

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA
Civil Appeal 56 of 1999

CALYSTUS MAKOKHA APPELLANT

V E R S U S

HUSSEIN OSORE MUNYIFWA RESPONDENT

**(An Appeal against the Judgement of Mr. C. Mwebi, Esq. RM, in
Kakamega SPMCC No. 643 of 1997 delivered on 6th May, 1999**

JUDGEMENT

Calistus Makokha Akunda (the Appellant) sued Hussein Osore Munyifwa (the Respondent) on 28.11.97 in Civil suit No.643 of 1997 in the Senior Resident Magistrate's Court at Kakamega seeking general damages for defamation. The translated words alleged to constitute defamation were uttered in a public baraza on 22-5-1997 by the Defendant and were alleged to be:-

**“you Calystus is (sic) a killer. You have killed
the father-in-law to Joseph Taabu Shiundu.”**

The Defendant in his defence denied these allegations and put the Plaintiff to the strict proof of the allegations.

The trial Resident Magistrate, C. Mwebi Esq., who heard the defamation suit found that the Plaintiff, who is the Appellant herein, had failed to prove his case on the balance of probabilities and dismissed the suit with costs prompting this appeal.

In his Memorandum of Appeal, the Appellant attacked the learned trial magistrate's decision in his four grounds of appeal in which he submitted that the case had been proved on the balance of Probabilities, that there was overwhelming evidence against the Respondent, that the learned trial magistrate erred in entertaining extraneous matter “as his basis of dismissing the suit” and finally that the trial court erred in not finding that the defence to the suit was a mere denial which should have been struck out.

Mr. Wekulo, who appeared for the Appellant argued all the grounds of appeal together and submitted that the defamatory words were in Luhya language and were translated and that as the allegation was supported by other evidence the court should have found for the plaintiff.

Mr. Mukavale, who appeared for the Respondent, opposed the appeal and submitted that the contentious word was “kill” and the witness who testified gave contradictory evidence regarding what they heard. He contended that the Appellant failed to prove his case on the balance of probabilities. It was his submission that there was no extraneous matter taken into account by the trial court and that the suit was rightly dismissed.

I have carefully perused the evidence adduced at the trial court. The words pleaded in the plaint alleged to be the defamatory words uttered by the Respondent were not on the balance of probabilities shown by evidence to have been uttered by the Respondent. The evidence in this regard was contradictory. The burden of proof lain on the Appellant to prove his case. The burden was not discharged. The suit was rightly dismissed. There is no merit in the appeal. It is dismissed with costs.

Dated at Kakamega this 6th day of October, 2005.

G. B. M. KARIUKI

JUDGE