

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM SUB-REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 156 OF 2022**

(Originating from the Decision of the Temeke District Court at Temeke in Civil Case No. 54  
of 2018 K. T. Mushi – SRM)

**UMMY YAKOBO ..... APPELLANT**

**VERSUS**

**MWANAAMINA SHABANI ..... RESPONDENT**

**JUDGMENT**

**23<sup>th</sup> Oct & 2<sup>nd</sup> Nov, 2023**

**KIREKIANO, J.:**

The respondent in this appeal Mwanaamina Shaban sued the appellant Umyy Yakobo at the District Court of Temeke. The claims were based on defamation in which the respondent claimed that the appellant had spread “rumors” that she was bewitched by the appellant. These claims got serious as the respondent claimed that, she lost business and harmony in her community. She thus claimed compensation amounting to Tshs. 47,000,000/= injunction restraining the appellant from committing further slander as well as a statement of apology.

The brief facts material in this case as could be gathered from the record was that the appellant and respondent are neighbors at Kurasini Dar Es Salaam. The two lived in harmony, however sometime in August 2017 the parties' relationship got tested when the appellant felt sick. Her sickness was not accepted as medical and normal cause of things. At this point beliefs of which craft came into the mix.

The respondent claimed that the appellant did slander her and that she bewitched her. It was also the respondent's case that the words that she was a witch were spread by the appellant to other neighbors she thus complained that the publication injured her business reputation and lost customers.

The appellant's defense was denial of any wrongdoing putting the respondent to strict proof. The trial court framed and decided the suit on three issues thus;

- 1. Whether the defendant defamed the plaintiff*
- 2. To what extent did the plaintiff suffer damages if any*
- 3. To what reliefs are the parties entitled?*

In the end, the trial court found that the claims were partly proved. It held that the appellant defamed the respondent, and no financial damages were suffered by the respondent, however, it awarded general damages of Tshs.

11,000,000/= and ordered a personal apology by the appellant to the respondent.

Dissatisfied with this decision the appellant preferred this appeal setting forth four grounds of appeal;

- 1. That the trial Court erred in law and fact by relying on weak evidence adduced by the respondent.*
- 2. That the trial court erred in Law for failure to analyze and evaluate well the evidence adduced by both sides of the case generally.*
- 3. That the trial Court erred in law and fact for failure to analyze and evaluate well the evidence adduced by both sides.*
- 4. That the trial Court erred in law by holding that the appellant failed to establish the allegations against her that they were not true.*

This appeal was heard by way of written submissions the appellant had the service of Mr. Jonas Kilimba learned advocate, while the respondent had the service of Mr. Octavian Francis Mzee learned advocate.

Submitting in support of the first ground, the appellant's counsel argued respondent did not prove in what way she was defamed, what words were disgraceful, and how her reputation was injured. It was Mr. Jonas Kilimba's submission that, the trial court erred in shifting the burden of proof to the

appellant who was the defendant to prove that she was clean. Citing Sections 110 and 112 of **Evidence Act Cap 6** [RE 2019] the appellant counsel faults the trial court where it held on page 4 of the judgement that: -

*"The defendant herein failed to establish in preponderance that the allegations against her were not true".*

To bolster this argument, he cited the decision in **Registered Trustee of Joy in the Harvest vs. Hamza K. Sungura**, Civil Appeal No. 149/2017 <https://tanzlii.org/> but also **Barelia Karangirangi vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 to the effect that; he who alleges must prove.

As such it was submitted that the trial Court misdirected itself in awarding general damages of Tshs. 11,000,000/= while the claims complained of were not proved in the first place.

In the 2<sup>nd</sup> ground, it was submitted that there was no analysis of evidence tendered by the appellant, there was evidence that the appellant received messages from unknown numbers. It was thus argued that the trial Court ought to have properly directed its mind on this. This was the position in **Lutter Symphorian Nelson vs. Attorney General and Ibrahim Msabala**

**[2000] TLR 419** that the trial Court ought to have directed its mind to evidence of all witnesses.

On the third ground, the counsel for the appellant pointed out that there was inconsistency in the evidence of (PW1) Mwanaamina and (PW3) Asha Bakari. While (PW1) said there was publication of alleged defamatory words PW3 said she did not spread the same. It was thus argued that the inconsistencies ought to be resolved in favor of the appellant.

In the fourth ground, the counsel for the appellant reiterates the aspect of burden of proof as stated in the first ground.

The respondent in her part through Mr. Octavian Mzee referred to the plant in para 5 on the words complained to be defamatory. He submitted that the alleged defamatory words were spread by the appellant to the respondent but later spread to Asha Bakari. He cited the decision in **Pullman vs. Walter Hill & Company [1891] 1 QB 524** to the effect that publication is sufficient when communicated to the third party. He argued that the respondent business was affected, with sales dropping from 200,000/= to 50,000/= per day.

On the analysis of the evidence as complained on the second ground the counsel for the respondent was of the view that the trial Court correctly analyzed evidence by PW1, PW2, and PW3 specifically Asha Bakari (PW3) that she was bewitched by respondent.

On the aspect of burden of proof also indicated on 1<sup>st</sup> and 4<sup>th</sup> grounds the defendant's counsel responded that it is true the burden is to one who alleges as stated under Section 110 of The Evidence Act, however basing on evidence of record this burden was discharged enough to find the appellant culpable of defamation.

Before resolving the grounds of appeal, I find it pertinent to indicate at this point that, this being a first appeal this court reserves the power and is indeed enjoined to re-evaluate the evidence on record and come up with its findings. There are plenty of authorities on this principle including **Millenium Coach Limited vs AFRI Carriers Limited (Civil Appeal 323 of 2019) [2022] TZCA 392**: [www.//tanzlii.org](http://www.tanzlii.org) and **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another, Civil Appeal No. 57 of 2017 CAT** <https://tanzlii.org/>.

The appellant's ground of appeal and the parties' submission are centered on one major issue for determination in this appeal, that is whether the respondent claims were proved in requisite standard.

A clear examination of the impugned judgment of the district court shows that the trial court considered the evidence by three plaintiffs witnesses, PW1 Mwanaamina, PW2 Mariam Mrisho, and PW3 Asha Bakar to the effect that the defendant showed them text messages and voice clips evidencing allegation of witchcraft against the respondent. Nevertheless, it acknowledged that there was a contradiction on the part of the plaintiff case and thus held;

*'Unfortunately, the defendant failed to establish preponderance that the allegations against her were not true.*

Assuming that alleged text messages and voice clips existed, there was no evidence of these messages or recordings tendered in court containing the alleged defamatory words or admission of defamation by the appellant. On the contrary, I have also considered defence testimony, the appellant's attempt to disprove this fact by tendering printouts of the messages communicated to her did not pass the test of admission. It appears this was

where the learned trial magistrate found that the appellant failed to disapprove the allegations against her.

It is a trite law that a person who alleges must prove the allegation. This is provided for under sections 110 and 111 of the **Evidence Act Cap 6 [RE 2019]** that:

*110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*

Considering that the onus of proof was upon the respondent, in the absence of other evidence to prove the alleged facts it ought to have ended here. The appellant was not at this stage under burden to prove her innocence as the trial court ruled in its judgement. See the case of **Registered Trustees of Joy in Harvest** cited above.

I have as such considered the respondent's submission, which referred to what the respondent claimed in her plaint to be existence and proof of the claims. Seemingly, the counsel for the appellant was attempting to convince this court that there was sufficient evidence. These claims ought to be proved by evidence and not by the strength of deposition in the paint and the counsel submissions: In **Registered Trustees of the Archdiocese of Dar es**



**Salaam vs. The Chairman Bunju Village Government, Civil Appeal No.**

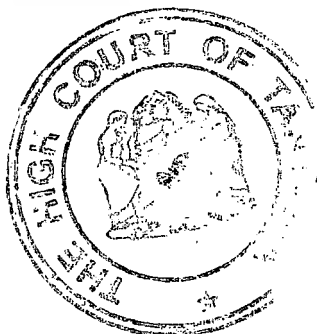
**147 of 2006** the Court of Appeal stated the following concerning submissions: -

*"With respect, however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.*

I thus find that there was no sufficient evidence to prove the respondent's claims. On the question of damages, the trial court having considered that there was no proof of financial loss suffered awarded general damages reasoning that there was mental and diminished reputation suffered by the respondent. I consider this aspect should not attract much discussion having found that the claims of defamation were not proved in the first place. It follows that the award of general damage follows suit and has no leg to stand.

In the final analysis and based on the reasons stated the respondent claims were not proved in the required standard. This appeal is allowed the

appellant the judgment and decree of the trial court is set aside. The appellant shall have the costs.



  
**A. J. KIREKIANO**

**JUDGE**

**02/11/2023**

**COURT:** Judgment delivered in chambers in the presence of the appellant and in absence of the respondent.

**Sgd: A. J. KIREKIANO**

**JUDGE**

**02/11/2023**