

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

CIVIL APPEAL NO. 11 OF 2022

(Arising from Judgement and Decree of the District Court of Nyamagana at Nyamagana, in Civil Case No. 53 of 2019)

**NATIONAL MICROFINANCE BANK PLC1ST APPELLANT
NSOMBO AND COMPANY LIMITED.....2ND APPELLANT
VERSUS
ABDALLAH YAHAYA LUHOLELA.....RESPONDENT**

JUDGMENT

*Last Order: 29.09.2022
Judgement Date: 07.10.2022*


R. B. MASSAM, J.

This appeal emanates from a Judgment and decree from the District Court of Nyamagana at Nyamagana dated 3rd December 2021, in Civil Case No. 53/2019 respondent sued the appellants claiming compensation for damage of Tshs. 150,000,000 on account of defamatory statements and slander words from appellants as follows:

"Nyumba hii inauzwa na banki ya NMB tapeli ametapeli benki mnada tarehe 1/6/2019, dalali hana bei namba za simu 0766342969 karibu"



Briefly, it goes that, the respondent entered into a loan agreement with the 1st appellant upon mortgage of his house located on plot No. 2006/2014 squatter within Ilemela District in Mwanza City. The time agreed to service the loan was three years, that from 2016 – 2019. The respondent did not honor the agreement and as a result, the 1st appellant engage the 2nd appellant to issue a notice to the respondent expressing their intention to sale and evict the respondent in the premises above to recover the loan. On 30/05/2019, the appellant went to the house of respondent and write on both sides of the wall-fence the words considered as defamatory statement and slander by the respondent. The respondent angered that, the words written eroded his reputation before his family, neighbours and entire members of the society. He sued the appellants claiming Tshs. 150,000,000/- as the general damage for libel, interest at 10% from the date of judgment until final payment, court interest at 10% from the date of judgment until final payment, costs of the suit and, any other relief, this court may deem it to grant, At the end of trial respondent succeeded, and the court ordered the 1st appellant to pay him [respondent] Tshs.10,000,000/= as general damage for libel, 7% interest on the decretal



sum at the bank rate from the date of decree to the date of fully payment, and costs of the suit.

Being aggrieved appellants lodged this appeal based on four grounds of appeal as follows: -

1. That the trial Magistrate erred in law and facts by failing to analyse the evidence of PW2 and without corroboration reached to conclusion that the NMB made announcement and typed defamatory words on the fence walls of the respondent's house.
2. That the trial magistrate erred in law and facts when she found that the appellant published defamatory words on the walls of the house of the respondent while there was no evidence to support that fact.
3. That the trial magistrate erred in law and facts by awarding Tshs. 10,000,000/= as general damages taking the circumstances of the case.
4. That the trial Magistrate erred in law and facts by awarding costs of the case to the respondent given the circumstance of the case.

When the appeal was called for hearing, the appellants were represented by Mr. Davis Advocate whilst the respondent was represented



by Baraka Dishon. This appeal by leave of the court was heard by way of written submission.

Arguing this appeal, the appellant counsel challenged the evaluation of evidence by the trial court claiming that the court failed to properly evaluate PW1, PW3, and PW4 evidence. According to their testimonies, no one who witness when the words were written so they cannot tell as to who exactly wrote the words so their testimonies were hearsay. Secondly, he submitted that there was lot of inconsistencies of PW1, PW2, PW3 and PW4, to the typed statement complained to be defamatory. He claims that, every witness testified a deferent statement concerning the written statement so there testimonies were never consistent as everyone testified on his/ her own facts so the trial court ought to have made adverse inference against the testimonies of the said witnesses.

Thirdly there were contradictory testimonies to who wrote the words complained. PW1 said that it was the court broker who wrote but on that day he was not at the scene. Again, PW2 mentioned NMB to be the one who wrote it when for the second time PW2 was again an eyewitness, and she mention the first appellant (NMB) but PW1 mentioned the second appellant (The court broker) the court broker. He added that to prove defamation one



needs to establish that the publication was made by the person against whom the claims are directed. Therefore the respondent had a duty bound to know who did publish words in his house, but he just speculate to be a court broker, so no proof as to who published that statement to the wall.

