



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 8 OF 2018

BETWEEN

BEATY OMARE.....1ST APPELLANT

KELVIN MUHATI.....2ND APPELLANT

JUDY ODONGO.....3RD APPELLANT

RITAH ORINDI.....4TH APPELLANT

AND

DAMARICE ADHIAMBO ABANDE.....RESPONDENT

[An appeal from the Judgment in Kisumu Chief Magistrate's Court Civil Suit number 434 of 2013 by Hon. M. Agutu – RM dated 15th August 2017]

JUDGMENT

1. The appellants, **BEATY OMARE, KELVIN MUTAHI, JUDY ODONGO** and **RITAH ORINDI** were held liable for the defamation of the respondent, **DAMARICE ADHIAMBO ABANDE**, and were ordered to pay her Kshs 300,000/= as General Damages and Kshs 50,000/= as Exemplary Damages.
2. Being dissatisfied with the judgment the appellants lodged this appeal. They contend that:
 - (i) The words uttered by them were not defamatory;
 - (ii) The words were not published;
 - (iii) There was justification as the letter was nothing more than a complaint to their superiors, and it was covered by the principles of confidentiality;
 - (iv) The damages that were awarded were not proven;
 - (v) The trial court took into account irrelevant issues and evidence which was non-existent;
 - (vi) The appellants' submissions were not given due consideration.
3. The letter in issue was addressed to the District Medical Officer of Health, through the District Public Health Nurse, Ahero.
4. It is common ground that all the four appellants signed the letter.
5. By the said letter, the appellants relayed the following message;

“ We, the nurses of Nyakongo Dispensary are not comfortable working with Mrs. Damarice Abande due to the following reasons:-

- i. Gross negligence in patient management.
- ii. Incitement of patients against other staff she terms as “outsiders” and use of abusive language to other staffs.
- iii. Continuous power struggle with the new nurse in charge.

And she had been officially released from the facility and does not want to leave, we request that she be reinstated as a nurse at Nyakongo and ourselves be transferred out to other health facilities to continue with service.”

6. When the respondent testified she confirmed that Ritah Orindi has been transferred to the Nyakongo Dispensary as the new In-Charge. Rita was to replace the respondent, who was transferred to Oren Dispensary.
7. On 23rd January 2013, the respondent lodged a Petition against her transfer to Oren Dispensary.
8. By her said petition, the respondent expressed the view that the transfer was a means of settling scores with her husband, who was a politician. Apparently, the respondent’s husband was opposing the former councilor for that area, and the councilor had vowed to have respondent removed from Nyakongo Dispensary.
9. In her petition, the respondent indicated that she was ready to perform general nursing duties at Nyakongo Dispensary.
10. My reading of that petition informs me that the respondent was keen to remain at Nyakongo Dispensary. She was even ready to forego the position of In-Charge, and to perform general nursing duties.
11. It was therefore not a false statement when the appellants indicated that the respondent did not want to leave Nyakongo Dispensary.
12. Upon receipt of the petition, the Provincial Human Resource Manager, Nyanza, Mr. Aggrey N. Omukubah wrote to the District Medical Officer of Health Nyando District. The letter is dated 19th March 2013, and it cancelled the transfer of the respondent from Nyakongo Dispensary to Oren dispensary.
13. On 10th April 2013, the District Medical Officer of Health, Nyando, wrote to the respondent. She stated that the transfer of the respondent was a part of the normal process, and that it was meant to improve the quality of services at Nyakongo Dispensary.
14. Dr. Rosemary Obara, the District Medical Officer of Health, Nyando, said;

“DHMT held a meeting with staffs in the facility on 7th March 2013 and realized that despite your request, your relationship with all the other staffs in the facility and the community is wanting and this has made performance of the facility to deteriorate. You were invited but you did not attend.

In the discussion the team realized that your political affiliation has interfered with the client turn out at the facility.

Finally the DHMT has the mandate to post staff within the district and therefore have decided that you report as per the posting, and hand over to the incoming In-Charge immediately and bring a copy of the handing over report to the DMOH office.”
15. It is worthy of note that that letter was exhibited by the respondent.
16. The letter says that notwithstanding the respondent’s petition to stay on at Nyakongo Dispensary, the District Medical Officer of Health had noted that the relationship between the respondent and all other members of staff was wanting.
17. The DMOH also noted that the political affiliation of the respondent was interfering with the turnout of clients at the facility.
18. In my understanding, that evaluation appears to confirm what the respondent had stated in her petition; that her husband was a politician and was apparently opposing the former councilor for the area.
19. The respondent made reference to remarks made by the said former councillor at political rallies, when he vowed to remove the respondent from Nyakongo.
20. In all probability, when there is a political duel between two persons and an officer of health is well-known to be connected to one of them, that could have an impact on the perception of persons who rely on the health facility at which the Officer of health was working.
21. In this case, the District Medical Officer of Health said that the political affiliation of the respondent had interfered with the turnout of clients at Nyakongo Dispensary.
22. Considering that the respondent never took issue with the observation made by the District Medical Officer of Health, it would appear that the views that had been expressed by the appellants had some basis.
23. Although the respondent testified that there had never been any complaints against her, she also said the following during cross-

examination:

“On 11th July 2013 I was called by the Administrator of Nyando Sub-County. His opening statements were;

‘Abande I am tired of complaints about you.’

I inquired what was going on. He informed me they would come to the facility at 4.00 p.m.”

24. In effect, there had been complaints about the respondent, if the statement she attributed to the Administrator of Nyando Sub-County was anything to go by.

25. In the circumstances, it is understandable why the appellants may have felt uncomfortable working with the respondent.

26. It is interesting to note that the respondent said;

“I was not hurt that my colleagues did not want to work with me, but I felt betrayed due to the letter written.”

27. PW2, DR. JAMES OBANDE OTIENO, was a Chief Specialist Orthopedic Surgeon. He was the Head of Surgery at Jaramogi Hospital.

28. He was conversant with personnel issues.

29. As far as he was concerned, if there had been an allegation of negligence, such a complaint must first be made by a patient. The said complaint was supposed to go to the Regulatory body.

30. In the case of nurses, such as the respondent, any complaint ought to have gone to the NURSING COUNCIL OF KENYA; that is what Dr. Otieno said.

31. The doctor confirmed that he had never worked at dispensaries, although he had supervised dispensaries.

32. In this case, it was his evidence that the documents produced by the defendants were not conclusive proof of negligence.

33. The words utilized by the doctor are significant, as they do not indicate an absence of negligence. The only thing that the witness was clear about is that the documents did not conclusively prove negligence.

34. In effect, I understand the doctor to have been saying that there was a possibility, albeit inconclusive, of negligence.

35. But any such negligence was, in the opinion of the witness, not attributable to an individual. His reason for so stating was that the management of a patient was teamwork.

36. The evidence of the doctor is not in tandem with the evidence of the respondent, as regards the procedure for lodging complaints.

37. Whilst the doctor said that complaints must emanate from a patient, who writes to the Regulatory Body, the respondent said;

“It is a procedure that if I have a complaint against a person I talk to the person. If we cannot solve the matter, it is forwarded to the superiors. The person to whom the letter were copied were my seniors.”

38. Therefore, as between the respondent and her only other witness, there is no consistency concerning the procedure for handling complaints.

39. If, as the respondent said, an unresolved dispute ought to have been forwarded to her seniors, it appears that the appellants had not made any mistake by communicating with the respondent’s superiors.

40. It would therefore follow that the superiors to whom the appellants wrote the letter in question, had a corresponding duty to receive complaints about the respondent, in her capacity as a nurse.

41. Meanwhile, it is also clear that RITA ORINDI (DW4) called a meeting on 22nd April 2013. One of the issues to be discussed at the meeting was the management of patients.

42. All the appellants, together with the respondent attended the said meeting.

43. According to the appellants, it was at that meeting when the respondent called them junior officers, who were also outsiders.

44. During cross-examination, the respondent suggested that subordinate staff could not be involved in discussing the management of patients.

45. However, DW4 explained that Patient Management started at the gate, when the patient was received by a watchman.
46. In my understanding, there are different aspects of Patient Management; for example there is the watchman who receives the patient at the gate, but he does not get involved in either the diagnosis process or in the actual treatment of the patient.
47. The respondent had testified that if a person had a complaint against her, that person ought to first talk to her.
48. In my understanding, the meeting to discuss Patient Management was an opportunity at which the nurses who had an issue concerning the manner in which the respondent had managed a patient, were to discuss the issue with the respondent.
49. Regrettably, the meeting did not yield a solution, and the appellants attribute the failure to the respondent, who expressed the view that she could not consult her juniors.
50. Dr. Otieno (PW2) said that a Medical Officer will be held to be negligent if you know a situation is risky but you do not act.
51. In this case it was the appellant's case that the respondent failed to comply with the National Guidelines for the Diagnosis, Treatment and Prevention of Malaria.
52. If indeed the respondent failed to comply with the said National Guidelines, it could have adversely affected the patient. The patient concerned is said to have suffered a suspected sciatic nerve injury.
53. If that be the position, it would not have been false to describe the respondent's inaction as constituting negligence.
54. I also note that when the respondent was cross-examining the appellants she did not challenge their evidence concerning her reference to the appellants as being outsiders and her juniors. I therefore find that the letter in issue was factually correct when it cited use of the phrase "outsiders", in relation to the appellants.
55. However, I have found no evidence at all about the alleged incitement of patients by the respondent, against the appellants.
56. In the absence of such evidence, I find that the appellants made a false statement in relation to the respondent.
57. I also find no evidence of abusive language which the respondent used against other members of staff.
58. There is also no clear evidence of the alleged Power Struggle between Rita and Damaris. However, it is possible to perceive some actions as indicative of a power struggle. The actions I make reference to include the chairing of a meeting of staff, whilst the incoming In-Charge was the secretary; and the continued handling of administrative matters such as renovations.
59. All in all, the situation prevailing at Nyakongo Dispensary was an unfortunate one. The nursing staff, who were supposed to work as a team, in providing services to patients, were not operating in consonance. So bad was the situation that the appellants offered to be transferred away, so that they would not have to work with the respondent. And the respondent was not hurt that her colleagues did not want to work with her, yet she still preferred to remain at Nyakongo Dispensary, as a nurse.
60. In the result, having re-evaluated all the evidence on record, I find that the respondent did not prove that the appellants were motivated by malice.
61. Secondly, the letter was, to a large extent, factually correct.
62. Thirdly, the letter was not published; as it was only written to persons who had a duty to receive information concerning the respondent.
63. Accordingly, I hold that the learned trial magistrate erred by finding the appellants liable for defamation. Therefore, I now set aside the judgment dated 15th August 2017 and substitute it with an Order dismissing the suit against the appellants.
64. As regards the costs of the suit, I order that each party will pay his/her own costs. I so order because of the findings that some of the statements in the letter authored by the appellants were false.
65. However, the appellants are awarded the costs of the Appeal.

DATED, SIGNED and DELIVERED at KISUMU this 17th day of September 2018.

FRED A. OCHIENG'

JUDGE