

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And KEREFU, J.A)

CIVIL APPEAL NO. 320 OF 2017

CELINA MICHAEL APPELLANT

VERSUS

- 1. MTANZANIA NEWSPAPER**
- 2. MWANANCHI NEWSPAPER**
- 3. MWANASPOTI NEWSPAPER**
- 4. EDITOR ITV**
- 5. EDITOR STAR TV**
- 6. EDITOR CHANNEL TEN**
- 7. RAI NEWSPAPER**



..... RESPONDENTS

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Mwanza)**

(De-Mello, J.)

dated the 28th day of May, 2015

in

Civil Case No. 15 of 2006

.....

JUDGMENT OF THE COURT

11th & 17th December, 2020

KWARIKO, J. A.:

The appellant sued the respondents in the High Court of Tanzania at Mwanza for compensation in respect of defamation allegedly committed by the respondents. In that suit, the appellant claimed for payment of TZS. 50,000,000.00 by each respondent being a compensation for libel and defamation, interest on the decretal sum

from the date of filing the suit till payment in full. The suit was dismissed in its entirety. Aggrieved by that decision, the appellant filed this appeal.

According to the facts of the case which led to this appeal, the appellant alleged that being a victim of HIV/AIDS, the respondents published and aired her photograph without her consent, imputing her to that condition. It was her further claim that the said advert defamed her and she suffered mental anguish, humiliation and the public shunned away from her.

On the other hand, save for the third respondent, all others filed their respective written statements of defence. In the said written statements of defence, the respondents did not deny the publication of the said photograph but claimed that it did not contain any defamatory message. As regards the source of the photograph, the respondents claimed that the appellant had entered into an agreement with the photo bank known as PANOS pictures based in Uganda and the UK where HAKIELIMU obtained it. On the part of the third respondent, the matter proceeded *ex parte* against it in terms of

Order VIII rule 14 of the Civil Procedure Code [CAP 33 R.E. 2019]
(the CPC).

To determine the controversy between the parties, the trial court framed and recorded the following three issues which were agreed upon by the parties;

- “1. Whether the defendants’ advert if any, displayed in the defendants’ different medias amounted to defamation as against the plaintiff.*
- 2. If the above is answered in the affirmative then, whether damages were suffered and, to what extent.*
- 3. To what relief(s), parties are entailed to?”*

At the trial, being the sole witness, the appellant (PW1), testified that on diverse dates between 8th September and 2nd December, 2005, the respondents aired and published her photograph in which she was pictured together with her infant child without her consent and approval. PW1 testified further that the said publication was in respect of her status as a victim of HIV/AIDS and it exposed her to public contempt and lowered her reputation. She added that, being a petty trader, her customers shunned away from

her and her children were scolded at school and as a result, they abandoned classes. The appellant tendered the said photograph which was admitted in evidence as exhibit P1.

On their part, the respondents had two witnesses, namely; Ayoub Semvua (DW1), the public relations officer of the fourth respondent and Doris Marealle (DW2), the legal and administration Manager of the second respondent. In their evidence, the witnesses did not deny the airing and publication of the appellant's photograph. However, they denied to know the appellant personally and that they had no evil intention with her. They maintained that the photograph did not contain any defamatory information and that it did not depict anything concerning the appellant's HIV/AIDS status. The witnesses testified further that the photograph originated from a Non-Governmental Organization called HAKIELIMU and the same was intended to educate and alert the general public on high maternal death rates which was a Government's campaign through MKUKUTA program.

In its decision, the trial Judge found that the appellant failed to prove that the photograph was published in bad faith with or without

her consent and that it was defamatory. It was found further that the respondents did not know the health status of the appellant that she was HIV positive. The trial court found also that the said photograph did not depict anything to that effect. The suit was therefore found devoid of merit and dismissed in its entirety.

In this appeal, the appellant has preferred the following three grounds.

- 1. That, the learned trial Judge erred in law and fact for not awarding the appellant after the respondents' publication [which] was illegal having not sought her consent thus intruding [into] her privacy.*
- 2. That, the learned trial Judge erred in law and fact to state that the respondents pleaded justification which [was] submitted by the NGO's and MKURABITA but without consent of the appellant to print or show [the] photograph of [the] appellant on TVs and newspapers.*
- 3. That, the learned trial Judge erred in law and fact to state that the appellant failed to prove her case while it is true that the appellant's photograph used by the respondents by way of publication or publicly spoken to in the word of*

"vifo vya uzazi" injured her reputation without her consent to show her photograph on newspapers and television."

At the hearing of the appeal, the appellant appeared in person without legal representation. On the other hand, Dr. George Mwaisondola, learned advocate represented the first, second, third, fourth and fifth respondents. The sixth and seventh respondents did not enter appearance though duly served through their counsel, known as Juristic Law Chambers on 26th November 2020. As such, the hearing of the appeal proceeded in their absence in terms of Rule 112(2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules).

It is noteworthy that neither the appellant nor the respondents filed written submissions as required under Rule 106 (1) and (7) of the Rules. Parties were thus allowed to argue the appeal orally.

When given an opportunity to amplify on her grounds of appeal, the appellant adopted the same without more and urged us to consider them and allow the appeal.

On his part, from the outset, Dr. Mwaisondola declared his stance of not supporting the appeal. He argued that the first and

second grounds do not arise from the issues framed by the trial court. The framed issues did not contain the aspect of lack of consent by the appellant in publishing her photograph. To clarify on this point, he referred us to pages 130 and 61 of the record of appeal and supplementary record of appeal, respectively.

Regarding the third ground of appeal, Dr. Mwaisondola argued that in order for the claim based on the tort of defamation to succeed, the claimant should establish the following ingredients: *First* is proof of publication of the alleged defamatory article. He submitted that exhibit P1 shows that the said photograph was published by the first, second and third respondents only. As such, the question of publication by the fourth and fifth respondents did not arise.

The learned counsel went on to argue that, despite the publication of the photograph, the appellant was duty bound to prove whether the same was defamatory. To bolster his position, he cited a persuasive decision of the High Court of Tanzania in the case of **Fatuma Salmini v. Dr. Maua Daftari**, Civil Case No. 34 of 2008 at Dar es Salaam (unreported). He argued that the appellant did not

prove whether the words accompanying the photograph were defamatory and that the publication defamed her.

Dr. Mwaisondola argued further that, the *second* ingredient is that for a publication to be defamatory, it should contain false information and capable of lowering the complainant's reputation. In support of this preposition he referred us to page 7 of the case of **Fatuma Salmini** (supra) and **Rugarabamu Archard Mwombeki v. Charles Kizigha & Three Others** [1985] T.L.R 59 at page 68.

The learned counsel contended that in the instant case, the photograph did not contain anything relating to HIV/AIDS and if anything, this issue was raised by the appellant herself in the plaint and in her oral testimony. The *third* ingredient as explained by the learned counsel is that the complainant should suffer damages as a result of the alleged defamatory publication. He added that, the appellant did not show how she suffered as a result of the said publication. In support of the foregoing contention he referred us to another case of the High Court of Tanzania of **Edwin William Shetho v. Managing Director of Arusha International Conference Centre** [1999] T.L.R 130.

Upon further reflection, the learned counsel argued that even if the publication was defamatory, being media outlets, the first to fifth respondents are covered by the defence of privilege because of the nature of their work, and particularly because they were doing so for the NGO's and the Government in a campaign to reduce maternal death rates. He contended that, the evidence to that effect was not controverted by the appellant as shown at page 69 of the record of appeal. As regards the defence of privilege, the learned counsel referred us to another persuasive decision of the High Court of Tanzania in the case of **Astus Njale Masule and Another v. Dogani Lunala** [2002] T.L.R 197. He finally urged us to find that the appeal has no merit deserving to be dismissed. He left the issue of costs to the discretion of the Court.

In rejoinder, the appellant argued that the respondents did not prove that the publication was done on behalf of the NGO's and the Government and those who asked the respondents to publish the photograph were not summoned to testify before the trial court. She submitted further that her children suffered ridicule following the publication and her local area leader accused and blamed her to advertise her HIV/AIDS status for purpose of receiving favours.

Upon being probed by the Court, the appellant admitted that the said photograph is not accompanied by any issues relating to her HIV status but argued that the respondents did not seek her consent to publish it. She added that she did not enter into any agreement with anyone to publish the complained of photograph.

We have considered the grounds of appeal and the submissions made by both parties in support and against them. The issue for our determination is whether this appeal has merit. In the course of his submissions, Dr. Mwaisondola argued that the first and second grounds have raised a new issue of consent of the appellant which was not dealt with at the trial court. Having perused the record of appeal, we are certain that the learned counsel's argument is not backed up by the record of appeal. This is so because from the outset the appellant complained that the respondents did not seek her consent to publish her photograph. She stated the following in paragraph 12 of the plaint:

*"That on diverse dates between 8th September up to 2nd December 2005, **without the consent of the plaintiff**, a victim of (HIV/AIDS) disease, the defendants published in their respective*

newspapers and advertised on their respective television channels the photograph of the plaintiff and the photograph of her deceased child, in relation to the aforesaid (HIV/AIDS....” (Emphasis supplied).

Apart from the appellant’s complaint of lack of consent in the publication of her photograph, the respondents countered it to the effect that the said photograph was published in the Government program to educate the public on maternal death rates and they got it from the NGO’s which sourced it from the photo bank with which the appellant had entered into agreement. Specifically, the sixth respondent stated at paragraph 6 of its written statement of defence thus:

“...The defendant states that the said photograph originated from HAKIELIMU, a Non-Governmental Organization, and the same was intending to educate and alert the public on the high maternal death rate. The defendant states further that the plaintiff had entered [into] an agreement with the photo bank known as PANOS PICTURES the copy right holder of the photograph based in Uganda and UK from where HAKIELIMU obtained the photograph of the plaintiff for educational

*purposes. **The defendant states that the plaintiff agreed to have her photograph taken for the said use and was financially considered.*** (Emphasis ours)

Following those pleadings, both parties led evidence for and against the suit. In her evidence at page 62 of the supplementary record of appeal the appellant stated as follows during examination in-chief:

*"There is no justification to display my photograph with such heading and **without my consent** and truly against the whole scenario..."* (Emphasis added)

Equally, during cross-examination at page 63 of the record of appeal she testified that:

"My complaint is on the consent and approval to display which was never sought...I insist that my approval was necessary prior to the display of any kind." (Emphasis ours)

On their part, the respondents evidenced through DW1 in relation to the complaint about the appellant's consent at page 66 of the supplementary record of appeal as follows:

"The allegations are that we advertised by publication and without her approval rather consent, that she is ill."

Now, from the foregoing, it is clear that the issue of consent featured prominently, not only in the pleadings by the parties, but also in their evidence during the hearing of the suit. However, that matter was not framed among the issues and considered with the view of resolving the controversy between the parties. The trial Judge merely mentioned it in passing in her judgment at page 136 of the record of appeal that:

"...the plaintiff failed to prove her case to standards. Whether it was advertised on bad faith or otherwise, with or without her consent..."

It is our considered view that the issue of consent of the appellant in publishing her photograph ought to have been framed as one of the issues for determination by the court because as stated above, it featured in the pleadings. Order VIII rule 40 (1) of the CPC provides as follows:

"Where a suit is not resolved by negotiation, conciliation, mediation or arbitration or other similar alternative procedure it shall revert to the trial

judge or magistrate for final pre-trial settlement and scheduling conference, to enable the court to schedule the future events and steps which are bound or likely to arise in the conduct of the case, including framing of issues and the date or dates for trial."

We wish to emphasize that framing of issues is an important step in the conduct of civil cases as it ensures just determination of controversies between the parties. Failure to frame the issues arising out of the pleadings has the danger of leaving the parties' controversy unresolved which may lead to false outcome of the case and wastage of time as it has happened in this case. In our earlier decision in the case of **Stella Temu v. Tanzania Revenue Authority** [2005] T.L.R 178, the first appellate court did not decide the matter that arose in the pleadings and the evidence given to that effect simply because it was not a framed issue, the Court stated inter alia thus:

"As the issue of defamation was contained in the pleadings and the appellant gave evidence on it, the trial court was right to make a finding on it even though it was not among the framed issues."

Similarly, in the case at hand, the trial court failed to frame and decide an issue concerning the appellant's consent in publishing her

photograph. This failure vitiated the proceedings from the stage of framing of issues and its resultant decision. We thus allow the appeal and hereby quash those proceedings and the judgment of the High Court.

Having quashed the proceedings and judgment, in order for justice to be done in this case, we remit the case file to the High Court for the suit to be heard de novo from the stage of framing of issues.

DATED at **MWANZA** this 17th day of December, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 17th day of December 2020, in the Presence of the Appellant in person and Mr. Geoffrey Kange, learned advocate for the first, second, third, fourth, fifth, sixth and seventh Respondents, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL