IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And KITUSI, J.A.)

CIVIL APPEAL NO. 126 OF 2018

THE PUBLIC SERVICE SOCIAL SECURITY FUND (Successor of THE PARASTATAL PENSIONS FUND)..... APPELLANT

VERSUS

SIRIEL MCHEMBE ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Mipawa, J.)

Dated the 3rd day of June, 2014
in
Revision No. 389 of 2013

JUDGMENT OF THE COURT

29th September, 2021 & 10th May, 2022

WAMBALI, J.A.:

The respondent, Siriel Mchembe was an employee of the Parastatal Pensions Fund from 1st October, 1995 until 2011 when her employment was terminated. It is noteworthy that pursuant to the provisions of section 77 of the Public Service Social Security Fund Act, No. 2 of 2018, the Parastatal Pensions Fund, the then appellant, ceased to exist after the repeal of the Parastatal Pensions Fund Act, [Act No. 14 of 1978]. Consequently, by operation of law the current appellant, the Public Service Social Security Fund, succeeded the Parastatal Pensions

Fund as the appellant in the instant appeal which was lodged in the Court on 23rd July, 2018 after Act No.2 of 2018 came into operation. In the circumstances, on 23rd September, 2021, before we commenced the hearing of the appeal, we granted leave to the appellant to effect amendments to the memorandum of appeal and part of the record of appeal to remove the Parastatal Pensions Fund and substitute it with the current appellant, the Public Service Social Security Fund (its successor) for the purpose of keeping with orderly conduct of the appeal in accordance with the law.

The brief background which has led to the instant appeal may be prefaced as follows: According to the record of appeal, after the respondent worked for the Parastatal Pensions Fund (the then appellant) for fifteen years, rising from the rank of Executive Assistant to Contributions Manager, their relationship turned sour leading to her termination as alluded to above. Consequently, the respondent instituted before the Commission for Mediation and Arbitration (the CMA) Labour Dispute No. CMA/ DSM/ ILA/ 624/ 11/07 (the Labour Dispute) against the appellant on allegation of unfair termination of her employment. The respondent also claimed compensation of TZS. 100,000,000.00 from the appellant for allegedly being responsible for publishing defamatory

statements, initially in Jamii Forum and later in Wazalendo Forums (the social media platforms) basically accusing her of being possessed with an evil spirit of prostitution and adultery at work place. Notably, in the respondent's opening statement in support of her claims lodged at the CMA, she contended that the alleged defamatory statements tarnished her image personally, in her marriage, in her work and the public at large, as the publication was accessed by many users of the respective social media platforms.

The labour dispute was strongly contested by the appellant. As it were, while the dispute was at the CMA, after mediation failed, it was referred to the panel of three Arbitrators, who heard the evidence for both sides and in the end, an award was issued in favour of the respondent. The CMA declared that the termination of the respondent was unfair and thus it ordered the appellant to reinstate her without loss of remuneration. More particularly, the CMA found the appellant liable for publishing and posting defamatory statements on the social media platforms, initially hosted by Jamii Forum and later by Wazalendo Forums. It ultimately ordered the appellant to pay the respondent TZS. 70,000,000.00 as compensation for the injury caused to her reputation.

The CMA's award was unsuccessfully challenged by the appellant at the High Court of Tanzania, Labour Division at Dar es Salaam through Revision No.389 of 2013. Basically, the High Court upheld the CMA's decision and ordered the appellant to reinstate the respondent in terms of section 40 (1) (a) of Employment and Labour Relations Act, Cap 366 (the ELRA); or upon deciding not to reinstate her, to comply with the provisions of section 40 (3) of the ELRA. The High Court also confirmed the CMA's order for payment of TZS. 70,000,000.00 to the respondent as compensation for injuries sustained due to the defamatory statements. It is against the decision of the High Court that the appellant has instituted the appeal to this Court.

In is however noted that the appellant is only aggrieved by part of the judgment of the High Court; namely, the order of payment of compensation for the alleged defamatory statements. The appellant does not, therefore, contest the High Court's decision confirming the respondent's award in respect of unfair termination. Noteworthy, initially, the dissatisfaction of the appellant was expressed through two grounds of appeal contained in the memorandum of appeal. Nonetheless, before we commenced the hearing, the appellant withdrew the second ground of appeal and sought amendment of the first ground

of appeal, which was granted as the respondent did not object. In this regard, the sole ground of appeal which will require our deliberation and determination is couched in the following terms: -

> *"That the High Court failed to subject the evidence on record by the respondent to judicial scrutiny".*

At the hearing of the appeal, the appellant was represented by Mr. Hangi Chang'a learned Principal State Attorney, assisted by Ms. Narindwa Sekimanga and Ms. Jenifer Msanga, both learned State Attorneys and Mr. Senen E. Mponda, learned advocate, who also represented the appellant at the CMA and the High Court respectively. On the adversary side, Mr. Paschal Kamala, learned advocate who similarly represented the respondent at the CMA and the High Court, entered appearance for the respondent to resist the appeal. Counsel for the parties adopted the written submissions lodged earlier on in Court in support of their respective positions for and against the appeal.

