

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: NDIKA, J.A., SEHEL, J.A., And KAIRO, J.A)

CIVIL APPEAL NO. 146 OF 2018

MIC TANZANIA LIMITED..... APPLICANT

VERSUS

EMMANUEL OLE KAMBAINI.....RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania, Dar es Salaam Registry at Dar es Salaam)
(Shangwa, J.)**

dated the 7th day of February, 2013

in

Civil Case No. 57 of 2000

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JUDGMENT OF THE COURT

2nd & 30th November, 2022.

SEHEL, J.A.:

The present appeal arose from a suit filed before the High Court for an action for malicious false statements allegedly made by the appellant to the respondent that led to the demotion and stripping off of the respondent's title as the Director General (DG) of the defunct Tanzania Communications Commission (TCC).

The brief facts giving rise to the present appeal are such that; the appellant is a mobile telephone company incorporated in Tanzania and the

respondent was the DG of the TCC, by then it was a regulatory body for postal and telecommunications services established through Tanzania Communications Act No. 18 of 1993 (the Act). At the time the TCC started its operations in 1994, the appellant was already in the industry since 1993 conducting its businesses in Dar es Salaam and Islands of Zanzibar and Pemba as per its concession agreement concluded with the defunct Tanzania Posts and Telecommunications Corporations (TPTC) (now Tanzania Telecommunications Company Limited (TTCL)). The said concession was for fifteen (15) years renewable for a further term of five (5) years.

According to the respondent, the Act provided a grace period of twelve months and upon its expiry, all operators, including the appellant, were required to apply and obtain a licence in order to conduct their businesses in Tanzania. In that regard, it was the case of the respondent that he required the appellant to comply with the law, that is, to obtain the licence, increase the local shareholding up to 35% and to migrate from analogue to digital but the appellant refused, and instead, went to complain to the then Minister for Communications and Transport, Mr.

William Kusila, (DW1). He claimed, in his plaint, that the appellant and the two others not parties to the present appeal, namely; MILLICOM (the parent company of the appellant) and Zanzibar Telecommunications Company Limited (ZANTEL) made false accusations to the Minister, Permanent Secretary of the Ministry of Communication and Transport (the Permanent Secretary), the President of the United Republic of Tanzania and the World Bank aimed at intimidating his performance of his duties as the DG. The said false statements were that the respondent;

- i) was frustrating investors in the communications sector.*
- ii) was biased against the appellant.*
- iii) had refused to allow the appellant to extend the analogue technology beyond the Coastal zone.*
- iv) had imposed a minimum requirement of 35% local shareholding in the appellant's company.*
- v) had refused to grant the appellant mobile cellular licence for Northern, Central and Southern Highlands Zones and refused to transfer the mobile cellular licence.*
- vi) had threatened to close appellant's office in Arusha, threatened to pull down the installations, created a disturbance and manhandled its staff.*

He further claimed that the said malicious and injurious false statements led to his removal from his post of the DG and that he was demoted to a lowest rank of a desk officer. He thus asserted that his reputation was injured since he was portrayed as being an anti-investors, unpatriotic and unprofessional in the discharge of his duties and unworthy of trust and the high office which the Government and Citizens of Tanzania had entrusted him. In that regard, he sought before the High Court of Tanzania for payment of special and general damages on account of malicious false statements, payment of interest and costs of the suit.

The appellant and MILLICOM filed a joint written statement of defence disputing the respondent's allegations. However, in the alternative, they did not deny making complaints to the Minister hence they pleaded a defence of qualified privilege, justification and or fair comment that they made genuine and bona fide business complaints to the appropriate authorities. That the complaints were not innuendoes or falsehoods and they had never been conveyed or communicated to the third parties.

At the conclusion of the trial, the High Court answered the four framed issues in favour of the respondent. On the first issue and second

issues whether the appellant made malicious and injurious falsehood statements against the respondent and whether the said statements were the cause of removal of the plaintiff from his post of DG of TCC, the High Court found that the respondent was performing his duties as a regulator for the industry in the country and was doing rightful thing in requiring the appellant to operate with a licence or to change from analogue to digital technology or in imposing a minimum requirement of 35% local shareholding in the appellant's company. It thus held that the complaints were malicious and injurious falsehood against the respondent. It also agreed with the respondent that the cause of his downfall from the post of DG, TCC to a mere desk officer in the Ministry resulted from the appellant's accusation made to DW1 that he was disturbing them in establishing a cellular mobile telecommunication network in Tanzania without justification.

As to the third issue whether the statements made by the appellant were privileged, the High Court found that the appellant and MILLICOM did not make any statements to be considered as privileged or not.

On the last issue as to what reliefs are parties entitled, it found that the respondent was entitled to both special and general damages and awarded him TZS. 27,000,000.00 and TZS. 50,000,000.00, respectively. The appellant was also ordered to pay interest on the decretal sum at court's rate and costs of the suit. The appellant was not satisfied with the decision of the High Court. In that respect, it filed the present appeal raising the following grounds:

i) The trial court erred at law and fact in holding that the respondent/plaintiff downfall from the post of Director General of the then Tanzania Telecommunications Commission to a desk officer was caused by the accusation made by the appellant and MILLICOM to the Minister.

ii) The trial court erred at law and fact in holding that complaints to the Minister by the appellant and MILLICOM were malicious and injurious falsehood to the respondent.

iii) The learned Judge erred at law and fact in not finding that complaints/statements made by the appellant and MILLICOM to the President and the Minister were true and justified, and or fair comment, and or privileged thereby not defamatory.

iv) The trial Judge erred at law and fact by awarding the respondent special damages without any proof and or strict proof as required by law.

v) The trial Judge erred at law and fact by awarding the respondent general damages without any proof and or legal justification.

Pursuant to Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), the appellant filed written submissions in support of the appeal that were fully adopted by Mr. John James, learned counsel for the appellant who appeared before us on 2nd November, 2022, when the appeal was called on for hearing.

On the part of the respondent, he appeared in person, unrepresented. He also adopted the reply written submissions filed, pursuant to Rule 106 (7) of the Rules, by his late counsel, one Mr. Stephano Bang'ando Chamuriho. In his oral submission, he urged the Court to interfere with the High Court's assessment of general damages which he argued, were strikingly low because he claimed for USD 3,000,000.00 only to be awarded TZS. 50,000,000.00.

There was no rejoinder submission from Mr. James.

In the written submission, the appellant combined and argued together the 1st, 2nd and 3rd grounds of appeal that fault the finding of the High Court that the appellant and MILLICOM made malicious and injurious falsehood statements before the Minister and the president leading to the respondent's demotion. It was submitted that the finding of the High Court is not supported by facts and evidence on record because DW1 told the trial court that he believed the appellant's complaints against the respondent to be genuine and directed the respondent not to interfere with the appellant's business. Nonetheless, the respondent remained adamant hence he was reprimanded for his acts of insubordination to his superiors as per a suspension letter dated 10th May, 1997 with Ref. No. CTC/PF/9/185 reflected, exhibit P3. It further submitted that the said letter shows that it was not the first time for the respondent to disobey the directives given by his superiors. It was also its submission that according to exhibit P2, the respondent was removed from his post for public interest as such his removal was not associated with the appellant's genuine complaint. With that submission, the appellant urged the Court to allow the appeal with costs.

On the other hand, the respondent supported the findings of the High Court and maintained that the reasons of his removal from his post emanated from the injurious falsehood communicated by the appellants to the Minister and His Excellency the President of the United Republic of Tanzania. He argued that the reasons as stated in the exhibit P3 that he failed to issue licence to the appellant; failed to transfer TTCL's licence to the appellant; uprooted Mobitel's installations and closed the offices of the appellant at Arusha were all false tainted with malice towards the respondent.

Having heard the competing arguments, we wish to point out that from the grounds of appeal and the submissions by the parties, the appellant does not dispute the following facts; that, the respondent was once the DG of TCC; that, the appellant complained to the Minister; that, the Minister convened a meeting to iron out the standing of the appellant who had a concession agreement with the TTCL vis a vis the regulator's function; that, by a letter dated 10th May, 1997, exhibit P3, the Permanent Secretary suspended the respondent from his post and on 13th May, 1997,

exhibit P2, His Excellency, the President of the United Republic of Tanzania removed the respondent from his position in public interest.

Therefore, the main contentious issue arising from the 1st, 2nd and 3rd grounds of appeal is whether the learned trial Judge directed himself correctly on the tort of malicious falsehood. We must admit that the tort of malicious falsehood has not yet been tested by the Court. That apart, we note that in England and Wales, for a plaintiff to succeed in an action for the tort of malicious falsehood, he must prove three things as set out in the case of **Ratcliffe v. Evans** (1892) 2 Q.B. 524 that:

"...an action will lie for written or oral falsehoods not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established. Such an action is not libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title."

Further, in the case of **Joyce v Sengupata and Another** [1993] 1 ALL ER 897, the Court of Appeal distinguished the tort of defamation with malicious falsehood in the following words:

"Before turning to the issues raised by the appeal I should comment briefly on the difference between defamation and malicious falsehood. The remedy provided by the law for words which injure a person's reputation is defamation. Words may also injure a person without damaging his reputation. An example would be a claim that the seller of goods or land is not the true owner. Another example would be a false assertion that a person has closed down his business. Such claims would not necessarily damage the reputation of those concerned. The remedy provided for this is malicious falsehood, sometimes called injurious falsehood or trade libel. This cause of action embraces particular types of malicious falsehood such as slander of title and slander of goods, but it is not confined to those headings.

