**THE COURT OF APPEAL OF TANZANIA**
**AT ARUSHA**

**CIVIL APPEAL No. 187 of 2020**
**(CORAM: MWARIJA. J.A., MAIGE. J.A., And MASOUD. J.A)**

**BETWEEN**

**GUARDIAN LIMITED..... .....1st APPELLANT**

**PRINTER AFRIQUE LIMITED.....2nd APPELLANT**

**VERSUS**

**JUSTIN NYARI.....RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha)**

**(Sambo, J.)**

**Dated 20th day of February, 2009**

**in**

**Civil Case No. 35 of 2001**

.....

**JUDGMENT OF THE COURT**

6th December, 2023 & 6th February, 2024

**MASOUD. J.A.:**

The appellants were successfully sued by the respondent for libel. They were alleged to have falsely and maliciously published or caused to be published in the newspaper known as Financial Times of 4th July, 2001 up to 10th July, 2001 a defamatory news item which seriously damaged the respondent's reputation and brought him to public scandal, odium and contempt. It was also alleged that, despite being requested for an apology

by the respondent, the appellants refused to do so. With such libel, the respondent successfully claimed to have suffered damages.

Despite reproducing the relevant publication alleged to be defamatory to the respondent word for word, the respondent's plaint highlighted the defamatory words in the following terms:

> *8. That in their natural and ordinary meaning the aforesaid defamatory words which graphically refer to the plaintiff by his true name, meant and were understood to mean:*
> *(a) That the Plaintiff is a top leader of a lawless group;*
> *(b) that the Plaintiff is a collaborator in the nasty and sordid campaign against AFGEM*
> *(c) that the Plaintiff is a traitor and a Judas Iskariot, who has betrayed the cause of small scale miners or appolos.*
> *(d) that the Plaintiff is a sell-out; a turn coat and a renegade; who has been brought out and compromised by the establishment.*

Upon hearing the suit, the trial court found that the respondent who was the plaintiff, managed to prove his case on the required standard. It entered an ex-parte judgment against the respondents and in the favour of the respondent. It answered the issues framed in the affirmative,

namely, whether the article complained of by the respondent was published by the appellants, and whether the said article was defamatory and was published falsely and maliciously by the appellants. As to reliefs, it awarded the respondent general damages to the tune of TZS 350,000,000.00 over and above TZS 200,000,000.00 which the respondent sought for in his plaint. In so doing, the trial court at page 94 of the record reasoned that:

> *The conduct of the defendants who did not bother to respond to the learned counsel's letter requesting full apology and again opted not to file their written statement of defence to this case., calls for them to be condemned to pay a substantial amount of general damages. This is the position of the court as well as the entire team work of gentlemen and lady assessors.*
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> *In August, 2001, the plaintiff claimed a total of TZS 200,000.00 as exemplary damage. It is almost nine years now from that time and given the occurring inflation since then. I think that amount is too minimal to reach the end of justice in this case. Even though as this court held in the case* ***of Leonard sawe v. L.D.S Nyakyi*** *[1976] L.R.T 21, general damages need not be specifically pleaded. This Honourable Court held that:*

*(2) General damages Is the type of damage which the law presume as a resultant of the defamation complained of and need not be specifically pleaded.*

Aggrieved by the said judgment and decree, the appellants have decided to appeal before this Court on the following grounds; **one**, the proceedings in the High Court were irregular and invalid as the assessors who sat with the trial judge did not have the required qualifications; **two**, the case as filed in the High Court was not within the pecuniary jurisdiction of the court; **three**, the trial judge erred in failing to hold that the publication was not in its plain and ordinary meaning defamatory of the respondent; **four**, failure to carry out a proper evaluation of evidence which would have shown that the respondent did not suffer damages as alleged in the plaint; **five**, failure to obtain opinions of the assessors regarding the quantum of general damages and; **six**, in assessing damages, the trial judge considered and gave effect to matters which were not before him at the trial.

At the hearing of the appeal, both parties were ably represented. While the appellants were represented by Mr. Jonathan Mbuga, learned Advocate, the respondent was represented by Mr. Kelvin Kwagilwa, learned advocate. The learned counsel from both sides had earlier on filed

written submissions in support and in opposition of the appeal, respectively, and they fully adopted them at the hearing.

