



**Republic v Mukuria (Criminal Appeal E012 of 2024)
[2024] KEHC 16203 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E012 OF 2024
DR KAVEDZA, J
DECEMBER 20, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

PHARIS MUKURIA RESPONDENT

*(Being an appeal against the acquittal by Hon. Kabuya (SPM) on
29th February 2024 by the Chief Magistrate’s Court at Kibera
Criminal Case No. E901 of 2023 Republic vs Pharis Mukuria)*

JUDGMENT

1. The respondent was charged with the offence of cyber harassment contrary to section 27 (1) (C) of the *Computer Misuse and Cyber Crime Act*. She was found to have no case to answer and was acquitted of the charge under section 210 of the *Criminal Procedure Code*. The particulars of the offence as per the charge sheet were that on 1st May 2023 at Mwarubaini Court in Mountain View Westlands Sub-County within Nairobi County, wilfully posted on Mwarubaini Court Whatsapp group that 'there is a lady in house no. 15 peddling drugs within the estate' which was grossly offensive and affected the said Salome Njeri Mureithi.
2. Being aggrieved, the appellant filed an appeal challenging the acquittal by the trial court. In the petition of appeal, the appellant challenged the trial court’s decision to acquit the respondent before being put on her defence. The appellant contended that the trial court erred in proceeding to analyse the case at the case to answer stage in a manner akin to giving final judgement. The appellant argued that the considering the prosecution’s evidence selectively. Finally, the trial court erred by trivialising the damage occasioned on the complainant. The appellant urged the court to set aside the acquittal and the matter be referred to another court with jurisdiction for re-trial.



3. This being the first appellate court, we are guided by the ruling in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.
4. The prosecution's case in brief was as follows: PW1, Salome Njeri Mureithi, and PW2, Peter Mureithi lived in House Number 15 at Mountain View, Mwarubaini Court. They had known the respondent as their neighbour for many years. One afternoon, a message appeared on the estate's WhatsApp group. The respondent claimed that a woman from their house was dealing drugs and that security agencies were handling the situation. Shocked by this accusation, PW1 and PW2 asked the respondent for clarification, but he ignored their questions.
5. Confused and frustrated, they turned to PW3 James Chacha, the estate's security coordinator, for help. PW3 assured them he had received no such report and speculated that the individuals involved might be from House Numbers 17 or 18, not 15. That night, the respondent issued an apology in the WhatsApp group, correcting the house numbers. PW3 explained that while the respondent's message did not name anyone specifically, it caused considerable distress. He acknowledged an incident had occurred at the security office the previous day but did not know the details.
6. PW3 encouraged the neighbours to resolve the matter peacefully, but tensions remained high, and reconciliation proved impossible.
7. The situation escalated when PW1 and PW2 reported the incident to PW5 Police Constable Ndile. PW5 recorded their statements and handed PW1's phone to PW5 Police Constable Mungai for forensic analysis. The analysis, documented in a report dated 11th May, 2023, confirmed the existence of the offensive message. This led to the respondent being formally charged in court.
8. During the investigation, PW1 revealed that she had no knowledge of an earlier argument at the security office involving a visitor and a parcel for House Number 15. PW2 who also knew the respondent, admitted there were tenants in their house whose interactions he could not account for. Though he received the respondent's apology, PW2 refused to forgive him, convinced the harm had been deliberate.
9. PW4 the forensic expert testified that there was no definitive proof linking the respondent to the phone number or verifying the authenticity of the WhatsApp group. Meanwhile, PW5 admitted he had not questioned the security guards about the earlier altercation. He also confirmed that no one he interviewed believed PW1 was a drug peddler. Additionally, he had no knowledge of any demand letter being served to the respondent.
10. At the conclusion of the prosecution's case, both parties filed written submissions, which were taken into consideration by the court in reaching its decision.
11. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
12. The appellant vide its grounds of appeal has attacked the decision of the learned trial magistrate on the basis that she failed to put the respondent on her defence despite overwhelming evidence in support of a case to answer. This being a case of cyber harassment, the prosecution now appellant had a duty to prove the ingredients of the offence charged. After the prosecution witnesses had testified, the trial court made a determination on the issue of whether a prima facie case had been made by the appellant



based on the evidence adduced. A prima facie case has been defined in the case of *Bhat V. Republic* [1957] EA 532 as follows:

“It may not be easy to define what is meant by a prima facie case but at least it must mean one which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

13. Section 27(1)(C) of the [Computer Misuse and Cyber Crimes Act](#), 2018 provides as follows:
 - (1) A person who, individually or with other persons, wilfully communicates, either directly or indirectly, with another person or anyone known to that person, commits an offence, if they know or ought to know that their conduct —
 - (a) is likely to cause those persons apprehension or fear of violence to them or damage or loss on that persons' property; or
 - (b) detrimentally affects that person; or
 - (c) is in whole or part, of an indecent or grossly offensive nature and affects the person.
 - (2) A person who commits an offence under subsection (1) is liable, on conviction, to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding ten years, or to both.
14. This Court on evaluation of the evidence on record confirms a defamatory WhatsApp message posted by the respondent, alleging that a woman from House Number 15 was peddling drugs. The message caused distress to Salome Njeri Mureithi (PW1) and Peter Mureithi (PW2), who sought clarification but were ignored. James Chacha (PW3), the estate's security coordinator, confirmed no such report existed and acknowledged the message caused harm. Forensic analysis of PW1's phone, documented in a report dated May 11, 2023, verified the presence of the offensive message. Although the respondent later apologized and corrected the house number, reconciliation efforts failed.
15. Section 210 of the [Criminal Procedure Code](#) provides for the acquittal of an accused person if at the close of the evidence in support of the charge, and after hearing such summing up, submission, or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person.
16. The Trial Court delivered a Ruling on 29th February 2024 stating that the prosecution had failed to prove that Accused committed the charge preferred against her. In addition, the complainant was at liberty to seek relief in a civil court to issue an appropriate award for her emotional pain.
17. I find the evidence on record plausible that the respondent may have committed the offence. The Prosecution discharged its legal duty and burden of proof under Section 107-109 of the [Evidence Act](#). He who alleges must prove. Whereas the burden of proof does not shift to the defense except in specific legislated circumstances, the accused is legally entitled to be given an opportunity if need be and if he chooses to give his defense or remain silent as provided by Section 211 [CPC](#).
18. From the inculpatory evidence on record strongly implicated the respondent, it is perplexing that the Trial Court on the one hand found that the Accused person had not committed an offence but in the same breath found out and recommended civil proceedings. It would have been logical if the Evidence on record did not disclose the offences and the respondent was acquitted irrespective of civil proceedings or not. The proposal of commencing civil proceedings suggests then there was misconduct by the respondent which the trial court preferred to be a breach of legal duty in civil proceedings and



not a criminal offence. With the evidence outlined above there was/is tangible and cogent evidence implicating the respondent for her to be placed on her defense.

19. In the circumstances, justice in the case demands that the matter be remitted to the trial court for hearing and determination of the case as per the charges preferred by the Prosecution as required by Section 354 *CPC*.
20. For the foregoing reasons I hereby make the following orders:
 - i. The petition of appeal dated 15th March 2024 is allowed and the order of acquittal under section 210 of the *Criminal Procedure Code* issued on 29th February 2024 is set aside forthwith.
 - ii. The matter is remitted to Chief Magistrate Kibera for hearing and determination in any Court other than the trial court.
 - iii. The Deputy Registrar Kibera High Court shall issue witness summons to the respondent and/or her advocate on record or both to appear before the Chief Magistrate's Court for allocation hearing and determination of the presently preferred charges.
 - iv. The respondent's bail/bond shall be reinstated.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Mburugu for the Appellant

Kamenchu Respondent

Achode Court Assistant

