



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 49 of 2003

LUCY GAKANYI KIREMAAPPELLANT

VERSUS

ANISIA KAGWIRIA MUNGANIARESPONDENT

*(An appeal from the judgment of D.J. Nyaga DMI magistrate delivered
at Tigania law Courts on 24th April 2003 in DMCC No. 16 of 2001)*

JUDGMENT

The respondent sued in the lower court the appellant for defamation. He alleged in that case that the appellant on 30th August 2008 defamed her by calling her in Kimeru *Mukenye* and *Maraya* which words meant un circumcised woman and a prostitute. These words the respondent alleged were uttered in the presence of many people. She therefore alleged that her character and reputation were injured. The appellant denied the claim. After receiving the parties evidence, the learned magistrate had this to say:-

“After carefully considering this case, I note that the issues are whether infact the words complained of were uttered by the defendant (appellant), and if so, whether they were defamatory, and finally if any and what compensation is payable. I believe the words mukenye and prostitute were uttered by the defendant. It is evident that the two women quarreled and there was a lot of noise there.”
The learned magistrate awarded the respondent Kshs. 10,000/= in general damages for defamation. The appellant being aggrieved by that judgment has filed the present appeal. In her grounds of appeal, she stated that the magistrate erred both in law and in fact in holding that the respondent had proved her case and in awarding her damages of Kshs. 10,000/=. Since this is the first appellant court, I am obligated to re-examine the evidence bearing in mind that I did not have an opportunity to see or hear the witnesses. The respondent in evidence said that the appellant found her at her shamba working. The appellant called her a copse. The appellant, according to her, also called her a prostitute and said that she was uncircumcised. The respondent said that those words were heard by PW2 and children that were present. That as a result, the children had since then shown her disrespect. On being cross examined the respondent said thus:-

“On 30th August 2001, Lucy (appellant) found me in my shamba and I was alone. She too was alone, but a woman was behind her.”
PW2 was on her way to her home on the material date when she found the appellant had put her handbag down and was holding a stone and making a lot of noise calling the respondent *mukenye* and prostitute. On being cross examined, this witness said that the appellant before reaching where the respondent was had passed her on the way and that she reached where both the appellant and respondent were about two hours from the time she was left by the appellant. PW3 was on the material day working in his farm. He heard the appellant insulting the respondent but in evidence did not repeat the words that were spoken by the appellant. The appellant in evidence in chief denied that she insulted the respondent. On the material day, she said she was on her way home when she met the respondent and PW2. Both were holding pangas. The respondent said to her that she would not pass where they were. The appellant stoned the respondent and DW2 came to the scene got hold of the respondent and gave her an opportunity to pass. On 3rd September 2001, her husband reported the matter to the

chief. The matter was heard and she was requested by the elders who deliberated on the matter with the chief to forgive the respondent. DW2 said that on the material day, he found the respondent and the appellant making noise. There was no one else present except an old woman and a child. He noted that the respondent was holding a panga. He held onto the respondent to avert the spilling of blood and led her away. DW3 was the chief who confirmed that the matter was reported by the appellant's husband. The appellant's husband reported that the respondent ambushed the appellant and wanted to cut the appellant with a panga. He summoned the respondent and the appellant to appear before him and elders in his office. The respondent did not tell the elders that she had been insulted by the appellant when she was summoned or that she had been called *mukenye* or a prostitute. One of the elders was the grandfather of the respondent. He requested that the matter be settled between the parties and the case was therefore withdrawn. He also said that the appellant did not insult the respondent before the elders. The chief's evidence contradicted the respondent's evidence who stated:-

“This same dispute was before our chief in September 2001 and chief ordered Lucy never to insult me again.”

Having re examined the evidence, I find that the respondent did not prove her case on the required standard of proof. She did not prove that the appellant uttered those words or that she was defamed. I say that the respondent did not prove the words that were uttered by the appellant because PW2 said that the appellant passed her on the way and it took her two hours to arrive at the scene. It's hard to understand how or when she heard the alleged defamatory words. On the whole, the evidence of the respondent, in my view, smacks of fabrication and is not credible. On the other side, I find that the appellant's evidence was credible. It is evident that both the appellant and the respondent on the material date quarreled and the matter was reported to the chief. However since the respondent's grandfather asked for the matter to be resolved between the parties it seems the respondent took that opportunity to file the present case. Having found that the appellant did not utter the words alleged which is an essential component of slander the respondent reputation was not affected by what occurred between them. It is obvious that both of them quarreled and for that reason, I am of the view that each party should bear their own costs in this appeal and in the lower court. I grant the following judgment:-

1. ***I order that DMCC Tigania Number 16 of 2001 and the judgment thereof of 29th April 2003 be set aside and be substituted with an order dismissing that case with no orders as to costs.***
2. ***Each party shall bear their own costs in this appeal.***

Dated and delivered at Meru this 7th day of May 2010.

MARY KASANGO
JUDGE