**Lipumba v Mzee**

**Division:** Court of Appeal of Tanzania at Zanzibar

**Date of judgment:** 4 December 2003

**Case Number:** 92/98

**Before:** Mroso, Munuo and Nsekela JJA

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**Summarised by:** A Mwanzia

*[1] Damages – Slander – Power of appellate court to review award of damages – Whether trial Judge*

*applied wrong principle or misapprehended facts to make wholly erroneous estimate – Whether general*

*damages flow from wrong complained of.*

*[2] Slander – Actionable* per se *– Slanderous words imputing commission of crime – Whether necessary*

*to prove special damages – Fair comment – Whether party must plead facts upon which defence of fair*

*comment predicated.*

**JUDGMENT**

**Mroso, Munuo and Nsekela JJA:** The Respondent, Zuberi Juma Mzee, at the material time was the

Chairman of the Electoral Commission of Zanzibar. He claimed that the Appellant, Professor Ibrahim

Haruna Lipumba had at a public rally at Tibirizi, Chake Chake, Pemba, uttered the following words:

“*Kama kumpandisha cheo kuwa katibu mkuu ofisi ya raisi, Mjumbe mmoja wa Tume ya Uchaguzi siyo*

*rushea tuiite kitu gani au Mwenyakiti wa Tume ya Uchaguzi ya Zanzibar kununua nyumba kwa zaidi ya TShs*

*milioni 60 mara tu baada ya uchaguzi haikutokana na rushwa ni nini?*” (Emphasis supplied.)

The Respondent claimed that these words spoken by the Appellant were defamatory and referred to him since he was the Chairman of the Electoral Commission of Zanzibar and that in their natural and ordinary meaning they meant and were understood to mean that the Respondent was a corrupt person who was bribed and so bought a house worth over TShs 60 million soon after announcing the election results. The Respondent claimed, *inter alia*, TShs 100 million as general damages from each of the four Defendants. The Second, Third and Fourth Defendants were the Editor of *Majira* newspaper, the General Manager, Business Times Limited and the General Manager, Business Printers Limited respectively. After due consideration and analysis of the evidence, the trial Judge (Kannonyele J) held that the Respondent had been defamed and ordered that each of the four Defendants should pay TShs 30 million as general damages. The Appellant was aggrieved by this decision hence the appeal to this Court. At the hearing of the appeal, Dr *Tenga*, learned advocate, represented the Appellant and Mr *Kashuumbugu*, learned advocate, represented the Respondent. Dr *Tenga* raised three grounds of appeal, namely:

“1. That the Learned trial Judge erred in law and in fact in failing to appreciate the distinction between libel and slander.

2. That the Learned trial Judge erred on law and in fact, in holding the Appellant equally liable as the rest of the Defendants therein as if the standards of proof for the alleged wrongs are equal and the same.