Submitting on the 3rd and 4th grounds of appeal, that the trial magistrate erred in law and facts by awarding Tshs. 10,000,000/- as general damage, and costs of the case to the respondent given the circumstances of the case, he submitted that there was no dispute that the respondent had borrowed money from the 1st appellant Tshs. 30,000,000/- and mortgaged his house and consequently, he defaulted to pay. The 1st appellant had a duty to recover debts as the nature of the business was a commercial bank as stated in the case of **General Tyre East Africa Ltd vs. HSBC Bank P/C** [2006] TLR 50 that, borrowers must fulfil and enforce their respective contractual obligations under the various lending/securities agreements entered into by the parties to restrain a debenture – holder from exercising his contractual rights and enforcing his security is not only unreasonable but contrary to express contractual terms of the agreement entered into by parties which in this case, were clearly admitted by the applicant himself.



So, at page 6 Magistrate said that in its attempt to recover the loan it had probable cause so the court was supposed to consider it as it was invested in the case of **Benjamini Joseph Miza vs. Cecilila Masinua** Appeal No. 16 of 2020 High Court Shinyanga which held that, Given the circumstances under which the letters were written the receipts and the contents of the said letter, I find nothing defamatory.

The publication was done with a lawful purpose, he continued by submitting that, the respondent's act of default necessitated the first respondent to exercise his rights under the mortgage agreement. He, therefore, became contributory to the alleged wrong committed against him and therefore the respondent can not deny being the genesis of whatever happened. He went on that, if this court found out this defamation was committed he can not be saying that he have come to justice with clean hands, that was a principle of equity applicable in our legal system through section 2 [1] of the Judicature and Application of Laws Act which entails that for one to seek the help of equity he must do equity. This is well stated in the case of **New Tabora Textile [T] Limited vs. Tanzania Union Industrial and Commercial workers [TUICO]**, that one who seeks equity must do equity, the party must be willing to complete all of his obligations as well. He asserts



that, equity will not permit a party to profit by his own wrong citing the case of **Salim Juma Kivara vs. Mwanachi Jumanne Mkizu** Pc. Civil appeal No. 11 f 2019 High Court at Moshi [unreported]. He insisted that, the fact that the respondent had defaulted and during the recovery process he sustained a wrong which from it this court need not to let him benefit, would as well create a bad precedent and indeed bank and financial institutions would be in trouble as they will definitely be dragged into wrongs not genuinely committed by them (*volent non fit injuria*), So it is his opinion that respondent was not entitled to the general damages nor costs as the trial court did not apply the law that makes it reach the decision. He also claims that the respondent did not prove his status and how the same was lowered by the statement complained, for the said advertisement was a normal procedure before conducting an auction and he did not state to what extent did he suffer damage for him to be entitled to the damage stated.

Lastly, it was his submission that publication was not proved against the appellant, and the extent to which the said reputation was lowed was never established, therefore there was no basis for which the court assessed damages, so the respondent ca not benefit from his own wrong. So he pray



the appeal to be allowed, the judgment and decree of the District Court of Nyamagana be quashed and set aside.

Responding to the appellant's submission the respondent learned counsel submitted that, according to the appellant's submission the claim in their appeal is based on the facts that the evidence by the witnesses called by the respondent were not collaborated as no evidence to support whether the appellant was the one who painted the defamatory words on the wall. He also oppose to the appellant's submissions insisting that no inconsistency of the testimony of the words of PW1, PW2, PW3 and PW4 in testifying over the defamatory words written on the wall fence.

He also asserts that, the court did analyze the evidence of PW1, PW2, PW3 and PW4. He added that the trial court was to first find whether the NMB and Nsombo are responsible for the painting of the wall of the house, as there was nowhere in the proceedings the appellant denied to have painted the words on the wall but they claimed that they were acting on their capacity to collect outstanding loan balance and in the judgment of trial court satisfied that the word "*tapeli*" or "*ametapell*" appeared on the mouth and testimony of every witness, also no dispute that the word "*tapeli*" is defamatory word, and a person named it has never won any trust even in



front of naked justice. He went on that, the evidence of PW4 [cameraman], and exhibits P1 and P2 relate to an advertisement painted to the wall that '*Nyumba hii inauzwa na NMB, mnada tarehe 2/6/2019.*' He cement his argument with the case of **Tito Peter Mwakyuza vs. Juma Abdala Kapikulira** DC Appeal No. 12/2019.

Referring to page 13 para 1 of judgment the evidence of PW3 the one who painted the wall said that the wall was written "*nyuma inauzwa na benki ametapeli benki*" PW1 who was a neighbour testified on the same words, and she heard auction announcement on the same words written/ painted on the wall that "*nyumba inauzwa na benki , tapeli ametapeli benki ya NMB*". He insisted that, in the judgment, the trial court analysed the evidence on pages 3 and 4 and co-relating words in the testimony of Pw1, PW2, PW3 and PW4 as the weight of the evidence only measured if it answers the issues on the matter and if it meets the standard of proof of the case. In the issue as to who painted the wall, he don't think to take this as a serious matter to discuss, for the reason that words written on the wall indicate directly that the author is the painter directly or on his instruction of the trial 1st appellant show that he hired and instructed 2nd appellant to collect the outstanding loan balance from the respondent. According to the judgment page 6, the



trial magistrate revealed the evidence by 1st and 2nd respondents that the publication itself has probable cause as the aim was to announce the eviction and sale of PW1 house in order to recover the outstanding balance from PW1 was from the loan agreement entered between PW1 and defendant so according to those findings, there is no doubt that 1st appellant and his workmen who acted maliciously to paint the defamatory word on the wall of the respondent.

In reply to the claim that no witness testified before the court knew the publisher or who painted the words on the wall, the evidence of PW1 reveals that it was 1st and 2nd appellant and their workmen and it was cemented by the evidence of PW2, PW3 and PW4. Again in the issue of the respondent to failure to prove to the court in the standard of proof, he replied that the trial Magistrate managed to analyse the facts, evidence and law regarding every issue in dispute as in the case of **Hamis, Magere vs. Diana Edward** Civil Appeal No. 23/2002 HC. Musoma.

In replying to ground numbers 3 and 4 the trial Magistrate erred in awarding Tshs. 1,000,000/- as general damage, and costs of the case, he cited a case of **Benjamini Joseph Miza vs. Cecilia Masinua**, the case is distinguishable to the matter at hand, the issue of general damage was



decided by the court of law in different decisions, the case of **Cooper Motor Cooperation limited vs. Moshi Arusha occupational Health service** [1990] TLR 96, which held that General damages need not be specifically pleaded they may be asked for by a mere statement or prayed or claim, and it held that interference of the award or will be seen that the magistrate or judge assessed the said damage by using a wrong principle of the law if that happens, the appellate court should disturb quantum of damage, awarded by the trial court, in **Davie vs. Powel** [1942] I ALL ER 657 which was approved by the pray council in **Nance vs. British Columbia Electric Rail Co. limited** [1951]

Again, he submitted that according to the appellant's submission that the same act of defamation was done in good cause, the probate cause claimed by the appellant would not go to the root of humiliating and depriving the rights of the respondent, the defamatory words had nothing to do with the contractual loan agreement and obligation to the payment of the outstanding loan, in the judgment of trial Magistrate referring the testimony by the respondent that respondent suffered damages physiologically, mentally and physically as he is husband, the father and businessman in the society in large, so he prayed this court to bless the trial



court judgement as the respondent deserve much to console the broken and perished reputation because bank and its official work men should not left free to humiliate the reputation of borrowers just on base of uncertain and illegal collection of outstanding loan balcony. So, he pray this appeal to be dismissed with cost.

Before I venture in the determination of this appeal, i will first give a highlights on the claim before this court that it arose out of the tort of deformation. 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".

The same principle is reflected in the case of **Peter Ng'omango v. Gerson M.K. Mwangwa and Another**, Civil Appeal No. 10 of 1998 (unreported) the Court described the 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".

Having considered the submission of the parties from the context above, perusing the records and the law, the main issue for determination is whether the appeal has merit. In addressing the 1st ground of appeal that the trial court failed to analyse the evidence of PW2 and without collaboration reached to the conclusion that NMB made an announcement and typed defamatory words on the fence wall of the respondent's house, the court have to re-analyse and evaluate the evidence adduced on record properly, this court being the first appellate court in this matter, is duty bound to re-examine the evidence adduced before the trial court and if necessary come up with its own conclusion see **Future Century limited vs. Tanesco**, Civil Appeal No. 5 of 2009, and **Leonard Mutembei vs. Principal Assistant Register of Title, ministry of land, Housing and urban development and another** Civil Appeal No. 57 of 2017.

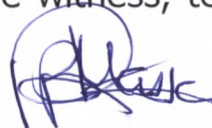


Thus, in order to for the plaintiff to succeed in an action for defamation has to prove that it was the defendant who made such statement with the following elements that: -

- i. That the statement is indeed defamatory
- ii. The statement referred to him/her,
- iii. That the statement was published, and
- iv. That the plaintiff suffered damages.

It was the appellant's submission that, respondent called four [4] witnesses but they failed to establish who made such publication. He went further that, all four witnesses failed to tell this court who exactly wrote or published those words. On the side of the respondent, he submitted that all, witnesses testified the evidence which was collaborated with the exhibit tendered, so in his side, the wording indicates directly that the author is the appellant either directly or on his instructions.

This court in the perusal of the court record found out that before going to the elements of the tort of defamation, it must be resolved without a doubt as to who published the publication claimed by the plaintiff to be defamatory. In this case, PW1 testimony mentioned a court broker to be the one who did that while PW2 who was the eye witness, testified that, she



heard a motor vehicle of NMB advertising the auction that the house of the respondent was intended to be sold and mentioned the appellant (NMB) was the one who wrote the publications on the wall of the respondent but she did not tell the court how did she identify them categorically, stating if she saw them before or, their uniforms worn, or particularly if they had IDs that identified them. PW3 who is the builder of the respondent told the court that the appellant workers are those who wrote the publication on the wall for the second time but at the first time, he never knew who put the publication. PW4 who is a street chairman, knew that the respondent took a loan and defaulted in payment and it was NMB who wrote the publication but he did not see them. Lastly, PW4 cameraman told the trial court that, he was called to take a photo in the house of the respondent concerning the advertisement which was painted in his house but he never told who wrote that advisement.

The position of law is that for a contradiction or inconsistency or omission in evidence to be considered material subject to conditions. In the case of **Dickson Elia Nsambwa vrs Republic** criminal appeal no 92 of 2007 and **Mohamed Said Mstula Vrs Republic** 1995 TLR 3 it was held that, where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistency and try to



resolve them if possible else the court has to decide whether the inconsistency and contradictions are only minor or whether they go to the root of the matter.

In this present case, the root of the matter is defamation. The witnesses of the respondent contradicts for there was a version that it was the NMB workers who published while the other version said that the court broker was the one who published it. Even the PW2 who was the eyewitness failed to prove who published the words on the wall. PW2 said that, she heard advertainments from a motor vehicle of the 1st appellant (NMB) but she did not tell the court how she identified them to be the NMB workers.

It goes therefore, it is not resolved by the adduced evidence who exactly wrote the publications between 1st appellant, 2nd appellant or any other person. In absence of the proof that it was the defendant who actually wrote the publications, dealing with other elements will not solve any purpose for there is no tortfeasor where the claim can be proved against

From the analysis made above, I have come to the conclusion that the evidence so far adduced fell far short of proving the claim against the

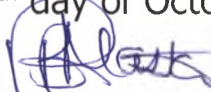


appellant, so this court hereby allow the appeal and quash and set aside the judgment and decree of the lower court with costs.

It is so ordered.

DATED at **MWANZA** this 7th day of October, 2022.




R.B. MASSAM.
JUDGE
07/10/2022

Court: Ruling delivered today this 07th day of October, 2022, in presence of parties learned counsels.


R.B. MASSAM
JUDGE
07/10/2022