



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 140 OF 2015**

**1. KIZITO ANYANGU SHAKABA**

**2. JUMA M. ASMAN.....APPELLANTS**

**VERSUS**

**KIZITO LIBASIA..... RESPONDENT**

**(An appeal from the Judgment of Hon. B.M. Ekhubi, Senior Resident Magistrate delivered on 14th August, 2015 in Mombasa SRMCC No. 2473 of 2009).**

**JUDGMENT**

1. The plaintiff (respondent) filed a suit in the lower court on 7th September, 2009 against the defendants (appellants) claiming the sum of Kshs. 296,400/= being the net value of his share in a partnership that they had in a transport business. The respondent also prayed for costs and interest and any other relief that the court could deem fit.

2. The appellants filed a defence and counter-claim and denied the allegations leveled against them with regard to the existence of a partnership and averred that if the same existed, the respondent expressly rejected the offer made to him by them, at the dissolution of the partnership. They claimed general damages for defamation of character, Ksh. 79,000/= being parking fees, loss of use, and an order compelling the respondent to release to the appellants' blank duly signed transfer forms for motor vehicle registration No. KVE 968/ZA 2804 and costs and interest.

3. The Hon. Magistrate considered the evidence adduced and entered judgment in favour of the respondent as against the appellants jointly and severally for Kshs. 296,400/= plus costs and interest. The counter-claim was dismissed.

4. The appellants being dissatisfied with the said judgment filed a memorandum of appeal on 11th September, 2015, raising the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in fact and in law in holding that the partnership between the Appellants and the Respondents was determined when it still clearly subsists;

(ii) That the Learned Magistrate erred in fact and in law in failing to consider and/or make a finding on the import of the Respondent's letter declining termination of the partnership;

(iii) That the Learned Magistrate erred in fact and in law in failing to consider in full the provisions of the Partnership Act (Cap 29 of the Laws of Kenya) which was the subsisting law;

(iv) That the Learned Magistrate erred in law by heavily relying on the Common Law position in total disregard of the legal position obtaining in Kenya;

(v) That the Learned Trial Magistrate erred in fact and in law in considering only portions of the Defendant's evidence and neglecting and/or failing to consider others;

(vi) That the Learned Trial Magistrate erred in fact and in law in disregarding express contents of the Occurrence Book (O.B.) extract;

(vii) That the Learned Trial Magistrate erred in fact and in law in holding that the Appellant's report of theft of a lorry to the Changamwe Police Station was not anchored by malice (sic), contrary to the evidence on record;

(viii) That the Learned Trial Magistrate erred in law and in fact in holding that the Defendants are hypocritical, per the words of the American President (POTUS) (sic) without fully considering the exhibits on record;

(ix) That the Learned Trial Magistrate erred in disregarding and/or not even considering majority of the exhibits produced which have a direct impact on the suit;

(x) That the Learned Trial Magistrate erred in fact and in law in failing to consider that the Respondent had expressly declined the Appellant's offer to dissolve the partnership; and

(xi) That the Learned Trial Magistrate erred on the Respondent's capital contribution (sic).

5. The appellants prayed for the appeal to be allowed with costs and for the Judgment of the lower court to be set aside.

6. The appellants' Counsel filed his written submissions 9th May, 2018. The respondent's Counsel had filed his on 8th May, 2018. The court undertook to peruse the same and write a Judgment.

7. The appellants' submissions are to the effect that there were offers made to determine the partnership by both the appellants and respondent which were rejected. It was stated that the first offer was made by the respondent's Advocates on 11<sup>th</sup> September, 2007. It was however rejected by the appellants through their Advocate's letter of 20th September, 2007. The second offer was made on 21<sup>st</sup> September, 2007 by the appellants but it was rejected by the respondent through his Advocate's letter dated 4<sup>th</sup> October, 2007. It was submitted that in the said letter the respondent asserted that the partnership between him and the appellants subsisted and that he continued to be entitled to his profits. It was further submitted that the respondent's Advocates letter dated 10th July, 2009 indicated that the partnership had not been dissolved.

8. This court was referred to the respondent's evidence where he testified that the minutes of 21st September, 2007 dissolved the partnership, yet he later on in his evidence, he said that the partnership came to an end in July or August, 2007. It was submitted that the respondent stated that when he reported to the Police, the partnership had not been dissolved. Counsel further stated in his submissions that the respondent in his evidence in court went on to say that the partnership was dissolved in the year 2009 and that he got the minutes later but they did not indicate if the partnership had been dissolved.

9. Counsel for the appellants contended that the Hon. Magistrate resolved the case in favour of the respondent by finding that he left the partnership from 6th August, 2007, a statement that was not supported by evidence.

10. It was also submitted that the Hon. Magistrate found that in a meeting held on 21<sup>st</sup> September, 2007 the appellants resolved to isolate the respondent from taking part in partnership business and offered him a send off package of Kshs. 296,400/=. It was therefore contended that the Hon. Magistrate disregarded both documentary and oral evidence. It was stated that once the offer was rejected, it lapsed and it could not be revived by the offeree.

11. The court was invited to consider that dissolution of the partnership could only have been made in accordance with Part V of the repealed Partnership Act, Cap 29 of the laws of Kenya.

12. It was submitted that the trial court proceeded on the premise that the appellants as the majority kicked out the respondent, which was in error. He cited the provisions of the repealed Section 29 of the Partnership Act which states that no majority of the partners can expel any partner unless power to do so is conferred by express agreement between the partners.

13. It was argued that since the parties herein still operate a partnership bank account at Cooperative Bank, the partnership still subsists and as such the order compelling the appellants to pay the respondent the amount he rejected and the holding by the Hon. Magistrate that the partnership was dissolved was erroneous.

14. The appellants' Counsel submitted that the Hon. Magistrate completely failed to consider their submissions before the lower court. The appellants prayed for their appeal to be allowed with costs.

15. The submissions that were filed by the respondent's Counsel were to the effect that the Hon. Magistrate arrived at the conclusion that by a majority decision of the appellants in the absence of the respondent, they dissolved the partnership on 21<sup>st</sup> September, 2007 and resolved that the respondent would have a send off package of Kshs. 296,400/=. It was submitted that the said decision was communicated to the respondent, whose protest to the appellants was ignored. It was stated that the respondent was completely excluded from the partnership business and two years later, without his knowledge or consent, the only asset of the partnership was sold by the appellants.

16. Counsel for the respondent supported the Hon. Magistrate's finding that the partnership ended on 21<sup>st</sup> September, 2007 and that by the time the parking fees were incurred in the year 2009, the respondent had absolutely nothing to do with the partnership and could not be called upon to contribute to the payment of the parking fees as he was deriving no financial benefit from the partnership.

17. The respondent's Counsel submitted that the Hon. Magistrate did not err in his finding on the issue of defamation as there was no inference of malice. The respondent prayed for the appeal to be dismissed and for the principle sum deposited in Consolidated Bank Limited in the joint names of the appellants' and respondent's Advocates to be released to the latter, together with all accrued interest since the time

of deposit.

## **THE EVIDENCE TENDERED IN THE COURT BELOW**

18. On 6th September, 2011 the plaintiff/respondent, Kizito Libasia, testified as PW1 in the lower court before Hon. M. Kizito, SRM and J. Omburah, SRM said case was at a later date taken over by Hon. Ekhubi, SRM. The respondent indicated that he knew the appellants as his business partners in a transport business which they used to run jointly. It was his evidence that they each contributed Kshs. 270,000/= towards the purchase of a lorry registration No. KVE 968 and a trailer, whose registration number he could not recall. He stated that he used to look for business. Their partnership lasted for three months and they made Kshs. 270,000/= in profits. It was his evidence that they used to hold regular meetings to plan on how to improve their business. He produced minutes of the meeting of 6<sup>th</sup> August, 2007 as plaintiff exhibit 1 (plt. exhibit 1). He also produced the minutes of a meeting held on 27<sup>th</sup> August, 2007, which he did not attend as plt. exhibit 2. He indicated that he noted that in the latter meeting the appellants showed a desire to sell the lorry because it was under-performing.

19. He testified that he challenged his partners to look for work and later advised them to sell the lorry to him at Kshs. 540,000/= and to consider dissolving the partnership. He produced the letter dated 11<sup>th</sup> September, 2007 as plt. exhibit 3, wherein he expressed interest to buy the lorry from the appellants. He further stated that through a letter dated 20th September, 2007, the appellants indicated they were not interested in selling the lorry to him and that they were ready to release him from the partnership and to buy him out. He also produced minutes of a meeting held on 12th September, 2007, which he did not attend as plt. exhibit 4.

20. The respondent's evidence was that another meeting was held on 21<sup>st</sup> September, 2007 but he did not attend the same. He produced minutes of the said meeting as plt. exhibit 5 and explained that during the meeting, the appellants worked out the accounts and resolved that he was entitled to only Kshs. 296,400/= from the partnership, which amount was to be paid through their Advocates. He indicated that it was further resolved in the said meeting that he was to be discharged but the appellants were to remain in the partnership. He testified that the appellants resolved that the lorry was to be operated by the two of them and any claim the appellant had should be considered extinguished.

21. The respondent in his evidence stated that on 4<sup>th</sup> October, 2007, his Advocates wrote to the appellants informing them that he was not satisfied with the manner in which the partnership accounts had been worked out and requested them appoint an Auditor acceptable to all, to work out the partnership accounts before dissolution of the partnership but he received no response. He produced the letter as plt. exhibit 6.

22. He stated that the lorry continued working after the resolutions the appellants made on 21st September, 2007 but he did not get any part of the proceeds. It was the respondent's evidence that on 10th July, 2009, his Advocates wrote to the appellants' Advocates informing them that he was ready and willing to accept the sum of Kshs. 296,400/= he had been offered while waiting for resolution of pending issues. His Advocate received a response on 27th July, 2009 from the appellants' Advocates in which they said that they were waiting for instructions from the appellants in relation to the payment of the said money. The respondent produced the two letters as plf. exhibits 7 and 8, respectively. Reminders to the letter dated 10th July, 2009 addressed to the appellants' Advocates were written on 6th August, 2009 and 17th August, 2009. The plaintiff produced the said letters and one dated 20th September, 2007 which the appellants' Advocates wrote to his Advocates as plt. exhibits 9, 10 and 11, respectively.

23. The respondent further adduced evidence that in a letter dated 19th August, 2009 his Advocates wrote to the appellants' Advocates reminding them that they had dissolved the partnership. He asked them for Kshs. 296,000/=. He produced the said letter as plt. exhibit 12. With regard to the issue of parking fees, as per a letter dated 28th August, 2009, his evidence was that the partnership had been dissolved as at the time the parking fees was incurred as from 15th April, 2008 to 2nd March, 2009. He also made reference to a letter dated 1<sup>st</sup> September, 2009 that addressed the issue of the account opened at Cooperative Bank, which he produced as plt. exhibit 13.

24. The respondent further testified that in the said letter he told the appellants he had no problem with the joint account and signing off as long as he was paid his share of Kshs. 296,400/=. With regard to documents for the motor vehicle, he informed the appellants that the 1st appellant collected the documents and he sold the said motor vehicle. He requested for release of the sum of Kshs. 296,400/= and his shares which they had marked out. He produced the letter on the said issue as exhibit 14. It was the respondent's evidence that the minutes of 21<sup>st</sup> September, 2007 dissolved the partnership but he needed an independent person to do the calculations.

25. The respondent also testified that the appellants took the motor vehicle from the parking yard. He made a report to Changamwe Police Station when he did not see the lorry at the parking yard as he wanted to find out where the lorry was. He further stated that in the years 2008 and 2009 he did not receive any money from the business carried out by the use of the lorry. He neither knew where it was nor did he have documents for the lorry. The respondent indicated that he was never served with a notice of the intended suit.

26. The 1<sup>st</sup> appellant, Kizito Anyangu Shakaba testified as DW1. It was his evidence before the lower court that in the year 2007, he, the 2<sup>nd</sup> appellant and the respondent herein agreed to form a partnership to operate a transport business. He and the 2<sup>nd</sup> appellant contributed Kshs. 297,500/= each and the respondent contributed Kshs. 282,500/=. The respondent promised to top up Kshs. 15,000/= later.

27. It was the evidence of the 1st appellant that they purchased a truck registration No. KVE 968 ZA2804 from Faud Abdalla and signed the transfer form but the discharge was handed over to the respondent by way of a log book and original transfer documents. He stated that after 2 months he was given the log book which had the name of a different seller. He did not see the transfer documents. They took insurance cover in the respondent's name.

28. The 1st appellant further testified that the truck operated from July to August, 2007 but the respondent who was managing the business could not adequately account for the proceeds. He stated that they agreed at a meeting held at Cool Breeze Hotel that from 1<sup>st</sup> August, 2007 they would take turns to collect the money. He indicated that the respondent did not attend a 2nd meeting and they realized that the logbook was defective.

29. He further indicated that when they held the second meeting on 27th August, 2007 they agreed to halt the operation of the truck for 2 weeks. He testified that the respondent was not cooperative and debts were not being settled. The appellants wrote to the respondent on 12<sup>th</sup> September, 2007 inviting him for a meeting. The letter was sent by registered mail. They received communication from the respondent's Advocate dated 11<sup>th</sup> September, 2007 giving them an offer for the appellant to be bought out of the partnership.

30. The 1st appellant further testified that the respondent threatened to forcefully take possession of the lorry, which he did on 17th September, 2007 while accompanied by a Police Officer. When the appellants went to Changamwe Police Station, they were detained on the ground that the lorry had been stolen. They however explained to the OCS and the 1<sup>st</sup> appellant availed the logbook and minutes of the meetings. On 19<sup>th</sup> September, 2007, they were summoned to the Police Station and the truck was released to them. He indicated that the respondent was cautioned against giving false information. The 1<sup>st</sup> appellant stated that they parked the vehicle at Kengeleni at a cost, for 320 days from 15<sup>th</sup> April 2008 to 2<sup>nd</sup> March 2009. They called meetings but the respondent did not attend. He indicated that he and the 2nd appellant resolved to sell the lorry due to wear and tear. He produced receipts as def. exhibits 1 and 2, for parking fees.

31. He testified that in a letter dated 20th September, 2007 they rejected the respondent's offer to buy them out. Subsequently, in a meeting held on 21st September, 2007 the appellants resolved to buy the respondent's shares at Kshs. 296,400/=/. The offer was rejected by the respondent through a letter dated 4th October, 2007. Two years later on 10th July, 2009, they received a letter from the respondent's Advocate, accepting their offer, but they did not release the money due to outstanding parking fees. The 1<sup>st</sup> appellant stated that there were outstanding issues. He testified that the partnership continued to exist as it had not been dissolved and that the respondent was not entitled to the claim herein.

32. The appellants sought compensation as per the counter-claim for defamation as a result of false information given to the Police and parking charges. They also demanded the release of a blank transfer form. The 1<sup>st</sup> appellant asserted that the partnership still existed due to the joint bank account at Cooperative Bank, Nkrumah road, Mombasa being active and for the reason that the respondent rejected their offer. He stated that the proceeds of the sale of the lorry are in the said bank account.

33. DW2 was No. 48730 Inspector Josephat Kimutai of Changamwe Police Station. He testified that a report was made to the said Police Station through OB No. 35/6/9/2007 by the respondent indicating that his partners had stolen the lorry. Another OB extract showed that the motor vehicle was detained after recovery. It was released through OB No. 49/19/9/2007. He produced the OB extracts as def. exhs. 3, 4 and 5. He further stated that the lorry was detained pursuant to a misleading report that it had been stolen.

#### **ANALYSIS AND DETERMINATION**

34. The issues for determination are:-

(i) If the partnership between the appellant and the respondent was dissolved; and

(ii) If the appellants were defamed by the respondent; and

(iii) If the counter-claim for parking fees and loss of use was properly dismissed.

35. The Hon. Magistrate considered all the evidence adduced before him at length. He applied the law to the facts and found that the partnership was dissolved and that the counter-claim had not been proved.

36. The evidence shows that the respondent offered to buy off the appellants, through a letter dated 11<sup>th</sup> September, 2007. They rejected the offer. The appellants met on 21<sup>st</sup> September, 2007 where they resolved to buy the respondent's share at Kshs. 296,400/=. Their offer was rejected by the respondent through a letter dated 4th October, 2007.

37. The appellants kept the lorry until the year 2009 when they sold it. As at the time the 1st appellant testified on 13th February, 2015, he was of the view that the partnership subsisted. Reference to the minutes of 21<sup>st</sup> September, 2007 at page 3 shows that the appellants arrived at the following resolution:-

**"That lorry KVE 968 and trailer ZA 2804 starts to operate as from 1<sup>st</sup> October, 2007 under Mr. Shakaba and Mr. Asman as sole partners and that the two will deal with any matters pertaining to the vehicles including the registration without any reference to Mr. Libasia even where penalty may be levied or involved. Mr. Libasia has till the end of 28th Septembers, 2007 to raise any objection contained herein. However, such objection shall not in any way interfere with the vehicle operations."** (emphasis added).

38. In my understanding, the effect of the above decision was to expel the respondent from the partnership. Even if the respondent declined the offer made to pay him Kshs. 296,400/= towards termination of the partnership, his rejection of the said amount was to no effect. The resolution arrived at on the meeting of 21<sup>st</sup> September, 2007 could only be changed in a subsequent meeting of the partners. It is therefore my finding that the respondent was expelled from the partnership through a resolution of the appellants.

39. Section 27 of the repealed Partnership Act, Cap 29 Laws of Kenya which was the operative Act as at the time the partnership in issue was formed provides as follows:-

***"A person shall cease to be a partner in a partnership if:-***

(a) .....

(b) ***the person is expelled as a partner by his co-partners under the provisions of section 29;***

(c) .....

(d) .....

(e) .....” (emphasis added).

40. Section 35 of the Act provides for the break up of a partnership in the following terms:-

**“(2) (a) a partnership whose term is not fixed; or**

**(b) that is for a fixed term and one or more partners, shall be dissolved if at least half the number of partners decide that the partnership should be dissolved.”**

41. My understanding of the meeting held on 21<sup>st</sup> September, 2007 as read against the provisions of Sections 27 and 35 of the Partnership Act is that the respondent was expelled from the partnership through a resolution of a meeting held by the appellants herein. It is my finding that the partnership was not dissolved as the appellants continued to carry on with the business of the said partnership. Having expelled the respondent from the partnership, he ceased to be a partner. The partnership therefore that continued to subsist was between the appellants. As said before, the respondent's rejection of the pay off could not reinstate him as a partner. Therefore, the respondent is entitled to the sum of Kshs. 296,400/= being the amount his former partners settled on as his send off package.

42. On the counter-claim, the appellants claimed damages for defamation after the respondent reported to Changamwe Police Station about the theft of the lorry. The appellants were arrested and held at the said Police Station for questioning as a result of which they alleged that they were defamed in the minds of right thinking members of the society and their reputation was greatly injured.

43. **Gatley on libel and slander**, 10th Edition at page 8 outlines statements that may be deemed to be defamatory by stating as follows:-

**“There is no wholly satisfactory definition of defamatory imputation. Three formulae have been particularly influential:**

**(1) would the imputation tend to ‘lower the plaintiff in the estimation of right-thinking members of society generally?’**

**(2) would the imputation tend to cause others to shun or avoid the claimant?**

**(3) would the words tend to expose the claimant to ‘hatred’ contempt or ridicule?**

**The question what is defamation relates to the nature of the statement made by the defendant: words may be defamatory even if they are believed by no one and even if they are true, though in the latter case they are not, of course, actionable.”**

44. In this matter, the appellants called DW2, a Police Officer as a witness to confirm that the respondent made a report to Changamwe Police Station to the effect that motor vehicle registration No. KVE 968 ZA2804 had been stolen. They were therefore summoned at the Police Station. The appellants however failed to call evidence from members of the public who knew them to prove that their reputation had been injured. They also failed to indicate the identity of the persons who got to know of the report made to the Police Station and to bring them to court to testify.

45. It is also my finding that the respondent is not liable to pay the parking fees claimed by the appellants for the reason that as at the time the said expense was incurred, the appellants had expelled the respondent from the partnership. Any expense incurred in terms of parking fees was the sole responsibility of the appellants. Loss of use is a special damage claim which should have been specifically pleaded. The appellants failed to do so. It cannot therefore hold.

46. The appellants so to say, threw their counter-claim to the court and hoped to be awarded damages without calling evidence to support the allegations therein. It is the finding of this court that they failed to prove the counter-claim on a balance of probabilities. I hold that the counter-claim was dismissed on merit by the Hon. Magistrate. I dismiss their appeal on the counter-claim.

47. The Counsel for the appellants referred to inconsistencies in the evidence of the respondent. The court considered the same and found that they would in no way affect this court's determination in this case as the respondent did prove his case on a balance of probabilities. Secondly, the inconsistencies complained of dealt with the issue of when the partnership was dissolved. The court's finding as stated earlier in this judgment is that the partnership was not dissolved but the respondent was expelled from the partnership.

48. The court also notes from the evidence of the 1<sup>st</sup> appellant that the lorry which was the only asset and source of income for the partnership was sold by the appellants.

49. The respondent is therefore entitled to the sum of Kshs. 296,400/= prayed for in the plaint and interest thereof at court rates. I also award him costs of the suit in the lower court and of the appeal herein. The appeal stands dismissed in its entirety.

**DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of November, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms Mwanzia holding brief for Mr. Obura for the appellants

Mr. Anyanzwa for the respondent

Mr. Oliver Musundi - Court Assistant