

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

CIVIL APPEAL NO. 172 OF 2017

(Arising from Civil Case No. 22 of 2014)

MOSES MSOKWA.....APPELLANT

VERSUS

GWANTWA KYANGWE.....RESPONDENT

JUDGEMENT

Date of last Order: 29/04/2020
Date of Judgement: 01/07/2020

MLYAMBINA, J.

The Appellant having being aggrieved by the decision of the Resident Magistrates Court of Dar es Salaam at Kisutu delivered on 8th the June, 2017 by honourable T. K. Simba appealed on three ground but argued the hereunder two grounds:

1. That, the trial Magistrate erred in law and fact for failing to inter prate the letter which was confidential.
2. That, the trial Magistrate erred in law and fact for failure to evaluate to the ingrediencies of defamatory statements.

It was argued that the Appellant being a retired leader and Mzee wa Kanisa having heard what was spreading in the Moravian Church at Ukonga wrote a letter which was marked confidential "SIRI" addressed to four higher level leaders of the Moravian

Church diocese of east zone and Zanzibar. The leaders whom were addressed are Mwanaidi Askofu Mwakafwila, Mwenyekiti Mch. Kajura and Katibu Mkuu Adolf Mwakanyamele.

The Appellant submitted that, according to the testimonies of PW2 Edward Malongo, the information was spread by different people at the church, the act which prompted the Appellant to write a confidential letter to the top leaders. On that note, the Appellant quoted page 4 second paragraph of the judgment:

...the information spread to several people and caused the defendant to write a letter to the headquarter of Moravian church Western Zone and Zanzibar informing he top officials on the incidence. The letter was returned to the Church to be discussed by Church Elders. According to PW2 the Plaintiff and the Defendant were called to appear for discussion on the issue but none turned up PW2 told the court the letter which was written by the Defendant purported to be an administrative letter...

In view of the Appellant, the above quoted testimonies of PW2 who was the Respondent's witness, gives clearly that the Appellant was not the initiator of the information purportedly to be defamatory

words. The Appellant merely wrote as a retired leader to notify the higher leaders on the information which were spread at the church.

The Appellant asserted that the purported letter was a confidential letter addressed to the leaders and it had the following title:

YAH: USHAURI KUMUONDOA HARAKA MCH. HANS
MWAKIJOJA KATIKA USHIRIKA WA UKONGA
KUEPUSHA SHARI KULETA AMANI YA KUDUMU NA
KUOKOA FEDHA ZA MAENDELEO YA USHIRIKA NA
KUCHANGIA JIMBO.

The Appellant was of view that the heading as its, has no any element of defamatory information's because it was solely addressed to the leaders so as to work on the issue.

Also, the testimonies of PW3 Reveland Adolf Edward Mwakanyamale told the court that the letter was confidential addressed to four leaders informing that the source of information was DW2 Rustom Edson Mwaseba who witnessed the incidence.

PW3 said that he received a letter (ID1) which was in a confidential form written by Moses Katwale Msokwa (the Defendant). PW3 said that the said letter had two issues, that Reveland Hans Mwakijoja was misusing the properties of the Church and that he had love affairs with the Plaintiff in the

Church. PW3 said that the letter from the Defendant had a paragraph saying that "Mwinjilisti Msaidizi Waushirika" saw the Reveland in the office at 14:00 hours in sexual affair.

The Appellant asserted that the purported defamatory information was not initiated by the Appellant. This position was supported by the testimonies of DW2 and DW3. DW2 told the court that he is the one who witnessed the purported sexual event and notified the 15 members who were attending the meeting at the Church. The Appellant quoted page 6 last paragraph of the judgment:

DW2 Rustom Edson told the court that she is an evangelist in Moravian Church at Ukonga in Dar es Salaam. DW2 said that one day Ukonga Morovian Church Reveland Mwakijoja had convened a meeting of about 15 Church Elders complaining that there were false publications that the (Reveland Mwakijoja) had sexual relationship with the Plaintiff. The Plaintiff was also there in the meeting. DW2 further told the court that in that meeting he told people who were there that he had once seen Reveland Makijoja doing sex in the Reveland's Office.

It was further asserted by the Appellant that the initiator of the sexual information being Rustom Edson Mwaseba, the Respondent

ought to have lodged a claim against the initiator, but the Appellant only wrote a confidential letter to the top leaders to notify them what was transpiring in the Ukonga Church. He had no intention of defaming any body and that is why it was confidential "SIRI" addressed to four top leaders of the Morovian Church.

According to the Appellant, the purpose of the letter was to seek assistance from the top leaders how to do away with the situation. At page 3 last paragraph, the Appellant requested for the committee team of three or five members be formed to investigate the issue, as follows:

kama taarifa zilizoibuka zitahakikiwa kuwa ni kweli yaani kama mtaunda tume ya uchunguzi wa wajumbe watatu au watano wenye hekima na ulokole wa kweli...

In view of the Appellant, the above paragraph indicates how the Appellant was looking for solution with no ill motive.

The Appellant cited the case of **Athuman Khalfan v. P.M Jonathan (1983) TLR 6** in which the Court of Appeal held that:

a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the

duty which is the foundation of his privilege; but on the contrary he will be protected even though his language should be violent or excessively strong; if having regard to all the circumstances of the case he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.....malice does not exist where a defendant honestly and reasonably believes in the truth of the communication.

It was submitted by the Appellant that he wrote the confidential letter to the four top leaders seeking their intervention after the purported sexual issue has spread in the church, the Appellant has never ever been the initiator of the defamatory statements. DW2 Rustam Mwaseba testified in court that he saw the purported sexual incidence and informed a church leader one Mr. Malongo so that he can table it to the management for deliberation, hence a defence of qualified privilege. To back up the position, the Appellant cited the case of **Makori Wassaga v. Joshua Mwakikambo and Another (1987) TLR 88** where the Court of Appeal held that:

To offset the defence of qualified privilege is not sufficient that the statement in question is consistent with the existence

of malice; but must be in consistent with bona fides and honesty of purpose:

Mere want of reasonable or probable cause is not conclusive to disrupt the defense of qualified privilege because the law first requires that a privilege should be used honestly and not that it should be used carefully.

The same position was also cemented in the case of **Astus Njale Masule and Samsodn Mipawa Molla v. Doganilu Nala** (2002) TLR 197 where the court of appeal held that:

Malice, which is presumed in every false and defamatory statement, stands rebutted by a privileged occasion; in such cases, in order to make a libel or slander actionable, the burden of proving actual or express malice is on the plaintiff.

According to the Appellant, the said letter (P1) at page 4, the Appellant shown how the effort of resolving the sexual incidence at the church level proved futile to quote:

Awali ya yote mtaona kwamba takribani miezi saba ilipita toka tendo lilipotendwa hadi kufunguliwa kesi Mahakamani. Hii ni kwa sababu wapeleka kesi Mahakamani walitaka ishughulikiwe na kuishia katika ngazi za kanisa kwa katiba ya

Morovian. Walilazimika kuchukua mkondo wa sheria za nchi baada ya kukatishwa tamaa na mbinu waliyokuwa wanatumia yeye na viongozi wake ya KUFUNIKA KOMBE MWANAHARAMU APITE waliyokuwa wanatumla kumlinda.

The above quoted paragraph of the said letter (P1) indicates that the sexual incidence was committed on 7/11/2012 while the purported letter of defamation wrote on 18/9/2013.

The court was told by the Appellant that the purpose of the Appellant was not actuated with malice, rather looking for solution for the top leaders in the incidence.

On the ground that the trial Magistrates erred in law and fact for failing to evaluate the tendered evidence. The Appellant submitted that the trial court grossly erred by failing to consider the tendered testimonies which indicated that the Appellant's letter was written after almost seven months had elapsed and the sexual information had already spread between the church members.

The Appellants submission goes on to read that, according to the testimonies of PW2 Edward Malongo, he got the information of sexual intercourse at the end of January, 2013 from Rostam Mwaseba while the Appellant's letter was written on 18th

September, 2013 which is after eight months. The second paragraph of page 4 reads:

PW2 Edward Malongo told the court that he is a Christian of Morovian Church and a member of elders' council. Pw2 told the court that sometimes at the end of January, 2013 he heard information from one Rustom Mwaseba, one of members of the Church, that the Plaintiff had sexual intercourse at the Church compound with the Church Reveland. This information spread to several people and caused the defendant to write a letter to the Headquarter of Morovian Church Western Zone and Zanzibar informing the top officials on the incidence. The letter was returned to the church to be discussed by Church elders.

In final view of the Appellant, from the above testimonies, PW2 was informed on the incidence by Rustom Mwaseba on January, 2013 while the Appellant's letter was of 18/09/2013. Hence the sexual information was not spread by the Appellant. The Appellant only wrote a letter after the incidence has already spread.

In reply to the first ground of appeal, the Respondent submitted that the Appellant has erred and missed a point. Thus, the trial court's decision was lucid and correct. It was submitted that the

trial Magistrate was justified to hold as it did at page 12 of his typed judgment that:

To my opinion and according to law, the words complained of at page 4 reading "kufanya mapenzi ofisini (Kanisani) na kiongozi wa kike wa kwaya ya ushirika (Mjane) Bi Gwantwa Kyangwe tarehe 7/11/2012 kulikopelekea kufunguliwa kesi na. 110 Mahakama ya Wilaya Juni 2013:" the defense by the Defendant that the letter was in a confidential form is of no help.

The Respondent submitted that the trial court correctly applied this court 's decision which is also found page no 4 of the trial court 's typed judgment in the case of **P. M. Jonathan v. Athumani Khalfan** (1980) TLR at page 179 which it was held:

Even confidential communication to one individual is defamatory and is actionable in law. It does not matter how the individual stands in relation to the plaintiff. It is worse if he stands a position of power.

The Respondent subscribed with the above holding because confidential information is effectively "secret" information. It may be confidential by virtue of an agreement (e.g. an employment contract), an established relationship (e. g Doctor –Patient) or

simply because it is information which has the necessary nature and quality of confidence. The Respondent submitted that throughout the trial of this case it is on record that what appeared to be done by the Appellant was against definition of confidential information because during cross examination, the Appellant admitted to have designed the headed paper to look like he Moravian with a view to cause it to be seen easily by Moravian church top leaders on allegations which was based from hearsay because they were spoken by a third party and not the Appellant. That he was never authorized to use the church head paper by Moravian management but it was the making of his own choice. That he addressed the allegations as confidential. Putting all these facts all together, the case of P.M Jonathan, (*supra*) had recognized and laid a foundation that confidential information, if defamatory, is actionable in law.

It was maintained by the Respondent that unlike what is on record, a confidential communication is ordinarily between two people who are affiliated in a confidential relation, such as an attorney and client, husband and wife, or master and servant. However, in view of the Respondent, going by the instant matter, the Respondent the Appellant was not in such a relationship. He was not in the employee's duty at the time neither he was permitted to use

Moravian church headed paper to defame the Respondent. Therefore, the Respondent contended that the Appellant averments on exhibit P1 was actuated with malice because it was made in the presence of a third part, whose presence was not necessary for such communication, hence it is not considered privileged. In the mater at hand, a decision made by this court in **PM Jonathan** (*supra*), was correctly applied by trial court as it was binding the trial court's decision. It is from this back ground, the Respondent asked this court to dismiss the 1st ground of appeal.

In reply to the ground that the trial court failed to evaluate the ingredient of defamatory statement , the Respondent stated inter alia that Appellant erred and missed a point on the reason that the trial court was correctly guided in recording 4 issues as appearing at page 8 of its decision, whereas analysis of evidence was correctly done at its page 10, 11 and 12 of trial court's judgment. Briefly, at page 10, the trial court noted and analyses correctly that the four people whom the letter was addressed for church leaders of Moravian Church Western Zone Tanzania and therefore the exhibit P1 was defamatory.

The Respondent replied that the trial court, in analyzing exhibit P1 It was guided by the evidence on record and not otherwise. The

Appellant has not challenged the trial courts principles that appeared at page 11 and 12 of the trial court's judgment but merely wants the is appellate court to find that the Appellant did no defame the Respondent. The Respondent added that the Appellant has erred because the trial court decision correctly analyzed the material facts of the case plus testimonies of both sides witness as shown at pages 1-8, whereas analysis is seeing at page 8-13 of the trial court judgment.

On the point concerning the word "SIRI" which DW1 has claimed to use, it was responded that it does not protect people of such caliber. He cited the case of **P.M. Jonathan v. Athuman Khalfan** [1980) TLR at page 179, where in was held thus;

even confidential communication to one individual, if defamatory, is actionable in law. It does not matter how the individual stands in relation to the plaintiff it is worse if he stands in a position of power.

In light of the above case law, it was the Respondent's submission that the Respondent's letter was *facie defamatory*. It contained a number of allegations which put together, means that the Respondent was an adulterer who committed prostitution in the Church with the Church Pastor.

I have deliberately gone through the long and detailed submissions of the parties, both of them have no issue with the principles governing defamation cases. I will start with the definition of the term defamation. The case of **New York Times Co v. Sullivan** 376 VS 254 (1964) defines the term defamation which is also referred in modern legal terminology as traducement, calumny, vilification, slander or libel as the communication of a statement that makes a claim (actual malice required to be proven, plaintiff being a public official).

In the case of **Sim v. Sretch** (1936) 2 All ER 1237, 1240, Lord Atkins observed that: A DEFAMATORY statement is one which 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.

In Tanzania, the term defamation was earlier defined in the case of **Hamis v. Akilimaiti** (1971) HCD No. 11 where the court defined it as communicating to the mind of another, matters which are untrue and likely in the natural cause of things substantively to disparage the reputation of third person.

This case deals with libel defamation which refers to written defamatory statement. It also deals with slander referring to oral statement.

The court went further to list four elements of defamation.

1. The statement written or spoken must be false.
2. It must be published or communicated
3. It must cause injury to the plaintiff.
4. It must be referring to be plaintiff

I have taken cognizance of the alleged defamatory statement. I'm of the view that there is nothing to establish defamation of the Respondent by the Appellant.


I'm of further finding that the letter addressed to the top Moravian Church Leaders was meant to make investigation on the alleged act of misquandering Church's funds and committing adultery/fornication with a choir member.

There is nothing to establish that the Appellant was malicious when composing and posting that letter to the high leaders of that church.

I do agree that it was wrong for the Appellant to have had used the church headed paper in his letter. However, that alone does


not constitute a defamation. It was neither an ill motive nor intended to confirm that the Respondent committed the alleged ill-acts.

In the totality of the above, I hereby uphold this appeal on merits. The decision of the RM'S court of Kisutu at Kusutu is hereby marked set aside. Considering the nature of the case, I award no costs. Order accordingly.



Y. J. MLYAMBINA
JUDGE
1/07/2020

Judgement pronounced and dated 1st July, 2020 in the absence of both parties.



Y. J. MLYAMBINA
JUDGE
1/07/2020