

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL APPEAL NO. 65 OF 2019

(Arising from the decision of Resident Magistrate Court for Kibaha at Kibaha in Civil
Case No. 09 of 2016)

**AUGUSTINO ELIAS MDACHIAPPELLANT
VERSUS
RAMADHAN OMARY NGALEBARESPONDENT**

JUDGEMENT

MASABO, J.:

On 26th March 2017, Ramadhan Omary Ngaleba, the respondent herein obtained a judgment against the Appellant for defamation. The brief background of the fact leading to this appeal as can be deciphered from the original record are that sometimes on 22nd July 2016 at Kidimu street, Pangani Ward in Kibaha Urban Council, the Respondent while monitoring his trucks which were carrying sand extracted from his farm, was stopped by the 1st Appellant who is a Councilor for Pangani Ward. The 1st appellant who was accompanied by two other people namely Philipo John Maganga (Ward Executive Officer for Pangani Ward) and Beatrice Mtenga (Village/street executive officer for Kidimu street), allegedly uttered the following defamatory statements against respondent:



4. The trial court erred in law and in fact in relying on contradictory and hearsay evidence of the Respondent;
5. The trial court erred in law and fact for failure to take into account the evidence adduced by the Appellant's side.

The appeal was argued by way of written submissions. In support of the 1st ground of appeal Mr. Mahay, learned counsel for the Appellant cited the case of **Jeremiah Kamama v Bugompola Mayandi** (1983) TLR 123 which stipulates the elements of malicious prosecution. He proceeded to argue that there was no evidence to prove that there was malicious prosecution because the incident happened in the course of execution of his duties as an officer of Kibaha Urban Council. He further submitted that the statements were not defamatory as the Respondent was extracting sand without obtaining a license from the Kibaha District Council or the Ministry responsible for Energy and Minerals hence the statement that "unafanya biashara ya mchanga bila kibali" was nothing but truth. He argued that, the Respondent failed to provide proof that he has a license, therefore, his allegation that the Appellant was actuated by malice was without proof.

Regarding the 3rd, 4th and 5th grounds which he consolidated, he submitted that the decision to award damage was erroneous as the Respondent did not adduce any evidence in proof that he suffered any damage. He argued that, it is the principle of law that a party who alleges a certain facts bears a burden to prove its existence (section 110 of the Law of Evidence Act, Cap RE 2019; also see the case of **Abdul- Karim Haji v Raymond Nchimbi**

Alois and Another (2006) TLR 419; **Moyo Africa Exportation Limited v Faiz Iddi Faizi and Others**, Commercial Case No. 108 of 2012, HC of Tanzania (Commercial Division) at Dar es Salaam). Based on these authorities, he reasoned that since in the instant case the Respondent provided no proof, and failed to call material witness in proof that the statement was uttered in the presence of his family and many other people, there was no justification for the court to award damages. Therefore, he prayed that the appeal be allowed with costs.

Responding to this submission, Mr. Hamza Matongo, counsel for the respondent submitted that the decision of the court was not erroneous as it was based on the issues framed by the court namely. It was submitted further that tendering business license in respect of sand extraction was not at issues hence the decision of the trial court was justified. Mr. Matongo argued further that the Appellants reference to malicious prosecution is irrelevant as the appeal emanates from a defamatory suit. Regarding proof of damage, it was argued that the award of damages was justified as there was proof that the Plaintiff uttered the defamatory words. Mr. Mahay rejoined with a long rejoinder which basically restated his submission in chief.

Having carefully considered the records and the submissions by the parties, it would appear to me that there are two key issues for determination, namely: (i) whether the court was correct in holding that the statement was defamatory and (ii) whether the trial court erred in awarding damages.



Before I embark on this task, let me comment briefly on the submission made by Mr. Mahay with regard to malicious prosecution. With respect, malicious prosecution and defamation are two distinct tortious actions. Malicious prosecution is meant to protect persons who are prosecuted maliciously and as per the authority in **Jeremiah Kamama** (supra), the plaintiff is under duty to prove five things namely, that he was prosecuted; the proceedings complained of ended in his favour; the prosecution was actuated by malice; there was no reasonable and probable cause to justify the prosecution; and that the plaintiff suffered damage as a result of prosecution.

On the other hand, defamation which is the subject of this suit centers on defamatory statement, is broadly defined to mean, a statement uttered against the plaintiff which "*injures the reputation of another by exposing him to hatred, contempt, or ridicule or which tends to lower him in the esteem of right thinking members of society*" (see Lord Atkin in **Sim vs Stretch** [1936] 2 all E.R 1237.).

According to Halsbury's Laws of England Vol. 28 4th edition para 10 p7, a defamatory statement, is the one which:

" tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business. "



In our jurisdiction, the term defamation is defined under section 35(1) of the Media Services Act, No. 12 of 2016 as:

'any matter which, if published, is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule or likely to damage any person in his profession or trade by an injury to his reputation..."

Defamation may be in a libel (when it is in writing) or slander (oral) form, as in the instant case. Unlike malicious prosecution, the law of defamation as summarized by Patrick O'Callaghan in the **Common Law Series: The Law of Tort** at paragraph 25.1, is concerned with the protection of one's reputation, and in so doing:

"The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character...."

In sum, the submission by Mr. Mahay, was to say the least, seriously misplaced.

Regarding the merit of the appeal, this being the first appeal, I should preface my determination with the position of law regarding the powers of the first appellate court as articulated by the Court of Appeal in the case



Sugar Board of Tanzania vs. Ayubu Nyimbi & 2 Others, Civil Appeal No. 53 of 2013, CAT at Dar Es Salaam (Unreported). In this case, it was held that, the first appeal court is vested with a duty to review the record of evidence of the Trial Court in order to determine whether the conclusion reached upon and, the evidence received, justifies a re-evaluation to see whether the issues framed at trial were properly determined. Having scrutinized the records, and as it will be demonstrated in the course of my analysis; I am of the view that, the circumstances of this case justifies re-evaluation of the evidence to determine whether the issues framed were properly determined.

It is to be noted that in a suit of defamation, whether in the form of libel or slander, as in the instant case, four ingredients must be proved namely; the statement is defamatory; it refers to the plaintiff; it was published by the defendant and, lastly falsehood of the statement [see **Kudwoli vs Eureka Educational and Training Consultant & 2 Others** Civil case 126 & 135 of 1990 and **Wycliffe A. Swanya v Toyota East Africa Ltd & another** [2009] eKLR).

As correctly submitted for the Appellant it is well settled principle of law that a person who alleges a certain fact, bears the burden to prove its existence (see section 110 of the Evidence Act, Cap 6 RE 2019). Therefore, in this case, it was upon the Respondent to prove that the words/ statements above stated were defamatory in nature, were uttered by the ppellant, they were uttered against him (the Respondent) and that they were not true.



According to the records court framed three issues namely: whether the defendant defamed the plaintiff; whether the defendant have caused the plaintiff to suffer any loss; and to what reliefs are the parties entitled to. The first issue addressed all the four aspects above. In answering this issue, the trial court gave a general finding that the words uttered against the respondent were defamatory in that, they were not true and they lowered his reputation.

The question to be asked is whether the evidence rendered by the Respondent sufficiently supported this finding. Upon scrutiny of the trial court record, I am of the view that the trial court failed short of appreciating the nature of defamation, its elements and defence thereto, and consequently failed to sufficiently evaluate the evidence tendered by the parties. Consequently, its judgement leaves a lot to be desired in terms of what exactly constituted defamatory statement.

As stated earlier, the Respondent had pleaded that the Appellant uttered to him two statements. While mindful of the vice of repetitions, I am constrained to once again reproduce the two statements below for easy of reference:

“kuanzia sasa upo chini ya ulinzi, unafanya biashara ya mchanga bila ya kibali”

“Ngoja tukuonyeshe safari hii utauhama mji huu na utafilisika na hutofanya biashara yoyote ya mchanga hapa”



In order to determine whether these two statements were defamatory, it was paramount for the trial court to ascribe meaning to the words appearing in these two statements vis-à-vis the Appellant's defence and see whether the statements above were indeed defamatory. Unfortunately, this was not done. To this end, I will examine each of the two sentence.

To start with the first statement, I have two crucial observations. First, there was an inconsistency in the testimonies of the Respondent's witnesses which left questions as to the actual words uttered by the Appellant. The Respondent who testified as PW1 told the court that the following words were uttered against him by the Appellant.

"nahakikisha hutafanya biashara katika kata hii"
"wewe mjeuri sana nimekwambia usifanye biashara na
wewe unafanya biashara".

Further, he testified that in addition to the above statements, the Appellant uttered the following words against him:

"Huna akili wewe, hujitambui, wewe pumbafu huna
haya";

On his part, PW2 told the court that, the words uttered by the Appellant were as follows:

"we mpumbavu huishi kulaumu hapa huruhusiwi
kutoa mchanga nilishakwambia unajifanya jeuri hapa
huruhusiwi kutoa mchanga kumamako"

PW3 story was that the Appellant uttered the following words against the Respondent:



"we mpumbavu mbwa tushakuelekeza kuwa hutakiwi kufanya biashara katika kata hii ya pangani na ukibisha utakiona"

"kwani huna akili na tutakufuatilia sana. Katika kata hii mpumbavu"

"tutakufilisi na tutapiga simu polisi mjinga wewe"

And lastly, PW4 who was the last witness for the plaintiff accounted that, the following words were uttered by the Appellant against the Respondent:

"wewe ni mpumbavu hujui kumamayo na tutakuonyesha hutafanya biashara"

I will not waste time on the inconsistencies because, although they were raised in the grounds of appeal, the Appellant silently abandoned them which implies that he found them immaterial and unworthy of pursuit. Considering that these statements were not pleaded, I will ignore them and confine my analysis to the pleaded statement to see whether they were indeed defamatory.

As stated above the first element to be proved in a defamatory case is that the statement was defamatory or in other words, it lowers the reputation of the person against whom it was made. The question to be asked therefore, is whether the statement uttered were such of the nature that they lowered the reputation of the Respondent. Having carefully read the two statements, I have found no defamation in the second sentence to wit: *"Ngoja tukuonyeshe safari hii utauhama mji huu na utafilisika na hutofanya biashara*

yoyote ya mchanga hapa." In contrast, the statement that "unafanya biashara ya mchanga bila ya kibali" imputes a criminal element on the part of the Respondent. Unless it is proved to be true, it is certainly defamatory.

The subsequent question as to whether these statements were uttered by the Appellant against the Respondent, was in my view sufficiently proved through the testimonies of PW1, PW2, PW1. Irrespective the inconsistencies in their testimonies, all these three witnesses converged on the fact that, the statement which I have hold to be defamatory was uttered by the Appellant against the Respondent.

Regarding the issue of publication, I entirely agree with the observation of the trial court that the plaintiff failed to render proof that the defamatory statements were uttered in the presence of his family and many other people apart from PW2, PW3 and PW4, DW2, and DW3. However, this does not mean that there was no publication because in law publication is deemed to have been done if a third party (someone other than the person making the statement or the subject of the statement) have seen, heard or read the defamatory statement. Thus, in the instant case, publication was established through the testimony of PW2 and PW3, who were present at the scene and heard the statements.

As regards the falsity of the statement, it is to be noted that, the appellant's case during trial was that he never uttered the said statements. In addition, the Appellant pleaded and testified that the Respondent was illegally



extracting sand in an area which is not planned for such purpose and he had no permit, which entails that, the statement that "*unafanya biashara ya mchanga bila ya kibali*" if anyhow uttered, was true. In his submission Mr. Mahay has argued that the court was erred in holding the statement as defamatory in total disregard of the appellant's evidence and in further disregard of the fact that, the plaintiff rendered no evidence in proof that he was licensed to extract sand at the disputed earlier.

A crucial question arising from this line of argument is, who between the appellant and the respondent had a duty to establish the falsity or truthfulness of this allegation. In **Uhuru Muigai Kenyatta v Baraza Limited** [2011] eKLR Rawal J (as she then was) it was held that the information that causes the defamation, will be assumed to be untrue until the defendant proves otherwise. The onus to prove that the statement is true does not rest on plaintiff; it rests on the defendant. Thus, in the instant case the onus was on the Appellant to provide proof that the respondent was not authorised to extract sand in the area. In my view, the Appellant sufficiently discharged his duty by rendering Exhibits D1, D2, D3, and D4 all of which specially barred sand extraction at Kidimu area which entails that the conduct of the Respondent was in contravention of the lawful orders of the local government authorities. Henceforth, the statement "*unafanya biashara ya mchanga bila ya kibali*", was with justification. Under the premise, I answer the first issue in the negative.



As regards the second issue for determination, having found that the statement was with justification and henceforth not defamatory, I would basically end here because, it will serve no purpose as there could be no damages for a non-existent defamation.

Accordingly, I allow the appeal with costs.

DATED at DAR ES SALAAM this 29th day of June 2020.

