IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 246 OF 2018

HAMZA BYARUSHENGO..... APPELLANT

VERSUS

FULGENCIA MANYA .....1ST RESPONDENT

GAUDENCE HYERA.....2ND RESPONDENT

EDITHER MAYEMBA.....3RD RESPONDENT

TUMAINI RADIO STATION.....4TH RESPONDENT

THE REGISTERED TRUSTEES OF THE

ARCHDIOSCESE OF DAR-ES-SALAAM.....5TH RESPONDENT

(Appeal from the Judgement and Decree of the High Court at Dar-es-salaam)

(Magoiga, J)

dated 31st day of August, 2018
in
Civil Case No. 113 of 2013)
.....

JUDGMENT OF THE COURT

25th March & 14th April, 2022

MUGASHA, J.A.:

The appellant, Mr. Hamza Byarushengo unsuccessfully sued Flugencia Manya, Gaudence Hyera, Edither Mayemba, Tumaini Radio Station and the Registered Trustees of the Archdiocese of Dar-es-salaam, the 1st 2nd, 3rd, 4th and 5th respondents respectively. It was alleged that, the 2nd and 3rd respondents, the employees of the 4th respondent, vide Radio

Tumaini Dukuduku program, conducted a live interview for two consecutive days that aired the 1st respondent's grievances containing defamatory statements against the appellant whereby the general public had an occasion to comment on the issue. It was alleged by the appellant that, he was psychologically affected because apart from the defamatory statements being untrue, they lowered his integrity in the society, he was shunned and laughed at by the members of the public who called him a conman, thief and killer. Consequently, as a businessman and an advocate of the High Court and courts subordinate thereto, he claimed to have lost business and earnings from clients in the wake of such maliciously broadcasted defamatory statements. Thus, the appellant sought against the respondents *inter alia* the following reliefs: payment of: TZS. 240,000,000/= being loss of expected earnings; general damages at the sum of TZS. 5,000,000,000/=; TZS. 1,000,000,000/= as exemplary damages, interest, costs and any other relief as the court deemed fit to grant.

In the written statements of defence the respondents denied the appellant's claims. The 1st respondent averred to have had a prolonged land dispute over an easement leading to the house of the appellant who

had initiated multiple court cases and harassment against her as per the police reports. It was further contended that, following her expressions in the dukuduku interview, the harassments ceased. As for the 2nd to 5th respondents, they contended that they neither had knowledge nor had any reason to believe that the statements against the appellant made by the 1st respondent were untrue. Besides, it was further averred that, their statements were neither defamatory and nor actuated by malice and instead, it was purely an expression of opinion on the statements made by the 1st respondent.

At the trial, among the controlling issues included, whether or not the words complained of did bear or were capable of bearing the meaning of defamation against the plaintiff who is the appellant herein.

In order to establish his claims, seven witnesses were paraded for the appellant's case including the appellant himself (PW1), Jafari Juma Nyaigeshe (PW2), Rashid Ahmad Kitaimara (PW3), Miraji Ayubu Ibrahim (PW4), Issack Zake (PW5) and Juma Shamsi Byarushengo (PW6). The defence lined up five witnesses who were: Flugencia Mikas Manya (DW1), Philomena Damian (DW2), Fr. Paul Haule (DW3), Gaudence Hyera (DW4) and Martin Nicas Manga (DW5). However, on account of what will unfold in

due course we shall not indulge in narrating the evidence adduced at the trial by the both sides save where it is necessary.

After a full trial, the High Court dismissed the appellant's suit on grounds that, **one,** he had failed to prove the actual words alleged to be defamatory; **two,** there was no malice on the part of the respondents considering that the program was aired live whereby members of the public are free to air opinions on individual matters; **three,** the 4th respondent was entitled to a defence of qualified privilege being under moral or social duty to make a statement even if it appears to be defamatory; **four,** the claims on loss of business were not proved as the evidence was not compatible with the pleadings.

Undaunted, the appellant has preferred this appeal fronting ten grounds of complaint as follows:

1. That, the learned trial judge grossly erred in law and in fact in failing to appreciate the distinction between libel and slander.

2. That, the learned trial Judge grossly erred in law and in fact in upholding the 1st respondent's legal issue contained in the final submissions that, the way the amended plaint was drafted in paragraphs 10 and 11 by quoting the words complained of to the

exclusion of other broadcasted words in the programme amounted to non-quoting verbatim the words complained of as required by law without hearing the parties on the aspects which was not part of the pleadings.

3. That, having regard to the fact that the respondents admitted in their pleadings to have uttered/published the words complained of, the learned trial Judge grossly erred in law and in fact in failing to hold that the admissions were binding on the respondents and constituted waiver of proof on the part of the appellant.

4. That, the learned trial Judge erred in law and in fact in holding that in order to prove that the words complained of were defamatory, the appellant and his witnesses were duty bound to state actual words used to defame him with no subtractions or omissions.

5. That, the learned trial Judge grossly erred in law and in fact in holding that the broadcasting by the 4th respondent was not done maliciously.

6. That, the learned trial Judge grossly erred in law and in fact in holding that the respondents were entitled to the defence of qualified

privilege without hearing the parties on the aspect of that defence which was neither pleaded nor among the framed issues.

7. That, having regard to the fact that the respondents published statements imputing criminal conduct and behaviour on the part of the appellant, the learned trial Judge grossly erred in law and in fact in holding that the 1st respondent was entitled to the defence of justification without any proof of the imputed crimes as required by law.

8. That, having regard that none of the documentary exhibits was endorsed by Bongole, J (the predecessor Judge) both Arufani, J (1st successors Judge) and Magoiga, J (the 2nd predecessors Judge) the learned trial Judge grossly erred in law and in fact in taking over the continuation of the trial failing to transfer the matter to this honourable Court for revision.

9. That, having regard to the fact the 1st successor Judge had taken over the continuation of the trial without recording reasons as to why the case was before him, the 2nd successor Judge/ the learned trial Judge grossly erred in law and in fact in taking over the continuation

of the trial and failing to transfer the matter to this Honourable Court for revision.

10. That, the learned trial Judge grossly erred in law and in fact in applying double standards to the appellant's final submissions and the witnesses who testified on the appellant's side as opposed to the respondents' final submissions and witnesses who testified on the respondents' side and arrived at wrong conclusions not based on any law or any evidence on record.

At the hearing, the appellant was represented by Mr. Juma Nassoro, learned counsel whereas the respondents had the services of Mr. Senen Mponda, learned counsel. Parties adopted written submissions earlier filed in terms of Rule 106 of the Tanzania Court of Appeal Rules, 2009 (the Rules). In the oral submissions, both learned counsel made oral submissions and clarifications in respect of the written arguments for either side. We commend the learned counsel for their industry in the written submissions but for the time being, we shall consider what is relevant in relation to the matter before us and a subject for determination. However, in the appellant's written submissions, the 7th ground of complaint was abandoned by the appellant and we mark it so.

Having considered the written submissions for and against the appeal and the record before us, initially we have to determine part of ground 8 partly and ground 9 as they have a bearing on the propriety or otherwise of the trial which is a subject of this appeal. The gist of the complaint in the said grounds is to the effect that the trial was flawed in the absence of reasons for the continuation of the trial before the two successor judges. This was argued to have violated the provisions of Order XVIII rule 10 (1) of the Civil Procedure Code [CAP 33 R.E.2002] (the CPC) and as such, it was incumbent on the 2nd successor Judge, instead of continuing with the trial, to forward the matter to the Court for revision. Thus, the appellant implored on the Court to annul the trial proceedings, the impugned judgment and order a retrial. To support his propositions, he cited to the cases of **GEORGES CENTRE LIMITED VS THE HONOURABLE ATTORNEY GENERAL AND ANOTHER,** Civil Appeal No. 29 of 2016 and **JOSEPH WASONGA VS ASSUMPTA NSHUNJU MSHAMA,** Civil Appeal No 97 of 2016 (both unreported).

In opposition, the respondents argued that, since the appellant was aware of the transfer of the initial predecessor Judge, the taking over and continuation of the trial was not flawed since parties had consented to the

continuation of the trial. To bolster his argument, he cited the case of **CHARLES YONA VS REPUBLIC,** Criminal Appeal No. 79 of 2019 (unreported).

It is glaring that in the matter under scrutiny, the trial was conducted by three learned Judges in succession, that is, Bongole, J, Arufani, J, and ultimately Magoiga J,. Order XVIII rule 10 of the CPC regulates the manner to deal with evidence taken before another judge or magistrate. It stipulates as follows:

> *"10 (1)* ***Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal*** *with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."*
>
> [Emphasis supplied]

We are aware that the Court has in its numerous decisions stated that reasons for the taking over must be stated by the successor Judge.

However, the reasons which prevent the trial Judge to continue with the trial include death, transfer or other cause and this is what must be brought to the attention of the parties before the continuation of the hearing before the successor Judge. In this regard, at page 156 of the record of appeal on 5/6/2016 parties were informed that the trial Judge was on transfer and that the matter would be mentioned on 19/7/2016. On that day, parties are on record to have consented to the continuation of the hearing before Arufani, J,. In the circumstances, as this was not a case of file grabbing, the parties were fully aware that the predecessor Judge had been transferred and as such, the issue of lack of jurisdiction to continue with the partly heard case did not at any stretch of imagination arise. In the same vein, the question of transferring the case file to the Court for revision was uncalled for as there was nothing to warrant revision by the Court. In the premises, complaint in part of the 8th ground and 9th ground of appeal is dismissed.

Next is the complaint in remainder of the 8th ground of appeal whereby the appellant is faulting the non-endorsement of exhibits by the initial predecessor Judge arguing this should have necessitated transfer of the case file to the Court for revision. This was opposed by the

respondents' counsel who urged us to hold the omission not fatal. On this, he cited to us the case of **PRINCESS NADIA (1998) LTD VS REMENCY SHIKUSIRY TARIMO AND TWO OTHERS,** Civil Appeal No, 242 of 2018 (unreported). The endorsement of exhibits upon being admitted in the evidence, is regulated by Order XIII rule 2 which stipulates as follows:

> *"(1) Subject to the provisions of the sub rule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely–*
>
> *(a) the number and title of the suit;*
>
> *(b) the name of the person producing the document;*
>
> *(c) the date on which it was produced; and*
>
> *(d) a statement of its having been so admitted;*
>
> *and the endorsement shall be signed or initialed by the judge or magistrate"*

In the present case, the exhibits in question were marked and numbered, signed and dated by the presiding judge. It is our considered view that, the omission to include the missing particulars in the said exhibits was inadvertent and, in any case, it did not render the exhibits not

endorsed as they were appropriately marked, signed and dated by the presiding Judge. We thus dismiss the remaining part of the 8th ground of appeal.

Next is the complaint in ground 10 that, the learned trial Judge applied double standards to the appellant's final submissions and testimony of his witnesses as opposed to the respondents' final submissions and the witnesses who testified on the respondents. This was argued to have resulted to wrong conclusions not based on any law nor any evidence on record. This need not detain us. In our considered view, the learned trial Judge in his Judgment did consider the evidence from both sides together with the rival submissions as opposed to the serious allegation against the learned trial Judge which is unwarranted.

We now turn to the substantive appeal. Gathering from the written submissions in the remaining grounds 1,2,3,4,5 and 6 and the record before us, they all revolve on one crucial issue that is, whether or not the appellant was defamed and what are the consequences.

Basically, in both the grounds of complaint and the written arguments of the appellant, the learned trial Judge is faulted on: **one:** upholding the 1st respondent's legal issue contained in the final

submissions on the manner of drafting the amended plaint whereby in paragraphs 10 and 11 the words complained of were quoted to the exclusion of other broadcasted words, were not *verbatim* while as the parties were not heard on the matter**. Two,** failure by the learned trial Judge to hold the respondents bound by their admission in respect of broadcasting words complained of which in essence constituted waiver of proof on the part of the appellant. Moreover, in the oral submissions, it was argued by the appellant's counsel that, what was pleaded in the amended plaint sufficed to show the cause of action of the appellant or else the plaint ought to have been rejected instead of proceeding with the trial.

On being probed by the Court on the sound recording which the appellant had promised to produce at the trial, Mr. Nassoro drew our attention to the evidence of the appellant which was to the effect that, the sound recording could not be produced as it was destroyed by the sun. In addition, the learned counsel contended that, such electronic evidence in the sound recording was by then not admissible in civil cases.

In opposition, the respondents' submission was to the effect that, besides the respondents denying to have broadcasted defamatory words

against the appellant, the exact defamatory statements were not set out in the pleadings which is reflective of the appellant's account at the trial. In this regard, it was argued for the respondents' counsel that, the appellant's reason for the non-production of the sound recording was an afterthought and ultimately, in the absence of the sound recording the appellant ultimately failed to discharge the legal onus to prove his case on the balance of probabilities.

Having considered the contending submissions and the record before us, we begin by restating that, it is a cherished principle of law that, generally, in civil cases, the burden of proof lies on a party who alleges anything in his favour. The principle is embraced in section 110 of the Evidence Act [CAP 6 R.E.2002]. It is also common knowledge that in civil proceedings, a party with legal burden also bears the evidential burden and the standard of proof is on the balance of probabilities. Confronted with the similar scenario the Court in the case of **ANTHONY M MASANGA VS PENINA MAMA NGESI AND ANOTHER,** Civil Appeal No. 118 of 2014 (unreported), cited with approval the case of Re B [2008] UKHL 35 where Lord Hoffman in defining the terms balance of probabilities stated thus:

"If a legal rule requires a fact to be proved...a judge or jury must decide whether or not it happened.

There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the Tribunal is left in doubt, the doubt is resolved by the rule that one party or other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened."

In a nutshell, the standard of proof is on balance of probabilities simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved. See – **GODFREY SAYI VS ANNA SIAME AS LEGAL REPRESENTATIVE OF THE LATE MARY MNDOLWA,** Civil Appeal No. 114 of 2012, **PAULINA SAMSON NDAWAVYA VS THERESIA THOMASI MADAHA,** Civil Appeal No. 45 of 2017; (both unreported). In the circumstances, we shall accordingly be guided by the stated principle to determine if the appellant had discharged the burden of proof.

In the matter under scrutiny, at the outset, it is pertinent to understand the meaning of defamation. The two learned scholars, Winfield

and Jolowicz in their Book titled **TORT,** nineteenth edition, 2015, W.E Peel & J Goudkamp, Sweet and Maxwell, at page 360, define a defamatory statement in the following manner: **One,** a statement which tends to bring a person into hatred contempt or ridicule; **two,** words must tend to lower the claimant in the estimation of the right thinking members of society in general; **three,** if words tend to cause the claimant to be shunned or avoided. A similar definition is embraced in the Halsbury's Laws of England Vol. 28 fourth edition at page 7, defamation is defined as follows:

> *"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 convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."*

In our jurisdiction, the Court had the occasion to define what constitutes a defamatory statement in the case of **PROFESSOR IBRAHIM H. LIPUMBA VS ZUBERI MZEE** [2004] T.L.R 38: *as a deliberate, untrue, derogatory statement usually about a person, whether in writing or orally.*

In the light of the above stated position, the elements of defamation and which must be proved by the claimant are: **one,** a defamatory statement

that refers to the claimant; **two,** that is published and is communicated to at least one person other than the claimant, **three,** that causes damage to the claimant. Then, the onus shifts to the defendant to prove that **one,** he/she had justification; **two,** that it was a matter of privileged occasion not actuated by malice. In the premises, since it is the appellant who alleged to have been defamed by the respondents, the burden of proof was on him. In this regard, the follow up question is whether he successfully discharged the onus.

Since it is settled position of the law that parties are bound by the pleadings whose proof is cemented by the evidence adduced, we begin with the what was pleaded by the appellant in paragraphs 9, 10, 12, 16 and 17 of the amended plaint as reproduced hereunder:

> *"Paragraph **9** – That the said campaign of malicious defamation started on the 3rd June, 2013 at 7.30 O' clock when the 2nd and 3rd defendants acting as broadcasters/employees of the 4th defendant, which is owned and run by the Catholic Church Archdiocese of Dar-es-salaam, conducted live interview with the 1st defendant. On that date the plaintiff did not hear what transpired.*

Paragraph 10 - *That on the 4th day of June, 2013 at 7.30 O'clock to 8.00 the Defendants continued with their campaign of malicious defamation to the effect that:*

The 2nd defendant: - Tangu jana tunasikiliza dukuduku iliyotufikia kutoka Ubungo – Msewe.....

The 3rd defendant: - ..... dukuduku hiyo inahusu mgogoro wa ardhi. Yaani kiwanja ambacho Flugencia na ndugu zake walikirithi toka kwa wazazi wao.....

1st defendant: .....mama yetu alipofariki alituachia shamba kubwa huko Ubungo Msewe..... baba yetu alikuwa na matatizo ya akili..... kutokana na hali hiyo watu walianza kuvamia shamba hilo..... miongoni mwa wavamizi alikuwa ni mwanasheria aitwaye Hamza Byarushengo na mtu mwingine anaitwa Malima.

3rd defendant: ..... wakawa wanafanya nini hao wavamizi?

1st defendant: ..... watu hawa wametutesa sana. Kila tunapodai haki yetu tunatishiwa kuuawa kwa bunduki.

Tunabambikiwa kesi za uongo. Walitufungulia kesi hamisini na nne (54), kesi thelathini na nne (34) zikafutwa na kubaki kesi ishirini (20) .....

The 2nd defendant: .....du hali inatisha..... kesi zote hizo:

The 1st defendant: ..... siku moja mdogo wangu Martin alichimba shimo kwenye shamba letu. Hamza akampiga halafu akaleta mapolisi kutoka kituo cha mbezi kwa Yusufu watukamate kwa kutusingizia kuwa tulimfanyia fujo.....

The 3rd defendant: .....makubwa haya.....

The 1st defendant: .....siku nyingine huyo mwanasheria alikuwa anataka kutuua kwa bunduki, akawa anapiga risasi hovyo watu wakaogopa na kufunga maduka yao wakidhani kwamba kuna majambazi wamevamia. Kutokana na hali hiyo tuliipiga simu kwa Kamanda Kova.....

.....nilikwenda nikatoa taarifa kituo cha polisi Mbezi kwa Yusufu. Huyo mwanasheria pamoja na ndugu zangu. (1) Martin Manya (2) Mary Manya na mtoto wangu. (3) Nicas Manya walikuja kituoni..... kitu cha

kushangaza baada ya kutoa maelezo tuliwekwa ndani eti tumemfanyia fujo mwanasheria.....

The 2nd defendant: Tutaendelea tena kesho kumsikiliza Flugencia.....

***Paragraph 11** – That on the 5th day of June, 2013 at 7.30 O'clock the defendants continued with their campaign of malicious defamation to the effect that:*

The 2nd defendant: ..... tangu juzi tunasikiliza dukuduku toka Ubungo Msewe.....

The 3rd defendant: .....ni kuhusu mgogoro wa ardhi.....

The 1st defendant: .....mwanasheria alileta wahuni wakampiga risasi nne mdogo wangu Martin iakini kwa bahati nzuri hakufa. Mpaka sasa bado ana kidonda tumboni.....

The 2nd defendant: .....huko polisi vipi.

The 1st defendant: ..... polisi wa Mbezi kwa Yusufu wanatusumbua sana.....jana

tumepigiwa simu kwamba twende polisi ili tupelekwe mahakamani.....

The 2nd defendant: .....mahakamani kufanya nini?

The 1st defendant.....ni kuhusu kesi tunazobambikiwa na mwanasheria.....

The 3rd defendant: ..... nimepokea ujumbe wa simu toka kwa Rose Michael anasema: Mwanasheria anavunja sheria kwa sababu ya maii. Ndiyo maana nilikataa kusomea sheria.....

The 2nd defendant: Huu ndio mwisho wa dukuduku hii toka Ubungo Msewe. Hatuna woga kwani tumefanya hivi kwa sababu ni kazi yetu.

Paragraph 12: *- of the amended plaint, contended that at the hearing, he will among others rely on the sound recording of the said libelous allegations.*

Paragraph 16 *– That by reason of the words so broadcasted/published by the defendants as aforesaid, the plaintiff as a business man and an advocate of the High Court has been gravely injured in his character and his name and reputation have been brought to scandal, odium and contempt, for which the plaintiff claims against the defendants*

jointly and severally, general damages for libel in the sum of Tshs. 5,000,000,000/= (say five billion only).

Paragraph 17 *– Further that, by reason of said libelous broadcasting/publication, the plaintiff lost potential client, SIX PK GENERAL TRADERS, who were to engage him (the Plaintiff) as a legal advisorfor five years by a monthly retainer of Tshs. 4,000,000/= which makes a total of Tshs. 240,000,000/= for the whole period (say shillings two hundred and forty million) only. Photostat copy of a letter from the potential client and the rejected retainer agreement are hereto attached and collectively marked H B – 4 to be read as forming part of this plaint."*

Parties are not in dispute that what is complained of falls in the category of libel and not slander. However, parties locked horns as to whether the statements complained of were defamatory. In the case of **FATMA SALMIN VS DR. MAUA DAFTARI,** Civil Case No. 34 of 2008 (unreported) the High Court emphasized among other things:

"In a suit by the plaintiff being one concerning defamation, be it libelous or slanderous statements, it is a requirement that the words complained of by

the plaintiff must be known and be set out verbatim in the statement of claim. It is not enough to set out their substance.

We fully subscribe to the said position which was also considered in the case of **NKALUBO VS KIBIRIGE** [1973] E.A 102. The Court among other things, stated:

> *"In all suits for libel the actual words complained of must be set out in the plaint.... In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends. Those words have often since been cited with approval.* ***This is not a mere technicality, because justice can only be done if the defendant knows exactly what words are complained of, so that he can prepare his defence*** "

[Emphasis supplied]

In the present matter, in the wake of the said blanks in what was pleaded in plaint, the exact defamatory statements broadcasted cannot be

discerned therefrom. This is cemented by the appellant's own account at pages 136 and 137 of the record of appeal as reflected hereunder:

> "I *was informed that I was defamed. I heard the broadcasting on 5th June, 2013. ...**The ..... shows there were other words she said but I don't know them.** There follow many quotations.*
>
> *These are what I told Nassoro verbally and that is what I said. It might be and might be not reproduced in this letter. **Some words which I told them were not quoted.** What are written in the letter are the ones I told them. They quoted me verbatim. **It is Nassoro & who chose to put them ..... The Court cannot know the words which were left.....***
>
> ***What is written is according to what I heard from those who gave me the information..... I chose the words to be included in the quotation.***
>
> ***At para 10 of the amended piaint is a reproduction of contents in para 5 and 6 of Edh. P6. It is true that this court has no benefit of knowing what was broadcasted on 4th June 2013 and what was broadcasted on 4th and 5th June, 2013....."***

[Emphasis supplied]

In the light of the bolded expressions, apart from the appellant testifying on being unaware of the exact statements broadcasted he conceded that what he told his advocate was not quoted. Ultimately he was sympathetic that, with the said blanks, even the trial court was not in a position to know what was broadcasted. This, in our considered view, placed the respondents in an uncertain position of knowing the alleged actual injurious words upon which the claim of defamation is founded. Moreover, since the appellant was duty bound to mention the exact words complained in the amended plaint which he never accomplished, the threshold of setting out such words *verbatim* was not met as correctly found by the learned trial Judge. We are fortified in that regard because the meaning of word *verbatim* is:

> *"in exact words: word for word quoted the speech verbatim. verbatim adjective. Definition of verbatim...being in or following exact word: word - for – word a verbatim report of the meeting" See:* https://www.meriam-webster.com:
>
> *What is a synonym of verbatim: a verbatim recording of the proceedings' word for word, letter for letter, line for line, literal, exact, direct, precise ,*

close faithful, undeviating, strict, unadulterated, unabridged, unvarnished, unembellished" : http://www.lexico.com:

In this regard, the appellant's complaint on parties not being heard as to the determination of words not being quoted *verbatim* is farfetched considering that the issue can be traced right from the appellant's pleadings and the evidence of the parties who were heard on the matter before the trial court made its determination. Moreover, the appellant's complaint that the respondents admitted to have broadcasted defamatory statements is not supported by the record which shows the respondents' clear and glaring denial of the appellant's claims. In addition, at page 243, Father Haule (PW3) told the trial court that, what was pleaded in paragraph 10 of the plaint is not what was broadcasted in the wake of blank dots connoting missing words. This was flanked by DW3, DW4 and DW5 who maintained that on account of incomplete quotations in the plaint with blank dots, the actual broadcasted words were unknown.

In the circumstances, the sound recording of the said libelous allegations was material evidence and failure to produce it entitled the trial court draw an inference adverse to the appellant's case. See: **AZIZI ABDALAH v REPUBLIC 1991 TLR 71.** Probably, the video sound

recording could have possibly remedied what was missing in the blank dots. We decline to accept the appellant's assertion on the sound recording being destroyed which leaves a lot to be desired and indeed it was an afterthought. Besides, the question of admissibility or otherwise of the video recording raised by the appellant's counsel, though raised from the bar which is irregular, did not waive the appellant's duty to produce it at the hearing in line with what is pleaded in paragraph 12 of the amended plaint and leave the same for determination by the trial court. That said, the empty gaps or blanks in the amended plaint cannot be remedied by the expressions contained in paragraphs 16 and 17 of that plaint because without exact words complained of, the substance and effect of the alleged defamatory words is not enough to prove defamation and as such, the respondents were not better placed to make the appropriate defences. See: **NKALUBO VS KIBIRIKE** (supra).

In view of what we have endeavoured to explain, apart from the appellant's amended plaint failing to disclose any cause of action, as rightly submitted by the appellant's counsel, it ought to have been rejected. That said, in the alternative and without prejudice to the aforesaid, the appellant did not discharge the legal burden on his claim of being defamed and thus

failed to prove his case on the balance of probabilities. In the premises, we do not find any reason to fault the decision of the learned trial Judge. This renders this appeal not merited and we hereby dismissed it with costs.

DATED at **DAR ES SALAAM** this 12th day of April, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W.B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of April, 2022 in the presence of the appellant in person and Jacob Kanis, learned counsel for the 1st, 2nd,3rd, 4th and 5th respondents, is hereby certified as a true copy of original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL