



**Milune & another v M’itirithia (Civil Appeal E061 of 2021)
[2023] KEHC 1870 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E061 OF 2021
EM MURIITHI, J
MARCH 16, 2023**

BETWEEN

JULIUS THURANIRA MILUNE 1ST APPELLANT

GEOFFREY M’ITHEGA 2ND APPELLANT

AND

IBRAHIM M’ELAKU M’ITIRITHIA RESPONDENT

*(An appeal from the Judgment and Decree of Hon. B. Mararo
(P.M) in Tigania PMCC No.16 of 2015 delivered on 19/4/2016)*

JUDGMENT

1. By a plaint dated February 16, 2015, the respondent sued the appellants seeking special damages, general and exemplary damages for defamation, costs of the suit and interests. He pleaded that on September 30, 2014, the appellants while in the company of a group of about 30 people came to his home within Kiorimba location and made false and malicious utterances with the intention of inciting the said group to inflict physical harm on him. The 1st appellant, while addressing the said group at the gate to his home stated that, “Ibrahim M’Elaku M’itirithia ni Murogi Nabatere Kuuragwa” translated to, “Ibrahim M’Elaku M’Itirithia is a witch. He should be killed.” The 2nd appellant on his part stated to the said group that, “Ibrahim M’Elaku ni Murogi na abatere kuthaamua na nja yekie yonthe na muunda jwawe junekerwe mwingi” translated to “Ibrahim M’Elaku is a witch. He should be chased away together with his family and his land given to the public.”
2. The plaintiff averred that the said words were defamatory and were understood to mean and meant that, he is a social misfit, an evil and dangerous person, who should be avoided by members of the society, because he practices witchcraft. As a consequence of the appellants’ unwarranted utterances, his reputation has been brought into public scandal and ridicule, as he is now being shunned by the



right thinking members of the society. He claimed for damages, costs of this suit and interest because he has suffered immense loss and damage.

3. The appellants denied the claim by their joint statement of defence dated March 13, 2015 and prayed for the respondent's suit to be dismissed.
4. After conclusion of the trial, the trial court found that the respondent had proved his case on a balance of probabilities, and awarded general damages of Ksh 800,000 plus costs and interest.

The Appeal

5. On appeal, the appellants filed their Memorandum of appeal on May 24, 2021 listing 5 grounds as follows:
 1. The learned Magistrate erred in law and fact by failing to appreciate that the burden of proof of general damages lay squarely on the respondent.
 2. The learned Magistrate misdirected himself on the assessment of quantum of general damages.
 3. The learned Magistrate misdirected himself by awarding general damages that were manifestly excessive and exorbitant in the circumstances of the case.
 4. The learned trial Magistrate erred in law and fact by failing to afford the appellants the right to a fair hearing.
 5. The learned Magistrate misdirected himself in law and fact by failing to consider that the appellants had filed a statement of defense and witness statements and ought to have been heard yet no reason was given and/or put on record as to why they could not be heard yet they were present in court and had demonstrated intention to defend the case.

Duty of the court

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co & others* [1968] EA 123).

The Evidence

7. PW1 Ibrahim M'Elaku M'Itirithia, the respondent herein, testified that:

“I have sued Julius and Geoffrey, they called me a witch, they slandered me. People now shun me as they think I am a witch. We went to the chief in 2014. They came on September 29, 2013 and September 20, 2014. It is what I have sued. They came to my home they wanted to kill me. They were about 30 there was a group of people. Julius said that I should be killed. Geoffrey said that I will be killed and my family evicted and my land reverted to public. I went to IO. The chief. He gave me a letter: 2nd chief referred to letter dated October 2, 2014 – P exhibit 1. I reported and was given an OB. OB/8/9/10./2014 – p Exhibit 2. Police came to my plot even the AP I told them what happened. I did not talk to police. Letter from chief dated October 14, 2014 – P Exhibit (1). We have not cased with them about witchcraft before. I have reported to police/chief/court. I did that dated letter D letter dated October 27, 2014 – P Exhibit 1. My friends shun me and my children do not go to school.



I live dangerously. I can die anytime. I am a church elder – Independent church. I cannot be given responsibility as they call me a witch. I cannot use my power – saw/sell maize they are jealous as my land is near the market. They have no right to insult me. Isaac and Mwirigi are witnesses. I want peace, costs. They should be here, I have been defamed. I would like my statement to be used as evidence.”

8. PW2 Isaac Mutuma, testified that:

“I know PW 1 and Julius Geoffrey. I recorded my statement. I wish to adopt it. On September 30, 2014 defendant came with people from another location. When Julius said that PW 1 is a witch and ought to be killed. Geoffrey said that PW 1 is a witch and he should leave and his land given to market. PW 1 is my father. We were at home. PW 1 is not a witch. They were told my father is not a witch. He was a village elder. He was excommunicated. People disassociate with him. We leave apart from others. People shun us. They should come to court and show he is a witch. Matter arbitrated before chief no evidence of witchcraft found got shocked as my father is not a witch.”

9. PW3 Joseph Mwirigi testified that:

“It is about PW 1 being called a witch. One day I was going to the shop. He home near shop. One said that he is a witch and ought to be killed. The other said that he be evicted and his land given to the public. We are from the said village. I have known him since childhood. It is village elder (Independent) I got sacred as the allegations are not true. I have not known him as a witch. People avoid him. I fear I know Julius/Geoffrey who are neighbour they brought statement. I wish to have my statement adopt.”

10. The appellants, who were present in court when the matter was heard did not testify, and therefore their case was closed by the court.

11. After the judgment was delivered, the appellants appointed the firm of Mbaabu M’Inoti & Co Advocates to file the application dated 18/8/2016 to set aside the said judgment. When that request was denied, the said Advocates vanished from the record and another firm of Kuria Karatu & Co. Advocates improperly took over by a Notice of Appointment filed on May 24, 2021. Since judgment had been entered, the said firm ought to have filed a consent or obtained leave of the court to come on record for the appellants, in line with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, which was not done. That firm of Advocates, which is improperly on record, is the one who lodged the memorandum of appeal on behalf of the appellants.

12. Nonetheless, the court will proceed to determine the appeal on its merits.

Submissions

13. The appellants urge that apart from the unsupported words of the respondent, there was nothing put on record to show that he indeed ran a power saw business and the consequent effect arising from the alleged slander. They urge that since no independent witness was called to testify to the respondent being denied an opportunity to serve as the elder of the church, the trial court ought to have found that there was minimal damage, if any, done to him, to warrant award of excessive general damages, and rely on *Miguna Miguna v Standard Group Limited & 4 others* (2016) eKLR and *Wycliffe A Swanya v Tunyuta East Africa Limited & Francis Massai* (2009) eKLR.



14. The appellants fault the trial court for awarding excessive general damages which were way above what had been proposed by the respondent in his submissions, and urge the court to interfere with the award. They further fault the trial court for considering extraneous issues thus arriving at an excessive award, and rely on *Philip J Makokha Opwora v Christopher Otieno Muliro* (2021) eKLR, *Rose Okinyi v Dinah Kerebi Nyansinga* (2020) eKLR and *Joyce Wambui Njuguna v Paul Ihungo Kahenya* (2021) eKLR. They urge that the trial court ought to have leaned towards hearing all the parties and endeavours made to have the parties fairly heard, as required by Article 50 of *the Constitution*. They urge that the appeal is meritorious and it should be allowed with costs.
15. The respondent submits that he proved his case on a balance of probabilities in the trial court. He urges the court to find that Ksh 800,000 was a fair assessment of general damages under the circumstances. He notifies the court that the 2nd appellant has since died. He urges the court to find that the appellants were accorded every chance to defend the suit before the trial court but they elected not to. He urges that the appeal lacks merits and prays for its dismissal with costs.

Analysis and determination

16. The issues for determination are (a) whether the respondent proved his case against the appellants; (b) whether the general damages awarded were excessive; and (c) whether the appellants were accorded a fair hearing.

Proof of the case

17. *Black Law's Dictionary* 8th Edition defines defamation as "the act of harming the reputation of another by making a false statement to a third person."
18. The appellants are said to have called the respondent a witch in the presence of about 30 people. They further stated that he should be killed and his land given to the public. The starting point is to establish whether those statements are defamatory in nature?
19. A statement is defamatory of a person, in the words of the Court of Appeal in *S M W v Z W M* [2015] eKLR, (Karanja, Mwilu (as she then was) & Azangalala JJ.A), if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.
20. The respondent testified that the appellants, in the presence of about 30 people, slandered him by calling him a witch, as a result of which members of the society shunned him. He stated that, "... Julius said that I should be killed. Geoffrey said that I will be killed and my family evicted and my land reverted to public...My friends shun me and my children do not go to school. I live dangerously. I can die anytime. I am a church elder – Independent church. I cannot be given responsibility as they call me a witch. I cannot use my power – saw/sell maize they are jealous as my land is near the market."
21. PW2, who was present when the defamatory words were uttered by the appellants, corroborated the testimony of PW1. He stated that his father, PW1, who was a village elder, was excommunicated and people shunned and disassociated themselves with him. When the matter was heard before the chief, no evidence of witchcraft was found.
22. PW3 was going to the shop, which is near the respondent's home, when he heard the appellants utter the defamatory words. He was surprised to hear those unfounded allegations about the respondent because he had known him his entire childhood, as a village elder. As a result of the said words, people avoided the respondent.



Fair hearing

23. The appellants urged that the trial court infringed on their right to fair hearing as envisaged under Article 50 of *the Constitution* by condemning them unheard.
24. After being served with the pleadings herein, the appellants entered appearance on 9/3/2015 and filed a joint defence, a list of witnesses and a witness statement on March 13, 2015. After judgment had been entered against them, they appointed the firm of Mbaabu M'Inoti & Co. Advocates to apply for setting aside of the said judgment and leave to properly defend themselves. They disowned the documents they had earlier filed terming them as forgeries. The trial court, vide its ruling of November 1, 2016 dismissed the said application with costs.
25. The record shows that the appellants were present in court on June 2, 2015 when the hearing date of August 11, 2015 was fixed. On the date of the hearing, the appellants duly appeared in court when PW1, PW2 and PW3 testified but they did not either cross examine them or testify.
26. This court thus finds that the appellants were accorded an opportunity to defend themselves but they chose not to. The trial court in its judgment properly considered the appellants' defence and witness statement before arriving at the decision it did. The appellants were obligated by law to call evidence to substantiate the allegations made in their defence, without which it remained a bare defence. That could only be done if they had testified and called witnesses whose testimonies would have been tested on cross examination.

Balance of probabilities

27. This court is on the evidence before it satisfied that the respondent proved on a balance of probabilities that the appellants' specifically referred to the respondent as a witch, in the presence of about 30 people, which words were false, malicious and defamatory. The respondent was consequently shunned and avoided by people and his reputation completely lowered in the right-thinking members of the society.

Excessive general damages

28. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as restated by the Court of Appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR as follows:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. (see *Kemfro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985] KLR 470).”

29. Having found that the respondent proved his case against the appellants on a balance of probabilities, he was entitled to damages in accordance with section 16A of the *Defamation Act*, which provides that:

“In any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just.”



30. In the English Court of Appeal decision in the case of *John v MG Ltd* [1996] 1 ALL ER 35 the court held that:

“The successful plaintiff in a defamation action is entitled to recover, the general compensatory damages such sum as will compensate him for the wrong he has suffered. That must compensate him for damage to his reputation, vindicate his name, and take account of the distress, hurt and humiliation which the defamatory publication caused.”

31. The appellant submitted that the award of general damages of Ksh 800,000 was excessive. It must be remembered that the award of damages is at the discretion of the trial court and, as stated by Law JA in *Butt v Khan* (1981) KLR 349 –

“[A]n appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respects, and so arrived at a figure, which was inordinately high or low.”

32. In *Rose Okinyi v Dinah Kerebi Nyansinga* [2020] eKLR and *Joyce Wambui Njuguna v Paul Ibungo Kabenya* [2021] eKLR cited by the appellants, the Court awarded general damages of Ksh 60,000 and Ksh 100,000, respectively, for slander.

33. This court in *Gatangi v Kungutia* (Civil Appeal E028 of 2020) [2022] KEHC 10596 (KLR), substituted an award of Ksh900,000 with Ksh 500,000 as general damages for slander.

34. Although this court finds that the appellants’ conduct in calling the respondent a witch was completely uncouth and uncalled for, it feels that the award of general damages of Ksh 800,000 was excessive in the circumstances. There was no evidence that the respondent owned a power saw, which he could not allegedly use as a consequence of the defamatory words by the appellants. This court considers that an award of Ksh 500,000 as general damages, will sufficiently compensate the respondent, for his loss including the humiliation he has suffered as a result of the defamatory words.

35. The court finds that the appeal is meritorious to extent of the quantum of the award of damages, which this court finds excessive and, consequently, reviews it to an award of Ksh500,000/-.

Orders

36. Accordingly, for the reasons set out above, the court makes the following orders:

1. The appeal from determination on liability is dismissed.
2. The appeal on quantum of damages is allowed and the award of Ksh 800,000/- is set aside and substituted with an award of Ksh 500,000/- together with costs and interest.
3. As both appellants and the respondent have partially succeeded in their contentions, there shall be no order as to costs of the appeal.

37 Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:



M/S Kuria Karatu & Co. Advocates for the appellants.

M/S Kitheka & Ouma Advocates for the respondent.

