



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KIAMBU**  
**(CORAM: CHERERE-J)**  
**CIVIL APPEAL NO.131 OF 2017**

**BETWEEN**

**PETER WACHIRA GITAU.....APPELLANT**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**JOYCE WANGITHI KARIUKI.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the judgment and decree in Thika CMCC No.615 of 2008*

*by Hon. L.Komingoi (CM) delivered by Hon. B.N.Ireri (PM) on 31<sup>st</sup> August, 2006)*

**JUDGMENT**

**Background**

1. **PETER WACHIRA GITAU** (hereinafter referred to as Appellant) was charged with incest in **Thika Criminal Case No. 1515 of 2016**. After the close of the prosecution case, the court found that no case to answer had been established and acquitted him under section 210 of the Criminal Procedure Code Cap 75 Laws of Kenya on 25<sup>th</sup> July, 2007.

2. By a plaint filed on 24<sup>th</sup> July, 2008, the Appellant sued **THE HON. ATTORNEY GENERAL** and **JOYCE WANGITHI KARIUKI** (*hereinafter referred to as Respondents*) for

- i. Damages for defamation and exemplary damages**
- ii. General damages for unlawful arrest, false imprisonment and malicious prosecution**
- iii. Costs of the suit and interest**

3. The 1<sup>st</sup> Respondent filed a statement of Defence and denied the claim.

4. By a judgment dated 31<sup>st</sup> August, 2006, the court dismissed the claim for damages for defamation and exemplary damages and awarded the Appellant Kshs. 50,000/- for malicious prosecution.

**The Appeal**

5. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 30.09.16 filed the Memorandum of Appeal of even date which sets out three main grounds as follows: -

- 1) The Learned trial Magistrate erred in law and in fact in failing to award damages commensurate with the Appellant's case**

2) The Learned trial Magistrate erred in law and in fact in failing to have regard to the quantum of damages awarded in decided cases of a similar nature

3) The Learned trial Magistrate erred in law and in fact in awarding a sum of damages that was inordinately low in the circumstances

### **SUBMISSIONS BY THE PARTIES**

6. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

#### **Appellant's submissions**

7. Appellant asserted that he had been charged with an offence that attracted a life sentence and had suffered negatively in his social life, family life and business as a result of the charges and publication of the case in newspapers. He urged the court to find that the sum of damages that was awarded was inordinately low in the circumstances.

8. The Appellant urged the court to enhance the sum awarded to Kshs. 800,000/- and in support thereof relied on **George Odhiambo & another v Isaac Muyomba Tungululu [2016] eKLR** which was a case on personal injuries. Appellant also relied on **Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another [2005] eKLR** where the Appellants who were acquitted on appeal were awarded Kshs. 500,000/- and Kshs. 300,000/- each for false imprisonment for 28 days and for malicious prosecution respectively.

#### **Respondents submissions**

9. Respondent's on one hand opposed the appeal and on the other urged the court to award Kshs. 200,000/- if it was inclined to allow the appeal. Reliance was placed on **Hassan Ogwimba Akibaya v Attorney General & 2 Others [2015] eKLR** where Kshs. 200,000/- was assessed for the Appellant who was acquitted for lack of corroboration of prosecution case.

#### **Analysis and Determination**

10. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion considering the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA**.

11. From the submissions on the part of the Respondent, it is not disputed that the magistrate's finding that the prosecution was malicious was well founded. This is buttressed by the fact of the 2<sup>nd</sup> Respondent who allegedly reported the criminal case to the police declined to disclose from where she got the information from. Evidence from this alleged informer was crucial as it formed the basic part of the information upon which Appellant was arrested and charged. The 2<sup>nd</sup> Respondent's conduct of declining to disclose her alleged informer should have raised a reasonable doubt on the part of the prosecution that she was either lying or was being economical with the truth and ought not to have acted on her information.

12. Appellant was charged on 07.04.06 and was released on bond on the same day. There is evidence that upon his arrest, Appellant was taken to his daughter's school under police escort. The case was published in the Standard and Nation Newspapers and it cannot be denied that these incidents injured his reputation. The criminal case hang over Appellant's head for one year and three months when he was subsequently acquitted.

13. The issue in question is whether the general damages of Kshs. 50, 000/- awarded is inordinately low in the circumstances.

14. The Court of Appeal in **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) KAR 727** at page 703 stated that: -

**“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.**

**The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

15. A reading of the submission by the Respondents discloses that they acknowledge that the award was low and makes an offer of Kshs. 200,000/-. I have considered **Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & Another** (supra) and it is distinguishable from this case for the reason that the case was heard fully and Appellants were convicted and even served 28 days in prison.

16. **Hassan Ogwimba Akibaya v Attorney General & 2 Others** (supra) is more or less similar to this case but considering the humiliation that was visited on the Appellant, I find that an award of Kshs. 500,000/- to be a proportionate award.

#### **Disposition**

17. In view of the foregoing finding, the Appeal succeeds. The award Kshs. 50,000/- for general damages for malicious prosecution is set aside and substituted with an award for Kshs. 400,000/-.

18. The Respondents shall pay costs of this appeal and of proceedings in the lower court.

**DELIVERED AND SIGNED AT KIAMBU THIS 25<sup>th</sup> DAY OF *October* 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Nancy

For the Appellant - Present in person

For the Respondent - N/A