IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MUGASHA, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 305 OF 2020

JASSON SAMSON RWEIKIZA.....APPELLANT

VERSUS

NOVATUS RWECHUNGURA NKWAMA .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Kilekamajenga, J.)

dated the 24th day of January, 2020
in
Civil Case No. 12 of 2016

.....

JUDGMENT OF THE COURT

24th & 29th November, 2021

KIHWELO, J.A.:

The appellant who was represented by Mr. Al Muswaduku Chamani, learned advocate, was the losing party in a suit which was filed in the High Court of Tanzania at Bukoba. He was aggrieved and appealed to this Court. The respondent was represented by Mr. Dastan Mujacki and Jovin Rutainulwa, learned advocates who gallantly resisted the appeal.

In order to facilitate an easy appreciation of the case we think, it is desirable to preface the judgment with brief facts which led to the instant appeal.

The appellant was and still is a Member of Parliament for Bukoba Rural Constituency under the umbrella of the ruling party *Chama cha Mapinduzi* popularly known by its acronym as CCM, having been re-elected for three consecutive terms since 2010. The appellant also holds several positions within CCM and outside the political arena, besides being a Member of Parliament. The appellant and the respondent have known each other since 1994 and when the current dispute arose the respondent was a CCM chairman at Bukoba Rural District in which lies the Constituency of Bukoba Rural where the appellant contested and won the election for Member of Parliament. The relationship between the duo turned toxic later when it is alleged that they engaged into a verbal duel allegation. Particularly, the appellant alleged that the respondent through Radio Karagwe FM altered defamatory statements alleging that the appellant was a thief who stole the respondent's car and that he rigged votes during the 2015 general election without which he could not have won the seat of Parliament. It was the appellant's further allegations that, the respondent repeated those defamatory statements during public gatherings both political and religious and in addition to that the appellant alleged that the respondent said that

the appellant discriminates muslims. According to the appellant these defamatory statements were severely damaging and lowered his reputation in the eyes of the general public the results of which he suffered damage. According to the appellant his quest for an apology from the respondent was met by a dead-end as the respondent was unapologetic.

Consequently, the appellant instituted a suit at the High Court Bukoba Civil Case Number 12 of 2016 against the respondent in respect of injurious publication alleged to have been uttered through slanderous statements made by the respondent on various dates and places without justification or privilege. The appellant prayed for specific damages to the tune of TZS. 216,000,000.00. In addition to that the appellant prayed for general damages to the tune of TZS. 1,000,000,000.00 or at the discretion of the Court and any other reliefs. The respondent gallantly resisted the claim by the appellant.

In the ensuing case for the appellant seven (7) witnesses, Jackson Jasson Rweikiza (PW1), Deogratias Rweyemamu Raphael (PW2), Swaibu Haji Zaidi (PW3), Deocres Byabato (PW4), Al Haji Mahamood Abdulhaman Kisakeni Mringo (PW5), Deusdedith Mitti Rweyemamu (PW6) and Avitus

Barongo (PW7) were lined up in support of the claim. On the adversary side, the respondent featured four witnesses Novatus Rwechungura Nkwama (DW1), Aziz Karumuna (PW2), Laurent Buteni (PW3) and Theonest Byarushengo (PW4) to support the denial of the appellant's claim.

At the height of the trial on 24th January, 2020 the High Court (Kilekamajenga, J.) dismissed the suit for being devoid of merit. In the result, disgruntled the appellant filed this appeal which is grounded upon eleven (11) points of grievance, namely:

1. *That, the trial court erred in law for not resolving in one way or another the other framed issues regardless whether two issues covered the same aspect;*
2. *That, the trial court although disclosed the standard of proof required in establishing the claim, but did not apply it hence basing on a higher standard of proof;*
3. *That, the learned Judge erred in law and fact to base his decision on the political animosities as it is not one of the privileges in the defamation case;*
4. *That, the learned Judge erroneously disbelieved PW2 by importing extraneous matters in his analysis;*
5. *That, the trial court erred in law and fact to disbelieve the evidence of PW6 and PW7 on the ground that their resignation from the*

appellant's service ought to be in writing and not easy in considering the scarcity of work in African community;

6. *That the trial court erred in law and fact to find the evidence of PW5 contradictory, questionable and confusing as well as hearsay by being influenced by the rejection of the documents without regard to the consequences thereto;*
7. *That the trial Judge was influenced by his finding that most of the appellant's witnesses were persons associated to him;*
8. *That the trial Judge erred in law to base his finding on the future events such as possibilities of the parties to contest in the 2020 National Election, by relying on the respondent's evidence without testing it with the appellant's;*
9. *That the trial Judge used double standard in assessing and considering the evidence of the appellant in relation with that of respondent;*
10. *That the learned Judge erred in law and procedure to point out some of the witnesses whom he thought could support his decision without considering other appellant's witnesses' evidence and the effect of the alleged published words by the respondent;*
11. *That the trial Judge had negative attitude throughout and was too hard in relation to the appellant's witnesses.*

At the hearing of this appeal on 24th November, 2021, like in the trial court, the appellant was represented by Mr. Al Muswadiku Chamani, learned advocate while the respondent was represented by Mr. Dastan Mujacki and

Mr. Jovin Rutainulwa both learned advocates. Mr. Chamani and Mr. Mujacki highlighted the respective written submissions lodged in support or in opposition to the appeal.

Having read and heard the submissions from each side, we propose to discuss these grounds in the following pattern.

We will begin by discussing the first ground which will be argued separately. In this ground of grievance, the appellant is seeking to challenge the procedure taken by the trial Judge who did not determine all the framed issues and instead, disposed the suit based upon the first issue only. In support of this point of grievance, the learned advocate for the appellant argued that, the proper procedure to be adopted by a trial court in determining a dispute is for the trial Judge or Magistrate to definitely resolve on each and every issue framed. To facilitate the appreciation of the proposition put forward by the learned counsel, he referred us to the case of **Alnoor Sharrif Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 (unreported) and **Sheikh Said v. The Registered Trustees of Manyema Masjid** [2005] TLR 61. He expounded that since the learned trial Judge decided the suit on the first framed issue the rules of procedure were

violated. The learned counsel implored us to remit the case to the High Court for it to consider and determine the matter. In amplifying further, his argument he referred us to the case of **Joseph Ndyamukama (Administrator of the estate of Gratian Ndyamukama) v. N.I.C Bank Tanzania Ltd & Others,** Civil Appeal No.239 of 2017 (unreported).

The respondent's learned advocate Mr. Mujacki, prefaced his reply submission by urging us to consider that the appellant did not prove his case before the trial court. In reply to the challenge on the procedure taken by the learned trial Judge who did not determine all the framed issues, Mr. Mujacki was fairly brief and contended that in the instant appeal the matter before the court was on defamation whose issues were interdependent and argued that the cases cited by the appellant were distinguishable from the instant appeal before this Court in that the facts in those other cases were not the same as the one in this appeal. He rounded up by imploring us to dismiss this ground of appeal.

What stands for our determination in view of the above submission is whether or not it was proper and correct in law for the learned trial High

Court Judge to decline to determine all framed issues to resolve the controversy between the parties.

In trying to answer this question, we find it apt in the circumstances of the instant appeal to reproduce issues that were framed by the court and agreed by parties as obtained at page 52 of the record of appeal:

a) *Whether the defendant actually defamed the plaintiff;*
b) *Whether the alleged statements given by the defendant were defamatory;*
c) *Whether the defendant was privileged in giving the alleged statements;*
d) *Whether the alleged statements given by the defendant caused damages (sic) to the plaintiff in the community.*

We are alive to the timebound principle of pleadings that each issue framed should be definitely resolved and that a judge is obliged to decide on each and every issue framed to resolve the dispute. See, for example **Alnoor Shariff Jamal** (supra), **Sheikh Said** (supra) and **Kukal Properties Development Ltd v. Maloo & Others** [1990-1994] E.A 281. However, we wish to state that the above principle is not a rule of the thumb which apply generally to every situation regardless of the circumstances obtaining. In our considered firm position, we are of the view that, the above principle applies

where issues framed are independent from each other and not where issues are interdependent like in the instant appeal where the rest of the issues were dependent upon the determination of the first issue in the affirmative. In the case at hand, it is evident on record that the learned trial Judge at page 230 of the record stated that:

> *"As the first issue has not been proved then there is no need to address the other issues. Therefore, the plaintiff's claim against the defendant is hereby dismissed....."*

On our part, we conclusively find that, looking at the four issues that were framed by the trial court and agreed by the parties, resolving the first issue automatically conclusively resolved the dispute between the parties which was whether or not the respondent defamed the appellant. Discussing the remaining three other issues which were dependent upon the determination of the first issue in the affirmative would have been an academic exercise in futility. We are of the firm conclusion that the situation would have been different if all the issues framed and agreed were independent from each other in which case the principle above would apply to the letter. In the circumstances, we are inclined to agree with the learned counsel for the respondent that the facts of all cases cited by the appellant

in support of this ground of complaint are distinguishable from the instant appeal. For instance, the case of **Alnoor Shariff Jamal** (supra) the matter before the Court was a petition for extension of time and the learned Judge abandoned that issue and instead issued the ruling by ordering the award to be remitted back to the Arbitrator. We wish to emphasize that every case must be decided according to its own peculiar circumstances. In view of the foregoing, the first ground of appeal is misconceived and therefore is dismissed.

Next for consideration are grounds two, five, six, nine and ten which we find convenient to discuss them conjointly as they relate to the burden of proof and the standard of proof in civil cases. The appellant's main complaint is that the trial Judge applied a higher standard of proof when analyzing the evidence of the appellant's witnesses than that of the respondent despite acknowledging at page 225 of the record of appeal that the standard of proof required is on a mere preponderance of probability or balance of probability. Referring to the impugned judgment Mr. Chamani cited a number of incidences which he claimed that the trial Judge was placing higher burden of proof on the appellant than is usually required. When prompted on whether it was not improper to have left out the Karagwe

FM Radio Station as a party in the case, Mr. Chamani quickly responded that it was upon the appellant to choose who to sue. When prompted further on the variance between pleadings and the evidence in particular on the incidences listed at page 24 of the record of appeal paragraph 4, he admittedly stated that there was no evidence to support the allegations such as minutes from the said meetings, audio, video recordings of transcripts of what is alleged to have been uttered by the respondent. He further admitted that the pleadings did not have particulars of damage nor was there any contract admitted to prove the existence of the alleged contractual relation between the appellant and PW5 in relation to the management and running of Paradigm schools.

In response Mr. Mujacki, contended that it is a general rule that he who asserts must prove his allegations and therefore the burden lies on the appellant to prove the existence of the alleged fact in this case, defamatory statements. He submitted further that, the trial Judge rightly addressed himself in terms of the provision of sections 110 (1) (2) and 111 of the Tanzania Evidence Act, Cap 6 R.E 2002 (the Evidence Act) and having weighed the evidence of the appellant against that of the respondent, he

came to the conclusion that the scales of justice tilted against the appellant who did not prove the case.

After careful consideration of the entire record and the rival submissions by advocates for the parties, the question that remains to be answered, to which the learned trial Judge's attention was also drawn is whether the appellant was able to prove its case. It is instructive to state that in terms of Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 as amended, the Court has power to re-appraise the evidence on record and draw inferences of fact. Undoubtedly, Mr. Mujacki has rightly submitted that the trial Judge rightly addressed himself on sections 110 (1) (2) and 111 of the Evidence Act.

It is a cherished principle of law that, generally, in civil proceedings, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Evidence Act. It is also common knowledge that in civil proceedings, including matrimonial causes and matters, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. See, for example **Godfrey Sayi v. Anna Siame as Legal**

Personal Representative of the late Marry Mndolwa, Civil Appeal No. 114 of 2012 (unreported). This is also provided for under section 3 (2) (b) of the Evidence Act. This means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. There is a considerable body of case law in this aspect and one case which stands out and which this Court has always sought inspiration is the statement by Lord Denning in **Miller v. Minister of Pensions** [1937] 2 All. ER 372 in which he states that:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in criminal case. If the evidence is such that the tribunal can say- We think it is more probable than not, the burden is*

discharged, but, if the probabilities are equal, it is not..."

It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case. We seek inspiration from the extract in Sarkar's Laws of Evidence, 18th Edition **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar**, published by Lexis Nexis and cited in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported):

> *"...**the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof**. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. **The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot***

proceed on the basis of weakness of the other party... *" [Emphasis added].*

Let us now see as to whether the appellant managed to prove his case as required by law. Looking critically at the testimonies of the eight witnesses for the appellant as against the four witnesses for the respondent, we are of the firm view that, the appellant's criticism of the learned trial Judge is, with respect, without any justification. We will explain, **One**, the appellant did not produce any evidence in the form of documentary or audio recording or video recording other than mere oral testimony of the eight witnesses while the allegations whereof were said to have been heard through radio, **Two**, the appellant himself testified under oath at page 61 of the record of appeal that it was not necessary to bring any evidence for the court to believe his story, in other words, the appellant wanted the court to believe his story even without concrete evidence contrary to the dictates of the law which places burden on the appellant. **Three**, the appellant himself offered a contradictory account of his testimony, whereas he testified at page 56 of the record of appeal that muslims no longer wanted him and his support because of the defamatory statement that he hated muslims but at page 57 of the record of appeal he testified that just two days before testifying in

court an organization of about 400 muslims in his District requested for a conference hall at his school, chairs and public address and **Four**, even with the testimonies of the eight appellant's witnesses, the four respondent's witnesses were able to counter each and every allegation by the appellant. Therefore, grounds two, five, six, nine and ten are held to be devoid of merit. They are accordingly dismissed.

Looking at the third, fourth, seventh and eighth grounds, the appellant contends that the trial Judge erred in basing his reasoning on extraneous matters such as the allegation of political animosities, the issue of scarcity of employment in the African community as a basis of dismissing the evidence of PW6 and PW7 and the possibilities of the appellant doctoring facts as part of smear campaigns as both the appellant and the respondent were aspiring to contest in the 2020 General Election. In response, the learned counsel for the respondent argued that the learned trial Judge was justified to make such remarks given the nature of testimony of the witnesses in particular PW5 and PW7 who were not able to give any evidence as proof of their alleged resignation from employment of the appellant. The learned counsel for the respondent submitted further that the learned trial Judge was justified to make such remarks because issues of political animosities and

the 2020 General Elections were raised by the parties themselves as reflected in their respective testimony at the hearing.

We have carefully considered the rival submissions and the records of appeal in respect of these grounds of appeal, and we think that, while agreeing with the appellant's counsel that the learned trial Judge made various conjecture or extraneous statements while discussing the evidence on record, however, these statements were made simply as remarks by way of chance which in essence did not prejudice the appellant because at all times these remarks were made after the learned trial Judge had already come to the conclusion of his findings. At this juncture we find it appropriate to reproduce the relevant parts of the record of appeal featured at pages 229 and 230 of the record which speak for itself:

> *"**On the other point, most of the plaintiff's witnesses were persons associated to him. As already stated above, having a relationship with a party does not affect the testimony if the witness is trustworthy, credible and reliable.** In the case of **Bahati Makeja v. Republic,** Criminal Appeal No. 118 of 2006, CAT at Mwanza (unreported), the Court stated that:*

"It is generally agreed that in assessing the credibility of a witness, the Court has to adopt a careful and dispassionate approach and critically evaluate the evidence in order to find out whether it is cogent, persuasive and credible. Relationship is not a factor to affect the credibility of a witness."

I also understand, every case must be decided based on its facts. In my view, the instant case is marred by political animosities. Both the plaintiff and defendant were politicians who aspire to contest for the seat of Member of Parliament later in 2020. The possibility of doctoring facts to destroy the defendant's popularity is higher. The testimony of the defendant also supports this possibility. The defendant informed the court that the plaintiff has been employing the same tactics to any person who seems to challenge his seat of Member of Parliament. The defendant cited live examples which were not disputed by the plaintiff.

Therefore, this court has carefully analyzed the plaintiff's case and reached to the conclusion that the first issue has not been proved. The plaintiff has failed to convince the court, even on the balance of probability, that he was defamed by the defendant. *As already*

stated, the alleged statements might have been cooked for political reasons. Again, the alleged defamatory statements might have been exaggerated. It is also unbelievable how the plaintiff's witnesses were able to repeat the same words as if they were parrots. They consistently stated that, the defendant defamed the plaintiff by saying that he is a thief; he stole the defendant's car and that he hates Muslims. While consistence in the witnesses' testimony is crucial, it is very unlikely that the defendant repeated the same words in all occasion."

We have emboldened the text in the above excerpt as a demonstration that, although the learned trial Judge may have made some undesirable extraneous remarks but these remarks were obiter, as such, did not affect the outcome of the case.

We think it is momentous that we should remark before we take leave of these grounds of grievance that, for the future it is important that judicial officers should confine themselves in adjudication so as to avoid as much as possible being hostage to fortunate and therefore minimize unnecessary complaints by the parties to the case one way or the other. In view of the

foregoing, the third, fourth, seventh and eighth grounds have no merit and accordingly they are dismissed.

We will finally turn to the complaint that the learned trial Judge was biased. This complaint although conspicuously featured in ground eleven which was abandoned by the appellant but also featured in periphery in other grounds of complaints as well and we find it desirable to make some remarks. It is a peremptory principle of law that, a matter not decided by the High Court or a subordinate court exercising extended jurisdiction, cannot be decided by the Court. This is the import of Section 4 (1) (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (AJA). It is clear that the jurisdiction of this Court on appeal is to consider and determine matters that have been considered and decided upon by the High Court and subordinate courts with extended jurisdiction. It is not insignificant to state that, there is a plethora of legal authorities in this matter, a good example is the case of **Celestine Maagi v. Tanzania Elimu Supplies (TES) and Another**, Civil Revision No. 2 of 2014 (unreported) which restated what is contained in Section 4 (1) (2) of AJA. Therefore, this Court cannot entertain any complaint not raised at the High Court. The appellant was at liberty to raise any complaint of bias before the learned trial Judge for it to be decided by the learned trial Judge either

way and not before this Court which has no jurisdiction. This complaint therefore has no merit and accordingly is dismissed.

In view of the aforesaid, we find no merit in the appeal. Consequently, we dismiss the appeal in its entirety with costs.

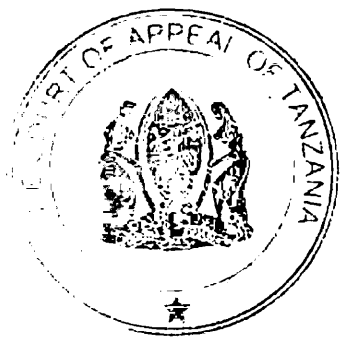
DATED at **BUKOBA** this 29th day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W.B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 29th day of November, 2021 in the presence of Mr. Brighton Mugisha holding brief of Mr. Ali Chamani, learned advocates for the appellant and Mr. Dastan Mujaki, learned advocate for the respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL