IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC CIVIL APPEAL No.35 OF 2018

(Original Civil case No.06 of 2018 of the District Court of Sengerema at Sengerema)

BORA JUMA .....APPELLANT

VERSUS

THEREZA NDAGAJA & 2 OTHERS .....RESPONDENT

JUDGMENT

05th March, & 13th July, 2020.

TIGANGA, J.

The above named appellant Bora Juma sued the respondents namely Thereza Ndagaja, Aman Mussa and Likulu Mussa before the District Court of Sengerema for the claim of;

(i) the payment of Tshs. 31,000,000/= as the general damages for defamation

(ii) payment of Tshs. 17,514,000/= as compensation for the destroyed properties

(iii) 20% per annual being commercial rate

(iv) Payment of 12% on decretal sum from the date of judgment until finalization of payment

(v) Costs of the suit to be granted

(vi) Any other relief as the honourable court may deem fit and just to grant.

The claim based on the fact that, on 03/07/2014, the respondents invaded the house of the appellant and started to destroy the house of the appellant thereby damaging her properties thereto which are one toilet, bathroom and one residential room. According to the evidence before the trial court, when they were committing the offence, they were insulting her by saying that "Tapeli mkubwa unajimilikisha ardhi."

That matter was reported to police station, where the accused persons who are now the respondents were arrested, charged, and convicted of the offence of malicious damage to property contrary to section 326 (1) of the Penal Code [Cap 16 R.E.2002] [now RE.2019]. Following that conviction, they were sentenced to a conditional discharge and ordered to pay compensation of the property damaged to the tune of Tsh. 615,000/= as per the charge sheet filed.

It was after those criminal proceedings have ended, when the appellant sued the respondents in this appeal, the proceedings under which this appeal originates. After full trial before the trial District Court which was conducted exparte following the failure of the respondents to appear, and file their written statement of defence, it was adjudged for the respondents after the court found that the claim was not proved at the required standard.

Aggrieved by the decision, the appellant appealed before this court against the decision. In such effort he filed this appeal against the decision of the District Court of Sengerema advancing four grounds of appeal as follows;

1. That the trial magistrate erred in law and fact by failure to appraise, analyse the evidence of the case at hand and decide upon it.
2. That the trial magistrate erred in law and fact to demand receipt and other documents to prove the costs, while the respondent demolished the appellant's toilet, bathroom and one residential room and her restaurant.
3. That the trial magistrate erred in law and fact by failure to consider exhibit P1 that the appellant suffered loss caused by the respondents.
4. That the trial magistrate erred in law and fact to overlook a fact that evidence by the appellant's side proved general damages on the part of the respondents.

The respondents were physically served but they did not appear. However this court made an order that they be served by publication in Mwananchi News Paper of 15/01/2020 yet still they did not appear, consequently the appeal was ordered to be heard *ex parte*.

By the order of this court, the appeal was argued by way of written submissions. In support of the first ground of appeal, Mr. Samwel Mahuma, Advocate for the appellant submitted that section 43A of the Evidence Act [Cap 6 R.E 2002] which provides that, any judgment in criminal proceedings, shall be conclusive evidence that the person

convicted committed the offence. According to him, as the respondents were found guilty and convicted that is a conclusive proof that they were responsible for the allegation.

That the appellant was seeking for damages for defamation of the word uttered that "tapeli mkubwa anajimilikisha ardhi" the statement which was not true and lowered the reputation of the appellant.

In relation to the second ground of appeal, he submitted that the trial magistrate erred to demand receipt of the amount of the demolished structures like restaurant, toilets and bathroom, as there is no doubt that the respondent demolished the said structures of the appellant the facts that entitles the appellant with compensation on specific damage, exemplary damages and general damages. He submitted that the trial magistrate seems to have looking for specific damages only and did not touch anything on defamation. He cited the case of **Haji Associates Company (T) Ltd & another vs John Mlundwa**, [1986] T.L.R 107 HC in which it was held that general damages are compensatory in nature, as they intend to take care of the plaintiff reputation as well as a solatium compensation for mental pain and suffering.

He submitted that in the alternative of the receipt, it does not mean that the appellant should not be compensated. The court should assess damages regarding the fact that the appellant is a lay person and was not represented in the District court. To support his argument he cited the case of **Rugarabamu Archard Mwombeki vs Charles Kizigha & three others,** [1985] T.L.R 59 HC in which although the plaintiff did not show the extent his business was affected by the

defamatory words of the defendant, yet still the court assessed damages for the plaintiff.

Arguing the third ground of appeal, it is his humble submission that, the learned trial magistrate would have considered exhibit P1 (a judgment in criminal case) which was tendered by the appellant proving her claim against the respondents. He submitted that the said judgment proves that there was a criminal case against the respondents in which they were found guilty which criminal case was not a bar to a civil case.

In buttress his arguments, he referred to section 43A of the Evidence Act, (supra) proves that a criminal conviction after a lapse of time proves that the convict committed the offence.

In the fourth ground of appeal, he submitted that the appellant proved general damages on the part of the respondents, he submitted further that the defendant was not only supposed to compensate the plaintiff for only actual loss, but also for general damages and punitive damages. He cited the case of **Angela Mpanduji vs Ancilla Kilinda** [1985] T.L.R (HC) in which it was held *inter alia* that, punitive damages are awarded not only to compensate the plaintiff for actual loss suffered but also as a punishment to the defendant so that the defendant will not repeat his act. It was submitted in conclusion that the appellant was not compensated at all, but she was paid only 615,000/=

In the end it was prayed for the following orders, as follows;

(a) that, the judgment and decree of the trial court be quashed and set aside

(b) that, the appellant to be compensated for loss caused by the respondents.

(c) that, the respondents be ordered to pay costs of this appeal, and that of the trial court.

(d) Any other reliefs that this honourable court deems fit and just to grant.

Upon a thorough consideration of the grounds of appeal, appellant's submissions in support of appeal, and going through the lower courts records, I will go straight to the first ground of appeal in which the appellant's concern is the error in law and fact allegedly committed by the trial magistrate by her failure to appraise and analyse the evidence, of the case at hand and decide upon it.

As earlier on pointed out the counsel for the appellant supported this ground by complaining that the trial magistrate failed to consider and be guided by section 43A of the Evidence Act [Cap 6 R.E 2019] which provides that, any judgment in criminal proceedings, shall be conclusive evidence that the person convicted committed the offence. As the respondents were found guilty and convicted that was a conclusive proof that they were responsible for the allegation. Further to that, he said there is no dispute that the respondents defamed the appellant by uttering words that "tapeli mkubwa anajimilikisha ardhi" the statement which was not true and lowered the reputation of the appellant.

I entirely agree with the counsel for the appellant that the provision of section 43A of the Evidence Act (supra) provides that;

"A final judgement of a court in any criminal proceedings shall, after the expiry of the time limit for an appeal against that judgement or after the date of the decision of an appeal in those proceedings, whichever is the later, be taken as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offence to which the judgement relates."

It is therefore true that the presence of the judgment against the respondents in Criminal Case No. 57 of 2016 is a conclusive proof that the respondents committed the offence of malicious damage to property as charged in that case. However the relevance of that judgment is in that criminal case and to the extent of the value of the property ascribed to them in the charge sheet. Looking at the judgment in criminal case which was tendered as exhibit in the case at trial, the property alleged to be maliciously damaged were cumulatively valued Tshs. 615,000/= and it was that amount which the court ordered as compensation in criminal case, that being the evidence on record, it was hard then, for the same person to come to the same court in the civil case and claim the payment of Tshs. 17,514,000/= as compensation for the destroyed properties and expect to be believed.

The obvious question which everyone would ask, when did these properties appreciate the value from hundredth thousands to tenth millions. Obviously coming to court in the circumstances one need to have strong evidence which would controvert the evidence already on record, which in this case at trial there was no such evidence. That means the trial magistrate rightly so found when she held that the appellant failed to prove the claim in compensation.

That takes me to the second ground of appeal, which complains of the trial magistrate's demand of receipt and other documents to prove the costs, while the respondents demolished the appellant's toilet, bathroom and one residential room and her restaurant. From the findings in the first ground of appeal, any one adjudicating matters of this nature, would ask the plaintiff if he had any extra evidence like the receipt or any other documents proving the great value other than that one proved in the criminal case. In the circumstance therefore, it was proper for the trial magistrates to ask for such a proof. That being the case then the second ground of appeal also fails for the reasons given herein after.

Regarding the third ground of appeal, that the trial magistrates erred in law and fact by failure to consider exhibit P1 that the appellant suffered loss caused by the respondents. Arguing in support of the third ground of appeal, he submitted that, exhibit P1 (a judgment in criminal case) which was tendered by the appellant proved her claim against the respondents. He submitted that the said judgment proves that there was a criminal case against the respondents in which they were found guilty which criminal case was not a bar to a civil case.

I agree that the exhibit P1 proved the criminal offence and that is not a bar to civil suit, however, as held in respect of the first and second ground of appeal, the trial magistrate rightly considered the said exhibit but the exhibit was not conclusive evidence without further evidence, to prove that the appellant was entitled to damages. The other evidence which would have entitled the appellant the damage was supposed to be the evidence of proof that she was earning from the damaged properties and that, that damage caused her failure to earn. Without

that evidence the appellant is precluded from complaining. This ground also fail for lack of merit.

On the fourth and last ground, that the trial magistrates erred in law and fact to overlook a fact that evidence by the appellant's side proved general damages on the part of the respondents. In support of that ground the counsel for the appellant submitted that, the appellant proved general damages on the part of the respondents, he submitted further that the defendant was not only supposed to compensate the plaintiff for only actual loss, but also for general damages and punitive damages. He cited the case of **Angela Mpanduji vs Ancilla Kilinda** [1985] T.L.R (HC) in which it was held inter alia that, punitive damages are awarded not only to compensate the plaintiff for actual loss suffered but also as a punishment to the defendant so that the defendant will not repeat his act. It was submitted in conclusion that the appellant was not compensated at all, but she was paid only 615,000/=

I agree with him that the court has a duty to make appropriate order for compensation where there is enough evidence to do so. In this case, I have passed through the evidence submitted by the plaintiffs' witnesses who are basically two, the only statements that I met which had it been proved would have taken to be defamation was the word that the respondents said against the appellant that, "tapeli mkubwa najimilikisha ardhi", which simply meant that the appellant was a "conman who has been squandering land". There is nowhere, where it was said that the words in any way injured the reputation of the appellant to entitle her damage.

In the tort of defamation at least the followings are the elements that the plaintiff must prove before he is entitled to damages. He must prove four elements.

(i) First, the plaintiff must prove that the defendant made a false and defamatory statement concerning the plaintiff.

(ii) Second, the plaintiff must prove that the defendant made an unprivileged publication to a third party.

(iii) Third, the plaintiff must prove that the publisher acted at least negligently in publishing the communication.

(iv) Four, that in some cases the plaintiff must prove special damages.

Defamation is categorised into two, namely *slander* and *libel*, while libel is actionable *per se*, slander needs the proof of damages. While libel is in the permanent or written form, slander are merely spoken words. In this case, the words were alleged to have been uttered against the appellant by the respondents, and therefore they are slander. They should be taken to have been proved when the plaintiff has proved damages. However there are exceptions to that general rule; that exceptional cases are four namely;

(i) Where the words impute to the plaintiff the commission of a criminal offence punishable by imprisonment.

(ii) Where they impute to him a contagious or infectious disease

(iii) Where they are spoken of him as a professional or businessman.

(iv) Where they impute unchastity or adultery to a woman or girl.

See the decision of my brother Sisya J in the case of **K. Hassani vs. Kithuku & Chali** [1985] TLR 212.

In this case the evidence brought by the appellant has not proved that the case was falling in one of the exceptions mentioned above, neither has it proved any damage that the plaintiff suffered, to entitle him the award of damage. That being the case, the fourth ground of appeal also fails, it was then justified for the trial magistrate to hold that the case was not proved as required by law. That said, the whole appeal crumbles, for the reasons given.

It is so ordered.

DATED at **MWANZA** this 13th day of July, 2020

J. C. Tiganga
Judge
13/07/2020

Judgment delivered in the open chambers in the absence of the parties but with the directives that, parties be notified of the results of their case through their mobile phones. Right of third appeal explained and guaranteed.

J. C. Tiganga
Judge
13/07/2020