3. That the Learned trial Judge erred in law and in fact in awarding such a huge sum of money as damages to the Respondent while the evidence adduced did not prove any special damages to the Respondent/Plaintiff”. The first ground of appeal need not detain us for it is clearly baseless. The trial Judge was well aware of the distinction between libel and slander. In the course of his judgment, the trial Judge referred to, *inter alia*, *A Dictionary of Modern Legal Usage* (2 ed) 1995 by Bivam A Garner at page 527 where it is stated thus: “In popular usage the terms libel and slander are synonymous, meaning a deliberate, untrue, derogatory statement, usually about a person, whether in writing or orally. In legal usage there are important differences. Each is an untrue and defamatory imputation made by one person about another which, if published (that is communicated to a third person), can be a ground for a civil action in damages. Such imputation is a libel if made in a permanent form (writing, pictures) or by broadcasting. It is slander if made in a fugitive form (for example by speaking or gestures). A further distinction is that an action for slander cannot ordinarily succeed without proof of actual damage has been caused; in an action for libel this is unnecessary”. A slander is a false and defamatory statement by spoken words or gestures which tend to injure the reputation of another. The Respondent complained that the words spoken by the Appellant at Tibirizi, Chake Chake, were slanderous. The trial Judge discussed this matter and found that the spoken words imputed the commission of a crime and so were actionable *per se*. In other words, there was no need for the Respondent to prove special damages. The complaint by the Respondent against the Appellant was based on the spoken words. It is therefore totally unfounded for Dr *Tenga* to fault the trial Judge on this ground. We now turn our attention to the second and third grounds of appeal which were argued together. Dr *Tenga* submitted that the theme of the spoken words complained of was to brief the party faithful (CUF) that the elections in Zanzibar had been rigged and as a result their presidential candidate had lost the election. He added that the Appellant appealed to President Mkapa to fight corruption which was rampant in the country. Due to corruption some members of the Electoral Commission had benefited by rigging the elections. This is what the Appellant stated in his evidence: “At the meeting I was commenting if it was not out of corruption proceeds with which the chairman could have bought such a house as alleged. Actually I was pausing a question in view of the widespread news about the Chairman of the Zanzibar Electoral Commission purchase an expensive house immediately after the elections”. When cross-examined by Mr *Kashuumbugu*, the Appellant did not mince his words: He stated as follows: “I still contend that the news in Unguja and Pemba after the elections up to the date I made the speech at the rally in Pemba that the Chairman of the Zanzibar Electoral Commission bought a 60 m house after the elections are true. In other words, I still contend that the news in Unguja and Pemba that the Chairman of the Electoral Commission had bought an expensive house estimated at about TShs 60 m or more were true notwithstanding that I made no research to verify the news, as I usually don’t on such matters. *I still contend that the chairman of the Zanzibar Electoral Commission was corrupted or bribed in order to rig the Presidential Election results of 1995*” (emphasis supplied). Mr *Kashuumbugu*, on his part, submitted that the words spoken by the Appellant imputed that the Respondent had purchased a house by corrupt means, which was a criminal offence. This allegation was repeated by the Appellant while testifying on oath and the Appellant did not feel any need to recant or verify the accuracy of those allegations. The learned advocate added that these words were false utterances and the mere fact that they were made at a public rally was not a defence at all. There is no dispute at all that the Appellant spoke those words at Tibirizi. He did not make any attempt to disown them. In fact he reiterated his belief in what he had said. The spoken words clearly referred to the Respondent. In this respect there was a lame attempt to suggest that the Respondent was not the target of those words. Like the trial Judge, we are not persuaded in the least that the Respondent was not the person being referred to. It is evident from the testimony of the Appellant himself, DW2, Said Miraji Adballa and DW3, Ayoub Bakari Hamadi that the Respondent soon after the election, through corrupt means/bribery was able to purchase a house well beyond his legitimate financial resources. The Appellant was not able to substantiate his allegations which were apparently founded upon rumours. Dr *Tenga*, however, forcefully argued that the words uttered were in the realm of politics and therefore protected as fair comment on a matter of public interest. It was a political discussion on an important national issue, namely, corruption. It is trite law that the defence of fair comment is concerned with the protection of comment. The Appellant had to plead the facts upon which the comment was based and the facts must have been in existence. The trial Judge found that the spoken words were statements of fact which were false. With respect, we concur with this finding. The Appellant himself without shame testified that he did not bother to do any homework to substantiate the accuracy or otherwise of the rumours he had heard and which formed the foundation of the defamatory words. The “real sting of the matter” or “the real pith and marrow” was the statement that the Respondent had soon after the elections purchased a house worth over TShs 60 million by corrupt means. This was an imputation that the Respondent had committed a criminal offence. Corruption is a serious matter and coming from a national leader of a political party and a Professor of Economics, it was bound to have an impact upon those who heard or read the article in *Majira* newspaper. Admittedly, corruption both in the public service and the private sector should not be condoned but this was not a licence for the Appellant to fabricate lies under the pretext of fair comment on a matter of public interest. With the greatest respect to the Appellant, we deprecate such behaviour. We expect our leaders both in government and in politics to have respect for the truth. We wish to respectfully associate ourselves with the observations made by Lord Nicholls in *Reynolds v Times Newspapers* [2000] 2 LRC 750 where he stated at page 760: “Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one’s reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely”. On our part, we do not entertain any doubts whatsoever that the words spoken by the Appellant at Tibirizi were slanderous; were untrue in substance and in fact; they clearly referred to the Respondent and imputed that he had committed a criminal offence. Under the circumstances, there was no need of proof of special damages as Dr *Tenga* had argued. The defence of fair comment therefore collapses. We now proceed on to consider and determine the complaint against what Dr *Tenga* termed as “a huge sum of money awarded as damages” to the Respondent. The trial Judge considered at some length the question of damages and awarded as general damages, TShs 30 million from each Defendant. Dr *Tenga* submitted that the case against the Appellant was based on slander, but in the assessment of damages, the Appellant was lumped together with the other three Defendants whose liability was based on libel. More specifically, Dr *Tenga* faulted the trial Judge for basing his assessment of damages on unpleaded matters, namely punitive or exemplary damages. He submitted that the quantum of damages be reviewed downwards to TShs 1 million, which in his view, would meet the justice of the case. For the Respondent Mr *Kashuumbungu* submitted that the essence of the suit was the words spoken by the Appellant at Tibirizi which imputed the commission of a criminal offence. This was actionable *per se* without proof of special damages. He added that the trial Judge took into account several factors, including the amount claimed in the plaint; the conduct of the Appellant in refusing to tender an apology; and the reputation and standing of the Respondent in society. What then are the general principles that should guide a court in assessing damages in defamation cases? We have sought inspiration from the case of *John v MGN Limited* [1996] 2 All ER 35 at page 47 wherein Sir Thomas Bingham MR had this to say: “The successful Plaintiff in a defamation action is entitled to recover as general compensatory damages, such sum as will compensate him for the damage to his reputation; vindicate for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the Plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and he core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful litigant may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the Defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the Defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place”. There is no evidence on the record on the extent of the circulation of the *Majira* newspaper in Unguja and Pemba or Tanzania Mainland for that matter. We do not know as well whether or not this newspaper has a website in this age of information and technology. The estimated number of people who attended the public rally is also unknown. The inevitable conclusion is that the circulation of the defamatory words was very limited indeed. The trial Judge mentioned the fact that the Appellant did not make an apology and this was indicative of malice. In the pleadings however, the Respondent did not demand an apology from the Appellant and therefore it was not right for the trial Judge to make adverse inferences against the Appellant for not tendering an apology or as a factor to award punitive or exemplary damages. Another factor which featured prominently in the assessment of damages was the protection of the Respondent’s reputation. We respectfully agree that person’s reputation should not be savaged without justification. PW2, Musa Juma, the only witness for the Respondent, stated: “We meet with the Plaintiff casually as a friend and to date I respect him the article in the *Majira* notwithstanding. No doubt however, the article has the effect of lowering the Plaintiff’s estimation in society. *To the best of my knowledge, the article has not adversely affected the Plaintiff in any manner*” (emphasis supplied). From the Respondent’s own witness, the injury to the Respondent’s reputation was minimal. On the other hand, we have taken note, with despair we must add, that the defamatory words were spoken by a prominent politician and distinguished academic but who unfortunately had no respect for the truthfulness of what he said concerning the Respondent, a distinguished public figure in his own right. The power of the Court to review awards of damages on the ground either that they are too high or too low is limited. It must be shown that the trial Judge arrived at his figure by applying a wrong principle or through a misapprehension of facts of for some other reason to have made a wholly erroneous estimate of the damage suffered. (See: *Associated Newspapers Ltd v Dingle* [1962] 2 All ER 737 at page 743.) It would appear to us that the trial Judge was unduly influenced by the staggering claim of TShs 100 million from each of the Defendants as general damages made by the Respondent. We would like to point out that the law presumes general damages to flow from the wrong complained of and need not be specially pleaded. In the words of Lord Dunedin in *Admiralty Commissioner v SS Susquehanna* [1926] AC 655 at page 661: “If there be any special damage which is attributable to the wrongful act that special damage must be averred an proved, and if proved, will be awarded. *If the damage be general, then it must be averred that such damage has been suffered, but the quantification is a jury question*” (emphasis supplied). The quantification of general damages should have been left to the Court to assess. In the result, and for the reasons hopefully amply explained above, we think that the award of TShs 30 (thirty) million as general damages, was on the high side. We would substitute the figure of TShs 10 (ten) million. The appeal is accordingly dismissed with costs.

For the Appellant:

*RW Tenga* instructed by *Law Associates Adv*

For the Respondent:

*DL Kashuumbungu* instructed by *Dominic Kashuumbugu and Co*