REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 49 OF 2011

EDWARD SHAKALA.....APPELLANT

VERSUS

ROSEMARY HALUBWA SHAKALA.....1ST RESPONDENT

CHARLES FORO WAWERU.....2ND RESPONDENT

(Being an appeal from the ruling of Hon. H.O. Baraza Resident Magistrate dated 21st December 2010 in Nakuru CMCC Number 1339 of 2007 Edward Shakala vs Rosemary Halubwa & Charles Foro Waweru)

J U D G M E N T

1. In **Nakuru Chief Magistrate's Civil Case Number 1339 of 2007** Edward K. Shakala sued his daughter Rosemary Halubwa Shakala and his son in law Charles Foro Waweru for defamation.

2. In a plaint dated 3rd October 2007 he averred that;

> ***"6. On or about the 29th day of July 2006 and September 2007 the 2nd defendant in cahoots with the 1st defendant have blatantly, falsely, maliciously, and in bad faith continuously published and/or caused to be published information concerning the Plaintiff which was defamatory ordinarily and by innuendo.***
>
> ***Particulars of defamation***
>
> ***a) That the plaintiff had physically and sexually abused the 1st defendant amounting to defilement and rape for a period of 10 years.***
>
> ***b) That due to the said persistent abuse and molestation my wife had run away from the plaintiff in the year 2001.***
>
> ***c) That the plaintiff had issued threats against the defendants were they to continue with their relationship as husband and wife.***
>
> ***Particulars of malice, bad faith, falsehood and blatancy***
>
> ***a) Publishing the said information to the Officer Commanding Police Station Garsen.***
>
> ***b) Publishing the said information to the Officer Commanding Police Division Hola.***
>
> ***c) Publishing the said information to many people when they had not even a scintilla of evidence to support their allegation.***
>
> ***d) Moving the police to arrest or discipline the plaintiff.***
>
> ***7. The said publication is their material and ordinary meaning and/or innuendo were understood by right-thinking members of the society to mean that the Plaintiff is a criminal with satanic depravity and a loudly immoral person who committed the offences of rape, defilement and incest contrary to the law as contained in the Penal Code and thus lethal and cannot be entrusted with safe custody of children and students and is a person who has no qualms for morality and is not in control of his sexual appetites. Further the said words were meant to portray that the plaintiff is a bully.***

8. By reason of the publication, the plaintiff has been greatly injured in his credible character, and reputation and standing in the society as a father and a husband and in his said career as he had been denied promotion to be the Chief Technologist and has stagnated as a Senior Technologist as a result of the publication which has subjected him to hatred, ridicule, odium and contempt in the society and claims against general and aggravated and/or exemplary damages.

9. That plaintiff avers that by virtue of the said publication he has been denied a promotion and or being confirmed as a Chief Technologist thus left at an acting role."

He prayed for judgment in terms of;

(a) General damages as in paragraph 8

(b) Aggravated and exemplary damages as in paragraph 8.

(c) Costs.

(d) Interests on a and b above.

3. In their joint statement of defence the defendants denied that the plaintiff was the father to 1st defendant and put him to strict proof thereof. They also denied all the other allegations and put the plaintiff to strict proof thereof. At paragraph 12 and 13 they made the averments;

"12. The defendants aver that the honourable court has no jurisdiction to hear and determine this matter.

13. The defendants aver that the suit herein has been brought in bad faith and is vexatious and an abuse of the court process and is totally defective. The defendants shall raise a preliminary objection at the earliest opportunity to this effect".

and sought that the suit be dismissed with costs.

4. On 4th October 2010 the defendants through counsel raised Notice of Preliminary Objection;

(a) "The subject matter of the suit herein relates to defamation.

(b) The Plaint as framed fails to comply with the mandatory requirement that the actual words complained of must be set out verbatim in the body of the Plaint.

(c) The Plaint as framed and filed fails to comply with the mandatory requirement that the particular identities of the person to whom the alleged words were published must be revealed.

(d) The suit is therefore fatally and incurably defective."

5. Relying on;

1. Roselle vs Buchanan (1885-86) Vol. XVI, QB 656.

2. Charles Bradlaugh & Annie Besant vs The Queen (1877-1878) Vol III QB, 607.

3. Atkinson vs Fosbroke 1865-1866 Vol.1 QB, 629

4. The Halsbury's Laws of England, Volume 28 4th Edition 93

Counsel for the defendants argued the court that in a defamation suit it was mandatory to lay out the actual words used because it was those words that set out the cause of action. That in the suit the plaintiff had not done so, and the case was therefore a non-starter.

6. Counsel for the plaintiff opposed the Preliminary Objection submitting that the said particulars were set out in paragraph 6 of the plaint.

7. The trial magistrate relying on **Collins vs Jones (1955) 2 All ER 175** and **Order VI rule 6A** of the **Civil Procedure Rules** found that it was a mandatory requirement that the actual words be set out in the plaint *"failure to which a cause of action cannot be established."* On that finding the trial court upheld the Preliminary Objection, struck out the suit with costs on 21st December 2010.

8. The ruling provoked this appeal and on 20th February 2011 a Memorandum of Appeal was filed on the following grounds: -

1. *The learned trial magistrate erred both in law and fact by f*inding *that the whole suit was incurably defective and thereby striking it out.*

2. *The learned trial magistrate erred both in law and fact by striking out the suit on the ground that the identity of the person to*

whom the alleged words were published was not revealed yet the same was plainly set out in the body of the plaint.

3. *The learned trial magistrate erred both in law and fact by disregarding the evidence of the appellant set out in paragraphs 6 and 7 in the body of the plaint on the actual words complained of.*

4. *The learned trial magistrate erred in law and fact in disregarding the exhibits and defamatory words and letters complained of having been produced by the respondent as exhibit.*

5. *The learned trial magistrate erred both in law and fact by finding in favour of the respondents without due consideration of the loss suffered by the appellant following malicious character assassination by the respondent.*

6. *The trial magistrate erred in law and fact in failing to consider that the preliminary objection as raised was belated and an abuse of the process of the law.*

7. *The learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions.*

9. Parties chose to dispose of the appeal by way of written submissions.

10. **Section 78** of the **Civil Procedure Act** provides for the powers of the court on appeal.

> ***"S.78. Powers of appellate court***
>
> ***(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—***
>
> ***(a) to determine a case finally;***
>
> ***(b) to remand a case;***
>
> ***(c) to frame issues and refer them for trial;***
>
> ***(d) to take additional evidence or to require the evidence to be taken;***
>
> ***(e) to order a new trial.***
>
> ***(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."***

11. This being a first appeal the court is required to retry the Preliminary Objection. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus**

> ***"An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270)."***

12. I have carefully read through the submissions and the authorities cited.

13. The issues to be determined are; whether the trial magistrate *was in error in upholding the preliminary objection*: whether he relied on *stale law and authorities*; whether the requirements of *Order 2 rule 7(1) are a technicality*; whether *Order 2 rule 15(1)(a) is applicable*.

14. For the appellant counsel argued the grounds in several clusters; the gist of the arguments was that the trial magistrate acted on a mere technicality, that the requirements of **Order VI rule 6A** ***(***now ***Order 2 rule 7(1)*** were a procedural requirement upon which the trial court had based its decision. On whether the suit was incurably defective, the appellant relying on **Order 2 rule 15 (1) (a)** argued that the Plaint set out a reasonable cause of action having laid out the particulars of the offence, particulars of malice and the damage suffered by the appellant. Also on **DT Dobie & Company (K) Limited v Muchina [1982] KLR** the words of *Madan J. A.* that unless the suit was so hopeless that it plainly did not disclose a reasonable cause of action, it ought not to be dismissed similarly. As to whether the words complained of and the persons they were published to ought to have been set out in the Plaint, the counsel for the appellant faulted the trial court for relying on **Order VI rule 6A** which he submitted was repealed by **Article 159 (2) (d)** of the **Constitution**, as a mere technicality. Citing **Susan Rokih v Joyce Kandie & 6 Others [2018] eKLR** where the judge found that **Order 2 rule 7 (3)** of the **Civil Procedure Rules** that *"a plaintiff in an action for libel need not plead malice in plaint but where malice is pleaded, failure to state particulars on which the claim is made does not automatically render a plaint defective,"* he urged this court to be persuaded of the same and allow the suit to be heard on merit.

15. On whether there was a point of law in the Preliminary Objection, it was argued from the appellant that counsel for the respondent had not raised any point of law but had used archaic authorities, state to be specific vis a vis the **Constitution of Kenya 2010.** Finally, that

Order 2 rule 15(1) (a) allowed a court to sustain a suit, and cited **Cresent Construction Company Limited v Delphis Bank Limited [2007] eKLR.**

> ***"The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations."***

16. For the respondent it was submitted;

> ***"The Preliminary Objection was principally based on the fact that the Plaint as framed did not comply with the mandatory requirements that the actual words complained of must be set out verbatim in the body of the Plaint and the fact that the mandatory requirements that the particular identities of the person to whom the alleged words were published must be revealed. It was for these two reasons that the Respondent argued that the suit was fatally and incurably defective."***

The gist of their arguments was that the failure to comply with **Order 2 rule 7 Civil Procedure Rules** is not a mere technicality. First, counsel clarified that **Order VI rule 6A** had not been repealed but had become the new **Order 2 rule 7.** Relying on **Harrison Kariuki Muru v National Bank of Kenya Limited & Another [2019] eKLR** where the judge reiterated the position of the court in **Collins v Jones (1955) All ER 145** that;

> ***"The particulars of the facts and matters referred to in this rule would ordinarily constitute the words concerning the plaintiff which in his view, are calculated to lower him in the estimation of the right thinking men or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an amputation on him disparaging or injurious to him in his office, profession, calling trade or business"***

The Judge went on to say;

> ***"A plaintiff in a libel action not only must set out with reasonable certainty in his pleading the words complained of, but also must be prepared to give such particulars as to ensure that he had a proper case to put before the court and is not merely fishing for one…"***

17. He also relied on **Hon. Kennedy Nyakundi v Jackson Ongubo & Gusii Star [2016] eKLR** where the court stated;

> ***"I find that in jurisdiction similar to ours, there is general unanimity that alleged defamatory words must be pleaded in the original language they were uttered. This position was ably stated in the case of Muir v January (1990) BLR where is was held: -***
>
> *"In an action of defamation, the actual words used are the material facts. It is elementary rule of pleading that all material facts must be pleaded. Therefore, in an action for defamation the actual words, or the part complained of, must be pleaded by setting out in the declaration. It is not enough to describe their substance, purpose or effect. If the words are in a foreign language, the actual words used must be set out in the foreign language, followed by a literal translation. Failure to comply with this rule of pleading rendered the pleading defective, and in the absence of an amendment to cure the defect, the plaintiff could not obtain judgment on the basis of the pleading…*
>
> ***"The law requires the very words in the libel to be set out in order that the court may judge whether they constitute a ground of action. The plaintiff has not done this. "***

In **Veronica Wambui v Michael Wanjohi Mathenge [2015] eKLR** the court stated emphatically:

> **"…This is not a mere technicality, because justice can only be done if the defendant knows exactly what words were complained of, so that he can prepare his defence…"**

The respondents pointed out that what amounts to a procedural technicality was what was settled in **Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** as;

> ***"Deviation from and lapses in form and procedures, which do not go to the jurisdiction of the court, or to the root of the dispute on which do not at all occasion prejudice or miscarriage of justice to the opposite party…"***

18. From the persuasive authorities cited it is clear that a claim on defamation is based on the use of ordinary words to mean something injurious to the claimant. That words were not used in their ordinary meaning but used with the intent of harming the claimant's reputation/person. **Order 2 rule 7(1)** is clear, first that the plaintiff will be alleging that words or matters were used in a defamatory sense. These words are the actual cause of action. These words that he is complaining of form the basis for the claim, hence they must be set out so that the other party is aware of the words they are alleged to have uttered and or published and for the court to be able to make the determination whether those words amounted to what is alleged. It is not sufficient for the claimant to speak of the effect of the utterance or publication. He must set out what was stated verbatim.

19. A view of the plaint and paragraph 6 in which it was argued before the trial court that the particulars were set out clearly indicates that no

such words were set out. Paragraph 6 merely sets out the alleged effect of the words or what was alleged to have been published.

20. The plaintiff made an allegation and the sense he made of the allegation but as to the actual words uttered/published by the respondents, none were set out in the plaint.

21. It has been suggested in the submissions that the trial court allowed an amendment of the plaint instead of striking it out. Nowhere in the appellant's submissions before the lower court was any such plea made to warrant this submission. The appellant simply stuck to his guns that he had set out the particulars of his claim under paragraph 6 of the Plaint.

22. The position on the law, and the jurisprudence on this issue is numerous, the alleged defamatory words must be set out. Failure to do so, is fatal to the claim. In that I associate myself with the findings in **Kennedy Nyakundi** and **Harrison Kariuki Muru.** That brings home the fact that the requirements of **Order 2 rule 7(1)** are not mere technicality, the words alleged to have been uttered, the particulars of fact, are the cause of action. Thay are what constitute the cause of action, without them there is none. And in this I associate myself with *Mativo J* in **Veronica Wambui**.

23. I find therefore that the failure by the plaintiff to set out the defamatory words in the Plaint was a fatal omission as the same rendered the suit a non-starter.

24. The trial court was right to uphold the preliminary objection.

25. It has been argued for the appellant that this was an exercise of discretion which ought to have been exercised to ensure justice for the appellant in light of **Article 50** on fair trial. Hence the question whether the case of **Susan Rokih** though persuasive is applicable to this suit? In that case, the judge was being asked to strike out the suit because of failure to comply with **Order 2 rule 7(1)** and went on to apply the principles set out under **Order 2 rule 15**, on striking out the pleadings.

> **"[Order 2, rule 15.] Striking out pleadings provides;**
>
> ***15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***
>
> ***(a) it discloses no reasonable cause of action or defence in law; or***
>
> ***(b) it is scandalous, frivolous or vexatious; or***
>
> ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
>
> ***(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.***
>
> ***(2) No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.***
>
> ***(3) So far as applicable this rule shall apply to an originating summons and a petition."***

26. That rule gives the court the discretion on what to do. It states;

> *"At any stage of the proceedings, court may order to be struck out or amended…."*

27. This provision calls for the exercise of discretion by the court, depending on the circumstances, to choose whether to strike out or to order an amendment. That means the court is persuaded that the choice it makes is the right one for the circumstances of the case before it.

28. The guiding principles for the exercise of judicial discretion were discussed by the Supreme Court in **Parliamentary Service Commission vs. Martin Nyaga Wambora & 2 Others [2018] eKLR** where it cited with approval the holding in **Mbogo v Shah [1968] EA 93 and 96** on the question whether a court on appeal ought to interfere with the exercise of discretion by the trial court. In that case the Court of Appeal stated;

> ***"We come to the second matter which arises in this appeal, and that is the circumstances in which the court should upset the exercise of discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways enunciating the principles which have been followed in this court, although I think they more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a while that the judge had been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."*** *(emphasis mine)*

Holding the trial court's decision against the light of these guidelines, can this court interfere with the trial court's decision as suggested by the citing of Susan Rokih and **Order 2 rule 15(1)(a)?** I pose and answer the following questions;

(i) Did the trial court misdirect itself? No, the authority the trial court relied on **Collins vs Jones (1955) 2 All ER 175** has been re-

stated recently by this court in other cases since the promulgation of our Constitution. It is therefore not correct that the trial court applied stale laws, stale jurisprudence.

(ii) Was the decision wrong? Clearly not as there are authorities of this court that failure to set out the words in a claim as this and the particulars of fact is fatal.

(iii) Was there mis-justice? The right to fair trail is for both the plaintiff and the defendant in civil suits. That sword cuts both ways. The defendant ought not to be ambushed. The pleadings must disclose the cause of action so that the defendant can prepare his defence. Without that the suit itself, was a non-starter. The appeal must fail with costs to the respondent.

29. Having held as above, I am of the view that the appeal has no merit. The same is dismissed with costs to the respondents.

Dated at Nakuru this 30th day of April, 2020.

Advocates notified but not available.

Fresh notice to issue.

Mumbua T. Matheka

Judge

30 April, 2020.

15/05/2020: Via Zoom

Edna Court Assistant

Wambeyi Makomere & Company Advocates for the appellant - N/A though notified

Guandaru Thuita & Company Advocates for the respondents - Waweru holding brief for Thuita

Delivered, Dated and Signed at Nakuru this 15th day of May, 2020.

Mumbua T. Matheka

Judge