



**Kinyua v Kenya Wildlife Services & another (Civil Appeal 33 of 2022)  
[2023] KEHC 1071 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1071 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 33 OF 2022  
RN NYAKUNDI, J  
FEBRUARY 21, 2023**

**BETWEEN**

**SIMON MUNDIA KINYUA ..... APPELLANT**

**AND**

**KENYA WILDLIFE SERVICES ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from Judgment of Hon Olga Onalo – Resident Magistrate delivered in Malindi Law Courts on the 25th March, 2022 in Malindi Cm’s Civil Suit No.111 of 2019 Simon Mundia Kinyua –vs-Kenya Wildlife Services & The Attorney General)*

**JUDGMENT**

1. This appeal arises from the judgment of Hon Olga Onalo Resident Magistrate delivered on March 25, 2022 wherein she dismissed the Plaintiff’s case. Aggrieved by the judgment, the appellant preferred an appeal founded on the following grounds;
  1. That the learned trial magistrate erred in law and in fact in failing to appreciate the documentary evidence given by the 1<sup>st</sup> respondent were linked to fraud and misrepresentation.
  2. That the learned trial magistrate erred in law and in fact in failing to consider the authenticity of the documentary evidence produced in court.
  3. That the learned trial magistrate erred in law and in fact in failing to consider the material evidence which was given to court by 1<sup>st</sup> respondent was not consistent.
  4. That the learned trial magistrate erred in law and in fact by disregarding the inherent contradictions and glaring gaps in the evidence given by the respondents thereby making an erroneous judgment.



5. That the learned trial magistrate erred in law and in fact by disregarding the inherent contradictions and glaring gaps in the evidence in terms of dates, contents or language used and the author of the documents which were produced in court by the respondents.
  6. That the learned trial magistrate erred in law and in fact as she failed to consider the language used in the documentary evidence produced by the appellant which in most cases were written on polite note and thus confusing them to be apologetic in nature.
2. The appellant herein had sued the respondents for damages on the footing of general, aggravated, punitive and exemplary; an injunction restraining the defendants from publishing defamatory words against the plaintiff, costs of the suit and interests.

### **Evidence at Trial**

3. Pw1 Simon Mundia Kinyua, the plaintiff, told the court that he was a security officer at Arabuko forest. He adopted his witness statement dated 28/5/2019 as evidence and produced as PEX 1 a-i a bundle of documents as per the list of documents on even date. He testified that on 13/6/2017 the 1<sup>st</sup> defendant wrote a bad letter with the purpose of defaming him that he is a mad person and not fit to carry out security duties or any other duties. It was his testimony that the letter was written in bad faith and sent to Arabuko Sokoke forest without his knowledge and with instructions that he should not be given a copy. He added that the letter caused circulation of rumours that he is mad, causing him a lot of pain and damage.
4. Dw1 Vincent Amakan Sammo a HR officer for the 1<sup>st</sup> defendant adopted his witness statement dated 21/10/20 and produced as DEX 1-26 a bundle of documents as per the list of documents dated 21/10/21 and 13/3/2020. He told the court that the plaintiff was an employee of the 1<sup>st</sup> defendant. That vide a letter dated 24/6/2010 (produced as DEX 5) the plaintiff had requested for help from the management which included an option for counselling. The plaintiff was then referred to counselling and follow up. In addition, the transfer was advisory and aimed at helping him by being closer home and there was no malice or defamation at all.
5. Dw2 Mutindi Mwabilo Kassim a warden in charge of Arabuko Sokoke adopted his witness statement dated February 10, 2020. He told the court that the plaintiff had refused to take up his duties. Further that the plaintiff referred himself as a mad person and counselling was still ongoing.

### **Submissions, Analysis and Determination**

6. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and should make an allowance or provision for that. This duty was well stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles 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 this 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 (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

7. I have perused the record of the trial court, the grounds the appeal is founded, the submissions as well as the authorities relied upon.

8. In determining the merits of the appeal, I have to evaluate the appellant's case which is founded on defamation. *Gatley on Libel and Slander* defines defamation as follows:

“The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. 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. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. A true imputation may still be defamatory, although its truth may be a defence to an action brought on it; conversely untruth alone does not render an imputation defamatory.”

9. The test to determine whether a statement is defamatory is an objective one which depends on what a reasonable person on reading or hearing a statement would perceive. *Halsbury's Laws of England* 4th Edition Volume 28 states at Page 23 states;-

“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.”

10. From the evidence on record, the appellant wrote to his employer seeking help which included counselling sessions. The management rolled out a wellness program for him and there were recommendations made for his wellbeing which included a transfer closer home to enable him deal with his condition. These communications were made between the management and his line managers. The appellant has not demonstrated that there were defamatory words from the referenced communication and whether the same were circulated to other people. In his own admission, the communication was confidential between his superiors and he does not even disclose how he came across the same.

11. Having examined the said communication as per the exhibits produced, I am not convinced that the 1<sup>st</sup> respondent in any way intended to injure the appellant's reputation but rather to aid him. The upshot is that the appeals fails for want of merit and the same is hereby dismissed with no orders as to costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 21<sup>st</sup> DAY OF FEBRUARY, 2023.**

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**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**



1. Mr Okoko for the Respondent
2. Mr Mukala is for the Respondent;-I am holding his brief.

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**S.M. GITHINJI**

**JUDGE**

**FEBRUARY 21, 2023**

