



REPUBLIC OF KENYA



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**Kiriga alias Ikev Ivooke v Kagia (Civil Appeal E236 of 2024)
[2025] KEHC 5949 (KLR) (7 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E236 OF 2024**

E OMINDE, J

MAY 7, 2025

BETWEEN

KEVIN NDUNGU KIRIGA ALIAS IKEV IVOOKE APPELLANT

AND

BERNARD KAGIA RESPONDENT

(Appeal arises from the ruling delivered by Hon. Peter Areri in Eldoret Chief Magistrates' Case No. E404 of 2024 which was delivered on 19/11/2024.)

JUDGMENT

1. This appeal arises from the ruling delivered by Hon. Peter Areri in Eldoret Chief Magistrates' Case No. E404 of 2024 which was delivered on 19/11/2024. The ruling arose from a Notice of Motion dated 10/09/2024 wherein the respondent sought to cite the applicant for contempt. The alleged contempt arose from the orders by the trial court, delivered on 03/09/2024.
2. The orders in the trial court were to the effect that the appellant was restrained from posting defamatory remarks against the plaintiff pending the determination of the suit. The appellant opposed the application vide a replying affidavit and the trial court determined the application vide a ruling delivered on 19/11/2024. In its ruling, the trial court cited the appellant for contempt pursuant to section 6(c) of the Contempt of Court Act. Additionally, the trial court issued a notice to show cause as to why the appellant should not pay a fine of KShs. 200,000/- or serve six months' imprisonment, pursuant to section 28 of the Contempt of Court Act.
3. Being aggrieved with the ruling, the appellant instituted the present appeal vide a Memorandum of Appeal dated 22/11/2024. The Appeal is premised on the following grounds;
 - i. The Learned Magistrate erred in law by considering and determining an application brought under the wrong provisions of the Law to wit, Section 5 of the Judicature Act, Section 3A of the



Civil Procedure Act, Order 40 Rule and Order 51 Rule 1 of the Civil Procedure Rules instead of Section 10 of the Magistrates Court Act No 26 of 2015.

- ii. The Learned Magistrate erred in law by applying an unconstitutional (and thus nullified and inoperative) Contempt of Court Act in his analysis and determination of the Contempt Application.
- iii. The Learned Magistrate erred in law by admitting and relying on, as evidence, the Judgement record of MCCR/E658/2022, the subject of an active appeal HCCRA/E107/2023, a fact that was brought to his attention both in (my) Replying Affidavit to Notice of Motion dated June 15, 2024 as well as in (my) Submissions to the Contempt Application, contrary to Section 47A of Evidence Act.
- iv. The Learned Magistrate erred in fact by finding that (I) had not disputed disobeying the court orders yet (I) had averred as much both in my replying Affidavit and my submissions.
- v. The Learned Magistrate erred in law and in fact by omitting from his analysis highlighting what part of the impugned Facebook post was contemptuous and how so.
- vi. The Learned magistrate erred in law and intact by ordering (me) to purge the contempt by "...pulling down all defamatory remarks against the plaintiff/applicant..." yet the contempt alleged/complained of in the application was disparaging the plaintiff's employer and not the plaintiff.
- vii. The Learned magistrate erred in law and in fact by ordering (me) to purge the contempt by "...pulling down all defamatory remarks against the plaintiff/applicant..." without identifying the defamatory remarks making them incapable of being enforced.
- viii. The Learned magistrate erred in law by relying on the nullified Contempt of Court Act in prescribing the punishment of a fine of Kshs. 200,000/- or six (6) months imprisonment far in excess of the prescribed punishment under Section 10 (6) of the Magistrates' Courts Act.

Hearing of the appeal.

4. The parties canvassed the appeal vide written submissions. The appellant filed submissions dated 22/12/2024 whereas the Respondent filed submissions dated 07/02/2025 through the firm of Messrs. Oduor, Munyua & Gerald Attorneys at Law LLP.

