



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL APPEAL NO. 96 OF 2011**

**JAMES NJAGI JOEL.....APPELLANT**

**VERSUS**

**JUNIUS NYAGA JOEL.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. This is an appeal against the judgment of Embu Resident Magistrate in CMCC No. 101 of 2005 in which the respondent filed the suit against the appellant seeking general damages for defamation as well as costs and interests. The trial court found that the respondent had been subjected to embarrassment and humiliation and proceeded to award the respondent Kshs. 80,000/= as general damages together with costs and interest of the suit.

2. Being dissatisfied with the trial court's judgment, the appellant filed his memorandum of appeal dated 4<sup>th</sup> August 2011 which was based on 9 grounds summarised as follows;

*a) That the learned trial magistrate erred in law in finding for the respondent against the weight of the evidence adduced.*

*b) That the learned trial magistrate erred in law in awarding general damages which were neither pleaded nor proved.*

3. The parties filed submissions to dispose of the matter.

**B. Appellant's Submissions**

4. It is submitted that the trial magistrate erred in law in not realizing that not all words of abuse amounted to defamation and that the respondent did not satisfy the essentials of defamation as set out in the case of **Wycliffe A. Swanya v Toyota East Africa Ltd & Another [2009] eKLR**. It is further submitted that respondent did not prove that the alleged insults did not disparage him in his office, profession, calling, trade or his business.

5. It was further submitted that the trial magistrate erred in finding that there was evidence of publication of slander as was necessary in the case of **Phinehas Nyaga v Gitobu Imanyara [2013] eKLR** or that the alleged insults were communicated to third parties.

6. It is further submitted that the trial magistrate failed to analyze the circumstances surrounding the alleged case when the insults were hurled as the appellant had been provoked contrary to the court's findings in the case of **Jane Wanjeri Mwangi v Jane Nyambura Gathira [2008] eKLR**.

### **C. Respondent's Submissions**

7. It is submitted that the learned magistrate did not err in law in finding that the words hurled by the appellant were words of abuse and amounted to defamation.

8. It is submitted that the respondent prayed for an award for general damages which was eventually awarded by the court and that the appellant is misleading the court by asserting that the respondent made a prayer for slander.

9. The respondent further submits that he called one witness before the trial court who corroborated his case and that contrary to the allegations by the appellant, he was not a coached witness and thus the appellant ought to substantiate the same as provided in the evidence act in section 107 that he who alleges must prove.

### **D. Analysis & Determination**

10. The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. It is trite that abusive words may not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

11. It is trite law that the words complained of must be malicious. The term "malicious" does not necessarily mean "spite" or "ill will" but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing that the defendant knew the words complained of were false or that he did not care to verify the correct position can be evidence of malice. The defamatory words must be shown to have been published by the defendant.

12. The foregoing ingredients of defamation were reiterated in the case of **John Ward v Standard Limited [2006] eKLR** where the court stated as follows: -

*"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: -*

*The statement must be defamatory.*

*The statement must refer to the plaintiff.*

*The statement must be published by the defendant.*

*The statement must be false."*

13. Black's Law Dictionary defines defamation as *"the act of harming the reputation of another by making a false statement to a third person."* The book Gatley on Libel and Slander authoritatively states that a statement is defamatory of the person of who it is published if it tends to lower him in the estimation of right thinking members of the society generally or it exposes him to public hatred, contempt or ridicule or it causes him to be shunned or avoided. A plaintiff in a defamation case must prove that the words were spoken or written by the defendant, that those words refer to him/her, that those words are false. That the words are defamatory or libellous and that he/she suffered injury as a result, that is, his/her reputation was injured as a result.

14. Also in Gatley on Libel and Slander it is stated that: -

*" a defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office trade or profession or to injure his financial credit."*

15. Winfield on Tort gives the following definition of defamation:

*“Defamation is 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.”*

16. On the other hand, Halsbury’s Laws of England defines a defamatory statement as: -

*“A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.”*

17. It is alleged that the appellant called the respondent “ngoma” (satan), “ngiti” (dog) and “murogi” (a witch). It is not in dispute that the words complained of were uttered by the appellant in the presence of PW1, a friend of the respondent. It is not disputed that the words complained of referred to the respondent. The only issue in dispute is whether the words were defamatory of and concerning the respondent.

18. The appellant denied that he uttered the said words and pleaded that there were differences between him and the respondent due to a land dispute. Evidence was adduced that the respondent is the elder step-brother of the appellant. With such denial by the appellant, the defence of justification would not be available to him in proof of the truth of the words uttered.

19. The respondent called PW1 as his witness. He testified that he was present at the time the alleged words were uttered. From the evidence the respondent proved that the appellant uttered the said words through the corroborative evidence of his witness. It was held in the case of John Patrick Machira Vs Wangethi Mwangi & Another Nairobi HCCC No. 1709 of 1996 that: -

*A defamatory publication is the publication of a statement about a person that tends to lower his reputation in the opinion of right thinking members of the community or to make them shun or avoid him.*

20. The words uttered against the respondent were uttered in the presence of another person who knew the respondent. If one is called “satan”, “dog” and “witch” in the presence of one or more persons, these words are indeed defamatory unless the defendant can prove that the words were true of the plaintiff’s character. The appellant herein did not rely on the defence of justification.

21. It is my finding that the learned magistrate correctly held that the words were defamatory; were published.

22. The other issue is whether the appellant’s action of uttering the words was actuated by malice. It was held in the case of J. P. Machira (supra) that: -

*Malice can be inferred from deliberate or reckless or even negligent ignoring of facts as can be deliberate lies.*

By the appellant uttering the words “satan”, “dog” and “witch”, he was reckless in his utterances and the words were not true.

23. As stated above the appellant in his defence denied the abusive words. On malice, Odunga J held in Phineas Nyagah v Gitobu Imanyara [2013] eKLR that: -

*“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice. ....Malice may also be inferred from the relations between the parties.... The failure to inquire in the facts is a fact from which inference of malice may properly be drawn.” (Underlining mine)*

24. The appellant and the respondent were not in good relation at the time the words were uttered. It was not denied by the respondent that there was an existing land dispute between the two and that the family had just concluded a meeting on that day that discussed some pertinent issues. I am satisfied that malice on part of the appellant was proved.

25. It is my finding that the magistrate correctly found that the respondent proved the case on a balance of probabilities against the appellant.

26. On damages, the law on circumstances under which an appellate court would interfere with an award of damages has been reiterated in numerous authorities and in various jurisdictions throughout the world and the general principle is the same.

27. In **Butt v Khan** Law, JA stated: -

*“... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low...”*

28. In assessing damages in an action for defamation the court has to consider the particular circumstances of each case, the plaintiff's position and standing in society, the mode and extent of publication, the apology, if offered and at what time of the proceedings, the conduct of the defendants from the time when libel was published up to the time of judgment.

29. In determining damages, I am alive to the principle that the sums should be fairly compensatory in the light of the nature of the injury to reputation and that a restrained hand in the award of damages is desirable since the court must maintain stable bearing. The award should also appear realistic in all the circumstances.

30. In regard to damages, Kshs. 80,000/= awarded to the respondent, I am of the considered view that the quantum was reasonable since the trial court took into consideration all the relevant factors.

31. Consequently, I find no merit in this appeal and I dismiss it with costs.

32. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 29<sup>TH</sup> DAY OF JANUARY, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Kathungu for Appellant**

**Ms. Muriuki for Githongori for Respondent**



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