

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM.

CIVIL CASE 113 OF 2013

HAMZA BYARUSHENGO PLAINTIFF

VERSUS.

FLUGENSIA MANYA 1ST DEFENDANT

GAUDENSIA HYERA 2ND DEFENDANT

EDITHER MAEMBA 3RD DEFENDANT

TUMAINI RADIO STATION 4^H DEFENDANT

THE REGISTERED TRUSTEE OF THE ARCHDIOCESE

OF DAR ES SALAAM 5TH DEFENDANT

Last day of the order: 01/08/2018

Day of the judgment: 31/08/2018

JUDGMENT.

MAGOIGA, J.

The named above plaintiff instituted a case of defamation against the above named defendants severally and jointly for broadcasting defamatory statements against himself on three consecutive days from 3rd June 2013 to 5th June 2013 inclusive, through a program called "DUKUDUKU" aired by the third defendant. It is alleged the first, second and third defendants



were actively involved in the said defamatory broadcasting. The 5th defendant was sued for being owner of the fourth defendant. The plaintiff claimed against all defendants as follows:-

- (a) An order for retraction of all the false and malicious allegations made and published by the defendants.
- (b) An order for publication by the defendants and at their costs, the plaintiff's approved retraction and unconditional apology immediately after the judgment.
- (c) An order for permanent injunction restraining the defendants by themselves, their agents, associates, workmen and servants from repeating the libel cast on the plaintiff and making any defamatory matter concerning the plaintiff.
- (d) An order for payment of Tshs 240,000,000/= being loss of expected earnings.
- (e) An order for payment of general damages in the sum of Tshs. 5,000,000,000/=
- (f) An order for payment of Tshs. 1,000,000,000/= as exemplary damages.



- (g) Interest on (d), (e), and (f) above at the rate of 30% p.a from the date of the filling the suit till judgment.
- (h) Interest on the decretal sum at court's rate from the date of judgment till payment in full.
- (i) Costs of the case be borne by the defendants.
- (j) Any other reliefs as the court may deem fit and just to grant.

The defendants filed their defenses refuting all claims by the plaintiff and invited the court to dismiss the suit with costs.

The brief facts of the case as gathered from the amended plaint are that, for three consecutive days, starting on 3rd to 5th day of June, 2013 the second and third defendants acting as broadcasters and employees of the fourth defendants, which is owned by the 5th defendant conducted a live interview with the first defendant by unleashing a premeditated, continuous and sustained campaign of defamation against the plaintiff. On 3rd day of June 2013 the plaintiff did not hear what transpired. The plaintiff averred that on 4th and 5th days of June 2013, at around 7.30 O'clock to 8.00 O'clock the first, second and third defendants through a program known as "DUKUDUKU" continued with their campaign of malicious defamation to the effect that the plaintiff was with another person by the

name of Malima invaded the land of the first defendant and have been threatening them by opening framed cases and threatening to kill them with guns. The alleged defamatory words according to paragraph 10 go thus: -

The 2nd Defendant :- "Tangu jana tunasikiliza dukuduku iliyotufikia kutoka Ubungo - Msewe."

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

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

The 3rd Defendant: ".....wakawa wanafanya nini hao wavamizi?"

The 1st Defendant: ".....watu hawa wametutesa sana. Kila tunapodai haki yetu tunatishiwa kuuawa kwa bunduki. Tunabambikiwa kesi za uongo. Walitufungulia kesi hamsini na nne (54), kesi thelathini na nne (34) zikafutwa na kubaki kesi ishirini(20)"

The 2nd Defendant: "du, hali inatisha!.....kesi zote hizo?"

The 1st Defendant: ".....siku moja mdogo wangu Martin alichimba shimo kwenye shamba letu, Hamza akampiga halafu akaleta mapolisi kutoka kituo cha

mbezi kwa Yusufu ili watukamate kwakutusingizia
kwamba tulimfanyia fujo
....."

The 3rd Defendant: ".....makubwa haya
!....."

The 1st Defendant: ".....siku nyingine huyo
mwanasheria
alikuwa anataka kutuua kwa bunduki, akawa
anapiga risasi hovyoy watu wakaogopa nakufunga
maduka yao wakidhani kwamba kuna majambazi
wamevamia. Kutokana na hali hiyo tulipiga simu kwa
kamanda Kova nilikwenda
nikatoa taarifa kituo cha polisi Mbezi kwa Yusufu.
Huyo mwanasheria pamoja na ndugu zangu: (1)
Martin Manya , (2) Mary Manya na mtoto wangu, (3)
Nicas Manya walikuja
kituoni.....kitu cha kushangaza
baada ya kutoa maelezo tuliwekwa ndani eti
tumemfanyia fujo mwanasheria"

The 3rd Defendant: ".....tumepokea ujumbe
mwingi wa simu..... wengine wanasema
suala hili lipelekwe kwenye vyombo vya sheria.
..... na wengine wanashauri
tuwahoji walalamikiwa ili tujue nao
wanasemaje....."

The 2nd Defendant: Tutaendelea tena kesho kumsikiliza
Flugencia....."

And according to paragraph 11 are that:-

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

The 3rd Defendant: "..... nikuhusu
mgogoro wa
ardhi....."

The 1st Defendant: ".....mwanasheria alileta
wahuni wakampiga risasi nne mdogo wangu Martin
lakini kwa bahati nzuri hakufa. Mpaka sasa bado
anakidonda tumboni....."

The 2nd Defendant: ".....huko polisi vipi?"

The 1st Defendant: ".....polisi wa Mbezi kwa Yusufu wanatusumbua sana jana tumepigiwa simu kwamba twende polisi ili tupelekwe mahakamani"

The 2nd Defendant: ".....mahakamani kufanya nini?"

The 1st Defendant:nikuhusu kesi tunazo bambikizwa na mwanasheria"

The 3rd Defendant: ".....nimepokea ujumbe wa simu toka kwa Rose Michael anasema: mwanasheria anavunja sheria kwasababu ya mali! Ndiyo maana mimi nilikataa kusomea sheria....."

The 2nd Defendant: "Huu ndio mwisho wa dukuduku hii toka Ubungo-Msewe. Hatuna woga kwani tumefanya hivi kwasababu hii ni kazi yetu"

The plaintiff went on alleging that by reason of the above quoted words, so broadcasted and published by the defendants, he as businessman and an advocate of the High Court has been gravely injured in his character and his name and reputation have been brought to scandal, odium, contempt and as such he has lost a potential client, SIX PK GENERAL TRADERS, who were to engage him as legal advisor for five years by a monthly retainer fees of tsh 4,000,000/= which make a total of Ths 240,000,000/= for the whole period.



The plaintiff further gave particulars of extreme malice, viciousness and cruelty that the defendant orchestrating a sustained campaign of libel in closely succeeding issues of Tuamini Radio, portraying the same vicious picture of the plaintiff without even broadcasting /publishing the plaintiff's story, obtaining libelous opinion of the public through text messages and broadcasting /publishing them, refusing to apologize and contravening all known rules of broadcasting, hence this suit.

The case underwent usual legal process and eventually was set for hearing after framing the following issues for determining this suit-

- (i) Whether the words complained of did bear or were capable of bearing the meaning of defamatory of the plaintiff.
- (ii) Whether broadcasting by the 4th defendant the words complained of was done maliciously.
- (iii) Whether the retainer agreement between Hamza Byarushango and advocates and Six PK General Traders signed by Hamza Byarushango on 31st May 2013 was so signed for genuine business transaction.



- (iv) If the answer to issue number 3 above is in the affirmative, whether the plaintiff suffered loss of Tshs 240,000,000/= expected earnings.
- (v) Whether the publication/broadcasting has injured the reputation of the plaintiff.
- (vi) Whether the first defendant is entitled to the defense of justification.
- (vii) To what reliefs are parties entitled to.

The plaintiff called a total of five witnesses and tendered six exhibits in his efforts to prove his case against the defendants. The plaintiff had several advocates, advocating for him, but he disengaged them and decided to proceed himself. The first defendant appeared in person and was enjoying the legal services of Mr. Dickson Mtogesewa, learned counsel throughout the case. The second, third, fourth and fifth defendants were enjoying the legal services of Mr. Senen Mponda, learned counsel.

The plaintiff, PW1 in his evidence in chief stated that he is an advocate of the High Court and a business man selling motor vehicle spare parts. He conducts the business of advocacy by the name of BYARUSHENGO AND COMPANY ADVOCATES. PW1 tendered certificate of registration and

extract from Register of BYARUSHENGO AND COMPANY ADVOCATES collectively which were received in evidence and marked Exhibit P1.

PW1 stated that apart from doing business of advocacy, he is also having another business of selling spare parts by the name of RWELU USED SPARE PARTS, and proceeded to tender a certificate of Registration name and extract from Register of RWELU USED SPARE PARTS and same was received in evidence and marked collectively as exhibit P2. PW1 went on to testify that he instituted this suit after being defamed via Tumaini Radio (the fourth Defendant). According to him, the published defamatory words were actively done by FULGENSIA MANYA (first defendant), GAUDENCE HYERA (second defendant), EDITHER MAYEMBA (third defendant), TUMAINI RADIO STATION (fourth defendant). PW1 stated that he joined the REGISTERED TRUSTEE OF ARCHDIOCESE OF DAR ES SALAAM (fifth defendant) of Catholic church for reason that they are the trustees and custodian of all the properties of Tumaini Radio Station.

PW1 testified that on 03/06/2013 he came to know of the ongoing defamation about him through other people he mentioned as MIDRAJI IBRAHIM and YASINTA KYAUKA, who told him that the first defendant was interrogated by the second and third defendants in Tumaini RADIO where

the first defendant was saying, the plaintiff invaded her field which she inherited from her mother located at Msewe area. PW1 further testified that on 04/06/2013 he heard the first defendant saying that, PW1 used to frame cases against herself and her relatives as well. And that at one time PW1 used gun to threatened them. On the 4th day of June 2013, PW1 tuned on Tumaini Radio and again on 05/06/2013 he heard the first defendant through DUKUDUKU program saying PW1 sent some hooligans who shot his younger brother of the first defendant by the name Martin Manya, but who fortunately survived. PW1 went on testifying that Edither Mayemba, the third defendant, read a message from one of the listener Rose Michael saying that PW1 was breaking the law because of the properties.

Testifying further, PW1 testified that these words were heard by many people in Tanzania mainland and Zanzibar, including Dar es salaam, Coast Region, Morogoro, Dodoma, Singida, Tabora, Shinyanga, Mwanza, Bukoba, Kilimanjaro, Arusha and all over the world as Radio Tumaini is captured via its website www.tumainimedia.com. According to PW1, these words were not true and the truth is that he never trespassed the field of Fulgensia Manya or any other person but he bought the said field from her father the

late NICAS MWANGWA MANYA. PW1 tendered the sales agreements dated 1st September, 2001, 5th December, 2001 and the judgment of Kimara Primary Court in Criminal Case No. 66 of 2001 collectively as exhibit P3. PW1 denied to have sent someone to go and shoot Martin Manya, to break the law for purposes of acquiring property.

PW1 testified further that the words publicized injured him by lowering his integrity in the society, was affected psychologically and that he lost some money he could have earned.

After publication whenever he passes in the streets of Msewe and Lindi, people would laugh at him by calling him TAPALI, MWIZI, MUUAJI, claiming that they heard so via Tumaini Radio. PW1 went on testifying that because of this publication his clients and expected clients some of the run away from him. He said SIX PK GENERAL TRADERS is an example of such client who wanted to give him a contract of 5 years at 5,000,000/-. PW1 said he was to earn 40,000,000/= from SIX PK GENERAL TRADERS but they refused to sign the retainer agreement on reason of such publication via Radio Tumaini. PW1 tendered a letter from SIX PK GENERAL TRADERS and the retainer agreements that was collectively received in evidence and marked as Exhibit P4.



PW1 testified further that when he finished construction in the land subject of the dispute, it is the first defendant and his brother Martin Manyamba who were harassing him and he reported them to police and were charged at Manzese Primary Court and convicted for six months in absentia. PW1 tendered Manzese Primary Court judgment dated 09 October, 2003 and same was admitted in evidence and marked exhibit P5. And lastly PW1 tendered a demand notice to the defendants from his first advocate Nassoro, which was admitted in evidence and marked exhibit P6. Eventually PW1 reiterated his prayer as contained in the plaint.

Under cross examination by the learned counsel for second, third, fourth and fifth defendants PW1 said in the year 2013 his income was 70,000,000/= but admitted all his incomes were qualifying to be registered for VAT but were not. PW1 on further cross examination admitted that at exhibit P6 which is a replica of paragraph 10 and 11 of the amended plaint does not contain all the actual words said because of the dash dash in the closed quotes. PW1 when further put into deep cross examination as to whether the court can know the missing words he replied thus;

“ the court cannot know the words which were left in the , it is true this court has no benefit of knowing



what was broadcasted on 4th June 2013 and on 5th June 2013 and same cannot be verified by documentary evidence....”

PW1 further admitted under cross examination that he has no prove of the areas covered by the license of the 4th defendant. PW1 admitted as well that his family and the family of the first defendant are not in good terms and that he fired a gun once to threatened Martin Manyo on 07/06/2003, when he went into his house. And that he has never had before any business with SIX PK GENERAL TRADERS.

Under cross examination by the learned counsel for the first defendant, PW1 admitted that he never produced any business license and that it is true he has a land dispute with the first defendant.

One SAFARI JUMA NYAIGESHA, PW2 testified for the plaintiff as to what happened on 04/06/2013. PW2 repeated the story of land dispute and gun threatening by PW1 as narrated by the first defendant to Radio Tuamaini. According to PW2 testimony, the first defendant was accompanied by four neighbours who in the broadcasting said Hamza Byarushengo is a hopeless man and unfit to the society. (Unfortunately the said neighbours were not mentioned, sued nor called to testify).



PW2 testified further in chief that on 05/06/2013 after the broadcasting the situation of Hamza was very bad as those people named PW1 as cone man and unfit person in the society. According to PW2, plaintiff moved to Tegeta to avoid harassment.

When PW2 was under cross examination by the learned counsel for the second, third, fourth and fifth defendants, PW2 stated that on 03/06/2013 he heard of the broadcasting from others (hearsay). On a further cross examination by the learned counsel for the first defendant, PW2 admitted there was a long dispute over land between the plaintiff and the family of Many.

One, RASHID AHMAD KATAIMARA, PW3 testified for the plaintiff that he is a businessman and work with SIX PK GENERAL TRADERS as a director. In May 2013 PW3 had business agreement that did not materialize because of the broadcasting that he heard through Radio Tuamaini between the first defendant and PW1. The session that was on is called "DUKUDUKU LANGU". The complaint by the first defendant was that PW1 had invaded their field and PW1 was threatening them with a gun. PW3 went on testifying that upon hearing that broadcasting he refrained to sign the contract because he learned that advocate Byarushango is involved in



criminal events and that he wrote to inform him that he cannot sign until he gets sufficient clarification about the allegation he heard against him in the radio. According to PW3 after writing that letter to PW1 that was the end of the business with the plaintiff.

When cross examined by the learned counsel for first defendant, PW3 insisted that he decided to do away with PW1 and instead entered a contract with another advocate known as KOMOYI. PW3 admitted there was no letter that was written to him together with the contract requiring him to sign business agreement. On further cross examination by learned counsel for the 2nd, 3rd, 4th, and 5th defendants, PW3 stated that in the said contract they had agreed a consideration of 4,000,000/= per month and according to him he never signed the contract because he wanted to make a follow up of the allegations he heard over the radio against advocate Byarushango. PW3 admitted he never called PW1 over what he heard and inform about what he heard; but he wrote the letter on 12/06/2013 informing him that he has refrained not to sign the contract. PW3 cannot give explanation on exhibit P4 because is written in English.

One, MIDRAJI AYOUB IBRAHIM, PW4 introduced himself as a journalist and testified for the plaintiff that he got the news of broadcasting from

people he never mentioned and never even mentioned the dates of broadcasting. PW4 testified that he never listened the whole program as he switched of his radio. PW4 phoned PW1 and asked him if he has heard of the allegations which were being aired by Radio Tumaini against him. PW4 repeated what others said that the program was all about. PW4 testified further that Hamza Byarushengo is no longer trusted person as he looks like a killer and a person who is not good in the society.

When cross examined by learned counsel for the 2nd, 3rd, 4th, and 5th defendant he admitted there is no any social avoidance of PW1. PW4 when cross examined by learned counsel for first defendant admitted that what is contained in exhibit P6 cannot be a content of the broadcasting and that genuine content can be obtained from the media concerned.

One, ISACK ZAKE, PW 5 is an advocate and testified for the plaintiff that he came to testify over a contract he prepared for PW1 which was on provision of the legal services, exhibit P4 with SIX PK GENERAL TRADERS. PW5 testified that he prepared the contract and witnessed himself of the same.



When cross examined after being shown the contract he said categorically that there was no contract as the other party never signed it. Equally important the contract allowed to be terminated at any time.

One, JUMA SHAMSHI BYARUSHENGO, PW6 testified for the plaintiff that he is the uncle to the plaintiff and shopkeeper of PW1 shop selling spare parts. In his testimony PW6 said whenever PW1 comes to court people call him hooligan because of what they heard in Radio Tumaini. On a further testimony, PW6 testified that he also heard the first defendant praying for responsible authority to assist her to stop the plaintiff to disturb her.

When cross examined by the learned counsel for the defendants, he admitted to hear DW1 had a land case with PW1, but of which he was not aware. PW6 admitted not knowing the source of the conflict between PW1 and DW1. PW6 said the people who were laughing at PW1 were neighbours and are still there as to the date of his testimony. PW6, went on telling the court that he believed PW1 is a hooligan though he still works with him because he has no alternative. PW6 further testimony is that he is not respecting PW1 because he trusted what was said in the Radio Tumaini is true.



This marked the end of the plaintiff's case.

In her defense to the suit, first defendant, FULUGENSIA NIKAS MANYA, DW1 testified and in her evidence in chief she stated that she is a resident of Ubungo, Msewe living with her family. DW1 stated that she knows the case in this court and she knows the PW1, whom she described as her neighbour. DW1 stated that ever since PW1 built his house which is some few metres from her house a dispute arose because PW1 wanted her land so that PW1 can use it for getting a road to his house and other uses.

It was the evidence of DW1 that, because of this land dispute PW1 used to hire hooligans in order to beat DW1 and his family. She narrated the incidence of 05/02/2013 in which PW1 fired a bullet directing to their house. It was her testimony that, when they report the incidences they ended up being locked up in cell. It was the testimony of DW1 that, when things were not working they reported the dispute to DCI, who gave direction and phone number in case of any breach of peace to report. That in one incidence they reported and PW1 and other hooligans were arrested but upon arrival at police they ended up being locked up in cell.



It was the evidence of DW1 that, after being locked several times despite the direction of DCI MANUMBA, she opted to go to Radio Tumaini in a programme called "DUKUDUKU" for more help.

DW1 further testified that, what is contained in paragraph 10 and 11 of the plaint is not true and is false. DW1 insisted that the dash dash in those paragraph no one can tell exactly the words spoken at all.

DW1 testified that she visited the Radio Tumaini station, the fourth defendant, for 3 consecutive days from 3-6 June 2013 with the aim of getting assisted over the daily looming disputes between PW1 and DW1. DW1 refute all claims of the plaintiff and pray for same to be dismissed as she never defamed him but went to tell the public what was going on over with PW1. In essence she was justified of what she said because that is the truth. DW1 invited the court to dismiss the suit for want of evidence with costs.

Under cross examination by the plaintiff himself, DW1 stated that he is a neighbor to PW1 after her late father sold land to PW1. He built a house and moved in. DW1 went of testifying under cross examination that, since



PW1 moved to Ubungo, Msewe there are several disputes arising from the land in question.

On a further cross examination DW1 admitted going to Radio Tumaini for help and it worked since that then there were no more threats and conflict as PW1 moved to Mbezi. DW1 was shown exhibit P5 and admitted she was convicted and sentenced to serve six months' imprisonment but was quick to state that the said conviction was stemming from a fabricated case against herself and his family member. On further testimony DW1 stated that, she went to Tumaini Radio for help and not anything else.

It was a further evidence of DW1 that, there are other cases against herself which were fabricated so that they cannot claim their land.


One PHILOMENA DAMIAN, DW2 testified in chief that she is resident of Ubungo, Msewe and knows both PW1 and DW1. DW2 testified that PW1 and DW1 had long land dispute, which has caused lack of peace between the two. DW2 gave an example of an incidence that happened in 2013, when PW1 shot a bullet and the police came and he was there too.

When cross examined by PW1 he stated that on firing of bullet he was there and witnessed PW1 firing.



One FR. PAUL HAULE, DW3 testified and stated that he is the director of Radio Tumaini. According to DW3 it is true they have such program called 'DUKUDUKU' in which every person or institution can take DUKUDUKU for the purpose of looking for solution. DW3 stated that the "DUKUDUKU" program is an open coverage program. DW3 stated further that Radio Tumaini coverage is Dar es salaam and Coastal regions only. DW3 disputed that Radio Tumaini is covering the entire Tanzania and is on website.

DW3 stated further that what is in paragraph 10 and 11 are not words that was broadcasted in the radio. One cannot tell the missing words are what, DW3 insisted. DW3 further testified that, what was broadcasted was a land dispute which is there and the person who was speaking was entitled to that open forum for help through "DUKUDUKU" for that matter. DW3 denying the claims of the plaintiff stated that failure to bring the actual words spoken and recorded the action of defamation cannot stand at all. No contents were brought in court, DW3 insisted. DW3 disputed the claim of 240,000,000/= as being fabricated against the defendants. According to DW3 the plaintiff rushed to court before we look for him as the next day we were served with notice of intention to sue. Eventually DW3 prayed the suit to be dismissed with costs.



When cross examined by the learned counsel for the plaintiff, DW3 stated that PW1 intention was to come to court rather than seeking any amicable solution. The chain of events was leading nowhere other than to court. According to him, they apologized in the same program but before they do anything a summons was issued and served against them.

One GAUDENSIA HYERA, PW4 testified that he works with Tumaini media comprise of Radio, TV and newspaper. PW4 went on testifying that he was in work on 4-5 June 2013 when DW1 came to their radio and complain about the land dispute between PW1 and DW1. DW4 testified that on 03rd June 2013 was an introduction but the real program was broadcasted on 4th and 5th June 2013 where DW1 was complaining over land dispute and related matters between herself and PW1. The "DUKUDUKU" program was an open program where people get a platform making their complaints and normally is the society. According to DW4, the complaint can be against the government or an institution and that it is their duty to look for the other side and give a chance to reply on condition to comply with the broadcasting rules of not abusing or insulting the other side.

It was the evidence of DW4 that, what is averred in paragraphs 10 and 11 is not exactly what was broadcasted but words created by PW1. A tape



recorder could have exactly the words spoken. The plaintiff was duty bound to bring the tape recorder with the exact contents; this being an open and closed quotes with some words missing makes it doubtful and highly edited and same does not show reality, PW4 insisted. DW4 testified further that while waiting to look for the other part, they received a letter from PW1 advocates requiring them to make an apology and they did a general apology. DW4 prayed the suit to be dismissed with costs.

Under cross examination by the plaintiff, PW4 stated that broadcasting was done on two days and the first day was just an introduction. PW4 insisted that what is contained in paragraph 10 and 11 of the plaint is not what happened. PW4 stated that the whole complaint was about land dispute and the bad relationship between PW1 and DW1.

When asked why they never reply to the letter from the advocate he stated that things happened very quickly that they got court summons and everything was left for court to decide.

One EDITHER MAYEMBA, DW5 testified that she is a journalist working with Tumaini Radio as broadcaster and producer. DW5 denied to have defamed PW1 and challenged the contents of paragraph 10 and 11 of the



plaint and in exhibit P6 by stating that do not reflect the true contents of the program. PW5 further stated that what followed after the program was a demand letter and court summons to them and now here to testify and refutes all claims by the PW1. PW5 denied the Radio Tumaini was on line by 2013.

Under cross examination by PW1, PW5 when shown her signatures of the WSD and amended WSD she said are not her signatures. PW5 when asked if they contacted PW1 she stated that it was not possible in the circumstances as they got the demand letter immediately.

One MARTIN NICAS MANYA, DW6 testified that he is a small business man, and resident of Ubungo Msewe. DW6 is a neighbour to PW1 and he stated that they have had a long conflict with PW1 over land which he inherited from his mother. Testifying further DW6 stated that the plaintiff has been framing cases against them and harassing them together with someone by the name of Gerald Malima who shot him with a pistol, but fortunately he survived.

When cross examined by the plaintiff, DW6 avoided most of the questions and ended up saying I don't know and was repeating the conflict and was



not in the studio when broadcasting was aired. That was all about the parties' testimonies.

At the closure of the evidence, advocates for parties were given time to file their final written submission in support of their respective sides by 14/08/2018.

I commend the plaintiff and the learned counsel for defendants for their readiness to have this matter finished at a very short notice and time; and for their brilliant submission which will assist this court in making its findings. Keep up the spirit!

In his final written submission, the learned counsel for the first defendant, Mr. Dickson Mtogeseva started by attacking the competency of the instant suit as far as pecuniary jurisdiction is concerned, by submitting that a claim of expected earnings is in law a claim of general damages and not special damages. Next, the counsel submitted that the way plaint was drafted in particular paragraph 10 and 11 leaving some blanks space and failure by the plaintiff to tender sound recording to supplement them amounts to plaintiff failure to prove any actionable defamatory claim as against the



first defendant who was justified to air and complain a long or protracted land dispute she and her family had with the plaintiff and other neighbours.

Learned counsel cited the case of Harris Vs. Warren (1879) 4 CPC 125 in which it was held that ***"according to Bullen and Leak, in claim founded on defamation in the form of libel, the words must be set out verbatim in the statement of claim. It is not enough to set out their substance or effect" and "In all suit for libel the actual words complained of must be set out in the plaint. In libel and slander the very words complained of are the facts on which the action is grounded."***

The learned counsel further cited the case of Fatma Salim V. Maua Daftari, Civil Case No. 34 of 2008, HC (Unreported) which quoted the above holding to buttress his point. According to him the whole case for plaintiff ought to fail. He equally attacked the testimonies of the plaintiff witnesses and discredited them all that what they testified is not what was pleaded.

Conclusively, the learned counsel submitted that the first defendant was justified because the program was an open forum where and the plaintiff



admitted to have a conflict and some of the words complained of were true. And lastly, they invited the court to dismiss this suit with costs.

The learned counsel Mr. Senen Mponda for the second, third, fourth and fifth defendants in his written submission filed on 14th day of August 2018 submitted that, the instant suit is due to fail for failure to plead exactly what happened. Like the learned counsel for first defendant he extensively attacked the way the suit was pleaded and the testimonies of the witnesses for plaintiff and conclusively submitted that the plaintiff has failed to discharge his legal burden of proof to prove his case and briefly submitted on other issues by saying same were not proved at all and invited the court to dismiss this suit with costs.

On the other hand, the plaintiff in his written submission filed on 14th August, 2018 started by his claims, background of the matter, issues and concluded by reiterating his prayers as contained in the plaint. According to him the test is whether the words complained of would tend to lower the reputation of the plaintiff in the opinion of the right-thinking persons. The plaintiff cited the cases of Rugarabamu Archard Mwombeki V Charles Kizigha and three others [1984] TLR 350, Charles Makongoro Nyerere V. Mwananchi Communication Ltd and another, HC, (Unreported) Civil Case



No. 121 of 2008 and that of Grace Ndeana V. NBC Holding Corporation, Civil Appeal no 76 of 1999, (CAT) Unreported DSM to buttress his point that the words complained of in their natural meaning were words capable of bearing defamatory and were meant to mean that the plaintiff grabbed/swindled the first defendant land..., the plaintiff is cruel to the first defendant and her relatives, hence a dangerous criminal, unfit to be an advocate,..... and lastly that the plaintiff is preferring false charges against the first defendant and her relative and concluded that he proved his case and was entitled of the reliefs claimed. In essence, according to him, he discharged his duty to this case and is entitled to all reliefs claimed. That marked in brief the submission by learned counsel for parties, the plaintiff inclusive.

I have seriously taken into account the pleadings, both oral and documentary evidence tendered and the final submission for or against the instant suit, all of which in their totality will be the basis for determining this suit. Here and there, I will refer to them in the course of determining this appeal. Where I will not be able to refer them, does not mean I have not seen and appreciate the same.



Based on available evidence and submission by the learned counsel, this court is tasked to make findings on seven issues agreed and recorded by the court in its endeavors to determine this suit. I find apposite to start with the first issue namely: -

1. Whether the words complained of did bear or were capable of bearing any meaning defamatory of the plaintiff.

The plaintiff is legally bound to prove every allegation made before the court can make a finding in his favour. In considering whether the plaintiff in this suit discharged the onus of proof as to entitle him to the reliefs sought, regards is to the essential elements that must be proved to establish a case of defamation, in particular, slander which is generally not actionable per se.

There is no doubt that in defamatory suit, like the instant one, the plaintiff has to prove that the words complained of, conveyed a defamatory meaning to whom they were conveyed to, and were uttered by the defendants to third parties and that they conveyed a defamatory meaning to the third parties.



In the instant suit the words complained of by the plaintiff are in paragraph 10 and 11 of the amended plaint, which is a replica of paragraph 5 and 6 in exhibit P6, which were said to have been uttered by the first defendant, second defendant and third defendant for three consecutive days from 3rd - 5th day of June 2013 via Radio Tumaini, a Dar es salaam, a radio owned by the 5th defendant, who is sued vicariously for the acts of the second and third defendants. Both paragraph 10 and 11 of the amended plaint, which are replica to paragraph 5 and 6 of exhibit P6 are quotations of the words spoken but are full of dash dash (.....). Looking closely at the contents of the said quoted words with some words missing and the contents of exhibit P6, one cannot tell exactly what happened on the alleged broadcasting. The actual words broadcasted remains a mysterious in the court record. The plaintiff when cross examined by the counsel for the defendants replied that:-

“the court cannot know the words which were left out in the dash dash...”

On a further cross examination as to what exactly happened PW1 replied thus:-



“That at paragraph 10 of the amended plaintiff is a reproduction of the contents of paragraphs 5 and 6 of exh P6 “ it is true that this court has no the benefit of knowing what was broadcasted on 4th June 2013 and what was broadcasted on 4th and 5th June 2013 cannot be verified by documentary evidence but can be verified by oral evidence.”

From the above it can be said that it is the duty of the plaintiff to establish the defamatory words broadcasted by the defendants to the hearing of the third persons. The words so broadcasted must be the exact words as it were said or uttered by the defendants to the plaintiff. The fact that the plaintiff admitted that this court has no benefit of knowing exactly what was broadcasted on 4th and 5th June 2013, then in such clear admission this court cannot make a guess work to fish out from what transpired to a no existing source. In the instant case, the defendants denied to have defamed the plaintiff, therefore, for the court to rule out in favour of the plaintiff, the court must be satisfied with the evidence before it that the defendants defamed and actual words should be stated clearly. I have carefully considered the evidence of both sides on this issue. The evidence given by the plaintiff and his six witnesses show different alleged



defamatory words were broadcasted. For clarity will produce what the witnesses said in their evidence.

PW2 said he tuned his radio on at 9 hrs on 4th June 2013 and heard broadcasting from Radio Tumaini that **Hamza Byarushengo is a cone man and unfit person in the society, but all these was a hearsay on his part because these words were according to PW2, were words spoken by the neighbours.** But there is nowhere in the amended plaint and exhibit P6 where it is averred that the words "**Hamza Byarushengo is a cone man**" to be words spoken by the defendants.

PW3 who listened to the broadcasting did not tell the exact words uttered but testified that he did not signed the contract because he heard that Hamza Byarushengo was doing criminal events. Not even mentioning the events in the exact words said. But again in his letter PW3 wrote that he did not signed the contract because "**Hamza Byarushengo ni mhalifu aliyekubuhu.**" I have traversed the amended plaint and the quoted words allegedly said to be defamatory, but nowhere such serious allegation are found in the quoted words. This leaves a lot to be desired in this matter. No single witness, the plaintiff inclusive, was able to tell exactly what happened and the exact words spoken.

PW4 and P5 were of no help in this issue at all.

PW6 who listened of the broadcasting never said in precisely what transpired and the actual words and what he said differed greatly from what was pleaded.

From the testimonies of PW1- PW6 none stated exactly what was broadcasted. Their testimonies were unable to state the exact words spoken in the program. Their evidence differed. All these discrepancies in evidence and pleadings as to the actual words spoken becomes very material to the instant suit when one has to consider the veracity of the witnesses. The plaintiff had a legal duty of proving actual words used to defame him.

In this case I unhesitatingly hold that the actual words spoken or rather broadcasted were not proved. Without knowing the exact words with no subtraction or addition, this court is unable to say the words complained of are defamatory or not. In the absence of the exact words, the case for the plaintiff stands to fail on this issue and I hold that issue number one is answered in the negative for failure to prove the exact words said. This a



slander case not actionable per se. The plaintiff is duty bound to prove the actual words. He miserably failed on this issue.

The next issue for determination is whether the broadcasting by the 4th defendant, the words complained of was done maliciously.

From the pleadings and the totality of the evidence tendered there is no doubt that the malice dies a natural death in the instant case where the programme is an open live programme aired by the 4th defendant in which members of the public are free to air their opinions on individual matters or matters of public interests. In the case of MAIMAN MOIRO V. NAILEJIET KJ ZAIBON [1980] TLR 274 it was held that **“it would appear that the learned trial judge found malice on the basis that the allegations made by the appellant against the respondent had no foundation. In other words, they were false allegations. I am of the view that the learned judge misdirected himself in law in finding malice on the basis of the falsehood of the allegation. Falsehood is one of the factors which constitute the act of defamation but is not per se a factor which constitute malice.”**



In the instant suit, no evidence was led to establish malice on the part of the 4th defendant. The "DUKUDUKU" program was a live program that was aired publically and same was not intended against plaintiff alone. In the above case of MOIRO (Supra) it was held that **"where a person is under moral or social duty to make a certain statement which appear to be defamatory, the defense of qualified privilege would be available provided such statement are made without malice."**

Guided by the above holding of the Court of Appeal of Tanzania and given the circumstances which the alleged broadcasting was done I am inclined to hold that what was broadcasted by the 4th respondent through the first defendant in the instant suit were comments that appear to have been made in a privileged occasion. Therefore, benefiting the two defendants, and such, answering issue number two and seven which both are answered in the negative. A privileged occasion arises where the defendant has an interest in making the communication to third parties and the third parties have a corresponding interest in receiving it as rightly held in the case of HS MONGATI V. B. SHARN (1968) HCD 167. The famous "DUKUDUKU" program is a privileged occasion that people can air their issues. The plaintiff in the instant suit has utterly failed to lead evidence



that the said broadcasting was tainted with malice by the first defendant and the 4th defendants for that matter.

What the plaintiff alleged and testified was that some of the words said were false and not true. This was not enough on his part. This issue stands to fail too.

The next issue is for consideration is whether the retainer agreement between Hamza Byarushengo Advocate and Six PK General Traders signed by Hamza Byarushengo on 31st day of May 2013 was so signed for genuine business transaction. To prove this issue, the plaintiff called PW3, PW5 and tendered exhibit P4 and alleged that by not signing this contract, he lost expected income of Tsh 240,000,000/= . The defendant disputed the genuineness of the preparation of the said contract and the issue of defamation. This has prompted this court to revisit the pleadings and the evidence tendered by the plaintiff in respect of this issue. There is no gainsaying that the evidence tendered in respect of this issue and the pleadings are at variance. In the first paragraph of the amended plaint the plaintiff pleaded that he is a natural person residing and working for again in Dar es Salaam as businessman and an advocate of the High Court and subordinate courts thereto. There is no single paragraph in the amended



plaint where the plaintiff averred expressly or that by necessary implication his business of advocacy and spare parts were defamed in anyway hence affected. The plaintiff did not plead that he trade in the names Byarushengo and Company Advocates or Rwelu Used Spare Parts. In other words, the plaintiff's plaint is silent as to his business being affected in anyway. So, the claims of the plaintiff on such claims are far remote in the circumstances of this suit. The averments in paragraph 1 of the plaint could only assist in the assessment of the general damages and the status of the plaintiff but same cannot be the basis of the claim without being pleaded. The plaintiff businesses in the alleged but disputed words are nowhere mentioned and in that vein I find them too remote to be connected to this claim. Had the plaintiff sued in his name and pleaded that trading as Byarushengo and Co Advocates or Rwelu Used Spare Parts that could be a different thing altogether. In the absence of such clear wording in the plaint, I find this pieces of evidence with due respect to the plaintiff misplaced in the circumstances of this case. Order XXIX of the CPC is clear how to institute suits by firms and persons carrying on business in names other than their own. In this suit, the evidence tendered namely exhibits P4, has no bearing with what was pleaded. In other words, the



pleadings and the exhibits are at variance. This is fatal to the case of the plaintiff as parties are bound by their pleadings.

However, PW3 in his letter dated 12/06/2013 stated clearly in his letter that they are declining to sign the contract because from what they heard in Radio Tumaini on 4th and 5th is that wakili Byarushengo is a cronic offender. (Au kwa Kiswahili ni kuwa tunapenda kukiri kwamba mkataba pamoja na nakala zake mlizotutumia tulizipata. Ila hatukuzisaini kutokana na taarifa tulizosikia tarehe 04 na 05 Juni 2013, kupitia Radio Tumaini kwamba wakili Byaushengo ni mhalifu aliyekubuhu). This piece of contents in the alleged letter is nowhere in the pleadings and the testimony of PW3. PW3 when testifying in chief he categorically said I quote him verbatim: -

“ I wrote a letter to advocate Hamza Byarushengo informing him I will not sign the contract until when I get sufficient clarification about the allegations about what I heard against him in the said radio” (Epmhasis supplied)

This piece of evidence materially contradicts what is in the letter. In the letter, there is nowhere he said he wanted clarification at all, but he raised another content of the words allegedly broadcasted that wakili



Byarushengo ni **Mhalifu aliyekubuhu**. The pleadings do not support this version that wakili Byarushengo ni mhalifu aliyekubuhu.

Therefore, I hold that this contract was inadvertently admitted in evidence and I decline to rely on it anymore. In the circumstances, I hold that this contract was prepared and signed without genuine motive in the circumstances. Having so hold, issue number 3, issue number 4 without much ado naturally and miserably stand to fail as well.

Finally, that said and done and for the reasons given above, I hold that the plaintiff utterly failed to prove his case and same is hereby dismissed with costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "S.M. Magoiga". The signature is stylized and spans across the text area.

S.M.MAGOIGA

JUDGE

31/08/2018