



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, MURGOR & KANTAL, JJA)

CIVIL APPEAL NO. 10 OF 2019

BETWEEN

PATRICK NYAGA.....1ST APPELLANT

RENTOKIL INITIAL (K) LIMITED.....2ND APPELLANT

AND

SANITAM SERVICES (EA)

LIMITED.....RESPONDENT

(Being an appeal from the judgment and order of High Court of Kenya at Nairobi (J. Kamau J.,) dated 19th September 2018

in

HC CA No. 332 of 2013)

JUDGMENT OF THE COURT

The respondent, Sanitam Services (EA) Limited instituted a suit against **the appellants, Patrick Nyaga (Patrick) and Rentokil Initial Limited** claiming general damages for defamation. Kamau Nyaga (*Kamau*), the Managing Director of the respondent claimed to have invented a sanitary bin for which he had registered patent No. AP 773. He claimed that on various dates between April and August 2008, Patrick had written letters to different customers that sought to depict the respondent as “unscrupulous” and “Illegal” in the manner in which it acquired its business. It was further contended that the ordinary and natural meaning of the words depicted the respondent and its directors as persons that acquired their business through dishonest, unscrupulous and illegal means.

As a result, their reputations were seriously injured, and they suffered severe embarrassment in the eyes of their customers, the business world and right-thinking members of the society. The respondent therefore claimed general damages, costs, and interest at court rates.

The appellants denied writing defamatory letters in the manner specified by the respondent. It was contended that the letters were a just, fair and honest representation of the facts given the circumstances; that the letters were intended to clear any confusion or misrepresentation occasioned by the respondent; that the meaning attributed to the allegations were spurious and exaggerated, and there was nothing in the letters that portrayed the respondent in a bad light. The appellants also denied having occasioned any injury or embarrassment to the respondent or to its directors.

During the hearing, the respondent’s Managing Director, Kamau, testified on its behalf. No other witness testified. He stated that the respondent was the owner of the Patent No. AP 773 pertaining to the sanitary bins it supplied to its customers and that the appellants also supplied similar bins. He further stated that he had received a letter from one of his customers, the Coffee Board of Kenya comprising a letter from the appellants that indicated that the respondent was “...attempting to acquire services through unacceptable ways,” and that it was for this reason that he claimed damages.

Patrick testified on behalf of the appellant, and on cross-examination admitted that they had written the letters to their customers.

In its judgment, the trial court found that the appellants had defamed the respondent and its directors in the letters that it had issued to various

customers, and further found that there was no justification for writing the letters. Based on the evidence showing that its patents were registered in Botswana, Kenya, Uganda, Zambia and Juba, the trial court entered judgment in favour of the respondent for Kshs.7 million.

Upon considering the grounds and the parties' submissions, the High Court dismissed the appeal after concluding that defamation was established to the required standard since the appellants' letters were laced with malice, and the insinuations and innuendoes that the respondent was intent on acquiring business through unscrupulous means which was intended to demean the respondent and to lower its standing or reputation in the eyes of right thinking members of the society.

Regarding the award of Kshs. 7 million, the High Court found it to be excessive and set it aside, and instead awarded the respondent a sum of Kshs. 2 million.

The appellants were once again aggrieved by the decision of the High Court and appealed to this Court on grounds that; the learned judge erred in awarding general damages of Kshs. 2 million; in disregarding the evidence that was before the trial court; in concluding that the trial court had

jurisdiction to hear and determine the suit; in finding that the contents of the letters were defamatory; in finding on a balance of probabilities that the respondents were the owners of the Patent No AP 773; in failing to appreciate that the issues were not properly framed and in delivering a judgment that went against the weight of the evidence.

The respondent also filed a cross appeal wherein it contended that the learned judge wrongly reduced the trial court's award of Kshs. 7 million to Kshs. 2 million on the basis that the trial magistrate did not have the pecuniary jurisdiction to make such award, and having found that a reduction was commensurate with comparative legal precedent.

Both parties filed written submissions. Whilst highlighting the appellants' submissions on a virtual platform owing to the Covid-19 Pandemic, learned counsel **Mr. Katiku** compressed the appellants' grounds of appeal into three issues, firstly, whether the learned judge fell into error when she failed to frame the issues for determination; secondly, in failing to determine whether or not defamation was proved on a balance of probabilities; and third, whether the impugned letters were published or read by any third party; that there was no evidence on record from a third party to prove that the letters in questions were in fact published. Counsel cited the case of **Selina Patani & another vs Dhiranji V. Patani [2019] eKLR**, for the proposition that since no third party tendered evidence confirming that it had received the offending letters, or that the letters lowered the respondent's in4

their mind, defamation was not proved. It was asserted that the only one witness called merely stated that a defamatory statement was made.

Learned counsel, **Mr. Mutiso**, submitted on behalf of the respondent. Counsel stated that contrary to the requirements of a second appeal, this Court was being requested to reevaluate the evidence afresh; that the tort of defamation was proved in both the trial court and the High Court; that the evidence showed that the appellants conceded that they had published the impugned letters to third parties, and therefore it was not necessary for this to be proved yet again.

