



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 6 OF 2016**

**MWIKALI JOSEPH.....APPELLANT**

**VERSUS**

**ROSE MWENDE MWEMA.....RESPONDENT**

*(Being an Appeal from the Judgment and Order in Kitui Chief Magistrate's Court Civil Suit No. 15 of 2010 by Hon. B. M. Kimemia (PM) on 08/08/13)*

**J U D G M E N T**

1. **Rose Mwende Mwema**, the Respondent, sued **Mwikali Joseph**, the Appellant, claiming general damages for slander, costs of the suit and any other relief that the Court would consider fit to grant. It was pleaded that in the month of **March, 2009** the Appellant uttered and published of the Respondent that she had evil spirits, witchcraft and she was a prostitute which words were interpreted to mean that she was a witch, she bewitches people, an evil person and a misfit in the society; and as a result she was held in contempt, public ridicule and shunned by the public. This injured her character, reputation and esteem as she was avoided by the right thinking members of the public.
2. The Appellant filed a statement of defence denying having published the words as alleged and denied any liability whatsoever.
3. That trial Court considered evidence adduced and reached a finding that evidence adduced by the Respondent was uncontroverted. Following proof of the words uttered on a balance of probabilities, an award of **Kshs. 15,000/=** was made in general damages as compensation for slander plus costs and interest.
4. Aggrieved, the Appellant appeals on grounds that:
  - The learned trial Magistrate erred and misdirected herself on the law in basing her decision on the failure of the Appellant to give evidence, even when the Respondent had not proved her case against the Appellant.
  - The learned trial Magistrate erred in law in ignoring the issues of law as raised by the Appellant in her submissions, which error led to the trial Magistrate to arrive at the wrong decision.
  - The learned trial Magistrate erred in law when she gave a decision in favour of the Respondent even when the evidence on record did not support the decision.
  - The learned trial Magistrate erred in law when she failed to dismiss the Respondent's case even when the evidence on record called for such dismissal.
5. Following directions given in the matter, the Appeal was to be canvassed by way of written submission, however, only the Appellant filed submissions.
6. It was urged that the defence case was closed by the Court when the parties were not in Court on the date scheduled. An Application to have the defence heard was objected to and disallowed. Therefore, the Appellant was not heard before the trial Court.
7. That according to evidence adduced the Respondent alluded to two (2) days, **3<sup>rd</sup> March, 2009** and **4<sup>th</sup> July, 2009** while she pleaded as to sometime in **March, 2009**; that the reference to **4<sup>th</sup> July, 2009** in her evidence was not material to the claim and was inadmissible. That regarding the pleaded date of **3<sup>rd</sup> March, 2009** she stated that she had a shop and a bar and a customer **Mwikali** said she had cohabited with her husband. That PW2 the husband of the Respondent, **Joseph Muema Kiswili** was told by the Respondent that she was alleged to be a prostitute, witch and had 'majini' but he trusted his wife completely and the Appellant did not tell him that the Respondent had an affair with the husband and both PW3 **John Ndaka** and PW4 **Bernard Mutemi Nzuku** gave hearsay evidence.
8. It was urged further, that ingredients of defamation namely that:

- The words and/or expressions complained of must be published to a third party.
- They must refer to the person complaining of the same.
- They must expose the person to ridicule, contempt and/or odium.
- They must tend to lower a person in the estimation of right thinking members of the public or make them shun or avoid the person.

Had to be proved but this was not. In this regard she relied on the case of **HCC.A 28/2003 Dr. Ali Wario vs. Dr. John Ng'ondu**.

9. That it was erroneous on the part of the trial Magistrate to base the decision on lack of evidence on the part of the Appellant yet she had filed a defence denying having published the words alleged. She relied on the case of **Dave vs. Business Machines LTD (1974) EA 68** where it was stated that when a defence has been filed but the Defendant does not attend, the Plaintiff must prove the case by evidence.

10. That had the trial Court complied with the law in respect of defended suits as provided by **Order 21 Rule 4** of the **Civil Procedure Rules** it would have made reference to the Plaintiff and Defence and found that evidence tendered by the Respondent was not relevant to pleadings.

11. This being a first Appeal, it is my duty to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility (**See Selle vs. Associated Motor Boat Company Limited (1968) EA 123**).

12. It is trite law that in Civil Cases, the burden of proof is on the Plaintiff and the standard of proof is on a balance of probabilities. In the case **Miller vs. Minister of Pensions (1947) 2 ALL ER 372 Denning J.** stated thus:

*“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’s more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance of 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.”*

13. This was a case of defamation where the Respondent (claimant) was required to prove on a balance of probabilities:

- (i) Existence of a defamatory statement.
- (ii) That the Defendant (Appellant herein) published the defamatory statement to a third party.
- (iii) The publication referred to the Claimant (Respondent).
- (iv) The defamatory statement tended to lower the person in the estimation of the right thinking members of the society such that they shunned her.

14. It was pleaded that in **March, 2009** the Defendant uttered and published words in Kikamba thus:

*“We Rose Mwendu wina majini na wi muoi na wi Malaya.”*

These words were translated into English as follows:

*“You Rose Mwendu you have evil spirits and you have witchcraft and you are also a prostitute.”*

15. In her testimony PW1 the Respondent told the Court as follows:

*“On 3<sup>rd</sup> March, 2009 the case started, I had a shop earlier and had a bar and customer that Mwikali said I cohabit with her husband (sic).”*

The other evidence adduced related to the **4<sup>th</sup> day of July, 2009** where she alleged that the Respondent went to her shop while angry and she told her to stop cohabiting with her husband. That she had investigated and found that she was fornicating with her husband in her bar and was using ‘majini’ to live with her husband.

16. PW2 the Respondent’s husband was informed by her of the allegations. PW3 and PW4 also heard of the allegations per their testimony. Their evidence was hearsay.

17. In the case of **Dare vs. Pulman (1982) 148 C.L.R. 658 at 664** it was stated that:

*“Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other*

***party a fair opportunity to meet, they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court ..."***

It was not pleaded that the words were uttered on the 4<sup>th</sup> day of **July, 2009**. The date pleaded was the 3<sup>rd</sup> day of **March, 2009**, therefore, the material claim was not supported by evidence tendered. It was alleged that as a result of utterances the Respondent closed the shop as customers avoided her shop, however, none of the alleged customers were called to testify. Therefore, no evidence was called to establish if any words were uttered they were indeed defamatory, they referred to the Respondent and were published to a third party.

18. In the case of **Knupffer vs. London Express Newspaper LTD (1944) 1 ALL ER 495** it was stated that:

***"The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the Plaintiff."***

19. This rule was not proved. The alleged customers who shunned the shop of the Respondent as alleged by PW2 such that it closed down were not called to testify. In the case of **S. M. W. vs. Z. W. M. (2015) eKLR** it was stated that:

***"A 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."***

20. Without evidence of those to whom the alleged utterances were published, I cannot interrogate whether the alleged persons were reasonable enough to act by avoiding or shunning the Respondent.

21. As aforesaid the duty was upon the Respondent to prove existence of the elements of defamation on a balance of probabilities. The allegations were denied by the Appellant, failure to tender evidence in her defence having been locked out on technicalities did not mean that evidence adduced by the Respondent remained uncontroverted as found by the trial Court.

22. In the circumstances, the Appeal is allowed. The Lower Court Judgment be and is hereby set aside and substituted with an order dismissing the Plaintiff's case with costs to the Defendant. The Appellant shall also have costs of the Appeal.

23. It is so ordered.

**Dated, Signed and Delivered at Kitui this 18<sup>th</sup> day of July, 2019.**

**L. N. MUTENDE**

**JUDGE**