IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC CIVIL APPEAL NO. 46 OF 2022

(*Originating from decision in Civil Case No. 2 of 2020 of the District Court of Manyoni*)

BISHOP JOHN LUPAA ..... APPELLANT

VERSUS

CHENAVIOLA SWENYA ..... RESPONDENT

JUDGMENT

Date of last Order: *26/10/ 2023*

Date of Judgment: *14/11/2023.*

LONGOPA, J:

The Appellant filed an appeal challenging a judgment and decree of the Manyoni District Court entered against him for defamation. Before the trial Court, it was Respondent's allegation that the Appellant uttered defamatory words in several instances against the Respondent.

It was claimed by Respondent that on 13/8/2018 at Regency Hotel in Singida the Appellant uttered defamatory words against the Respondent by stating that the Respondent is a bad worker, a prostitute, a thief who misappropriate project funds and that she was not a God-fearing person.

Also, that on 30/5/2019 while at the Anglican Church Manyoni during a morning service, the Appellant defamed the Respondent by calling her a prostitute, thief and a person who misappropriate development fund for TEARFUND, he does not recognise her and that Appellant was not ready to work with the Respondent as she was a bad person.

It was the Respondent view that these words uttered against her were untrue and they intended to impair her reputation to members of the society, fellow workers, and leadership of the organization the Respondent was working with including the participants from within and outside Tanzania who were in the Annual Meeting for TEARFUND organization. Throughout, the Appellant refuted to have issued any defamatory statement against Respondent.

Upon concluding the hearing of both parties' witnesses, the trial Court found that tort of defamation was committed by the Appellant. At this juncture, the trial Court entered judgment in favour of and ordered for compensation of general damages nature to the Respondent at the tune of **TZS 5,000,000/=** (shillings Five Million only) with costs of the suit.

The Appellant was aggrieved by the decision of the trial Court. The Appellant preferred a long list of grounds of appeal, namely:

1. That the trial court erred in law and in fact by giving judgment and decree in Civil case No 2 of 2019 whose proceedings had gross irregularities;

2. That the trial court erred in law and fact by deciding in favour of the respondent as it did basing on prosecution evidence which did not prove the case on the standard required by law;

3. That the trial court erred in law and facts by deciding for respondent while there was unfair hearing against the appellant;

4. That the trial court erred in law and facts when it rejected and denied the appellant opportunity to file notice to produce additional documents;

5. That the judgment delivered by the trial Court on 27th October 2022 is incurable defective;

6. That the trial Court erred in law and fact when it failed totally to record, narrate and evaluate the appellant evidence;

7. That the trial court erred in law and fact when it found that all the issues were framed in affirmative while they were not proved by the respondent;

8. That the trial court erred in law and fact when it decided against the appellant who had strong evidence disputing all the allegations against him;

9. That the trial court erred in law and fact when it failed to give reasonable factors that enabled it in assessing the general damages;

10. That the trial court erred in law and fact when it decided against the appellant only by discussing and finding liability of the appellant on one material date event of 13th August 2018. The rest events stated by the respondent were neither discussed nor decided a thing that culminate to doubts;

11. That the first trial magistrate disqualified and withdrew himself from presiding and hearing Civil Case No 2 of 2019 without stating the reasons thereof;

12. That the trial court erred in law and fact when it decided to give judgment for respondent as it disregarding strong evidence of the appellant;

13. That the trial court erred in law and fact when it considered the evidence of prosecution witnesses without assessing their demeanor and credibility;

14. That the trial court erred in law and fact when it gave a vague verdict;

15. That the trial court erred in law and fact when it gave judgment against the appellant relying on his pleadings only not his evidence.

We noted that these grounds are repetitive in nature. They can be categorized into four main grounds. First, the irregularities on the

proceedings of the trial court. Second, failure by trial court to analyse and accurately assess the evidence of both parties before arriving at a decision. Third, criteria on assessment of general damages awarded to the Respondent. Fourth, defectiveness of the judgment and vagueness of the verdict.

On irregularities that allegedly tainted the proceedings and judgment, the Appellant submitted that Order IX Rule 5 of the CPC was violated on account that when the matter was fixed for hearing there was non-appearance of the Plaintiff which legally would warrant dismissal of the suit. This was upon Appellant's Counsel prayer for dismissal of the suit. On the other hand, Respondent's submission refuted the argument that trial court exercised its powers judiciously by upholding constitutional right to be heard and avoid technicalities. It was Respondent's further submission that Respondent had no tendencies on non-appearance.

