



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 34 OF 2015

JACOB MWANTO WANGORA.....APPELLANT

-VERSUS-

HEZRON MWANDO KIRORIO.....RESPONDENT

(Being an appellant's appeal against the judgement of the trial magistrate Hon. Mary Ochieng SRM in Kajiado Principal Magistrate's Court Civil Case No. 283 of 2010 delivered on 18/9/2013)

JUDGEMENT

JACOB MWANTO WANGORA, hereinafter referred as the appellant sued HEZRON MWANDO KIRORIO, hereinafter referred as the respondent in the senior resident magistrate court at Kajiado on 2/9/2010 in an action for libel and to recover damages that his reputation in the community was at risk or damages.

The brief facts constituting the claim were that on or about the 5th day of January 2010, the respondent falsely and maliciously wrote and published to the Parish Minister, Kiserian Parish, Ngong Presbytery, Nkoroi Church Elders, Marisho Church Elders and Merisho and the Kirk Session Clerk of and concerning the plaintiff the words following, that is to say:

"I have been very much disturbed since I heard in the weekly church (bulletin) announcement that Mr. Jacob Mwanto Wangora has been named in the Office of the Parish PCMF (Nkoroi Church and as a member of the same from PCEA Ilmerijo Church do oppose the same. This is as a result of protracted civil and criminal cases with Jacob, which has plundered our family for the last fifteen years since the death of our parents.

Jacob is a younger brother to my late father who was his elder. This is an open issue which is not new to the people of this area and beyond. This has culminated in the conviction of the above Jacob has been sentenced to one year jail term with an option of a fine. I do not see how a convicted criminal can lead the P.C.M.F. fraternity. If need be I can attach recent criminal court rulings as evidence in the most recent one being criminal case No. 1202/2005 delivered on 16/10/2009. I hereby oppose his appointment to any P.C.M.F. office."

The respondent in his defence denied any wrong doing and averred that the letter was merely fair comment made in utmost good faith to the church. He further denied that the letter was meant for public consumption as alleged by the appellant in his plaint. In the same defence the respondent cited various cases involving the appellant as a party which had been adjudicated by courts of law.

The trial magistrate after a full trial held that the allegations of the appellant had not been proved so as to establish justification, that the words used were a libel in the way of his reputation.

The trial magistrate further arrived at a finding that the respondent was not actuated by malice.

On appeal the main grounds taken up by the appellant were:

- (1) That the learned trial magistrate erred in law and fact in holding that the letter dated 5/1/2010 was not published.**
- (2) That the learned trial magistrate erred in law and fact in finding that the letter dated 5/1/2010 was written in accordance with the rules of the Presbyterian Church of East Africa (PCEA).**
- (3) That the learned trial magistrate cardinally erred in law in upholding the respondent's claim that the appellant was a convicted criminal as at the time the letter dated 5/1/2010 was written.**
- (4) That the learned trial magistrate erred in law and fact in concluding on the strength of wrong and immaterial facts, that the defence of justification and fair comment applied to the case before her.**
- (5) That the learned trial magistrate erred in law and fact when she strangely and contrary to the evidence on record held that the respondent's assertions of the appellant plundering his family with many civil and criminal cases was true.**
- (6) That the learned trial magistrate in whole erred in law and fact in concluding that the letter dated 5/1/2010 was not defamatory of the appellant.**

Mr. Githuka for the appellant argued the appeal on the basis of the grounds raised in the memorandum of appeal namely issue No. 1, 2, 3, 4, 5 and 6. The learned counsel placed reliance on the following cited authorities;

(a) Alfred Mabeya v Sampuli Salim Mwanyonje & 2 Others [2006] eKLR

(b) Daniel Musinga t/a Musinga & Co. Advocates v Nation Newspaper Ltd [2005] eKLR.

(c) Godwin Wanjuki Wachira v Okoth [1976-80] 1KLR.

On the part of the respondent Mr. Maranga learned counsel also filed written submissions as a rejoinder to the appellant's case. According to Mr. Maranga the action for libel was not proved on a balance of probabilities at the trial court by the appellant. Learned counsel further submitted that the appellant was under a legal obligation to call the relevant witnesses to prove that the letter complained of was received by the church or parish minister, elders and members to prove that this letter was in circulation. The respondent argued and contended that the appellant had been involved in a litigation between his family and the appellant. To the findings of the learned trial magistrate, learned counsel submitted that the appellant's case was lost for reasons that the words complained of did not constitute libel.

I have heard both counsels and each one of them has supplied written submissions of the arguments in respect of this appeal. Before going in depth on the issues concerning the appellant memorandum of appeal it is pertinent to review the evidence at the trial court.

It was the testimony of PW1 Jacob Mwanto Wangora that he is a retired civil servant and also Chair Ongata Rongai and Kware Plot Owner Association. The appellant further stated that he held many posts as member District Environment Committee Kajiado North. He was also formally a teacher who rose up to the rank of Director of Education. The appellant who is a member of Presbyterian church and elected member of P.C.M.F. In his testimony the appellant contended that the letter was defamatory and it was addressed to the parish minister and other members of the church with the intention to defamation. The appellant further told the court that the respondent allegations referring to him as a convicted criminal and

one who has been involved in plunder of family property as false and embarrassing. On this ground he sought award of general damages, costs and interest.

The respondent Hezron Mwando on his part admitted writing the letter dated 5/1/2010 about the appellant whose contents he did not dispute. The respondent attributed to the circumstances of the protracted civil cases between his family and the appellant as one of the issues raised in the letter to the parish minister. In the same letter the respondent had also made reference to the criminal case against the appellant which he had been convicted and sentence to one year imprisonment. The respondent in his evidence denied that he was pursuing a vendetta against the appellant rather than bring these matters to the attention of the church. The second basis was to have the contents of the letter to be brought to the attention of the appellant by the church officials.

ANALYSIS AND DETERMINATION:

I first begin with an examination of the applicable law which sets forth what the appellant has the burden of proving on a balance of probabilities on an action for defamation. By definition libel or slander is:

“Any impulsion which may tend to lower the plaintiff in the estimation of right thinking members of the society generally to cut him off from society or to expose him to hatred contempt or ridicule.”

(See Gateley on libel and slander).

In *Hulsbury's Law of England 4th Edition Volume 28* the learned author states as follows:

“A defamatory statement is a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey any imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.”

The fundamental question which arises in this appeal is that the law of defamation should give effect to both the right to freedom of expression as enshrined in Article 33(1) of the Constitution precepts. That the dignity of all persons shall be inviolable as set out under Article 33(3) of the same Constitution. The Constitution of Kenya therefore protects every person from harm to their reputation arising from false defamatory statements. The Defamation Act Cap 56 as amended in 2012 defines defamation as, **“a publication without justification, lawful excuse calculated to injure reputation, contempt or ridicule.”**

In Kenya our jurisprudence is underpinned in the common law tort of defamation where the plaintiff must establish the following elements:

- (1) That the defendant made a defamatory statement to a third person.
- (2) That the statement was false.
- (3) That the defendant was legally at fault in making the statement; and
- (4) That the plaintiff suffered harm.

(See Galley on Libel and Slander 8th Edition [1981] pg 35), <http://injuryfindlaw.com/torts> elements of libel and slander html).

Reputation of a man is a mysterious thing and there is a presumption that everyone knows the value of reputation. William Shakespeare, O the LLO, Act (iii) Scene (iii) II 155 – 61 characterized a good name as follows:

“Good name in man and woman, dear my Lord, is the immediate jewel of their souls: who steals

my purse steals thrush; it is something, nothing Twas mine tis his, and has been slave to thousands; but he that fitches from me good name robs me of that which not enriches him and makes me poor indeed.”

The estimate of a person’s reputation is what the law defamation was enacted to protect. The Learned Author ***T. Sharkie, A Treatise on the Law of Slander, Libel Scandalim Magnatum and False Rumours*** described the concept of reputation in the following specifics:

“Reputation itself, considered as the object of injury, owes its being and importance chiefly to the various artificial relations which are created as society advances. The numerous gradations of rank and authority, the honours and distinctions extended to the exertion of talent in the learned professions, the emoluments acquired by the mechanical skill and ingenuity, under the numerous subdivisions of labour, the increase of commerce and particularly. The substitution of symbols for property in commercial intercourse – all in different digress, connect themselves with credit and character, affixing to them a value, not merely ideal but capable of pecuniary measurement, and consequently recommending them as the proper objects of legal protection.”

In that case as succinctly stated to injure such a reputation without justification exposes oneself to pay for resultant loss by way of pecuniary compensation. The honour and reputations of a man is therefore equated with monetary value.

The appellant basing his case on these principles appealed to the court below to compensate him for losses suffered by virtue of the defamatory letter written by the respondent. It is trite that the appellant laid the burden to persuade the trial court the definition events culminating in the letter of 5/10/2013 disparaged and dishonoured him within the community.

The learned trial magistrate on this second part of the case by the appellant was required to establish whether: the communication is defamatory and it did harm his reputation, so as to lower him in the estimation of the community; or whether the communication deterred third person from associating or dealing with the appellant.

From these perspectives I will review the evidence in totality on its fact and the reasoning of the learned trial magistrate in which he determined the case against the appellant.

The constitutional right of freedom of expression is a powerful right so fundamental in a diverse and multiethnic society like ours. In the instant appeal the libel complained of was contained in a letter dated 5/10/2010 signed by the respondent who is a nephew to the appellant. It is the stand by the appellant that the said words namely, ***“as a result of a protracted civil and criminal cases plundered our family for the last fifteen years since the death of our father and further that he is a convicted person sentenced to one year imprisonment with an option of fine, had seriously injured his character, credit, odium, competent, scandalized him as a person on right standing in society as a retired educationist, member of the PECA church who holds various leadership positions in the church.”*** The complainant had therefore suffered damages from the respondent.

It is on the basis of these words the trial court was required to track down the defamatory meanings to give effect to the appellant’s claim. The learned trial magistrate having weighed the pleadings and the evidence arrived at the conclusion that the appellant did not prove his case to warrant the reliefs sought. That is the reason he has taken a second shot at the claim before this appellate court.

Going by the definition of defamation as provided for under the Defamation Act and other scholarly texts the six grounds in this appeal can be reformulated and to be addressed as follows:

(1) Whether the words in the letter dated 5/1/2010 as pleaded in paragraph 3 of the plaint made by the respondent were defamatory and addressed to a third person.

(2) Whether the said statement and words constituted libel of the appellant in the way of his

character and reputation.

(3) Whether the words in the letter contained an imputation that the appellant had committed a criminal offence and or intermeddled with the family property of the respondent.

(4) Whether the publication of the said letter was true in substance and in fact and could be brought within the defence of justification.

(5) Whether there was malice on the part of the respondent in writing and publishing the letter against the appellant.

(6) Whether the circumstances of the case the appellant was entitled to damages.

I will tackle issues No. 1,2,3 in view of the intersection in a consolidated approach. From the pleadings and evidence on record it is not disputed that the respondent wrote the impugned letter about the appellant. The respondent categorically states and admits that the appellant is his uncle by virtue of being a younger brother to his late father.

It is also not in dispute that the respondent letter was addressed to the parish minister. The letter was a kind of objection raised to the appellant being confirmed or named to the office of parish PCMF chair (Nkoroi church) and as a member for the same from P.C.E.A congregation. The respondent in respect to the appellant claim relied on the defence of fair comment made in utmost good faith to the parish administration.

It is therefore the duty of this court to construe the meaning of the words as they could be interpreted in the context of a reasonable man to consider the defamatory effect. In the case of *Hayward v Thompson & Others [1981] 3 ALLER Lord Denning* stated thus, **“One thing is of essence in law of libel. It is that the words should be defamatory and untrue and should be published if and concerning the plaintiff. That is the plaintiff should aimed at or intended by the defendant.....”**

In the scholarly by *Gatley on libel and slander 6th Edition* the legal meaning of defamation is stated as follows:

“A man commits the tort of defamation when he publishes to a third person words (or matter containing an untrue imputation against the reputation of another.”

In English Law publication to the person himself defamed, **“is not actionable, though it may be criminal. The interest protected is not personal pride broadly speaking, if the publication is made permanent form or is broadcast. The matter published is libel, if in fugitive form it is slander. The most important distinction of the two is that the law presumes that some damage will flow from the publication of a libel.”**

Thus in the case of *Onama v Uganda Argus Ltd [1969] EA 92* the learned judges of the Easter African Court of Appeal set out interalia that:

“In deciding whether the words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to general public, but also to all those who have greater or special knowledge of the subject matter.....”

In the present case the nature of the information in respect of the appellant convicted of a criminal offence can be directly be established from the Chief Magistrate Case No. 1202 of 2005 at Makandara Court. The appellant in that case after a full trial was convicted of three counts of obtaining registration by false pretences contrary to section 320 of the Penal Code and sentenced to a fine each of Ksh.50,000 in default to serve one year imprisonment. His appeal to the high court in Cr. Appeal No. 468 of 2009 was dismissed on 27/9/2011.

The primary evidence the respondent had in his possession as at 5/1/2010 was the status of the criminal case which an investigations and prosecution from constitutional mandate institution had acted upon the complainant against the appellant. The appellant had been a subject to a fair and public hearing before a court of law as provided for under Article 50 (1) of the Constitution.

There is no dispute that contrary to the submissions by learned counsel relying on section 47 of the Evidence Act Cap 80 of the Laws of Kenya the appellant was convicted and sentence by competent court of known criminal offences in the penal code specially the provisions of section 320 of the Code. The appellant therefore cannot invoke section 47 of the Act to as a defence to trial whose decision had also been affirmed by the high court.

On the time factor the record speaks for itself that the impugned letter was written and published on 5/1/2010. The learned trial magistrate delivered her judgment on 18/9/2013 with the available material indicative of the criminal appeal having been dismissed by the high court.

On the other hand the trial magistrate could not be in position to forecast or foretell the outcome of the pending appeal before the court of appeal. The judgement of the magistrate court was therefore conclusive evidence as to the final order until the contrary is proved. The evidence on record amply demonstrates that the appellant had offered himself or nominated to take leadership role in the church; where he is a member.

One cannot think of any greater responsibility than position of leading in any capacity in the church ministry. The biblical texts like; 1st Timothy 3: 7-13, 2nd Timothy 2: 1-13, Exodus 18: 21-22 provided for challenging requirements for Christian leadership. In the above passages the key characteristics including: trustworthy, honest, competency, integrity and rectitude.

The flock has the responsibility to examine the overseer, deacon or elder before assumption of office to confirm that he has a good reputation and lived of his character both in private and public life. If one considers the evidence of the appellant it seems he was destined to take up the chair of PCMF. That the letter in question was therefore written by the respondent to bring to the defence of the church information which he considered relevant in electing the appellant to assume the chairmanship of PMCF. The second aspect of the respondent's letter touched on the protracted civil cases and plunder of the family property by the appellant.

I have examined the trial court record and submissions in support of this appeal with great respect to the appellant counsel submissions. There is accumulative evidence in Civil Appeal No. 312 of 2002 the appellant has had a protracted land dispute dating way back to the division, district and provincial land dispute tribunals. The court notes that the letter of 5/1/2010 made reference to this cases in the respondent's address to the parish minister. Whereas it can be observed or interpreted that on the face of it that the words used by the respondent are defamatory. One cannot infer ill will or that the respondent created a false impression that the appellant was involved in a land dispute litigation traceable to the land dispute tribunals. In the light of learned counsel submissions he relied on the decisions in the case of **Alfred Mabeya (Supra)**, **Daniel Musinga (Supra)** on publication of the defamatory words and injury to the appellant's reputation.

In my view evidence on dispute over family property was in question before the relevant tribunals and courts to determine as to the rightful owners. The court finally ruled in favour of the appellant.

It is simply impossible to believe that because there has been a protracted litigation between family members the same can be elevated to a defamatory stature. The phrase as a result of protracted civil and criminal cases with Jacob which has plundered our family for the last fifteen years since the death of our parents does not convey the meaning that the cases were maliciously brought; nor is there evidence that the appellant committed a crime in suing over the family property.

My reasoning from the evidence at the trial substantially the words published by the respondent were accurate as to the litigation. The mere fact that the respondent words can be perceived to be defamatory

there are more of a rhetoric by a person who holds that the other person's conduct is unreasonable. Black's Law Dictionary defines disparagement as '*false and injurious statement that discredits or distracts from the reputation of another's property, product or business.*'

In addition Webster II New Reversal Dictionary 387 [1984] it defines disparage as, "*to speak of in a bulleting way, decry, to reduce in rand or esteem.*" In the present case the statement published in the letter can be described in the context of the situation in the church. The respondent was asking the parish minister and the members to consider information pursuant to confirming the appellant to his position. To me this was to protect the church and save them from embarrassment in the event those facts come into their knowledge at a later date. The conviction of the appellant was a fact. It cannot be interpreted to be an attack on the appellant's reputation or credibility.

These grounds of appeal therefore fails.

As to issue No.4 and 5 on fair hearing and malice. The appellant submitted the allegations in the letter were malicious. That the respondent failed or ignored to attend the PCEA meeting of elders to justify the defamatory statements. In the English case of Fraser v Evans & Another [1969] 1ALL ER 8:

"It all comes back to this, there are some things which are such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and make fair comment on it. This is an in an integral part of the rights to free speech and expression. It must not be whittled away. The secondary times assert that in this case there is a matter of public concern. They admit that they are going to injure the plaintiff's reputation but they say that they can justify it, that they are only making fair comment on a matter of public interest...."

Judge Rawal DCJ as she then was in the case of Uhuru M. Kenyatta v Baraza Leonard [2011] eKLR held:

"While taking defence of justification or qualified privilege in the defamation case, the defendant was required by law to establish the true facts and the plaintiff has no burden to prove the defence raised by the defendant. Once verified, the justification or qualified privilege does not insert the defendant and in any event, the onus that the same is true rests on the defendants to make it a fair publication."

In the persuasive authority from the Supreme Court of Appeal Canada, the court in Wilradeolia v Simpson [2008] SCC 40 set out the requirements for the fair comment defence:

- "(a) The comment must be on a matter of public interest.***
- (b) The comment must be based on fact.***
- (c) The comment though it can include inference of fact must be recognizable as a comment.***
- (d) The comment must satisfy the following objective test could any person honestly express that the opinion on the proved facts.***
- (e) Even though the comment satisfies the objective test, the defence can be deflated if the plaintiff proves that the defendant was actuated by express malice."***

In the same court in the case of Grant v Torstar [2009] 3 SCR 640 SCC 61 the delivering of judgement the court provided the following guiding principles:

- (1) The defamatory statement must be read in context of the publication as a whole.***
- (2) Public interest is not synonymous with what interests the public.***

(3) An individual's reasonable expectation of privacy must be respected in this determination.

(4) It is enough that some segment of the community would have a genuine interest in recovering the information on the subject.

(5) The subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached.

(6) The public has a genuine stake in knowing about many matters ranging from science and the arts to the environment, religion and morality.”

The decisions in the recent superior courts to which I have made reference to are clearly in agreement with the English Common Law on defamation. What then are the facts? The respondent (member of the PCEA church Nkoroi heard the appellant's name in the weekly bulletin he had been named to the office of chair to PMCF Nkoroi. The respondent considering the position and the surrounding circumstances elected to share with church membership and parish minister personal information about the appellant. It was considered necessary from the letter written by the respondent such matters be brought to the attention of the appellant and the parish administration.

Although the appellant had retained the right of appeal the statement that he was a convicted criminal was a fact. The same applies to the civil allegation with the same members of his family as supported by case references cited elsewhere in this judgement. The law does not envisage where the respondent was required to prove the truth in minute detail of each of the statement in the letter to the parish minister. The respondent did not allege but stated the facts within his knowledge and even the appellant.

The subject matter compelling the publication of the letter was one to be described to fall within the realm of public interest. The appellant was destined to be the chair of PMCF within the church. It could have been manifestly dishonest for the respondent not to bring to the attention of the church existence of such facts.

In my view the publication by the respondent has satisfied the defence of fair comment of proceedings on matter of public interest which under the constitutional were entitled to know. In **Peter Carter – Rucks Treatise on Libel and Slander** stated as follows:

“To state accurately and clearly what a man has done and then to express an opinion is comment which cannot do any harm or work injustice. For the defence of fair comment to succeed it must be proved that the subject matter of the comment is a matter of legitimate public interest; that the facts upon which the comment is based are true and that the comment is fair in the sense that it is relevant to the facts and in the sense that it is expressed of the honest opinion of the writer. A write is not entitled to overstep those limits and impute sordid motives not warranted by the facts.”

As regards the publication the appellant submitted that the respondent is guilty of malice. The other contention by the appellant was that the act by the respondent as expressed in the letter was at variance with the evidence and the record. In learned counsel submissions the appellant conviction and sentence was quashed by the Court of Appeal in Cr. Appeal No. 352 of 2011. In respect of the civil cases the dispute was determined in favour of the appellant in Civil Appeal No. 312 of 2002.

I have already observed in both cases there was no express finding in the judgement that the litigation was on the basis of malice.

Can this court find therefore that the respondent conduct in writing the letter was such that to justify malice against him? I think the principle expressed in the case of **Phineas Nyagah v Gilbert Imanyara [2013] eKR** is relevant where the court held:

“Malice here does not necessary mean spite or ill will but recklessness itself may be evidence of malice. Evidence of malice maybe found in the publication itself if the language used is utterly beyond or disproportionate to the facts.

....malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely.”

I have given dint consideration to the testimony by PW1 the appellant. There is no doubt at the trial the appellant rightly so referred to the various decisions involving the disputes between him and the respondent family. The criminal case touching on the criminal indictment was yet to be determined when he prosecuted the defamation. We are not told both at the trial and before this court whey the session clerk issued him with a resignation letter. It is also on record that after the letter was published the appellant received any acknowledgement. The evidence of PW1 the appellant cites the letter of resignation dated 4/3/2010. He did not tell the court the circumstances which occasioned his resignation. The appellant also exhibited a letter of invitation dated 11/3/2010 to meet parish elders.

In all these circumstances no evidence came out that the letter of 5/1/2010 contributed in disparaged, the appellant being held in suspicion or contempt by the church. The trial magistrate had nothing to go by in the form of evidence to support malice. This is not a case where the respondent was under obligation to contact the appellant to verify the facts. In the instant case the particulars subject matter of the letter were within the knowledge of the appellant.

I therefore find that the letter was not malicious.

I want to determine this appeal by relying on the passage from the book Galley on libel and Slander, 9th Edition at paragraph 3.28 where the author stated as follows:

“It follows from the fact that the context and circumstances of the publication must be taken into account that the plaintiff cannot pick and choose parts of the publication which, standing alone would be defamatory. This or that sentence may be considered defamatory but there may be other passages that take away the sting. If in one part of the publication something disreputable to the plaintiff is stated, but that is removed by the conclusion the bane and antidote must be taken together.”

I am of the considered view that the force of authorities referred to in this appeal demonstrated the context the trial magistrate analyzed the issues before her on the complaint. My view is fortified with the discussion and arguments taken in this appeal alongside with the decision in the case of ***Selle v Associated Motor Boat Company Limited [1986] EA 123*** on the proper role of an appellate court:

“An appeal to this court from a trial by the high court or subordinate court to the high court emphasis mine is by way of a retrial 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 or heard the witnesses and should make due allowance in that respect. In particular this court is not bound necessary to follow the judge’s findings of fact if it appears either that he has clearly failed to some point to take into account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case in gealfit.”

Applying the above principles my view of the learned trial magistrate judgement I am satisfied that she gave a proper analysis based on evidence and submissions by the two learned counsels representing the parties to the claim. The learned trial magistrate rejected the evidence of the appellant that there existed credible material of a conviction of the appellant in Criminal Case No. 1202 of 2005 that the fact

communication of the impugned letter by the respondent to church was mere information to the church. That by reading of the letter in context and its publication the appellant did not discharge the burden of proof on a balance of probabilities. That the words used in the letter defamed the appellant.

The learned trial magistrate further considered the defence of justification and fair comment as applicable in the appellant case. It is clear from the words that the letter was written when the church bulletin, a circulation to the members informing them of the candidature of the applicant. It is not in dispute that he appellant had offered himself to a leadership role in the church. The purpose of the communication to the members of the church from the parish minister was to invite them to participate in any way or a process towards his appointment. The respondent as a minister of the church had the right to freedom of expression as enshrined under Article 33 of the Constitution to provide and give information necessary to the parish minister in the nomination process for appointment of the appellant.

On my part taking all these considerations together and review of the evidence on record, I am unable to identify any instance in which the learned trial magistrate erred in law or fact on the issues before her. I would therefore dismiss the entire appeal on its entirety with costs to the respondent.

My last gem to you is a paraphrase from the Holy Book:

“May you both be reconciled through Jesus Christ whom you profess as your savior by breaking down the wall of hostility between you; and your uncle. Only him alone shall bring healing and restoration of relationship.”

Dated, delivered and signed in open court at Kajiado this 25th day of September, 2017.

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Githuka for the appellant

Mr. Maranga for the respondent

Mr. Mateli Court Assistant