



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 86 OF 2010

1. JOSEPH KIIO
2. WILSON M. MATHEKA APPELLANTS

VERSUS

1. JONATHAN MUTHAE
2. JOHN MAKAU KIMANI
3. BETH NGII MAKAU
4. DANIEL NZIOKA MAKAU
5. BONIFACE MUSYOKA KIMANI
6. JONATHAN MUTHAMA KALOKI
7. PETER M. MBITHI
8. SAMUEL NZIOKA MULI
9. JOSEPH K. KIMEU RESPONDENTS

(Being an appeal from the judgment of the Hon. Mr J. M. Munguti (R.M) in the Chief Magistrate's Court at Machakos in Chief Magistrate's Court Civil Case No. 910 of 2004 dated 27th May 2010)

J U D G M E N T

1. The Appellants were at the material time the officials of **New Mitaboni Co-operative Society Ltd.** The Respondents were members of the said society.
2. The Respondents vide a plaint dated 22/9/2004 sued the Appellants for aggravated general damages for defamation. The Respondents alleged that on 10/7/2004, the Appellants jointly made and published defamatory letters addressed to the Respondents and copied to other members of the society and the public.
3. The said letters made the following allegations against the Respondents:-
 4. **“In the said letter the Defendants published of and concerning the Plaintiffs the following allegations in the English language:-**

- a. **You have been misadvising members to split the society to uneconomical units.**
 - b. **You have been inciting members not to deliver Coffee to their factories.**
 - c. **You have not been promoting peace amongst members. (Members groupings).**
 - d. **You have been holding parallel meetings whether society convenes either special or general meetings.**
 - e. **You have been combining forces to sue other members instead of forwarding your cases to the Registrar of Co-operatives.**
5. **The Plaintiffs avers that the Ordinary meaning as well as meaning by innuendo of the said publications is that;-**
- a. **The Plaintiffs are liars who have been misleading people by way of giving false advice.**
 - b. **The Plaintiffs are inciters who have been inciting others for wrongful and unlawful causes.**
 - c. **The Plaintiffs are not law-abiding citizens who have been holding unlawful meetings and disregarding the laws of the land.**
 - d. **The Plaintiffs are bad people who should be avoided by the society.”**
4. The claim was denied. The Appellants denied any malice and stated that if the said words were published they were published on an occasion of qualified privilege in the discharge of official duty.
5. The eight (8) Respondents testified (PW1 to PW8) and also called three witnesses, (PW9 – PW11). All the Respondents testified that on 10/7/2004 they had attended the Society’s Annual General Meeting. Each of them produced a letter addressed to them. The letters advised them that they were no longer members of the society and could therefore not deliver their coffee to the said society. The letters contained the words complained of which I have already paraphrased above. According to the Respondents, the contents of the said letters did not reflect what had been discussed at the Society’s Annual General Meeting of 24/06/2004. That the letters were copied to the D.C., O.C.P.D, D.O, DCO the PCO and copies pinned on the notice board of the society. That the contents of the letters were also announced through the loudspeakers at the meeting which had a crowd of about three thousand people.
6. DW1, **Alphonse Musyoka Matheka** testified on the Appellant’s side. His evidence is that during the Annual General Meeting held on 24/06/2004, a resolution was passed authorizing the management to kick out the Respondents from the society. That as the Secretary to the society, he wrote the said letter on behalf of the society. He further testified that the contents of the letter were true and denied that there was any malice. That the Respondents intended to form a new society called **New Kalua** and had made an application to the **Registrar of Co-operative Society**. That the Plaintiffs were not at the Annual General Meeting held on 24/6/2004 as they were holding a parallel meeting about 100 metres away.
7. That the Provincial Administration and the police were called in and the Respondents dispersed. It was conceded that the letters in question were copied to all concerned persons but were not publicized. The letter was signed by the Appellants as the officials of the Society. The Respondents were also said to have filed cases in court against the society.
8. At the conclusion of the trial, the lower court found the Respondents’ case was proved beyond reasonable doubts. The Respondents were awarded Kshs.300,000/= each as aggravated damages and Kshs.100,000/= General Damages plus costs and interests.
9. The Appellants were dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as follows:-
1. **“That there was an error in the entry of judgment at 100% against the Appellants.**

2. **That the learned magistrate erred in law in fact when he found that words complained of were false.**
3. **That the learned magistrate erred in law and in fact when he found that he defences of justification and privileges were not available to the Defendants.**
4. **That the learned magistrate erred in law and in fact when he entered judgment against the 1st Defendant.**
5. **That the learned magistrate erred in law and in fact when he relied on extraneous matters to find that the words complained of were published.**
6. **That the learned magistrate erred in law and in fact when he disregarded the whole of the defence evidence.**
7. **That the learned magistrate erred in law and in fact when he awarded aggravated damages of Kshs.300,000/= to each of the Plaintiffs.”**

10. The appeal was canvassed by way of written submissions which I have duly considered.

11. In a suit founded on defamation, the Plaintiff must prove the following five elements:-

- a. First, the words complained of, must actually refer to the Plaintiff;
- b. Second, the words must be defamatory i.e. the words must tend to lower or actually lower the character or reputation of the Plaintiff in the eyes of right-thinking members of the society;
- c. Third, the words must be published to a third party;
- d. Fourth, the words must be false i.e. truth is an absolute defence to an action in defamation
(Winfield & Jolowicz on tort 16th edition at p. 140.)

12. The writing of the letters in question is not denied. The said letters were addressed to the Respondents. The letters therefore referred to the Respondents.

13. On whether there was publication, it is noted that the letters were copied to:-

- **The commission of Co-operatives, Nairobi**
- **The Provincial Co-operative Officer, Embu**
- **District Co-operative Officer, Machakos**
- **DC – Machakos**
- **OCPD – Machakos**
- **D.O – Kathiani/Central Divisions**

14. There is also evidence on record that the contents of the letters were announced at the meeting through loud speakers. As a result according to the evidence of the Respondent, other members of the society started shunning them. The letters are also copied to six other public offices.

15. The Appellants conceded to having published the words complained of but pleaded justification. According to the Appellants, as the officials of the society, they had a duty to communicate to the members the resolution of the meeting of 24/6/2004 **Minute No. 9/AGM/2004/2005**. The said minutes were produced as an exhibit (D exh3). The said minute stated *inter alia*:-

“After a lengthy discussion, it was proposed by **David Matheka M/No.2213** seconded by **Joseph Kilonzo M/No. 1263** and unanimously agreed by all members that, **Kimani** and his group are hereby expelled from the society with effect from 24/6/2004. The following were among the Group:-

GROUP EXPELLED:

M/Name	M/No.	Produce 2003:	Produce 2004:
1. John M. Kimani	908	1314 kgs	Nil

2. Peter Mumo Mbithi	1574	474 ½ Kgs	Nil
3. Jonathan M. Mbuvi	545	1759½ Kgs	Nil
4. Daniel N. Makau	74	95½ Kgs	14½ Kgs
5. Boniface M. Kimani	1157	1239½ Kgs	Nil
6. Joseph K. Kimeu	2125	119 ½ Kgs	Nil
7. Beth N. Makau	196	2028 Kgs	Nil
8. Jonathan M. Kaloki	8787	411 Kgs	Nil
9. Danson M. Mutiso	2241	247½ Kgs	Nil
10. Sammy N. Muli	1497	1167½ Kgs	202 Kgs.”

16. The reasons for the expulsions were given in the said meeting as, *inter alia*:-

- **Convening parallel meetings**
- **Inciting/misleading members**
- **Calling for the split of the society**
- **Suing the society.**

17. The instances of the said parallel meetings, incitement of members by telling them not to deliver coffee to their factories, attempts to form a new society and suing the society have been given in the said minutes. However, the question of involvement of police powers did not arise in the said meetings. The Respondents were free to exercise their rights to form a new society if they so wished or to sue the society. There was no need to treat them like criminals through the involvement of the public service officers to whom the letters in question have been copied to. Copying the letters to the security agents connotes malice on the Appellants' side. The said security agents were not members of the society. There was therefore no justification for the said involvement of security agents. There is no evidence of any steps taken to verify the truth of the allegations of incitement of members and not promoting peace. These allegations allude to criminal activities on the Respondents' part. There was no justification for publishing these utterances. The Appellant failed to adduce evidence that established the truth of the said utterances.

18. The Respondents established the damage caused to their reputation. According to the Respondents' evidence, the members of public talked about their expulsion from the society. That some of the members of public treated them with contempt and stopped greeting them and treating them with respect as they had been depicted as criminals.

19. On the issue of aggravated damages, the contents of the letter were published to a big gathering at the Annual General Meeting and the letter copied to general government offices. As stated by the Court of Appeal in the case of **Ken Odondi & 2 Others –vs- Okoth Omburah & Company Advocates**:-

“Exemplary damages on the other hand had gone beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice, insistence on a flurry defence of justification of failure to apologize.”

20. Although all the above elements of aggravated damages have been proved, the award of Kshs.300,000/= as aggravated damages in addition to Kshs. 100,000/= General Damages was inordinately high. On the weight of the injury suffered, the Respondents' evidence is that they were farmers in the society in question. No details have been given to concerning how their

livelihood as farmers was specifically affected by the libel. The circulation to the non-members of the society was not wide. An award of a composite figure of Kshs.100,000/= as general and aggravated damages to each of the Respondents is in my view reasonable and I award the same.

21. With the foregoing, the appeal has merits and succeeds partially. The decretal sum to be met by the Appellants on equal basis. Since the appeal has partially succeeded, each party to meet own costs of this appeal.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **12th** day of **March** 2015.

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B. THURANIRA JADEN

JUDGE