Before we commence our deliberation and consideration of the sole ground of appeal, we deem it appropriate to resolve a preliminary point of law which was raised by Mr. Kamala in the written submission in opposing the appeal. The thrust of the learned counsel's argument is that, the preferred ground of appeal which intends to challenge the

alleged failure of the High Court to scrutinize the evidence does not deserve consideration by the Court as it is premised on facts and not on a point of law as required by section 57 of the Labour Institutions Act, Cap 300 (the LIA). For clarity, the section provides as follows: -

> *"Any party to the proceedings at the Labour Court may appeal against the decision of the court to the Court of Appeal of Tanzania on point of law only".*

In support of the contention, Mr. Kamala submitted that throughout the appellant's written submission in support of the appeal, it is apparent that she is challenging the failure of the CMA and the High Court to consider the defamatory statements (exhibit P8) and the evidence of the respondent (PW1) and Dr. Mabula Mchembe (PW3). It is the contention of Mr. Kamala that since the respective ground of appeal has basically raised evidential issues concerning the decision of the CMA which was confirmed by the High Court, this Court has no powers to exercise its appellate jurisdiction. To support his submission, he referred us to the decision of the Court in **Bahari Oilfield Services EPZ LTD v. Peter Wilson**, Civil Appeal No.157 of 2020 (unreported) in which reference was made to another decision in **Severo Mutegeki and Another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini**

Dodoma (DUWASA), Civil Appeal No. 343 of 2019 (unreported). To this end, Mr. Kamala pressed us to find that the appeal is incompetent for offending section 57 of the LIA, and thereby strike it out.

In reply, Mr. Mponda acknowledged the fact that section 57 of the LIA bars appeals from the Labour Division of the High Court which are not based on points of law. However, he argued that the thrust of the appellant's ground of appeal is not only based on the issue of evidence but also on the failure of the CMA and the High Court to evaluate the evidence on record in relation to the law concerning the tort of defamation to ascertain whether the appellant was the author of the alleged defamatory statements. Besides, he added, the appellant's contention in the ground of appeal is that the tort of defamation was not pleaded, but was simply stated in the respondent's claim form she lodged at the CMA. He emphasized that, both the CMA and the High Court did not deliberate on how the tort of defamation was linked to the labour dispute which was basically on unfair termination. He submitted further that it is in this regard that the appellant does not contest the High Court's decision on the finding that the respondent was unfairly terminated.

In the end, relying on his submission on the competence of the appeal before the Court, Mr. Mponda argued that the decisions referred by Mr. Kamala to support his contention on the applicability of section 57 of the LIA are not applicable in the circumstances of this appeal. He therefore, implored us to overrule the preliminary point of law and proceed to determine the appeal on merit. He strongly contended that the issue in the sole ground of appeal is whether the law in relation to the tort of defamation was properly applied in the evaluation of the evidence on record by the CMA and the High Court.

Admittedly, it is beyond dispute that in **Bahari Oilfield Services EPZ LTD v. Peter Wilson** and **Severo Mutegeki and Another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA)** (supra), the Court reaffirmed the settled position that section 57 of the LIA bars appeals from the Labour Division of the High Court to the Court which are not grounded on points of law. Equally important, the Court took the same stand in **Insignia Limited v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 14 of 2007 and **Atlas Copco Tanzania Limited v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 167 of 2019 (both unreported), when it dealt with the interpretation of section 25(2)

of the Tax Revenue Appeal Act, Cap 408 R. E. 2006 ("the TRAA") which provides that appeals to the Court from the Tax Revenue Appeals Tribunal shall lie on matters involving questions of law only.

However, in the latter decision the Court went further and posed the question on what is a point of law. To answer the question, the Court made reference to the decision of the Supreme Court of India in **Meenakshi Mills, Madurai v. The Commissioner of Income Tax, Madras** (1957) AIR 49, 1956 SCR 691 in which a number of Indian and foreign decisions on what amounts to a question of law, as opposed to a matter of fact within the meaning of section 66(1) of the Indian Income Tax Act, were discussed in the course of determining the appeal. Essentially, the Supreme Court of India categorized the following as questions of law: -

> *"1. When a point for determination is a pure question of law such as construction of a statute or document of title....*
>
> *2. When the point for determination is a mixed question of law and fact; while the finding of the Tribunal on the facts found is final in its decision as to the legal effect of those findings is a question of law which can be reviewed by the Court.*

3. A finding on a question of fact is open to attack, under section 66 (1) as erroneous in law when there is no evidence to support it or if it is perverse."

Remarkably, the Supreme Court of India also stated that an inference of fact would remain as such and that its character will not change. Specifically, it stated that: -

"4. When the finding is one of fact, the fact that it is itself in inference from other basic facts will not alter its character as one of fact".

Moreover, the Court in **Atlas Copco Tanzania Limited** (supra) also made reference to the decision of the Supreme Court of Kenya in **Gatirau Peter Munya v. Dickson Mwenda Kithinji & Three Others** [2014] eKLR in which the above stated decision of the Supreme Court of India was considered in the context of the provisions of section 85A of the Election Act in dealing with electoral disputes resolution. In that decision the Supreme Court of Kenya stated: -

"[We] would characterize the three elements of the phrase "matters of law" as follows: -

(a) ***the technical element:*** *involving the interpretation of a constitutional or statutory provision;*

(b) ***the practical element:*** *involving the application of the constitution and the law to a set of facts or evidence on record;*

(c) ***the evidential element:*** *involving the evaluation of the conclusions of a trial court on the basis of the evidence on record".*

After reviewing those foreign decisions, this Court held that for the purpose of section 25(2) of the TRAA the question of law means any of the following: -

> *"First, an issue on the interpretation of a provision of the constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration.*
>
> *Secondly, a question on the application by the Tribunal of a provision of the constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record.*
>
> *Finally, a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there is no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it."*

Applying the above exposition of the law to the instant appeal, and having gone through the record of appeal and the submissions of the

counsel for the parties through written and oral submissions, we think the crucial legal issue which arises from the sole ground of appeal is: whether the CMA and the High Court properly dealt with the evidence of the parties on record in relation to the law with regard to the tort of defamation in arriving at the final decision concerning the liability of the appellant over the alleged defamatory statements. In our settled opinion, in the light of the evidence on record and the decision of the High Court, the sole ground of appeal in the instant appeal falls squarely within the final holding of the Court in **Atlas Copco Tanzania Limited** (supra) reproduced above. Consequently, we overrule the preliminary point of law raised by the counsel for the respondent for lacking substance and proceed to determine the appeal on merit.

We now turn to consider the appellant's sole ground of appeal. In support of the appeal, Mr. Mponda learned advocate who addressed the Court faulted the High Court for its failure to evaluate the evidence on record properly in relation to the tort of defamation. He contended that as a result, it wrongly concluded that the appellant is the one who published and posted the alleged defamatory statements on social media platforms. He emphasized that as the High Court was considering the decision of the CMA on revision for the first time, it was bound to

subject the evidence on record to judicial scrutiny. To buttress his argument, he made reference to the decision of the Court in **Damson Ndaweka v. Ally Saidi Mtera,** Civil Appeal No. 5 of 1999 (unreported) and that of the defunct Court of Appeal for East Africa in **Dinkerrai Ramkrishna Pandya v. Rex** [1957] I E. A. 336 (CAD).

Mr. Mponda submitted further that the High Court wrongly confirmed the finding of the CMA that the appellant was liable for the defamatory statements contained in exhibit P8 on the contention that she failed to control those who were responsible for publishing and posting the respective statements on social media platforms from her computers. In his submission, the conclusion of the High Court is wrong because; first, exhibit P8 contained defamatory statements not only against the reputation of the respondent but also against the Director General, senior members of the management and staff of the appellant. It is in this regard, he argued, that initially the respondent was subjected to displinary proceedings by the appellant being accused of publishing and posting the alleged defamatory statements in Jamii Forum before it was further posted in Wazalendo Forums, but was cleared of the accusation. Secondly, as exhibit P8 was sourced from online social media networks, it was prone to adulteration by those who

participated in airing their views as contributors to the social media networks. Thirdly, in her evidence in chief and during cross-examination the respondent admitted that she did not know the author of the defamatory statements though she nonetheless maintained that it was authored by the appellant using her computer at 21:45 hours. Besides, he added, even her crucial witness, that is, PW3 conceded that he did not know the publisher of the defamatory statements.

In the circumstances, Mr. Mponda submitted that as it was the duty of the respondent to prove on balance of probabilities that it was the appellant and not any other person who published and posted the alleged defamatory statements in the social media platforms, it was wrong for the High Court to have confirmed the decision of the CMA that the appellant was liable for her failure to control the use of her computers by placing reliance on the evidence of Julius Kam Mganga (DW5) who testified for the appellant. In the premises, Mr Mponda submitted that in view of the evidence in the record of appeal, there is no basis to conclude, as the High Court did, that the appellant is liable for publishing and posting the defamatory statements, and thereby holding the respondent entitled to the compensation which was awarded by the CMA for the injury to her reputation. The learned advocate

maintained that the High Court arrived at that decision without evaluating the evidence sufficiently and directing itself on the law with regard to the tort of defamation and how it must be proved by the complainant.

In the circumstances, Mr. Mponda urged us to allow the appeal and reverse the decision and order of the High Court that confirmed the award of the CMA for payment of TZS. 70,000,000.00 as compensation to the respondent for the alleged defamatory statements.

For his part, Mr. Kamala strongly defended the decision and order of the High Court that confirmed the CMA's findings on the liability of the appellant and the award of compensation granted to the respondent. He submitted that the evidence of the respondent to the effect that exhibit P8 was published and posted by the appellant on social media platforms using her computers was not challenged. He explained that the respondent's evidence is strengthened by the fact that as reflected at page 60 of the record of appeal, exhibit P8 was "last edited by PPF on 27th April, 2011 at 09:45 p.m".

In this regard, Mr. Kamala supported the findings of the CMA and the High Court that the appellant was negligent in controlling the use of her computers by its workers because: according to her regulations, the

use of computers after 5:00 p.m had to be authorised by the Director of Information Communication Technology (ICT). Therefore, he submitted that the appellant must have known the person who possessed and utilized the computer to publish and post the defamatory statements against the respondent in Jamii Forum and Wazalendo Forums.

To this end, Mr. Kamala strongly argued that the issue of malice in the publication of the defamatory statements is implied in the appellant's inaction and negligence to control the use of her computers by its employees/officers beyond the prescribed period, during which the respective statements were published and posted in the respective social media platforms. He emphasized that the High Court in its decision sufficiently considered the applicable law with regard to the ingredients of proving the tort of defamation before it confirmed the findings of the CMA that the appellant was liable for the publication and posting of the defamatory statements in the social media platforms.

Additionally, Mr. Kamala defended the compensation which was granted to the respondent. He submitted that the said compensation was not only granted for damages because of the injury suffered by the respondent for defamatory statements, but also for unfair termination. He thus beseeched the Court to uphold the decision of the High Court

and dismiss the appeal with costs, as in his view, the evidence in the record of appeal fully supports the findings on the liability of the appellant.

To resolve the appellant's complaint in the sole ground of appeal, we deem it appropriate to revisit the crucial evidence on record leading to the finding of the CMA which was confirmed by the High Court. We are doing this conscious of the settled position that being the second appellate court, we should rarely interfere with the concurrent findings of facts by the CMA and the High Court unless there has been a misapprehension of evidence occasioning a miscarriage of justice or violation of a principle of law or procedure (see **Neli Manase Foya v. Damian Mlinga** [2005] T. L. R. 167, among many decisions of the Court).

It is noted from the record of appeal that in order to resolve the issue of defamation, the CMA and the parties agreed and framed the following statement as the 4th issue: -

> *"4. Endapo mlalamikiwa alitangaza (publish) maelezo ya makusudi ya kumdhalilisha mlalamikaji na endapo mlalamikaji alipata madhara kutokana na matangazo hayo?"*
>
> Literally translated as:

"4. whether the appellant published the defamatory statement and if so whether the respondent reputation was injured by the publication".

Apparently, according to the record of appeal, in resolving the respective issue, the CMA heavily relied on the evidence of PW1, PW3, DW5 and exhibit P8 (the defamatory statements which were initially published and posted on Jamii Forum and later transferred to Wazalendo Forums through http:// Wazalendoforums.com).

Basically, after analysing the evidence on record in relation to the above reproduced fourth issue, the CMA stated as follows: -

"DW5 alieleza kwamba computer iliyotumika kusambaza habari chafu za viongozi wa PPF ilikuwa ya mlalamikaji na kwamba hakuna ubishi kipindi ambacho taarifa hizo zilitumwa mlalamikaji alikuwa katika likizo. Aidha DW5 alitanabaisha kwamba forensic report iliyogundua kwamba compuer iliyotumika kusambazia ujumbe huo ilifutwa na mfanyakazi mwingine wa PPF na pia alieleza kwamba aliye-publish habari hizo ni 'wahuni' toka hapo hapo PPF. Ikumbukwe kwamba huyo DW5 ni Meneja Rasilimali Watu na ndiyo anayetoa ushahidi kwamba ni 'wahuni toka PPF' na alikiri kwamba muda wa mwisho wa

kutumia computer za ofisi ni saa 11:00 jioni baada ya hapo anapaswa kupata kibali toka kwa Mkurugenzi wa Information Technology na kwamba taarifa hizo chafu zilitumwa baada ya masaa ya kawaida ya kazi, hivyo basi mlalamikiwa alikuwa na uwezo wa kum-detect ni 'muhuni' yupi wa ofisi ya PPF aliyepewa kibali na Director of IT kubaki ofisini baada ya muda wa kazi na kutumia computer ya mlalamikaji kulisababisha watu wengine kutuma postings nyingine kwenye mitandao hiyo ya Jamii Forums na Wazalendo Forums na kuzidi kuwachafua wafanyakazi wengine hadi mlalamikaji ambaye hakuwepo kwenye postings za awali na ripoti ilibainisha kwamba hakutuma postings hizo.

Ni maoni ya jopo hili mlalamikiwa anahusika na postings hizo kwa sababu (1) alijua publisher ni muhuni toka PPF na hakuchukua hatua yoyote, (2) alijua kwamba ushahidi umefutwa kwa wale waliotumiwa pia alikaa kimya.

Kuthibitisha kwamba mlalamikiwa aliwajua waliohusika na kutumia computer za ofisi na kutuma postings hizo DW5, tunamnukuu: -

"kuna mfanyakazi wa IT alifuta ushahidi wote kwenye computer za waliotumiwa, hivyo ushahidi unaomhusu mlalamikaji haukuwepo".

Kwa mantiki hii, mlalamikiwa alikuwa na uwezo kabisa wa kubaini aliyeandika na hata aliyefuta kwa kuzingatia ukweli kwamba anamjua aliyefuta anatokea Kitengo cha Information Technology...

Kitendo cha mlalamikiwa kutombaini au kumtaja aliyehusika na kutuma taarifa hizo chafu ndiko kulikopelekea taarifa inazomhusu PW1 kutumwa ambazo kimsingi zimemchafua..."

Having reasoned, as it did, the CMA then concluded as follows on the issue on the relief of compensation of TZS. 100,000,000.00 which was claimed by the respondent for the defamatory statements: -

"Suala hili ni la 'kikazi lakini limeleta madhara katika maisha yake binafsi 'private life' na kuathiri mahusiano yake ya ndoa na kanisani hivyo basi kutokana na madhara aliyopata mlalamikaji mlalamikiwa anapaswa kumlipa fidia ya madhara hayo, na hivyo jopo limeona kwamba fidia stahiki kwa mlalamikaji huyu ni Tshs. 70,000,000/= (milioni sabini tu)."

As gleaned from the reproduced parts of the decision and award of the CMA, in essence, the thrust of its holding that the appellant was responsible for the alleged defamatory statements is that, as the appellant had the control of the computers in the office in which the respondent's computer, who was on vacation, was used for publishing

and posting them on social media platforms; she was in a position to know the person who used it beyond the prescribed time of 17.00 hours as it could not be used without the authorization of the Director of ICT. Indeed, it was the firm opinion of the CMA that as the appellant remained quiet without intervening on the incident for a considerable period until the complaint of the respondent was lodged, an adverse inference had to be drawn that she was responsible for the publication and posting of the defamatory statements. The CMA also affirmed that according to DW5 the defamatory statements that were published and posted on the said social media platforms were deleted from the computer by one of the appellant's employees who was described as a "hooligan" from the IT department, and therefore, she was duty bound to know the respective person.

As intimated above, the High Court fully endorsed the findings, decision and award of the CMA with regard to the disputed compensation granted to the respondent. We must pause here and observe that our thorough perusal of the CMA decision and award leaves us with no doubt that though there was acknowledgement that it was dealing with the tort of defamation, there is no reference at all of the

relevant law in that particular area of law with regard to the standard of proof and who bears the burden in substantiating the claim.

We also note from the record of appeal that the CMA did not subject the evidence of the parties before it with regard to the requisite ingredients for proving the tort of defamation, which in law entitles a successful party to compensation for the publication of the defamatory statements.

Equally important, though it is evident from the decision of the High Court that considerable efforts were made to deliberate on whether the CMA had jurisdiction to determine the dispute between the parties involving a tort of defamation and the answer was in the affirmative, there is nothing in the record of appeal showing that reference was made to the relevant law in respect of the ingredients for proving the tort of defamation. Indeed, according to the record of appeal, it is quite clear that the High Court did not subject to scrutiny the evidence of the parties, with regard to the proof of defamation in relation to the applicable law before it upheld the findings, decision and award of the CMA on this issue. At this juncture, we deem it appropriate to revisit the position of the law with regard to the tort of defamation.

According to **Winfield and Jolowicz on Tort,** Eleventh Edition by W.H.V. Rodgers: Sweet & Maxwell – London, 1979 at page 274 defamation is defined as: -

> *"...the publication of a statement which reflects on a person's reputation and tends to lower him on the estimate of right-thinking members of the society generally or tend to make them shun or avoid him".*

In **Peter Ng'omango v. Gerson M.K. Mwangwa and Another**, Civil Appeal No. 10 of 1998 (unreported) the Court described the tort of defamation in the following terms: -

> *"...the tort of defamation essentially lies in the publication of a statement which tends to lower a person, in the estimation of right thinking members of the society generally, hence to amount to defamation there has to be publication to a third party of a matter containing an untrue imputation against the reputation of another".*

It is in this regard that in **Valentine M. Eyakuze v. Editor of Sunday News and Two Others** [1974] L.R.T. No. 49 Mfalila, J. (as he then was) stated that: -

> *"The tort of defamation cannot be divorced from the social context in which it is operating and*

there are as many social contexts as there are legal jurisdictions".

Defamation can therefore take a form of: a libel which is mostly in permanent form as it is usually written and must be visible; or slander which is expressed in oral form. The fundamental distinction of the two forms of defamation respectively, therefore, is the medium in which they are expressed, that is, one is expressed in written form while the other in oral form. In **Professor Ibrahim H. Lupumba v. Zuberi Juma Mzee** [2004] T.L.R. 381, the Court held among others that: -

(i) a libel is a defamatory imputation made in permanent form such as in writing while slander is defamatory imputation made in a fugitive form such as by speaking or gestures..."

It is equally important to stress that when the defamatory statement is published, the liability is not limited to the writer but it also extends to publishers, and in terms of online publication, to internet service providers including blogs, websites, web-hosting and the like. Noteworthy, repetition of a defamatory statement is a fresh publication and creates a cause of action [see Owen, R (2000): **Essential Tort Law,** 3rd Edition, Cavendish Publishing Limited, London, Sydney].

Thus, in order to succeed in an action for defamation, the plaintiff has to prove the following elements: that the defamatory statement exists; that the statement referred to him/her; that the statement was published; and that the plaintiff suffered damages.

According to McBridge and Bagshow, in their book entitled **Tort Law**, 5th Edition, Longman Law Series, 2015, a statement will be defamatory if reading or hearing it would make an ordinary reasonable person tend to: -

> "*think less well as a person of the individual referred to; think that the person referred to lacked the ability to do their job effectively; shun or avoid the person referred to as a figure of fun or an object of ridicule*".

In this regard, the issue is not how the defamatory statement makes the person referred to feel, but the impression it is likely to make on those reading or hearing it.

Clearly therefore, the plaintiff must prove that the statement could tend to have that effect on an ordinary reasonable listener or reader.

It is also important to appreciate that a defamatory statement must be published. A statement is thus considered to have been published when the defendant communicates to anyone other than the

plaintiff. There has to be a third party receiving the defamatory statement for there to be a publication. Thus, publication of a defamatory statement is a pre-requisite to establish defamation.

In the premises, in **Pullman v. Walter Hill & Company** (1891) 1QB 524 it was stated that: -

> *"Publication is the making known, the defamatory matter after it has been written to some person other than the person to whom it is written. If the statement is sent straight to the person of whom it is written there is no publication of it; for you cannot publish a libel of a man against himself".*

Indeed, in **Nyabanganya Mtani v. Nyankanyi Kabera** [1983] T. L. R. 332, it was held that there is no publication if defamatory statements/words are not uttered to the third party.

At this point, we think it is also important to observe that in the case at hand, publication of the defamatory statements against the respondent, senior members of management and staff of the appellant was not in the traditional sense, such as, in a newspaper article. To the contrary, the defamatory statements were published and posted on online media platforms, initially on Jamii Forum and later transferred to Wazalendo Forums as reflected in exhibit P8.

We can therefore refer to this type of libel as social media defamation. According to Suboth Asthana in the Article **Defamation in the Internet Age: Laws and Issues in India**, it is generally accepted that social media defamation is a term used to describe the content that is published to a social media platform that defames or is injurious to the person or business reputation. This type of defamation can also commonly be referred to as cyber defamation, disparagement, character assassination, cyberbullying and cyber harassment. Therefore, any such act taking place online or on the cyber space leads to online defamation or cyber defamation.

Suboth Asthana states further that cyber defamation occurs when a computer or modern electronic device connected to the internet is used as a tool or medium to defame a person or entity. For example, publishing a defamatory statement against a person on social media networking site such as Facebook (Meta), twitter etc. or sending an email containing defamatory content about a person with the intention to defame him/her. What is important however is that the law applies the same despite the medium of communicating this act in physical and digital world.

Nonetheless, in recent times, social media sites have increasingly become platforms on which users feel they should be allowed to exercise their right to free speech. Yet, freedom of speech does not give anyone not even social media users the right to say or publish whatever they want without repercussions.

In the circumstances, with the advent and proliferation of the various social media platforms such as Facebook (Meta), Twitter, LinkedIn, Snap Chart, Instagram, etc. there has been an increase in a number of defamation cases heard in courts in several jurisdictions arising from posts in social media. Yet in most jurisdictions, Tanzania inclusive, the existing laws do not have an adequate approach towards cases involving social media defamation. As such, though in defamation cases, the court has to balance a person's right to free speech and person's right not to be defamed by looking at the gravity of the allegation, the size and influence of the circulation, the extent and nature of the claimant's reputation and the effect of publication; sometimes, in the current era of the internet, it becomes practically difficult for courts to apply the principles of 18th and 19th centuries cases to the issues arising on the internet in the 21st century. It is acknowledged that, cyber defamation is neither bound by time nor by

national boundaries, that is, a person sitting in one corner of the world can at any time easily cause damage to a person sitting in another corner of the world within few minutes.

Cognizant of the complexity caused by online defamation, authors Vinakshi Kadan and Bhaana Gendhi in their Article "**Revisiting Cyber Defamation Laws in India & Comparison with English Law**" state that: -

> *"Getting the cure if there should arise an occurrence of online defamation is troublesome and a greater amount of convoluted nature, yet whenever followed fittingly, utilizing specialized and legal strategy, it might be anything but difficult to demonstrate and indict the guilty party and furthermore to get the harms. Be that as it may, the cures are not compelling and adequate as when it could be implemented, the abusive material as sound, video or text would have accomplished the ideal effect of the guilty parties.*
>
> *These cures were presented for the defamation in physical space as opposed to online medium as the idea of online medium is particular from physical medium. In cyber space, the correspondence of distribution is moment and*

worldwide, caricaturing the personality and obscurity is very simple when contrasted with physical space.

The greatest test for defamation in the Digital Space is against whom the activity ought to be started for defamation. The 'Spoofing Identity', 'Impersonation' and 'Anonymity' is simple and as such knowing the personality of the individual who has caused the defamation may not be doable at the principal case and accordingly it might be hard to start the procedure for criminal defamation or recording the suit for harms for defamation".

In the circumstances, though as alluded to above currently the normal laws of libel apply to publication on social media including the ability of the defendant to raise various defences, we think it is high time for the authorities to ensure that our defamation laws are designed to be applied to all kinds of social media defamation in the Digital Space.

It is in this regard that the decision of the Supreme Court of the United Kingdom in **Stocker v. Stocker** [2019] UKSC 17, handed down on 3rd April 2019 has provided some insight on what should be done in determining the meaning of the published defamatory statement on physical and social media platforms for those accused of online

defamation. In short, the United Kingdom Supreme Court (UKSC) apart from acknowledging the governing principles on defamation published in physical means like in newspaper articles, it emphasized that in an online defamation, a court must determine a single defamatory meaning being governed or guided by reasonableness. Particularly, Lord Kerr, SCJ (with whom Lord Reed, Lady Black, Lord Briggs and Lord Kitchin agreed) set out some guidelines on how the court should approach its determination of meaning of the published defamatory statement by citing Sir Anthony Clarke MR's well-known guidance in **Jevnes v. News Magazines Ltd & Another** [2008] EWCA Civ 130 that: -

> *(1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve, but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking, but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning whether other non-defamatory meaning are invaluable. (3) Over-elaborated analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bone and antidote' taken together. (6) The*

hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meaning, the court should rule out any meaning which, "can only emerge as the procedure of some strained, or forced, or utterly unreasonable interpretation..." (see Eady, J ***in Gillick v. Brook Advisory Centres*** *approved by this Court [2001] EWCA Civ 1263 at para 7 and* ***Galley on Libel and Slander*** *(10th ed), para 306). (8) It follows that it is not enough to say that by some person or another the word might be understood in a defamatory sense..."*

Moreover, Lord Kerr, SCJ referred to the rider that Sharp, L.J. of the England and Wales Court of Appeal had added to the second criteria in **Elliot v. Rufus** [2015] EWCA Civ 121 when she said at para 11: -

"...To this I would only add that the words 'should not select one bad meaning where other non-defamatory meaning are available' are apt to be misleading without fuller explanation. They obviously do not mean in a case such as this one, where it is open to a defendant to contend either on a capability application or indeed at trial

that the words complained of are not defamatory of the claimant, that the tribunal adjudicating on the question must then select the non-defamatory meaning for which the defendant contends. Instead, those words are 'part of the description of the hypothetical reasonable reader, rather than (as) a prescription of how such a reader should attribute meanings to words complained of as defamatory see ***McAlpire v. Bercow*** *[2013] EWHC 1342 (QB), paras 63 to 66."*

Applying the guidance to the context in which words are published, Lord Kerr SCJ then remarked: -

"All of this, of course, emphasises that the primary role of the court is to focus on how the ordinary reasonable reader would construe the words. And this highlights the court's duty to step aside from lawyerly analysis to inhibit the world of the typical reader of a Facebook post. To fulfil the obligation, the court should be particularly conscious of the context in which the statement was made..."

It is instructive to note that in general the UKSC held that it was unwise to search a Facebook post for its theoretical or logically deducible meaning. On the contrary, the search for meaning should

reflect the fact that Facebook like other social media platforms is a 'casual medium' in the nature of a conversation rather than a carefully chosen expression.

More particularly, in **Stocker v. Stocker** (supra) in so far as social media publications are concerned the UKSC effectively created a sub-category of the "reasonable reader". It thus explained at paragraph 41 of the judgment as follows:-

> *"The fact that this was a Facebook post is critical. The advent of the 21st century has brought with a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet in Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read."*

Indeed, Lord Kerr, SCJ referred to the observations of Warby and Nicklin, JJs in **Manroe v. Hopkins** [2017] EWHC 433 (QB) and **Monir v. Wood** [2018] EWHC 3525 (QB) respectively (both libel cases) about the need to adopt an "impressionistic approach" when determining the meaning of tweets.

Perhaps more significantly, Lord Kerr, SCJ referred to the remarks of which concerned the publication of allegation of internet bulletin

boards as reflected at paragraphs 14 and 16 of the judgments by Nicklin J taken by Eady, J in dealing with online bulletin boards in **Smith v. ADVFN plc** [2008] EWHC 1797 (QB) where he said at paras 14 1nd 16:-

> *"14...Particular characteristics which I should have in mind are that they are read by relatively few people, most of whom will share an interest in the subject matter; they are rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take'.*
>
> *16 ... people do not often take a 'thread' and go through it as a whole like a newspaper article. They tend to read the remarks, make their own contributions if they feel inclined, and think no more about it".*

When concluding that the trial judge (Mitting, J) in **Stocker v. Stocker** (supra) failed to conduct a realistic exploration of how the ordinary reader of the Facebook post would have understood the

published and posted words, Lord Kerr thus remarked as follows at paras 47 and 49 of the judgment respectively:-

> *"47. Readers of Facebook post do not subject them to close analysis. They do not have someone by their side pointing out the possible meanings that might, theoretically, be given to the post...*
>
> *"49. Such a reader does not splice the post into separate clauses, much less isolate individual words and contemplate their possible significance".*

We accordingly endorse the persuasive observation, reasoning and conclusion of the UKSC with regard to the test in determining the meaning of the published online defamatory statements posted on social media platforms and the burden of proof.

Having laid down the position of law with regard to the tort of defamation, we now revert to consider the ground of appeal on whether there is sufficient evidence to support the finding of the CMA and the High Court that the appellant is liable for the publication of the online defamatory statements against the respondent.

Applying the settled position of law, according to the evidence on record, there is no dispute that the alleged defamatory statements

against the respondent, some senior members of the management and staff of the appellant were initially published and posted in Jamii Forum. However, according to the record of appeal, exhibit P8 containing 22 pages was later posted on Wazalendo Forums after the contributors alleged that Jamii Forum platform had been compromised by the appellant's management. There is also no dispute that the information contained in exhibit P8 was directed to not only the respondent but also to senior members of the management and staff of the appellant. It is however, unfortunate that though the CMA in its finding reproduced above found that the appellant is responsible for the publication of the defamatory statements against the respondent, it did not find whether on the strength of the evidence on record the respective statements were true or false. The CMA simply concluded that the respondent's reputation was injured in the eyes of her fellow employee, the family, the church and the public at large as the information was accessed by many people who visited the respective social media platforms.

In their decisions both the CMA and the High Court relied heavily on the evidence of PW1, PW3, exhibit P8 and DW5.

Be it as it may, in view of the evidence on record, the crucial issue for our determination is whether, the respondent proved that the

appellant is responsible for the publication and posting of the online defamatory statements in Wazalendo Forums as reflected in exhibit P8.

It was strongly submitted by Mr. Kamala for the respondent in support of the High Court decision that the appellant is liable because exhibit P8 was last edited by her officer on 27th April, 2011 at 9:45 p.m. and that she failed to control the use of her computer which was used for publishing and posting of the defamatory statement on Wazalendo Forums.

We note from the testimony of the respondent (PW1) that earlier on she stated in her evidence in chief that though she did not know the person who authored the information, she was convinced that the same was authored by the appellant as it was her computer which was used. For clarity, she testified as follows at the CMA:-

> *"Nadhani PPF ndiyo wameandika kwani siku 3 kabla hizi document haijaandikwa Mkurugenzi aliniita ofisini kwake akaniambia nimefanya maombi maalum asirudi tena kazini.*
>
> *Hii document imeandikwa na computer ya PPF na imechapwa saa 3 na dakika 45 usiku, kwa mujibu wa taratibu za kazi ni lazima huyo mtu awe na kibali cha Mkurugenzi wa Utawala."*

When PW1 was cross-examined on why she thought exhibit P8 was published and posted by the appellant, she repeated her earlier statement reproduced above. She however stated on further cross-examination that the information was not authored by the Director General but by the appellant.

From the evidence on record, it is plainly clear that the respondent did not identify or point out any officer of the appellant who was responsible for publishing and posting exhibit P8 in the Wazalendo Forums. Similarly, PW3 who testified in support of the respondent admitted that though he considered the information contained in exhibit P8 to be highly defamatory of the respondent, himself and the entire family, he did not know the person who published and posted it in the social media platforms.

On the other hand, having closely examined exhibit P8, we note that there are several platform users who are indicated to have been involved in posting the statements since 28/12/2010 at 6:36pm to 20/4/2011. They are vividly identified by their respective user names as 'Mzalendo', 'Kijana', 'PPF insider' (junior member), 'Saracen' and 'PPF'. Specifically, from page 16 – 22 of exhibit P8, which contain specific information in respect of the respondent and other officials of the

appellant, the person who is indicated to have originally posted the publication in Jamii Forum on 27/4/2011 at 09:34 is "asia mwandu." However, at the end of the information at page 22, the name of the poster is simply indicated as "Asia". Besides, there is no evidence in the record of appeal from the respondent to show whether 'Asia' was a fictitious name or a recognized employee of the appellant. In the circumstances, though Mr. Kamala placed reliance on the fact that exhibit P8 was last edited at 9:45 pm at the appellant's office, which formed the basis of the CMA and High Court decision, on the argument that the appellant was negligent to control her computer which was used to publish exhibit P8, we entertain doubt on the soundness of that conclusion in view of the evidence from the respondent on record.

We are indeed of the opinion that the evidence of DW5 relied on by both the CMA and High Court to arrive to this conclusion could not be taken as admission of liability by the appellant.

It is a requirement of the law that the respondent had the burden to prove the allegation on a balance of probabilities that it was the appellant or its officers duly authorised who published the defamatory statements and posted it on Wazalendo Forums with the intention to inflict injury on her reputation. On the contrary, she did not discharge

this burden. In the premises, in the light of the complexity of detecting the author of the defamatory statements and the existence of so many unknown persons who made contributions in Wazalendo Forums posts for the entire period from 28/12/2010 to 27/4/2011, we respectfully, in the circumstances of this case, take leave to differ with the argument of Mr. Kamala that malice was implied on the appellant's failure to control the use of her computer. We are settled that the respondent was supposed to present sufficient evidence before the CMA to show and satisfy it that the appellant or its employee was maliciously responsible for publishing and posting the alleged defamatory statements against her and that they were intended to injure her reputation.

In the circumstances, we agree with Mr. Mponda that the High Court did not critically analyse the evidence of the parties as a whole in line with the law alluded to above with regard to online defamation through social media platforms, particularly, Wazalendo Forums before it confirmed the finding of the CMA, that there was ample evidence to show that the appellant was responsible for publishing and posting exhibit P8.

Moreover, we are settled that apart from the High Court's failure to revaluate the evidence properly, it also failed to subject the available

evidence to the applicable law concerning the tort of defamation. As a result, the High Court ended in an erroneous legal conclusion that the appellant was responsible for the publication and posting of the online defamatory statements against the respondent in Wazalendo Forums allegedly because it failed to control its computers against the use by its staff. Thus, while the statements might seem defamatory of the respondent, yet, since the active involvement of the appellant was not proved as required by law, the respondent could not be entitled to the awarded damages resulting from online defamatory statements.

With regard to the submission whether the award of TZS. 70,000,000.00 was not only granted to the respondent for defamatory statements but also for unfair termination as argued by Mr. Kamala, we think the submission is not supported by the record. Admittedly, in her opening statement in support of the claim, the respondent claimed compensation for both unfair termination and the alleged defamatory statements. However, according to the decision of the CMA, the compensation of TZS. 100,000,000.00 which was initially claimed by the respondent, was reduced to TZS. 70,000,000.00 and it is plain that it was for defamatory statements.

For clarity, we better let the decision of the CMA speak for itself: -

"Katika kujibu masuali ya madodoso PW1 alieleza kuwa sababu ya yeye kudai fidia ya shilingi 100,000,000/= ni kutokana na yote yaliyoandikwa katika kielelezo P8 ambayo ni e-mail iliyoandikwa na PPF siku tatu kabla ya e-mail kutumwa Wazalendo Forums".

It was in the light of the respondent's prayer that in the end, the CMA granted her the compensation of TZS. 70,000,000.00 alluded to above. Specifically, the CMA stated that:-

"Pamoja na hayo mlalamikiwa anaamuriwa kumlipa mlalamikaji fidia ya shillingi za Kitanzania million sabini tu (70,000,000/=) kutokana na madhara aliyoyapata kama tulivyoeleza hapo juu".

In the event, we respectfully decline to go along with the argument of Mr. Kamala that the compensation that was granted to the respondent by the CMA and confirmed by the High Court was also in respect of unfair termination. On the contrary, we are settled that in the light of the decision and award of the CMA and the judgment of the High Court, the respondent was granted the requisite relief for unfair termination, which is not the subject of the instant appeal, under section 40 (1) (a) of the ELRA. It was on this connection that the High Court

ordered further that in case the appellant failed to comply with the order for unfair termination, she should resort to section 40 (3) of the ELRA.

In the circumstances, we find that the sole ground of appeal has been substantiated by the appellant. Consequently, we find the appeal meritorious and hereby allow it.

In the end, considering the nature of the dispute in the instant appeal, we order that parties shall bear their respective costs.

DATED at **DAR ES SALAAM** this 29th day of April, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 10th day of May, 2022 in the presence of Ms. Easter Msangi who holding brief of Ms. Narindwa Sekimanga, learned State Attorney for appellant and Respondent is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL