**IN THE COURT OF APPEAL**

**AT NYERI**

**(Coram: Platt, Gachuhi & Apaloo JJA)**

**CIVIL APPEAL NO 40 OF 1986**

**BETWEEN**

**CHARLES MWITHALII.....APPELLANT**

**AND**

**JULIUS BARIU M'ITOBI.....RESPONDENT**

**JUDGMENT**

May 19, 1988, **Platt, Gachuhi & Apaloo JJA** delivered the reasons for Judgment of the court.

On May 21, 1987, we set aside the judgment in this case and remitted the record to the High Court for re-hearing by a different judge. We indicated that we would give our reasons later. This we now do.

The parties to this case live at Njia location in Meru District. The respondent was a businessman of some standing in the area and the appellant was a teacher. Both seem to have backed rival candidates in a local council election. The appellant's brother, popularly referred to as Stanley was successful. The respondent's candidate lost and it seems the relationship between the parties was less than cordial.

On December 16, 1979, the respondent was invited as a guest of honour at a fund raising ceremony by the local Catholic Church. In the morning of that day, documents which made unflatering references to a person named as J Bariu Ngoroko were found posted along a number of public places at Njia. These posters were handwritten and there is little doubt that the person who wrote these posters published or caused them to be published.

The respondent's son and a number of local residents read the posters and thought they not only referred to the respondent, but were defamatory of him. The latter's reaction on learning of the posters, was to make a complaint to the police who concluded that the writer of the posters had committed a criminal offence.

Although nobody saw the appellant write or publish these documents he became the immediate object of suspicion. When questioned by the police, the appellant denied the authorship of the posters and indeed disclaimed any knowledge of those documents. In order to determine the author of these documents, the police in the course of their investigation gave the appellant and two other persons a dictation and obtained their handwritings.They also collected a number of exercise books in the undisputed handwriting of the appellant. All these were forwarded to a document examiner.

The evidence suggested that the handwriting expert must have expressed a view incriminating the

appellant. So on the strength of his report, the appellant alone was charged with the offence of threatening a breach of the peace by writing and distributing defamatory letters".

In view of the appellant's stated position, the charge could not be brought home to him unless it was established that he in truth wrote those documents and inferentially published them. So when put on his trial, the prosecution called as a witness, the document examiner, a man by the name of H W Wamalwa. He gave oral evidence before the court and expressed his opinion on a number of handwritings he examined. In the result, the appellant was on May 17, 1980 convicted of the offence charged.

This conviction was, on March 25, 1981, quashed by the High Court on appeal on a ground which had nothing to do with the authorship of the document. That court held that the facts proved did not support the charge.

But such was the depth of feeling that before the High Court verdict was known, the respondent brought a plant against the appellant in which he sought damages for defamation. The basis of the action was that the appellant "wrote and published various documents to the members of the public" which the respondent claimed libeled him. The appellant for his part, "denies publishing any document or documents making any allegation of the plaintiff or at all whether defamatory or otherwise."

The appellant denied that those documents were defamatory. He also raised a number of pleading points in his statement of defence. But the main issue joined on the pleadings and on which the success or failure of the suit hinged, was who wrote and published the documents?

There can be little doubt that the onus of establishing this lay squarely on the respondent. At the trial before the High Court, the document examiner did not give evidence and no other oral evidence was led on the issue.

The evidence of the proceedings in the criminal case were produced before the court. Apparently from a perusal of them the learned trial judge held that:-

> "The posters were produced in a criminal case in which the defendant was the accused. The document examiner who examined and compared the defendant's handwriting and the posters was of the opinion that it was the defendant who wrote the posters. I am satisfied that these were the same posters which were examined and compared by the document examiner …"

The judge then concluded on this issue that:-

> "… I am satisfied that it was the defendant who published these posters which are the subject of this suit."

The court considered tat these posters referred to the respondent and that they were defamatory of him. He accordingly held the appellant liable in damages to the respondent and assessed this at Kshs 30,000 with costs and interest.

The appellant contested that judgment before this court on no fewer than ten grounds of appeal. Argument was addressed to us on almost all these grounds, some of which challenged the holding that the posters were defamatory or that they referred to the respondent. It was also contended that the damages awarded were excessive. In view of the order we made, these matters will again be debated in the High Court and on that account, we refrain from making any pronouncement on the validity or otherwise of those contentions.

But the one ground which we thought was substantial and which decided us to make the order of rehearing, was the first ground which, in substance, complained that the judge was in error when he held that the documents in question "were written and published by the defendant". It was contended that the document examiner's evidence as to the opinion he formed of the disputed posters was inadmissible in evidence and that as that was the basis of the judge's holding that it was the appellant who wrote and

published the documents, that holding was erroneous.

Although counsel for the appellant did not so put it, the opinion evidence of the document examiner who was not called as a witness before the court as to the author of the disputed documents was hearsay and was inadmissible in evidence on that ground. That being so, there was no legal evidence before the court on which it could properly hold that the appellant "wrote and published" the allegedly defamatory documents.

As the evidence of the document examiner was given in judicial proceedings between the same parties, that evidence could be admitted under the liberal regime of section 34 of the Evidence Act, (cap 80) if the conditions laid down by that section were fulfilled. No facts were given in evidence on which it can be held that the factual conditions laid down by that section were met. It did not even appear that the learned judge was aware that the former testimony of the document examiner was inadmissible in proof of the authorship of the offensive documents.

Counsel for the respondent sought to get round the exclusionary hearsay rule, by relying on section 84 of the Evidence Act. It is not necessary to read that section in full. It should suffice to say that that part of the Act merely mandated the making of certain presumptions. In the context of this case, as the proceedings of the magistrate's court were produced in evidence and were duly signed by the magistrate, the court is obliged to presume that (1) the proceedings were genuine and (2) that the evidence of the document examiner was duly taken. That section did not, unlike section 34, seek to modify the hearsay rule. We thought therefore that section 84 of the'Evidence Act in no way assisted the respondent.

In our opinion, proof by legally admissible evidence that the offending documents were written and published by the appellant was essential to the success of the action. As this was not forthcoming, we thought the judgment condemning him to pay damages could not stand. It may well be that the appellant in truth wrote and published the documents in question and that legal proof of this would have been offered, had not the court and counsel for the respondent slipped on the nature and quality of the evidence required.

In the circumstances, we felt allowance of the appeal simpliciter may be construed as an endorsement by this court of what may well be a serious libel of the respondent. That, in our judgment, would be wrong. We therefore felt, that subject to the respondent paying the costs thrown away, the ends of justice would be met if the case is heard afresh. (*Khemaney v Lachbai Murlidhar* (1960) EA I; *Shah Bharhal v Kumari* (1961) EA 679).

We accordingly so ordered.

**Dated and delivered at Nyeri this 19th day of May , 1988**

**H.G PLATT**

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**JUDGE OF APPEAL**

**J.M GACHUHI**

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**JUDGE**

**F.K APALOO**

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**JUDGE OF APPEAL**