



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 249 OF 2008

FREDRICK NJOGU MATHENGE.....APPELLANT

- V E R S U S -

STRAGBAG INTERNATIONAL GMBH.....RESPONDENT

(Being an appeal from the judgement of Hon. Miss E. N. Maina,

Senior Principal Magistrate delivered on 16th April, 2008

in Nairobi CMCC No. 8862 of 2006)

JUDGEMENT

1) Fredrick Njogu Mathenge, the appellant herein, filed an action before the Chief Magistrate's Court vide the amended plaint dated 20.9.2005 in which he sought for judgment against Stragbag International GMBH, the respondent herein as follows:

a. Ksh.327,400/=

b. Loss of income

c. General damages

d. Costs

2) The appellant's case is to the effect that on 3.6.2003 he was employed by the respondent as a wages officer and computer operator. He claimed that on 8th December 2004, the respondent through its officers falsely and maliciously accused him of stealing ksh.650,000/=. The appellant said he was eventually arrested by police who handcuffed him and that he was first taken to his friends house where the police impounded his newly purchased car. He also alleged that he was taken to his house where those who arrested him carried out a search where upon they carted away a sum of ksh.153,000/=. It is his evidence that it later transpired that those who arrested him were not actually police officers. The appellant was eventually charged vide criminal case no. 1552 of 2005 at Kibera Law Courts. The motor vehicle was detained at C.I.D. Headquarters for four (4) months before being released to the appellant. The appellant claimed he spent ksh.68,000/= to repair the motor vehicle which had been damaged while in the custody of the C.I.D. The appellant also alleged that he never went back to the respondent's employment since it no longer saw him as an employee. He instead filed the action against the respondent asking for

judgment as stated hereinabove. The respondent vehemently denied the appellant's claim and stated that it was justified to summarily dismiss the appellant. The suit was heard and substantially dismissed save that the appellant was awarded ksh.53,000/= being the amount he expended on the repair of the motor vehicle which was damaged while in police custody. The appellant was unhappy with the decision hence this appeal.

3) On appeal, the appellant put forward the following grounds in his memorandum:

- 1. The learned magistrate erred in law in holding that the plaintiff failed to prove his case.***
- 2. The learned magistrate erred in law in failing to record the plaintiff's counsel objections, consider them and rule on them before proceeding with the trial.***
- 3. The learned magistrate erred in law in admitting in evidence the defendant's exhibits which were inadmissible in law.***
- 4. The learned magistrate misdirected herself in fact and law in her analysis of the evidence tendered thereby arriving at findings which were against the weight of evidence.***
- 5. The learned magistrate erred both in fact and law in holding that the words complained of were not defamatory.***
- 6. The learned magistrate erred both in fact and law in holding that the plaintiff was not entitled to damages for slander.***
- 7. The learned magistrate erred in law in failing to appreciate and apply the principles applicable for the award of damages for loss of profit.***
- 8. The learned magistrate erred in law in holding that damages for loss of profit is not awardable.***
- 9. The learned magistrate misdirected herself in law in holding that the plaintiff's termination was lawful.***
- 10. The learned magistrate erred in fact and in law in holding that the defendant was entitled to dismiss the plaintiff summarily.***
- 11. The learned magistrate erred in law in failing to award the plaintiff damages for wrongful dismissal.***
- 12. The learned magistrate erred both in fact and law in holding that the plaintiff failed to prove that he lost the sum of kshs.153,000.00.***
- 13. The learned magistrate erred in law in failing to grant the plaintiff damages for false imprisonment and aggravated damages.***
- 14. The learned magistrate erred in law in failing to award the plaintiff cost of the suit.***
- 15. The learned magistrate erred in law in failing to address herself to the plaintiff's counsel submission.***

4. When the appeal came up for hearing, this court gave directions to have the same disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions plus the authorities cited.

5. Though the appellant put forward a total of fifteen grounds of appeal, the aforesaid grounds may be

collapsed to two main grounds;

First, that the learned Senior Principal Magistrate erred by dismissing the appellant's suit yet the appellant had proved his case to the required standard of proof.

Secondly, that the trial magistrate erred by failing to award the appellant damages as prayed in the plaint.

6. On the first ground of appeal, the appellant has argued that he tendered evidence showing that one Boromisa uttered defamatory words in the presence of one Cosman. It is also argued that a Mr. Nazim, the respondent's Financial Controller repeated the offending words in the presence of both Mssrs Boromisa and Cosman. The appellant further stated that the offending words were also published in the presence of the two police impersonators who arrested him. The appellant urged this court to find that the defamatory words were published to third parties who acted on the words by arresting the appellant in full view of his workmates and the general public. It is the submission of the respondent that there was no corroboration to the alleged defamatory words and further that there was no evidence that the alleged defamatory statements were published to the fellow employees as alleged. I have re-evaluated the evidence presented over the tort of defamation. It is apparent from the record that the respondent through its senior employees summoned the appellant and informed him that they had realised that he had stolen ksh.650,000/= from the respondent. It is also not in dispute that the complaint was reported to the police who took action leading to arrest and arraignment of the appellant before a court of law. The trial Senior Principal Magistrate formed the opinion that the words complained of, were published by officers in authority over the appellant and therefore not defamatory. It is also apparent from record that the appellant did not summon his colleagues who were present at the time the alleged defamatory words were published. The persons who are alleged to have uttered the words were the appellant's superiors. In any case the allegations led to his arrest and appearance before a court of law to face the offence of theft. The theft case is yet to be heard and determined. Having critically examined the evidence, it is therefore difficult to state that the tort of defamation was proved. Consequently, the finding of the trial magistrate that the appellant had not established his case to the required standard of proof cannot be faulted. There was no evidence that the respondent was actuated by malice or improper motive in uttering the offending words.

7. The appellant argued that he gave direct evidence which was to the effect that the police impersonators broke into his safe and took away ksh.153,000/=. He stated that his evidence was not controverted therefore it was wrong for the trial magistrate to dismiss his claim of ksh.153,000/=.

8. The respondent was of the view that the appellant did not present independent evidence to show that the alleged amount was inside the cash box. It is also pointed out that there was no evidence of the alleged broken safe or a report at the police station therefore the appellant failed to prove his case. With respect, I agree with the respondent that the appellant failed to tender credible evidence to establish the theft of ksh.153,000/= from his house. The theft was not reported to the police. What remains is the word of the appellant against that of the respondent.

9. The other ground of appeal which the appellant has urged is to the effect that the trial court erred in failing to award him loss of profit despite the fact that he presented credible evidence to establish the claim of ksh.150,000/=. The appellant argued that he tendered in evidence as an exhibit a sale agreement between him and one Raphael Nguta for ksh.300,000/=. He stated that he intended to sell the motor vehicle for ksh.450,000/= but he could not conclude the sale because the motor vehicle was impounded and detained at the police station. The respondent contended that the appellant had failed to present credible evidence of the later sale deal therefore the court could not grant him the request. With respect I agree with the respondent's argument that the appellant had failed to present evidence whether oral or documentary to prove the intended sale of the motor vehicle for ksh.450,000/=. The trial magistrate was therefore right to decline the claim.

10. On the second ground the appellant complained that he was entitled to damages in the circumstances of this case. The respondent is of the submission that the appellant having failed to prove that he was

defamed, he was not entitled to any damages. Having re-evaluated the evidence tendered before the trial court it is clear in my mind that the appellant having failed to prove his claim, he cannot expect to be paid damages. The learned Senior Principal Magistrate was therefore right to dismiss the claim for damages.

11. In the end, I find no merit in this appeal. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 5th day of April, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents