



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 142 OF 2013

STEPHEN ONYANDO.....APPELLANT

VERSUS

ZACHARY ONSONGO MOSETI.....RESPONDENT

(An appeal from the judgment and decree of Hon. ANNE C.A. ONGINJO (Chief Magistrate) dated and delivered on the 9th day of October, 2013 in the Original Kisii CMCC No. 131 of 2012)

JUDGMENT

1. On 24th April 2012, **STEPHEN ONYANDO** (the appellant herein) sued **ZACHARY ONSONGO MOSETI** (the respondent herein) in Kisii CMCC No. 139 of 2012 wherein he sought general and exemplary damages for defamation, unconditional and/or unqualified apology, and costs of the suit. The translated version of the defamatory words alleged to have been uttered by the respondent in Ekegusii Language at Kisii Municipal Cemetery within Kisii Town on 9th February 2012 were as follows:

“My son was killed by Chief Stephen Onyando with other groups of Kisungu sungu. By this time he is going to see things he has never seen even him he cannot be alive. He is going to be killed by me.”

2. The respondent denied uttering the alleged defamatory words in his defence filed in court on 10th May 2012 after which a trial ensued before Anne C.A. Ong’ingo Chief Magistrate (as she was then) and at the close of the case, the trial court found that the appellant’s case was not proved on a balance of probabilities whereupon she dismissed the said suit thereby precipitating the instant appeal. The appellant listed 14 grounds of appeal in his memorandum of appeal which can be summarized into two main points as follows:

- a) **That the trial magistrate erred in holding that the appellant had not adduced sufficient evidence in support of his case.**
- b) **That the trial magistrate did not properly analyze and give weight to the evidence tendered by the appellant and his witnesses while she unfairly accepted the evidence of respondent and his witnesses.**

3. On 5th December, 2012, the parties herein agreed to canvass the appeal by way of written submissions.

Appellant’s submissions

4. M/s Oguttu Mboya & Co. Advocates for the appellant submitted that appellant proved that the

respondent uttered the defamatory words complained of, which words were offensive in nature. He added that the appellant called 2 witnesses PW2 and PW3 who confirmed that they were present at Kisii Municipal Cemetery where the defamatory words were uttered.

5. He faulted the trial court for holding that the appellant's witnesses were his (appellant's) relatives and could therefore have been coached to give false testimonies in court. It was the appellant's contention that the trial court was wrong in concluding that the appellant was a suspect in the inquest into the death of the respondent's son when he (appellant) was only a witness in the said inquest.

6. The appellant contended that the trial court erred in believing the evidence of the respondent and his witnesses when they alleged that the offensive words could not have been uttered in the presence of police officers.

7. The appellant relied on the decisions in **Rodgers Abisai vs Wachira Waruru & Another – Nairobi Civil Appeal No. 12/2003** wherein it was held that one cannot utter defamatory statements against another person and seek solace in criminal charges. The appellant also cited the case of **Mikidadi vs Khalfan & Another (2004) 2KLR pages 496-505** wherein it was stated:

“Publishing untruths without verifying information whether such conduct amounts to recklessness- refusal to apologize amounts to malice.”

8. The appellant further relied on the cases of **Nation newspapers Ltd vs Chesire Nairobi CA No. 26 of 1982**, **George Oraro vs Barak Eston Mbajah HCCC 85 of 1992** and **Samuel Ndungu Mukunya vs Nation Media Group Ltd & Another Nairobi HCCC [2015] eKLR**.

9. The appellant sought prayers that:

a) The Appeal herein be allowed and the judgment and decree of the Trial Magistrate dated 9th October 2013, vide KISII CMCC NO. 139 of 2012, be set aside, reviewed, varied and/or quashed.

b) The Honourable Court be pleased to substitute therefore an Order allowing the Appellant's suit in the Subordinate Court vide KISII CMCC NO. 139 OF 2012,

c) The Honourable Court be pleased to Award and assess General Compensatory Damages for Defamation in favour of the Appellant in the following terms;

i. General Damages for Defamation in the sum of Kshs. 2,000,000/= only.

ii. Exemplary Damages for defamation in the sum of Kshs. 500,000/= only.

iii. Unconditional and/or unqualified apology published in alike and/or similar manner as the utterances complained of. In default damages *in lieu* of apology.

d) Costs of this appeal and costs incurred in the subordinate court be borne by the Respondent.

Respondent's submissions

10. M/s Kaburi Henry & Co. Advocates for the respondent submitted that the trial magistrate properly applied her mind in delivering a sound and well reasoned judgment that cannot be faulted by the appellant in any way. It was the respondent's case that the appellant's witnesses did not explain how they happened to be at the cemetery at the time that the alleged defamatory words were alleged to have been uttered in view of the fact that they were neither members of the respondent's family nor the group that had been tasked with the duty of exhuming the respondent's son's body.

11. The respondent contended that his witnesses' testimonies were not challenged. He stated that the alleged defamatory words did not have the effect of lowering the esteem or standing of the appellant in the community since the appellant himself testified that he got promotions and even became a church pastor despite the alleged defamation. It was the respondent's case that the appellant's witnesses gave contradictory evidence and he did not prove his case on a balance of probabilities.

12. The respondent relied on the cases of **Wycliffe A. Swanyu vs Toyota East Africa Ltd & Another [2009] eKLR** and **Calystus Makokha vs Hussein Osore Munifwa [2005] eKLR**. The respondent sought the dismissal of the appeal.

13. 12. This is a first appeal and this court is therefore mandated to re-analyze the evidence tendered before the trial court with a view to arriving at its own independent verdict while bearing in mind the fact that it neither saw nor heard the witnesses testify. See **Selle vs Associated Motor boat Company (1968) EA 123**.

14. As I have already stated in this judgment, the appellant testified and called 2 witnesses in support of his case as follows:

15. The appellant testified as PW1. His testimony was that he was the assistant chief of Bogisero Sub-location and an ordained pastor with PAG Church at Ogembo. He stated that on 9th February 2012, he received a telephone calls from several people to the effect that there was a body which had been exhumed from Kisii Municipal Mortuary and that the defendant was claiming that he was the one who had killed his son one William Moseti. He added that the words defamatory words were uttered by the respondent in Ekegusii languages as translated hereinabove at the beginning of this judgment. His case was that as a civil servant, his image was damaged by the defamatory utterances as he was shunned by members of the society who then viewed him as a murderer. He added that he was not able to execute his duties effectively as his area residents had lost faith in him following the publishing of the said defamatory words.

16. PW2 John Ochulegi Obayi testified that he had on 9th February 2012 travelled by matatu from Mosochi to Kisii town when at Kisii Level 5 Hospital Mortuary, the motor vehicle he was travelling in got a puncture after which he decided to walk to town and that on reaching near the mortuary, he saw a big crowd of people gathered at the cemetery and on moving closer to them to find out what was going on, he heard the respondent talking to the group of people and telling them that his son whose body was being exhumed, was killed by the appellant. He said that he knew both the appellant and the respondent and that he was surprised at the allegations that the appellant, whom he knew to be a pastor, could kill someone. He stated that he then started fearing the appellant, but that he later on informed the appellant of what he had heard. He added that the appellant had a good record and had been promoted to become a chief. On cross examination, he said that it was a coincident that he was near the cemetery when the exhumation was going on and that there was a big crowd including police officers at the cemetery. He added that the appellant was a respected chief.

17. PW3 Richard Mujumbe, also from Mosochi testified that on 9th February 2012, while at his workplace at a hotel near Kisii Level 5 Hospital, he heard that a body was being exhumed whereupon he decided to go to the cemetery to witness the exhumation and that while at the cemetery, he heard the respondent utter the defamatory words **"huyu mtoto wangu nafufua mwili aliuliwa na Stephen Onyando."** He stated that he did not know the appellant as a murderer and that when he heard those words, he became afraid of him and shunned him, but that he later on did his own investigations and established that the allegations were false.

18. PW4 Jonathan Nyakundi testified that on 9th February 2012 while at Mosochi, he heard the respondent talk through a public address system when he uttered words in Ekegusii language to the effect that his son had been murdered by the appellant and 'Kisungusungu'. The testimony of PW4 was however later expunged from the court record at the instance of the appellant's advocate Mr. Ochwangi who thereafter closed the appellant's case.

19. The respondent testified as DW1 and narrated how his son, one William Moseti (deceased) was murdered by a vigilante group known as sungusungu which group thereafter circulated leaflets all over his area to warn him against burying the deceased at his home thereby prompting him to obtain a permit to bury the body at Kisii Municipal cemetery which burial took place on 28th June 2010 at 8 p.m. After burying the deceased, the respondent embarked on a mission to seek justice against his son's killers through the local provincial administration, the police and the Kenya National Commission on Human Rights (KNCHR). He stated that an inquest file No. 3 of 2010 was then opened to probe into the death of the deceased which file went missing and another file No. 14 of 2012 was thereafter opened. He added that the appellant was the main suspect in the inquest.

20. He claimed that at some point in May 2010, the appellant assaulted him over a domestic dispute that he (respondent) had with his estranged wife and that as a result of the assault he filed a complaint against the appellant who was then his area chief which complaint led to the appellant's suspension from his said job. He stated that the appellant thereafter sued him jointly with the Attorney General in Kisii CMCC No. 385 of 2012 over allegations that he had instigated his said sacking.

21. It was the respondent's case that the appellant was in the habit of assaulting people in his area of jurisdiction indiscriminately and that when the appellant assaulted him, he complained to the KNCHR which complaint resulted in the appellant's sacking and the institution of Kisii CMCRC 137 of 2011 wherein the appellant was charged with assault. According to the respondent, there was enmity between him and the appellant arising out of the assault case that he (respondent) had initiated against him.

22. On the exhumation issue, the respondent testified that, 2 years after burying his son, William Moseti, at Kisii Municipal Cemetery, he sought and obtained a court order in Kisii CM Misc. Application No. 112 of 2011 allowing him to exhume the body which he later re-buried at his home. It was the respondent's case that he did not utter the alleged defamatory words at the cemetery. He stated that the appellant's witnesses were not at the cemetery at the time of the exhumation and neither did the vehicle carrying the deceased's body make any stop-over at Riotigo market. The respondent stated that he did not know who killed his son. He added that PW2 was the appellant's youth wing during the time that he was the chief while PW3 was the appellant's nephew.

23. DW2 David Okari Moseti, DW3 John Ondieki Okworo and DW4 Alfred Gitebi Bangoi were among the people who accompanied the respondent to the cemetery to exhume the body of the deceased. They all stated that no speeches were made at the cemetery and the police officers were at hand to keep members of the public away from the scene of the exhumation. They stated that they did not hear the respondent utter the defamatory words and that at the burial, only the pastor and the chief spoke. DW3 stated that the deceased was killed by the 'sungusungu' vigilante group.

Analysis and Determination

24. I have carefully considered the grounds listed in the instant appeal, the record of appeal and the submissions made by the parties' respective counsels. I note that the issues for determination are:

- a) Whether the alleged defamatory words were uttered by the respondent.**
- b) Whether the defamatory words referred to the appellant.**
- c) Whether any damage was occasioned to the appellant as a result thereof.**
- d) What damages if any the appellant is entitled to.**
- e) Who should bear the costs of the suit.**

25. On the first issue of whether the respondent uttered the defamatory words, the appellant stated at paragraph 3 of the plaintiff that the words were uttered in Ekegusii language which are translated at paragraph 4 as follows:

“My son was killed by Chief Stephen Onyando with other kisungusungu. By this time he is going to see things he has never seen even him he cannot be alive. He is going to be killed by me.”

26. From the very outset, I wish to note that it was not disputed that the respondent’s son was killed by a vigilante mob that later on distributed leaflets warning his relatives against burying his body at the respondent's home and this led the burial at the Kisii Municipal Cemetery. It was also not disputed that the body lay in the said cemetery for two years and was on the date that 9th February, 2012 the respondent was at the cemetery engaged in exhumation of the body for re-burial at his home.

27. The appellant presented two witnesses (PW2 and PW3) in court whose evidence was that they heard the respondent utter the defamatory words. I have considered the evidence of the appellant’s said witnesses and I note that nowhere in their testimony did they mention the exact defamatory words allegedly uttered by the respondent or that the said words were uttered in Ekegusii language as was alleged by the appellant in the plaint.

28. PW2 had the following to say during his examination in chief:

“I found mzee Moseti talking to a group of people and saying the body of his son which was being exhumed was murdered by Stephen Onyando the chief. Later I learnt Zachary’s son is known as William Moseti. Zachary said that since Stephen killed his son using sungusungu, he had to take revenge.”

29. PW3, on the other hand had the following to say:

“I found mzee Zacharia Moseti the defendant herein had gathered people and he was saying “huyu mtoto wangu nafufua mwili aliuliwa na Stephen Onyando.”

30. As can be seen from the extract of the appellant’s witnesses’ testimonies, there is a contradiction between what was pleaded in the plaint as the defamatory words and what was stated by the witnesses before the court. In fact, the testimony of PW3 shows that the alleged defamatory words were uttered in Kiswahili language and not Ekegusii as stated in plaint. The importance of pleading the exact words spoken and giving evidence to support the said words were expounded by Odunga J when dismissing a defamation case on similar grounds in the case of **Dr. Lucas Munyua v Royal Media Services Ltd & Another HCCC No. 52 of 2008** when he said:

“In this case however, neither in the plaint nor in the evidence were the exact words reproduced so that the court is handicapped in finding whether the words published were in fact defamatory.”

31. In the instant case, the appellant testified that he was not present at the cemetery where the alleged defamatory words were uttered and that he relied on the information that was relayed to him by his 2 witnesses PW2 and PW3. Under those circumstances, it was critical for the two witnesses to inform the court of the exact words uttered by the respondent and the language in which they were uttered so as to enable the court reach a finding on whether, the said words were defamatory or not. Without stating the exact words uttered by the respondent in their testimonies, if at all any words were uttered, it means that the witnesses were only giving their own interpretation of what the respondent said and this leaves the court with no material upon which it can reach a finding that the words were defamatory.

32. In the case before me, the appellant’s witnesses did not disclose the names of the persons to whom the words were spoken as they both claimed that the respondent was talking to the huge crowd gathered at the cemetery.

33. Still on the issue of whether or not the defamatory words were uttered by the respondent, it was not disputed that there existed bad blood between the appellant and the respondent emanating from their past differences that resulted in the respondent accusing the appellant of assault which accusation ended in the

institution of criminal proceedings against the appellant. It was also not disputed that a complaint lodged by the respondent against the appellant led to the appellant's sacking and in turn the appellant sued the respondent and the Attorney general over his said sacking.

34. Under the above circumstances, it did not escape the court's attention that there existed a bad blood between the appellant and the respondent with each one of them making accusations and counter accusations against each other in terms of how many claims that they had each filed. It would then appear that the parties were competing to outdo each other in terms of the number of cases that they are filing in court. With the background of this case in mind, one cannot help but get the feeling that this case is being used by the appellant to settle old scores. It is for the above reasons that I find that it would have been prudent for the appellant to furnish the court with cogent proof from independent witnesses to confirm the exact defamatory words were uttered against him rather than availing his former youth wing member and nephew as witnesses. Furthermore, it was clear that the appellant's witnesses were not part of the group of people who were tasked with the responsibility of carrying out the exhumation of the body at the cemetery and therefore, their coincidental presence at the cemetery at the exact same time that the respondent allegedly uttered the defamatory words is quite questionable.

35. In my humble view, a cemetery is not a recreational park or a picnic site where people go for fun activities or to while away their time. Indeed, a cemetery is a place people go to only for the serious and solemn, if not spooky, business of burying their dead or in other instances, such as in the present case, to exhume the dead. The appellant's witnesses had no business to transact at the cemetery on the day they allege that they heard the respondent make the defamatory statements. It is for the above reasons that I find it unbelievable the appellant's witnesses could, by sheer coincident, be at the cemetery at the exact same time to hear the defamatory words being uttered. In a nutshell am not satisfied that the appellant proved that the respondent uttered the said words.

36. Needless to say, the alleged defamatory words, if indeed they were uttered, bordered on criminal intent. Both the appellant's and respondent's witnesses stated that there were several police officers controlling the crowd and overseeing the exhumation exercise. I therefore find it very unlikely that the respondent could have been so reckless and brazen as to declare that he would kill the appellant in the full view and hearing of the said police officer's. In any event, the appellant did not prove that he reported the threats to his life to any law enforcement officers and this reinforces my finding that there was no sufficient proof of the claim that the respondent uttered the offensive words.

37. The trial magistrate observed as follows in her judgment regarding the presence of police officers at the cemetery:

“Evidence on record shows between 9 and 12 police officers were deployed to ensure law and order was maintained at the cemetery and at the defendant's home where remains of his son was to be interred and the 2 witnesses who testified PW2, PW3 and PW4 do not explain why they did not report to the police officers who were on site about the inciting and threatening utterances. I do find it unbelievable that the police could stand and watch defendant utter such words when the situation on the ground was very volatile and that is why they were ordered by the court to give security.”

38. In *Sumaria & Another vs. Allied Industrial Limited [2007] 2 KLR, pg 1-9, at pg 8*), the learned judges P.K Tunoi, E.O O'Kubasu & W.S Deverell JJ.A, observed that the first Appellate Court is obliged to consider the evidence, re-evaluate it and make its own conclusions, but in doing so, it must be remembered that it has neither seen nor heard the witnesses and that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did and further, the Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appears that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanour of material witness was inconsistent with evidence in the case generally. (*See also, Selle & Another vs Associated Motor Board Co Ltd & Others (supra) and*

Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982] 1 KAR 278.)

39. In **Makube vs Nyamuro (1983) KLR 403**, the Court of Appeal reiterated that a Court on Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

40. In the instant case, I find no reason to interfere with the trial magistrate's findings on fact regarding the circumstances prevailing at the time the defamatory words were alleged to have been uttered together with her findings that the heavy presence of the police and the volatile nature of the situation on the ground made it very unlikely that the respondent could have uttered the said words.

41. Having found that the appellant did not prove that the defamatory words were uttered by the respondent, it follows that it would not be necessary to deal on other issues for determination as they all flow or depend on the determination on the first issue of whether or not the defamatory words were uttered.

42. On the issue of award of damages and costs, **Section 16A of Defamation Act Cap 36 Laws of Kenya** provides as follows:

“16A. Award of damages

In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just: Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings.”

43. In the instant case, the appellant alleged that he suffered damage to his reputation as a chief, a family man and a pastor because he was said to be a murderer. He said that he lost face in the society and his family was also affected by the respondent's utterances. The evidence tendered by the witnesses of both parties did not however indicate that the appellant's reputation or image was dented in any way by the alleged defamatory words. It was not disputed that the appellant got a promotion to the position of a chief soon thereafter and that he continued to serve as a church pastor despite the alleged defamation. To my mind, the above scenario reinforces the finding that the alleged defamatory utterances were never uttered or, assuming that I am wrong on this finding, then the said words had very little or no impact on the appellant's reputation in which case any damages to be awarded for defamation would have to take into account their impact, if any, on the appellant's reputation. Under the above circumstances and bearing in mind the appellant's position in the society, I would have awarded the appellant the sum of Kshs. 500,000/= general damages for defamation if he had proved his case against the respondent.

44. Having found that the appellant did not prove that the respondent uttered the defamatory words against him, the order that commends itself to me is the order to dismiss the instant appeal with costs to the respondent.

45. It is so ordered.

Dated, signed and delivered in open court this 4th day of April, 2017.

HON. W. A. OKWANY

JUDGE

In the presence of:

- Miss Mutiria for the Appellant

- Mr. Kaburi for the Respondent
- Omwoyo court clerk