Appellants' Submissions.

5. The Appellant submitted that the contempt application was brought under Section 5 of the Judicature Act, section 3A of Civil Procedure Act, Order 40 Rule 1 (a) and Order 51 Rule 1 of the Civil Procedure Rules, none of which were relevant to move the court. Further, that the Respondent ought to have moved the court under Section 10 of Magistrates Act which grants the subordinate courts power to punish contempt. He urged that the trial magistrate ought to have struck out the motion on this very ground as was held in *Mariga & 2 others v Mariga & another* [2024] KECA 470 (KLR). He additionally cited the case of *Daniel Kimani Njihia v Francis Mwangi Kimani & Thika District Land Registrar* [2015] KESC 19 (KLR).
6. The applicant submitted that worse than allowing an application under the wrong provisions of the law, the trial magistrate tried the same, under nullified legislation. He highlighted that in paragraph 5 of the ruling delivered on 19/11/2024, the magistrate cited sections 5 and 6 of the Contempt of Court Act, as well in the final where he quoted Section 28 of the same Act to punish contempt. He



cited the case of Kenya Human Rights Commission v Attorney General & Law Society of Kenya [2018] KEHC 9656 (KLR), where Justice Chacha Mwita held that the *Contempt of Court Act* was unconstitutional, urging that the *Contempt of Court Act* had been nullified for six years as at the time of filing the contempt application. Further, that even without *Contempt of Court Act*, the trial magistrate had recourse in Section 10 of Magistrates Courts Act, the very legislation that established his court and office. He cited Section 10(6) of the Act and contrasted it with Section 28(1) of the nullified *Contempt of Court Act*, urging that it follows that the trial magistrate meted the maximum punishment, under the nullified Act, of a fine of Kshs 200,000/- or imprisonment of six months, both of which were way in excess of his jurisdiction. The appellant submitted that for allowing his court to be moved under the wrong provisions, and for hearing, determining and punishing Contempt under unconstitutional and therefore null and invalid legislation, this court should set aside the Ruling and consequential orders.

7. On whether he was in contempt as at 19/11/2024, the appellant submitted that the court needs to interrogate the ex-parte orders dated 27/06/2024, the temporary injunctive orders from the ruling dated 03/09/2024, the Contempt Application dated 09/09/2024 as well as the ruling dated 19/11/2024. He highlighted that the ex-parte orders restrained the appellant “from making further defamatory remarks against the plaintiff and or his employer pending hearing and determination of this application and or further orders of the court” and further, stated that these orders lapsed or expired on 03/09/2024 when the trial court made a determination of the application and issued further orders restraining the appellant “from further posting or publishing any defamatory statements and/ or making any defamatory posts or publications in relation to the Plaintiff pending the hearing and determination of the main suit.’ He stated that the only difference between 27/06/2024 ex-parte orders and final temporary injunctive orders of 03/09/2024 was that the latter excluded the plaintiff’s employer.
8. He urged that the Contempt Motion dated 10/09/2024 ought to have been struck out at the first instance as it did not disclose any reasonable cause of action for, whereas it complained about the Respondent’s employer being disparaged, the September 3rd temporary injunctive orders restrained the appellant from making further defamatory posts in relation to the Respondent and not the Respondent’s employer. Further, that in paragraph 4 of the Contempt Ruling, where the trial Magistrate stated: “...It is common ground that on 3rd September 2024 the court restrained KEVIN NDUNGU KIRIGA alias IVEK IVOOKE the defendant/Respondent from further posting defamatory remarks against the plaintiff and/or his employer pending the hearing...”, and whether by mischief or innocent mistake, the magistrate materially misstated his September 3rd temporary Injunctive orders by adding the respondent’s employer as the object of the orders. He urged that the misstatement of the injunctive orders notwithstanding, the trial magistrate erred in citing the appellant for contempt as nowhere in the respondent’s pleadings, in both the June 18th and September 10th applications served upon the appellant, was this employer identified, nor was any evidence on record proving that the respondent was employed by any of the persons mentioned in the September 9 Facebook post complained of.
9. The appellant submitted that in Paragraph 7 of the Contempt Ruling, the trial magistrate, by stating; “The defendant/Respondent herein does not dispute the fact that he has disobeyed the court’s orders. He only disputes ownership of the Facebook page IVEK IVOOKE...” grossly misapprehended or ignored the appellant’s averments as the appellant in his defence disputed and denied obeying the court orders both in his Replying Affidavit to the contempt application as well in his written submissions. He maintained that the trial magistrate erred in deeming the charge of disobeying the court’s order unchallenged and uncontroverted.



10. The appellant submitted that it is trite law that Contempt proceedings are quasi- criminal in nature, a fact the trial magistrate pointed out and brought out by Section 10(7) of Magistrates Act. Further, that the standard of proof is higher than Civil Proceedings' balance of probability and lower than criminal procedure's beyond reasonable doubt as was held in *Mutitika v Baharini Farm Ltd* [1985] KECA 60 (KLR). He urged that the trial court exclusively relied on a criminal judgement for evidence and highlighted paragraph 7 the impugned decision in this regard. He stated that a criminal appeal was lodged on 23/11/2023 against both the conviction and sentencing of MCCR/E658/2022 which appeal is before this court. Further, that the trial Magistrate was duly notified of the appeal by the appellant in his averments in response to the application dated 10/06/2024 where a record of the appeal was annexed. He additionally cited Section 47A of *Evidence Act*, urging that the appeal is an estoppel against admitting and relying on the criminal case judgement in any court of law until the appeal is determined and dismissed if ever. In support of these submissions, he cited the decisions in *You Guo Jiang Siefco v AA Kawir* (Civil Appeal 122of1996) 1996 KECA 188 (KLR), *Kenyatta Obegi & James Nyabuto Obegi v Sebastiano Oino Mogusu* [2021] KEHC 9608 (KLR) and *John Njoroge Murigi v DMK* (Minor suing through the father and next friend Michael Kariuki Ng'ang'a) [2022] KEHC 2479 (KLR).
11. The appellant urged that the Respondent's repeatedly referring to him as the alias iKev iVooke, without his consent, injects bias in the trial magistrate, as he is presumed to be the owner/author/publisher of the Facebook account/page iKev iVooke and reduced to merely defending the publications before there is evidence that he owns or controls the account and page.
12. The appellant submitted that almost every facet of Right to a Fair trial under Article 50 was violated by the trial court from the moment the trial magistrate issued the ruling on November 19 to November 29 for various reasons, to wit; on 29/11/2024 the trial magistrate punished him for contempt under a nullified law; that in the orders of 19/11/2024 the trial magistrate ventured into other frolics outside the one Facebook postdated September 9 and that his rights to adduce and challenge evidence was violated contrary to article 50(2)(k) as the Respondent produced evidence of non-compliance with the orders of the court, which evidence he was not served with. He maintained that the events after November 19 separately amounted to a sham or mock trial calculated to jail the appellant at all costs in by disregarding his Article 50 of *the Constitution*. The Appellant prayed that this court allows the appeal, quashes all consequential orders of the trial court and orders a refund of the Kshs. 185,556/- fine.

Respondent's submissions.

13. Learned counsel for the respondent submitted that the Magistrates' Court Act, under section 10, gives the Magistrates Court jurisdiction to hear contempt of court matters. Further, that section 10 (3) provides the scope of contempt in civil matters. He submitted that orders of the court are binding and should be adhered to, urging that this was stated by Mativo J (as he then was) in *Samuel M. N. Mweru & Others v National Land Commission, Nairobi City Water and Sewerage Company Limited & Nairobi City Water County* [2020] KEHC 9233 (KLR). Counsel further submitted that Contempt of Court therefore is the conduct that defies or disrespects the authority of court, and went on to cite the definition of the same from *Black's Law dictionary 9th Edition*. He additionally cited the case of *Shimmers Plaza Ltd v National Bank of Kenya Ltd* [2015] KECA 945 (KLR) and the case of *Katsuri Limited v Kapurchand Depor Shah* [2016] eKLR, in this regard.
14. Counsel submitted that in *Samuel M. N. Mweru & Others v National Land Commission, Nairobi City Water and Sewerage Company Limited & Nairobi City Water County* [2020] KEHC 9233 (KLR) Mativo J. stated that the aspects that need to be proven in civil contempt include;



- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
 - (b) the defendant had knowledge of or proper notice of the terms of the order;
 - (c) the defendant has acted in breach of the terms of the order; and
 - (d) the defendant's conduct was deliberate.
15. Further, that the aspects set hereinabove were met and that the Appellant was in contempt of court. The Appellant had knowledge of the court orders issued on 27/6/2024 and 3/9/2024 restraining him from making further defamatory statements against the Respondent and or his employer. He however disobeyed the said orders and went ahead and posted the defamatory statements on his Facebook page using the name Ikev Ivooke. Furthermore, his actions were deliberate as they referred to the prayers that the Respondent is seeking in the suit. Counsel urged that the post by the Appellant was not only a disobedience to the court orders, but in so doing, he also diminished the dignity of the court. He did so by stating in his post that "As I once said the only way Omieri takataka can ever win against Ikev Ivooke is by using the best Senior Counsels, alumni of University of Nairobi Faculty of Law, AND compromising the court. "
16. Counsel cited the case of Sheila Cassatt Issenberg & Watoto World Centre v Antony Macharia Kinyanjui [2021] KEHC 5592 (KLR) where Mwita J laid out the reason why courts punish contempt, and urged that from the actions of the Appellant, and him implying that the court can be compromised, he was indeed in contempt, as was found by the Magistrate.
17. Counsel cited Section 27 of the *Civil Procedure Act* and the case of Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd [2014] eKLR with regards to costs. He urged the court to dismiss the appeal with costs to the Respondent.

Analysis & Determination.

18. The duty of a Court sitting as a 1st appellate Court is as laid out in the case of Abok James Odera T/ A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-
- "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."
19. Further in Williamson Diamonds Ltd and another v Brown [1970] EA 1, the court held that:
- "The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."
20. Having addressed my mind to the Grounds of Appeal raised by the Appellant as well as the submissions by Counsel for both parties, I note that the Appellant has raised inter alia, two very pertinent and germane issues. The 1st issue pertains to the Statutory Provision under which the Trial Magistrate found him guilty and proceeded to punish him for contempt. The 2nd issue pertains to the fact that the Trial Magistrate found him guilty and punished him for contempt whereas he had already lodge an appeal



against the entirety of the Court’s decision and the matter was already live before the High Court. I note that he did submit on these issues in great detail and at length.

21. The above notwithstanding, I note that Counsel for the Respondent in his submissions largely dwelt on the facts of the case and what defines and/or constitutes contempt of court. Save to mention that Magistrates have power to punish for contempt under Section 10 of the Magistrates’ Court Act he did not specifically address himself to this ground of appeal that the Trial Magistrate proceeded under the wrong Statutory Provision and did not at all address the second issue. In this regard then, it is my considered opinion that the twin issues for determination then are;

- a. Whether the trial court erred by punishing the appellant for contempt under Section 5 and 6 of the Contempt of Court Act No. 46 of 2016.
- b. Whether the trial court erred in relying on the judgement in a criminal case that is pending hearing on appeal as evidence of contempt

22. It should be noted that in the case of Kenya Human Rights Commission v Attorney General & another [2018] eKLR, Justice Chacha Mwita declared the Contempt of Court Act No. 46 of 2016 unconstitutional when he stated as follows;

Having considered the petition, the response, submissions, the constitution and the law, I am persuaded that sections, 30 and 35 of the Contempt of court Act are unconstitutional. I, however, find that the entire fails the constitutional test of validity for lack of public participation and for encroaching on the independence of the judiciary. Consequently, and for the above reasons, this petition succeeds and I make the following orders.

1. A declaration is hereby issued that Sections 30, and 35 of the impugned contempt of court Act No 46 of 2010 are inconsistent with the constitution and are therefore null void.
2. A declaration is hereby issued that the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary [Emphasis mine]

23. Subsequently in the case of Akoyo v Permanent Secretary, State Department for Devolution; Attorney General (Interested Party) (Application 440 of 2018) [2023] KEHC 23189 (KLR) (Judicial Review) (6 October 2023) (Ruling), while discussing the effects of the repeal of the Contempt of Court Act, Justice Ngaah, whose finding I wholly associate myself with, expressed himself as follows;

Since the law that purported to repeal the Act was voided, the result was that we reverted to section 5 of the Judicature Act on matters contempt. The net effect of annulling the Contempt of Court Act, 2016 was that it was if the never existed. It was void ab initio and no action taken upon it, including the purported repealing of the Judicature Act can be said to be valid.

24. In MacFoy v United Africa Company Appeal No.67 of 1960 (Privy Council) it was held as follows:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity.

25. With the Contempt Court Act having been declared unconstitutional and therefore reverting the Courts to applying Section 5 of The Judicature Act in dealing with matters of contempt of Court, it



should further be noted that the said Section 5 is specifically with respect to the Power of the High Court and the Court of Appeal and not the Magistrates 'Court to punish for contempt. It provides as follows;

Section 5; Contempt of court.

1. The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
26. In this existing scenario then, the power of the Magistrates' Court to punish for contempt is provided under Section 10(3) of the Magistrate's Courts Act CAP 10 Laws of Kenya which provides as hereunder;
 - (1) Subject to the provisions of any other law, the court shall have power to punish for contempt.
 - (2) ...
 - (3) In the case of Civil proceedings, the wilful disobedience of any judgment, decree, direction, order, or other process of court or wilful breach of an undertaking given to a court constitutes contempt of court.
 - (4) ...
 - (5)
 - (6) The court may sentence a person who commits an offence under Sub-Section (1) to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shilling or both;
 - (7) A person may appeal against an order of the court made by way of punishment for contempt of court as if it were a conviction and sentence made in exercise of the ordinary original criminal jurisdiction of the court.
27. In light of the above, on the 1st issue for determination, I do find that indeed the Trial Magistrate erred in convicting and sentencing the appellant herein for contempt under the Provisions of the [Contempt of Court Act](#) No. 46 of 2010 for the simple reason that the said Act having been declared unconstitutional then ceased to exist. As rightly submitted by Counsel for the Respondent, the Court ought to have proceeded under Section 10 of the Magistrates 'Court Act. This finding then renders the entire contempt proceedings before the Trial Court a nullity.
28. On the second issue on whether the trial court erred in relying on the judgement in a criminal case as evidence of contempt, In light of my finding on the 1st issue, I will not go into much ado on the same save to point out that as long as an appeal has been filed against a decision of any Court and is still live before a Superior Court, then the provisions of Section 47A of the [Evidence Act](#) come into play and under the provisions of the said Section, such a matter cannot be said to have been conclusively determined
29. Section 47A of the [Evidence Act](#) is to the following effect;



A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

30. The upshot of my findings then is that the Appellant's Appeal has merit and the same is allowed in its entirety. The finding of the Hon Peter Areri in his Ruling delivered on 19th November 2024 together with the subsequent Conviction and Sentence is now hereby set aside in its entirety and the Appellant if held in custody as a consequence of the said Ruling is to be released forthwith unless otherwise lawfully held.

READ DATED AND SIGNED AT ELDORET ON 7TH MAY 2025

E. OMINDE

JUDGE

