



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 42 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

CHARITY MURITHI.....APPELLANT

AND

LUCY NKIO MICIANO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.P. M. Wechuli, RM dated 12th April 2018 at the Principal Magistrates Court at Tigania in Civil Case No. 180 of 2015)

JUDGMENT

1. The appellant in this case filed suit claiming damages for defamation. She alleged that on 5th October, 2015 at about 10.00am at Antubeiga Village, Miathene Location, Tigania West of Meru County, the respondent, in Kimeru, called her in a public place, “*uwe uri Murogi, niwarogere Nyukue na urathukia mutanocia*” The words translated in English were, “You are a witch, you bewitched your mother, and you made your brother to be confused.”

2. The respondent denied the appellant’s claim and filed a counterclaim to which she stated that at the same time and at the same place, the appellant defamed her by stating, “*Uwe uri Murogi ugwe Woragire mwana wakwa.*” The words translated in English were that, “*you are a witch you are the one who killed my child.*”

3. The trial magistrate hearing the matter agreed with both parties that the words alleged by each side were defamatory. What is in issue is whether the words were uttered and whether they were published. The trial magistrate dismissed the appellant’s claim on the basis that the words uttered by the respondent were uttered in private as they were uttered on the appellant’s property. The respondent’s case was that the appellant accosted her and called her a witch. She reported the matter to the police and the appellant was charged for creating a disturbance in a manner likely to cause a breach of the peace. At the time of hearing the criminal case was still pending. The trial magistrate accepted the respondent’s case, allowed it and awarded her Kshs. 200,000/- in damages.

4. In resolving this appeal, I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour (see *Selle v Associated Motor Boat Co. [1968] EA 123*).

5. From the evidence, the appellant’s brother was the respondent’s husband. The appellant (PW 1) testified that on 5th October 2015 at about 10.00am, she was at her farm with other people when the respondent (DW 1) passed by and started abusing her by calling her a witch. She told the court that she reported the matter to the elders to resolve the issue but the respondent refused to attend the meetings.

6. Andrew Kaburi (PW 2) testified that he was along the road looking for fodder when he heard noises from the farm belonging to Zipporah Kabirithu (PW 3). When he went there he found PW 3’s child uprooting cassava. In a little while the defendant came with Corporal Gitonga whereupon he heard DW 1 calling PW 1 a witch. PW 3 testified that she was on her farm when the DW 1 came to confront her over the farm. She heard the DW 1 abusing PW 1. She told the court that DW 1 reported PW 1 to the elders.

7. DW 1 testified that on 5th October 2015 she heard screams and when she went to the farm she found ‘David’ and ‘Martin’ fighting and it is then PW 1 confronted her with a panga and called her a witch. She raised the complaint with the police and caused her to be charged. She told the court that the suit was filed in reaction to the criminal case. Priscilla Gache (DW 2) went to check what was happening when she heard people screaming. She saw PW 1 chasing DW 1 with a panga and calling her a witch whereupon police officers intervened. PC Michael Kibet (DW 3) testified that she received the complaint from DW 1 and charged PW 1 with creating disturbance likely to cause a breach of the peace. He confirmed that PW 2 recorded a statement.

8. I have analyzed all the evidence and I am unable to agree with the findings of the trial court that since the incident did not take place in a public place the appellant failed to prove her case. This was a misdirection on the part of the trial magistrate as public in this case meant that other people were present not that the incident took place in private. An essential element of defamation is that the defamatory words must be published. Publication for purposes of defamation means communication to a third part other than the person defamed. In **Pullman v W. Hill & Co Ltd [1891] 1 QB 524**, Lord Esher MR stated that publication referred to, “[t]he making known of the defamatory matter after it has been written to some person other than the person of whom it is written”. Publication does not depend on whether the words were uttered on private property or a non-public place. The issue is whether the words were heard by a third party. In this case, the testimony of PW 1, PW 2 and PW 3 is that the defamatory words uttered by DW 1 were heard by them.

9. As regards whether the appellant proved her case, the trial magistrate found that PW 2 was an unreliable witness because he also gave a statement in support of DW 1’s criminal case against PW 1. He also placed emphasis on the fact that PW 1 did not prove that the words were uttered in a public place. I would agree with the conclusion that PW 2 was an unreliable witness but does it necessarily undermine her case? The trial magistrate did not comment on the testimony of PW 3 who heard DW 1 utter the words. Taking this evidence and the respondent’s evidence, I find that it is apparent that both parties had a previous misunderstanding and this case including the criminal case was just a way to settle scores.

10. PW 1 also testified that she tried to get the elders to resolve the matter but the respondent did not respond to this entreaty. This was confirmed by PW 2. DW 1 did not comment on this aspect of the case yet DW 1 was given the benefit of being believed because she lodged a criminal case. Conversely, it is only after the appellant filed her claim that the respondent deemed it fit to lodge her counterclaim. It is not lost to me that both parties alleged that they called each other “witches.”

11. I do not find either party credible. I would find that the words uttered by both of them were mere vituperation which does not constitute defamation given the circumstances I have set out. As stated by **Winfield and Jolowicz on Tort, 5th Edition at page 406**, “words which are prima facie defamatory are not actionable if it is clear that they were uttered merely as general vituperation and were so understood by those who heard them.” (See **Parkins v Scott [1862] H & C 153**).

12. I allow the appeal but I make an order dismissing the appellant’s claim and the respondent’s counterclaim but with no orders as to cost in this court and in the court below.

DATED and DELIVERED at MERU this 15th day of October 2018.

D.S. MAJANJA

JUDGE

Mr Anampiu instructed by Ayub K. Anampiu & Company Advocates for the appellant.

Mr Wamache instructed by Mutembe & Kimathi Advocates for the respondent.