REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL 102 OF 2003

REPUBLIC..……..……...……APPELLANT

-VERSUS-

JACKSON KITUU KIILU ……..…….. 1ST RESPONDENT

FRANCIS NDERITU MUCHIRI ……..…….. 2NDRESPONDENT

(Being an Appeal from the Ruling of A. W. Gathogo Esq., Resident Magistrate read on 29th August 2003 by Solomon Wamwayi, Chief Magistrate in Eldoret Chief Magistrate's Court Criminal Case No.11010 of 20003)

REPUBLIC ……..…..…... PROSECUTOR

-VERSUS-

JACKSON KITUU KIILU ……..…..…… 1ST ACCUSED

FRANCIS NDERITU MUCHIRI ……...…….…… 2ND ACCUSED

JUDGEMENT

This is an appeal by the State against the decision of the Resident Magistrate at Eldoret acquitting the two respondents on the ground of no case to answer.

The respondents were charged with the offence of publishing defamatory matters contrary to section 194 of the Penal Code (Cap.63).The particulars of the charge were that on the 26th day of December 2002 at Eldoret town in Uasin Gishu District of the Rift Valley Province, jointly with others not before the court, with intent to defame Reuben Chesire, they published defamatory matters concerning the said Rebuen Chesire namely, he is corrupt, immoral and looted Kshs.18 million from Kenya Grain Growers Cooperative union.After hearing eight witnesses and submissions from the prosecution and the defence, the learned magistrate delivered a ruling acquitting the respondents on no case to answer.

The State has appealed from the decision of the learned magistrate on five grounds as follows: –

1.That the learned magistrate erred in law and in fact in acquitting the respondents under section 210 of the Criminal Procedure Code.

2.That the learned magistrate erred in law and fact in disregarding and overlooking the overwhelming evidence adduced in court by the prosecution.

3.That the learned magistrate erred in law and in fact in acquitting the respondents when there was sufficient and corroborative evidence worth of conviction.

4.That the learned magistrate erred in law and in fact in acquitting the respondents whereas the prosecution had proved their case beyond reasonable doubt.

5.That the learned magistrate erred in law and in fact in arbitrarily making a ruling that clearly offends the principles of natural justice.

The State asked the court to allow the appeal, reverse the determination of the subordinate court and make such orders that it may deem just to grant.

At the hearing of the appeal Mr. Omutelema the Principal State Counsel submitted that the learned magistrate erred in acquitting the respondents on no case to answer.That the magistrate put the standard of proof as proof beyond reasonable doubt instead of a prima facie case that is required to put the respondents on their defence.He also submitted that the magistrate misdirected herself on the ownership of the subject motor vehicle.That there was also a misdirection on who had authored the offensive articles as the magistrate did not direct herself to the distinction between authoring and distribution.The case was for distribution, not based on authorship.He also submitted that the magistrate misdirected herself on the search when she stated that the search was in the absence of the respondents.He referred to section 194 and 196 of the Penal Code (Cap.63), which define various modes of publication, which include delivery.

Mr. Nyachiro for the respondents submitted that the magistrate was justified in acquitting the respondents on no case to answer.The evidence is on an occurrence that took place on 25th December 2002 while he charge sheet stated that the offence was committed on 26th December 2002.Also no prima facie case had been established by the close of the prosecution case.A prima facie case is basically evidence which, if the accused does not tender any evidence, then a conviction would be justified.He submitted further that there was no evidence that the first respondent went and collected the vehicle from the police station.

He furthersubmitted that section 194 of the Penal Code (Cap.63) provides that it is necessary to prove authorship of the articles and the connection of the authorship with accused persons.He further submitted that there were contradictions in the evidence of PW1 and PW2 on the source of the information that connects the respondents to the alleged offence.He submitted that in any case that information is hearsay.

I have perused the record of the proceedings. The respondents were charged with publishing defamatory matters.The charge specifically stated that the date was 26th December 2002.The witnesses who testified in court stated that the offence occurred in the night of 25th December 2002 at about 10.30 pm.That the respondents were in a vehicle, which was found to have had the defamatory publications.The key witnesses were PW2 and PW3.Neither PW2 nor PW3 saw any of the respondents distributing or throwing out the said articles.The evidence of PW2 (Bob Muya) was that while he was at Korosoit hotel, the KANU supporters spoilt the NARC pasting materials in a jerrican.It was his evidence that the second respondent kicked the jerrican.The first respondent was in a sports car.The first and second respondents went away and returned shortly in a vehicle which had cabin lights on.The witness said that he saw pink leaflets inthe vehicle and also a coy of the Weekly News paper.He askedthe respondents whether they were supplying the leaflets and they denied.Then PW3 William Chesire grabbed the keys of the vehicle.

PW3 stated that while near Reuben Chesire's house at Elgon View, earlier on the same night, they had seen some leaflets flying from a vehicle.They did not identify the occupants of that vehicle.On this evidence the magistrate found that the respondents did not have a case to answer on the offence of publication of defamatory matters.

I have reviewed the evidence on record as well as the ruling of the learned magistrate.There is no evidence that the respondents were the authors of the documents.The Weekly News Paper which is said to be defamatory is said to have been written by Wycliff Okello.That Wycliff Okello is neither of the respondents, nor was he found.There is no evidence that any of the witnesses saw any of the respondents distributing the documents.The learned magistrate considered and evaluated the evidence on record to

come to her conclusion.In my view, even assuming for the sake of argument that the two respondents were in the car that was carrying the said documents, that would not amount to publication as required by law.They had either to be authors or distributors.There is no evidence that they were either.Secondly there is the issue of the variance of the dates with the charge sheet stating the date of the offence as 26th December 2002 and the evidence of witnesses stating the date of the offence as 25th December 2002.That was a crucial discrepancy.It was not corrected before the close of the prosecution case.

The learned magistrate acquitted the respondents on the basis that no prima facie case was established to put the respondents on their defence. On the evidence on record, I find that she was justified in doing so.I find no reason to depart from her findings and decision.She directed herself properly on the evidence before her.She did not make a ruling that offends the principles of natural justice, nor did she overlook the evidence of the prosecution.

For the above reasons, I dismiss the appeal and uphold the decision of the learned magistrate.

Delivered and Dated at Eldoret this 17th Day of February 2005

George Dulu

Ag. Judge

In the Presence of:Mr. Nyachiro for respondents, Ms. Oundo for State.