

**IN THE FIJI COURT OF APPEAL, FIJI**

[On Appeal from the High Court]

**CIVIL APPEAL NO. ABU 052 of 2020**

[Suva Civil Action No. HBC 353 of 2015]

**BETWEEN : ROSHNI DEVI**

*Appellant*

**AND : MUKESH KUMAR**

*Respondent*

**Coram : Jitoko, P  
: Morgan, JA  
: Clark, JA**

**Counsel : Mr. N Sharma and Ms. S. Dutt for the Appellant  
: Mr. S. Kumar for the Respondent**

**Date of Hearing : 3 November 2023**

**Date of Judgment : 30 November 2023**

**JUDGMENT**

**Jitoko, P**

1. I have read the judgment in draft of Morgan JA and I am in complete agreement with his reasonings and conclusion.

## **Morgan, JA**

### **Introduction and Facts**

2. This is an appeal by the Appellant Roshni Devi against the judgment of Justice Deepthi Amaratunga delivered in the High Court at Suva on 10 June 2020 where the Judge found that the Appellant had defamed her husband Munesh Kumar the Respondent on numerous occasions and awarded general damages of \$50,000.00 to the Respondent with costs.
3. Being dissatisfied with this judgment the Appellant filed a Notice of Appeal in this Court on 7 July 2020 for an order that the decision be wholly set aside and for orders that the costs of the Appeal and hearing in the High Court be paid by the Respondent and for such further orders as this Court deems just.
4. The notice of appeal relied on the following grounds of appeal:-

- “1. That the Learned Judge erred in law and in fact in holding at Paragraph 8 and 9 of the Judgment that the Appellant had repeatedly accused the Respondent of impregnating and having a relationship with her sister’s daughter to third parties when there was no such evidence nor any witnesses were produced by the Respondent to prove these allegations in light of the pleadings in his Statement of Claim.*
- 2. That the Learned Judge erred in law and in fact in holding at Paragraph 31 and 42 of the Judgment that the Court had in a separate DVRO proceedings made orders to restrain the Appellant from making the alleged slanderous complained of by the Respondent in his claim for defamation when there was no such admission of making the alleged statements nor an evidence to prove that the Court had made any findings as such.*
- 3. That the Learned Judge erred in law and in fact in holding at Paragraph 52 that the Appellant had accused the Respondent as the father of the pregnancy of her sister’s daughter and that she had shouted this in the neighbourhood and had on more than one occasion publically accused the Respondent of adultery without considering that the Respondent failed to produce any witnesses as per his pleadings and brought his Aunty, Phul Kuar to give evidence on an alleged incident which the Respondent had not pleaded nor particularized in his claim.*
- 4. That the Learned Judge erred in law and in fact in holding at Paragraphs 50-52 that just because the Appellant admitted that she was told not to reveal the pregnancy to her brother in law, but had revealed it without delay, the*

*Respondent had proven on a balance of probability that the Appellant had accused the Respondent of being the father of the pregnancy and had shouted from the neighbourhood and had on more than one occasion publically accused the Respondent of Adultery. The Learned Judge had failed to consider that the Appellant had a not only a moral and social pregnancy and the intention to illegally terminate the pregnancy by an abortion.*

- 5. That the Learned Judge erred in law and in fact in holding at Paragraph 32 of the Judgment that the Appellant had made the alleged false accusation which was defamatory and these allegations did not require the pleadings to specify the exact words nor the meaning of those words especially when the pleadings did not disclose nor particularize the incident on which evidence of Phul Kuar was produced by the Respondent at the hearing to allow the Appellant to produce evidence in her defence.*
- 6. That the Learned Judge erred in law in holding that the Respondent was not required to state the exact words of slander in his pleadings.*
- 7. That the Learned Judge erred in law and in fact in accepting the reliability and credibility of the witness Phul Kuar in Paragraphs 55-58 of the Judgment when such witness could not remember the exact words nor the date of the alleged incident nor was shew aware of the dispute between the parties but was closely related and biased to the Respondent.*
- 8. That the Learned Judge erred in law and in fact in holding at Paragraphs 61 and 62 of the Judgment that the Appellant was denying an obvious fact that she had made allegations of adultery against the Respondent and that the Appellant had come to the conclusion that the Respondent was the father of the pregnancy when the Respondent had failed to produce any witnesses to the incidents pleaded in his Statement of Claim.*
- 9. In light of the evidence as a whole and the pleadings, the Learned Judge erred in holding that the Respondent had proven that the Appellant had shouted about the alleged pregnancy by the Respondent on numerous occasions.*
- 10. That the Learned Judge erred in law and in fact in awarding \$50,000 in general damages and \$3,000 in costs against the Appellant without the Respondent providing evidence of his reputation nor of any such damage to his reputation when the evidence showed to the contrary that the Respondent continued his construction business even after the alleged utterances.*
- 11. That the Learned Judge erred in law and in fact in failing to uphold that the allegations made by the Respondent in his pleadings all related to matrimonial disputes and were made on privileged occasions and were made without malice therefore on the evidence available to the Court could not hold that the Appellant's actions in informing her brother-in-law of the*

*pregnancy amounted to or imputed to a false allegation of adultery and impregnation by the Respondent when the Appellant had a moral, social and legal obligations to inform her brother-in-law of his daughters intention to abort the pregnancy.*

*12. That the Learned Judge erred in law and in fact in reaching its decision in favour of the Respondent when the Respondent failed to prove that the Appellant was actuated by malice and had in fact made the alleged accusations of impregnation and adultery.*

*13. That the Learned Judge erred in law and in fact in accepting the evidence of the Respondent and his witness and determining the claim on such basis when the said evidence was inconsistent, contradictory and incapable of being relied upon and the evidence as a whole showed that the Respondent had brought the defamation proceedings after a few years after the alleged incidents in vindictiveness after the Appellant had made property distribution proceedings in the Family Court.*

*14. That the Learned Judge's decision is wrong and erroneous having regard to all the pleadings and evidence on the whole."*

5. The Judge recorded the facts in his judgment as follows:

*"FACTS*

*2. Following facts are admitted at Pre Trial Conference*

- a. Plaintiff and Defendant were married partners and now they are divorced.*
- b. Plaintiff had informed to Defendant while they were married that her sister requested for \$200 for abortion.*
- c. Plaintiff had obtained Domestic Violence Restraining Order (DVRO) against Defendant.*

*3. Apart from above facts at the hearing while giving evidence Defendant admitted that Plaintiff and she got married in 1990 and remained married till 2018. They had remained married when Plaintiff informed the Defendant that her sister had requested for money from Plaintiff and also had informed that her daughter was pregnant and money was needed for that.*

*4. On or around 2013 the incident relating a news of her sister's child being pregnant was revealed by Plaintiff to Defendant. Defendant had asked from Plaintiff, that how he knew about pregnancy, and why he was concerned about it.*

5. *Defendant had felt suspicious about Plaintiff's knowledge about the pregnancy and had also inquired whether, her brother -in-law knew about it and Plaintiff had answered in negative.*
6. *According to Plaintiff, Defendant made a false allegation based on the suspicion that her sister did not inform her about pregnancy of the child but informed to the Plaintiff.*
7. *Plaintiff said that was due to good relationship he had with the family members of Defendant. He also said that Defendant and her sister was not in good terms, and that was the reason for seeking money from him.*
8. *Plaintiff had requested not to inform to brother in law, in fear of reprisal or danger of violence towards the pregnant daughter. Despite this, Defendant had called her brother-in -law and informed that his child was pregnant.*
9. *According to the Plaintiff, after this incident Defendant had repeatedly accused him of impregnating Defendant's sister's child.*
10. *After revelation Defendant had started accusing Plaintiff of impregnating and having a relationship with said pregnant person to third parties.*
11. *Plaintiff had sought DVRO against Defendant to restrain her from further embarrassing Plaintiff through this false accusation relating to alleged adulterous relationship.*
12. *Plaintiff in his evidence said that he was a reputed person in the construction industry and Defendant had marked an advertisement marked D4 indicating that he had sought a carpenter for his business 2015.*
13. *Plaintiff owned three lands comprised in CT 12884 (D1) and CT24411 (D2) CT13105 (D3). All of them were under mortgage.*
14. *Plaintiff and another witness Phul Kuar gave evidence for the Plaintiff and she had witnessed Defendant's public accusation of Plaintiff relating to adultery. Defendant gave evidence and denied that she accused Plaintiff of adultery but she admitted that her sister's child was pregnant and she was suspicious about the Plaintiff's knowledge in that.*
15. *Defendant in the statement of defence had taken up the defence of qualified privilege. In paragraph three of the statement of defence stated that comments made by Defendant to the Plaintiff were in the context of matrimonial dispute.*
16. *Defendant also admitted that a their relationship had turned sour due to this issue and had tried to resolve this through religious body without success."*

6. The Appellant in her submissions has contested this version of the facts. In particular as will be evident in this judgment, she claims paragraph 10 above was never admitted and indeed was strongly contested by the Appellant.
7. Curiously prior to stating the above facts and analysing the evidence and law, the Judge made the following statement which he described as an introduction.

*“INTRODUCTION*

*1. Plaintiff filed this action against his ex-wife for defamation for false allegation of adultery. Said adultery involved a close relative. These accusations had arisen due to a pregnancy in Defendant's sister's daughter. In the statement of claim Plaintiff had failed to state exact words that were allegedly made by the Defendant and this was understood considering the circumstances of this case. Parties were married at the time of false accusation and Defendant had spread the alleged rumor to third parties including close relatives. Defendant claimed qualified privilege as they were married at that time. 'In an action for libel the precise words of the document are material (Harris v Warre [1879] UK Law Rp CP 5; (1879) 4 CP.D. 125), but in leaving the case to the jury the judge may invite them to say whether the defendant used words to the like effect (per Bankes LJ., Fournier v National Provincial Bank (1924) 40 TLR 214, p 216). In some cases precise words are material, but this does not mean when there was continuous slander all the words and or one specific instance of exact words are mandatory. Requirement to state exact words will depend on the circumstances. When the Plaintiff and Defendant's marriage had broken due to false accusation of adultery, and evidence of Defendant's behavior towards Plaintiff and other close friends, there was no need to state exact words of all or any one such incident. Her false allegation itself was defamatory and different words used in many instances of allegation of adultery, need not repeat in the statement of claim. This is the rationale in not requiring to prove special damages in terms of Section 9 of Defamation Act 1971. Defendant had more than in one occasion in front of third parties had made allegations of adultery to Plaintiff and this is regarding pregnancy of a close relative and there was no ambiguity as to the allegation contained in statement of claim, as it was the reason for Divorce of the parties and also resulted in restraining Defendant.”*

8. This passage makes crucial findings of fact and law which as the Appellant has submitted and with which I agree, gives the impression that the Judge has made a determination of the claim without properly considering the facts, evidence and law. Critically he makes

findings on an elementary preliminary issue, that is, whether the alleged defamation had been properly pleaded, prior to considering this issue.

### **The Pleadings**

9. In a Writ of Summons and Statement of Claim filed on 18 November 2015, the Respondent alleged in paragraph 4 of the Statement of Claim that the Appellant had made false allegations that the Respondent had made her sister's daughter pregnant. The Appellant went on to allege in paragraphs 7, 9, 11 and 12 of the Statement of Claim that the Appellant repeated the "same words" to her in laws, head pastor Suli, other pastors and the Appellant's family members.
10. The words allegedly used, the time and place they were allegedly uttered and to whom were not specified.
11. The Respondent went on to state at paragraph 18 of his claim that the "said words" in their natural meaning meant that the Appellant was a womaniser, corrupt, dishonest and a violent person. It was further alleged in paragraphs 22 to 38 of the Statement of Claim as follows:-

"22. ***IN*** their natural and ordinary meaning and innuendoes the words complained of in the said paragraph, meant and were understood to mean:-

- (i) That the Plaintiff was a shellfish man and bulldozer of his of his own wish;
- (ii) That the Plaintiff was a hypocrite;
- (iii) Such other meanings as will be made out at the trial of this action.

23. ***FURTHERMORE*** the said words spoken and conducts of the Defendant or qualities tending to degrade or disparage the Plaintiff or expose him to public hatred, contempt or ridicule.

24. ***THE*** said words were calculated to injure or tarnish the Plaintiff in his professional reputation as a resident of Valili Street, Nakasi area, his family members and in his good name and fame as a respected member of the community.

25. **THE** said words disparage the reputation of the Plaintiff and tend to lower him in the estimation of right thinking members of society generally.
26. **THAT** the said words have brought the Plaintiff to public hatred, ridicule, scandal, odium and contempt and as a result he is now being shunned by the very people whom he used to associate with previously.
27. **THAT** the said words impute a serious misconduct or want of qualification or skill in a lawful profession.
28. **THAT** the said words mean and were meant to be understood that the Plaintiff was not to be trusted or employed to carry out any construction works.
29. **THAT** the said words mean and were meant to be understood that the Plaintiff was of a dissolute and profligate character.
30. **THAT** the said words mean and were meant to be understood that the Plaintiff has been guilty of a distrust and dishonourable conduct.
31. **THAT** the said words mean and were meant to be understood that the Plaintiff is unfit to associate with respectable members of the society or with any other person for that matter.
32. **IN** truth and in fact, the said words were, and each other was false, untrue, inaccurate and misleading.
33. **THE** said words have brought injury to the Plaintiff's reputation and feelings.
34. **THAT** as a result of the said words the Plaintiff has suffered distress, embarrassment and anxiety.
35. **THE** Plaintiff charges that the Defendant's said words complained of maliciously, deliberately and recklessly.
36. **THAT** the said words were spoken by the Defendant out of spite of ill feeling and with some ulterior motive.
37. **THAT** as a result of the said words the Plaintiff has been highly defamed and lost lot of business opportunities.
38. **THAT** the Plaintiff requested the Defendant not to speak like that but she continuously said it."



12. Finally the Respondent claimed general damages for defamation of character in the sum of \$1,000.000/00, damages (both exemplary and aggravated) an injunction to stop the Appellant from dispelling false information, interest and costs.
13. In her Statement of Defence the Appellant denied the allegations made in paragraphs 4 and 5 of the Statement of Claim and claimed that any statements made were qualified privilege comments made in the context of a matrimonial dispute.
14. The Appellant went on to state in paragraph 5 of her Statement of Defence that the Respondent had not stated the actual defamatory words uttered by the Appellant nor had he particularised the claim for the Appellant to fully respond to the same. The Appellant thereafter in her Statement of Defence denied the allegations made by the Respondent in his Statement of Claim.

## Analysis

15. At the outset of his analysis of the matter, the Judge noted that the Appellant had raised as a preliminary issue that the Statement of Claim did not contain the exact defamatory words uttered.
16. After citing definitions of Defamation from Gatley on Libel and Slander and the Defamation Act the Judge referred to Section 9 of the Defamation Act which reads:-

*“Words spoken and published which impute chastity or adultery to any woman or girl shall not require special damage to render them actionable”*
17. This section has no relevance to this matter however as there was no such imputation. The Judge himself noted in paragraph 22 of the Judgment as follows:-

*“22. In this case the allegation is not that the words spoken had imputed adultery, but Defendant had directly stated that the Plaintiff had sired the child to her sisters’ daughter, which is a direct allegation of adultery and also improper relationship with a close relative.”*

18. He then went on to state the following at paragraph 23 of his Judgment:-

*“23 In the paragraph four of the statement of claim it is stated that Defendant had made false allegation alleging the Plaintiff had made her sister’s daughter pregnant. This was an allegation of adulterous act of Defendant to a close relative. This paragraph and subsequent description and facts, gave the Defendant clear understanding of the act or acts of slander alleged in the statement of claim.”*

19. Paragraph 4 does not allege the false allegation was made to a close relative however it merely states that the allegation had been made.

20. The Judge then took the position at paragraphs 35 and 36 of his judgment that the important factor was the false allegation rather than the exact words of such allegation when he stated:-

*“35. In a marriage relationship when parties accuse another of adultery relating to a close relative, it is difficult to gather all or even one instances where such allegations were made considering the circumstances and close relationship between them. So it will be impossible to plead exact words, or instances with precision.*

*36. The important factor was the false allegation rather than the exact words of such allegation. Plaintiff can be falsely implicated in more than one way through use of different words, but the incident accused was the same and allegation was adultery.”*

21. He then concluded in respect to the preliminary issue at paragraph 44 of his judgment as follows:-

*“... I overrule the preliminary objection that failure to mention exact words in the statement of claim is not fatal. If there is a rigid rule as to exact words are needed, it will not be conducive as in this case where defamation was a continuous infringement or cause of action...”*

22. With respect this analysis and conclusion is not a correct statement of the law in Fiji. In **Chand v Fiji Times Ltd** (2011) FJSC 2. The Supreme Court stated at paragraph 18 and 19 of the Judgment in reference to Defamation pleadings as follows:-

*“18. The objective of pleadings is to narrow the issues between the parties and limit the scope of the trial. However, it is trite law that pleadings in a defamation action are in a special category and must be prepared with great care and scrutiny.”*

19. *Another cardinal rule of pleadings in defamation cases is that the Statement of Claim generally must set out verbatim the precise words alleged to have been used by the perpetrator...*"
23. I would add the statement of claim must obviously also precisely set out when the alleged words were spoken and to whom.
24. The rationale behind the above requirements is to enable the Defendant to ascertain the specifics of the claim so as to be able to formulate a defence.
25. It is evident from the above that the Judge considered that the allegation of defamation had been set out in paragraph 4 of the Statement of Claim and that the manner in which it was set out was sufficient in the circumstances of this case.
26. Significantly as set out above the Appellant had pleaded in paragraph 5 of her Statement of Defence as follows:-
- "5. The Defendant for that says that the Plaintiff has not stated the actual words uttered by the Defendant nor has he particularized the claim for the Defendant to fully respond to the same."*
27. The Appellant denied both in her Statement of Defence and at the hearing, making the alleged statement.
28. The Judge stated the following at paragraph 31 of his judgment:
- " 31 It was admitted that the Plaintiff had prior to institution of this action sought DVRO against Defendant in order to restrain her false allegation and further embarrassing Plaintiff and such order was made by the Court and this was an admitted fact in the Pre-Trial Conference between the parties."*
29. This is wrong. The only agreed fact in this regard in the Pre-Trial Conference Minutes in the Record is as follows:-
- "1.3 Later the Plaintiff had obtained Domestic Violence Restraining Order which was then served to the Defendant who later appeared in the Court on the said date"*

Further, a perusal of the DVRO in the Record makes no such order.

30. The Respondent has submitted in his written submissions and at the hearing before this Court that because the Appellant pleaded Qualified Privilege in her Statement of Defence that in itself amounted to an admission of making the defamatory comment. He also submitted that the Appellant had never in fact denied making the alleged statement. This is wrong.
31. As was pointed out by the Appellant's Counsel at the hearing the claim for Qualified Privilege relates to statements made in respect of the pregnancy of her sisters' daughter. It is not an admission by the Appellant that she had made the defamatory comments alleged in paragraph 4 of the Statement of Claim. Indeed as has been pointed out she denied making the alleged defamatory comments in her Statement of Defence and in both examination in chief and cross examination at the hearing.

## **Conclusion**

32. I therefore conclude that the Judge was wrong in deciding that the allegation of defamation had been properly set out in paragraph 4 of the Statement of Claim and that the failure to use exact words in the Statement of Claim was not fatal. I consider that this failure together with the lack of detail regarding where when and to whom the alleged defamatory statements were made has resulted in a significant miscarriage of justice against the Appellant.
33. Even if these omissions were not fatal, I consider that the Respondent did not prove the allegation of defamation against the Appellant.
34. Despite claiming in his statement of claim without details that the alleged defamatory words were made to the Appellants' in laws, head pastor Suli, other pastors and her family members, none of these persons were called as witnesses. The only witness called at the hearing in support of the Respondent's claim was his elderly Aunt Phul Kuar. The Respondent did not plead in his Statement of Claim that the alleged defamatory statements had been made in the presence of Phul Kuar and where and when this was alleged to have

taken place to enable the Appellant to properly defend the claim. In any event the allegation of defamation in the Statement of Claim is that the Defendant had made false allegations alleging that the Plaintiff had made her sisters' daughter pregnant. Phul Kuar's evidence however was that the Defendant had told everyone who was at her house that the Plaintiff was having a relationship with her sisters' daughter. She was also very vague about when this allegation was said to have been made. I do not consider that the evidence of Phul Kuar established or supported a claim of defamation against the Appellant.

35. In view of this conclusion I need not consider the other issues raised in the grounds of appeal.

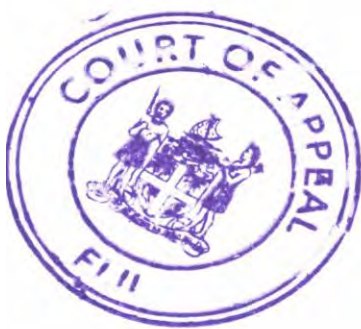
**Clark JA**

36. I concur in the judgment of Morgan JA and the orders made.


37. **Orders**


For the reasons set out above, I allow the appeal and make the following orders:-

1. *The Appeal is allowed and the Judgment and the orders of the High Court dated 10 June 2020 are set aside.*
2. *I make no order as to costs of this appeal.*



  
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**The Hon Mr. Justice Filimone Jitoko**  
PRESIDENT, COURT OF APPEAL

  
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**The Hon Mr. Justice Walton Morgan**  
JUSTICE OF APPEAL

  
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**The Hon Madam Justice Karen Clark**  
JUSTICE OF APPEAL