



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL APPEAL NO. 27 OF 2012**

**JANET NGUNO MWENDWA.....APPELLANT**

**VERSUS**

**MAWIA MUTHAMI.....1<sup>ST</sup> RESPONDENT**

**TABITHA KYAMBI.....2<sup>ND</sup> RESPONDENT**

**MUTHAMI MWANZI.....3<sup>RD</sup> RESPONDENT**

*(From the decision in Mwingi PMCC No. 45 of 2009 delivered on 3<sup>rd</sup> October 2012 H. M. Nyaberi Ag. SPM)*

**JUDGMENT**

The appellant filed a plaint in the subordinate court alleging defamation by the three respondents. She claimed general damages, a permanent injunction restraining the respondents from publishing defamatory matters against her, interest and costs. The respondents filed a defence. The case was heard and judgment delivered on 3<sup>rd</sup> October 2012 in which the appellant's suit was dismissed with costs.

Dissatisfied with the decision of the trial court, the appellant has appealed to this court on the following grounds:-

1. The learned trial magistrate erred in law and fact when he arrived at a decision against the weight of the evidence.
2. The learned trial magistrate erred and misdirected himself in law when he failed to indicate how much he could have awarded the plaintiff in damages if the plaintiff had been successful.
3. The learned trial magistrate erred in law and fact when he observed that the plaintiff was not present when the defamatory words were uttered and therefore had failed to prove her case.
4. The learned magistrate erred in law when he only relied on the respondents evidence of their witnesses when delivering judgment.

Counsel for the parties, Ms. Kinyua Mwaniki & Wainaina advocates for the appellant and Mulinga Mbaluka & Co. advocates for the respondent filed written submissions. Mr. Kinyua who appeared for the appellant highlighted the written submissions. Counsel for the respondents filed written submissions but did not attend the hearing of the appeal.

I have perused and considered the submissions of both parties counsel, both written and oral. No authorities were cited in the submissions.

At the trial, the appellant called five (5) witnesses. The respondents called four (4) witnesses. The contention of the appellant was that the respondents published in front of a crowd of about 60 people that the appellant had bewitched the 1<sup>st</sup> respondent with supernatural spirits. The respondents, on the other hand, maintained that the 3<sup>rd</sup> respondent merely reported an allegation of sickness of the 1<sup>st</sup> respondent to the husband of the appellant who was an assistant chief for a solution to be found. Both sides agreed that the 1<sup>st</sup> respondent, a daughter of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, claimed to be possessed by evil spirits.

This being a first appeal, I am duty bound to re-examine the evidence on record afresh and come to my independent conclusions and inferences – See the case of **Selle Vs. Associated Boat Co. Ltd [1968] EA 347.**

I have re-examined the evidence on record. I have also perused the judgment of the trial court.

For a publication to be defamatory it has to be a statement which reflects on a person's reputation and which tends to lower him or her in the estimation of right thinking members of the society generally and tends to make such members of society shun or avoid him.

This was a case for defamation. In such a case, a plaintiff is required to establish on the balance of probabilities that:-

1. The statement was published by the defendant.
2. That it was false.
3. That it was made in regard to the plaintiff.
4. That it lowered the reputation of the plaintiff in the minds of the public.

The words stated by the three respondents in Kikamba language and translated to English were as follows. The 1<sup>st</sup> respondent is said to have said ***“uncle Morris, it is aunt Ngumos evil spirits that are tormenting me. She planted these evil spirits at our homestead when she gave at Kshs. 200/= one kilogramme of sugar and tea leaves”.***

The 2<sup>nd</sup> respondent who is the mother of the 1<sup>st</sup> respondent was said to have stated- ***“it is Nguno who is bewitching Mawia through her evil spirits and that is why she is this ill. His evil spirits stay at the tomb within Kathiiani Primary School where she established a home for them”.***

The 3<sup>rd</sup> respondent who is the father of the 1<sup>st</sup> respondent was said to have stated – ***“Mawia got sick on 23/06/2008 and upon investigating the cause of her illness, I discovered that it was caused by evil spirits thrown to her by Nguno through Kshs. 200/=, one kilogram of sugar and tea leaves which she brought to this house. It is Nguno's evil spirits that are tormenting my child”.***

Having re-evaluated the evidence on record, I find that the words above complained about by the appellant were uttered against her by the respondents in Kikamba language. Otherwise there would be no reason for the return to the appellants of the sugar, and tea leaves and money described by the 2<sup>nd</sup> respondent. In my view also, the words need not have been uttered in the presence of the appellant for them to be defamatory. It was sufficient that they were published to people. In this case I find that the said words were uttered to a number of people, who could total 60 people. There was thus publication of the words to the public which even attracted a prayer session. There was also publication of the words to the husband of the appellant.

In my view, associating somebody with witchcraft in Africa, specifically among the Kamba people is a serious allegation that will definitely lower the reputation of a person. No wonder the appellant refused to go to the scene of the prayers session. It was a wise move, as her life was in danger due to the said utterances associated her with witchcraft. She was lucky not to have been lynched, according to her

evidence. she had to relocate for sometime. I thus find that defamation was proved on the balance of probabilities.

I also agree with the appellant that the learned trial magistrate should have assessed the damages awardable even if the case was dismissed. The magistrate erred in not doing so. such assessment would be of great assistance to the appellate court. In my view, an award of Kshs. 150,000/= as damages is adequate compensation to the appellant.

In the result, I allow the appeal and set aside the judgment of the trial court. I enter judgment for the appellant as prayed in the plaint and award her general damages of Kshs. 150,000/= for defamation with interest from today's date. For the avoidance of doubt the injunction sought is hereby granted. The appellant will have the costs of the appeal and the proceedings in the subordinate court.

**Dated and delivered at Garissa this 14<sup>th</sup> day of May, 2015**

**GEORGE DULU**

**JUDGE**