



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 48 OF 2018

ELIZABETH MUTHONI MWEMA.....APPLICANT/APPELLANT

VERSUS

MBUVI MWIKYA.....RESPONDENT

J U D G M E N T

1. **Elizabeth Muthoni Mwema**, the Appellant, filed a suit against the Respondent, **Mbuvu Mwikya** claiming **Kshs. 3000/=** interest at Court rates and costs. The claim arose out of monetary compensation made against the Respondent by elders after the Respondent allegedly published false allegations against the Appellant.

2. In his written statement of defence, the Respondent denied allegations pleaded and averred that the local elders had no jurisdiction to make any monetary compensation against him.

3. The trial court considered evidence before it and reached a finding that there was no agreement between the parties that could bind the Respondent and that the elders did not have monetary jurisdiction against parties therefore dismissed the claim.

4. Aggrieved, the Appellant appeals on grounds that:

(i) The Learned District Magistrate II erred in law and misdirected himself when he held that the elders had no jurisdiction to entertain the appellants claim against the Respondent.

(ii) The Learned District Magistrate II erred and misdirected himself when he misconstrued an award as an agreement and he further erred when he proceeded to decide the case on the basis of an agreement, when infact the basis of the claim was that of an award by local elders.

(iii) The learned District Magistrate erred and misdirected himself when he held that the elders meeting deciding on the dispute between the appellant and the Respondent was not properly constituted without giving reasons to that effect.

(iv) The Learned District Magistrate II erred and misdirected himself when he held that the Respondent was forced to sign the agreement when in the first place there was no such agreement but an award and he further erred when he held that there was no meeting of the minds between the parties "ad idem".

(v) The findings of the Learned District Magistrate II were against the weight of evidence as adduced.

5. The appeal was canvassed by way of written submissions. It was urged by the Appellant that there was an arbitration award by local elders, an award of Kshs. 3000/= therefore sit was a misdirection on the part of the trial Magistrate to reach a finding that elders did not have jurisdiction to entertain monetary claims as they derive their jurisdiction from customary law, practice and rites. That at the time, customary law was recognized by the Judicature Act. That under customary law elders make monetary awards as in cases of payment of dowry as well as compensation where one has been offended by another, including even pregnancy compensation.

6. That an award of elders is not an agreement but a decision that binds the parties who subjected themselves to the jurisdiction of the court of elders. That the panel of elders having been properly constituted allegations to the contrary is not backed by evidence. He disputed the allegation that the Respondent was forced to sign the decision.

7. In the case of **SELLE -Vs- ASSOCIATED MOTOR BOAT COMPANY LIMITED 1968** it was stated thus:

"...This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

8. The gravamen of the Appellant is that the trial court misdirected itself in reaching the finding that the local elders who determined the matter that resulted into the award of Kshs. 3000/= to the Appellant lacked the requisite jurisdiction. It was urged that elders derive their jurisdiction from customary law, practice and rites that is recognized by the constitution and in particular that customary law was recognized by the Judicature Acts then.

9. The alleged false allegations were stated to have been published by the Respondents in the **year 2004** in the **month of April**, according to one of the witnesses **PW3, Francis Wambua Kake**, although the pleadings were silent on when the alleged false spoken statement was made. If this was the time in question, the judicature Act was clear in that regard. Courts could be guided by African Customary Law in civil cases as long as it was not repugnant to justice and morality and/or was not inconsistent with any written law.

10. Therefore, the question to be answered is whether the elders who determined the matter had jurisdiction to hear it. The complaint was made to the chief, according to the Appellant, but he did not take part in deliberations. The resolution that was reduced into writing on the 30/4/2004 was signed by the parties and elders who were present. The Respondent was required to pay some kshs. 3000/= being cleansing award to the Appellant.

11. The question to be determined is whether the Appellant had a cause of action to enable her make the complaint which was properly before the elders. In the Appellant's submissions it is argued that elders make monetary awards in cases of payment of dowry as well as where persons are offended by others including pregnancy compensation. This was a case of alleged utterances that were untrue therefore evidence had to be tendered to establish the same.

12. PW3 stated that he encountered the Respondent who told him that his brother's wife planned to kill him and since the Appellant was his elder brother's wife he formed an opinion that he referred to her. Therefore he told her. On cross-examination he stated that his five (5) brothers were married but he settled on the Appellant.

13. There was a huge gap that was left regarding the recording of the testimonies by witnesses and how the elders reached the decision.

14. An allegation that one wants to kill another damages the good reputation of the person which would have been called upon the person whose character is injured to seek redress for the unjustified injury. The forum to determine such a matter would be a court of law. Therefore the elders lacked the jurisdiction to determine the matter and therefore had no jurisdiction to award the monetary compensation.

15. In the result, the trial Magistrate did not fall into error in reaching the impugned decision. Consequently the appeal lacks merit. Accordingly it is dismissed. Since the respondents did not file any submissions, there will be no orders as to costs at the Appellate stage.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 11TH day of September, 2019

L.N. MUTENDE

JUDGE