



**Muriuki v Muthama & another (Civil Appeal E107 of 2022)  
[2025] KEHC 14877 (KLR) (17 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14877 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E107 OF 2022  
A MSHILA, J  
OCTOBER 17, 2025**

**BETWEEN**

**JANE WANGARI MURIUKI ..... APPELLANT**

**AND**

**ESTHER WANJIKU MUTHAMA ..... 1<sup>ST</sup> RESPONDENT**

**ROSE WANJIRU MUTHANA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment issued by Hon. P. Muboli (PM)  
on 28/4/2022 at Githunguri Law Courts in SPMCC NO. 16 OF 2019)*

**JUDGMENT**

**BACKGROUND**

1. By a Plaint filed on 5<sup>th</sup> March, 2019, the Appellant sued the Respondents for judgment against the said Respondents and sought for;
  - a. An order directing the Defendants/Respondents to make a full and unqualified apology, amends and withdrawal to be given the widest possible circulation from the place they published the defamatory words, in particular within Githunguri market.
  - b. General and aggravated damages for defamation.
  - c. Costs of this suit.
  - d. Interest on (b) above.
2. The Appellant avers that on 1/12/2018, while on her normal day to day business at her shop located in Githunguri Township, the Respondents without any justification uttered abusive and defamatory words against the Appellant in the public.



3. She contended that the 2<sup>nd</sup> Respondent uttered the following words;- “wewe ni Malaya, mchawi, mwizi wa ma-ploti, mwizi wa mabwana ya watu” while the 1<sup>st</sup> Respondent uttered the following words;- “Malaya wewe, unaiba ma-plot, umeolewa na guka, tunaweza kukuuu”
4. The Respondents filed their statement of Defence on 17/6/2029 denying the averments in the Plaint.
5. The matter proceeded to a full hearing. The trial court found that the Appellant had failed to prove all the ingredients of the tort of defamation on a balance of probabilities and followed to dismiss the suit with costs.
6. The Appellant is dissatisfied with the lower Court’s judgment and has preferred the present Appeal. In her Memorandum of Appeal, she listed three grounds of appeal namely that:-
  - a. That the Learned Magistrate erred in fact and in law in holding that the Appellant had not proven publication of the defamatory words while she had filed and produced a charge sheet and proceedings in Criminal Case Number 2094 of 2018 where both Respondents had been charged and convicted on their own plea.
  - b. The Learned Magistrate erred in fact by failing to consider and direct his mind to the Appellant’s evidence proving publication of the defamatory statements hence arriving at a wrong conclusion.
  - c. The Learned Magistrate misdirected himself in completely disregarding the Appellant’s case and considered extraneous matters, hence arriving at a wrong conclusion.
7. The court directed the parties to canvass the appeal by way of written submissions.

#### **APPELLANT’S SUBMISSIONS.**

8. The Appellant submits that the evidence before court established that the defamatory statements were indeed published, uttered in a public place where they were heard by third parties. The Respondents were said to have pleaded guilty to the offence of offensive conduct contrary to Section 94(1) of the Penal Code. Reliance was placed in the case of *Wycliffe A. Swanya v Toyota East Africa Ltd & another* (2009) eKLR. The defamatory statements were said to have been uttered in a public setting where the effect of humiliating and degrading the Appellant were achieved. It was submitted that the evidence on record is more than sufficient to establish the publication of defamatory statements. The Appellant’s reputation was injured, the statements were false and were communicated to third parties deliberately and with intent to tarnish the Appellant’s character. The Appellant’s case was said to be overwhelming in respect of the balance of probabilities test. Reliance was placed in the case of *William Kabogo Gitau v George Thuo & 2 others* (2010) 1KLR 526. Lastly, the Appellant submitted that she is entitled to damages as such she sought for damages as assessed by the trial court together with costs of this appeal and the trial court.

#### **RESPONDENTS’ SUBMISSIONS**

9. The Respondents submit that publication was not established as such the appeal should fail. It was submitted that proof of presence of members of the society when the alleged defamatory words were made should be adduced which was not done herein as the Appellant did not call witnesses during trial. The Respondents were charged with intent to provoke a breach of peace which was said to be anchored on different legal principles. It was submitted that it being that the parties were quarreling while at their respective shops which are adjacent to each other, the Appellant ought to have called witnesses to prove that the alleged abusive words were heard by a third party so as to prove publication.



The Respondents submit that they were punished for the offense of offensive conduct as such should not be punished twice for defamation which the Appellant was unable to prove during trial.

### **TRIAL COURT'S EVIDENCE**

10. Jane Wangari Muriuki (PW1) testified that she sells household goods in Githunguri. She adopted her witness statement as well as her list of documents. She stated that the Respondents maligned her name as they called her abusive names in public in front of her children, clients and business partners. She stated that there were many people hence she was embarrassed and humiliated. That she reported the matter at Githunguri Police Station and the Respondents were arrested and they were charged with the offence of offensive conduct where they pleaded guilty and were convicted and sentenced. She has since suffered as some clients kept off her business, that her tenants vacated the premises. She sought for damages plus costs.
11. Rosemary Wanjiru Muthama (DW1) adopted her witness statement and her list of documents. She stated that she was charged in court and only pleaded guilty so as to resolve the case at the earliest. She stated that it is the Appellant who started calling them names. She denied conducting herself in an offensive manner as alleged by the Appellant.

### **ISSUES FOR DETERMINATION**

12. Having read and considered the trial court record and the submissions by both parties, the main issue framed for determination is;
  - i. Whether the Appellant proved publication of the defamatory words.

### **ANALYSIS**

13. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, this principle was enunciated thus

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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...”
14. Article 33(3) of *the Constitution* provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.
15. The elements for defamation as stated in *Winfield and Jolowicz on Tort, Seventeenth Edition* are that the statement must be defamatory, secondly that it must refer to and identify the claimant and that it must be published by which is meant that it must be communicated to at least one person other than the claimant.
16. The Appellant herein contends that the respondents made abusive words towards her in public as such she was embarrassed and humiliated causing her to report the matter to the police and the Respondents were subsequently charged with the offence of offensive conduct where they pleaded guilty and were convicted and sentenced.



17. The Respondents aver that they pleaded guilty to the charge so as to resolve the case easily and did not think much of it. They stated that they have since filed a revision which is pending before this court.
18. The Appellant is dissatisfied with the finding of the trial court where her case was dismissed with costs for failing to prove publication.
19. At this point it is not disputed that the alleged defamatory words were uttered by the Respondents and that the said words referred to the Appellant, what is in dispute is whether the said defamatory words were indeed published.
20. The trial court found that the Appellant had not proved that the alleged defamatory words were uttered in public and/or before other persons other than the Appellant as such proceeded to dismiss the Appellant's claim.
21. The Appellant submits that the defamatory statements were uttered in a public place where they were heard by third parties tarnishing her character. On their part, the Respondents contend that the Appellant failed to call witnesses to prove that they heard the alleged defamatory words so as to prove publication. Having been punished for offensive conduct, they should not be punished twice for defamation which has not been proved.
22. In respect of the requirement of publication of the defamatory words, the law requires that that the said defamatory words must be published to a third party other than the claimant. The essence of publication is the making the defamatory statement known to a person or persons other than the claimant, and it is this aspect that makes defamation actionable in the sense that it is what causes other persons to think of the claimant in a less favourable manner. Refer the case of Joseph Nzalu Ngeana v Winfred Kanyaa Muvaka (2015) KEHC 942 (KLR)
23. In the matter herein, the Appellant claims that the defamatory words were made in front of her children and clients and that this affected her business and also caused her tenants to vacate, however, the Appellant did not call any witnesses to support these allegations.
24. As discussed earlier and as captured in the case of Charity Murithi v Lucy Nkio Miciano ([2018] KEHC 3016 (KLR) an essential element of defamation is that the defamatory words must be published. Publication for purposes of defamation means communication to a third party 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”.
25. It is not enough that the Respondents were charged or offensive conduct where they pleaded guilty and were convicted of the said offence, the Appellant ought to have provided evidence to the trial court to prove that indeed the alleged defamatory words were communicated to third parties who now hold the Appellant with less regard.
26. Failure to call witnesses on the part of the Appellant, caused the claim for defamation to fail as publication must be proved over and above proving that defamatory words were uttered against yourself which is the case herein.
27. In the circumstances, this Court is satisfied that the appeal lacks merit.



## **FINDINGS AND DETERMINATION**

28. For the forgoing reasons this Court makes the following finding and determination;

- i. The appeal is found to be devoid of merit and it is hereby dismissed with costs to the Respondents.

29. Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 17<sup>TH</sup> DAY OF OCTOBER, 2025.**

**A. MSHILA**

**JUDGE**

In the presence of;

Sanja – Court Assistant

Uploaded in the presence of Court Assistant

