

**IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
CIVIL APPEAL NO 27 OF 2020**

ELSON TEKERE MUJUNGU _____ **APPELLANT**

VERSUS

1. JT MAPENDO COMPANY _____ **1st RESPONDENT**

2. JACOBUS MAPENDO _____ **2nd RESPONDENT**

(Arising from the decision and orders of the district court of Musoma at Musoma, Hon. Marwa RM, in civil case 9 of 2020 dated 08.07.2020)

EX PARTE JUDGEMENT

6th & 27th November 2020

GALEBA, J.

This appeal arises from the decision of the district court of Musoma determining a civil action based on the tort of defamation by word of mouth also called slander. It was alleged that on 24.04.2019 **JACOBUS MAPENDO** uttered demeaning words injurious to the reputation of **ELSON TEKERE MUJUNGU**. The words uttered, according to paragraph 5 of the plaint, are that the said **ELSON TEKERE MUJUNGU**;

'ni mwizi, mhuni, ameiba pesa zangu nyingi kupitia kampuni yangu ya JT Mapendo, hata kama ni profesa niliyewahi kufanya naye biashara, lazima nitumie mbinu nimfilisi, nimkomeshe kupitia mahakama.'

Consequent to the above utterances, the appellant entertained psychological shock accompanied with heart attack and fell down. He has since been disabled and has lost speech. Other allegations were that the 2nd defendant used the 1st defendant to fabricate and file civil case no. 516 of 2017 in Musoma urban primary court whose decision was set aside in civil appeal no. 42 of 2019. In the case before the trial court, the plaintiff was claiming Tshs 150,000,000/= specific damages, Tshs 30,000,000/= general damages and costs of the suits. In reply, the defendants denied all allegations in the plaint and submitted further that the defendant had been sick even before 24.04.2019.

The district court heard the case and in the final analysis, it dismissed the same with costs for want of merit. This appeal is meant to challenge that decision of the district court.

Before this court the appellant raised 5 grounds of appeal which were; **first**, that the trial court erred because it decided the case based on issues which were not raised by the parties, **secondly** that the court erred by failing to resolve some issues which were raised and **thirdly** that the court erred in holding that the appellant deserved to be defamed because

he was a debtor. The **forth** ground was that the trial court decided the case without analyzing the documents relating to false and fabricated documents and **lastly** that the trial court erred when it decided the case without considering strong evidence of the appellant which proved the case on the balance of probabilities.

When the appeal came up for hearing the respondent did not appear, so I made orders that the appellant proceeds **ex parte** the respondent. **Mr. Ostack Mligo** learned advocate for the appellant, in arguing 1st, 2nd and 4th grounds of appeal submitted that the trial court erred because it did not resolve 2nd, 3rd and the 4th issues. He submitted that as per the case of **Sosthenes Bruno and Dianaroase Bruno v Flora Shauri**, Civil Appeal no 81 of 2016, what the trial court did was illegal referring the court to page 7 of that decision. In resolving this complaint, this court needs to list down the issues that were framed by the district court. The issues before the court were the following;

"1. Whether the 2nd defendant uttered defamatory statement against the plaintiff.

2. Whether Civil Case no 516/2017 filed at Musoma primary court involved fabricated and false information.

- 3. If the 1st and 2nd issues are answered in the affirmative, whether the said acts amounts to defamation.**
- 4. Whether the relief claimed by the plaintiff is justifiable.**
- 5. What reliefs the parties are entitled to.”**

According to how the trial court framed the issues, the 3rd issue could be entertained only and only if both the 1st and 2nd grounds were to be resolved in the affirmative. In this case the court had resolved the 1st issue in the negative, therefore there was no way could the 3rd issue be entertained even if the 2nd issue could be entertained and be resolved in the affirmative, because the 3rd was dependent on both the 1st and 2nd grounds being resolved affirmatively. In other words the trial court having answered the 1st issue negatively, resolving the 2nd whichever way would not make any difference, the defendants would not be condemned for any act of defamation as pleaded. In the circumstances the case cited is distinguishable because in this case issues that were not resolved were dependent on the results of another issue.

Although 2nd and 3rd issues were dependent on the results of the 1st, Mr. Mligo was of the view that, still the 2nd issue could be resolved

independently. He submitted that the trial court was wrong to state that the court was not the appropriate venue, without first calling parties for him to be able to decide so. He submitted that that offended their right to be heard. I disagree with both Mr. Mligo and the trial court as well. As for Mr. Mligo, it is his client's side which had created the whole trouble by complaining on matters that were supposed to be settled elsewhere. The saying that fits the conduct of the appellant is that of '**whoever goes to equity must have clean hands**'. They are not entitled to complain of the results arising from the circumstances their side created. The court was only wrong for the reason it cited, but it was right for the decision it made; a decision to refuse to resolve the issue, because its results was immaterial as long as the 1st issue had been resolved the way it was resolved. So this court cannot remit this matter to the trial court for determination of the 2nd issue because, it will be inconsequential as the 3rd will not be resolved for the 1st had been resolved negatively.

On further inquiring from Mr. Mligo whether resolving the 2nd issue would not have meant to resolve an issue that was supposed to be resolved on appeal against the decision in civil case no. 516 of 2017, Mr.

Mligo was reluctant to agree but was finally of the relatively same view. In other words, there was a question of a proper appreciation of the forum at which a complaint in the 2nd issue could be resolved. The complaint in paragraph 3 of the plaint which resulted in formulation of the 3rd issue was on matters that were supposed to be handled either in the primary court or in an appeal from that court's decision. To say it in a more plain way; if the appellant wanted the 2nd issue to be resolved in courts, he was supposed to approach the district court by way of appeal and not by way of a fresh suit, as he did in this case. In the circumstances, the 1st, 2nd and 4th grounds of appeal have no merit.

In supporting the 3rd ground of appeal Mr. Mligo submitted that the trial court was not supposed to hold that the appellant was a debtor in the case that was decided in the primary court. In respect of this ground, it is important for one to be attentive. On 08.06.2020, the plaintiff's witness, **MR. JEREMIA TEKELE MUJUNGU** prayed to tender a judgment of Musoma urban primary court in civil case no 516 of 2017. The defendants did not have objection and the judgment was admitted as **EXHIBIT P2**. In

that judgment at the 4th page at the third paragraph it is recorded as follows;

'...Baada ya hapo mdaiwa hakuendelea kulipa tena shauri la madai namba 516/2017 lilirudishwa mahakamani kutoka mahakama ya wilaya kwa sababu tu mshauri mmoja hakuweka sahihi, mpaka sasa mdai anamdai mdaiwa jumla ya sh 17,200,000/= ikiwemo gharama za ushauri aliyoamriwa mdaiwa kulipa gharama ya sh 2,000,000/=.'

At page 3 of the judgment being challenged in this appeal, the trial magistrate stated;

"...according to the judgment and decree in respect of civil case no 516/2017 Musoma Urban Primary Court, the plaintiff was a debtor to the defendants and hence those words alleged to have been said by the 2nd defendant could not be taken to be false."

The question one should seek to answer is who tendered evidence in the district court to prove to that court that the appellant was indebted to the 1st respondent? From the above it is clear, the documentary evidence tendered by **MR. JEREMIA TEKELE MUJUNGU** revealed that indeed, the appellant was indebted to 1st respondent which fact the trial court subscribed to. In this appeal the appellant is like submitting that the trial court was not supposed to agree with his own witness. That argument

does not coincide with logic, for the appellant is blowing both hot and cold at the same time. The appellant's case in the district court, by his evidence, was that he was indebted to the 1st respondent and because of that, this court cannot fault the trial magistrate on the conclusion which it was led into making by the appellant's evidence. For those reasons, the 3rd ground of appeal has no merit and the same is dismissed.

Before getting to the 5th ground, there were two aspects that were not disputed by Mr. Mligo, they were that; specific damages were not proved in the district court and that there was no evidence that the cause of stroke and heart attack of the appellant were a result of the acts of the 2nd respondent. Now, the 5th ground of appeal.

In respect of that ground, Mr. Mligo submitted that the appellant tendered abundant evidence that the appellant was defamed and that the 2nd respondent stated that he was in Dodoma but he could not prove it. In order to resolve this ground I will have to revisit the evidence of the prosecution. **PW1 MR. JEREMIA TEKELE MJUNGU**, testified that the offensive words were uttered in his presence, but he did not go ahead to tell the court how he started from then onwards to hold the appellant in

low esteem. So that evidence did not prove defamation. For slander to be proved the person who received the information must also testify that he had always held the defamed person in high esteem and from then on he no longer accorded the person defamed any respect. This was missing in the evidence of **PW1**. Like **PW1**, other witnesses, **PW3 KARANGI NYABUKIKA** and **PW4 DONALD ZEPHANIA SONDO** none of them proved any defamation based on the above principle. However, **PW2 CHITIKU MATURI MAFWIMBO**, testified that she lost hope and trust in the appellant. There was however an issue with the identity of the 2nd respondent by the witness. She testified that she knew the 2nd respondent on 24.04.2019 but during cross examination she then changed course and said that she did not know who was **JACOBUS MAPENDO**. Such a witness is a slippery witness and cannot be trusted, this watered down her credibility and so was the weight of her evidence. Coupled with the allegations of the 2nd respondent that he was in Dodoma at the time, the tort of defamation was not proved. In the circumstances, the 5th ground of appeal fails to be substantiated.

Based on the above reasons this appeal is dismissed for want of merit with
not orders as to costs.

DATED at MUSOMA this 27th November 2020



Z. N. Galeba
JUDGE
27.11.2020