

**IN THE HIGH COURT OF ZANZIBAR
AT TUNGUU
CIVIL CASE NO. 70 OF 2021**

**MTUMWA SAID HAJI KIJIBA @ KIZOBA PLAINTIFF
VS**

KHAMIS FOUM KHAMIS DEFENDANT

JUDGEMNET OF THE COURT

03/08/2023 & 26/09/2023

KAZI, J.:

The plaintiff, Mtumwa Said Haji Kijiba @ Kizoba, is suing the respondent, Khamis Fom Khamis, for slander. His plaint stated that the defendant convened a meeting in August 2021, which was attended by several people, including Nassor Mohamed Nassor and Muzne. It was further pleaded that in the said meeting, the defendant uttered, "*Mkuu wa wilaya kaniambia kwamba, eti Kizoba amemwambia kwamba atampa Mkuu wa Wilaya Milioni 20 ishirini na viwanja vitano ili ile kesi ya rafiki yake aiamue upande wake*". One, Muzne, recorded the defendant's utterance through her phone and sent it to her husband Ali Saleh, who lives in London, and then Ali Saleh sent the same to his father Khatib Hamad @ Mkojani, who sent it to the plaintiff. The plaintiff, therefore, claimed that the defendants uttered the said words purposely and had, among

other things, tarnished the plaintiff's good image and lowered his reputation to the members of his community. Thus, the plaintiffs, inter alia, seek damages for defamation committed by the defendants of the tune of Tsh. 400,000,000/-, punitive damages of Tsh 20,000,000 and Tsh. 20,000,000/- as a general damage.

The defendant denied the allegation. In his written defence, he stated that he did not utter the words complained.

From the contents of the pleading, the following issues were framed by the Court: -

1. Whether the defendant defames the plaintiff.
2. Whether the defendant's defamatory utterances have lowered the plaintiff's reputation to the rest of the members of his society.
3. What remedies are parties entitled to?

When this suit was scheduled for hearing, the plaintiff was represented by Mr. Gido Simfukwe, learned advocate, whereas the defendant enjoyed the service of Mr. Hassan Kijogoo, learned advocate. At the closure of the defendant's case, both learned advocates prayed successfully to file a final written

submission. However, I have noted that Mr. Simfukwe alone filed the final submission.

In establishing his case, the plaintiff had two witnesses. PW1 was Mtumwa Said Haji (plaintiff). In his testimony, he stated that the defendant, Fom Khamis Fom, defamed him, his family and his people in the meeting he conducted. He averred that in August 2021, he was called through the phone by a person known as Khatib and was asked if he saw how he was defamed in social media. He testified further that, later, he received on his phone a voice note from the said Khatib, who also informed him that the defendant conducted a meeting with the people who had land claims within the Central District of Southern Region of Zanzibar. PW1 stated that Khatib told him that the defendant was recorded in his meeting by Muzne and Nassor and that Khatib received the said record, which was sent to him by a person in the United Kingdom. It was PW1 evidence that the defendant in his meeting uttered the following words, that "*Kazoba alikuja kwa Mkuu wa Wilaya kuja kumwambia kuwa katika hawa wajumbe kuna rafiki yake mmoja anahusika kwa vile kamwambia Mkuu wa Wilaya atampa milioni 20 na viwanja vitano ili Mkuu wa Wilaya ampendelee rafiki yake Kazoba*". PW1, therefore, claimed that the words affected his and his family's reputation. He

contended that his friends, who are CCM leaders, such as Nassir Ali Juma, Garlos Nyimbo, Hamis Mbeto and Zainab Shomari, considered him a useless person with no morals. Before winding up his testimony, PW1 was allowed to play the alleged voice note, which was saved on his phone. The note was, however, not audible, and I took note of it.

PW2 was Khatib Hamad Juma. He averred that the words uttered by Khamis Fom lowered the plaintiff's reputation. He said the words spoken by the defendant Mtumwa Said Haji were that "the plaintiff gave money District Commissioner and that he promised the District Commissioner to give him five plots of land." PW2 contended further that he heard the said words after receiving a WhatsApp voice note sent from the United Kingdom by one Ame Abdalla. PW2 concluded that he considers the words in the voice note defamation, which lowered the plaintiff's reputation. In the cross-examination, PW2 stated that he recognized the voice of Khamis Fom and Muzne from the said voice note. He also stated that nobody believed what was uttered by the defendant against the plaintiff.

Defendant Khamis Fom Khamis, in his defence, when testified as DW1, contended that he did not utter any words against

Mtumwa Haji. He maintained that the voice heard from the voice note was not his voice and that he did not say that the plaintiff gave the District Commissioner 20 million shillings. He, therefore, prayed the Court to dismiss this suit.

In his final written submission, the plaintiff's advocate submitted that the plaintiff had managed to prove his case to the required standard. While relying on the decision of **Haji Associates Company (T) LTD and Another v John Mlundwa** [1986], he urged the Court to award the plaintiff both the general and exemplary damages. In addition, the learned advocate referred the cases of **K. Hassan v Kithuku and Chali** [1935] T. L. R 212 and **Public Social Security Fund v Siriel Mchebe**, Civil Appeal No. 126 of 2018, [2022] TZCA 284 to support his final submission.

I have dispassionately considered the evidence from both sides and the final submission of Mr. Simfukwe, a learned advocate. I will now resolve the issue framed. In doing so, however, I will be guided by the following principles of the law; **One**: in civil cases, the standard of proof is on the balance of probabilities. The Evidence Act 2016 places a burden of proof on a person who desires a court to give a judgment. Thus, section 118 of the Act provides that: -

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

And, section 117 (1) (2) of the Evidence Act provides: -

"117. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

In addition, section 3 of the same legislation provides that such fact is said to be proved when, after considering the matter before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists, See, **Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others** (Civil Appeal 66 of 2019) [2021] TZCA 168 (4 May 2021).

Two: All facts, except the contents of the documents or electronic records, may be proved by direct oral evidence. Direct oral evidence is the evidence of a fact based on a witness's knowledge of that fact acquired through the witness's senses. Therefore, according to section 65 (1) of the Evidence Act, the oral evidence is considered to be direct if;

- (a) It refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
- (b) It refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
- (c) It refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; or
- (d) It refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who has that opinion on those grounds.

Now, as it can be observed from the evidence presented by PW1 and PW2 at the trial, which the plaintiff relied upon in establishing his claim against the respondent, much of it was hearsay. PW1 relied on what he heard from PW2. Similarly, PW1's testimony relied on what he was told by his young brother, Ame Abdalla. Additionally, PW1 and PW2 relied on the

voice note, which was not tendered in evidence and hence did not form part of the Court records, allegedly recorded by Muzne and Nassor. Both PW1 and PW2 narrated that they received the voice note on their phone through WhatsApp without revealing its ingenuity. As such, all evidence presented by the plaintiff's side opposed the principles of the laws I have demonstrated herein. Thus, inadmissible.

In the circumstances, the first issue is answered negatively. As the second issue depends on the confirmation of the first issue, the same is succumbed.

From my above findings, the plaintiff has failed to prove his case against the defendant, and I accordingly dismiss it with costs. It is so ordered.

Dated at Tunguu, Zanzibar this 26th September 2023.



G. J. KAZI
JUDGE
26/09/2023