



REPUBLIC OF KENYA



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**Martin v Mwanzia (Civil Appeal 37 of 2017)
[2022] KEHC 10033 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL 37 OF 2017**

**RK LIMO, J
JULY 27, 2022**

BETWEEN

VERONICA MWENDE MARTIN APPELLANT

AND

MULI MWANZIA RESPONDENT

(Being an Appeal from the Judgement and Order of the Learned Ag. Senior Resident Magistrate A.S. Lesootia Esq. at Kitui Principal Magistrate's Court Civil Suit No. 1 of 2010 dated 7.5.2014)

JUDGMENT

1. This appeal relates to a judgement delivered vide Principal Magistrate's Court at Kitui Civil Case No. 1 of 2010. In that suit the Respondent had sued the appellant for defamation.
2. The Respondent alleged that the appellant uttered the following words against him which words when translated were as follows:

"Muli I want to tell you in front of your mother and wife that you are one of those persons sent by Mulei Wambua to come and burn my homestead and I am assuring you that I will have you jailed."
3. The Respondent pleaded the said words when taken in their natural and ordinary meaning meant or were understood to mean the following: -
 - i. That he is a criminal.
 - ii. That he was preparing to commit an offence of arson.
 - iii. That he aids and abets crime.
 - iv. That he is really a bad person.
 - v. That he is unfit to live with members of his society.



- vi. That he ought to be jailed.
4. The Respondent claimed that the words aforesaid were malicious, false and caused him contempt, ridicule and embarrassment. He further pleaded that he was a law abiding person and a community leader at Mbusyani Location, Kitui. He therefore, sought damages.
5. The Respondent called two witnesses who testified that they heard the appellant utter the said words though not exactly the uttered words.
6. The appellant denied ever uttering the said words and faulted the respondent for being used by her brother in law one Mulei Wambua. The appellant claimed that the respondent was a casual employee of the said Mulei Wambua and that one Kilonzi Kimanzi another employee of the same person had instituted a similar Suit vide Civil Suit No. 2 of 2010 and another Civil Suit No. 218 of 2009.
7. The appellant called witnesses who testified that on the material day, they were with the appellant and never heard of any confrontation between her and the respondent.
8. The trial court evaluated the evidence and found that the respondent had proved his case and awarded him Kshs. 250,000 being general, exemplary and aggravated damages.
9. The appellant was dissatisfied and lodged this appeal which was initially filed in Machakos High Court before it was transferred to this court.

In her memorandum of appeal, the appellant raises the following grounds namely: -

- i. That the learned magistrate erred and misdirected himself on the facts when he made a finding that the appellant defamed the respondent when the evidence adduced were at variance with what was pleaded.
- ii. That the learned magistrate erred when he relied on contradictory evidence of the Respondent and his witnesses.
- iii. That the learned magistrate erred when he disregarded the evidence showing that the appellant was not at the scene where the alleged utterances were made.
- iv. That the learned magistrate erred by awarding the respondent exemplary and aggravated damages contrary to the law and evidence tendered.
- v. That the learned magistrate erred by awarding the respondent general damages of Kshs. 150,000 without justification or legal basis.
10. In her submissions done through learned counsel, J.K. Mwalimu & Co. Advocate, the appellant avers that the alleged defamatory words uttered were heavily contested by the appellant who adduced evidence to show that she as in her office at the time serving her residents as the Assistant Chief.
11. The appellant further contends that she has also been sued by Mulei Wambua vide Civil Suit No. 218/2019. She claims that another suit filed by Kilonzi Kimanzi vide Civil Suit No. 2 of 2010 was dismissed for lacking in merit and the subsequent appeal preferred by Kilonzi Kimanzi abated upon his demise.
12. The appellant has faulted the trial court in relation to his finding about the alleged defamatory words. According to the appellant, the evidence of the Respondent and his witnesses contradicted in material particulars. She claims that the date of the alleged incident was not clearly revealed adding that the witnesses did not state that the appellant was at the home of the Respondent. She faults the witnesses for being coached to lie.



