IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MUSINGA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 149 OF 2004

BETWEEN

GIBSON OMBONYA SHIRAKU……..……..... APPELLANT

AND

BRITISH AIRWAYS PLC……..…..... RESPONDENT

(Being an Appeal from the judgment and decree of the High

Court, Nairobi, Hon. Lady Justice Gacheche delivered on 14th November 2002

in

H.C.C.C. NO. 1765 OF 1998)

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JUDGMENT OF THE COURT

1. Mr. Gibson Ombonya Shiraku, the appellant, lodged an appeal in this Court way back on 15th July 2004 against the judgment of the High Court (Hon. Lady Justice Gacheche) delivered on 14th November 2002 in suit No. NBI HCCC No. 1765 of 1998 in which he had sued British Airways for recovery of general and special damages on the ground that the said Airline had defamed him and lost his goods valued at Shs.153,600/= while he was about to board British Airways Flight No. BA 2832 at London's Gatwick International Airport enroute to Paris Charles De Gaule Airport. The appellant alleged that British Airways, the respondent, without any reasonable cause maliciously caused him to be arrested on suspicion that he was carrying dangerous cargo into the plane and that he was a danger and a risk to other travellers, and crew. These allegations were denied by the respondent and the suit went to hearing before Lady Justice Gacheche who, on 13th November 2002, dismissed it with costs on the ground that the appellant had failed to prove the allegations whereupon the appellant lodged a notice of appeal on 18th June 2004 and record of appeal on 15th July 2004.

2. In the memorandum of appeal, the appellant preferred the following 7 grounds of appeal:-

"(1) THAT the learned judge took an inordinately and unjustifiably long period of time to deliver the judgment and thus left out and failed to consider crucial and important evidence tendered by the

Appellant at the hearing of the case.

2. *The learned judge erred in law and fact in holding that the defamatory words were not brought or set out in the Plaint and evidence tendered by the Appellant.*

   (3) The learned judge erred in law and fact in finding that the Appellant's action/complaint did not fall within the ambit of actions or complaints actionable per se to wit that there was no imputation of a criminal intent thus erred in demanding of the Appellant to prove special damage.

   (4) The learned Judge erred in law and fact in failing to find that the Respondent had tendered no evidence to rebut the evidence put forth by the Appellant, upon which she could throw out and doubt the authenticity of the Appellant's claim and evidence tendered on oath.

   (5) The learned judge erred in law and fact and misapplied the evidence tendered by the Appellant and further erred in holding the Appellant's evidence contradictory while in the same breath exonerating the Respondent's by finding that the letters they issued were vague and did not entitle the Plaintiff to compensation.

   (6) The learned judge erred in law and fact in finding that the Appellant had been fully compensated for loss of luggage under the IATA rules which rules were inapplicable and had not been proved at the hearing.

   (7) The learned judge erred in law and misapplied the law and authorities tendered.

3. The evidence in support of the appellant's claim was given before the trial judge by the appellant who did not call any other witness. The respondent did not offer any evidence. Both parties filed written submissions and lists of authorities following which the court delivered judgment on the date aforementioned.
4. The learned trial judge made the following finding in her judgment-

   "I do find that this suit which is based on slander would not fall within the category which would be actionable per se and as aforementioned, the plaintiff would be required to sufficiently plead and prove special damages, for it cannot be an imputation of a criminal act for an airline to search passengers' cargo for unauthorized or dangerous cargo."

5. The learned trial judge went on to hold in her judgment

"…the plaintiff did not specifically plead the real words, nor did it come out clearly in his evidence. I would in the circumstances find that no defamatory words were actually uttered as alleged, and from which I would have inferred as meaning.

"…….All in all I find that the evidence that was adduced by the plaintiff falls short of the required standard for defamation or even false and unlawful arrest and detention. I am also for the reasons stated above, unable to find any element of discrimination, in the whole affair, and I dismiss the plaintiff's suit with costs."

6. When the appeal came up before us Mr. Namada, learned counsel for the appellant, submitted that the issue in the memorandum of appeal in grounds 2 and 3 was whether the defamatory words complained of were brought out in the pleadings and in the evidence. He was spot on in this regard. He contended that there is no hard and fast rule on the format defamatory words must take. Again counsel was spot on but, there must be words before the issue of format can arise. It was also counsel's submission that the person who had uttered the defamatory words was identified. He criticized the trial court for finding that the slander was not actionable *per se* without proof of damage. He submitted that there was imputation of criminal intent regardless of whether or not it was acted on. It was the appellant's contention that the inspection on account of suspicion of illegal cargo had criminal imputations such as terrorism, and illegal trafficking in

contraband. In his view, *"inspection of the luggage reinforced the criminal intent,"* and hence the slander. The appellant questioned the propriety of the action of the officer at Gatwick in stopping and detaining him when he had a ticket and a boarding pass. He urged the Court to find that there was unlawful arrest and that the trial judge erred in dismissing the claim.

7. It was further the submission of the appellant's counsel that the respondent did not offer any evidence to contradict the evidence of the appellant and accordingly the trial judge should have found in favour of the appellant as the appellant's evidence was not controverted.
8. Mr. Kimani Kiragu, the learned counsel for the respondent, urged that the appeal had no merit and should be dismissed. He submitted that the law of defamation was concerned with protection of reputation and it was immaterial what one thought of oneself as the law was concerned with what those who hear the defamatory words think of one. He pointed out that only the appellant gave testimony in the suit in support of his claim during the trial. Counsel for the respondent referred us to a decision of this court in **Daniel N. Ngunia v KGGCU Limited** (C.A. Civil Appeal No. 281 of 1998 at Nakuru) (unreported) in which the court noted from the record in respect of the appellant's claim for damages for defamation that the appellant was the only person who testified in support of his claim. The court proceeded to find that "in those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege." Counsel contended that the duty to prove the allegations reposed on the appellant *qua* plaintiff because he who alleges must prove (see **S. 107 – 109** of the **Evidence Act, Cap 80**) and pointed out that it was a misconception on the part of the Appellant that his claim was bound to succeed merely because the respondent did not call evidence. He pointed out that the appellant had no basis to criticize the respondent which had an obligation to ensure the safety of all passengers and that it was wrong for the appellant to proceed on the footing that the respondent had no right to inquire into what he was carrying or to control his movement. Further, said counsel, nowhere were the alleged defamatory words uttered and the trial judge correctly so found.
9. In his reply to Mr. Kiragu's submission, Mr. Namada told the court that he had abandoned ground No. 1 in the memorandum of appeal on the issue of delay in delivery of judgment. On publication of the alleged defamatory words, he told the court that the appellant had no opportunity to bring to court persons who were present during the incident at Gatwick International Airport to testify. It was his submission that "there is a presumption that somebody must have heard the words" and that "the court should take judicial notice of that fact." Counsel did not cite any authority for these statements, which, if true, would change the law and render unnecessary the legal requirement that a plaintiff must prove the allegations he makes in actions for slander. These statements are misconceived in law.
10. We have perused the record of appeal including the pleadings and evidence adduced at the trial. We have also given due consideration to the rival submissions of counsel. The issue for determination in this appeal is whether the appellant adduced sufficient evidence before the trial judge to prove his claim on a balance of probabilities. The burden to do so reposed on him. Did he discharge that burden and if so, was it at the correct standard of proof, namely on the balance of probabilities?
11. The respondent did not adduce any evidence at the trial. This however did not absolve the appellant from his duty to prove his case on a balance of probabilities. All it did was to make the appellant's task of proving his case on a balance of probabilities easier because the case was one-sided and the court did not have to compare the case for the appellant with any other evidence from the respondent but burden and standard of proof remained the same. This answers ground No. 4 in the memorandum of appeal which is further answered by the authority of Daniel Ngunia (supra).
12. The defamatory words were not set out in the plaint and the trial judge was correct in finding that the defamatory words were not pleaded. The trial judge found-

"the plaintiff did not specifically plead the real words, nor did it come out clearly in evidence. I would in the circumstance find that no defamatory words were actually uttered as alleged and from which I would have inferred a meaning."

13. Our perusal of the pleadings and the evidence adduced vindicates the learned judge's finding. In

absence of the words complained of from the pleadings and in the evidence, the appellant's claim has no leg to stand on. The entire case hinged on this. In effect therefore, the alleged defamatory words were not proved and further, there was no evidence of publication of any defamatory words. We decline the invitation by counsel to hold that there is a presumption that somebody must have heard the alleged defamatory words. If there were defamatory words, and if they were published, the burden of proving both their existence and publication reposed on the appellant. He failed to discharge it. Counsel for the appellant also invited us to take judicial notice of such presumption which we decline to take as the law requires a claimant to prove his case.

14. Before we conclude this judgment, perhaps it is necessary for us to point out that the ground on which words imputing a criminal offence are actionable *per se* is the damage to the plaintiff's good name, not the fact that he is put in jeopardy of criminal proceedings. If the defamatory words spoken are not actionable *per se*, they are actionable if they cause special damage which in law is the loss of some definite temporal advantage. But it is crucial that publication is proved. In the instant case, the appellant did not adduce evidence of publication quite apart from the fact that the allegedly slanderous words were not spelt out. The trial judge observed in her judgment that the appellant had stated in his evidence that *"no discussion had been held in public but that he held discussions in a secluded area in a room."* The trial judge found the appellant's evidence *"contradictory and untruthful and thus unreliable."* The trial judge had the vantage position of observing the appellant under cross-examination. Quite apart from the paucity of evidence, there was the added reason of contradictory and therefore unreliable evidence. The trial judge delivered herself as follows in this regard:

"But even then, though he alleged that he had been forced and pushed into the interrogation room, he was to state, during cross-examination that 'no, they didn't push me in, they directed me into the room. The Metropolitan Police pushed me. No I had not refused to go into the room. I was shown the room and ordered to follow them." On the same token, although he had originally testified that Racey had uttered the alleged defamatory words in the presence of his friends and all other travellers, he was later to change his testimony line during cross-examination when he stated that no discussion had been held in public, but that he held the discussions in a secluded area in a room.

"I do in the circumstances find his evidence very contradictory and untruthful, and thus unreliable.

I do find that the letters that were issued by the defendants were vague and cannot form the basis for his claim that he is entitled to the compensation that he now demands. For one to succeed on the basis of a letter, it must be clear, unequivocal and specific, which they were not and cannot thus be relied upon in support of his claim."

15. We are in agreement with the decision reached by the learned trial Judge in dismissing the appellant's suit.
16. In the light of what we have stated above, we find no merit in the appeal and hereby dismiss it with costs to the respondent.

Dated and delivered this *6th day of June 2014.*

G.B.M. KARIUKI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR