



**REPUBLIC OF KENYA**

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

**HCCA NO. 40 OF 2015**

**(From the Original Keroka SRM Civil Suit No. 539 of 2009)**

**SHEM N. OSIKE.....APPELLANT**

**=VRS=**

**NELSON AMING'A OYUGI.....RESPONDENT**

***[Being an Appeal from the Judgement and Decree of Hon. J. M. Were, Senior Resident Magistrate delivered on the 28<sup>th</sup> day of July, 2011 in Keroka SRM CC No. 539 of 2009]***

**JUDGEMENT**

The Respondent sued the Appellant seeking damages for defamation and was awarded a sum of Kshs. 150,000/=. The allegation against the Appellant was that he had uttered the following words in reference to the Respondent:-

***“I am under threat from the Executive Secretary KNUT Masaba Branch and Head Teacher of Obwari Primary School who is present here. I do not go to any social place in Keroka and I do not even sleep in my house due to the threats I have received from the two.”***

In his judgement the Learned Trial Magistrate found that the words were made in the presence of other members of a school committee and were intended to project the Respondent as a person of ill-will but on causing actual harm to the Appellant.

He also made a finding that the esteem of the Respondent was lowered in the eyes of right thinking members of the society and that the words had caused him to be shunned or avoided and were therefore defamatory.

Being dissatisfied, the Appellant preferred this appeal on the following grounds:-

- 1. THAT the Learned Trial Magistrate erred in law and facts when he held that the Appellant had not proved his defence to the requisite standards, whilst the counter was true.**
- 2. THAT the Learned Trial Magistrate erred in law and facts when he entered his judgement upon matters that were never canvassed in evidence or submitted upon the parties to the matter that were before him.**
- 3. THAT the Learned Trial Magistrate erred in law and fact when he took into account irrelevant pieces of evidence to the prejudice of the Appellant's case.**
- 4. THAT the Learned Trial Magistrate erred in law and fact in failing to give due consideration of the merits of the evidence in the suit as to whether the alleged defamation arose in a circumstances that were privileged.**
- 5. THAT the Learned Trial Magistrate erred in law and fact by awarding the Respondent Kshs. 150,000/= as general damages and costs to the suit being excessive and which was never proved.**
- 6. THAT the Learned Trial Magistrate erred in law and facts when he overlooked the Court record, and failed totally to address the issues of law and facts raised in respect of the Appellant filed submissions.**
- 7. THAT the Learned Trial Magistrate erred in law when he totally failed to address, the fundamental issues which was raised in the Appellant's submissions dated 20<sup>th</sup> June, 2011 and filed in Court on 24<sup>th</sup> June, 2011 were never addressed in the judgement of the Court.**

The appeal was canvassed through written submissions. I have considered those submissions and the authorities cited therein fully and as the first appellate court, I have also reconsidered and evaluated the evidence before the Trial Court so as to arrive at my own conclusions. I have done so while appreciating that unlike the Learned Trial Magistrate I did not benefit from seeing or hearing the witnesses testify.

The Respondent's evidence was that on 2<sup>nd</sup> October 2009 he received information from one Nelson Oyugi that the Appellant had during the case of another teacher stated that **"he was under threat of Executive Secretary of KNUT Masaba Branch and the HRM of Obwari Primary School who is present here. I don't go to any social place at Keroka and I don't sleep in my house due to threats from the two."** He stated that he was shocked as he had never threatened the Respondent although they had come into contact as they were both teachers. The Respondent also stated that as a result of those utterances by the Appellant his reputation was affected as people called him a criminal.

Abel Nyangaresi Bichanga (Pw2) and Nelson Amuga Oyugi (Pw3) who were both present at the disciplinary proceedings confirmed that the Appellant uttered those words. According to Pw2 the Appellant's exact words were that he was being threatened by phone by the office of the Plaintiff and the Headmaster of Oyugi Obwari Primary School. Pw2 stated that the words did not affect his respect for the Respondent as he continued to respect him the same way he did previously. He however felt that the Respondent had been slandered.

Daniel Barasa a Sergeant attached to Keroka CID office testified that on 26<sup>th</sup> October 2009 the Appellant reported that he had received threats from the Respondent in this case and another person. He testified that he opened a file and commenced investigations and that he later forwarded the file to the Attorney General's office but was told there was not enough evidence to charge the suspects. He did not therefore proceed further.

On his part the Appellant testified and called a witness who claimed to have also been threatened in regard to a disciplinary case they were handling. The witness stated that prior to the Appellant reporting the matter he too had made a report to the Police.

As defined in *Halsburys Law of England 4<sup>th</sup> Edition Vol. 28 on Liberal and Slander* cited in *Clement Muturi Kigano =vrs= Joseph Nyaga [2010] eKLR:-*

***"A slander for which an action will lie is defamatory statement if made or conveyed by spoken words, sounds, looks, signs, gestures or some other non-permanent form, published of and concerning the Plaintiff to a person other than the Plaintiff, by which the Plaintiff has suffered actual damage, often referred to as special damage, which he must allege and prove or which is actionable perse."***

Applying the above test to the present case I find that indeed the Appellant uttered the words complained of, that he did so of and concerning the Respondent and that he did so to a person(s) other than the Plaintiff. The words were uttered during disciplinary proceedings of another teacher and there were several people present. The question is, were the words defamatory? My finding is that the words spoken of the Respondent were not defamatory. Slander is not actionable perse and the Respondent ought to have proved that the words in their ordinary meaning were defamatory in that he suffered actual damage.

From the evidence of Pw1 and Pw2, all the Appellant did was to say that he had received threats from the Respondent in regard to that matter. There is evidence that he had in fact been threatened by those two people and that he had reported the threats to the police. Sgt. Barasa a witness for the Respondent confirmed having received the report. He even contemplated charging the two people who had issued the threats but the evidence was insufficient. To allege that someone has threatened you is not in itself defamatory. Indeed the Respondent did not suffer any special damage as a result of that allegation. None of his witnesses alleged to have thought differently of him as a result of the allegations. Pw2 for instance stated that he continued to respect the Respondent despite those allegations. It is not sufficient for one to say that they were embarrassed by the words complained of. Embarrassment does not equal to special damage. The Respondent neither pleaded nor proved special damage and moreover the Trial Magistrate ought to have considered the circumstances under which the words complained of were uttered. It was during disciplinary proceedings of a teacher who had allegedly defiled a pupil and the Appellant was merely bringing it to the attention of those present that he had received threats in connection with those proceedings. Whereas the Respondent alleges to have been called a criminal as a result of the words complained, he did not adduce evidence of any person referring to him as a criminal.

Clearly the Respondent did not prove defamation and it is my finding that the Trial Magistrate misdirected himself in finding that he did.

I find merit in this appeal and the same is allowed. The award of damages is set aside and the Appellant is awarded the costs of this appeal as well as the suit in the Court below.

It is so ordered.

**Dated and Delivered at Nyamira this 12<sup>th</sup> day of July, 2018.**

**E. N. MAINA**

**JUDGE**