Before resorting to addressing this aspect, I find it imperative to refer to the trial courts' proceedings. It is not in dispute that final pre-trial conference (Final PTC) the Court fixed the hearing date on 1/4/2021. Also, it is not in dispute that on 1/4/2021, the Plaintiff (Respondent herein), her advocate and the defendant (Appellant herein) were not in Court save for the advocate for Appellant. Third, the hearing was adjourned to 4/5/2021 and on that material date neither the Respondent or her advocate nor the Appellant was in attendance. It was once again, the advocate for Appellant alone who made appearance before the Court. At this point, the advocate

for Appellant prayed for dismissal of the case for non-appearance of the Respondent. However, record indicates that the trial court had a different view on the matter.

I concur with observation that indeed Order IX Rule 5 is clear that when there is non-appearance of the Plaintiff on a date set for hearing, the Court is enjoined to dismiss the case. Upon perusal of record of the trial court I hasten to find that trial court was justified. Record on pages 12 -13 of the typed proceedings indicates that on 1/4/2021 trial court granted a prayer by advocate for the Appellant for adjournment to another hearing date. The hearing was fixed for hearing on 4/5/2021. On 4/5/2021, trial court declined to grant a dismissal order as prayed by advocate for the Appellant. However, trial court scheduled 21/5/2021 as the new hearing date. This was termed as the last adjournment. The trial court went further to order that parties must appear on the set date and that summons to the Plaintiff to be issued, that is, summons to appear. It is noted from the record that The Appellant's advocate did not address trial court if the Respondent had been notified of the new date of hearing.

It is my view that the approach taken by trial court was legally appropriate. The record does not indicate at all if Respondent and her advocate were notified about the new hearing date. It would be condemning the Respondent unheard to order dismissal of the suit while there was no evidence on record that Respondent was fully notified of this new date of hearing. However, if that dismissal prayer would have been on

1/4/2021 of which the Respondent and her advocate were fully notified, trial court would have a justification to dismiss the same unless it deemed necessary to order otherwise.

The second limb on irregularities is based on unfair hearing regarding refusal by trial court to allow the Appellant to file notice of additional documents on 10/9/2021. It should be recalled that on 21/5/2021 trial Court did allow the Respondent to file additional documents without leave of the Court. It was submission of the Appellant that such refusal was made prematurely and was tantamount to injustice as it is against the natural justice principle of fair hearing which is fundamental under Article 13 of the Constitution of the United Republic of Tanzania, Cap 2 R.E 2002.

On this matter, advocate for Respondent argued that it was appropriate and in accordance with prevailing laws for trial court to deny a prayer to add documents at the defence case hearing stage. They referred this Court to the provision of Order XIII rule 1(1) and (2) of the CPC. It was submitted that it that provision applied by the Respondent on 21/5/2021 to file list of additional documents. Further, it was argued that Appellant did not advance any good cause for trial court to permit the Appellant to add documents.

The CPC provides a manner through which documents can reach the Court of law. Order XIII rule 1(1) and (2) is illustrative on this point. It states that:

Order XIII

1.-(1) ***The parties or their advocates shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power***, on which they intend to rely and which has not already been filed in court, and all documents which the court has ordered to be produced.

(2) The court shall receive the document so produced provided that they are accompanied by an accurate list thereof.

This provision mandates both parties and their advocates to ensure that all documents intended to be relied upon in the hearing of case to be produced before the Court on the first hearing date. It is critical for parties to adhere to this procedure prior to hearing evidence of any witnesses at all. It serves the parties to understand the nature of the documents that the other party relies on to prepare for hearing of the suit.

Order XIII rule 2 of the CPC relates to effect of non-compliance to this legal requirement. The law prevents production of any such documents in any subsequent stage as evidence until and unless a good cause is shown to the satisfaction of the Court.

Record of proceedings of trial court at page 15 reveals that on 21/5/2021 which was the first hearing date of the suit the Plaintiff produced all documents that were to be relied upon by the Plaintiff during the hearing. Further, the Court allowed the adjournment of hearing at the instance of Appellant's advocate to allow perusal of the documents. As we have quoted Order XIII rule 1 above, production of documents by parties or their advocates at this stage does not require any leave of the Court.

It is on record also that Appellant's advocate applied to file a notice to produce documents on 10/9/2021. At this stage, three Plaintiff's witnesses had already testified before trial Court. Any production of documents to be used as evidence other that those produced on first hearing date would mandatorily require leave of the court as per Order XIII rule 2 of the CPC. It would call for trial court to exercise its discretion to allow or otherwise depending on availability of a good cause to its satisfaction.

The available evidence on record reveals that trial court exercised its discretionary powers judiciously as it heard both parties on the matter prior to make an order rejecting filing of notice to produce documents during the stage of hearing. In circumstances of the matter, we find that a case of **Tryphony Gwalanda t/a Gwalanda versus National Microfinance Bank and Another** (HC) Mwanza, Misc. Land Appeal No. 57 of 2021 is inapplicable.

The reasons for the requirement to produce all the documents on the first hearing date and restricting any subsequent stage of the proceeding are well articulated in the case of **Yusufu Mwandami Gwayaka vs Shemsa Hamis Saidi** (DC Civil Appeal 10 of 2021) [2022] TZHC 10808 (14 June 2022). I wish to quote Kagomba, J. in extenso at pages 16-17 of the Judgment as follows:

> Order XIII rule 1 of the CPC mandatorily requires parties or their advocates to produce all the documentary evidence at the first hearing of the suit. **This means a party should seize the earliest opportunity to produce all the documentary evidence needs to substantiate claims.**
>
> Order XIII rule 2 provides that a document which ought to be produced as per rule 1 is not produced, **SHALL** not be received at any subsequent stage of the proceedings **UNLESS** good cause is shown to the satisfaction of the Court non- production thereof.
>
> This provision emphatically requires a Magistrate or Judge to record the reason for accepting such documents. The intention of the law here is to enjoin parties and their advocate to produce all their documentary evidence without delay at the earliest opportunity where the matter is called for hearing. The second objective of the law is to restrict

> acceptance of such documentary evidence once delayed. Therefore, it was a duty of the appellant to show good reason as to why he did not produce the same at the earliest opportunity. The learned advocate for the appellant has not told this Court what was that good cause which the trial Court was informed about yet denied them access to produce. It is not enough for the learned advocate to say that the documentary evidence was important.

The Judge further concluded at page 17 that:

> Also, in a situation like this where there is a mandatory provision of the law calling for an action by a party or his advocate, the overriding objective or oxygen principle cannot be invoked to circumvent a mandatory provision of the law.

This was the decision of the Court of Appeal of Tanzania in **Martin D. Kumalija & others vs. Iron and Steel Ltd** (Civil Application 70 of 2018) [2019] TZCA 542 (27 February 2019), where CAT stated lucidly at page 9 of the ruling that:

> While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the Court.

It is without a flicker of doubt that both the Court of Appeal and High Court have addressed adequately the circumstances related to rejection of production of documents when its production is in contravention of Order XIII Rule 1 of the CPC.

Third limb of irregularity is based on non-citation of the law on which the trial court based its decision. It was submission of Appellant that judgment answered all issues in affirmative without stating which law was violated. The Respondent submitted that decision complies with all requirements of judgment as per Order XX Rule 4 that the same must state concise statement of the case, points of determination, the decision thereon and the reasons for determination.

Further, it was submitted that on page 6 of the typed judgment trial Court cited the case of **Augustino Elias Mdachi v. Ramadhan Omary Ngaleba**, Civil Appeal No. 65 of 2019 which suffices as the law which was violated on reasons for the decision as in our jurisdiction case law is part of the law.

This limb of irregularity need not to detains this Court. It is a common knowledge that the defamation suit being a tortious liability is based on case law developed by Courts. It is not based on statutory provisions as the Appellant would wish this Court to believe.

I concur with Counsel for the Respondent that a relevant case was cited to substantiate an affirmative finding on the first issue. There is plethora of authorities that defamation is based on judicial pronouncements. For instance, **Hamza Byarushengo vs Fulgencia Manya & Others** (Civil Appeal 246 of 2018) [2022] TZCA 207 (14 April 2022); **Public Service Social Security Fund vs Siriel Mchemba** (Civil Appeal 126 of 2018) [2022] TZCA 284 (10 May 2022); **Amina Mohamed @ Fani Mohamed vs Gulam Hussein Dewji Remtullah @ Gulam** (DC Civil Appeal Case 5 of 2020) [2022] TZHC 14417 (30 September 2022); and **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama** (Civil Appeal 305 of 2020) [2021] TZCA 699 (29 November 2021). These authorities shall be discussed at a later stage.