13. The appellant also faults the trial court for making an award on exemplary and aggravated damages when the cause of action was not libel but slander.
14. She claims that an award of Kshs. 250,000 for a casual laborer was on the higher side even if the case had been proved against her.
15. The Respondent has opposed this appeal insisting that the offending words were uttered by the appellant to the effect that he was a thug and criminal sent to burn the appellant's house. He claims that two people to wit PW2 and PW3 heard the offending words.
16. He concedes that there was another suit on similar allegations filed by Mulei Wambua vide Kitui CMCC No 218/2009 but claims that the appellant lost the suit and the appeal preferred.
17. The Respondent submits that the words uttered were not justified by the appellant and that the words exposed him to ridicule without any justification. He claims that he was entitled to damages awarded and has cited the decision in the case of Ambassador Chirau Makwere versus Royal Media Services (Nairobi High Court Civil Case No. 57 of 2004) to buttress his contention adding that the allegation that he was planning to burn the appellant's house amounted to a criminal offence. He submits that Section 16A of *Defamation Act* entitled him to damages of not less than Kshs. 400,000 and that he was only awarded Kshs. 250,000 which in his view were not excessive.
18. This court has considered this appeal and the response made. As observed above the appeal relates to a decision of the subordinate court regarding a suit filed by the respondent against the appellant on defamation.
19. In a defamatory suit, the words complained of are key and should in their natural ordinary meaning show or depict someone in bad light in the eyes of ordinary and right thinking members of the society.
20. In this matter, the words complained of are disputed and the appellant has faulted the trial court for finding that the words were uttered.
21. I have considered what was pleaded by the Respondent which I have captured above and what was orally adduced in court. There is some disconnect between what is pleaded and what the respondent orally stated in court. During trial, the respondent stated that the appellant uttered the following words;

“I was not to tell you in front of your wife and mother that you sent by Wambua Mulei to send to burn by house and I will send you to jail.”

In the plaint, the respondent pleaded as follows: -

“Muli, I want to tell you in front of your mother and wife that you are one of those persons send by Mulei Wambua to come and burn my homestead and I am assuring you that I will have you jailed.”

22. The two set of words are not in tandem. If perhaps there were errors or typos in how the words were captured during trial by the trial court, the respondent's witnesses account also appears inconsistent Kalimi Muli (PW2) stated that on 12th February 2009, she was home when the appellant standing outside stated;

“She came to tell Muli in front of us two (mother and me) that the Plaintiff had been sent by Mulei Wambua to send thugs to burn her homestead and that she was going to jail the



defendant.....I am not aware that the Plaintiffs sent thieves to the Defendant. My husband has never been involved in any criminal activity.”

23. Mulatia Ndui (PW3) stated that he heard the following words;

“.....That she will put the Plaintiff to jail because he is the one who Mulei uses to send thieves to her.....”

24. The Respondent also pleaded that the words were uttered at Ngiluni Market but his evidence and that of his witnesses indicate that the words were uttered at the home of the respondent.

25. The inconsistencies apparent in the alleged uttered words when taken in light of the fact that there were other suits filed against the same appellant by both Mulei Wambua and Kilonzi Kimanzi on the same subject matter indicates that there was more than met the eye in the suits filed.

26. I have perused through the pleadings in Kitui SRM’s Court Civil Suit No. 2 of 2010-between Kilonzi Kimanzi and the Appellant herein, and find a striking similarity on the alleged defamatory words uttered. The Appellant avers that both Kilonzi Kimanzi and the respondent were employees of Mulei Wambua, who is reported to be the brother in-law to the appellant and allegedly who harbored a grudge against her.

27. The trial court fell into error when it failed to consider that issue raised by the appellant in her defence. The trial court also fell into error when it failed to note the apparent inconsistency between what was pleaded *visa viz* what was adduced during trial.

28. Had the trial court considered those factors then obviously its finding would have perhaps been different. The trial court was expected to make a finding of fact that the actual words complained were uttered in a Public place or in a place with more than 2 persons but when you find an inconsistency on the place the words were allegedly uttered and the witnesses who heard the words includes a spouse of the claimant, then it is a misdirection to find that the case has been proved.

29. In my considered view on the basis of the evidence tendered, the Respondent’s case was not proved. The appellant stated that she was at her office and brought witnesses to affirm that fact but the trial court appears to have put more weight on the inconsistencies of defence witnesses and at the same time, failed to take into account inconsistencies on the claimant’s side.

In the premises, this court finds merit in this appeal on liability and I do not even need to go into the question of damages. This appeal for the aforesaid reasons is allowed with costs to the appellant. The amount deposited together with interests be handed back to the appellant. The judgement in the lower Court is set aside and in its place a dismissal Order is issued with costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 27TH DAY OF JULY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

