

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA**

HC. CIVIL APPEAL NO. 01 OF 2020

(Originating from Civil Case No 03/2019 of Sengerema District Court at Sengerema)

NATIONAL MICROFINCE BANK PLC ----- APPELLANT

VERSUS

SARAH RICHARD HAMZA ----- RESPONDENT

JUDGMENT

08th June & 25th August, 2020

TIGANGA, J

The Respondent Sarah Richard Hamza, was the plaintiff before Sengerema District Court in Civil Case No. 03/2019 in which she sued the appellant, National Microfinance Bank PLC, hereinafter referred to as NMB, who was the defendant before that Court. She claimed Tshs. 190,000,000/= being the general damages arising from the defendant's act of publishing illegal and wrong information against her.

The background of the dispute between the parties are that, the respondent was a former employee of the appellant as Bank Teller at Sengerema from 19th day of September 2006 up to 22/09/2015 when she was terminated for gross misconduct. The alleged misconduct was that the respondent solicited/demanded for bribes/kickbacks through her M pesa



account from a loan customer before or after disbursing the loan money to the customer.

That resulted into the appellant accusing her and used her M pesa information without her consent the act which infringed the plaintiff's right to privacy. It was also a complaint that that information was obtained without following the proper procedure as required by law. At first, the respondent sued Vodacom to have un procedurally supplied his M - pesa information without following proper procedure, but Vodacom denied to have supplied the said information to NMB and insisted to have complied with the law.

Thereafter the respondent complained to TCRA against Vodacom where she was advised to find legal redress in the court of law as the same complaint raised was of criminal nature.

She complained that the use of such information by the appellant made her to suffer financial loss of Tshs. 190,000,000/= and that her reputation has been adversely affected. That her family, former employee and other right thinking members of the society are shunning away from her and treat her as a thief, unreliable and a corrupt person. Before the trial court the respondent prayed for compensation of general damage to be assessed by the court, the costs of the suit and any other order or and relief as this court may deem fit and just to grant.

After full trial, the respondent was found to have proved her claim, and she was consequently awarded Tshs. 190,000,000/= as compensation *"though that is not as sufficient as the same was expecting to earn at the*

end of the day when she retires, but it suffice to award that amount as regarding the pecuniary Jurisdiction of the trial court". The appellant was also ordered to bear the costs of the case.

Aggrieved by the judgment and decree of the trial court, the appellant appealed to this court. Through Mr. Joseph Kinango learned counsel he filed a total of seven grounds of appeal which for easy reference they are hereby reproduced as follows;-

- i. That the trial magistrate erred in law and facts for deciding points of preliminary objection in the judgment while the same were already raised and decided by the same court.
- ii. That the trial court erred in law and facts by holding the amount of Tshs. 190,000,000/=, the general damages claimed is within the court's jurisdiction.
- iii. That the trial court erred in law for trying a suit which is time barred.
- iv. That the trial court erred in law and facts for trying a suit which is constructively *res judicata* to Labour Dispute No. CMA/MZA/SENG/385/2015.
- v. That the trial court erred in law and facts for trying a suit which is founded on contract of employment which the trial court lacks jurisdiction to entertain.
- vi. That the trial court erred in law and facts for holding that the claim for defamation was established within the standard of the law.
- vii. The trial Magistrate erred in law and facts for deciding issue number 2 and 3 in a manner which denotes that the court was deciding a

claim of unfair termination which is within the jurisdiction of the trial court.

The appellant prayed the appeal to be allowed, the judgment be quashed and set aside. It also prayed for the costs of the appeal and the proceedings of the court bellow, and any other reliefs that this honourable court may deem fit and just to grant.

After being served with the memorandum of appeal, the respondent filed reply to the Memorandum of Appeal. While responding to the first ground of appeal he submitted that a mere mentioning of the point of objection in the judgment did not affect the content of the judgment. That in respect to the second ground of appeal, he submitted that the amount of Tshs. 190,000,000/= is within the jurisdiction of the trial court.

Responding on the third ground of appeal, he said the matter was filed within time, while responding on the fourth ground of appeal, that the case is founded on a tort not on employment contract. Therefore the trial court had the jurisdiction to entertain the case. Regarding the content of the sixth ground, he said the evidence adduced proved the claim of defamation. While regarding the ground number seven, she said the judgment does not shoe that the trial court decided on unfair termination.

By the leave of the court, this appeal was argued by way of written submissions, which were filed according to the schedule. On the first ground of appeal, the submission in chief is to the effect that Civil Case No. 03/2019 before the District Court of Sengerema was time bared. Submitting on that point, Mr. Paschal Kamala, counsel for the appellant

submitted that, the position of the law is that tortious claims should be instituted within three years from the date when the action arose as to per section 3 (1) read together with the first schedule, part one, item 6 of the Law of Limitation Act [Cap 89 Re 2019].

He submitted that Civil Case No. 03/2019 was filed before the District Court of Sengerema on 04/03/2019, while the claim for defamation arose on 22nd September 2015. The suit was filed almost four years from the time when the cause of action arose.

He also submitted that, that fact was admitted by the respondent in the proceedings, at page 22 that the suit was filed after four years. He also submitted that, Order XXIII, Rule 2 of the Law of Limitation Act (Supra) sic provides that the matter withdrawn with leave to refile is subject to the law of limitation guiding the respective claim as to when it arose. He also submitted that, the fact that there was Civil Case No. 09/2018 filed on 01/08/2018 alleging defamation against the appellant which was withdrawn on 27/02/2019 with leave to refile, cannot save Civil Case No. 03/2019 from being time barred. He referred to the case of **Yusuph Same and Another Vs Hadija Yusuph** [1996] TLR 347 (HC), which held *inter alia*, that it was immaterial that the same was set up as a defence.

On the second ground of appeal, that the suit was constructively *res judicata* to Labour Dispute No. CMA/MZ/SENG/385/2015, he submitted that the argument and the decision of the trial court went as far as establishing what she would be getting or earning had she not been terminated, it was as if the trial magistrate was determining the issue of unfair termination

which was the subject in the above referred labour dispute, which was decided by the CMA and a subsequent revision which was decided in the favour of the respondent.

On the 3rd ground of appeal that, the trial court had no jurisdiction for entertaining the suit founded on contract of employment without jurisdiction. He submitted that, the cause of action arose from purely employment relationship between the appellant and the respondent.

He submitted that the jurisdiction to entertain the matter of this nature is vested in the Commission for Mediation and Arbitration as provided by the Employment and Labour Relations Act as amended by the written law Miscellaneous Amendment Act, Act No. 08/2006, which gave a broader interpretation of the term dispute. He cited section 88 (1) (b) (ii) of the said law which really vested the CMA with jurisdiction to entertain and determine all labour related disputes including contract and related tortious liability arising from the labour disputes. In support of that position, he cited the case of **Anne Mushi vs Vodacom Tanzania Limited**, Civil Case No. 92 of 2010, which held among others that the High Court Labour Division has exclusive jurisdiction in all matters related to labour disputes, including the tortious liabilities arising from the employment or labour relationship. In so doing he relied on section 51 and section 94 (1) (d) of the Employment and Labour Relations Act 2004, as amended by Act No. 08/2006 and section 51 of the Labour Institutions Act as amended by Act No. 08/2006. In buttress of that point, he submitted that, the matter was filed on a wrong forum.

On the fourth ground of appeal which is that, the defamation was not established within the standard of the law. On that, he submitted that in law, for defamation to be established, it must be proved that (i) The defendant made a false and defamatory statement concerning the plaintiff, (ii) that he made it to a third party while knowing that it was false, (iii) that the publisher acted at least negligently in publishing the communication. He submitted that from the evidence on record which was relied upon by the trial court, the respondent testified that the appellant used her M - pesa statement of her phone number, without her consent causing her to lose her employment.

While the appellant testified that the information was from the whistle blower and the appellant officer used it in the course of investigating and interrogating the respondent, and thereafter in the disciplinary action against the respondent and not otherwise. He said the appellant received the information under authority of being the employer of the respondent and acted on the said information in the process of conducting disciplinary proceedings against the respondent not otherwise.

He said the appellant had legal privilege of receiving the information for the purposes of determining reasons for termination of the employment of the respondent. According to him, in the circumstances of this case, the tort of defamation cannot stand as it was held in the case of **Amos Jonathan vs J. S. Masuka & Others** [1983] TLR 201 (HC) where it was held *inter alia* that,

7. 

"Qualified privilege covers the publication of defamatory matter by a person who has a legal, social and moral duty to publish and the recipient has a legal, social and moral duty to receive the publication."

He also cited the case of **East Africa Standard vs Gittan**, [1977] E. A 678, where it was held by spry, Ag J, (as he then was) that;

"The test of what is defamatory is whether the word complained of would tend to lower the reputation of the plaintiff in the opinion of the right thinking persons, and one could look at the general impression they are likely to create in the mind of the reasonable persons."

He submitted in the end that, the respondent admitted not to know the person who took the M-pesa statement from Vodacom to NMB and she admitted that the M -pesa statement contained the correct information, and that the M-pesa statement does not speak anything of persons reputation. Since the statement is alleged to contain the true information which has not been published by the appellant, he concluded that the appellant has no liability as the respondent cannot be defamed by numerical figures of transaction in the M - pesa statement which contained true and fact transactions.

He prayed the appeal to be allowed, the judgment of the lower court be quashed and set aside, with the costs of appeal and the proceedings before the court bellow. The respondent filed reply to the submission in chief, in which she agreed that the cause of action arose in 2015, but the

suit was filed in 2018 before the expiry of three years. However, it was withdrawn on 27/02/2019 with leave to refile. Soon thereafter, on 04/03/2019 Civil Case No. 03/2019 was filed. She submitted that since this period was spent by the respondent prosecuting the suit in the court of law the said period must be excluded as provided under section 21 (1) of the Law of Limitation Act [Cap 89 RE 2019].

In respect of ground number two, it was submitted that the suit before the trial court was not constructively *res judicata* as it is a completely different case from Labour Dispute No. CMA MZ/SENG/385/2015. She admitted that the dispute arose from work environment; however the present one is defamation triable by ordinary courts, not otherwise.

She submitted that, Act No. 08 of 2006 which amended both the Employment and Labour Relations Act No. 6/2004 and the Labour Institutions Act, did not exclude the jurisdiction of the ordinary court, but it included the High Court Labour Division to try claims based on tort.

She submitted that the *res judicata* as it is known under section 9 Civil Procedure Code [Cap 33 RE 2019] requires cases to be between the same parties, to concern the same subject matter, and parties must be litigating under the same title.

He submitted that these were different matters whatsoever, as before the CMA the claim based on unfair termination, while before Sengerema District Court the claim stems from a tort of defamation, arising

from illegal possession of M-pesa statement of the respondent by the appellant. Therefore the two actions are different and distinct.

Responding to the 3rd ground of appeal, she submitted that, although she agrees that, what transpired leading to the claim was in a working relationship, but the acts leading to the claim was defamatory in character therefore triable by ordinary courts. She insisted that the amendment introduced by Act No. 08/2006 did not exclude the ordinary court from trying suits based on torts.

In respect of the last ground of appeal, that defamation was not established within the standard of law, she submitted that the allegations are not correct as the element of defamation were proved. She insisted that it was on record that the appellant used the respondent's M-pesa statement information without her consent and without following procedure as required by law, involving her in corrupt transactions, used the statement to mount investigation and due to that investigation the respondent was terminated from her employment. She said the statement did not express who was the client from whom the respondent solicited the bribe. She submitted that the act done constituted defamatory element as correctly held in the case of **Archard Mwombeki Vs Charles Kizigha & three others**, [1985] T.L.R 59, as the statement was false and published to the third party.

She is also in her submission at one, with the decision of **PM. Johnathan Vs Athuman Khalfan** (1980) TLR.175. She submitted further that, the respondent was the employee of the appellant, since its act was

false and malicious, it constituted defamation. It is also not proper that the appellant was justified to do so because it was her employer. In **P.M Jonathan Vs Athuman Halfan** (supra), it was held that qualified privilege can only be called in when the occasion is used honestly and without malicious motives. She submitted that, in this case the act done by the appellant's officer was not honest, as the allegations were false and unjustified. She lastly submitted that the case of **East African standard Vs Gittan** (1970) E. A 678 is very much in her support. She submitted that, she has been adversely affected as she has been being looked upon by her current and former fellow employee as a corrupt person that is why she was terminated from employment. She submitted that all these justified her entitlement to damages to her loss of employment, tarnishing her image and reputation. She asked the appeal to be dismissed with costs.

In rejoinder, the counsel for the appellant, insisted that the suit was instituted out of time, and therefore since the former one which was instituted in time was withdrawn at the respondents own volition the same cannot be saved by section 21 (1) of the law of Limitation Act (supra) as it is bound by the condition stipulated under Order XXIII Rule 2 of the CPC Cap 33 (supra) which provides that after withdraw, refileing must be subject to the law of limitation.

Rejoining in respect of the second ground of *res judicata*, he submitted that the respondent was not correct to equate the matter at hand with the provision of section 9 of the Civil Procedure Code, as what the appellant counsel submitted is that the matter is not *re judicata* but

constructively *res judicata* as held in the case of **The State of UP, vs Nawab Hussain AIR**, (1977) SC 1680, and since the respondent admits the dispute to arise from an employment relationship, it cannot be distinguished with labour dispute No. CMA/MZ/SENG/385/2015.

He also submitted that the allegations that the ordinary court and the High Court Labour Division have concurrent original jurisdiction has no merits as section 51 (1) of the Labour Institution Act [Cap 300 RE 2019] gives exclusive jurisdiction to the High Court Labour Division over labour matters.

He submitted that the authorities in **Amos Jonathan vs J. S. Masuka & Others** (1983) TLR where it was held *inter alia* that employers cannot be held liable for defamation when exercising the it disciplinary authorities applies.

He submitted that the case of **Archard Mwombeki vs Charles Kiziga** (supra) is distinguishable in this case, and there is no evidence to prove that the statement was published to unauthorized persons. He also submitted that the authority in the case of **P.M. Jonathan vs Athuman Khalifan** (supra) as the respondent has not managed to establish on series of statement which could defame her. He also submitted that the principles for the defamation to stand have not been established. He in the end asked for the appeal to be allowed with costs.

After having extensively summarised the contents of the submissions filed by the parties, I feel indebted to say a word or two commenting on

the job done by the counsel in their well researched submissions. Their submissions have assisted this court to deliberate on the issues at hand.

Considering the grounds of appeal and the submissions by parties, for the reason to be revealed in the course of this judgment, I will start with the 3rd ground of Appeal which raises a complaint that the court entertained the matter before it without jurisdiction. In that ground, the appellant has capitalised under the provision of section 88 (1) (b) (ii) and (iii) as amended by Act No. 08/2006, which provides as follow.

"For the purpose of this section a dispute means;

(a) A complaint over.

*(ii) Any other contravention of this Act or any other Labour law, or breach of contract or any employment or Labour **Matter falling under common law, tortious liability and vicarious liability in which the amount claimed is below the pecuniary jurisdictions of the High Court** (Emphasis added)*

These provisions are under part VIII of the Act providing for dispute resolution, under sub part B which provides for the type of dispute which needs to be resolved by arbitration. This means, any dispute arising from the employment relationship be it the breach of the contract, or tortious liability provided, the same is arising from the employment relationship, with the amount claimed which is below the pecuniary jurisdiction of the High Court (Labour Division) or which has been referred to the CMA by HC

under 94 (3) (a) (ii) it is entertainable by the Commission for Mediation and Arbitration by way of arbitration proceedings.

Mr. Kamala also asked this court to make reference to the provision of section 51 of the Labour Institutions Act which also provides as follows;-

Section 51

*"subject to the constitution and labour laws, the Labour Court has exclusive civil jurisdiction over any matter reserved for its decision by labour laws and any employment matter falling under common law, **tortious liability**, vicarious liability or breach of contract within the pecuniary jurisdiction of the High Court". [Emphasis added]*

From their wordings and phraseology, these provisions are the same, but providing for exclusive jurisdictions of different labour institutions for resolving labour disputes. While section 88 (1) (b) (iii) of the Employment and Labour Relations Act No. 6/2004 as amended by Act, No. 8/2006 provides for the exclusive jurisdiction of the arbitration by the Commission for Mediation and Arbitration in the matter specified under that provision, section 51 of the Labour Institutions Act No. 7/2004 as amended by Act No 8/2006 provides for exclusive jurisdiction to the High Court in the matters provided under that section.

The Respondent, while admitting that the law section 88 of the Employment and Labour Relations Act read together with section 51 of the Labour Institutions Act, both as amended by Act No. 08/2006, provides the

CMA and Labour Court with powers over tortious liability arising from employment relationship, she however argued that, that did not take away the jurisdiction over the same matter from the ordinary court.

Now the issue is whether the provision of section 88 of the ELRA, and section 51 of Labour Institutions Act, (supra) both as amended by Act No. 8/2006 left some residue powers to the ordinary court to entertain and determine the tortious liability of the employer against employee arising in the course of the employee's employment. It is the law that the jurisdiction of any court is a creature either of the constitution or the statute.

The jurisdiction of Labour Court is provided under part VIII, sub part C of the Employment and Labour Relations Act (supra) under the subtitle called "Adjudication". Under section 94 (1), the law provides that,

*"Subject to the constitution of the United Republic of Tanzania, 1977, the Labour Court shall have **exclusive jurisdiction over the application interpretation and implementation of the provision of this act over any employment or labour matter falling under common law tortuous liability, vicarious liability or breach of contract within pecuniary jurisdiction of the High Court and to decide***

(3) Where a party refers a dispute to the Labour Court, the Court may;

(a) if it is a dispute that is required to be referred to the Labour Court in terms of this Act

- (i) decide the dispute or*
 - (ii) refer the dispute to the commission to be decided by arbitration.*
- (b) if it is the complaint that is required to be referred to arbitration*
 - (i) refer the complaint to the commission for it to be dealt with under section 88.** (Emphasis supplied).*

From the wording of this section, I also agree with my sister Hon. Massengi, J, in the case of **Anne Mushi and Seven others vs Vodacom Tanzania Limited** (supra) that the Labour Court, and the Commission for Mediation and Arbitration under section 88 & 94 of ELRA as well as section 51 of the Labour Institutions Act, (supra), have exclusive jurisdiction to entertain and determine all matters provided under the Employment and Labour Relation Act including all matters of tortious nature arising out of the employment relationship, between the parties. This matter would have been filed either with the Commission for Mediation and Arbitration or the High Court Labour Division, which on its wisdom would have referred the matter to the commission under section 94 (3) (b) (i) to be dealt with under section 88 of the same Act.

From these provisions, the Labour Laws left no any residue powers to the ordinary court as suggested by the respondent.

In the fine, it is safe to conclude that the trial District court did in the first place, act without jurisdiction. That being the position, I am justified to

quash and nullify the proceedings and set aside the judgment and decree of the trial District Court for the reason given.

Now as this ground has disposed of the appeal, it will be an academic exercise to venture into dealing with the rest of the grounds, especially after I have found that the court had no jurisdiction, meaning that, what went on was nothing but a nullity. I thus allow the appeal; nullify the proceedings and the judgment of the trial District Court. Since the error was committed by the court to entertain the case without jurisdiction, no order as to cost is made.

It is so ordered.

DATED at MWANZA on this 25th day of August 2020

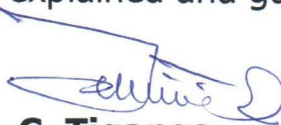


J. C. Tiganga

Judge

25/08/2020

Judgment delivered in open chambers in the presence of the parties' representatives. Right of appeal explained and guaranteed.



J. C. Tiganga

Judge

25/08/2020