



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

**CIVIL APPEAL NO. 64 OF 2000**

**JOSEPH MUSYOKA KALII ..... PLAINTIFF/APPELLANT**

VERSUS

**MUSYOKA KILATYA ..... DEFENDANT/RESPONDENT**

*(Being an appeal from the Judgment of the Principal Magistrate's Court at Kitui of Hon P.N. Wekesa  
(R.M) Civil Case No. 38 of 1999 dated 13<sup>th</sup> July 2000)*

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*(Before B. Thurania Jaden J)*

**J U D G M E N T**

1. The Appellant, **Joseph Musyoka Kalii** who was the Plaintiff in the lower court had sued the Respondent **Musyoka Kilatya** (the Defendant), for damages for defamation, special damages of Kshs.6,000/=, costs and interests. The Appellant's claim was that the Respondent had defamed him by accusing him of having bewitched his (Respondent's) child, thereby lowering the Appellant's esteem before the eyes of right-thinking members of the society.
2. The claim was denied as per the statement of defence dated 23/2/1999.
3. The trial magistrate arrived at the conclusion that the Appellant had failed to prove his case on a balance of probability and dismissed the Appellant's case with costs. The Appellant was aggrieved by the said judgment and appealed to this court on the following grounds:-

**1. "The learned Resident Magistrate erred and misdirected herself in law and fact when she held that there were inconsistencies in the Appellant's case, while in fact there were no such inconsistencies.**

**2. The learned Resident Magistrate erred and misdirected herself when she failed to find that the Appellant had established the tort of defamation by slander as against the Respondent by proving all the elements of defamation on a balance of probability and she further erred when she failed to award damages to the Appellant.**

**3. The findings of the learned Resident Magistrate were against the weight of evidence as was adduced."**

4. The appeal was canvassed by way of written submissions. The Appellant filed his submissions but the Respondent did not file any though served. I have duly considered the submissions filed.

5. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. *See for example Selle –vs- Associated Boat Co. Ltd (1968) EA 123.*
6. In a suit founded on defamation, the Plaintiff must prove the following five elements:-
  - a. First, the words complained of, must actually refer to the Plaintiff;
  - b. Second, the words must be defamatory i.e. the words must tend to lower or actually lower the character or reputation of the Plaintiff in the eyes of right-thinking members of the society;
  - c. Third, the words must be published to a third party;
  - d. Fourth, the words must be false i.e. truth is an absolute defence to an action in defamation;
  - e. Fifth, for slander, there must be proof of resultant damage (**Winfield & Jolowicz on tort 16<sup>th</sup> edition at p. 140.**)
7. The Appellant (PW1) testified that the Respondent defamed him by accusing him of having bewitched the Respondent's child. The defamatory words are said to have been uttered before a group of over 35 people in the village where both the Appellant and the Respondent hail from. The said group included the village elders. The elders then decided to send both the Appellant and the Respondent to a traditional doctor by the name "Dr. Willy" for a cleansing ceremony. That the ceremony was carried out and both parties were declared "clean". PW1 further testified that he incurred expenses of Kshs.6,000/= which included the subsistence, travelling and accommodation expenses when they went to see "Dr Willy". PW1 gave the accommodation expenses as Kshs.150/= per night for five days.
8. PW1 called two witnesses, PW2 **Peter Kilonzo**, a farmer and PW3 **Musyoka Nzina**, a mason. The evidence of both PW2 and PW3 essentially agrees with that of Appellant that the Respondent made the allegations of witchcraft against the Appellant before a group of more than 35 villagers. That the elders referred the matter to the traditional doctor for the cleansing ceremony which cleared both parties of the allegations of practicing witchcraft.
9. On the other hand, the Respondent testified as DW1. According to the evidence of the Respondent (DW1), it was his child who said that the Appellant had bewitched her. DW4 **Beth Musyoka** the Respondent's wife gave similar evidence, stating that it was their sick child who made the allegations against the Appellant. DW2 **Ndambuki Kieti** and DW3 **George Nyamai Mbuli** who are two of the elders who presided over the meeting of the more than 35 villagers also testified that the allegations of witchcraft were made by the child. That is when the elders called the meeting and recorded the proceedings of the same. The meeting culminated in both the Appellant and the Respondent being referred to a cleansing ceremony where the Respondent was cleared of being a wizard.
10. The elders (DW2 & DW3) who chaired the meeting and who made the decision to call the meeting testified on the Respondent's side. Their evidence is categorical that the allegations were made by a child who was sent by the Respondent's wife (DW4). The Respondent's wife (DW4) confirmed having reported the matter to the elders. The elders further testified that they are the ones who called the meeting and informed the other villagers about the witchcraft allegations. It is therefore not clear whether the words complained of were uttered by the Respondent or published by the Respondent. On a balance of probability, I agree with the trial court that the Appellant failed to prove his case. The weight of evidence on record is heavier on the Respondent's side and makes the Respondent's case more probable than the Appellant's.
11. The Appellant did not produce any receipts in support of his claim for special damages. Special damages must not only be proved but strictly proved.
12. Whether the Plaintiff's case was successful or not, the trial court was duty bound to assess the damages which would have been payable had the Appellant's case succeeded. (*See for example, Mordekai Mwangi Nanswa v Bhogals Garage Ltd C.A No. 124 of 1993 KLR.*)

The only evidence against which the damages payable can be estimated is the Appellant's evidence that he was a farmer and businessman. The evidence by the Respondent shows that people still go to the Appellant's shop. There is no evidence to show that his business went down or that he was shunned by his village mates.

13. The Plaintiff's counsel submitted for an award of Kshs.50,000/= as General Damages, stating that he could have submitted for more but was limited by the trial magistrate's pecuniary jurisdiction.

However, the Kshs.50,000/= would have been a reasonable assessment of General Damages. I would have awarded the Appellant Kshs.50,000/= as General Damages if his case was successful. 14.However, having arrived to the conclusion that the Appellant's case was not proved on a balance of probability, I find no merits in the appeal and dismiss the same with costs.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this **19<sup>th</sup>** day of **June** 2014.

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**B. THURANIRA JADEN**

**JUDGE**