



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NUMBER 94 OF 2013**

**ISAAC NGUGI GITHUA.....APPELLANT**

**VERSUS**

**NYAGA MOSES.....RESPONDENT**

***(Being Appeal from the Judgment of Hon. Teresiah Matheka, Principal Magistrate delivered on 29<sup>th</sup> September 2011 in Nyahururu PMCC No.2007)***

**JUDGMENT**

1. By his statement of claim filed on the 11<sup>th</sup> September 2013 the appellant accused the Respondent of having defamed him by way of a letter written to the Senior Assistant Chief of Muruai Sub-Location dated 4<sup>th</sup> October 2006.

The said letter mentioned seven retired parents of Ngurumo Primary School. The author of the said letter was the Head Master. It was addressed to the Area Sub-chief as aforementioned and not copied to anyone else. It was delivered in a sealed envelop.

It appears like the addressee discussed the said letter with the Appellant who felt offended and aggrieved leading to the trial court suit. He sought general and exemplary damages for libel plus costs and interest of the suit.

2. The Respondent raised a defence of qualified privilege and in the alternative stated that he had a moral, social and legal duty to publish the said letter in the interest of the school. Upon hearing the case the trial Magistrate made findings that the case was not proved to the required standards, on a balance of probability and dismissed the same with costs.

3. This appeal before the court raises several grounds from which three issues arise for determination by the court:

*(1) Whether the appellant proved his case by the evidence adduced in court to the required standards and whether the trial magistrate failed to appreciate the law and principles upon which a defamation suit, by way of libel, is based.*

*(2) Whether the trial magistrate erred in law and fact by failing to find that the document complained of was libelious to the appellants character and whether the respondent was justified in authoring and disseminating the same.*

4. The offensive letter written by the head teacher of Ngurumo Primary School was coached in the

following manner:

*“The Senior Assistant Chief*

*Muruai Sub-Location*

*Dear Sir*

**NIGHT MEETINGS**

*Community policing start with an individual. So I have an obligation to inform you on people who believe in a manner likely to cause a breach of peace.*

*The people mentioned hereby have been meeting at Isaac Ngugi's home. He has been sponsoring supper for them. Main reason is that they were not satisfied with the decision made by the General Meeting (22<sup>nd</sup> September 2006). The Education Act empowers School Committee and parents to decide on the fate of their school. Today (4<sup>th</sup> October 2006) they went to Ndaragwa to an unknown office*

1. **Isaac Ngugi** - **retired parent**
2. **Daniel Mwaniki** - **retired parent**
3. **Eunice Wangechi** - **retired parent**
4. **David Kingori** - **retired parent**
5. **James Njoroge** - **retired parent**
6. **Joseph Ndung'u** - **retired parent**
7. **Isaac Mwangi** - **retired parent**
8. **Muthomi Ngwandaro - RETIRED**

*The retired parents are misusing some few parents in order to champion their ill motives. Please take note and be alert.*

*Thanks in advance*

*Yours faithfully*

**Signed**

**Stamped**

**NYAGA MOSES**

**Ngurumo Primary School**

**HEAD MASTER**

**Box 1198**

**NYAHURURU**

**4.10.2006.**

5. This is the first appellate court. It is under a duty to re-evaluate the evidence tendered before the trial court and come up with its own findings and conclusions.

**See *Selle and Another -vs- Associated Motor Boat Co. Ltd and Others (1968) E.A 123.***

The court is not bound to agree with the trial courts findings on facts if it appears that the court clearly failed to take into account some particular circumstances or probabilities.

I have considered the offensive letter. I note that it was written to the Appellant only and not copied to anyone else. It was delivered in a sealed envelop. It generally addresses issues of the Ndurumo Primary School and the retired teachers who were apparently not happy with resolutions of the parents meeting on community policing. It contains some information to the sub-chief who is advised to be on the alert as there could be a breach of the peace due to some activities by the retired parents. Somehow the retired parents, among them the appellant got wind of the said letter and thought it was defamatory of his character and therefore sued the author the Respondent for damages.

6. I have considered the appellant's evidence adduced before the trial court. It was his testimony that by the said letter, he was brought into hatred, ridicule, scandal and public ridicule. He denied having been hosting night meetings in his home. He testified that his neighbours saw him as an evil person. He did not elaborate. On cross-examination, the appellant stated that he was offended because of the allegations as they were lies and false. He did not elaborate on inuendos stated in his plaint Paragraph 6.

7. PW2, the appellant's wife saw the letter. She stated that her husband's reputation was damaged because night meetings are banned in Kenya and cannot be held without permission. She did not state in what manner her husband's reputation was damaged.

PW3 was told of the letter. She testified that she left the appellant to take action, she did nothing. PW4 was the Senior Assistant Chief of Muruai Sub-location to whom the offensive letter was addressed. It was his testimony that there was a land dispute over the school land and acknowledged having received the said letter in a sealed envelop. It was his evidence that the retired parents were being restrained from cultivating the school land that the appellant and others had leased. He denied that there were any night meetings. He stated that the appellant was and still is a respected person by members of the public, but there was an apparent grudge between him and the Respondent. He told the court that the letter was in a sealed envelop and that it was his duty to receive complaints on security issues from the public and further encouraged them to bring such complaints including the dispute over the school land.

8. The Respondent raised a defence of qualified privilege. In his testimony before the trial court, he stated that the appellant was a tenant of the school land and that he wrote the alleged offensive letter as there was tension in the school because of the school land whereof the appellant including other retired parents were kicked out of the school *shamba*. He stated that he did what he was supposed to do in line with the community policing where the public was to take care of their security, and that it was his duty to inform the Sub-chief of any threat to peace.

9. He testified that the letter was meant for the Sub-Chief only as the appellant had started clearing the *shamba* despite the school parents decision to have him and others evicted, and to him, that could have caused chaos and breach of peace in the school. He testified that the sub-chief and the public could not have viewed the appellant as a bad person as that depended on investigations. He finally stated that as the headmaster of the school, it was his duty to report the matter to the assistant chief and that he did not defame the appellant.

10. That being the evidence tendered, I now come to the issues as framed and analysis of the said evidence with a view to finding out whether the trial Magistrate's findings and conclusion were against the law and the weight of evidence as alleged by the appellant. See **Selle case** (Supra).

11. The offensive letter dated 4<sup>th</sup> October 2006 is reproduced above. The background leading to the Headmaster to write the said letter is given in the parties respective evidence.

It is clear that there was a dispute over the use of the school land by the appellant and others against the school parents' resolutions to have them evicted.

As the Headmaster, the respondent was under a duty to inform the security agents of a threatened breach of peace by the appellant and others. Though the night meetings were denied by the appellant, it was the duty of the Headmaster/Respondent to report to the senior assistant chief of what he thought would be a cause for breach of peace in his school. Does his defence of qualified privilege hold? Was the Headmaster justified to make the report?

By the said letter, did the Respondent convey defamatory message to the Senior Assistant Chief or any other member of the public? These are questions that beg answers.

12. As stated above, the appellant in his testimony did not show how the letter was defamatory to his good reputation which he did not state.

The key witness, PW4 The Senior Assistant Chief to whom the letter was written to and copied to no other person stated that the appellant was still a respected person in the community. The appellant and his witnesses did not demonstrate by evidence that the appellant was shunned or avoided by members of the community nor that his reputation was lowered in anyway. The court finds no malice by the respondent in writing the letter to the Assistant Chief as it contained information of interest to the addressee, and was not meant for consumption by the general public.

**In Mary Mumbi Njoroge and Another -vs- BBK & Another Nbi HCCC No. 2938 of 1987.**  
The court stated that:

***“An occasion is privileged where the person who makes the communication has an interest or legal duty, Social or moral to make it to the person to whom it is so made and that person has a corresponding interest or duty to receive.”***

Being the head teacher of the school, it was his duty to make the communication of the subject matter for action by the security agencies who too had corresponding interest and duty to act on the same. See **University of Nairobi -vs- Mbutia Nbi C.A. No 20 of 1979.**

It is on record that the Assistant Chief encouraged all parties to file complaints with him and indeed welcomed the community policing from the public.

13. The appellant submitted that the message conveyed was defamatory to him, and that it left no doubt that he was a criminal with illegal and evil intention against the lawful administration of the school. The appellant did not file a reply to defence of qualified privilege and did not call any evidence to support the above submission. Indeed his witness PW4, the Assistant Chief to whom the letter was addressed confirmed that the appellant was still a respected person in his community.

On that point, after careful consideration this court, like the trial Magistrate, finds that the said letter did not convey any defamatory message to the public in general. No demonstration at all was had of the effects of the message, he was not held in contempt, shunned or ridiculed and indeed his reputation was still intact and not in any way lowered in the eyes of the public as confirmed by the Assistant Chief.

14. The offensive letter was addressed to one person only. The Senior Assistant Chief, PW4.

The appellant has not demonstrated that the said letter was sent or copied to other parties which would have brought out the element of malice. If the same was shown to other parties by the addressee, that was outside the writers or publishers intentions.

If the respondent was actuated by malice and intended to publish the letter for other persons consumption, he could have easily done so by copying it to all other persons that he may have intended. For a defamation suit to succeed, it ought to be shown that the material was published to a person other than the complainant. It is evident that the said material was meant for the Assistant Chief's consumption and no other persons, including the appellant.

15. It is a public duty of every one who reasonably believes that a crime has been committed or is about to be committed to assist in the discovery of the wrongdoer. In those circumstances, any complaint made or information given for the purpose of investigations to the police or any law enforcement agent will be in the interest of the society and therefore privileged. If the person giving the information has reasonable belief about the intended commission of the offence, it is his duty and right to inform the police. He can therefore not be subjected to an action of damages merely because it turns out that the persons as to whom he has given the information is after all not guilty of the crime.

It is stated, in the **Tanzanian case of Rwekanika -vs- Biriamungu** cited by the High Court with approval from the treatise **“Gatley on Slander” 6<sup>th</sup> Edition Page 218 -19 -**

that:

*“it is trite law and a well settled principle of law that where an individual gives information or makes a statement to an officer of the law, whose duty is to detect and prosecute criminals or that someone has committed a crime, such information or statement has the protection of privilege for the best interest of society and the suppression of crime.*

*It further goes onto state that if the charge is made honestly and to the proper authorities, the mere fact that it is found groundless, or that proceedings in respect of it are subsequently abandoned will not destroy the privilege. But if the publication is made with malice, that destroys the privilege.”*

16. Considering the evidence in its totality by both the appellant and the Respondent before the trial court, and also submissions by learned counsel, it is evident that the communication by the respondent to the Assistant Chief, of and concerning the appellant and others was nothing but an honest communication of vital information without malice to a law enforcement agent for the good and interest of the school.

In **Apidi -vs- Shabit & Another (2005) e KLR** it was held that the defence of qualified privilege in defamation can be destroyed by malice whether express or implied. It is however for the plaintiff to impute the malice to the satisfaction of the court.

17. It is mandatory under **Order 2 Rule 7 of Civil Procedure Rules** in defamation suits for the plaintiff to file a reply to defence giving particulars of the facts and matters on which the malice is to be inferred. It is not for the court to infer such malice where none has been satisfactorily pleaded. The appellant in this matter did not file such reply.

**Order 2 Rule 7 (3) states:**

*“where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts which he relies in support of the allegations of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.”*

18. I therefore find no fault with the trial Magistrate's finding that the communication subject of this appeal was justified in view of the circumstances stated above.

It is my further finding that the appellant failed in its duty to prove its claim against the Respondent culminating in its dismissal with costs.

In its entirety, the court finds that the appeal lacks merit and is a candidate for dismissal.

As costs follow the event, see **Section 27** of the **Civil Procedure Act** the trial Magistrate was right to make an order that costs of the dismissed suit be paid by the appellant.

19. For the above reasons, the appeal is dismissed with costs to the respondent.

**Dated, signed and delivered in open court this 26<sup>th</sup> day of May 2016**

**JANET MULWA**

**JUDGE**