



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KOOME, OKWENGU & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 20 OF 2014

BETWEEN

JONES MAGHANGA SOLOMON APPELLANT

AND

ELIUD MBOGHO MAJANI..... RESPONDENT

(Appeal from the order of the High Court of Kenya at Mombasa

(R. Mwongo, J.) delivered on 11th April 2014

in

H.C.C.C . NO.140 OF 2011)

JUDGMENT OF THE COURT

1. **ELIUD MBOGHO MAJANI**, the respondent in this appeal, obtained judgment in the Resident Magistrate court at Voi against **JONES MAGHANGA SOLOMON**, the appellant, in the sum of Shs.500,000/= as damages in a civil suit for defamation arising from utterances made by the appellant at a public meeting at a place called Ghazi Trading Centre in Taita Taveta location, Voi on 16th April 2008.

2. The trial magistrate found that the evidence adduced by the respondent had been admitted by the appellant and was thus uncontroverted; and that therefore the claim was proved, that the respondent's reputation "*was lowered in the eyes of tright thinking members of the public and the appellant had been shunned or avoided by his family and exposed to hatred, contempt, or ridicule and had suffered damage.*" He awarded the respondent Shs.500,000/= as damages and issued a permanent injunction restraining the appellant from publishing defamatory words against the appellant. The appellant appealed to the High Court against the decision.

3. In its judgment dated 11th April 2014, dismissing the appeal, the High Court (R Mwongo, J) found that the words complained of, which were not denied, were defamatory. The High Court also found that the appellant failed to demonstrate the truth of the words complained of both in substance and fact, and consequently failed to justify the slanderous words on a balance of probability.

4. On the issue of award of Shs.500,000/= as damages, the learned judge delivered himself as follows –

“whilst my own view is that the amount awarded is somewhat high and that I myself would not have awarded that amount, I do not consider that my own impression of how much was payable should on that basis alone override the amount awarded by the Hon. Magistrate.”

5. In this second appeal, the appellant, put forward 7 grounds of appeal as follows –

1. ***The Learned Judge erred in law and in fact in failing to re-evaluate the evidence of the trial court.***
2. ***The Learned Judge erred in law and in fact in failing to make a finding that the trial magistrate had out rightly dismissed the appellant’s defence of justification without reference to the defence evidence.***
3. ***The Learned Judge erred in law in failing to make a finding that the appellant had successfully established the defence of justification.***
4. ***The Learned Judge erred in law and in fact in making a finding that the damages of Ksh 500,000 awarded were pleaded for, hence awarded as liquidated damages when in fact the respondent had not pleaded for liquidated damages.***
5. ***The Learned Judge erred in law and in fact in, after making a finding that the damages awarded were excessive, upholding the quantum.***
6. ***The Learned Judge erred in law and in fact in failing to make a finding that the respondent’s evidence did not support his pleadings.***
7. ***The Learned Judge erred in law and in fact in upholding the misapprehension of the trial magistrate of the import of section 3 of the Defamation Act viz a vis the defence of justification.***

BACKGROUND

The record shows that the following were the alleged defamatory words in Kiswahili -

- a. ***...Chief ameshirikiana na wauzaji wa pombe ya mpangara na kwa kila mitungi mbili inauzwa moja ni chief”***
- b. ***“Na kwamba chief amearibu nyumba za watu wa location”***

In the plaint the words were translated thus;

- a. ***“the chief has a conspiracy with the illegal (sic) brewers of illicit brew of mpangara and actively selling the same that in every 2 (two) jericans sold by the brewers one of them (the money is for the chief”***
- b. ***“the chief has broken the families of the location by involving himself in immoral sexual relationship with married women.”***

6. The respondent was the Chief of Ngolia Location where he resided and the appellant was a councilor of Ngolia Ward. They knew each other well on 16th April 2008, the respondent’s superior, namely the District Commissioner (DC) convened a DC Baraza (or meeting) at Ngolia Trading Centre. The respondent was the master of ceremonies. He invited the appellant to attend *qua* councilor. The latter attended. The baraza had a lot of people. After the meeting started, the respondent invited the appellant to address it. That is when the appellant uttered the words complained of by the respondent.

7. The respondent testified in the trial court and explained that the words were understood by the public to mean, *inter alia*, that he was adulterous and was breaking up families. He told the trial magistrate that he deserved damages in the tune of Shs.500,000/=. He also sought a restraining order to stop the appellant from making further defamatory statements against him.

8. The respondent called as a witness in the trial court one Elijah Kingeru Mwadime, a businessman at Ndome and Kilifi who knew both the appellant and the respondent. Elijah Kingeru Mwadime confirmed being at the meeting which the area District Officer and the District Commissioner also attended. He also confirmed the fact that the appellant uttered the words complained of and gave them the same defamatory meaning as the respondent did. A farmer in Ghazi Location also testified on the respondent's behalf and confirmed that the appellant uttered the words complained of.

9. The appellant gave testimony in the trial court. He admitted having uttered the words complained of and attributed them to the complaints received by him from members of the public. He testified that he had investigated the complaints and found them to be true. He also stated in cross-examination that he uttered the words in front of the DC and about 150 people in the Baraza at Ngolia Trading Centre, Ghazi, Taita Taveta.

The appellant's two witnesses were Lempard Mulamba and Erick Jumbe Mwangongo. They confirmed having heard the appellant utter the words complained of at the said meeting.

When the appeal came up for hearing on 28th January 2015, learned counsel **Ms M.S. Shariff** urged us to reverse the judgment of the High Court on the ground that the High Court had failed to evaluate the evidence and erred in doing so. In counsel's view, the defence of justification had been proved because Eric Jumbe Mwangongo who testified as the respondent's witness stated in his evidence-in-chief that –

“it is true that the chief (meaning the respondent) was having sex with people's wife (sic). I found the chief in my house having sex with my wife. It was on 5th August 2007, a Sunday. I went to the plaintiff (respondent) and told him that he was breaking my family. On 14th August 2007, we had a meeting (court) at my step-brother's home (Robinson Mwasara Mwangongo). The Chief (respondent) was found guilty and fined. He was required to clean my home ... he was to give me Shs.30,000/= for trespassing my home. I decided to file a case No.97 of 2008 against the chief. The chief is my brother-in-law. He is married to my own sister.”

12. It was contended by the appellant's counsel that the standard of proof of the defence of justification was higher than proof on the balance of probabilities and that the record shows that the requisite standard of proof was attained.

13. On general damages, counsel for the appellant contended that the respondent pleaded for Shs.500,000/= and in evidence prayed for the same amount and curiously got it, there was no justification for the award not least because the respondent did not suffer damage nor was he shunned by anyone contrary to what he alleged.

14. **Mr. Mwinzi**, learned counsel for the respondent, opposed the appeal and submitted that there was no basis for the defence of justification. He contended that the suit filed against the respondent by PW3 was dismissed for lack of evidence and for that reason allegations made in it with regard to adultery could not constitute evidence in support of the defence of justification. It was counsel's submission that as appellant had admitted having uttered the words complained of, he could not extricate himself from liability.

15. On the issue of damages, it was the submission of the respondent's counsel that the sum of Shs.500,000/= awarded by the trial court and upheld by the High Court was reasonable. He urged us to dismiss the appeal.

16. We have given this appeal due consideration. It is a second appeal. Consequently, this Court is enjoined to address only issues of law and to pay homage to concurrent findings of fact by the two courts

below unless the findings were not based on evidence or were a pervasion of the evidence or this Court is satisfied that on the totality of the evidence, no reasonable tribunal properly directing its mind would arrive at such findings.

17. The words alleged to be defamatory of the respondent were not denied by the appellant. In fact, the appellant asserted in evidence that he uttered them. He claimed justification. Justification was pleaded and the fact that the appellant's witness, Erick Jumbe Mwangongo testified and stated that the words were true was put forward as sufficient in law to prove justification and to discharge the burden of proof. But there can be no dispute that the allegations by the witness that a group of elders made a decision that the respondent was guilty of sexual acts did not *ipso facto* constitute evidence which could be put forward as proof of the allegations or to support the defence of justification. The appellant relied on allegations made in a dismissed suit as a justification for the words complained of.

18. The issues of law for our consideration and determination in this appeal which the appellant has raised in his memorandum of appeal are three. **First**, whether the defence of justification was proved and **secondly**, whether the damages awarded were excessive and **thirdly** whether the courts below properly evaluated evidence adduced by the parties.

19. On the first issue, the defamatory words were admitted. The appellant even testified and called witnesses to support the fact that he uttered the words. There was no dispute that the words carried the meaning and were understood to mean what the respondent contended. Indeed, the stance taken by the appellant is that he was justified in exposing the respondent as an adulterer. In his defence, the appellant pleaded justification and he adduced evidence through Mr. Erick Jumbe Mwangongo, whose sister is married by the respondent and is therefore the respondent's brother-in-law. The witness claimed to have found the respondent having sex with his (Erick Jumbe Mwangongo's) wife on 5th August 2007. Erick Jumbe Mwangongo filed Suit No.97/2008 in the Magistrate's Court against the respondent. It was dismissed. The effect of the dismissal is that the allegations were not proved to the satisfaction of the Court. The two lower courts made concurrent findings that there was no evidence adduced to support the defence of justification. The only "evidence" the appellant put forward as justification for the defamation was the evidence of Eric Jumbe Mwangongo whose suit No.97 of 2008 against the respondent was dismissed. Eric Jumbe told the trial court that he sued the respondent for raping his wife. As the suit was dismissed, the allegations of rape made in it and/or adultery were not proved and there were no findings made by the court in that regard.

20. The onus of the defence of justification was on the appellant. The law requires that there be justification of the truth of the substantial imputation in a libel or slander. The defence of justification is that the words complained of were true in substance and in fact (see **Associated Leisure Ltd (photographic Equipment Co Ltd) v. Associated Newspapers Ltd [1970] 2 QB 450 pg 456**). It was incumbent upon the appellant to satisfy the Court that the defamatory words were true in substance and in fact. It is correct in our view, that where a defamatory statement imputes the commission by the plaintiff of an offence, the defendant, so as to succeed in his plea of justification, must prove the commission of the offence as strictly as if the plaintiff was being prosecuted for it (see **Chalmers v. Shackell [1834], 6 c. & p.475**). Where there is no imputation of a crime, the proof required is less strict but it is incumbent for the defendant to satisfy the Court that the statement justified is substantially true. The law presumes that defamatory words are false and it is for the defendant to satisfy the Court that the statement which is justified is true in substance and in fact. It is however accepted in law that a justification does not have to be in respect of every detail or epithet in the words complained of. (see **Halsbury's Laws of England, Fourth Edn, para 85 pg 43**). In cases where, as here, the words complained of do not impute commission of a criminal offence, the proof required is, on the balance of probabilities but the defendant must satisfy the Court that the statement justified is substantially true, even if the proof does not establish every detail.

21. In law, it is correct to state that where a defendant alleges that a plaintiff is guilty of habitual misconduct, the defendant does not discharge the burden on him by proving one isolated instance of such misconduct (see **Halsbury laws of England Fourth edn, Vol. 28 para 91**). In this case, there was no evidence that the respondent is a serial adulterer and the incident alleged, even if it had been proved,

could not have justified the allegation made. In this appeal, the appellant did not discharge his burden of proof and the lower courts were correct in their finding in this regard.

22. As regards the issue of quantum of damages, though less susceptible to precision in terms of calculation as compared with damages for personal injury claims, nevertheless there are essential principles underpinning the awards which (principles) show that the factors to be considered include the seriousness of the defamation, the range of its publication, the behavior of the offending party that may aggravate the award; and existence of circumstances that may give rise to exemplary damages. The object of an award of damages is to give vindication to the plaintiff and assuage the injured feelings, reputation and character. In the instant appeal, the words were uttered at a baraza attended by 150 people or so in the home area of the respondent. He was depicted as a social menace in that it was alleged that he used his position as a chief to violate other men's wives and to destabilize society through sale of local brew. The award may appear a tad too big but when all the circumstances in which the utterances were made are taken into account, it cannot be said to be excessive. The basis on which we would be justified to interfere with the award does not exist not least because the award is not excessive nor was it premised on wrong principles. We decline to interfere with it.

23. Finally, after a careful perusal of the entire record, we have come to the inevitable conclusion that both courts below properly evaluated the evidence and came to the right conclusion.

24. In the result we find no merit in the appeal which we hereby dismiss with costs to the respondent.

Dated and made at Malindi this 9th day of October, 2015.

M. K. KOOME

.....

JUDGE OF APPEAL

H. OKWENGU

.....

JUDGE OF APPEAL

G.B.M. KARIUKI SC

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR