



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 7 OF 2015

JOSEPH BEHAILU AILA.....APPELLANT

VERSUS

WOCHE AILA.....RESPONDENT

(An appeal from the judgment and decree of the Hon. Mr. T.M.Wafula, Resident magistrate,

In Marsabit PMCC no. 4 of 2013 delivered on 10th September 2015)

JUDGEMENT

JOSEPH BAILU AILA, the Appellant herein, sued **WOCHE AILA**, the Respondent herein, through a plaint dated 4th September 2013, filed before the Senior Principal Magistrate's court, Marsabit. In the aforesaid plaint, the Appellant sought for judgment in the following terms:

- a. General damages for defamation and slander.
- b. Permanent mandatory injunction restraining the defendant from publishing any defamatory statement against the plaintiff.*
- c. Costs of the suit and interest.

The Respondent did not file a defence to the Appellant's claim.

The suit was listed for formal proof and it was dismissed on 10.9.2015 with no orders to costs.

The Appellant was dissatisfied hence this appeal.

On appeal, the Appellant put forward the following grounds:

- 1. THAT the learned trial magistrate erred in law and in fact by failing to appreciate the plaintiff's witnesses' evidence.*
- 2. THAT the learned trial magistrate erred in law and in fact by failing to consider that the plaintiff's evidence supported the claim.*
- 3. That the learned trial magistrate erred in law and in fact by failing to make a finding that the*

offence of defamation was proved.

4. THAT the learned trial magistrate erred in law and in fact by stating that the other third parties had to be disclosed.

5. THAT the learned trial magistrate erred in fact and by failing to provide for costs.

I have re-evaluated the case that was before the trial court. It is the Appellant's contention that he was not given justice and that he was denied costs.

The learned trial magistrate delivered himself as follows:

" From the evidence on record there are all the making of a defamatory statement made by the defendant against the plaintiff except that there is no proof that the plaintiff's reputation has been tainted among the right thinking members of society. No witness has testified no statement adopted in evidence what says that as a result of the said defamatory statement I treated the plaintiff with contempt or odium."

The complained of statement is slander. Slander is defined in the **Black's Law Dictionary**, seventh edition as:

"A defamatory statement expressed in a transitory form, especially in speech."

Damages for slander are not actionable per se like in libel; the same must be proved by the plaintiff. There are four exceptions to this general rule. These are:

1. Imputation of criminal offence punishable with imprisonment.
2. Imputation of disease.
3. Imputation of unchastity to a female.
4. Imputation of unfitness or incompetence.

The appellant had complained that the respondent had falsely alleged that he had assaulted him and then bribed all government officers.

Although the respondent did not enter appearance nor file defence, he was given a chance to make a statement. This was irregular. He still maintained that the respondent assaulted and injured him. This coupled with the appellant's evidence and that of his witnesses may have informed the court to make a finding that the respondent had made a defamatory statement. I concur with this finding.

The statement complained of imputed criminal offences of battery and bribery. The learned trial magistrate erred for this did not require the appellant to prove any damage to his reputation. He ought to have awarded damages to the appellant. I therefore set aside the lower court's decision and award Kshs. 50,000 (fifty thousand) general damages to the appellant and costs both in the lower court and for this appeal.

Dated at MARSABIT this 6th day of July 2016

KIARIE WAWERU KIARIE

JUDGE