From the proceedings in this Court and the court below, the following matters were not in dispute between the parties. It was not in dispute that there was a publication on the Financial Times published by the appellant as afore stated. It was not in dispute that the publication had to do with the respondent. It was also not in dispute that the respondent claimed for general damages in the trial court to the tune of TZS 200,000,000.00. It was, similarly, not in dispute that by virtue of regulation 3(2)(a), (b), and (c) of the Procedure for Trial of Cases of Defamation Regulations, G.N. No. 92 of 1979, the trial court sat with assessors in determining the suit. It was equally not in dispute that the suit proceeded ex-parte in terms of the trial court's order of 22nd February,2002. It was likewise not in dispute that there was no indication in the trial court's record found at page 60 of the record of appeal that the assessors who sat with the trial court met the qualification criteria set out under the above-cited regulation.

With the foregoing matters which are not in dispute in mind, the following matters appeared to be contentious in this appeal, regard being had to the raised grounds of appeal and the rival submissions of both

learned counsel which are on the record: **Firstly**, it was in dispute that the assessors who sat with the trial judge were qualified in terms of the requirements of the afore-cited regulation; **secondly**, it was in dispute that the suit was within the trial court's pecuniary jurisdiction; **thirdly**, it was in dispute that the impugned publication was in its plain and ordinary meaning defamatory to the respondent and; **fourthly**, it was also in dispute that the respondent was entitled to damages, regard being had to the evidence on the record which was, allegedly, not properly evaluated, opinion of assessors as to quantum of general damage was not sought from the assessors by the trial judge, and not considered by the trial judge.

With regard to the first issue, both learned counsel referred us to the Newspapers Act, Cap. 229 R.E 2002 which was then in force and regulation 3(2)(a), (b), and (c) of the Procedure for Trial of Cases of Defamation Regulations (supra), which provided for the requirement of the trial court to sit with at least three assessors. According to this regulation, a person may serve as an assessor if it appears to the trial court that he is of the apparent age of not less than twenty one years and not more than sixty years; that he can read and has a good understanding

of Kiswahili or English; and that he is suitable in all other respects to serve as an assessor.

It was argued by Mr. Mbuga that, although at page 60 of the record of appeal it is evident that the trial court sat with three assessors, the record as to the competence of the assessors, in terms of the requirement of regulation 3 of the above mention Regulations, is missing. It was thus submitted that the omission has occasioned a fatal irregularity to the trial court proceedings which meant that the trial court was not properly constituted when it tried the matter. As such, the trial proceedings were, according to Mr. Mbuga, a nullity. Mr. Mbuga relied heavily on case law pertaining to assessors in murder cases to fortify his submission.

On the other hand, Mr. Kwagilwa in reply reminded us that the proceedings sought to be faulted by Mr. Mbuga were ex-parte. It, therefore, meant that they were not in any way opposed by the appellant. The absence of the record as to competence of the assessors is, according to Mr. Kwagilwa, misconceived because there is no requirement under the above regulation for the trial court to record a finding of his assessment of the competence of the selected assessors. If at all, the failure is curable under rule 115 of the Tanzania Court of Appeal Rules, 2009.

Mindful of the provision of regulation 3 of the Regulations (supra), we considered the rival arguments. Whilst it is true that the record listed the assessors who sat with the trial judge without disclosing whether they were qualified to sit as such, it is clear that they were procured by the trial court and not by any of the parties. The argument that the assessors were not qualified and therefore not competent because the record does not say so, is of no avail because the same record does not indicate that they were not qualified although they were appointed by the trial court as the assessors. There was, on the other hand, nothing shown from the record or otherwise suggesting that the assessors selected by the trial court were not qualified and therefore not competent.

Since the regulation providing for the qualifications of assessors does not plainly require the competence of the selected assessors to be reflected by an express statement in the trial court proceedings, failure to do so cannot vitiate the trial proceedings. We, therefore, agree with Mr. Kwagilwa's submission that the omission was not fatal and if any, it is curable under rule 115 of the Tanzania Court of Appeal Rules, 2009. We, accordingly, find no merit on the first ground of appeal and we herein dismiss it.

On whether the suit from which the instant appeal arose was within the trial court's pecuniary jurisdiction, Mr. Mbuga referred us to the general damages of TZS 200,000,000.00 that was claimed by the respondent in his plaint, arguing that since they were not substantive claim, the said general damages could not be the basis of determining the trial court's pecuniary jurisdiction. He relied on **Tanzania-China Friendship Textile Co. Ltd v. Our Lady of The Usambara Sisters** [2006] T.L.R 70. He urged us to find that since the trial court had no jurisdiction, the trial proceedings were a nullity.

While agreeing that it was only the court that could assess the general damages, in reply, Mr. Kwagilwa had it that the case of **Tanzania-China Friendship Textile** (supra) is distinguishable and not applicable to the circumstances of the instant case, where there was no claim made by the appellants in the trial court leading to a conclusion that the pecuniary value of the claim was not within the jurisdiction of the trial court. In support, the learned counsel heavily relied on the case of **Peter Joseph Kilibika and Another v. Patric Aloyce Mlingi**, Civil Appeal No. 37 of 2009 (unreported) in which, in a situation which was somehow akin to the circumstances of the case at hand, we held that:

*"We shall deal first with the issue of jurisdiction of the High Court. In the suit before the High Court, the subject matter was determination and unlawful confinement. The respondent claimed for damages for TZS 800,000,000.00. There was no claim made which could lead to a conclusion that the pecuniary value of the claim is not within the jurisdiction of the High Court. The circumstances of this case are different from the circumstances prevailing in the* ***Friendship-Textiles*** *(supra). In the* ***Friendship-Textiles case*** *the principal claim was below 10,000.00. It was a specific claim for TZS 8,136.720 being the cost incurred for the production of the vitenge and tax paid. We are therefore of the considered view that this ground has no basis".*

Whilst it is true that there was no claim made in the instant case at the trial court suggesting that the trial court had no jurisdiction, it is also true that the trial court's decision was within the fours of our decision in **Peter Joseph Kilibika and Another v. Patric Aloyce Mlingi** (supra) which dealt with similar issue. Without much ado, and whilst mindful of the general jurisdiction of the trial court, we are of the considered view that the ground has, in the circumstances of the instant appeal, no basis. We dismiss it.

On whether the trial judge erred in failing to hold that the publication was not in its plain and ordinary meaning defamatory of the respondent, we considered at length the rival arguments in relation to the publication complained of. The publication was quoted verbatim in paragraph 6 of the plaint and the substance of its effect set out in para 7 of the said plaint. Whilst the counsel for the appellants essentially maintained that the complained of words of the publication were factual and therefore, not defamatory of the respondent, the counsel for the respondent maintained that the publication complained of, which was not disputed, was defamatory in its natural and ordinary meaning and at the trial, ample evidence was led at establishing the publication and the injury suffered by the respondent.

We had no difficulties in finding that the substance of the complained of defamatory statement, which was not disputed by the appellants, had it that the respondent, who was specifically mentioned by his names, the positions he then held, and his business, was a top leader of a lawless group, and a traitor who betrayed the cause of small miners. The statement is in our finding, defamatory of the respondent in its plain and ordinary meaning as was correctly found by the trial judge at page 89 of the record of appeal.

In relation to the issue of whether the complained statement was indeed defamatory of the respondent, we were also referred by the counsel for the respondent to the evidence on the record. In particular, our attention was drawn from page 147 up to 148 where the publication of the defamatory statement was admitted as Exhibit P5; from page 63 up to page 65 and page 139, 141 and 142, where the respondent testified how the complained of publication was false and defamatory of him and in support of such claim Exhibits P1, P2, P4 and P4 were admitted in evidence without objection. Needless to say, the pleading that the publication had a defamatory statement of the respondent was not disputed since the trial proceeded ex-parte. The appellant cannot be heard at this stage raising any defence which was not at the trial court. Accordingly, the claim of fair comment on matters of public interest is unfounded. We accordingly find that the ground of appeal complaining that the publication was not in its plain and ordinary meaning defamatory is unfounded and is dismissed.

Going by the evidence adduced by the respondent at the trial court, we are satisfied that they correspond with the pleading. The uncontroverted evidence from the respondent (PW1), and Karosi Isaya (PW2), a small miner since February, 1988, established that there was

indeed the publication which was defamatory of the respondent as pointed out in paragraph 6 and 7 of the respondent's plaint. Given the status and the standing of the respondent in the politics and mining industry, which on the record stand uncontroverted, it is evident that the publication, defamatory as it was, lowered the respondent's reputation in estimation of right-thinking members of the society generally, and thereby injured his personality by branding him as compromised, a traitor and a leader of lawless group.

Consistent with the testimony of PW2, it is clear that, as a result of the publication, the respondent was exposed to hatred, furious and ridicule to mention but a few. We are, therefore, in agreement with the findings of the trial judge which are apparent from page 80 up to page 84 of the record. We are, therefore, of the view that the trial judge was correct in finding that the respondent suffered damages. The fourth ground of appeal fails and is herein dismissed.

As to the claim that the trial judge did not obtain the opinion of the assessors as alleged in the fifth ground of appeal, we have had to go by the impugned trial court's judgment. We did so in the light of the submission by the counsel for the appellants that the assessors were not invited to give their opinion on the general damages.

It is evident from the impugned judgment that the trial judge sought and considered the assessors' opinion. At page 94 of the record, the trial judge referred to the opinion of the assessors who were of the view that the appellants must be condemned to pay a substantial amount of general damages given that they did not bother to respond to the request for a full apology and opted not to file their defence. We think that the trial judge after obtaining and considering the opinion of the assessors proceeded to assess and award general damages to the respondent to the tune of TZS 350,000,000.00, as correctly submitted by the respondent's counsel. The fifth ground of appeal as to failure of the trial judge to obtain opinion of the assessors regarding the quantum of general damages is without substance. It is dismissed.

In the light of the foregoing, the only pertinent issue is whether in assessing the general damages, the trial judge considered factors which were not canvassed before him. In this issue, the learned counsel for the appellants argued that by referring to inflation, the trial court considered a factor which was not canvassed by the respondent. In so doing therefore, the trial court ended up awarding the respondent general damages to the tune of TZS 350,000,000/- although there was no basis for such assessment.

On his part, the learned counsel for the respondent admitted that the trial judge at page 94 of the record referred to inflation while assessing the general damages. He argued that in view of the circumstances of the case, and eight years that had since lapsed, the trial judge did not act on wrong principle in taking into account the inflation factor.

We considered the record before us in the light of the reasoning of the trial judge as he was awarding the general damages to the tune of TZS 350,000,000.00. Admittedly, there was neither pleadings, nor evidence which provided materials entitling the trial court to consider the inflation factor, and ultimately arriving at the conclusion that the respondent would be entitled to TZS 350,000,000.00 as general damages. As the reason assigned for the assessment was not based on the pleadings and evidence, we would agree with the appellants that the amount was unjustifiable. In the result, we allow the sixth ground of appeal as we find that the trial judge considered inflation factor which was not part of the pleadings. As such, the award of TZS 350,000,000.00 to the respondent as general damages and interests thereof at 12% per annum had no basis. We think, the amount of TZS 200,000,000.00 which was pleaded and testified upon would be appropriate in the circumstances.

In conclusion, the appeal is partly allowed in the sixth ground of appeal to the extent of substitution of the general damages of TZS 350,000,000.00 with interest on the decretal amount at 12% per annum from the date of the judgment, for TZS 200,000,000.00 with interest on the substituted decretal sum at 7% per annum from the date of the judgment. Otherwise, the appeal is, in all the other grounds, devoid of merit, and it is dismissed. In the circumstances, we make no order as to costs.

**DATED** at **DAR ES SALAAM** this 31st day of January, 2024.

A. G. MWARIJA
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

B. S. MASOUD
**JUSTICE OF APPEAL**

The Judgment delivered this 6th day of February, 2024 in the presence of Mr. Hance Mrindoko, counsel for the appellants also holding brief for Kwagilwa, counsel for the respondent is hereby certified as a true copy of the original.

J. J. KAMALA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**