IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC.CIVIL APPEAL NO. 26 OF 2016

(Originating from Arusha Urban Primary Court, Civil Case No. 146/2014 and Civil Appeal No.)

ELIAKIMU JONAS.....APPELLANT

VERSUS

VICTORIA JAPHET.....RESPONDENT

JUDGMENT

DR. OPIYO, J.

The appellant named above being aggrieved with the judgment and decree of the District Court at Arusha in Civil Appeal No. 61/2014 dated 26th day of June, 2015 appeals against the whole judgment and decree basing on the following grounds;

1. That the Appellate Court erred in law and in fact by declining to consider that, since the appellant had discharged his punishment in Criminal Case No. 1297/2013 the same he was not liable in a civil suit.

2. That the first appellate court erred in law and fact by declining to consider the opinions of assessors.

3. That the first appellate court erred in law and fact by failing to properly evaluate the evidence tendered in the trial court.

Before this court both the appellant and the respondent appeared in person and unrepresented. This court ordered the hearing of the appeal to be disposed of by way of written submission, where the appellant was ordered to file his submission by 27/7/2017, the respondents to file reply by 11/8/2017 and rejoinder if any to be filed by18/8/2017. Both parties filed their submission accordingly.

Arguing the appeal, the appellant submitting on the first ground of appeal stated that Maromboso Primary Court in Criminal Case No. 1297/2013was finally disposed of in favour of the respondent, whereas the trial court imposed the following sentence;

> *ADHABU*
> *Mshtakiwa hili ni kosa lake la mara ya kwanza lakini kutokana na shufaa zake alizotoa mbele ya Mahakama hii, mshitakiwa anapewa adhabu ya kulipa fainiyaTsh. 50000 (Elfuhamsini au Gerezani miezi mitatu (3)*
> *Fidia kwa mlalamikaji ni Tsh. 100,000/= (laki moja).*

On the other hand, when the appellant was testifying before the trial court in Civil Case No. 146/2014 he had this to say;

> *"Baada ya kuhukumiwa nililipa faini ya Shs. 50,000 na fidia ya Shs. 100,000 aliyokabidhiwa mdai....."*

He further stated that, the appellant had not only paid the fine as required by the trial court but also he paid the respondent a lump sum of Tshs. 100,000/= as compensation and the respondent did not dispute that he received the said amount as compensation. He contended that, the fact that the respondent accepted the said amount as compensation it was irregular for her to file a civil suit against the appellant claiming to be re-compensated for similar damage. He thus, contended that, the first Appellate Court erred in law by deciding that the appellant should compensate the respondent a lump sum of Tshs. 543,000/=.

Opposing the appeal, the appellant responding to the this ground of appeal submitted that, in the trial court he successfully sued the Appellant for the following reliefs:- Costs for treatments, disturbances and transport costs of which all together made a total of two millions, seven hundred and eighty six thousands (Tshs.2,786,000) which accrued from the criminal act done by appellant. The trial court found that the appellant was guilty with the offence of *"Assaults causing actual bodily harm"* in Criminal Case No. 1297/2013. The appellant

herein never appealed on it instead, he opted in paying fine. She contended that, the acceptance of appellant to pay fine means that, he accepts what he did and therefore cannot escape the liabilities and costs she incurred as all occurred due to his criminal act against her. She said that, at the trial court, she prayed for costs of Tshs 2,786,000/= as the expenses she incurred, but the court granted the amount of Tshs.1,050,000/= which it found to be reasonable and clearly proved. That amount was reversed and reduced by appellate District Curt of Arusha to the tune of Tshs.543,000/= which on her side, she find it to be unfair as the appellate court had no reason to differ with the primary court decision. He referred this court to the case of **Daviws v. Powell Diffryn Associated Collers Ltd** (1935) 1KB 354,360 where it was stated that;

> *'in effect the Court, before it interferes with an award of damages should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these reasons or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balances of opinion of preference."*

She further stated that,the amount which the appellant is opposing in this appeal does not reach even the half of the amount she incurred due to his criminal act against her, even the compensation given by the trial court has nothing to do as far as tortures, damages and

body harm he caused to her has been proved. She referred to the case of **Tatu Kiungwe v Kassim Madai**(2005) TLR 405 where it was held that;

> *"A Criminal court is not the proper forum for determining the right for claiming damages. only civil court, via a civil suit can determine such matter."*

And submitted that, the amount of Tshs. 100,000/= and Tshs. 50, 000/= was ordered to be paid by the trial court in a criminal case, does not bar the respondent here to file a Civil suit against appellant for payment of damages suffered by respondent due to appellant's criminal act. She stated that, in the case of **Livingstone v. Rawyards Cool Co.** (1880) 5 App. Cas.39 as referred by Court of Appeal of Tanzania at Zanzibar in **Razia Jaffer Ali v Ahmed Mohamed Ali Sewji and Five Others** (2006) TLR 433 it was held that;

> *"Damages is that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

She thus contend that, the amount of Tshs.1,050,000/= was clear damages amount she incurred due to sufferings and injuries caused by appellant of which has to be compensated by appellant.

transport costs totaling Tshs. 2,786,000 she incurred in relation to the appellants criminal act against her.

