IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CIVIL APPEAL NO. 20 OF 2008

(Originating from the judgement of the Court of the Resident Magistrate of Mwanza in Civil Case No. 19 of 2005 dated 25/03/2008)

THE MANAGING DIRECTOR,

KENYA COMMERCIAL BANK (T) LTD ..... 1ST APPELLANT

ALBERT ODONGO .....2ND APPELLANT

VERSUS

SHADRACK J. NDEGE ..... RESPONDENT

JUDGEMENT

Date of Last order: 14/12/2020

Date of Judgement: 16/3/2021

F. K. MANYANDA, J.

This appeal has a checkered history, the Appellants namely, the Managing Director, Kenya Commercial Bank (T) Ltd and Albert Odongo, hereafter referred to as the 1st Appellant and 2nd Appellant, respectively or simply Appellants, filed this appeal way back in 2008 against a judgement and decree of the Court of the Resident Magistrate of Mwanza in Civil Case

No. 19 of 2005 dated 25/03/2008. When the appeal was heard by Hon. Mackanja, Judge, as he then was, in his judgement dated 15/10/2008 struck it out on ground that the appeal was not accompanied with a valid decree, a point of law he raised *suo motu*, without hearing the parties.

Aggrieved, the Appellants applied for leave to appeal to the Court of Appeal. The application was heard by the same Hon. Mackanja, J. who on 01/04/2009 certified that there was a point of law for consideration by the Court of Appeal instead of granting leave to appeal. The Appellants applied for revision to the Court of Appeal which on 10/10/2011 nullified the ruling by Hon. Mackanja on ground that the judge ought to grant or not to grant leave, and, not certification of a point of law. The Court of Appeal gave the parties liberty to apply afresh for leave in this Court.

The Appellants chose to exercise their rights of appeal by making a fresh application for leave to appeal, this time it was heard by Hon. Mruma, J. who granted leave to the appellants on 10/04/2012. Following grant of leave, the Appellants successfully appealed to the Court of Appeal which on 11/05/2020 allowed the appeal, quashed the judgement of Hon. Mackanja, Judge, and ordered re-hearing of the appeal by a different judge.

Hence, this appeal landed in my hands twelve years after delivery of the impugned judgement of the Court of the Resident Magistrate for Mwanza by Hon. E. G. Rujwahuka, RM, in 2008.

It started as follows, that is; as per particulars in the plaint, the Respondent was, at the time the dispute arose, an employee of the Kenya Commercial Bank (T) Limited stationed at Arusha, the 1st Appellant a Managing Director of the Kenya Commercial Bank (T) Limited and 2nd Appellant, the Relationship Manager of the Kenya Commercial Bank (T) Limited stationed at Mwanza Branch. Before shifting to Arusha, the Respondent's working station was at Mwanza whereas on 27/12/2004 was promoted to the rank of Section Head and transferred to Arusha.

In order to carry out the transfer, the Respondent procured three quotations for costs of transporting his personal effects, from which a successful one of TSh 1,400,000/= was picked and paid by the Appellants. It turned out that the Appellants accused the Respondent of moving to Arusha without transporting his personal effects, hence required the him to recover the money paid to the transporter. The bank account of the Respondent was also frozen. In the course of communications between the

two sides, the Respondent complained of been defamed by the Appellants, hence filed a suit which was registered as Civil Case No. 19 of 2005 in which he prayed for payment of Tshs. 99,800,000/= being general damages suffered, a declaration that a letter dated 01/03/2005 was written maliciously and unlawfully. The trial court granted the reliefs prayed but reduced the general damages to Tshs. 80,000,000/=.

In their appeal the Appellants raised a total of 14 grounds of appeal that: -

1. The learned trial magistrate erred in law and facts in holding that the written statement of defence did not plead the fact that the 1st Appellant was not liable.

2. The learned trial magistrate erred in law and facts in holding that the 1st Appellant was liable to the Respondent.

3. The learned trial magistrate erred in law and facts in holding that the Respondent was defamed vide letter dated 01/03/2005.

4. Having answered issue number 2, to wit; whether the publication was privileged and or justified; in the affirmative, the learned trial

magistrate erred in law and facts in holding that the Appellants were liable for defamation.

5. The learned trial magistrate erred in law and facts in holding that the Respondent's cheque was unlawfully dishonored by the Appellants or any one of them.

6. The learned trial magistrate erred in law and facts in holding that the Respondent's account was unlawfully frozen by the Appellants or any of them.

7. The learned trial magistrate erred in law and facts in admitting and relying on Exhibit PV.

8. The learned trial magistrate erred in law and facts in considering and determining issues related to the legality of the Respondent's termination from employment in particular.

9. The learned trial magistrate erred in law and facts in dealing with matters which were never pleaded and prayed for by the Respondent.

10. The learned trial magistrate erred in law and facts in dealing with extraneous matters.

11. The trial magistrate erred in law and facts in awarding general damages in the absence of any evidence leading to the grant.

12. The trial magistrate erred in law and facts by taking into account irrelevant factors in assessing general damages.

13. The learned trial magistrate erred in law and facts in awarding excessive damages to the tune of Tshs. 80,000,000/=.

14. The learned trial magistrate erred in law and facts in declaring that the letter with reference No. KCB/MZA/03/1166 dated 01/03/2005 was written maliciously and unlawfully.

Hearing of the appeal was ordered by Hon. Mackanja, J. in 2008 to be conducted by way of written submissions.

On 11/09/2020, I summoned the parties in order to hear them on the way forward as well as anything to add to their written submissions, following changes in our laws over that long time since 2008.

Mr. Kyariga, learned Advocate, for the Appellant, adopted their written submissions filed on 20/08/2008 and rejoinder filed on 12/09/2008 and clarified inviting this Court to re-evaluate the evidence and come to its own findings not necessarily to be like of the trial court.

He added in respect of ground 3 that the trial magistrate erred in holding that the Respondent was defamed via a letter dated 01/03/2005. He was of the view that even if this Court finds similar to the trial court, that the Respondent was defamed, then; it should find that the said letter was not published as no third party outside KCB accessed the same. He cited the case of **Future Century Ltd vs. TANESCO**, Civil Appeal No. 05 of 2009 (unreported).

On his side Mr. Outa, learned Advocate, for the Respondent, adopted their written submissions filed on 15/09/2008 and added clarifying that the Respondent sued the KCB as indicated in the Plaint where there is a comma separating the names. He also pointed out that even if the Court finds that the names are different the same is minor error which does not occasion any miscarriage of justice because the Appellants were made to understand the liability of the Bank through the evidence. He cited the case

of **CRDB Bank Ltd vs. Isaac B. Mwamasika and 2 Others,** Civil Application No. 139 of 2017 CAT (unreported).

In addition, Mr. Outa contended that when the issue of privileged communication comes into consideration, the Court should find that the same is not available because the evidence does not support it. He was of the view that there is evidence supporting unjustifiable publication of the letter.

As regard to damages amount of Tshs. 80,000,000/=, he pointed out that the same suits the case, basing on the evidence of personality damage and considering the devaluation rate of the schilling. He prayed the appeal to be dismissed.

Mr. Kyariga rejoined by reiterating his contentions in his submission in chief and added that the whole evidence was against the 2nd Appellant, the Bank is not touched. He insisted that it is not a matter of naming parties but the cause of action as pleaded against the 1st Appellant and that the two Appellants have different legal personalities between the Managing Director and the KCB as a corporate entity. Moreover, he

repeated his contention that the letter being an internal memo was not defamatory and there was no publication thereof, also the communication was a privileged one. As regard to general damages, the counsel was of the view that in absence of proof of injuries, bearing in mind that the Respondent had not lost his job by the time the testified, then the issue of general damages does not arise. He prayed the appeal to be allowed.

Those were the submissions of the parties; I appreciate the respective Counsel for their well researched works, which has been very useful to me.

Let me start with the issue of defamation which is contained in grounds 3, 4 and 14 of the appeal, that is; whether the learned trial magistrate erred in law and facts in holding that the Respondent was defamed vide letter dated 01/03/2005 and having answered issue number 2, to wit; whether the publication was privileged and or justified; in the affirmative, the learned trial magistrate erred in law and facts in holding that the Appellants were liable for defamation. Also whether the letter with reference number KCB/MZA/03/1166 dated 01/03/2005 was written maliciously.

It was submitted for the Appellants challenging the decision of the trial magistrate that the Respondent was defamed basing on suspicion and thought and that the letter dated 01/03/2005 contained untrue allegations. The contention by the Appellant is that the allegations were true and the said letter was asking the Respondent to show cause. The employer was at liberty to impose disciplinary action against him. The Appellants believe that there was no defamation. They gave three elements of defamation after quoting from a famous book **Winfield and Jolowiz on Torts**, 15th Edition as: -

i. That the statement was defamatory;

ii. It must refer to the plaintiff and identify him; and

iii. It must be published i.e communicated to at least one person other than the plaintiff.

From these elements, the Appellants contend that DW1, the 2nd Appellant (2nd defendant) wrote the letter dated 01/03/2005 among others asking the Respondent (plaintiff) to show cause why disciplinary action should not be taken against him for fraudulently claiming Tshs. 1,400,000/= because the money paid to Mbise, the transporter, had not

been used for the intended purposes of transporting goods. The Appellants are of the view that the letter was not defamatory because it didn't tend to lower him in the estimation or right thinking of the society generally as it is not bad to question anybody to give his statement. They cited the case of **Amos Jonathan vs. J. S. Masuka and Others** [1983] TLR 2001 where the Court said inter alia:-

> *"To find that what the Defendants did amounted to defamation would create a far reading and very dangerous precedent. No longer will the employer warn his employees for unbecoming conduct else the ground for dismissal would be taken as defamatory."*

On the other hand, the Respondent argued that the contention by the Appellants that they were just exercising their rights as employers to discipline the Respondent as per **Amos Jonathan's case (supra)** is unfounded because the author did not act bonafide and there were no material condition for him to act upon. The Counsel for the Respondent distinguished the said case of **Amos Jonathan (supra)** with the instant case. He was of the view that Paragraph 3 of the letter dated 01/03/2005 contained defamatory words contending that there were no material facts

supporting the preposition that the Respondent fraudulently claimed the money, Tshs. 1,400,000/= from the Appellants.

It was the Counsel's submissions that the 1st Appellant chose one of the three quotations which was from Riziki Kaleb Mbise (PW3) which was accepted and payment of Tshs. 1,400,000/= made. A contract between the 1st Appellant and the said Mbise was concluded to which the Respondent was not a party. Hence the revocation of that contract does not concern the Respondent.

He added further that, since the time limit of implementation of that contract is unknown because the accepted quotation was not tendered in evidence, the unilateral cancellation by the Appellants was in breach of the contract. The Counsel went on that in absence of material facts for cancellation of the contract, which had time for implementation, then; there was no fraudulently claim for payments to the transporter as was alleged by the Appellants. He gave the definition of the word fraudulent from a book **Collins Paperback Thesaurus** 4th Edition, 2001 as meaning *"deceitful craftily, criminal, crook, dishonest, double-dealing....."*

At this moment let me first determine the issue whether the letter dated 01/03/2005 was defamatory or not. This was is a complaint by the Appellants in ground 3. The word defamation is defined in the **Black's Law Dictionary**, Bryan A. Garner, 8th Edition, as meaning *"the act of harming the reputation of another by making a false statement to a third person."* The said dictionary quotes from a book by P. H. Winfield, **A Textbook of the Law of Torts**, 5th Edition, at page 242, which elaborates the term 'defamation' "*that, it is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally.*"

In my understanding, for a statement to be defamatory must contain facts which are untrue which are directed towards a defamed person and which, when made known to a third party, have the effect of lowering the personality status of that person in his society.

The Court of Appeal discussed at length this position of the law of torts on defamation in the case of **Peter Ng'homango vs. Gerson K. Mwanga and Another,** Civil Appeal No. 10 of 1998 (unreported) at page 16 after quoting from the authors of the book **Salmond and Heuston on**

the Law of Torts, 21st Edition (1996) Sweet and Maxwell Ltd, London at page 138 that: -

> *"The tort consists in the publication of a* ***false*** *defamatory statement concerning another person without lawful justification."*(emphasis added).

The Court of Appeal also quoted from the book **"Clark and Lindsell on Torts"** 17th Edition, 1995, Sweet and Maxwell, London at pages 1009 and 1010 that: -

> *"So, a person who communicates to the mind of another* ***matter which is untrue*** *and likely in the course of things substantially to disparage a third person is, on the face of it, guilty of a legal wrong for which the remedy is an action in tort for defamation."*(emphasis added).

This definition is in line with that one given by the Appellants from **Winfield and Jolowiz on Torts**, 15th Edition at page 448 which gives three elements that is: -

i. The statement was defamatory;

ii. It must refer to the plaintiff and identify him; and

iii. It must be published i.e communicated to at least one person other than the plaintiff.

In this case the defaming statement is alleged to have been contained in the letter dated 01/03/2005.

Going by the elements of defamation as listed above, this Court has asked itself a sub question, whether the three elements listed above are established in the contents of that letter, therefore, defamatory.

In respect of element number one, the Appellants contend that the contents are true because the money paid to Mbise, the transporter, had not been used for the intended purposes of transporting goods. The Respondent contends that the contents are not true because there are no material facts to make it true. There is no evidence on time limit within which the goods were to be transported; the quotations were not tendered in evidence. The Respondent had not secured a house in Arusha at the time the accusations were raised and required to recover the money from the transporter. Moreover, the Respondent was not a part to the contract between the Appellants and the transporter.

This Court is in agreement with the Respondent on reasons that there are no true material facts which made the 2nd Appellant write the demand letter requiring the Respondent to show cause why should not disciplinary actions be taken against him for "fraudulent claiming" Tshs. 1,400,000/=.

According to the evidence on record it was the 2nd Appellant who investigated and found that the Respondent had not transported any personal effects to Arusha, but there is no explanation as to when such goods were required to be transported to Arusha. Moreover, there is no any explanation as to how the investigation by the 2nd Appellant was carried out and what the results thereof were.

This Court has gone through Exhibit PV, of which question of its admissibility will be discussed later, and found that since the 2nd Appellants had approved the payments pending retrospective approval from the Head office, it was within their knowledge that anything could happen, including but limited to, as it happened in this matter, refusal of approval. One asks himself why then did the 2nd Appellant so hurriedly reverse the transaction and accuse the Respondent of fraudulently claiming the money in issue

before obtaining the requisite approval or disapproval? The answer would appear that the Appellants acted in speculations.

Equally as rightly submitted by the Respondent, he was not a part to the contract between the Appellants and the said transporter. According to the evidence on record, the Respondent just collected the quotations and submitted them to the Appellants. It was the Appellants who chose the transporter. It was within the Appellants' power to accept or reject the proposal by the transporter. In the end of the day it was the Appellants who accepted the transporter's proposals and made the payments. Therefore concluding a contract between the Appellants and the transporter. The Respondent is a stranger to that contract. This fact was within the knowledge of the 2nd Appellant when he wrote the letter dated 01/03/2005.

This Court also finds, as a matter of fact, that failure of tendering of the quotation in evidence, which after been accepted became valid contract, which would have revealed the conditions which were required to be fulfilled by the transporter, makes the allegations contained in the letter

dated 01/03/2005 by the 2nd Appellant more speculative and pre suppositions than reality.

Without minting words, the contents of Paragraph 3 of the said letter were not true and this fact was within the knowledge of its author.

This Court is in agreement with the authority in **Amos Jonathan's case (supra)** that employers are entitled to require their employees to show cause in suspected disciplinary matters. However, that case is distinguishable from the circumstances of the case at hand. In the instant case as seen above the allegation was a hoax. This Court believes that the authority in **Amos Jonathan's case (supra)** did not mean to bless unfound and hoax allegations by employers which would embarrass and defame employees. This Court is of settled mind that the contents of the letter dated 01/03/2005 were untrue as far as allegations of "fraudulent claim" of Tshs. 1,400,000/= are concerned and falls squarely within the legal positions explained above, that it is defamatory.

The second element is on identity of the person whom is alleged to have been defamed. This issue is not in controversy in this matter. The

letter dated 01/03/2005 (Exhibit PIV) was addressed to the Respondent through the Manager, KCB Arusha naming him as "Shadrack Ndege" as the responsible person. Shadrack Ndege is the Respondent herein.

The third element is whether there was publication of the letter dated 01/03/2005 (Exhibit PIV).

The Appellants submitted that even if this Court finds similar to the trial court, that the Respondent was defamed, then; it should find that the said letter was an internal memo and not published as no third party outside KCB accessed the same. He cited the case of **Future Century Ltd vs. TANESCO**, Civil Appeal No. 05 of 2009 (unreported). Moreover, if the Court finds that there was publication, then the said communication was a privileged one.

In their lengthy submissions on this area, the Appellants contended that the 2nd Appellant took necessary measures to ensure that the letter is not published to unauthorized persons. The measures included calling the Branch Manager for Arusha before faxing the letter and also confirming by telephone after sending it. Moreover, it was argued that it was not possible

for anyone to read it because the fax machine was fixed at a front room to the Branch Manager as such anyone trying to access it would be seen by the Branch Manager through the glass window. It was also the view of the Counsel for the Appellants that PW2 who claimed to have read the letter, could not have manage to cover the whole 2 paged in "2 or 3 seconds". In addition, it was contended that the said PW2 being a cashier or teller was a cubical officer, was unauthorized to read the letter as she was not unconcerned with it, she accessed and read the letter in breach of her duty, an act which does not amount to publication. They supported their position with Common Law cases including the case of **Huth vs. Huth** (1915) 3 KB 32 where it was held that accessibility to letter in breach of duty does not amount to publication. The Appellants, basing on the authority in the above cited case, were of the views that there could be publication, if say, the letter in issue was read by a clerk or secretary. Since there is no such evidence then, there is no proof of publication.

Further in their attempt to lower the weight of PW2 evidence, the Appellants discredited her testimony on allegations that at the time of

testifying she was fired by the KCB and that she was a friend of the Respondent, therefore her testimony was unreliable.

On the other hand, the Counsel for the Respondent submitted that the evidence on record reveal that there was publication and that on the issue of privileged communication, the Court should find that the same is not available because the evidence does not support it. It was the contention by the Counsel for the Respondent that the evidence proving publication of the letter in issue includes the evidence that it was typed by a secretary, it was copied to the Human Resource at Head Office and the same was read by PW2 and the Branch Manager in Arusha. The attacks on evidence by PW2 that she was fired by KCB and that she was a friend of the Respondent are unfounded.

I have pondered the submissions by both sides on this issue and I agree with the Appellants that, for defamation to be established, there must be proof of publication i.e. communication of the defamatory materials to at least one person other than the plaintiff, such other person is, in legal language termed as a 'third party'.

In this case it is common ground that the 2nd Appellant wrote the letter dated 01/03/2005. That it was the 2nd Appellant who faxed the letter to Arusha KCB Branch. It is not disputed either that the letter was received at Arusha through a fax which was fixed at a room used by the secretary to the Branch Manager.

The parties differ on whose hands the letter did land.

The Respondents led evidence that the letter was accessed by PW2 who was at that room processing some data PW2 read it and knew that the Respondent was accused of fraudulent claiming money from the Appellants to the tune of Tshs. 1,400,000/= and he was required not only to recover the same but also to show cause why should not disciplinary action be taken against him.

The Appellant refute this evidence saying that safeguards were taken to prevent it from falling into third parties' hands by telephone conversations after sending it, but there is no evidence to prove this. Moreover, the Appellants concentrated at attempt to lower the weight of PW2 evidence arguing that: -

i. It was not possible for anyone to read it because the fax machine was fixed at a front room to the Branch Manager as such anyone trying to access it would be seen by the Branch Manager through the glass window. This is more imaginary than evidence, I say so because no witness testified on this, neither the Branch manager nor the Secretary testified to substantiate this contention by the Appellants. It was the Appellants' duty to support their contention with evidence).

ii. PW2 could not have managed to cover the whole 2 paged in 2 or 3 seconds. This Court finds that such a statement was just an estimation of time. Her testimony was to the effect that she managed to read the letter as she had ample time doing data compilation on the same desk where the fax arrived. Mentioning of 2 or 3 seconds was just an estimation which in real sense it cannot be an actuality because in common sense two seconds is a mere blink of an eye. This Court believes into her testimony.

iii. There could have been publication, if the said letter was read by a clerk or secretary not by a cashier, this Court finds no difference, since both are third parties to the communication.

iv. At the time of testifying she was fire by the KCB and that she was a friend of the Respondent, therefore her testimony was unreliable, this Court finds that these are not grounds to disbelieve the testimony of a witness. It is trite law that every witness is entitled to credence and must be believed and his or her testimony accepted unless there are good and cogent reasons for not believing a witness. See the case of **Goodluck Kyando vs. Republic**, Criminal Appeal No. 118 of 2006 (unreported);

v. The Common Law case of **Huth vs. Huth** (1915) 3 KB 32 PW2 that there is no publication where an unauthorized third-party gains accesses and reads defamatory materials in breach of his or her duty, is distinguishable in the case in hand because PW2 was authorized to use the room in which the fax was fixed. She was not a trespasser in that room. She was doing data compilation, the duty of the Bank. The letter also was not marked as confidential.

vi. The letter was published to staff within the Bank, this contention is unfound because the status of the Respondent was ultimately

affected due to leakage of the contents of the letter after been revealed to persons other than himself.

On the other hand the Respondent contended that the letter in issue was published to other persons because it was copied to the Human Resources at the Head Office of KCB, it is true as Exhibit PIV speaks itself, however there is no evidence that the same did ever reach its destination this is because it only shows that it was copied but there is no evidence, that it reached the destination. The Respondents also contended that the letter was typed by a Secretary of the Appellants; this Court has been unable to find such evidence on record.

All in all, when put on a weighing machine, the evidence of the Respondent is heavier revealing that there was publication as the defamatory information leaked to PW2, a third party an act which constitutes a tortious wrong termed as defamation.

This Court is satisfied that the evidence established publication of the defamatory letter dated 01/03/2005; and the learned trial magistrate was correct in holding that the Respondent was defamed via letter dated 01/03/2005. Ground 3 and 14 have no merit.

This brings me to **ground 4** that whether the defence of privilege or justification of communication or publication is availed to the Appellants.

The Appellants did not submit much on this issue other than attacking part of the judgement of the trial court where it answered issue number two in affirmative. The Appellants contend that once the trial court affirmed issued number two, then the Appellants were not liable because issue number two states that whether the publication was privileged and or justified.

The challenged part of the judgement is on page 14 at paragraph 3 which reads as follows: -

> *"From the overview narrated above I agree with the Counsel for the Plaintiff that the Defendants has no right lien (sic) but unlawfully dishonoured the plaintiff's cheque and unlawfully froze his account. This answers issues number three and four in affirmative* ***as the issue number one and two answered together affirmative*** *above."*

I think this contention is not true and tries to confuse this Court. I say so because if one reads the flow of the judgement, the trial magistrate immediately before writing the impugned part, it is made clear that the trial

magistrate was supporting the submissions of the plaintiff in respect of the publication of the defamatory letter as been unjustified. She wrote in paragraph one of the same page 14 as follows: -

> *"So the allegation of that (sic) the Plaintiff's had defrauded Bank (sic) was not true. According to the evidence laid down from the plaintiff's case, it cannot be disputed that there is the defamation on exhibit PIV with reasons that, the written letter Exhibit IV at part 3 of page two was defamatory and it refer (sic) directly to the plaintiff and it was published and communicated to another person as PW2 testified. And that Exhibit IV was written maliciously without justification."*

The totality of these words can be summarized that the trial magistrate was satisfied that the contents of Paragraph 3 of the letter, Exhibit PIV, that the Plaintiff's had defrauded the Bank were not true, it was defamatory and the same was published to third parties without justification.

It is a firm opinion of this Court that the trial magistrate, having the issue number one answered in affirmative, then with all those elaborations in paragraph one of page 14 of the judgement, the same trial magistrate also found that the publication was unjustified, the word 'affirmative'

written on the impugned paragraph 3 is alien to the flow of the judgement and this Court finds it a merely slip of a pen. The finding on un-justification of the publication was already made by the trial court before the impugned summary. Ground 4 has no merit.

Having determined grounds 3 and 4, the next question is who is liable with the defamation. This takes me to the complaint in grounds 1 and 2 of the appeal.

Admittedly, the cause of action in this matter is based on three conducts namely, defamation, freezing of the account of the Respondent and dishonor of a cheque drawn by the Respondent.

It is the submissions by the Appellant that the Appellants pleaded in their written statement of defence (pleadings) the issue of the 1st Appellant none liability. He pointed out the relevant paragraphs as being 8, 9, 13, 14 and 15 of the written statement of defence.

Moreover, it was contended for the Appellants that the evidence does not show that the 1st Appellant was involved in committing the acts which led

to the three causes of action in this matter namely, defamation, freezing of the account of the Respondent and dishonor of a cheque drawn by the Respondent. It is their contentions further that the acts were perpetrated by the 2nd Appellant; the 1st Appellant is not liable either in his personal or official capacity. They concluded that: -

> *"We agree a company like Kenya Commercial Bank (T) Ltd might be held liable for a tort committed by its employees because it is a* ***distinct legal entity having its existence independent of its members and officers.***"

It is the views of the Appellants that a managing director of a company is a mere employee of that company and the company and its managing director are separate entities. In order to imply vicarious liability the company has to be sued also. He cited a number of persuasive Common law cases.

On the other hand the Respondent Counsel argued that it was the office of the Managing Director which was impleaded not the person holding that office, there is a distinction between the Office of the Managing Director and the person holding that office. That the person

holding the Office of the Managing Director is the employee but the office of the Managing Director is the Company itself. It is the views of the Respondent that since they sued the Managing Director, Kenya Commercial Bank (T) Ltd, they sued the Bank itself, in other words, the term "the Managing Director, Kenya Commercial Bank (T) Ltd", means the Bank not the individual person holding that office. It was contended for the Respondent that pursuant to the provisions of section 181 of the Companies Act, [Cap. 212 R. E. 2002] the company acts through her directors and the acts of the directors under their official capacity are acts of a company itself.

The testimony of PW1 (Respondent) shows that it was the 2nd Appellant who wrote the defamatory letter dated 01/03/2005 and froze his bank account, the 2nd Appellant conceded in his testimony that he did all that on behalf of the Bank, but tried to justify that the transaction was suspicion one. Equally it is revealed by the evidence and as conceded by the Respondent that, it was the 2nd Appellant who received the quotations and, according to Exhibit PV, he is the one who forwarded the quotations to the Head Office and hence, caused the payments to the transporter to be effected. He is the one who wrote the defamatory letter dated

01/03/2005 and he is the one who dishonoured the cheque and also froze the bank account of the Respondent.

This court has visited the written statement of defence filed by the Appellants and found that, although not directly stated so, the totality of the averments in paragraphs 8, 9, 13, 14 and 15 show that there was pleading to the effect that the 1st Appellant is not liable. From this revelation by the evidence, this court is in agreement with the submissions by the Appellants that the 1st Appellant is not personally touched by the evidence, but I am not in agreement with them on his liability by virtue of his position as a Managing Director of Kenya Commercial Bank (T) Ltd as I will explain below.

Now, the next mini question here is whether or not the Kenya Commercial Bank (T) Ltd is vicariously liable from the defamatory conducts of the Appellants.

Vicarious liability is defined as the liability of one person for the acts of another. And the most commonly found category of vicarious liability is within the employer-employee relationship, where the employer is

vicariously liable for torts wrongs committed by the employee in the course of his or her employment.

In this case at hand, the 2nd Appellant was the employee of the Kenya Commercial Bank (T) Ltd, he conceded to have committed the tort wrongs stated above, and he committed the same in the course of his employment. The 2nd Appellant was responsible to the 1st Appellant; hence the 1st Appellant was also liable by virtue of his position as Managing Director of Kenya Commercial Bank (T) Ltd.

The Appellants raised a legal issue that Kenya Commercial Bank (T) Ltd was not made a party to the case. The Respondent contend that since they sued the Managing Director, Kenya Commercial Bank (T) Ltd, they sued the Bank itself, in other words, the term "the Managing Director, Kenya Commercial Bank (T) Ltd", means the Bank not the individual person holding that office.

I think the Respondent is right. I say so because, had the Respondent intended to sue the Managing Director in person, he could have done by suing him in his personal capacity by his name, not the title. Moreover as

rightly submitted by the Respondent's Counsel, pursuant to the provisions of section 181 of the Companies Act, companies do act through their directors. The 1st Appellant was a director; he is covered by the law.

It follows therefore that, Kenya Commercial Bank (T) Ltd is liable for the tort of defamation committed by her employee, the 2nd Appellant. Grounds 3, 4 and 14 have no merit.

This takes me to grounds 5 and 6 of the appeal where the Appellants contend that the acts of freezing of the Respondent's bank account and dishonoring of the cheque were done by Godfrey Joseph, the Operations Manager of the Kenya Commercial Bank (T) Ltd who was not sued. Therefore it was not liability.

The Counsel for the Respondent argued condemning the Appellants generally that they are the keepers of the bank account of the Respondent. Therefore they denied him of his rights to use his bank account as a bank's customer without justification.

This Court has followed the rival argument by the parties on this issue and visited the evidence on record, it is in agreement with the Respondent that the freezing of the account and dishonouring of the cheque was done by the Bank on advise by the Appellants. In his testimony, the 2nd Appellant stated at page 34 of the proceedings that: -

> *The Operation Manager, Godfrey Joseph, was one of the top boss here in Mwanza and the overall top boss in Mwanza was myself and 1st Defendant.*

On page 38 the 2nd Appellant testified that: -

> *"In our view the transaction which [was] done by the plaintiff was suspicious ..... the Bank decided to restrict the bank account of the plaintiff. ..... The cheque was dishounoured because the account was restricted"*

This Court is of the firm views that from these statements of the 2nd Appellant, the bank account of the Respondent was froze and the Cheque dishonoured by the Bank after advice by the 2nd Appellant and the bank actors were the Appellants and the said Godrey Joseph. Since the freezing of the bank account was a result of the accusations against the Respondent of fraudulent claim of money for transportation of personal

effects; the accusations which have been held to be untrue and defamatory, then it follows that the freezing of the bank account and subsequent dishonor of the cheque were also unjustified, hence unlawful. Grounds 5 and 6 of the appeal have no merit.

Ground number 7 deals with a legal issue, I will come to it at a later moment, right now let me go to grounds 8, 9 and 10 which blame the trial Resident Magistrate on considering and determining issues related to the legality of the Respondent's termination from employment which were never pleaded and prayed for by the Respondent and extraneous matters.

The Appellants argued shortly that termination from employment was not among issues pleaded by the Respondent. The Respondent did not address these grounds at all. This Court takes it that the Respondent does not contest the issues raised in these grounds.

I think the Respondent did not contest these grounds for obvious reasons. The issues neither relates to defamation nor damages. The termination of the Respondent was carried out four months later in July, 2005 for quite different grounds from the one that gave rise to this matter.

The allegations were of dishonest by transferring some money from one customer into another's customer bank accounts without authorization. This Court is at par with the Appellants that those were irrelevant and extraneous issues. However, this error by the trial magistrate did not affect the liability on defamation as found above. Grounds 8, 9 and 10 have no merit.

The Appellant argued ground 11 separately from grounds 12 and 13 which were argued together. I think both grounds 11, 12 and 13 concern one complaint that the trial magistrate erred in granting damages to tune of Tshs. 80,000,000/= without supporting evidence. Moreover, the Appellants argued that the trial magistrate took into consideration of termination of Respondent from employment, which was irrelevant.

The Appellant contend that the trial Magistratre went wrong on charging too high damages while the circumstances were not guaranteeing the same for the reasons that the trial Court had already found that the defamatory publication did not spread too much and that it based on speculation that his profession was in jeopardy, and that he would never be employed. They cited the case of **Henry Hidaya Ilanga vs.**

Manyema Manyoka [1961] EA 705 which laid down the basis for an appellate court to interfere with the quantum of damages where that the trial court applied wrong principle by taking into account irrelevant factor or leaving out relevant one or amount awarded is too high.

The Respondent's Council treated grounds 8, 9 and 10 as if they deal with issues of damages. In fact those grounds of appeal don't deal with issue of assessment of general damages, instead, they deal with complaint on taking up irrelevant extraneous and labour matters.

The Respondent's Counsel argued that in awarding damages, the court has to look at the extent of injury suffered by the plaintiff, he relied on the case of **Prof. Ibrahim Lipumba vs. Zuberi Juma Mzee**, Civil Appeal No. 92 of 1998 (unreported) where the Court of Appeal insisted that reputation is an integral and important part of dignity of a person which can be injured.

He also cited the case of **Tanganyika Standard (N) Ltd and Another vs. Rugarabamu Archard Mwombeki** [1987] TLR 40 where

the Court of Appeal directed courts to take into consideration the extent of spread of the publication of the defamatory materials.

In the first place this Court agrees with the line of authorities in the cases cited by the parties. In this case, the trial magistrate took note that there was no wide spread of publication of the defamation. However, as seen above he took into consideration irrelevant factors of loosing employment and failure to secure job in future by the Respondent. Evidence reveals that the Respondent was still at his work by the time the defamatory letter was published on 01/03/2005. He became sacked from employment in July of that year for a completely different matter. There is no evidence which relates the letter dated 01/03/2021 with the acts that led to dismissal of the Respondent in July, 2005.

The Respondent prayed for general damages of Tshs. 99,800,000/=, the trial magistrate awarded Tshs. 80,000,000/=. This was the year 2008.

The Appellants contend that the Respondent is not entitled to any damages because he was a junior staff, the bounced cheque was drawn by

him and that he did not lose any business because he was not a businessman.

The Counsel for the Respondent contend that by any means the Respondent's reputation was jeopardized by the defamation publication, the trial magistrate lowered the damages from Tshs. 99,800,000/= to 80,000,000/= after taking into account relevant factors including loss of trust in the Respondent by other future employment and that the defamation was done with intention for profit because the act of freezing the Respondent's bank account was to secure recovery of money paid to the transporter. This act was oppression upon the Respondent, the same should not be lowered.

It is trite law that the purpose of general damages is to give reparation the injured party and the quantification is the duty of the court. In the case of **Said Kibwana and Another vs. Rose Jumbe** [1993] TLR 175 it was held that;

> *"A plaintiff should only ask for damages and leave the quantification to the Court. The Court determines how much damages are due be it in the contract or tort, which so far as money can compensate, will give the injured party reparation*

for the wrongful act and for all the natural and direct consequences of the wrongful act."

The power of the court to review awards of damages on the ground that they are too high or too low is limited. How are they so limited, the court of Appeal in the case of **Prof. Ibrahim H. Lipumba vs. Zuberi Juma Mzee,** Civil Appeal No. 92 of 1998, held that:-

"The power of the Court to review awards of damages on the ground either that they are too high ot too low are limited. It must be shown that the trial judge arrived at his figure by applying a wrong principle or through a misapprehension of facts or for some other reason to have made wholly erroneous estimate of the damage suffered."

In this appeal, the trial court when assessing the quantum of damages said:-

"In the result, from the entire record, I think the award of Tshs. 99,800,000/= as general damages was (sic) on the high side. So on these circumstances, I have no any other relief to the parties rather than to substitute the figure for award to the plaintiff at Tshs. 80,000,000/=."

As gleaned from the quotation, there were no reasons why the figure of Tshs. 99,800,000/= was rejected for been too high and why it was lowered by Tshs. 19,800,000/= to Tshs. 80,000,000/=.

The issues of loss of future employment by the Respondent were rather speculative than real. The evidence do not show that the defamation was intentional for making profit by the Bank.

In this case, as shown above, it was a true finding of the trial court, a position which this court admits that, there were no wide spread publication, however, on the other hand, it is mundane truth that the Respondent suffered some personal reputation injury.

To strike a balance, this Court finds that, the general damages assessed and awarded was too high in the circumstances at the time of assessment in 2008. However taking into the account the depreciation of the shilling and inflation that has hit the Shilling all over the time of twelve years since 2008 to date this Court finds no reasons of interfering the figure of Tshs. 80,000,000/=.

The Appellants in ground 7 raised an issue on point of law claiming that Exhibit PV was illegally admitted in evidence because the notice to produce it was issued under a wrong provision of the law. It was argued that the notice to produce the documents was given under Order XI rule 13 of the Civil Procedure Code (CPC) which provides for production of documents mentioned in the pleadings of a party but that party fails to produce them. The adverse party may issue a notice to produce the said documents. In this case, it was submitted that the Appellants did not mention Exhibit PV in their pleadings; therefore it was wrong for the trial court to admit the document for want of proper notice.

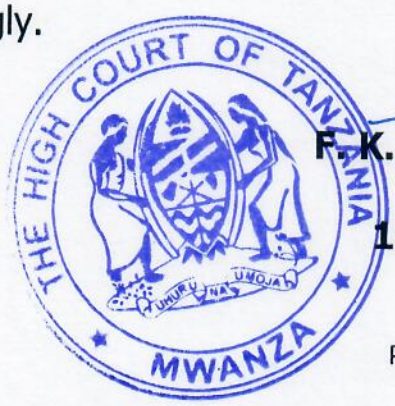
The Respondent argued that it was proper in law for the trial court to admit Exhibit P in evidence because the original was given under Section 68 of the Evidence Act.

This Court have explored the record of this appeal and found that as a matter of fact on 16/05/2006, the trial court admitted into evidence Exhibit PV after overruling an objection on point of law that the notice to produce it was issued under a wrong provision of the law. The ground for admission thereof was that the notice for their production under Section 68 of the

Evidence Act, which is applicable for admissibility of secondary documents, sufficed.

This Court has considered the rival arguments by both sides on this issue and thoroughly examined the record of this appeal, it is in agreement with the Respondent that Exhibit PV is admissible in evidence. The notice to produce secondary evidence, of which originals were in hands of the Appellants, was given under section 68 of the Evidence Act. Even if the Appellants did not mention those documents in the plaint, by the nature of the case and the pleadings which shows the relevance of the Exhibit PV, it is the firm opinion of this Court that the Appellants were not prejudiced in any way. The trial court rightly overruled the objection. Ground 7 has no merit.

In the upshot, and for reasons stated above, I find that the appeal has no merit. I do hereby dismiss the appeal in its entirety with costs. Order accordingly.



F. K. MANYANDA
JUDGE
16/03/2021