REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 1 OF 2019

JULIUS VANA MUTHANGYA......APPELLANT

VERSUS

KATUUNI MBILA NZAI...........RESPONDENT

JUDGMENT

1. On 23/9/06 the appellant via his agent or servant or emissaries wrote a letter to one Muthembi of Koliwa Sub-Location. The letter was in form of complaint against Katumi Mbila respondent for what he stated to be that she was playing magic against him (them). That she gave wife and daughter of son of Kira something in a jag which was poured on his (their) footsteps where he (they) passed through two areas and burn the place. He (they) did not know whether it was bewitching them (him) or why they did so.

2. He then sought guidance and what next. This provoked a suit lodged on 6/8/07 against Appellant on defamation based on the above cited wards.

3. After hearing the suit, the trial court awarded Respondent Kshs.40,000/= as general damages plus costs.

4. The aforesaid decision precipitated the lodging of the instant appeal in which 5 grounds were set namely;

> **1. The learned magistrate erred in law and in fact when he misinterpreted the letter of the appellant.**
>
> **2. The learned magistrate erred in law and in fact when he heard and relied on the respondent alone.**
>
> **3. The learned magistrate erred in law when he failed to find out the agenda of the Assistant Assistant Chief in this case.**
>
> **4. The learned magistrate erred in law and in fact when he ignored the facts given by DW2 as the eye witness.**
>
> **5. The learned magistrate erred in law when he listened to unreliable and contradictory evidence given by PW1, PW2, PW3 and PW4.**

5. The court gave directions that the appeal be canvassed via written submissions but only Respondent filled the same as directed.

SUBMISSIONS:

6. The appellant submitted that the trial magistrate wrongly interpreted that the words ordinarily were understandable to mean the appellant was possessed by demons, was a wizard and would materially lower his (sic) reputation in the eyes of the community.

7. It was contended that the ordinary meaning of the word magic does not imply witchcraft. According the Oxford advanced dictionary (online edition) magic means "***the secret power of appearing to make impossible things happen by saying special words or doing special things."***

8. The appellant argued that there was no evidence presented to court where the appellant used the word wizard. It is our submission that the words used by the appellant did not in any way connote that the respondent was a witch. The fact that he asked whether the respondent was trying bewitching them or not was used in connection to the acts of the respondent.

9. The allegation by the appellant that the respondent sent two people to his pour some substance on the footsteps of the appellants was never

denied. This was what the appellant was questioning. Thus it's argued that, the above letter did not in any way amount to defamation.

10. Further it is submitted that, the words which were subject of the suit were contained in a letter sent to the Assistant Assistant chief. The said Assistant Assistant chief was also the respondent witness 1 (record of appeal page 30) The Assistant Assistant chief was given the letter because he was involved in arbitration of a dispute between the neighbours (the appellant and respondent).

11. It therefore means that the Assistant Aassistant chief had assumed a role of a quasi-judicial body. He could not again turn and become the respondent's witness by alleging the defamatory words were published to him. The appellant relied on the case of ***Gathoni Gathukumi vs Eliphas Mbaya Mtuanyiri (2008) eKLR where*** **Makhadia J** rightly stated:-

> **"When the Assistant Assistant chief was conducting the proceedings, he assumed quasi-judicial role. He wanted to get to the bottom of the dispute. He cannot therefore turn around and be a witness of the respondent and claim that the appellant published the offensive words of and concerning the respondent to him."**

12. It is argued that the facts in the above case are in all fours as in the present case. The Assistant Assistant chief must have had ulterior motives as he very well knew he was given the letter in furtherance of the dispute he was arbitrating.

13. It is contended that it is astonishing why he turned and started reading the letter to members of the public. It is worth noting PW2 is the respondent's son, PW3 is the respondent's brother in-law, PW4 was the respondent herself. The Assistant Assistant chief in bad taste, decided to read and interpret the privileged communication to the witnesses.

14. The letter having been sent to Assistant Assistant chief of official capacity was privileged and therefore there was no publishing and that, privileged communication is a defence even where words may amount to defamation which is denied here.

15. It is submitted that, for an action in defamation to succeed, the respondent must successfully demonstrate that the words were published by the appellant and have led to the respondent being shunned by members of the public or their esteem or regard they were held being lowered. The respondent only testified that her children are referred to as children of a witch. This evidence apart from being hearsay, no person was called to testify that effect.

16. Lastly, it is quite evident that the court did not evaluate the evidence tendered by the parties in whole. I careful analysis of the evidence would have revealed that the respondent's witnesses were inconsistent, contradictory and not trustworthy. The court would have come with a different finding it had done a careful evaluation of the evidence.

DUTY OF THE FIRST APPELLATE COURT:

17. It is now established that the role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof, as was restated in **Oluoch Eric Gogo vs Universal Corporation Limited [2015] eKLR,** the court restated the duty of an appellate court as follows:

> **"As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd &Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect…….**
>
> **…….From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally"**

APPELLANT'S EVIDENCE:

18. PW1 Julius Kutui Muthambei testified to being the Assistant chief Kaliwa Sub-location and to receiving a letter by the appellant attending allegations of witchcraft against the respondent "Pexh 1".

19. He testified to existence of a land dispute between the respondent and the appellant. He testified the letter was brought by Kyalo Nzoka and Kimwele Nzoka and wasn't seated at the time of delivery.

20. PW2 Benard Mutuku Mbila, son to the respondent testified to existence of a land dispute between the respondent and appellant and confirmed receiving reports of the allegations of witchcraft.

21. PW3 Mwanxa Nzae testified to being the brother in-law to the respondent and testified to having knowledge of the land dispute and defamation.

22. PW4 Tabitha Kathini testified to existence of a pre-existing land dispute and to receiving a letter from the appellant on 26/6/2006 which she testified defamed her and generally soiled her reputation within the neighbourhood and community at large.

23. She testified that the letter was widely published including being read out by the assistant chief before a crowd of villagers.

24. DW1 Julius Maithya admitted existence of land dispute and that they'd been advised by the area D.O. to erect a fence demarcating the boundary between. He admitted writing the letter alleged to have been defamatory. He claimed to have written the letter as a concerned citizen and stood by its contents, claiming he did not intend to defame the respondent.

25. DW2 Kimwele Nzeka testified to delivering the impugned letter to its intended recipient.

ISSUES, ANALYSIS AND DETERMINATION:

26. Having considered the evidence and the rival submissions, I find that since the appellant has admitted having authored the impugned letter, only five key issues emerge for my determination in this case. These are;

> **(i) Whether the respondents have proved that the offending letter was published.**
>
> **(ii) If the answer to (i) above is in the affirmative, whether the content of the said letter was defamatory of the respondents.**
>
> **(iii) Whether the defence of qualified privilege was available to the appellant.**
>
> **(iv) Whether the respondents are entitled to the orders sought.**
>
> **(v) What orders should be made on costs"**

27. The Court of Appeal in ***Wycliffe A. Swanya vs Tunyuta East Africa Limited & Francis Massai Nairobi CA No. 70 of 2008*** set out the essential components which a respondent must prove in order to succeed in an action on defamation. The respondent must prove the following;

> **i. That the matter complained of is defamatory in character.**
>
> **ii. That the defamatory utterances or statement was published or communicated to someone other than the person defamed.**
>
> **iii. That it was published maliciously.**
>
> **iv. In slander subject to certain exceptions, that the respondent suffered special damages.**

28. It is perhaps important to point out at this juncture that there are two kinds of defamation namely; ***libel*** and ***slander***. ***Libel*** consists of a defamatory statement in a permanent form like in a printed or written form while ***slander*** is defamation by word of mouth.

29. Turning to the first issue, publication basically means the communication of the defamatory statement, words or information to a 3rd party other than the person allegedly defamed.

30. In this case, it is not disputed that the offending letter was addressed to the assistant chief of the area who of course heads the security of the area.

31. The respondent did adduce evidence to prove that the letter was received by the addressee. The appellant did not deny having authored the said letter. In the circumstances, I find as a fact that the letter was published to the assistant chief and concerning the respondent.

32. I must hasten to add that in law, publication of a defamatory statement whether in spoken or written form would still be proved even if it was communicated to a single person other than the person defamed. The extent or scope of its communication is only relevant in the assessment of quantum of damages and not to proof of publication.

33. Having made the above finding, the next question for my consideration is whether the respondents have demonstrated on a balance of probabilities that the letter injured their reputation and character in the eyes of right thinking members of the society.

34. Before embarking on an analysis of this issue, it is important to remind ourselves of the legal definition of the tort of defamation.

35. Defamation has been defined in ***Blacks Law Dictionary 8th Edition*** at Page 448 as**;**

> **"the act of harming the reputation of another by making a false statement to a third person."**

36. It is also defined in ***Winfield & Jalowicz 15th Edition as*****;**

> **" .. a publication of a statement which reflects on a person's reputation and tends to lower him in the estimate of right thinking members of the society generally or which tend to make them shun or avoid that person…."**

37. A defamatory statement is defined in ***Gatley on Libel and Slander 11th Edition at page 38 as;***

"one which is to the claimant's discredit; or which tends to lower him in the estimation of others or causes him to be shunned or avoided; or exposes him to hatred, contempt or ridicule …."

38. Given the above definition, it follows that for a respondent to succeed in an action on defamation, he or she must prove that the offending statement was not only published but that it exposed him to public ridicule, contempt and hatred or injured his reputation in his office, trade, profession or financial credit.

39. The standard of opinion is that of right thinking members of society. Abusive or offensive words may not be defamatory per se. To be defamatory, the words or statement must be proved to be false and malicious. The burden of proving that the words complained of were in fact defamatory lies on the respondent. It may be significant to note at this point that unlike slander, libel is actionable per se without proof of actual damage.

40. In this case, I find that the words complained of, are contained in a letter by the appellant in the record of appeal page 11:

"…Katuuni mbila was playing magic against us. She gave wife and daughter of son of Kiiru something in a jug, it was poured on our footsteps where passed through two areas and the places. We do not know whether it was bewitching us why they did so."

41. The trial magistrate interpreted that the words ordinarily were understandable to mean the appellant was possessed by demons, was a wizard and would materially lower respondent's reputation in the eyes of the community. The statements would disparage the respondents' reputation; expose her to hatred and contempt and cause her to be shunned or avoided by right thinking members of the society.

42. But such statements would only be defamatory if they were proved to be false and malicious.26. In defamation cases, malice does not necessarily mean spite or ill will.

43. Evidence of malice may be found in the language or tone of the publication if it is utterly beyond or disproportionate to the facts or it can be inferred from a deliberate or reckless ignorance of the facts**.** See **JP Machira vs Wangethi, Mwangi and Nation Newspapers Civil Appeal No.179 of 1997; Godwin Wachira vs Okoth (1977) KLR 24.**

44. A close scrutiny of the said letter reveals that it was in the main communicating a complaint which the appellant wished to have investigated by the assistant chief he had received that the respondent was did certain things as stated in the letter.

45. The appellant in his evidence testified of the existence of land dispute and that they'd been advised by the area D.O. to erect a fence demarcating the boundary between. He admitted writing the letter alleged to have been defamatory. He claimed to have written the letter as a concerned citizen and stood by its contents, claiming he did not intend to defame the respondent.

46. The allegations in the letter by the appellant were not controverted by the respondent. The respondent did not adduce independent evidence to prove that the aforesaid statements were false in substance.

47. Unlike in the case of defamation founded on printed publications in newspapers or live media broadcasts where media companies are expected and required to investigate the truth or falsity of information they receive or seek the views of the person affected before publishing it, this case presents a completely different scenario.

48. This is a case of an individual citizen who just like any other citizen had both a legal and civic duty to report his apprehension regarding the actions or any reasonable suspicion concerning plans to commit witch craft which would be a criminal offence to the assistant chief who heads security personnel in charge of his area for investigations.

49. The nature of the information in this case in my view was such that the appellant could not have had capacity to investigate it on his own or seek the views of the respondents' first to establish the truth or otherwise of the allegations before reporting the same to the security organs for appropriate action.

50. I say so because as an individual, the appellant could not have had the capacity or the machinery required for that purpose. And it was only after investigations by the assistant chief, police or other members of the security committee that the truth of the matter would have been established.

51. His duty ended the minute he reported the matter to the authorities. From the evidence of the respondent, they appear to have rushed to court immediately the letter was leaked to them.

52. They should have waited for the relevant assistant chief or authorities to investigate the matter for its truth or otherwise to be established so that if it was found to be false, they would have a basis to complain that the appellant falsely and maliciously published defamatory statements concerning them.

53. The letter was addressed to the assistant chief and was not copied to anybody else. The letter, by the appellant was not proved to be actuated by malice. It is apparent that his only interest was to have the information investigated.

54. I thus find that the respondents have failed to prove to the required standard that the publication was false and malicious. This finding leads me to the conclusion that the evidence in this case falls short of establishing on a balance of probabilities that the statements made in the offending letter were defamatory of the respondent.

55. In the event that am wrong in this finding, I wish to examine the defence of qualified privilege raised by the appellant with a view to establishing whether it was available to him in this case.

56. The defence of qualified privilege is a common law defence which developed after the House of Lords decision in ***Reynolds vs Times Newspapers Limited [2001] 2 AC 127*** which introduced the duty- interest test or the right to know test in publications on matters of public concern.

57. The defence was considered in ***Chirau Ali Mwakere V Nation Media Group Ltd & Another (2009) eKLR*** where **Khamoni J** (as he then was) defined a privileged occasion as follows;

> **"An occasion is privileged where the person who makes a communication has interest or a duty, legal, social or moral to make it to the person to whom it was made and the person to whom it is so made had a corresponding interest to receive it".**

58. In Halsbury's Laws of England 4th Edition Reissue Vol. 28 at Para 109, the learned and distinguished author explains the basis of the defence of qualified privilege and lists some categories of occasions in which the defence would be applicable. He asserts as follows:

> **"On grounds of public policy, the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person even when that statement is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. The principal categories of qualified privilege are:**
>
> > **(1) Limited communications between persons having a common and corresponding duty or interest to make and receive the communication,**
> >
> > **(2) Communications to the public at large, or to a section of the public, made pursuant to a legal, social or moral duty to do so or in reply to a public attack.**
> >
> > **(3) Fair and accurate reports, published generally, of the proceedings of specified persons and bodies…."**

59. In ***Gatley on Libel and Slander 8th Edition page 441 paragraph 442*** the statements to which the defence of qualified privilege should apply are stated to include the following;-

> **1. Statements made in the discharge of a public of private duty.**
>
> **2. Statements made on subject-matter in which the appellant has a legitimate interest.**
>
> **3. Statements made by the appellant to obtain redress for a grievance**
>
> **4. Reports of parliamentary proceedings.**
>
> **5. Extracts from, or abstracts of, parliamentary reports, papers, votes, or proceedings published by the authority of parliament.**

60. It is not disputed that the appellant and respondent were having land dispute at the time and assistant chief pw1 was seized of the same. In ***Gathoni Gathukumi vs Eliphas Mbaya Mtuanyiri (2008) eKLR*** **Makhadia J** rightly stated;

> **"When the assistant chief was conducting the proceedings, he assumed quasi-judicial role. He wanted to get to the bottom of the dispute. He cannot therefore turn around and be a witness of the respondent and claim that the appellant published the offensive words of and concerning the respondent to him."**

61. The facts in the above case are in all fours as in the present case. The Assistant chief must have had ulterior motives as he very well knew he was given the letter in furtherance of the dispute he was arbitrating.

62. It is astonishing why he turned and started reading the letter to members of the public. It is worth noting PW2 is the respondent's son, PW3 is the respondent's brother in-law, PW4 was the respondent herself.

63. The Assistant chief in bad taste, decided to read and interpret the privileged communication to the witnesses. The letter having been sent to Assistant chief in his official capacity it was privileged and therefore there was no publishing. Privileged communication is a defence even where words may amount to defamation.

64. As an individual citizen and as a party to a dispute before the assistant chief, he had a legitimate interest in being security conscious and he had an obligation to look out for his own security and safety. He also had both a legal and civic duty to report to the assistant chief who was the area authority.

65. In view of the foregoing, I am persuaded to find that the letter was published on an occasion of qualified privilege. The defence of qualified privilege, just like the other statutory defences of absolute privilege, justification and fair comment on a matter of public interest are complete defences to an action founded on defamation.

66. In the premises, it is my finding that the respondent was not entitled to the reliefs sought in the suit thus the appeal succeeds. The court makes the following orders;

i. Appeal is allowed thus lower suit is dismissed.

ii. Parties to bear their own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 6TH DAY OF AUGUST, 2019.

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C. KARIUKI

JUDGE