

HCT – 04 - CV- CA-0138-2015
(ARISING FROM SIRONKO CIVIL SUIT NO. 26 OF 2008)

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VERSUS

BEFORE: THE HON. MR. JUSTICE HERY I. KAWESA

As a first appellate court this court must re-evaluate the evidence, scrutinise it and make conclusions thereon, keeping in mind the fact that it did not have the opportunity to listen to and observe the witnesses.

The appellant argued all grounds of appeal together. This court will follow the same trend. The evidence before court was through.

PW.1 Nabukwasi Juliet who stated that on the fateful day on 09.01.2008 she heard someone knocking at her door at 5:00a.m, when she peeped it was defendant and she was abusing her. She waited till morning and upon hearing people outside she came out. Defendant/Respondents attacked her. A scuffle ensued and defendant continued uttering the said words in front of her father-in-law, father, elder brother and her husband **Mafabi**. A report was later made to police by defendant and plaintiff was charged of assault.

PW.2 Haruna Wetaka, while going to dig passed the trading centre where both plaintiff and defendant reside. She found defendant (her sister) abusing plaintiff (her daughter). The words were immoral and were ashaming to her, and such an old lady could not utter such words like “you pay men for sex”. “In your vagina there is sand and water.”

PW.3 Mafabi Swaibu said plaintiff is his uncle’s wife, while defendant is a friend. Early in the morning on the fateful day he heard a lot of noise in front of him. He heard defendant uttering obscene word which she (witnesses) was ashamed of pronouncing like “you have sand in your vagina., you pay men for sexual favours.”

PW.4 Kamiya Wetaka, said on 09.1.2008 in the morning he found defendant quarrelling. Defendant quarrelled until plaintiff came and asked her why she had abused her all night. Defendant responded with words in lugishu that plaintiff has “mukikunya inside the vagina,” “she drips water in her buttocks.” “she lies down like a banana stem while having fun with her husband on the bed....”

DW.1 Alice Manake said on 10.01.2008 while at home at 8:00a.m, she was sweeping and conversing when plaintiff came and grabbed her assaulting her in the process.

The matters ended up in police. She alleged the conflict was because the Plaintiff/Respondent had aided her daughter to abort and she reported her to police. She (Plaintiff) then concocted this case as a cover up.

DW.2 Erukana Wakanyasi said the defendant (DW.1) came and told him of what had befallen her daughter. Plaintiff then attacked her, boxed her and threw her down.

DW.3 Makafu Andrew, was also informed by DW.1 how plaintiff had assisted her daughter to abort. Plaintiff then came and began beating defendant. There was some exchange of words and a fight.

DW.4 Namataka Rina said PW.1 aided her to abort. She informed the mother (DW.1) who confronted PW.1 she concocted this claim to cover up the alleged abortion case.

The learned trial magistrate, basing on the above evidence found all issues in the affirmative, gave judgment for Plaintiff/Respondent and awarded her damages of shs.4,000,000/= (General) and shs. 500,000/= (Punitive); and costs.

This court has carefully re-evaluated the evidence, pleadings and submissions. I now find as follows.

1. The law of defamation

In the case of *Chaina Movat & Anor. V. Kyarimpa Civil Appeal 42 of 2008* (unreported), **J. Kwesiga** discusses the law of defamation at length and stated that defamation arises where a person publishes defamatory words when he speaks them to or in presence of a third person and a statement is defamatory of the person of whom it is published if it is calculated to lower him in the estimation of ordinary, just, reasonable, men. The test is whether under the circumstances in which the words were published reasonable people would be likely to understand them in a defamatory sense.

According to **Maxwell's Tort Series Sweet and Maxwell (2nd Edition 2004) at page 361- (12-010)**, the authors write that:

*“The statement is defamatory if it harms a person’s reputation. It is more difficult, however to state exactly when a person’s reputation will be harmed. The classic definition is found in **Sim v. Strech (1936) 2 ALLER 1237** where statements were held to be defamatory and therefore to harm a person’s reputation when they “tend to lower the plaintiff in the estimation of right thinking members of society generally” This has been extended by **Youssoupoff v. Mam Pictures Ltd (1934) 50 TLR 581**, to circumstances where the claimant is “Shunned or avoided as a result of the statements.”*

The question to ask in this case is;

1. Were the words uttered?
2. Were they defamatory?
3. Was there a defence?

Whether the words were uttered.

