

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**DC CIVIL APPEAL CASE NO. 12 OF 2019**

(Appeal from the decision of the District Court of Ruangwa at Ruangwa  
in Civil Case No. 1 of 2019 delivered on 9<sup>th</sup> August, 2019)

**BETWEEN**

**TITO PETER MWAKYUSA.....APPELLANT**

**VERSUS**

**JUMA ABDALLAH KAPIKULIRA.....RESPONDENT**

21 May & 9 June, 2020

**JUDGMENT**

**DYANSOBERA, J:**

The appellant Tito Peter Mwakyausa filed a suit before the District Court at Ruangwa against the respondent one Juma Abdallah Kapikulira. In that suit, the appellant was claiming damages for defamation. The basis of the claims on defamation was, according to the plaint and the written submission, messages and words allegedly circulated by the

respondent to the residents of Mbekenyera and nearby villages. It was averred that the respondent, sometime in early November, 2018, created a text message through Short Message Service which, the appellant argued, was defamatory to his reputation as it created an impression that the appellant was a thief in that the said message was demanding the respondent to send the money to the appellant through the phone Number 0769446136. The matter was then referred to the police. The appellant complained that the spreading of the message to the villagers made them lose trust in him. He explained that he is well known businessman dealing with money transfers through M-Pesa agent, Airtel Money agent, Tigo Pesa agent and others and, therefore, the respondent's acts lowered his status and longtime built reputation of as many customers declined to use the appellant's facilities. He argued that this led him to be in financial crisis that he cannot even repay the bank loans due to decline in business.

In his defence, the respondent disputed the contents in the appellant's averments and put him to strict proof. He prayed the suit to be dismissed with costs.

The trial court found the appellant's case not proved to the preponderance of probabilities and, on 9<sup>th</sup> August 2019, dismissed the suit with costs.

The appellant was aggrieved and has appealed to this court on four grounds of appeal which are to the following effect. One, that there was failure on part of the trial court to term the electronic communication done through the message as one of publication that leads to defamation. Two, that there was misdirection on part of the learned trial Resident Magistrate on the ingredients of the tort of defamation. Three, that the tort of defamation was proved on balance of probabilities and four, that no justifiable reasons were given on the dismissal of the appellant's claims whereby the respondent did not deny the truth.

Before me, the hearing of the appeal was conducted in writing and a time frame set for the parties to file their respective written submissions. The parties complied with the court's order. In support of the appeal, Mr. Sambwe Mwalyego Shitambala, learned counsel who represented the appellant made his submission in chief and later a rejoinder. In the time, Ms Leticia Msechu, learned advocate who stood for the respondent submitted in reply.

Mr. Shitambala started submitting on the third ground of appeal. He contended that the appellant had proved that he was defamed. Learned advocate explained that the evidence of the appellant revealed

that on 23<sup>rd</sup> day of January he attended the DC'S meeting and while there one business person told him that he had seen the appellant's message (SMS) in the respondent's handset indicating that the message was shown to various people which amounted to communication of false information to the third person. Counsel further argued that the appellant was called by the OCS of Mbekenyera (PW2) on 24<sup>th</sup> January, 2019 at the Police Station on the same matter of false information. In his view, the false information was communicated and shared to the OCS and other police officers until it was interfered by PW2 who investigated the matter to find out that the number in question was registered in the name of Fatuma Mahindi (sic) and not the appellant. On that account, learned advocate contended, the appellant had adduced evidence which was not disputed or shaken by the respondent to the effect that the respondent had started to broadcast the said message (sms) to other people since 2018 and eventually the respondent agreed to finish the matter as he wrote two posters to withdraw his defamatory statement and was read to pay Tshs.5, 000,000/= as compensation instead of Tshs. 10,000,000/= as demanded by the appellant.

On the injury suffered by the appellant, learned advocate stated that the appellant had testified that his business and personality were injured since people lost confidence on him and he was still suffering.

Learned advocate pointed out that the evidence of appellant was supported by PW2 whose evidence is to the effect that the respondent went to his office and alleged that he received an SMS from the appellant asking him to send money and that was a proof that communication to the third party which amounted to defamation. Emphasising on the evidence of the appellant being corroborated in material particular, Mr. Shitambala told this court that the evidence of PW3(Bahati Michael) supports the evidence of the appellant who testified that he was in the restaurant of Kwa Mama Nora where people were talking that the appellant wanted to steal money from the respondent and that the same PW3 had heard Mandale saying that the appellant had become a thief. Mr. Shitambala insisted that the evidence of PW3 was not shaken and went unquestioned by the respondent indicating that the respondent communicated the message to so many people which amounts to defamation which was malicious and ill intended. Mr. Shitambala further submitted that the respondent, in his defence, did not deny the act but admitted that to have received a message, went to the village office and later to the police station.

A further submission of the learned advocate indicated that although the respondent denied to have spoken in the street, his conduct was not a secret and that the respondent, on cross examination,

stated that, "I suspected that he wanted to steal from me". The issue of publication was, as the learned counsel submitted, also supported by DW2 one Ramamdhani Chande Mkongo who told the trial court that he is the chairman of the village council of Naunambe and that the respondent reported to him on the message and that as a leader he talked to people in the village as the same witness stated that he communicated the Village Executive Officer on the matter.

Submitting on the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, Mr. Shitambala argued that all ingredients of defamation were met in that respondent's information was false, and was made by the respondent against the appellant, and that the appellant reputation was injured and his business was also injured, the circumstances which brings it within the definition of defamation elucidated in the case of **Hamis vs. Akilimali** (1971) HCD 111 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 the third person".

For the respondent, Ms. Leticia Msechu first, reiterated a background of the matter, recited a summary of what transpired in court and listed the grounds of appeal. She also alerted this court that the

appellant, through his learned counsel, had abandoned the 4<sup>th</sup> ground of appeal.

Responding to the 3<sup>rd</sup> ground of appeal, Ms. Msechu submitted that the alleged businessman to whom the information was published was not procured during trial to give his evidence, his identity was unknown and the contents of the message cannot be verified. Learned counsel for the respondent termed this type of submission as hearsay. She urged the court to find that the appellant had failed to prove his case to the required standard.

On the evidence of PW1, PW2 and PW3, learned counsel said that though they gave their testimonies, their evidence was far from proving defamation which the appellant had based on the alleged text message which came to his knowledge after he was reported to the police station and claimed TZS.51,000,000/=(Fifty one million) being damages he sustained thereafter. Ms Leticia further argued the appellant did not prove injury he is alleged to have sustained. As regards the evidence of PW 2, learned advocate pointed out that the witness received the complaint from the respondent and advised both the appellant and the respondent that they should resolve the matter amicably, the advice the appellant compromised by preferring civil proceedings before the District

Court of Ruangwa. She contended that PW2 could not testify on the appellant being defamed by the respondent as he was not present at the publication of the defamatory statement. With respect to the evidence of PW3, Ms Msechu pressed that the witness admitted to have heard the utterances from the local café 'kijiweni' that the appellant had sent the SMS to the respondent requesting money from him. The argument that PW3 heard statement connected to slander from Mandale is a new fact which was not before the District Court of Ruangwa and that PW 3's evidence is hearsay as well which is in law, inadmissible. To buttress her argument, learned counsel cited the case of **Mathias Timothy v. Republic** [1984] TLR 86, 87 on the authority that in testimony of a witness, where the issue is one of the false evidence, the falsehood has to be considered in weighing the evidence as a whole; and where the falsehood is glaring and fundamental its effect is utterly to destroy confidence in the witness altogether, unless there is other independent evidence to corroborate the evidence.

Learned counsel joined hands with the trial court in finding that the defamation was not proved on balance of probabilities.

As far as grounds 1 and 2 are concerned, counsel for the respondent submitted that the ingredients of defamation were not



proved by the appellant and the **Akilimali's** case is very much distinguishable because definition of term is one thing and proving it is another thing. She argued that in the present case the appellant failed to prove the existence of defamation because the entire statements were tainted with hearsay evidence only. According to learned counsel, for a statement to be defamatory in the eyes of law the following tests is deployed by the court of law to determine in favour of the complainant. First such statement must be defamatory; second, the defamatory statement must refer to the plaintiff. Third, defamatory statement must be published to a third party and fourth the victim must be damaged by the statement, which is the statement must cause serious harm to the claimant. These tests were not met by the Appellant during hearing because the appellant did not prove his case but was telling the court hearsay and false statements as held in the case of Mathias Timothy (supra), learned advocate stressed.

In her further submission, learned counsel for the respondent explored that the appellant was required to prove that not only there was defamatory statement but also the intention of the respondent to lower his reputation which was indicated of the statement itself. More so the appellant must substantiate that he suffered loss of his business. The

case of **Rugarabamu Archard Mwombeki vs. Charles Kizigha & Three Others** [1985].

Ms Msechu argued that the appellant (PW1) did, neither in his pleadings nor in his testimony, tell the trial court how much was he earning and how much he has lost after the alleged defamatory statement of the respondent.

The learned counsel for the respondent further contended that the respondent, in reporting to the police station, was exercising his legal right which could in no way, amount to defamation. She said that the evidence of the appellant lacked corroboration as rightly found by the trial court. She relied on the case of **Makame Junedi Mwinyi v. Serikali ya Mapinduzi Zanzibar (SMZ)** [2000] TLR 455.

Finally, learned counsel for the respondent submitted that the trial magistrate was justified in arriving at the impugned decision considering the fact that the appellant's evidence did not meet the standard of proof required under the law and there was no defamation committed to the appellant. She prayed this appeal be dismissed with costs.

Having taken into account the rival submissions by the learned counsel, the grounds of appeal and the record of the trial District Court, I agree with both learned advocates that the definition of defamation

found in the case of **Hamisi v. Akilimali** (supra) expresses the correct legal position in our jurisdiction of what defamation is. According to that case, defamation is communicating to the mind of another, matters which are untrue and likely in the natural cause of things substantially to disparage the reputation of the third person.

The issue calling for determination is whether the appellant did prove that he was defamed by the respondent in the context explained in the cited case of **Hamisi v. Akilimali** (supra). As correctly put by Ms Leticia Msechu, learned counsel for the respondent, to assert that there was defamation is one thing and to prove it is another.

In order for the appellant to succeed in his suit of defamation, he had to prove the following five essential elements. First, the statement complained of was defamatory. Second, the statement was published. Third, the statement was false. Fourth, the statement was injurious to the appellant's reputation. And fifth, the statement was unprivileged.

But what is a defamatory statement? It is a false statement of fact that exposes a person to hatred, ridicule or contempt, causing him to be shunned or injures him in his business or trade.

Generally, courts will look at context of the statement and its substance in order to determine not only whether the statement is or the

words are an opinion or factual assertion but also to discern the imputation contained in that statement or in those words complained of. The importance of indicating that statement or words both in the plaint and in evidence cannot be over emphasised. The rules are that, first, the whole statement complained of must be read and not only a part or its parts. Second, words must be taken in the sense of their natural and ordinary meaning.

As to the test to be applied to determine whether the particular statement is defamatory is the answer to the question, 'would the words tend to lower the plaintiff in the estimation of right thinking members of society? The test of the defamatory nature of a statement being its tendency to excite against the plaintiff the adverse opinion or feelings of other persons, a form of defamation is an attack upon the moral character of the plaintiff attributing him to any form of disgraceful conduct, such as crime, dishonesty, untruthfulness, trickery, ingratitude or cruelty.

In the present matter, despite my microscopic scrutiny, I have failed to come across the complained of statement which is alleged to be in the form of Short Message Services published by the respondent. Neither the plaint nor the evidence on record depicts that SMS was extracted, printed, annexed to the plaint and admitted in evidence. The

absence of the statement both on the appellant's plaint and in evidence deprived both the District Court and this Court an opportunity to discern its context and substance so as to determine if it was an opinion or factual assertion. The Courts were also denied the opportunity of determining the imputation contained in the complained of statement. It is true that the evidence of the appellant was supported by PW 2, PW 3 and PW 4 but the issue is whether a third party saw or heard that very statement the subject of defamation. Was the statement false, injurious and unprivileged? These issues could only be fairly resolved if the said statement was tendered and admitted in evidence. Without it, it is difficult to gauge whether the essential ingredients were proved, leave alone proved on balance of probabilities as argued by the learned counsel for the appellant.

After all, under section 16 of the Cyber Crime Act, 2015 publication of false information through internet or social media is criminalised. Reporting to the police as the respondent did could not be excepted as the respondent's legal right under our jurisdiction and hence negating malice on his part.

In fairness, since the termed electronic communication allegedly done through message was not exhibited in evidence, the trial District

Court cannot be faulted for having found that the defamation was not proved and to have disallowed the suit with costs.

This appeal fails and is dismissed with costs to the respondent.

Order accordingly.



W.P.Dyansobera

JUDGE

9.6.2020

This judgment is delivered under my hand and the seal of this Court on this 9<sup>th</sup> day of June, 2020 in the presence of the appellant and in the absence of the respondent.



W.P. Dyansobera

JUDGE