



Sanitam Services (EA) Limited v Nyaga & another (Application E016 of 2023) [2023] KESC 81 (KLR) (Civ) (22 September 2023) (Ruling)

Neutral citation: [2023] KESC 81 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

APPLICATION E016 OF 2023

**MK KOOME, CJ & P, PM MWILU, DCJ & VP,
MK IBRAHIM, SC WANJALA & W OUKO, SCJJ**

SEPTEMBER 22, 2023

BETWEEN

SANITAM SERVICES (EA) LIMITED APPLICANT

AND

RENTOKIL INITIAL (K) LIMITED 1ST RESPONDENT

PATRICK NYAGA 2ND RESPONDENT

(Being an application for review of the Ruling and Orders of the Court of Appeal in Civil Application No. E089 of 2021 given at Nairobi (Okwengu, Warsame & Mativo, JJ.A) dated 31st March, 2023 dismissing the Application for Grant of Certification)

Apprehension of a miscarriage of justice is not a basis for granting certification for an appeal to the Supreme Court

The originating motion sought the certification of the matter as fit for determination by the court against the decision and judgment of the Court of Appeal in C.A. No. 10 of 2019. The court held that a mere apprehension of a miscarriage of justice, was a matter most apt for resolution in the superior courts below, and was not a proper basis for granting certification for an appeal to the Supreme Court.

Reported by Kakai Toili

Civil Practice and Procedure - appeals - appeals to the Supreme Court - matters of general public importance - certification of matters of general public importance - whether a mere apprehension of a miscarriage of justice was a proper basis for granting certification for an appeal to the Supreme Court - of Kenya, 2010, article 163(4)(b).

Brief facts

The originating motion sought among other orders: the review/ setting aside the ruling, orders and decision of the Court of Appeal in Civil Application No. E089 of 2021; the certification of the matter as fit for determination by the court against the decision and judgment of the Court of Appeal in C.A. No. 10 of 2019.



The applicant contended that the Court of Appeal's finding and judgment in Civil Appeal No. 10 of 2019 which was based on an additional principle/ingredient of defamation had no foundation in law; that was, the requirement for evidence by a third party to establish injury to a person's reputation. According to the applicant, the requirement, albeit erroneous, had often been applied by the courts below and therefore the intended appeal presented the Supreme Court with an opportunity to resolve the anomaly and error.

The applicant further contended that the requirement for evidence by a third party violated and ousted the applicant's inherent right to dignity. The applicant also found that despite appreciating that the 1st respondent had admitted to the four known legal principles/ingredients of defamation, the Court of Appeal found the applicant had not established the erroneous additional principle; and the effect of such a finding was that it altered the entire body of law relating to admissions. The respondents contended that: the application had not met the test for certification as raising matters of general public importance.

Issues

Whether a mere apprehension of a miscarriage of justice was a proper basis for granting certification for an appeal to the Supreme Court.

Held

1. The applicant had not specified whether the application was made under article 163(4)(a) or (b) of the . However, the court took cognizance of the fact that the substance of the application and the orders sought related to article 163(4)(b) which granted the court jurisdiction to hear appeals from the Court of Appeal on matters of general public importance.
2. The questions set out by the applicant as matters of general public importance were whether third party evidence was a prerequisite in defamation, and whether there was a violation of the applicant's rights under articles 25(c) and 28 of the , which were factual issues specific to the parties' circumstances and did not transcend the parties' dispute.
3. The applicant had not established any contradiction or uncertainty in law arising from the Court of Appeal judgment in respect to its decision on the ingredients of the tort of defamation, and the attendant law that required settlement by the court. On the alleged violation of articles 25(c), 28, 164 and 166 of the by the Court of Appeal, the same was not subject to the court's jurisdiction under article 163(4)(b) of the .
4. A mere apprehension of a miscarriage of justice, was a matter most apt for resolution in the superior courts below, and was not a proper basis for granting certification for an appeal to the Supreme Court.
5. From a perusal of the impugned Court of Appeal ruling, the Court of Appeal correctly interrogated the applicants' proposed issues under the threshold set by the court in case.

Originating motion dated April 13, 2023 and filed on May 25, 2023 dismissed.

Orders

Each party to bear own costs.

Citations

Cases

1. Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione (Application 4 of 2012; [2013] KESC 11 (KLR)) — Followed
2. Kenya Plantation and Agricultural Workers Union v Kenya Export Floriculture Horticulture and Allied Workers Union (Civil Application Sup 5 of 2017 [2018] eKLR) — Explained
3. Malcolm Bell v Daniel Toroitich Arap Moi & another (Application 1 of 2013 ;[2013]eKLR) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 25(c);28;33(3);163(4)(a)(b);164;166 — Interpreted
2. Evidence Act (cap 80) — section 17, 20, 22, 23, 100, 107, 117, 119, 143 ,162 — Interpreted
3. Supreme Court Rules,2011 (Act No 7 of 2011 Sub Leg) — rule 24,26 — Interpreted



Advocates

Mr. Mutiso for the Applicant

Mr. Wanjohi b/b Mr. Katiku for the Respondents

RULING

1. Upon perusing the originating motion dated April 13, 2023 and filed on May 25, 2023, pursuant to article 163(4) of the [Constitution](#), and rules 24 and 26 of the [Supreme Court Rules](#), seeking the following orders:
 1. The ruling, orders and decision of the court of Appeal of March 31, 2023 in Civil Application No E089 of 2021 be reviewed/set aside.
 2. This honourable court be pleased to certify this matter as fit for determination by the Supreme Court against the decision and Judgment of the Court of Appeal in CA No 10 of 2019.
 3. As a consequence, thereof, the applicant be granted leave to appeal to the Supreme Court.
 4. That as a consequence thereto this honourable court be pleased to, inter alia, formulate the following issues for consideration in the intended appeal:
 - i. Is the principle of third-party evidence one of the principles of the law requisite in defamation proceedings?
 - ii. Is third party's evidence the best evidence in defamation proceedings?
 - iii. Did the Court of Appeal by its findings and judgment oust the applicant's inherent right to dignity under article 28 of the [Constitution of Kenya](#)?
 - iv. Was there a violation and infringement of the applicant's rights under article 25(c) and 28 of the [Constitution of Kenya](#)?
 - v. Is it time for the court to reinterpret and correct the precedent set out in legal dicta in regard to defamation in light of article 25(c) and 28 of the [Constitution of Kenya](#)?
 5. Cost be provided for.
2. Upon perusing the grounds on the face of the application and the supporting affidavit by the applicant's Director, SM Kamau Ng'ang'a, sworn on April 13, 2023 where he contends that: the legally established ingredients for the tort of defamation are that the statement in issue must be defamatory, it must refer to the plaintiff, it must be published by the defendant and it must be false; the Court of Appeal's finding and judgment in Civil Appeal No 10 of 2019 which was based on an additional principle/ingredient which has no foundation in law; that is, the requirement for evidence by a third party to establish injury to a person's reputation; the aforementioned requirement, albeit erroneous, has often been applied by the courts below; therefore the intended appeal presents the Supreme Court with an opportunity to resolve the anomaly and error; the requirement for evidence by a third party violates and ousts the applicant's inherent right to dignity under article 28 of the [Constitution](#); despite appreciating that the 1st respondent had admitted to the four known legal principles/ingredients of defamation, the Court of Appeal found the applicant had not established the erroneous additional principle; and the effect of such a finding is that it altered the entire body of law relating to admissions; and



3. Upon Further considering the applicant’s grounds that: the Court of Appeal’s reliance on irrelevant case law violates articles 164 and 166 of the [Constitution](#); whereas it was a second appeal, the Court of Appeal took into account matters of fact including facts that had neither been raised nor canvassed at the trial and appellate court contrary to article 25(c) of the [Constitution](#); the impugned judgment violates sections 17, 20, 22, 23, 100, 107, 117, 119, 143 and 162 of the [Evidence Act](#); the issues sought to be raised in the intended appeal transcend the parties dispute and are of general public interest; and
4. Upon considering the applicant’s submissions dated May 22, 2023 and filed on May 25, 2023 where it contends that: its intended appeal meets the test and threshold set out in the Court of Appeal decision in [Kenya Plantation and Agricultural Workers Union v Kenya Export Floriculture Horticulture and Allied Workers Union](#) Sup Case No 5 of 2017 [2018] eKLR; there is need for interpretation of articles 25(c), 28, 33(3) of the [Constitution](#) relating to the right to fair trial, dignity and freedom of expression given that persons must be protected from reputational risks; other jurisdictions such as India, United Kingdom, USA, Australia and Nigeria do not require that harm or injury to a person’s reputation should be proved by evidence of a third party witness under the respective laws;
5. Noting that the respondents did not file any response to the application but only filed the submissions dated June 20, 2023 on June 23, 2023 wherein they contend that: the application has not met the test for certification as raising matters of general public importance relying on this court’s decisions in [Hermanus Phillipus Steyn v Giovanni Gneccbi-Ruscone](#) SC Application 4 of 2013 [2013] eKLR, and [Malcolm Bell v Daniel Toroitich Arap Moi & another](#), Supreme Court Application No 1 of 2013 [2013] eKLR which the Court of Appeal correctly applied; the matter does not raise any substantial point of law with a bearing on public interest but is a dispute that arose between two private entities; it has not been demonstrated that there is uncertainty in the law of defamation within our jurisdiction nor have there been contradictory precedents thereto; the applicant has failed to concisely set out the specific elements of general public importance in the present dispute but merely alleges breach of numerous constitutional and statutory provisions without providing a cogent nexus to public interest; and
6. Noting that the applicant has not specified whether the application is made under article 163(4)(a) or (b) of the [Constitution](#), we take cognizance of the fact that the substance of the application and the orders sought relate to article 163(4)(b) which grants this court jurisdiction to hear appeals from the Court of Appeal on matters of general public importance; and
7. Taking into Account this court’s guiding principles for certifying a matter as one involving general public importance set out in [Hermanus Phillipus Steyn](#) case, we Now Opine as follows:
 - i. The issues for determination in the substantive appeal before the Court of Appeal were whether the learned Judge of the High Court rightly found that the ingredients for the tort of defamation were proved on a balance of probabilities; whether the learned Judge rightly reduced the award from Kshs 7 million to Kshs 2 million; and specifically whether to succeed in the claim for defamation, it was incumbent upon the applicant herein to prove that as a consequence of the letters referred to, the operative words being, “..that Sanitam Service have approached many of our customers with similar warnings in the recent past with clear intent to acquire business through unscrupulous ways...” and “...this is illegal approach..” its character and reputation was diminished.
 - ii. In summary, the five questions set out by the applicant as matters of general public importance are whether third party evidence is a prerequisite in defamation, and whether there was a violation of the applicant’s rights under articles 25(c) and 28 of the [Constitution](#), which in our



view are factual issues specific to the parties' circumstances and do not transcend the parties' dispute;

- iii. The applicant has not established any contradiction or uncertainty in law arising from the Court of Appeal judgment in respect to its decision on the ingredients of the tort of defamation, and the attendant law that requires settlement by this Court. On the alleged violation of articles 25(c), 28, 164 and 166 of the Constitution by the Court of Appeal, the same is not subject to the Court's jurisdiction under article 163(4)(b) of the Constitution;
 - iv. We reiterate, as we have in previous decisions of the court, that a mere apprehension of a miscarriage of justice, is a matter most apt for resolution in the superior courts below, and is not a proper basis for granting certification for an appeal to the Supreme Court;
 - v. We have perused the impugned Court of Appeal ruling and are satisfied that the Court of Appeal correctly interrogated the applicants' proposed issues under the threshold set by this Court in Hermanus Phillipus Steyn case. We affirm the appellate court's decision in declining to certify the questions raised by the applicant as matters of general public importance that would necessitate the exercise of this court's jurisdiction under article 163(4)(b) of the Constitution;
8. Consequently, for reasons aforesaid, we make the following orders:
- i. The originating motion dated April 13, 2023 and filed on May 25, 2023 be and is hereby dismissed; and
 - ii. Each party to bear own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

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M.K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT
.....

P. M. MWILU M.

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT
.....

K. IBRAHIM

JUSTICE OF THE SUPREME COURT
.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT
.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original



**REGISTRAR,
SUPREME COURT OF KENYA**