I have examined all the evidence and the genesis of this case. From evidence as per PW.1, PW.2, PW.3 and PW.4 and that of DW.1, DW.2, DW.3 and DW.4. It can be summed up that PW.1 (plaintiff) and DW.1 (Defendant) on the date in question exchanged bitter words arising out of DW.4’s earlier condition (alleged abortion by assistance of PW.1).

Evidence shows that this bitter exchange of words attracted the attention of the public.

DW.1 herself in evidence said at paragraph 1 of her cross-examination:

“I told the public about the behaviour of the plaintiff after making my daughter abort.....”

All her witnesses were in agreement that a fight took place following an exchange of words. See DW.2 on paragraph 1 of her evidence where she says, “on 10.1.2007defendant came and started telling me what happened to her daughter..... as she was telling us plaintiff came and told defendant that why is she ashaming her. Plaintiff attacked defendant,.....got hold of her and put her down.....”

This witness says the plaintiff confronted defendant who was telling them information which she deemed “was ashaming her.” This shows that there were some words exchanged which led to the nexus of the fight.

DW.3 Makafu also at paragraph 4 of her evidence in chief said “set was unhappy and speaking with sorrow and told me while others were hearing.... plaintiff heard and then came....she uttered that plaintiff is the one who supplied medicine.....”

These witnesses help court to know that there was a public pronouncement of bitterness (exchange of words) between plaintiff and defendant. The only question that arises is, were the words uttered defamatory? Plaintiff and the witness claimed these words were.

Whether words uttered were defamatory;

From evidence of PW.1-PW.2, PW.3, PW.4 the plaintiff mentioned that among the words which were uttered, the defendant told her that;

“I don’t know how to sleep with men and I pay money to men for sex, that I have a watery, sandy vagina, I am like a pig.”

These words were confirmed as uttered by **PW.2 Haruna Wetaka**, **PW.3 Mafabi** confirmed that defendant used obscene words which were ashaming, and PW.4 also repeats the same words as uttered by her on record.

The statements attributed to defendant in my view given the above evidence were proved as uttered. This seems to have been a highly emotional confrontation since it involved the alleged procurement of abortion. It has to be remembered that these parties are close relatives i.e.

Plaintiff, defendant, DW.2 and DW.4. I note that this exchange was uncalled for and D.1 seems to have failed to exercise restraint in showing her displeasure of PW.1's conduct.

Her utterances therefore shocked, embarrassed and scandalised those who heard them (irrespective of her disappointments). She went beyond the standard of reasonableness, and ended by committing the forbidden trespass of defamation. This is so because, at common law, the question is whether your utterances are capable of harming the reputation of the complainant in the eyes of "right thinking members of society." According to ***Lewis v. Daily Telegraph [1964] AC 234*** per **Lord Heid**,

"the standard is the standard of the "reasonable person" ... this standard in Practice is determined partly by the Judge, who decides if the statement in question is capable of being defamatory before it can be put before a jury....."

In my opinion the words having been uttered in presence of elderly members of the public, including the Plaintiff's husband, father in law, brothers and sisters was grossly vulgar, immoral, and defamatory of the plaintiff.

The arguments raised by counsel for the appellant that these words were not defamatory. It has been proved by the testimonies of the witnesses that there were people present when plaintiff and defendant exchanged before fighting. PW.1 said DW.1 repeated the words in the morning. In presence of other people as shown defendant's witnesses confirmed the narration, though did not specifically repeat the offensive words (which is understandable since they came to defend the defendant).

The evidence burden placed on plaintiff to prove that the words were uttered, and they led to her being shunned and lowered in esteem on the balance of probability was satisfied.

I am in agreement with counsel for Respondent that there is no merit in the grounds of appeal as raised.

I find that all grounds 1, 2, and 3 are not proved. This appeal fails and is dismissed with costs. I so order.

Henry I. Kawesa

JUDGE

20.06.2017