



**Republic v Nzau (Criminal Case E147 of 2024)
[2025] KEMC 189 (KLR) (5 August 2025) (Judgment)**

Neutral citation: [2025] KEMC 189 (KLR)

**REPUBLIC OF KENYA
IN THE LAMU LAW COURTS
CRIMINAL CASE E147 OF 2024
FM MULAMA, RM
AUGUST 5, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

DONALD MWENDWA NZAU ACCUSED

JUDGMENT

A. Introduction.

1. *The constitution* of Kenya 2010 guarantees every person some rights and freedoms which are fundamental to any society however, it is when those rights and freedoms are exercised in violation of other people’s rights and freedoms that a court of law such as this is called upon to balance the scales of justice and make a determination of which of the 2 entitlements is more deserving of the court’s intervention. No wonder it is often said the enjoyment of one’s fundamental rights and freedoms stop where the fundamental rights and freedoms of another person starts.
2. Of importance to note however, is that every person retains the right to freedom of expression which includes freedom of expression which broadly includes but not limited to seek, receive or impart/share information or ideas provided that it should not be lost on any of us that the exercise of that right and fundamental freedom comes with a lot of responsibility and accountability in terms of the respect of others and their reputation.
3. Donald Mwendwa Nzau alias Password Mwendwa alias Abdulaziz Mwendwa is charged with the offence of publication of false information contrary to section 23 of the *Computer Misuse and Cybercrimes Act* No. 5 of 2018.
4. It is the prosecution’s case that on 20th day of July 2023 at around 1244hours at an unknown place within the republic of Kenya through Safaricom mobile number 07XXXXXXX registered in his name



the accused made a publication on Lamu Yetu Sote whatsapp group to which he is a member by stating the following words;

“offcos we are not on the same level,mwanaharamu wa kijaluo jambazi sugu. Nimekufunza kuvaa viatu 2019”

5. It is the prosecution’s case that the accused published the above-mentioned words while knowing they are false and meant to discredit the reputation of the complainant Shee Kupa Shee.
6. 6 witnesses were lined up by the state and each testified on the matter and exhibits produced. I have considered all those together with the evidences and the testimony of the accused in defence.

The Prosecution’s case.

7. It is the prosecution’s case through the complainant that on the material date and time there were demonstrations in the country but Lamu county was largely peaceful but on perusing and going through the conversations in the group called “Lamu Yetu Sote” he found the accused calling for demonstration. It was his testimony that the accused was inciting people to demonstrate and even shared a video of him demonstrating in Mombasa.
8. Pw 1 further testified that he then sent a message to one Bingwa an activist on the presumption that the said Bingwa was behind the call for demonstration and he wrote that message warning him and that is when the accused responded to his message telling him that the complaint was now immune to being insulted and taking people to court.
9. The complainant then responded to him that they are not on the same level and that he should keep his calm and that is when the accused wrote the words complained off and which is the basis of this charges.
10. It was the complainant’s sentiments that the words complained off were insults to him and depicted his parents as promiscuous having slept with a person of Luo origin outside wedlock(mwanaharamu) all of which was not true.
11. Pw 2 confirmed to have seen the exchange between the 2 and even identified the whatsapp conversation extract and stated that in as much as he did not mention the complainant, the words complained off were made in response to the complainant’s message in the said group.
12. Pw 3 and 4 corroborated the evidence of the complainant to the extent that they saw and read the words complained off and which according to them referred to the complainant given that the accused did not expressly mention the complainant but made the insults in response to his text message.
13. Pw 5 a DCI forensic investigator confirmed that the words complained off were in a whatsapp group called Lamu Yetu Sote. He also made a finding that number 07XXXXXXX belonged to one of the administrators to the said group and that the number had a corresponding name of Password Mwendwa and he produced the report dated 15/12/23 and a printout certificate as Pexh 1 and 2 respectively.

Defence case.

14. In his sworn testimony the accused identified himself as Donald Mwendwa Nzau alias Password Mwendwa alias Abdulaziz Mwendwa a resident of Machakos but previously a resident of Lamu. He denied the charges and stated that they were good friends and business partners with the complainant but they fell out for various reasons.



15. He admitted to have been a member of the subject whatsapp group called Lamu Yetu Sote and after being shown the whatsapp extract it was his view that it did not show its name, date and the complainant's name and number.
16. On being shown the report produced in evidence and especially finding no. 3 it was his testimony that the number was not familiar to him and that his phone was not examined yet it was crucial that it be examined. The accused further lamented as to how the report talked on the events of 20/6/2023 yet the charge sheet talks of 20/7/2023 and that he was at a loss on which dates he was to speak to.

The accused's submissions

17. The court has been urged in the opening paragraph of the submissions to appreciate the relationship that existed between the adversaries and that they were bosom buddies and business partners.
18. It is further urged that along the way they became enemies due to various dynamics including but not limited to politics and according to the accused it is on that backdrop that the accused has been charged with the current offence. In short it is the accused's submissions that the charges are politically motivated.
19. In his submissions the accused raised 2 germane issues for determination to wit whether the charge sheet herein is defective and whether the prosecution has proved its case beyond any reasonable doubt.
20. On the first issue the accused submits that the charge is defective on account of the evidence adduced being at variance with the charges. In support of this assertion it was his submission that the critical piece of evidence to wit the analyst report has grave variances and inconsistencies and that a further contention was that the offending words lack specificity within the language of Section 23 of the Act where the person whose reputation is discredited must be identified.
21. The accused further submitted that the charge sheet talks of the date of the offence as 20/7/2023 and on the other hand the report and the exhibit memo talk of 20/6/2023 and as such there is no report on record on the events of 20/7/2023.
22. In support of his contention that the charge sheet is defective relied on the case of Yongo vs Republic[1983] KLR 319.
23. On the second issue as to whether the state had proved its case to the required standards the accused submitted that there needs to be no room for even a single doubt for the court to convict and as such there is no evidence to show that the complainant was indeed a member of the said whatsapp group and as such the prosecution did not prove that the words complained off were directed to the complainant.

Submissions by the state.

24. The state relied on the evidence on record and did not file any submissions.
25. I have considered all the evidence and testimonies of the witnesses as well as the submissions by the accused and the authorities cited therein.

B. Issue For Determination.

26. From the testimonies of the witnesses as well as submissions by the accused this court has crafted the following issues for determination;
 - a. Whether the charge sheet is defective.



- b. Whether it is the accused's number that published the words complained off.
 - c. Whether the words complained off were false.
 - d. Whether the words complained off may result to panic or chaos among citizens.
 - e. Whether the words complained off discredits the reputation of the complainant.
27. As it may now be apparent, issues (b) to (e) if answered in the affirmative would definitely translate to the state having proved the charge beyond reasonable doubt and the vice versa is also true.

C. Analysis And Determination.

Whether the charge sheet is defective.

28. In determining whether a charge sheet is defective or not the court of appeal in the case of *Sigilani vs Republic* (2004) 2 KLR 480 held as follows;

“the principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

29. Further in the case of *Yongo vs Republic* (1983) KLR 319 held that a charge is defective when it gives a misdescription of the alleged offence in its particulars.

30. Against the aforesaid legal background, it is the accused's contention that the charge sheet is defective because it failed to disclose all the necessary full particulars of the offence as required as it does not disclose to whom the words complained off were directed to and that it is only the accused's mobile number that is indicated and the one for the complainant is not shown and that the complainant's name is not mentioned in the words complained off.

31. The charge sheet read as follows;

“Donald Mwendwa Nzau Alias Password : On the 20th day of July 2023 at around 1244hours at an unknown place within the republic of Kenya, through a Safaricom mobile number 07XXXXXXX registered under your name. You made a publication on Lamu Yetu Sote whatsapp group of which you are a member stating, “offcos we are not on the same level, mwanaharamu wa kijaluo jambazi sugu. Nimekufunza kuvaa viatu 2019”. You made the publication knowing they are false, and are meant to discredit the reputation of Shee Kupa Shee”

32. A plain reading of the particulars of the charge in my view disclose an offence and the said particulars are sufficient enough to enable the accused mount a proper defence. What I gather from the accused's submissions on this matter as contained at paragraphs 17 onwards is that the particulars do not disclose to whom those alleged words were directed to. In all fairness the ending sentence clearly inform the accused that the words were not only false but were meant to discredit the reputation of the complainant one Shee Kupa Shee. This is clear to me that the words complained off were directed to the complainant.

33. It is further argued that there is no where in the charge sheet where the alleged words were actually directed to the complainant's phone number. In my view in as much as that is true on the particulars in that the complainant's number is not captured, that is a matter of evidence and we can only tell



that after reviewing the evidence in its entirety. Particulars are to give a suggestion or an indication of what the accused is to expect during trial and those particulars are to be firmed up during testimony of witnesses.

34. In the circumstances I do find and hold that the particulars as indicated in the charge sheet disclosed an offence and/or gave sufficient particulars to support the charge facing the accused and as such the charge sheet as presented is not defective in any manner.

Whether it is the accused's number that published the words complained off.

35. It was the evidence of Pw 1,2,3 and 4 being members of the subject whatsapp group christened Lamu Yetu Sote that it is the accused person who published the words complained off.
36. In support of this the extracts of the said chats were produced in evidence. The accused poured cold water on that piece of evidence stating for among other reasons that the extracts did not show or prove that the complainant was a member of the said group and that neither his name nor phone number have been shown in the extracts produced in court.
37. I have perused the report containing the said extracts and there is evidence that phone number 07XXXXXXXX was and still is registered in the name of Donald Mwendwa Nzau and the same was registered on 3/8/2016 at 1738 hours. The accused person has not denied those details. Infact the national identity card as contained in the subscriber details is the same ID number as the one contained in the charge sheet. The accused has not denied that the details as contained in the subscriber details are not his.
38. Having satisfied myself that 07XXXXXXXX is registered in the name of the accused person I now proceed to consider the twin issue of whether the said number was a member of the subject group and whether it was the same that published the words complained off.
39. Again the accused poured cold water on the said extracts especially with regards to some extracts not having the name of the group. However, contrary to his assertion, there is one that has the name of the group and the name and number of the accused are conspicuously displayed and the accused is infact one of the administrators. A look at the said extract, the accused number +2547XXXXXXXX is against the name Password Mwendwa. The accused in introducing himself in defence indicated that he is also know as Password Mwendwa among other names. Further his name is below a member by the name "Malik n Bilal.." of 0702xxx178. Furthermore in defence the accused admitted to being a member of the said group but he is no longer a member.
40. Flowing from the above I am thus satisfied that phone number +2547XXXXXXXX (07XXXXXXXX) registered and/or belongs to the accused as per the subscriber details was a member of the said group to wit Lamu Yetu Sote.
41. As to whether it was the same number that published the words complained off, a cursory look of the extracts once again, it shows that the number +2547XXXXXXXX (Password Mwe...) published the words complained off at 12:44. The accused in a bid to deny such publication resorted to an excuse that the page that contains the words complained off does not have the name of the group. A look at the said extract one would see that as the extract was taken, the person who took the same searched for the keyword in order to access the impugned message and in the circumstances there is no way that the name will be reflected when one is searching for a particular message from the group. The other pages of the extract have not been denied or there is no demonstration from the accused that they are from a different group.



42. Furthermore, such an allegation having been made against the accused and in a bid to rebut that allegation, it was incumbent upon the accused to produce in evidence an extract that shows its another group or that such words were not published in the said group on the material day and time by that number. I say this well aware that both the accused and the complainant were members of the said group and that piece of evidence would have effectively rebutted the assertion by the state/complainant but that would still be an uphill task as I do not know how the accused would have navigated the issue of the number but that is neither here nor there.
43. To my mind it is immaterial that the accused's number or phone was not examined forensically. The fact that Pw 1,2,3 and 4 were members of the same group and could see whatever was posted using their respective phones, either of their phones could still be used to extract the data that was extracted and as such there is no prejudice the accused suffered in not having his phone examined and none has been demonstrated by the accused. All the state needed was to prove that the words were published and who was responsible for publishing the impugned words.
44. Issues were also raised by the accused as to the contents of the exhibit memo and the report and whether they made reference to events of 20/6/2023 or 20/7/2023. I have looked at both the report and the exhibit memo and what I note is that there are those slight typographical errors as the errors are not consistent, one can easily tell they are typographical errors. For instance on the exhibit memo at the precis of the offence, the DCI officer makes reference to 20/6/2023 but down the said document at the time,date and place committed, the date is indicated as 20/7/2023. The same is also stated of the report where at the overview bit at the top page of the report, it makes reference to 20/6/2023. I do also find that as a typographical error which errors did not in any way prejudice the accused in defending himself and in any event no such prejudice was demonstrated.
45. The accused was well aware of what the offence is all about and how it occurred by virtue of him admitting to have been part of the group where the words complained off were posted and as I stated elsewhere in this judgment, in order to effectively rebut the case by the prosecution his version of evidence and story would have been important and this is not in any way to suggest that the burden was to shift to the accused to prove his innocence.
46. In the end and flowing from what I have discussed above it is the finding of the court and I so hold that it is the accused's number to wit +2547XXXXXXX that published the words complained off. This is further confirmed by finding number 4 in the report by the digital forensic examiner

Whether the words complained off were false

47. It is now clear that it is the accused who published the words complained off. I now proceed to determine whether the said words were false.
48. Section 107 of the *Evidence Act* states that whoever desires a court to give judgment on a legal right or liability dependent on the existence of certain facts must prove those facts. In essence, the person making a claim is responsible for providing evidence to support their claim. It is therefore incumbent upon the accused to prove that indeed the words complained off were true and if that is to be established then the charges would automatically fail and be within the realm of truth or fair comment.
49. The accused in his defence just denied the charges as he did during plea and thereafter went to comment on their past relationships with the complainant and other issues but never sought to inform the court whether such words were true. There is no evidence that the accused adduced to show that the complainant was an illegitimate child of Luo origin and I say illegitimate child as a direct translation



of the word/phrase “mwanaharamu” because the children’s Act 2022 does not define a child in that phrase.

50. The accused through his counsel and during the examination of some of the witnesses intimated that “mwanaharamu” is a phrase that is commonly used in Lamu among other phrases and they answered in the affirmative but in my view that does not make it right. I take judicial notice of the phrase “mwanaharamu” and its import in this area and especially recently following the supreme court decision in Petition number E035 OF 2023 Fatuma Athman Abud Faraj vs Ruth Faith Mwawasi and 2 others and the kind of discourse the decision has elicited on the issue of whether the said “mwanaharamu” can inherit property and the supreme court was clear that excluding that child born of wedlock from inheriting the fathers estate was unreasonable and unjustifiable. This did not and still has not gone well with the Muslim community.
51. I have brought this up to demonstrate how such a phrase “mwanaharamu” is regarded within the Muslim community to which luckily both the accused and the complainant profess but that is the much I can say least I also find myself deep into the discourse.
52. Another phrase that has been used is that the complainant is not only a child born out of wedlock but born of a Luo father. According to the complainant, the phrase depicted his parents as promiscuous when the accused knew too well it was not true. Similarly the accused did not provide any evidence to show that the father of the complainant was of Luo origin. Similarly know evidence was led by the accused to show that he indeed taught the complainant to wear shoes.
53. The other aspect of the words complained off is that the complaint is a serial or most wanted criminal in Swahili is “jambazi sugu”. Contrary to the submission of counsel at paragraph 34 of his submissions and as I have already observed pursuant to Section 107 of the *Evidence Act*, it is the accused to prove that whatever he said was true given that the state has stated that they are false. So it was the duty of the accused to lead evidence to demonstrate that the complainant is a serial and/or most wanted criminal. No summon, warrants or even a case number depicting the complainant as such was produced in evidence and I similarly find that aspect to be grossly false.
54. The net effect is that it is the finding of the court that in the absence of any evidence in rebuttal as to the truth of the words complained, the words as published by the accused were false and I dare add so unfortunate.

Whether the words complained off may result to panic or chaos among citizens

55. It is now clear to my mind given to what I have stated in the immediately preceding issue, the words complained off if construed in their natural and ordinary meaning have the possible effect of causing panic and chaos among citizens especially members of that group.
56. Some of the members might think the complainant is a child born out of wedlock and that he is a serial and/or wanted criminal and we all shiver and enter into panic mood whenever there is word that there is a serial and/or most wanted criminal in their midst. The long and short of this is that the words construed naturally had the effect of causing panic to citizens especially those members of that group.

Whether the words complained off discredits the reputation of the complainant.

57. The complainant has been clear that his reputation has been tainted by the accused given his status in the society and the fact that he is a public servant working as the director disaster management.
58. Tied to the issue of being referred to as “mwanaharamu” and given the beliefs and religious underpinnings on the same which this court takes judicial notice off that single word alone has the



greatest potential of discrediting the complainant's reputation. It is even further exacerbated by the fact that the accused asserts that he is not only born out of wedlock but with another man from the Luo nation. According to the complainant this depicted his parents as promiscuous.

59. The thought of this alone has the potential of discrediting not only the reputation of the complainant but that of his family as well.
60. As I near the end of this judgment I should point out that I am not convinced that these charges were politically motivated. The evidence by the state was cogent enough to prove each of the issues I framed and that are necessary to prove the charge against the accused person.
61. As I pen off allow me state this again for purposes of emphasis, our Constitution at article 33 provides for the freedom of expression but in as much as it provides in details what that freedom entails, it ends by stating that even as individuals enjoy that right they do so respecting the rights and reputation of others. This should remind all of us the issue of social media accountability. The same is personal and not shared and we should be keen on whatever we post and to always look out for factual backing before pressing the send button to all and sundry.

D. Conclusion And Disposition.

62. The upshot of all of the foregoing it is the court's finding of the court that the prosecution proved the charge against the accused person beyond reasonable doubt.
63. The accused person is thus guilty of the offence of publication of false information contrary to section 23 of the *Computer Misuse and Cybercrimes Act* and he is consequently convicted in that offence under section 215 of the CPC
64. Orders accordingly.

DATED, SIGNED AND DELIVERED AT LAMU LAW COURTS THIS..5TH DAY OF AUGUST 2025.

F.M.MULAMA

RESIDENT MAGISTRATE

In the presence of:

Peter Birir for DPP.

Mr. Soita for the accused.

Donald Mwendwa Nzau alias password

Court Assistant:- Fathiya Loo.