Concerning the cross appeal, it was submitted that the trial court acted within its pecuniary jurisdiction and rightly awarded the respondent Kshs. 7 million. It was argued that the learned judge was wrong to reduce the award from Kshs. 7 million to Kshs. 2 million since the appeal in the High Court was not based on whether or not the trial court had jurisdiction to award Kshs. 7 million in damages.

In a brief reply, Mr. Katiku asserted that there was no dispute that the letters were written but what was in contestation was whether this amounted to a publication, and that the burden was on the respondents to demonstrate that a statement defaming the respondents had been published, and that this was not done.

This is a second appeal, and it is an established principle that a second appellate court will not interfere with the decision of the lower court unless it is apparent that the trial court and the first appellate court took into account matters they ought not to have taken into account or failed to take into account matters that they should have taken into consideration. In the case of **Kenya Breweries Ltd v Godfrey Odoyo, Civil Appeal No. 127 of 2007**, where this Court held:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court, on second appeal confines itself to matters of law unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse...”

We have considered the grounds of appeal and the cross appeal as well as the parties' submissions and find that the issues for consideration are; whether the learned judge rightly found that the ingredients for the tort of defamation were proved on a balance of probabilities; whether the learned judge rightly reduced the award from Kshs. 7 million to Kshs. 2 million.

In considering whether the High Court rightly found that the ingredients for the tort of defamation were proved on a balance of probabilities, it is essential to consider the elements necessary for a finding to be reached on the tort of defamation.

Winfield on Tort defines defamation as “... the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tends to make them shun or avoid that person.”

The ingredients of defamation as set out in the case of **John Edward vs Standard Ltd, HCCC 1062 of 2005** amongst other authorities are;

“A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes

him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are:-

- i) the statement must be defamatory;**
- ii) the statement must refer to the plaintiff;**
- iii) the statement must be published by the defendant;**
- iv) the statement must be false.”**

In this case, it is not disputed that the appellants wrote various letters to their customers wherein the impugned portion stated that;

“We understand that you have received a letter from Sanitam services warning you of legal action as a result of using the sanitary units that we have installed at your clients washrooms and which allegedly infringe on their patent...I also wish to point out that Sanitam Service have approached many of our customers with similar warnings in the recent past with clear intent to acquire business through unscrupulous ways. I am however happy to report that this illegal approach has yielded no results and is untenable...”

There is no question that the appellants’ letters made reference to the respondent, and in so far as the words communicated in the letters were concerned, the operative words being “...that Sanitam Service have approached many of our customers with similar warnings in the recent past with clear intent to acquire business through unscrupulous ways...” and “...this illegal approach...” both the trial magistrate and the High Court were satisfied that they contained insinuations and innuendoes that the respondent was intent on acquiring business through unscrupulous means which words were intended to demean the respondent, and to lower its standing or reputation in the minds of right thinking members of the society.

But having said that, the appellants’ grievance is that, the courts below failed to ascertain whether defamation was proved to the required standard; that, for the claimant’s claim of defamation to succeed, it was incumbent upon it to prove that as a consequence of the publication, its character and reputation was diminished.

In *Halsbury’s Laws of England 4th Edition Vol. 28 at page 23*, it was opined that;

“In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

Which brings us to the question of whether it was proved that the letters written to third parties resulted in diminishing or lowering of the claimant’s reputation in the minds of the third parties to whom the letters were addressed.⁸

In the case of *Selina Patani & another vs Dhiranji V. Patani (supra)* this Court explained that;

“As to whether the appellants character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants’ reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person’s own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication”.

As such, to prove its claim, the respondent ought to have called evidence from the third parties to whom the letters were addressed to prove that the statements contained diminished its reputation in their minds. As seen above, only the Managing Director of the respondent testified. And in his evidence he made a passing mention of the letters, but did not specify how they had defamed him. Furthermore, no third party evidence was called that pointed to damage of reputation or that depicted a lowering of the respondent’s reputation in the customers’ minds as a consequence of the letters. In effect, the evidence in its totality fell far short of the standard required to prove defamation. Absent such evidence, as was the case here, there would be no basis for a court to reach a finding that the claimant was defamed. Such was the case in *Daniel N. Ngunia vs KGGCU Limited [2000] eKLR* where this Court observed that the claimant having been the only person who testified in support of his claim for defamation, the claim could not possibly succeed. We therefore find that, contrary to the conclusions reached by both the trial court and the High Court, the claim for defamation was not properly made out.

Having determined as we have that there was no proof of injury to the respondent’s reputation and that necessary ingredients of the tort of defamation were not established, we need not go into considering the other grounds of appeal or the cross appeal.

For the foregoing reasons, the appeal is merited and is allowed. The judgment of the High Court of **18th September 2018** is hereby set aside with costs to the appellants. The cross appeal fails and is hereby dismissed.

It is so ordered

Dated and delivered at Nairobi this 5th day of February, 2021.

S. GATEMBU KAIRU, (FCI Arb)

.....

JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. Ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR