IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: WAMBALI, J.A., SEHEL, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 343 OF 2021

VODACOM TANZANIA PLC.....APPELLANT

VERSUS

JOSEPH ALLIM NGOTI.....RESPONDENT

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

(Matogolo, J.)

Dated the 23rd day of April, 2021

in

Civil Case No. 4 of 2019

JUDGMENT OF THE COURT

21st & 30th March, 2023

WAMBALI, J.A.:

The respondent, Joseph Allim Ngoti was the plaintiff in Civil Case No. 4 of 2019 that he lodged against the appellant, Vodacom Tanzania PLC. In that suit, the respondent sued the appellant on allegation that she unlawfully and without affording him the right to be heard, suspended his M-Pesa services through mobile number 0752307358 on the contention that he violated the M-Pesa Consumer Terms and Conditions of Use. It is on the record of appeal that as the appellant did not heed to the demand notice dated 19th December, 2017 (exhibit P2)

for compensation for the alleged wrong, the respondent instituted the above stated case claiming the following reliefs against the appellant:

(a) TZS. 320,000,000.00 as specific damages;

(b) Payment of TZS. 584,000,000.00 as general damages resulting from the loss of income;

(c) Payment of interest on the decretal amount at the court rate from the date of judgment till payment in full is made;

(d) Payment of costs and incidental to the suit;

(e) Any other relief that the High Court deemed fit to grant;

Upon being served with the plaint, the appellant, a telecommunication company providing both communication and mobile money transaction services through its affiliate company, M-Pesa Limited, lodged a written statement of defence in which it categorically denied any wrong doing and averred that the appellant was not entitled to any relief claimed in the suit.

It was the contention of the appellant that she did not suspend the M-Pesa services without justifiable reasons as alleged by the respondent. On the contrary, the appellant averred that there was ample information that the respondent's Mobile number 0752307358

was involved in fraudulent transaction. The appellant maintained that she was availed with Police RB number MFG/RB/5267/2017 from Mafinga Police Station in respect of the allegation of fraud involving the respondent's mobile number. In this regard, the appellant totally denied to have caused damages to the respondent.

In order to resolve the dispute between the parties, the trial court framed the following issues which were agreed by the parties: **One,** whether there was justification for the defendant to suspend service to the plaintiff via mobile phone No. 0752307358; **two**, whether the defendant did any defamatory act against the plaintiff in the manner alleged; and **three,** to what relief are the parties entitled.

During the trial, the respondent testified as PW1 and was supported by two witnesses; namely, George Modestus Kwiyava (PW2) and Zacharia Peter Kavenuka (PW3). He also tendered ten exhibits, most of them collectively.

On the adversary side, Alex Kadinda, Hosea Mahila and Benedict Mathew Kitegwa testified as DW1, DW2 and DW3 respectively. In addition, four exhibits were tendered and admitted into evidence.

At the conclusion of the hearing, the trial court decided in favour of the respondent and decreed that he was entitled to be paid by the

appellant, the following: TZS. 225,000,000.00 as specific damages; TZS. 50,000,000.00 as general damages; and TZS. 20,000,000.00 as damages for defamation.

It is the decision of the High Court which has prompted the appellant to lodge the appeal to this Court, premised on the following grounds as per the memorandum of appeal:

> *"(i) That the High Court Judge erred in fact for holding that the appellant was not justified to suspend the Respondent's M-Pesa Account from the services despite of clear evidence that there was a complaint from a customer supported with Police RB that involved the Respondent violating the Appellant's policy.*
>
> *(ii) That the High Court Judge erred in law and fact in awarding the Respondent specific damages to the tune of TZS. 225,000,000.00, while the same were not specifically pleaded and proved as required by law.*
>
> *(iii) That the High Court Judge erred in law and fact in holding and awarding the Respondent damages of TZS. 20,000,000.00 for defamation while the evidence before the Court had proved that there was a dispute involving Respondent's M-Pesa account at the time of suspension and*

without proof of appellant publishing defamatory words against the Respondent.

(iv) That the High Court Judge erred in law and fact in awarding the Respondent excessive general damages to the tune of TZS. 50,000,000.00, without any justifiable reasons.

(v) That the High Court Judge erred in law and in fact in admitting documentary evidence which otherwise is not admissible."

At the hearing of the appeal before us, Mr. Luka Elingaya, learned advocate appeared for the appellant. He outrightly adopted the written submission and the list of authorities lodged earlier on in support of the appeal. He only explained briefly with regard to the first ground of appeal. He also briefly rejoined the oral submission of the respondent's counsel with regard to the evidence of PW3 and the issue of defamation. In the end, he urged us to allow the appeal with costs.

On the other side, Mr. Shaba Mtung'e, learned advocate who appeared for the respondent also adopted the written submission and the list of authorities and explained briefly on the issues of damages awarded by the trial court in respect of specific damages and defamation. Basically, he prayed that on the strength of the written submissions, the appeal be dismissed with costs.

It was submitted for the appellant by his counsel that the holding by the trial judge that there was no justification to suspend the respondent's M-Pesa account from service is an indication that he failed to consider the legal responsibility vested in the appellant as the service provider to supervise its services and the responsibility vested on the respondent as the customer to adhere to the terms and conditions of service.

It was argued further that according to the evidence of DW1, the appellant received a complaint through its office at Mafinga from one of its customers called Hosea Malila (DW2) concerning being deceived his money by the respondent through M-Pesa account mobile number 0752307358. According to the evidence of DW1, he argued, the said customer (DW2) presented a police RB (exhibit D2) that indicated he had reported the incident at Police Station Mafinga and that after he interrogated him and reviewed the respondent's M-Pesa account as indicated by exhibit P5, it was observed that the two were involved in a financial transaction as complained by DW2. As a result, the respondent's Mobile number 0752307358 was suspended from M-Pesa services particularly from withdrawing money. He added that according

to the evidence on record, the respondent was informed and required to visit the appellant's office at Mafinga for consultation on the matter.

It was also the further testimony of DW1, the officer of the appellant, that, the respondent visited the appellant's office at Iringa and thus DW1 called DW2 for the purposes of consultation. However, DW2 came with the police who arrested the respondent and sent him to Mafinga Police Station and since then he never returned to the appellant's office and DW1 leant later that the respondent settled the matter with DW2 after he paid the claimed amount of money that involved their transaction.

The learned advocate for the appellant, therefore, argued that the suspension of the respondent's M-Pesa withdrawal services was aimed to investigate the lodged complaint by involving him and the complainant (DW2). He maintained that the suspension was done in accordance with items 6.1 and 6.1.1. of the Customer Terms and Conditions of Use made under Regulation 45(1) and (2) of the Electronic Money Regulations of 2015 (the Electronic Money Regulation) which was admitted at the trial as exhibit D1.

In the circumstances, the appellant's counsel argued that the respondent was aware or ought to have been aware that any

unauthorized, unlawful, improper, or fraudulent use of the M-Pesa services may have led to suspension, restriction, or termination of the services and that, the trial judge ignored to address that important fact. He thus argued us to allow the first ground of appeal.

In reply, the respondent's advocate defended the trial judges finding on this matter. He contended that the appellant suspended the respondent's M-Pesa services without justification and that the respondent was not given the right to be heard before the action to suspend the service was reached by the appellant. He went on to contend that the alleged terms and conditions (exhibit D2) which essentially is a standard form contract, did not contain the amendment introduced later and did not bear the name of the current appellant, that is Vodacom Tanzania PLC, but Vodacom Tanzania Limited. He therefore concluded that the said terms are not there and could not be relied upon by the appellant to justify the action taken in suspending the respondent's M-Pesa withdrawal services.

It was further submitted for the respondent that the appellant did not even tender the said M-Pesa statement to show on which date the transaction was done, and that non among the witnesses; namely DW1, DW2 and DW3 proved what they testified concerning M-Pesa statement

or data massages and thus their assertions remained as stories only without any relevancy to the fact in issue.

With regard to settlement of the complaint reported by DW2 to the police in respect of the payment of money, the respondent's counsel argued that the same is not credible because the purported document which was produced and admitted as exhibit D3 at the trial by DW2 was not a contract between them as it was not signed by the respondent and the OCD. Therefore, he argued that the document could not be taken as admission by the respondent of being indebted to DW2 through the alleged fraudulent M-Pesa transaction.

In the end, the learned advocate implored us to dismiss the first ground of appeal.

It is noted that in resolving the first issue as framed at the trial, in which it's finding is the subject of the first ground of appeal, the trial judge was satisfied that the act of the appellant to suspend the respondent's M-Pesa services was not justified and thus answered it positively. Particularly, the trial judge reasoned and decided as follows:

> *"Having carefully considered the evidence on record it is my considered opinion that, there was no any justification for the defendant to suspend the plaintiff's M-Pesa account basing on the*

complaint lodged at the police. Normally RB number is issued to all who report criminal complaint's at a police, it is just a mere allegation without any proof. For Vodacom to suspend the services basing on a mere allegation was not proper. It would be proper if the complainant would have filed the case and the order to suspend the services issued by the court or any other competent authority vested with powers to do so. More so because there is evidence revealing that the plaintiff complained to the Region Crimes Officer (RCO) Iringa who replied vide letter dated 26/3/2018 (annexture Eh-7) which is part of exhibit P.2 collectively in which the police are denying to have directed Vodacom to block the M-Pesa account. In that letter from the RCO in the last paragraph it is written as follows:

"kama mlalamikaji alikwenda kufunga account ya M-PESA ni yeye mwenyewe wala si polisi hawakuhusika. Kwa hiyo polisi hawahusiki lolote."

Furthermore, in that letter it shows that, complaint between the plaintiff and Hosea Malila was a civil matter and not criminal matter. The said Hosea Malila who was the witness for the defence testified that, after being paid his money

by the plaintiff he notified Vodacom but surprisingly despite being notified still Vodacom did not open the account, the act which shows that the defendant had bad intention against the plaintiff. In actual fact they had no any justifiable reason for blocking the plaintiff M-Pesa account as It was also confirmed by the Vodacom Regional Manager (DW3) that Vodacom had no reason to block the plaintiff's M-Pesa account. It was so blocked prematurely. At least what Vodacom all they could do was just to stop the transaction of that Tshs. 2,070,000/= and not to suspend the services as they did.

The defendant is relying on regulation 6.1 of its consumer terms and conditions for use and asserts that she has right to suspend the services to the customer without notifying him. But it should be remembered that Vodacom authorities are regulated by TCRA, and according to TCRA regulations (haki za mteja wa mawasiliano na wajibu wa mteja wa mawasiliano), it is mandatory for Vodacom to notify their customer before suspending or blocking the service as provided in the exhibit "P2". But in the instant matter the plaintiff was not notified before M-Pesa account was suspended..."

We have carefully scrutinized the above observation and finding of the trial judge. We are however of the considered view that it is not consistent with the evidence of the parties on record as a whole. We shall demonstrate below.

To appreciate our deliberation, and in order to exercise our power of re-appraising the evidence in terms of rule 36(1) (a) of the Tanzania Court of Appeal Rules, 2009, we find it pertinent to reproduce the relevant parts of the evidence of the important witnesses as depicted from the record of appeal. We start with the evidence of the respondent (PW1) as hereunder:

> *"The dispute before this Court is for the defendant to block my phone number. I was using for M-Pesa transaction. The same was blocked by Vodacom...*
> *On 14/12/2017 while travelling from Arusha to Iringa I arrived at Chalinze and went to the M-Pesa agent for purpose of withdrawing money. That was not possible as I was getting reply that the transaction cannot be completed and I was advised to communicate with the customer service department. I called to the customer service who advised me to go to the Vodashop. I continued with my journey. On 15/12/2017 upon arriving at Iringa I went to Vodashop. I met with*

an attendant who to whom I mentioned my phone number 0752307358. After check in the system she told me that my phone number has been blocked. I inquired as to the problem. I was told that it was involved in theft. While still discussing one person who is working with Vodacom shop Mafinga that told Alex that "here is your phone number" I asked Alex as to what was the problem he told me that the phone number was blocked because it was involved in electronic transactions theft. And after that the matter was reported at the Police Station Mafinga. Therefore went to Mafinga Police Station to inquire further. ***I also engaged an advocate and we wrote demand Notice to Vodacom requiring to open the services on my phone number but they answered that since my phone number was involved in theft the matter is with the police.*** *I asked my advocate to write to the RCO. He wrote to him who responded to our letter stating that it was no any criminal offence involving me in connection with my phone number. I therefore complained to TCRA and Bank of Tanzania. After such complaint they advised me to sue Vodacom. That is why I filed this suit against Vodacom. After I read the documents in exhibit P2 I did not*

see that I committed any offence using my phone number to be blocked but I was not given opportunity to be heard before my phone number was blocked.

One Hosea Maiiia lodged complaint at the Police Station Mafinga. What happened is that I was doing business with Hosea Maliia who paid deposit for buying timber from me Tshs, 2,076,000/= in the presence of George Kinjava. He paid me cash. The said Hosea Maiiia was supposed to collect timber from me while I travelled I told him not to collect the same until when I am back. That is why he decided to complain against me at police station. I paid back his money. *That money has no any relation with the blocked phone number. I once traded with Hosea Malila. For the first time he paid me through M-Pesa when he deposited Tshs. 2,500,000/= in 30/10/2017. All transactions we did with Hosea Malila were completed and after deposit money into my account by M-Pesa. I was supplying him with timbers. Hosea Malila and Vodacom worker have relationship of doing business together ..." [Emphasis added]*

It is noteworthy that when PW1 was cross-examined by the appellant's counsel, he stated as follows:

> *"After I registered for M-Pesa I understood that I was bound to follow criteria and conditions for M-Pesa transaction (vigezo na matumizi). Vodacom did inform me if I was bound to follow those conditions. I was aware that in case I fail to adhere to the condition for use of M-Pesa would take action against. I do not know any other conditions...*
>
> ***Hosea Malila complained against me in a criminal case at Mafinga. The Police told me that, that was a civil dispute. I was doing timber business with Hosea Malila who was paying through M-Pesa or cash.***
>
> ***After Hosea Mallla had complained against me I paid his money. It is true I said there is one Alex working with Vodacom has relationship with Hosea Malila. But I suspected so I am not sure.*** *The RB of Police Iringa was not in respect of my M-Pesa account. The RB was of Police Mafinga."* *[Emphasis added]*

Indeed, during re-examination, he stated as follows; -

> *"RB is a report to enable one who is the investigator of the case...I went to police station*

Mafinga after being informed by Vodacom that there was a case. After the Police Iringa had arrived, I was told to go to Mafinga.
The sum of Tshs. 2,070,000/= I paid had no relationship by M-Pesa. As the case amount, I was paid. ***I returned them after Hosea had defamed me. Vodacom were not part of the contract..."***

On the other hand, PW2 who connected Hosea Malila (DW2) to the respondent for the timber business, testified both during examination in chief and cross-examination that, he later paid Tshs. 2,070,000/= through M-Pesa but he could not get the timber because the respondent travelled, a matter which led DW2 to complain to him. He made it clear that the timber which was the subject of the payment was not collected by DW2 because he was no longer in good terms with the respondent and he was paid his money later.

On the part of the appellant, to counter the respondent's testimony, DW1 gave a detailed narration of what transpired leading to the suspension of the respondent's M-Pesa account from withdrawing money. DW1 emphasized that the suspension was done after the appellant through its office at Mafinga, received complaints from DW2

and that the respondent was notified through SMS and directed him to contact the appellant's office. Specifically, DW1 testified that:-

> *"...he came to Vodacom Office and we explained to him his account was blocked. The client was directed to visit Vodashop- Mafinga but went to Iringa, where he was informed that his account was blocked but he was required to go to Vodacom Mafinga. But fortunate enough on that date I was to Vodacom Iringa Office, I was called and asked if I know the issue I agreed and told Ngoti what happened. Then I communicated with Hosea, the police come and took Ngoti up to the Police Station Mafinga. From there I have never seen Ngoti in our office nor did I hear anything from him.*
>
> ***I expected that after they have resolved their dispute at the police station Ngoti would come to inform me the way their difference was resolved so that we can open his account. But I have never seen or heard him. The said Ngoti never came to our office to request the opening of his account. The relationship between me and Hosea are only that he is a customer of Vodacom and I am rendering service at Vodashop. I asked to render service to him."*** [Emphasis added]

During cross-examination DW1 emphasized that: -

> *"It is true according to TCRA contract we are required to communicate with client before suspension or blockage of their line.* ***I confirm that he was informed by SMS although I did not bring any document here..."*** *[Emphasis added]*

Moreover, the complainant who testified for the appellant at the trial as DW2 confirmed that he reported to both the police and Vodacom that, despite making payment to the respondent through his mobile number M-Pesa account for supply of timber, he was not supplied with the same. He told them that the respondent was not responding to his phone calls through his mobile phone. He testified further that he reported to Vodacom because the issue involved M-Pesa transaction. In this regard he stated:-

> *"... he told me to give him advance of Tshs, 2,070,000/=. I paid him cash 1,570,000/= through M-Pesa. Our agreement was to deliver timber the following day. When I went there the next day, I did not find him there nor was there any timber. But he was also not picking my phone calls. George called at him, and told him I was there to collect timber but I did not see him. He told George that he removed the timber in*

the forest and sent them to Mafinga for safety purpose. I talked through the mobile phone of George asking him as to where I will get the timber but he was not even picking my phone. He told me that he was away from his phone but could pick my phone if I made a call. ***After I arrived at Mafinga and making call to him, he was not picking my phone for three consecutive days that is why I reported him at the police. The police called at him requiring to report at the police station the following date at 2:00pm. But he did not go there. The OCS gave me the RB that the said Ngoti has obtained money by false pretence. The police told me that once I saw him I had to report to the police. The suspect was arrested and remanded the following day he was released on bail. He paid Tshs. 700,000/= the remaining amount Tshs. 1,370,000/= was paid after a week. Then we put on record to acknowledge that he has paid me.***

After I reported the suspect at the police station, I also complained at Vodacom shop as he promised to pay me through M-Pesa. I went to Vodacom shop with the Police RB. *To prove that Joseph Ngoti*

paid me at the police station I have evidence, a document which we signed and witnessed by other witnesses." [Emphasis added.]

It is noted that the document on the said payment was tendered by DW2 and admitted as exhibit D3 without objection from the respondent or his counsel.

When DW2 was cross-examined on the issue of reporting and the person to blame for not re-opening the respondent's suspended M-Pesa service, he stated that:

"...the same day Ngoti paid me, I informed Vodacom.

That is 22/12/2017. The one to blame is Joseph Ngoti who did not report to Vodacom.... I did not know what has been going on after Ngoti has paid..."

During re-examination, DW2 stated that Jacob Mwangoti appeared in exhibit D3 as a surety of the respondent who bailed him out and that the most important thing for him was that he was paid back his money.

From the foregoing extract of the evidence of the parties for both sides, it is not disputed that the circumstances which led to the suspension of the respondent's M-Pesa withdrawal services, followed the complaint of DW2 to the appellant's office at Mafinga. There is also no

dispute that the respondent was initially informed of the matter after DW2 reported the incident and the respondent was summoned to consult the appellant's office at Mafinga. It is on record that the respondent went at Iringa office but was arrested by the police in response to the RB issued after DW2 reported the matter and sent to Mafinga Police Station where he was put into custody and later released on bail. The arrest of the respondent, therefore, occurred before he had consulted with the appellant on the issues of the suspension which was the purpose of his being summoned. It is also not in dispute that the respondent repaid DW2 the money as per his evidence, DW2 and exhibit D3.

We are however, aware of the argument of his counsel in his written submissions that, exhibit D3 could not be relied on to confirm that he paid the said money because it had no signature of the respondent and the police officer in charge of the station.

For our part, we are of the considered view that the argument is misplaced. We say so because, firstly, as we have noted above, exhibit D3 which was tendered by DW2 was admitted without objection from the respondent or his advocate. Secondly, in the said exhibit, it is clearly indicated that the respondent personally paid Tshs. 700,000/= on

19/12/2017 and later one Jacob Mwangoti who bailed him out of police remand at Mafinga Police Station paid Tshs. 1,370,000/= on 22/12/2017. It is also indicated that the agreement was reached in the presence of the persons indicated therein from both sides, that is, three witnesses for the respondent and two witnesses for DW2. Thus, considering the contents of exhibit D3, it was not necessary that the signature of the respondent had to be there since it is crystal clear that Jacob Mwangoti represented him during the signing of the agreement and indeed paid on his behalf. It is no wonder that according to the record of appeal, the evidence on the matter was not seriously impeached. Indeed, throughout his evidence reproduced above, the respondent agreed that he paid DW2 the money back after he failed to supply timber to him as agreed.

On the other hand, it is clear that according to the evidence on record, after the dispute between DW2 and the respondent was settled, the respondent did not go back to Vodacom office at Mafinga to sort out the issue of his M-Pesa withdrawal services being suspended.

In our view, as testified by DW1 and DW2, it is the respondent who was to blame. It is indeed not known why the respondent proceeded to write a demand notice on 19/12/2017 which was hardly

five days after the suspension instead of going to negotiate with the appellant who had summoned him and responded to the call but he was arrested before holding the discussion on the matter of suspension.

Besides, if we go by exhibit D3, the demand notice was written on the same day, that is, on 19/12/2017 when the appellant paid DW2 the first installment of Tshs.700,000/=. More importantly, in the said demand notice (exhibit P2), the demand did not concern the restoration of the suspended M-Pesa services as testified in his evidence reproduced above, but it was in respect of the claim for general and specific damages which should have been paid within thirty days. It is further noted that the demand notice was directed to both the appellant and DW2. It is in this regard that, the reply of the appellant through exhibit D2 concerned the said demand and not anything to do with the suspension of the M-Pesa withdrawal services as alleged by the respondent.

In the circumstances, the reasoning of the trial judge that the police denied to have caused the appellant to suspend the M-Pesa services of the appellant is not relevant. The police letter, we respectfully hold, merely intended to answer the respondent that it was not them who instructed the appellant to suspend M-Pesa services. The

letter clearly suggested that if it was the complainant who had done so and they had nothing to do on the matter. We respectfully hold this view because, the crucial fact is that DW2's complaint to the Police led to the arrest of the respondent who had been paid money by DW2 both in cash and through M-Pesa service. Besides, as shown above, the respondent paid back the money and police were informed as per exhibit D3. More importantly, as per the reproduced evidence of DW2, it is on record that he is the one who notified the appellant of the said electronic financial transaction and that, he also gave feedback on the matter after he was paid back his money by the respondent.

Thus, whether the police took the matter as civil and not criminal, did not remove the fact that the complaint on the dispute between the respondent and DW2 over financial transaction was reported at the police and the parties settled it through payment by the respondent.

Therefore, as stated above, after the settlement, the respondent had a duty to approach the appellant to settle the pending matter of suspension, which unfortunately, according to the evidence on record, he did not do.

On the other hand, in his written submissions in opposition of the on this ground of appeal, the respondent's counsel raised the issue of

the name of the appellant who tendered the document (exhibit D2) on the terms and conditions and argued that the same was tendered by a different person and therefore ineffectual. He also added that, what was tendered was overtaken by event as it had been amended.

With regard to the first issue on the name of the appellant, we refrain from determining it, because though the matter arose during cross-examination of DW1 by the respondent's counsel, the trial court did not make any finding on it in its judgment and the respondent has not cross-appeal. The Court is empowered to deal with the matter which was decided by the courts below and not otherwise.

On the issue of exhibit D1 being overtaken by event, we are of the view that, since the appellant insisted that it was the one which was tendered and it was admitted by the trial court, it was the duty of the respondent to impeach it by tendering the updated version if any. Otherwise we go by the record of the trial court.

In the circumstances and from the foregoing deliberation, we agree with the appellant that the trial judge had no basis to find that the first issue was answered in the affirmative despite the ample evidence to the contrary. We therefore allow the first ground of appeal.

Having allowed the first ground of appeal, we do not need to dwell much in considering and determining the second, fourth and fifth grounds of appeal as their determination depended entirely on the outcome of the first ground of appeal. The damages awarded to the respondent which are challenged in the respective grounds, arose from proposition that the suspension of the M-Pesa account was unlawful, which we have rejected.

Next for our consideration is the third ground of appeal on defamation. It was submitted for the appellant that the trial court's finding that the respondent was defamed by the appellant by relying on the evidence of PW3 and exhibit P3, has no basis. It was the learned counsel for the appellant's submission that the evidence of PW3 was full of contradictions on the issue of defamation and could no be relied upon to support the pleading in paragraph 10 of the plaint which is the basis of the claim for damages resulting from defamation. In the circumstances, it was stated that what PW3 stated in the letter is different from what he testified at the trial as reflected at pages 451 and 452 of the record of appeal.

In this regard, the observation and holding of the trial judge in the following paragraph of his judgment is faulted:

"There is evidence by Zacharia Kivanuke (PW3) from Photte Investment company Ltd that they tried to effect payment to the plaintiff through his M-Pesa account but was not possible. They told their director based at Iringa to find out from Vodacom, only to be told that the plaintiff's M-Pesa account was blocked because it was involved in theft... The learned counsel for the defendant also argued that there is no evidence tendered by the plaintiff to prove that defendant uttered defamatory words. With due respect to the learned counsel, evidence of PW3 suffices to prove that. It does not need documentary evidence."

The counsel for the appellant submitted through written submission that, the evidence of PW3 did not establish the name and identity of the officer of the appellant who uttered the complained defamatory statement and from which office. This is because, he argued, while in his letter (exhibit P3), he said he was told by Vodacom Office at Iringa without mentioning the name, during his testimony, he changed the story and stated that he was told by Vodacom shop at Mafinga. Hence, he added, the trial judge could not have overlooked such a serious contradiction in the evidence of PW3 which eroded his

credibility and conclude that defamation was proved as required by law through that witness.

It was also argued for the respondent that the reliance of the trial court on the case of **Professor Ibrahim Lipumba v. Zuberi Juma Mzee** [2004] T. L.R. 381 on defamation was improper as its facts are distinguishable with the circumstances of the case involving the current parties.

Therefore, in the counsel's opinion, the trial judge erred to find that defamation was proved to entitle the respondent damages to the tune of TZS. 20,000,000.00, and prayed that the third ground of appeal be allowed.

We note from the respondent's counsel written submission that nothing was stated with regard to the appellant's submission stated above especially with regard to credibility of the evidence of PW3 in support of the claim of damage for defamation. On the contrary, it was only submitted for the respondent that, the evidence of DW1 confirmed without doubt that the words fraud was inserted by him in the office as reflected at page 461 of the record of appeal. He added that the said statement was confirmed by DW3 and concluded that for that reason the respondent lost reputation to Kigola and Photte Investments

Limited, deserves the damage of TZS. 20,000,000.00 awarded by the High Court.

To appreciate the discussion and determination to follow, we find it important to state that the basis of the claim of damages emanated from the averment of the respondent in paragraphs 10 and 11 of the plaint as reflected at page 4 of the record of appeal which we reproduce hereunder:

> *"10. That IN CONSEQUENCES OF THE SAID ALLEGATION AND ACTION TAKEN BY THE DEFENDANT FOR BLOCKING THE SERVICE TO THE PLAINTIFF AND BY TELLING THE CUSTOMER THAT "AMEFUNGIWA KWA SABABU AMEJIPATIA HELA KWA NJIA YA UDANGANYIFU" these words have destroyed the reputation of the plaintiff because the massage which was sent to clients of the plaintiff was bad message hence it caused some of the customer to breach or to stop buying the timber from the complainant.*
>
> *11. That the said words were calculated at the complainant into public scandal and audium, and to show that the complainant was unworthy of doing the business through his M-Pesa service."*

Unfortunately, according to evidence on the record, there is no indication that the allegation of the respondent that the act of the

appellant to suspend the M-Pesa service was explained and proved by the respondent to constitute defamation as stated by the appellant's counsel. The evidence of PW3 which was relied upon concerned the alleged spoken words by the appellant's officers. However, according to his evidence, he did not show which of the particular statement was published between that in paragraphs 10 of the plaint and the one contained in his letter (exhibit P3) and the oral testimony to constitute libel.

By whatever standard, since there was no proof of publication in written form, the alleged spoken words fell into the category of slander which had to be proved to the satisfaction of the trial court.

It is noted that immediately after the trial judge answered the first issue in the affirmative, he briefly reasoned and concluded on the second issue in respect of defamation as follows:

> *"As we have seen in the first issue, that there was no justification for the plaintiff to suspend the service to the plaintiff via mobile phone No. 0752307358. Also there is evidence from the record that, the defendant suspended the services for allegation that, the plaintiff's line was involved in electronic transaction theft while it was not. Zacharia Kavenuke (PW3) testified that,*

he was informed by Vodacom Mafinga that, the plaintiff line was involved in electronic theft transactions, ***in my opinion this act was a defamatory act*** *which lowered the plaintiff's reputation as a result some of his customers lost confidence of doing business with him such as Photte Investments company Limited who decided to rescind the contract they had entered into with the plaintiff saying that they cannot do a business with a thief. Thus, the second issue is answered in the affirmative."* [Emphasis added].

From the above excerpt, it is clear that there was no evidence on the issue of suspension as a basis of defamation as averred in the plaint and indeed, no finding was made by the trial court to that effect.

Moreover, we are of the considered opinion that the claim of defamation was not proved as required by law. This is because; **firstly,** what was averred in paragraph 10 of the plaint on the issue of fraud is not what PW3 sought to prove at the trial. On the contrary, according to the evidence on record, PW3 came up with the issue of allegation of theft. At page 451 of the record of appeal, PW3 stated that:

"... We could not proceed with contract with Joseph Ngoti because of the allegations of theft on the part of Joseph Ngoti. We could not work with a thief".

Notably, in paragraph 10 of the plaint, it is averred that the customer (Photte Investments Company Limited) reported to the respondent that the suspension of Mpesa service was due to fraud. **Secondly**, as submitted by the appellant's counsel, PW3 did not prove to the required standard that the responsible officer of the appellant uttered the alleged defamatory statement; leave alone the exact words between those stated in paragraph 10 of the plaint, in PW3's letter (exhibit P3) and his oral testimony at the trial. More importantly, PW3 contradicted himself with regard to which of the appellant's office between Iringa and Mafinga he was told the alleged statement. The matter was not therefore settled for the trial judge to conclude that defamation against the respondent was fully proved to justify damages he awarded.

Therefore, the argument of the respondent's counsel with regard to the testimony of DW1 during cross examination that the word fraud was inserted by the office cannot hold water in the circumstances. It was the duty of the respondent to parade evidence to the satisfaction of the trial court that such kind of statement was published by the appellant against the respondent and communicated to the third party (the customer). More importantly, it seems to us that the respondent

was not as to who really allegedly defamed him since in his evidence reproduced above; he testified that he paid back the money because DW2 defamed him without giving further explanation. This is contrary to what he pleaded in paragraph 10 of the plaint and the testimony of PW3 in support of the claim for defamation. It is in this regard, that 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".*

In defamation, the issue is not therefore how the defamatory statement makes the person feel, but the impression it is likely to make on those reading or hearing it (see **Public Service Social Security Fund v. Siriel Mchembe,** Civil Appeal No. 126 of 2018 [2022] TZCA 284; [10 May, 2022; TANZLII].

In the case at hand, according to the evidence on record, the respondent essentially concentrated in showing that the alleged

defamatory statement lowered his business reputation without having established that the said statement was really published and whether the alleged statement was defamatory in the eyes of a person who heard.

In the result and from the foregoing, we are compelled to allow the third ground of appeal.

In the end, based on what we have said in respect of the grounds of appeal, we allow the appeal with costs to the extent explained above and accordingly reverse the trial court's judgment and decree.

DATED at **IRINGA** this 30th day of March, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 30th day of March, 2023 in the presence of Mr. Mandela Mziray who holds brief for Mr. Luka Elingaya, learned advocate for the appellant and Mr. Shaba Mtung'e, learned advocate for the respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL