



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 69 OF 2001**

**(From Original Conviction and Sentence in Criminal Case No. 2075 of 1997  
of the Chief Magistrate's court at Nairobi)**

**PATRICK GICHEHU GATONYE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

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

The appellant PATRICK GICHEHU GATONYE was committed by the Principal Magistrate Nairobi of the offence of publishing defamatory matter c/s 194 of the Penal Code. He was placed on probation for a period of 2½ years. The appeal is against both conviction and sentence. The particulars of the charge are that in diverse dates between 6th day of November, 1996 and 14th day of August, 1997 within Nairobi area with intent to defame ELIZABETH WANJIKU MUCHIRA the appellant published defamatory matters concerning the said ELIZABETH WANJIKU MUCHIRA that she was recruiting students in lesbianism and drug trafficking. The prosecution called evidence from 15 witnesses. The appellant gave evidence on oath and called 2 witnesses.

The appellant and Elizabeth Wanjiku Muchira (PW1) were employees of U.N.E.P Gigiri Nairobi. There is evidence that there was bad blood between the two touching on the former wife of the appellant. Some anonymous letters were written to PW1 and circulated to individuals and institutions. The letters were defamatory in nature and disparaged PW1. Initially PW1 suspected the appellant but there was no evidence to convict him with the letters.

IP James Muraguri (PW15) of CID Gigiri testified that on 16.11.1996 PW1 complained to him about the anonymous letters. He called the appellant to be taken to his office. He recorded a statement under inquiry from the appellant in which the appellant denied knowledge of the letters. PW15 then released the appellant. PW15 convened a search at the appellants house at Kinoo and found nothing incriminating the appellant.

The arrest and arraignment of the appellant was prompted by an alleged visit to the office of PW1 by the appellant's gardener called Ngugi and 2 young girls. Ngugi is said to have presented copies of some of the defamatory letters to security officers at UN offices Gigiri who called P.C Franklin Kirimi (PW14). PW14 accompanied Ngugi to the appellants house, in the absence of the appellant, and broke into the appellants bedroom where the purportedly bundles of the defamatory letters.

In his defence the appellant to fully denied committing the offence. He denied that he knew Rose Nyambura Kinyanjui (PW2) who allegedly typed a draft for the appellant and made photocopies thereof. He complained that the specimen which were in his handwriting were written by him when the police asked him to do so.

I have reevaluated the evidence presented to the lower court. My finding is that the prosecution case was not proved beyond reasonable doubt. The appellants gardener and the 2 girls were not called as witnesses for the prosecution. The itching question is what made the appellants gardener betray his master? That was not unraveled. The appellant was on duty the day a search was made in his house. The search and the alleged recovery of letters and other items in the appellants house and cars was prejudicial to the appellants case. This is so especially in view of the fact that an earlier search had been conducted in November, 1996 which bore no fruit. The research and “recovery” in my view looks like a plan against the appellant. The appellants locker in the office was also broken and searched in the appellants absence. This was irregular and quite unjustified. There is no indication that the appellant was not available when his locker and bedroom were broken into. Looking at the tried of events we can easily conclude that the letters were planted on the appellant. In the judgement the learned trial magistrate remarked that the appellant made no effort to defend himself at the course of the prosecution case. Such observation is wrong in law. In a criminal case the burden is in the prosecution to prove its case against an accused person beyond reasonable doubt. It is not for an accused person to prove his innocence.

The conviction of the appellant was unsafe. I allow the appeal quash the conviction and set aside sentence. The appellant will be set at liberty.

Dated this 25th day of January, 2002.

J.K. MITEY

JUDGE

25.1.2002

Mitey, J

Appellant present

Mungai holding brief for Okello

Ndungu – Court Clerk

COURT

Judgement delivered.

J.K. MITEY

JUDGE