The last limb on irregularity is based on disqualification of former trial magistrate and successor taking over without assigning reasons thereto. Appellant submitted that recusal and subsequent taking over of the proceedings by a successor trial magistrate was a partial compliance to Order VIII Rule 10 (1) of the CPC. This submission was refuted by Respondent on account that it was on Appellant's instance that trial magistrate (Hon. S. J Kayinga, RM) disqualified himself from adjudicating the case. The reasons were that Appellant had no confidence on the trial magistrate allegedly on biasness. Respondent submitted that to allow fair trial the trial magistrate did recuse himself from the conduct of the case. Further, Respondent argued that Appellant is on serious abuse of the Court

process as he is the one who prayed for the trial magistrate to recuse himself.

I thought it prudent to address the circumstances under which recusal and disqualification of a magistrate/judge may be invoked. There are several judicial decisions shedding some light on the circumstances where recusal of a judge or magistrate may be required. In the case of **Khalid Mwisongo v. UNITRANS(T) Ltd**, Misc. Application No. 298 of 2016, the High Court of Tanzania (Labour Division) at Dar es Salaam (Unreported), Mashaka, J. (as she then was) at page 7 observed that:

> Perhaps, at this juncture this Court feels compelled to make a legal literature on what grounds can amount to recusal or disqualification of a judge or magistrate from the conduct of the case. An objection against a judge or magistrate can legitimately be raised in the following circumstances: one, if there is evidence of bad blood between the litigant and the judge concerned. Two, if the judge has close relationship with adverse party or one of them. Three, if the judge or a member of his or her close family had an interest in the outcome of the litigation other than the administration of justice. Also, a judge may recuse himself or herself on ground of bias. A judge or magistrate should not be asked to disqualify himself or herself on flimsy or imaginary fears.

It is important to note that there must be solid grounds for anyone to make an application for recusal of a judge. Such application should not be made unreasonably for sake of requesting a judge or magistrate to recuse without any justifications.

In the case of **Issack Mwamasika and 2 Others v. CRDB Bank Ltd**, Civil Revision No. 6 of 2016 [2016] TZCA 546 (19 September 2016), the Court of Appeal of Tanzania, at page 15 stated that:

> Before penning off, we note that recusal and disqualification is a sensitive subject, since it draws into question the fitness of a judge to carry out the fundamental role of his or her position –the fair and impartial resolution of judicial proceedings. So, the decision to file a motion seeking disqualification should be made only after careful consideration.

Also, it is important to reiterate a wise counsel found in the case of **Dhirajlal Walji Ladwa and Others v. Jitesh Jayantilal Ladwa**, Commercial Cause No. 2 of 2020 the High Court of Tanzania Commercial Division at Dar es Salaam at page 21, where Nangela, J. stated that:

> ...all judicial officers take the oath to administer justice to all manner of people impartially, and without fear, favour, affection or ill will. That oath must be respected. It follows,

> therefore, that, while it is crucial to see to it that justice in every case is not only done but seen to be done, it is equally imperative to allow judicial officers to carry out their duties to sit and perform their judicial functions in accordance with their oath of office.

These judicial decisions have set clear criteria for any application for recusal of a judge or magistrate from presiding over judicial matters. Recusal should not be embarked on in absence of solid grounds for the same. There must be a valid ground for recusal not on utterly unsubstantiated, wrong and unfounded grounds. Simply, recusal should be applied on where and when there are solid grounds impairing the impartiality of a judicial officer.

Though on record no indications of biasness of trial magistrate towards Appellant's case during trial can be noticed, the trial Magistrate gave in to the whims of the Appellant by recusing himself. I believe the trial magistrate did so to allow justice to be done. He adhered to a legal adage that not only should justice be done but the same should be seen to have been done.

I have thoroughly perused the record and found that the recusal of the trial magistrate was a result of the Appellant's prayer which was supported by Advocate for Appellant who indicated that he is just engaged

by the Appellant to handle the case thus wishes of the Appellant regarding recusal should be granted.

