THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CIVIL APPEAL NO. 10 OF 2021

(Originating from the decision of the District Court of Mtwara at Mtwara Civil case No. 3/2021)

OLIVIA KANWA .....APPELLANT

VERSUS

RAPHAEL KAMBONA ..... 1st RESPONDENT

STELLA MARRIS MTWARA UNIVERSITY

COLLEGE (STEMMUCO) .....2ND RESPONDENT

JUDGEMENT

9/3/2023 & 2/5/2023

LALTAIKA, J;

The Appellant herein **OLIVIA KANWA** is dissatisfied with the decision of the District Court of Mtwara in Civil Case No. 3/202 (Hon. L.M. Jang'andu, RM) She appealed to this Court on two grounds as reproduced bellow:

1. *That the trial court grossly erred in law and in fact by failure to consider that it has jurisdiction to try the case as far as the common law tort is concerned.*
2. *That the trial court grossly erred in Law and in fact by holding that in order to institute an unlawfully (sic!) confinement case, a criminal case should be proved first.*

When the matter was called on for hearing, **Ms. Happyness Sabatho**, and **Mr. Rainery Songea**, learned advocates, appeared for the appellant and respondents respectively. Counsel for both parties proposed that the hearing proceed by way of written submissions. The proposal received a nodding of this court and a scheduled to that effect was jointly agreed and the hearing commenced.

Submitting on the first ground of appeal, Ms. Sabatho averred that it was undisputed that specific damages and not general damages determine pecuniary jurisdiction of the court. Nevertheless, contended the learned counsel, there are circumstances where pleadings fail to quantify specific claims and instead only a general statement of the claims is fronted.

It is Ms. Sabatho's submission further that in the instant matter, specific damages are unquantifiable. To that end, the learned counsel averred, jurisdiction lies with the Resident Magistrate's Courts and the District Court. The learned counsel referred this court to section 13 of the Civil Procedure Code, [CAP.33 R.E 2019] and the case of **Mwananchi Communication Ltd & 2other Vs. Joshua K. Kajula & 2 Others,** Civil Appeal No. 126/01 of 2016 at page 21 CAT (unreported).

Moving on to the second ground of appeal, Ms. Sabatho faulted the lower court's holding that criminal conviction was needed to prove a complaint on unlawful confinement. The learned counsel is of a firm view that the complainant was only required to establish that he/she was arrested and that, it was none other than the defendant who authorized the arrest. To bolster her argument, Ms. Sabatho cited the case of **Albert Mlilo &**

Another v. William Hermia Kasege, Civil Appeal case no. 01 of 2015 at page 11, High court Mbeya(unreported) and that of **Peter Joseph Kilibika & Another v. Patrick Aloyce Mlingi,** Civil Appeal No. 37 of 2009, CAT (unreported).

The learned counsel stated emphatically that the basic element of unlawful confinement is whether the arrest was executed adding that such an element needs to be proved through production of evidence. To that end, Ms. Sabatho averred, the same could not be disposed of by way of a preliminary objection geared towards pure points of law. To bolster her argument, Ms. Sabatho referred this court to the Court of Appeal case of **Mohamed enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (Unreported).

Resisting the appeal, counsel for the respondents started off by a claim that as far as the first ground of appeal is concerned, there was no such holding made by the lower court. Mr. Songea averred that the respondent herein raised three objection which were; one suit was incompetent for lack of jurisdiction, two the plaintiff had sued the second defendant herein who had no legal personality and three the suit did not disclose a cause of action against the defendant.

The learned counsel claimed that the trial court decided the matter on the third point of preliminary objection holding that the plaintiff first needed to go to a criminal court to prove the criminal case against the defendants (now respondents) before filling a civil case. Nevertheless, argued Mr. Songea, the learned counsel for the appellants had misconceived what was held in

Mwananchi Communication Ltd & 2other v. Joshua K. Kajula & 2 Others (supra).

Moving on to the second ground of appeal, Mr. Songea averred that the appellant had defended unlawful confinement as if it were the same as false imprisonment and unlawful detention. Since unlawful confinement is provided under section 249 and 253 of the Penal code R.E. 2019, argued the learned counsel, acquittal of the plaintiff was necessary as a basis for a civil case. To bolster his argument, the learned counsel referred this court to the case of **Ahmed Chilambo Vs. Murray & Roberts Contractors Limited, Civil** Case Number 44 2005 (Unreported) and that of **Simon Chitanda Vs. Abdul Kisoma** [1993] TLR 11.

