

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 225 OF 2022

BETWEEN : SAINAZ NISHA
PLAINTIFF

AND : MOHAMMED BILAL KHAN
DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. Z. Mohammed, for the Plaintiff.
Defendant absent and no representation.

FORMAL PROOF : Hearing on 31st May 2023.

DATE OF DECISION : 11th August, 2023

JUDGMENT

1. The plaintiff on 16th August 2022 filed her writ of Summons, together with the Statement of claim, against the defendant, who is said to be her former husband, and claimed the following reliefs.
 - a) *A DECLARATION that the Defendant is liable for Defamation;*
 - b) *AN ORDER for Damages in the sum of \$100,000.00;*
 - c) *AN ORDER for Exemplary and Compensatory damages due to the injury of professional reputation and injury to feelings in the sum of \$100,000.00;*
 - d) *COAST on a Solicitor/Client indemnity basis on a higher scale;*
2. The Writ of Summons, together with the Statement of Claim, was reportedly served on the defendant on 16th August 2022, to which there was no response from the defendant.
3. Accordingly, the plaintiff's solicitors on 6th February 2023 filed Ex-parte summons to enter the matter for Formal proof hearing and the same being allowed, the Plaintiff "PW2" and her present husband "PW1", namely, Sheikh Abdul Shaheem, gave evidence at the formal proof hearing held on 31st May 2023.
4. The plaintiff's Statement of Claim, inter-alia, states as follows:
 1. *THAT the plaintiff was married to the defendant only for a period of 6-7 days and the marriage irretrievably broke down with no prospect for reconciliation. He was her estranged husband during the time material to this action.*

2. *THAT the defendant by way of telecommunication medium called her family members, relatives and acquaintances including her fiancé and made very serious, perilous, detrimental, defamatory, slanderous and malicious statements with regard to her.*
3. *THAT the defendant in making such very serious , perilous, detrimental defamatory slanderous and malicious statements was fully aware that he was assassinating the plaintiff's personal character amongst her family, relatives, acquaintances and fiancé.*
4. *THAT when the plaintiff walked out of the marriage of the defendant due to the irretrievable issues, the defendant became vindictive.*
5. *THAT the defendant pronounced the said allegations by uttering the said statements to other persons and / or general public also.*
5. The main witness for the plaintiff was her present husband (PW-1), who has given evidence by referring to a Transcript of a Telephone conversation that the defendant said to have had with him. This is the only witness the plaintiff chose to call in support of her case against the defendant.
6. The plaintiff (PW-2) in her evidence, having stated that the defendant has said something about her to her present husband, Sheik Abdul Shahim (PW-1), gave further evidence about her short-lived marriage with the defendant for 6-7 days, about the death of her previous husband, her employment in Australia as a Disable Support Worker and finally ended her evidence by affirmatively answering two leading questions.
7. Even the evidence of her husband, the "PW-1" also found to be contaminated with leading questions with affirmative answers thereto. These questions and answers are, unarguably, inimical to the plaintiff's case.
8. However, on careful perusal of the pleadings and the evidence led, it is observed that the plaintiff has based her cause of action on a person to person "Telephone Conversation" the plaintiff's former husband, the defendant, and the present husband "PW-1" said to have had on an **unspecified date and time**. No evidence adduced to show that the defendant had similar telephone conversations or made these very statements or allegations or accusations or similar statements to any other family members, friends, relatives or the general public with the intent of causing harm to the plaintiff.
9. As per the oral evidence available before me and the contents of the transcript , what appears to have happened is a private conversation between two individuals , contents of which were privy only to this witness and not seems to have gone beyond him.
10. Another salient point observed was that the plaintiff, in her Statement of Claim, has not pleaded those very words alleged to be defamatory of the plaintiff. The reason being that the defendant should know exactly what the actual words that he is alleged to have used against the plaintiff.

11. The plaintiff, in order to succeed in an action of this nature, must prove the publication of the libelous matter was intended to and received by more than one, and if the plaintiff does not satisfy the onus of proof of publication in that manner, which is on her in this respect, there is no cause of action.
12. Further, paragraph 9 of the Statement of Claim refers to the words being published in the Facebook as well. But there was no evidence to prove such publication, which if published, undoubtedly, would have reached a large number of readers.
13. In ***Fiji Daily Post Company Ltd v Rabuka***, [2006]FJCA 47 the judgment of the High Court was upheld in appeal:

"Slander consists in the apprehension of the hearer. It follows that if the defendant denies he made the slanderous statement, as in the present case, the hearer must be called to state that the words were spoken in his or her hearing".

14. In this case at hand, it is only the plaintiff's present husband "PW-1", who is the recipient of the telephone call and gave evidence relying on the transcript of the conversation. This requires corroboration and confirmation by some other witness/s who also should be the recipient of the same statement.
15. GATLEY ON LIBEL AND SLANDER, (11th Ed, 2008) at para 34.13 states:

"Action for Slander. Where there is no admission by the defendant that he spoke the words complained of or words to like effect, the plaintiff must call evidence of what the defendant said and of who heard him. The witnesses will usually be those who were present, but evidence is admissible of what the witness was told the defendant said by someone who was present. Evidence of the claimant as to what was said, and as to the presence of other people, may be insufficient, as the fact that there were other people around does not of itself entitle anyone to draw the conclusion that those people must have heard what was said. A tape recording of the slander would be admissible. The actual words alleged to have been published must be proved; it is not sufficient for witnesses to state what they conceive to be the substance or effect of the words, or their impression of what was said".

16. In this case , the exact words alleged to be defamatory and found in the transcript of the telephone conversation such as **"So in Fiji I knew her character was bad "** (9.07) , **"She used to have relationships with men here and there" (9.35)** and **" she goes with her mother and sister and does black magic on me"** have not been specifically pleaded at all in the statement of claim .
17. This is well stated in **GATLEY ON LIBEL AND SLANDER,(9th Ed, 1998) at para 32.10** which I quote:

Setting out words complained of: slander. The general principles governing the pleading of the actual words in libel also apply in slander. Thus, in slander the actual words spoken must also be set out verbatim" in order that the defendant may know the certainty of the charge, and may be able to shape his defence". It is not sufficient to allege that the slanderer used such and such words, or that effect.

18. **Denning, L.J.**(as he then was) *in Collins v Jones, [1955] 2 All E.R. 145 at pg 146* declared:

In a libel action it is essential to know the very words which the plaintiff founds his claim. As LORD COLERIDGE, C.J., said in *Harris v. Warre* [1879] UKLawRpCP 5; (1879), 4 C.P.D. 125 at p.128:

"In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them....In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends."


19. The fact that this telephone conversation did contain some statements defamatory of the plaintiff, is not sufficient to ground a libel action. Plaintiff must show what the actual words were. A plaintiff is not entitled to bring a libel action on an un-pleaded contents in the alleged conversation. She must in her pleading set out the words with reasonable certainty for the defendant to know as to what he alleged to have uttered. A mere allegation that it is defamatory is not sufficient.
20. The defendant cannot overcome this predicament by guessing at the words and putting them in his pleading. The court will require the plaintiff to give particulars so as to ensure that she has a proper case to put before the court and is not merely fishing for one. If she cannot give the particulars, she will not be allowed to go on with the claim.
21. In my judgment, the plaintiff's action fails.

Orders

(a) The plaintiff's action is dismissed.

(b) No order for cost made.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 11th day of August, 2023.

SOLICITORS:

For the Plaintiff: Zoyab Shafi Mohamed, Legal – Barristers and Solicitors.

For the Defendants: Not represented