IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 224 OF 2018

(Arising from the decision of Resident Magistrate Court for Dar es Salaam at Kisutu in Civil Case No. 46 of 2017)

NYOTA TANZANIA LIMITED .....APPELLANT

VERSUS

ONESMUS D. ONYANGO .....1ST RESPONDENT

MWANANCHI COMMUNICATION .....2ND RESPONDENT

JUDGEMENT

MASABO, J.:-

The appeal before me emanates from a publication originated by the Appellant and published on 30/8/2012 in Mwananchi Newspaper, a daily newspaper owned by the 2nd Respondent. The publication which was in form of a public notice issued to the effect that the 1st Respondent was no longer the employee of the appellant discontented the 1st Respondent. He successfully sued the Appellant and the 2nd Respondent for defamation before the Resident Magistrate Court for Dar es Salaam at Kisutu whereby he obtained a decree of Tshs 70,000,000/= as general damages. The Appellant was disgruntled hence the current appeal challenging the finding of the trial court on four grounds:

1. That the trial court erred in law and in fact by deciding in favour of the Respondent that the publication was defamatory contrary to the

intention of the appellant who only intended to notify the public that the 1st Respondent was no longer its employee

2. That the trial court erred in law and in fact by disregarding the testimony and evidence adduced as well as various letters tendered as evidence by the Appellant during trial to show that the Respondent had direct contact with clients of the Appellant
3. That the trial court erred in law and in fact by deciding that the publication was taken without justification while there was proof that the 1st Respondent absconded from duty for two weeks without the Appellant knowing his whereabouts
4. That the trial court erred in law and facts by condemning the Appellant that he did not respond to the 1st Respondent's resignation letter and take action to a person who was no longer their employee

For appreciation of the four grounds above the background to the appeal are that, the Appellant and 1st respondent were part to an employment relationship which ensured on 1st January 2006 after the 1st Respondent executed the an agreement signifying his acceptance to work for the Appellant (then Maersk Tanzania Ltd) in the capacity of Operations Assistant. Two years later, on 24th April 2008 he was promoted to the rank of Senior Supervisor Cost Controller a post he held until 17th August 2012 when he tendered his resignation. The 1st respondent never responded to his resignation letter. Instead, on 30th August 2012, it published a public notice in Mwananchi Newspaper, a daily newspaper owned by the 2nd Respondent.

The notice, titled "Tangazo la Umma" and bearing the 1st Respondents photograph had the following message:

> "Nyota Tanzania inapenda kutoa taarifa kwa umma kuwa Onesmo (mwenye picha hapo juu) si mtanyakazi tena wa kampuni ya Nyota Tanzania Limited. Onesmo alikuwa Mkaguzi Mwandamizi wa hesabu za ugavi katika ofisi yetu kuu ya Nyota Tanzania Limited, Kuanzia 21 Agosti 2012. Nyota Tanzania haitahusika/kuwajibika na biashara yoyote itakayoendeshwa/ itakayofanyika au huduma yoyote atakayojihusisha nayo kwa niaba ya Nyota au Maersk Line"

It was the 1st Respondent's argument during trial that the publication was defamatory and maliciously made to lower his reputation. He told the court that the notice was intended to inform the public that he was of untrustworthy character, unfaithful and capable of doing transactions on behalf of the Appellant's company even after he had terminated his employment with the Appellant and that a result of such publication he suffered mental anguish following numerous phone calls and messages from his friends and relatives who wanted to know what has befallen him. He also pleaded that the publication was the sole reason for cancellation of an employment offer he had secured with a company in the name of Cargoworx Tz Limited which had offered him a post of Operation Manager.

The Appellant did not dispute the publication but pleaded that it was justified to issue the publication because the 1st Respondent was no longer their employee having voluntarily tendered his resignation letter. In further

justification of the publication, the Appellant pleaded that, the 1st Respondent's resignation was craftly fronted to pre-empty disciplinary procedures initiated against him as it was tendered only one day after he was served with a letter demanding explanation in respect of his two-weeks abscondment from work which ensured after some audit queries were raised on liner costs to which the 1st Respondent was responsible.

At the hearing, all the parties were dully represented. The Appellant was represented by Mr. Issa Mrindoko, learned counsel. The 1st Respondent enjoyed the representation of Mr. Elisaria Mosha, Learned Counsel and the 2nd Respondent was ably represented by Mr. Sheppo John.

In his submission in support of the Appeal Mr. Mrindoko started by consolidating the first two grounds of appeal. He also consolidated the last two grounds of appeal. Hence the 4 grounds of appeal were reduced into 2, namely the consolidated 1st and 2nd ground of appeal and the consolidated 3rd and 4th grounds of appeal. He then proceeded to submit in support of the consolidated ground no 1 and 2, whereby he argued that the publication was justifiable in law and equity because at the time of publication the 1st Respondent was no longer the employee of the Appellant having absconded from work for 2 weeks without any notice and having, subsequently thereafter, unilaterally and willfully served the Appellant with a resignation letter. He reasoned that, since the resignation letter had a 24 hours notice the employment relationship between the Appellant and the 1st Respondent ceased with immediate effect after the expiry of the 24 hours.

Moreover, he reasoned that since the employment relationship between the dual ceased, the appellant was legally justified to issue a *bonafide* public notice that the 1st Respondent was no longer its employee. Fortifying this point further, Mr. Mrinmdoko argued under labour law, each of the parties is at liberty to terminate the employment relationship, and legally, the Appellant being the employer was not bound to respond to the resignation letter. He dismissed the argument that the 1st Respondent was at the material time an employee of the Appellant for being devoid of merit and argued further that since the employer is not legally barred from making a public notice following termination of its employee, it was erroneous to condemn the appellant because such publications are done, where necessary, to safeguard the interest of the employer and that is not an offence.

Mr. Mrindoko faulted the trial court's judgment for being contradictory in that, on the one hand it avoided the issue of misconduct committed by the 1st respondent on explanation that the same was a purely labour issue which could only be dealt with as per labour laws and procedures while at the same time it held that the publication was not justifiable as no proof/ evidence was rendered to show that the misconduct were taken to a level which could justify the publication. Mr. Mrindoko concluded that finding was erroneous and shows that had the misconduct been dealt with *as* per labour law procedures the publication would be justified.

Mr. Mrindiko further submitted that the publication was not malicious as was only intended to inform the public that the 1st Respondent was no longer under the employment of the Appellant. He argued that such notice was important because the 1st Respondent's duties which included among others: to do verifications of vender invoices, pulling monthly costs report and analyzing them and participating in negotiation of new contracts and extension of existing contract put him in direct contract with present and potential contractors/suppliers. He argued that, the testimony rendered by the 1st Respondent himself in the course of hearing as supported by Exhibit D3 clearly revealed that he had contact with outsiders hence it was wrong for the court to hold that the publication was without justification while it is clear on record that the Respondent had direct contact with the Appellant's clients and potential customers. On this basis he argued further that the reasoning by the trial magistrate that the publication was calculated to show that the plaintiff is not honest was baseless as there was nothing on record to suggest so.

On the second consolidated ground of appeal, Mr. Mrindoko submitted that the trial court failed to asses and evaluate evidence and due to this it wrongly awarded damages without justification. He argued that had the trial court properly evaluated evidence on record, it would have found that following the 1st Respondent abscondment from work he was served with a letter to show cause why disciplinary measures should not be taken again him and on the next day he resigned from employment giving 24 hours' notice. Mr. Mrindoko reasoned that, under the circumstances, publication

was necessary and was done in good faith. He added that, the reasoning by the trial court that the publication was malicious and was calculated to make the 1st Respondent suffer was a serious misconception and merely speculative. Further, he argued that, the documents tendered by 1st Respondent to show revocation of his employment offer had no merit as no witness form the originating company was procured to show how the publication ignited the cancellation of offer nor was there any letter to show that indeed he was offered employment by the said company.

Mr. Mrindoko further argued that in awarding Tshs 70 million as general damages the trial court did not state any legal principles as to how it reached as sum awarded. He argued that that was contrary to the principle of law as articulated in the case of **Anthony Ngoo and Another V Kitinda Kimaro** Civil Appeal No 25 of 25 of 2014, Court of Appeal of Tanzania (unreported)where it was held that in awarding general damages the court must assign reasons for awarding general damages. Based on these grounds he prayed that the appeal be allowed and the decision of the trial court be quashed and set aside.

In reply, Mr. Mosha, learned counsel opened his address by citing the case of **Yasin Ramadhani Chang'a v R** (1999) TLR 481 where the Court of Appeal gave principle to be applied when re- evaluating the evidence of trial court. Having made this observation he proceeded to submit on the 1st consolidated ground whereby he submitted that the trial court did not error in holding that publication was defamatory as the proceedings are self-

explanatory that the trial court was properly guided by law and facts on file. He argued that, in law what constitutes defamatory publication can only be justified/ categorized into two, namely: the statement must false, and that it was actuated by malice. Thus, the question for determination is whether the two elements were proved. Based on these two elements he argued that the trial court was correct in its findings because at the time of publication the 1st Respondent was still in the employment of the Appellant as his resignation letter had not been respondent to hence it was false for the Appellant to publish that the 1st respondent was no longer in its employment.

Regarding the allegation by the Appellant that it had commenced disciplinary proceedings against the 1st Respondent prior to the resignation letter, Mr. Mosha argued that such submission is seriously lacking because there was no evidence that exhibit D1 (Notice to show cause) was ever served to the 1st Respondent or that a disciplinary action against him had commenced or concluded. To the contrary, he ably proved that at the time he was employed to the time when he resigned, he was of good character and has not been subject to disciplinary charges. Thus, the trial court was correct in rejecting to be moved to determine matters related to labour law since the 1st Respondent resignation letter dated 17/8/2012 was voluntarily made.

In essence, Mr. Mosha's argument was to the effect that, the publication would have been justified if the 1st Respondent was charged before a properly constituted disciplinary committee and found guilty of a disciplinary

offence. He cited the case of **Abbas Othuman Jongo V. Silent Road Haluge Limited**, Rev. No 142 of 2011, HC (Labour Division) and argued that, since the Appellant allegedly commenced a disciplinary measure for misconduct, the said measure had to come to an end. Therefore, since no disciplinary action was taken the 1st Respondent was at the material time still the employee of the Respondent hence there was no justification for the publication. Further, he cited the case of **Bozert Omolo V. Secretary Group (T) Limited**, Revision No. 297/2014 High Court Labour Division (Dar es Salaam) (reported in Labour Digest 137 of 2014) where Nyerere J held that abscondment is not automatic. Based on this, he submitted that the trial court was correct in its finding because as a general law misconduct if any should have been dealt with at the earliest possible opportunity which was not the case here as there is no proof that the 1st Respondent was given right to be heard before properly constituted disciplinary committee leading to a verdict terminating him from employment.

Regarding the resignation letter he underscored that it was an offer to the Appellant to which he had a right to accept or reject and that could have been done by responding to the letter. The failure by the Appellant to respond to the resignation letter signified his rejection of the offer hence there was no need for publication because he knew very well that that the employment relationship between them was still existent. Thus, the court was correct to hold that the issue regarding termination was supposed to have been proved before rushing to the media. He concluded that the

publication constituted a falsehood because contrary to what was published, the 1st Respondent was still under the employment of the Appellant.

Regarding the argument that the matter was a labour matter hence the trial court was without jurisdiction, he argued that that was a misdirection because the publication was a tortious matter and its proof depended much on the presence of the 2nd Respondent who published the public notice. He argued subsequently that the 1st Respondent's case at trial level would have not been established in the absence of 2nd Respondent's proof that indeed it published the publication. He argued further that the Appellant can not escape responsibility because it was the one ho instructed the 2nd Respondent to publish the notice while knowing that the 1st Respondent never worked as an auditor and also fully aware that his employment contract was still intact. He added that, the matter would have been a labour matter if Exhibit D1 which allegedly initiated the disciplinary procedure was pursued to finality.

Regarding the award of Tshs 70,000,000/= Mr. Mosha argued that the trial court accurately directed itself to the evidence tendered by the parties in the course of trail and its finding was justified as it was based on legal principles and evidence on record. He submitted that the 1st Respondent ably proved that the publication was circulated to the general public and that he suffered damages and based on this the trial court correctly exercised its discretion in awarding general damages.

On the 2nd Respondent's side, Mr. Sheppo briefly submitted that the publication of the articles by the 2nd Respondent was legally tenable as it was done after being satisfied that no employment relationship existed between the Appellant and the 1st Respondent. Therefore, the trail court was right in exonerating the 2nd Respondent from liability. Regarding the jurisdictional issue, Mr Sheppo submitted that the suit was purely a labour matter hence it ought to be filed at the Commission for Mediation and Arbitration (CMA) because given the nature of the claim, it is impossible to determine the issue of defamation without first determining whether or not at the time of publication the employment relationship was still subsisting and this issue could only be determined through a labour forum. He added that, under the law, the CMA has jurisdiction to deal with defamation arising from employment hence the suit ought to be filed at the CMA.

In rejoinder Mr. Mrindoko distinguished the instant case with the case the two cases cited by Mr. Mosha. He argued that, the case of **Abbas Othman v Jongo** (supra) is distinguishable because it dealt with asituation where the Applicant was terminated orally and was not served with termination letter so there was no proof of termination whereas in the present case it was the 1st respondent who terminated the employment by tendering a resignation letter. He submitted further that the law recognizes various forms of termination. For instance Rule 3(2) of the Employment and Labour Relations (Code of Good Practice) GN. NO. 42/2007 provides for categories of termination of employment and in Rule 3(2) (c) is Termination of

employment by employee. In fortifying this point he cited the case of **Cocacola Kwanza Limited & Kajeri Misyange**, Labour Revision No. 238/2008 High Court (Labour Division) where the court held that since the Respondent voluntary resigned he was not entitled to terminal benefits. He submitted that in this case the Respondent resigned to craftly doge the disciplinary measures emanating from Exhibit D3 collectively which involved among others the 1st Respondents over charges to clients which raised an audit query.

He rejoined further that abscondment from work for a period of more than 5 days is one the misconducts which can lead into termination of employment as per page 74 of the Employment and Labour Relations (Code of God Practice) GN 42/2007. Therefore, since the 1st Respondent absented himself from work for two weeks he was subject to disciplinary procedures which he craftly dodged by tendering resignation notice. In fortifying his argument that there was no employment relationship he cited the case **of NMB PLC V Bosco Thadei Komba** Labour Revison No. 14 of 2017 where it was held that Rule 6 (1) and (2) of GN 42/2007 sufficiently proves that the relationship between the employer and the employee come to an end when the employee tenders a resignation letter.

Regarding the case of **Bozert Omolo V. Secretary Group (T) Limited**, he argued that it is materially distinguishable and irrelevant because in that case the employer never tool any action following the employee abscondment whereas in the instant case the Appellant took action by

requiring the 1st Respondent to show cause why disciplinary action should be commenced but the process did not come to finality as the 1st Respondent quickly tendered registration.

I have carefully considered the submissions from both parties. Conceptually, **Halsbury's Laws of England** Vol. 28 4th edition para 10 p7 defines a defamatory statement as:

> " A defamatory statement is a statement 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."

A publication is considered defamatory if "it tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person" (See **Winfield in J.A Jolowicz and T Ellis Lewis, Winfield** on Tort 8th Edition p 254). In the words of **Lord Atkin** a statement is considered defamatory if it "injures the reputation of another by exposing him to hatred, contempt, or ridicule or which tends to lower him in the esteem of right thinking members of society" (**Sim vs Stretch** [1936] 2 all E.R 1237.

In a defamation suit four ingredients must be proved, namely the statement must be defamatory, it refers to the plaintiff, it was published by the defendant, and lastly, it is false (falsehood of the statement) [see **Kudwoli vs Eureka Educational and Training Consultant & 2 Others** Civil case 126 & 135 of 1990 and **Wycliffe A. Swanya v Toyota East Africa Ltd & another** [2009] eKLR). Inevitably, the burden rests on the plaintiff to prove that the statement is defamatory in character, was actuated by malice and encompasses the elements above stated.

In the instant case the trial court framed two issues to guide its determination, namely (i) Whether the publication statement by defendants was a defamatory one, and (ii) What reliefs are the parties entitled to. In its findings it answered the first question in the affirmative and reasoned that the publication had no justification but was calculated to show that the 1st Respondent is not honest and had been in trouble with the appellant which culminated into his termination. The Appellant does not dispute the publication. His major contention is that the publication was with justification. The contention is noticeably based on the general principle of law under which defendant in defamation suit are exonerates from liability if it is proved that the publication was privileged or justified. This court is, therefore, tasked to determine whether or not the trial court was correct in its finding that the publication was defamatory and without justification.
Before embarking on this task there is one crucial issue to be determined concerning the jurisdiction of the trial court. While referring this court to the trial court's finding in page 9 of the judgment, Mr. Mrindoko submitted that

the dispute between the parties was in the nature of a labour matter hence ought to have been resolved in labour dispute forums. He forcefully argued that the trial court misdirected itself in that having found that the question as to whether disciplinary actions had commenced against the 1st respondent fell outside its jurisdiction it ought not to proceed to determine the suit as the issues between the parties could not have been determined without first resolving this issue. In opposition Mr. Mosha apart from submitting that the suit was a tortious one hence fell under the jurisdiction of the trial court challenged Mr. Mrindoko for raising this issue haphazardly during the hearing of the appeal.

To start with Mr. Mosha's last point, I have taken note and I entirely agree with him that this point has been rather raised haphazardly as it does not feature in the list of grounds of appeal sketched in the memorandum of appeal. It is however a settled principle of law that the question of jurisdiction being of fundamental importance to the adjudication process can be raised at any stage even at the appeal stage (**M/S Tanzania China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] TLR 70) and once it has been raised the court has to address it to determine whether or not it is clothed with the necessary jurisdiction. The Court of Appeal articulated this position in the case of **Fanuel Mantiri Ng'unda v. Herman M Ngunda**, Civil Appeal No. 8 of 1995, CAT (unreported) where it stated that:

> "The jurisdiction of any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature....the question of

> jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case."

Guided by this principle, this court will proceed to determine the point so raised as to whether or not the claims were of the nature of a labour dispute hence beyond the scope of the jurisdiction of the trial court.

To resolve this question, it is important to first determine what constitutes a labour matter/dispute. Section 4 of the Employment and Labour Relations Act define the term 'Labour matter" to mean any matter relating to employment or labour relations. A more nuanced definition is found under Section 88 (1) which defines a labour dispute to encompass:

> 88.-(1).....
>
> (a) a dispute of interest if the parties to the dispute are engaged in an essential service;
>
> (b) a complaint over
>
> (i) the fairness or lawfulness of an employee's termination of employment;
>
> (ii) any other contravention of this Act or any other labour law or breach of contract or any employment or labour matter falling under common law, tortuous liability and vicarious liability in which the amount

claimed is below the pecuniary jurisdictions of the High Court;

(iii) any dispute referred to arbitration by the Labour Court under section 94(3)(a)(ii).

Resolution of these disputes fall under the exclusive jurisdiction of labour dispute resolution forums constituted of the Commission for Mediation and Arbitration (CMA), the High Court and the Court of Appeal. Subject to pecuniary jurisdiction of these disputes compulsorily commence at the CMA which is at the bottom of the labour dispute resolution forums ladder (See section 86 of the Employment and Labour Relations Act, 2004).

In the instant case, it is not in dispute between the parties that their suit has its genesis in the employment relationship between the Appellant and the 1st Respondent. What is in dispute is whether the issue raised are detached from their employment's relationship. In my strong view and as the court record and the submissions made by both parties clearly reveal, the conflict between the parties encompasses a cocktail of a tortious and labour elements. Whether or a conflict of this nature can be adjudicated in ordinary courts depends on how the claims are coined. Where the claims involved in the dispute are fully detached from the parties' employment relationship and are of such a nature that can be determined independent from the parties' employment related rights and interests it can be actionable in ordinary courts. Conversely, if the claims are predicated on the employment relationship between the parties it will inevitably fall under the description of

a labour matter and will consequently be subject to the exclusive jurisdiction of the labour dispute resolution forums as they are also vested with jurisdiction over tortious liability (See section 88 and 94).

The case of **Pangea Minerals Ltd v Mark A Mkunde,** Labour Case digest 2013 no. 98 and **Patrick Tuni Kihenzile v Stanibic Bank (T) Limited**, HC Labour Division Revision No. 47 of 2011 highlight this position. In **Pangea Minerals** (supra) the court held that "under the provision of section 94 of the Employment and Labour Relations Act, Cap 366 the Labour Court has exclusive jurisdiction *over any employment or labour matter falling under common law, tortious liability, vicarious liability or breach of contract*. In the same spirit in **Patrick Tuni Kihenzile v Stanibic Bank (T) Limited** (supra) it was held that Section of 88 (1)(b) (ii) of the Employment and Labour Relations Act, gives CMA jurisdiction to entertain complaints matters pertaining to contravention of labour laws, breach of employment contract or labour matters falling under common law and tortious liability irrespective of pecuniary jurisdiction.

The claims in the instant case were predicated was the status of the employment relationship between the Appellant and the 1st Respondent at the time of publication of the defamatory statement and this could be resolved by establishing the effect of the resignation letter tendered by the 1st Respondent and disciplinary measures allegedly commenced by the Appellant. For the Appellant it was maintained that the employment relationship between them ceased after the 1st Respondent tendered his

resignation letter while on the other hand the 1st Respondent forcefully maintained that at the material time he was still in the employment of the Appellant as his resignation letter had not been responded to by the Appellant. Regarding the disciplinary measures, the 1st Respondent maintained that throughout his employment term with the Appellant he was of good character and had never been subject to any disciplinary action/charges. On its part, the Appellant claimed that there were auditing queries in the 1st Respondent's portfolio which in their view prompted the 1st Respondent's uncontested abscondment from work for a period of two weeks. Mr. Mrindoko forcefully argued that since the 1st Respondent absented himself from work for two weeks, he was subject to disciplinary procedures. He maintained that such measures had commenced as, one day prior to tendering his resignation, the 1st Respondent was served with a letter requiring him to show cause why he should not be subjected to disciplinary action a procedure which he crafty avoided by tendering a resignation letter.

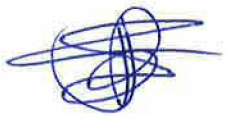
Both parties seem to agree with the trial magistrate's finding that disciplinary matters were beyond the scope of the jurisdiction of the trial court because it posed a purely labour issue which can only be determined through the labour forums. I will not labour on this point as I also entirely subscribe to the trial court's finding on this issue. As for the second point, i.e, the effect of the resignation letter, I am at one with Mr. Mrindoko. Termination of employment whether done at the instant of the employer or the employee is a purely labour issue hence subject to the exclusive jurisdiction of labour dispute forums. Only these forums can determine whether or not the

resignation letter tendered by 1st Respondent terminated the employment relationship between him and the Appellant and if so when did the termination become effective. Did it become effective immediately upon the Appellant's receipt of the resignation letter or upon the expiry of the time indicated in the letter as submitted by the Appellant or did the relationship between them remain intact pending the employer's response/endorsement of the letter? These questions could certainly not be determined in an ordinary court.

In the final event, I agree with Mr. Mrindoko that the suit was wrongly instituted before the Court of the Resident Magistrate for Dar es Salaam at Kisutu as it had no mandate over labour issues.

Accordingly, the appeal is allowed. The whole trial proceedings and judgment of the trial court are hereby quashed and set aside for being a nullity. Costs to follow event.

DATED at DAR ES SALAAM this 12th day of June 2020.



J.L. MASABO

JUDGE