



Sagala v Sagala (Civil Appeal 9 of 2023) [2024] KEHC 5573 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 9 OF 2023**

AC MRIMA, J

MAY 9, 2024

BETWEEN

HILLARY LIBESE SAGALA APPELLANT

AND

WYCLIFFE NGAIRA SAGALA RESPONDENT

(Being an Appeal arising out of the judgment and decree of Hon. Kassim Akida (Resident Magistrate) in Kitale Chief Magistrate's Court Civil Case No. 455 of 2022 delivered on 27th March, 2023)

JUDGMENT

Introduction

1. The Appellant herein, Hillary Libese Sagala, was the Plaintiff in Kitale Chief Magistrates Civil Case No. 455 of 2016; Hillary Libese Sagala v Wycliffe Ngaira Sagala, (hereinafter referred to as 'the suit').
2. The Respondent herein was the Defendant in the suit. The Appellant is a son to the Respondent.
3. The Appellant was dissatisfied with the dismissal of the suit and lodged an appeal which is the subject of this judgment.

The Appeal:

4. A Memorandum of Appeal was dated 28th March 2023 and filed on 30th March, 2023.
5. The grounds of appeal were as follows: -
 1. That the learned trial magistrate erred in law and in fact in finding the applicant liable determination when no defamation was proved.
 2. That the learned trial magistrate erred in holding that the plaintiff/respondent had proved his case on a balance of probability.



3. That the learned trial magistrate erred in law and in fact in awarding damages which were inordinate by excessive, all circumstances considered.
 4. That the learned trial magistrate erred in law and fact in failing to find that the material alleged to be defamatory was privileged.
 5. That the learned trial magistrate erred in law and fact in disregarding the applicant's defence.
 6. That the learned magistrate erred in finding that the allegations used in the letter documents in issue had not been proved to be true correct fair comment and privileged or otherwise herein.
6. The Appellant then prayed for the following reliefs: -That this appeal is allowed and the judgment of trial subordinate court be set aside.The costs of this appeal are borne by the respondent's and any reward the court may wish to award.Such further or other orders as this honourable court may deem just and expedient.
7. The appeal was heard by way of written submissions. Both parties duly complied. The Appellant appeared in person in this appeal just like before the trial Court. The Respondent was represented throughout the trial and in this appeal.
8. Whereas the Appellant fronted that the appeal be allowed and appropriate reliefs be granted, the Respondent vouched for the dismissal of the appeal with costs.

Analysis

9. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. v Associated Motor Boat Co. Ltd* [1968] EA 123).
10. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* [1982-88] 1 KAR 278 and *Kiruga v Kiruga & Another* [1988] KLR 348].
11. To enable this Court, to ascertain the issues for determination and their discussion, it is imperative that the parties' cases in the suit be briefly revisited.
12. The Appellant [who was the Plaintiff in the suit] mounted a claim against his father, the Respondent, based on the duty of a parent to take care of his/her children. In this case, the Appellant contended that the Respondent abandoned him since his childhood and that he had to be taken care by his grandparents. The Appellant further contended that despite the Respondent owning a large chunk of land known as Kaisagat/Makhonge Blk 6/Leisa/35 measuring 16.20 Ha, which he inherited from his father, the Respondent was disposing it without according him a portion thereof for settlement sake.
13. On the basis of the said complaint, the Appellant prayed for the following prayers in the Plaint filed in the suit: -
 - a. My father to show me where to settle with my family.
 - b. Damages costed by my father and stresses to be compensated by the respondent.
 - c. And any reward the court may wish to award may do so.
14. The Respondent opposed the suit. He filed a Defence.



