



**REPUBLIC OF KENYA**

**High Court at Meru**

**Civil Appeal 79 of 2008**

**JOSEPH KIRAITHE.....APPELLANT**

**VERSUS**

**SIMON MUGAMBI MIKUARI.....RESPONDENT**

**(An appeal from the judgment/decision of the learned Resident Magistrate Mr. G. Oyugi,  
dated 22<sup>nd</sup> July, 2008 in Tigania Senior Resident Magistrate's Civil Suit No. 103 of 2006).**

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

The respondent JOSEPH KIRAITHE sued the appellant at the lower court claiming general damages for defamation and costs of the suit. The appellant filed defence and counter claim claiming general damages for defamation.

The respondent in his plaint dated 15<sup>th</sup> August, 2006 averred that on 5<sup>th</sup> August, 2006 at around 6.00 p.m at Mweronkanga location the appellant uttered the following defamatory words against the respondent, in Kimeru language that is to say:-

***“Ugwe uri Murogi” Mwamba wa Musinka” which would me and were understood to mean that the respondent is a witch and a robber who uses a gun to steal. The respondent further stated the natural and ordinary meaning of the said words were that the respondent is a social misfit, a witch who kills, and a dangerous criminal who should be avoided by law abiding citizens.”***

That the appellant on the other hand filed defence and counterclaim dated 29<sup>th</sup> August, 2006. The appellant generally denied the respondent's claim in his defence and made a counter-claim. The appellant in his counter claim averred that on 5<sup>th</sup> August, 2006 at around 8.00 p.m at Mweronkanga location, the respondent uttered the following defamatory words against the appellant, in Kimeru Language that is to say:-

***“Ugwe uri Malaya Na wina Aids, Uri Mwamba Na Murogi.”***

Which words the appellant averred translated to Mean:-

***“You are a prostitute who has Aids and you are a thief and a witch.”***

The appellant in his plaint averred that the said words were published to the right thinking members of the society without any justification. The appellant averred the natural and ordinary meaning of the said words were understood to mean that the appellant was a prostitute, and of immoral character, that the

appellant is infected with a deadly Aids virus, that the appellant is a criminal who steals other people's property and that the appellant is a witch who harms members of the society with demons. The respondent filed reply to the defence and counterclaim on 26<sup>th</sup> September, 2006. The respondent denied the allegations raised in the defence and repeated the contents of the plaint. Equally the respondent denied the allegations set out in the appellant's counterclaim.

During the hearing of the suit the respondent gave evidence and called two independent witnesses whereas the appellant gave evidence and called one witness, being his wife.

The learned trial Magistrate in his judgment found that PW1's evidence was corroborated by PW2 who was present when the words complained of were published by the appellant and concerning the respondent. The trial Magistrate found that the respondent made a report to PW3 on the same day at around 7.00 p.m. The learned trial Magistrate further stated that he did think the applicant was telling the court the truth when he claimed that he was the one who had been defamed because the time the appellant claimed he was defamed that is the time the respondent was with PW3. The trial Court found it was impossible as such for the respondent to be at PW3's home and at the appellant's home at the same time. The trial court further found that the appellant did not call any independent witness to corroborate his evidence. The appellant called his wife and court found the appellant's evidence and that of his wife as self-serving. The court did not believe the evidence of the appellant and his wife and questioned appellant's delay in filing his claim against the respondent instead of waiting to be sued so as to put a counterclaim.

The trial court found that it was respondent who was defamed by the appellant and awarded the respondent general damages of Kshs.40000/- and dismissed appellant's counterclaim with costs to the respondent.

The appellant being aggrieved by the trial court's judgment dated 22<sup>nd</sup> July, 2007 to preferred to file this appeal setting 7 grounds of appeal as follows:-

- 1. The learned trial Magistrate erred in law and fact in that he did not find that the pleadings relied on by the respondent were defective.***
- 2. The learned trial Magistrate erred in law and in fact in not finding that the words complained of were mere or vulgar abuse and not defamatory in law.***
- 3. The judgment of the learned Resident Magistrate is against the weight of evidence and failed to deal with the serious contradictions in the plaintiff's/respondent's case.***
- 4. The learned trial Magistrate erred in law and in fact in dismissing the counter-claim on the ground that the plaintiff/respondent rushed to court first.***
- 5. The whole of the judgment of the Resident Magistrate is bad in law and in fact in that it was not properly or/and adequately supported by evidence and the relevant law of defamation.***
- 6. The Award of damages made by the Resident Magistrate is bad in law and was not supported by any evidence.***
- 7. The learned Resident Magistrate***

When the appeal came up for direction both appellant and respondent counsel consented to the appeal being determined by way of written submissions. The learned advocate for the appellant Mr. Maitai Rimita filed his written submissions on 24<sup>th</sup> October, 2012 whereas the firm of M/S Mbaabu M'Inoti appearing for the respondent filed their written submissions on 28<sup>th</sup> November, 2012. The court has considered the said submissions. It has also considered the pleadings, proceedings and judgment and the Counsel opposing positions.

The appellant Counsel has argued all the 7 grounds of Appeal altogether. The appellant's main grounds of appeal are that the learned trial Magistrate's judgment was against the weight of evidence and that it failed to appreciate and/or deal with serious contradictions in the respondent's case. The appellant took issue with the respondent's testimony during cross-examination when the respondent said he was abused/insulted by the appellant while he was inside his home and the appellant was standing on the doorway and said PW2 was present. PW2 the appellant contended he said "I never witnessed the plaintiff being abused inside the plaintiff's house."

The appellant also took issue with the statement that the respondent said during cross examination that he went to see PW3 on the following day. The appellant further contended that PW1 stated that when he told the appellant to go, the appellant refused and stood at the gate and continued abusing him while, PW2 said that when the respondent told the appellant to go, the appellant left. The appellant further contended that the respondent said that other people heard him abused, whereas PW2 said there were no other people who heard the respondent being abused apart from PW2 and respondent's wife. The appellant submitted in the light of the contradictions the testimony of PW1, PW2 and PW3 ought to have been disregarded as their credibility had been totally shattered. The appellant further urged the actual place where defamation took place is unclear since PW1 claim it was inside his house while PW2 stated it was outside respondent's house. The appellant referred me to the case of **SURE & 9 OTHERS – V- NYAMAICO-KISUMU(1988) KLR 574** when the Court of Appeal held:-

***1. The resolution of the conflict on the evidence as to where the attachment had taken place was central to a finding of fact as to the correctness or otherwise of the attachment, and to the credibility of the witnesses.***

The respondent evidence is that the appellant went to respondent's home around 5.00 p.m and found him with PW2, Joshat Nabea, his neighbor and the appellant started by abusing PW2 calling him "takataka". That when respondent intervened and asked the appellant what was the problem, the appellant called the respondent a "Murogi" a witch and that he was a thief of guns."

That the appellant left and when he stood at the gate he continued abusing the appellant calling him a witch and people told him to go away. The appellant went to this home and returned with arrows and bakora and continued calling the respondent a thief of guns and a witch. The respondent in cross-examination simply stated he was inside his house when the appellant came and stood on doorway and abused him. The respondent's evidence is clear that the appellant abused him severally. The respondent was not abused only when he was inside the house but the abuse at the house was the beginning of series of abuses by the appellant.

PW2 in his evidence testified that he heard the appellant abuse the respondent while he was on the road before he entered the respondent's home. He asked PW2 why he was associating with a thief of a gun and a witch and when respondent intervened the appellant called the respondent a witch and a thief of gun. That is when the respondent told the appellant to go away but the appellant went on talking despite people beseeching him to go away. PW2 said he never witnessed the respondent being abused inside the house. The respondent testified that he was inside the house and that the appellant stood on the doorway when he abused the respondent. The respondent did not say the appellant was inside the house. There is clear evidence that PW2 was at the time the respondent was defamed by the appellant at the respondent's home. There was no suggestion during cross-examination that PW2 was not at the respondent's home on 5/8/2006 at the time the respondent was being defamed by the appellant.

I have considered the evidence of PW1, PW2 and PW3 and apparently during their cross-examination they were merely answering the question as were put to them. Their answers did not diminish their evidence nor did they contradict one another on the material facts of the respondent's case. The evidence of PW1, PW2 and PW3 matched materially save for very minor details which did not affect the respondent's case. I find in the evidence of PW1 and PW2 there was no contradictions on publication of the defamatory words by the appellant to PW1, and PW2. The publication of the defamatory words was made to PW1, PW2 and PW1's wife and PW1's minor children and that the appellant continued on talking despite people beseeching him to go away. PW3 was not at respondent's home at the time of

defamation was made but he was later informed by the respondent of what had transpired and said by the appellant.

The evidence by the respondent and his witnesses was consistent and materially corroborative. The trial court analyzed and evaluated the evidence and came to sound conclusion. I have analyzed the evidence and evaluated the same and find that the appellant published the defamatory words to PW2, amongst other members of public.

I find that the place where the defamatory words were uttered is specific and clear that it was at respondent's home at Mweronkanga location. That it matters not whether the words were uttered inside the house, or outside or along the road so long as the defamatory words were uttered. The words complained of were defamatory and that were published to PW2 whilst at the respondent's home and were also published to other people who were outside the respondent's gate and who beseeched the appellant to go away.

The words were that:-

***“You are a witch and a robber who uses guns to steal”***

For one to succeed in claim for defamation the words complained of must be defamatory and the same must be published to a third party. The words must be calculated to injure the reputation of the person or be actionable per se.

In the instant case the words complained of imputes a crime and are therefore actionable per se.

The appellant relied on the case of **SURE & 9 OTHERS –VS- NYAMAIKO**(Supra). The case dealt with the issue of resolution of the conflict on evidence as to where the attachment had taken place which was central to a finding of fact as to the correctness or otherwise of the attachment and as to the credibility of the witnesses as per holding No.4 of the judgment. That was a finding on a specific issue before that court and is not a general principle laid down in the judgment as purported by the appellant in his submission. I find therefore the judgment is distinguishable and not relevant in the instant appeal.

The appellant submitted that the trial Magistrate failed to appreciate that defamation is a publication that is calculated to injure the reputation of another by exposing him to harm or contempt or ridicule, and as such, the intention to injure another person's reputation is an indispensable ingredient of defamation. He urged that a person cannot claim to have been defamed through a statement uttered to him only as in the present case. He relied on the case of **DR. ALI WARIO – V- JOHN NG'ONDU HCCA NO. 28 OF 2003**. He further urged mere vulgar abuse is not defamatory.

In the instant appeal, I have found that the words complained of imputed crime on the part of the respondent and are actionable per se.

The words complained of were not mere vulgar or abusive words as submitted by the appellant, neither were they only published to the respondent alone. The defamatory words were published to PW2 amongst other members of public who were not called as witnesses. The fact that only PW2 gave evidence do not mean there was no sufficient publication.

The case of **WARIO – V- DR. JOHN NG'ONDU**(supra) can therefore be distinguished as there was publication in this case to PW2.

The appellant faulted the learned trial Magistrate for dismissing the appellant's counterclaim casually by a mere reason that the respondent rushed to court first. He further urged the trial court failed to appreciate that litigation is not the only conflict resolution mechanism in Kenya and that due to the expenses involved in litigation, many Kenyans with genuine grievances are unable to access justice through litigation, while others tend to do away with their grievances. He urged further by dismissing the appellants wife's testimony as "self-serving" the learned trial Magistrate erred since he failed to

appreciate that the appellant had been defamed before his wife as a person suffering from the deadly HIV AIDS and as a result the appellant had been shunned by his wife.

The learned trial Magistrate in his judgment stated that he did not think the appellant was telling the truth and he did not believe him. The trial court had the opportunity to see and hear the evidence and determine the misdemeanor of the witnesses which this court did not and as such I give due allowance. The appellant's counterclaim on the other hand was not supported by any independent witness to corroborate the appellant's allegations that he had been defamed by the respondent. The trial court termed the appellant's wife's testimony as self-serving as there is no way a wife can be an independent witness and further a wife cannot be said to be a third party for the purposes of proving publication of defamatory words. The learned Magistrate also found that the respondent could not have been at the appellant's home and at the home of PW3 at the same time.

I find that the trial court having found that the appellant was not truthful and having given reasons for rejecting the appellant's evidence acted properly made no error in rejecting the appellant's claim.

The appellant lastly urged that the award of damages given by learned Magistrate was manifestly excessive and not supported by evidence. The appellant referred me to the case of **GODWIN WANJUKI WACHIRA- OKOTH(1997) KLR 24** in which case Muli, J, as he then was, stated that mild defamation cannot attract a large sum in compensation.

The learned trial Magistrate considered the respondent's status in the society and his occupation was that of buying and selling goats and the fact that the defamatory words never reached a wide audience. The trial court also considered the locality from where both the appellant and respondent come from and awarded a sum of Kshs.40,000/=. The words published of and concerning the respondent imputed the respondent was a witch and a dangerous criminal who robs people using gun which crime attracts capital punishment. The sum awarded was not manifestly excessive in view of the nature of the defamatory words against the respondent. We cannot say the defamation was mild as such save that the publication was made in a remote area which there were no many people. In view of the foregoing I find no basis of interfering with the award made by the trial court. I find it reasonable and the same should be allowed to stand.

Having found that the appeal has no merits I dismiss the same with costs of the appeal to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2013.**

**J. A. MAKAU**

**JUDGE**

***Delivered in open court in the presence of:-***

1. Nyenyire h/b for Mr. Rimita for appellant
2. Kiambi for the respondent(absent)

**J. A. MAKAU**

**JUDGE**