

THE HIGH COURT OF ZANZIBAR

HELD AT TUNGUU

CIVIL APPEAL No. 52 OF 2022

**(Appeal from the decision of the Regional Magistrate's Court held at Mwera
in the Civil Case No. 03 of 2015, Hon. Said H. Khalfan)**

KHADIJA ABRAHMAN MTANDYA.....APPELLANT

VERSUS

GENERAL MANAGER

DONGWE CLUB VACANZERESPONDENT

JUDGMENT

19th June & 17th October, 2023

A. I. S. Suwedi, J

Always a man's reputation is considered a valuable property, it is indorsed as an inherent personal right and so each and every man has a right to protect his reputation. Injuring a man's reputation is not correct and it is to offend that person. The offence committed by that person who is lowering someone else's reputation is known as "defamation". In simple term, defamation is a statement that that injures a third party's reputation. Hence, I asked myself a letter from an employer to terminate employment contract of his employee which has shown the reason for termination as

required by section 112 (2) of the Employment Act, No. 11 of 2005, whether it is falling within the scope of the term "defamation".

However, let me first take you to what happened prior to this appeal. Appellant instituted a suit, Civil Case No. 03 of 2015 before the Regional Magistrate's Court at Mwera claiming for TZS 35,000,000/- being compensation resulted from the respondent's act to damage the name, respect and reputation of the appellant. She also requested the Court to order the respondent to apologise to her and any other order deem just to her. The appellant stated that she was an employee of the respondent for not less than 7 years. On 02/04/2015, the respondent maliciously has made intentionally, uncorrected and dishonest the written defamatory statement against the appellant that she participated and found liable on the allegations of theft at the respondent's place without the matter being reported at Police and to be prosecuted before the Court of Law. The appellant claimed further that respondent done that with intention to lower her reputation and make her shy to her fellow employees and within the surrounding societies and consequently cause high prolongation detriment to her and the respondent failed to regret by making correction of the same. Finally, the learned trial Magistrate held that the appellant failed to

prove her claim and that there was no defamatory statement made by the respondent.

Aggrieved by that decision, the appellant lodged this appeal advancing 5 grounds and she abandoned the last ground to remain with 4 as:

1. Kwamba, Mh. Hakim amefanya makosa kisheria katika kutoa hukumu yake kwa kujiegemeza kuhitaji kuwepo ushahidi wa barua za kuombewa kazi mbele ya Mahkama ambazo hazina mashiko na kushindwa kuvizingatia pamoja na kufanya uchunguzi wa kina kuhusuiana na vielelezo "A", "B", "C" na "D" vya muomba rufaa ambavyo vilikubaliwa mbele ya Mahkama wakati wa kutoa ushahidi.
2. Kwamba, Mh. Hakim amefanya makosa kisheria katika hukumu yake kwa kujiegemeza kwake kuhitaji ushahidi wa TEDDY na SECURITY SUPERVISOR mbele ya Mahkama na kuacha kuzingatia ushahidi wenye nguvu wa muomba rufaa katika kuthibitisha kuwepo kwa tuhuma ya defamation aliyofanyiwa na mpinga rufaa.
3. Kwamba, Mh. Hakim huyo amefanya makosa kisheria katika hukumu yake kwa kusema muomba rufaa ameshindwa kuthibitisha kuwepo kwa tuhuma ya defamation aliyofanyiwa na mpinga rufaa kwani hakuna kielelezo cha maandishi wala kauli ya mdomo yenye kuashiria jambo hilo wala kuonekana kuwepo athari ya jambo hilo katika jamii kupitia wasomaji na wasikilizaji isipokuwa kielelezo "A" kinaeleza habari ya "Disciplinary measure"
4. Kwamba, Mh. Hakim amefanya makosa ya kisheria na ushahidi katika kutoa hukumu yake kwa kusema muomba rufaa ameshindwa kuthibitisha ushahidi wake katika kiwango kikubwa cha uwezekano (balance of probabilities) kwa kuwepo kufanyiwa tuhuma za defamation na muomba

rufaa ambapo ushahidi wa mpinga rufaa (DW1 na DW2) ulithibitisha kwa dhahiri kuwepo kwa defamation.

Before me, the appellant represented by the learned counsel Abdillah Khamis and the respondent appeared under the service of the learned counsel Nassor Khamis.

Submitting ground one, counsel Abdillah the learned trial Magistrate erred in demanding the employment application letter as the appellant had no copy of it as she tendered to the respondent during the time she is looking for job. The learned trial magistrate failed to consider exhibits "A", "B", "C" and "D" which shows clearly what had happened.

In respect with the second ground, counsel Abdillah stated that the learned trial Magistrate ignored the strong evidence given and demanded other witnesses, Teddy and Security Supervisor while Teddy is a supervisor of the appellant's department and he had already passed away. On the other hand, the Security Supervisor was an employee of the respondent and so the respondent was the one who had a duty to bring him. It was an error to force the appellant to bring him instead of the respondent.

As far as the third ground is concern, counsel Abdillah submitted that the learned trial Magistrate committed an error for the failure to see the effect within the society while exhibit "A" is showing defamatory statement.

The respondent did a meeting with other staffs and communicated the issue of theft and the Hon. Magistrate failed to see that.

Finally, the fourth ground it was stated that the learned trial Magistrate held that the appellant failed to prove at the balance of probabilities while the appellant evidence shows the possibility of defamation and that evidence was corroborated by the respondent's evidence. Counsel Abdillah strengthened his arguments by citing the cases of **I. S. Msangi v. Jumuiya ya Wafanyakazi and Workers Development Corporation** (1992) TLR 259; **Professor Ibrahim Lipumba v. Zuberi Juma Mzee** (2004) TLR 381 and **Hemed Said v. Mohamed Mbilu** (1984) TLR 113 and he prayed for the appeal to be allowed.

Replying, counsel Nassor submitted that "defamation" is a word of art and legal terminology with its ingredients. It has to be a false accusation against third party and it must have negative effect that reputation of a person defamed lowered. The appellant and her all other witnesses just said that she was a called a thief and she is applying for jobs but in vain. The learned trial Magistrate said that those application letters were not brought to Court.

On the issue of Teddy to have called other staffs and told them that appellant is a thief, Teddy is no more now and the statement he gave was not in record. The issue of Security Supervisor is not worth as each party had a duty to prove its case. If the appellant wished to have him as a witness, she could say so but the respondent had no issue with him that was why he did not bring him.

With regard to the third ground, counsel Nassor replied that there was no defamatory statement or gestures. The offence committed at the work place and disciplinary measures were taken. The entire case based on the exhibit "A" of which this Court attention is needed. Counsel Nassor also disvalued ground four of appeal and he said that the appellant failed to prove at the balance of probability and all cases cited were irrelevant since the ingredients of defamation were not met. He finally prayed for the appeal to be dismissed.

Counsel Abdillah re-joined that exhibit "A" contains some ingredients of defamation and the evidence of the appellant shows that her reputation was lowered as she was not able to get job anymore. On the statement communicated by Teddy, PW2 was present at the meeting and he managed to prove the words stated. He also contended that a failure to bring the security Supervisor cannot be taken as a basis to hold that the

appellant failed to prove her case and the case based on all exhibit not only exhibit "A". He lastly, reiterated his earlier prayers and he prayed that the respondent's prayers to be rejected.

Before plunging into the judgment of the trial Court, I go first to the evidence given. The appellant built up by 3 witnesses; however the main case was made by her evidence. Her evidence was that on 15/03/2015 she was discriminated by the respondent who was her employer. On that day, she entered her duty as usually and she finished about 10:00pm and went home. In the evening she received information from Teddy that she stole properties, the next day she did not attend work as she was sick but her husband was informed that she did not attend because she stole company's properties. The appellant contended to have received the news from her friend and not from the Personal Officer (P.O) but her husband, **Ibadi Ramadhan Hassan** (PW1) made follow up of the news and he was shown the stolen properties by the P.O.

The evidence further shows that the appellant received a letter from the respondent with reference "Disciplinary Measure", the letter tendered and accepted as exhibit "A". She supplied a response and after the expiration of two weeks' time given, on 02/04/2015 she reported but she was not allowed to enter. The Security Officer came out at 11:00 am with

her stuffs which he opened them publicly and take out her underwear's, pads and bras, then she was asked to signed the hotel check out and she did so. After that PW3 opened a dispute before the Dispute Handling Unit (DHU) and she was awarded 6 months' salary and the certificate of service. PW3 also tendered annexures "B", "C" and "D" and the same were accepted as exhibit "B", "C" and "D" respectively.

The story of other two witnesses, **Ibadi Omar Hassan** (PW1) as said earlier that he made follow-up after receiving information. PW1 requested for the matter to be brought to Police but the P.O insisted that the matter will be finalised by them. He also demanded a clearance letter from **Mr. Seif** so as to clear his wife but he failed. **Twaha Ramadhan Msanga** (PW2) was present at the staffs' meeting whereby their boss Happy Tatae informed them that PW3 suspected to stole some stuffs and so they were required to re-arrange their duties as PW3 was suspended.

Moreover, I had put my eyes to the exhibits tendered, exhibit "A" is a letter dated 20/03/2015 with reference "Disciplinary Measure". The letter informed PW3 on the items found in the Shaaban's car and that the driver confirmed that stuffs found were put by her with the help of **Moh'd Wazir**. The letter suspended PW3 for 2 weeks without pay from 20/03 to 02/04/2015 and she was required to provide explanation on the accusation

not less than 26/03/2015 as to why disciplinary measure should not be taken against her. Exhibit "B" is the certificate that the dispute resolved in mediation (DHU Form No. 4). The exhibit shows that the appellant awarded 6 months' salary and the certificate of service. Exhibit "C" dated 02/04/2015 and it show that the respondent was not satisfied with the explanation given by the appellant and decided to dismiss PW3 from 03/04/2015. Lastly, exhibit "D" is the DHU Form No. 1 that confirmed that the appellant filed a dispute before the DHU.

On the other hand, the case of the respondent made up by 2 witnesses, **Seif Khamis Seif** (Human Resource) and **Giorgid Scudu** (General Manager) as DWI and DWII respectively. Their evidence was simply on how they received the information from the Security Officer, the procedure taken after receiving and the penalty imposed.

Having sum-up the evidence by the parties, I am concentrating to the four grounds tabled which under my considered view the three of them (1, 2, and 3) will be answered jointly as all of them are talking about the errors committed by the trial Court of ignoring the evidence given and demanding other evidence. The learned trial Magistrate based his decision mainly on the exhibit "A" in determining the issue whether defamatory practice committed by the respondent against the appellant and so the

appellant claimed that the trial Magistrate erred for ignoring other exhibits and considered only exhibit "A". On my side, I failed to see that the learned trial Magistrate ignored other exhibits since the evidence supplied shows that exhibit "A" is the source of the claim and other exhibits are its consequences. What I have noted from the Judgment, the trial Magistrate commented that there is no evidence on the side of the appellant that shows that the words wrote in the letter shunned her in the public and that she never gave evidence that show the application for jobs she made were rejected because of the matter happened with the respondent.

Again, learned trial Magistrate failed to see the written document or oral statement that referred to the appellant that had been communicated and publicized by the respondent. What the trial Magistrate had noticed was the letter that shows disciplinary measure to have been taken against the appellant. With regard to this point, he referred the evidence of PW2 who told the Court that he has been told by their supervisor and he commented that the supervisor was not called to testify. As such, I did not see that the learned trial Magistrate forced or demanded the supervisor to be brought as said by counsel Abdillah but what I see is that he showed the seriousness of the point that at least the point would have been strong

if the supervisor had been brought to testify. Hence, I am hesitating to agree with the appellant that the trial Magistrate erred.

Lastly, the appellant blamed the trial Magistrate to hold that the appellant failed to prove at the balance of probabilities. As said earlier, the appellant claimed to have been defamed by the respondent by calling her a thief. Let me see what has been done by the respondent amounted to defamation? This can drive me to say whether the learned trial Magistrate was right or wrong. Appellant has been suspended by the letter dated 20/03/2015 which was accepted as exhibit "A" and for quick reference I am reproducing it hereunder:

REF: DISCIPLINARY MEASURE

On Wednesday date 18th March, '15 you are on duty morning shift, around 14:21 hours when the ultimate security at the main gate searched Shaaban Mohd's car no. Z 726 CK who was come by order to pick up laundry materials for the purpose of wash at town.

Upon searching the ultimate security she found one mop blue bucket which is inside there is one haptic liquid 500ml, one liquid toilet cleaner (Ero) 1000ml, one insect killer 400ml, one medium yellow towel and two air freshener 300ml each, which is packed and puts in a (mop bucket) is moved taken illegally way.

On continue investigation to the driver Shaaban he denied that the item or parcel it is belonging to Khadija A'rahman goods, taken shifted from laundry to keep in Shaaban's car with

collaboration by Moh'd Wazir your colleague for their personal uses without administrative authorization, which is observed and realized by the ultimate security.

For that fact illustration the Management seems you did something wrong that is contrary to the company regulations and subsequently the Management to decide to give suspension letter for two weeks without pay as from 20th March'15 to 02nd April'15.

Within the period of suspension not less than 26th March'15 you are require to submit your explanation letter why the Management can't deserve to take disciplinary action against your behaviour. Failure to submit your letter on propriety manner the Management can take reasonable action against your behaviour. You are requiring reporting on duty on 03rd April'15.

Thank you

(sgd)

GIORGIO SCUDU

GENERAL MANAGER

C.C Labour Officer

South Region - Zanzibar

Again, the respondent gave the appellant another letter dated 02/04/2015. This letter tendered and accepted as exhibit "C" which bears the same reference "**DISCIPLINARY MEASURE**". The same is hereunder copied as:

The management received your letter of 25th March'15 and deeply considered.

You are the senior staff experience and familiarity to the company regulation as well understanding an abiding in your routine works. In mental, physical you prepared items or articles and plan with an intentionally to defraud and movement the company properties unlawful from the original position – laundry wardrobe to outside the resort premises.

This is intended widely appeared to your preparation movement in difference segments/steps that which has been done:-

- A) To pick up one haptic liquid 500ml, one medium yellow towel, one liquid toilet cleaner (Aro) 1000ml, one insect killer 400ml and two air freshener 300ml each, collecting together in one unit put into the blue and white (mop bucket) and store away by hidden.
- B) You command junior Laundry Attendant Moh'd Wazir to take your goods from Laundry and directed him to put in a Shaaban's car.
- C) To telling false your junior staff Moh'd Wazir, driver Shaaban Moh'd and even security guard where she was at near main kitchen post lie that you have a permit authorised by the management to take the company commodities for your personal interest.

The fact in issue is that you an intent cheating Moh'd Wazir, driver Shaaban and security guard to telling false that you have the permit for those goods for your personal interest, while it's not true, that is absolute completely false. On appearance you can't deserve to say you are faithful and trustful, that is really incapable deceive, that causing to be the sole and main source of make corruption that tends to your fellow's forces to breach the company regulations of accomplishing your personal interest.

From the factors elaborating the management seems you are conspiracy that you want to obtain goods by false pretence and that is the main source of the facts issues whereas you try to control remote your fellows to facilitate your ambition plan as well. Hence, the management has no alternative way to continuing your services rather to give dismissal letter as from 3rd April'15

Thank you

(sgd)

GIORGIO SCUDU

GENERAL MANAGER

C.C Labour Officer

South Region

ZANZIBAR

I have examined these two letters vis-à-vis the ingredients of defamation so as to determine whether the learned trial Magistrate was correct or not. Defamation can stand when the following are found:

- i. The false statement purporting to be fact
- ii. The Statement must refer to the plaintiff
- iii. The intention of the wrongdoer
- iv. The Statement must be published or communicated to a third person
- v. The Statement must cause injury

To hold a person liable for defamation a statement made must be false and unpleasant. That is to say defamation begins when somebody makes a false statement and so if the statement made is true then there is

no defamation. What I have noted within the records, the respondent suspended and consequently dismissed the appellant for theft. When an employer suspended and dismissed an employee, the Employment Act, No. 11 of 2005 is inevitable. It says:

109 (1) An employer may suspend an employee who has breached any of the disciplinary rules without pay for a period not exceeding two weeks.

(2) Where the employer **decides to impose suspension** as a disciplinary penalty the employer shall be **required to follow the disciplinary procedure specified in section 110**. [Emphasis added]

The fact the appellant committed the offence of theft which is not punishable by verbal warning, section 110 (2) is applicable and it says:

110 (2) An employee who commits a disciplinary offence or is suspected to commit a disciplinary offence other than an offence punishable by verbal warning **shall be notified in writing of the offence and the disciplinary penalty which the employer intends to take against the employee**. [Emphasis is given]

With regard to dismissal then the requirement stated under section 112 (2) is relevant. It provides:

112 (2) An employer who dismisses an employee is required to **notify the employee in writing of the dismissal, the**

reasons for dismissal, and the date on which that action shall take effect. [Emphasis added]

The letters given by the respondent to the appellant followed the condition set by the above quoted provisions. The fact that an employer is under mandatory situations, I am of the view that a letter from an employer to suspend and/or to terminate employment contract of his employee which stated the offence committed and the disciplinary penalty or reasons for termination, the employee cannot be said the employer defamed him/her. However, the situation can be different if the accusation given was false and that there is a proof showing that the accusation was false and that an employer had intent to lower the employee's status. Also there must be evidence that an employer publicized or communicated to a third person and that third party believes it to be true. In **Peter Ng'omongo v. Gerson M. K. Mwanga & another**, Civil Appeal No. 10 of 1998 (unreported) the Court of Appeal said:

.....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 publication to a third party of a matter containing an imputation against the reputation of another

Besides, the proof of injury must also be shown, otherwise an employer cannot be held liable for defamation.

Coming back to the records, the appellant apart from showing the suspension and dismissal letters which under my considered opinion they were given following the conditions set under the Employment Act (supra), no further evidence given which would cause me to have other thoughts. The appellant did not prove that the accusation was false one and no ill-intention on the side of the respondent has been shown. Much more, the appellant failed to show that the respondent communicated the matter to the third party. Evidence of the appellant said that the information was given to her by her friend not the Personal Officer but the friend was not mentioned in order to determine whether the friend is a third party or not. PW2 on his side, he testified that the information was given to him and other employees by their boss, the late **Happy Tatae**. I have read the part of his evidence so closely but there is no any element that the intention was to communicate the matter. He said that:

In morning we had meeting with our boss the late HAPPY TATAE that KHADIJA suspected to stole that staff should arrange to restructure the duties because she was suspended.

The passage shows that the intention was not to communicate that the appellant is theft but to me the intention was to let the employee re-arrange themselves due to the absence of the appellant.


In **Public Service Social Security Fund (Successor of THE PARASTATAL PENSIONS FUND) v. Siriel Mchemba** (Civil Appeal 126 of 2018) [2022] TZCA 284 (10 May 2022), the Court of Appeal observed that:

.....the issue is not how the defamatory statement makes the person referred to feel, but the impression it is likely to make on those reading or hearing it.

From the wording of the Court, the concern is not the feeling of the complainant but an issue is on the others who hear the statement. Hence, the appellant was duty bound to prove the allegation, she should not base on her feelings after the event.

Therefore, I am of the same view with the learned trial Magistrate that the appellant failed to prove her claim and consequently, I am dismissing the appeal in its entirety.

DATED at TUNGUU this 17th day of October, 2023



A. I. S. SUWEDI
JUDGE