IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J. A., MWANDAMBO, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 135 OF 2019

IMANI OMARI MADEGA .....APPELLANT

VERSUS

YUSUF MEHBOOB MANJI.....1ST RESPONDENT
ASMAH MOKIWA.....2ND RESPONDENT
THE MANAGING EDITOR, JAMBOLEO NEWS PAPER.....3RD RESPONDENT
JAMBO CONCEPT (T) LIMITED.....4TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania at Dar es Salaam)

(Mlyambina, J.)

dated the 17th day of December, 2019
in
Civil Case No. 220 of 2011

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JUDGMENT OF THE COURT

27th April & 2nd August, 2022

MWANDAMBO, J.A.:

The appellant, Imani Omari Madega, was aggrieved by a decision of the High Court (Mlyambina, J) sitting at Dar es Salaam made on 17/12/2018 dismissing his suit premised on the tort of defamation in Civil Case No. 220 of 2011. The plaint alleged that, the first respondent uttered words defamatory of the appellant reported by Asmah Mokiwa (second respondent) and caused them to be published in Jambo Leo Newspaper (third respondent) printed by Jambo Concept (T) Limited (fourth respondent) for which he claimed various reliefs against the

respondents. The trial High Court found the appellant's case wanting to sustain the claims therein and dismissed it culminating into the instant appeal.

The facts leading to the suit before the trial court and ultimately this appeal are not too difficult to tell. Between 2007 and 2010, the appellant, a lawyer by profession and a practising advocate was a Chairman of Young African Sports Clubs (henceforth Yanga or the Club). On the other hand, the first respondent was a trustee of Yanga during the appellant's leadership. On 18/12/2011, the first respondent participated at an event for the inauguration of one of Yanga's branches christened as Shumato in Gongo la Mboto area in Dar es Salaam City as a guest of honour. In that capacity, the first respondent addressed the audience during which he is alleged to have uttered words accusing the appellant for selling two club's key players and converted the proceeds thereof for his personal use particularly; to finance his political campaigns for member of parliament in Chalinze constituency, Coastal Region. Even though there were two versions on the participation at the event, Ally Iddi Simba (PW5) claimed to have been present at the event as it was open to the public. The following day, Jambo Leo tabloid published words said to have been uttered by the first respondent. One of the persons who claimed to have read the newspaper on 19/12/2011

carrying an article on what transpired at the club's branch inauguration event was Ramadhani Saidi (PW2) who broke the said news to the appellant. Not surprisingly, the appellant perceived the words in the newspaper as defamatory and denigrating of him. Since the first respondent did not retract the words and apologise through the same media in accordance with the appellant's demand, he instituted the suit in the trial court for an assortment of reliefs including; monetary award in the sum of TZS 4,000,000,000.00 as general damages, TZS 180,000,000.00 for loss of expected earnings for lost business transaction, TZS 1,000,000,000.00 as exemplary damages. The foregoing were claimed in addition to an order for retraction of the published statement and permanent injunction restraining the respondents from repeating the libel cast on the appellant.

Whilst admitting his participation and addressing members of the Club at the branch inauguration event, the first respondent denied having uttered the words complained of or having caused the publication, printing or writing the article containing such impugned words in the newspaper. In addition, the first respondent's case was that the meeting he addressed was closed for the Club's members neither had he mentioned the appellant's name in his speech. The second, third and fourth respondents denied that the printing and

writing of the words complained of were false or malicious. They all distanced themselves from liability in the suit.

The trial court determined the suit based on five issues namely;

1) *Whether the words complained of are defamatory of the plaintiff (appellant).*

2) *Whether the defendants are entitled to the defence of justification.*

3) *Whether the defendants are entitled to the defence of qualified privilege.*

4) *Whether the defamation caused loss to the plaintiff's business in the sum of Tshs. 180,000,000/=*

5) *What reliefs are the parties entitled to.*

That said, we shall now examine briefly the trial court's findings based on the evidence of five witnesses for the appellant and four on behalf of the first respondent. Apparently, the second, third and fourth respondents did not testify even though one Juma Pinto (PW5), the erstwhile Managing Editor of the third respondent testified for the first respondent.

The trial court's finding on the first issue was that the words complained of; conversion of proceeds from the sale of two club's key players to the appellant's personal gain were defamatory in their nature.

However, the trial court found no evidence proving that the first respondent made the statement or published, printed or caused to be published and printed such statement in the third respondent's newspaper. It thus answered the issue against the appellant but it found the second, third and fourth respondents liable for publishing the defamatory statements in the third respondent.

The trial court's finding on the defences of justification and qualified privilege subject of the second and third issues was in the affirmative. Nevertheless, the second, third and fourth respondents did not plead justification and qualified privilege in defence to the appellant's suit and thus the two issues could not have arisen for the trial court's determination. We say so mindful of the provisions of Order XIV rule 1 of the Civil Procedure Code (the CPC) which requires that issues must be framed from material propositions of facts or law affirmed by one party and denied by the other. Neither could the issues have been framed from any allegation made on oath, answers to any interrogatories or contents of any documents produced by any of the respondents in terms of Order XIV rule 3 of the CPC.

At any rate, the respondents could not have availed themselves of the said defences without offending the well- established principle that

parties are bound by their own pleadings expressed in many cases, in particular, **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161. See also **Farrel v. Secretary of State** [1980] 1 A11. ER 166, 171 referred in **EX – 38556 S/SGT Sylvester S. Nyondi v. IGP & AG,** Civil Appeal No. 64 of 2014 (unreported). Since the two issues did not arise from the pleadings, they could not have been made subject of any determination in the suit.

Next, the trial court dealt with the appellant's entitlement to the claim of TZS 180,000,000.00 as loss of expected earnings. Having scanned through the evidence on record, the trial Judge took the view that the evidence proving the claim fell below the threshold set out under sections 110 and 111 of the Evidence Act. According to the trial court, the appellant failed to discharge his burden of proof in support of that claim primarily because the appellant; a partner in Universal Law Chambers who was to be engaged for five years on a retainership agreement earning TZS 3,000,000.00 per month had no proprietary interest in the property of the firm. Having answered the four substantive issues against the appellant, the trial court dismissed the suit in its entirety resulting into this appeal predicated on five grounds of complaint.

Mr. Hamza Byarushengo, learned advocate who represented the appellant at the trial, did alike in this appeal. He had earlier on filed written submissions in support of the appeal. Despite being notified through substituted service by publication in Mwananchi and Daily Newspapers in pursuance of the Court's order made on 15/03/2022, none of the respondents appeared at the hearing of the appeal. Since the respondents defaulted appearance when the appeal was called on for hearing, the Court did not see it fit to adjourn the hearing. It proceeded with the hearing in the respondents' absence in terms of rule 112 (2) of the Tanzania Court of Appeal Rules,2009 (the Rules).

The first ground of appeal is premised on the first respondent's pleadings in paragraphs three and four of his written statement of defence claimed to have admitted the appellant's allegations in paragraphs seven and eight of the plaint. The ground runs: -

> *That, having regard to the fact the [first] respondent admitted in his pleadings to have uttered/published the words complained, the learned trial Judge grossly erred in law and in fact in failing to hold that the admissions were binding on the first respondent and constituted a waiver of proof on the part of the appellant."*

By and large, the learned advocate's submission in this ground is anchored on Order VIII rules 4 and 5 of the CPC. Mr. Byarushengo contended that since the first respondent did not dispute having made a speech at the Yanga Club branch inauguration function, he must be taken to have constructively admitted the words complained of in the third respondent in line with Order VIII rule 5 of the CPC. The learned advocate sought to impress the Court to sustain his argument relying on commentaries from the works of **V.V. Chitaley & K.N Anaji Rao** at page 511 in a Book titled: **The Code of Civil Procedure (Act V of 1908),** 2nd edition commenting on Order VIII rule 5 of the Indian Code of Civil Procedure, a replica of Order VIII rule 5 of the CPC. To a large extent, the learned authors' commentaries are based on decided cases in India in relation to admissions in pleadings which may be express or constructive through evasive denials of allegations in the plaint which are deemed to be admissions. There is no dispute on that proposition but the question for our determination is whether there was any such admissions in the first respondent's written statement of defence and if so, whether the trial court would have been bound to enter judgment had it been properly moved to do that before the suit proceeded to trial.

For ease of reference, we take the liberty to reproduce paragraphs 3 and 4 of the first respondent's written statement of defence in answer to the corresponding paragraphs in the plaint thus:

3. *That paragraph 7 of the plaint is disputed and denied and, the plaintiff is put to strict proof thereof. Furthermore, the statement of the plaintiff that "the 2nd, 3rd and 4th Defendants under the direction of the 1st Defendant falsely and maliciously wrote, printed and published an article concerning the plaintiff in black and green colours is too vague, false and without any substance, other than the such reports have already in the past been reported in many other publications which the plaintiff has never sued against, and thus the publication may be a regurgitation of past reports of misconduct of the plaintiff. That further the contents of 7 of the plaint do not disclose any cause of action as against the 1st Defendant.*

4. *That the contents of paragraph 8 of the plaintiff are disputed. The plaintiff was in a private meeting with members of Young Africans Sport club and was expressing only his opinion of general leadership shortfalls of the Club and never mentioned the name of the plaintiff. The allegation of the plaintiff is made against the 1st Defendant in his plaint as an expression of the plaintiff's personal guilt consciousness of his mischievous leadership. That the contents of paragraph 8 of the plaint do not disclose any cause of action against the 1st Defendant"*

With respect, having examined the averments in the reproduced paragraphs, we are unable to go along with the learned advocate. In our view, the averments in the two paragraphs appear to be too clear to constitute admission on the appellant's allegations in the corresponding paragraphs in the plaint. That would explain why the appellant did not move the trial court for judgment on admission before the suit proceeded to trial. The record shows that the appellant's advocate did so in his closing submissions after the trial had been concluded.

As the appellant's learned advocate would appreciate, the purpose behind entering judgment on admission is to save the plaintiff from the requirement to call evidence to prove facts which the defendant has admitted either expressly or constructively. Nevertheless, as the authors of **Mulla on The Code of Civil Procedure, Act V of 1908,** 15th edition by P.M Bakshi, page 1272 point out, entering judgment on admission is not automatic or a matter of right. The court has wide discretion to either enter judgment upon admission or make such order as it thinks fit. Indeed, since the trial court heard evidence from the appellant's and first respondent's witnesses, it would not have been inappropriate, in our view, to enter judgment on the alleged constructive admissions in the first respondent's words at that stage

instead of determining the suit based on the evidence on record. In the upshot, we find no merit in ground one and we dismiss it.

In ground two, the trial court is faulted for, allegedly, failure to analyse evidence objectively in relation to PW1, PW5, DW1 and DW4 along with exhibit P1 thereby failing to find that the words complained of were uttered by the first respondent. By this ground, the appellant invites the Court to find that had the trial court made an objective analysis of the evidence from the said witnesses, it would have found that the appellant had discharged his burden of proof and held that the words complained of were uttered by the first respondent. To achieve that end, the Court has to reappraise the evidence on record with a view to arriving at its own findings of fact acting under the power bestowed on it under rule 36 (1) (a) of the Rules.

The first issue from which ground two has arisen was whether the words complained of were defamatory of the appellant. Plainly, that presupposes that there was no dispute as to the person who uttered the said words in the first place which is not the case. Be that as it may, there was no dispute that the first respondent participated at the function marking the inauguration of Yanga branch and addressed the audience as a guest of honour. The dispute rested on whether the first

respondent made the address in a closed meeting or open to the public. The other aspect related to the nature of the words uttered by the first respondent in his speech. Whilst the appellant relied on the evidence of PW1 and PW5, the first respondent had DW2 and DW4 in addition to his own testimony.

It was not suggested that the second respondent who was the news reporter attended the said meeting since exhibit P1 does not disclose the source of the story reported by her. Unfortunately, the second respondent did not testify along with the third and fourth respondents.

There is no dispute that PW1 was not in the meeting at Gongolamboto. He just received a call from PW2 a day after the meeting that Jambo Leo had published a story on what had transpired the previous day and afterwards read the story in the newspapers. That means that PW1 cannot be the right person to lead evidence capable of being acted upon by the trial court proving that the first respondent uttered the words complained of. That takes us to PW5 who claims to have attended the meeting on 18/12/2011. The substance of his evidence was that he attended the meeting at Gongolamboto though he was not a resident there neither a member of that branch. His evidence

was that he developed interest in attending the meeting on his errands in the course of his business in that area. He did not tell the trial court how he came to know of the meeting meant for the branch club members in as much as there is no suggestion that there were any public announcements inviting all and sundry to attend such meeting. Neither did he disclose the specific place at which the meeting took place.

The effect of the above is that neither PW1 nor PW5 offered any proof that they saw and heard the first respondent uttering the words complained of. The two witnesses did not discharge the burden of proof on the standard required in civil cases; balance of probabilities.

The attack against the trial court's finding is that PW1's and PW5's evidence was not refuted contrary to the trial court's finding. According to the learned advocate, PW1 and PW5 gave concurrent evidence on what transpired at the impugned meeting which could not have been whittled down and rebutted by the evidence of DW1, DW2 and DW4.

The learned advocate invites the Court to sustain his argument that the evidence of defence witnesses through DW1, DW2 and DW4 was contradictory in material respects which should not have been believed by the trial court. The burden in that argument lies in two

aspects. Firstly, the defence witnesses were not called to prove the case for the appellant rather to disprove it in relation to the facts in issue; whether the first respondent uttered the words complained of. The assumption was that the appellant had discharged his burden of proof it being trite law that proof of the plaintiff's case does not depend on the weakness in the defence case – See for instance; **Paulina Samson Ndawavya v. Theresia Madaha,** Civil Appeal No. 45 of 2017 (unreported).

Secondly, contradictions are bound to occur in each and every case for a number of reasons including lapse of memory due to lapse of time and interpretation of events by different people. What is important is whether the contradictions go to the root of the evidence.

The issue at the trial was whether DW1 uttered the words complained of as published in Jambo Leo tabloid rather than whether the meeting was held in an open space or in a hall which appears to be the preoccupation in the alleged contradictions in the testimonies of PW5, DW1, DW2 and DW4. In our view, in so far as PW5, who claimed to have attended the meeting did not say the exact words alleged to have been published in the tabloid defamatory of the appellant, he cannot be held to have been of any help in proving the appellant's case.

Under the circumstances, we see no justification for interfering with the finding of the trial court that the appellant did not discharge his burden proving that the words complained of were uttered by the first respondent. The first respondent had no duty to disprove a negative for, as we have held in various cases, a negative is incapable of proof. See for instance: **Zubeda Ahmed Lakha v. Hajibhai Kawa Ibrahim & 2 Others**, Civil Appeal No. 238 of 2018 (unreported). Accordingly, we find no merit in ground two and dismiss it.

Grounds three and four relate to the negative findings on the defences of justification and qualified privilege, subject of the third and fourth issues. We need not belabour on these grounds in view of what we have discussed above. The issues on the basis of which the trial court made its findings did not arise from the pleadings or any document forming part of the pleadings contrary to the dictates of Order XIV rule 1 of the CPC. Needless to say, since the trial court found the second, third and fourth respondents liable for publishing the libel against the appellant, the findings made in their favour on the defences of justification and qualified privilege which were not available to them, such findings are hereby set aside. Consequently, we allow grounds three and four with net effect that they are liable to the appellant on the

publication defamatory of the appellant. Next, we shall turn our attention to ground five.

The complaint in ground five is against the trial court's alleged failure to consider the submissions and authorities placed before it by the appellant's counsel. The learned advocate sought reliance from **Tanzania Breweries Ltd v. Anthony Nyingi,** Civil Appeal No. 119 of 2014 (unreported) stressing the need for courts to pay regard to authorities cited in counsel's submissions if they decide to reject them. Otherwise, Mr. Byarushengo insinuates that the trial court's judgment leaves suspicions that *"something fishy was on play."* However, apart from the general attack, the learned advocate did not point out specific authorities he cited which the learned trial judge did not consider. In the absence of that, we cannot be in a position to make any meaningful determination of the complaint. Suffice it to say that, as we held in **The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village Government & 11 others,** Civil Appeal no. 147 of 2006(unreported), submissions are elaborations or explanations on evidence already tendered and so they are expected to contain arguments on the applicable law. It has not been suggested that the outcome of the trial was a result of the alleged omission by the trial court. This ground is bereft of merit and we dismiss it as well.

In the event, the appeal stands dismissed against the first respondent and partly allowed against the second, third and fourth respondents. Upon a serious consideration of Mr. Byarushengo's submissions on the reliefs, we agree with him that the appellant is entitled to award of general damages for the offensive libel and not all the reliefs he claimed in the plaint which were dismissed by the trial High Court. This is so because we have not been satisfied from the evidence that there was any justification for the award of exemplary and punitive damages over and above general damages. Similarly, as held by trial High Court, the appellant's claim for payment of TZS 180,000,000.00 on account of loss of business was rightly dismissed because it was not sufficiently proved. All things considered, unlike Mr. Byrushengo, the authorities he cited in favour of an award of damages are relevant where Court is called upon to interfere with the trial court's exercise of its discretion in awarding the damages. As this is not the case, there will be no basis upon which the Court can award the damages asked. In the upshot, we think this is a fit case to make an order under rule 38 of the Rules to the extent it relates to assessment of general damages. Accordingly, we remit the issue of general damages and direct the High Court to assess the sum payable to the appellant as

against the second, third and fourth respondents for the offensive publication.

The appellant is awarded his costs in this appeal against the second, third and fourth respondents. As the first respondent did not appear to resist his appeal, we make no order for costs in that regard.

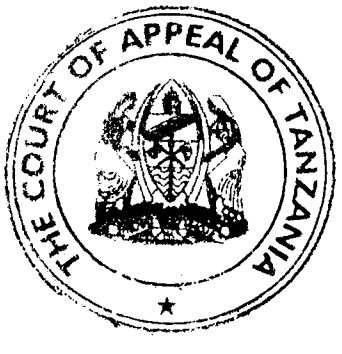
DATED at **DAR ES SALAAM** this 26th day of July, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of August 2022, in the Presence of the Mr. Hamza Byarushengo, learned counsel for the appellant and absence of the 1st, 2nd, 3rd and 4th Respondents, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL