



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CIVIL APPEAL NO.38 OF 2019**

**NYOOKA MUTUA.....APPELLANT**

**-VERSUS-**

**PETER MWAU SYOVO.....RESPONDENT**

(Being an Appeal from the Judgment of Hon. J.N Mwaniki (SPM) in Makueni Senior Principal Magistrate's Court Civil Case No.151 of 2010,

delivered on 24<sup>th</sup> April 2019)

**JUDGMENT**

1. The Respondent through an amended plaint filed in the lower court on 04/09/2013, sought general damages for defamation, special damages, costs and interest. His case was that in November 2010, the Appellant reported to Makueni Police station that he (*Respondent*) had obtained from him Kshs.18,000/= by false pretences. According to the Respondent, the report which was false injured his reputation as it meant that he was a conman. It was also his case that he had installed power to the Appellant's shop at a cost of Kshs.38,500/= and the balance of Kshs.15,500/= was still outstanding.

2. The Appellant filed a statement of defence, denying the allegations of defamation. He also counter claimed for Kshs.18,000/= which he had advanced the amount to the Respondent for onward transmission to his (*Appellant*) Advocate for preparation of a caution. The matter proceeded for hearing and judgment was entered in favour of the Respondent. He was awarded Kshs.350,000/= as general damages for defamation.

3. Aggrieved by the decision, the Appellant filed this appeal on the following grounds:

- a. The learned trial Magistrate grossly erred in law and fact by rejecting the defence and counterclaim.
- b. The learned trial Magistrate grossly erred in law and fact by entering judgment in favor of the plaintiff against the weight of the evidence on record.
- c. The learned trial Magistrate grossly erred in law and fact by awarding the plaintiff general damages which were excessive.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

**Appellant's submissions**

5. The Appellant submits that defamation is a tort defined as the publication of a statement which tends to lower a person in the estimation of right thinking members of the society. He submits that the defamatory words must be communicated to at least one more person other than the one defamed.

6. He submits that in his pleadings before the trial court, he had indicated that the Respondent was indebted to him in the sum of Kshs.18,000/= which he had committed to refund but did not. Accordingly, he submits that the report to Makueni police station was genuine and not malicious. To support this argument, he cites the case of **Phineas Nyagah –vs- Gitibu Imanyara** where the court stated that;

“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts.

That may lead to an inference of malice...malice may also be inferred from the relations between the parties...the failure to inquire in the facts is a fact from which inference of malice may properly be drawn.”

7. He also submits that the Respondent did not prove that he was an electrical technician or that he was injured by the report made to the police.

8. It's his further submission that he adduced evidence in the trial court to show that he had paid for the electrical installation contract way back in 2003 and that evidence was never challenged. He contends that the Respondent did not prove his case on a balance of probabilities.

### **Respondent's submissions**

9. The Respondent submits that he stated the loss of his business caused by the Appellant's defamation. He contends that the Appellant neither provided a record nor called a witness to prove the amount in the counterclaim.

10. He further submits that the Appellant admitted having entered into an agreement with him for electrical installation as well as making a report to the CID that he (*Respondent*) had obtained money from him by false pretences. He submits that the evidence of one of his witnesses shows that the Appellant maliciously and publicly referred to him as a conman. Further, that the evidence of PW2 shows that people lost trust in him due to the defamation and his profession was affected as he could no longer get contracts for electrical installation.

11. He argues that the Appellant delivered the letter written by the police to his wife during a parents' day meeting at Kinywani primary school in the presence of all the parents thus causing his removal as the school chairman. He contends that his reputation was injured and he was shunned and avoided by the parents at the said school.

12. He submits that he is a qualified electrical technician and did his work well. That there was an admission in the defence to the effect that the Appellant pays his bills directly to Kenya Power without any problem. He attributes the success to the installation he did at the Appellant's premises. He contends that opening of accounts and installing KPLC meters by KPLC engineers is proof that he is a qualified electrical technician.

### **Summary of the case before the trial court**

13. The Respondent's case before the trial court was premised on the evidence of two witnesses. He testified that he was an electrical technician and he knew the Appellant. He said he was contracted by the Appellant to do internal installation in shop 2A at a cost of Kshs.38,950/=.

14. On that day he paid him Kshs.5,000/= and a further Kshs.18,000/= on 2<sup>nd</sup> September, 2010, leaving a balance of Kshs.15,500/=. The contract was reduced into writing in Kikamba (PEXB1) and translated into English (PEXB1a). His work was certified by Kenya power and lighting company.

15. He explained how he had been called by the CID and told that he had obtained Kshs.18,000/= by false pretences. That upon explaining himself he was released. He produced a "request to compel attendance" as PEXB2 and Kenya power and lightning company receipts as PEXB 3a – c.

16. It was his further evidence that as a result of the report to the CID he was relieved of his duty as chairman of Kinywani primary school. He also lost out on work opportunities because of this matter with the Appellant. He denied any indebtedness to the Appellant, nor signing the agreement dated 18<sup>th</sup> November 2010 at the CID (DEXB4)

17. In cross examination he confirmed that the Appellant had thumb printed PEXB1a. He also confirmed that the payment was to be by instalments. He denied that the payment by the Appellant was for another purpose.

18. His witness **John Kala Iseve (Pw2)** testified that both the Appellant and Respondent were known to him. He stated that he was present on 8<sup>th</sup> August 2003 when the contract between the two parties was entered into. He confirmed all that the Respondent said about the payments and balance, and the report to the CID over conmanship of Kshs.18,000/=.

19. In cross examination he said he did not know whether the Appellant could write or not. He said he was present when the agreement was written but he agreed that the Respondent did not involve him in all his agreements.

20. The Appellant was the only witness for the defence. He testified that the Respondent was his neighbor whose testimony he refuted. He stated that for the electricity installation assignment he had paid the Respondent by two instalments of Kshs.4,000/= plus a bull worth Kshs.17,500/= totaling to Kshs.25,500/=. He was however owed by the Respondent Kshs.18,000/= which he had given him to take to a lawyer. He got it upon withdrawal of Kshs.20,000/= from KCB (bank slip DEXB1).

21. It was his evidence that together with the Kshs.18,000/= was a signed list of witnesses plus other documents. He did not remain with a copy of any of the documents. He said he was illiterate and did not thumb print or sign any document.

22. He further stated that the Respondent had disappeared with the documents he gave him and he had never been called by any lawyer. That the Respondent had signed DEXB4 agreeing to owing him Kshs.18,000/=.

23. In cross examination he denied knowledge of any written agreement including PEXB1a. He also denied that the charges for the

electricity installation were Kshs.38,000/=. He stated that there were no witnesses when they got into an agreement. He at the same time denied that they ever entered into any agreement. He confirmed that he had no bills at KPLC and the electricity was functioning. He wondered why it had taken the Respondent seven (7) years to make the claim.

24. This is a first appeal and this court has a duty to analyze and re-evaluate the evidence on record in order to reach its own conclusions, bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle and Another –vs- Associated Motor Boat Co. Ltd (1968) E.A 123**.

25. Having considered the grounds of appeal, the rival submissions and entire record, I find the following issues to fall for determination.

- a. Whether the learned trial Magistrate erred by dismissing the counter claim.
- b. Whether the Respondent proved his case on a balance of probabilities.
- c. Whether the general damages awarded were excessive.

**Issue (a) Whether the learned trial Magistrate erred by dismissing the counterclaim**

26. The Appellant counterclaimed for Kshs.18,000/= which he said he had given to the Respondent to deliver to his (*Appellant's*) lawyer. This is the amount that prompted a report to the police station about the charge of 'obtaining by false pretences'. It is the Appellant's testimony that he had cleared with the Respondent on the issue of the electricity installation at the time they got into the one of Kshs.18,000/=. The Respondent denied all these assertions.

27. I have seen in the file a document dated 02/10/2010 referring to Kshs.18,000/= and an unnamed advocate (DEXB3). It is the Appellant's evidence that he gave the Respondent Kshs.18,000/= out of the Kshs.20,000/= he had withdrawn for onward transmission to his lawyer. This document (DEXB3) has clearly two signatures. Whose are they since the Appellant says he could not sign but only thumb print?

28. In response the Respondent states that the Kshs.18,000/= was part of the payment for the electricity installation leaving a balance of Kshs.15,500. The Applicant has stated that he paid the Respondent by two instalments of Kshs.4,000/= totaling to Kshs.8,000/=. That the balance (whose figure he does not give) was to be cleared through a bull valued at Kshs.17,500/= which he gave to the Respondent.

29. The Appellant claimed to have witnesses for all this but he did not call any of them to support his case. Besides his word of mouth there is nothing to show that he gave to the Respondent a bull worth Kshs.17,500/=.

30. On the allegation of him giving the Respondent Kshs.18,000/= for payment of his advocate, he does not first of all explain why he was not able to deal with the unknown advocate himself. The Respondent was not the unknown advocate's representative or clerk. The Respondent and his witness confirmed that indeed the Appellant paid the former Kshs.18,000/= in respect to the electricity installation bill. Pw2 said he witnessed the payment and receipt of Kshs.18,000/=.

31. At this juncture, it is imperative to reproduce the sentiments of Lord Denning in **Miller –vs- Minister of Pensions (1947) 2 ALL ER 372**, with regard to the standard of proof in civil cases;

**“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.**

**Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”**

32. Considering the totality of the evidence therefore, the higher probability was that the Kshs.18,000/= was given by the Appellant to the Respondent as payment for his services for the electricity installation. I therefore find that the Appellant failed to prove his counterclaim and the learned trial Magistrate was right in dismissing it.

**Issue (b) Whether the Respondent proved his case on a balance of probabilities.**

33. Having opined that the counter claim was rightly dismissed, it automatically follows that the report made was not genuine as it was not informed by a genuine claim. Following the report to the CID by the Appellant, the Respondent was summoned to the police station. After explaining himself he was released and never charged.

34. The Respondent explained how the Appellant's report to the CID had affected him as a person and his business. This was corroborated by Pw2 whom the Appellant referred to as a conman in his own evidence. I am satisfied that the learned trial Magistrate analysed the evidence well and arrived at the right conclusion.

35. The Respondent had made a claim of special damages of Kshs.15,500/= being the balance of the installation charges. This was a claim for year 2003 and he only filed his claim in year 2010 which was seven (7) years after the sum was incurred. As much as the agreement

(PEXB1) indicates that the balance was to be paid in instalments, I find the period of seven years to be too inordinate. In any case, he was barred from bringing any suit based on contract after the lapse of six years as per the provisions of section 41(1) of the Limitations of Actions Act. I therefore disallow the claim for special damages which was time barred.

**Issue no. (c) Whether the general damages awarded were excessive.**

36. I have considered the amount awarded by the trial court as general damages for defamation. It is not disputed that the Respondent is an electrical technician. The report to the CID caused him to be rejected by the parents of Kinywani primary school as their chairperson. He was viewed as a conman. He also lost business opportunities as a result of this as confirmed by the Respondent and Pw2.

37. I have considered the cases of: -

**i. Muthui Mwai and 2 Others –vs- The Standard News Papers and 2 Others High Court Civil Case No. 832 of 1990 Nairobi [2012] eKLR** where the Plaintiffs were each awarded Kshs.400,000/= as general damages on 21<sup>st</sup> September, 2012 for libel.

**ii. Livingstone Mwangi –vs- Sheria Co-operative Society High Court Civil Case No. 162 of 2009 Nyeri [2016] eKLR** where the Plaintiff was on 22<sup>nd</sup> April 2016 awarded Kshs.300,000/= for defamation.

38. Considering what the Respondent went through as a result of the Appellant’s report to the CID, I find an award of Kshs.350,000/= to be abit excessive. I set it aside and substitute it with an award of Kshs.300,000/=.

39. I therefore enter judgment for the Respondent in the sum of Kshs.300,000/=(**Three hundred thousand**) with interest and costs. Interest to run from the date of judgment by the lower court.

(ii) The Respondent also gets costs of the appeal.

Orders accordingly.

**Delivered, signed & dated this 3<sup>rd</sup> day of April 2020, in open court at Makueni.**

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**H. I. Ong’udi**

**Judge**