

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL APPEAL NO. 247 OF 2021

MOHAMED IQBAL NORAY APPELLANT

VERSUS

THE REGISTERED TRUSTEES

OF KOKNI MUSLIM JAMAAT RESPONDENT

**(Appeal from the judgment and decree of the Resident Magistrate's Court
of Dar es Salaam at Kisutu in Civil Case No. 221 of 2018)**

JUDGMENT

14th July & 22nd August, 2022

KISANYA, J.:

The appellant was the defendant in a suit filed against him at the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 221 of 2018. The main reliefs sought by the respondent, The Registered Trustees of Kokni Muslim Jamaat were an order to the appellant to publish an unconditional apology on the front page in a newspaper of widest circulation for a period of one week and general damages to the tune of USD 2,000,000/= . The said reliefs were premised on the defamatory words alleged to have been uttered by the appellant.

In terms of the record, the material facts leading to the instant appeal were as follows: The respondent is a religious organization registered under Cap. 318,

R.E 2002. She is entrusted with handling the welfare of the religious members. Some of the services offered by the respondent include, officiating marriage, schools and burial services. The appellant is a member of the respondent's society. At one point in time, he was also one of the trustees.

On 16th October, 2018, various members of the community and press attended an official meeting held and Kisutu area, Dar es Salaam. The meeting was chaired by the District Commissioner of Ilala. It was the respondent's case that during the said meeting, the appellant uttered defamatory words which were pleaded in paragraphs 5 and 6 of the plaint. The said words are reproduced hereunder:-

- (a) *"Mama nimeresign kwa hiyo post kwa sababu jumuiya wametumia USD 1,500,000 Million Dollars kununua kiwanja hapa hapa Ilala na hizo hela zilikuwa za wanyonge."*
- (b) *"Halafu wana mpango wa kuuza Kabrastan I mean graveyard 25 acres jamaa anataka kuwauzia watu wa grave yard iko Kinondoni."*
- (c) *"Chairman na trustee wapo very corrupted."*
- (d) *"I got proof and that there are four trustees they are very corrupt, 1.5 million dollars wanaleta, wanavusha, kuna chemist kuna stationeries wanaleta kwa jina hiyo, wanaleta kwa wingi."*
- (e) *"Huyo chairman na trustees, hawa trustees watano"*

hasa mmoja Dr. Mustafa, he is a Doctor lakini anafanya mambo ya uhalifu katika community yetu. He is working at Aghakhan Hospital, mimi nataka licence yake ifutwe kabisa."

According to the respondent, the above words were defamatory and meant to be understood that; *one*, the respondent was engaging in corrupt practices and did not care about the wellbeing of its members; *two*, the respondent was mismanaging funds and assets at the stake of its members, *three*, the respondent was using the organization to conduct illegal business contrary to the purposes for which the organization was registered for; and *four*, the trustees and leaders were not trustworthy and had no good moral character to lead the organization.

In view of the foregoing, the respondent claimed that, the alleged defamatory words caused irreparable harm and were intended to tarnish her good image something which injured her reputation and did subject the organization to ridicule, hatred and contempt in the eyes of the right thinking members of the society within and outside Tanzania. It was further alleged by the respondent that, her quest for an apology from the appellant did not work out, thereby leading to the suit which gave rise to the appeal at hand.

When served with the plaint, the appellant filed a written statement of defence in which he admitted to have uttered the words which formed the basis of the respondent's claim. However, he claimed that the said words were not

defamatory of the respondent. He further filed a notice of preliminary objection on various points of law. One of the points of objection was to the effect that the plaintiff was bad and misconceived in law, on account that the respondent being a body corporate, could not be defamed. Upon hearing both sides, the trial court overruled all preliminary objections for want of merits.

To determine the dispute, the parties proposed three issues which were adopted and recorded by the trial court. The said issues read as follows: -

- 1. Whether the words pleaded in paragraphs 5 and 6 of the plaintiff are defamatory of the plaintiff.*
- 2. Whether the defence of truth and fair comment is available to the defendant.*
- 3. What are the reliefs the parties are entitled to.*

Determined to prove her case against the appellant, the respondent marshaled three witnesses. These are Ahmad Khan (PW1), Shakir Yunus Tassar (PW2) and Dr. Mustapha Abubakar Abdulrahim Babmia (PW3) who introduced themselves as the respondent's Chairman, Secretary and Trustee, respectively. The appellant did not enter his defence. He raised the defence of no case to answer.

Having considered evidence adduced by the respondent and the closing submissions made by the counsel for both parties, the trial court was satisfied that the words uttered by the appellant were defamatory. It went on to award general

damages to the tune of Tshs. 50,000,000 in favour of the respondent. Furthermore, the appellant was ordered to publish an unconditional apology on the front page in a local newspaper of widest coverage.

Displeased, the appellant filed the present appeal. It is grounded upon the following points:

- 1. That the trial magistrate grossly erred and misdirected himself in law and on the facts in holding that the Respondents (sic) were defamed by the Appellant in their official capacity as the registered trustees of the Kokni Muslim Jamaat.*
- 2. That the trial magistrate further grossly erred and misdirected himself in law and on the fact in holding that the words uttered by the Appellant were defamatory of the Respondent (sic) without proof thereof.*
- 3. That the trial magistrate further grossly erred and misdirected himself in failing to properly assess and evaluate the evidence that was before him, thus arriving at an erroneous decision.*
- 4. That the trial magistrate further grossly erred and misdirected himself in awarding damages which were, considering the whole circumstances of the case, manifestly excessive and were awarded without any legal or other justification.*

Before me for hearing of the appeal were Dr. Mutabaazi Lugaziya, learned counsel who advocated for the appellant and Mr. Mbuga Jonathan, also learned counsel representing the respondent.

Arguing in support of the appeal, Dr. Lugaziya prefaced his submission by adopting his closing submissions before the trial court to form part of his submission in chief. He went on to submit that in accordance with the law, the words are defamatory if they have impacted on other parties who are right thinking members of the society. It was his further argument that the said words must have a cumulative effect on the thinking of those people vis-à-vis the appellant to the effect of changing their perception towards the plaintiff (respondent).

With regard the case at hand, Dr. Lugaziya submitted that the respondent did not prove how the words uttered by the appellant caused other thinking member of the society to have a low esteem of the respondent. His submission was among others, based on the contention that the trustees returned to their office. It was also Dr. Lugaziya's contention that there was no proof in respect of damages suffered by the respondent. In that regard, he was of the view that the basis of general damages of Tshs. 50,000,000/ awarded by the trial court is not known.

Elaborating further, Dr. Lugaziya argued that defamation is proved by establishing that the plaintiff suffered damage. He reiterated his contention such evidence is lacking in the case at hand. That being the case, the learned counsel was of the considered views that there was no proper assessment of evidence adduced before the trial court and that the trial court misapplied the principle

applicable in determining defamation thereby arriving at an erroneous decision. On the foregoing, Dr. Lugaziya prayed that the appeal be allowed with costs.

In response, Mr. Mbuga cogently resisted the appeal on the account that the appellant's submission is misplaced in law and fact. He also adopted the respondent's closing submission before the trial court to form part of his reply to the submission.

Responding to the first ground of appeal, Mr. Mbuga was of the view that it was related to the respondent's capacity to institute a suit for defamation. He went on to submit that the said ground was improperly raised before this Court. His submission was based on the reason that the issue whether the respondent has capacity to sue for defamation does not feature in the decision subject to this appeal. Although the learned counsel conceded that the trial court made a ruling that the respondent had capacity to sue for defamation, he argued that there was no order which could give rise to the first ground of appeal. To support his argument, the learned counsel cited Order XXXIX Rule 1 and Order XL of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC) and the case of **Mussa Chande Jape vs Moza Mohamed Salim**, Civil Appeal No. 141 of 2018.

In alternative, Mr. Mbuga submitted that the respondent is an entity registered under the Trustees Incorporation Act. He went on referring the Court to the book titled "**The Law of Torts**", **26th Edition** in which **Rantanlal**

Rachchoddas (the author) states that the trustees have locus to sue upon proving that the defamation was referred to them. In view of that position, the learned counsel invited me to dismiss the first ground of appeal.

With regard to the second and third grounds of appeal, Mr. Mbuga was in agreement with Dr. Lugaziya on the general principles of defamation. However, he contended that the appellant's counsel did not connect the said principles with the facts presented before the trial court.

Making reference to pages 2 and 3 of the impugned judgment, the learned counsel submitted that the trial court quoted the defamatory statements as stated in the in plaint. He went on to submit that the appellant did not dispute to have uttered the complained words but raised the defence of justification and fair comment. Mr. Mbuga went on to argue that the appellant was duty bound to produce evidence to prove his defence. At that point, the learned counsel cited the case of the High Court of Kenya at Nairobi in **Hon. Adam Reynan vs Standard Ltd and Another** [2020] eKLR to support his position. He further submitted that, since the appellant opted not to enter his defence, the evidence that the respondent was defamed remained uncontested. On that account, the learned counsel was of the firm view that the trial court evaluated the evidence adduced before it. He, therefore, asked me to overrule the second and third grounds of appeal for want of merit.

As regards the fourth ground of appeal, Mr. Mbuga submitted that general damages is awarded at the discretion of the trial court basing on the facts presented before it. He also cited the case of **Ibrahim H. Lipumba vs Zubeir Juma Mzee** [2004] TLR 381 in which the Court of Appeal gave guidance on the factors to be considered in awarding general damages. The learned counsel went on contending that the respondent prayed for general damages of USD 2. 5 million on the account the Trust (institution) depends on its trustees and that it has been in existence from 1935. Referring further to the case of **Kirabo vs Editor** [1990] Vol. E.A.L.R 149, Mr. Mbuga argued that the trial court was justified to award the damages of Tshs 50,000,000 because the appellant did not prove the defence of justification. In conclusion, the learned counsel moved the Court to dismiss the appeal with costs.

In rejoinder, Dr. Lugaziya submitted that the ruling in respect of the first ground was not appealable for being interlocutory. It was further submitted that defamation is related to personal reputation and that the Registered Trustees cannot sue in respect of reputation of individual trustees.

As regards the issue of evaluation of evidence, Dr. Lugaziya reiterated that the evaluation contravened the principles of law. He further contended that, although the words were uttered by the appellant, it was not proved that the respondent was defamed.

With regard to the case cited by the respondent's counsel, Dr. Lugaziya submitted that the plaintiff therein proved to have been defamed. Therefore, he was of the view that they are distinguishable from the circumstances of this case.

On the issue of general damages, Dr. Lugaziya stated that he is alive to the principle that general damages is awarded at the discretion of the trial court and such power cannot be interfered with. However, he submitted that the law is also settled that discretionary powers must be exercised judiciously and in accordance with the law. He reiterated that there was no evidence to prove the respondent's claim and general damages of Tshs 50,000,000 awarded by the trial court.

I have weighed the learned rival submissions on the issue pertaining to this appeal. The crucial issue is whether the appeal is meritorious. Considering that the appellant's submission was too general, I propose to address the appeal in the manner the grounds of appeal were tacked by the learned counsel for the respondent.

Starting with the first ground of appeal, the memorandum of appeal shows that the trial court is faulted for holding that "the Respondents were defamed by the appellant in their official capacity as registered trustees of the Kokni Muslim Jamaat." At the outset, this ground should not detain us. It was not addressed by the appellant when invited to submit in support of his appeal. As a result, the respondent was not in a better position of understanding the gist of the appellant's

complaint. This is exhibited by the fact that the learned counsel for respondent replied to this ground by addressing the issue whether the respondent had capacity to sue for defamation. Guided by the settled law, the appellant is taken to have abandoned the first ground of appeal.

Even if I was to address the said ground, I agree with the learned counsel for the respondent that this ground is misconceived. Pursuant to Order XXXIX, Rule 1 of the CPC, an appeal to this Court stems from the decision made by the trial court. In terms of the impugned judgment and decree appended to the memorandum of appeal, the trial court did not hold that "the Respondents were defamed by the appellant in their official capacity as the registered trustees of the Kokni Muslim Jamaat." For the foresaid, the first ground of appeal lacks merit.

Next for consideration are the second and third grounds which I find convenient to discuss them conjointly. It is my considered view that they relate to evaluation of evidence in support of the issue whether the words uttered by the appellant were defamatory. The law is settled that for the tort of defamation to stand, the plaintiff must prove the following: *One*, that the words are defamatory. *Two*, that the words referred to the plaintiff. *Three*, that the words were communicated to a third party. See for instance, the case of **Meneja Mkuu Zanzi Resort Hotel vs Ali Said Paramana**, Civil Appeal No. 296 of 2019 (*supra*) in which the Court of Appeal underlined that: -

*"There are also two authoritative authors in their books, Winfield and Jolowicz on Tort, Fifteenth Edition, 1998, Ch. 12, p390-461 and Michael A. Jones, Textbook on Torts, Seventh Edition, 2000, Ch. 13, pages 495-534, state that the claimant has to prove the following to succeed in the tort of defamation (slander and libel): **First**, words must be defamatory. **Second**, words must have referred to the claimant and **Third**, there must be publication, that is, communication to a third party."*

In the case at hand, the appellant did not dispute to have uttered the words which led to the suit preferred against him. It was also not disputed that the words were uttered during the public meeting chaired by the then District Commissioner of Ilala. Considering further that the said meeting was attended by other people other than the trustees, it is also clear that parties were not at issue that the words were communicated to a third party. In that regard, the third ingredient of defamation was duly proved.

With regard to the second and third ingredients, the trial court framed the issue whether the words uttered by the appellant were defamatory of the respondent. In view of the said issue and the rules of evidence under section 110 of the Evidence Act, Cap. 6, R.E. 2019, it was the appellant's duty to prove that the words uttered by the appellant were defamatory and that they referred to the respondent. That being the position, the learned counsel's contention that the

appellant did not enter defence applies if it is proved that the words uttered by the former were defamatory of the respondent.

Starting with the issue whether the words were defamatory, I find it appropriate to cite **The Halsbury's Laws of England** Vol. 28 4th edition, Paragraph 10 page 7 in which a defamatory statement is defined in the following terms:-

"a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

In the light of the above definition which was also referred to by the trial court, I agree with Dr. Lugaziya that, the statements or words are defamatory if they tend to lower a person in the estimation of right-thinking members of the society or which tends to shun or avoid that person. There is a plethora of authorities on that position. One of the said authorities is the case of **Ally Maswanya vs African Buyer and Trader (Publications) Ltd & Others** [1981] T.L.R 221, where it was observed that:-

"In consideration whether the words were defamatory in their ordinary or hidden meaning the court will look at the effect in the mind of reasonable man in the community."

As hinted earlier, Dr. Lugaziya contends that the respondent did not prove that her reputation was lowered in estimation of the right thinking members of the society. Pursuant to the words uttered by the appellant, it is the trustees who were stated to be corrupt persons. It was further averred in the plaint that the words injured the respondent's reputation and that they subjected the organization/respondent to ridicule, hatred and contempt in the eyes of the right thinking members of the society. Was that claim proved? The answer to this question is found in the evidence on record.

The first witness is PW1, the chairman of the Board of Trustees. He testified, among others that, the respondent was affected because the trustees were suspected by the members of the organization (Trust) to be thieves. He also testified that the trustees were injured and their reputation lowered. However, PW1 admitted that he was still the respondent's chairman, and he is trusted person. This is reflected in his evidence during cross-examination when he stated:

"I am still the chairman, they trust me. Despite of all allegations am still a chairman."(Emphasize supplied).

It was further adduced by PW1 that the sponsors had lost trust on the respondent and that the said sponsors stopped their donation or sponsorship. However, such fact was not proved. PW1 did not name the said sponsors or donors and how they cancelled their sponsorship or donation. Further to this, PW1, did

not produce evidence to prove how the respondent was denied loan by the banks due to the appellant's words, as deposed in his evidence in chief.

There came the second witness (PW2) whose position is the secretary of the Board of Trustees. As far as the issue under consideration is concerned, PW2 his evidence that members of the society lost confidence and that two schools were affected was not duly. It was expected of him to produce figures showing how the schools were affected by the words uttered by the appellant. When cross-examined, PW2 stated that an organization which is defamed cannot prosper. However, he did not give evidence on how the respondent failed to prosper after the words were uttered by the appellant.

The last witness is one of the trustees who testified as PW3. He told the court on how he was personally affected by the words uttered by the appellant. However, he did not adduce evidence on how the appellant's statements lowered the respondent's reputation in the right thinking members of the society and how the Trust as a whole was affected by the said words.

Therefore, reading from the evidence adduced by the respondent, I find merit in Dr. Lugaziya's argument that it was not proved whether the statements uttered against the trustees affected the respondent (the Trust). In that regard, it is not known whether the right thinking members of the society changed how they valued the respondent. Indeed, the fact that the PW1, PW3 and other trustees are

still in their office suggest that the members of the society did not believe the statements uttered by the appellant.

According to the trite law, the statements or words are not defamatory unless it is proved, among other, that the said statements or words lowered the claimant's reputation in the estimation of the people of his community or caused the claimant to be avoided or exposed to any hatred, contempt or ridicule. I am also fortified by the decision of the Court of Appeal in the case of **Meneja Mkuu Zanzi Resort Hotel** (supra) where it was held that:-

"Applying the above reasoning to this case, in the absence of any other evidence to support the claims by the respondent that his reputation was injured, the circumstances do not lead us to find that the utterance by Franco in anyway lowered the respondent's reputation in the estimation of the people surrounding him or caused him to be shunned or avoided or exposed him to any hatred, contempt or ridicule. Therefore, we are of firm view that the alleged remarks fail the test and they are not defamatory."

Being guided by the above position, I hold the view that the trial court erred in holding that the words uttered by the appellant were defamatory while there was no evidence to prove how the respondent, The Registered Trustees of Kokni Muslim Jamaat was affected the said words.

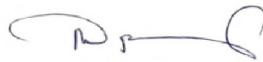
As stated earlier, the second limb of the first issue framed by the trial court required the respondent to prove that the words uttered by the appellant referred to her. This aspect was not addressed by the trial court. Given that the appellant deposed in paragraph 4 of the written statement of defence that the words were “not defamatory of the respondent” and that he believed that the individual trustees are not synonymous with the Trust, the respondent ought to have proved how the words were referring to the organization/ the Registered Trustees of Kokni Muslim Jamaat and not the individual trustees. However, PW1, PW2 and PW3 did not give evidence to prove that the statements uttered by the appellant were referring to the Registered Trustees of Kokni Muslim Jamaat and not the individual trustees.

For the reasons stated afore, I find merit in the second and third grounds of appeal. It is clear that had the trial court properly evaluated the evidence adduced by the respondent, it would not have decided the first issue in affirmative.

Upon determining that there is no evidence to prove that the words subject to this case were defamatory of the respondent, I find it not necessary to address the fourth ground of appeal on issue of general damages awarded by the trial court. This is so because the issue of general damages and other relief were subject to proof of the suit for defamation. It is therefore, my considered view that this appeal can be disposed of basing on the first and second grounds of appeal.

On the basis of the foregoing reasons, I allow the appeal by quashing the judgment and setting aside the decree of the trial court. Given that the appellant is a member of the respondent's organization, I find it suitable to order each party to bear its own costs.

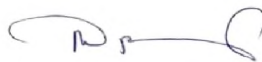
DATED at DAR ES SALAAM this 22nd day of August, 2022.



S.E. Kisanya
JUDGE

COURT: Judgment delivered this 22th day of August, 2022 in the presence of Dr. Mutabaazi Lugaziya, learned advocate for the appellant, Mr. Alfred Rweymamu, learned advocate for the respondent and Ms. Zawadi, court clerk.

Right of appeal to the Court of Appeal explained.



S.E. Kisanya
JUDGE
22/08/2022