



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

**AT NYERI**

**CIVIL APPEAL NO. 14 OF 2008**

**MWANIKI NJOROGE.....APPELLANT**

**VERSUS**

**BETH WANJIKU NGUGI.....RESPONDENT**

***(Being appeal against the judgment of S. M. Mokuu, Senior Magistrate in Kigumo Senior Resident Magistrate's Civil Case No. 7 of 2007 delivered on 22<sup>nd</sup> November 2007)***

**JUDGMENT**

This judgment is the result of the appeal against the judgment of S. M. Mokuu, learned Senior Resident Magistrate, delivered on 22<sup>nd</sup> November 2007 vide Kigumo S.R.M.C.C. No. 7 of 2007. The record shows that Mwaniki Njoroge, the appellant herein, filed the plaint dated 18<sup>th</sup> January 2007, in which he prayed for judgment against Beth Wanjiru Ngugi, the Respondent herein, in the following terms:

- (a) General damages for defamation.
- (b) Costs and Interest.
- (c) Any other relief.

The Respondent filed a defence to deny the Appellant's claim. The suit was heard by Hon. S. M. Mokuu, learned Senior Resident Magistrate. The learned Magistrate proceeded to dismiss the case on the basis that the Appellant had not proved his case on a balance of probabilities. The Appellant was dissatisfied hence this appeal.

On appeal, the appellant put forward the following grounds in his Memorandum of Appeal:

1. ***The learned Magistrate erred in failing to give sufficient consideration and weight to the evidence of P.W.1, P.W.2, and P.W.3 regarding utterances and the place of such utterances as forming the basis for the cause of action on defamation and failed to analyse the evidence as required; the Learned Magistrate failed even to give any or any reasonable and sound reasons for not accepting the evidence offered by the plaintiff.***

2. *The Learned Magistrate erred in basing his judgment on the evidence of the defence witnesses when the record shows that they gave contradictory evidence and were not worthy of credit taken together and even after commenting on the demeanour of D.W.1.*
3. *The Learned Magistrate erred in giving undue weight to the contradictory and inconsistent of .D.W.1, D.W.2 and D.W.3 and which evidence evidently favoured and corroborated the appellant's case.*
4. *The Trial magistrate in his duty to analyse all the evidence on record and thus arrived at wrong findings and judgment.*
5. *The Learned Magistrate erred in law and fact by restricting himself to just one incidence of defamation and totally disregarding the other incident thus arriving at a wrong conclusion.*
6. *The learned magistrate erred in law and fact by his failure to appreciate both the case before him and the ingredients informing defamation law.*
7. *The learned magistrate erred in law and fact when he purported to import into his judgment concepts and criteria which are unknown to law and not applicable to such a trial as before him.*
8. *The Learned magistrate erred in law and fact in his placement of the burden of proof as applicable in law.*

When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal determined by written submissions.

I have considered the rival submissions and the recorded evidence presented before the trial court. In the trial court the Appellant alleged that the Respondent had defamed him on two occasions i.e. on 9<sup>th</sup> August 2006 and on 25<sup>th</sup> August 2006. It is said that on 9<sup>th</sup> August 2006, the respondent uttered the following defamatory words against him:

***“You are a witch. Who does not know that you are a witch and a murderer in the whole village? You have been running naked around my homestead. You killed my cow”.***

The Appellant further alleged that on 25<sup>th</sup> August 2006 the Respondent uttered the following words against him:

***“Yes I said you are a witch. Even now I repeat that you are a witch and a murderer. You have seen nothing and more will come.”***

The Appellant testified and tendered the evidence of two other independent witnesses in support of his case. The Appellant told the trial court that on 9<sup>th</sup> August 2006 he heard the Respondent utter those words in the presence of mourners who were attending a burial in the neighbourhood. The Appellant alleged that he got upset by those words hence he sent one **Isaac Kabiru** (P.W.2) to the Respondent. P.W.2 said he approached the Respondent but the Respondent told him that she would not apologize to the Appellant. **Monicah Wahigumo** (P.W.3), told the trial court that she saw and heard the Respondent utter the words complained of against the Appellant on 9<sup>th</sup> August 2006. P.W.3 further stated that she was also present at the Chief's office on 25<sup>th</sup> August 2006 when the Respondent uttered the alleged defamatory words against the Appellant. She alleged that there were many people who heard the words uttered by the Respondent. P.W. 3 claimed that the villagers have since then tended to avoid the Appellant. The Respondent on her part testified and tendered the evidence of three independent witnesses. The Respondent denied having defamed the Appellant. The Respondent said that on 9<sup>th</sup> August 2006, she was with her son until 11.00 p.m. when her son got out of the house and found the Appellant outside. The Respondent said she also came out of the house whereupon she saw the appellant enter the house of Monica, her co-wife. She said she does not own cows and that she was not in good terms with her co-wife. The respondent confirmed that on that date there was a memorial service for a deceased child of the Respondent's co-wife. The Respondent admitted that P.W.2 had gone to see her to tell her to restrain her son from going with the Appellant. **Joseph Macharia** (D.W.2), a son to the Respondent told the trial court that on 9<sup>th</sup> august 2006, he saw the Appellant enter his step mother's house. D.W.2 said the Appellant wore a vest and an underwear. D.W.2 said that appellant had lodged a complaint before the

area chief alleging that he had been abused by D.W. 2. The evidence of D.W.2 in respect of the dispute before the area chief was corroborated by **Juliana Wambui** (D.W.4).

At the close of the evidence the learned Senior Resident Magistrate came to the conclusion that there were many contradictions in the evidence presented in support of the Appellant's case and that it was necessary for the evidence of the chief to be tendered to shed more light of what happened. He concluded that the Appellant had failed to prove his case to the required standards.

Having set out in brief the case that was before the trial court, let me now turn my attention to the appeal. On the first, fourth, fifth and sixth grounds it is argued that the trial Senior Resident Magistrate had failed to give reasons for disbelieving the evidence of the Appellant. I have re-evaluated the evidence of the Appellant. His evidence is to the effect that on 9<sup>th</sup> August 2006, he heard the Respondent utter the words complained of. He said he sent Isaac Kabiru to approach the Respondent. He reported to the area Chief when he did not get any response from Isaac Kabiru. The appellant alleged that the respondent admitted she abused him when she appeared before the chief on 5<sup>th</sup> August 2006. He claimed he became shy to move freely within the village after the Respondent uttered those words. The Appellant further claimed that he no longer moves freely nor go to church. **Isaac Kabiru** (P.W.2) told the court that the Appellant mixes freely with people and that he regularly goes to church. P.W. 2 further stated that he did not hear the respondent abuse the Appellant. Monica Wahigumu (P.W.3) a co-wife to the respondent alleged she heard the Respondent abuse the Appellant on 9<sup>th</sup> August 2006. P.W. 3 confirmed the dispute was taken before the area chief. She claimed she no longer associates with the Appellant since then and that people have avoided him. The Respondent has alleged that P.W. 3 is her co-wife whom she does not cope with. A critical analysis of the evidence will reveal that the Appellant's case will heavily depend on his evidence and that of P.W.3. The evidence of P.W. 2 appears to have weakened the evidence of P.W. 1. P.W. 2 was not present when the Respondent is alleged to have abused the appellant. P.W. 2 avers that the Appellant goes to church as usual and that people freely associated with him. It is obvious that the evidence of P.W.2 has substantially contradicted the Appellant's evidence. The evidence of P.W.3 cannot be used to corroborate the evidence of the Appellant because there is clear evidence that P.W.3 is a co-wife to the Respondent. The duo did not enjoy cordial relationship. It is possible P.W. 3 may have given evidence to settle scores with the Respondent. After a careful re-evaluation of the evidence, I have come to the conclusion that the Appellant had failed to prove his case to the required standards. The trial magistrate cannot therefore be faulted for coming to the same conclusion.

In the seventh ground of appeal, it is alleged that the trial magistrate applied a criteria unknown to law in deciding the case. It is alleged that the Appellant had failed to summons the chief being a crucial witness to testify. It would appear the trial magistrate was of the view though not explicit, that the chief's evidence may have been excluded by the Appellant because it was not favourable to his case. At the beginning, I thought of brushing aside the argument but after a critical examination at the fifth ground of appeal, I have concluded that there was something the Appellant may have intended to hide by failing to summon the chief. The Appellant alleged that he was defamed at the chief's office. He also stated that the Respondent admitted of having defamed him before the chief. The Respondent on the other hand had alleged that the dispute before the chief was in respect of a dispute between the Appellant and her son (D.W.2). With respect, I agree with the holding of the trial magistrate that it was very crucial that the evidence of the area chief was necessary to prove the particulars of defamation which allegedly took place on 25<sup>th</sup> August 2006. The failure to call the chief meant that the Appellant had something to hide from the court.

In the end I find the appeal to be without merit. It is dismissed with costs to the Respondent.

***Dated and delivered at Nyeri this 15<sup>th</sup> day of July 2011.***

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Kirubi for Appellant. No appearance for Respondents.