# Ogembo v Yongo (Civil Appeal E200 of 2023) [2024] KEHC 15763 (KLR) (9 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15763 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL E200 OF 2023**

**RE ABURILI, J**

**DECEMBER 9, 2024**

**BETWEEN**

**ELIUD OKUNGU OGEMBO ................................................................ APPELLANT**

**AND**

**CHRISTOPHER ONDIEK YONGO ................................................ RESPONDENT**

*(Being an Appeal from the Judgment and decree of the Hon. E. Obina (SPM) Delivered at Kisumu on the 16th Day of November, 2023 in Kisumu Civil No. E056 of 2022)*

## JUDGMENT

### Introduction

1. The appellant Eliud Okungu Ogembo sued the respondent Christopher Ondiek Yongo for libel alleging that on diverse dates, the respondent via WhatsApp groups that they were both members of, posted offending words that he knew were not true and which statements lowered the reputation of the appellant, a respected church elder and deacon at AIC church and a highly respected member of the society, in the right-thinking members of the society.
2. It was the appellant's case that the respondent was actuated by extreme malice and spite against him in writing the offending words which were not only false but also highly defamatory.
3. The appellant sought the following orders against the respondent: -
    a. A permanent injunction restricting the defendant by himself, his servants, agents or otherwise from writing in any manner whatsoever any other or further messages concerning the plaintiff or his business or any matter directly affecting or relating to the plaintiff.
    b. General damages for libel
    c. Damages on the footing of aggravated or exemplary damages

d. An apology and restriction in the platforms given the same prominence as the defamatory one

e. Costs of this suit

f. Interest on (b), (c) and (e) above at court rates

g. Any other or further relief as this Honourable court may deem fit to grant.

4. The respondent entered appearance and filed a defence dated 8th April 2022 denying the appellant's allegations and putting him to strict proof of the same. The respondent thus prayed that the suit be dismissed with costs.

5. In his judgement, the trial magistrate held that the appellant by failing to attach the Certificate of Electronic Evidence to the WhatsApp messages which his case was based on, the said messages became inadmissible and thus the appellant failed to demonstrate his case. The trial magistrate then proceeded to dismiss the appellant's suit with costs to the respondent.

6. In Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 16th November 2023 raising the following grounds of appeal;

   a. The trial magistrate erred in law and in fact in finding and holding that the suit lacks merit thus dismissing the appellant's suit.

   b. The trial magistrate erred in law and fact by failing to appreciate the totality of the evidence before him and the submissions made on behalf of the appellant thus reaching to a conclusion that was contrary to the evidence before him.

   c. The trial magistrate erred in law and in fact by disregarding all the evidence that was adduced by the appellant as proof that the respondent has defamed him.

7. The parties agreed to dispose the dispose of the appeal by way of written submissions.

**The Appellant's Submissions**

8. The appellant submitted that the words published by the respondent against the appellant are clearly defamatory as the same have been proven by the DNA test conducted, to be false and as they were published in a public forum by the respondent referring to him in a bid to taint his image in public thus the appellant proved all the elements of defamation.

9. It was submitted that the respondent lacked the defence of justification as the statements that he made had been proven to be false. The appellant submitted that the respondent admitted in his defence and witness statement to have made the defamatory statements and thus the certificate of electronic evidence was not necessary.

10. The appellant submitted that he was entitled to general damages of Kshs. 10,000,000 as he had proved that the respondent was the one who made the defamatory statements. It was further submitted that he was entitled to aggravated damages as the words published were quite detrimental to the appellant's reputation as it reached a large audience and was thus limiting his ability to deliver his duties which were equally his source of income.

**The Respondent's Submissions**

11. The respondent submitted that the appellant had failed to prove the elements of the tort of defamation firstly as the name of the alleged author of the defamatory statements from the appellant's screenshot was Christopher Ondiek Yongo 1 while his name is Christopher Otieno Ondiek.

12. It was the respondent's submission that he was not a member of the two WhatsApp groups where the alleged defamatory statements were allegedly made and as the identity of a member of a WhatsApp group is tied to the member's phone number, the appellant had failed to establish with certainty that it was the respondent who authored the alleged statements.

13. The respondent further submitted that the screenshots adduced by the appellant as evidence were marred with inconsistencies in that there was no clear distinction between the WhatsApp chats in the Duoka Development Group and those in The Great Abwao Community.

14. It was further submitted that the purported WhatsApp screenshots grossly violated the provisions of Section 106 B of the *Evidence Act* as they were not accompanied by a Certificate of Electronic Evidence and as held in the case of Selina Vukinu Ambe v Fernandez Sajero [2021] eKLR.

15. It was submitted that the appellant misled the court into believing that the WhatsApp screenshots marked as P Exh.6 formed part of the WhatsApp group chats as they were messages exchanged between the appellant and the respondent and cannot amount to publications to third parties. The appellant further submitted that he established that he was not a member of either WhatsApp groups where the alleged defamatory texts were made.

16. The respondent further submitted that WhatsApp group chats do not amount to publication to third parties and it was the appellant who made the contents of those chats public by filing the suit before the trial court. Reliance was placed in the case of Selina Vukinu Ambe supra.

17. It was submitted that no one from either WhatsApp groups was called to testify that the alleged published messages and as thus the appellant failed to prove how his reputation was lowered. Reliance was placed on the case of Selina Patani & Another v Dhiranji V. Patani [2019] eKLR & S M W v Z W M [2015] eKLR.

18. The respondent submitted that it was not contested that the defamatory statements against the appellant were in the public domain long before being allegedly published in the WhatsApp groups as was evident from the materials adduced by the appellant.

19. It was submitted that the appellant had failed to prove his case and was thus not entitled to an award of general damages or aggravated damages.

20. The appellant further submitted that the instant appeal ought to be dismissed with costs to himself.

**Analysis and Determination**

21. This being a first appeal the court relies on a number of principles as set out in Selle and Another v Associated Motor Boat Company Ltd & others [1968] 1EA 123:

> " ...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

22. I have carefully considered the grounds of appeal and the submissions for and against this appeal, coupled with the evidence adduced by both parties in the trial court. The issue for determination herein is thus whether the trial court erred in dismissing the appellant's defamation suit against the appellant.

23. Black's Law Dictionary 8th Edition defines defamation as "the act of harming the reputation of another by making a false statement to a third person."

24. The ingredients of the tort of defamation were reiterated by J.L.A. Osiemo in John Ward v Standard Limited [2006] eKLR as follows:

> " A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling. The ingredients of defamation are: (i) the statement must be defamatory (ii) the statement must refer to the plaintiff (iii) the statement must be published by the defendant (iv) the statement must be false."

25. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined:

> " In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense."

26. The Court of Appeal in S M W v Z W M [2015] eKLR, Karanja, Mwilu JJA (as she then was) & Azangalala JJ. A concisely stated: -

> " A statement is defamatory of the person of whom it is published 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."

27. The Court of Appeal in Selina Patani & Another v Dhiranji V. Patani [2019] eKLR- Karanja, Odek & Kantai, JJA quoted Patrick O'Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 where it was explicitly stated that: "the law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation as it recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements that injure his reputation."

28. As earlier stated, the appellant sued the respondent for defamation alleging that the appellant had published some messages in two WhatsApp groups that had the effect of lowering the appellant's reputation in the eyes of the right-thinking members of the society.

29. The respondent denied being a member in the alleged WhatsApp groups as his phone numbers were not linked to the aforementioned WhatsApp groups or the alleged individual whom the appellant claimed was making the alleged defamatory statements and further, that the respondent testified that his name and that of the alleged defamer were different him being Christopher Otieno Ondiek while the name in the messages the appellant's case was based on was Christopher Ondiek Yongo 1.

30. The appellant's case was based on messages extracted from WhatsApp messages. However, the appellant did not attach a Certificate of Electronic Evidence in compliance with section 106B of the *Evidence Act*.

31. The admissibility of electronic records is provided for under Section 106 B of the *Evidence Act* (Cap 80) Laws of Kenya in the following terms:

> " 106B

> (1) Notwithstanding, anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as a computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible."

32. Under sub-section (4), where a party seeks to give evidence by virtue of section 106B he has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. The certificate should further:

> "a) identify the electronic record containing the statement and describing the manner in which it was produced; and
>
> b) give such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer."

33. In the case of Republic vs Barisa Wayu Matuguda [2011] eKLR the court observed that:

> ". . . any information stored in a computer. . . which is then printed or copied. . . shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied."

34. The court went on to state that:

> "This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate this CD is inadmissible as evidence."

35. In Benson Mugatsia vs Cornel Rasanga Amater, Election Petition 2 of 2012, citing Republic vs Berisa Wayu Matuguda Criminal Case No.6 of 2008, the court considered when a certificate of electronic evidence will be admissible and stated:

> "....any information stored in a computer ...which is then printed or copied......shall be treated just like documentary evidence and will be admissible as evidence without production of the original: However Section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied."

36. The Court of Appeal in John Lokitare Lodinyo v I.E.B.C and 2 Others [2018] eKLR addressed the question of admissibility of electronic records under S 106B and stated;

> " 54: Essentially, the sections provide that electronic evidence which is printed out shall be treated like documentary evidence and will be admissible without production of the computer used to generate the information. The appellant claimed that his technical team downloaded the forms and had them printed. He admitted that the forms were from the IEBC public portal. Ordinarily, this would have meant accessing the IEBC portal, which one could only do if they had access to the internet, proceeding to log onto the IEBC portal page, clicking on the Forms 35A uploaded on Kacheliba Constituency, downloading the Forms 35A onto the computer's hard disk and finally printing the documents via a printer connected to the computer.
>
> "55. It is at this juncture that the provisions of Section 106B of the *Evidence Act* come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do. This Court in the case of County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR stated that;
>
> > "Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer." In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced..."

37. In the case of Richard Nyagaka Tong'i v Independent Electoral & Boundaries Commission & 2 others Election Petition No. 5 of 2013 [2013] eKLR the court found that:

> " 27. In the present case the petitioner has not produced a certificate under section 106B (4) of the *Evidence Act* and the person who operated the computer and printer during the printing of the photographs was not called to testify as to the condition of the machines and the integrity of process of the printing of the photographs. The person who testified was the photographer who although he stated that he was with the computer operator when the photographs were made cannot vouch for the due operation of the computer and printer and the integrity of the photographs having himself admitted that they would at times sit with the operator to choose colours in which the photographs would be printed. The court cannot rule out the possibility of doctored photographs,

and in accordance with section 106B, the photographs are inadmissible and shall not be considered."

38. It is evidently clear that electronic documents must be accompanied by a certificate in terms of section 106 B (4) of the *Evidence act* for them to be deemed admissible. There is no other way out. This is a requirement in civil and criminal cases before courts, except in matters where statutes exclude the application of strict rules of evidence such as the Small Claims Court or specific tribunals.

39. Defamation of character is a civil wrong/tort.Therefore, the rule of admissibility of evidence is strictly applicable unlike in proceedings before the Small Claims Court and therefore the WhatsApp messages together with certificate of electronic evidence must be produced as mandated by Section 106B of the *Evidence Act*, As that fulfils the requirements of authenticity and validity of the information and/or evidence.

40. It is worth noting that the certificate shall provide vital information as to the source, process and delivery of the electronic record or evidence to the Court and parties so as to enable admission of the electronic record as evidence. The content of the certificate would aid and satisfy the court as to reliability of generation of the electronic record/evidence; the integrity of the process and the origin of the content.

41. Therefore, in my view, the requirement of electronic certificate is not merely a procedural and technical matter under Section 106B (4) of the Act curable or ousted by application of Article 159 (2) (d) of *Constitution of Kenya, 2010*.

42. It is my view, that the mandatory Provisions of the *Evidence Act* are not only about form but also substance. Thus, before the Court can admit electronic records/evidence, an electronic certificate is mandatory to confirm the source, process, custody and delivery of the said electronic record before admission so as to eliminate the possibility of manipulation of the record.

43. The WhatsApp messages in the instant case ought to have been produced together with certificate of electronic evidence to confirm their authenticity and integrity before admission.

44. In the case of Nonny Gathoni Njenga & Jane Wambui Odewale & 2 Others Civil Case 490 of 2013, it was held that the Petitioner may be given time to provide the certificate. In the circumstances of this case; that will be impossible; because, the certificate would be prepared now after the issue was raised in Court and determined upon by the trial court and therefore, its content shall be difficult for parties to verify the validity and integrity of the certificate of electronic evidence.

45. Additionally, and as earlier stated, the respondent herein disputed the contents of the WhatsApp messages relied on by the appellant, that the name of the alleged individual stated to have made the defamatory messages was not his, that there was no link drawn between the alleged defamer's WhatsApp account and the respondent's number.

46. I reiterate that the certificate of electronic evidence is a mandatory requirement in the absence of which the WhatsApp messages cannot be admitted as evidence. The certificate ought to have formed part of the evidence in the proceedings before the trial court.

47. The Court of Appeal in County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR stated as follows regarding non production of certificate of electronic evidence

> " Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in

this section are satisfied in relation to the information and computer." In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions to vouch for the authenticity and integrity of the electronic record sought to be produced..."

48. Mulwa J citing the above Court of Appeal decision which is binding on this Court stated as follows and I concur:

> " 20. In the instant case, the computer print outs/ screen shots produced by the Plaintiff as proof of publication failed to pass the test of production of electronic evidence Section 106B of the *Evidence Act*. This is because they were not accompanied by a Certificate of Electronic Record which is a mandatory requirement. Counsel for the 2nd Defendant raised the issue on cross examination but the Plaintiff and/ or his advocate did not deem it fit to seek leave to file the Certificate. In the premises, the court finds that the Plaintiff did not prove that the alleged publications were made by the 2nd and the 3rd Defendants on their social media platforms. He failed to discharge the legal burden of proof under Section 107(1) of the *Evidence Act* which stipulates that:"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
>
> 21. Having made the above findings, the court deems it unnecessary to delve into determining whether the other ingredients of the tort of defamation have been established. The Plaintiff has failed to prove his case to the standard required in civil cases which is on a balance of probabilities.
>
> 22. Consequently, this suit is hereby dismissed with each party to bear own costs."

49. In the same vein, I find this appeal devoid of any merit as the appellant's suit failed the test of proof on a balance of probabilities as required by law stipulated in this judgment, the appellant having failed to produce the certificate of electronic evidence of the WhatsApp screenshots as proof that the screenshots, in fact, emanated from his phone and that they were sent by the respondent.

50. Consequently, as the appellant's case was based on alleged defamatory statements made on WhatsApp, in the absence of the certificate of electronic evidence above stated, his case collapses.

51. The upshot of the above is that I uphold the trial court's judgement dismissing the appellant's suit and proceed to dismiss the instant appeal for lack of merit.

52. On costs, the successful party deserves costs. However, the appellant was represented by an advocate who was expected to ensure that the certificate of electronic evidence was filed and produced as an exhibit. He filed the suit without such certificate.

53. The appellant has suffered fate because of failure to be advised by his advocate. I find it inappropriate to condemn him to pay costs of this appeal and of the lower court. I order that the parties shall each bear their own costs of the appeal and of the suit as dismissed.

54. Decree to issue.

55. The lower court file to be returned.

56. This file is closed.

57. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY OF DECEMBER, 2024**

**R.E. ABURILI**

**JUDGE**