

THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

CIVIL APPEAL No. 31 OF 2022

*(Arising from the Resident Magistrates' Court of Musoma at Musoma
in Civil Case No. 15 of 2021)*

REV. ISACK RICHARD APPELLANT

Versus

- 1. BISHOP SOLOMON RUKUMAYE**
- 2. ARCH. BISHOP ELIAB ESENTOZI**
- 3. MAGRETH ISACK &**
- 4. ESTHER YOHANA**

..... RESPONDENTS

JUDGMENT

16.05.2023 & 22.05.2023

Mtulya, J.:

This court on 6th August 2021, had resolved a petition on the tort of defamation and believed that for a petitioner to be successful in a suit of defamation, he must prove three (3) important elements. The court identified the elements as: first, the words (statement) must be defamatory; second, the words must directed to the petitioner to cause injuries; and finally, the words must published (communicated) to a third party. On the indicated date, this court was scheduled to resolve an issue whether the words: *Mjane aliyepewa ulinzi na Magufuli ageuziwa kibao*, published in *Mwananchi Newspaper* of 2nd March 2017,

were defamatory. Finally, this court, at page 14 of the judgment, had resolved that:

...the petition before this court lacks merit because the essential elements of a tort of defamation were not proved...information so published though used derogatory words, is true, which is a defence against tort of defamation.

The reasoning of the court is found at page 9 & 10 of the decision, that:

...a tort of defamation cannot stand if the defence that the alleged defamatory statement is true is successfully pleaded...if the words are true or justifiable there is no defamation...in the present case, although the words sound derogatory and may lead to ridicule, the respondent testified that the facts stated in the news paper article are true and justifiable.

The thinking of this court on the available defences is displayed at page 9 of the decision that after the claimant's proof of all necessary elements in the tort of defamation, the onus shifts to the respondent to prove that the complained statement

enjoys defence in the following matters, *viz.* first, justification (the words were true); second, fair comments; third, privilege; fourth, not malicious (unintentional); and finally, consent. All necessary materials displayed in the present judgment are available in precedent of this court resolved in **Swabaha Mohamedi Shoshi v. James Magai & Two Others**, Petition No. 1 of 2020.

In the indicated precedent, this court had invited and considered a bundle of materials on the subject of defamation, in terms of the provisions of the law, precedents and writings of professionals (see: **Meneja Mkuu, Zanzibar Resort Hotel v. Ali Said Paramana**, Civil Appeal No. 296 of 2019; **Professor Ibrahim Lipumba v. Zuberi Mzee** [2004] TLR 381; **Rugarabamu Archard Mwombeki v. Charles Kizigha & Three Others** [1985] TLR 59; **Hamisi v. Akilimali** [1971] HCD 111; and publication of **Winfield & Jolowicz on Tort**, 15th Ed. 1998, Chapter 12 at pages 390-461).

This court was invited again, on 16th May 2023 in **Civil Appeal No. 31 of 2022** (the appeal), to resolve an issue whether a tort of defamation exists in the publication of the following words:

Kanisa haliwezi kuongozwa na Mchungaji Mzinzi na mtu yeyote atakaye onekana anashirikiana na Mchungaji Isack Richard anashirikiana na mzinzi hivyo atachukuliwa hatua za kidhamu.

The words were allegedly spoken by **Bishop Solomon Rukumaye** (the first respondent) and **Arch. Bishop Eliab Esentozi** (the second respondent) and were graced by **Magreth Isack** (the third respondent) and **Esther Yohana** (the fourth respondent). The complaint on the alleged defamation was registered at the **Resident Magistrates' Court of Musoma at Musoma** (the RM's court) in **Civil Case no. 15 of 2021** (the case). After registration of all relevant materials, the RM's court on 24th November 2022, had dismissed the petition for want of proof of defamation in the case. The reasoning of the RM's court is found at page 17 of the judgment that:

...the alleged libel and slander uttered by the respondents was justified and true and its publication before the church intended to preserve and protect interests of the church and since the disciplinary action taken by the church leaders herein the respondents to the petitioner was according to the articles of the constitution of Gilgal

International Ministries and based on personal hatred, the tort of defamation cannot succeed in this case.

The RM's court had resolved the matter with the aid of section 35 & 37 of the **Media Services Act No. 12 of 2016** (the Media Act), precedents in **Tanzania Daima Newspaper & Four Others v. Hajina Onesphory**, Civil Appeal No. 15 of 2019, **Peter Ng'omango v. Gerson M.K. Mwangwa & Another**, Civil Appeal No. 10 of 1998, **Bendzel v. Kartar Singh** [1953] EACA 53, **Hoare v. Jossep** [1953] EA 218 and publications in R.V., Houston, **Salmond on Law of Torts**, 17th Ed. 1977 and **Black's Law Dictionary**, 8th Ed. 2004.

However, the RM's court in the case had declined to resolve all necessary elements of the tort of defamation as directed by the indicated authorities and moved into the defences available on the subject and accordingly resolved the dispute. The RM's court had thought at page 15 of the judgment that:

*I found that the respondents **Bishop Solomon Rukumaye and Arch. Bishop Eliabu Esentози** has spoken such words as leaders of the church who are answerable to protect discipline and affairs of*

the church to bar the sinners within the ambit of the church hence, they are privileged by the law as they protected interest of the church as the group.

In order to be understood, the RMs court had cited the authorities in **Anatory Rwebangira v. Emmanuel Ishashi**, Civil Appeal No. 47 of 2016 and **Meneja Mkuu, Zanzibar Resort Hotel v. Ali Said Paramana** (supra). The RM's court had also found, at page 17 of the decision that the statement uttered the first and second respondents were true as per investigation conducted by the church leaders assisted by the wife of the appellant. Finally, the RM's court remained mute on the status of the other two respondents, the third and fourth in the case, who were not leaders in the church. Reading the record of appeal, it is revealed further that the RM's court had declined to call the fourth respondent to respond on the allegation levelled against her, although it awarded costs to all the respondents in the case.

On 16th May 2023, when the appeal was scheduled for hearing in this court, the parties had marshalled the legal services of **Mr. Emmanuel Gervas** and **Mr. Julius Kirigiti**, learned counsels for the appellant and respondents respectively. According to Mr. Gervas the appellant had filed a total of thirteen

(13) complaints to protest the decision of the RM's court whereas Mr. Kirigiti had replied that the respondents enjoyed the defence of privilege. This is a great contest to scrutinize the words of Bishops and Arch. Bishops against their church members. Its determination may set a standard practice in this jurisdiction.

However, this court had noted the two (2) indicated faults on the record, namely: first, decline of the RM's to determine all necessary elements of defamation; and second, failure to call and hear the fourth respondent. The defects go to the merit of the case, which had halted the appeal hearing. This court then invited the learned minds to cherish the right to be heard on the raised issues.

According to Mr. Gervas, the RM's court failed to resolve all necessary ingredients of defamation hence had declined to resolve the issues that were brought by the parties to the RM's court. For the available remedies, Mr. Gervas opined that the RM's court may be directed to prepare fresh and proper judgment that will comprise all important elements. On the second fault, Mr. Gervas submitted that the fourth defendant was denied the right to be heard, which is serious irregularity

that cannot be cured by composing fresh judgment. In his opinion, Mr. Gervas thought that even if the judgment is re-drafted, it will not comprise analysis of the fourth defendant's materials, who was declined summons of hearing and no *ex-parte* order was issued against her.

On the other hand, Mr. Kirigiti supported the submission of Mr. Gervas contending that the trial magistrate had declined to analyze all necessary ingredients of defamation, which is error material to the merit of the judgment. Regarding the summons and evidence of the fourth respondent, Mr. Kirigiti submitted that the fourth respondent was ordered costs without appearance in the case or *ex-parte* order against her. According to Mr. Kirigiti, the faults can be resolved by inviting revisionary powers of this court to set aside the proceedings and quash judgment of the RM's court and give appropriate orders.

From the record, it is vivid that the fourth respondent was denied the right to be heard. The right to be heard is not only a constitutional right enshrined under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R. E. 2002] (the Constitution), but also a human right issue which must be protected and promoted at all levels (see: **Judge In**

Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng’uni [2004] TLR 44; **Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251; **Tanelec Limited v. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 20 of 2018).

This is the court of record entrusted with additional mandate of ensuring proper application of the laws by the lower courts in judicial hierarchy. It has the duty to address glaring illegality and cannot justifiably close its eyes in a situation where a party was denied to cherish the right to be heard. Having noted there is vivid display of illegality on the record, I am moved to invoke the revisionary powers enacted under section 79 (3) of the **Civil Procedure Code [Cap. 33 R.E. 2019]** (the Code) to revise the record of appeal on the two indicated errors, as I hereby do.

In the end, I have decided to set aside the nullity proceedings of the RM’s court in the case from 19th January 2022, when the case was scheduled for necessary orders to set pre-trial conference and quash the judgment delivered on 24th November 2022, as it emanated from the nullity proceedings. I do so for want of right to be heard on part of the fourth

respondent and consideration of all necessary elements of defamation. The purpose is to put the record right.

For interest of justice, I invoke section 76 (1) (b) of the Code to remit the case file to the RM's court for the matter to be considered and resolved by another competent magistrate in accordance to the laws regulating hearing of cases at the RM's court. I do so, without costs as the faults were caused by the parties, but blessed by the RM's court.

It is so ordered.



F.H. Mtulya

Judge

22.05.2023

This Judgment was delivered in Chambers under the Seal of this court in the presence of **Mr. Emmanuel Gervas**, learned counsel for the appellant and in the presence of **Mr. Julius Kirigiti**, learned counsel for the respondents.

F. H. Mtulya

Judge

22.05.2023