Having dispassionately considered rival submissions and keenly examined the lower court records, the issue for my determination is whether the appeal is meritorious.

It should be noted that this is an appeal against a RULING on Preliminary Objection (PO). For reasons that shall become obvious soon, I will avoid touching on substantive issues raised by the appellant (then plaintiff). For ease of reference counsel for the 1st and 2nd defendants (now 1st and 2nd respondents) had raised three points of preliminary objection:

1. *That the suit is incompetent for lack of jurisdiction*
2. *The Plaintiff has sued the 2nd defendant who has no legal personality*
3. *That the suit does not disclose a cause of action against the defendants.*

The learned trial magistrate neatly summarized arguments by both learned counsel. He was convinced that the objections raised were sufficient

to dispose of the suit. As expected, he went ahead after analyzing arguments by both sides, gave the following reason for his decision:

> *"For the above exposed authority, I concur with Mr. Msalenge that the plaintiff was first required to go to a criminal court to prove criminal case (sic!) against the defendants and thereafter to this court for civil action. With these observations I see no reasons to discuss the remaining two objections as the answer in the 1st above are enough to dispose this suit entirely...In the event the suit is hereby struck out the suit (sic!) with costs"*

I must say, with due respect, that the pathway pursued by the learned Magistrate took him far into the vicinity, away from resolving the problem brought to his court. As alluded to above, there were only three points of preliminary objection put by the then counsel for the first and second defendants. The first was on jurisdiction. In the above quoted reason for the decision, the learned Magistrate clearly provided ***"I see no reasons to discuss the remaining two objections as the answer in the 1st above are enough to dispose this suit entirely..."*** (emphasis mine).

Ordinarily, in the context of the above, the phrase "the remaining two" would mean "excluding the first point". That is what counsel for the appellant understood. As a result, she spent a great deal of time arguing for pecuniary jurisdiction of Magistrate Courts. She cited a number of authorities to support her arguments.

Counsel for the respondents, however, is on a totally different frequency. He claimed that the trial court decided the matter on the third point of preliminary objection holding that the **plaintiff first needed to go to a**

criminal court to prove the criminal case against the defendants (now respondents) before filling a civil case.

I have problems accepting this kind of reasoning. It defeats the purpose of a preliminary objection. A PO must be on a point of law that does not require production of evidence. Besides, and I must say this sparingly, I see no link between a cause of action in a civil suit and the requirement "to go to a criminal court to prove a criminal case". That is nothing short of documentary evidence.

Since none of us is absolutely clear which of the three preliminary points of objection forms the basis for the decision (Ms. Sabatho thinks the 1st point, Mr. Songea believes it was the third and I would say none of the above), an order for retrial cannot be avoided.

I am alive to the settled position of the law that an order for a retrial arises when the appellate court finds out that the judgment of the trial court is defective for leaving contested material issues unresolved and undecided which error or omission renders the said judgment a nullity and incapable of being upheld. See, **Stanslaus Rugaba Kasusura & Attorney General vs Phares Kabuye** [1982] T.L.R. 192. See also **Fatehali Manji versus Republic** (1966) EA 344.

Premised on the above, I hereby **nullify and set aside the Ruling and order(s) in *Civil case No. 3/2021.*** Further, I order Civil case No. 3/2021 be retried with the following directives: **one,** the trial court should first determine viability of the objections raised before entertaining them **two;** try to ensure the matter is determined on merit as opposed to

embracing technicalities. **three,** should conditions permit, encourage parties to reach an amicable settlement since the dispute bears some academic integrity related issues. Such issues normally find better and long-lasting solutions from within.

It is so ordered.

E.I. LALTAIKA

JUDGE
05.03.2023

Court

This judgement is delivered today in the presence of Ms. Happiness Sabatho, counsel for the appellant and Mr. Issa Chiputula counsel for the respondent.

E.I. LALTAIKA

JUDGE
05.03.2023

Court

The right to appeal to the Court of Appeal fully explained.

E.I. LALTAIKA

JUDGE
05.03.2023