IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MWANGESI, J.A., KOROSSO, J.A., And LEVIRA, J.A.)

CIVIL APPEAL NO. 296 OF 2019

MENEJA MKUU ZANZI RESORT HOTEL ..... APPELLANT

VERSUS

ALI SAID PARAMANA ..... RESPONDENT

(Appeal from the decision of the High Court for Zanzibar at Vuga)

(Sepetu, J.)

dated the 03rd day of December, 2015

in

Civil Case No. 13 of 2013

.....

JUDGMENT OF THE COURT

11th & 18th December, 2020

KOROSSO, J.A.:

The appeal stems from the judgment and decree of the High Court for Zanzibar sitting at Vuga (Sepetu, J.) dated 3rd December, 2015 in Civil Case No. 13 of 2013. In that case, Ali Said Paramana (the respondent) instituted a suit against Meneja Mkuu Zanzi Resort Hotel (the appellant) claiming for reliefs of Tshs. sixty-five million shillings (65,000,000/-) in total on account of a defamatory statement alleged to have been uttered by the appellant (the defendant then) stating that the respondent (the plaintiff then) had poisoned a person who goes by the name Franco, who was at the time attending an interview for the post of

a chef in the said hotel, using Russian juice which he prepared and handed him. At the trial which ensued, to prove his case, the respondent called three (3) witnesses, that is; the respondent himself (PW1); Mahmoud Jafar Ali (PW2) and Vumilia Mbegu Uliza (PW3). No exhibits were tendered to support the case.

The appellant strongly denied the respondent's claims of having uttered any defamatory remarks or statements against the respondent and in his defence he managed to call four (4) witnesses without tendering any exhibit, that is; Abdul Zaidi Omar (DW1); Haulat Bakari Saidi (DW2); Halid Hussein Msoudore (DW3) and Bukal Marek (DW4). After a full trial, the High Court Judge entered judgment for the respondent. The appellant was ordered **one**, to pay the respondent Tshs. fifty-five million (55,000,000/=) as compensation for the defamation. **Two,** to pay the respondent Tshs. ten million (10,000,000/=) as compensation for disturbance and **three**, the costs. Aggrieved by the decision, the appellant lodged the current appeal in this Court.

To better appreciate the essence of the current appeal, it is pertinent to unfold albeit briefly the background facts of the case gathered from the record of appeal. Suffice to say, at the time when the alleged incident took place the appellant, was the General Manager

(Meneja Mkuu) of Zanzi Resort Hotel whereas, the respondent was an employee of Zanzi Resort Hotel as a Principal Supervisor of the restaurant, on probationary period of three months. The respondent's claims were centered on the fact that he was the subject of defamatory remarks against him and consequential to the said incident, he was unfairly dismissed from his place of work.

According to the respondent (who testified as PW1), on the 26th October, 2012 he was summoned by Mr. Patayo, one of his bosses, and upon responding to the said call, he also found the appellant there. The respondent was then queried by the two regarding what he had done the previous day, that is, on the 24th October, 2012 and also whether he had served a drink to anyone on that day. He was then informed that one of the persons there, named Franco, was in critical condition and had been taken to the hospital. The respondent was also told that Franco alleged that it is the respondent who had served him with Russian juice which had poisoned him. What transpired in this meeting between the respondent and his bosses was witnessed by PW2 who also stated that he partly heard the conversation by the three of them.

DWI, DW2 and DW3 gave evidence that at the time Franco was uttering that he had been poisoned by the appellant he was in a drunken state, and that he was shouting around that he had been

poisoned by the respondent. When queried on the said allegations, the respondent denied having served any drink to Franco on the respective date, stating that being the restaurant supervisor, preparation of drinks for clients was not part of his tasks.

After the discussion with his bosses ended, the respondent continued undertaking his tasks at the hotel having been reassured by his bosses, of there being no reprisal. To the respondent's surprise, the next day he was handed a letter of dismissal and some money and not told anything else. Dissatisfied by the dismissal, he reported the matter to the Dispute Handling Unit (DHU) where the respondent failed to appear when summoned and the respondent was advised to seek recourse in court, which he subsequently did.

The respondent claims that the defamatory remarks against him have caused psychological damage to him and his children have been suspended from school due to lack of school fees from 2012. That his house was about to be sold because he could no longer service his loan and he is no longer employable.

On the other side, the appellant disputed the respondent's claims in the written statement of defence filed, stating that no defamatory remarks were ever uttered by the appellant against the respondent nor was there any publication of the alleged defamatory remarks. The

appellant also alleged that the respondent had created the story and he put the respondent to strict proof on the claims fronted.

The memorandum of appeal before us fronted four (4) grounds as follows: -

1. *The trial Court erred in law and fact by deciding that the Defendant defamed the Plaintiff without fulfilling the ingredients of the defamation.*
2. *The trial Court erred in law and fact by entering judgment against the defendant basing on the alleged defamatory statement without assigning reason thereof, while such statement has been proved by the court to be made by Mr. Franco a third person, which act has injured the interest of your humble Appellant.*
3. *The trial Court erred in law by giving decision relying on hearsay evidence adduced by PW3 which contravenes with the evidence adduced in its totality.*
4. *The trial Court erred in law by delivering the judgment which lacks the essential ingredients such as proper analysis of evidence and reasons for that decision.*

On the day this appeal was scheduled for hearing before us, Mr. Suleiman Salim Abdulla, learned Advocate, represented the appellant,

whereas on the part of the respondent, Mr. Isaack Msengi, learned counsel, entered appearance.

When the hearing commenced, counsel for both parties were invited to amplify and respond respectively on the filed grounds of appeal. Mr. Abdulla informed the Court that he was adopting the written submissions filed which amplify the grounds of appeal set out in the memorandum of appeal. However, in this judgment we shall present only the salient points from both the written and oral submissions for each ground as expounded by each counsel.

The counsel for the appellant proceeded to argue the appeal seriatim. Starting with the 1st ground of appeal that challenges the High Court (trial court) finding that the appellant defamed the respondent (the plaintiff then) while the ingredients of defamation were not fulfilled. The counsel argued that for one to prove defamation three things must be proved. **First,** the statement complained of must be defamatory and made by the person alleged to have made the defamation. That is, the statement has to make an ordinary and/or reasonable person hearing or reading it to think less of the person who has been referred to in the said statement, or injure the reputation of the person in the society. **Second,** the alleged defamatory statement must refer to the claimant, it must be shown that an ordinary or reasonable reader or listener

including an acquittance of the claimant, would understand that the complained statement referred to the claimant. **Third**, the statement complained about must be proved to have been published. Here it means that such a statement is communicated to any other person other than the claimant.

The appellant's counsel contended that the nature of the respondent's complaints in the trial were that he was defamed by the appellant, on words proved to have been uttered by Mr. Franco, and that this being the case, the claims were not founded on reason. He argued that the witnesses relied upon (DW1 and DW2) to support the respondent's claims of being defamed also stated that they heard a drunked Mr. Franco shouting that he had been poisoned by the respondent (who was PW1) around the hotel. The learned counsel argued that the witnesses from the appellant and the respondent's side, who testified on hearing Franco allegations on being poisoned, stated that at the time, Mr. Franco was at the hotel after undertaking an interview to be hired as a Chef and was not employed by the appellant.

Mr. Abdallah further stated that even though the claims by Mr. Franco that he had been poisoned by the respondent can be said to be defamatory as against the respondent, but what is clear from the evidence meted at the trial is that the said words were not voiced by the

appellant or any of his employees. That, when the appellant's senior officers heard the claims by Franco of being poisoned, they took action by initiating investigation on the matter to find out what had transpired and the culprit as stated by DW3 and DW4, and each hotel staff member was interviewed. That from the evidence presented in the trial court there is no doubt that the alleged defamatory statement was made, but by a drunk Franco and not the appellant.

The learned counsel for the appellant also challenged the trial court's finding that there was communication between the appellant and his Director where they discussed the incident and thus rendered publication of the alleged defamatory remarks. He argued that this finding was not based on the evidence presented in court. Arguing that in any case, even if there was communication between the two Managers, it was the act of an employer passing information to an employee and thus, rendered it to be privileged information. The case of **Athumani Khalfan vs P. M. Jonathan** [1983] TLR 6 was referred to augment the assertion. Therefore, being privileged information, it derogates any contention that the appellant did publish the alleged defamatory statement.

According to the learned counsel, when all the stated infractions including the lack of evidence are considered, it leaves no doubt that the

High Court failed to consider all the essential elements required to prove defamation, and in effect did not manage to prove their claims against the appellant. He contended further that taking all the above facts into consideration, indisputably, the conclusion reached by the High Court was flawed and he invited the Court to interfere and find thus.

