IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 35 OF 2013

EDITOR MAJIRA NEWSPAPER ..... FIRST APPELLANT
BUSINESS PRINTERS LIMITED ..... SECOND APPELLANT
BEATRICE MOSSES ..... THIRD APPELLANT
NICKSON MKILANYA ..... FOURTH APPELLANT

VERSUS

REV. FR. RICCARDO ENRICO RICCION & 26 OTHERS ..... RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar Es Salaam)

(Shangwa, J.)
dated 20th day of September 2012
in
Civil Case No. 35 of 2006

RULING OF THE COURT

15th June & 25th July 2017

NDIKA J.A.:

Reverend Father Ricciardo Enrico Riccioni, the first respondent herein, is a Roman Catholic priest based in Morogoro where he offers spiritual services. Apart from being the Episcopal Vicar for religious institutes of Morogoro Catholic Diocese, he was the overseer of the *Association of the Little Brothers and Sisters of Africa* and the Director of a radio station known as *Radio Ukweli*, both based in Morogoro. Before the High Court of Tanzania

sitting at Dar Es Salaam in Civil Case No. 35 of 2006, Father Riccioni together with twenty-six members of the aforesaid association, herein known as "twenty-six other respondents", sued the appellants for libel arising from publication of an article in a local Swahili daily newspaper known as *Majira* of 29th May 2005, Issue No. 4162 Vol. II/2172 alleged to be defamatory. The first appellant owns the aforesaid newspaper, its printer being the second appellant. The third and fourth appellants were the original authors of the article complained of.

It is on the record that the impugned article bore the heading "*Padri adaiwa kulazimisha waseminari kula nyoka*" literally meaning that "*Priest forces seminarians to eat snakes*". Apart from that article being further prefaced by two sub-headings to the effect that "*Ushahidi wa nyoka aiiyepikwa wapelekwa kwa Askofu*" and "*Mhusika adai anakula kwa kufuata maagizo ya Yesu*" (plainly meaning "*Evidence of cooked snake meat presented to the Bishop*" and "*The accused claims he eats snake meat upon the teachings of Jesus Christ*"), its main body, consisting of about twenty detailed paragraphs, gives what promises to be an unembellished account of unsavoury practices of an eccentric priest identified as "*Father Ricardo Maria of the Roman Catholic, Morogoro Diocese*" in eating snake meat and forcing

that practice on seminarians or members of the association that he was overseeing.

Following a full trial, the High Court entered judgment and decree against the appellants. While the Court awarded the first respondent TZS. 5,000,000.00 as damages for the libelous publication, it gave TZS. 13,000,000.00 to the rest of the respondents as joint compensation. In addition, the appellants were ordered to publish an apology to the respondents on the front page of their newspaper. Dissatisfied, the appellants lodged the present appeal, challenging the High Court's decision on five grounds.

When the appeal came up before us for hearing, Mr. Gabriel S. Mnyele, learned Counsel for the appellants, conceded, at our prompting, that the appeal was incompetent on account of two apparent anomalies. First, the notice of appeal forming the basis of the appeal only states that the appeal is against "Rev. Fr. Riccardo Enrico Riccioni and 26 Others" without disclosing the names of the so-called "26 Others". Secondly, the record of appeal is incomplete due to the omission of the proceedings of the High Court in Miscellaneous Civil Application No. 176 of 2004 in which that Court granted the first respondent herein leave under which he lodged the original suit, that

is, Civil Case No. 35 of 2006, against the appellants for himself and on behalf of twenty-six other persons.

Professor Cyriacus Binamungu, learned Counsel for the respondent, agreed that the appeal was rendered incompetent on account of the anomalies alluded to earlier. He thus prayed that the appeal be struck out.

On our part, we are satisfied that the notice of appeal on the record is defective because it violates rule 83 (3) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), which requires the appellant to state the names and addresses of all respondents intended to be served with copies of the notice. It would have helped had the purported "26 Others" been identified in a list attached to that notice. Secondly, we are also satisfied that the record of appeal is incomplete for omitting the proceedings of the High Court in Miscellaneous Civil Application No. 176 of 2004 in which that Court granted the first respondent herein leave upon which he lodged the originating suit, that is, Civil Case No. 35 of 2006, against the appellants for himself and on behalf of twenty-six other persons. Apart from that omission being a clear contravention of the mandatory requirement of rule 96 (1) (k) of the Rules, it also made it difficult for this Court to identify who the twenty-six persons the High Court allowed the first respondent herein to represent in the suit. Both

the High Court's judgment and decree only mention "26 Others" without disclosing their identities. Indeed, the entire record of appeal manifestly lacks any material providing such identities.

