

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CIVIL APPEAL NO. 10 OF 2021**

*(C/F Civil Case No. 04 of 2020, Resident Magistrate Court of Moshi at Moshi)*

**MICHAEL ZACHARIA ..... APPELLANT**

**VERSUS**

**FLOMENA SOMBANANGA ..... RESPONDENT**

**JUDGMENT**

**MUTUNGI .J.**

In order to join the Court in the journey of this appeal, it is imperative to outline albeit briefly the historical background. It all started on 10<sup>th</sup> day of April, 2019 while the appellant seated at Gasper Michale's grocery enjoying his beer, was suddenly attacked by the respondent pouring on him a shower of insults. In view thereof she allegedly uttered abusive words mainly "wewe ni msenge, mshenzi na mpumbavu huna adabu." She went on and forcefully grabbed the appellant by his neck, struggled him to the extent that she tore off a button from his shirt. The said acts caused him mental, emotional and psychological torture. Much so being a reputable

teacher and a Government official, these words lowered and tarnished his integrity together with his reputation in the society. To put salt to the wound, these words were uttered in front of a crowd of people present at the time.

The appellant went forth and reported the matter to the police who arrested the respondent henceforth. She was accordingly charged for uttering abusive language and assault causing bodily harm. In the end she was convicted and sentenced in Criminal Case No. 36/2019 by the Usseri Primary Court, as an alternative sentence she paid a fine.

It is in regard of the foregoing that the appellant filed with the Resident Magistrate Court of Moshi at Moshi, Civil Case No. 4 of 2020 subject of this appeal praying for Judgment and Decree against the respondent as follows: -

- (i) Payment of Tshs. 185,000,000/= or as may be assessed by the honourable court, being general damages for tarnishing the plaintiff's reputation and for non-consensual contact causing him physical, mental, emotional and physiological torture.
- (ii) Payment of Tshs. 10,000,000/= or as may be assessed by the Honourable Court, being general

damages for sufferings and psychological torture for such defamatory accusation and battery.

- (iii) An order that, the defendant apologizes and clear the plaintiff's name via public meeting.
- (iv) Payment of costs of this suit.
- (v) Any other orders which this Honourable Court may deem fit and just to grant.

Having deliberated on the evidence adduced, the trial court found the words uttered by the respondent were not defamatory. On the same the court was of the view, the words must have been strictly interpreted within their meaning. The appellant in that regard did not in any way explain the meaning of the uttered words and how the same offended him.

As to the act allegedly committed on the appellant, the same was found to impute a criminal element falling under Section 240 and 89 of the Penal Code Cap. 16 R.E. 2019, rather than a tortious liability. The same notwithstanding once sentenced by the Usseri Primary Court, had served her sentence for the offences she had committed. In line with the court's findings, the first issue was answered in the negative to the effect the respondent did not defame the appellant. Having so

found, the trial court was of the settled opinion once the first issue had been answered in the negative, it would serve no purpose to proceed with the determination of the rest of the issues which solely depended on the same. Conclusively, the trial court dismissed the suit for want of merits with costs.

It is now that the appellant is seen before this court on appeal having been aggrieved by the said decision. He has raised three grounds as hereunder: -

1. That the Magistrate erred in law and fact in holding that the appellant failed to explain if the words "Mshenzi, Mpumbavu, Msenge" defamed him.
2. That the Magistrate erred in law and fact in holding that, the appellant's cause of action falls under criminal liability rather than tortious liability.
3. That the Magistrate failed to examine the adduced evidence on the claim of assault and decide on the matter.

During hearing of the appeal, the appellant was represented by Mr. Thomas Kitundu, learned counsel whereas the respondent defaulted appearance. Reading from the record, despite several summons issued against

her, (hence aware of the appeal filed), she did not bother to enter appearance. The appeal as a result proceeded Ex-parte.

Submitting on the 1<sup>st</sup> ground, Mr. Kitundu stated, the trial Magistrate erred in not finding that the words mshenzi, mpumbavu, msenge defamed the appellant. He cited the case of Anatori Rwebangira Vs. Emmanuel Ishazi (Civil Appeal No. 47/2016 at page14. Which defined defamation, as words aiming at lowering one's reputation culminating to ridicule by the community. He averred, the elements of defamation include among other things, the words so uttered should be defamatory in nature as held in the case of Said Ally Masanja Vs. African buyer and Trader (Publications & Ltd & Others [1981] TLR at 221. He argued, the words mshenzi, mpumbavu, msenge were uttered before the appellant's students, their parents hence defamatory to the appellant who is a retired teacher and highly respected by his society.

The learned counsel defined the word **Mshenzi** as a person who does not understand himself, **Mpumbavu** the person has no intelligence and **Msenge** a person who is gay. Since, the appellant is none of the above, these words made him loose value and respect in his society. The

community around him looked down on him and worse off the students' parents doubted his teaching capability.

Mr. Kitundu further submitted, it is on record before Usseri Primary Court in Criminal Case No. 36/2019, the respondent was convicted on the same offences, thus, the trial magistrate ought to have taken judicial notice of this fact as envisaged by section 43A, 58 and 59(a) of the Evidence Act, Cap 6. R.E. 2019. In view thereof this ground is to be allowed.

On the second ground, the learned counsel argued, the trial magistrate erred in finding the appellant's cause of action falls on criminal and not tortious liability. He referred the court to the case of **Anatory (supra)** at page 15 that, defamation attracts both criminal and tortious liability. On the same footing, slander as is the case at hand attracts a tortious liability as seen at page 14 of the same case. It is paramount that there should be an imputation the claimant is unfit to carry on his trade, business or profession. In that regard, the learned counsel asserted, the words uttered by the respondent intended to show the appellant was unfit for the profession and should be terminated. He argued, at page 17 of the trial court's proceedings, the respondent succeeded in her intention to move the

society to ridicule the appellant which amounts to tortious liability.

Lastly, Mr. Kitundu submitted, the trial magistrate failed to properly analyze the adduced evidence before her on the claim of assault. He argued before the trial court, the plaint had two claims as per paragraphs 3, 4, 5 & 6 and likewise the reliefs were on defamation and assault. On the claim of assault, he argued, the appellant was strangled, pushed on the wall and his shirt's button removed. However, the trial magistrate dealt with only defamation and failed to deal with the assault which was raised as a 3<sup>rd</sup> issue without giving explanations why the same was left out.

He then proceed to cite the case of **Alnoor Shariff Jamal Vs. Balnadir Ibrahim Shamje, Civil Appeal No. 25/2006 (unreported)** which decided, if there are independent issues, the court should deal and determine each issue accordingly. Since the issue of assault, was not determined and damage not granted, he prayed, this court does re-evaluate the evidence and proceed to determine the issue on assault as prayed in the plaint. He invited the Court to the Court of Appeal decisions in the cases of **Hassan Mzee Mfaume Vs. Republic [1981] TLR 167, Idd Jobs Vs. Mubber [1970] E.A 976** and **Ruffar .S. Nelson Vs. A. G. &**

**Another [2000] TLR 419** where the Apex Court ruled, the undecided issue can be attended to by the Appellate Court where the appellant had adduced evidence to that effect. In the end he prayed the appeal be allowed with costs.

After the appellant counsel's submission, it is apposite to briefly explain the meaning of the term 'defamation'; According to the **Black's Law Dictionary 8<sup>th</sup> Edition**, the term defamation is defined as;

*"A statement that tends to injure the reputation of a person referred to in it. The statement is likely to lower that person in the estimation of reasonable people and in particular to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear or dislike"*

In the case of **Hamza Byarushengo Vs. Fulgencia Manya and 4 others, Civil Appeal No. 246 of 2018 CAT at Dar es Salaam (unreported)** the Court of Appeal of Tanzania had this to say on defamation;

*"... **One**, a statement which tends to bring a person into hatred, contempt or ridicule; **two**, words must tend to lower the claimant in the estimation of the right thinking members of society in general; **three**, if words tend to cause the claimant to be shunned or avoided ..."*



See also **Astus Njale Masule and Samson Mipawa Molla Vs. Dogan Lunala (2002) TLR 197** as well as the persuasive decisions in **Theaker Vs. Richardson (1915) 3KB 32, Sim Vs. Stretch (1936) 2 All E.R. 1237.**

It is however the duty of the complainant to establish that the facts she/he asserted or pleaded in his/her plaint against the respondent were defamatory in the sense they had injured his reputation or was brought to ridicule, hatred in the estimation of the right thinking member of society.

Borrowing leaf from the cited authorities, I will now start with the 1<sup>st</sup> ground of appeal that, the trial court erred in not finding the words “Mshenzi, Mpumbavu, Msenge” defamed the appellant. As already underscored, the appellant was duty bound to establish on the balance of probability, how his dignity, reputation, profession had been lowered and feelings injured by the respondent's uttered words. The requirement of proof by a complainant was stressed in the persuasive case of **Rugarabamu Archard Mwombeki Vs. Charles Kizigha and three others (1985 ) TLR 59.**

In reaching its decision, the trial court observed the alleged defamatory words were not explained their meaning and

how each of them defamed the appellant. I am in all fours with this reasoning, considering it is clear such words were not defined or explained by the appellant during trial but rather through the learned counsel's submission in this court at the appeal stage. The appellant's advocate is seen going at length to provide the literal meaning of the words to mean; somebody who does not understand himself (mshenzi), stupid (mpumbavu) and gay (msenge). In my settled view, this is new evidence adduced on appeal while the respondent is curtailed the right to cross examine on the same.

It was not the trial Court's task to define the alleged uttered words and analyse how each injured the appellant. It should be borne in mind the incident took place in a grocery where people were taking beers and enjoying themselves, not in a public meeting where people are attentively organized. The appellant failed to account how his students, their parents and the society at large did look down on him after the respondent's utterances. It is not clear whether he was shunned, ridiculed or judged by those around on the material day or thereafter. His witness (PW2) incidentally the owner of the grocery, did not provide proof of how the uttered words had injured the

reputation of the plaintiff and exposed him to hatred, contempt or ridicule. All that PW2 saw was the immediate acts of the respondent. In view thereof this ground is found to have no merit and is dismissed.

Regarding the 2<sup>nd</sup> ground that, the trial court erred in holding, the appellant's cause of action falls under criminal liability rather than tortious liability, I agree with the appellant's counsel that, abusive words attract both criminal and tortious liability. The fact that the respondent had already been convicted in Criminal Case No. 36 of 2019 at Usseri Primary Court is no bar to sue her for defamation. The main purpose of criminal liability is to enforce criminal justice while tort law has a central motive of compensating the victim rather than punishing the wrong doer. Thus, even when the respondent was found guilty and convicted, she paid a fine to the state. The tortious liability claimed in the matter at hand is to provide reliefs to the injured party (appellant). In the circumstances, being sued for tortious liability after the criminal case does not amount to double jeopardy as observed by the trial court. This principle is only applicable in criminal cases when a person is prosecuted and

punished twice for the same offence. This ground has merit and the same is allowed.

Lastly on the claim of assault, it is true that the trial magistrate did not adjudicate on the matter after finding that the first issue was answered in the negative. For clarity the issues were as follows: -

- i. Whether the defendant defamed the plaintiff.*
- ii. If the 1<sup>st</sup> issue is answered in affirmative, what is the plaintiff entitled to.*
- iii. Whether the defendant assaulted the plaintiff.*
- iv. To what reliefs are the parties entitled to.*

It was therefore imperative for the trial court to adjudicate on the 3<sup>rd</sup> and 4<sup>th</sup> issues. More so having been framed as different and distinct issues. As rightly submitted by the appellant's counsel, this court being a first appellate court has powers to re-evaluate or re-asses the trial court's evidence. I will thus usurp the said powers and go into the record.

In re-evaluating and re-assessing the evidence adduced at the trial court regarding the assault complaint, this court is guided by the general essential elements of the tort of assault. The same are **(a)** an act intended to cause an apprehension of harmful or offensive contact that causes

apprehension of that contact to the victim. **(b)** The act required for an assault must be overt **(c)** Mere violent and abusive language or words alone are insufficient. In that regard to qualify an assault, the victim must be assaulted combined with some action that indicates the ability to carry out a threat. The usual test to be applied is thus whether the act would induce such an apprehension in the mind of a reasonable person.

In the matter at hand, the appellant testified, the respondent had attacked him. He is quoted at page 15 of the proceedings to have stated: -

***"The defendant attacked me and pushed me to the wall. She also insulted me that "mshenzi, mpumbavu, msenge".***

On cross-examination at page 16 of the proceedings, the appellant replied: -

***"Philomena insulted me. Apart from insulting me he also pushed me to the wall while holding my shirt."***

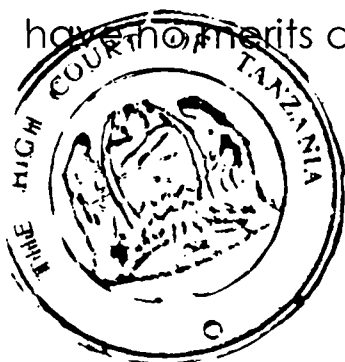
Having synthesized the above quotes, the Court is not at all convinced from such evidence that, the force as explained by the appellant or the act applied by the respondent was intended to induce apprehension or

reasonable fear to the appellant and the people who were present at the time in point.

In my above findings I take inspiration from the case of **Common Wealth Vs. White, 110 Mass 407 [1872], to 39** that,

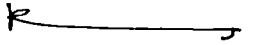
*"It is the probable and natural effect of the conduct of the defendant on the plaintiff, or the tendency of the defendant's acts to induce the breach of peace, that is important in determining whether or not an assault has been committed."*

In light of this court's findings, the appellant's complaint in respect of assault cannot stand as there is no gain of evidence to show the respondent's act induced such apprehension of harm or threat in the mind of a reasonable person to warrant granting any damages. This ground fails. In the upshot, apart from the findings on the second ground of appeal, the appeal is substantially found to have no merits and is accordingly dismissed with costs.

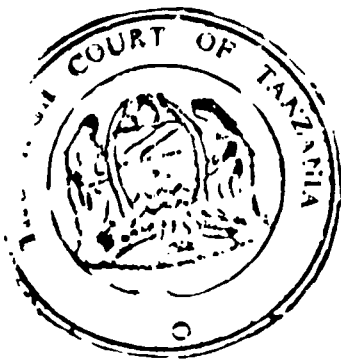



**B. R. MUTUNGI**  
**JUDGE**  
**18/05/2022**

Judgment read this day of 18/08/2022 in presence of Appellant.

  
**B. R. MUTUNGI**  
**JUDGE**  
**18/05/2022**

RIGHT OF APPEAL EXPLAINED



  
**B. R. MUTUNGI**  
**JUDGE**  
**18/05/2022**