REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

(Coram: Odunga, J)

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 144 OF 2016

JOSEPH NDUNGI.....APPELLANT

VERSUS

VICTOR MUNYAO.....RESPONDENT

[An appeal from the whole judgement of the Honorable Y.A. Shikanda (SRM) as he then was delivered on 8.12.2016 in Machakos Chief Magistrates Court Civil Case No. 749 of 2005]

BETWEEN

JOSEPH NDUNGI.....PLAINTIFF

VERSUS

VICTOR MUNYAO.....DEFENDANT

JUDGEMENT

1. The Appellant herein sued the Respondent in Machakos Chief Magistrates Court Civil Case No. 749 of 2005 for general damages for defamation. According to the Appellant, on 1st January, 2005, the Respondent published of and concerning the Appellant a libelous letter to the effect that in accordance with the By-Law 14 of 21st November, 1998 of Kithainio Self Help Group, he was expelled from the said Group for threatening to break the group. It was his case that the said letter was read to members and circulated among them and to other members of the public. According to him, by the said letter, he was portrayed as being untrustworthy and anti-social; criminally oriented; that he caused people to react against the government; that he was an undesirable person; and that the same imputed criminal offence against. As a result of the foregoing, he was regarded with feelings of hatred, contempt, ridicule, fear and dislike. It was his case that the respondent acted ultra vires as he had no power to expel him from.

2. The claim was defended by the Respondent who in his defence denied the allegations made by the Appellant. According to him, the suit was incompetent and fatally defective for failing to comply with the mandatory provisions of the law. Further, the suit did not disclose any cause of action against him and prayed for the suit to be struck off and/ or dismissed.

3. In support of his case, the Appellant testified that he sued because of the letter that was written to him by the respondent. He testified that they were members of a burial organization and that he never called anyone a fool. He denied the allegations made in the said letter and lamented that he was being isolated because of the said letter. He claimed that 2 members of his family had died but were not helped by the burial group. On cross examination he testified that he was a chairman of the subject self-help group and did not know if it was registered. He testified that the respondent was the author of the letter and that the group had no by laws. It was his testimony that he was accused falsely and the management refused to admit.

4. In support of his case, the Appellant called his wife, **Beatrice Syokau Moses** (PW2), who testified that the appellant is her husband who was suspended from being a member of the burial union of their village. She lamented that 2 of her children died and the members refused to dig the grave of her children. On cross examination she testified that she also was a member of the subject group.

5. In his evidence, the Respondent herein testified that he was a secretary to the subject group that was registered as evidenced by the original certificate of registration which he exhibited. According to him, on 26th December, 2014, they were dealing with issues relating to funerals of some deceased members and the committee was discussing an issue where some members were alleged to have incited others against

contributing towards burial expenses. The said committee met three members including the Appellant herein. It was his evidence that under the said by-laws, the committee had power, by way of sealed letters addressed to them, to expel members or their families which letters were to be served at a general meeting. He stated he wrote the letter was written to the Appellant in his capacity as the Secretary of the group following the meeting and exhibited the minutes of the meeting but denied that the contents of the said letter were read to the group members but the same were given to the village elder to deliver since the subjects were not present. It was therefore his evidence that they did not defame the Appellant. According to him, under the constitution of the group, an undisciplined member faces expulsion together with is family.

6. The Defendant also called **John Muasya Mutisya** who testified as DW2. According to him, both the the Appellant and the Respondent were his neighbours and that they had a self-help group in their village known as Kathianio Self-Help Group of which he was the chairman in 2005. According to him, in 2004 two of their members passed away and the Appellant tried to undermine the group by inciting members not to contribute. As a result, a committee meeting was called in January, 2005 where it was decided to invoke the disciplinary clause and that the persons involved cease to be members. As a result, the appellant and 2 other members were served with letters to the effect that they and their family members be expelled from the group. It was however his evidence that the letters were not read out at the members meetings and that the letters were in envelopes. He disclosed that the letters were signed by the secretary.

7. In his judgement, the trial magistrate placed reliance on the case of **Alnashir Visram vs Standard Limited (2016) eKLR** and found that since the impugned letter was not produced in evidence, there was no evidence that the said letter was published hence concluded that the appellant failed to prove the elements of defamation. He was however of the view that had he found for the Appellant, he would have awarded him damages in the sum of Kshs 500,000/- as general damages. He however dismissed the suit for want of proof.

8. The appellant was dissatisfied with the decision and appealed to this court on the following 7 grounds;

> ***a) The learned trial magistrate erred in law and fact when he failed to consider that the letter filed in court had been referred and adopted in evidence by the appellant.***
>
> ***b) The trial magistrate erred in law when he failed to consider that the appellant was unrepresented and it was not easy and possible for him to understand the difference between a document that is produced as an exhibit and another that is marked for production***
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> ***c) The learned trial magistrate erred in law and fact when he relied on irrelevant case law in deciding the appellant's case.***
>
> ***d) The learned trial magistrate erred in law and fact when he failed to consider that it was implied publication when the letter was written as it was meant to be read by the persons to whom it was intended;***
>
> ***e) The learned trial magistrate erred in law when he failed to appreciate that the publication imputed a criminal connotation on the part of the appellant and this was enough proof of damage***
>
> ***f) The learned trial magistrate erred in law and fact when he dismissed the appellant's case against the weight of evidence;***
>
> ***g) The learned magistrate erred in law when he failed to appreciate that the appellant had proved his case to the required standard.***

9. The appellant prayed that the appeal be allowed, the lower court judgement be set aside and costs be granted to him.

10. Although the parties were directed to prosecute the appeal via written submissions, only the Respondent filed he same which I have considered.

Determination

11. Before determining the above issues it is important to set out the principles guiding the law of defamation. In my view, defamation is rooted in our Constitution since under article 32(1) of the Constitution every person has the right to freedom of conscience, religion, thought, belief and opinion. This Article makes it clear that the freedom to express one's opinion is a fundamental freedom enshrined in the Constitution. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has a constitutional underpinning.

12. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. ***Gatley on Libel and Slander*, 8th Edition** at page 15 paragraph 31: "The gist of the tort of Libel and slander is the publication of a matter (usually words) conveying a defamatory imputation. 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. The standard of opinion is that of right thinking people generally."

13. Slander is defamatory matter that is in transitory form. It is only actionable on proof of special damages save for exceptional cases where it imputes a serious crime, disease, or attack on professional ability. See **Khasakhala vs. Aurali and Others [1995-98]1 E.A. 112**.

14. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the

estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Therefore, defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. This must be so because an injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts. See **J P Machira Vs. Wangethi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**

15. There are two kinds of defamation; slander and libel. Slander is where a person orally or verbally utters defamatory words of and concerning another person whereas libel is where a person writes of and concerning another person defamatory statements or words. Slander and libel are therefore different forms of defamation. Libel consists of a defamatory statement or representation in permanent form and as opposed to slander, libel is punishable *per se* without proof of damage and the actual sum to be awarded is "at large". Although a person's reputation has no actual cash value, the Court is free to form its own estimate of the harm taking into account all the circumstances.

16. The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided. Whereas mere abusive words may not be defamatory, the speaker of the words must take the risk of his audience construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense. In this case the Court found that the words uttered meant that the Appellant misused some money with the head teacher. It was found that the statement imputed that the Appellant was a fraudster.

17. Secondly, the words must refer to the plaintiff**.** However, the court found that there was no reference to the Appellant. The Appellant called witnesses who testified and stated that the said words were addressed to the Appellant. As stated above, the speaker of the words must take the risk of his audience construing them as defamatory and in this case the witnesses construed the words as defamatory and were made in reference to the Appellant. To my mind there is no requirement that the words must mention the Plaintiff by name as long as they are directed at the Plaintiff. In this case all the witnesses stated that the utterances were directed at the Appellant.

