



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HCCA NO 105 OF 2016

ALI NUR.....1ST APPELLANT

MUSLIM ASSOCIATION MOSQUE COMMITTEE.....2ND APPELLANT

VERSUS

MADRASATUL HUDA PROJECT/FOUNDATION.....RESPONDENT

J U D G E M E N T

1. **ALI NUR (1ST Appellant)** and **MUSLIM ASSOCIATION MOSQUE COMMITTEE (2ND Appellant)** had been sued in the lower Court by the Respondent (**MADRASATUL HUDA PROJECT/FOUNDATION**) who sought: -

- a) **Orders of injunction restraining 1st Appellant jointly and severally, by themselves, their servants, and/or employees, or otherwise making, uttering, advertising of the respondents or in connection to it, about to or concerning it, which may in any way or manner, be prejudicial to the Respondent.**
- b) **General damages for defamation.**
- c) **Aggravated and exemplary damages.**
- d) **Costs of the suit.**

The appellant denied liability and sought for dismissal of the suit.

2. After a hearing judgement was entered in favour of the Respondent against the applicants with an award of Kshs. 3,000,000/= (Three million) by general damages.

The respondent was also awarded costs of the suit plus interest.

3. The appellant was aggrieved by this finding and filed the appeal on the following evidence that: -

- a) The evidence did not support the documents, as the respondent claimed to be defamed was a corporate body and not a living person.
- b) The trial court considered extraneous issues and failed to consider the evidence tendered by the appellant.
- c) The Trial Magistrate applied wrong principals in arriving at the decision.

The appellants thus pray that the judgement entered after there be set aside.

4. The appeal was canvassed by way of written submissions where the appellants pointed out that the alleged defamatory words did not make any reference to the respondent.

5. The respondent's claim as set out in the pleadings was that, on 7th April, 2004, the appellants jointly and severally conspired to falsely, wrongly and maliciously and with intent to injure the respondent's reputation and character, wrote, published printed and distributed, or

cause to be distributed, of and concerning the respondent, false and defamatory words and statements.

The words complained of were as follows:

“Kuna waislamu siku hizi wanao toa vieti haramu kwa waumini kupitia njia ya undanganyifu na kula pesa za waislamu bure. Na stakabadhi hizo ni bandia na hazitambuliki, na wana batisa watu kama wakristo”. (There are Muslims who nowadays issue fictitious certificates to worshippers through false means and embezzle their money. Those certificates are false, not recognized, and they baptize people like Christians)

6. The 2nd appellant was said to have inserted, published and placed, a baptismal card on the notice board at the mosque with the followed words:

“This document is not approved at the District Registration Office. Kindly get a recognized one from Jamia Mosque officers.”

It was the respondent’s lament, that the statement was slanderous and was understood to mean that

- a) It was established to embezzle worshippers of their funds.
- b) Issues fake certificates.
- c) Is composed of untrustworthy leaders.
- d) Is made up of thieves.
- e) Should be avoided completely by members of the public and the larger Muslim community.
- f) Has committed crime and offences under the criminal law system in Kenya.

7. That in their ordinary meaning the same meant that the respondent was not to be trusted, unfairly and unjustly enriched itself, was unprincipled and not fit to be a religious organization. These words were said to have disparaged the respondent and injured its pecuniary and moral standing thereby prejudicing its practice and source of livelihood.

8. The trial Magistrate held that the respondent was an entity capable of being defamed, being an artificial person incorporated as a non-profit making organization with recognized legal status. Further that the respondent is made up of individuals, thus making it obvious that any words referred to the respondent’s activity touched on these individuals.

9. The trial court was satisfied that the utterances and the publication complained of affects the respondent’s reputation and were communicated to more than 2 people and was defamatory. That the appellant never apologized to the respondent. The trial Magistrate thus awarded **Kshs. 2,000,000/=** as compensatory damages and **Kshs. 1,000,000/=** as exemplary as punitive damages.

10. At the trial, **ABUBAKR AHMED BINI (PW1)** an Imam and Madrassa teacher told the trial court that on 8/7/2011 on Friday at 1245 pm, **ALI NUR (1ST appellant)** an Imam at Jamia/Mosque Eldoret stood up during prayers and castigated the respondent for being comen who were issuing false certificates used for obtaining national identity cards. Further that the foundation was baptizing Muslims and issuing them with certificates.

11. PW3 confirmed that the foundation issued Islamic Baptism certificates through the chair (being PW1) and this was done so as to adhere to government of Kenya’s regulations and enable Muslim faithful to obtain national identity cards. He was categorical that the issuance of baptism certificate was not contrary to Islamic teachings as they were not performing baptism rituals, the way Christians do.

11. The 1st appellant claimed that the Foundation was receiving **Kshs. 500/-** for each certificate apparently the impugned remarks had also been pinned on the notice board – and PW1 took photographs of the same, which were produced as exhibits. When the Foundation’s officials raised the issue with **MUSLIM ASSOCIATION MOSQUE COMMITTEE** which is in charge of the **JAMIA MOSQUE** in Eldoret, the response they got was:

“chura awezi kumzuia ngombe kunywa maji, nendeni mnapo taka” (A frog cannot prevent a cow from being watered. (drinking water??) You may go wherever you may wish).

12. PW1 explained that as a result of the “insults “the Foundation was not able to work well, and being a religious Foundation, they could not be trusted any more. He described the Foundation as one that is registered with the Ministry of Gender and Social services, and had been singled out by **SUPKEM** in recognition of their services to Muslims in **UASIN GISHU** County. The **Kadhi at ELDORET Law Courts** had also recognized their services vide a letter produced as Ex.6

13. On cross examination PW1 conceded that baptism is not practiced under the Islamic religion. He stated:

“My name and the names of other members were put in bad light, and people lost faith in our association.

14. **AMINA ALI (PW2)** who sells clothes in **ELDORET TOWN** confirmed that she requested PW1 to issue her with a baptism certificate so as to enable her apply for a birth certificate. However, the document which PW1 issued has rejected at but was from DC's office. She later approached **JAMIA MOSQUE** and was issued with another certificate which was accepted at the District Registrar's office.

15. On cross examination she said she had never heard that the respondent had been defamed, although it was announced by the **Imam of Jamia Mosque**, that the baptism certificate issued to her was a forgery she stated:

"I have no bad feelings about PW1, Abubaki. I still respect PW1. I have not heard anyone complain about the plaintiff association"

16. **IBRAHIM HABIB HABUBAKARA (PW3)** a pharmacist cum youth leader at **JAMIA MOSQUE** confirmed hearing the 1st appellant utter the words complained of, in the presence of many people in the mosque during the Friday prayers. He stated that as a consequence the respondent was considered as consisting of conmen – but it later turned out that the utterances were false and malicious.

17. He explained that the group normally issues certificates to those who intend to change their names but do not claim anything (which I understand to mean at no fee). That the words referred to were also published in a bulletin which is given to faithful at the mosque mostly on Fridays. On re-examination the witness explained that although the certificates issued by the respondent bore the word **BAPTISM**, it did not have the same context as that of Christians.

18. **OMAR MOMANYI (PW4)** a mechanic within Eldoret confirmed seeing the document on the notice board at **JAMIA MOSQUE** on 8th July, 2011 when he had gone for Friday prayers. That the document remained on the notice for over one week. It was his evidence that the contents of the document were not true, as the respondent had been valuable to the Muslim Community and were basically concerned with Islam. He was categorical that the letters the respondent had been giving were so as to facilitate issuance of the identity cards and birth certificates, and were not being paid for.

19. Further that **JAMIA MOSQUE** was earlier issuing a document and the word baptism which appeared on the impugned document was a misnomer. On cross examination PW4 stated:

"I am not aware of any person who has been conned by the plaintiffs. Plaintiffs get donations which they give to the needy. The other group used to issue the baptism card upon payment. I am not aware of any apology from the defendants. The certificates which were being issued were not fake. There were chances that one side was felonious in the other. The reputation of the group went down due to the notice..."

20. The 1st appellant in his testimony disowned the respondent as being unknown to him. It was his evidence that a letter was sent from the Office of the President expressing concern that some Muslims were issued with documents to assist in registration of birth, and he wanted to ascertain the position.

21. Thereafter, he announced to the Muslims to be aware of the fake document which related to Islamic baptism. He placed the communication on the notice board so as to notify members of the public, especially after an alert had come from Nairobi disowning the documents on Islamic baptism.

22. The **Young Muslim Association** then placed an advert in the bulletin, distancing themselves from the baptism document. He maintained that the respondent had no authority to give any certificates and that it was **JAMIA Mosque** which had genuine certificates. As far as he was concerned: -

"I made an announcement in food faith to the Muslims that fake documents were being issued. I did not mention the name of the plaintiff's herein..."

23. On cross examination he confirmed making the announcement in the presence of many people to the effect that some people were giving fake document, and the fake documents was placed on the notice board. That he did not mention names, and merely notified Muslims that they do not baptize, although he did not know the meaning of the term baptism as it appeared in the document.

24. He however, confirmed that Muslims were being issued with certificates to enable them get earlier documents from the foundation. He denied suggestions that he was in competition with the respondents and said:

"... I did not have any conversation with the group before going public. I had done nothing to seek forgiveness ... whatever I stated was published in the Friday bulleting..."

25. On re-examination he stated that **MUSLIM ASSOCIATION MOSQUE COMMITTEE ELDORET** was allowed to issue letters to assist in the process of registration of documents.

ABDULLAHI JAMIA (DW2) of businessmen running hotel and also doing construction work in **ELDORET** testified on behalf of **MUSLIM ASSOCIATION MOSQUE COMMITTEE ELDORET** confirmed that the 1st appellant announced that as a matter of caution, any Muslim who wanted an identity card, birth certificate or passport, should liaise with the offices of the Muslim Eldoret Mosque Committee to get a letter verifying their status with the District registrar of Person.

26. He explained that before the announcement was made, around the year 2003 the District registrar of Persons, had mandated the Muslims

Association Eldoret to vet all Muslims in UASIN GISHU County and get their particulars for easier vetting.

27. He explained that the **District Registrar of Persons** had written to the committee a letter warning them of a group of robbers and cartels who were issuing notifications letters of birth and a baptism certificate yet under the ISLAMIC religion there is no baptism. The letter DEX2 was copied to the Christians community in Uasin Gishu and he Directorate Registrar Bureau, Nairobi.

27. DW2 maintained that Islam does not practice baptism, and it was waiting for a response to issue baptismal cards. As far as he knew, the District Registrar of Person had sent Ex 1 (i.e. the certificates issued by the respondent) as an exhibit to warn certain Muslims who wanted to obtain birth certificates and natural identity cards. That the procedure for getting such documents was a request the area chief to write a letter to the Committee confirming that the applicant was a resident of his area. Thereafter the committee would vet the applicant.

28. DW2 stated the following about the respondent's officials.

“... I knew them as my fellow Muslims. We informed the plaintiff's leader that is Imam and we contained them. We told them not to issue baptism cards, because that is a security issue. I have not sought for pardon from the plaintiff”.

29. The appellants in their written submissions to this appeal, argue that the words complained of did not mention the respondent 's name nor was any statement directed to the respondent. That in any event there was nothing defamatory in the nature of the words spoken and nothing infers that the natural or intended meaning was false or intended to damage the respondent's reputation.

30. It is contended that the respondent is not a living person capable of being defamed as it is an amorphous body, and nothing was presented to the court to show the office bearers. The court is urged to be guided by the case of the **KNUPPSEER V LONDON EXPRESS NEWSPAPER (1994) AC 116** where Lord VISCOUNT Simon stated that:

“In the words complained of there is no specific mention of the appellant from the beginning to the end”.

31. That in any case the words complained of amount to fair comment as

- a) The respondent was a self-help group whose mandate did not indicate issuing baptismal cards.**
- b) Such duty of writing recommendations letters vests with the churches and mosques.**
- c) It is common knowledge that Muslims do not baptize their followers – a practice embraced by Christians.**

So the words spoken by the 1st appellant were a fair comment on a matter of public interest especially bearing in mind the issue of insecurity which is rampant in the country among illegal immigrants. The remarks were made during a sermon.

32. Secondly that the 2nd appellant is registered as **MUSLIM ASSOCIATION MOSQUE COMMITTEE ELDORET** and **NOT MUSLIM ASSOCIATION MOSQUE COMMITTEE.**

As regards the damages awarded, the appellants submit that the same lacked judicial basis and was manifestly excessive going beyond vindicating or consoling the respondent for the alleged injury done. In support of this reference is made to **JONES V POLLAND (1997) EMLR 233** where a check list of compensable factors in an action for libel where emanated to include

- (1) The objective features of the label itself, such as its granting province the circulation of the medium in which it is published and any repetition.**
- (2) The subjective effect on the plaintiff's feelings not only for the province itself but from the defendants conduct therefore both up to and including the trial itself.**
- (3) Matters tending to mitigate damages such as the publication of an apology.**
- (4) Matters tending to reduce damage.**
- (5) Vindication of the plaintiff's reputation past and future.**

This court is urged to review the award downwards and/or set it aside entirely.

33. On the other hand, the respondent maintains it is duly incorporated as a non-profit making organization with a recognized legal status. Reference is made to the registration certificate (Ex.4) and is thus as a legal entity capable of being defamed.

34. It is argued that the trial Magistrate correctly considered the evidence analyzed the issues and applied the law before making her document. Reference is made to the text **Winfield on Tort** by **J.A Jolowicz and Ellis Lewis (8th Ed Pg. 254)** which gives the definition of defamation.

It is submitted that the words explained of were:

a) Published by the appellant

b) Concerned the respondent

c) Defamatory in character

d) Published maliciously

35. As regards the award this court is urged not to interfere with the same as nothing has been presented to suggest that the trial court acted upon some wrong principle of law or that the sum awarded was extremely high as to be an entirely erroneous estimate of the damage.

The words complained of:

“Kuna watu siku hizi wanatoa vieti haramu kwa waumini kupitia njia ya undanganyifu na kula pesa za waislamu bure, na stakabadhi hizo ni bandia na hazitambuliki, na wanabatiza watu kama wakristo”

36. Did these words tend to lower the respondent in the estimation of right-thinking members of society generally? Would it tend to make reasonable persons shun and avoid the Respondent or expose it to hatred, contempt or ridicule or convey an imputation on it, disparaging or injuries or to its calling, or business?

37. The statement made a general reference to **“watu”** (people) it did not mention any names but it made reference to issuance of fictitious or false certificate to worshippers through false means and embezzlement of money from faithfuls – that indeed suggests criminal and dishonest conduct. A look at the certificate shows it bears the word **“baptism”** a practice both parties agree is alien in the practice of Islam, and forms a key component of Christian practice. So that to say that:

“they baptize people like Christian” may have been rather harsh and ill-informed yet on face value – what else would one conclude – especially where the “offended” faith has no teaching or practice or baptism? Wouldn’t the most rational response be ***“they have now adopted Christian practice, or something*** along these lines.

38. I think the major problem in the statement which would be said to be defamatory was the embezzlement of money for the faithful’s. Did the appellants have a basis for making this kind of assertion as to raise the defence of fair comment?

39. From the evidence of DW2, the genesis of these remarks were not just some whimsical fanciful thought which caught the 1st appellant’s imagination. It stemmed from a communication by the **District Registrar of Persons** who had requested DW1 in his capacity as the Imam at **JAMIA** mosque to caution Muslim faithful’s regarding baptism certificates which had been forged.

40. I take judicial notice of the general insecurity in the country and that such a precaution which was communicated to both the mosques and churches, could not be taken lightly by the persons to whom the letters were addressed. So, I wonder how else should the 1st Appellant have communicated the concern – without saying that some people were issuing fictitious fake certificates and pointing out the odd allusion of baptism in Islam. To drive the point home, as to what was being alluded to, in my view the most natural thing to refer to was the very certificate which the respondent had issued.

41. And as if to confirm the query concerning these certificates the respondents own witness (PW2) confirmed that when she presented the **Islamic Baptismal card**” to the District Registrar of Persons it was rejected.

42. But what about the allegations of embezzlement which indeed connotes criminal conduct? This must be considered alongside the question whether the respondent was capable of being defamed, since it is an artificial person. Does Winfield’s definition find a home to roost in the respondent’s porch? Does a body known as Muslim Association Mosque Committee exist?

Section 7A (7) of Defamation Act provides that: -

In any Civil proceedings for libel instituted by a person or a body of persons entitled to a right of reply who or which has found to exercise such right in accordance with this section, the court shall in the event of it having found in favour of the plaintiff, be at liberty to reduce the amount of damages which it would have otherwise awarded by such sum as the court considers appropriate having regard to as circumstances of the case.

43. The general rule as to who can sue in a claim of defamation was succinctly disclosed in the text of **GATLEY AND LINDSELL ON SLANDER AND LIBEL** at page 197 as follows:

“An action for defamation is a purely personal action. The proper person to one as a claimant is the person defamed, and the proper person to be sued as a defendant is the person who published the defamatory words or caused them to be published (though they may include a person vicariously enable for another).

44. A company is a legal person with the capacity to sue or be sued, In **C. MEHTA & CO. LTD v STANDARD BANK LTD (2014) EKLK** the court awarded the plaintiff (a corporate body) damages for defamation and disrepute due to the defendant’s claims. It therefore follows that the respondent had the capacity to sue for defamation as far as the allegations of embezzlement of funds was concerned. Indeed, the 1st appellant’s conduct was reckless as he readily admitted that he never sought audience with the respondent to confirm whether there

were any charges being levied for the certificates in question. Worse still the 1st appellant was not apologetic about this, saying he had not done anything wrong. As pointed out – every other limb of the contested statement was fair comment **EXCEPT** on the claim about embezzlement faithful's money.

45. Such an allegation certainly brought the respondent to ridicule and contempt and embarrassment. Therefore, taking into account the conduct of the 1st appellant, then the sum to be awarded must be such as to compensate the respondent for the damage to its reputation as a Foundation established to assist the needy Muslims, through funding and assistance from other sources. The award must indicate the good work the respondent had been doing and which had been acknowledged by **SUPKEM** and the **Eldoret Law Courts Kadhi**. It must also be such as to convince those who knew of the defamatory claims bordering on criminal conduct, that the respondent was wrongfully accused – this was the approach adopted in the case of **OCHIENG V STANDARD LTD 1 (2004) KLR 225** and **FRANCIS OLE KAPARO V THE STANDARD LTD AND OTHERS NBI HCCA NO 1230 OF 2004**.

46. Having found that part of the statement amounted to **FAIR COMMENT**, I am persuaded that it is appropriate for the sum awarded be reviewed so as to scale it down. Taking into account the 1st appellant's conduct I consider an award of **Kshs 500,000/- (Five hundred thousand only)** as adequate and I so award. The amount awarded is thus set aside and substituted with a sum of **Kshs. 500,000/-**.

47. As regards exemplary or aggravated damages, I consider the case of **Cassel and Co. Limited V Broome and Anor, (1972) AC 1027** where Lord Devlin's speech in **Rookes V Bernard (1964) AC 1129** was referred to as follows: -

“Thus, a case for exemplary damages must be presented quite differently from one for compensatory damages, ... But the fact that these two sets of damage differ essentially does not necessary mean that there should be two awards”

47. Exemplary damages are appropriate if the compensatory damages are considered inadequate and is aggravated by the way in which the defendant has behaved towards the plaintiff. It is for outrageous conduct and to deter the defendant from repeatedly the conduct compensated of. So malicious and /or insulting conduct will aggravate the damages awarded, and of course where there is a repeat of the malicious utterances, then the damages will be further aggerated. In my view a sum of **Kshs 200,000/-** is adequate for aggravated damage – so the sum awarded is set aside and substituted with the sum of **Kshs. 200,000/-**.

48. As for the 2nd appellant, the issue remains as to whether there exists such an entity – the name ascribed to the 2nd respondent does not relate to it and no attempt was made to rectify the anomaly. This means even if judgement against the 2nd appellant was to stand, it would be difficult to execute because no such legal entity as described exists. But even for argument's sake, what was so defamatory in what was published either in the bulletin or pinned up on the notice board to the effect that:

“This document is not approved at the District Registration Office. Kindly get a recognized one from Jamia Mosque officers.”

49. Surely, wasn't that the factual state of affairs as confirmed by Amina (PW2) who said the **District Registrar** rejected the baptism forms issued by the respondent, but accepted the one issued by the **JAMIA mosque**. In-fact that was also the gist of the letter written by the Registrar's office, and there was no basis for holding the 2nd appellant liable for defamation whatsoever. Consequently, the judgement against the 2nd appellant be and is hereby set aside entirely.

The 1st appellant bears 2/3 costs of the appeal. The respondent bears 1/3 costs of the appeal.

E- Delivered and dated this 15th day of May 2020 at ELDORET

H.A OMONDI

JUDGE