



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 120 OF 2019

JANET MITHIKA.....1ST APPELLANT

GLADYS MITHIKA.....2ND APPELLANT

VERSUS

MONICA KALINGU.....RESPONDENT

(Being an appeal from the judgement of Hon. R. Ongira (Ms) RM delivered on 4th September 2019 in Tigania PM CC No. 54 of 2012.)

JUDGEMENT

1. The Respondent sued the Appellant seeking judgement against the Appellants jointly and severally seeking general damages for defamation, costs of the suit and interest and any other relief that the Honourable Court may deem fit and just to grant.
2. The cause of action arose on 13th April 2012 in Mukamio village at around 7:00 p.m. when the Appellants while in the presence of members of the public maliciously and without any reasonable excuse uttered defamatory words in reference to the Respondent as follows :
 - a. The 1st Appellant uttered the words ;“*Uwe Kalinguuri Kingura, Marayana Ngagutana*”loosely translated to mean, Kalingu is a clitoris, prostitute and uncircumcised.
 - b. That the 2nd Appellant inter alia spoke the following words of concerning the Respondent and in Kimeru abusive language “*Uwe Kalingu Uri Kino, Mukenyeturiga Kinyana Churubari* which literally means that Monica is a vaginal, uncircumcised who does not wear underwear.
3. That the said words being false in both their literal and ordinary meaning have had the effect of lowering the estimation of the Respondent before the right thinking members of the society who comprise her family, neighbours, her customers and general Mukiamio village residents who have shunned her for the reasons aforesaid.
4. The Appellants filed a joint statement of defence on 30th September 2013 denying the particulars of defamation and denied that they uttered the words complained of and therefore put the Respondent to strict proof.
5. The matter proceeded for hearing on respective dates where the Respondent called three witnesses in support of her case whereas the Appellant testified in their respective capacities without calling further witnesses. The trial court found that the Respondent had proved that the aforesaid words had been uttered by the Appellants. It held the Appellants jointly and severally liable for the tort of defamation as the Respondent had proved her case on a balance of probability and in accordance to **Section 107-108 of the Evidence Act Cap 80 Laws of Kenya.**
6. On general damages the court was of the considered view that an award of Kshs. 70,000/= shall vindicate the Respondent reputation in the eyes of members of the community. The trial court also awarded costs and interest of the suit from the date of delivery of the judgement.
7. Aggrieved by the aforesaid decision the Appellants filed their memorandum of appeal on 30th September 2019 raising six grounds of appeal that are enumerated as follows;
 - a. **That the learned Resident Magistrate erred in law and infact in deciding the case in favour of the Respondent when the case was not proved on a balance of probability.**
 - b. **That the learned Resident Magistrate erred in law and fact in interpretation on the ingredients of defamation hence**

arriving at the wrong conclusion.

- c. That the learned Magistrate did not analyse the evidence of the Plaintiff viz a viz the evidence of the Appellants.
- d. That the learned Magistrate erred in awarding damages to the Respondent even when it was proved that she had not suffered any damages at all.
- e. The judgement of the learned Magistrate was against the weight of the law and the evidence.
- f. The award is manifestly excessive.

8. On 21/1/2020 this court directed the parties to canvass the appeal through written submissions. Both parties have since filed their respective submissions. The Appellant submitted that the words complained of were mere abuses and did not constitute defamation. That the Respondent did not prove she suffered any damages as she stated that her business went down due to other causes and not because of the alleged defamation. That PW2 stated that he still holds the Respondent in high regard. That the statement of the Respondent varies with her evidence in chief.

9. The Appellants in their submissions said that the Respondents did not prove her case on a balance of probabilities as the words complained of were mere abuses and did not constitute defamation. That the Respondent and her witnesses did not prove that she suffered any damages or at all as it is clear that she stated her business went down because of other causes and not because of the alleged defamation. They said that PW2 stated that she still held the Respondent in high esteem. The Appellants said that the Respondent statement was at variance with her evidence in chief and the trial Magistrate clearly failed to analyse the evidence of the Appellants which was truthful in relation to the Respondents evidence. They said that the award made was excessive and urged that the appeal be allowed.

10. The Respondent on her part submitted that her evidence in the trial court was consistent and believable as opposed to the Appellant's evidence. That she had proved that the words uttered by the Appellants constituted defamatory words and were not mere abuses and that she had proved her case on a balance of probabilities and had suffered damages of the defamatory words suffered damages as a result since after the incident she was shunned by her customers a major contributing factor in negatively affecting her general shop and posho mill business.

11. In support of her submissions she relied on the following authorities;

- a. Musikari Kombo v Royal Media Services Limited [2018] eKLR, where it was stated, "The test for whether a statement is defamatory is an objective one. It is not dependant on the intention of the publisher but on what a reasonable person reading the statement would perceive"
- b. SMW VsZWM 2015 eKLR where defamation was defined as follows,

"Statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred contempt or ridicule or if it causes him to be shunned or avoided. "The Respondents argued that the slanderous words uttered by the Appellants were defamatory in nature.

- c. Miller Vs Minister of Pension 1947
- d. Juliana MulikwaMuindi v Board of Management Yanga Mixed Secondary School & Another [2018] eKLR.
- e. Johnson Evan Gicheru Vs Andrew Morton and Another [2005]eKLR
- f. Butt Vs Khan (1977) KAR

Analysis and Determination

12. The duty of the 1st appellate court was explained in the case of Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123, where it was observed thus:-

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

13. **Pw1 Monica Kalingu**, the Respondent herein testified that the Appellants came to her shop in Mukamio Market and uttered the defamatory words in Kimeru abusive language as pleaded in the plaint. That the 2nd Appellant proceeded to brandish a sword threatening to harm her. She screamed attracting attention to people who were around. The Appellants then ran away. It was her testimony that she reported the matter to Mikinduri police station where she was advised to file a civil suit.

14. In cross examination she restated that the Appellants uttered the words as stated in paragraph 3 of the plaint. She also stated that the 1st Appellant stated that, “today she will circumcise me.” She told the court that the insults affected her business negatively. That she stopped operating her business because of this case. She however stated that she has a posho mill other than being a farmer and the said business in doing well. In re-examination it was her testimony that after being insulted the business she had of a shop dwindled because customers disappeared.

15. **PW2 Joshua Thurania** corroborated the testimony of the PW1. He stated that he was present at the canteen/shop when he heard the Appellants utter the words in paragraph 3 of the plaint. He also confirmed that the 2nd Appellant brandished a sword and threatened to harm the Respondent that it was at that point that the Respondent screamed and attracted the attention of the public as the Appellants narrowly escaped.

16. In cross-examination, PW2 testified that he was operating the posho mill which was side by side with the canteen. That at the time he had closed the posho mill and proceeded to the canteen to hand over the proceeds of the day and that is when the insults were hurled.

17. He also told the court that he had known the Respondent from the time she was a child. That she is a respectable woman in the village and the insults hurled at her are not a true description of the Respondent. That the posho mill doesn't have customers due to competition from other posho mills. The shop was never closed down as it is still operating and doing well.

18. In re-examination he stated that there was no other thing that may have contributed to the customers of the posho mill to dwindle save for the competition in the said business.

19. **PW3 KonjuKaibiru** also confirmed being present and hearing the Appellant hurling the insults to the Respondent. He averred knowing the Appellant all her life and that now people despise her because of the insults hurled against her. That her business does not have customers as before. He is not familiar as to why the Respondent does not have customers as before. That the posho mill is still there but she closed down her shop/ canteen. He confirmed recording a statement at Mikinduri Police station.

20. In re-examination he stated that he thinks the insults negatively affected the business of the Respondent as she closed down her shop and now, she does not have many customers.

21. **Dw1 Janet Mithika**, the 1st Appellant herein in her written statement stated that on the material date she left her business premises in Ankamia market at 6 pm and was later joined by her sister the 2nd Appellant. That she neither met the Respondent nor defame her. She noted that there was a persistent grudge between her and the Respondent. That on the month of June 2009 the Respondent who is equally a neighbour came at their boundary and started insulting the 2nd Appellant telling her she was pregnant, she is having AIDS. That their mother came out and restrained her from continuing with the insults. She stated that the issues was amicably resolved at home hence there was no need to file a suit against the Respondent. That the suit therein was as a result of the persistent grudge.

22. In her examination in chief however she acknowledge that she met the Respondent on the material date. It was her testimony that around 7:00 p.m. she met her as she had sent her husband to go and buy for her photocopy papers and she had gone to collect the same. That she met the Respondent children who informed her their father wasn't back and the Plaintiff came out to abuse them claiming that they were staying with her husband.

23. In cross-examination the 1st Appellant admitted that she failed to record what transpired on 13/4/2012 on her statement. She stated that she did not call any other witnesses as she didn't think it was necessary.

24. **DW2 Gladys Mithika** corroborated the testimony of DW1 and confirmed that she accompanied the 1st Appellant to the Respondent's posho mill where they were informed that the Respondent's husband was not present at the time. That the Respondent then stated that they wanted to stay with her husband, a statement that is not true as they were related to her husband who is her uncle.

25. She also confirmed that there is a grudge between them and the Respondent. That the Respondent insulted her while she was pregnant by stating that she was carrying a child while having AIDS. She stated that the child is now 10 years old. That the matter was amicably settled at home. She also stated that the grudge between them and the Respondent was due to a boundary dispute.

26. In cross-examination she stated that there were no other customers at the shop and it was just her DW1 and the Respondent. That the Respondent abused them that they were prostitutes and that they wanted to stay with her husband.

27. In the trial Courts determination the court held as follows;

“In the view of this court, a defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit and the standard of opinion is that of the right thinking person's generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks onto its tendency. A true imputation may still be defamatory although it truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory. The law protects every person from harm to their reputation by false and derogatory remarks about their person, known as defamation.

This court now holds that indeed the words hurled against the plaintiff were indeed defamatory to the character of the plaintiff as they touched on the plaintiff's character in terms of chastity depicting her as someone of loose morals in the society. These were not just mere insults as submitted by the Defendant in their written submissions...

28. Having considered the grounds of appeal the pleadings and judgement in the lower court as well as the submissions in this appeal, the issues for this court's determination are whether the Appellants have satisfied the court that the judgement of the trial court should be set aside

29. A claimant in a defamation suit ought to principally establish in no particular order:

- (i) **The existence of a defamatory statement;**
- (ii) **The defendant has published or caused the publication of the defamatory statement;**
- (iii) **The publication refers to the claimant.**

See **Musikari Kombo v Royal Media Services Limited [2018] eKLR**

30. The trial Magistrate established that the words stated in paragraph 3 and 3(b) were uttered by the Appellants herein and that PW2 and PW3 were witnesses to the Appellants utterances against the Respondent and that the Appellants defence was a mere denial with unsubstantiated claims that it is the Respondent who insulted them and yet they did not file a counter claim with their statement of defence. The trial Magistrate found that indeed the words uttered by the Appellants was defamatory to her character as they touch on her character in terms of chastity depicting her as a person with loose morals in society. I am therefore satisfied that the Respondent proved the existence and publication of the defamatory words on a balance of probabilities.

31. As to whether the defamatory words were mere insults. I find that that the same were intended to disparage, ridicule and disgrace the respondent. From the ordinary meaning of the words the same were not mere insults but were defamatory words.

32. The next ground of appeal is whether the Respondent was entitled to general damages. In **Rose Okinyi v Dinah Kerebi Nyansinga [2020] eKLR** a case of similar proportions to this case the Appellant had insulted the Respondent using the words "malaya" the court held as follows with regard to whether the words were actionable.

"Are the words actionable per se? It is my finding that the words amount to slander which is actionable per se and the respondent did not require to prove that she suffered damage such as loss of business, loss of reputation, or ridicule. The words imputed to the respondent not just a crime involving moral turpitude as prostitution is indeed a crime in our law but also unchastity of a woman. The appellants uttered the words in a public market and the respondent was humiliated, hurt and distressed. It is immaterial that those who heard their utterances did not believe them or did not act differently towards her..."

33. Borrowing from the above determination and the evidence of the Respondent and the Pw3 that the business of the Respondent had been adversely affected I find that the Respondent was entitled to general damages.

34. The last ground of appeal was whether the award of general damages was excessive. In **Rose Okinyi (supra)** delivered on 23rd April 2020 the court found that an award of Kshs. 60,000/= was adequate to compensate her for the humiliation. As I have opined above the case has similar proportions to this case. I therefore find that the amount issued by the trial court with regard to general damages was not excessive but adequate to compensate the Respondent for the humiliation.

35. The appeal herein therefore lacks merit and the same is therefore dismissed with costs to the Respondent.

HON. A. ONGINJO

JUDGE

JUDGEMENT DATED AND DELIVERED AT MERU VIA EMAIL THIS 21ST DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.A. ONGINJO

JUDGE