On the above analysis, we are constrained to strike out the appeal on account of its incompetence. However, before we do so, we would like to deal with apparent irregularities, pursuant to our powers under the provisions of section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 RE 2002, that we detected on the record of appeal on which we invited the parties to address us.

We noted from the outset that since the respondents' action for libel against the appellants arose out of an article published in a newspaper, the trial before the High Court had to be conducted with the aid of assessors in accordance with the provisions of section 57 of the Newspapers Act, Cap. 229 RE 2002. For ease of reference, we reproduce section 57 (1) – (3) thus:

> *"(1) Notwithstanding any provision contained in any other law for the time being in force regulating the procedure and practice of courts, in all proceedings to which the provisions of this Part apply the court shall* ***sit with not less than***

three competent assessors and the case shall be tried in the manner prescribed in this section.

(2) In all proceedings to which the provisions of this Part apply, ***when the case on both sides is closed the court*** *shall sum up the evidence for the plaintiff and the defendant, and shall* ***then require each of the assessors to state his opinion orally as to the case against the defendant and as to any specific question of fact addressed to him by the court, and shall record such opinion.***

(3) In deciding any proceedings to which the provisions of this Part apply the court shall not be bound to conform to the opinions of the assessors." [Emphasis added]

Briefly, the above provisions require the following: first, the trial court is enjoined, in trying a libel suit arising from a matter published in a newspaper, to "sit with not less than three competent assessors". Secondly, the trial court is required, after the case on both sides is closed, to sum up to the assessors the evidence for both parties, and then to require each of the assessors to state his opinion orally on the whole case and questions of fact

that may arise, and finally to record such opinion. Lastly, the court is required to decide the suit on the understanding that it is not bound to conform to the opinions of the assessors.

We are aware that section 57 (1) of Cap. 229 (supra) was amended by section 16 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, Act No. 11 of 2010 by deleting subsections (1), (2) and (3) and substituting for them new subsections (1), (2) and (3). The effect of that amendment was to remove the mandatory requirement for newspaper libel cases to be tried by the court with the aid of assessors. Consequently, the court had discretion to conduct trial without the aid of assessors. It could only sit with the aid of assessors where it determines that the "ends of justice so require" and that "the matter before it is of the nature attracting the aid of assessors." If the court opted for trial with the aid of assessors, it would then be bound to try the suit in compliance with the provisions of new subsections (2) and (3) of section 57, which retained the requirements of the deleted subsections (2) and (3) with minor adjustments. We are also cognizant that section 66 of the recently enacted Media Services Act, Act No. 13 of 2016, repealed the entire scheme of the Newspapers Act, Cap. 229 (supra) and, in effect, it abolished the procedure for trial with the aid of assessors for libel actions arising out of published newspapers. Nonetheless, we are certain that since the trial record

bears it out that the trial commenced before the High Court on 20th September 2007 prior to the amendment of section 57 of Cap. 229 (supra) in 2010 or the repeal of that law in 2016, the trial court was bound to comply fully with the law at it was then, which, as we have demonstrated, contained the requirement for the full participation of, at least, three assessors in the manner summarized earlier.

When we invited the parties to address us on whether the High Court tried the cases with the aid of assessors in the manner required by the law and procedure, they both conceded that the trial was irregularly conducted in two respects: first, they acknowledged that the High Court improperly allowed the assessors to cross-examine witnesses instead of putting questions in accordance with their statutory mandate as stipulated by section 177 of the Evidence Act, Cap. 6 RE 2002. That section, empowering assessors to put questions to witnesses, states thus:

> *"In cases tried with assessors, the assessors may put any questions to the witness, through or by leave of the court, which the court itself might put and which it considers proper."*

Secondly, the parties acknowledged that the High Court did not comply with the mandatory provisions of section 57 (2) of Cap. 229 (supra) that required the Court, after the case on both sides is closed, to sum up to the assessors the evidence for both parties, and then to require each assessor to state his opinion orally on the whole case and questions of fact that may arise, and finally to record such opinion. Apart from admitting that the Court did not sum up the evidence to the assessors after hearing evidence adduced by both parties, they acknowledged that the assessors did not give their opinions orally before the Court. Although Mr. Mnyele particularly pointed out that, as indicated at page 83 of the record of appeal, the learned Trial Judge, after hearing the evidence on both sides and receiving final submissions of the parties on 18th June 2012, ordered the assessors that "the opinion by assessors to be submitted in writing before 27/06/2012", he thought that the said course did not comply with the letter and spirit of the aforesaid section 57 (2).

We wish to begin with the irregularity concerning the manner of questioning by the assessors. It is common ground that the High Court allowed the assessors to cross-examine the witness as their questioning to the witnesses was recorded as cross-examination by the common prefix "XXD". It has been stated on many occasions by this Court that the statutory

mandate of the assessors is not to cross-examine but to put questions to witnesses in line with the terms of section 177 of Cap. 6 (supra): see, for instance, the following unreported decisions of this Court in **Mathayo Mwalimu and Another v Republic**, Criminal Appeal No. 147 of 2008; **Elias Mtati @ Ibichi v The Republic**, Criminal Appeal No. 65 of 2014; and **R v Crospery Ntagalinda @ Koro**, Criminal Appeal No. 73 of 2014. We think that the High Court erred to give opportunity to the assessors to cross-examine the witnesses. Crucially, we are of the view that the cross-examination made by the assessors, at times, went beyond simply seeking clarification on matters raised in the evidence in chief. It prejudiced the party whose witness was subjected to improper cross-examination. On this basis, the trial was irredeemably vitiated.

As regards the non-compliance with section 57 (2) of Cap. 229 (supra), we would express our concurrence with the parties that the trial was further impaired, irreversibly so, by the learned Trial Judge's omission to sum up the evidence to the assessors after the hearing of the evidence was concluded coupled with his failure to call, receive and record each assessor's oral opinion on the whole case and, in particular, questions of fact arising from the trial. We note from the record of appeal with concern that even the assessors' opinions irregularly ordered by the High Court on 18th June 2012

to be given in writing are not part of the record. We are unable to verify whether such written opinions were actually lodged or not even though we note at page 15 of the typed decision of the High Court, that the said Court made reference, in just one short sentence, to what it called the "opinion of gentlemen assessors."

The irregularity in respect of section 57 (2) of 229 (supra), as stated above, leaves us with no doubt that the trial before the High Court was, in effect, conducted without the aid of assessors contrary to the mandatory dictates of section 57 (1) of 229 (supra). There is a plethora of decisions of this Court indicating that a trial required to be conducted with the aid of assessors would be irreversibly vitiated if the assessors are not fully involved in the trial on account of various mishaps such as improper summing up to assessors, failure to take into account assessors' opinion and so on: see, for instance, the following unreported decisions in **Jackson @ Mabeyo Francis v. Republic**, Criminal Appeal No. 55 of 1994; **Tulubuzya Bituro v Republic** [1982] TLR 264; **Washington s/o Odindo v R** (1954) 21 EACA 392 **and Andrea and Another v R** (1958) EA 684.

In the final analysis, we are satisfied, as we have demonstrated, that the trial before the High Court was a nullity. We are thus constrained to

invoke our revisional powers under rule 4 (2) of Cap. 141 (supra) to nullify the proceedings of the High Court from the first day of hearing onwards. The judgment and decree of the High Court are hereby quashed and set aside. We order that the suit be tried afresh before another Judge of competent jurisdiction according to the applicable law and procedure.

Accordingly, this appeal is struck out on account of its incompetence as we explained earlier. We order each part to bear its own costs as the appeal has been disposed of on upon legal points raised by the Court *suo motu*.

DATED at **DAR ES SALAAM** this 19th day of July 2017.

B.M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

(A.H. Msumi)
DEPUTY REGISTRAR
COURT OF APPEAL