



REPUBLIC OF KENYA



KENYA LAW
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**Kisilu v Musyoka & another (Civil Appeal E088 of 2019)
[2023] KEHC 22605 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E088 OF 2019
TM MATHEKA, J
SEPTEMBER 25, 2023**

BETWEEN

JULIUS MUIA KISILU APPELLANT

AND

JANET MBULA MUSYOKA 1ST RESPONDENT

COSMAS MUKOSI KISILU 2ND RESPONDENT

(Appeal from, judgment of Hon. Mwaniki J. in SPM CC 73/2018 of 30/10/2019)

JUDGMENT

1. On 20/6/2018 the respondents were the Plaintiffs in MKN SPMCC 73/2018 where the appellant was the defendant. They sought judgment against him in the following terms.
 - a. A permanent injunction restraining the defendant by himself or his servants from sending abusive and threatening messages or any other annoying words containing the allegations concerning the Plaintiffs.
 - b. General, exemplary and aggravated damages for defamation, injurious slander and nuisance.
 - c. Costs of the suits.
 - d. Any other or further relief that this Hon. Court shall deem fit to grant.
2. After hearing the Plaintiff's case only, the learned trial magistrate found in their favour and awarded each damages in the sum of Kshs 200,000.
3. The Defendant was aggrieved and lodged this appeal on 10 grounds:- that the trial court denied the defendant the right to be heard by refusing the 1st application for adjournment, that the trial court failed to promote Article 159 (2) (c) of the Constitution as this was a family dispute that ought to have



been referred to mediation, that the trial court failed to find that that the plaintiffs failed to establish their case, that the trial court relied on WhatsApp and text messages that were without certificate - hence inadmissible; that these messages were in Kikamba not translated, that no material damage was established, and that no basis was laid by the plaintiffs for the injunction issued.

4. The appellant sought that the appeal be allowed and the judgment of the trial magistrate's judgement be substituted with an order dismissing the plaintiffs' suit.
5. I have carefully considered the pleadings, the witness statements, the documentary evidence and the submissions by counsel.
6. The issues for determination include whether the plaintiff's indeed established that the appellant was liable for defamation to warrant the orders granted by the magistrate, whether the appellant was denied the right to be heard, and whether this was a matter that ought to have been referred to mediation.
7. The brief facts of the case are that the plaintiffs and the defendant are siblings in a family of 11. The 1st plaintiff is the 1st born among girls, the 2nd is the eldest in the family and the defendant is the 7th born.
8. From the pleadings and the documents filed the parties have been exchanging messages accusing one another of witchcraft. The Plaintiffs produced before court text messages WhatsApp messages, in Kikamba, Kiswahili and English language, whose translation they have set out in English in the plaint.
9. They allege that the defendant sent those messages to them and also forwarded the same to other members of the family - to the effect that the plaintiffs are witches, sorcerers and murderers.
10. The Defendant admits sending those messages saying that they are the truth - that in their family their parents raised them to believe that there was witchcraft around them - and every so often, brought magicians and medicine men to carry out protection rituals. He claims that upon the death of their parents the two plaintiffs have perpetuated the said rituals.
11. The defendant made a counter claim that the plaintiffs have accused him of having "majini" that have given him power and riches and that he raises a "cat" in his home that has scared even his own family - he pleaded that he would demonstrate in his oral evidence - the things that the plaintiff had done, the thing that they had said - and he would show that it was only by "the grace of God" he had survived their witchcraft attacks.
12. In their testimonies in court the plaintiffs produced as exhibits the printed messages from her phones - as exhibits before he - learned trial magistrate.
13. PW3 and PW4 - simply told the court that they were aware of the issue and that the defendant had told them about the plaintiffs being witches, and practicing witchcraft.
14. The plaintiffs each told the court that the defendant had threatened to use Mungiki to eliminate them - 1st plaintiff said she felt ashamed, and could no longer walk freely as people see for her as a witch, the 2nd defendant said he summoned the defendant - defendant turned against him and began to send similar messages to him.
15. In his judgment the learned trial magistrate stated,

"...from the evidence and the exhibits, I have no doubt defendant and in print media broad casted to the plaintiff and others calling them evil people hiding in the church, witches, wizards who have evil alters in their homes, pleasing and appeasing demons and sacrificing to them. He did call them murderers.... the defendant did inform them that he



had broadcasted the messages to others...the messages by the defendant were intended to and did lower the plaintiff's in the estimates of right thinking members of the society and exposed them to contempt and ridicule and made them avoided by people in general... the plaintiffs being his siblings he knew the messages to be false..."

16. In the submissions filed on 19/7/2023 the appellant submitted that the plaintiff had failed to establish the ingredients for defamation vide; The existence of a defamatory statement That the defendant had / caused to be/ published the defamatory statement That the publication referred to the plaintiffs. For this he cited *Musikari Kambo v Royal Media Services Ltd* [2018] eKLR para 20.
17. It is argued for the appellant that the messages published on WhatsApp and text to the plaintiff themselves were not defamatory because they were chats between the appellant and the respondents - on their personal phones, that as per *Richard Otieno Kwach v Ltd & David Makali* Nairobi HCCC 1099/2004 words become defamatory if they involve the personal character or official reputation of the plaintiff; and the Miguna Miguna case(sic) that statement that are merely offensive are not defamatory.
18. That in this case the statements were published to the plaintiffs only. No evidence was provided that they were published to 3rd parties and therefore there was no defamation.
19. It was further urged that the statements that were provided by the plaintiffs were inadmissible – they were in Kikamba , there was no certificate of translation - hence they were inadmissible – that they were also not accompanied by the requisite certificate seeing that they were electronic messages, that this was part of the defendant, defence which the court did not consider.
20. For the respondents through submission filed on 1/8/2023 - it was argued, on the claim that the appellant was denied the right to a fair hearing. It was argued that that the learned trial magistrate acted in accordance with order 12 rule 2 of the *Civil Procedure Rules* when he proceeded *ex parte*. It states When only plaintiff attends
If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—
 - (a) that notice of hearing was duly served, it may proceed *ex parte*; (b)...; or
 - (c) ...
21. That the appellant could have approached the court under order 12 rule 7 of the *Civil Procedure Rule* to have the *ex parte* judgment set aside/varied. He relies on *Faraj Maharus (Administrator of the Estate of Khadija Rajab Suleiman) v Martin Glass Industries & 3 others* CA Civil Appeal No 13 of 2003 [2005] eKLR , *Thomas Openda v Peter Martin AHN* [1984] eKLR.
22. It is also argued that the appellant did not have an arguable case because he admitted to making the statements/utterances - that even given the opportunity he could not have led any evidence of sorcery.
23. Further that with respect to Article 159(2) (c) - on ADR - the court could not impose on the parties ADR, and not every case is suitable for ADR. That the appellant never made the request, the parties had tried and failed before coming to court - that the appellant is adamant that the respondent, practice witchcraft and sorcery.
24. On the ingredient of defamation, the respondents submits that on the strength of *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR - where it was held that the words must tend to lower the plaintiff in the estimation of right minded people in society , cause the plaintiff to be shunned /avoided by other persons - it must be shown that the words were not merely abusive - but



- caused injury to the reputation , character and dignity of the plaintiff - that the plaintiff would have to establish that the words would have been understood by any reasonable person to be defamatory – see [John Edward v Standard Ltd.](#)
25. That indeed the respondents suffered damage for which they deserved the compensation that was awarded; that for instance the respondent stated that there were person the 1st appellant had killed but no list was attached to the pleadings or produced as evidence.
 26. With respect to admissibility of the evidence - the respondents submitted that the appellant admitted having made the statements and hence the respondent did not need to do anything else.
 27. On the award of damages the respondents cited [Nation Media Group Ltd and 2 others v John Joseph Kamotho](#) as cited in [Joseph Njogu Kamunge](#) (above) that assessment of damages depends on the circumstances of each case “the plaintiffs’ position and standing in society, the mode and extent of publication, the apology if offered... the conduct of the defendants from the time of when the libel was published up to the time of the judgment.”
 28. From the foregoing it is not in dispute that the parties here in are siblings, from the same family – the two eldest and one, the 7th born. It is also not denied by the appellant that he uttered those statements to the plaintiffs themselves. He denies sending those messages to anyone else. – hence the questions is - are these messages defamatory ? the appellant is adamant that what he said is the truth and that had he been given the opportunity to testify on oath, he would have demonstrated the truthfulness of his statements. He never got to testify and the opportunity to demonstrate the truthfulness of his utterance passed the court.
 29. In addition, he brings in his Christian faith - and says that that it has been the shield that has protected him against the plaintiff’s witchcraft.
 30. I have to contend with the fact that I never heard nor saw the respondents testify. Neither did I get to see the appellant. However a consideration of both sides of the case as it emerges from the record , the pleadings , the submissions it is evident that there exists a deep seated family dispute where only the parties know the truth. This is one of those cases where in my view the court will not be told what happened yet the subject the cause of the alleged cause of action is something based on the beliefs of the parties themselves, and it would have been of note to see how the appellant would have established that the respondents were practicing witchcraft and sorcery. Hence the conclusion by the learned trial magistrate that the appellant knew what he was saying about his siblings was false was not based on any evidence but from the denials by the respondents.
 31. That besides I view the evidence before me and review it and re analyses it and draw the conclusions that I find supported by that evidence.
 32. I did not find any evidence placed before court that the messages were published to any 3rd party other than the plaintiff’s themselves. The plaintiffs produced evidence of the statements sent to their own phones. There is no evidence from any third party who it is alleged the message were shared with. No relative or close family friend was called to testify that they had received the alleged messages. No evidence was produced from any service provider to show that the messages sent to the respondents were sent to any other person other that the respondents themselves. This begs the question how then can messages sent to the plaintiffs themselves be said to be defamatory? The answer can only be in the negative. They cannot be defamatory unless they were published to other parties other that the respondents themselves.



33. That brings me to the next ingredient- and from the record plaintiffs did not produce any evidence to show that the words resulted in them being shunned or avoided by any member of the society. There is no evidence for example, that the church members of the plaintiff, church had shunned her, no evidence that there was any reaction from members of the society or even the family to show that they were influenced by the words alleged to have been shared with them. Neither is there evidence provided to demonstrate how indeed the plaintiffs/respondents were injured by the said words.
34. The plaintiffs alleged psychological torture - but produced no evidence of this.
35. I am wont to agree with the appellant that the learned trial magistrate did not have evidence of the alleged defamation ; what he had before him were statements of insults, abuses from one family member to the other , who also alleged to have received similar verbal assaults from them. That may explain why the counter claim was met with denials, and without hearing the appellant , the court could not have determined on a balance of probabilities, the falsehood or otherwise of the statement made by the appellant or the respondents, and especially when the appellant had pleaded that he would have demonstrated the same.
36. It cannot be over looked that to be called a witch/mchawi/murogi in the public will more often than not bear serious repercussion for the person so accused. The society is averse to such persons and gets hostile and especially where death of any member of the society is associated with the alleged evil powers there. There would be no question about it if these allegations had been publicized as alleged by the respondents.
37. My view of the matter, drawn from what the pleadings say is that these family members have deep seated differences that they are unable to deal with due to differences- in beliefs - there appears to be competition in the acquisition of material things, in the “developments” of each other’s families - and the accusation and counter accusation are running in the family circles.
38. I have not seen the evidence where these have gone outside the family circles – there is no print media as stated by the learned trial magistrate and the evidence is that everything was between the defendant’s phones, and the phones of the plaintiffs.
39. Without evidence of publication beyond this – the other ingredient of defamation cannot even be said to have arisen.
40. The circumstances are such that what was before the court were insults exchanged by siblings and family members amongst themselves. That is why I find that contrary to counsel’s submissions courts do not impose Court Annexed Mediation on parties – Courts are obligated to encourage parties to pursue amicable dispute resolution - this is in view of the Constitution’s purpose to ensure social transformation through to justice where the courts ensure justice is done by addressing not only the issue that presents - but the root cause of the issue - that is the purpose of the multi-door approach to justice presented by Article 159(2) (c) of the Constitution
41. It does not mean that the courts abdicate their duty and mandate to adjudicate the disputes - it only means that the court urges the parties to pursue other constitutionally alternative means, under its supervision, to resolve the actual dispute that has led to the matter in court in an atmosphere of choice amongst their people without the limit of the rules of evidence, an atmosphere that allows resolution and the healing of broken relations.
42. In this case – the appellant depones that the cause of all these differences is a family rooted issue proceedings from their biological parents and his reading of the Bible - the respondents feel insulted by their younger brother - who in the pride of his faith risks exposing the family to scrutiny and ridicule



even involving the memory of their deceased parents . These are issues only the family and the close relatives can resolve once and for all - and that is available through the ADR that is provided for by the Katiba.

43. That said - the tort of defamation is proved by evidence - the statements complained of must be defamatory, must be published and must injure the reputation of the plaintiff – whose burden it is to prove all these – What is before the court are the statements - no evidence they were published no evidence of injury to warrant the finding of the lower court and the award of damages.

I also agree that the statement were not accompanied by a certificate of translation, they were downloaded from their phone - and there was no compliance until the Evidence Act.

44. It is not clear how the learned trial magistrate was able to accept the statements in Kikamba as evidence without translation - and how he could tell what they actually stated.
45. Ultimately on the strength of the authorities cited, the evidence on record - I find that the ingredients of defamation were not proved and the appeal is merited, the learned trial magistrate was within his rights to proceed *ex parte* but with what consequences? Shutting out evidence that would have assisted him to arrive at a just decision, and the parties to this matter being siblings would have benefitted from court annexed mediation or AJS.
46. That said appeal is allowed - the judgment of the subordinate court is set aside and substituted with an order dismissing the plaintiffs' case.
47. Each party will bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF SEPT 2023

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MUMBUA T MATHEKA

JUDGE

CA Nelima

Muinde for Appellant

N/A for Respondent

D.Muinde & Associates Advocates

Respondent's counsel

Isika & Associates

