

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CIVIL APPEAL NO. 19 OF 2021

(Original Civ. Case No. 2 of 2020 of the District Court of Ukerewe at Nansio)

VERDIANA CHARLES.....APPELLANT

versus

PENDO NJELI PAULORESPONDENT

JUDGMENT

12th & 30th August, 2021

RUMANYIKA, J.:

The appeal is against judgment and decree dated 08/04/2020 of Ukerewe district court (the trial court) with respect to torts of defamation and claims of shs. 35.0m as special damages, Pendo Njeli Paulo (the respondent) having had lost the war and battle but she got shs. 5.0m being general damages and, as usual, costs of the case.

Messrs M. Mhingo and C. Mkaima learned counsel appeared for the appellant and Verediana Charles (the respondent) respectively.

The 4 grounds of appeal essentially revolved around points:-

- (1) That, the respondent's case was not proved on the required balance of probabilities.
- (2) That, the learned trial resident magistrate erred in law and in fact having had based his decision on judgment of a criminal court.
- (3) That the learned trial resident magistrate improperly evaluated the evidence.
- (4) That general damages of shs. 5.0m awarded were not proved by the respondent.

On grounds 1 and 2, Mr. Mhingo learned counsel submitted that now that the trial court had based its decision only on the criminal proceedings the respondent's case was not on balance of probabilities proved definitely so were all the consequential claims. Second, that had the learned trial resident magistrate analyzed the evidence properly that is the words, if at all uttered by the appellant were not malicious or publicly made, she should have otherwise been decided (case of **PM. Jonathan v. Athuman Halfan** (1980) TLR 175. Three, that the respondent's business may have had fallen down yes, but with regard to the awarded general damages there was no connection between the business and the alleged insulting words.

On his part, Mr. M. Charles learned counsel submitted;- **(a)** that the word uttered by appellant were untrue and both intended to scandalize and injure the respondent's character **(b)** that sufficed the evidence of pw, pw2 and pw3 to establish defamation nondisclosure of the names of the alleged 15 people notwithstanding. That is all.

The evidence on record would read thus:-

Pw1 Pendo Njeli Paulo wife of Musa Charles (copy of certificate of marriage-exhibit PE1) stated that she was a business woman of Kakukuru, Ukerewe. That they had such a last born (copy of birth certificate – Exhibit, PE2) and cause of action was insult words in presence, say of 15-20 choir members uttered by the defendant that the latter was a prostitute, victim of HIV AIDS who deliberately infected people, that her last child was born out of wedlock and only the defendant's husband was the responsible father. That following the incident she reported it to Muriti police out post on 28/12/2019 her father one Mwanzalima was notified and raised concern and under took to reconcile them but shortly gave up. That she prosecuted the defendant successfully as end of the day the defendant was convicted and ordered to pay fine (copy of the judgment-exhibit PE3). That she tested HIV AIDS negative but late in the day in the eye of the

community her reputation having had been ruined/lowered and her business gone down (copy of TIN certificate business hence, tax clearance- Exhibits PE4 PEC & PE6) respectively copy of the Baptism certificate- Exhibit PE7.

Pw2 Alphaxad Magungu a peasant of Kakukuru stated that he was a member of the parties' choir who also witnessed the incident. One Siwema, Happiness and Wenseslaus Lusato also were there.

Pw3 Magdalena Mathias a business woman of Kakukuru, Ukerewe stated that also she witnessed the incident on 28/12/2019 as the choir was practicing at Siwema place where, but against morality in the end the defendant insulted her so much that she (pw3) left them behind because she could not withstand it.

Pw4 Deogratias Machumu Tungaraza stated that by September, 2020 she served as a clinical officer of Nansio Government hospital where, following the incident but in ordinary course of business he diagnosed the plaintiff and the latter tested HIV negative (copy of the form-Exhibit – PE7). That is all.

Dw1 Verediana Charles Magesa of Kakukuru, Ukerewe stated that as a member of the choir, but upon closure of practice on 28/02/2019 she had some personal issues to discuss with the plaintiff, previously the latter having had insulted her at a bar but as the plaintiff ran wild she quitted the place some members of the choir having had cooled them down. The plaintiff having had threatened to fix her. That shortly she (Dw1) was charged, prosecuted, convicted and sentenced to pay a fine of shs. 70,000/= or six (6) months imprisonment in default.

Dw2 Charles Mwanzalima Padre of Nakamwa, Ukerewe he stated that parties were his church members and following the criminal charges, with a view to reconciling them he summoned them but they defaulted and the appellant did not involve him before she instituted the subsequent civil proceedings. That is all.

Dw3 Josephat Sesegwe of Kakukuru, Ukerewe stated that on 28/12/2019, orally the respondent complained against the appellant that it was convened but a settlement was unsuccessful attempted. Dw3 supported the respondent's case essentially.

The central issue is whether the appellant's case was proved on the balance of probabilities.

It appears now was sufficiently convinced, the learned trial magistrate, except, correctly so in my considered view the claims of shs. 35.0m being specific damages, the claims of general damages of which out of shs. 20.0m the appellant was awarded shs. 5.0m, the respondent may have had seriously insulted her yes, but the question would be whether the appellant was in the public insulted. The answer is no because if anything, Pw1, Pw3 and Dw3 whom, according to the appellant's evidence perhaps amongst 15-20 members of the choir whom might have witnessed the incident, more so Dw3, their stories were materially at variance so much so that as far as the essential ingredient of publication was concern the appellant's case was sufficiently shaken. Evidence by quality not by quantity yes, but like Mr. Mhingo learned counsel argued, it would have been a different scenario if at least the names of the alleged 15-20 members present were in evidence mentioned much as contrary to the appellant's story that initially she reported the incident to the padre, the latter raised concern and he blamed the respondent, Dw3 gave a different version all together.

Last but not least, it is common knowledge, save for stigma which amongst themselves some community members may have had on HIV Aids victims, I wonder if, for that matter HIV positive test could be justification or defendant's defence else the courts would have been promoting stigmatization of HIV AIDS in disguise. In other words therefore, with regard to HIV AIDS truth was no longer good defence.

Without runing risks of confirming the alleged immoral of the high standard, whether or not the appellant was a baptized Christian and, according to birth certificate father of the appellant's last born, there was none other than the appellant's husband. It was immaterial in my considered opinion because if anything, it was biblically proved that only pagans committed adulterous association and had children out of wedlock.

In the upshot, the appeal is allowed. Decision and orders of the trial court are quashed and set aside respectively. The appellant shall have costs of the case here and at the trial court. It is so ordered.

Right of appeal explained.

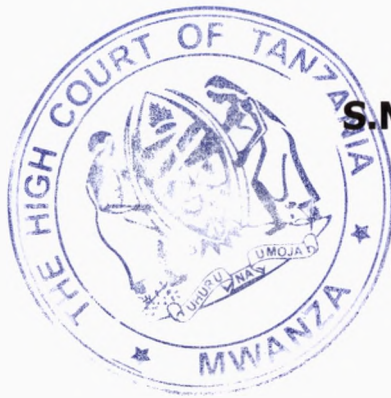


S.M. RUMANYIKA

JUDGE

17/08/2021

The judgment delivered under my hand and seal of the court in chambers this 30/08/2021 in the absence of the parties.



S.M. RUMANYIKA

JUDGE

30/08/2021