



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

**AT MERU**

**Civil Appeal 146 of 2001**

**MOSES MURIUKI ..... APPELLANT**

**VERSUS**

**FREDRICK MWORIA ..... RESPONDENT**

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

1. On an unclear date in March 1998, the Respondent, Fredrick Mworia, wrote a letter to the District Commissioner at Maua and for clarity the letter reads as follows:

“Dear sir,

As an elder of Nkomo Location, on behalf of ordinary residents we are complaining of sub-chief of Kilincune Moses Muriuki in that **he has formed habit of collecting money those who used to go to the near market to sell their produce, no official receipt for that effect.***(sic)*

**He is used to interfere with land cases in many ways.** *(sic)*

**He seems to be working under instruction of two godfathers to whom he has said was the one who played to make him be employed as sub chief last year.** *(sic)*

**In most cases has used to go alone to people’s homes and make research without a warrant, that means he too much after money in many ways in the sub-location.**

**He seems to have no co-operation with ordinary people for any development in this sub-location.** *(sic)*

**Therefore we fear that if this sub-chief continues with the above mentioned habits our sub-location will remain as on of the an undeveloped area in this location, and that is why we are requesting you by this letter to investigate and prevent these evil things against him.** *(sic)*

**Yours faithfully**

**Fredrick Mworia**

**Cc**

**The Provincial Commissioner – Eastern Province**

## **The District Officer – Uringu Division**

### **The Chief of Ekomo Location**

### **The Sub Chief of Kilincune Sub-Location.”**

2. The Appellant was offended by that letter and instituted SRMCC No. 77/1998 in which he sought general damages for defamation. At paragraph of the Plaintiff in that suit he set out his understanding of the meaning of the offending words to be that;

**“(a) The plaintiff is a dishonest person who collects people’s money dishonestly.**

**(b) The plaintiff is a criminal who engages in the unlawful acts of making alleged searches in peoples homes.**

**(c) The plaintiff is wanting in integrity and is a man of questionable and reprehensible conduct and therefore he is unfit to hold positions of leadership and responsibility.**

**(d) The employment of the plaintiff was not out of merit but out of illegal and/or unorthodox influence of other people.**

**(e) The plaintiff is a hear (*sic*) and rogue whose words and actions cannot be believed or trusted”.**

3. The claim was heard and finally dismissed on 3.11.1999 and the Appellant unhappy with that order instituted the present Appeal on the following grounds;-

**i. “That the learned trial magistrate erred in law and in fact in holding that the appellant had failed to prove his case on a balance of probabilities.**

**ii. The learned trial magistrate erred in law and in fact in failing to consider the evidence of the Plaintiff’s witnesses which would have made him arrive at a different conclusion.**

**iii. The learned trial magistrate erred in law and in fact in holding that the plaintiff’s witnesses were not credible.**

**iv. The learned trial magistrate erred in law and in fact that he dwelt with extraneous matters in arriving at the judgment.**

**v. The judgment of the learned trial magistrate is contrary to the evidence and law applicable”.**

4. I should go back and state that in his Statement of Defence the Respondent raised only one fundamental issue; that the statements complained of were justified and there was nothing defamatory about them (paragraph 3 of the Defence)

5. In the Appeal, the following issues require determination:

(a) Were the words complained of in their meaning as set out by the Appellant defamatory of him and in any event was defamation proved?

(b) If not, was the defence of justification available in the circumstances of this case?

6. On the first question, the Appellant in his evidence stated that during the relevant period, he was the Assistant Chief for Kilencune Sub-Location, Nkama Location, Meru North District and that the offending letter dented his credibility as a public official. He denied the contents of the letter and that because of its publication, his relations with the Chief of the area changed as the latter did not trust him. In support of his case he called P.W.1, Joseph Kailemia, the Chief, Nkama Location who said that he received a copy

of the offending letter on 21.3.1998 and before he could act on it, his immediate senior, the District Officer, Uringu Division asked him to investigate the allegations contained in it. P.W.1 did so by consulting the sub areas (village head men) within the Appellant's area of jurisdiction and specifically Kirianki M'Ibaya and Francis Nturibi as well as elders, amongst them being one Kabirithu. He also spoke to the Demarcation Officer and the Land Adjudication Officer for the area and the result was that he found no truth in the allegations. In a letter to the District Officer produced as P.Exh.2 the witness stated inter-alia;

**“I write to inform (*sic*) that after my through investigations in the sub-location, the three allegations laid upon him by Fredrick Mworira are false.”**

7. P.W. 1 said that although he had previously had full trust in the Appellant, the letter created doubts in his mind and he sent spies to monitor his actions.

8. P.W.2 was Francis Ntoribi, a sub-area who said that he had received information in March 1998 that the Respondent was making certain allegations about the Appellant. The same are set out elsewhere above and that it was one Jeremiah Nthabathi and Moses Ntalami who said so. That when the Chief (P.W.1) also enquired about the same matters a week later, P.W.2 denied the allegations but that his own attitude towards the Appellant changed and P.W.2 started fearing the Appellant and was uncomfortable doing any work with him. He admitted that he saw the offending letter with Jeremiah Nthabathi aforesaid and that it was at a canteen belonging to the latter. He added that the letter had an impact in his locality because members of the public no longer attended meetings called by the Appellant in large numbers as was previously the case.

9. P.W.3, Wilson Kinoti Mutiga a neighbour of both the Appellant and the Respondent, said in evidence that he read the offending letter and was later consulted by the Chief, P.W.2 about the Appellant's conduct and it was his evidence that the allegations against the Appellant were untrue.

10. Before turning to the evidence by the Respondent, I should say that since a party is bound by its pleadings, the only issue that the Respondent had to show was that the comments made regarding the Appellant in the offending letter were justified meaning that they were true. I have seen an extract from Salmon on the Law of Torts, 14<sup>th</sup> ed, where it is stated thus:-

**“The defence that the statement is true is termed a plea of justification, the defendant being said to justify the publication. The burden of proof rests upon the defendant; it is for him to prove that the statement is true, not for the plaintiff to prove that it is false”**

11. If this be the law, what evidence did the Respondent bring forth to justify the offending statements which he did not deny authoring? He said that the Appellant and he had bad relations starting from 1987 when they were both officials of Kirindine Self-Help Group. He said that he had received complaints from members of the public about the Appellant's conduct but no action was taken by the Appellant's seniors. He also said that the Appellant had accepted that he received money for the construction of an Administration Police line and did not issue receipts to those who contributed the money.

12. In support of the Respondent's case, David Kaindio Maingi gave evidence to the effect that he knew both parties and that he was party to the writing of the offending letter of complaint to the local District Commissioner because the Appellant had arrested him and others for failing to pay some money towards the building of an Administration Police Line. That when he was taken to Nchiru Police Station after the Appellant had arrested him but the police officers released him because they saw that no offence had been committed. The witness said that the Appellant used to hold Kangaroo courts to settle land disputes and he recalled an instance where he fined an unnamed lady, Ksh.2000/-. He did not however know the lady, the dispute or why the fine was imposed.

13. D.W.2 was Timothy Muthiga and like the previous witness, he too said that he was arrested for failure to pay some money, which he did not pay because the Appellant was not issuing receipts for the same. He said however that he was not locked up and was released. He too said that the Appellant held

kangaroo courts at Kilinchune and imposed fines and gave the example of one Kaleo who was fined Ksh.2,000/- because his/her cows had strayed into one Ntee's land.

14. D.W.3, Johnson Kirara Naikabu said that on 30.3.1998 the Appellant asked him for money being his contribution to build an Administration Police line but he failed to issue a receipt for it.

15. The learned trial magistrate believed the Defence and stated that as far as he was concerned, the words complained of were justified. That the Appellant was a man of questionable character and the letter complained of was not defamatory of that character.

16. As I understand it, once the defence of justification is raised, then the falsity of defamation is presumed until it is dispelled by the Defendant, in this case the Respondent. Further, the Respondent was obligated to prove all the material statements contained in the alleged libel, in substance and effect and this is why in Salmond (ibid) it is stated;

**“The defence (of justification) is a dangerous one, for an unsuccessful attempt to establish it may be treated as an aggravation of the original injury”**

17. From the evidence as I have set out above, what the Respondent attempted to prove was:-

(i) That the Appellant collected money without receipts for the construction of an Administration Police post/lines in his locality and did not issue receipts and arrested persons who did not pay that money.

(ii) That he held kangaroo courts and fined people he found guilty of offences including trespass.

18. No evidence whatsoever was laid to show;

(a) that he had a habit of collecting money from those who used to go to **“the near market (sic) to sell their produce and no official receipt was issued to that effect”**. All the witnesses for the Respondent said that they were arrested at home and money demanded and when they refused to pay they were taken to Nchiru Police Station. This assertion is materially different from the original complaint contained in the offending letter.

(b) That he was working under the instructions of godfathers who influenced his employment as an assistant chief. On the contrary P.W.2 said that the Appellant was interviewed and employed on merit.

(c) That he interfered with land cases in many ways. This is materially different from the holding of Kangaroo courts and in any event the evidence on record relates to trespass to land by a cow belonging to one Kaleo who was not called to testify and the evidence in that regard little more than hearsay.

(d) That he used to go to people's homes and conduct searches without a warrant. This is materially different from the evidence that he arrested people at their homes for failure to pay money to build an Administration Police post or lines.

19. Without saying much more, it is clear that the material statements contained in the offending letter were not all proved and by repeating them on evidence, the Respondent perpetuated the injury and the defence of justification fails. Once it has failed then the falsity of the statements becomes a matter of presumption. Has the Appellant's reputation been injured? Clearly yes; all his witnesses said categorically that they changed their attitude towards him and doubted his integrity as a leader and public servant. That is a clear case of defamation as is stated in Winfield on Tort 8<sup>th</sup> ed. At page 254 that:-

**“Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person”.**

20. Incidentally, publication cannot be denied because the Respondent said that he circulated it and

discussed it with people in his sub location and other people followed suit and wrote other letters which were copied to the Appellant's superiors. In fact D.W. 2 confirmed this fact in his evidence.

21. Having found as I have that the offending words were defamatory, then I should quickly move on to the quantum of damages payable. In submissions, before me I was not pointed to any issue regarding damages payable. In submissions before the trial court, however, counsel for the Appellant proposed the figure of Ksh.300,000/- in damages based on the authority of Mutuma Angaine vs Standard Ltd HCCC 6191/1991. In that case the offending words were that Mutuma Angaine, "**clerk of Meru Municipal Council does not have the necessary qualifications for the Post**" and Bosire J (as he then was) awarded Ksh.200,000/- in damages. The offending words in that case are not far in substance from the ones in this case but taking into account the effects of time since that judgment, inflation and the increase in cost of living, I agree that Ksh.300,000/- would be adequate compensation to the Appellant's reputation. In fact D.W. 2 confirmed this fact in his evidence.

22. In the event, I shall allow the Appeal, set aside the order of dismissal of the suit in the trial court and substitute that order with an award of ksh.300,000/- in damages against the Respondent together with costs in the trial court and appeal. Interest is also granted on the award and costs at court rates from the date from the date of Judgment in this court until payment in full.

23. Orders accordingly.

Dated, signed and delivered in open court at Meru this 3<sup>rd</sup> Day of July 2007.

**ISAAC LENAOLA**

**JUDGE**

**In the presence**

Mr. Rimita Advocate for the Appellant

Mr. C. Kariuki Advocate for the Respondent

**ISAAC LENAOLA**

**JUDGE**