IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC CIVIL APPEAL NO. 08 OF 2022

(Originating from Civil Case No. 03 of 2022 Mbinga District Court at Mbinga)

SUBIRA G. KOMBA ..... APPELLANT

VERSUS

MWANAHARUSI SAIDI ..... RESPONDENT

JUDGEMENT

Date of last Order: *06/09/2022*
Date of Judgement: *20/10/2022*

MLYAMBINA, J.

The Appellant, Subira G. Komba filed this appeal against the decision of Mbinga District Court at Mbinga (hence forth the Trial Court) in *Civil Case No. 03 of 2022* which was delivered on 25th April, 2022. The grounds for appeal are as follows: *First*, the Trial Court erred in law to hear this matter contrary to the law. *Second*, the Trial Court erred in law and in fact by failing to evaluate well and appreciate the evidence adduced by the Plaintiff (Appellant herein), hence reaching erroneous decision. *Third,* the Trial Court erred by holding that the Plaintiff failed to prove how she was damaged by the Defendant's statement.

By consent of the parties, this appeal was argued by way of written submission. To start with the first ground of appeal, the

Appellant told this Court that their case was scheduled for mediation before Trial. Unfortunately, the mediation was unsuccessful. But the procedure in relation to mediation was left in the file contrary to the requirement of *Order VIII Rule 31 of the Civil Procedure Code [Cap 33 Revised Edition 2019].* The Appellant went on to submit that; the mediation session was conducted without conducting a scheduling order as provided under *Order VIII Rule 22 (2) of the Civil Procedure Code (supra).* For that reason, it was the Appellant view that failure to comply with the mandatory provision vitiated the whole proceedings.

In reply, the Respondent averred that *Order VIII Rule 31 (supra)* did not allow re mediation before nullifying the previous mediation conducted by another body. Further, the Respondent averred that; Parties were mediated before the Arbitration Board of Masumuni Ward on 16th July, 2021. It was the Appellant's view that the act of the Court to schedule the matter for mediation once again was illegal.

In her rejoinder, the Appellant submitted in relation to the Respondent allegation that the Judiciary of Tanzania does not entertain hearsay. The Appellant challenged the Respondent for not been clear as to what he was trying to say. *First,* the five years strategic plan referred in her submission is irrelevant to this matter. *Second,* the illegality of the

mediation contended by the Respondent on ground that it was conducted by Arbitration board of Masumuni Ward is baseless.

It was the Appellant's contention that Mediation is a compulsory Court annexed procedure where by any Civil case has to be referred to a mediator prior to the hearing immediately after being filed to Court as per *Order VIII Rule 24 of the Civil Procedure Code (supra)*. For easy of reference, *Order VIII Rule 24 (supra)* provides:

> Subject to the provision of any written law the Court *shall* refer every Civil action for negotiation, conciliation, Mediation or Arbitration or similar alternative procedure, before proceeding for Trial. [Emphasis added]

Mediation is governed under *Order VIII Rule 24 to 34 of the Civil Procedure Code (supra)*. The Appellant complained on what she called illegality committed by the mediator for failure to conduct scheduling order before proceeding with other steps. She supported his allegation with *Order VIII Rule 22 (2) of the Civil Procedure Code (supra)*. For easy reference *Order VIII Rule 22 (2)* provides that:

> 22.-(1) a Judge or Magistrate to whom a case has been assigned shall, within a period of twenty-one days after conclusion of the pleadings, hold and

preside over a first pre-Trial settlement and scheduling conference, attended by the parties or their recognised agents or advocates, for the purpose of ascertaining the speed track of the case, resolving the case through the use of procedures for alternative dispute resolution such as negotiation, conciliation, mediation, arbitration or such other procedures not involving a Trial.

(2) in ascertaining the speed track of the case, the presiding Judge or Magistrate, shall after consultation with the parties or their recognised agents or advocates, determine the appropriate speed track for such a case and make a scheduling order, setting out the date or time for future events or steps in the case including the use of procedures for alternative dispute resolution.

(3) the appropriate speed track of a case shall be determined as follows:

(a) speed track one shall be reserved for cases considered by the Judge or Magistrate to be fast cases, capable of being or are required in the interest

of justice to be concluded fast within a period not exceeding ten months from the date of the first pre-Trial conference.

(b) speed track two shall be reserved for cases considered by a Judge or Magistrate to be normal cases capable of being or are required in the interest of justice to be concluded within a period not exceeding twelve months from the date when mediation or arbitration or other similar alternative procedure fails;

(c) speed track three shall be reserved for cases considered by a Judge or Magistrate to be complex cases capable of being or are required in the interest of justice to be concluded within a period not exceeding fourteen months from the date when negotiation, conciliation, mediation or arbitration or other similar alternative procedure fails;

(d) speed track four shall be reserved for cases considered by a Judge or Magistrate to be special cases which fall in none of the three abovementioned categories but which nonetheless need to be

concluded within a period not exceeding twenty four months from the date when negotiation, conciliation, mediation or arbitration or other similar alternative procedure fails;

To begin with and to put the record clear, the provision of *Order VIII Rule 22 (supra)* is not party of the rules which govern the mediation procedure. It is a mandatory procedure conducted by the assigned Judge or Magistrate before the suit is scheduled for mediation. It involves not only the assigned Judge or Magistrate but also the parties or their representative (if any). I went through the Trial Court proceedings and discovered that on 6th September, 2021 before the parties and their representative, the advocates, Parties agreed on speed track one. The agreement was in compliance with *Order VIII Rule 22 (3) (a) of the Civil Procedure Code (supra).*

Also, the Appellant complained on the issue of confidentiality. That, after failure of the mediation, the proceedings were left in the same file and returned to the assigned Magistrate to proceed with the hearing. The Appellant cited the provision of *Order VIII Rule 31 (supra)* which requires the communication at the mediation to be confidential. The same position has been maintained by this Court in the cases of **M/s Cide Company v. Tanzania Forest services (TFS) Agency**

and Another, Land Case No. 65 of 2015, High Court of Tanzania at Dar es Salaam (unreported); and **Ruth Twissa v. Islael Salath Mwakila and 5 Others**, Land Case No. 65 of 2015,High Court of Tanzania at Dar es Salaam (unreported) where the Court had this to say:

> Unlike the potential publicity of Court proceedings, everything said at the mediation is entirely confidential to the parties (unless specifically agreed otherwise).

Form the words of the provision of Order VIIIC Rule 31 and the decision from **Ms. Cide Company and Ruth Twisa** *(supra),* it is evident that the mediation proceedings are totally confidential unlike other proceedings. Therefore, it was wise for the Mediator to comply with the requirements of the law because laws are enacted to be obeyed and not otherwise. The proceedings are there flawed for failure to comply with one of the fundamental rules of mediation.

On the second ground, the Appellant told this Court that the Trial Court erred in law and facts by failing to evaluate well and appreciate the evidence adduced by the Appellant before the Trial Court. That, she proved heavily that the Defendant defamed her by spreading false information that she was having sexual relation with the Respondent's concubine. As a result, she suffered a damage for been regarded with

feelings of hatred, contempt, ridicule and disesteem among the member of her society leading to the loss of her tailoring customers. It was the Appellant's view that she managed to prove her case but the Trial Court found there was no any defamation.

The Respondent contested the appeal because the defamation complaint was a false and based on hearsay evidence. As such, the Court cannot entertain the hearsay evidence.

As the first appellate Court, the Court is duty bound to re-evaluate the evidence of the Trial Court and come up with a new finding and satisfy itself if the Trial Court decided the matter according to the law. Before determining the issue, there are many decisions of the Court in which the word Defamation was defined. To mention the few, the case of **Hamis v. Akilimali** (1971) HCD 111, the case of **Tito Peter Mwakyusa v. Juma Abdallah Kapikulipa**, DC Civil Appeal No. 12 of 2019, High Court of Tanzania at Mtwara (unreported), the case of **Professor Ibrahim H. Lipumba v. Zuberi Mzee** [2004] TLR 38 where the Court defined the word defamation to mean:

> As a deliberate, untrue, derogatory statement usually about a person, whether in written or orally.

Also, in the case of **Hamza Byarushengo v. Fulgencia Manya and 4 Others**, Civil Appeal No. 246 of 2018, Court of Appeal of

Tanzania at Dar es Salaam (unreported), apart from providing the meaning of the word defamation, the Court went further stating the elements of defamation in which the claimant has to prove before the Court as follows:

> ...the elements of defamation and which must be proved by the claimant are: *One*, a defamatory statement that refers to the claimant. *Two*, that is published and communicated to at least one person other than the claimant. *Three* that cause damage to the claimant.

It is a cardinal law that parties are bound by their pleadings. The witnesses' evidence (if any) supports the pleadings. From the record, it was the Appellant's husband who informed her that she had sexual affair with the Respondent's husband. She reported the same to the Village Executive Officer (VEO). The VEO summoned the Respondent to his office where she confessed and agreed to compensate the Appellant but later on, she refused to pay.

Taking into consideration that the Appellant is a married woman living with her husband, it is the findings of the Court that the alleged statement is a defamatory statement. Indeed, taking into further note that the Appellant is a businesswoman, the statement might lower her

reputation and shun away her customer(s). However, the Appellant heard the defamatory statement from her husband and not from the Respondent. For the statement to be defamatory it has to be communicated at least to one person apart from the one who was defamed. PW3 the Village Executive Officer testified to have heard the defamatory statement from the Respondent when he summoned her to his office where she confessed and agreed to compensate the Appellant. But there was no any tangible evidence to prove the same.

Moreover, the Appellant averred further that; the defamatory statement spread by the Respondent damaged not only her reputation at her church, endangered her relationship with her husband but also with the society as a whole. But the Respondent failed to summon the people at her church to prove her allegation. The Appellant has offered no any explanation as to what extend she was injured.

Therefore, it is the finding of this Court that the Trial Magistrate was right to hold that the Appellant failed to prove the existence of defamatory statement which was claimed to be spread by the Respondent. It was just a hearsay statement from her own man.

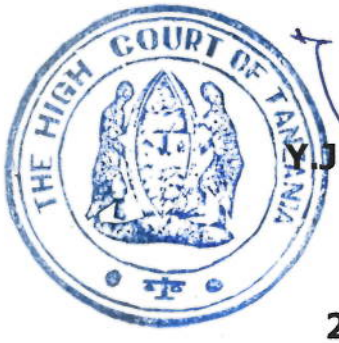
Moreso, the Appellant told this Court that the Trial Court erred by holding that the Plaintiff (Appellant herein) failed to prove that she was damaged by the Defendant's statement. The Appellant referred this

Court at page 5 paragraph 3 of the Trial Court judgement in which the Trial Court conceded on the statement to be defamatory. But at the same page 5 paragraph 4, the Court stated that the Plaintiff failed to prove how she was damaged by those words apart from losing her tailoring clients. She claimed to lose her man trust and customers in business.

It is the further findings of this Court that one of the ingredients to prove the defamation is that; the claimant must show how the statement caused injury to him/her. The same was maintained by this Court in the case of **Moses Msokwa v. Gwantwa Kyangwe**, Civil Appeal No. 172 of 2017, High Court of Tanzania at Dar es Salaam (unreported). The allegation that the statement by the Respondent caused her to loss trust form her man and customer shun away, were not not enough to prove her injuries. The Appellant was supposed to tell the Court to what extend she was injured by the statement.

Conclusively, I hereby grant the appeal and order the matter be tried *denovo* before another competent Magistrate. Costs shall follow the event.

Order accordingly.



Y.J. MLYAMBINA

JUDGE

20/10/2022

Judgement pronounced and dated 20th day of October, 2022 in the presence of both parties in person.

Y.J. MLYAMBINA

JUDGE

20/10/2022