***Falsity** is an essential ingredient of this tort. The plaintiff must establish the untruthfulness of the statement of which he complains. **Malice** is*

*another essential ingredient. A genuine dispute about the ownership of goods or land should not of itself be actionable. So, a person who acted in good faith is not liable. Further, since the object of this cause of action is to provide a person with a remedy for a false statement made maliciously which has caused him damage, at common law proof of **financial loss** was another essential ingredient.” [Emphasis made]*

It follows then that the tort of defamation is different from injurious falsehood where the plaintiff has to prove not only that the statements were false but also made with malice calculated to produce actual financial loss or damage. As to what constitutes malice in connection with injurious falsehood statements, Maugham J in the case of **Balden v. Shorter** [1993] ALL ER 249 considered and adopted a passage from *Salmond on Torts*, 7th edition, pp. 582-583 and said:

"The meaning of 'malice' in connection with injurious falsehood is dealt with in Salmond on Torts (7th edn, pp.582-583) in the following passage, which I accept as correct:

What is meant by malice in this connection? Lord Davey, in Royal Baking Powder Co. v. Wright,

Crossley & Co. (18 RPC at p. 99) defines it as meaning the absence of just cause or excuse. It is to be observed, however, that is not one of the recognised meanings of the term malice in other connection. As an act done without just cause or excuse is wrongful, but not necessarily malicious; for example, a trespass by mistake on another man's land or the conversion of his chattels under an erroneous claim of right. Notwithstanding Lord Davey's dictum, it is now apparently settled that malice in the law of slander of title and other forms of injurious falsehood means some dishonest or otherwise improper motive. A bona fide assertion of title, however mistaken, if made for the protection of one's own interest or for some other proper purpose, is not malicious."

Principally, the test of what constitutes malice in the tort of malicious falsehood is the same as the test in relation to the torts of libel and slander.

It should be remembered that, in the appeal before us, the appellant does not dispute that the respondent was the DG of the TCC responsible for overseeing and regulating the telecommunications industry in the

country. Further, at the time of misunderstandings, the appellant was operating through a concession agreement concluded by itself and TPTC. In arriving to the conclusion that there was malicious falsehood statements, the learned trial Judge found that, the respondent 'was performing his duties as a regulator for Posts and Telecommunications in the country' and he was acting in accordance with the law. In short, the learned trial Judge did not direct his mind as to whether the complaints made contained untrue statements, whether the dominant motive which actuated the appellant to make the complaints to the Minister was a desire to intimidate the respondent in performing his function as the DG of the TCC or were made as a vent to personal spite or ill-will towards the respondent. Upon our own re-evaluation of evidence, we find that the respondent failed to produce any evidence to support such allegations.

What we gathered from the evidence is that the respondent wanted the appellant to comply with the law but the appellant strongly believed that it was exempted from further obtaining a licence from the regulator as it already had one from TPTC and that it was required to operate within the terms and conditions of the concession agreement. The evidence of

PW1, PW2 and PW3 was such that the appellant did not want to comply with the law that led to misunderstanding. Hence, the appellant went to complain to the Minister, DW1. As stated earlier, the appellant does not dispute that it made complaints but advanced a defence of justification that it made genuine business complaints to the relevant authorities. On our part, we find and entirely agree with the appellant that it made fair, just and reasonable complaints because there is evidence from PW3 and PW4 that the respondent went to dismantle the telecommunications equipment at Arusha, installed by the appellant. Given the appellant's core business was to provide mobile phone services, ordinarily, any business entity would have lodged complaints from the acts done by the respondent. In view of that, we find that the dominant motive of the appellant to make the complaints to the Minister was to protect its business. They were not made with ill-motive or with a desire to intimidate the respondent in performing his function as the DG of the TCC as alleged by the respondent. Accordingly, we find merit in the 1st, 2nd and 3rd grounds of appeal.

On the basis of the foregoing, the 3rd and 5th grounds of appeal together with the prayer made by the respondent that this Court should interfere with the award of the general damages crumble.

All said and done, we find merit in the appeal which we do hereby allow it with costs by quashing and setting aside the High Court's judgment.

DATED at **MWANZA** this 28th day of November, 2022.

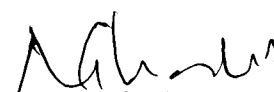
G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered on 30th day of November, 2022 in the presence of the Mr. John James, learned counsel for the applicant and respondent present in person via video link, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL