



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 706 OF 2017**

SHAHEED ALI KHAN.....1<sup>ST</sup> APPELLANT  
TARIQ KHAN..... 2<sup>ND</sup> APPELLANT  
ASSAD MUGHAL..... 3<sup>RD</sup> APPELLANT  
ROCKSTAR GROUP LIMITED.....4<sup>TH</sup> APPELLANT

VERSUS

YASMIN KOUSER MUGHAL.....RESPONDENT

**JUDGMENT**

1. This appeal arises from the ruling delivered by the learned trial magistrate in Milimani CMCC No. 2228 of 2016. In the impugned ruling, the learned trial magistrate dismissed a preliminary objection taken by the appellants in a suit in which the respondent had sued them seeking *inter alia* general and punitive damages for defamation.

2. The trial court's record shows that the preliminary objection was filed by the appellants as part of their opposition to a Notice of Motion dated 13<sup>th</sup> April 2016 filed by the respondent together with the plaint instituting the suit. In the motion, the respondent sought orders of interlocutory prohibitory injunction to restrain the appellants from posting or publishing defamatory statements relating to awards won by the respondent during the Punjabi Muslim Awards (PMA) 2015 or any other defamatory material in reference to the respondent.

3. The preliminary objection challenged the jurisdiction of the trial court to hear and determine the respondent's suit by virtue of *Articles 33, 23 (1), 165 (3) (a), (b), and (e), 16 (6), 169 (2) of the Constitution of Kenya, 2010 and Section 8 (i) (2) and (3) of the Magistrates Court Act, 2015.*

The record shows that the objection was prosecuted by way of written submissions. After considering the rival submissions filed by the parties, the learned trial magistrate dismissed the preliminary objection in a ruling delivered on 1<sup>st</sup> December 2017. That ruling is the subject matter of this appeal.

4. In the memorandum of appeal filed on 14<sup>th</sup> December 2017, the appellants raised six grounds of appeal as follows:

- (i) That the learned trial magistrate erred in law and fact in finding that the magistrate's court had jurisdiction on matters relating to defamation.*
- (ii) That the learned trial magistrate erred in law and fact in finding that the magistrate's court has pecuniary jurisdiction when the same was never canvassed.*
- (iii) That the learned trial magistrate erred in law and fact in misinterpreting the preliminary objection on record and arriving at a wrong conclusion.*
- (iv) That the learned trial magistrate erred in law and fact in failing to take into consideration and appreciating the grounds of the preliminary objection dated 27<sup>th</sup> April, 2016.*
- (v) That the learned trial magistrate failed to consider and/or ignored the submissions of the appellants and consequently*

*reached a decision which is erroneous in law.*

**(vi) That the learned trial magistrate failed to consider and determine the appellants' objection as against the respondent.**

5. On the above grounds, the appellants implored this court to set aside the impugned ruling and any consequential order and to dismiss the respondent's suit with costs. The appellants also prayed for costs of the suit in the lower court and in this appeal.

6. By consent of the parties, the appeal was prosecuted by way of written submissions which both parties duly filed and highlighted before me on 16<sup>th</sup> September 2020.

7. This is a first appeal to the High Court. The duty of a first appellate court is now well settled. As succinctly summarized by the Court of Appeal in *Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR*, the duty requires the court to:

**“..... re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

8. In their written submissions dated 3<sup>rd</sup> August 2020, the appellants submitted that the law of defamation as applied in Kenya is founded on *Article 33 (1) and (3)* as well as the common law as modified by the *Defamation Act Chapter 36 of the Laws of Kenya*. Relying on *Articles 23 (1) and 165 (3) of the Constitution*, the appellants submitted that since defamation is founded on *Article 33 of the Constitution*, by virtue of *Section 8 (3) of the Magistrate's Court Act, 2015*, the Magistrates Court does not have jurisdiction to entertain or hear the respondent's suit. That only the High Court has jurisdiction to hear and determine suits founded on defamation and that therefore, the trial court erred in dismissing the appellants' preliminary objection.

In support of their submissions, the appellants relied on the persuasive authorities of *Phineas Nyagah V Gitobu Imanyara, [2013] eKLR*, *Christopher Ndarathi Murungaru V Standard Limited & 2 Others, [2012] eKLR*, *Jasper Ndeke Shadrack v Standard Group Limited & another [2019] eKLR* and *Jane Njeri Onyango V Erick Ochieng & 2 Others, [2015] eKLR*.

9. On his part, the respondent submitted that the appellants claim that the Magistrates Court does not have jurisdiction to hear defamation claims is frivolous and amounted to a misconception of the law. According to the respondent, the Articles of the constitution relied on by the appellants to advance their aforesaid argument were either irrelevant or non-existent as *Article 33* only guarantees the right to freedom of expression and *Article 165 (3)* deals with the jurisdiction of the High Court. *Article 16 (6)* was non-existent while *Article 16* deals with dual citizenship.

10. According to the respondent, defamation is a tort of a civil nature and under *Section 7 (1) of the Magistrates Court Act 2015*, the Magistrates Court has jurisdiction to entertain a defamation claim provided that the damages sought or awarded would not exceed KShs.20,000,000.

11. I have given due consideration to the grounds of appeal, the record of the trial court and the rival written and oral submissions made on behalf of the parties by learned counsel *Mr. Khan* for the appellants and learned counsel *Mr. Simba* for the respondent. I have also read the impugned ruling.

12. I wish to start by addressing the appellants' complaint that in his ruling, the learned trial magistrate failed to consider the appellants' objection as well as their submissions and thereby arrived at an erroneous decision.

13. My reading of the trial court's ruling leaves no doubt that in arriving at his decision, the learned trial magistrate clearly considered the submissions made by both the appellants and the respondent. After weighing the submissions, the learned trial magistrate found that the position advanced by the respondent represented the correct legal position and he consequently dismissed the appellant's preliminary objection. I do not therefore find any merit in grounds 5 and 6 of the appeal.

14. That said, I now wish to consider the crux of the appellants' appeal which is the claim that the learned trial magistrate erred in his finding that the Magistrate's Court has jurisdiction to entertain and hear defamation cases.

15. As correctly submitted by the appellants, jurisdiction is everything and as held in the celebrated case of *The Owners of Motor Vessel "Lillian S" V Caltex Oil Kenya Limited, [1989] eKLR*, a court must lay down its tools in respect of any matter before it once it realizes that it does not have jurisdiction to try it.

16. It is trite that jurisdiction flows from either the Constitution or written law. This is the import of the Supreme Court's decision in *Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others, [2012] eKLR*.

17. In this case, the appellants have argued that defamation amounts to a violation of the right of freedom of expression guaranteed in *Article 33 (1) of the Constitution* and that an action in defamation should be instituted in the High Court in the manner envisaged by *Articles 22(1) and 23 (1) of the Constitution*.

18. *Article 33 (1) of the Constitution* states as follows:

**“Every person has the right to freedom of expression, which includes—**

(a) *freedom to seek, receive or impart information or ideas;*

(b) *freedom of artistic creativity; and*

(c) *academic freedom and freedom of scientific research.”*

19. Whereas I agree with the appellants’ submissions that the High Court has exclusive jurisdiction under *Article 165 (3) (b)* to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened with violation which jurisdiction is invoked through constitutional petitions filed under *Articles 22 (1) and 23 (1)* of the *Constitution*, I see nothing in the provisions of *Article 33 (1)* that would support the appellants’ contention that actions in defamation are founded on *Article 33 (1)* of the *Constitution*. This article only guarantees to every person freedom of expression in all the various forms specified in the Article.

20. A reading of *Article 33 (2) and (3)* reveals that the right to freedom of expression is not absolute. It must be exercised in a manner that *inter alia* promotes peace in the country and among its citizens and in a manner that respects the rights and reputation of others. It is also not one of the rights that cannot be limited as stated in *Article 25* of the *Constitution*. Therefore, in addition to the provisions of *Article 33 (2) and (3)*, the right is subject to limitation under *Article 24*.

21. As admitted by the appellants in their submissions, defamation is a tort derived from the common law as modified in Kenya by the *Defamation Act*. It is a civil claim designed to protect a person’s reputation, that is, the estimation in which he is held by others. This position was acknowledged by this court in the case of *Phinehas Nyagah V Gitobu Imanyara, [supra]* referenced by the appellants in which the court stated as follows:

**“...the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In a tort for defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals.”**

22. In my view, in stating that the tort of defamation has constitutional underpinnings, the court was not saying that defamation is an action meant to enforce the right to freedom of expression. The court must have been referring to the limitations to the right to freedom of expression specifically expressed in *Article 33 (2) and (3)* which requires that in exercising the right to freedom of expression, a person must respect the rights and reputation of others.

23. The fact that defamation is purely a civil claim can be deduced from the definition of the term in *Blacks Law Dictionary* at page 506. It is defined as a:

**“malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person.....a false written or oral statement that damages another’s reputation.....”**

24. In view of the foregoing, I find no basis for the appellants’ argument that defamation amounts to breach of a constitutional right enshrined in *Article 33* of the *Constitution*. After studying all the constitutional provisions cited in the appellants’ preliminary objection, I did not find any that limits the subordinate’s court’s jurisdiction to hear any civil claim including actions in defamation.

25. The question that I must now answer is this: Did the learned trial magistrate err when he dismissed the preliminary objection? The answer to this question requires a consideration of *Article 169* of the *Constitution* and the provision of the *Magistrates Court Act, 2015*.

26. *Article 169* establishes the Subordinate or the Magistrates Court and states at sub *Article 2* that “*parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1)*”.

27. Parliament in implementing *Article 169 (2)* enacted the *Magistrates Court Act 2015*. *Section 7 (1)* thereof provides for the civil jurisdiction of the Magistrates Court which is pegged on the monetary value of the subject matter and the rank of the presiding magistrate in whose court the suit is filed.

28. The lowest jurisdiction is for suits filed in the Resident Magistrate’s Court whose value should not exceed KShs.5,000,000 while the highest is KShs.20,000,000 where the court is presided over by a Chief Magistrate. This therefore means that in matters of a civil nature, the Magistrates Court has civil jurisdiction to deal with matters whose value does not exceed KShs.20,000,000 or civil claims which would attract damages ranging from KShs.5,000,000 to KShs.20,000,000.

29. It is not disputed that the claim filed in the lower court was an action seeking *inter alia* damages for defamation. A look at the pleadings confirms this position. There is nothing in the pleadings showing that the respondent’s claim was based on an alleged violation of a constitutional right.

30. It is not disputed that the High Court has unlimited original jurisdiction in both civil and criminal matters but the fact that the respondent deliberately chose to file the suit in the subordinate court can only be understood to mean that he was hoping to be awarded damages of not more than KShs.20,000,000 if his suit was successful. The fact that the High Court equally has jurisdiction to entertain such a suit cannot oust the jurisdiction donated by statute to the Magistrates Court to hear and determine civil suits including actions founded on defamation.

31. The appellants’ averment that *Section 8 (3)* of the *Magistrates Court Act* ousted the lower court’s jurisdiction cannot be sustained in view of my earlier finding that defamation is a tort, a civil claim which is actionable in an ordinary civil suit not by way of a constitutional petition

in the manner contemplated in *Articles 22 and 23 of the Constitution*.

**32.** It is noteworthy that all the authorities relied on by the appellant in this appeal involved a challenge to the High Court's jurisdiction to determine defamation claims by virtue of *Article 34 (2) of the Constitution* which deals with freedom of the media. Those cases are therefore distinguishable from the suit giving rise to this appeal where what was challenged was the jurisdiction of the Magistrates Court to entertain defamation cases. It may be important to note that the appellants did not quote a single authority to support their proposition that the Magistrates Court lacks jurisdiction to entertain defamation claims.

**33.** For all the foregoing reasons and findings, I am unable to fault the learned trial magistrates finding that the Magistrates Court has jurisdiction to entertain, hear and determine the respondent's suit. It is thus my finding that the appellants' preliminary objection was devoid of merit and it was properly dismissed.

**34.** In the result, I am satisfied that the appellants' appeal is not merited. It is accordingly dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>th</sup> day of December 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms. Athman for the appellants

Mr. Simba for the respondent

Ms Mwinzi: Court Assistant