



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: AZANGALALA, J. MOHAMMED & KANTAI, J.J.A.

CIVIL APPEAL NO. 224 OF 2012

BETWEEN

B.A.1ST APPELLANT

D.A.O.2ND APPELLANT

AND

STANDARD GROUP LIMITED1ST RESPONDENT

CHILDREN OF GOD RELIEF INSTITUTE (NYUMBANI) .. 2ND RESPONDENT

LEA TOTO PROGRAMME3RD RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Ngugi, J) dated 20th April, 2012

in

CONSTITUTIONAL PETITION NO. 48 OF 2011)

JUDGMENT OF THE COURT

1. This an appeal from the decision of *Mumbi Ngugi, J* in Constitutional

Petition No. 48 of 2011 (*hereinafter the Petition*) filed by the 2nd appellant on behalf of the 1st appellant, citing violations of constitutional rights and freedoms under **Articles 28, 31 and 53(2) of the Constitution**.

Background

2. The 2nd appellant, [**D.A.O.**] mother to the 1st appellant, [**B.A.**], filed a constitutional petition dated 21st March 2011 in the High Court as next friend of the 1st appellant against **STANDARD GROUP LIMITED** [1st respondent], **CHILDREN OF GOD RELIEF INSTITUTE NYUMBANI** [2nd respondent] and **LEA TOTO PROGRAMME**, [3rd respondent]. Her petition was supported by her affidavit sworn on 21st March, 2011.

3. The cause of action was founded on a publication carried by the 1st respondent on 23rd December, 2007. The 2nd appellant averred that on 8th December 2007, the 2nd and 3rd respondents organised a 'fun day' for children from various homes to which the 1st appellant was invited to attend; that on 23rd December 2007, the 1st respondent published or caused to be published in their pullout magazine called 'Twinkle', a photograph of the 1st appellant with two other children which indicated the names of the children; that the purpose of this publication was to portray the 2nd and 3rd respondents as committed to their cause or mission of providing home based care to children who are HIV positive.
4. The 2nd appellant averred that this publication disclosed the status of the 1st appellant and thus the 2nd appellant as HIV positive, without their consent; that this unlawful disclosure amounted to a violation of their right to privacy; that the publication infringed the privacy of the communication between the appellants and the 2nd and 3rd respondents regarding their HIV status; that this unconsented disclosure of their HIV status subjected the 1st and 2nd appellants to stigma associated with HIV/AIDS; that the adverse inclusion of the 1st appellant's name against her photograph infringed her right to privacy and contravened the 1st appellant's best interest as a child; that the publication has caused her mental anxiety, depression and psychological trauma and she has as a consequence lost the companionship of friends and relatives; that her business has suffered adversely; that her eldest son has also been adversely affected by the stigma which reflects in his deteriorated school performance and that the publication is therefore a violation of the appellants' right to human dignity, privacy and protection against unnecessary revelations of information relating to their private affairs and in not considering the best interest of the child.
5. The 2nd appellant sought the following orders:
 - i. *A declaration that the respondents' publication violates the appellants' rights to human dignity and their right to privacy;*
 - ii. *a declaration that the publication threatens the appellants' rights to equality before the law, equal protection and benefit of the law and the appellants' fundamental freedom from discrimination;*
 - iii. *a declaration that the publication contravenes the 1st appellant's best interest under **Article 53(2) of the Constitution**;*
 - iv. *a declaration that the respondents' publication contravenes*

Section 22(1) of the HIV and AIDS Prevention and Control Act, No. 8 of 2001;
 - v. *a permanent injunction to restrain the respondents, their employees, servants or agents from publishing or causing to be published any information or photo(s) of the 1st appellant within their possession or power;*
 - vi. *apology by the respondents to the appellants in the same daily publication;*
 - vii. *general damages, exemplary damages, costs and refund of filing fees for the application and petition.*
6. The 1st respondent opposed the petition and filed two replying affidavits: one by Jenipher Wachie, the photojournalist who took the impugned photograph sworn on 10th September, 2011 and the second by Nelly Matheka, the Assistant Director of the 1st respondent sworn on 14th September, 2011.
7. Jenipher Wachie, averred in her affidavit that on 8th December 2007, she attended the fun day at

[particulars withheld] Secondary School in Parklands Nairobi where children of various homes were in attendance; that invitation to the event had been issued by the event organisers; that there was a male guardian accompanying the children from the 3rd respondent with whose consent the impugned photographs were taken and who also supplied the deponent with the names of the children. She denied that the photograph revealed the health status of any of the children since that was not the objective of the photograph.

8. Nelly Matheka, Assistant Director of the 1st respondent, deponed that the photograph was indicative of the attendance by the children at an event organised for them published in a weekly feature in a children's pull out magazine (Twinkle). The deponent averred that the photograph and words appearing in the article do not in any way:
- i. *insinuate or suggest in any way the health status of the children;*
 - ii. *violate the provisions of HIV & AIDS Prevention and Control Act in that no disclosure is made of any kind of issue relating to the health condition of any child appearing in the photograph;*
 - iii. *violate the appellant's right to privacy as no information relating to the appellant's family or private affairs was the subject of the publication;*
 - iv. *discuss the result of the HIV/AIDS test of the appellants or suggest that the appellants had been the subject of any tests of that kind with any organisation;*
 - v. *there is no disclosure of any kind about the health status of the children appearing in the photograph which in any event the 1st respondent is unaware of since the same was not the subject of publication; and*
 - vi. *the identification of the children by name alone does not make any suggestion whatsoever on their health status.*

The deponent averred that the photograph did not in any way disclose the health status of the children whose status was not even known to the 1st respondent and was not the subject of the publication.

9. The 2nd respondent also opposed the petition by way of replying affidavit sworn on 24th June, 2011 by Sister Mary Owens, the Executive Director of the 2nd respondent. It was deponed that the petition ought to be struck out with costs as against the 2nd respondent since the petition failed to satisfy the legal test for a constitutional petition set out in the case of **ANARITA KARIMI V R, (No. 1) [1979] KLR 154**; that the petition failed to set out with reasonable precision the complaint against the 2nd respondent, the provision of the Constitution and the manner in which the same was infringed by the 2nd respondent; that the petition raised a civil claim triable under the Defamation Act, Chapter 36 of the Laws of Kenya and contravened the principle upheld by the High Court in **JEREMIAH MUKU V METHODIST CHURCH OF KENYA REGISTERED TRUSTEES & REV DR STEPHEN KANYARU M'IMPWI, [2007] eKLR**; that the 3rd respondent does not exist as a legal entity and consequently lacks capacity to be sued; that the alleged event was not organised by the 2nd respondent as alleged and neither did the 2nd respondent publish or cause to be published a photograph and name of the 1st appellant. The deponent denied revealing the HIV/AIDS status of the appellants or violating their rights to privacy, inherent dignity and privacy of communication. The 2nd respondent denied liability for the alleged contravention of the appellants' fundamental rights and freedoms.

10. After considering the petition, affidavits and submissions, the learned Judge dismissed the Petition and determined that the appellants could not make a claim under the current Constitution in respect of alleged violations that occurred prior to its promulgation. The learned Judge was not

satisfied that the photographs disclosed the health status of the appellants thus violated their rights under the Constitution, the HIV/AIDS Control and Prevention Act No. 14 of 2006 and the Children Act No. 8 of 2001 and dismissed the petition for lack of merit with no orders as to costs.

11. Dissatisfied with the judgment, the appellants now bring this appeal on the grounds that the learned Judge erred in law and in fact in:

1. *Dismissing the Petition as being unmeritorious.*
2. *Failing to find that the respondents had jointly and severally violated the appellants' rights and fundamental freedoms as alleged.*
3. *Finding that the 3rd respondent cannot be sued in its own name.*
4. *Failing to find that the violations complained of had stopped with the publication herein; and failing to find that the publication constituted an ongoing violation of the appellants' rights and fundamental freedoms until remedied.*
5. *Failing to find that the affidavits sworn on behalf of the 1st respondent in reply to the Petition were incompetent.*
6. *Adopting an omnibus and restrictive interpretation of the rights provisions under the repealed and current (2010) Constitutions.*
7. *Making a decision contrary to the pleadings and the law.*

The appellants prayed for the appeal to be allowed; that the decision of the High Court be set aside, the petition be allowed and for the costs of this appeal and the costs of the proceedings in the High Court be awarded to the appellants.

Submissions by Counsel

12. When the matter came up for hearing before this Court, all parties were represented by learned counsel. Mr G.B Miyare was present for the appellants; Mr Abidha represented the 1st respondent while Ms Makobu held brief for Mr Mutula Kilonzo Jr. and represented the 2nd and 3rd respondents.

13. On behalf of the appellants, Mr Miyare submitted that the decision of the learned Judge was contrary to the pleadings before her. Counsel submitted that the nature of work done by the 2nd respondent was not contested and was therefore not in issue; that the disclosure of the HIV/AIDS status of the appellants by the publication was in relation to the mandate of the 2nd and 3rd respondents; that the disclosure of the appellants' HIV/AIDS status was without the consent of either the appellants or the 2nd and 3rd respondent as the guardians of the children which was a violation of their rights and in violation of the best interests of the children; that the HIV and AIDS Prevention and Control Act provides that the status of a person will not be disclosed without their consent; that the 1st appellant's rights to protect her best interests as a minor, were violated by disclosing her HIV/AIDS status without consent; that the learned Judge erred in making a finding that the current Constitution could not be applied retrospectively; that the publication was made in print in 2007 and since it was not retracted it is of a continuing nature. Counsel also faulted the determination of the learned Judge who found that the right to privacy under the repealed Constitution was not available and cited **S. 70 of that Constitution** which accorded the right to individual privacy; that the Constitution does not confer these rights as human rights are accorded to all by virtue of one being a human being. Counsel urged the Court to allow the appeal.

14. On the status of the 3rd respondent, it was submitted that **Article 20(3)** of the current Constitution

requires the Court to adopt an interpretation that most favours the enforcement of a right or fundamental freedom. Counsel cited **Article 260** which defines the term „person? found in **Article 22** to include a body of persons, corporate or incorporate, which in effect enables the 3rd respondent to be sued for enforcement of the Bill of Rights. Counsel urged the Court to consider the submissions and authorities filed in the High Court and urged the Court to allow the appeal.

15. Mr Abidha, learned counsel for the 1st respondent, opposed the appeal and submitted that the present appeal is basically one on facts and is devoid of any legal issues. Counsel urged the Court to rely on the submissions made before the High Court and pointed out that the appellants instituted a petition based on events that took place in 2007 and brought them within the purview of the current Constitution; that the infringements cited by the appellants were not provided for in the repealed Constitution and the appeal could, therefore not succeed as there was no Constitutional infringement. Counsel urged the Court to dismiss the appeal with costs to the 1st respondent.

16. Ms Makabu, learned counsel for the 2nd and 3rd respondents also opposed the appeal and associated herself with the submissions made by counsel for the 1st respondent. She also relied on written submissions filed before the High Court on behalf of the 2nd and 3rd respondents. Counsel submitted that the appellants failed to set out with precision the complaint against the 2nd and 3rd respondents since the complaints specified were general and not clear as against who they sought and are, therefore, defective. Counsel referred to the **Anarita Case** (supra) which illustrated that the Petitioner should set out with reasonable precision what is complained of, the provision infringed and the manner it is said to have been infringed – all of which was not in the Petition; that the prayers sought are the same prayers as would be sought in a defamation claim in which 3 essential elements have to be shown (*words must be defamatory; they must be maliciously published and that they must refer to the plaintiff*), which the petitioner also failed to show. Counsel submitted that there is no evidence to show that the 2nd and 3rd respondents had published any defamatory words and that having failed to establish these elements, the claim must therefore fail.

17. Counsel argued that the appellants filed the Constitutional Petition as a substitute for a claim under the Defamation Act by way of a suit and agreed with the learned Judge's decision to dismiss the Petition as being unmeritorious. Counsel supported the learned Judge's finding that the 3rd respondent is not a legal person and cannot be sued as it has no legal personality; that it is an outreach programme created by the 2nd respondent and cannot exist without the 2nd respondent; that had the Petition been successful, any orders would have been as against the 2nd respondent and that the appellant failed to show how the violations of their Constitutional rights were continuous.

18. Counsel also agreed with the submissions of the 1st respondent that the current Constitution cannot be applied retrospectively and cited the case of **Joseph Ihuo Mwaura & 82 others v The Attorney General (supra)**. Counsel reiterated the fact that the Petition was misconceived, without merit and marred by defects and prayed for the Court to find the appeal as vexatious, frivolous and without merit and to uphold the impugned judgment.

19. In reply, Mr Miyare submitted that the best interests of the child should be given paramount consideration as stated in the Children's Act, 2011 which was in force even before the promulgation of the Constitution; that defamation proceedings were not alive before the High Court or before this Court but what was before the Court were violations of Constitutional rights and **Article 22** gave the appellant the right to seek Constitutional redress. Counsel argued that the appellant could still pursue the alternative remedy simultaneously with the Constitutional Petition; that the 3rd respondent is a registered charitable trust that was in custody of the child and had the obligation to observe and protect the best interests of the child and failed to protect the best interests of the child and is therefore liable. Counsel reiterated his arguments under **Articles 260 and 21** that the 3rd respondent was capable of being sued for violations of fundamental rights under the current Constitution. Counsel urged the Court to allow the appeal.

Determination

20. This being a first appeal, the Court is enjoined to reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it has neither seen nor heard the witnesses. See: **SELLE AND ANOTHER V ASSOCIATED MOTOR BOAT COMPANY LTD AND OTHERS, [1968] 1 EA 123 (CAZ).**

21. We have considered the grounds of appeal and the submissions of the learned counsel as well as the judgment of the trial court and the applicable law. Having done so, in our view, the issues for determination which we draw from the memorandum of appeal and submissions of counsel would appear to be:

- i. *Does the 3rd respondent, Lea Toto Programme have the capacity to be sued in its own name?*
- ii. *Was the publication by the 1st respondent defamatory?*
- iii. *Can the appellants claim breach of their rights to privacy and dignity under the current Constitution?*
- iv. *Were the appellants' rights to equal protection and benefit of the law breached?*
- v. *Was there any breach of the Children's Act and the HIV and AIDS Prevention and Control Act?*

- i. **Does the 3rd respondent, Lea Toto Programme have the capacity to be sued in its own name?**

Order 1 rule 3 of the Civil Procedure Rules deals with the question of who may be joined as a defendant in a suit, it provides –

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

22. It is therefore not in contention that the 3rd Respondent may be joined as a defendant in the suit as has happened, what is in contention is whether the 3rd Respondent can be sued in its own name. The wording of **Order 1 rule 3** above is to the effect that „all persons...? this begs the question – who is a person? **Article 260 of the Constitution** defines a person as follows: „a person includes a company, association or other body of persons whether incorporated or unincorporated?. This is the same definition ascribed to “person” in the

Interpretation and General Provisions Act [Chapter 2, Laws of Kenya].

23. John Salmond in his treatise *Jurisprudence* defines a person as follows - (this is a definition which seems to be well regarded and appears in the Black's Law Dictionary 9th edition):

“So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition.” John Salmond, *Jurisprudence* 318

(Glanville L Williams ed., 10th ed. 1947).

24. The Black's Law Dictionary (9th edition) defines an artificial person as:

“An entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being”.

25. In their Petition the appellants describe the petitioner as a community based outreach programme of Nyumbani Children's Home (the 2nd respondent). In its affidavit replying to the Petition, the 2nd respondent denies the 3rd respondent's description by the appellants and avers that the 3rd respondent does not exist as a legal entity and consequently does not have capacity to be sued in its own name.

26. In their submissions before the High Court, the appellants also argued that the 3rd respondent is a charitable children's institution as defined under **section 58 of the Children Act, 2001**. The said section defines a charitable children's institution as: *“a home or institution which has been established by a person, corporate or unincorporate, a religious organisation or a non-governmental organisation and has been granted approval by the Council to manage a programme for the care, protection, rehabilitation or control of children”*. The appellants also argue that the 3rd respondent has been granted approval by the National Council for Children's Services to manage programmes for the care, protection, rehabilitation or control of children. The Constitutional definition of a person does not appear to be conclusive due to the use of the word “includes” and this gives room for a wider interpretation of what a person may be deemed to be. If in fact the 3rd respondent has been granted approval by the National Council for Children's Services and is also a charitable children's institution as defined above then we find that it is actually a person capable of being sued in its own name under the 2010 Constitution.

This finding may, however, not assist the appellants in the end.

ii. Was the publication by the 1st respondent defamatory?

27. Winfield and Jolowicz on Tort describes defamation thus:

“Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him. For historical reasons defamation takes the form of two separate torts, libel and slander, the former being generally more favourable to the claimant because it is actionable per se and injury to reputation will be presumed. However, whether the case is one of libel or slander the following elements must be proved by the claimant:

- 1. The statement must be defamatory*
- 2. It must refer to the claimant, i.e. identify him*
- 3. It must be published, i.e. communicated to at least one person other than the claimant.*

In practice the statement (“imputation” is the technically correct description) is almost always in the form of words but it can take any form which conveys meaning, for example a picture, a cartoon or a statue.” – WVH Rogers, Winfield and

Jolowicz on Tort (18th edition Sweet and Maxwell) 570

28. The above noted elements of defamation have been accepted in one form or the other in numerous cases including for instance the case of **CFC STANBIC BANK LIMITED V CONSUMER FEDERATION OF KENYA (COFEK)**

Being sued through its officials namely **STEPHEN MUTORO & 2 OTHERS** [2014] eKLR. Applying this definition to the case at hand then it is clear that what is in contention is whether the 1st respondent's publication was defamatory. Again, Winfield and Jolowicz offers an in-depth analysis on this issue. Its assertion is:

“A comprehensive definition has eluded courts and commentators. Sometimes it is defined simply as the publication of words which tend to bring a person into “hatred, contempt or ridicule” but this is too narrow, for a statement may be defamatory if it excites in reasonable people feelings less strong than that. Often quoted tests are that the words must tend to lower the claimant in the estimation of right-thinking members of society generally or must amount to a false statement about a person to his discredit; but to these we must at least add that words may be defamatory if they tend to cause the claimant to be shunned or avoided, for it is unquestionably defamatory to impute insanity or insolvency to a person, although, far from exciting hatred, contempt or ridicule, it would rouse only pity or sympathy in the minds of reasonable people, who may nevertheless be inclined to shun his society. Slessor LJ took this view in Yousoupoff v Metro-Goldwyn-Mayer Pictures Ltd where a film falsely imputed that the claimant, a Russian princess, had been raped by Rasputin, for that tended “to make the claimant be shunned and avoided and that without any moral discredit on her part”.

WVH Rogers, *Winfield and Jolowicz on Tort* (18th edition Sweet and Maxwell) 577

29. Courts have widely adopted this view, the court in **PHINEHAS NYAGAH V GITOBU IMANYARA**, [2013] eKLR held that:

“The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and dis-esteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on.”

30. The facts at hand are that the publication is of a photograph of the 1st appellant in the *Twinkle* Magazine which is published by the 1st respondent.

The photograph is titled “Picture Album” and contains the pictures of children at a fun day from different children's homes including the 3rd respondent and Soweto. This photograph of itself is not at all defamatory. Nothing in it lowers the 1st appellant's estimation in the eyes of right-thinking members of society. The appellants argue that the 3rd respondent is known nationally and internationally as a home for children who are HIV positive. This particular claim does not appear to have been proved but assuming the court were to accept the appellants' argument that they were defamed because the 3rd respondent is renowned as a home for children suffering HIV and Aids the argument would actually be self-defeating as truth is recognised as a complete defence to an action for defamation. The appellant cannot use this argument as a sword and shield at the same time. For these reasons the appellants' argument of defamation fails.

iii. Can the appellants claim breach of their rights to privacy and dignity under the current Constitution?

31. The rights to human dignity and privacy are provided for under ***Articles 28 and 31 respectively of the Constitution of Kenya, 2010***. The appellants claim that their constitutional rights to human dignity and privacy were breached. The events leading to the appellants' Petition, that is the publication in the 1st respondent's newspaper, occurred on December 23rd 2007. The current Constitution was promulgated on 27th August, 2010. The repealed Constitution which was applicable when the publication was made did not provide for the rights to human dignity and privacy in the way that those rights are defined by the Constitution today. The question which then

arises is whether the current Constitution can act retrospectively so as to confer these rights to the appellants. The issue of the retrospective application of the Constitution is now old hat. The Supreme Court has best stated what the law is on this issue in **SAMUEL KAMAU MACHARIA & ANOTHER V KENYA COMMERCIAL BANK LIMITED & 2 OTHERS, [2012] eKLR:**

“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the

Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.”

32. It is accepted that a Constitution is not a typical piece of legislation. It is the supreme law of the land and its interpretation ought to breathe life into its provisions.

iv. Were the appellants’ rights to equal protection and benefit of the law breached?

33. The appellants allege that the respondents’ actions were in breach of their rights under **Article 27 of the Constitution**. This Article of the Constitution provides for equality and freedom from discrimination by stating *inter alia* that every person is equal before the law and has the right to equal protection and equal benefit of the law. Considering the afore-noted rule on the retrospective application of the Constitution particularly as stated in the Supreme Court decision of **Samuel Kamau Macharia (supra)** then it is clear that this provision of the law cannot apply to the case at hand it having arisen years before the Constitution was enacted. One may consider, as the High Court did, the similar right provided for under **section 82 of the repealed Constitution** which was applicable when the present issue arose. **Section 82(2)** which is the operative part of that section provides:

“Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.”

34. This provision of the Bill of Rights prohibited discrimination by a person acting in an official capacity. The corresponding provision in the current Constitution, **Article 27** prohibits discrimination from any person whatsoever. 35. One of the key differences between the Bill of Rights in the current Constitution and the Bill of Rights in the repealed Constitution is that the repealed Bill of Rights prohibited discrimination by a person acting in an official capacity and not by any person generally as is the case in the current Bill of Rights. The current Bill of Rights’ application is both horizontal and vertical whereas the former’s was to a large extent vertical. This particular issue has been discussed in numerous decided cases (see **CHARLES MURIGU MURITHII & 2 OTHERS V ATTORNEY GENERAL, [2015] eKLR**).

36. For this reason we find that even if we were to apply **section 82 of the repealed Constitution** to the current case then it would still have no application. Accordingly, this ground of appeal fails.

v. Was there any breach of the Children’s Act and the HIV and AIDS

Prevention and Control Act?

37. The appellants have raised the claim that the 1st appellant's rights under the Children's Act and the 1st and 2nd appellants rights under the HIV and AIDS Prevention and Control Act were breached. The substratum of this claim is the publication in the 1st respondent. We find that this publication, is not in any way defamatory, harmful or infringing the appellants' rights. For this reason, it follows that it cannot be the subject of a claim with regard to the infringement of rights under the said Acts and therefore there was no breach of the same.

38. We come to the conclusion that the learned Judge properly directed her mind to the pleadings and evidence and arrived at the correct decision. None of the grounds challenging that decision can succeed and are dismissed. The appeal accordingly fails and is dismissed. Given the parties' respective positions and considering their particular circumstances in this appeal, the proper order to make on costs is that each party bears their own costs.

Dated and delivered at Nairobi this 27th day of May, 2016.

F. AZANGALALA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR