

**IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA  
(MWANZA SUB-REGISTRY)**

**MWANZA  
CIVIL APPEAL NO.12 OF 2019**

*(Appeal from the judgment and decree of Magu District Court in Civil Case No. 5 of 2021  
dated 29.11.2021 before Hon.G. K. Sumaye, Resident Magistrate)*

**FIKIRI JOHN @ MIHAYO.....APPELLANT**

**VERSUS**

**ROBERT MANONI @ GERVAS.....RESPONDENT**

**JUDGMENT**

**8<sup>th</sup> Sept. & 9<sup>th</sup> Nov., 2022**

**DYANSOBERA, J:.**

The respondent herein instituted a suit before the District Court of Magu at Magu claiming TZS 35, 000, 000.00 as special damages for the defamatory statements uttered by the appellant that he, the respondent, had sexual intercourse with the appellant's step mother after the death of the appellant's father and that it is the respondent who killed his (appellant's) father; general damages to the tune of TZS 2, 000, 000.00, an apology by the appellant to the respondent and costs of the suit.

The basis of the respondent's complaint was that on 6<sup>th</sup> August, 2021 during the appellant's family meeting held at Kipeja Village within

Kandawe Ward in Magu District when discussing the estate of the late John Mihayo Ng'umbila, the appellant's father, the appellant defamed the respondent in the following words:-

*"Robert alifanya mapenzi ndani na mama siku ya tatu na ya nne kwenye kitanda cha baba baada ya mazishi na ametengeneza mlango wa chumbani kwa mama na ndiye aliyemuua baba yangu".*

It was the respondent's complaint that after the defamatory statement was heard by his wife, they are now in misunderstanding whereby she is always accusing him that, *"badala ya kwenda kulinda usiku umekuwa unaenda kulala na wake za watu"*, the statement that has destroyed their marriage relationship and peace.

The matter was reported to the Kipeja Village Executive Officer then to Magu Primary Court. After resolution failed, the matter landed in the District Court at Magu.

After a full trial, the learned Resident Magistrate was satisfied that the respondent had proved his case on balance of probabilities. He awarded him TZS 20, 000, 000.00 being damages for the appellant's defamatory statement that the respondent had sexual intercourse with the appellant's step mother after the death of the defendant's father, TZS 10,

000, 000.00 being damages for the appellant's defamatory statement that the respondent is the one who killed his (appellant's) father, TZS 1, 000, 000.00 being general damages and lastly, the appellant was ordered to make apologies for the defamatory statement he made against the respondent within 30 days from that day and further that costs had to follow the event. Aggrieved, the appellant has now come to the court, on four grounds of grievance mainly on two aspects. First, lack of jurisdiction of the trial court and two, failure by the trial court to evaluate the evidence.

The parties requested the appeal to be heard by way of written submissions. The court endorsed their request.

The appellant's written submission in support of the appeal was drawn by Mr. Mwanaupanga, learned Counsel but filed by the appellant. With regard to the complaint on lack of jurisdiction, it was submitted for the appellant that according to the principle enshrined under Section 18 (1) (a) (iii) of the Magistrates' Courts Act [Cap. 11 R.E.2019] sets out demarcation of jurisdiction between the primary court on one hand and the district court/Resident Magistrate's Court on the other hand based on pecuniary value of the subject matter. According to the appellant, section 13 of the Civil Procedure Code provides that every suit is to be mandatorily

filed in the court of the lowest grade save the High Court which has unlimited jurisdiction. The case of **Denja John Boto v. Umoja wa Wafanyabiashara Ndogondogo Mali Moja**, Civil Appeal No. 157 of 2018 was cited in support of the argument. The appellant insisted that the question of jurisdiction is fundamental and can be raised at any stage. He was of the view that the District Court had no pecuniary jurisdiction to adjudicate upon this case whose jurisdiction is vested in the lowest court, the Primary Court for that matter.

In relation to the second complaint on failure to evaluate the evidence, the appellant submitted that the trial court erred in finding that the respondent was entitled to the specific and general damages awarded to him. Further that, the same court failed to evaluate and consider the evidence, particularly that of DW 2 Joseph Evarist Kusekwa and DW 3 one Masumbuko Juma.

The respondent, in rebuttal, submitted that the trial court had jurisdiction as the primary court could not hear claims on tort as its jurisdiction is confined only where the law applicable is customary or Islamic law. The court was referred to Section 18 (1) (a) (i) of the Magistrates' Courts Act on the authority that a primary court has

As far as the first issue is concerned, there is no dispute that the appellant had been sued on defamation. This is a common law tort. It falls neither under customary law nor Islamic law. The Primary Court would lack jurisdiction to hear and determine the suit, for as rightly pointed out by the respondent, the jurisdiction of the primary court is conferred by the provisions of Section 18 (1) (a) (i) of the Magistrates' Courts Act [Cap. 11 R.E.2019]. This court, in the case of **Daniel v. Kanyok** (supra) took the same position. This means that under the provision of Section 13 of the Civil Procedure Code, the lowest court competent to try it was the District Court and not the Primary Court. The complaint on the aspect of the jurisdiction fails.

As to the proof or otherwise of the tort of defamation, it is trite that in an action for defamation be it slander or libel, the plaintiff, to succeed, has to prove the following four elements, that is to say:-

- i. The words or the act must be defamatory
- ii. They must refer to the plaintiff
- iii. They must have been published
- iv. They must have been published maliciously

On the first element, the test to be applied to determine whether the particular statement is defamatory is the answer to the question, 'would the words tend to lower the plaintiff in the estimation of right-thinking members of society? The test of the defamatory nature of a statement being its tendency to excite against the plaintiff the adverse opinion or feelings of other persons, a form of defamation is an attack upon the moral character of the plaintiff attributing him to any form of disgraceful conduct, such as crime, dishonesty, untruthfulness, trickery, ingratitude or cruelty. In this case, it was proved in evidence that the respondent's reputation was lowered as he was taken to have been dishonest.

The second element was also proved in that the statement referred to the respondent. The fact that the statement was published does not pose any difficulty as the defamatory words were uttered in public, that is at the family meeting.

The rest element is whether the statement was demonstrably false. For the statement to be defamatory, it must be both false and provable. In other words, truth is absolute defence in a defamation suit.

In the case under consideration, the appellant had uttered the words that the respondent had sexual intercourse with the appellant's step mother after the death of the appellant's father. The fact that the respondent had sexual intercourse with the appellant's step mother after the death of the appellant's father was supported by the evidence of DW 2 Joseph Evarist Kusekwa (DW 2) and DW 3 one Masumbuko Juma. Indeed, the appellant's step mother who testified as PW 2 did not rebut this glaring fact. It is my finding that making a statement that the respondent had sexual intercourse with the appellant's step mother after the death of the appellant's father as the appellant did, was not defamatory, if the respondent did, in fact, have sexual intercourse with the appellant's step mother as alleged. The statement was true regardless whether it was uncomfortable or displeasing to the respondent or unprofessional to the appellant.

That being the case, the tort of defamation was not, as rightly argued by the appellant, proved to the required standard.

I agree that the trial court erred both in law and in fact in finding that the tort of defamation was proved and that the award the damages to the respondent was illegal and uncalled for.

For those reasons, I allow the appeal and quash and set aside the judgment and orders of the District Court.

The appellant is awarded costs in this court and in the court below.

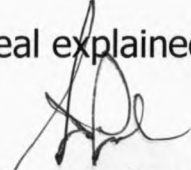
Order accordingly.

  
**W.P. Dyansobera**  
**Judge**  
**9.11.2022**

This judgment has been delivered in open court this 9<sup>th</sup> day of November, 2022 in the presence of the appellant and respondent.

Rights of appeal to the Court of Appeal explained.



  
**W.P. Dyansobera**  
**Judge**