REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 51 of 2005

GATHONI GATHUKUMI……..APPELLANT

VERSUS

ELIPHAS MBAYA MTUANYIRI……..…RESPONDENT

(From original Judgment of the Senior Resident Magistrate's Court at Nanyuki (E.G. MBAYA – S.R.M)

in S.R.M.CC. NO.128 of 2004 dated 12th September, 2005.)

J U D G M E N T

Gathoni Gathukumi, hereinafter referred to as "*the appellant*" was sued in the subordinate court by **Eliphas Mbaya Mtuanyiri** hereinafter referred to as "*the respondent*" for damages for alleged defamation. The respondent alleged in the plaint filed in the Senior Resident Magistrate's Court at Nanyuki that the appellant had made allegations that he was a witch and a sorcerer who practices black magic and had bewitched her son and inflicted him with epilepsy and that he is a person who keeps "*Majini*" (evil spirits) in his house which he uses to torment and cause harm to her. It was the contention of the respondent that the aforesaid allegations were made by the appellant and published in the whole village by the appellant despite his knowledge that they were false, untrue and with no basis whatsoever. As a result of the false allegations made and published by the appellant against the respondent, the respondent suffered loss and damage in that his reputation was greatly injured among right thinking members of the public and in particular his village who have shunned and or avoided him and his standing in the said society was thereby greatly lowered.

On being served with the plaint, the appellant entered appearance and subsequently filed a defence. In her defence, the appellant denied the allegations made against her by the respondent in the plaint.

When the case came up for hearing, the respondent testified and called two other witnesses. On the appellant's side, only the appellant testified. The respondent's story was as follows; that the appellant and him were neighbours in the village known as Kangata on the outskirts of Nanyuki town. Sometime back the appellant released her chicken which fed on the respondent's wheat. The respondent told her to lock up her chicken and she refused. He enlisted the intervention of the village headman to no avail. Three weeks later the appellant went to the Assistant Chief of the area and told him that the respondent had sent demons and devils to her home. The respondent was summoned and during the hearing of the dispute, the appellant claimed in the presence of as many as 20 people that the respondent was a witch who had bewitched her family members. These words were uttered at the Assistant Chief's office. As a result of the utterances the respondent suffered loss and damage. He conceded in his testimony though that the villagers' relationship with him has not been affected in anyway and he continues living happily

with his neighbours. Under cross-examination by the appellant, the respondent stated that the appellant reported him to the Assistant Chief that he was a witch and the Assistant Chief sent for him. That the appellant still called him a witch in the meeting with the Assistant Chief and the villagers.

The Assistant Chief of Kangata Sub-location was the respondent's first witness. He testified that the appellant came to his office and reported that one of her children was falling frequently and that it was the respondent who was bewitching her child. The Assistant Chief advised her to take the child to hospital. The following day the respondent came to his office and reported that the appellant was calling him a witch. The appellant told the witness that church believers had confided to her that it was the respondent who had bewitched her child. The witness told the appellant to avail those servants of God. She did not. That the appellant had called the respondent a witch in his presence.

The last witness was **Henry Ribu**. He is the village headman. He knew both the appellant and respondent as they were neighbours and his subjects. He testified that one day the respondent came to him and told him to tell the appellant to stop her chicken from straying into his land. Later on the Assistant Chief asked him to accompany him to the respondent's home to witness the removal of witchcraft. The appellant repeated in their presence that the respondent had bewitched her child. She said that she would get God's servants to remove the witchcraft. She fixed a date. On that date the servants of God failed to show up. Under cross-examination, the witness conceded that he was married to the respondent's sister.

In her defence, the appellant testified as follows: That the evidence against her was fabricated, that on the day she is alleged to have defamed the respondent she was in church. That she had no chicken. That she was a neighbour of the respondent and did not understand why the respondent brought her to court. Under cross-examination, she admitted that there was a boundary dispute between the respondent and herself. She went on to state that the two witnesses who testified on behalf of the respondent lied.

On 9th September, 2005, the learned Magistrate delivered his judgment in the matter. In a short and terse judgment, the learned Magistrate found for the respondent in the following manner;

"……**I have gone through the evidence on record. I am convinced the plaintiff has proved his case on a balance of probabilities. The plaintiff called two witnesses. PW2 and PW3 said they heard defendant calling the plaintiff a witch. PW3 told court neighbours fear the plaintiff. His reputation was affected by the words by the defendant……from the evidence on record the plaintiff did not suffer much loss. A figure of Ksh.15,000/= would adequately compensate the plaintiff…..."**

That holding has sparked this appeal. In a home made memorandum of appeal, the appellant faults the judgment of the learned Magistrate on the following grounds:

1. That the learned Senior Resident Magistrate erred in law and in fact in finding that the defendant uttered the words that the plaintiff was a witch when there was no evidence to support this finding.

2. That the learned Senior Resident Magistrate erred in law and in fact in failing to distinguish the conflicting evidence on issues of witchcraft, children and boundary.

3. That the learned Magistrate erred in law and in fact in holding that the plaintiff had proved a case of defamation against the defendant when the same had not been proved.

4. That the learned Magistrate erred in law and in fact in awarding damages of Ksh.15,000/= to the plaintiff without considering that there was no injury suffered by the plaintiff as there was no evidence to support it.

5. The learned Magistrate erred in law and in fact in failing to appreciate that there was no reasonable evidence of why the defendant could have uttered the alleged words.

6. The learned Magistrate erred in law and infact in finding that the words purported to have been uttered by the defendant the evidence available contradicts it.

7. The learned Magistrate erred in law and in fact in failing to hold that the defendant did not have a sick child on which grounds of witchcraft were based and was not proved.

8. The learned Magistrate erred in law and in fact in finding that the words were uttered within reaching of may(sic) people, lowered the plaintiff's integrate(sic) and esteem to right thinking members of the public as evidence adduced proved to the contrary.

9. The learned Magistrate erred in law and in fact in failing to consider the evidence of the defendant and condemning her wholesale.

10. The learned Magistrate erred in law and in fact in failing to analyse the defendant\s evidence against the plaintiff in awarding damages for the plaintiff.

When the appeal came up for hearing, the appellant was unrepresented whereas the respondent appeared with **Mr. Mwangi**, as his learned counsel.

In her submissions in support of the appeal, the appellant submitted that there was a grudge between her and the respondent hence the suit. That the witnesses who testified on behalf of the respondent had been bought by the respondent. Finally she submitted that there was no adequate evidence to prove the case of the respondent.

The response by **Mr. Mwangi**, was as follows: that the evidence was clear. That the two witnesses testified that they had heard the appellant on several occasions call the respondent a witch, which is actionable perse without proof of damage. The defence and appellant's evidence was mere denial. She never called any witness to confirm that she was in church on the material day. On damages awarded, counsel submitted that the same was fair taking into account *section 16A* of the defamation act.

This is a first appeal and so this court is obliged to reconsider the evidence, assess it and make appropriate conclusions on such evidence, but always remembering that it neither saw nor heard the witnesses – See **Peters V Sunday Post Ltd (1958) EA.424, Selle & another V Associated Motor Boat Co. Ltd & others (1968) EA.123 and Ephantus Mwangi & Another V Duncan Mwangi Wambugu (1982 – 88) I KAR.278.**

The respondent's claim was predicated upon slander. There are two kinds of defamation though; slander and libel. Slander is where a person orally or verbally utters defamatory words of and concerning another person. However, libel is where a person writes of and concerning another person defamatory statements or words. Slander and libel are therefore different forms of defamation. According to **Winfield & Jalowicz on tort 15th Edition,** Defamation is defined generally as,

"……**the publication of a statement which reflects on a person's reputation and tends to lower him in the estimate of right thinking members of society generally or tends to make them shun or avoid him…."**

As opposed to libel, slander is punishable perse without proof of damage especially in situations like in this case where the appellant imputes a criminal offence of the respondent that is punishable by imprisonment. What this means therefore is that the respondent was not required to show that he had suffered any loss and or damage as a result of slander contrary to the submissions of the appellant. Being a witch and sorcerer is a criminal offence in this country and is punishable with imprisonment. It was claimed that the appellant called the respondent a witch and or sorcerer. That being the case the respondent need not have proved that he suffered any loss or damage as a result of being referred to as aforesaid.

However on the balance of probability, did the respondent make out a case for slander? My reading of

the proceedings does not give such comfort. First and forest *Order VI Rule 6A (1), (2), (3) and (4) and 6B* of the Civil Procedure Rules which govern how pleadings in suit based on defamation should be framed were not complied with.

Paragraph 4 of the plaint in essence captured the respondent's complaint in this way,

"…..**The plaintiff avers that the defendant has made and has been making allegations that the plaintiff is a witch and a sorcerer who practices black magic and has bewitched the defendant's son and inflicted him with epilepsy and that the defendant is a person who keeps "*Majini*" (evil spirits) in his house which he uses to torment and cause harm to the defendant full particulars of which are well known to the defendant…."**

From the fore going what strikes a keen observer is the generalization of the claim. For instance it is not known when and where the alleged defamatory words of and concerning the respondent were uttered and to whom. It is trite law that an action founded on defamation cannot be filed after one year. That is to say that a suit based on defamation must be filed within one year of the cause of action accruing failing which it will be time barred. It therefore behoves a litigant, coming to court on that basis to be specific as to when exactly the alleged defamatory words were uttered. That is the only way that the court may be able to determine whether or not the suit is statute barred. It cannot be left to the court to speculate whether the action is maintainable. The plaint must show when the alleged defamatory words were uttered. The plaint must also show or give particulars of the natural meaning of the alleged defamatory words, and if from the alleged defamatory words an innuendo has to be inferred, particulars of the innuendo must be stated. The plaint as drawn and filed falls far below the aforesaid expectations. It is silent on the day, time when and to whom the alleged defamatory words were uttered. It does not give the particulars of the natural meaning of the words a witch, sorcerer, black magic, majini and or evil spirits, or if an innuendo was to be inferred no such particulars have been given. It cannot be left to court to infer or interprete the natural meaning of the said works or the innuendo that should be inferred. The respondent in his own testimony did not at all allude to the exact date when the appellant defamed him. His witnesses too (PW2 & PW3) were also not clear or specific as to when they heard the appellant allegedly defame the respondent. For all intents and purposes, the court could have been pushed to hear and determine a matter which may perhaps have been time barred. The court may as well have adjudicated upon a matter which was not defamatory in the absence particulars of the ordinary meaning of the words complained of and or innuendo to be drawn from the said words.

For a party to succeed in case hinging on defamation, there must publication of the defamatory words. I doubt whether there was such publication in the circumstances of this case. The respondent pleaded that the appellant published the offensive words to the entire village. However a part from PW2 and PW3 both members of provincial Administration, no other villager testified on behalf of the respondent. PW2 was the Assistant Chief whereas PW3 was the village headman. It should also not be forgotten that PW3 is married to the respondent's sister. He is therefore a brother in law to the respondent. Accordingly his evidence has to be taken with a bit of caution. Likelihood of bias in favour of his brother in law cannot be ruled out.

The respondent in his evidence did not say that the appellant had ever confronted him face to face and uttered the defamatory words. Infact it would appear that the first time he heard of the defamatory words was when he was summoned by the Assistant Chief. It would appear that it was during the hearing of the dispute that the appellant is alleged to have uttered and or repeated the said words. It would appear again that there were many people in the Assistant Chief's office. My reading of the evidence shows that the appellant approached PW2 with a complaint against the respondent. Having listened to the complainant he decided to summon the respondent in abid to resolve the issue. It would appear again that in the process of arbitrating on the issue, the appellant is alleged to have uttered or repeated the offensive words. It is not clear whether the offending words were uttered in Kiswahili, English or even Kikuyu or whether the words were uttered at the urging of PW2. When the Assistant Chief was conducting the proceedings, he assumed quasi judicial role. He wanted to get to the bottom of the dispute. He cannot therefore turn around and be a witness of the respondent and claim that the appellant published the offensive words of and concerning the respondent to him. The same goes for PW2 as he too was acting in

his official capacity as a village headman when the alleged offensive words were uttered. They may have even been the ones who urged the appellant on and or encouraged her to repeat what was being alleged to be defamatory words in the process of hearing the dispute. In those circumstances, I fail to see how there could possibly have been publication of the offensive words. All those 20 or so villagers assembled at the Assistant Chief's offices may have come to listen to the dispute or may have had their own issues which they wanted the Assistant Chief to attend to. If in the process they found themselves in the unhappy position of hearing a matter which was of least concern to them, it cannot be said therefore that the defamatory words were published to them by the appellant. It was in bad taste therefore for PW2 and PW3 who were expected to be neutral in the whole episode to turn around and be partial in favour of the respondent and purport to claim that the defamatory words were published to them of and concerning the respondent by the appellant. Those proceedings I would imagine were privileged. Since the respondents in the proceedings before the Assistant chief were acting in their official capacities as members of the Provincial Administration, the appellant could not have published to them the alleged defamatory words. The same applies to the events before the aforesaid proceedings. Whatever the appellant may have reported to the two witnesses, it was made to them in their official capacity. There having been no publication of the offensive words to any other person other than the two witnesses whose publication I have discounted, I would hold that there was no publication of the offensive words to any third party. In holding that the respondent was defamed by virtue of the publication of the defamatory words to the Assistant Chief and the village Headman, the learned Magistrate fell into error.

Having carefully evaluated and analysed the evidence tendered, I find myself unable to agree with the conclusions reached by the learned Magistrate. Accordingly and for the foregoing reasons, I will allow the appeal, set aside the judgment and decree of **E.G. Mbaya, SRM** given on 12th September, 2005 and substitute therefor an order dismissing with costs the respondent's suit in the lower court. The appellant shall also have costs of this appeal.

Dated and delivered at Nyeri this 30th day of June, 2008

M.S.A. MAKHANDIA

JUDGE