

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY**

AT MWANZA

HIGH COURT CIVIL APPEAL No. 40 OF 2018

**(Arising from Civil Case No. 22 of 2016 before the Resident
Magistrates Court of Mwanza)**

ATHUMAN NYENGE1ST APPELLANT
NNAJUMU RAMADHAN.....2ND APPELLANT
MFAUME YASIN.....3RD APPELLANT
HASHIM MRUNGU.....4TH APPELLANT
RAMADHAN MUHSYA.....5TH APPELLANT
RAMADHAN MAJID.....6TH APPELLANT

VERSUS


MUSSA MAKKA1ST RESPONDENT
REGISTERED TRUSTEE OF BARAZA KUU
LA WAISLAAM TANZANIA & ANOTHER.....2ND RESPONDENT

JUDGMENT

12th & 28th May 2021

TIGANGA, J.

The appellants herein filed a suit before the Resident Magistrates Court of Mwanza against the respondents in which the appellants were claiming damages for defamation. The basis of their claim was, according to the plaint, the defamatory letter that was written by the employee of the second defendant to the District Commissioner of



Ukerewe District naming the appellants jointly and severally to be terrorists and members of Islamic States, a fact which was fabricated.

The said letter also communicated to the District Commissioner that, the appellants were calling themselves members of Islamic States and were the source of the innermost part of the violence and unrest which is said to have occurred on 04/03/2016 at Nansio.

They claimed also that the said letter was read before all Muslims in all mosques in Nansio and due to that the appellants' reputation was lowered, they suffered psychological and mental anguish as all members of the society believed them to be bad people and terrorists.

After full trial, the court found the appellants' case not proved to the required standard and so the same was dismissed. The appellants were aggrieved and decided to appeal before this court, their grounds of appeal being that;

1. That the Honourable trial Magistrate grossly erred in law and fact for failure to observe that the appellants had been defamed.
2. That the Honourable trial Magistrate grossly erred in law and fact for failure to find that the appellants' evidence was more watertight than the respondents' evidence.



3. That the Honourable trial Magistrate grossly erred in law and fact for not evaluating evidence adduced to the required standard which could have shown that the respondents' evidence was tainted with contradictions.
4. That the Honourable trial Magistrate grossly erred in law and fact for not observing that the respondent had admitted that they had named the appellants as members of Islamic state.

The hearing of this appeal was done by written submissions and in support of the appeal, Mr. Julius Mushobozi, learned counsel who represented the appellants made his submission by first praying to consolidate the grounds into one which reads; "The Honourable Court grossly erred in law and fact for failure to observe that the appellants had been defamed by the respondents."

In support of that ground, he submitted that, the appellants were defamed by the respondents twice as seen in the 6th to 12th paragraphs of the plaint. He said that the appellants were defamed both through word of mouth (slander) and in writings (libel).

As to what needs to be proved in order to succeed in the tort of defamation, the counsel cited the case of **Meneja Mkuu Zanzi Resort Hotel vs Ali Said Paramana**, Civil Appeal No. 296 of 2019, CAT



(unreported) in which it was stated that first, the words must be defamatory, two, they must be referring to the claimant, three, there must be publication i.e. communication to a third party.

The onus will then shift to the defendant to prove that the said words are true or that he had justification, or it was a fair comment on matters of public interest, or the statement was made on the matter of privileged occasion, or an international defamation, or that there was consent of the complainant.

Mr. Mushobozi, went on to submit that, the respondents named the appellants as members of Islamic state, but later vacated that notion meaning that the statement was false and that no justification was made to warrant the statement made by the respondents. According to him, the statement was malicious which was intended to lower the reputation of the appellants. He concluded that the Magistrate failed to observe that the evidence by the appellants was heavier than that of the respondents therefore basing on the principle in the case of **Ibrahim H. Lipumba vs. Zuberi Juma Mzee**, [2004] TLR 381 they are entitled to compensation.

For the respondents, Mr. Steven Mkwega, learned counsel, while responding in opposition of the grounds of appeal, he submitted that,



the substance of this appeal is in the purported defamatory letter that was said to have been prepared by the 1st respondent and called upon this court to see whether the said letter contained any defamatory words and whether at the time of writing that letter the 1st respondent had an evil mind of defaming the appellants.

He argued that going through the evidence of DW1 to DW4, it can be found that, the same proved that, on 4/3/2016 there was indeed a breach of peace at the Masjid Ijumaa following the introduction of a new Assistant District Sheikh as was directed by BAKWATA, the second respondent herein, which act was strongly opposed by the appellants thus leading to the said commotion.

According to him, that was when, the 1st respondent as the Secretary of BAKWATA stationed at Ukerewe decided to report the matter to the District Commissioner of Ukerewe as the proper authority.

He submitted further that in the letter to the District Commissioner, the author did not refer to the appellants as members of Islamic states rather he stated that the appellants were calling themselves Islamic States. He went further and submitted that, when he questioned if the word "Islamic states" is in itself defamatory, the answer to that was that, it was not.



Regarding the term "terrorists", the counsel stated that nowhere the respondents referred to the appellants as terrorists and nor was it contained in the letter complained of.

Insisting on what should be proved for the tort of defamation to succeed, the counsel also cited the case of **Prof. Ibrahim Haruna Lipumba vs. Zuberi Juma Mzee** [2004] TLR page 381 and stated that the appellants case lack the essential ingredients for the tort of defamation to stand, as the 1st respondent's communication to the District Commission of Ukerewe was made bonafidly and without any ill will. Therefore basing on the principle in the case of **Athuman Khalfan vs. Jonathan** [1983] TLR page 6., the counsel said, it was a privileged communication to the proper authority.

Lastly, Mr. Makwega invited this court to look at the principle of the effect of the said communication in the mind of a reasonable man in the community where the appellants belong, as was articulated in the case of **Said Ally Maswanya vs. African Buyer and Trader Publications Ltd & Others** [1981] TLR 221, and see, that the appellants were not defamed in any way, thus the appeal is devoid of merits so he asked that it be dismissed with costs.



In their rejoinder, the learned counsel for the appellants submitted that, the statement that they were calling themselves Islamic states was not justified by the respondents. Thus, it was not true that, the appellants were calling themselves Islamic State, but it was the respondents who contended so. According to him, that is the reason as to why the respondents had to withdraw the notion because it was false.

He stated further that the term "terrorists" is indicated by the nature of acts, the purpose and the end result as shown in the letters i.e. exhibits P1 and P2. He insisted that there was no evidence to warrant the respondents to call the appellants members of Islamic State and that it was done by ill will and was not privileged.

Lastly, the counsel argued that, the letter and clarifications that the appellants were terrorists, violent and peace breachers were explained in the Mosque and before the District Defence and Security Committee, so counsel prayed that the appeal be allowed with costs.

Having taken into account the raised ground of appeal, the submission by the learned counsel for the parties and the records thereof, I find it important for the better understanding of the concept and the matter at hand, to look at the meaning of the term

"defamation". In **Black Law Dictionary 2004**, 8th edition at page 1260, the term means defamation means;

"The act of harming the reputation of another by making a false statement to a third person"

In the case of **Hamis vs. Akilimali** (1971) HCD 111 it was defined as;

"..communicating to the mind of another, matters which are untrue and likely in the cause of things substantively to disparage the reputation of the third person"

To establish prima facie defamation, a plaintiff must prove the following essential elements, **first**, that the statement complained of was defamatory, **second**, that it was published, **third**, that it was false, **fourth**, that the statement was injurious to the appellant's reputation, and **fifth**, that the statement was unprivileged.

In proving whether or not the ground of appeal has merits, the first thing that needs to be proved is, whether the statement contained in the letter complained of was in itself defamatory. In doing this, I would first wish to state that for the tort of defamation to stand, the

words complained of must be strictly interpreted and must within their meaning be defamatory.

Now looking at exhibit P1, the letter which is the center of the suit before the trial court and this appeal, the word through which the appellants claimed to have been defamed is "Islamic states"

In the plaint, the appellants (then plaintiffs) averred that the respondents in the letter named them as "terrorists" and "members of Islamic states". However, going through the said letter nowhere is it shown that the respondents referred the appellants as terrorists or members of Islamic States. What was written in the letter was that the appellants were calling themselves Islamic states.

As already stated before, the words that are complained to be defamatory must be strictly interpreted and be seen as defamatory within that strict meaning. Looking at the word "Islamic states" or "a member of Islamic states" and giving it its strict meaning, I do not see that it would impute in the mind of the reasonable man in the community the sense which in any way attacks the moral character, injure the reputation or draw adverse opinions against the appellants. No wonder when PW2 was cross examined, at page 25 of the typed trial

court proceedings, he replied that it is not a bad thing to be a member of Islamic states.

I think it would have been different if the respondents had used the term "terrorists" but seeing that the term was not used as it does not appear anywhere in the Exhibit P1, I find it difficult to conclude that the tort of defamation was proved. What the counsel for the appellants was trying to do was to assume another word "terrorist" to exist other than what was written in the letter and which was claimed to be defamatory. Failure to prove that, the complained words are defamatory, then the tort cannot be said to have been proved.

More so, the appellants did not prove as they brought no evidence showing or rather proving how they suffered to enable the court to grant them the specific damages and general damages as prayed.

Even if they proved the words to be defamatory in nature, and that their publication caused suffering to the appellants, which is not the case herein, yet still looking at its nature and the mode of publication, the statement in my opinion was privileged. This finds a base on the authority from in the decision of The Court of Appeal for East Africa in the case of **Jayantilal Somabhai Shah vs 1. Consolidated Printers Limited, 2. Uganda Argus Newspapers Limited, & 3. Charles**



Harrison, Civil Appeal No 44 of 1971, where the Court while upholding the decision of the trial Court, it relied on the English case of **Adam v. Ward (1917) A.C. at p. 334** which defined the privileged occasion to mean

"A privileged occasion is an occasion where the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it."

The court further referred to another English case of **Mangena v. Wright (1909) 2 K.B. 958** which reads;

"A communication by a public servant of a matter within his own province concerning the conduct of a person who is for the time taking a public part, the matter being one of public interest as to which the public are entitled to information, may be a privileged communication on the part of that public servant, and, if sent by him to a newspaper and published therein, it may also be the subject of privilege in the proprietor of the newspaper, as that is the ordinary channel by means of which the communication can be made public."

Further to that, in its decision, the Court made further reference to the decision of Lopes L.J. in **Albutt v. General Council of Medical Education and Registration 23 Q.B.D. 400 at page 412**, where it

was stated as follows:-

"The publication of a matter of a public nature and of public interest and for public information was privileged, provided, it was published with the honest desire to afford the public information and with no sinister motive."

In this case, the communication was done by the secretary of the second respondent who is an officer in charge of day to day activities of the second respondent. The Communication was reporting an incident which caused the breach of peace at the mosque, and the same was made to the District Commissioner, who is the Chairman of the District Defence and Security Committee. By virtue of his position, the District Commissioner, was supposed to know what happened, for purposes of discussing and possible solution by the Security Committee. The proper person or office to inform the District Commissioner on the issue is the office of the secretary of the second respondent.

In my considered view, that is a privileged communication within the meaning of the authority in the case of **Jayantilal Somabhai Shah vs 1. Consolidated Printers Ltd) 2. Uganda Argus Newspapers Limited) and 3. Charles Harrison)** (supra)

To this end, I find that, it was proper for the trial court to find that the tort of defamation had not been proved to the required standard.

This appeal therefore fails and is dismissed for want of merits. For purposes of promoting peace between the parties, no order as to costs is made.

It is accordingly ordered

DATED at MWANZA on this 28th day of May, 2021.

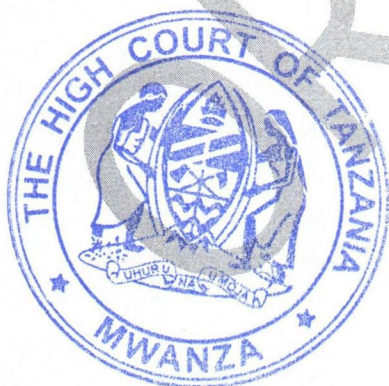


J.C.Tiganga

Judge

28/05/2021

Judgment delivered in open chambers in the presence of the advocates for the parties. Right of appeal explained and guaranteed.



J.C.TIGANGA

JUDGE

28/05/2021