In arguing the 2nd ground of appeal that faulted the High Court entering judgment against the appellant without assigning any reasons on how the said conclusion was reached, the counsel for the appellant, contended that in the Judgment of the High Court, two conclusions were drawn to expound what was before it, **One,** that Mr. Franco made the defamatory statement and **Two,** that Mathew's and Louis's acts, being the employees of the appellant are calculated acts of the appellant, thus imputing vicarious liability on the part of the appellant for the acts done by Mr. Franco, Mathew and Louis. The counsel argued that before imputing vicarious liability on the part of the appellant, the High Court should have sought proof that Mr. Franco's disputed statement was actually approved by the appellant. That, in fact there was also no proof presented in Court that Mr. Franco was an employee of the appellant, DW1, DW2, DW3 testimonies were that Mr. Franco was there at the hotel as a trainee and to participate in an interview seeking for the post of a chef.

The learned counsel thus argued that, the learned High Court Judge's conclusion was erroneous because it was not based on evidence. That the evidence of DW2 and DW3 was that it was Franco who made the alleged defamatory statement and this fact was not disputed by any evidence. The learned counsel reasoned that it follows thus that the learned High Court Judge decision should have been based on the evidence before him and not otherwise. Thus, having made a finding that it was Mr. Franco who made the alleged defamatory statement, he should have then proceeded to find Mr. Franco liable and not the appellant as he ended up doing.

The 3rd ground of appeal embraces complaints that the learned High Court Judge relied on hearsay evidence adduced by PW3 regarding the issues on the table since it was based on what she claimed she heard when two other people were having a telephone conversation which she was not party to nor invited to participate. The appellant's counsel argued that it was PW3 who alluded to have heard the Manager of Hakuna Matata one Olivia talking on the phone with the Manager of Zanzi Resort Hotel with regard to the alleged defamatory statement against the respondent. The learned counsel's other issue against the evidence of PW3 was that, when the witness was testifying, during cross examination, when questioned on this, she failed to state the exact date

she heard the respective conversation and also said she could not specifically hear the ongoing telephone conversation between the two people.

Responding to the 3rd ground of appeal, on complaints of the High Court Judge's reliance on hearsay evidence of PW3, the learned counsel argued that this was improper and in contravention of section 63 and 64 of the Tanzania Evidence Act, Cap 6 Revised Edition 2019 (the Evidence Act) especially where none of those alleged to have been conversing were called as witnesses to testify on the gist of the said conversation. The case of **Gozibert Rwamulelwa vs Prisca Rwamulelwa** [2003] TLR 417 was cited to buttress the stance expounded, and the counsel concluded this ground stating that the High Court should not have thus considered PW3 evidence, being hearsay evidence.

The learned counsel reasoned that it is from PW3's evidence that the learned High Court Judge made a finding that the alleged defamatory words were published. That the assertion being the appellant to have published the defamatory words. That it later became known, through the evidence that in actual fact the Manager did converse with his CEO, which in effect is usual for such people to communicate on what transpires in the hotel, and that it is thus

privileged information and not publishing alleged defamatory utterances as imputed by the learned High Court Judge.

With regard to the 4th ground of appeal faulting the Judgment of the High Court arguing that it lacks essential ingredients such as proper analysis of evidence and reasons for that decision, in this ground the main point of contention was to challenge the award given to the respondent by the learned High Court Judge upon finding in favour of the respondent. The counsel for the appellant argued that the High Court failed to justify or substantiate that the respondent deserved the said award or how the granted award was arrived at.

The learned counsel also stated that the High Court did not even utilize the holding in the case it cited, that is an English case, **John vs MGN Ltd**, [1997] QB 586 which discussed calculation of damages in defamation cases, which emphasized the importance of proper analysis of evidence presented balancing it with the duty of the plaintiff to be vindicated for the wrong he has suffered. Although, at the same time bearing in mind that each judge or magistrate has his or her own style as stated in **Meneja Mkuu Karafuu Hotel vs Evans Peter**, Civil Appeal No. 17 of 2009 (unreported) which was also referred to. The counsel for the appellant thus prayed for the appeal to be allowed with costs.

On the part of the respondent, at the start of his submissions, Mr. Msengi sought the Court's leave to adopt the filed written submissions so as to form part of the oral submissions, a prayer which we granted. The learned counsel also stated that the respondent should be recorded to be objecting the appeal. He then proceeded to highlight the fact that the relationship between the appellant and the respondent was one of employer and employee and the respondent's employment was terminated subsequent to the allegations of having poisoned Franco.

Responding to the 1st ground of appeal, Mr. Msengi disputed the argument that the High Court did not properly consider or analyze the evidence before the court as it relates to the ingredients of defamation but relied on the evidence of PW1, who explained what transpired leading to the current appeal and the hearsay evidence of PW3. The learned counsel contended that the totality of evidence showed that the ingredients of defamation were fulfilled.

On allegations that the defamatory remarks were uttered by a drunk Franco, the respondent's counsel argued that this cannot save the appellant from liability of defamation because there was no expert proof that at the time the alleged defamatory words were uttered, he was drunk. He contended further that publication was proved when the Manager of the hotel Mr. Luis relayed the untrue defamatory words to

the Manager of Hakuna Matata and lowered the respondent's reputation. That by publishing the defamatory words in effect, defamation on his part was actualized.

With respect to the 2nd ground of appeal, the learned counsel submitted that the High Court Judgment was based on analysis of evidence before it. The High Court was satisfied that the defamatory words against the respondent were made. However, the counsel conceded that the words used by the learned High Court Judge at pages 70 paragraph line 23-24 of the record of appeal, that Franco was running around the house screaming was not supported by evidence and it is not clear which testimony the High Court Judge relied on to make the said observation.

Responding to the 3rd ground that the High Court Judge relied on hearsay evidence of PW3 to find that there was publication of the alleged defamatory remarks, the learned counsel maintained that the complaint has no basis; He argued that the evidence of PW3 is not hearsay and even if it was hearsay, it then falls under the exceptions to the rule since the said evidence finds support in the evidence of PW1.

In responding to the 4th ground of appeal, the learned counsel confronted the complaints therein arguing that the High Court judgment complied with Order XXIII Rule 3(2) of the Civil Procedure Rules of Cap

8, Laws of Zanzibar. He contended that the said judgment has all the essential parts required and the evidence was properly analyzed and reasons for the decision therein provided.

The counsel cited the case of **Professor Ibrahim H. Lipumba vs Zuberi Juma Mzee** [2004] TLR 381 which divulged factors to be considered in awarding awards for defamation and that the High Court did consider all the requisite factors provided in the said judgment in making the award it did to the respondent for the reliefs sought. That the High Court considered the gravity of the defamation the respondent did suffer, and injury to personal integrity, professional reputation and also the conduct of the appellant in his refusal to apologize. He thus prayed for dismissal of the appeal.

The appellant's counsel preferred not to state anything further when given an opportunity of rejoinder.

We have dispassionately considered the submissions by the counsel for the parties both oral and written, cited references and the record of appeal. Suffice to say, being the first appellate Court, we subscribe to the fact that we have the duty to also re-examine, re-appraise and re-evaluate the evidence on record and come to our own decision where need arises (See **Peters vs Sunday Post Ltd.** (1958) E.A. 424; **Hassan Mzee Mfaume vs Republic** (1981) TLR 167).

In this appeal, we shall deliberate and determine the 1st, 2nd and 3rd grounds of appeal conjointly since they in effect address one critical issue, and then we shall proceed to deliberate on the 4th ground of appeal separately. In essence, we find that for the 1st, 2nd and 3rd grounds of appeal, the issue for determination is whether the respondent's claims of defamation as against the appellant were proved?

At this juncture, it is pertinent to start by striving to understand and conceptualize on what amounts to defamation. The **Halsbury's Laws of England** Vol. 28 4th edition, Paragraph 10 page 7 defines a defamatory statement as:

> *"a statement 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".*

We subscribe to the said definition and this Court had an opportunity to also deliberate on this and in **Professor Ibrahim H. Lipumba vs Zuberi Juma Mzee** (supra), defamatory statement was defined as:

> *"a deliberate, untrue, derogatory statement, usually about a person, whether in writing or orally".*

There are also two authoritative authors in their books, **Winfield and Jolowicz on Tort,** Fifteenth Edition, 1998, Ch. 12, p390-461 and Michael A. Jones, **Textbook on Torts**, Seventh Edition, 2000, Ch. 13, pages 495-534, state that the claimant has to prove the following to succeed in the tort of defamation (slander and libel): **First**, words must be defamatory. **Second,** words must have referred to the claimant and **Third**, there must be publication, that is, communication to a third party. The onus will then shift to the defendant to prove that **One**, the words were true or he had justification; **Two** that it was a fair comment on matter of public interest; **Three** that it was made on the matter of privileged occasion; **Four** that an intentional defamation; and **Five** that there was consent.

In the present case, the respondent alleged that the words uttered by Franco "*that it is Ali who poisoned me*" or "Ali poisoned Franco" are defamatory words in nature and content. The appellant was imputed to have committed the tort of defamation on allegations that having heard the said utterances, he proceeded to publish the said utterances by communicating with other people informing them of the contended remarks.

The respondent denied having poisoned Franco claiming that the said accusations against him are untrue. When the evidence of DW2 and

DW3 is assessed, there is no question that it is one Franco who made the said remarks that he was poisoned by the respondent. The learned High Court Judge, also found this to be a fact when he stated at page 70 line 11 of the record of appeal that:

> *"... as evidence so adduced shows that witnesses from both sides proved that Mr. Franco ran around the hotel screaming and accusing plaintiff to have poisoned him..."*

Both counsel for the parties in their submissions also alluded to the fact that it is Mr. Franco who uttered the statement accusing the respondent at the time he was at Zanzi Resort Hotel in the area accommodating employees. There is also evidence that when Franco was shouting and uttering the alleged defamatory statement, as testified by DW1, DW2 and DW3, he was drunk. This evidence was also found to be a fact by the learned High Court Judge at page 70 of the record of appeal when he stated:

> *"... Well defence side strongly tried to show that Mr. Franco is not part and parcel of the hotel.* ***Therefore, bearing in mind that and considering he was drunken*** *one cannot take into account statements made by drunker because it is the normal conduct of drunker to provoke any word which comes in their mouth..." [Emphasis our own].*

At this juncture we should also mention the concern raised by the learned counsel for the respondent, on there being vicarious liability on the part of the appellant for the statement made by Franco. It is noteworthy that this fact was not among the issues deliberated by the learned High Court Judge. We equally do not see any need to venture into that boat because as stated earlier in this judgement there is no evidence on record establishing that Franco was the employee of the appellant at the time of uttering the alleged defamatory statement.

Having made a finding that the alleged defamatory statement was made by Franco, accusing the respondent of poisoning him, we proceed to consider a sub issue, whether the said statement/remarks by Franco fall within the definition of a defamatory statement.

According to the respondent, his reputation was lowered in the minds of right-thinking members of the society and he was exposed to hatred and contempt, and he averred that his dismissal from the job had a bearing on and was prompted by the said accusation. The appellant denied this fact, stating that the respondent's dismissal was part of the redundancy drive effected at the Hotel and nothing else.

We are mindful of the fact that one of the most important ingredient in proving there being defamatory remarks is to show that the statement is one which tends to lower a person in the estimation of

right -thinking members of the society generally, or to cause him to be shunned or avoided or to expose him to hatred, contempt of ridicule.

As stated earlier, the fact that Franco was drunk when he uttered those remarks is not disputed. There was even a finding to that effect by the High Court Judge as shown above. DW1 at page 51 of the record, stated that, on the 24th October, 2012 while at the staff house canteen, Mr. Franco came and was drunk and shouting stating that he had been poisoned and that it is the respondent who was responsible. He also stated that he was not sure how many people heard but that the people there laughed when they heard this. DW1 also stated:

> *"... I was questioned on that report by manager and I replied, "am not sure of that but I think he just wanted money from defendant".*

Regarding the same incidence, DW2 stated at page 53 of the record of appeal that on the day of the incidence, while in his room he heard noise and saw Franco who was drunk and was complaining that his drink has been poisoned by the respondent. He also stated he did not think that Franco was poisoned. On the part of DW2, at page 55 of the record of appeal, his evidence is that he heard a drunk Franco saying that his drink has been poisoned but that he did no say who had poisoned it.

DW1, DW2 and DW3 are the only witnesses who heard Franco shouting and uttering the alleged defamatory words. But when you examine their testimonies neither of them took Franco's word seriously, and all of the three witnesses state that they did not believe that Franco was poisoned. In fact, there is no witness who testified that after hearing Franco's utterance they changed their opinion on the respondent, they regarded him the same they had before the said utterances by Franco.

On the part of the respondent's witnesses, PW2 did not witness Franco uttering the alleged defamatory words, but heard two of his bosses talking to the respondent querying him about what had happened on the day of the incident, in effect this witness was eavesdropping on the said conversation. According to PW2, after the respondent had completed the conversation with the bosses, he and the respondent continued with their work and at the end of the day he left with the respondent. Thus, the fact that he had heard the respondent being questioned on whether he had poisoned Franco, from the evidence, how he related with the respondent did not change in any way.

On the part of PW3, her role was also to call the respondent to inform him of what she heard her boss one Olivia discuss with someone

she didn't know, also eavesdropped on a one-sided telephone conversation. Although she stated that Olivia had informed PW3 some details about the conversation she had with someone from Zanzi Resort hotel and that she did hear something about there being trouble at Zanzi Resort. But from her testimony, after having heard that the respondent was accused of having poisoned someone, that did not stop her from calling him to warn him of the news. Therefore, from these witnesses, it is clear that, the information related to allegations against the respondent poisoning Franco, did not change how they related with the respondent, their attitude towards or how they valued the respondent. There was no evidence to show the contrary. In fact, what it reflects is that most of these witnesses did not believe the said allegations or did not take them seriously, especially when you consider it was testified that Franco was drunk when he uttered the said remarks.

In **Said Ally Maswanya vs African Buyer and Trader (Publications) Ltd & Others** (1981) T.L.R 221 it was held that;

> "*In consideration whether the words were defamatory in their ordinary or hidden meaning the court will look at the effect in the mind of reasonable man in the community*"

Thus, from the above definition, a defamatory statement is, one which tends to lower a person in the estimation of right-thinking members of the society or which tends to shun or avoid that person.

Applying the above reasoning to this case, in the absence of any other evidence to support the claims by the respondent that his reputation was injured, the circumstances do not lead us to find that the utterance by Franco in anyway lowered the respondent's reputation in the estimation of the people surrounding him or caused him to be shunned or avoided or exposed him to any hatred, contempt or ridicule. Therefore, we are of firm view that the alleged remarks fail the test and they are not defamatory. Thus, the first issue is answered in the negative.

Even if for the sake of argument, we were to find they were defamatory, we have failed to find any proof that there was any publication of the said utterance by the appellant. Publication means communicating the defamatory utterance to a third person. The respondent's claims in this case were that the respondent communicated the utterance to the Manager of Hakuna Matata Hotel. There is no cogent evidence to sustain it. The only evidence relied upon by the respondent is the evidence of PW3. Suffice to say while considering this we shall also deliberate on the 3rd ground of appeal, which challenged

the learned High Court Judge for relying on the evidence of PW3 which they alleged was hearsay.

To appreciate the evidence of PW3 it is important to reproduce it as it is from page 48 line 18 and page 49 of the record of appeal. PW3's evidence is to the effect that in 2013 in October, while in the office, she received a phone call from Zanzibar Resort wanting to speak to Olivia, the Manager at Hakuna Matata Hotel, but she did not recognize the person who called. We reproduce part of her testimony:

> *"...I passed the phone to Olivia, after finished with the call came outside the office and informed me that somebody has been poisoned. That poisoned person called Franco that he was poisoned by Ali Paramana (PW1)".*

The evidence of PW3 is based on what she was told by Olivia and not on any communication she heard. So, information on the person who was on the other side of the phone came from Olivia because she testified that she did not know who it was when she picked the phone. On this issue we are guided by the Law of Evidence Act, Cap 6 Revised Edition 2019 (the Evidence Act), whereby section 61 and 62 reproduced read as follows:

> *"61. All facts, except the contents of documents, may be proved by oral evidence. Oral evidence must be direct*

62.- (1) Oral evidence must, in all cases whatever, be direct; that is to say- (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds"

Undoubtedly, PW3 evidence was not direct evidence and it cannot be said to fall within the exceptions to the hearsay evidence rule. PW3 evidence when assessed clearly falls within the ambit of hearsay evidence especially when the person who informed her on the content of the conversation she testified against, that is one Olivia was not called as a witness.

The other issue which was advanced by the respondent's counsel was the fact that claims of defamation against the appellant are also

inferred by virtue of being Mathew and Louis's employer. Mathew and Louis are alleged to have published the alleged defamatory remarks by communicating the said remarks to other people. We are aware that the learned High Court Judge in his judgment did consider and this can be discerned where it is stated at page 70:

> *"... And this has been proved before the court as both Luis and Mathew spread those allegations in different ways of communications to other person and since they are employees of defendant therefore the act done by them is omitted (sic) to have been done by the defendant..."*

But upon our perusal of the record of appeal we are perplexed on this finding by the learned High Court Judge because we find no evidence to substantiate it. We have gone through the evidence of PW2, PW3, DW1, DW2, DW3 and DW4 we found nothing to state that there was evidence that it was Louis and Mathew who published the stated remarks. At the same time even if this was the case, then the only evidence available that Louis and Mathew were employees of the appellant is through the evidence of DW4 who stated that Louis was the manager of the hotel. That on the 24th October, 2012 she called him saying there was a big problem at the hotel as one of their guests was running around saying he has been poisoned by the respondent.

Regarding this communication, the learned counsel for the appellant implored us to find that this communication was between the Director and the Manager of the Hotel and thus it was privileged information and thus we should refrain to accept the invitation by the respondent's side that this was publishing information. It is well known that, one of the defence in defamation is that the information is privileged. This Court in **I.S Msangi vs Jumuiya ya Wafanyakazi and Workers Development Corporation** [1992] TLR 258 had an opportunity to discuss factors for consideration where the said defence of privileged or qualified privilege is raised in defamation cases and we held:

> *"Where a person raises the defence of qualified privilege on the ground that he had a duty to make the offending statement it must further be shown that the statement was made in good faith and that the person to whom it was made had corresponding interest and duty to receive it".*

Again, in **Athuman Khalfan v, P.M Jonathan** (supra) we held that:

> *"a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty*

which is the foundation of his privilege; but on the contrary he will be protected even though his language should be violent or excessively strong; if having regard to all the circumstances of the case he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so... malice does not exist where a defendant honestly and reasonably believes in the truth of the communication".

Applying the above holdings to the present case, indisputably DW4 being Louis's boss, the communication regarding what transpired in the hotel was part and parcel of the duties or tasks done in the operation of the hotel, so as rightly stated by the counsel for the appellant it was a privileged information, and thus the communication of the statement cannot be said to fall within the ambit of defamation.

Taking all the above factors in consideration, we find that the High Court Judge should have refrained from relying on such evidence. At page 70 of the record of appeal, it is clear that in making a finding that there was publication on the part of the appellant, the learned High Court Judge relied on the evidence of PW3 which inferred that the appellant did communicate with Olivia on the matter related to the alleged defamatory statement originating from Franco when he stated:

"Indeed it was at further stage proved that those allegations where false but the act done by operation manager Mr. Mathew to call Manager of Hakuna Matata hotel and report that someone had poisoned by PW1 made for those allegations to spread. And it got to knowledge of PW3 who knew PW1 as they used to work together at Zanzi Resort."

By relying on the evidence which is hearsay, without doubt the conclusion reached by the learned High Court Judge that there was publication of the defamatory remarks by the appellant was flawed. In effect our finding on the first issue means that the 1st, 2nd and 3rd grounds of appeal are found to be meritorious.

Having determined that the remarks that it is the respondent who poisoned Franco, under the circumstances and for the reasons stated above are not defamatory remarks, and that there was no publication of the said remarks by the appellant, we find no need to address the second issue, found in the 4th ground related to determination of the awards granted to the respondent. We are of the view that having determined the first issue, it is sufficient to dispose of this appeal without having to determine the remaining ground of appeal.

For reasons assigned above, we allow the appeal, and hereby quash the judgment and decree of the High Court. Costs to be met by the respondent.

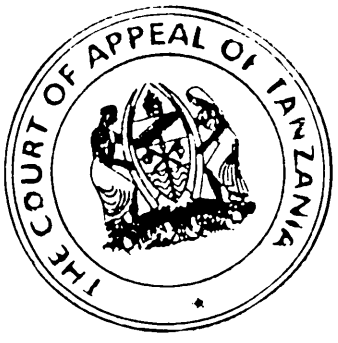
DATED at **ZANZIBAR** this 18th day of December, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 18th day of December, 2020 in the presence of Mr. Khamis Ibrahim Khamis, learned counsel for the Appellant and Mr. Isaack Msengi, learned counsel for the respondent is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL