

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MOROGORO)
AT MOROGORO

CIVIL APPEAL NO. 10 OF 2022

(Originating from the decision of the Resident Magistrates' Court of Morogoro in Civil Case No. 23 of 2020)

MW RICE MILLERS LIMITED.....APPELANT

VERSUS

MWASA SECURITY LIMITED.....RESPONDENT

JUDGEMENT

Hearing date on: 28/7/2022

Ruling date on: 10/8/2022

NGWEMBE, J:

The appellant herein, was aggrieved against the trial court which awarded the respondent with compensation of forty-five Million Shillings (TZS 45,000,000/=) for the alleged injuries sustained due to defamatory utterances lowered her reputation before the public. Briefly, the respondent, Mwasa Security Company had a contract of provision of security services with the appellant, MW Rice Millers Limited which lasted for four and a half years.

It is noteworthy that, Mwasa Security Company is a Corporate Body established under the Companies Act operating her business of

provision of security services within Tanzania Main Land having her main office in Morogoro Municipality in Morogoro region.

To recap the background which led into the instant appeal may be prefaced that, the respondent entered into a provision of security services to MW Rice Millers Limited (the Appellant) for four and a half (4 ½) years, thereafter their relationship turned sour. As a result, the appellant on 20th May 2020 and 22nd May 2020, prepared and served the respondent with a termination letter. In turn the respondent claimed the contents of those letters had defamatory materials. Thus, the appellant wilfully and without legal justification alleged the respondent to have involved into misappropriation and theft of the properties of the appellant. Such allegations damaged her image and reputation to the extent of barring other persons from entering into security services with her.

Consequently, the respondent preferred an action against the appellant for defamation before the Resident Magistrates' Court of Morogoro, registered as Civil Case No. 23 of 2020. The respondent/plaintiff claimed that those two letters comprised defamatory statements which lowered the reputation of the respondent. Thus, claimed compensation of Shilling Two Hundred Million (TZS. 200,000,000/=).

The allegation was strongly contested by the appellant. However, after hearing evidences from both sides, at the end the trial magistrate decided in favour of the respondent. The trial magistrate proceeded to award forty-five Million Shillings only (TZS 45,000,000/=) to the

respondent as compensation for the injury sustained from the alleged defamatory statements which lowered the reputation of the respondent.

It is against that decision of the Trial Court, which triggered the appellant to appeal to this Court. Noteworthy, initially, the dissatisfaction of the appellant was expressed through three grounds of appeal contained in the memorandum of appeal. Nonetheless, before I commenced the hearing, the appellant prayed to file additional grounds of appeal, which prayer was granted, as such on 27/6/2022 the appellant filed four (4) additional grounds of appeal, making an aggregate of seven (7) grounds of appeal. In that regard, the grounds of appeal which will require my deliberation and determination are couched in the following terms: -

1. That, the trial court's Learned Magistrate erred in law by proceeding with a suit founded on defamation with a plaint and not with a petition.
2. That, the trial court erred in law and in fact in relying on contradictory and hearsay evidence of the Respondent;
3. That, the trial court erred in law and fact by relying on the appellants contentions which were not submitted during the hearing by including his own words;
4. That, the trial court erred in law (illegality) by proceeding with a suit founded on defamation with a plaint and not a petition;
5. That, the trial court erred in law and fact by deciding that, the defendant has defamed the plaintiff without fulfilling the ingredients of defamation;

6. That, the trial court erred in law by entering a judgement against the appellant basing on the alleged defamatory statements without assigning the reasons thereof; and
7. That, the trial court erred in by delivering a judgement which lacks the essential ingredients such as proper analysis of evidence and reasons for those decisions.

Considering these grounds of appeal, obvious grounds 1 and 4 are similar in nature and in contents, same may be joined and considered together.

On the hearing of this appeal, the appellant was represented by Mr. Justine Mbanga, learned advocate, and on the adversary side Mr. Thomas Mathias, learned advocate entered appearance for the respondent.

Mr. Justine Mbanga commenced his submission, by abandoning the first three grounds of appeal proceeded to argue only the additional grounds of appeal, that is from ground four to seven.

Arguing on the first ground on proceeding with trial founded on defamation with a plaint instead of a petition. Submitted that defamation case is instituted in court by way of a petition and not by way of a plaint. Insisted his argument by referring this court to the **Media Service Act of 2016** and **Media Service Defamation Service Rules of 2019**. Rule 4 (1), states that the suit shall be instituted by a way of petition in a form set out in a schedule and contends that the plaint and petition are distinct documents, each has its own contents. He further submitted that since this being the case of defamation and it was instituted by a plaint instead of petition contrary

to Rule 4(1), the trial court ought to dismiss the suit forthwith. In support of his submission, he cited two cases of **Masumbuko Fadhili Makolokolo Vs. Elias Mwamisawa Civil Case No. 3 of 2020** at page 3 and **Martin Kumaliya & 117 Others Vs. Iron and steel Ltd, Civil Application No. 70/18 of 2018** at page 3.

For his part, Mr Thomas Mathias submitted that he is not disputing on the cited law and its Rules, however the nature of the suit at a trial court was not founded under **Media Service Act** and its **rules**, he argued that the law cited create defamation founded on publication on Radios, TV, Social network as per section 2 of the Media Services Act and that the respondent was never defamed through them and that the law cited does not cover defamatory words from letters. He further submitted that at page 2 of the trial court's judgement the letter of the appellant was circulated to street, therefore categorically neither party were involved under Media Service Act, hence the provision of the Act and its Rules are not applicable in these circumstances.

He strongly defended the use of plaint instead of petition by citing **Order IV Rule I of the Civil Procedure Code R.E 2019 (CPC)**, which states that the suit is filed by a plaint. He also referred this court to section 3A and 3B of the CPC which introduced overriding objectives to avoid technicalities, in support he cited the case of **Omari Said & Another vs R Criminal Appeal No. 99/1 of 2014** at page 4.

On second ground, he argued that the trial court erred in law and fact by deciding that, the defendant has defamed the plaintiff without considering the ingredients of defamation. In support of the appeal Mr. Justine Mbanda referred this court to section **35 (1) of the Media**

Service Act which defines what is defamation and also cited the case of **Hamza Bryarushengo Vs. Fulgencia Manya and 4 others, Civil appeal No. 246 of 2018** at page 16-17, which provided ingredients of defamation.

Moreover, he submitted that the trial magistrate never considered and tested those ingredients of defamation. Thus, the trial magistrate erred to decide against the appellant in the absence of proof as to whether the alleged defamatory statements were published by the appellant and how the respondent suffered out of that statement. At page 4 of the judgement the magistrate stated that "*it was a considered view of the court that the statement was defamatory*" but the respondent did not prove each element of defamation.

On the adversary side, learned advocate Thomas Mathias briefly submitted that, the trial court tested all ingredients of defamation and that the trial court at page 2 of the judgement considered all relevant elements of defamation. Further submitted that, the statement contained in the letter was proved not to be true.

On third ground, briefly the advocate for the appellant submitted that, the trial Magistrate concluded the case without assigning reasons. He cited Order XX Rule 4 of the CPC, which provide mandatory requirements for the contents of the court judgement that reasons for the decision must be made.

On the last ground, which is similar to the third ground, Mr. Justine Mbanga submitted that, essential elements of judgement are lacking in the trial court's judgement contrary to rule 5 of Order XX. In concluding

his submission, he prayed this appeal be granted and the decision of the trial court be set aside with costs.

In replying to both grounds 3 & 4, Mr. Thomas Mathias contended that, both grounds lack merits because the trial Magistrate assigned good reasons for his judgement and that, it is apparent in page 4 and 5 of the judgement. In conclusion he prayed this appeal be dismissed with costs.

In brief rejoinder, the learned counsel for the appellant, submitted that, the first ground still stand firm unshaken because section 3A & 3B can not rescue the respondent for using plaint instead of petition. The error goes to the root of procedural rules. On ingredients of defamation, he insisted that, they were not tested and he posed a question who published that letter to the public anyway? Lastly, he submitted that this appeal is merited same be allowed with costs.

Having highlighted the background and the arguments advanced by the disputants, I now turn to determine the merits of this appeal, but before touching those grounds, I find it prudent, to determine as to whether the provisions of **the Media Services Act of 2016** and **The Media Services (Defamation Proceedings) Rules of 2019** are applicable in this case, in so doing also will answer the first ground of appeal.

The appellant in his submission suggested that, the alleged defamation case ought to be instituted under **the Media Services Act of 2016** and **The Media Services (Defamation Proceedings) Rules of 2019** and in that circumstances the case was supposed to be

instituted by way of petition as opposed to a plaint. In support he cited **rule 4(1)**. For ease of reference the rule is quoted hereunder:-

"S. 4. -(1) Legal proceedings under Part V of the Act shall be instituted by way of a petition in the Form DP set out in the Schedule."

He also cited section 35 (Part V) of **The Media Services Act of 2016** which define defamation, the section is also quoted: -

S. 35 (1) Any matter which, if published, is like to injure the 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, is a defamatory matter.

The definition of defamation under **Media Services Act 2016** put emphasize that, publication is among the requisite element, so, I took some effort to peruse in Interpretation Section of the Act. Section. **3 of The Media Services Act of 2016** defines "Publication"

"To mean any communication of content through media and media was defined to mean the industry, trade or business of collecting, processing and dissemination of content through radio, television or news papers and includes online platforms."

From the above cited provisions of the law, I am in the same consensus with Mr. Thomas Mathias that as long as the respondent was not defamed through any media as construed under **Section 3 of The Media Services Act 2016**, the claim of defamation indeed does not fall under the provision of this Act and its rules. The alleged defamatory statements were not published in any media be it radio, television,

newspapers or any online platforms. Hence it was properly filed by a plaintiff under the CPC. Therefore, the first ground of appeal must fail.

Coming to the second ground of appeal, apparently, according to the record of appeal, the trial court had two issues for determination, the first one being whether the defendant made defamatory statements against the plaintiff, the trial court answered it in affirmative, hence aggrieved the appellant and he contends that the trial court relied on contradictory and hearsay evidence to decide in favour of the respondent.

In resolving this issue, the trial court relied on the testimony of PW1 to the effect that, the appellant terminated the contract via two letters exhibit P2 (a) and (b). The testimony of PW2, the Human Resource Officer of the respondent who joined hands with the testimony of PW1 that the said letters contained theft allegations against the respondent and PW3 who testified that on 20/5/2020 at the plaintiff's company gate he saw a letter (exh. P2) and took it to PW1 also there was testimony from PW4 and PW5 who both testified that they heard from others that respondent is not trustful and due to that bad information, they did not hire the respondent for the provision of security services.

Having reasoned, as it did, the trial court then concluded, there was defamation and ordered relief of compensation of TZS. 45,000,000 for the defamatory statements contained in the letter addressed to the respondent which were as follows: -

"Your Company provided with us good services in the past, however, personnel provided by your company are not as efficient as we thought. We have been observing them not



following our company's rules, and we have several times found them in misappropriation of company's properties such as theft"

The court finds the above statement defamatory because it accuses the plaintiff's company employees to be involved in theft practices. As gleaned from the reproduced parts of the decision and award of the trial court, in essence, the thrust of its holding that the appellant was responsible for the alleged defamatory statements. That even DW1 admits to write defamatory letter which was later on circulated in streets as alleged by PW1, PW2 and PW3 and due to that, respondent suffered financial loss for failure to secure clients.

At this juncture, it is appropriate to revisit the position of the law with regard to the tort of defamation. According to **Winfield and Jolowicz on Tort**, Eleventh Edition by W.H.V. Rodgers: Sweet & Maxwell - London, 1979 at page 274 defamation is defined as: -

"...the publication of a statement which reflects on a person's reputation and tends to lower him on the estimate of right-thinking members of the society generally or tend to make them shun or avoid him".

In **Peter Ng'omango Vs. Gerson M.K. Mwangwa and Another, Civil Appeal No. 10 of 1998**, the Court of Appeal described tort of defamation in the following terms: -

"...the tort of defamation essentially lies in the publication of a statement which tends to lower a person, in the estimation of right-thinking members of the society generally, hence to amount to defamation there has to be publication to a third



party of a matter containing an untrue imputation against the reputation of another".

It is in this regard that in **Valentine M. Eyakuze Vs. Editor of Sunday News and Two Others [1974] L.R.T. No. 49** Mfalila, J. (as he then was) stated that: -

"The tort of defamation cannot be divorced from the social context in which it is operating and there are as many social contexts as there are legal jurisdictions".

Defamation can therefore take a form of a libel which is mostly in permanent form as it is usually written and must be visible; or slander which is expressed in oral form. The fundamental distinction of the two forms of defamation respectively, therefore, is the medium in which they are expressed, that is, one is expressed in written form while the other in oral form. In **Professor Ibrahim H. Lipumba Vs. Zuberi Juma Mzee [2004] T.L.R. 381**, the Court held: -

"a libel is a defamatory imputation made in permanent form such as in writing while slander is defamatory imputation made in a fugitive form such as by speaking or gestures..."

It is equally important to stress that, when the defamatory statement is published, the liability is not limited to the writer, it extends to publishers, and in terms of online publication, to internet service providers including blogs, websites, web-hosting and the like. Noteworthy, repetition of a defamatory statement is a fresh publication and creates a cause of action [see Owen, R (2000): **Essential Tort Law**, 3rd Edition, Cavendish Publishing Limited, London, Sydney].

Thus, in order to succeed in an action for defamation, the respondent had a duty to prove the following elements before the trial court: that the defamatory statement exists; that the statement referred to him/her; that the statement was published; and that the plaintiff suffered damages. According to **Mc Bridge** and **Bag show**, in their book entitled **Tort Law**, 5th Edition, Longman Law Series, 2015, a statement will be defamatory if reading or hearing it would make an ordinary reasonable person tend to: -

"Think less well as a person of the individual referred to; think that the person referred to lacked the ability to do their job effectively; shun or avoid the person referred to as a figure of fun or an object of ridicule".

In this regard, the issue is not how the defamatory statement makes the person referred to feel, but the impression it is likely to make on those reading or hearing it. Clearly therefore, the plaintiff must prove that the statement could tend to have that effect on an ordinary reasonable listener or reader.

It is also important to appreciate that a defamatory statement must be published. A statement is thus considered to have been published when the defendant communicates to anyone other than the plaintiff. There must be a third party receiving the defamatory statement for there to be a publication. Thus, publication of a defamatory statement is a pre-requisite to establish defamation. In the premises, in **Pullman Vs. Walter Hill & Company (1891) 1QB 524** held: -

"Publication is the making known, the defamatory matter after it has been written to some person other than the person to

whom it is written. If the statement is sent straight to the person of whom it is written there is no publication of it; for you cannot publish a libel of a man against himself".

Indeed, in **Nyabanganya Mtani Vs. Nyankanyi Kabera [1983] T. L. R. 332**, it was held that there is no publication if defamatory statements/words are not uttered to the third party.

At this juncture it is necessary to make reference to the case at hand and check whether all elements of defamation was proved. First on the existence of defamatory statement. It is no doubt the statement as quoted above from the letters of appellant to respondent may be treated as defamatory and did specifically refer to the respondent even DW1 testified to that effect. The question is whether that statement was published in the real meaning as described herein above? PW3 testified to have found the letter which alleged the respondent to have involved into theft at the gate and brought it to PW1. Likewise, the Human Resource Officer of the respondent testified that the letter was brought to them by PW3, but it was not sealed and that PW3 found the letter circulating to street. The result 8 companies terminated the contract with the respondent.

Testified further that, it was the appellant who circulated the letter and not PW1. There is inconsistency between the evidence of PW3 and PW2. While PW3 testified to have found the letter at the gate, PW2 testified that PW3 found the letter being circulating. PW1 testified that the letter was lost and it spread to different people at her office and outside. PW4 in his testimony testified to be told by some servants from

other security companies that the respondent is not trustworthy. The same testimony was given by PW5

Those testimonies during trial, none of them proved that, indeed the appellant was the one who published the alleged defamatory letter to third parties, instead the evidence given was tainted with inconsistencies. Mere allegations and hearsay cannot constitute defamation. PW1 testified to receive a letter with defamatory statements from PW3. At the same time PW3 testified to have found the letter at the gate. Similarly, PW2 testified that, PW3 found the letter being circulated and that the appellant published it, but he failed to specify where, when and to whom the same was published. PW4 and PW5 testified on pure hearsay that he heard about the statements, but he did not testify as to whether they knew who published it.

As it was rightly held in the case of **Nyabanganya Mtani (Supra)** there is no publication if defamatory statements/words are not uttered to the third party. In the case at hand the respondent failed to prove as to whether it was the appellant who publicised those defamatory statements contained in the letters to third parties. Mere fact that the letter spread to different people on the street does not constitute publication.

Having so said and for the foregoing reasons, the second ground is capable of disposing off the whole appeal. Thus, no need to consider the remaining grounds for obvious reason that same cannot change the already arrived conclusion. I therefore, find merits on this appeal, same is allowed. Due to the circumstances of this appeal, it is prudent if I order each party to bear his/her own costs.

I accordingly Order.

Dated at Morogoro in Chambers this 10th August, 2022



P. J. NGWEMBE

JUDGE

10/8/2022

Court: Ruling delivered at Morogoro in Chambers on this 10th day of August, 2022 in the absence of the appellant but in the presence of Advocate Salma Jafari for Thomas Mathias for the Respondent.



S. J. KAINDA

DEPUTY REGISTRAR

10/8/2022