15. Whereas the Respondent admitted being the father to the Appellant, he stated that the Appellant was born out of wedlock and that he never married his mother. That, the Appellant was brought to the home of the Respondent when still young and unmarried.
16. The Respondent posited that he took care of the Appellant who was raised by the Respondent's mother and even took him to School. He contended that the Appellant had serious disciplinary issues at the Kaveye Youth Polytechnic where he had admitted him to pursue an artisan course; a result of which he was suspended indefinitely.
17. The Respondent further contended that he even allotted the Appellant a portion of 0.66 acres out of his land known as Plot No. 75 Kaisagat for purposes of his settlement. The portion had a house and trees. Surprisingly, the Appellant harvested the trees and sold off the portion.
18. It was the Respondent's position, therefore, that the suit was misconceived and ought to fail.
19. On the basis of the foregoing, the trial Court found that pursuant to Section 35 of the *Children Act* [No. 9 of 2022], the duty of a parent upon his/her children extended beyond the child's 18th birthday only in special circumstances and upon application to Court.
20. Having been satisfied that there were no special circumstances in the case, the Court declined the suit. It was that dismissal that prompted the instant appeal.
21. This Court has carefully considered the record and the submissions.
22. From the Memorandum of Appeal, it seems that the Appellant preferred some grounds which had no nexus with the subject matter. For instance, the first, fourth and sixth grounds dealt with defamation and the third ground dealt with an award of damages. Such issues were not part of the pleadings in the suit and also never arose for determination during the trial. The first, fourth and sixth grounds are hereby struck off the Memorandum of Appeal.
23. Going forward, therefore, this Court will accord the Appellant the benefit of doubt, being a layman, and not put so much premium on the way the appeal and grounds were preferred. Instead, this Court will revisit the evidence on record, evaluate it and reach a conclusion on whether the suit be sustained or otherwise.
24. The cause of action in the suit was on the parental responsibility over one's children. Even without saying it loud, what the Appellant fronted in the suit was an attempt at ensuring that the parent/ Respondent discharged his constitutional responsibilities on him beyond his 18th birthday.
25. In order to be able to, therefore, properly look at the issue, a brief look at the place of parents and children in *the Constitution* becomes paramount.
26. Whereas the rights and fundamental freedoms of parents and children are captured under Part 3 of Chapter Four of *the Constitution* under the Bill of Rights, the other rights and fundamental freedoms in the entire Bill of Rights also apply to them.
27. Article 19 of *the Constitution* describes the Bill of Rights as an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies. It further provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.
28. The provision further provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State; do not exclude other rights and fundamental



freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with *the Constitution* and are subject only to the limitations contemplated in *the Constitution*.

29. Article 45 of *the Constitution* provides for the family. It defines the family as the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.
30. Article 53 of the Constitution provides for children.
31. Article 260 of *the Constitution* describes a "child" to mean an individual who has not attained the age of eighteen years. Therefore, the rights and fundamental freedoms under Article 53 are specifically meant to apply to such individuals who have not attained the age of eighteen years.
32. A holistic reading of Article 53 of *the Constitution* favours an interpretation to the effect that the rights and fundamental freedoms therein encompasses the parental responsibility over the children on the parents. I say so since Section 31 of the *Children Act* defines "parental responsibility" as follows: -

means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child."
33. Some of the rights under Article 53 of *the Constitution*, and which are relevant to the appeal herein, relate to the duty of a parent to provide parental care, protection and shelter to the children.
34. However, as pointed out above, the Article 53 rights are only available to children. That, therefore, brings us to a look at the *Children Act*, Cap. 141 of the Laws of Kenya [formerly No. 9 of 2022].
35. The preamble of the *Children Act* states that it is an Act of Parliament to give effect to Article 53 of *the Constitution*; to make provision for children rights, parental responsibility, alternative care of children including guardianship, foster care placement and adoption; to make provision for care and protection of children and children in conflict with the law; to make provision for, and regulate the administration of children services; to establish the National Council for Children's Services and for connected purposes.
36. The *Children Act* also describes a child as in Article 260 of *the Constitution*; to mean an individual who has not attained the age of eighteen years.
37. Whereas parental responsibility mainly attaches to a parent in respect to a child, Section 35 of the *Children Act* provides for an extension of the responsibility beyond eighteenth birthday of a child.
38. The said provision states as under: -
 - (1) Parental responsibility in respect of a child may be extended by an order of the Court after the date on which the child attains the age of eighteen years if the Court is satisfied, either of its own motion or on application by any person, that special circumstances exist with regard to the welfare of the child that would necessitate the making of such extension.
 - (2) The special circumstances referred to in subsection (1) include cases where the child is in need of extended parental responsibility by reason of special needs arising from severe disability or developmental disorder.



- (3) An application under this section may be made either before or after the child has attained the age of eighteen years by—
- (a) the parent;
 - (b) any person who has parental responsibility over the child or by a relative of a child;
 - (c) the Secretary; or
 - (d) the child.
- (emphasis added).

39. It is, hence, the prevailing legal position that a Court may in appropriate special circumstances extend parental responsibility beyond a child's eighteenth birthday.
40. But what does the term 'special circumstances' mean?
41. *The Constitution* and the *Children Act* do not define the term. In other jurisdictions the term 'special circumstances' has been used to mean 'exceptional circumstances' or 'unusual' or 'extraordinary circumstances' or 'compelling reasons'.
42. Having gone through various statutes, scholarly writings and decisions within and outside our jurisdiction, it appears that the term 'special circumstances' (or as the case may be) is not settled and may include a rubric of circumstances.
43. The 10th Edition, Black's Law Dictionary defines 'extraordinary' as "beyond what is usual, customary, regular or common". It also defines 'a circumstance' as "an accompanying or accessory fact, event or condition such as a piece of evidence that indicates the probability of an event". The dictionary goes ahead to define "extraordinary circumstance" as "a highly unusual set of facts that are not commonly associated with a particular thing or event."
44. In Kenya, Courts have, as well, dealt with the issue. In *Republic v Joktan Mayende & 3 Others* [2012] eKLR, *Mohamed Abdurrahman Said & Another v Republic* [2012] eKLR, *Wilson Thirimba v DPP* [2012] eKLR, among others, the Courts reverted to the meaning of the word 'compelling' as defined in the Concise Oxford Dictionary, 9th Edition which is defined as 'rousing, strong, interest, attention, conviction or admiration'.
45. Admitting the challenge in the term 'exceptional circumstances', the Constitutional Court of South Africa in *Liesching and Others v S* (CCT304/16) [2018] ZACC 25; *2018 (11) BCLR 1349 (CC)*; 2019 (1) SACR 178 (CC) (29 August 2018) quoted with approval the definition in *S v Petersen* 2008 (2) SACR 355 (C) and had this to say: -

Meaning of "exceptional circumstances"

- (39) The phrase "exceptional circumstances" is not defined in the Superior Courts Act. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as "ordinary" in one case may be treated as "exceptional" in another. For instance, in *Petersen* a Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Western Cape High



Court) observed in relation to an application for bail under section 60(11) (a) of the Criminal Procedure Act:

On the meaning and interpretation of ‘exceptional circumstances’ in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11) (a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria.”

46. Defining the term further, the South African Court in *S v Bruintjies* 2003 (2) SACR 575 (SCA) had the following to say: -

.... What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant fact.

... If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.

47. Still on the South Africa jurisprudence, in *S v Rudolph* 2010 (1) SACR 262 (SCA) at 266 g-h, the Court dealt with what exceptional circumstance are and reiterated that the Applicant in bail application must, on a balance of probability, demonstrate that “exceptional circumstances” in his or her case, indeed, do exist and that they “in the interests of justice permit his release”. This, according to the Court, involves the balancing” between the liberty interests of the accused and the interests of which”, society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstance” are shown by the accused to exist”.
48. Given the amorphous nature of the term ‘special circumstances’ or ‘exceptional circumstances’, a Court while exercising its discretion in dealing with an application for extension of parental responsibility beyond a child’s eighteenth birthday must consider all relevant factors and determine whether individually or cumulatively warrant a finding that circumstances of an exceptional or special nature exist which justify the extension. There must be a balance between the rights of the Applicant sought to be protected by the extension and the rights of the parent who has all along borne the parental responsibility.
49. In this case, those ‘special or exceptional circumstances’ must be demonstrated by the Appellant.
50. In doing so, the Appellant, in paragraph 3 of the Plaint, averred that he was born on 1st January 1987. As such, by the time the Appellant filed the suit [in November 2022], he was aged around 35 years old. The Appellant is now aged around 37 years old. Under Article 260 of *the Constitution*, the Appellant is not even a youth since he is over 35 years old.



51. Since the Appellant is aged way beyond 18 years old, the suit can only be an attempt to extend parental responsibility beyond his eighteenth birthday.
52. For the Appellant to benefit from the provisions of Article 53 of *the Constitution* and Section 35 of the *Children Act*, he had to demonstrate that special circumstances existed in his favour that would necessitate the making of such extension.
53. Some of the special circumstances under the *Children Act* include special needs arising from severe disability or developmental disorder. Needless to say, the Court reserves the discretion to appropriately consider and declare some circumstances as special ones calling for the extension of the parental responsibility.
54. Returning to this case and on the guidance of the foregoing, the Appellant attempted to demonstrate some special circumstances. He, for instance, averred that the Respondent abandoned him and that he was raised by her grandparents, that the Respondent did not educate him and that the Respondent did not provide him with care, protection and shelter.
55. The Respondent denied the allegations and tendered evidence to the contrary.
56. With such state of affairs, the rules of evidence on the burden and standard of proof came into play.
57. The legal doctrines of burden of proof and standard of proof have been subjected to a lot of legal discourse such that it may not be necessary to replicate the same in this judgment. However, briefly put, the burden of proof is a legal doctrine which principally deals with the duty of a party or parties to adduce evidence in a matter in proof of a certain fact. The standard of proof relates to the evidential threshold required for a claim to be considered as having been proved.
58. The issue of the burden of proof has two facets. There are the legal burden of proof and the evidential burden of proof.
59. Sections 107(1), (2) and 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya deals with the burden of proof. They states as under: -
- Sections 107(1) and (2):
1. 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.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- and
- Section 109:
- Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
60. The foregoing provisions bring out what is referred to as the legal burden of proof. That burden remains on the Claimant throughout the case.
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62. There is also the evidential burden of proof. This legal principle was discussed in Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga v IEBC & 2 Others [2018] eKLR as under: -



26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.
27. The principle of ‘evidential burden of proof’ is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in *Singh v Mota Singh & Another* [2008] 1 KLR 1 stated that an election is a matter of public importance not to be lightly set-aside and in the case of *Jeet Mohinder Singh v Harminder Singh Jassi*, AIR 2000 SC 258 the Supreme Court of India stated that ‘the success of a candidate who has won at an election should not be lightly interfered with...Any person seeking such interference must strictly conform to the requirements of the law...’.
28. The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -
- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
- (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law....
63. It, therefore, follows that whereas the legal burden of proof is static and rests on the Claimant throughout the trial, the evidential burden of proof may shift to the other party(ies) depending on the nature and effect of evidence adduced by the Claimant.
64. On the standard of proof in ordinary civil claims, the Black’s Law Dictionary, (9th Edition, 2009) at page 1535 defines ‘the standard of proof’ as: -
- [t]he degree or level of proof demanded in a specific case in order for a party to succeed.
65. In many jurisdictions and decisions world over three main categories of the standard of proof emerge. They are the criminal standard of proof of ‘beyond reasonable doubt’, the application of civil case standard of ‘balance of probabilities’ and the application of an intermediate standard of proof.
66. In this case, therefore, the applicable standard of proof is the one in civil cases being ‘proof on balance of probabilities’.



67. Having said as much, this Court is now called upon to determine whether the Appellant demonstrated any special circumstances in this case to warrant the extension of the Respondent's parental responsibility over him and for necessary orders.
69. Based on the averments made by the Appellant, the Respondent tendered evidence to the effect that cared for him through his parents, that he educated the Appellant and that he gave him land to settle in. There is also evidence that the Appellant sold off the land allotted to him by the Respondent. Several exhibits were produced by the Respondent.
70. The Respondent, therefore, managed to shift the evidential burden of proof back to the Appellant. It was, hence, upon the Appellant to adduce further evidence countering the Respondent's evidence. That, he did not do. As such, the averments by the Respondent were uncontroverted and can only be found by this Court as truthful.
71. On a balanced scale, this Court does not, hence, find any special circumstances in this case. The Respondent reasonably discharged his duties under Article 53 of *the Constitution* upon the Appellant. The circumstances referred to by the Appellant do not in any way amount to special circumstances warranting the extension of parental responsibility.
72. The Appellant was well taken care of by the Respondent. What the Appellant now goes through are normal day-to-day struggles in his life which he must fend for himself. Conversely, the Appellant can only demonstrate respect and loyalty to his father for any assistance.
73. This Court affirms that there is no demonstration and proof that the Respondent abandoned the Appellant, did not educate him or failed to accord him shelter and land. The Respondent did all that.
74. In sum, the Appellant's case was not proved. It is on that basis that this Court finally agrees with the finding of the trial Court which dismissed the suit.

Disposition:

75. As I come to the end of this judgment, I hereby tender my sincere apologies to the parties for the late delivery of this decision. The Judge has a huge workload emanating from two High Court stations and is also engaged in a Tribunal investigating the conduct of a Judge which sits in Nairobi.
76. Having so said and drawing from the above, the following final orders do hereby issue: -
 - a. The appeal is hereby dismissed.
 - b. The Appellant shall bear the costs of the appeal.
77. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 9TH DAY OF MAY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Hillary Libese Sagala, the Appellant in person.

Mr. Kaosa, Learned Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

