litre way above that of a normal person which is 50 units per litre. DW1 produced a medical report he prepared on the Appellant.
- 10) In cross-examination DW1 stated that he did not carry out tests for alcohol and that there was no evidence of alcohol on the patient (Appellant). He also stated that he did not recommend that the patient's sickness was alcohol related.
- 11) Upon taking into account the aforesaid evidence, the learned senior Resident Magistrate came to the conclusion that the Appellant had failed to establish his claim and proceeded to dismiss the action.
- 12) Though the Appellant put forward a total of seven (7) grounds of appeal, it is apparent the main issue which commends itself for determination is whether the Appellant's suit was properly determined. It is the Appellant's submission that he tendered credible and sufficient evidence which established that he was defamed by the Respondent.
- 13) The Appellant further argued that he presented evidence showing that the Respondent breached the contracts of insurance.
- 14) On the question as to whether the Appellant was defamed, the Appellant gave the particulars of **defamation** and **malice** in paragraphs 6 and 7 of the plaint respectively. It is not in dispute that the Respondent informed DW1 that it could not pay the Appellant's medical bill because his illness was alcohol related and was therefore not covered by the medical Insurance policy.
- 15) The information was disclosed to a third party namely Maggie Muthoka (DW1). The information depicted the Appellant as irresponsible and a drunkard. The information was not backed by the medical report produced by Dr. Leonard Mzee (DW1).
- 16) DW1 told the trial court that there was no evidence that the Appellant's sickness was alcohol related. The information was therefore false.
- 17) With respect, I agree with the submissions of the Appellant that the information was made by the Respondent with the sole intention of avoiding the insurance policy. In the circumstances, malice can be inferred on the part of the Respondent.
- 18) I am convinced that the Appellant presented evidence which proved his case to the required standards in Civil cases i.e on a balance of probabilities.
- 19) The learned senior Resident Magistrate therefore erred by dismissing the Appellant's case. In short, the Appellant established the particulars of defamation and also, that the insurance contract was breached. Consequently, the order dismissing the suit is hereby set aside and is substituted with an order entering Judgment.
- 20) As regards, damages, the learned Senior Resident Magistrate stated that had the Appellant succeeded in proving his case, he would have awarded him a sum of ksh 800,000/= as damages for defamation.
- 21) The Appellant urged this court to enhance the award to ksh. 2,500,000 since the awards in the case law cited were made more than 10 years ago.
- 22) It is not in dispute that the trial magistrate relied on two cases in assessing damages. The first case is that of **Jared Omonde Kisera t/a Omonde Kisera & Co. Advocates Vs Ken Omondi & 2 others Nairobi H.CC. No 160 of 2001** (unreported) in which this court awarded ksh. 800,000/=.
- 23) The second case is that of **George Shane Okoth t/a Okoth & Co. Advocates Vs The Standard Ltd H.CCC no 12 of 2009** in which this court awarded ksh. 1,500,000/=.
- 24) It is not in dispute that the awards in the cited authorities were made more than 10 years ago. Taking into account the inflationary trends, I think it will be unfair to keep on making the same award. I am satisfied that an award of ksh. 2,000,000/= is reasonable.
- 25) In the plaint, the Appellant specifically pleaded to be paid a specific sum of ksh. 270,216 in respect of the medical fees and transport expenses he incurred when the Respondent declined to settle the Appellant's medical bill. At the trial, the Appellant produced receipts to prove the aforesaid expenditure. I am satisfied he is entitled to the claim.

26) In the end, this appeal is allowed. Consequently, the order dismissing the suit is set aside and is substituted with an order entering Judgment in favour of the Appellant and against the Respondents as follows:

- i) Ksh 2,000,000/= for damages for defamation
- ii) Ksh 270,216/= being a refund of medical and transport expenses.
- iii) Ksh, 200,000/= as damages for breach of contract
- iv) Costs of the suit
- v) Costs of this appeal

Dated, signed and delivered at Nairobi this 15th of January, 2020.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent