

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL No. 2 OF 2020

(Originating from Resident Magistrate's Court Civil Case No. 28 of 2018)

SIMON SOKA NYANGACHANI APPELLANT

VERSUS

CHARLES J. NGENDO 1st RESPONDENT

THE TRUSTEES OF THE TANZANIA

NATIONAL PARKS 2nd RESPONDENT

29th April & 28th May, 2021

JUDGMENT

MKAPA, J.

The instant appeal is against the decision of the Resident Magistrates' Court of Moshi (trial court) in **Civil Case No. 28 of 2018** delivered on 17th August, 2020 (B.T. Maziku).

Briefly, the relevant facts leading to this appeal are that, in 2018 the appellant filed **Civil Case No. 28 of 2018** claiming against the 1st and 2nd respondents for payment of shillings Seventy Five Thousand Million (Tshs 75,000,000/=) being damages for defamation. It was alleged by the appellant that while working as deputy secretary with the Kilimanjaro Potters Association, on the 1st February 2018, the 1st respondent who was chief warden at Kilimanjaro National Park wrote a letter to the Kilimanjaro



Porters Association Reference No. BA.88/179/01 allegedly containing words which were defamatory in nature to the effect that, the appellant in the present case was a thief after he had misappropriated association's funds. The trial court dismissed the case for want of merit hence this appeal comprising the followings grounds;

1. That, the trial court magistrate erred in law and fact in failing to evaluate prosecution evidence against defence case.
2. That, the trial magistrate erred in law and fact in failing to note that the letter written by the 1st respondent did not relate to the alleged complaints by the porters.
3. That, the trial magistrate erred in law and fact in not considering overwhelming evidence by the plaintiff instead considered weak defence evidence tainted with contradictions.
4. That, the trial magistrate failed to take note that no member of the Kilimanjaro Porters Association was summoned as defence witness.

When the matter was called for hearing the Court ordered the appeal to be disposed of by way of filing written submissions and parties complied by filling the same timely. No rejoinder was preferred. The appellant appeared in person unrepresented



while the respondents were jointly represented by Mr. George Dalali, learned advocate.

Supporting the appeal the appellant firstly abandoned the 3rd ground of appeal and proceeded to argue the remaining grounds. On the 1st ground, the appellant submitted that, the trial magistrate disregarded the letter that was submitted by the appellant in his plaint on the ground that the same was not tendered in court as evidence. He argued that the fact that the 1st respondent in his defence admitted to have written the said letter the trial court ought to have applied the overriding objective principle to cure the omission.

As to the 2nd ground the appellant contended that the 1st respondent wrote the said letter after he had received complaints from the porters complaining about the alleged theft and misappropriation of funds. It was the appellant's view that the 1st defendant's testimony on the said letter was a hearsay since he testified on what he heard from the porters while none of them was summoned before the trial court as witness.

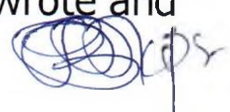
Submitting on the 4th ground the appellant averred that, DW1's testimony as member of Kilimanjaro Porters Association was not credible as he wasn't sure whether the appellant actually misappropriated the Association's fund until he heard the rumours. It was the appellant's view that DW1's testimony did

not deserve credence so was that of DW3 who testified the fact that he just heard about the misappropriation hence his testimony was as good as a hearsay. He finally prayed for this Court to quash and set aside the trial court's decision and decree and allow the appeal with costs.

Refuting the appeal Mr. Dalali first submitted on the 4th ground on the allegations that no porter was summoned to testify, as baseless since it was on record that defence witness (DW1,) was a porter with the Kilimanjaro Porter's association. He went on explaining that it was clear from the records that that DW1 did actually testify before the trial court and identified the appellant as Mr. Soka who was present on 15th January 2018 at Machame gate when the scuffle ensued.

Furthering his argument the learned counsel argued that DW1's testimony as a porter at Kilimanjaro Porters Association was corroborated by DW2 and DW4 testimonies thus he prayed for this ground of appeal to be dismissed.

As regards the 1st and 2nd grounds of appeal, Mr. Dalali submitted that, reading from the facts stated in the plaint and examining the evidence adduced before the trial court, it was crystal clear that the foundation of the appellant's claims against the respondents were based on the allegations that the 1st respondent who is an employee of the 2nd respondent wrote and



published a letter which contained defamatory words against the appellant. The learned counsel elaborated further that the appellant's cause of action against the respondents arose from tort of **defamation** predominantly "**libel**". He placed reliance on section 38 of **the Newspaper Act**, Cap 229 [R.E 2002] which defines "**Libel**" as;

Any person who, by print, writing, printing, effigy or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, shall be guilty of the offence termed "libel".

Based on the above legal provision, Mr. Dalali cited the Court of Appeal decision in **Professor Ibrahim H. Lipumba V Zuberi Juma Mzee**, 2004 TLR p. 381 in which the Court observed;

A libel is a defamatory imputation made in permanent form, such as in writing while slander is a defamatory imputation made in a fugitive form such as by speaking or gestures.

In light of the foregoing, Mr. Dalali averred that the question for determination by the court is whether according to the evidence adduced before the trial court, the appellant did prove the tort of libel. It was Mr. Dalali's contention that the appellant failed to



prove the same. To support his contention he referred section 40 (1) of the Newspaper Act which defines publication of libel as hereunder;

A person publishes a libel if he causes the print, writing, painting, effigy or other means by which the defamatory matter is conveyed, to be dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, so that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person.

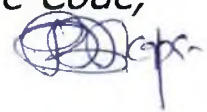
Taking note of the above provision, it was Mr. Dalalali's view that the respondents neither made nor published any statement against the appellant, That, until the case was finally determined by the trial court the appellant failed to tender the letter which alleged to have contained words which were defamatory in nature thus, failed to prove his allegations to the required standard under section 110,111 and 112 of the Evidence Act, Cap 6 [R.E 2019]

Mr. Dalali averred further that, the letter which had been annexed to the plaint as **Annexture S1** was not tendered in court in order to form part of the proceedings or court records. To support his contention he relied on the case of **Puma Energy**

Tanzania Ltd V. Spec – check Enterprises Ltd, Commercial Case No. 19 of 2014, High Court of Tanzania at Dar es salaam where Mwambelege, J. (as he then was) held that;

*"It is settled law in this jurisdiction that annextures, unless admitted in evidence, are not part of evidence - see: **Abdallah Abass Najim Vs Amin Ahmad Ali** [2006] TLR 55, **Japan International Cooperation Agency (JICA) Vs Khaki Complex Limited**, Civil Appeal No. 107 of 2004 (CAT unreported), **Mohamed A. Issa Vs John Machela**, Civil Appeal No. 55 of 2013 (CAT unreported), and **Shemsa Khalifa And Two Others Vs Suleman Hamed Abdalla**, Civil Appeal No. 82 of 2012 (CAT unreported).*

Furthering his contention he referred the decision in **Japan International Cooperation Agency**, where the Court of Appeal quoted with approval the decision of the High Court of India of **S. M James and another Vs Dr. Abdul Khair**, AIR 1961 p. 242 also quoted with approval in **Puma Energy Tanzania Ltd** cited supra whereby the Indian Court construed Order XIII rule 7 of the Indian Civil procedure Code,



which is in pari materia with our Order XIII Rule 7 (1) and (2) of our CPC, in which it was held;

*"From Rule 7 above quoted, it is plain that documents admitted in evidence are the only documents that can legally be on the record; and, other documents cannot be on record of the suit. The language of Rule 7 shows that the document must be either placed on the record or returned to the person producing it. There is no alternative. Rule 7 (2) is explicit, and therefore, **a document not having been admitted in evidence, cannot be treated as forming part of 'the record of the suit' even though, in fact, it is found amongst the papers of the record.**" [Emphasis supplied].*

From the foregoing legal authorities, it was Mr. Dalali's argument that the appellant failed to prove the tort of defamation (libel) in written form, as **Annexure S1** (the alleged letter) was not admitted into evidence. He prayed for the 1st, 2nd and 3rd grounds of Appeal be dismissed by this Court for want of merit.

Additionally, Mr. Dalali challenged the Appellant for failure to prove the claimed compensation of shillings Seventy Five Million



(Tshs. 75,000,000/=) as special damages that accrued from his cause of action. The learned Counsel reiterated the well established principle of law that special damages must be specifically pleaded and proved of which the Appellant failed prove. To support his argument he referred the decision in the case of **Stanbic Bank Tanzania Limited Versus Abercrombie & Kent (T) Limited** Civil Appeal No. 21 of 2001 where Court of Appeal observed;

*"The law is that special damages must be proved specifically and strictly. Lord Macnaghten in **Bolag v Hutchison [1950] A.C. 515** at page 525 - laid down what we accept as the correct statement of the law that special damages are:-*

... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly."

Mr. Dalali finally prayed for the Court to dismiss this appeal with costs.

Having considered parties submissions and gone through the trial court's records, before indulging in determining the merits and demerits of this appeal, I find it necessary at the outset to



reiterate the well established principle related to documentary evidence whenever it is intended to be introduced in evidence and form part of the suit that, must first be cleared for admission before being admitted into evidence.

In the instant appeal it is sufficiently established that, Annexure S1 (the letter which is the foundation of this Appeal) alleged to contain words which were defamatory in nature, was not admitted into evidence even though was found among the records attached to the documents of the court (the plaint). It is on trial court's record that during the trial, PW1 and PW2 testified on the said annexure without first producing and tendering it for admission into evidence. Given the circumstances my view is, the omission vitiated the whole proceedings. In the case of **Robinson Mwanjisi and 3 Others v. Republic** [2003] TLR 218 at page 226, the Court of Appeal observed the following;

*"Where it is intended to introduce any document in evidence, it should first be cleared for admission, **and be actually admitted** ... "[Emphasis added].*

A reading of the above authority, it clearly lay down the procedure for admitting a document into evidence.

On the other hand in his submission the appellant has urged the Court to invoke the principle of Overriding Objective in order to cure the said omission. However, my answer is emphatically in

the negative. I hold so because much as the said principle urges Courts to exonerate from legal technicalities and have regard to substantive justice, the Overriding Objective Principle cannot be applied blindly against mandatory provisions of the procedural law as was held by the Court of Appeal in its decision in **Mandorosi Village Council and 2 Others, Civil Appeal No 66 of 2017** where the Court held;

"Regarding the overriding objective principle we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case"

On the basis of the foregoing analysis, I found no ground to fault the trial court's decision. Accordingly, the decision of the trial court is upheld consequently, the appeal is hereby dismissed.

Dated and delivered at Moshi this, 28th May, 2021.




S.B. MKAPA
JUDGE
28/05/2021