Further, the successor trial magistrate clearly addressed the parties to the case on the change of the magistrate. In fact, on 7/12/2021 the parties were addressed properly. It is on record that both advocates did not object to the successor magistrate from taking over the proceedings at the stage where the former trial magistrate had left (See pages 167 to 172 of the typed proceedings).

It is unpalatable for a learned advocate to try to mislead the Appellate Court on alleged non-compliance by the trial court of Order XIX rule 10 of the CPC. It is an afterthought that should not be countenanced. At this juncture, I find that grounds of appeal 1, 3, 4, 6, 11 and 15 collapse for being devoid of merits.

The next set of grounds combine ground 2,7 and 10 of appeal. This set attacks the decision of trial court that there was no proof of the Respondent's case to the required standard.

The arguments are based on disputed evidence on utterance of defamatory statement by the Appellant against the Respondent, failure to call some important witnesses on the side of the Respondent, absence of publication of the defamatory statements and absence of the proof of damage of image and reputation of the Respondent. On the other hand,

Respondent argued that testimony of PW 6 (Respondent) was corroborated by strong testimonies of PW 1and PW 2 for utterances made at Regency Hotel in Singida and testimonies of PW 3 and 4 for alleged defamatory statements made at the Anglican Church at Manyoni. Also, Respondent argued that Exhibits P1, P.2, P.3 and P4 contained series of Appellant's defamatory statements against the Respondent at diverse occasions.

To address this set of combined grounds it is important to analyse shortly on the tort of defamation prior to embarking on standard and burden of proof.

Regarding the meaning of defamation, the Court of Appeal has articulated this aspect in the case of **Public Service Social Security Fund vs Siriel Mchemba** (Civil Appeal 126 of 2018) [2022] TZCA 284 (10 May 2022, at page 23 where CAT noted that "defamation is publication of defamatory statement that tend to lower reputation of a person before right-thinking members of the society."

Further, CAT articulated forms of defamation in page 24, where it stated that:

> Defamation can therefore take a form of: a libel which is mostly in permanent form as it is usually written and must be visible; or slander which is expressed in oral form. The fundamental distinction of the two forms of defamation respectively, therefore, is the medium in which they are

expressed, that is, one is expressed in written form while the other in oral form.

As per CAT decision in **Public Service Social Security Fund** case (**Supra**), there are four main elements of tort of defamation, namely the plaintiff must prove: (a) existence of defamatory statement; (b) that the statement referred to him/her (Plaintiff); (c) the statement was published to the third party; and (d) that the plaintiff suffered damages.

The main issue now is whether these elements exist in the instant case. It is on record from the testimonies of PW 1, PW 2, PW 3, PW 4 and PW 6 that statements of defamatory nature were made by the Appellant. PW 6 evidence indicates that on 13/8.2018, the Appellant uttered defamatory statement against her in the following terms:

> "TEARFUND brought a worker to him namely Chenaviola Swenya who is "a bad worker (*mfanyakazi wa hovyo*), a prostitute *(mhuni na Malaya*), a thief (*mwizi*), who misappropriate project funds (*anatumia vibaya fedha za miradi*) and not God-fearing person" (See page 84 of the proceedings).

This testimony is corroborated by PW 1 (at page 25 of the typed proceedings) who testified to have heard the Appellant stating that the Respondent is "a prostitute, a thief, a person of bad habit, and indicent

person." Further, it was the evidence of PW 2 (at page 36 of proceedings) that Appellant did utter the following words against the Respondent: "an incompetent, a prostitute and a person who is always a later comer." Furthermore, (at page 39), PW 2 testified that Appellant called the Respondent as an "employee who is a prostitute, incompetent and bad mannered."

All these utterences were made at the annual general meeting of the TEARFUND at Regency Hotel in Singida. On the other hand, Testimonies of DW 1 and DW 2 is to the effect that though the Appellant was at Regency Hotel Singida on that material date and addressed the gathering of TEARFUND, the Appellant never uttered those allegedly defamatory statements against the Respondent.

The record also indicates that on 30/5/2019 at Manyoni Anglican Church the Appellant uttered the words before a gathering soon after Respondent had thanked congregants for their prayers that she had secured a Zonal Cluster Manager's position. PW 6 testified that Appellant stated that she (Respondent) is "a prostitute, a thief, a person who misappropriate project funds and she was not a God-fearing person." It is further evidence of PW 6 that, the Appellant categorically stated that he was not going to cooperate and work with the Respondent because of those alleged behaviour (See pages 89,90, 91,93-97 and 98 of proceedings).

Such testimony is intandem with that of PW 3 who is one of the Priests that attended the morning prayer at the Anglican Church at Manyoni on that material date. PW 3 stated that Appellant called the Respondent as " a prostitute, a person who squanders project money, a person of bad habits, and an indecent person." This tallies with what PW 4 testified in Court in this respect (See pages 42, 54 and 55 of the proceedings). In a similar fashion, these testimonies were refuted by testimonies of DW 1, DW 3 and DW 4. At some point, defence testimony indicates that Respondent was an employee of the Rift Valley Diocese (RVD) of the Anglican Church thus it was the Appellant and his management team at RVD who were evaluating the Respondent's daily work thus had a right to fairly comment.

The defence evidence is watered down by the exhibits forming part of the Respondent's testimony including the email correspondences where the TEARFUND Country Director sent an employment letter to the Appellant for signing as an implementing partner of TEARFUND regarding the Respondent as a TEARFUND Zonal Cluster Manager at the Appellant diocese. Moreover, there was no documentary evidence whatsoever from the Appellant to prove that Respondent was an employee of RVD thus Appellant as a bishop of that diocese and the Vicar General could have supervisory role over her.

It does not make a sense that a supervisor would comment on a meeting of a partner institution about the weaknesses or otherwise of his

employee not related to that organization where he so comments. Evidence of PW 1, PW 2, PW 3, PW 4, and PW 6 in their totality established that alleged statements were made against the Respondent. All these statements, according to the testimonies were referring to the Respondent. They are defamatory in nature, and they were communicated to third parties, the members participating in TEARFUND Annual Meeting at Regency Hotel in Singida and congregants at Anglican Church in Manyoni on fateful day.

Further, it is noted from the available testimonies that the defamatory statements made by the Appellant against the Respondent were published. The testimonies indicated that at Regency Hotel Singida, the defamatory statements referring to Respondent was communicated to all participants of the TEARFUND annual general meeting. Both Respondent's and Appellant's testimonies agree on the fact the meeting was attended by different dignitaries including those from Zambia, Rwanda and Kenya as well as all employees of TEARFUND organization in Tanzania Office.

In the case of **Hamza Byarushengo vs Fulgencia Manya & Others** (Civil Appeal 246 of 2018) [2022] TZCA 207 (14 April 2022), the Court of Appeal at page 17 stated the "a defamatory statement must be published and communicated to at least one person other than the Claimant."

Testimonies of Respondent's and Appellant's witnesses reveal that at Regency Hotel Singida there were more than forty (40) persons in attendance. Thus, publication of the allegedly defamatory statements exists in circumstances of the matter. On similar note, the evidence of PW 3, PW 4 and PW 6 reflect that there was publication to defamatory statements against the Respondent at Manyoni as all congregants who attended the prayer were there. It must be reiterated at this point that publication for oral form of defamation refers to communication of the statement to any third person i.e. telling a third party or informing a gathering etc.

Lastly, the testimonies have indicated that performance of the Respondent deteriorated after the incidents of defaming her. That is why, the trial magistrate found Respondent suffered emotional, and psychological torture and her reputation was generally lowered as members of the society including fellow congregants and workers at TEARFUND organization and its partners considered her not trustworthy person.

The evidence available on record supports the analysis and findings of the trial magistrate in pages 6, 7, 8 and 9 of the judgment that tort of defamation was committed by the Appellant against the Respondent.

Further, PW 1, PW 2, PW 3, PW 4 and PW 6 are all eye-witnesses, who testified to have been in the two respective places where defamatory statements were given. All of them provided direct evidence as per section

62 of the Evidence Act, Cap 6 R.E. 2019. They witnessed the presence of the Appellant and Respondent at Regency Hotel Singida and at Anglican Church Manyoni. All four witnesses PW 1, PW 2, PW 3 and PW 4 testimonies are to the effect that they heard the Appellant uttering the statements. This evidence was not serious impaired by the Appellant during cross -examination thus it remains intact. Thus, I am of the settled firm view that there was no need to call any other witnesses as available evidence is strong testimony.

Additionally, sections 110 and 111 of the Evidence Act require that a person who alleges must prove. The Act provides 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.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. On whom burden of proof lies.
>
> 111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side. Burden of proof of particular fact.

These two provisions simply require that a person who alleges must prove to entitled to a judgment of the Court. I am convinced that available evidence on record from PW 1, PW 2, PW 3, PW 4 and PW 6 regarding

defamatory statements and Exhibits P1, P2, P.3 and P.4 outweigh the Appellant's witnesses' testimonies.

I subscribe to finding in case of **Hemedi Saidi v. Mohamed Mbilu [1984] TLR 113** where the High Court (Sisya, J.) observed that a party whose evidence is weightier than the other party, that party is entitled to the decision of the Court.

It was a burden of proof on the side of the Respondent to establish that all elements of tort of defamation exist. As per Judgment and record of the proceedings, I am of a settled view that the Respondent did manage ably to demonstrate before the trial Court that defamatory statements were made; the statements referred to her; the statements were published by communication to the third party other than the Respondent; and that the Respondent suffered emotional, psychological torture and lowered reputation to right-thinking members of the society.

In the case of **Charles Richard Kombe t/a Building vs Evarani Mtungi & Others** (Civil Appeal 38 of 2012) [2017] TZCA 153 (8 March 2017, the Court of Appeal emphasizes on the standard of proof. On page 6, it stated that:

> We need not cite any provision of law because this being a civil matter, it is elementary that the standard of proof is always on the balance of probabilities and not beyond

reasonable doubt. Further, the two could neither co-existed nor applied interchangeably as was done in this case.

From the record, the Respondent managed sufficiently to establish on balance of probability that a tort of defamation has be committed by the Appellant against her. I am in fully agreement with the analysis and findings of the trial court that tort of defamation was committed against the Respondent as ably demonstrated in the judgment. I will therefore at this point reject ground 2, 7 and 10 of the grounds of appeal for being incompetent and unmeritorious.

The third set of grounds of appeal focuses on the vagueness of verdict and incurably defective judgment in Civil Case 2 of 2020. The arguments are that there was grant of general damages amounting to **TZS 5,000,000** (Five million) in absence of proof of specific damages. Also, Appellant submitted that the Court did not consider relevant factors and invited this Court to apply the principle in **Antony Ngoo and Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 CAT Arusha (Unreported) on factors to be considered prior to granting general damages.

Further, Appellant submitted that judgment is incurable defective for lack of narration, record and evaluation of defence evidence. Respondent is of the view that trial court adhered to all requirements for award of general damages as per the Case of **Professor Ibrahim Lipumba v Zuberi Juma Mzee** [2004] TLR 381.

The contention of the Appellant that general damages cannot be granted in absence of special damages is a misplaced and lack any legal basis. There are several authorities that show that general damages are awardable on proof of case without proof of the quantum. On the contrary, special damages requires a litigant to plead and prove specifically every item of special damages. Thus, any figures arrived at by court as special damages should be proved prior to its grant. This would normally involve things like costs incurred with attendant receipts like hospital bills, loss of employment with its attendant salary slip at the time of such loss as result of an action by the defendant, proof of loss business with clear and ascertained earning amounts from that particular business and so on.

In **Antony Ngoo and Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 CAT Arusha (Unreported), the Court of Appeal gave guidance, at pages 15-16, to the effect that:

> The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign a reason. Although the law presumes general damages to flow from the wrong complained of, general damages are not damages at large.

It is the trial Court which determines judiciously the amount of general damages awardable. This is arrived at upon consideration of available evidence on record. The Court in the above decision emphasizes for a reason for the award.

Also, in the case of **Professor Ibrahim Lipumba v Zuberi Juma Mzee** [2004] TLR 381, the Court stated that:

> The successful plaintiff in a defamation action is entitled to recover as general compensatory damages, such sum as will compensate him for the damage to his reputation; vindicate for the wrong he has suffered. That sum must compensate him for the damage of his reputation; vindicate his good name; and take account of the distress; hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant.; a libel published to millions has a greater potential to cause damage than a libel published to handful of people. A successful litigant may properly look to an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and

refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libelous publication took place.

This decision indicates that general damages are not dependent on proof of special damages. General damages arise out of the existence of proof of all elements of the tort of defamation and the compensation in way of general damages should cater for injured reputation, personality, hurt and distress and vindicating the good name of the Plaintiff.

It is clear from the available evidence on record that trial magistrate considered all necessary factors in arriving at the decision. The trial court was of the settled view that it could not award special damages as Respondent had not specifically proved special damages. In pages 12-13 of the judgment, trial magistrate demonstrated the reasons for awarding general damages to compensate for compensating the Respondent for emotional and psychological torture suffered and since reputation of the Respondent was lowered in mind of right-thinking members of the society.

As a result of the foregoing, I am inclined to borrow a leaf from a judgment of the High Court in case of **Managing Director Tanzania New Habari Ltd vs Fadhili Josiah Manongi** (Civil Appeal 115 of 2019) [2021] TZHC 6220 (7 September 2021), where Hon. Masabo, J.: noted that:

> It is a cardinal principle that, since the assessment of general damages falls under the purview of judicial discretion, the figure arrived at by the trial court is not disturbed on appeal unless it is based on erroneous principle or it is so low or so excessive that it must have been based on some incorrect reasoning.

It is my settled view that there are no reasons for now to interfere with finding and decision of the trial court regarding award of general damages as it correctly applied the principles regarding such damages. Trial magistrate categorically provided reasons and factors that were considered to arrive at the verdict. It was therefore justifiable for the trial court to award general damages to a tune of **TZS 5,000,000/=**.

In respect of second tier of lack of narration, record and evaluation of the defence evidence is straightforward issue. The trial court judgment contains narration of the facts that led to the institution of the case, narration of the evidence of both parties, specifically about the Appellant in pages 2 and 5 as well analysis of evidence of both parties throughout the judgment (pages 6 to 10 of the judgment). This limb of the grounds seems to fall in the same trap of lacking concrete merits. I proceed to dismiss grounds 5, 9 and 14 for being unmeritorious in circumstances of case at hand.

The last set of grounds comprises ground 8, 12 and 13. The Appellant faults the decision of trial court for not considering compelling evidence of defence side. The evidence referred to related to the alleged absenteeism from work, late comer, and failure to adhere to instructions of Respondent's immediate supervisor at RVD. Also, evidence of defence that statements made on 13/8/2018 was a fair comment. Third, that there was failure on Respondent to prove malice on part of the Appellant.

Conversely, Respondent submitted that Appellant failed to prove if Respondent was an employee of RVD, her behaviour-allegedly absenteeism from work, late coming and failure to adhere to instruction as well as failure to prove that Exhibit D.1 was signed and received by the Respondent.

This Court has found that there is nothing of documentary nature on record to substantiate that Respondent was an employee of Rift Valley Diocese of the Anglican Church. There was no evidence of payment of remuneration nor contribution to social security fund for the Respondent. Exhibit P 3 which is an email between Appellant and one Justine Nyamonga (TEARFUND Country Director) contradicts the oral testimonies of Appellant's witnesses that Respondent was employed by RVD.

As it was noted when addressing the question on whether defamation was committed against the Respondent, the trial court

addressed the testimonies of both Appellant and Respondent to arrive at a verdict against the Appellant.

Having found that tort of defamation has been established to the required standard, addressing the question of fair comment as advanced by the Appellant seems to be an academic exercise. We do not find any justification for so doing. The trial court did weigh the evidence of both sides and on balance of probability found that Respondent was entitled to judgment and decree of the Court. Indeed, the statements: prostitute, thief, a person who squander project funds and a person of bad habit which implies criminality and unchastity on part of the Respondent are not fair comment to any right-thinking member of the society. They are injurious and tend to assassinate character of the Respondent. Confidently, as per record of trial court and the analysis above, I find this last set of grounds lacking merit and I proceed to reject ground 8, 12 and 13 for being devoid of merits.

In the upshot, having addressed all the grounds of appeal under different heads above, a defamation case against the Appellant was established and proved the Respondent to the required standard of balance of probability. Available record reveals ample evidence to support the findings of the trial court that appellant committed tort of defamation.

In totality of evidence on record, I find no fault on the judgement and decree of the trial court. I uphold the findings of the District Court of Manyoni in Civil case No. 2 of 2020. Therefore, I find this appeal devoid of merits. I proceed to dismiss it in its entirety accordingly with costs.

DATED and **DELIVERED** at **DODOMA** this 14th day of November 2023.

E.E. LONGOPA
JUDGE
14/11/2023.