

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MWANZA
AT MWANZA

HIGH COURT CIVIL CASE NO 08 OF 2010

SARIRO R. MWITA PLAINTIFF

VERSUS

1. KATIBU MKUU	} DEFENDANTS
WIZARA YA MAJI NA UMWAGILIAJI		
2.THE ATTORNEY GENERAL		

JUDGEMENT

29/05 & 18/07/2014

SUMARI, J.

The Plaintiff Sariro Mwita is an erstwhile employee of the 1st defendant. He secured his employment in the Ministry of Water and Irrigation way back in 1972 as a water technician. Upon graduating at the University of Dar es salaam in 1978 he became a hydrologist. Having served the Ministry for a considerable number of years the plaintiff retired on 12th day of December, 2008. A year or so after his retirement, the plaintiff instituted this tortuous liability suit of defamation against his former employer claiming *interalia* a tune of Tsh 150,000,000/= for damages he sustained as a result of defamatory statement letter that was issued in the due course of employment.

What happened, to the culmination of the suit, is yearning indeed. The facts, as they themselves understandably and audibly speak, are straight-forward, and uncomplicated, and they are as follows. P.W.1 Sariro P. Mwita, averred that after graduating from the University of Dar es salaam he was promoted to a rank of hydrologist as opposed to water technician. The post he had when employed. That in 2000 he was promoted to a rank of senior hydrologist II. That pursuant to the ongoing government changes vide Secular No.5 of 2002 he was once again promoted to a rank of Principal Hydrologist II with effect from 1st July, 2003.

The plaintiff further intensified that the dispute started with his employer when he got another letter from the 1st defendant promoting him from the rank of Senior Hydrologist to Principal Hydrologist. This letter dated 20/10/2004 was admitted as "Exhibit P.1". The gist of Exh. P.1 as the plaintiff stated was that in the said letter he was promoted from the post of Senior Hydrologist to the post of Principal Hydrologist II, the rank or post he had already had. That he was promoted to what he so called "None existing post".

Having received the said letter he complained to the Principal Secretary in the Ministry of Water and Livestock Development who replied the same vide Exh. P2. Being dissatisfied with the answers in Exh P.2 he wrote another letter which was also replied. He tendered the said letter dated 22/06/2006, Exh. P.3. Butting his case Pw1 stated that after receiving Exh. P.3 though he was not satisfied with the answers given

therein, he waited for quite a long period of time then he decided to write another letter to the personal secretary explaining his grievances. Same as above, this letter was replied on 19/03/2007 which was admitted by this Court as Exh.P.4.

The source of this dispute is Exh. P.4 which the plaintiff alleges that, there were defamatory statements published in the said Exhibit. That when the plaintiff was about to retire he wrote the final letter complaining about the alleged defamatory statements in Exh. P4. His complaints were replied in Exh P.5. The plaintiff's outcry is the contents of Exh P.4 were reached without giving him an opportunity of being heard. That, this curtailed him to be promoted to the rank he deserved which is Principal Hydrologist I, as a result he retired as a Principal Hydrologist II.

Crowing it all, Pw1 stated apart from the defamatory statement in Exhibit P.4 his employer undermined his employment success which ultimately lowered his pension benefits. He blamed the 1st defendant for being so negligent and careless as in one occasion addressed him as a geologist rather than hydrologist.

Defending themselves the defendants called two witnesses; the first was Dw1 one, Epifania Gaspa Mosha who is now working as a District Administrative Secretary (DAS) at Lindi District in Pwani Region. In her sworn defences he stated that before being appointed as a DAS she was working with the Ministry of Water as Principal Human Resource officer

who at certain times used to act as a Director of Administration and Human Resource Management.

Expounding much, Dw1 stated that she was the one who wrote a letter to the plaintiff "Exh. P.4" informing him of the outcome of vetting exercise which was done in respect of the plaintiff. It is this letter that the plaintiff alleges contains defamatory statement.

Dw1 stated that ordinarily once the employer wants to propose promotion of his employees, the employer is supposed to send his recommendation to the Permanent Secretary Presidents' Office, Public Service Management. He was of the view that the Principal Secretary Ministry of Water complied with the above stated procedure by sending a plaintiff's name in that respect as the plaintiff was supposed to be promoted to a rank of Principal Hydrologist I.

Supplementing her defence, Dw1 stated that after the Permanent Secretary Presidents' Office, Public Service Management receives a name of the proposed employee they do a vetting exercise prior promoting an employee. After the vetting exercise is done then the results are returned back to the employer.

That while the plaintiff avers and apportioned that the defendant have defamed him, Dw1 demurred and tried to throw the suit ball, back into the yard of the Permanent Secretary Presidents' Office that it was the one which conducted the vetting exercise and informed the outcome of the

said exercise to the 1st defendant. The said outcome was that, that the plaintiff was found to be unethical so he deserved not to be promoted. Dw1 pointed out specifically that, one of the reasons was that the plaintiff was a drunkard person or employee" *mlevi wa kupindukia*". That having received the said vetting result he wrote the letter to the plaintiff informing him his promotion fate and requested him to correct himself. That the said letter" Exh P.4" was sent to the Director for Water Resources who was his immediate boss. That this letter was send under confidential cover and was posted by post to the plaintiff.

Narrowing down the plaintiff's case the defendant's summoned Dw2, one Alfred Paul Marandu who is an employee in the Ministry of Communication and Science and Technology working as an Assistant Director of Human Resource Management. Prior to that he was working with the Ministry of Water and Livestock Management.

Dw2 testimony was that he came to know the dispute at hand in 2004 when the plaintiff who was working as a Hydrologist at the Ministry of Water at Musoma Station. That the plaintiff's complaint is that he was not promoted to the required standard from Principal Hydrologist grade II to grade I.

When cross examined why at one point in time the plaintiff was addressed as a geologist while he was a hydrologist, Dw2 stated that was a typing errors which was occasioned due to the fact that the Ministry of Water and Ministry of Minerals were the same at that time. That the

confusion on the promotion of the plaintiff was explained to him in exhibit P.2.

During hearing of this case the plaintiff prosecuted his case alone unrepresented whereby Mr. Kidando, learned, State Attorney appeared for the defendants. At the hearing the following three (3) issues were agreed and framed:-

- 1. Whether the plaintiff was defamed.*
- 2. Whether the plaintiff's employment success was undermined.*
- 3. What are the reliefs the parties are entitled.*

On the onset before I proceed to delve into the crux of the parties' submissions with respect to the issues raised, I should point out that both parties to the suit agreed on filing written submissions which the plaintiff duly did according to his time scheduled. However, to my surprise Mr. Kidando, State Attorney opted not to file the same, for the reasons best known to himself. The failure to do the same without reasonable and justifiable causes, drove me round the bend.

Now, as to the 1st issue whether the plaintiff was defamed, the plaintiff has not submitted much in this aspect. He briefly stated that the defendants never proved the allegations by any documentary evidence for the ground which prompted them to write defamatory letter to the plaintiff

other than verbal statement. That the impact of the alleged defamatory letter curtailed his success.

Indeed, with regard to 1st issue I will start with an important preface. Under our law and, I believe, in all civilized jurisdictions, a man is entitled to his good name and to the esteem in which he is held by others. He also has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification. The other civilizations so found long ago. (See **Scott v Sampson** [1882] 8 QBD 203).

If a defamatory statement is made in writing or some permanent form the tort of libel is committed and the law assumes damages. (See **Ratcliffe v Evans** [1892] 2 QB 524 at 528.

A defamatory statement is one which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him, disparaging or injurious to him in his office, profession, calling, trade or business. (See "Gatley on Libel and Slander" (8 ed) para 31).

We were told by the plaintiff he was defamed by the letter written by the 1st defendant on 19/03/2007 which was tendered and admitted as "exhibit P.1 " , it is wise if a quote the said letter as hereunder:-

YAH: KUPANDISHWA CHEO

Ninakiri kupokea barua yako yenye kumb Na. PF.575/218 ya tarehe 23/02/2007.

Kama ulivyokua umejulishwa hapo awali ni kwamba jina lako lilikua miongoni mwa majina ya watumishi wa kada mbalimbali yaliyowasilishwa ofisi ya Raisi Menejimenti ya Utumishi wa Umma ili kupata idhini/kibali cha kuwapandisha vyeo. Hata hivyo ninasikitika kukujulisha kwamba wewe ni miongoni mwa maofisa waliopatikana na dosari mbalimbali za kiusalama, kimaadili na kiutendaji, hivyo kuamuliwa kwamba hustahili kupandishwa cheo kuwa mhaidrolojia Mkuu daraja la I kama ilivyopendekezwa.

Imebainika kuwa utendaji wako wa kazi umeathiriwa na ulevi uliokithiri, na kusababisha ushindwe kuwa mbunifu katika kutafuta kazi za malipo ili uweze kuwalipa vibarua. Kwa barua hii unatakiwa kujirekebisha na kuzingatika kanuni za maadili katika utumishi wa umma ili kuepuka kuchukuliwa hatua za kinidhamu kwa mijibu wa sheria, kanuni na taratibu za uendeshaaji katika utumishi wa umma. [Emphasis supplied]

It was long settled that for a plaintiff to succeed on his claim of defamation he has to prove the following elements, which were well stipulated in the case of **Sim Versus Stretchy(1936)2 ALL E.R. 1237(HL):-**


- a) That the words are defamatory.*
- b) That the words have been published maliciously (Communicated to the third party).*
- c) That the words tend to lower the plaintiff's reputation in the estates of the thinking member of the society.*

Starting with the 1st element as to whether the words in Exh. P.4" were defamatory, the plaintiff averred that the words, "*Imebainika kuwa utendaji wako wa kazi umeathiriwa na ulevi uliokithiri, na kusababisha ushindwe kuwa mbunifu katika kutafuta kazi za malipo ili uweze kuwalipa vibarua..*". The vexing question is whether these words were defamatory. Decided cases indicate that the meaning of words for the purpose of the law of defamatory is not a question of legal construction since laymen will read into words an implication more freely than a lawyer. The meaning is that which words would convey to ordinary persons. The Court must not put a strained or unlikely construction upon words. (See **Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd** [1964] AC 234 at 258) where it is stated:

"It is defamatory to impute to a man in any office any corrupt, dishonest, or other misconduct and this is so whether the office is public or private".

On the above principles I now proceed to decide whether the article was defamatory. I find that without "any strained or unlikely construction" the words in Exh. P.4 may be capable of bearing to an ordinary reasonable person that the plaintiff failed to perform his duties due to excessive drunkenness actions and or conducts if published.

Following this, the 2nd element to be tackled is whether the defendants publish the alleged defamatory statement maliciously. It cannot be disputed that the issues which came between the contending parties emanated from the ordinary cause of employment. Pw1 contention is that the defendant maliciously published the said defamatory words.

The issue is whether there was publication. It is long time settled that, for the tort of defamation to be established, defamatory material must have been communicated to someone other than the plaintiff. In defamation law, the requirement of communication to a third person is known as "**publication**". It has been said that publication is the "gist" of an action for civil defamation. Thus, in **Powell v Gelston [1916] 2 KB 615 at 619**. Bray J stated that: *There is no doubt that to give rise to a cause of action there must be a publication by the defendant. That is the foundation of the action.* 

Again, another commonly cited definition of "publication" was provided by Lord Esher in **Pullman v Hill & Co [1891] 1 QB 524 at 527**. that publication is, "*the making known the defamatory matter after it has been written to some person other than the person of 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 to himself*".

As I pointed out earlier, looking at the alleged defamatory letter, Dw1 testified that, "...*the letter was forwarded to him through the Director of Water Resources whom was his immediate boss. This was send under confidential cover and was posted by post...*" I am made to believe that the 1st defendant had qualified privilege to do what he did. Qualified privilege covers the publications of defamatory matter by a person who has a legal, social or moral obligations to publish and the recipient has legal, social and moral duty to receive the publication. In this case the position runs like this: the 1st defendant wrote a letter as an Administrator. He had powers to inform the plaintiff the reasons that impends his promotion. The letter (EX.P.1) was forwarded to the Director of Water Resources, who was the plaintiff's immediate boss whom had a duty to know of the situation. The publications never went beyond those people. It was also stated in **Bryanston Finance v De Vries [1975] QB 703** that, "*where a letter was written to protect the interests of the business there was a common interest between the employer and employee, and so a letter dictated to a secretary in the normal course of business was protected by qualified privilege*".

Remarkably, even if for the sake of argument I assume that there was publication of the said defamatory letter as alleged by the plaintiff. I am of the opinion that the said publication was not done with malice or ill intent.

The available evidence and very firm testimony of Dw1 that the 1st defendant was the one who proposed for the promotion of the plaintiff from the rank of Principal Hydrologist grade II to grade I. The promotion was subject to vetting exercise which, according to Dw1 was done by Permanent Secretary Presidents' Office, Public Service Management. After the said vetting exercise the 1st defendant received outcome of their employee who was unfit to be promoted. What the 1st defendant did was fairly done i.e. communicate the said outcome to the plaintiff through "Exh P.4". I hereby quote in verbatim part of the 1st defendant's reply in the said letter:-

"Kama ulivyokua umejulishwa hapo awali ni kwamba jina lako lilikua miongoni mwa majina ya watumishi wa kada mbalimbali yaliyowasilishwa ofisi ya Raisi Menejimenti ya Utumishi wa Umma ili kupata idhini/kibali cha kuwapandisha vyeo. Hata hivyo ninasikitika kukujuiisha kwamba wewe ni miongoni mwa maofisa waliopatikana na dosari mbalimbali za kiusalama, kimaadili na kiutendaji, hivyo kuamuliwa kwamba hustahili kupandishwa cheo kuwa

mhaidrolojia Mkuu daraja la I kama ilivyopendekezwa...".

Though the contents of the above letter are self explanatory, a point of limine to be taken into consideration is that I have failed to establish any element of malice on part on the 1st defendant. The 1st defendant was merely informing the plaintiff about what transpired. Had the 1st defendant had malice with the plaintiff she wouldn't have proposed the plaintiff at the first place to be amongst the employees who were to be promoted. Though the words in "Exh. P.4" were defamatory in nature the said letter was bonafide issue without any sort of malice as alleged by the plaintiff. It is the trite and remarkable law that; malice does not exist where a defendant honestly and reasonably believes in the truth of the communication see **Athumani Khalfani v PM Jonathan** [1983] TLR 6 (CA). Therefore the defendant was doing her legal duty and had no malice towards the plaintiff.

To find that what the defendants did amounted to defamation would create a far-reaching and a very dangerous precedent. No longer will an employer communicate to his employee the outcome of vetting exercise. The 1st issue therefore is answered in the negative.

Turning back to the 2nd issue as to whether the plaintiff success was undermined, in his submission the plaintiff averred that he was denied right of audience as he was convicted without being afforded an opportunity of being heard. He challenged what the 1st defendant did as it

was contrary the Public Service Act, No.8 of 2002 and Regulations. In addition to that the plaintiff cemented that the position he had attained was at higher rank to call for responsibility to be considered for more responsible post in the nation but that was castrated by unjustified actions.

Now, looking at Exh P.1, on 20/10/2004 the 1st defendant wrote a letter to the plaintiff titled "Kupadishwa cheo" in which from Senior Hydrologist to Principal Hydrologist II. The plaintiff also tendered Exh. P.2 dated 22/08/2005 which was also titled "Kupandishwa cheo". There was also Exh. P.3 dated 22/06/2006 titled "Kupandishwa Cheo kuwa Principal Hydrologist II badala ya Principal Hydrologist I". The gist of the said letter was as follows "*...napenda kukufahamisha kwamba jina lako lipo kwenye orodha iliyopelekwa ofisi ya utumishi wa umma, kwa hiyo pindi majibu yatakapopatikana utarujulishwa mapema iwezekanavyo....*". Again there was Exh. P.4 which the plaintiff alleged contained defamatory statement and the last letter was Exh. P5.

With great respect, after keen scrutinization of the tendered exhibits I have not seen or encountered anywhere in the exhibits that shows the plaintiff was promoted in a non existing post as he alleges. Nevertheless, Looking at the plaintiff's submission in this regard, he has submitted that at para 5 and 6 of his plaint he annexed annexure "A" dated 30.09.2004 titled "*Kubadilishwa kuwa Mhaidrojia Mkuu Daraja la II*" and the similar promotion was reflected in annexure "B" dated 20.10.2004 titled "*Kupandishwa cheo*".

The stance of the plaintiff's arguments in the above issue is not meritorious because the said letter dated 30.09.2004 which was labeled annexure "A" in his plaint was not tendered before this Court. Therefore, the said annexure "A" which the plaintiff is highly relying upon cannot be relied by this Court as it was not tendered. In the case of **SHEMSA KHALIFA AND TWO OTHERS vs. SULEMAN HAMED ABDALLA**, Civil Appeal No. 82 of 2012, the Court of Appeal of Tanzania had an occasion to state the following on the consequences of courts relying on documents not tendered and admitted in evidence:-

*"At this juncture, we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court. We outrightly are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case **to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold that this led to a grave miscarriage of justice.**"*

[Emphasis supplied].

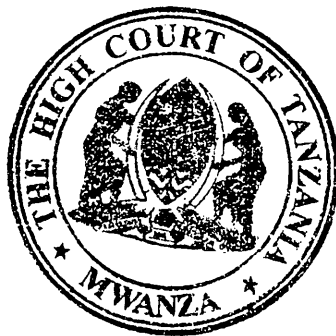


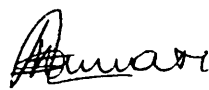
Dw1 and Dw2 gave very firm evidence that they were the ones who proposed for the promotion of the plaintiff as evidenced by "exhibit P.3" and they communicated the same in "Exhibit P.4". It is the vetting exercise that let the plaintiff not to be promoted and not otherwise. The 1st defendant therefore did not undermine the plaintiff's success as alleged. The 2nd issue is also answered in the negative.

Having ruled the two issues above in the negative, I hereby dismiss this suit for lack of merits. No order for costs.

It is accordingly ordered.

AT MWANZA
18/07/2014




A.N.M. SUMARI
JUDGE