



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MWILU & AZANGALALA JJA)**

**CIVIL APPEAL NO. 56 OF 2006**

**BETWEEN**

**S M W .....APPELLANT**

**AND**

**Z W M .....RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Honourable Mr. Justice P.N. Waki, J.) dated 10<sup>th</sup> February 2006*

in

**H.C.C.C. NO. 577 OF 2001)**

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**JUDGMENT OF THE COURT**

1. In a Complaint filed on 9<sup>th</sup> April, 2001 at the High Court of Kenya, Nairobi, the Plaintiff, **S M W**, (appellant) sued the Defendant, **Z W M**, (respondent) for defamation and more particularly libel based on the defendant's letter dated 15<sup>th</sup> March, 2001 addressed to the Plaintiff and copied to the OCS Gatundu Police Station, D.O. Gatundu South Division and S.M. Gitau &

Co. Advocates (the Defendant's Advocates). In particular, the plaintiff pleaded, in paragraph 3 of the complaint, as follows:

***“On or about the 15<sup>th</sup> March, 2001 the defendant falsely and maliciously wrote and published to Officer Commanding Gatundu Police Station, the District Officer Gatundu, Messrs. S.M. Gitau and Company Advocates, the Chief Ndarugu Location and others (whom the plaintiff cannot presently better identify) of and concerning the plaintiff as follows:-***

***“Also noted with great concern you continually (sic) been interfering with the late B M's Estate and our old mother by offering her gifts so as to obtain sexual favours without total regards (sic) of the family's feelings.***

***You are therefore instructed to observe the following:-***

**1. Never ever interfere with the Estate (sic), the family of the Late B M.**

**2. Never interfere in any manner and for whatever reasons to (sic) Mrs. T N M who is the mother of the family.**

**3. Never give any material gift to her, instead give it to your mother or members of your family.**

**Please note that there is law that protect (sic)the widows, the weak and strong. We instruct you to reply in writing on or before 30<sup>th</sup> March, 2001 through the office of the District Officer (D.O.) Gatundu South, and copy the same to O.C.S. Gatundu.**

**Failure to heed the above outlined instructions the family will be left (sic) with no alternative but to take any action against you as they deem fit. The shameful behaviour must stop once and for all.**

**By a copy of this letter D.O. (sic) is requested to receive written undertaking from you stating that you understood the contents of the letter.”**

2. The plaintiff further pleaded, in paragraph 4, that prior and after the aforesaid publication between the years 2000 and 2001 the defendant also spoke and/or published the words in paragraph 3 of the Plaint above to all and sundry, the people of Gatundu (North and South) Thika Kenya and elsewhere in Kenya. According to the plaintiff, the natural and ordinary meaning the words complained of meant and were understood to mean that the plaintiff, *inter alia*, is a sexual pervert and pimp; fraudster, and grabber intent on defrauding and/or intermeddling in the defendant's late father's estate; a hypocrite; covetous with insatiable greed to dispossess the weak, the disadvantaged and irresponsible. Consequently, the plaintiff who is a, 'leading politician, farmer and a business entrepreneur in Kenya and elsewhere has had his reputation seriously damaged.

3. In his defence, the defendant without admitting, denied that the said words bore or were capable of being understood to bear any of the meanings set out in paragraph 5 of the plaint or any meaning defamatory of the plaintiff. In the alternative, the defence averred that the words were true in substance and in fact and pleaded four distinctive particulars of justification. The defence further averred that the words complained of were not to be true the same did not materially injure the plaintiff's reputation.

4. At trial the plaintiff called five witnesses; the plaintiff, T N M (the defendant's biological mother), K N, a neighbor and friend of the plaintiff, F T C a neighbor known to both the plaintiff and the defendant and J K M, the Chief Ndarugu location where the plaintiff and defendant resided and where the cause of action arose. The defendant also relied on three witnesses; the defendant and F M M the defendant's brother and J K M, the defendant's brother and J K M, the defendant's younger brother.

5. The submissions filed by the respective counsel for the plaintiff and defendant reiterated their respective cases.

6. In a considered judgment delivered on 10<sup>th</sup> February, 2006 the learned trial Judge (P. N. Waki), as he then was found that the words complained of were true in substance, and they did not bear the meanings ascribed to them with the upshot that the tort of defamation did not lie. Consequently the plaintiff's suit was dismissed with costs. This is the judgment which provoked the present appeal. The appellant listed ten grounds of appeal, stating that the learned judge had erred in law and in fact and misdirected himself in making his findings including:-

- **that there was no evidence that the letter written by the respondent of and concerning the appellant was forwarded and published to the persons to whom it was copied;**
- **that the publication by the Respondent of the letter complained of to the D.O. Gatundu South division, the OCS Gatundu South and S.M. Gitau & Co. Advocates was under qualified privilege;**

- *that the defamatory statements published by the Respondent of and concerning the Appellant were true in substance.*
- *that the Respondent had proved the defence of justification.*

7. At the hearing of the appeal, learned counsel **Mr.C. N. Kihara**, appeared for the appellant while learned counsel **Mr. D. K. Musyoka** appeared for the respondent. In addition to filing written submissions, the learned counsel highlighted their submissions before us.

8. Learned counsel for the appellant reiterated and elaborated on the grounds of appeal emphasizing that the main issue for trial was the truth of the words contained in the letter. Counsel argued that the trial Judge erred in extensively dealing with the issue of publication arguing that the finding on publication was unnecessary, and that it was that kind of inquiry by the trial Judge that resulted in substantial injustice to the appellant. According to the appellant's counsel, the respondent had failed to prove the allegations and or justify the same especially the allegation that gifts by the plaintiff to the defendant's mother were the cause of family squabbles. It was counsel's further contention that matters of adultery are defamatory *per se* and the alleged publication to the chief, OCS and Defendant's Advocates was defamatory and never intended to afford the appellant fair trial. He further submitted that failure by the respondent to attend the Chief when summoned demonstrated ill-will, spite and malice against the appellant. Counsel cited the case of **J.P Machira t/a Machira& Company Advocated vs East Africa Standard Limited [2001] eKLR** in support of his argument that the defence of justification did not suffice; **Mc Gregor on Damages 15<sup>th</sup>ed Sweet and Maxwell** to support his argument that the Respondent was malicious and **Martin Tindi Khaemba vs Standard Newspapers [2008] eKLR** to support his argument on damages. In his list of authorities filed, counsel listed the case of **Media Council of Kenya v Eric Orina [2013] eKLR** though he never made any reference to the case in his oral or written submissions.

9. Learned counsel for the Respondent on his part opposed the appeal arguing that the appeal largely turns on two heads – whether the letter was defamatory and whether the words were true. Learned counsel for the Respondent relied on the case of **Slim & Others vs Daily Telegraph [1968] 1 All ER 497** ; **Gatley on Libel and Slander, 8<sup>th</sup> Edition** and **Halsbury's Laws of England 4<sup>th</sup> Edition** in his argument reiterating that words must be read within their context and there should be no strained construction of the words. He reiterated that the trial Judge was right on his returning a negative finding on publication, the matter having been extensively argued before the court.

10. We have considered all the submissions, both written and oral and the authorities cited by both counsel.

11. Despite raising his issues in contention differently from the respondent, learned counsel for the appellant did not frame issues for determination before this court. He proposed to deal with his grounds of appeal as framed in the memorandum of appeal filed before this court. The Respondent on the other hand framed the following four issues for determination:

- *Whether the letter dated 15<sup>th</sup> March 2001, which is the subject of these proceedings, was defamatory of the defendant;*
- *Whether the contents of the letter were true in substance and justified.*
- *Whether the letter was published to the D.O. Gatundu, OCS Gatundu police station and S.M. Gitau& Co. advocates. If so, whether the publication enjoyed qualified privilege.*
- *Whether the letter was published to PW2, PW4 and PW5, that is K N, F T C and Chief J K M.*

12. As already stated the appellant did not frame any issues for determination but accepted three issues framed by the plaintiff at the trial before the High Court. We have anxiously perused the record and have come to the conclusion that the appeal turns on the following two main issues:

- *Whether the contents of the letter dated 15<sup>th</sup> March 2001 were defamatory of the defendant;*
- *Whether any defence in defamation is available to the respondent.*

13. This is a first appeal and the duty of the first appellate court was succinctly stated by the East Africa Court of Appeal in Selle v Associated Motor Boat Company Ltd [1968] EA 123, 126 as follows:

*“An appeal to this court from a trial by the High Court is by way of a retrial and the principals upon which this court acts in such an appeal are well settled.*

*Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”.*

14. On the onset we must point out that the principles upon which this court may interfere with the exercise of discretion of the trial judge are well established. This court must, to interfere, be satisfied that the judge has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice – Mbogo & Another v Shah [1968] EA 93; Ephantus Mwangi & Another v Wambugu [1983/4] 2 KCA 100 and also Sumaria & Another v Ahed Industries Ltd (ur) Civil Appeal No. 203 of 2002.

15. Black Law’s Dictionary 8<sup>th</sup> Edition defines defamation as *the act of harming the reputation of another by making a false statement to a third person.* (emphasis added). 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 (10<sup>th</sup> 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.”*

16. The test whether the words are defamatory and whether they refer to the plaintiff is objective. According to Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 28 at Page 23;

*“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.”*

Thus, in determining the meaning of words for purposes of defamation, the court does not employ legal construction, it will consider the layman’s understanding of the same. The question is not what the defendant intended. The mere fact that the hearers understood the language in a defamatory sense does not make it defamatory unless they were reasonably justified in so

understanding it`. The words complained of should be considered in their natural and ordinary meaning: **see Gatley on Libel and Slander (8<sup>th</sup> edition) paragraphs 88-93.**

17. From the record, it is apparent that the trial Judge went to great length to consider the ordinary meaning of the words. In his judgment, the trial judge considered the dictionary meaning in *Longmans Dictionary of Contemporary English* to ascertain the meaning ascribed to the respondent's letter by the appellant – sexual pervert, pimp, fraudster, grabber, hypocrite, covetous and irresponsible and returned a finding that no such meaning was capable of being ascribed to the words. We would like to point out that if it is contended, as the appellant did, that the words are defamatory in their ordinary and natural meaning, it is no more necessary for the plaintiff to plead more than the words themselves. The words sexual pervert, pimp, fraudster, grabber, hypocrite, covetous and irresponsible were not at any point included in the letter but it is an innuendo as to how the appellant perceived them. For instance, a pimp is defined under the Longman's dictionary above as a man who makes money by controlling prostitutes. The letter did not have any such connotation in our view and we find the appellant's connotation to be stretched. As a result we do not fault the trial judge.

18. The letter should also be considered in the context of which it was written and not in isolation to ascertain whether it was defamatory or not. From the record, it is not in dispute that as per paragraph 1 of the said letter, the appellant had received two more letters addressed to him by the Respondent's Advocates Gitau S.M. & Co. Advocates on 14<sup>th</sup> July 2000 and 8<sup>th</sup> September 2000 also copied to the Area Chief and O.C.S. Gatundu which letters the appellant had refused to acknowledge. No mention was made by either party of the contents of the said earlier letters but we could safely infer that there had been an ongoing dispute between the appellant and the respondent over the same issues. From the record, it was also evident that the relationship between the appellant and the respondent and his younger brothers was strained as a result of the romantic involvement between the appellant and the respondent's mother.

The appellant did not conduct himself beyond reproach towards the Respondent and his family despite his advanced age especially with regards to the commencement and progression of his relationship with the

Respondent's mother. We see no point to repeat the details of the trial Judge's judgment in this respect. The letter dated 15<sup>th</sup> March 2001 can therefore be viewed in the context of a continuation of the dispute between the appellant and the Respondent.

19. The trial judge had considered the testimony of witnesses with a view to assessing their credibility and at no point did any of the Appellant's witnesses at trial consider the appellant to have been defamed by the contents of the letter. The witnesses who testified at trial constitute and pass the ordinary reasonable man test as they were not only neighbours but also people known to the disputants. There was no evidence of any public ridicule, hatred or even shunning experienced by the appellant.

The appellant had only testified at the trial court that he felt shy to interact with some of his friends in tea farming. The appellant appears to have had an apprehension of defamation on himself ostensibly based on how he himself considered his standing in the society. That is not what defamation is in law. The appellant himself further testified before the trial court that nothing had changed in his dairy farming business. Moreover, despite being a tea farmer in Gatundu, he had since relocated to his Karen home at the time of these proceedings where the chances of any possible defamation of him became slimmer based on the existing solitary and liberal lifestyle adopted by urbanites. As elucidated earlier, the test to be applied is that of the reasonable ordinary man, not the appellant or the respondent. Further, not all statements which may result in lowering of the plaintiff's reputation are defamatory. In the premises, we do not find any reason to interfere with the trial Judge's findings and are satisfied that the letter dated 15<sup>th</sup> March 2001 cannot be understood to bear the meaning ascribed to them.

20. The appellant having not succeeded on the first ground, we do not find it necessary to consider the second ground or assess the damages as this court's further consideration would merely be academic. The upshot of the foregoing is that we find that the appeal totally lacks merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of July, 2015.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**