

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

PETITION NO. 1 OF 2020

SWABAHA MOHAMEDI SHOSI.....PETITIONER

-VERSUS-

JAMES MAGAI.....1st RESPONDENT

THE MANAGING DIRECTOR

MWANANCHI NEWSPAPER.....2nd RESPONDENT

MWANANCHI COMMUNICATIONS LIMITED.....3rd RESPONDENT

JUDGMENT

Date of last order: 13/07/2021

Date of ruling: 06/08/2021

AGATHO, J.:

The background of this Petition is that the Petitioner claims to be defamed by the Respondents where, the 1st respondent authored an article and published it in Mwananchi Newspaper managed by the 2nd Respondent and owned by the 3rd Respondent. The 1st Respondent is alleged to have authored and published the newspaper article titled **"MJANE ALIYEPEWA ULINZI NA MAGUFULI AGEUZIWA KIBAO."** This article was published on a front page of Mwananchi newspaper dated 2/3/2017. Besides the title of

newspaper article, the petitioner was also irked by the details of the article including words, sentences, and the entire article was alleged to be defamatory of the petitioner. The said words are for instance *"Mjane aliyechafua hali ya hewa wakati wa maadhimisho ya kilele cha siku ya Sheria nchini kibao kimemgeukia baada ya kuburuzwa mahakamani kutokana na maneno aliyoyasema kwa Rais John Pombe Magufuli."* The Petitioner invited this Court to determine whether the newspaper article is not defamatory. To do so the Court framed the following issues:

- (i) Whether or not on 2/3/2017 without any colour of right or even consulting the Petitioner the 1st Respondent published or caused to be published an article on Mwananchi Newspaper with the petitioner's photograph an article title was *"MJANE ALIYEPEWA ULINZI NA JPM AGEUZIWA KIBAO."*
- (ii) Whether or not the words in the publication (Mwananchi Newspaper dated 2/3/2017 with the above shown title) was defamatory of the Petitioner.
- (iii) Whether the Petitioner suffered any damage.
- (iv) What reliefs are the parties entitled to.

First, whether or not on 2/3/2017 without any colour of right or even consulting the Petitioner, the 1st Respondent published or caused to be published an article on Mwananchi Newspaper with the Petitioner's photograph the article titled *"MJANE ALIYEPEWA ULINZI NA JPM AGEUZIWA KIBAO."*

Looking at the evidence Exhibit P2 Mwananchi Newspaper dated 2/3/2017) it is unclear whether the 1st Respondent, the author of the article consulted the Petitioner. Moreover, in his testimony (the 1st Respondent) admitted during cross examination at pages 23-24 of proceedings that he authored the article. He also stated that he did not see a need to consult the Plaintiff (Saburia Mohamed Shosi) or the Petitioner to balance the story. This is apparent on page 11 of the proceedings. He further admitted that he went to the High Court to verify the truth of the story he was given by advocate Abdon Rwegasira. He admitted that he did not follow the procedure in getting information about the case filed in the High Court at Dar es Salaam. He simply saw the then Deputy Registrar of High Court Hon. Tiganga who confirmed that there was indeed a case filed by Saburia Mohamed Shosi against the Petitioner. But because the case at hand is not about professional misconduct of the journalist, the question as to the appropriateness of means or procedure of

obtaining the story or news is irrelevant. The present case is about defamation. The submissions of the counsel for the Petitioner focused on showing that the Petitioner was not aware of the case filed by Saburia Mohamed Shosi against her. This is also found in the testimony of the Petitioner (PW1) at pages 8, and 12 of the proceedings. It is unfortunate that the submissions did not strictly focus on the framed issue. However, on page 2 of the written submissions, the Petitioner's counsel centred on words, or phrases that could have constituted defamation. For instance:

"Mjane aliyechafua hali ya hewa wakati wa maadhimisho ya Kilele cha Siku ya Sheria nchini Kibao kimemgeukia baada ya kuburuzwa mahakamani kutokana na maneno aliyoyasema kwa Rais John Pombe Magufuli."

It is indeed true that the Petitioner was sued but if the above extract from the newspaper article is literary translated as the Petitioner (PW1) stated on pages 9 of the proceedings and as well as what her learned counsel seem to suggest (at pages 1-2 of his written submissions), it would mean the Petitioner was dragged to Court by force. He (the counsel) added that the Petitioner was unaware of the suit instituted against her when the newspaper

article was published. Moreover and to show that she was not dragged to Court, the RATCO bus tickets were tendered as Exhibit P1 to prove that she was in her private trip from Dar es salaam to Tanga on the date the article was published. This can also be seen on page 8 of the proceedings.

The testimony of the 1st Respondent shows that he is not disputing authoring and publishing the newspaper article. From the evidence adduced and the submissions of the parties it is undisputed that the 1st Respondent published the article but in journalism or news reporting in the print media or press such as newspaper any article before its publication goes through editorial or vetting process. The newspaper article complained about seems to have gone through that process. The chief editor, and the newspaper owner seem to have consented to its publication. In the case at hand therefore the 1st Respondent published or caused to be published the article titled *"MJANE ALIYEPEWA ULINZI NA JPM AGEUZIWA KIBAO."*

The second issue as framed by the Court was whether or not the words in the publication (Mwananchi Newspaper date 2/3/2017 with the above title was defamatory of the petitioner. To answer this issue, we formulated other sub-issues. These were: What is defamation? Can a word or words constitute defamation? Are the

words published in the article in Mwananchi Newspaper dated 2/3/2017 titled "MJANE ALIYEPEWA ULINZI NA JPM AGEUZIWA KIBAO" defamatory?

Under Section 35 of the Media Services Act, the Act No. 12 of 2016, it defines defamation as

"Any matter which, if published is likely to injure reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation."

The above definition is broad enough to cover words, or articles in the newspaper. Consequently, the words or the articles published in the newspapers may be defamatory. The next question is whether the title and words contained in the above cited article published in the Mwananchi Newspaper of 2/3/2017 are defamatory of the petitioner?

In the case of **Rugarabamu Archard Mwombeki v Charles Kizigha & 3 Others [1985] TLR 59** it was held that defamation is *"a false and malicious statement about a man to his discredit."* This case provides a glimpse of the ingredients of defamation. That it has to be a false and malicious statement but that holding is

missing some other ingredients that will be shown in due course. To determine whether the words in the article published in the Mwananchi Newspaper of 2/3/2017 are defamatory the following ought to be considered:

- (1) Whether the words/statement is false
- (2) Whether words are commonly used in journalism as profession.

From the testimony of the 1st respondent although the words used in the newspaper article sound derogatory, they do not necessarily mean that they are false. It does not mean that message it conveys is untrue. The testimony of the 1st respondent shows that he got information about the case Saburia Mohamed Shosi filed against the petitioner from Advocate Abdon Rwegasira. The words alleged to be defamatory in the present case are the title of the newspaper article and the words contained in the article.

"MJANE ALIYEPEWA ULINZI NA JPM AGEUZIWA KIBAO." Whether this title of newspaper article is defamatory? Reading through the article other words or extract with eye-catching effect are visible ***"Mjane aliyechafua hali ya hewa wakati wa maadhimisho ya Kilele cha Siku ya Sheria nchini kibao kimemgeukia baada ya***

***kuburuzwa mahakamani kutokana na maneno aliyoyasema
kwa Rais John Pombe Magufuli."***

The Petitioner's counsel dissected the story and stressed on words/phrases such as ***"Mjane aliyechafua hali ya hewa wakati wa maadhimisho ya Kilele cha Siku ya Sheria..."*** The Petitioner's counsel argued that at page 2 of his written submissions that these words are highly defamatory. The petitioner's counsel literary translated these words to mean that the Petitioner farted before the President of United Republic of Tanzania. With due respect to the learned counsel that is not the message the newspaper article carried. The journalists like other professions have their own writing style as well as words they use in news or stories published in their newspapers to attract attention of customers. However, the words chosen though should not ridicule or defame any person. If the words chosen are derogatory and the story is true as it is with the present case, the journalist may be sued for negligent misstatement or professional misconduct. There are remedies provided for under the Media Services Act, the Act No. 12 of 2016 where the media house or journalist has acted unprofessionally for instance publishing unbalanced story. In that case the claim may not be defamation.

It is quite common for journalists to use satire and figures of speech to convey the message to readers. Oftentimes they use words or phrases that will catch readers' attention. If such statements are true, there cannot be defamation and, whether there is defamation or not it is a question of evidence, depending on the facts of a particular case.

Again, the counsel for the Petitioner strongly argued on pages 2-3 of the written submissions that the words "*aburuzwa mahakamani...*" are defamatory. From what I have stated in the foregoing paragraph these words "*aburuzwa mahakamani*" do not constitute defamation because it is true there was a case filed against the Petitioner, meaning she was sued. I am of the view that the words used are part of journalistic language. Although they may sound derogatory or unprofessional, they are not defamatory.

The Court of Appeal of Tanzania has held in the case of **Meneja Mkuu Zanzi Resort Hotel v Ali Said Paramana Civil Appeal No 296 of 2019** (unreported) at pages 19-20 that one of the most important ingredients of proving there being defamatory remarks is to show that the statement is one which tends to lower a person on the estimation right-thinking members of the society generally or to

cause him to be shunned, or avoided or to expose him to hatred, contempt or ridicule.

While the above holding is somewhat true with the phrase "*achafua hali ya hewa...*" and "*aburuzwa mahakamani...*" But I ask myself, is that all when it comes to defamation. It should be noted that the Court of Appeal of Tanzania in the above case said one of the most important ingredients, it means there are other ingredients. While journalists are entitled to be creative in writing their newspaper articles and their respective headings, they ought to be mindful not to injure reputation of other persons.

"Mjane aliyechafua hali ya hewa wakati wa maadhimisho ya Kilele cha Siku ya Sheria nchini kibao kimemgeukia baada ya kuburuzwa mahakamani kutokana na maneno aliyoyasema kwa Rais John Pombe Magufuli."

The above extract may expose a person to ridicule. It is not palatable. Arguably it is unprofessional journalism but is it defamatory? In **Hamisi v Akilimiali [1971] HCD 111** and in **Meneja Mkuu Zanzi Resort Hotel v Ali Said Paranama (supra) pp. 6-7** the ingredients of defamation or to prove defamation three things must be proved:

- (1) The statement complained about must be defamatory and made by the Defendant/Respondent.
- (2) The alleged defamatory must refer to the Plaintiff/Petitioner, whoever knows the Petitioner would understand that statement referred to the Petitioner.
- (3) The statement complained about must be proved to have been published.

If this Court could have simply ended up by looking at (1) – (3) above, the conclusion would be that the respondent did really defame the petitioner because the above listed ingredients somehow match what is found in the newspaper article and testimonies of PW1 and the DW1. However, on a close scrutiny of the term defamatory statement that is not the case. In **Professor Ibrahim Lipumba v Zuberi Mzee [2004] TLR 381**, the Court of Appeal of Tanzania defined defamatory statement to mean: **“a deliberate untrue, derogatory statement, usually about a person, whether in writing or orally.”**

At this juncture we underline the word **“untrue.”** It must be false statement because a true statement is not defamatory. This was also held in the case of **Rugarabamu Archard Mwombeki vs**

Charles Kizigha & 3 others (supra). The Court of Appeal of Tanzania in **Zanzi Resort Hotel case** (supra at page 17) rightly cited Professor Winfield book Winfield and Jolowicz on Tort 15th ed., 1998 Ch. 12 at pages 390-461 which articulate that for the claimant to be successful in defamation case he should prove the following:

- (1) Words must be defamatory.
- (2) Words refer to the claimant.
- (3) The words must be published or communicated to a third party.

Some of the above ingredients (especially (2) and (3)) may be found in the present case. However, the onus will shift to the Respondent to prove that:

- (1) The words were true or he had justification
- (2) That it was fair comment or
- (3) It was made on privileged ground
- (4) That it was unintentional or not malicious
- (5) That there was consent

What is stated hereinabove from (1) – (5) are what constitutes defences against defamation case. These have been explained in **Zanzi Resort Hotel case** (supra) at page 17.

In the case at hand the Petitioner alleges that the words published by the Respondent in Mwananchi Newspaper of 2/3/2017 are defamatory. These words are "*achafua hali ya hewa*" and "*aburuzwa mahakamni*." Although they constitute figure of speech, they may also be regarded as defamatory if they are untrue. For instance, "*achafua hali ya hewa*" means causing commotion. "*Aburuzwa mahakamani*" means has been taken to court or simply has been sued. In the present case relatives and friends of the Petitioner were concerned and phoned her. These are in the PW1 testimony at pages 9-10 of the proceedings. The publication of the news article might have injured or lowered the Petitioner's reputation. However, a tort of defamation cannot stand if the defence that the alleged defamatory statement is true is successfully pleaded. In other words, if the words are true or justifiable there is no defamation. This is clear on page 23 of the proceedings. Therefore, in the present case, although the words sound derogatory and may lead to ridicule, the respondent (DW1) testified that the facts stated in the newspaper article are true and justifiable. This is found on pages 22-25 of the proceedings. That testimony was not rebutted or contradicted. The respondent during examination in chief and cross examination testified that the words

"achafua hali ya hewa" and "kuburuzwa mahakamani" are words that are used by journalists. These can be seen on pages 22-26 of the proceedings.

He explained that "achafua hali ya hewa" referred to the incidence which took place on 2/2/2017 (the Law Day) before the President Magufuli, the then President of the United Republic of Tanzania, where security officers were pushing the Petitioner back with her poster but she kept on struggling in the pushing and shouting and eventually President Magufuli saw her and ordered the security officers to let her come forward and explain her complaints. That incidence or commotion is what the Respondent (DW1) referred to as "kuchafua hali ya hewa." This incident was broadcasted by various media outlets in Tanzania and beyond.

The Petitioner's counsel asked the Respondent during cross examination whether it was bad for ordinary citizens to air out their views or bring their complaints to the attention of the President of the United Republic of Tanzania. The Respondent replied in the affirmative. That is apparent on page 25 of the proceedings. But we ask ourselves did the incident really occur? Was this incident which led to the alleged publication? Is this incident true or false? The

answer is that the incident did occur on 2/2/2017 at the summit of the Law Day. And it was reported in various media outlets. Was the incident anticipated by the audiences? Certainly, not, it was not anticipated. Therefore, it was something unexpected. For the journalist (Respondent) that was "*kuchafua hali ya hewa*." Although it sounds negative and derogatory but it is true. Hence, I hesitate to regard that as defamation in the context of the cases of **Hamis v Akilimali (supra)**, and **Prof Ibrahim Lipumba case (supra)** and what Prof. Winfield and Jolowicz said in their book on the law of Tort defined as defamation.

As with regards to the phrase "*aburuzwa mahakamani*" this sound like being dragged forcefully to court, which is not the case with the petitioner. It is true that she was sued in a Civil Case No. 38 of 2017 in the High Court of Tanzania, Dar es Salaam Registry at Dar es salaam. The suit was filed on 24/2/2017 according to the copy of the plaint admitted as Exhibit D1. This is a fact. Regardless of how the respondent got that information or news it cannot be defamatory because the information is true.

There is a question as to the time of publication. The Petitioner claims that the publication was premature because it was it was

made before the Petitioner was served with the Summons to Appear before the Court in the Civil Case No. 38 of 2017. The Petitioner was not aware of the case filed against her. But does lack of awareness make a true information untrue? Certainly, no. The date of publication of the newspaper article in Mwananchi Newspaper was 2/3/2017. The case against the Petitioner was filed on 24/2/2017. The Petitioner was served with Summons on 22/3/2017. Since the information published was true there is no defamation committed on the Petitioner. However, the Petitioner could have thought of other avenues such as professional negligence including the misconduct or unprofessionalism of the Respondent as a journalist for publishing an article without consulting the parties whose information is the content of the said article.

I have noted the Petitioner's counsel arguing that there are inconsistencies in the testimony of the Respondent that he said the information regarding the case of Saburia Mohamed Shosi against Swabaha Mohamed Shosi, he (the Respondent) got it from advocate Abdon Rwegasira. Later the respondent said he confirmed it from the Deputy Registrar of the High Court, Hon. Tiganga and that he obtained the information from Court records. These are

visible in the submissions of the Petitioner's Counsel at page 24 of the proceedings. In my view, such inconsistencies are minor and may be disregarded. It was held by the Court of Appeal of Tanzania in **Issa Hassan Uki v Republic Criminal Appeal No. 129 of 2017, Court of Appeal of Tanzania at Mtwara (Unreported)** that inconsistencies that do not go to the root of the matter are minor and should be disregarded.

From the above considerations and evaluation, the second issue is answered in the negative. That there was no defamation. Consequently, the 3rd issue dies off as there cannot be damage if there is no defamation. Therefore, the 3rd issue is excluded from examination.

As for the 4th issue, what reliefs are the parties entitled to? The Petitioner prayed for:

- (a) General damages to the tune of TSHS. 400,000,000/=.
- (b) Punitive damages to the tune of TSHS. 100,000,000/=.
- (c) Interest rate at 7% Court rate from the date of the judgment to date of full payment on items (a) and (b).
- (d) Costs of the suit.

These reliefs could only be awarded if the defamation was proved. In the case at hand there is no defamation. Moreover, in assessing damages we could have considered whether the Respondent offered an apology or claimed privilege. In this case none of these have been done. Perhaps because the Respondent believed the alleged defamatory publication was true and justifiable which negated the claim.

The Respondent on his side he prayed for the dismissal of the suit with costs. Since I have held that there is no defamation in the present case because the words or information have been proved to be true and the case between Saburia Mohamed Shosi and Swabaha Mohamed Shosi does really exist and it was filed on 24/2/2017 quite ahead of alleged defamatory news article published in Mwananchi Newspaper. Despite that, by the time the newspaper article was published the Petitioner had not yet received the summons, the case against her was already instituted in the Court and that constitutes a true information and hence no defamation but before penning down, I should say something regarding the 2nd and 3rd Respondents. These parties did not appear in person. It is also on record that Advocate Nkwera was representing all the Respondents. This is visible throughout the records of proceedings

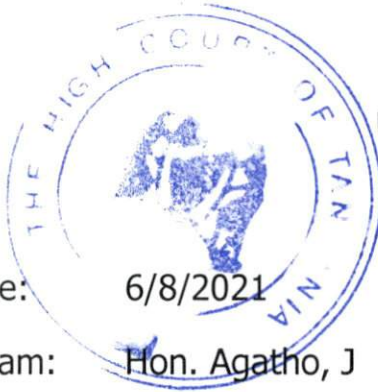
right from page 2, and the pleadings. Moreover, on pages 23-24 the 1st Respondent did state that he is representing them without any documentation. This is not proper. Besides the case was not a representative suit. Although neither the Petitioner nor her counsel prayed for ex parte proof or ex parte judgment against the 2nd and 3rd which could hardly be maintainable because Advocate Nkwera appeared for all (1st, 2nd, and 3rd) Respondents. It is undisputed that had the defamation been proved, they could have been condemned for damages and costs. The 2nd and 3rd Respondents neglecting to enter appearance is not conclusive evidence that the Petitioner has proved the claim against them. Besides, there was an Advocate representing them.

With the above findings, the Petition before this court lacks merit because the essential ingredients of a tort of defamation were not proved. Besides the information so published though used derogatory words is true, which is a defence against tort of defamation and since it is trite law that where the published statement is true there is no defamation.

The petition is consequently dismissed with costs.

It is so ordered.

DATED at TANGA this 6th Day of August, 2021.




U. J. AGATHO

JUDGE

06/08/2021

Date: 6/8/2021

Coram: Hon. Agatho, J

Petitioner: Present, and her advocate Mambosasa for the Petitioner was also present.

Respondents: 1st Respondent was present, and Advocate Yona Lucas holding brief of Advocate Ambrose Nkwera for the Respondents.

B/C: Alex

Court: Judgment delivered on this 6th day of August, 2021 in the presence of the Petitioner, Advocate Mambosasa for the Petitioner, the 1st Respondent and Advocate Yona Lucas who was holding brief of Advocate Ambrose Nkwera for the Respondents.




U. J. AGATHO

JUDGE

06/08/2021

Court: Right of Appeal explained.




U. J. AGATHO

JUDGE

06/08/2021