

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION**

**AT ARUSHA**

**LABOUR COMPLAINT No. 04 OF 2013**

**RONILICK KASAMBARA MCHAMI ..... COMPLAINANT**

**VERSUS**

**BRIGHTON B. L. KILEWA ..... 1<sup>ST</sup> RESPONDENT**

**BISHOP PAULO ISAKI AKYOO ..... 2<sup>ND</sup> RESPONDENT**

**THE GOVERNING BOARD OF MAKUMIRA UNIVERSITY ..... 3<sup>RD</sup> RESPONDENT**

**THE REGISTERED TRUSTEES OF THE EVANGELICAL**

**LUTHERAN CHURCH OF TANZANIA ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

27<sup>th</sup> November & 29<sup>th</sup> December, 2023

**TIGANGA, J.**

Dr. Ronilick Kasambara Mchami is one of the gifted persons. He is a theologian and lawyer by profession. He is a holder of a Doctorate of Philosophy (Ph.D) in Theology specializing in the New Testament. He is also one of the Senior Advocate of the High Court and Courts Subordinate thereto having practiced law for decades. He also has been a lecturer at Tumaini Makumila Theological College before it was upgraded to a full University College of Tumaini where he taught theology in the New Testament. According to the evidence, before acquiring these higher grades he was first

ordained as the Pastor and licensed to give all important pastoral sacraments in the Evangelical Lutheran Church of Tanzania (hereinafter ELCT) in the Southern Diocese. In his service under the Southern Diocese, he was also a Principal or Headmaster of Kidugala Junior Seminary, that was before he went for further studies taking a Bachelor of Laws from the University of Dar es Salaam. According to him, after his distinguished performance in his Theology courses, he was employed by the ELCT headquarters as an assistant lecturer on 16<sup>th</sup> May 1988 a post he then served up to 23<sup>rd</sup> January 2006 when he alleged to be terminated from his employment.

It is also his evident that, after the termination, the termination letter and the information about his termination were published and circulated in a manner that defamed him thereby tarnishing his image and his long-grown career. The complaint went as far as informing the Court that, the person who purportedly terminated him had no power to do so, and that the termination was illegal and malicious thus damaging his reputation.

The complainant raised seven legal issues which are for the Court to address.

- a) Whether the third respondent illegally assumed the mandate of the employer of the complainant.

- b) Whether the first respondent illegally and maliciously defamed the complainant
- c) Whether the second respondent illegally and maliciously defamed the complainant
- d) Whether the fourth respondent illegally and maliciously defamed the complainant
- e) Whether the complainant has suffered reputation injuries, and damages as averred in the statement of complaint
- f) Whether the complainant is entitled to the reliefs he is praying for in this complaint

He prayed for the following reliefs;

- i. The findings that the respondent committed a tort of malicious defamation against the complainant entitling the complainant to the payment of special damages in the sum of Tanzania Shillings 102,180,100./=
- ii. The findings that, the defamation by the respondents has damaged the personal reputation of the complainant entitling him to payment of shillings 100,000,000/=
- iii. The findings that, the defamation by the respondents has damaged the academic career of the complainant entitling him the payment of shillings 150,000,000/=
- iv. The findings that, the defamation by the respondents has damaged the academic career, and professional practice as a theologian and lawyer of the complainant entitling him the

payment of exemplary damage of Tanzania shillings 50,000,000/=

- v. The findings that, the defamation by the respondents has damaged the personal reputation, academic career, and professional practice as a theologian and lawyer of the complainant entitling him the general damages to be assessed by this Court.
- vi. An order for the respondents to pay the costs of this complaint.
- vii. An order for the respondents to pay the complainant the interest at the court rate on the awarded damages from the date of the judgment till payment in full.
- viii. Any other relief or reliefs as this honourable Court may deem fit and just to grant.

The claim in the complaint was opposed by the respondent's joint response to the statement of complaint. In their response, the respondents disputed to have tortiously defamed the complainant and that, the issue of illegal assumption of powers has already been determined by the defunct Industrial Court of Tanzania in Inquiry No. 145 of 2006 and that there is no cause of action to be resorted to by the complainant in terms of section 94 (1) of the **Employment and Labour Relations Act** [Cap 366 R.E 2019].

They also disputed the allegation that the complainant was employed by the fourth respondent to work as the tutorial assistant at the then

Lutheran Theological College of Makumira based on his qualification in both law and theology. To the contrary, they said the complainant being the ordained pastor was requested from his Diocese and sent on secondment arrangement to work at the college.

They also said the extraordinary meeting of the third respondent held on 23<sup>rd</sup> January 2006 was not illegal and it did not lack the legal mandate to make the decision it made, as it was convened in the ordinary cause of the 3<sup>rd</sup> respondent's business. They also responded that the third respondent was a supervisor of the day-to-day activities of the lecturers seconded to it and could return the lecturers including the complainant to their respective dioceses.

In their view, as long as the complainant knew that he was there on secondment, and would one day return to his home Diocese, then the decision of the third respondent was not defamatory and the decision of the third respondent and its confirmation by the central committee and the Executive Council of the fourth respondent, as well as the announcement of the same to the University staffs and students were all done in good faith on occasion of qualified privilege and that, the respondents were justified in doing whatever they did. In the end, they proposed three legal issues for

this court to address. **One**, whether the engagement of the complainant with the third respondent was on a secondment basis. **Two**, whether the fourth respondent ever employed the complainant to work for the third respondent? **Three**, whether the decision made by the third respondent's meeting on 23<sup>rd</sup> January 2006 and the announcement thereof by the respondents were defamatory to the complainant. They also prayed for the dismissal of the complaint in its entirety.

The trial was conducted with the aid of two assessors namely Mr. Jonathan Ndumbaro for the complainants and Mr. Erick Stanslaus who was for the Respondents. Also, throughout the trial, the complainant being a lawyer, has been appearing in person and unrepresented, while the respondents have been represented by Mr. Ezra Mwaluko, learned Advocate.

At first, the case was assigned to my predecessor in office Hon. M.G. Mzuna, J who conducted all the preliminaries and heard part of the complainant's case before he was transferred to another duty station consequent of which the same was assigned to me for continuation of trial and final disposal.

Before the trial commenced four issues were framed namely,

1. Whether the three letters dated 23<sup>rd</sup> January 2006 (C.6) & (C.7) and that of 28<sup>th</sup> April 2006 (C.12) were defamatory to the complainant?
2. Whether the subsequent utterances made by the 2<sup>nd</sup> respondent Bishop Paulo Isaki Akyoo made first to Makumira University Lecturers and supporting staff as well as the students of Makumira University College on 23<sup>rd</sup> January 2006 were defamatory to the complainant?
3. If the 1<sup>st</sup> and 2<sup>nd</sup> issues are answered in affirmative, whether they damaged the university carrier of the complainant?
4. What relief parties are entitled thereto?

In an effort to prove the claim, the complainant called a total of five witnesses, including himself. The names of the witnesses in their respective orders are as follows: Dr. Ronilick Kasambala Mchami, PW1, Dr. Modestus Josephat Lukonga, PW2, Emmanuel Robinson Mweta, PW3, Mch. Donald Theletion Mfavoo, PW4, and Rev. Dr. Phares Ilomo, PW5.

On the other hand, the respondent called a total of four witnesses to disprove the claim namely, Bishop. (Rtd) Prof. Owdenburg Moses Mdegella, DW1, Robert Martin Kitundu, DW2, Brighton Kilewa, DW3, and Bishop (Rtd) Paulo Isack Akyoo, DW4.

The evidence by the complainant is generally that, he was employed by the ELCT commonly known by its Swahili acronym (KKKT) vide a letter of 16<sup>th</sup> May 1988. According to him, his employment was under the constitution of the ELCT but he was summarily terminated on 23<sup>rd</sup> January 2006 with a total disregard of the said Constitution. He tendered the constitution under which he was employed which was admitted without objection as Exhibit P1. In that exhibit, he referred to page 9 titled "Wajibu wa Halmashauri Kuu za KKKT" particularly items No.5 & 6. He said he was employed as the Tutorial Assistant at Makumira University College which is one of the Institutions of ELCT as one of the Senior Staffs. He was therefore supposed to be removed from his employment by using that constitution which provides for a procedure. ***"Kuondoa Kazini mtumishi yoyote mwenye daraja la juu katika kituo cha kazi za umoja."*** Therefore, if they wanted to terminate him, they ought to have charged him under that provision before the Executive Council itself where he would have been given a chance to defend himself and call witnesses to defend him.

In his further evidence, he said when he started from 1988 – 1997 the institution was called the Lutheran Theological College of Makumira. It was the Constituent Colleges under the Tumaini University. In 1997 the ELCT



Church registered it as the Makumira University College of Tumaini University. Following those changes, there was a need to re-arrange the positions and ranks of lecturers at Makumira University. Therefore, the lecturers including the complainant submitted their CVs to the Senate, he was elevated to the rank of lecturer vides a letter of 23/3/199, exhibit P4.

In his insistence that the University Governing Board had no relation to the employment of lecturers, he invited the court to read sections 43 and 45 of the **Universities Act**. Act No.7/2005. He said he was employed by the ELCT. He said however, even if we are to agree that the Governing Board had powers to do so under S.44 (2) (d) of the Universities Act, the composition of the Governing Board requires the students to be represented in the board that purportedly terminated him excluded the student's representative.

He said after his termination he filed the defamation case in the Labour Court because he was permitted by the ruling of this Court in Civil Case No. 24/2008 High Court Arusha, Exhibit. P2. He insisted that he was a Lecturer 'Mkufunzi' who was under the Principal of the University not under the Governing Board as he was employed by the Executive Council of ELCT to work in the "**Kazi za Umoja**," so he was under the Principal, not the Board.

He said his employment terms were stated under part 2(d) and it was permanent as it provides even pension “haki za uzeeni” or retirement benefits. He was also given a house which he paid rent, medical care for which he was given a 75% contribution by the Church (KKKT). His letter of employment was written by Aman Mwenegoha who served as Secretary General of ELCT for 10 years. In his view, all words of that letter are to be given their real meaning.

He said during the time of his service, he published a substantive number of publications he tendered a list of them and the respective publications which he published. They were all admitted without objection as exhibit P5 collectively.

He also told the Court that, during that time he undertook the Bar Exam and enrolled as an Advocate since on 16/12/1991 as proved by the certificate of admission, exhibit P6. Still growing in his career he studied and was awarded a Doctorate of Philosophy PhD as proved by exhibit P7 an Award of Ph.D in Theology dated 4/5/2005.

Besides his academic carrier, he mentioned other community work or service he rendered as stipulated in para 7 (iv) of my complaint that, he was a founding Headmaster of Kidugala Lutheran Seminary from December 1981

to May 1984. He was also a UDSM Chaplain from June 1985 to January 1988. Also, he served as one of the International Election Observers in the Republic of South Africa from March to May 1994, where he was sent by the World Council of Churches. He was also one of the members who revised the ELCT Constitution from May 2002 to June 2006. He was also a member of the Constitution and Legal Affairs Committee of the Christian Council of Tanzania from May 2001 to June 2008.

He went on testifying that, in 2006 he was earning Tshs 850,000/= as his salary and was the most loved lecturer at the University. Further to that, the so-called extraordinary Board meeting convened by the 3<sup>rd</sup> respondent on 23<sup>rd</sup> January 2006 was illegal. He tendered the "Kikao cha Dharura cha Bodi ya Chuo, 23 January 2006 Safari Hotel Arusha, exhibit P8 it was received as secondary evidence after complying with the law of evidence about the admission of secondary evidence. He said, the meeting was attended by Bishop Akyoo as chairperson and other members who were Professors, Doctors, etc., who are all literate persons. Page 2 agenda 2 BC 1, 2006, and in that meeting they discussed the complainant. PW1 insisted that it was none of their responsibilities as a Board under the University Act and "Halmashauri ya Makumira".

He said further that, the students' representative was removed from the members of the Board contrary to S.44 (2) (d) of the University Act simply because the meeting concerned his lecturer. In his view, that was wrong as the student must be represented. In his further view, there was no logic to remove him because the letter was made publicly known even to the students. The resolution as stated on page 5 there is no secret behind its content. It was also resolved that, the academic staff, supporting staff, and students should be notified publicly. He said he was by then in a lecturer room teaching when he was told to attend that extraordinary meeting at the Safari Hotel. He had no option he attended with Dr. Simbeye his Co – lecturer who was also summoned although there was no notice served to him or even the charge sheet. In the said meeting, PW1 stated that he was just asked some questions to give his opinion as reflected on pages 4 – 5 of the proceedings of the meeting before the Board had arrived at the decision. He insisted that the meeting was illegal for lack of students' representative as per the law. He also said the decision to make the decision reached known to other staff members and students was illegal as the Board had no power to do so because section 34 (2) (a) of the University Act does not give them

powers to do so. Therefore, they did so to defame him and they did so very proudly and happily.

PW1 further stated that, while at his place of work, together with other staff members two of them being Dr. George Fyabungo and the late Humprey, he was served with two letters by Ms. Felister Majora, one of the letters was addressed to him, the other one was addressed to Bishop Mdegella, that is exhibits P9 and P10 both with the heading "***Kurudishwa kwenye Dayosisi yako Iringa.***" He said the 3<sup>rd</sup> respondent reached to that decision and the 4<sup>th</sup> respondent discussed those letters, and confirmed their contents of which were defamatory and authorized the 1<sup>st</sup> respondent who was then the Secretary-General of the 4<sup>th</sup> respondent. He said the letters were copied to the then presiding Bishop, the late Samson Mshemba, Bishop Paul Akyoo, the Chair of the Board, Bishop Mdegella of Iringa Diocese, and the Provost of Makumira others. That letter dated 28<sup>th</sup> April 2006 is exhibit P11.

He said since the wording of the letter was "***Kusitishwa huduma***" that in his view was the termination of employment. He said the letter set the last date for him to leave Makumira and he was also disallowed to teach at Makumira or even to be paid ½ salary. They told him that his terms of

service were governed by ELCT Rules, which he entirely disagreed with. After he was served the letter on 23<sup>rd</sup> January 2006 by the personal secretary of the provost's office, he was called to go to the said office where he found members of the Board. While there, he was asked by members of the Board led by the chairman, the 2<sup>nd</sup> respondent whether he received the letter and read it. The chairman informed him that they were going to announce these decisions to his colleagues and students, so he was notified to be free to choose to be there or not. He stated that was said in a jovial and happy gesture showing that they were happy with what they were doing. He said even making public the contents of exhibits P9, P10, and P11 intended to defame him.

He explained that exhibits P9 and P10 talked about his return to the Diocese of Iringa. That in his view defamed him because you cannot be returned to your diocese unless you have committed some wrongs. Second, the Board defamed him because it had no mandate and powers to deliberate on such matters. To support that he referred the Court to exhibit P1 the Constitution of ELCT sheria No.4 "(b) (iv) (i) which provides that, the board had no mandate to seat discuss and conclude **"Kufuatia Mazungumzo hayo"** on what they did.

Also under the University Act, section 45 (a) – (h) the Board has no power to discuss and decide as they did, therefore what they did was illegal. So, the words “***Kusitisha huduma yake katika Chuo Kikuu Kishiriki cha Makumira mara moja kuanzia tarehe ya barua hii***” was in essence terminating him the powers which they did not possess, therefore that to him amounts to summary termination. In his view, that presupposed, he was the offender either he committed a misconduct under the Security of Employment Act [Cap 386 RE 2002].

However, when he was testifying Mr. Mwaluko intervened objecting to his line of testimony on the ground that, the issue of employment had been dealt with and decided by the court and that none of the respondents were his immediate employers

The complainant said the High Court Judges decided that issue per incuriam. Following his response to the objection raised, the Court informed him that, this case was not in the appropriate forum to review that decision and gave an order dated 07<sup>th</sup> March 2022 directing the complainant to limit his evidence to the framed issues.

He said his employment with Makumira was permanent, he was not seconded as alleged. He said his identity was “Mchungaji toka Dayosisi ya

Iringa” he said reverends are not employed by their Diocese; they are called, so they work under the calling as opposed to employment. He said the executive Council of ELCT gave him the employment as per Rule 8 (b) (5) – page 8 & 9 of Exhibit.P1. So, the 3<sup>rd</sup> respondent had no mandate to take him back to Iringa Diocese as they purported to do. He said that even the allegation that his benefit was to be paid by the College is not true because it was the treasurer of the 4<sup>th</sup> Respondent who was covering the payment of his transport from Arusha to Iringa including the NSSF benefits.

He said the 1<sup>st</sup> Respondent, the one who wrote that letter, had no mandate as the executor “Mtekelezaji” decision. he referred to Exhp.P1 Page 14, that the 1<sup>st</sup> respondent must execute the decisions of the General-Assembly and the Executive Council of the Central Committee of the 4<sup>th</sup> respondent. He cannot execute the decision of the Board as Canon No.11 B (10) – Page 15 says he has no mandate to vote, he spoke.

In his view, since the 1<sup>st</sup> respondent had no mandate, then the letter was meant to defame him. The letter was copied to the Board Chairman and the Chancellor of Makumira. He said since the letters were kept in the file as permanent records that means they are libel as any Presiding Bishop, Provost, and Chairman who enters the respective offices will read them. He



said the word used in the letters could not afford him an opportunity to be employed by another institution and the word "Aondoke" as used means he is a bad-mannered man which in his view, is defamation.

He said the decision caused him physical, mental, and psychological torture as after moving from the Board meeting heading to the staff room, he felt some pain from his stomach to his chest and he broke some tears but later gained some strength and went to the staff room and decided to hide himself under the table. Then the Board members entered. The Board chairman greeted them and they replied to him. There were 45 members of the staff (lecturers and supporting staff among them were Dr. Ernest Mhando, head of the Biblical Department, and therefore the complainant's boss, Rev Dr. Fiabangu, Rev. SR. Sylvester Kahakwa, and Humphrey Kimaso among them. Then the Board chairman announced the illegal and defamatory decision saying that.

*"Bodi imemuachisha kazi Mchami kwa sababu Uongozi wa Chuo hautaki kufanya kazi naye. Umesema aidha Mchami aondolewe au wenyewe ubaki au uongozi uong'oke au Mchami abaki."*

He said, thereafter, there was silence in the room, then Rev. Doctor Fiabangu asked the question as to whether they complied with the Labour laws. Then the chairman replied that "*Nyinyi ndo mnajua sheria za kazi zaidi?*"

After that answer there was silence again, and then Rev. Dr. Kahakwa demanded for the reasons of that decision. Following that demand, he was replied to by Rev. Dr. Hans Mwakabana one of the board members that: - "*hata nyinyi ni waajiliwa*" to mean that "*they were also employees*".

Thereafter the board members went to the assembly hall where they informed the students who were about 395 of the decision of the board. But the students shouted out, showing disagreement with the decision reached. He said that decision was interpreted to mean that the complainant committed disciplinary offences so he was punished and therefore was adjudged to be an unfit person to work with. He said all these were done without any legal backup either from the constitution of ELCT or the University Act or Regulations. He said being an adult, a Reverend and Advocate of the High Court, a PhD holder therefore one of the Philophers in this Country and therefore a gentleman he was affected. In his view, the issues of employment between employer and employee were not supposed

to be made public. After that announcement, the complainant remained at Makumira University while thinking about what happened to him in pain.

He thereafter wrote a letter to the Board chairman requesting him to rescind the decision within seven days, that is exhibit P14, failure of which he promised to institute legal proceedings. The said letter was replied to by a letter from the Provost's Office Tumaini Makumira University dated 01<sup>st</sup> February 2006 which decision confirmed that it terminated him. That letter also stands as a libel because it defamed him as it was copied to other people including Professor John Shayo the Vice Chancellor of KCMC University Moshi. He said that was done with the intent to defame him because when he wrote his letter, he did not give a copy to the said Prof. Shayo. The other copies of the said letter were made to his immediate boss Kaimu Katibu Mkuu. It was also copied to Provost of Makumira whom he never copied and therefore a libel as it defamed him.

He said Paragraphs 1 – 3 of the said letter talk about giving him a chance to defend himself while there was no charge given to him. Above all, he was not given adequate time to make his defence and call witnesses to defend him. He said when he appeared before the Board on 17<sup>th</sup> January 2006 and 23<sup>rd</sup> January 2006, he was told to give his opinion not to defend

himself. In his view, giving opinions has nothing to do with defending oneself.

Thirdly, he said it was wrong to say that Makumira University gave the Board powers to deliberate on his fate because at the time of his employment at Makumira, he was in Lutheran Theological College of Makumira, while now it is known as Makumira University College. He said in 1988 when he joined the college, he was not given the constitution of the college. And up to when he was terminated, he had never seen it. In the pleadings, they never attached the alleged constitution which gives them powers to do so.

Fourthly, he said since they have the ELCT constitution (Exhp.1) which provides that the Board has no Mandate, then the Makumira University cannot confer powers to the Board. Further supporting the arguments, he referred to paragraph two of Exh P.13 which talks about something wrong. He said further that he was not asked by the church but the church called him and he responded to the call, having responded, he was then employed and paid salary by the ELCT Secretary General as reflected in Exhibit P3 not by Makumira University as alleged as it was the cashier of ELCT who used to go and pay the salary, not the college.

Above all, he said, the Makumira University is run by the funds from ELCT not from its funds. It is not independent even if they receive the college fees. In his view, the allegation that the ELCT should know where to place him is a wrong perception for the Board operates under the church, it cannot direct the church that they are returning the church employee for placement.

In his further view, the Board ought to have known that Makumira belongs to the ELCT. He said his employment was based on the recommendation of the Governing Executive Committee (Council) of the church. He said the wording of that letter is wrong for he has never been employed by Iringa Diocese as at the time he was employed to work in Makumira he came from Iringa Municipal Council where he was working as a Council Solicitor. He said the decision to terminate him according to exhibit P.12 was done deliberately and harm him. He said at first, he decided to settle the matter in church. He decided to involve the Chairman of the Board who is the 2<sup>nd</sup> respondent and Rev. Erasto Ngira who was a District pastor of Meru District when the complainant joined studies at Makumira in 1977, he used to come several times to give speeches. He was a good Reverend father with respect and of high integrity and, he was older than the

complainant and the 2<sup>nd</sup> respondent. But the 2<sup>nd</sup> respondent refused both the complainant's request and a tripartite meeting between them.

He said, during all that time he had been suffering not only himself but also his wife and children as he was, by then, still living in the compass at Makumira University amid of 345 people, to him it was painful. After the failure to settle, he decided to report the matter to the Labour Officer at Arusha District, complaining against the Board. The Labour Officer after hearing them all, the Labour Officer concluded that the decision of the Board was not proper, he told them to return the matter to the Board so that the Board could revisit its decision, he also told them to continue paying the complainant half of his salary, they were also told that whenever the Board will do anything regarding that particular matter, they have to inform the Labour Officer. In the end, they agreed on the advice and directives given by the Labour Officer, the agreement that was kept in writing and signed by the complainant on one hand and Professor Gwakisa Mwakagali, the Principal of Makumira on the other hand. However, the respondent did not honour that agreement, it was when he on 24<sup>th</sup> November 2016, instructed Advocate Herbert Makange to serve all the respondents a demand Notice and a notice of an intention to sue. The one to the 1<sup>st</sup> respondent is exhibit P16, the 2<sup>nd</sup>

respondent is exhibit P17, the Chairman of the Board is exhibit P18, and the one addressed to the Secretary General of ELCT is exhibit P19. He said those letters were ignored, therefore he decided to sue by filing this complaint.

In his further evidence, he said the first respondent was supposed to advise the Church ELCT not to do what they did but he did not do so. He said he was not employed by the Iringa Diocese as he had never conducted any mass in the Iringa Diocese and the Iringa Diocese was not his employer, but he was serving the Iringa Municipal Council. Furthermore, he said he was given a scholarship from the Church and he was supposed to work for it as a lecturer.

He said his dismissal caused him to lose his salary of Tshs. 655,000/- per month, his status as a university lecturer, goodwill in building his ability, and his teaching experience from 1988 to 2006 which experience would be used to promote him to the rank of Professor.

He said the respondents had no legal and factual justification to remove him from his position as a lecturer as they had no mandate to do so. He said he had never been accused of any misconduct. He said he suffered both general and specific damage. He said when he was terminated, he was 48 years old while he was supposed to retire at the age of 65 years, and he

asked the court to base its computation on Tshs. 655,000 X 12 X 17 years which entitles him Tshs. 132,600,000 /- as a specific damage.

Regarding General damage, he asked the court based on what he pleaded to give him what he is entitled. In his conviction, he said he was defamed and he suffered damages.

On cross-examination, he said, he was employed by the executive council by a letter which was signed by the Secretary General of ELCT, and in paragraph 2 of the said letter exhibit P3 they thanked Iringa Diocese for allowing him to work with Makumira. He said he had never negated that fact as he has never been called to negate it. He said exhibit P3 in paragraph 4 mentions him as a Reverend from Iringa Diocese but he has never been asked to dispute. He said that letter exhibit P3 does not show that he was employed on probation and neither he has ever been confirmed in this employment either by ELCT or Makumira University College but nevertheless, he said he was a Senior Officer.

He said he held a degree in law and a degree in theology and that even at Iringa he was the head of the Legal Department. He said the Secretary-General could not employ him but was implementing the decision of the executive council of the ELCT under part XI 13 (7) of the Constitution



of the ELCT. He said he had never been shown a calling that was sent to the Iringa Diocese. He said he complained before the Industrial Court that the Makumira had no power to return him to the Iringa Diocese, but he lost before three Judges of that Court and he has appealed to the Court of Appeal. He said, however, the case at hand is not a trade dispute but a defamation case. He said he want this Court to interpret the canon of the Constitution as well as the Universities Act in line with the concept of defamation. He said in his view, the decision made in contravention of the law is defamation as the Respondents had no power to do so.

He said even the letter which returned him to Iringa Diocese was defamatory, as the words used "*Kurudishwa kwenye Diosisi yako ya Iringa*" literally translated that "to be returned to Iringa Diocese", suggests that he is a wrongdoer.

Also, the word "*kusitisha huduma yako katika Chuo Kikuu Makumira mara moja kuanzia tarehe ya barua hii 23/01/2016*" which meant (to immediately stop your service at Makumira University with effect from the date of this letter i.e. 23/01/2006) was in his view also defamatory to him because it proves that he was dismissed. He said he challenged the

termination because he was not employed by the University but the ELCT Headquarters.

He said he had bad blood with about four members of the Board, those were Bishop S. Munga, Prof. Mwakagali, and Prof. Mwakabana as well as Dr. Florence Gamunga but did not plead the issue of personal grudges with them before the Board had deliberated on the issue. He said the decision was reached by 14 people who were Board members but four out of them were not in good terms with him.

He said although exhibit P10 was addressed to Bishop Mdegela it was not proper because the Constitution of ELCT does not require the Bishop to be informed. He said when he joined Makumira he found about eight other lecturers who were Reverend and each was from a certain Diocese, but he did not know how they found their way there and did not know whether they were there under similar procedure or not.

He said throughout his stay at Makumira he was being paid salary by his employer ELCT, not the University. He said in re-examination that the presence of words "*kuhusu Barua ya Kuajiriwa*" and "*Ajira yako*" and the responsibility played by the ELCT, shows that he was employed by the ELCT, and said had he been under the Board the letter would have said expressly.

He said he did not apply for a job because the ELCT constitution did not make it a requirement that a person must apply for employment in the church, and so were the Labour laws in force by then.

He said another proof that he was not seconded by the Iringa Diocese but employed was because he was given a pension resulting from what he contributed. He said he was employed by ELCT because the University is the property of ELCT and that the pastorship is not an employment but a calling. He said he was called from Iringa because it was a place he was living. He said in exhibit P9 there was no word secondment used. He said all words there prove that he was terminated without reasonable cause, and the information about his termination was published to the staff and students as well as the letters were copied to many people. In his view that is defamation which entitles him to damages as claimed.

His evidence was supported by **PW2 Dr. Modestus Joseph Lukonge** a registered quality surveyor and a theologian, therefore an ordained Reverend a position which to him is a calling that imparts a divine responsibility which is done by the guidance of the word of God, the constitution of ELCT, and the laws of the country.

According to his evidence, in the year 2005, he was undertaking study at Makumira University, where the complainant was one of the lecturers. He said one of the gates was arbitrarily closed by the university authority, acts which brought commotion because people could not use the main gate including the families of those who were living in the university campus. He informed the court that on 23<sup>rd</sup> January 2006 while on campus, the bell rang calling all students to the meeting. He said that the meeting was attended by about 300-350 students and in the presence of all members of the Board, including, the Chairman of the Board. He said at the meeting, the 2<sup>nd</sup> respondent announced that the complainant was no longer an employee of the University, he was terminated with effect from that date. But when one student asked for the reasons, the Board Chairman said that his termination was with the issues pertaining to administration, not the students, but after being further probed, he said the complainant was terminated because he did not fulfill his responsibility and had no cooperation with his fellow. He said those words caused commotion and the meeting had no proper ending.

Thereafter, life went on without the complaint at the University, but after some years, he met the complainant who asked him if he would give evidence in his favour, he said he agreed, but another person after noticing

that he had such intention warned him that by that act, he was preparing trouble with the church. He said he was even called by the chaplain and asked why did he defend the complainant but replied by telling him that he would just give evidence of what he saw as right in his presence and that following his stand he was intimidated, but did not give up.

On cross-examination, he said, he could not know how the complainant was called to Makumira University. He said he did not know the background of the decision and whether the persons who intimidated him were sent by the university authority or otherwise.

He also said that he also gave evidence in a labour case before the Industrial Court which the complainant told him that he lost but is now appealing to the Court of Appeal of Tanzania. He said he did not know exactly what the Diocese from which the complainant was coming but he remembered that the Diocese was in the southern part of Tanzania.

In re-examination, he said that all happened in his presence in a broad daylight and throughout that meeting, the principal speaker was the 2<sup>nd</sup> respondent.

The complaint case was also supported by PW3 Emmanuel Robinson Mweta who introduced himself as the Labour Officer in charge from Arusha Labour Office. In his sworn testimonies he said in this case the wording of exhibit P.9 suggests defamation for the employee can be returned to his home only when he is terminated due to misconduct or after retiring. He believes that the complainant was employed as the word "*huduma*" means an obligation that is rooted in the employment contract. Therefore, the employer can stop the services of the employee only when he has proved that the employee has committed the disciplinary misconduct and he must charge him first before terminating him. In his view, if the employer does that without charging the employee is defaming the employee. That is a permanent defamation, it injures the employee's reputation in the community he was serving.

He further said that the act of writing the said letters exhibits P9, P10, and P11 and circulating copies to many people is nothing but defamation which is not allowed by laws, both, the Security of Employment Act and the Employment and Labour Relations Act. In his further view, the letter in question bars the employee from being re-employed by any other employer for it imputes the feeling that, they said person is not to be trusted. He said

the letter was defamatory because its life span is unlimited as writings are permanent.

On cross examination he said he studied at Makumira between 2005 and 2008, he knew the complainant in the year 2006, when he was their law of contract teacher. He said in public service some employees work on secondment arrangements. It may be "kuazimwa in Kishwahili". He said the complainant did not tell him that he lost the case before the Industrial Court neither did he tell him that he made reference to the three Judges and failed. In his understanding, a person on secondment can be summarily dismissed or terminated by the person to whom he is seconded if he commits any misconduct meriting termination or summary dismissal.

He further said the secondment is explained in the public service via standing orders for the Public Service and in his view public service does not include the church service for he does not know whether there is any law which governs the secondment in church service. He said a person under secondment cannot be summarily stopped from service by the employer to whom he is seconded. In the letter, exhibit P9 and P10 there is no word secondment. He said the court decision was made *per in-curium* therefore it is not a valid judgment and it should therefore not be cherished. In his view

in those three letters, which are exhibits P.9, P.10, and P11 there is nowhere it has been written that secondment would be ended up by the Board.

The complainant's case was also supported by PW.4 Donald Theleton Mfavoo, a businessman who was running a stationary business selling office accessories at Makumira since 1998. He was living about 800 meters from the Makumira Tumaini campus with most of his customers being the residents of the street and the people from the Makumira University staff and students. He said on 23<sup>rd</sup> January 2006 from the evening while at his place doing his business, he heard the information spread by students and some of the staff who were living out of the campus that the complainant was terminated from employment by the University Board which was by then under Bishop Akyoo.

According to him, the information kept spreading, in the business premises, like shops, the marketplace, and at some incidents in social gatherings like the burial ceremonies. He gave an example at the burial ceremony of Walter Msuya, which the complainant also attended. He said in his view the complainant must have a problem which is why he was terminated. Lastly, he said he saw him shifting from the house he was using on campus.



On cross-examination, he said that he knew the complainant because he was a Reverend and had a coaster that used to take passengers to Moshi. He also knew him to be a lecturer teaching theology but did not know how he found himself at Makumira University, as most of the information was told to him by the students who were studying at Makumira University. He said he did not know the employment relationship of the complainant and the University and he could not know as to whether the reasons for termination were valid or not. He said he was also discussing that issue with other people but could not know the exact number of people he discussed with.

He said the complainant followed him and asked him to come to court about four months ago because he was aware of the incident, and that, he knew that the complainant was directed to return to where he came from. He said although he did not know the reasons for his termination, he was sure that the complainant was defamed, but if the termination reasons are valid then there is no defamation. He further said he heard that; the complainant was directed to be returned to his home by the Board but he did not hear them saying the reasons for termination. The employee who has not committed a disciplinary offence cannot be terminated.

Last on the list of the complainant's witnesses is PW5 Rev. Dr. Phares Ilomo, a Ph.D holder in theology, having studied for his Bachelor's in Tanzania while his master's and Ph.D in German. He said after completion of his bachelor he was ordained as a Reverend in South Central (Kusini Kati) Diocese, where he was given a task to teach the French language and to offer Sacrament in church. He said Pastorship is the responsibility given to a person to preach and teach the word of God and offer Sacrament. It is not an employment but a service, now he is a lecturer at Tumaini University, he started in 2005, as a lecturer before he was promoted to a senior lecturer and is now in preparation to be an Associate Professor.

He said the criteria for promotion in universities as per TCU regulations depends on publications, through papers, lectures, and chapters in books that a person is considered for promotion. He went on saying that, for a person to be promoted as senior lecturer, he must publish two articles in two recognized journals, and two points for teaching. For the two points to be obtained he must have taught for at least three years.

But from senior lecturer to Associate professor, he must have seven points for teaching and five points must be for journal publication. He said he knows the journals that is exhibit P5 collectively as he has been reading

them and knew the theological value of these articles as they are very respected journals with their articles therein, and the said publication entitled the complainant to be a full professor.

He said exhibit P.9 the way it was written has two implications, on the pastoral side, it raises questions and injures the reputation of the complainant at the university he has been teaching. He said in that letter there is no word secondment, also the said letter does not disclose the offence and there is no reason given. If published to the public or co-workers it leaves questions thus lowering the academic reputation of the complainant in church service.

In his view, the person to whom this letter has been addressed cannot be re-employed, that is the result of the particular letter as it marks the end of that person's in employment.

On cross-examination, he said he has not been given a professorial grade, but he is still waiting to be given a letter of appointment as a professor. He said the complainant has been his teacher since 1988 when he was Tutorial Assistant, he taught him one subject of Greek. He further said that the complainant found him at the University, he was already a reverend father, but he did not know how he came by at the University. But

all people were being employed by ELCT- HQ by asking the person to be released by his Diocese to be employed by the ELCT. He said he knew the complainant was in conflict with his employer because the complainant was an employee.

He further stated that, when he was studying at Makumira, there was a university governing Board to which the lecturers were also responsible to. Lastly, he said he is not sure whether the complainant was employed because he has no proof to that effect. However, he was sure by then that they were employed by the ELCT- HQ.

In re-examination, he said the word professor is a French word, but it means teaching or a teacher of university level. Therefore, it is proper to address him as a professor. Upon being asked the question for clarification he said he knew the information of the case before being given a letter exhibit P.9. he was informed the same by the complainant that he had dispute with his employer.

That marked the complainant's case, hence the defence case which started by calling Bishop (Retired) Prof. Owdenburg Moses Mdegela who served as a Bishop of ELCT Iringa Diocese for thirty years from 01/01/1987 up to 01/01/2017 when he retired. He introduced himself to be a scholar of

a Diploma in theology, a Bachelor of Divinity at Makumira University, a master's degree in Theology, in Missiology from Fuller Theological Seminary in the USA, and a Ph.D in Theology and Philosophy in Systematic Theology in 2005. He became a Reverend after his Diploma award and later became a Bishop in the year 1987 a position he held for 30 years up to 2017 when he retired. He is currently a Lecturer in mission and theology at the University of Iringa and Japanese Bible Institute.

He admitted to knowing the complainant since long ago when they were studying together at Makumira Lutheran Theological Seminary. He also knew him as his fellow Reverend whom they were serving together in the Southern Diocese. And later as the first Headmaster of Kidugala Lutheran Junior Seminary. He also knows him as his employee who shifted from the Southern Diocese in the year 1988 to the Iringa Diocese. He also knows him as a person he seconded to go and work at Makumira University after the Complainant was requested to go and work with Makumira University. He said the request was through a letter which was written by the Secretary General of the ELCT, Amani Mwenegoha, exhibit D1.

He said Makumira University is one of the common works of the ELCT church. According to him, the procedure to send a person to the theological

teaching activities is that Pastors who work in the common works of the church go there on secondment. The procedure for all pastors is that, the ELCT Secretary General writes a letter to one of its constitutional members, the Diocese, asking for the leadership of the Diocese to allow a person who is requested for secondment. The leadership includes the Bishop, the Assistant to the Bishop, the General Secretary, the Treasury, and if necessary, any of the decision-making bodies of the Diocese.

The procedure that was used for the complainant implies that the complainant was a permanent employee of the Southern Diocese, which is the mother of the Iringa Diocese. He said the complainant was seconded by the Iringa Diocese because he had problems with the Southern Diocese. Speaking about what the problem was he said, while he was the headmaster of Kidungala Lutheran Junior Seminary, he left the seminary by throwing the keys to his boss who was the Director of the whole seminary, and went to study law at UDSM and when he completed his studies he went back to the Southern Diocese and then the late Bishop Vuhahula requested him to deal with the case of seconding the complainant to Makumira because Makumira was in an urgent need of a teacher in the New Testament Degree. Since it would take too long for the Southern Diocese to resolve the

misunderstanding between the complainant and the Diocese, the Southern Diocese Bishop asked him to deal with the secondment of the complainant.

The complainant was aware because the Bishop-Elect approached DW1 from a navigable situation that he was capable of seconding him. Not only that Bishop Vuhahula but also the complainant went requesting him for secondment.

DW1 said in his further evidence that, after receiving exhibit D1 and meeting face-to-face with Bishop-elect Vuhahula and discussing how they should handle the transfer of the complainant from Southern Diocese to the Iringa Diocese, they mutually agreed that Pastors are free to move from one Diocese to another in the Southern part, he wrote to the Secretary-General of ELCT agreeing to second the complainant and stated that the issue of transfer to Iringa Diocese would be sorted out later.

He said after some years, Makumira Theological College complained to the Board in 1992 that the complainant was deviating from his teaching responsibility and spending most of the time doing the work of an Advocate. Therefore, they resolved that, he should be sent back to his Diocese. He said having heard that he asked to meet with the chairman of the Board so that they can discuss the matter, the complainant, and the principal. He said he

expected the complainant to defend himself but instead of defending himself, he wrote a letter of apology dated 22/2/1992, exhibit D2. By then the late Bishop Eliwaha Mshana wrote back to the presiding Bishop the late Bishop Sebastian Kolowa pleading on behalf of DW1 and his behalf, that the complainant be given another chance. At that time, and in that letter the complainant confirmed that he was from the Iringa Diocese.

DW1 insisted that the complainant was seconded by the ELCT Iringa Diocese to the ELCT Common work at Makumira University with the terms and conditions of his work given by the General Secretary as a member of the Board of Makumira and as a person who was given responsibilities to work with all people in various Boards who would be under common works. He also said that in exhibit P3 the General Secretary made it clear that, the complainant would remain a pastor of ELCT Iringa Diocese. That means DW1 remained his employer even at the time when he was suspended by Makumira University, he remained an employee of the Iringa Diocese. Pastors in the church are employed according to the Labour law, the employee is paid a salary and pays the contributions in the provident funds. He gave the example of himself as a retired Bishop, when he retired, he was paid all his retirement benefits the same as the complainant. Generally, he



said the employee must subscribe to the requirement of the Government and the complainant subscribed to that requirement.

According to him, in the first letter, there was a communication to him that they were returning the complainant to the Iringa Diocese, the communication was by a letter which was sent to him, exhibit D3. And after receiving that letter he waited for the complainant to go but in vain. He said looking at exhibits P10 and P11, there is no defamation contained therein. According to him, the two letters had the details of what transpired. It was not defamatory to return the complainant to Iringa Diocese. Decision in exhibit P11 paragraph 2 he said it was proper to send this letter to him. Therefore, he sees nothing defamatory in exhibit P11. He said he was the one who received the complainant from the Southern Diocese and seconded him to Makumira for the common work of the church. When he committed the first misconduct, he apologized and was given another chance and continued to work at Makumira. In his apology he asked to be forgiven and promised not to repeat the mistake and asked not to be returned to Iringa Diocese.

He said exhibit P1, is a version of 2005, before, there was a constitution that was changed in 2005. He said page 3 of the canon and the constitution

have been the guiding law up to that year. He said Makumira Theological College was using the constitution to get its teachers, the chairman of the Board of Makumira University is appointed according to this constitution of ELCT, and even the Board members are appointed via the same constitution, exhibit P1.

According to him, the 8<sup>th</sup> canon "B" "13" regarding the appointment and termination, the tutorial assistant is not a level of leadership, he, therefore, doesn't belong to any "Ngazi ya Uongozi". He said the complainant was an assistant lecturer, and a lecturer was not a rank of leadership. Exhibit P3 provides that he was a lecturer. Therefore, an employee of a middle rank.

He said the complainant was seconded to Makumira University after being called and it was after receiving the calling, he seconded him. He said when the complainant was at Iringa, he was also a lawyer of Iringa Municipal Council, but he was the one who sent him to Makumira University under secondment. He said there are two meetings which were mentioned in exhibit D1, they were of the Executive Council and the Board. He said the University Board recommended the complainant to the ELCT Executive Council, then the Council through the Secretary-General wrote to Iringa Diocese requesting the complainant to be sent to Makumira University in the

common work of ELCT. Equally in the letter dated 23/01/2006 which returned the complainant to Iringa Diocese, the procedure was the same. The University Board does not go directly to the Diocese.

Therefore, after the Board had decided, it sent the recommendations to the Executive Council of the ELCT which communicates with the respective Diocese. Therefore, exhibit P3 was written to the complainant after he had been seconded by DW1. The author of exhibit P3 is the author of exhibit D1. He said although exhibits P3 and D1 did not use the word secondment, DW1 was the one who used the word secondment when he was sending the complainant. He said the secondment of the complainant was of an indefinite period and that exhibit P3 relates to terms and conditions of employment under the secondment which entitles him to the payment of salary and pension.

Further cross-examined DW1 stated, Priesthood is employment if one is paid salaries and that ELCT does not employ the priest, Diocese does and the constitution of the Diocese defines that. He added that the complainant was good at the beginning, he was a good lecturer in class but later started to misbehave and later asked for forgiveness, and committed himself that he would change.

Regarding the members of the Board, he said members of the Board of MUCO are appointed by the General assembly which he was privileged to be a member. According to him, the normal Board meeting or the extraordinary Board meeting of the University Council have the same powers. In his understanding the said council meeting must be called within 30 days, though said he did not know the consequences if the meeting of the council is not called within 30 days.

He said however that, it depends on the reasons for calling that meeting, but generally as per the law is that there should be an emergency meeting and the decision of the said meeting may be implemented by the Secretary-General. He said he has been the vice chairperson of Tumaini University College, and member of the Makumira Theological College Board. He said the responsibilities of the Board are found in the University charter and currently in the Memorandum of Understanding, the charter provides for powers of the Board to deal with the discipline of the lecturers. Under law 4C, the church has formed a Council which is in the charter of the University.

He said section 43 (2) of the Universities Act creates two organs which are the University Council and the Governing Board. And that with Makumira University there are two Boards, one is dealing with the University Generally

and the other one is dealing with the theological studies, and the latter is directly under, and responsible to the ELCT executive council. It is the Board of the ELCT which is created by the Constitution of the ELCT, not under the Universities Act. According to him, the theological Board deals with the part of the University that deals with theology teachings, therefore the priests or pastors are under that Board. He said the Universities Act does not apply to the training of pastors as the Parliament does not regulate the teaching of the priest.

He said exhibit P9 was written by the Secretary-General of the ELCT. The letter was not a punishment but it was returning the complainant to his home Diocese and the Board had the capacity to deal with him as Pastor/Priest. Therefore, the Secretary-General had powers on 23<sup>rd</sup> January 2006 to do what he did on behalf of the Executive Council in the execution of the decision of the Board of the theological section of the University. He said the proof that he seconded the complainant lies in the content of exhibit D2, where he used the words "NAMTOA KWENDA KUWA MTUMISHI WA KAZI ZA UMOJA "That means he was seconding him.

He generally insisted that pastors from the Diocese go to the common work "Kazi za Umoja" on secondment. Therefore, it was temporary and when

the Board was done with him according to exhibit P11, it did not terminate him but returned him to his Diocese. The Board did that as indicated in exhibit P15 and the 1<sup>st</sup> respondent wrote exhibits P9, P10, and P11 in execution of the decision of the Board which was blessed by the executive council.

The defence case was also supported by the evidence of **Robert Martin Kitundu**, DW2 who introduced himself as the current Secretary-General of ELCT having assumed that role on 01<sup>st</sup> December 2021. That position makes him the chief executive officer of the ELCT and a custodian of all documents of ELCT. He said he knew the complainant's issues after reading the documents which he found in his office. He said exhibits D1 and D2 are the documents of ELCT. D1 is from the ELCT HQ authored by Dr. Aman Mwenegoha, the then Secretary General which called the complainant to come and render service to the institution of the church that is Makumira University while D2 is from Iringa Diocese authored by Dr. Mdegela, the Bishop of Iringa Diocese sending the complainant to Makumira University from Iringa Diocese.

According to him, the letter shows that the complainant is a pastor of Iringa Diocese who was called to serve at Makumira. To prove that the

complainant was from Iringa Diocese he said there was a letter dated 11/4/1992 written by the complainant himself in which he was pleading not to be returned to his Dioceses, that is exhibit D4. That, in his view, proves the complainant to be a priest of Iringa Diocese and he was at Makumira under secondment as proved by the judgment of the Labour Court in Labour Revision No. 03 of 2013, exhibit D5.

He further said that there was no defamation in returning the complainant to his home Diocese after the institution which requested and received him had decided that it no longer needed the service he was rendering. He said the complainant was not the first to be returned to his home Diocese. In the bid to prove that, he gave the example of Dr. Reverend Msafiri Mbilu who was returned to his Diocese in Tanga after the secondment. He prayed that the suit be dismissed as it is tarnishing the image of the church.

When he was cross-examined by the complainant, he said he came to give evidence on behalf of the ELCT. The documents he had shown and tendered, indicate that they answered the claim. He said before the complainant was seconded to Makumira University it was the board of the University that requested him through the church (ELCT) authority.

According to him, the Board selects the person they want, recommends him to the HQ of the ELCT which approves the recommendation, then the Secretary-General writes to the respective Diocese in compliance with the University's requests. He said in this matter, the Diocese of Iringa is the complainant's workstation from where he was requested by the Bishop who sent him by secondment to Makumira University.

Further to that he said, although the heading of exhibit P3 reads "Barua ya kuajiriwa" it is because secondment and employment go together, this letter was written after the correspondence asking for secondment. The letter means that he was called to go and serve at Makumira University. He said exhibit P9 is neither a termination letter nor defamatory. He said Makumira University has two boards one is established under the Universities Act, and the other one is under the Constitution of ELCT which is called a Theological Board.

He further stated that, the University Act, requires the presence of the president of student government but the minutes show that in this case he was ordered to go out because the issue that was to be discussed was the ethics of his teacher. The constitution of the ELCT, and the regulation governs the Theological Board. The meeting was legal because it followed



the procedure and it was made under the constitution of the ELCT. He said in the private sector no law that bars secondment, in that sector, the fact that the fare was paid by another Diocese does not change the fact that he was seconded.

Regarding exhibit D1 whether the word "***kutumwa***" is also known as "***seconded***," he said it means the same thing. Regarding exhibit P3 particularly the pension section, he said the secondment does not take away the right to pension. That is why he was to be informed and the Treasurer informed him.

DW2 said further that, in exhibit P3, the 4<sup>th</sup> paragraph shows that the complainant was seconded, to the common works and the other church activities. Although the constitution does not provide for emergency meetings, in his view, where the emergency occurs the meeting must be called; it is not wise to wait for an ordinary meeting where there is an emergency. He spoke. The Secretary-General had powers to execute the resolutions of the Boards and other organs. The Secretary-General is the executive officer and should not be barred. In his view, had his powers been limited, the Constitution ought or would have specifically provided.

Another defence witness was **Brighton Kilewa**, DW3 a retired Secretary-General of the ELCT who retired on 30<sup>th</sup> November 2021. He is a holder of a Bachelor of Business Administration from the University of Dar es Salaam and a Master's degree holder in Business Administration in the same field from ESAMI. He said during his tenure as the Secretary-General, he was the chief executive of the ELCT, a custodian of all the ELCT documents, one of the trustees of the Registered Trustee of ELCT, and the executor of the central committee, the executive committee and the General council decisions of the ELCT. He was also executing other mandates of the Office of the Secretary-General.

DW3 told this Court that, he knows the complainant as one of the Reverend of ELCT of Iringa Diocese but who was originally of the Southern Diocese. He also knows him as one of the Reverends who was sent to Makumira as a lecturer at the Theological College, of Tumaini Makumira. He said he knew him because he sued the ELCT before the Industrial Court of Tanzania where he gave evidence as the Witness of Tumaini Makumira University. He said the University is one of the common works of the Church because the church has about 27 Dioceses and each Diocese has its properties under the trusteeship of the Trust.

The University of Tumaini is owned by the whole church and all Diocese. He said the Reverend who are called to the common works, teaches theology subjects to the pastor students before they are ordained as pastors. He narrated the procedure of how the pastors are called to the common works of the ELCT Board of the University to propose/recommend the names of the Reverend to be seconded for teaching purposes. After such a recommendation, the Secretary-General receives the proposal and submits the same to the central committee of the church. After the central committee had blessed the proposal, the Secretary-General writes a letter to the respective Diocese requesting the release of the proposed Pastor for the common work.

He said in the matter relating to the calling of the complainant to the common works the same procedure was followed. He said after the central committee had blessed the proposal made by the Board, the Secretary-General wrote a letter to Bishop Mdegella who was by then the Bishop of the Iringa Diocese. The correspondence with Bishop Mdegella was through exhibits D1 and D2. While exhibit D1 is a letter written by Secretary General and it was addressed to Bishop O. Mdegela of Iringa Diocese which requested him to release Mchami and send him to serve at Tumaini

University. Exhibit D2 is a letter from Bishop, Dr. O. Mdegela which was released the complainant to go and teach at Makumira. He said the complainant was not employed by the ELCT. He was not employed by "Halmashauri Kuu" had he been employed the Secretary General would have indicated or quoted the letter which he used to apply.

He said according to exhibit P1, the persons who are employed by the ELCT HQ are the Deputy Secretary-General, and those who lead the institutions of the ELCT. He said the exhibit does not employ him, but it informs him of his right to the terms of service under the secondment. Further to that, paragraph 3(d) of the said exhibit besides informing him about his contribution requirement in the pension funds, also reminded him under paragraph 4 he was informed that he was still a pastor or Reverend of the ELCT Iringa Diocese.

Speaking about exhibit D4, a letter written on 11/04/1992 to the Secretary General of ELCT by the complainant regarding his return to his Diocese, DW3 said in the said letter, the complainant proves that Iringa is his home Diocese as he was pleading not to be returned to Iringa to continue with his pastorship. He said if he was not from Iringa, he would have refused the letter which called him to Makumira.

Regarding the decision of the University Board convened on 23<sup>rd</sup> January 2006, he said it was a legal meeting and it called the complainant and gave him right to be heard and he responded. According to him, the Board was forced to convene a meeting because, the complainant was accused of many things and, by then he was accused to have been accusing the administration of the University following its decision to close one of the gates. In his accusation, the complainant decided to petition against that act by enticing others to join him and compel the administration to open the gate. He was soliciting people to rise against the University administration. DW3 said after assessing the matter, the Board decided to return him to his home Diocese to continue his service there. It was also directed that the University should inform the University lecturers, students, and other staff. He said it was important to inform them because there was tension among the University community and after they had been informed it released the tension. He said as the Secretary-General after the board meeting, on 23<sup>rd</sup> January 2006 he wrote a letter, (exhibit P9), to the complainant informing him about the decision of the Board and copied the same letter to his Bishop and other stakeholders like the Presiding Bishop. He also wrote exhibit P10

to Bishop Dr. Mdegella, the Bishop of Iringa Diocese informing him of the decision of the Board to return the complainant to his Diocese.

Speaking concerning exhibit P11, he said it is a letter dated 28<sup>th</sup> April 2006 written to the complainant, by DW3 who by then was Secretary General of ELCT. The letter was titled "**Kurudishwa kwenye Dayosisi yako ya Iringa Kihuduma.**" the letter informed the complainant that, the Board did not terminate him, but he was returned to his Diocese. Secondly, the letter was informing him that the central committee has blessed the decision of the Board that he be returned to his Diocese.

He said exhibits P9, P10, and P11, did not defame the complainant as the letters were communicating the decision of the Board, and the said decision was blessed by the central committee of the ELCT, therefore, there is nothing defamatory in the letters. Further to that, there is nothing defamatory in copying the letters to other people who are stakeholders, and in his reply he also copied them.

On cross-examination by the complainant, he said in performing his duty as the Secretary-General, he was using the Constitution of the United Republic of Tanzania, Labour Laws, and other laws which were governing the church activities including the constitution of ELCT. He said he did not

remember if he personally replied to the complaint, but he is sure they filed their response and in paragraph 1. (9) (c) they raised the preliminary objection. He said the PO raised is not defamatory, as he is not aware that in dismissing the objection the court said it was a lie.

Speaking of canon 11 on page 14 paragraph (b), he was to guard the constitution of the ELCT as one of his responsibilities. The Makumira Theological College has been there since 1954-1997 and its existence has been an important link to the work of the church. He said the Reverend who is called or seconded to the common works of the church are not employed by "**Halmashauri Kuu**" they are employed by their Diocese they go to Makumira by way of secondment. The "**Halmashauri Kuu**" does not employ reverends or pastors, at page 10 canon number 13 the said canon does not talk about the employment of a Pastor to teach at Makumira.

Talking about whether the constitution of ELCT recognizes the emergency meeting, he said under Canon 7(a) the Constitution allows emergency meetings. The church recognizes the emergency issue that calls for an emergency meeting and that the Board meeting conducted on 17<sup>th</sup> January 2006 which reached the decision that was executed on 23<sup>rd</sup> January 2006 was an emergent one and, therefore valid and legally recognized by

the ELCT Constitution and since it was blessed by the ELCT top management meeting, then it was valid. He said the Board referred to under page 24 of exhibit P1 is a theological Board alone because it was the one governing the theological teachings.

He further said in exhibit D1, there is no word "**azima**" or "**ajira ya kuazima**", used, the letter says that you were called the heading talk of "**wito**" and/or "**kumtuma**" which means to be sent to Makumira. He said since the Board recommended that he be called, it also had powers to return him to his Diocese. He said the University is under the church and all Dioceses, so the University can identify the potential Pastor to come to teach at the University. According to Exhibit D1, it is a board meeting that stopped the service of the complainant at Makumira and in writing Exhibit P9 he was executing the decision of the Board. Upon further cross-examined; he said accusing the University leadership is not an offence under the constitution. The Board ordered and directed the complainant to go back to his Diocese.

The last defence witness was Paulo Isack Akyoo, DW4, a retired Bishop of ELCT Meru Diocese the position he served for 24 years. He was also the Chairman of the Board of Makumira University in 2006 when the impugned decision was made. In his sworn testimony, he said he served various ELCT



departments and he once was a Principal of Mwika Biblical College, and lastly the chairman of Makumira Theological College which later turned to be Tumaini University Makumira.

He said knew the complainant as a lecturer who was teaching Theology and laws at Makumira University when he was the chairman of the theological Board. He said in January 2006 during his tenure as the chairperson of the Board, the University administration decided for security reasons to close one of the unofficial paths. That decision was opposed by the complainant who enticed and solicited students and staff members to go against the decision of the Management.

He said in the church service some procedures were to be followed taking into account that the duty of the complainant was to teach theology in both, theory and practical, then enticing students and staff to go against the decision of the University was against the ethics. Following that state of affairs on 17<sup>th</sup> January 2006, the Board was called and on 23<sup>rd</sup> January 2006, the Board after hearing and discussing the issue of the complainant the board having taken into account the fact that he was a seconded Reverend, decided to return him to his Diocese (Iringa Diocese).

He said the complainant was seconded by his original Diocese as required of the Reverend who is recommended to teach at Makumira University. Therefore, exhibits P9, P10, and P11, are not defamatory as the church cannot defame its own Reverend. The University said since the complainant did not meet their expectations, they decided to return him to his mother Diocese of Iringa. He asked the Court to find that, what the Board did was proper and just like the Labour Court decided vide exhibit D5.

When cross-examined by the Complainant, DW4 said during his tenure he followed the law and the Constitution of ELCT, exhibit P1. He said the pathways which were closed are those which were not official, the official pathways were not closed. When the issue was presented before the meeting, they summoned the complainant and informed him about the complaint. He said page 3 of the Minutes of the Board resolution 2 (b) (c) (i) in exhibit P8 shows that the Board did not give him a chance to cross-examine the person who informed the Board. He said after hearing him, the Board decided to return him to Iringa.

He said before that he had accused Prof. Mwakagali of embezzlement of College Funds, some of the issues were not recorded as such. He said the secondment is provided under the ELCT Constitution on page 25 that the

MUCO council shall control the human resources. The procedure of the church is that the workers of the University are called by secondment to come and work at the University.

He said under canon No. 17 (b) (13) the word secondment is not expressly there, but the pastors are requested from the Diocese because the ELCT HQ has no pastors, the pastors are of the Diocese. He said since the complainant was of the Iringa Diocese, they could not take any action other than returning him to his original Diocese and that was not a punishment

He said it was a must that he was supposed to be informed, and so his Bishop as well as the presiding Bishop of ELCT, and that was supposed to be done by the Secretary General of ELCT, the 1<sup>st</sup> Respondent. He said in all those letters, there was nothing defamatory, and that the absence of the student leader on the Board was aimed at protecting the respect of the complainant not otherwise.

In re-examination, he said the constitution does not provide for procedures of secondment and that since the complainant is a Reverend then the Universities Act does not apply to the Pastors/Reverend working at Makumira as they are under the Theological part of the University. Lastly, he said since the University is the property of the church, then the secondment

must be initiated by the Board but completed by ELCT HQ. That marked the defence case as well. After completion of the hearing, the parties decided to file their respective final closing submissions which they filed in time.

In his final closing submission, the complainant submitted urging the court to find that the three letters which are exhibits P9, P10, and P11 were defamatory in the sense that, the same was based on the decision which was reached at the meeting called in violation of the constitution of ELCT exhibit P1 on the following base. The Court is also called upon to find that the three letters namely Exhibit P9, P10, and P11 were defamatory on the ground that, they were based on the decision which was reached at the meeting called in violation of the Constitution and the law as follows;

- i) It was called in 7 days instead of 30 days as stipulated by the Constitution Exhibit P1;
- ii) That the decision was reached in the meeting which was illegal in the sense that, it contravened section 44 (2) (d) of the Universities Act, of 2005 for being reached without having the student representation;
- iii) That, the fact that the complainant possesses a number of professional, societal, religious, and academic qualifications attracting distinguished respect, and the fact that the three letters were lowering his esteemed respect and reputation is another

reason as to why the letters were defamatory and that the same was proved by the evidence of PW4 and PW5.

- iv) That the wording of exhibit P9, conveys the message that the complainant must have committed the disciplinary offence that is why he was returned to his Diocese, while it does not state how the complainant was proven guilty under the Security of Employment Act or exhibit P1 (The Constitution of the ELCT) he said that also conveys a message that the complainant was a wrongdoer. The court was asked to find so based on the evidence of PW4 and DW3 that proves that no person had ever been returned to his home Diocese without fault. That means, the decision conveys a message that the complainant was an offender without proving him to be guilty.
- v) That the decision reached on 23<sup>rd</sup> January 2006 was based on the “**mazungumzo**” a “discussion” not a hearing of the labour offence committed by the complainant as there is enough evidence in the evidence of DW3 and DW4 that they did not charge him. That means there was no valid decision made.
- vi) That, the evidence of the complainant said he was called and employed by **Halmashauri Kuu** of the ELCT as a tutorial assistant as supported by cannon VIII B5 on page 9 of exhibit P1. So, he was employed as one of the senior staff of the College and was paid salaries and had to be paid pension. Therefore, to purport that he was seconded and returned to the Iringa Diocese is false and defamatory.

- vii) That the announcement of the content of exhibits P9 and P10 to the staff and students was defamatory.
- viii) He said the word "**kusitisha huduma yako**" is also defamatory as he interpreted the word "**huduma**" to mean obligation which is rooted in employment contracts. The said decision and exhibits P9, P10, and P11 are defamatory because the same is false and illegal and the 3<sup>rd</sup> respondent had no power over him, as he was not his employer and there is no wrong, he committed.
- ix) That, the allegation that the complainant solicited other staff and students to go against the decision of the college administration and that the accused the leaders for embezzlement were not pleaded by the respondent and no issue was framed on these allegations he reminded the court to be guided by the decision of **Joseph Marco vs Pascal Rweyemamu** [1977] TLR 59 that courts and parties should confine the evidence and findings on the pleaded matters and the issues framed.
- x) That the 3<sup>rd</sup> respondent had no power to terminate him but it had powers only to recommend to the central committee of ELTC, and that his right would be paid by the university authority is also illegal.
- xi) That as the decision was illegal, it was not proper to disseminate such information and to force the complainant to leave the campus.
- xii) That, the decision was made by the "**Kamati Tendaji ya Kanisa la Kiinjili la Tanzania**" which is not recognized by exhibit P1.
- xiii) That the alleged decision was illegal because it was not confirmed by the executive council as required by Shena 4B(iii) of Exhibit P1, thus rendering the decision illegal.

xiv) That, the right to be heard was prejudicated by the act of the respondents of not charging him with the disciplinary offence, contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania as interpreted in the case of **Magreth Method Rapunda vs The National Museum of Tanzania**, Civil Appeal No. 251 of 2019.

Based on the above exposition, the complainant prayed the Court to find that exhibits P9, P10, and P11 were defamatory.

On the second issue as to whether the subsequent utterances of the contents of exhibits P9, P10, and P11 to the lecturers and supporting staff as well as the students were defamatory against the complainant. The complainant was of the view that the 2<sup>nd</sup> respondent's utterances were defamatory and were made maliciously. He referred to the book titled **The Law of Defamation and Malicious Prosecution, 4<sup>th</sup> edition of 2001** in which the learned Author wrote that, in the law of defamation the law presumes malice from the mere act of the respondent publishing defamatory matter. He said the decision to announce the matter to the student and members staff was made falsely and aimed at defaming the complainant.

In his further view, the statement "***Bodi imemuachisha kazi Mchami kwa sababu uongozi wa chuo hautaki kufanya kazi naye***"

***umesema aidha Mchami aondolewe au wenyewe ubaki ya uongozi ung'oke au Mchami abaki'*** In the complainant's view, these statements are defamatory. The complainant was of the firm view that, the statements were made maliciously and intended to defame his university career, thus entitling him to the relief sought in the pleading.

The respondents through their defence counsel started their submission with the background which in essence was to the effect that, the complainant was seconded by his Diocese of Iringa to the then Lutheran Theological College Makumira which later came to be known as the Makumira University College of Tumaini. He said his secondment was following a request by the 3<sup>rd</sup> respondent through the Central Committee (Kamati Kuu) of the Executive Council (Halmashauri Kuu) of the 4<sup>th</sup> respondent to the complainant's Diocese of Iringa for him to be seconded to the common works of the Church way back in 1988.

He said also that on 23<sup>rd</sup> January 2006, a decision was made by the third respondent that, the complainant be returned to his home Diocese of Iringa. The complainant, having been not satisfied by the decision of the Board which was blessed by the Church Organ, decided to file a Trade dispute No. 145 of 2006 in the Defunct Industrial Court of Tanzania claiming



that he had been wrongly terminated. The Industrial Court held that the complainant was not terminated because he was working there under secondment.

Regarding the 1<sup>st</sup> and 2<sup>nd</sup> issues he said these issues are resolved negatively, as exhibit P9, P10, and P11 as well as the subsequent utterances to the lecturer and members of supporting staff as well as the students as they were just communicating the decision of the Governing Board and the 2<sup>nd</sup> respondent did so because he was the Chairman of the Board.

The decision of the Board to return the complainant to his home Diocese of Iringa was made in good faith on the occasion of qualified privileges and the respondents were justified in doing whatever they did. He said the Board had such Power to do what it did. Also, although the complainant was seconded, still the 3<sup>rd</sup> respondent had powers over him, and the said power included returning him to his home Diocese. They supported the contention by the decision of the Court of Appeal of Tanzania in the case of the **Board of Internal Trade vs Yonah Mapenzi** [1998] TLR in which while allowing the appeal the court held *inter alia* that;

*“Parastatal service Regulation states that the disciplinary authority in respect of the employees of the Board is the Board, this cannot*

*mean that other bodies or institutions to which Boards employees are seconded cannot assume disciplinary powers over them”.*

The counsel argued that it is inconceivable for the complainant to argue that the third respondent had no powers over him as it was day-to-day supervision running and maintenance of the lecturer and other supporting staff including the complainant.

The Counsel added that even if exhibits P9, P10, and P11 were offending as perceived by the complainant (with which the respondent disagreed), still the respondents were and are still entitled to the defence of qualified privileges as they had an interest in making communications being complained of and that the lecturers, supporting staff, students and those who received copies of the said three letters had a corresponding interest in receiving the communication. They supported their contention with a series of authorities such as **Makori Wassaga vs Joshua Mwaikambo & Another** (1987) TLR 88 CAT, **Astus Njare Masule and Samson Mipawa Molla vs Goddani Lunala** (2002) TLR **196 (HC)** **Board of Internal Traders vs Yona Mapenzi CAT** supra. **Future Century Limited vs TANESCO** (2016) TLR **277 CAT** and **Ignas Bachemela vs Michael Peter Mpambagomba** TLR **515 HC**.

In the foregoing, he urged the 1<sup>st</sup> and 2<sup>nd</sup> framed issues to be resolved in negative. In his view, he urged the court to find the two issues in the negative. he asks the court to find that the 3<sup>rd</sup> is inconsequential, thus entitling the complainant to no any relief sought. He prayed for the complainant to be dismissed in its entirety.

As a legal requirement, this Court was obliged to receive the opinion of the assessors who throughout the trial aided the proceedings. Both assessors gave their respective opinions in writing.

Starting with Mr. Jonathan Ndumbaro who stood for the complainant. In his well-reasoned opinion, he said exhibits P9, P10, and P11 were defamatory and defamed the complainant in various ways. He stressed on the phraseology of the documents themselves, the legality of the meetings that came up with the decisions executed by the letters, and the facts that the said exhibits were copied to many people publishing the defamatory statements contained therein.

Regarding the subsequent utterance made by the 2<sup>nd</sup> respondent, Mr. Ndumbaro opined that even those were defamatory as they meant to disseminate the information that was not necessary to be so disseminated. Further to that, he said the way the utterance was done conveyed the

message that the complainant is a wrongdoer which is why he was returned to his home Diocese and the University administration was not ready to work with him. He cited a number of cases which I find relevant in providing various principles of defamation cases, but for brevity's sake, I will not reproduce them but will consider them in this judgment. He in the end asked the court to find that the complainant had proved his claim at the required standards. He asked it to proceed granting him the relief sought.

On the other side, Mr. Erick Faustine Stanislaus who was for the respondents opined that, the case against the respondent was not proved on the balance of probabilities. He cited a number of cases to back up his decision which I find relevant, but for a similar purpose of brevity, I will consider them in the analysis of the issues framed for determination. However, in short, Mr. Erick opined that the complainant failed to give evidence proving the framed, that the three letters exhibit P9, P10, and P11 were defamatory and therefore injured his reputation and so to the subsequent utterance made by the 2<sup>nd</sup> respondent to the members of staff and students. Therefore, what was done did not damage his University career, thus entitling him to no any damage claimed.

Before I go to the merit of the matter, I find it apposite to make some issues clear. First, is the fact that I have extensively and almost reproduced every piece of evidence given by the parties so this judgment may be seen to be unnecessarily long and voluminous, this has been caused by the nature of the case and the parties involved. During the period I attended them, I learned that they need every piece of their evidence to be considered.

Secondly, from the pleadings, the evidence, and the submissions made by the parties and their Advocates, I find that there are some facts adduced in evidence that were not pleaded in the pleadings. In these facts, the Court is called to determine the legality of the meeting which made a decision, the subject of the letters written by the 1<sup>st</sup> respondent on 23<sup>rd</sup> January 2006 and subsequent thereto, (that is exhibits P9, P10, and P11), Claiming that the meeting and the decision thereof are illegal for being in contravention of the Constitution of the ELCT and section 44(2)(d) of the Universities Act, for lack of students' representation in the Board.

Another issue is of the complainant being either employed by the ELCT Central Committee or seconded by the Iringa Diocese to Makumira Theological College.

The last issue is whether the complainant was returned to his home Diocese or was terminated by the Board from his employment which he was employed by the ELCT. For reasons to be revealed in due course, I will start with these issues. In resolving them, I will be guided by the following legal principles. **First**, in civil cases or cases of a civil nature, parties are bound by their pleadings. This is based on the provision of Order VI Rule 7 of the **Civil Procedure Code** [Cap 33 R.E 2019] which provides as follows;

*"7. No pleadings shall, except by way of amendment, raise any new ground of claim or contain any allegation of facts inconsistent with the previous pleading of the party pleading the same."*

Interpreting this provision, the Court of Appeal of Tanzania in the case of **Yara Tanzania Limited vs IKUWO General Enterprises Limited**, Civil Appeal No. 309 of 2019 CAT-DSM, held *inter alia* that,

*"It is settled that parties are not allowed to depart from their pleadings by raising new claims which are not founded in pleadings or inconsistent to what is pleaded."*

Relying on its previous decision on the same matter, the Court went on holding that;

*"In line with the above principle the court has from time to time refused to place reliance on evidence not founded on pleadings. For instance, in **Barclays Bank (T) Ltd vs Jacob Muro**, Civil Appeal*

*No. 357 OF 2019 (Unreported) the Court made the following observation."*

*"We feel compelled at this point to restate the time-honored principle of law that, any evidence produced by any of the parties are bound by their pleadings and that any evidence produced by any of the parties which does not which does not support the pleaded facts or is at variance with the pleaded facts must be ignored. See **James Funke Gwagiio vs The Attorney Generali** [2004] TLR 161 See Also **Lawrence Surumbu Tara vs Hon. Attorney Generali and two Others**, Civil Appeal No. 56 of 2012 and **Charies Rechard Kombe t/a Building vs Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012 (Both Unreported)."*

*"Similarly in **National Insurance Corporation vs Sekulu Construction Company** [1986] TLR 157 it was stated that parties to dispute are not during trial, allowed to depart from pleading by adducing evidence which is extraneous to the pleadings."*

Also, see **Joseph Marco vs Pascal Rweyemamu** [1977] TLR 59 as cited by the complainant.

In the statement of complaint, the cause of action is founded on the tort of defamation. This can be ascertained from the facts pleaded in the said statement as well as the relief sought in that statement and the issues framed for determination. The three-pointed-out matters that the parties particularly the complainant brought evidence to prove them while they were

not pleaded are, **first**, the legality of the meeting of the board and the decision reached, the **second**, is an issue of whether the complainant was employed or seconded, and if he was employed who was the employer, **third** is the issue whether the complainant was returned to his home Diocese or terminated. As already pointed out, these issues were neither pleaded in the statement of complaint nor were framed as issues to be determined by this court.

Further to that, there is enough evidence to prove that the issue of whether the complainant was employed or seconded and whether he was returned to his home Diocese or terminated, was the subject of the discussion and decision of the Industrial Court in Inquiry No. 145 of 2006 which was later referred to the full bench of three Judges. Before both Courts (single Judge and three judges) the two issues were decided that the complainant was under secondment and that he was returned to his home Diocese not terminated. Furthermore, I was informed in the course of the hearing that the decision was appealed against and there is a pending appeal before the Court of Appeal of Tanzania.

Now that I am in the position, I am not prepared to be trapped by the temptation of discussing and deciding these issues. It should also be noted



that, on 07<sup>th</sup> March 2022 in the course of the trial, Mr. Mwaluko, raised a concern that the issue in question had already been decided by the Industrial Court, therefore in his view, it was not proper for the complainant to raise it again in this case. In response to such concern, the complaint said that the Industrial Court decided the two issues *per in curium*. This court by its order of that date informed the complainant that, this case was not a proper forum to review that decision, and directed the complainant to limit his evidence on the issues framed from the pleadings.

That being the case therefore, as these issues have not been pleaded and some of them have already been decided by the competent court, I do abstain from deciding them, as they deserve to be ignored as directed by Order VI Rule 7 of the CPC as interpreted by the case of **Yara Tanzania Limited vs IKUWO General Enterprises Limited** (Supra).

Having so decided, I now go back to the merit of the case particularly the issues framed. As earlier pointed out, the cause of action from which the two issues are framed is defamation. I find it apposite to point out *albeit* briefly, how the tort of defamation found its way in our laws. This will not detain me much, as we are all aware that, it is by the reception clause vide **Tanganyika Order in Council**, 1920, particularly Article 17 of the Order,

which created this Court and clothed it with jurisdiction to apply the laws of India, the substance of common law of England, the doctrine of equity, and the statutes of general application. The tort of defamation being one of the substances of common law of England was imported by that Order, and from that time and throughout, the same has been applicable in Tanganyika and later Tanzania. This is also reflected in section 2 (3) of our **Judicature and Application of Laws Act** [Cap 358 R.E. 2019] (the JALA) which gives this court power to apply the principles of common law, the doctrines of equity, and the statutes of general application in force in England on the 22<sup>nd</sup> day of July 1920.

The question that follows is to look at the general concept of defamation as applied in Tanzania. In so doing I would like to take the exhaustive definition made by my senior brother Mlacha, J. (as he then was) in the case of **Khatibu Said Bondo vs Juma Hamis Mbozwa and 2 Others**, (DC) Civil Appeal No. 10 of 2021 (High Court Kigoma Sub-Registry). In his endeavor to define it, he relied on the case of **Hamza Byarushengo vs Fulgencia Manya & 3 others**, (CAT), Civil Appeal No. 246 of 2018 pages 15-16 had this to say:

*"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."*

He also referred to **Halsbury's Laws of England Vol. 4th edition**, on page 7: where 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."*

He also relied on the case of **Peter Nghomango vs Gerson M.K. and another**, Civil Appeal No. 10 of 1998 (CAT - unreported), it was said thus:

*"The tort of defamation essentially lies in the publication of a statement which tends to lower a person, in the estimation of right-thinking members of the society generally, hence to amount to defamation there has to be a publication to a third party of a matter containing untrue imputation against the reputation of another"(Emphasis added).*

In the **Public Service Social Security Fund (Successor of the Parastatal Pensions Fund) vs Siriel Mchembe** (CAT), Civil Appeal

No. 126/2018 page 24 it was said thus:

*"Defamation can therefore take the form; of 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 distinctions 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 is in oral form"*(Emphasis added).

The court went on to say the following on page 25;

*"Thus, in order to succeed in an action for defamation, the plaintiff has to prove the following elements: that the defamatory statement exists; that the statement referred to him/her; that the statement was published and that the plaintiff suffered damages"* (Emphasis added)

The court went on to say the following.

*"... the issue is not how the defamatory statement makes a person referred to feel, but the impression it is likely to make on those reading or hearing it... a defamatory statement must be published. A statement is thus considered to have been published when the defendant communicates to anyone other than the plaintiff There has to be a third party receiving the defamatory statement for there*

*to be a publication. Thus, publication of defamatory statement is a prerequisite to establishing defamation."*(Emphasis added).

Furthermore, in the case of **Valentine M. Eyakuze vs Editor of Sunday News and two others** [1974] L.R.T 49 this court, (Mfalila J, (as he then was) said as hereunder: -

*"The fort of defamation cannot be divorced from the **social context in which it is operating** and there are as many social contexts as there as legal jurisdictions"*(Emphasis added).

Now, what do we normally do in ascertaining as to whether the words used either in writings or uttered orally; are defamatory or not, we start by looking at the pleadings and see the set of words, written or spoken. The words must be pleaded clearly in the plaint (in this case the statement of complaint) and proved to exist later during trial. We examine the words in the social context and ascertain if they are capable of conveying a message lowering the reputation of the complainant in the eyes of the right-thinking members of the particular group of people or society. If yes, we proceed to see if they were published to a third party.

The measure is not how the complainant felt after reading the words or hearing them but how the third party sees the words after they were communicated to him or her. That third party must belong to the group of

the right-thinking members of the society. I hold so because one society may differ from another, we look into the particular society or group of people and examine the feelings of the society about what had been written or spoken against the plaintiff/complainant who also must belong to a certain class or group of people with a certain status. It is also important to look at the status of the plaintiff before and after the publication, and equally important to look at the words in the context of the society for some words may be defamatory in one society and jokes in another.

As earlier pointed out, looking at the pleadings I find the words pleaded to be in paragraph 7 (ix) of the statement of complaint they are in three sets as sourced from exhibit P9, P10, and P11 the words are;

- i. "Kusitisha huduma yako katika Chuo Kikuu Kishiriki Cha Makumira maramoja kuanzia tarehe ya barua hii",*
- ii. "Na kwamba unarudishwa Kwenda kutoa huduma kwenye Dayosis yako ya Iringa"*
- iii. Kwa ajili ya Maandalizi ya kuondoka kurudi Iringa unapewa muda wa mwezi mmoja kuanzia tarehe ya barua hii. Siku ya mwisho ya kuondoka ni tarehe 28 Februari 2006."*

The complainant asked the court to interpret the words to mean. *(i) To terminate your service at Makumira University College immediately*

*counted from the date of this letter, (ii). And that you are returned to provide your services to Iringa Diocese (iii). You are given a period of one month from the date of this letter to prepare to return to Iringa. The last day for you to depart from the campus of Makumira University College is 28<sup>th</sup> February 2006.*

Before looking at the context of the matter at hand, I feel indebted to look into the word “***Kusitisha huduma yako***” whether it means “***To terminate your service.***” In my view, the literal meaning of the word “*Kusitisha huduma yako*” in the context of the matter at hand, is not to terminate but to stop your service. The next question is whether, in the context of the matter at hand, these words as they stand are by their nature defamatory in the sense that they tend to lower the complainant 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? Whether they are of that nature was something that was supposed to be proved by the evidence of the complainant as required under section 110 of the **Evidence Act**, Cap 6 R.E 2022, and the standard of proof is under section 3(2)(b) of the same Act to

be proved beyond reasonable doubts. This has been interpreted in the case of **Miller vs. Minister of Pensions** [1937] 2 ALL. ER 372 as quoted with approval in the case of **Paulina Samson Ndawavya vs. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017, CAT at Mwanza (Unreported), Lord Denning had this to say;

*"If at the end of the case, the evidence turns the scale one way or other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to determine conclusion one way or other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say –We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not..."*

See also **Maria Amandus Kavishe vs. Norah Waziri Mzeru (Administratrix of the Estate of the late Silvanus Mzeru) & Another**, Civil Appeal No. 365 of 2019 CAT at Dsm (unreported) where the Court of Appeal had this to say;

*"It is a cherished principle of law that, generally in civil cases, the burden of proof lies on the person who alleges anything in his or*



*her favour. This is the essence of the provisions of sections 110 (1), (2) and 111 of the Evidence Act. It is equally elementary that, since in this appeal the dispute between the parties was of civil nature, the standard of proof was on a balance of probabilities, which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. See **Anthony Masanga v. Penina Mama Ngesi & Another**, Civil Appeal No. 118 of 2014, and **Hamza Byarushengo vs Fulgencia Manya & 4 Others**, Civil Appeal No. 33 of 2017 (both unreported). It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies, discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case."*

I have scanned the three letters, that is exhibits P9, P10, and P11, I am of the firm view that, the words contained therein do not present direct defamatory meaning. Therefore, they are in the first place not defamatory. Further to that, even if, for the sake of arguments, we assume that the letters contained the defamatory statement, (which is not the case). I find the persons to whom the three letters were directed do not fall under the category of the third party. I hold so because, at Makumira University, the complainant was a lecturer. The persons who were copied with exhibit P9 were the chairman of the Board of the University in which the complainant was working and the provost of that university.

Exhibit P10 was a letter addressed to Dr. O Mdehella, Bishop of Iringa, a Diocese from which the complainant is alleged to originate, and was written to him in his official capacity. It was copied to the chairman of the Board of the University he was teaching, Prof. John Shayo, the Vice Chancellor of Tumaini University Moshi, the Provost of Makumira University, and the complainant himself. Last is exhibit P11, a letter written to the complainant, and copied to the Presiding Bishop of ELCT, Bishop Samson Mushemba, also to the chairman of the Board of the University he was working into, Bishop Mdegella of Iringa Diocese, and the Provost of Makumira University.

In my view, the letters were official communication of the decision of the Board and the Central Committee of ELCT. Those who were copied and served with the letters were just being informed of the decisions of the Board and the Central Committee. In the case of **Ignatius N. Bashemela vs Michael Peter Mpambagomba & Sukah Security Co. Ltd**, Civil Appeal No. 31 of 2016 my senior sister, Kairo J, (as she then was), held suggestively that, if the letters are written or copied to the persons who by their positions are required to get that information those persons do not fall under the category of the third party for the publication to them to be termed defamatory. This leads to the conclusion that the letters exhibits P9, P10,

and P11 were not, by their nature, defamatory and the persons to whom they were directed were not third parties. The first issue is therefore resolved in the negative.

Regarding the second issue as to whether the subsequent utterances made by the 2<sup>nd</sup> respondent Bishop Paulo Isack Akyoo made first to Makumira University Lecturers and supporting staff as well as the students of Makumira University College on 23<sup>rd</sup> January 2006, were defamatory to the complainant.

In the case at hand, there is no dispute that on 23<sup>rd</sup> January 2006 after the decision of the Board, the Board Chairman held two meetings, one, with Makumira University lecturers and supporting staff and the second, with the students of that University College and informed them the decision of the Board. Now, applying the same principle but this time guided by the decision in the case of the **Public Service Social Security Fund (Successor of the Parastatal Pensions Fund) vs. Siriel Mchembe (supra)** in which the Court of Appeal laid the principle that to succeed in an action for defamation, the plaintiff has to prove four elements: **one**, that the defamatory statement exists; **two**, that the statement referred to

complainant; **three**, that the statement was published and, **four**, that the plaintiff suffered damages.

The first element to be proved is whether the words used are by their nature defamatory. The next step is to look at the pleadings and ascertain whether the words that are alleged to be defamatory were pleaded in the statement of complaint. Having passed through the statement of complaint, I find the same to have been pleaded under Paragraph 7(xiii) of the statement of complaint which was styled in the following words.

*"Bodi imemuachisha Kazi Mchami kwa sababu uongozi wa Chuo hautaki kufanya kazi naye. Umesema aidha Mchami aondolewe na wenyewe ubaki au uongozi uondolewe na Mchami abaki."*

The complainant translated the same to mean that;

*"The Board has terminated the service of Mchami because the college leadership does not want to work with him. It has said Mchami should be removed and the leadership should remain or the leadership should be removed and Mchami should remain."*

It was also pleaded in paragraph 7(xiv) that while talking with the students the Chairman of the Board said;

*"Bodi imemuachisha Mchami mara moja tangu leo, imeamua arudishwe Dayosisi ya Iringa."*

Translated by the complainant in English to mean that;

*"The Board has summarily terminated the services of Mchami as of today and it has decided to return him to Iringa Diocese."*

In the evidence of the complainant given under oath as reflected on pages 42 and 43 of the typed proceedings, he reiterated what was pleaded herein above to have been spoken to the lecturer and staff as well as students, on 23<sup>rd</sup> January 2006. That was supported by the evidence of PW2 who said he was present when these words were published as reflected in his evidence on page 79 of the typed proceedings. Now, the question is whether these words are by their nature defamatory. In ascertaining whether words are defamatory, the meaning from which defamation is drawn should not be inferred it should be expressed in the sense that whoever hears or reads them should note the defamation nature of the same except where the same is founded on an innuendo.

In the case of **Public Service Social Security Fund (Successor of the Parastatal Pensions Fund) vs. Siriel Mchembe (supra)**, it was held that in defamation cases the issue is not how the defamatory statement makes a person referred to feel, but the impression it is likely to make on those reading or hearing it. On that, the complainant has said in his evidence

that the words used suggest that he was a wrongdoer which is why he was returned to his Diocese of Iringa.

By the evidence available, there is no dispute that the complainant is a person of high status, he is a Reverend in the ELCT, a lecturer of the university, and an Advocate of the High Court. The society surrounding him is the Academic staff at the Makumira University Community, his fellow Reverend and the people he serves in that church as well as the lawyers and his clients. The respondents did not in their response to the statement of the complaint as well as in the evidence given in the defence dispute have held two meetings and announced the decision of the Board to the University staff and students. They just said they did that in good faith on occasion of qualified privilege and that, the respondents were justified in doing whatever they did.

In law, as held in a good number of cases, some of them being **Makori Wassaga vs Joshua Mwaikambo & Another** (1987) TLR 88 CAT, **Astus Njare Masule and Samson Mipawa Molla Vs Goddani Lunala** (2002) TLR 196 (HC) **Board of Internal Traders vs Yona Mapenzi CAT** supra. **Future Century Limited vs TANESCO** (2016) TLR 277 CAT and **Ignas Bashemela vs Michael Peter Mpambagomba** TLR 515 HC that for the

defence of qualified privilege to stand, a person relying on it, must be a person in a position of authority or trust to make statement or relay or report the statements that would be considered slander or libel if made by anyone else.

Generally, the person communicating the statement must have a legal, moral, or social duty to make it the recipient has a corresponding interest to receive it and the conduct of the defendant in publishing that matter is reasonable in the circumstances and it was not actuated with malice or ill motive.

In this case, the second respondent who was sued to have published the statement before the members of staff and later students, was a person in authority as he was the chairman of the Board which deliberated and decided to return the complainant to Iringa Diocese. Therefore, he had the legal, moral, and social duty to inform the University Community.

Further to that, the persons he informed were members of the community in which the complainant was working therefore they had a right to know what had befallen the complainant. And it has not been established that the 2<sup>nd</sup> respondent or any member of the Board had malice while doing

what they did. That being the case, although the statement by the doctrine of innuendo would have suggested it to be defamatory, it is saved by the defence of qualified privilege. Therefore, the second issue is also resolved in a negative.

Having resolved the 1<sup>st</sup> and 2<sup>nd</sup> issues in the negative, then the 3<sup>rd</sup> issue becomes inconsequential. Therefore, based on the findings of every issue. I find the complainant to have failed to prove his claim, the claim is thus dismissed for the reasons given. Since the matter is by nature a labour complaint, no order as to costs is made.

It is accordingly ordered

**DATED** and delivered at **ARUSHA** this 29<sup>th</sup> day of December 2023



**J.C. TIGANGA**  
**JUDGE**