

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: OMAR, J.A., MFALILA, Ag. J.A., And MAPIGANO, Ag. J.A.)

CIVIL APPEAL NO. 14 OF 1986

BETWEEN

- |                     |           |            |
|---------------------|-----------|------------|
| 1. HAMZA ABED       | . . . . . | APPELLANTS |
| 2. ABDU ATHUMANI    |           |            |
| 3. RASHID MWICHANDE |           |            |

AND

- |                              |       |             |
|------------------------------|-------|-------------|
| 1. SHEIKH NURDIN HUSSEIN     | . . . | RESPONDENTS |
| 2. SHEIKH HASHIM H. ABDALLAH |       |             |
| 3. SHEIKH ABDURAHAMAN SHAMTE |       |             |

(Appeal from the judgement and decree of  
the High Court of Tanzania at Dar'es Salaam)  
(Nyalali, C.J.) dated the 15th day of  
November, 1982

in

Civil Case No. 5 of 1976

JUDGMENT OF OMAR, J.A.:

I have read the judgment of my brother Mapigano, and I am  
not in agreement with his findings on the following grounds:-

There was a dispute over the leadership and Management  
of the affairs of the sect of Shadhuly Liyadhurtiy involving the  
Members on the one side three of whom are the appellants in this  
case and the respondents who are all Sheikhs leading the sect,  
on the other.

In the course of their dispute a number of meetings were convened  
with a view to resolving this dispute between Muslims of the same  
religious sect.

Pursuant to the advice given by the Administrator-General  
after he had failed to resolve the dispute at a meeting held  
in his office, a letter was written by the appellants to Bakwata  
in which the respondents the Sheikhs of the sect were portrayed  
in derogatory terms. This letter is the basis of the suit.  
During the pendency of the suit another writing in a form of a  
report about the Sect was written and circulated in a language  
which was more uncouth, undignified and flagrant than the first  
letter, this according to the trial Chief Justice was not called for  
and could only have emanated from improper motive. The following  
is a quotation from this third letter:

The meaning...../2

The meaning of overlordship and breaking of peace

"They are overlords because these Sheikhs have the origin of Arabs or they have married Arab women therefore they see themselves better than other people. And to refuse to attend the local councils in the land for reconciliation purposes is to break the peace.....

The lifetime of Sheikh H. M. After the death we see the property of the Region of Dar es Salaam alone being hijacked by the hooligans and the cutthroats by claiming that it was all for the sake of Sheikh H. M. If he was the Sheikh of East Africa has he willed that only the Dar es Salaam properties should be taken. Why were not properties of Kenya, Uganda, Zanzibar and other regions of Tanzania Mainland taken. Tanzania is a country of lovers of justice. We shall fight for justice until hooliganism high-way manship and the robbery of religious funds and property are wiped out."

It is clear that the writers of this last defamatory letter the appellants have all along been actuated by malice. They are admitting that the Sheikhs overlordship is intolerable because they are people of Arab extraction and or had married Arab women and this makes them very arrogant and uppish and must be wiped out or rather their hooliganism and daylight robbery of religious funds and as highway men they must be stopped. These are the contents of the letter which prompted C.J. to see that there was malice all along.

No doubt the period was too long between the first defamatory letter and the third, and calls for a review of what transpired in between. But this outburst was an eye opened which showed that all the appellants' agitation was as a result of intolerance of people of Arab extraction and leanings who were gaining their foothold in what they considered the exclusive religious preserve of themselves, the sons of the soil.

What transpired between the first and the third letter was not according to my brother Mapigano, touched upon by the trial Chief Justice as a circumstance which could have aggravated the situation and so explain away the tone of the last letter. I am of the view that a glance of the third letter in its new dimension of vilification shows that that has been the turn of mind of appellants since the events leading to the writing of the first letter. If that is the case then malice which was not discernible in the first letter, emerged in the third letter with racial over tones of no small measure.

Even the...../3

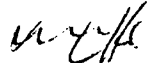
Even the existence of Arāb wives was called in to explain the highhandedness of the Sheikhs in running the affairs of the sect. Is this not pure racial hatred, and all the rest of dissatisfaction merely an eye wash?

The trial C.J. on reading the third letter did not **hesitate** to find malice stretching back to the first letter and so found qualified privilege negatived by it. I am of the same mind. And I would find defamation established and award the same costs as the High Court did against the appellants. I would dismiss the appeal. But woefully I am in the minority.

DATED at DAR ES SALAAM this 18th day of December, 1987.

A. M. A. OMAR  
JUSTICE OF APPEAL

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

  
(J. H. MSOFTE)  
SENIOR DEPUTY REGISTRAR.