The issue for determination therefore is whether it is possible to file a civil suit for damages after succeeding in a criminal case where the victim was awarded and accepted compensation from the convict. Based on the case of**Razia Jaffer Ali v Ahmed Mohamed Ali Sewji and Five Others** (supra), cited by the respondent defining the damages as remedy intended to put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong in question, my answer to this issue is in the affirmative. This is because as per another case of **TatuKiungwe v KassimMadai**(supra) also referred by the appellant a criminal court is not the proper forum for determining the right for claiming damages as it does not avail a chance for one to prove losses one sustained in relation to the act in question, but just proof perpetration of the act in question by the defendant. Based on that, I am of the considered view that the award of compensation in criminal case is not a bar to subsequent civil suit for damages resulting from a criminal act. Indeed compensation awarded by criminal court cannot obstruct civil claim, if extra damages can be awarded for damage arising from the same criminal act to serve the purpose for which damages are awarded for, i.e. bringing the claimant to the same position she was before the commitment of the wrong act. Thus the first ground of appeal is dismissed.

I now turn tosecond ground of appeal, in this ground the appellant started by quoting section 7(1) and (2) of the Magistrates' Courts Act, Cap. 11 R.E 2002 which provides that;

> *"S. 7(1) In every proceeding in the Primary Court, including a finding, the court shall sit with not less than two assessors.*
> *(2) All matters in the Primary Court including a finding in any issue, the question of adjourning the hearing, an application for bail a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award and all questions and issues whatsoever or any of them be decided by the majority of the magistrates and assessors present and in the event of an equality of votes the Magistrate shall have the casting votes in addition to his deliberative votes.*

He added that, also Rule 3(1) of the Magistrates' Courts' (Primary Courts) (Judgment of Courts) Rules G.N. No. 2 of 1998 provides that;

> *"Where in any proceedings the Court had heard all the evidence or matters pertaining to the issue to be determined by the Court, the magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the Court."*

He contended that, the above provision summarily stipulates that primary courts must be constituted by a Magistrate sitting with at

least two assessors and before reaching a decision, the Magistrate must take the opinion of the assessors. He went further submitting that, the trial court was duly constituted with two assessors namely Redempta Joseph and Ramadhani Said, but the trial Magistratedeclined to take their opinions. He stated that, the omission to do so was fatal, and it renders the decision of the trial court void. His argument was fortified with the case of **Agnes Severine vs Mussa Mdoe [1989] TLR, page 164** where the it was stated that;

> *"the omission by the trial magistrate to take the opinion of the Second assessor was fatal and it rendered the purported Judgment null and void".*

In response to this ground of appeal (second), respondent submitted that the trial court was duly constituted with two assessors namely Redempta Joseph and Ramadhani Saidi and the said two assessors gave their opinion and their opinion was in favor of her. He referred this court to page 5 and 6 of the typed primary court judgment. However, she stated that the trial Magistrate is not bound by assessors' opinions as alleged by appellant, as such the appellate court was proper to disregard this ground of appeal.

The basis of appellants argument is that the first appellate court erred in failure to considerer that the primary court's decision violated provision of section 7 (1) and (2) of the Magistrates' Courts Act, and

And Rule 3 (1) of the Magistrates' Courts' (Primary Courts) (Judgment of Courts) Rules G.N. No. 2 of 1998by failure to consider opinion of assessors in making it. He contended that, although the above provision stipulates that primary courts must be constituted by a Magistrate sitting with at least two assessors and before reaching a decision, the Magistrate must take the opinion of the assessors, but the magistrate in this case reached a decision without taking opinion of assessors, he sat with, namely Redempta Joseph and Ramadhani Said. Responding to the second ground of appeal, respondent denied this fact by submitting the trial court was duly constituted with two assessors who accordingly gave their opinion in her favour as per pages 5 and 6 of the typed primary court judgment.

My take is that, it is a settled law from the above provisions of laws which have been couched on mandatory terms to consider opinion of assessors in reaching primary court's decision,thus omission by the Primary Court Magistrate to take the opinion of the assessors constituting the court is fatal rendering the purported judgment null and void. From the trial court records, it is evident that the court sat with two above named assessors, but their opinions were not at all taken before the court reached the impugned decision. After closure of the evidence the court embarked in judgement writing without recording the opinion of assessors. Surprisingly after reaching the decision holding the appellant accountable to pay compensation of a specified amount the court purported to take the opinion of assessors

on whether they supported his verdict or not. With due respect to the trial magistrate, that procedure is not what the law stipulates. The requirement is taking opinion of assessors before analysis of evidence and reaching what a can call 'a proposed decision' for the assessors to approve. Taking assessors opinion after judgement writing is as good as not taking their opinion at all and it is indeed contrary to law as correctly argued by the appellant. Thus, I hasten to hold that the trial court's (Arusha Urban Primary Court civil application no 146/2014 by Hon. S.E. Joseph dated 14/11/2014) proceedings and decision were nullity in eyes of the law. I therefore accordingly nullify the same together with the subsequent appeal therefrom, Civil appeal no 61/2014 (before Arusha District Court by Hon. N. Baro dated 26th June 2015). I order a retrial of the case before another magistrate with a new set of assessors.

Order accordingly.

(Sgd)

DR. M. OPIYO

JUDGE

20/4/2018

I hereby certify this to be a true copy of the original.

HIGH COURT OF TANZANIA

A.K. RUMISHA

DEPUTY REGISTRAR

ARUSHA