18. Thirdly, the words must be malicious. Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. 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 but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself. The language used is utterly beyond the facts. The failure to inquire is into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement, was false or did not care whether it be true or false will be evidence of malice. See **Godwin Wachira vs. Okoth [1977] KLR 24; J P Machira vs. Wangethi Mangi** (supra). In the absence of any explanation as to why the said words were uttered one can only say that they were recklessly uttered and therefore were uttered maliciously.

19. It was therefore held in **AlnashirVisram vs. Standard Limited [2016] eKLR,** as follows:

> **"Defamation is the publication of a statement which tends to lower a person's reputation or character in the estimation of right thinking members generally and which makes them shun and avoid him. The burden of proof lies on the claimant to establish that the published words or statements as published of and concerning the plaintiff are defamatory of him or her. The claimant must prove, on a balance of probabilities, that the words complained of were published of and concerning him; that they were published by the defendant; that they were false; and that they were defamatory in character of the claimant tending to lower him in the estimation of right thinking members of the society generally, making them shun or avoid him. Finally, the claimant must prove that the publication was done with malice."**

20. In the same vein, in the case of **Wycliffe A. Swanya vs. Toyota East Africa Ltd &Another [2009] eKLR** the Court of Appeal observed that:

> **"For the purpose of deciding a case of defamation, the Court is called upon to consider the essential of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:**
>
> **(i) That the matter of which the plaintiff complains is defamatory in character.**
>
> **(ii) That the defamatory statement or utterance was published by the defendants.**
>
> **Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed."**

21. To prove defamation, it is necessary for evidence to be adduced to show what third parties thought about the plaintiff as a result of the said publication. In this case the alleged defamatory letter was not even produced as exhibit before this court. In fact, it was not even marked for identification. Even if it had been marked, it would still not have amounted to an exhibit in the case. That the marked but unproduced document is hearsay, untested and unauthenticated account was set out in **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR** where the court held;-

"16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"

17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case" Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they has simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification……."

22. I agree with the Respondent that the above decision shows that the court can only rely or consider what has been produced in evidence and therefore if a document that has been marked for identification but not produced is not part of the record, then a document that is merely filed but is neither referred to nor produced in evidence cannot be considered by the court.

23. Apart from that the Appellant did not call any person to whom the alleged defamatory material was published and the witness called by him did not aver that as a result of the said utterances she formed a dim view of the Appellant's character. Where no such evidence is adduced as happened in this case, there would be no basis upon which the Court would be entitled to find that a plaintiff was defamed unless the case falls under the category which is said to be actionable *per se*. There is, however, no tangible evidence on record that the Appellant's reputation was disparaged or that the alleged defamatory matter tended to lower him in the estimation of right thinking members of society generally.

24. On those grounds, I agree with the learned trial magistrate that the Appellant did not prove the elements of defamation and his case was for dismissal.

25. Before concluding this judgement in cases of defamation, it must always be remembered that award of damages in defamation cases measure something so intrinsic to human dignity as a person's reputation and honour as these are not marketplace commodities. Unlike businesses, honour is not quoted on Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur. There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of as reputation, on the one hand, and determining as sum of money as compensation, on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award, and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank. This is not to underrate the part monetary awards play in our society. The threat of damages will continue to be needed as a deterrent as long as the world we live in remains as money oriented as it is. Moreover, it is well established that damage to one's reputation may not fully be cured by counter-publication or apology; the harmful statement often lingers on in people's minds. So even if damages do not cure the defamation, they may deter promiscuous slander, and constitutes a real solace for irreparable harm done to one's reputation. See **Albie Sachs, J** in **Dikoko vs. Mokhatla 2006 (6) SA 235 (CC); 2007 (I) BCLR I (CC)**.

26. In the premises, I dismiss the appeal but as the parties herein are related, there will be no order as to the costs of this appeal.

27. It is so ordered.

Judgement read, signed and delivered at Machakos in open Court this 21st day of July, 2020.

G.V. ODUNGA

JUDGE

In the presence of:

Miss Kaloki for P M Mutuku for the Appellant

Mr Nthiwa for Mrs Nzei for the Respondent

CA Geoffrey