

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOB A DISTRICT REGISTRY
AT BUKOBA**

CONSOLIDATED CIVIL APPEAL NO. 15 OF 2019

(Arising from Civil Case No.35 of 2017 of Bukoba Resident Magistrate's Court)

- 1. TANZANIA DAIMA NEWS PAPER.....1ST APPELLANT**
- 2. ABSALOM KIBANDA.....2ND APPELLANT**
- 3. MBEKI MBEKI.....3RD APPELLANT**
- 4. ANTIDIUS KALUNDE.....4TH APPELLANT**
- 5. FREE MEDIA LTD.....5TH APPELLANT**

VERSUS

HAJINAS ONESPHORY.....RESPONDENT

JUDGMENT

23/09/2021 & 13/12/2021

NGIGWANA, J.

The appellants in this case at hand, were losing parties and as well defendants in the judgment delivered on 6th, September, 2021 by the Resident Magistrate's court of Bukoba at Bukoba before Maweda, RM. To appreciate the context upon which this appeal was brought, it is imperative at this juncture to recapitulate the facts of this case. At the trial Court, Hajinas Onesphory (Henceforth the respondent) who was the plaintiff sued the appellants Tanzania Daima News Paper (1st Defendant), Absalom Kibanda (2nd Defendant), Mbeki Mbeki (3rd defendant), Antidius Kalunde (4th defendant) and Free Media Limited (5th Defendant) for the tort of defamation. At the trial court, the matter was heard *ex parte* against the 1st, 2nd, and 5th appellants

only. In that regard, the 1st, 2nd and 5th defendants appealed separately against the respondent and whose appeal was registered as Civil Appeal No.15/2019. The said appellants together with the 3rd, 4th and 5th appellants again jointly filed another memorandum of appeal against the same respondent which was registered as Civil Case Appeal No.18 of 2019. Later on this court ordered both appeals to be consolidated in **Civil Appeal No. 15 of 2019**. Thus, in this appeal the appellants Tanzania Daima News Paper, Absalom Kibanda, Mbeki Mbeki, Antidius Kalunde and Free Media will therefore be referred to as the 1st, 2nd, 3rd, 4th and 5th appellants respectively.

The record has it that the respondent successfully sued the appellants for the tort of defamation. When the cause of action arose, the respondent was an investigating officer for the Prevention and Combating of Corruption Bureau (PCCB) in Karagwe District in 2011. The 3rd appellant (Mbeki Mbeki) made a defamatory publication by writing for the 1st appellant in an article titled "*Ofisa Takukuru adaiwa kuwalinda wanyarwanda*" This article later on was published in Tanzania Daima Newspaper (The 1st appellant) where the respondent chanced to obtain the said article and read it. The contents of the said article had the theme that the respondent was protecting habitual cattle rustlers of "Wanyarwanda" (Rwandese people) of origin and aiding them from not being prosecuted after the allegation that the respondent received corruption money from them.

The record further has it that the 1st appellant published another defamatory statement in his newspaper which was headed that "*Kamanda wa Takukuru alalamikiwa*" which was prepared by the 4th appellant one Antidius Kalunde,

which also the respondent managed to come across a copy of the published article. That the 3rd appellant was the one who collected and wrote information on the issue of Rwandese people alleged to be protected by the respondent. The respondent at that time was acting in his official capacity as PCCB investigation officer. That the 2nd appellant one Absalom Kibanda was an editor of the 1st appellant newspaper responsible or charged with the duty of verifying the story to ensure that the story is balanced before publication and that the 5th appellant one Free Media Ltd was the owner of the 1st appellant (a newspaper) and employer of the 2nd, 3rd and 4th appellants.

The record further informs this court that by these two publications the respondent lost reputation in the society and was rendered untrustworthy by his friends and relatives which resulted from being demoted from being District Bureau Chief for Karagwe District to the lower post of a mere investigating officer whereby he was transferred to the Kagera region PCCB office. That he was injured psychologically and mentally and eventually undergone various transfers to wit Geita Region and finally Manyoni District in Singida Region.

The trial court at the end of the hearing, found the respondent had proved the suit on the preponderance of probabilities and therefore entered the judgment and decree in favour of the respondent and consequently held all appellants liable.

The decision of the trial court was not welcomed by the appellants herein hence the current appeal with the following grounds:

1. *That, the Trial Resident Magistrate grossly erred in law to deny the appellants the fundamental right to know and participate during the delivery of judgment the act and omission which resulted into miscarriage of justice after the case had proceeded ex parte against them.*
2. *That, the trial Resident Magistrate misdirected himself in law and on facts for relying on exhibits P1, P2, P3 and P4 which were rendered in evidence but without properly been endorsed by the Trial Magistrate according to law.*
3. *That, the trial Resident Magistrate grossly erred in law and on facts to grant special damages to the Respondent to the tune of Tshs.20,000,000/=which were never proved as required by law.*
4. *That, the Trial Resident Magistrate misdirected himself in Law and on facts to award general damages to the Respondent without any scintilla of proof of defamation for the alleged publication.*
5. *That, the trial Resident Magistrate grossly misdirected himself in Law and on facts for deciding the case infavour of the Respondent without any proof of the standards required in Civil Suits.*

Submitting on the first ground, Advocate Kabunga registered a complaint that the *ex parte* judgment was delivered without notifying the appellants. He was of the view that even if the case was heard *ex parte*, the appellants had the right to be informed the date of judgment so as to know what is the decision of the court. Unfortunately, the appellants were denied such right and no

ground was given. He cited the case of **Cosmas Constantine Ltd vs Ano Garment Ltd** (1992) TLR 127 where the court of Appeal of Tanzania insisted that where the case is heard *ex parte*, the party has a right to be notified on the date of judgment to know the outcome.

As regard to the second ground, Mr. Kabunga argued that exhibits P1, P2, P3 and P4 were tendered but not endorsed by the magistrate as required by Order XIII rule 4(1) of the Civil Procedure Code Cap 33 R.E 2002). Mr. Kabunga argued that it is mandatory that the exhibits tendered in court must be endorsed which must show number and title of the court, the name of the person producing the document, the date in which it was produced, endorsement by signing or putting the initials of the magistrate or judge. It was Mr. Kabunga's conviction that, failure to abide to the explained procedure of endorsing exhibits, they have to be expunged from the court records. He made reference to the case of **Ashraf Akber Khan vs Ravji Govind Varsan** Civil Appeal No. 5 of 2017, CAT at Arusha. Basing on this authority, Mr. Kabunga prays that exhibits referred above be expunged from the court records. This implies that there is no evidence to prove libel defamation.

As regard to the 3rd ground, the learned counsel submitted that the awarded special damages to the tune of Tshs. 20,000,000/= were never pleaded nor proved by the respondent as required by law. He elaborated that, those special damages must be pleaded and strictly proved. That the court has no discretion whatsoever to award special damages. That looking at the plaint, the respondent, pleaded special damages at the tune of 50,000,000 and general damages of 100,000,000 but at the end, the court awarded

20,000,000 as special damages while the respondent from p.12-19 of the trial court proceeding there is no where the respondent ever prayed the award of 50,000,000 or 20,000,000 and no any exhibit tendered to prove special damages at the tune of 20,000,000 but surprisingly at the last page of the judgment, the trial court awarded special damages at the tune of 20,000,000 which was not even pleaded and the judgment is silent on evidences to that effect. To back up his stance, the learned counsel made reference to the case of **Dampras Star Service Ltd vs Miss Fatuma Mwale** (2000) T.L.R 390 which held that damages cannot stand where they were not pleaded and strictly proved.

Concerning the fourth ground, Advocate Kabunga submitted that, general damages are awarded by the discretion of the court and discretion must be exercised judiciously but, in this case, defamation was not proved. That from pg 52-56 of the typed proceedings there is evidence of DW3 one Gosbert Begumisa Blandes who was the member of Parliament at that time and was the one who initiated the complaints against the respondent for interfering the case filed against the Rwandese people alleged to have stolen cattle. He wondered why DW3 was not made a party to this case as was a necessary party and without a necessary party the tort of defamation cannot be proved. That under section 37 of the News Media Act, 2016 Cap 229, the appellants had privileged communications to report to the public what was going on. That general damages were awarded to the tune of 70,000,000 but no reasons were given by the trial Magistrate. He referred the case of **Ashaf**

(Supra) at pg 26-27 where it was insisted that the reasons have to be given in awarding damages.

When it was Advocate Josephat Rweyemamu's turn, he concurred with the submission of his co-advocate. He further elaborated on the 3rd and 5th grounds that even himself failed to see how the trial magistrate decided the validity of the evidence of the 3rd and 4th Appellant and like wise did not put any weight in the evidence of DW3. That there were two publications but none of them mentioned the name of the respondent. That it was clearly published that "*Kamanda wa Takukuru.....*" that when the respondent was cross examined in court, he said there were four officers in the office. The character defamed was not specifically mentioned. He invited the court to look in **PM Jonathan vs Athuman Khalfan** (1980) T.L.R 115 where it was held that in libel case in which the character defamed was not mentioned, the tort of libel cannot stand. That even if the information went in public by the 4th defendant. Advocate Rweyemamu supports Kabuga's submission that the publication was in good faith after receiving the information from reliable person (DW3) a member of parliament. It was therefore expression of opinion in good faith under Section 39(d) of the Media service Act No. 12 of 2016.

In his reply Submission, Mr. Victor Blasio, the respondent, counsel stated that there is no dispute that the matter was heard exparte against the appellants. He brought this court to attention that Order IX rule 8 of the Civil Procedure Code Cap 33 R:E 2019 allows the Magistrate to give orders including that of pronouncing judgment. He contended that the 2nd, 3rd and 4th appellants were the employees of the 5th appellant. That on 26/06/2019, the 4th appellant was

in court when the date of judgment was set, hence he has notified the rest of the appellants. That even where the matter proceeded *ex parte*, what the court can do is to nullify the proceedings of the day and not otherwise. He prayed this court to be guided by the case of **Awadhi Idd Kajass vrs Mayfair Investment Ltd** Civil Application No. 281/17/2017 pg 6-7.

Responding on the second ground, it was his submission that the exhibits were signed, dated and marked by the trial magistrate hence dully endorsed. That the case of **Ashraf(supra)** at pg 14-15 the court found that the necessary particulars were there and that minor errors can be ignored. The case at hand, only the tittle of the case was not indicated. That since no miscarriages of justice was occasioned, the court should find the exhibits were properly tendered, admitted and endorsed.

His response to the 3rd ground was that when the court finds that there is defamation what follows next is compensation to the injured person. That it was not mandatory to prove special damages or giving reasons for general damages. In the case of **Hajji Assumta Admisttratio vs John Marwa** (1986) TLR 107 it was stated that general damages are compensatory in nature. He dismissed the allegation that the issue of special damages was raised *sua Moto*. That it was pleaded in the plaint since PW1 prayed at pg 12 that he was defamed, hence was entitled to compensation and he has done so via exhibit P1, P2 and P3. In that regard, the respondent counsel insisted that the respondent's reputation was really injured.

As regard to the 4th ground that defamation was not proved and therefore the respondent was not entitled damages, the respondent's counsel reacted on

Mr. Kabuga's submission in chief where he based on his argument on the evidence of DW3 (Gosbert Blandes) that he was the necessary party who was supposed to be sued. The respondent's counsel refuted that it is the duty of the plaintiff (respondent herein) to choose who to sue. That the exhibits and evidences convinced the court that there was defamation as there was publication of defamatory words which referred the respondent thus it is not necessary that the name of the defamed person be mentioned. Mr. Victor insisted that, reading the evidence of DW3, it is plain and clear that the person who was referred in the publication was the respondent and that the evidence of PW1, PW2, PW3 and PW4 is clear that the one who was referred was the respondent. Reacting on Advocate Kabunga's defense that in terms of section 37 the publication was privileged, Mr. Victor responded that section 38 of the Media Service Act shows publication which is privileged. That the case at hand publication was not privileged. That section 36 of the Media Service Act defines defamation by media printing. He reiterated that there was proof of defamation and that the general damages awarded were proper and the reasons were assigned.

Reacting on Advocate Rweyemamu's submission that the publication was done on good faith, Mr. Victor argued against it that the respondent would have been consulted so as to balance the story before publication.

In rejoinder, Advocate Kabunga contended that the appellants were not summoned to receive an ex parte judgment and that even if PW4 attended still was not ordered to notify the rest of appellants as the proceedings are silent.

Similarly with failure to endorse the exhibit, they submit that the law was not complied with.

As regard the issue of special damages awarded at to the tune of 20,000,000/= he submitted that the case of **Haji (supra)** was about general damages. Exhibit P1, P2 and P3 talks about publication and P3 is a demotion letter of the respondent, they do not talk about questions of damages. The respondent, never requested for Tsh. 50,000,000/= or 20,000,000/= as special damages. He emphasized that the proceedings are clear.

Mr. Kabunga went on explaining that in order to prove defamation the person who caused defamation must be joined in the case. That also one of the elements of defamation is that the publication must be false but in this case exhibit P3 is the demotion letter of the respondent which proves that the publication was not false to the extent of being demoted by PCCB, a Government Institution which did a due diligence and after publication, demoted the respondent. He added that the demotion letter was issued by the Director General for PCCB on 13/12/2012 after publication which was on March 2012, and this denotes that the letter was written 9 months later after due diligence hence the was justifiable and words were not defamatory in nature.

Advocate Rweyemamu rejoined that the interval between the two publications is almost one year. The publications were not distinguished. He reiterated that in the first publication at page 19-20 it is clear that PCCB officers were many and that no name was mentioned and that the respondent has not shown that the appellant were employees of the 5th appellant.

Having taken due consideration to the grounds of appeal and reply thereon as well as the rival submissions from learned advocates for both parties, I am now in a position to determine the entire appeal as I hereby do hereunder; The first and second grounds hinges on procedural technicalities which their end results may be fatal or curable depending on the circumstances of the case at hand. The said grounds will not detain me. It is apparent clear that the suit at the trial was heard exparte against the 1st, 2nd and 5th appellants and when the judgment was delivered the 4th appellant appeared but the 3rd appellant who was aware on the judgment date did not appear. It is Crystal clear that the appellants herein whose suit were heard exparte were not notified through summons but due to the nature and relationship of employment existing to all defendants at the trial, there could be no way honestly the rest of the defendants could not have been notified by their co-appellants (co-defendants at the trial) who appeared in court and hence aware of the progress of the case.

I am alive of the cited case of **Cosmas Constantine** (Supra) by the appellants' counsel that even if the case was heard exparte the non-appearing parties should be notified the date of judgment. The rationale has been for the non-appearing parties to know the outcome and take necessary immediate steps but to our case at hand the said case is distinguishable since the 1st and 3rd appellants are legal persons and employers of the 4th appellant who appeared on the date of delivery of judgment, it implies that the appellants were accordingly notified through the 4th defendant who appeared and there is no way it can be said that they were denied their rights to know

the outcome that is why they were able to take the necessary step to wit; to bring this appeal in time to impugn the merit of the delivered ex parte judgment against them. It was rightly argued by the respondent counsel that even if this court finds that it was an incurable irregularity, the remedy was to nullify the proceedings of the date of delivering the judgment. In my view, if such move of nullifying the proceedings on the date of delivering ex parte judgment is taken, it will not even serve any purpose as the merit of the delivered ex parte judgment will remain intact as the ex parte judgment will have not even been set aside rather to order re-delivering it again after notifying the non-appeared parties. The wisdom of this court dictates that for the interest of justice, the overriding objective of this case is to proceed determining the merit of the appealed ex parte judgment. Hence the first ground lacks merit and it is hereby dismissed.

In the second ground the appellants' counsel threw blames to the trial magistrate that he did not endorse the exhibits as required by order XIII rule 4(1) of CPC (supra). With due respect to the Appellants, counsel, I had an ample time to scrutinize the said exhibits and finally I was satisfied that the said exhibits were signed, dated and marked by the trial magistrate hence endorsed save that were not stamped which to me, I view it as curable irregularity which cannot invalidate the trial in the advent of overriding objectives Principle. Since they were dated, signed and marked by the trial court, it suffices for endorsement purpose and after all that, the learned counsel did not show how the appellants were prejudiced as also rightly argued by the respondent's counsel. The second ground has no merit too.

The third, fourth and fifth grounds boil down on the proof of tort of defamation. I am not ready to delve in the discussion of awarding damages without discussing whether the tort of defamation was proved or not. For convenience purposes, I will first opt to deal with the 3rd, 4th and 5th grounds of appeal altogether and by so doing, I will be answering one broad issue as to whether the tort of defamation was proved? In endeavor to answer this broad issue sub issues will be dealt in seriatim thus:

1. *Whether there was publication?*
2. *Whether the publication referred to the respondent?*
3. *Whether the publication was defamatory?*
4. *Whether the defences advanced by the appellants of **truth, goodfaith, justification and fair comment** are acceptable?*

With regards to the first sub issue of publication, I find no difficult to agree with the trial court as well as the respondent that there was publication in the exhibit P2 (Tanzania Daima News Paper/1st Appellant) published on 30th March, 2012 titled "*Kamanda wa Takukuru Alalamikiwa*" the reporter being Antidius Kalunde (4th Appellant). Similarly on exhibit P1 (Tanzania Daima Newspaper(owned by the first Appellant) published on 20th April, 2011 titled "*Ofisa Takukuru adaiwa kuwalinda Wanyarwanda*" The reporter was Mbeki Mbeki (3rd appellant). From the above exhibits, the first sub issue is answered affirmatively. I therefore Concur with the trial court that there was publication made by the said appellants.

Whether the publication referred to the Respondent. In the first publication, of 20th April, 2011, the name of the respondent was not specifically mentioned and it was also the defense of the 3rd appellant that the name was not specifically mentioned. Advocate Rweyemamu argued that since the respondent conceded that there were more than one officers at PCCB office Karagwe therefore the publication did not refer or identify him. It is true, looking at the **exhibit P1** there is no where the name of the respondent was mentioned, however as both parties agree that the source of information of the publication was Godbless Blandes (DW3) and himself in his testimony explained the theft incidence which was filed as a criminal case in Karagwe District court and thereby mentioned the respondent as Hajinas Onesphory whom he was complaining against for paralyzing legal process by assisting Rwandese people, the complaint which was a result of such publication, it is therefore clear that the first publication referred to the respondent. The identification of the respondent in the published article need not be drawn exclusively from the contents of the publication; it may only be understood to refer to the plaintiff/respondent by persons with special knowledge of the circumstances. For example, **East African Standard v. Gitau, [1970] E.A. 678 (CA-K)** a picture of a damaged car, not itself identifiable, was published with a caption which described the scene of the accident and referred to the driver in terms, held to be defamatory and it was decided that it defamed the plaintiff in the eyes of those persons who know that he had been driving the car.

In another case of **Knupffer v. London Express Newspaper Ltd.** (1944) A.C. 116 at page 121, the position was set out succinctly by Viscount Simon, L.C., and I would respectfully adopt his words, when he said:

"There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law can the article, having regard to its language, be regarded as capable of referring to the appellant. The second question is a question of fact - Does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as matter of law, to be answered in the negative."

Unlike the first publication, the second publication was categorically published and put more clear by referring to the respondent as it mentioned the name of the respondent one Onesphori Ajinas where the contents elaborating the title of "*Kamanda wa Takukuru Alalamikiwa*" was expressed that "*Ofisa huyo Onesphori Ajinas anajihusisha na kesi isiyomhusu kwa kuwatishia wapelelezi wa kesi hiyo inayoendelea mahakama ya wilaya Kayunga*" It is therefore apparent clear that the second publication by Antidius Kalunde (4th Appellant) was a continuation of publication of the first incidence against the respondent hence I shake hands with the trial court and equally the respondent's counsel that in both publications, the respondent was referred.

*The third question is whether the publication was defamatory. A statement is defamatory if it is likely to lower the reputation of a person of whom it is made in the estimation of ordinary, just and reasonable men. See **Odongkara v. Astles [1970] E.A. 374.***

Moreover, **The Black's Law dictionary** 8th Edition, 1st reprint, 2004 as rightly referred by the trial court defines defamation to mean:

"The act of harming the reputation of another by making a false statement.. A false written or oral statement that damages another person's reputation"

Consistently **Salmond on law of Torts**, 17th Edition, 1977 by R.V. Houston at page 139 also referred by the trial court explains:

"The wrong of defamation consists in the publication of a false statement concerning another person without justification"

From the above quoted definitions of the tort of defamation, it appears that the term "**false**" is also very pertinent element which the person defamed has to prove before the tort of defamation can stand. In tackling this issue of whether the words were defamatory in nature, I will also be determining the last issue which touches on the appellants' defense as to whether there was justification. It was Mr. Kabunga's argument that the publication was justified, true and made in good faith as exhibit P3 tendered by the respondent himself proves that the words were thus not defamatory. He was to the effect that PCCB is the esteemed Government Institution and employer of the respondent that ended demoting the respondent from his senior position to lower one after making due diligence that what was reported in news paper was true.Mr.

Kabunga and his co-advocate one Rweyemamu had their firm conviction buttressed by section 39(d) of the Media Service Act that the publication was justified.

I had an ample time of perusing and reading the contents of exhibit P3 which was the demoting letter written by the Executive Director of PCCB. The decision to demote the respondent was driven from the same publications in the said newspaper. I am thus inclined to agree with Advocate Kabunga that the fact that the publication resulted to demotion by the Government Bureau signifies that the publication was highly probable true and not false otherwise the respondent would not have been demoted instead would be promoted and hence the tort of defamation cannot stand. The plea of justification is an assertion that the alleged libel or slander is the truth and, if this is established, it is a complete answer to civil proceedings for defamation, except where the truth was presented in such a way as to convey a defamatory innuendo. See **Bendzel v. Kartar Singh** (1953) 20 E.A.C.A. 53 (CA-K). However, it is not necessary to prove that the statement is literally true: it is sufficient if it is true in substance and there is no gross exaggeration as it was underscored in the case of **Hoare v. Jessop** [1965] E.A. 218 (CA-K). Conversely, that it is substantially true must be strictly proved: for example, proof that a person was convicted of an offence is not enough to justify a statement that he committed that offence. See in **Figueredo v. Editor, Sunday Nation** [1968] E.A. 501 (U); see also **Peckover v. Muyu H.C.C.C.** No. 1458 of 1970 (K) (unreported). It is worth noting that where a defence of justification is established, it is irrelevant that the defendant may have been actuated by

indirect or improper motives. See again in **Hoare v. Jessop** [supra]. If the trial court had considered exhibit P3 and properly directed its mind on it carefully in connection to the last element of whether the publication was **"false or true"** thus assessing whether the article was defamatory, it would probably have arrived at the different conclusion that the published words were true and justified hence the tort of defamation was not proved. In order to balance interests of protecting the reputation rights of individuals in the society as well as Promoting professionalism of journalists in the media industry for establishing regulations of media services and other related matters as expressed in the long title of Media Services Act, No.12 of 2016, the Legislature of Tanzania enacted the said law. Section 37 of the said law also rightly relied by Advocate Kabunga, recognizes publication in matters which are true published for public benefit as lawful publication. I will therefore quote section 37 viz:

"Publication of defamatory matter concerning a person shall be unlawful within the meaning of this part unless

(a) the matter is true and it was for public benefit that it is published, or

(b) It is privileged as one of the grounds for the reasons provided under this Act"

From the foregoing discussion, the third and fourth issues are affirmatively answered that the words were true and justified hence the words were not defamatory and hence the tort of defamation at the trial court was not proved on the balance of probabilities.

In the upshot, this appeal has merit. It is therefore allowed. The judgment and resultant orders of the trial court are overturned. Costs to be granted to the appellants.

Order accordingly.



E. L. NGIGWANA

JUDGE

13/12/2021

Judgment delivered this 13th day of December, 2021 in the presence of Mr. J.S. Rweyemamu learned counsel for the 3rd and 4th appellants, Mr. Frank Karoli, learned advocate for the 1st, 2nd and 5th appellants but in the absence of the respondent on notice.



E. L. NGIGWANA

JUDGE

13/12/2021

Right of appeal explained.



E.L. NGIGWANA

JUDGE

13/12/2021