

TANZANIA / JUDGMENT

innocent malamsha vs sarah makiluli four others 2024 tzhc 562 29 february 2024

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TZHCDECIDED
29 February 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MOSHI AT MOSHI CIVIL CASE NO. 15 OF 2021 INNOCENT MALAMSHA
..... PLAINTIFF VERSUS SARAH MAKILULI
.....1ST DEFENDANT MARY ANSELUMI
.....2ND DEFENDANT ROMBO DISTRICT
COUNCIL.....3RD DEFENDANT SITEYA MELUBO MOLLEL(Social Welfare
Officer)4TH DEFENDANT THE HON. ATTORNEY GENERAL5TH
DEFENDANT

JUDGMENT

13th Dec. 2023 & 29th Feb. 2024 A.P.KILIMI, J.: The plaintiff namely INNOCENT MALAMSHA has filed this suit against all defendants mentioned above praying for the judgment and decree on the following orders;

1. A declaration that the conducts of the Defendants amount to tort of defamation thus caused damage on personality of the plaintiff.
2. An order for compensation against the defendants at the tune of TZS 400,000,000.00 (Four Hundred Million) being the general damages inflicted on the plaintiff by the conducts of all the Defendants.
3. Costs of the suit and incidental costs thereto be borne by the Defendants. 1
4. Any other relief(s) that the Honourable court may deem fit and just to grant At paragraph 3 of the amended plaint filed in this court on 28th February 2023, The Plaintiff therein averred that defendants jointly and severally without any justification and knowing exactly that it was not true did negligently publicized false statement which was communicated amongst the community members and the public at large that the Plaintiff is the biological father of the two children named MARIA and INNOCENT who are unknown to the Plaintiff and in his capacity as their biological father has abandoned, deserted and declined to provide for the said children the facts which were absolutely false thus caused mental, social and emotional suffering on the plaintiff's personality towards the community. In order to appreciate the

context in which this suit was instituted, I find it necessary to begin with a summary of the essential facts of the dispute. Sometime in the year 2006 while the plaintiff was a public servant serving at Rombo District Council in the Education Department as Education Officer under the Teachers Training Department. One child was dumped at plaintiff's residence, after sometime he realised it was the first and second defendant who did the said act, he reported the matter at police station, 2 they were arrested and later set free. In lieu thereof Plaintiff was arraigned at the court and charged for deserting the two children, later the case was dismissed for want of prosecution, and the said children were taken to Cornel Ngaleku Orphanage Center for custody and care under the instruction and recommendation from the 3rd Defendant's as social welfare Officer. When the children grew up, the said orphanage centre demanded the children to be returned to their original families. It was then the 3rd Defendant being led by his boss, the 4th Defendant started afresh to claim that Plaintiff is the biological father of the said children thus responsible to take custody and care of the said children and published that allegation. The Plaintiff refuted to be the biological father of them. His refusal caused third and fourth defendant on 16th April, 2020 to filed an application for parentage before the Juvenile Court of Kilimanjaro at Rombo against the Plaintiff claiming a declaration that the plaintiff is the father of the children and an order to pay for maintenance of the children from 2003 to 2020. At the trial, the said court ordered for DNA test between the Plaintiff and the said children, the Results of the DNA test was communicated to the trial court, where it was proved that the Plaintiff had no any biological relationship with the said children. Consequently, the Court in its ruling dated 4th March 2021 refused to grant the orders sought in the said application and dismissed the application. In their response, the third, fourth and fifth respondents contended that they do not know of any published false statement as the Plaintiff has neither shown nor stated in his amended plaint the alleged published false statement and how the said false statement was communicated to the public by the 3rd and 4th Defendants. They also contended that the Plaintiff simply stated that the Defendants jointly published false statement without stating when, where and how the Defendants were involved to publish the said false statement and which damage the Plaintiff suffered. Before the hearing of this matter started on Scheduling Conference parties through the services of their learned counsel, Mr. Julius Damas Focus for the Plaintiff, whereas Mr. Yohana Marco learned State Attorney represented the third, fourth and fifth defendants. Both agreed and framed three issues for determination as hereunder;

1. Whether the defendants act from the plaintiff of Innocent and Maria amounted to defamation.
2. If the above is in affirmative, whether the plaintiff suffered damages.
3. To which reliefs are parties entitled to. 4 In respect to the first and second defendants, this matter proceeded ex-parte against them after all necessary legal service done and did not respond. The plaintiff's case was mounted by the plaintiff Innocent Andrew Malamsha (PW1), Kenney Manoo Mtei (PW2), Aloyce Sadikiel Kavishe (PW3), Christina Boniventura

Malamsha (PW4) and Sibiriana Teodoli Mtenga (PW5). Whereas in PW1' testimony managed to tender 3 exhibits, which included; Application for Parentage filed by Social Welfare Officer of Rombo Admitted as (exhibit P1) Ruling of the Juvenile Court of Rombo in Misc. Civil application no.2 of 2020 dated 4/3/2021 (exhibit P2) and 90 days' notice of intention to sue (exhibit P3). It was PW1 who started by testifying and briefly had this to say after being alleged to be the biological father of the two children, he was sent to court by 3rd and 4th respondents, thereafter after DNA test it was revealed is not biological father of the children. Respondents stayed silence without apologising. He also said to that effect respondents made defamation, which caused dishonest and lost respectable position he had in the society but also caused his matrimonial relation be disrupted. PW1 also said himself, his wife and children were mentally disturbed to that effect. 5 PW1 further told this court that before he was taken to court, third defendant accused him for four matters to the District Commissioner, first that he should take children because they have grown up, second, to pay the Orphanage Centre Cormelius Ngereko all cost of maintaining children third, to pay disturbance costs and four costs of education of the said children. To prove what he says tendered exhibit P1 and P2. In regard to the amount of Tshs. 400,000,000/= claimed, PW1 said the same should be paid by the District Council due to its failure to fulfil obligation entrusted, by the act of allowing 3rd respondent to report false information. In respect to others if the court found responsible, this court should combine all claims. PW1 further said publication made by 3rd respondent is to file a case and continue to publicize words in front of peoples, that "Hili libaba hovyoy kabisa linazaa watoto linaacha acha huko hovyoy hovyoy bila kutoa matunzo nitamkomesha", words which defamed him. Another witness is PW2 Kenney Manoo Mtei who testified that he recalled on 2006, plaintiff followed him to his home and informed he has a problem, they went to plaintiff home where he saw a boy laying front of plaintiff's house while his wife lamenting that plaintiff is not honest to their 6 marriage. PW2 managed to convince and took the child for preliminary aid. Later in 2020 he accompanied plaintiff to the court, being thereat he heard fourth defendant uttering "Zee zima linazaa zaa hovyoy, nitakunyoosha ". Aloyce Sadikiel Kavishe (PW3) said being out of office of fourth respondent while heading to his employer's office, he heard her telling the plaintiff and I quote "We zee zima unazaa zaa hovyoy umetelekeza watoto" PW3 further said after 3 days he met with plaintiff who told him, fourth respondent as a Social Welfare Officer was having grievances with him after he refused to take care and custody of dumped child in his house. Another witness (PW4) one Christina Boniventura Malamsha told this court that, the plaintiff who is also her brother was alleged to desert a child thrown by one Maria Auselmu, she was the one who carried the said child to police station with the plaintiff, she also said after DNA test it was revealed Plaintiff is not the biological father of the child. The evidence in regard to participation of the first and second respondent in this matter was told by PW5 who by then was Village Executive Officer, when he said that he was told by police officers that his village member Sarah Makilulu and Maria Auselm first and second respondents 7 respectively have dumped down a young baby at plaintiff's resident. He went with them; they managed to arrest first respondent and handled her to police station. PW5 further said by that act plaintiff' status was lowered, also his matrimonial relation was

disturbed. In defence case, one Ikumbaga Mwenisongele (PW1) started to testify that he worked as District Social Welfare Officer from year 2009 to 2014, he was moved to that Kisangara Institute 2014. He knew according to Data base of the Children Centre called Cornel Ngareku which revealed there are two children belong to Innocent Malamsha (Plaintiff), he also knew the issue of parentage was initiated before he was transferred to the station, but until he departed the said station no report was communicated. When cross examined by Mr. Marco, DW1 said the report on the Data Base of said centre shows that Innocent Malamsha and Mary Malamsha were found in the premises of Plaintiff that is why they were given that names of the plaintiff. Another defence witness Edward George Magupa (PW2) told this court, being working as Assistant Community Development Officer at District Council of Rombo, He was given a task by the office of District Commissioner to search for the parent of children Maria and Innocent who were cared at children home, (Ngaleku Children Centre), he went there and talked to 8 administration. He realised that according to the documents of registration, those children were named Innocent Malamsha and Maria Malamsha. He interrogated one Kenedi Mtei and Sostemas Shirima, whom both said those children belong to Plaintiff. He searched for their mother unsuccessfully, then he wrote a report and handled to the District Commissioner, hereinafter "DC". DC instructed a meeting with the plaintiff with District Administrative Secretary "DAS" and PW2, where in that meeting plaintiff refused to know the children then they informed DC the outcomes of the said meeting. It was then when DC advised to use DNA to find the biological father. Then, the fourth respondent one Steiya Melubo appeared in this court as a witness (PW3), she testified that she worked at Rombo as Assistant Community Development Officer and later recategorized to be Senior Assistant Social Welfare Officer. She was assigned to work with Cornel Ngaleku Children Centre, and knew about Innocent Malamsha. Later, DC assembled her and District Legal officer and told them about children at Cornelius Ngeleku named Maria and Innocent, then the District legal Officer advised law should be followed and advice to file a case for parentage against the plaintiff at Rombo District Court, and then she filed the case at the Court. 9 DW3 further said the said court ordered for DNA test which the results proved that the Plaintiff was not the father of those children, then after that nothing continued. When she was crossed by Plaintiff's counsel, DW3 said did not communicate with the plaintiff although they met in the court building and she never defamed him, also she doesn't know about the spread of news from her office that plaintiff is accused of deserting the children. George Kulutwe Romwadi (PW4) was the last witness for defence, stated that he was working at Rombo District Council, as Social Welfare Officer. On 2015 he was assigned to supervise orphanage center of Cornelius Ngaleku, upon inquiry to the data base, he found a child called Innocent Malamsha registered in 19/6/2006 and another was called Mary Malamsha who was under foster care, he then communicated with plaintiff who was working at Teachers Resources Centre by then his response was that he is not the parent of that child, then he returned the said reply to the Head said Children Centre. On 6/2/2017 the leadership of Cornel Ngaleku conducted a meeting and decided that the process of testing DNA between plaintiff and the children should be done in order to reveal the parentage of the children. DW4 further said after that he did communicate with plaintiff and told the

resolution of the children Centre to test for DNA, the plaintiff replied he 10 has duty which could not allow him to make such a test. Thus, DNA was not done. Few days later on November, 2017 he was transferred from that station. In cross examination by the plaintiff's counsel DW4 stated that, upon his transfer he handed the office to Steya Mollel (fourth defendant) by letter which also instructed the pending the issues of Cornel Ngaleku center, therefore fourth respondent was having a duty to do all duties which was not completed including the child called Innocent Malamsha in respect to test for DNA. After the hearing of both parties, counsels for both parties preferred to file final submissions, I congratulate them for their research and I will refer to them whenever it is necessary to do so. Before I proceed with evaluation of evidence, I find it is pertinent to highlight prerequisites for establishing the existence of defamation. The Halsbury's Laws of England Vol. 28 4th edition, Paragraph 10 page 7 defines a defamatory statement as: "a statement which tends to lower a person In the estimation of right-thinking members of society generally or to cause him to be shunned 11 or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business. Also, Winfield and Jolowicz in their Book titled TORT 19th Edition, define a Defamatory Statement to mean; first, a statement which tends to bring a person into hatred contempt or ridicule; second, the words must tend to lower the claimant in the estimation of the right-thinking members of society in general; and third, the words tend to cause the claimant to be shunned or avoided. Moreover, in Black's Law Dictionary 8th Edition at page 1261 defined Defamatory Statement as; " ... a statement tending to harm a person's reputation by subjecting the person to public contempt, disgrace ridicule or by adverse affecting the persons business." From the above excerpt, it is a common understanding, in order defamation to be proved the plaintiff need to prove the following; First, words must be defamatory. Second, words must have referred to the claimant and Third, there must be publication, that is, communication to a third party. However, if the defendant admit to publish the defamatory word might have absolute defence if first, he proves that; the words were true or he had justification; second; that it was a fair comment on matter of public 12 interest; Third; that it was made on the matter of privileged occasion; Fourth; that an intentional defamation; and fifth; that there was consent. (Meneja Mkuu Zanzi Resort Hotel vs Ali Said Paramana [2020] TZCA 1920 (TANZLII) In line with the above position, the question is whether the Plaintiff in this matter has met the threshold to warrant the grant of the damages sought for defamation. Starting with the first issue, in the present matter, the Plaintiff has sued five persons as defendants, now the issue before me is whether each of them have uttered words which are defamatory to the plaintiff. To start with the first and second defendants, despite the facts that they did not enter appearance in this matter, the plaintiff case did not establish words they uttered which amount to defamation. What this part did was to show that they did concern with the dumping a child alleged to belong to the plaintiff as father, in my view if at all that was their acts, In my view in this matter cannot be defamation as alluded hereinabove, defamation happen if there are acts of harming the reputation of another by making a false statement to a third person. Thus, the acts of the above two defendants even if could have proved, probably should amount to

criminal offence 13 because no any evidence was tendered in this court proving any words they uttered in regard to the plaintiff. Nevertheless, the facts that there was communication they passed to the third party that the child belong to the plaintiff, I have considered the evidence tendered, no single witness turned in this court testifying they heard from first and second defendant uttering those words. From the foregoing I am of considered opinion the plaintiff has failed to prove that first and second defendants defamed him, thus are not responsible for anything. In respect to the third, fourth and fifth, according to the evidence adduced it shows they have been sued generally for the acts conducted and second the fourth defendant was sued specifically for the words alleged she uttered to the plaintiff, however the two others have been sued as the immediate boss and Supervisor of the daily duties of the fourth defendants. To start being sued generally, according to the amended plaint filed and the evidence of the plaintiff himself which in fact is not far from the evidence of the defendant's case, the allegation that the plaintiff is the father of the two children was initiated from Cornelius Ngareku Orphanage Centre, 14 whereat they asked District Welfare Authority that the two children registered in the name of Plaintiff as their father should be taken to stay with their origin family. Thus, in my view it was not mistake for the third and fourth defendant to ask and inquire on the correctness of the information they got from the said children centre. Even if any probe for investigation was made against the plaintiff to search for truth still was their duty to search for the truth. Therefore, as rightly done, the acts of the fourth defendant to send the application of parentage at the Juvenile court of Rombo under the instructions of the third defendant still it was their duty as officers entrusted to keep the welfare of children to find the solution for the betterment of the said children. For instance, one George Kulutwe Romwad (DW4) a social welfare officer testified that he attended the said children center and shown data base of two children having the name of the Plaintiff despite the allegation existed against the plaintiff to be the father of them, he approached the plaintiff who refused, the resolution reached was for DNA test still the plaintiff said has no time. Thus, he was transferred to another station and handled the matter to the fourth defendant who proceeded with matter. 15 Under the above circumstances, I am settled that what the two defendants did of sending the plaintiff to the court for parentage, they did it honestly for searching the truth of the allegation against the plaintiff, in view thereof they are privileged for the acts, thus cannot be sued for defamation or negligence. (See Makory Wassaga vs Joshua Mwaikambo and Another (1987) T.L.R. 88). Having reasoned as above, the third and fourth defendants' acts said above cannot amount to defamation or abuse of their office. Another claim by the plaintiff which is so specific, was that the fourth defendant uttered the words which are defamatory to the plaintiff, the same was evidenced at the trial by plaintiff evidence by PW2 and PW3. On this point, I find it irresistible to quote the testimony of these witness for purpose of clarity. PW2 testified that; "I decided to go with him to the court, then plaintiff was called and allegation was read to him, plaintiff said it is no true. Being out of the court Siteya Mollel passed near us and said "Zee zim a linazaa zaa hovyoy, nitakunyoosha akafyonza akaondoka zake". PW3 testified that; 16 "Siteiya Mollel told that plaintiff, "W e zee zim a unazaa zaa hovyoy um etelekeza w atoto" I heard those words I was out of the office of Social Welfare, I was there, I met with plaintiff

when I was greeting him, Siteya Mollel came out, and said those words, then I continue with my duty.” From the excerpt above, starting with the evidence of PW2 above, in my view the court is not told how many people were together with PW2 when he heard those words, since PW2 said Siteya Mollel passed near them. I think it could have been easy to know those words were directed to the plaintiff or not if the numbers of persons at the said could have been known, for instance if there were other persons more than the plaintiff and PW2, in my view it is difficult to know whom those words were directed to. Since one of the requisites for defamation words uttered must be referred to the claimant/plaintiff, I have considered the above testimony, I have failed to apprehend as any reasonable people would regard the statement was referring to the plaintiff and not otherwise. Therefore, the fact that the words uttered did not mention the plaintiff and in regard to the above circumstances which is not settled, in my view, I am settled, it is difficult simply to infer those words were directed to the plaintiff. 17 In respect to the testimony of the PW3 above, before I proceed I must say that, What constitutes defamation should be distinguished from mere vulgar abuse which may injure someone’s dignity but not their reputation. Abusive words could not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not simply abusive. The burden of proof was upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. (see *Penfold vs Westcote* [1806] 2 B&P (NR) 335.) In this case at hand, the words said above by PW3, in view the words “W e zee zim a unazaa zaa hovyo” amount to the abuse, but when in conjunction with the words “um etelek eza w atoto” became defamatory words. In my opinion the test applied here is whether these words lower the plaintiff reputation in the eyes of right-thinking members of society? In further examination in chief PW3 had this to say; “to my side that words defamed the plaintiff, and he lost reputation and the community at large avoided him. The community grasped that he is a prostitute, lazy and not honest.” 18 PW3 heard these words as a third party therefore there is no dispute that the words were published by the fourth defendant. In regard on whether the words referred to the plaintiff, in my view, the quoted words of PW3 are very clear because he said directly that, the fourth defendant told the plaintiff when she came out from her office and met them out greeting each other. In considering the above circumstances, I am settled the words uttered was referring to the plaintiff and not otherwise, taking also regard the existence of the allegation to the Plaintiff of deserting children at the mentioned Children Care Centre. However, I have also thought, whether the fact that fourth defendant was having a task to make a follow up the allegation against the plaintiff that he has deserted his own child, thus, is privileged to say such words to the Plaintiff. In my view is not covered with that defence under the above circumstances when she uttered those words. I am saying so because those words were uttered out of office in the presence of the third party who is not a member in any probe, thus, totally not concern with the commission of inquiry on the said allegation. Therefore, I am settled the fourth defendant by doing so was having malice to injure the reputation of the Plaintiff out of her official capacity. 19 On the premises and from what I have endeavoured to discuss above, I am satisfied that those words uttered by the fourth defendant to the plaintiff in the presence of PW3 defamed the plaintiff. Therefore,

I thus find the first issue is answered partly in affirmative, because is the only the fourth defendant and on her own individual capacity liable for defamation and not institutional capacity as the plaintiff tried to allege. In respect to the issue as to whether the plaintiff suffered damages, in my view the same is obvious but in regard to amount to be awarded it depend on the circumstances proved or extent proved for the injury of the character of the Plaintiff. According to the plaintiff he told this court his reputation was injured whereby his children despised him and he was not on good terms with his wife. Further, he testified that he was disqualified from being nominee of councillor's election because of being regarded of having bad reputation in the society. I have considered the said testimony and his credibility on said testimony, in my opinion it needed to be supported by evidence, as rightly submitted by the defendants' counsel neither his wife nor his children were brought by the plaintiff. I think the same could have been at better position to tell this court; first, how they perceived the said defamation; second, could 20 have shown how defamatory words were published to them and third how their relation with their father for the children and disharmony for the wife of plaintiff affected their normal existed life before. Moreover, the same applies to contention by the plaintiff in his testimony that he was disqualified in counsellors' election in his ward, no any person appeared to prove that he was the candidate and he lost in preliminaries because of the said allegation. In my opinion the above were material witnesses to be called by the plaintiff but he did nothing, and as said above himself did not suffice the purpose, thus by not doing the same, I am satisfied should be construed to his disadvantage. (See: Hemed Said vs Mohamed Mbilu [1983] TLR 113). Therefore, having adumbrated as above, the second issue is answered that the plaintiff has suffered damage only to the extent proved above. In regard to the last issue, the point for determination is assessment of damages the plaintiff is entitle to. The plaintiff has claimed Tshs. 400,000,000/= as general damages for the injury of his reputation. I am mindful, in assessing damages in an action for defamation the court had to consider the particular circumstances of each case, the plaintiff's position and standing in society and the mode and extent of publication. Therefore, the above consideration entails the damages to be awarded should be fairly 21 compensatory in the light of the nature of the injury to reputation and the same should also appear realistic in all the circumstances. As pointed above, I have considered that only one person PW3 heard defamatory statements from the fourth respondent, thus this determines the extent of publication of the said defamatory words, also I have taken regard on above evaluation and the reasons stated thereto, I find the plaintiff is entitled damages and consequently I hereby order the fourth defendant personally as an individual to pay damages to Plaintiff to the tune of Tshs. 1,500,000/= (one million and five hundred thousand Tshs) which in my settled view will meet the justice of this matter. In the circumstances I grant no order as to costs. It is so ordered. DATED at MOSHI this day of 29th February, 2024 X JUDGE Signed by: A. P. KILIMI 22 Court: - Judgment delivered today on 29th day of February, 2024 in the presence of Mr. Constantine Kimario advocate for Petitioner and Mr. Abel Mushi Solicitor for Rombo District Council. Also Plaintiff present Sgd: A. P. KILIMI JUDGE 29/02/2024 Court: - Right of Appeal duly explained. Sgd: A. P. KILIMI JUDGE 29/02/2024 23

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