Mudi & 2 others v Nation Media Group Limited (Civil Appeal 407 of 2017) [2024] KECA 20 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 20 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 407 OF 2017

SG KAIRU, F TUIYOTT & JW LESSIT, JJA

JANUARY 25, 2024

BETWEEN

CHRISTOPHER MUDI ..... 1ST APPELLANT

JOHN KIMANI ..... 2ND APPELLANT

SIMON KERAI ..... 3RD APPELLANT

AND

NATION MEDIA GROUP LIMITED ..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ougo, J.) delivered on 31st October 2014 in High Court Civil Suit No. 995 of 2002)

JUDGMENT

1. This appeal arises from the judgment of the High Court at Nairobi (Ougo, J.) delivered on 31st October 2014 dismissing the appellant's libel suit against the respondent. The appellants' claim before the High Court was that three articles published by the respondent in its publication "Taifa Leo" on 11th and 26th August 2001 and 10th September 2001 were defamatory. The articles concerned the registration of students for Kenya Certificate of Secondary Examination at Kahuho Uhuru High School, where the 1st appellant was the head teacher and where the 2nd and 3rd appellants were parents.

2. The facts in brief are that on 11th August 2001, 26th August 2001, and 10th September 2001 the respondent published articles in its daily newspaper, Taifa Leo, under the respective headings, "Wanafunzi Kukosa Mtihani wa KCSE"; "Hofu ya wazazi kuhusu wana wao"; and "Usajili wa watahiniwa wazusha zogo shuleni" respectively.

3. The appellants were aggrieved and filed suit on 12th June 2002 before the High Court at Nairobi in which they sought orders to restrain the respondent from publishing "malicious, libelous and false

articles" in any edition of Taifa Leo newspaper. They also prayed for general and aggravated damages. In paragraph 5 of the plaint, the appellants pleaded as follows:

> " 5. On or about the 11th August 2001, 26th August 2001, and 10th September 2001 the [respondent] entered, published and distributed or caused to be so entered, published and distributed during the said days respectively articles in its "Taifa Leo" edition relating to registration of form (4) students for Kenya Certificate of Secondary Examination and/or issues concerning Kahuho Uhuru High School entitled:
>
> " Wanafunzi kukhosa mtihani wa KCSE"
>
> (Students miss their KCSE examination)
>
> " Hofu ya wazazi kuhusu wana wao"
>
> (Parents worry about their children)
>
> " Usajili wa watahiniwa wazusha zogo shuleni"
>
> (Registration of examinations candidates' causes an uproar in school)"

4. The appellants averred that the articles were devoid of any truth whatsoever and unfounded and that the articles were defamatory in insinuating or implying that the first appellant who was the Principal of the school had failed to register students who were otherwise qualified to be registered for the examinations; that the first appellant had failed to explain to the students and the parents and had given empty promises; that the students, parents, and teachers had demonstrated against the first appellant and the school administration; that for a number of years no student from the school had been admitted to university; that the first appellant was not a fit person to lead the school; and that the 2nd and 3rd appellants were among the parents who had allegedly walked to the respondents premises in protest and appeared in the newspaper pictorial of 11th August 2001.

5. In its statement of defence the respondent: averred that the appellants were nonsuited and reserved the right to request for further and better particulars; admitted publishing the articles but denied the same were defamatory or that the same were malicious; pleaded further that the publication was fair comment in good faith and without malice upon a matter of public interest concerning education.

6. The trial commenced before Khaminwa, J. and was concluded before Ougo, J. In his testimony, the 1st appellant, Christopher Mudi (PW1), who at the material time was the Principal of the School, stated that he was defamed by the articles; that it was falsely alleged in the articles that he had failed to register students for examinations despite having received registration fees; that it was not true, as claimed in the articles, that he was involved in demonstrations with students by walking for 15 kilometers with the students; and that contrary to claims in the articles, he had not kept parents waiting for 7 hours.

7. The 1st appellant testified further that it was also not true that parents had demonstrated against him asserting that there was no demonstration at all; that he was traumatized and mentally tortured for fear of being sacked for things that he had not done; that when the writer of the articles went to school before 26/8/2001, he did not talk to him; and that he was under pressure and was summoned by the Chief Inspector of Schools to explain the articles. He stated that he applied for promotion to Job group N but failed the interview which he attributes to the alleged defamatory articles and that author of the articles was a teacher before he became a writer.

8. In his testimony, the second appellant, John Kimani Nguitui, PW2, stated that he was among three parents who had gone to seek help from the Minister of Education at Jogoo House, but on failing to see the Minister decided to go to the media for help; that on 4th August 2001, together with 2 other parents and 5 children, they went to the media where they explained to the press that they had needy children who they wanted to be registered for national examinations but they lacked money to do so and wanted the Minister of Education to intervene; and that they were asked to pose for a photograph which was published.

9. The second appellant denied that there were teachers that had accompanied them to the media house as claimed in the articles. He stated that he instituted the suit against the respondent for labelling him a demonstrator and for claiming that he had paid examination registration fees and the same diverted by the headmaster when he had not done so. He stated that he had lost income due to the publication of the said articles.

10. The testimony of the 3rd appellant, Simon Kerai, PW3 aligned with that of PW2. He maintained that the articles were misleading and that as a result of the publications his businesses of buying timber and charcoal burning were adversely affected as he was seen as a dishonest person and his prospects of becoming a village elder or getting a job were dimmed.

11. The respondent did not adduce any evidence.

12. The learned Judge considered the matter, and, as already noted dismissed the suit. In doing so, the Judge took issue with the omission by the appellants to set out in the plaint the specific offensive words of the articles they complained of.

13. In their memorandum of appeal, the appellants have challenged the judgment on the grounds that the judge erred in: failing to consider "the defamatory statements as were set out in the articles contained" in their list of documents; failing to find that the titles to the articles were themselves defamatory; failing to infer that through the titles of the articles, the appellants were referring to the entire content of the articles; and failing to consider the evidence.

14. We heard the appeal on 24th October 2023 when learned counsel Dr. Khaminwa appeared for the appellants and briefly highlighted his written submissions. Learned counsel Miss. Muvindyo appeared for the respondent and indicated that she was unable to proceed and had not filed submissions as her firm no longer had instructions in the matter. Due notice of hearing having been served and absent an application for leave to cease acting, we directed that the hearing should proceed.

15. Dr. Khaminwa in highlighting his written submissions urged that the articles published by the respondent were defamatory as a whole; that all persons privy to information regarding the management of Kahuho Uhuru High School would have understood the publications in a defamatory sense; that the articles portrayed the appellants as dishonest members of society; that the articles contained untruths regarding the appellants which the trial court ought to have considered; and that the articles were false in every respect. It was submitted that the articles could be construed as intentional and malicious as the respondent failed to verify the contents of the allegations.

16. Counsel urged that the failure to set out, verbatim, the whole articles did not prejudice the respondent since they were furnished with the entire articles in the bundle of documents; that reproducing the articles in the plaint would have resulted in bulky pleadings and in a bid to promote efficiency, the articles were included in the list of documents.

17. It was submitted that the overriding objective under Sections 1A and 1B of the *Civil Procedure Act*, Sections 3A and 3B of the *Appellate Jurisdiction Act* and Article 159(2)(d) of *the Constitution* should

be invoked to ensure just determination. The case of *Stephen Boro Gitiha v Family Finance Building Society & 3 others* [2009] eKLR was cited for the proposition that the overriding objective overshadows all technicalities and rules.

18. Miss. Muvindyo did not offer any submissions maintaining that her hands were tied and left the matter to the Court.

19. We have considered the appeal and the submission in keeping with the power of re-appraisal of the evidence under Rule 31 of the *Court of Appeal Rules*, 2022 with a view to drawing our own conclusions. We can only interfere with the decision of the learned Judge if satisfied that the judge misdirected herself in law; or that she misapprehended the facts; or took account of considerations of which she should not have taken account; or failed to take account of considerations of which she should have taken account, or, that her decision, is plainly wrong. See. *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR. We bear that in mind in considering this appeal.

20. It is not in dispute that other than setting out the headings or titles of the articles complained of in the plaint, the appellants did not in their plaint set out or indicate the words or portions of the articles they claimed to be defamatory. It was on that basis that the the learned Judge, in dismissing the appellants' suit, stated that in libel cases, the very words complained of are the fact on which the action is grounded and must be set out in the plaint.

21. The Kiswahili versions of the articles complained of are not part of the record of appeal before us. What is included in the record are the English translations of the articles. In the article published on 11th August 2001 under the heading "Wanafunzi Kukosa Mtihani was KCSE" (students to miss KCSE exam), the author Anthony Nyongesa, in a three page write up, posited that it is likely more than ten students of Kahuho High School would not sit the National KCSE exam at the end of the year. The article published on 26th August 2001 by the same writer was titled "Hofu ya wazazi kuhusu wana wao" (Parents worry about their children)

22. Similarly, the article published on 10th September 2001 under the title "Usajili wa watahiniwa wazusha zogo shuleni" (registration of candidates causes problems in school) for instance ran into several pages under the general theme that it is disheartening to a parent, after using a lot of resources to educate a child, if the child does not sit for national exams.

23. It was, in our view, incumbent upon the appellants to identify the word or portions of those articles which they claimed to be defamatory in order to bring out clearly the defamatory nature of the alleged articles. In *Raphael Lukale v Elizabeth Mayabi & another* [2018] eKLR, this Court expressed that:

> " All the law requires is that the plaintiff must try as much as possible to reproduce the words used in a defamation claim. See Gatley on Libel and Slander, 11th Edition at 28.17 page 973 "...If the exact words cannot be pleaded, the words must at least be set out with reasonable precision."

24. See also the decision of this Court in *Wycliffe A Swanya v Toyota East Africa Limited & another* [2009] eKLR. The rationale for doing so, was explained by the High Court (Majanja, J.) in *Amedo Center Kenya Limited v Solomon Ouko Onyango & another* [2017] eKLR where the Judge stated:

> "The essence of a defamation case is that certain specific words were used by the defendant that are defamatory of the plaintiff. It is therefore a requirement of the law that the exact or precise words alleged to be defamatory are pleaded to enable the defendant know the case he is facing and to assist the court arrive at a decision as to whether the words are defamatory.

> This principle, summarised in Gatley on Libel and Slander at para 2611, is as follows, "The law requires the very words of the libel to be set out in the declaration in order that the court may judge whether they constitute a ground for action". [Emphasis added]

25. We therefore endorse the pronouncement by the learned Judge in her judgment that:

> "The details of the publications of 11th and 26th August 2001 and 10th September 2001 were not set out verbatim in the plaint. The plaintiff has annexed the said articles in the plaintiff bundle of documents at pages 1, 2 and 3 and the translations at page 37 (a) 37 (b) and 38 to 41. Guided by the East African Court of Appeal case of *Nkalubo v Kibirige* (*supra*) that in libel and slander cases the very words complained of are the facts on which the action is grounded must be set out in the plaint and looking words set out in the plaint at paragraph 5 in my view I find that what was pleaded or set out were the headings of the 3 articles. Paragraph 6 and 7 of the plaint sets out what the plaintiffs allege was defamatory. To prove their claim on defamation it was important to set out details of the defamatory words. I therefore agree with the defendants' submissions that the plaintiff's case cannot succeed. The headings of the articles as pleaded in the plaint are not defamatory."

26. There is no basis for this Court to interfere with that decision. Moreover, the headings or titles of the articles the appellants complained of made no reference to the appellants and neither were the statements in those headings demonstrated to be false. Furthermore, the ingredients of defamation, namely, that the "statement is made concerning the plaintiff, the statement is defamatory, and the statement is false" were not established. See *Ongwen & 5 others v Omollo & 6 others* (Civil Appeal 133 & 150 of 2018 (Consolidated)) [2023] KECA 1444 (KLR).

27. The appeal fails and is dismissed. As the respondent did not participate in the appeal, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR