Ambe v Sajero (Civil Appeal E331 of 2022)
[2024] KECA 1687 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1687 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E331 OF 2022

PO KIAGE, LA ACHODE & PM GACHOKA, JJA

NOVEMBER 22, 2024

BETWEEN

DR SELINA VUKINU AMBE ..... APPELLANT

AND

FERNANDEZ SAJERO ..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Kamau, J.) delivered on 29th April 2021 in HCCC No. 172 of 2018)

JUDGMENT

1. At all times material and relevant to the appeal, the appellant was the proprietor of house no. 606 situated in Green Park Estate, Cluster Three. The respondent was residing within that estate. Both parties were members of the Cluster's WhatsApp group. The appellant contended that the respondent's safaricom cell number was 0731595460.

2. On 19th May 2008 at 9:54 p.m., the respondent published the following text in the said WhatsApp group using his cell number:

> " well ... I still believe this could be an alien (emoji) finding it extremely hard work to co-exist with normal human beings! Who else could pull such a stunt! (emoji)."

3. The appellant stated that the message stemmed from a broiled argument in the said group. According to the appellant, the first inserted emoji demonstrated what an alien looked like and was directed at her.. She deduced that the said message was calculated to defame her as she had made a decision to obtain a court order stopping any further development in the estate's open ground pending the hearing and determination of a dispute.

4. The appellant opined that the comment was intended to suggest that she was antisocial, mean, inhuman, insensitive to others, lacked candor, a crook of the highest order, self-conceited with no feelings or compassion for others and a sadist who wished bad luck upon people.

5. The appellant furthered that the statement elicited responses from 70 members of the group causing her untoward ridicule and vilification. Those allegations were untrue and sensational. She added that prior to the content, she enjoyed eminence and was recognized as a person of substantial standing, high esteem and respect from the general public, neighbours, colleagues and the community.

6. The appellant accused the respondent of posting the said comment maliciously and that it was calculated to injure, disparage, damage her reputation and lower her esteem before right thinking members of the society. As a consequence, the appellant averred that she suffered injury to her character and reputation. The respondent was aware that the said comment would give rise to defamation proceedings.

7. The appellant notified the respondent of her intention to sue by requesting him to furnish a written apology, unreservedly and unconditionally retract the post, a publication of the apology to all such persons the libel had been published to and a written admission of liability. However, the respondent did not honor the same. Consequently, the appellant filed her plaint dated 20th June 2018 in Nairobi HCCC No. 172 of 2018 seeking the following reliefs:

    a. Damages;

    b. An injunction restraining the respondent whether by himself, his servants, agents or otherwise howsoever from further posting or causing to be posted words defamatory of the appellant;

    c. Costs of the suit;

    d. Interest on (a) and (c) above;

    e. Any such further or other relief as may to this Honorable Court appear fit and just to grant.

8. The respondent entered appearance on 22nd August 2018. He filed a statement of defence dated 14th August 2018 on 22nd August 2018 denying all the averments set out in the plaint. He defended that the statement was an opinion that contributed to a debate in the group in respect of the appellant's decision to obtain a court order stopping developments in the estate's open grounds. He prayed that the suit be dismissed with costs as it disclosed no reasonable cause of action.

9. In her judgment dated 29th April 2021, Kamau, J. found that the appellant had failed to discharge her burden of proof to the required standard. Accordingly, the suit was dismissed but with no orders as to costs. The relevant portion of the judgement reads as follows:

> " This court noted that the message by the Defendant herein showed that the Plaintiff herein had not been referred to by name. The question of her identity and the circumstances under which the message was sent were pertinent issues in determining whether or not the message she had complained about was defamatory.
>
> A careful perusal of the chats showed that several members in the WhatsApp group did not appear to know who had obtained the court order stopping the future upgrades that were to be done on the playground. There were comments such as:
>
> "Aiyah! Court order? From where/who?" "Aje sasa? Who? What?"
>
> "Well if the person doing it doesn't have kids they wouldn't share our interests"

"Whoever does this is of course assuming that 70 residents don't have a say on how to manage their playground"

"Just a thought- could this person be having an issue that needs counselling?"

However, a few people seemed to know who this was as they commented as follows:

(emoji emoji) it's always the same person..."

"...we cannot Alloow (sic) one person to muzzle is a deny our children development that they do need" "...with what is happening on the ground, I think she is stopping Gems from helping us"

"...I think we need to get ours before she thinks of enjoining us into this."

"I think this person belongs to the wrong place. She belongs somewhere else...where homes are a kilometer apart"

"But genuinely, I think it is very unfair for 1 person to act like a bh"

"Well she was the same lady chasing kids from the playground and then later started taking pictures and recording kids while they were playing in the playground..."

It was not clear from the Defendant's message whether he knew who this person was or not as his message read as follows:

"well... i still believe this could be an alien (inserted an emoji apparently demonstrating what an alien looks like) finding it extremely hard work to co-exist with normal human beings! Who else could pull such a stunt (emoji)"

As regards whom the person being complained about was, this court was able to ascertain that it was one person and that person was female. Other than those who had prior knowledge of her resisting the upgrading of the playground, none of the other WhatsApp members or this court appeared to know exactly who she was. In view of the fact that the Plaintiff's identity was not clearly discernible from the chats, the onus was on her to satisfy the court that all the members in the WhatsApp group knew the person being discussed was her and that the Defendant's comment lowered her reputation before the seventy (70) members who were in that WhatsApp group.

She was also under an obligation to demonstrate how the Defendant's message in particular lowered her reputation in the estimation of right thinking members of the society. Indeed, there were other recommendations that were made regarding how to deal with the court order she was said to have obtained. These comments were as follows:

"This is so selfish, is there a way we can seek audience and hear whatever the reason is and work out an understanding, just a few people from the cluster, just thinking!"

"We had suggested earlier (Jonas has minutes) that we immediately start legal process of stopping whoever it is from interfering with the rights and freedom speak to her"

"Am not around but I guess Cluster 3 residents/officials need to attend court on the indicated date to get the full picture"

"Residents Attending the court hearing in multitudes shows she's one voice vs 70..."

"Or we contribute, get a lawyer and also enjoin C3 since its (sic) our grounds under discusion (sic). Then get orders to stop any interference once and for all. Otherwise this nonsense will never stop."

"Gems has nothing to do with what is happening on the grounds. I think she is stopping Gems from helping us."

"It's in fairness total rubbish. We must push the person to the shoves."

"Mmmmh, soo (sic) the pics were meant for evidence in the courts? Aiya"

"...See what we've been dealing with all this time. Please let us put an end to this once and for all. please (sic) even if we have to petition our case too." .....

The court was further not persuaded that the Plaintiff demonstrated that she was easily identifiable in the WhatsApp group as the person who was referred to as an alien and further infer from the post that she was anti-social, mean, inhuman, insensitive to others, lacking in candour (sic), a crook of the highest order, a self- conceited person with no feelings and compassion to others or a sadist who wished bad luck to others.

Indeed, certain members in the WhatsApp group took the view that action needed to be taken against her order so as not to stop development of the playground ground. The Plaintiff's failure to present at least present one (1) witness from the WhatsApp group who would have testified how he or she had been forced to look at her differently as a result of the Defendant's post weakened her case greatly. The evidence of PW 2 who was her husband was not sufficient to have *Evidence Act*, the screenshots of the messages the Plaintiff adduced in evidence and were taken on her behalf by PW 2 were inadmissible in the circumstances of the case herein. In view of the fact that her case was hinged on the screenshot of the Defendant's message, her case had no legs to stand on.

Despite the Defendant not have testified to rebut her testimony, the burden of proof continued to lie with the Plaintiff to prove her case as has been stipulated in Section 109 of the *Evidence Act* that

provides that the burden of proof lies with that person who wishes the court to believe in its existence and that he who asserts a fact must prove as stipulated in Section 107 of the *Evidence Act*."

10. The appellant is aggrieved by those findings. She filed her notice of appeal dated 8th May 2021 and her memorandum of appeal dated 10th May 2022. The appellant was dissatisfied with the learned judge's findings on the following summarized grounds: that the trial court was in error in concluding that the appellant had not established the elements of defamation to the required standard; that she did not require the testimony of a member of the WhatsApp group; that the WhatsApp messages adduced in evidence were conclusive enough to establish the tort; that the learned judge failed to take into account that the respondent did not participate in the hearing to rebut her evidence; and that the learned judge failed to consider her submissions and documents adduced in totality.

11. In the premised circumstances, the appellant urged this Court to allow the appeal by setting aside the judgment of the trial court dated 29th April 2021and that her suit be allowed. She further prayed for costs of the appeal.

12. The appeal was heard virtually on 27th February 2024. Learned counsel Mr. Malenya was present for the appellant. The respondent or his counsel was absent in spite of being duly served with the hearing notice. The appellant adopted her written submissions dated 29th January 2024 together with her list and bundle of authorities dated 26th February 2024.

13. The appellant condensed the facts giving rise to the dispute to advance that since the trial court had identified that the comment the subject of this dispute was directed at a woman, and authored by the respondent, it ought to have intuited that the said words were targeted at the appellant with intent to lower her reputation. She was shunned by other residents who no longer interacted with her. Additionally, together with her husband PW2, they were removed from the WhatsApp group and as a consequence she suffered serious injury to her dignity and self-confidence.

14. Secondly, she submitted that PW2's evidence, was sufficient enough to establish that the words were defamatory. Thirdly, the appellant urged that the chats adduced in evidence were apparent, sufficient and conclusive evidence that the tort of defamation had been established to the required standard of proof. In any event, her evidence was uncontroverted. For those reasons, she urged this Court to allow her appeal and award Kshs. 5,000,000.00 in damages as fair compensation.

15. We have considered the record of appeal, the submissions and the authorities cited. As a first appellate court, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions. In reconsidering and re-evaluating the evidence, this Court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time. [See *Peters vs. Sunday Post Limited* [1958] EA 424].

16. In this appeal, the main issue for determination is whether the appellant had established the tort of defamation to the required standard of proof, being on a balance of probabilities. At trial, the appellant called herself (PW1) and her husband James Ambe (PW2) to testify. Her evidence was corroborated by that of PW2.

    The appellant laid out her superlative stellar work experience and qualifications stating that on the evening of 19th May 2018, she received a call from her husband PW2, that the following message had been posted by the respondent on the Cluster WhatsApp Group:

    > " well ... I still believe this could be an alien (inserted an emoji apparently demonstrating what an alien looks like) finding it extremely hard work to co-exist with normal human beings! Who else could pull such a stunt! (emoji)."

17. PW2 shared this content to PW1 having taken a screenshot of that particular message. PW1 learnt that the said message triggered a flurry of messages with the viewership of about 70 members. It was PW1's evidence that the message was directed at her because she made the decision to obtain a court order stopping construction on the estate's open ground pending the hearing and determination of a case.

18. As a result of the message, PW1 lamented that she was branded as antisocial, mean, inhuman, insensitive to others, lacked candor, a crook of the highest order, self-conceited with no feelings or compassion for others and a sadist who wished bad luck upon people.

19. As a result, she suffered ridicule, injury, damage, disparage to her character and low self-esteem before the eyes of right thinking members of the society as a result of the allegations which were untrue and sensational. She added that she was removed from the WhatsApp group yet those comments remained retrievable. In addition, she had received numerous calls from her friends inquiring on the contents of the text.

20. The tort of defamation is well known in our jurisdiction. This Court in *Selina Patani & Another vs. Dhiranji V. Patani* [2019] eKLR, quoting Patrick O'Callaghan in the 'Common Law Series: The Law of Tort at paragraph 25.1', stated that:

> "The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: Defamation protects a person's reputation; that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements that injure his reputation."

21. Similarly, this Court in *Musikari Kombo vs. Royal Media Services Limited* [2018] eKLR, citing the same author and text writings. The Law of Tort at paragraph 25.1', stated as follows:

> "The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..."

22. This protection has also gained traction in the prism of our Constitution. In his persuasive decision of *Phineas Nyagah vs. Gitobu Imanyara* (2015) eKLR, Odunga, J. (as he then was) distinguishably articulated himself as follows:

> "Under article 32(1) of *the Constitution* every person has the right to freedom of conscience, religion, thought, belief and opinion and provides that the freedom to express one's opinion is a fundamental freedom. Article 33(1) (a) provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In a tort for defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals."

23. The test for determining defamation is purely objective. In *Halsbury's Laws of England 4th Edition* Vol. 28 at page 23 the authors opined:

24. This Court in *S M W vs. Z W M* [2015] eKLR laid out the requirements for establishing defamation as follows:

> "A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided: see Gatley on Libel and Slander (10th edition). A plaintiff in a defamation case must prove that the words were spoken /written; that those words refer to him/her; that those words are

false; that the words are defamatory or libelous and that he/she suffered injury to reputation as a result.

In the case before the court, it is not disputed that the letter in issue was written by the Respondent and the words referred to the Appellant: see Winfield & Jolowicz on Tort (8th edition) 1967 at page 255:

"The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation, or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard."

25. Did the appellant meet that threshold? At the onset, we must point out that though the respondent did not challenge the evidence of the appellant, that does not automatically mean that the appellant was entitled to the reliefs sought. The burden of proof in establishing this tort remains alive and existing and does not vitiate on account of unchallenged evidence.

26. It is to also be borne in mind that the elements of defamation are conjunctive. In other words, they must be ascertained all together and none is autonomous over the other. It is not disputed that the respondent wrote the message, the subject of this dispute. The same was published in the Cluster's WhatsApp group.

27. According to the appellant, that message was directed to her.

One of the mandatory requirements of defamation is that it must be directed at the allegor. In this case, the words complained of did not address any person in particular. Looking at the said text, we do concur with the findings of the trial court that firstly, no external person would have objectively identified that the said words were directed at the appellant. Secondly, we are not persuaded to hold that the said words insinuated that she was antisocial, mean, inhuman, insensitive to others, lacked candor, a crook of the highest order, self-conceited with no feelings or compassion for others and a sadist who wished bad luck upon people.

28. In any event, it is also not clear from the messages in the group that they concurred with the sentiments of the respondent. Any participant was purely expressing him or herself independent of the statement made by the respondent. As rightfully found by the trial judge, we do not think that the statement was directed at the appellant with a view to injuring her reputation before right thinking members of the society.

29. Turning to the respondent's message, it is clear that he was responding to a previous comment from one of the contributors of the chat and it is not clear if his comment led to an uphill battle. All the persons therein were clearly independently unsatisfied with the issuance of the court order.

30. Looking at the statement, we find that the words were an expression of dissatisfaction over the court order. Taken in their ordinary meaning, one cannot say that they had the intention to cause ridicule, shame, disparage or harm to a particular individual. We understand the statement to be one of pure frustration. We furthermore do not find them likely to be understood by the ordinary man that they were defamatory in their nature.

31. The appellant's other witness to the proceedings was her husband PW2. The appellant was made aware of the message from a screenshot that PW2 shared with his wife. We find that the evidence of PW2 did not meet the ordinary person test.

Extrapolating, he was more probable than not to concur with the testimony of his wife.

32. It would have been more prudent for the appellant to invite third parties not related to her such as the friends who purportedly called her concerning the statement made by the respondent. Furthermore, and critically, PW2 did not demonstrate to the trial court as to how he saw her differently as a result of the comments complained of. He did not state in his evidence how the comments affected how he personally viewed the appellant. That evidence in our view did not establish that her image was tainted in the eyes of others. It was not weighty.

33. That notwithstanding, we do concur with the trial court that since the substance of the allegations emanated from a screenshot, the same ought to have ascribed to the provisions of section 106A of the *Evidence Act*. That did not happen as the certificate envisaged in that provision was not adduced in evidence. Resultantly, the absence of that certificate contemplated therein rendered the screenshot inadmissible and the appellant's case despondent.

34. The upshot of our above findings is that the appellant failed to demonstrate that the trial court was in error in arriving at those findings. Those findings captivatingly analyzed the evidence on record and are laudable. Consequently, we come to the conclusion that the appeal herein lacks merit and it is dismissed but with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

P. O. KIAGE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

L. GACHOKA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR