IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

DC. CIVIL APPEAL NO. 107 OF 2022

MUBEZI JONATHAN KANDAGA ..... APPELLANT

VERSUS

HAMISI MOHAMED SAID ..... RESPONDENT

(Appeal from the Judgment and decree of the District Court of Ilala at Kinyerezi)
(G. E. Nkwera, SRM)
Dated 11th day of July 2022
In
(Civil Case No. 106 of 2020)

JUDGMENT

Date: 05/06 & 17/07/2023

NKWABI, J.:

In the trial court, the respondent successfully sued the appellant for general damages for threatening to kill the respondent and his daughter, spoiling the respondent's reputation for having extra-marital affairs with the wife of the respondent one Zena Shabani which caused the respondent to suffer psychologically, loss of income for he was unable to attend work when attending court for more than three months.

The respondent was awarded T.shs 12,000,000/= as general damages. The respondent also kept in his bag an order for costs which was granted by the trial court.

Offended by the judgment and the decree of the trial court, the appellant rushed to this Court for a redress. He has six grounds of appeal as listed herein below:

1. That the honourable trial court grossly erred in law and fact for awarding damages contrary to the required standards of proof.
2. That the honourable trial court grossly erred in law and facts for failure to properly evaluate the evidence in record if properly evaluated, then the findings was obvious that the appellant's case was heavier than the respondent's case,
3. That, the honourable trial court grossly erred in law and fact by awarding the respondent T.shs Twelve million (say 12,000,000/=) in absence of sufficient evidence.
4. That the honourable trial court grossly erred in law and fact for not holding that the evidence adduced by one Jumanne Hamza was hearsay in nature and the evidence adduced by the same contradicted with the evidence adduced by the respondent.

5. That, the honourable trial court grossly erred in law and fact for relying on extraneous matter in her decision.
6. That the honourable trial court grossly erred in law for improperly admitting exhibits contrary to law.

It is in respect of the above grounds of appeal the appellant asks this Court to allow the appeal with costs. He further asks I reverse the decision of the trial court and judgment be entered in favour of the appellant.

The appeal was heard by way of written submissions. Mr. Julius Mushobozi, learned counsel, drew and filed written submissions in chief and rejoinder submission for the appellant. The respondent's reply submission was drawn and filed by Mr. Godian A. Mugusi, also learned counsel. I will deal with the grounds of appeal in the manner they were submitted for by the counsel of both parties.

Starting the submissions to support the appeal, the counsel for the appellant argued the 5th and 6th grounds together which he stated were to the effect that the honourable trial court grossly erred in law for improperly admitting exhibits contrary to the law.

Mr. Mushobozi explained that exhibit P1 and exhibit P2 were wrongly admitted because were not read over to the appellant. He cited, among other criminal decisions of the Court of Appeal, the case of **Mwinyi Jamal Kitalamba @ Igonzi and 4 Others v. Republic,** [2020] TLR 508 where it was stated that:

> *"Failure to read the exhibit after being admitted the omission is fatal as it contravenes the fair right of an accused person to know the contents of the evidence tendered and admitted against him. It was wrong and prejudicial."*

Mr. Mushobozi pressed for expungement of exhibit P.1 and exhibit P.2 citing **Robison Mwanjisi v. Republic** [2003] T.L.R. 218.

In reply it was argued that the counsel for the appellant was supplied with the documentary exhibits prior to admission and commented on the same that he had no objection. It is asserted that the exhibits were not strange to the appellant as they were served to him prior the hearing dates. It is further contended that the proceedings were well recorded and the exhibits were read over loudly.

In rejoinder submission it was urged that the counsel for the respondent does not deny that the documentary evidences were never read instead he has blatantly ignored and diverged for his own convenience by submitting alternatively that the appellant and his advocate never objected to the documents, an argument which was not argued in their submission in chief. He reiterated his submission in chief.

I have considered the submission of both parties in respect of the complaint. I have also gone through the proceedings of the trial court and found the complaint is true. It is true that after the documentary evidence were received by the trial court, they were not read over to the appellant. That violated the position clearly set by the Court of Appeal in **Bulugu Nzungu v. Republic,** Criminal Appeal No. 39 of 2018 CAT (unreported) where it was underscored that:

> *"It is now a well-established principle of Law of Evidence as applicable in trial of cases, both civil and criminal, that generally once a document is admitted in evidence after clearance by the person against whom it is tendered, it must be read over to that person."*

That said, I expunge the documentary evidence from the court record.

The next ground of complaint advanced by the appellant for my consideration and determination is that the honourable trail court grossly erred in law and fact for failure to hold that the respondent had proved his case against the appellant on the balance of probabilities. It is submitted that the judgment in criminal case No. 1786 of 2020 where the appellant was convicted was not relevant in civil case No. 106 of 2020. In this case the trial magistrate did not evaluate independently the evidence on record and ultimately considered the judgment of Ukonga primary court (exhibit P.2) to support the trial court's decision. Mr. Mushobozi backed his argument by the case of **Charles Christopher Humphrey Richard Kombe t/s Humphrey Building Materials v. Kinondoni Municipal Council,** Civil Appeal No. 125 of 2016, CAT (unreported) where it was underscored that:

> *"The judgment of the High Court was only relevant as it related to the appellant's acquittal. It was not relevant to prove that the appellant had a valid permit to occupy the disputed land. ...*
>
> *We have no slightest doubt that the above reflects a correct legal position on the correct interpretation of section 43A of Cap. 6. From the above, it will be dealt that despite the High*

Court sustaining the appellant's acquittal particularly on the count connected with erecting a stall without permit. Such acquittal did not bind the trial court in the suit to determine an issue based on the lawfulness of the demolition."

It is further contended that the respondent never witnessed extra marital affair between his wife and the appellant so his evidence ought to be discarded under section 62 of the Evidence Act, Cap. 6 R.E. 2019. He further cited the case of **Jadili Muhumbi v. The Republic,** Criminal Appeal No. 229 of 2021, CAT (unreported) where it was held that:

"What is normally done with hearsay evidence is to attach little or no value to such evidence while it remains on record. Vumi Liapenda Mushi v. Republic, Criminal Appeal No. 327 of 2016 (unreported)."

The respondent's counsel reply was that the grounds of appeal were disputed. It is also the contention of the respondent that the witness of the respondent saw with his eyes the appellant sleep in the bedroom of the respondent with the wife of the respondent, thus the suit was proved and the appellant failed to defend himself. He insisted that in civil case, prove is

on the balance of probabilities citing **Anthony Masaga v. Penina Kitira & Another,** [2015] T.L.R. 46.

In rejoinder the counsel for the appellant stated that the respondent never adduced direct evidence on the interfering with marriage. It is added that nowhere in the records does it show that the appellant threatened to kill the respondent twice, it was opined by Mr. Mushobozi that, hence it is a new fact which has been imported by the respondent's counsel at the juncture of hearing this appeal.

It was further submitted that the cited case of **Lucas Nyalyongera v. Republic** [1994] T.L.R. 201 is inapplicable to the circumstances of this case because in that case the prosecution did not impeach the appellant's evidence while in the instant case the appellant entirely bred holes in the respondent's evidence during cross-examination.

I have gone through the evidence in the court record, I think, with profound respect to Mr. Mushobozi, that the grievance is unfounded. There is direct evidence from PW2 Jumanne Hamza who used to stay at the home of the respondent. PW2 saw the appellant go out with the wife of the respondent and wife of the respondent come home while drunk. He also saw the

appellant sleep in the room of the respondent with the wife of the respondent and other acts which clearly indicate that the appellant was having extra-marital affair with the wife of the respondent.

As the evidence that the Zena Shabani is the wife of the respondent was not controverted in cross-examination, then that fact was admitted. The ground of appeal crumbles to the ground.

Then another ground of appeal for my determination is that the honourable trial court grossly misdirected itself in law by awarding the respondent T.shs twelve million (say 12,000,000/=) contrary to the required standards of proof.

The counsel for the appellant argued that it was not safely vouched for the respondent to plead them through general damages as most of the claims obviously called for specific proof including loss of income. Thus, it is submitted, the trial court erred to grant reliefs which were generally couched without being specifically pleaded. He referred me, apart from the book of **Winfield and Jolowicz on Tort,** 16th Edition, Sweet & Maxwell, London, 2002, at page 760 on paragraph 22.15. The decision of the Court of Appeal

of Tanzania in **Jonathan Kalaze v. Tanzania Breweries Limited,** Civil Appeal No. 360 of 2019 where it was stated that:

> *"At page 66 of the record of appeal, the same PW1 said that he lost his business and entire life, whatever that meant. It is, therefore, undisputed that the appellant had in addition to pleading unquantifiable damages namely he also pleaded loss of business and profit which were specific in nature and required to be specifically pleaded and strictly proved. Unfortunately, before the High Court, the learned advocate for the appellant, in a way, admitted that in order for one to claim loss of business, he must claim special damages which was, right in our considered view. This position was also taken in the case of* ***Msolele General Agencies v. African Inland Church,*** *(1994) T.L.R. 92 where it was held that a claim of loss of business or profit falls within a specific claim requiring strict proof."*

The counsel for the appellant added that despite specific reliefs were pleaded generally, they were not proved to the hilt in respect of high blood pressure from 19th May 2020 as a result which he received treatment at Amana

hospital, psychology fitness, how he had earned and accumulated exponentially a capital worth T.shs 80,000,000/= and how the same drastically dropped to T.shs 20,000,000/=, how his respect was lowered due to the extra marital affairs between the appellant and the respondent's wife and how his children education was endangered. He cited **Zuberi Augustino Mugabe v. Anicet Mugabe** [1992] T.L.R. 137 CAT and **Alfred Fundi v. Geled Mango & Two Others** [2019] T.L.R. 42 where, in the latter case, it was stated that:

> *"In the instant case, the Appellant had not produced any documentary evidence to substantiate and justify the claim. As such therefore, there was no verifiable evidence to prove that the appellant incurred costs. There should have been proof that he actually sustained those injuries following the said accident and consequently he incurred specified costs and medical expenses for his injuries and such costs and medical expenses should have been supported by respective medical receipts. These supporting documents were not produced before the trial court."*

The respondent's response was that the 1st and 3rd grounds of appeal are strongly disputed in that the trial magistrate was correct to award T.shs 12,000,000/= to the respondent as general damages after evaluating the evidence of each witness. He backed his submission with the case of **Tanzania Saruji Corporation v. African Marble Co. Ltd** [2004] T.L.R. 155 where it was held that:

> *"General damages are such the law will presume to be direct, natural or probable consequences of the act complained of, the defendant's wrongdoing must, therefore have been a cause, if not a sole, particularly significance, cause of damage."*

It is thus prayed for the respondent that the appeal be dismissed with costs while upholding the trial court's judgment.

It was contended in rejoinder submission for the appellant that the submission for the respondent did not flag holes against the submission in chief as to whether the respondent combined the claims which required specific proof in nature, whether the respondent proved if he was psychologically and mentally affected as a result he suffered high blood pressure, how he earned T.shs 80,000,000/= and how it drastically fell to

T.shs 20,000,000/=. It is added that the manner the counsel for the respondent submitted is as if he meant specific damages were the same thing as general damages. He distinguished the case of **Tanzania Saruji Corporation** (supra) with the instant case because the instant case, the cause of action is threatening to kill, loss of income and distortion of respondent's reputation whereas in the cited case the cause of action was based on detinue.

I have closely scrutinized the arguments of both counsel in respect of the above criticism leveled against the decision of the trial court. With respect, I think that the learned counsel for the appellant is trying to mislead the Court. The decision of the trial court is very clear. It is on general damages and costs. This is what the trial court said and I quote:

> *"Hivyo basi, Mahakama hii, inaamuru Mdai alipwe na Mdai Shilingi Milioni Kumi na Mbili (Shs. 12,000,000/=) kama madhara ya jumla na gharama za shauri hili."*

The question now is, can this Court interfere with the discretion exercised by the trial court in awarding the general damages? The answer can be easily found in the case of **Nance v. British Columbia Electric Rail Co. Ltd** (1951) AC. 601 at P. 613 where it was held that:

"Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that award below simply because it would have awarded a different figure if it had tried the case ... before the appellate court can properly intervene, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant on), or, short of this that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage ..."

I am satisfied that the trial court did not exercise its discretion by applying a wrong principle. The act of the appellant having an affair with the wife of the respondent injured the respondent. It injured his reputation among the family members and his neighbours. He had to get redress. The complaint is unmerited and dismissed.

The last ground of appeal is that the honourable trial court grossly erred in law and fact for relying on extraneous matter in her decision. The same was quoted that:

"... ila kwa matendo yote kwa ujumla lazima mtu akose nguvu za kufanya kazi (muda wa mashauri na kufuatilia suala hili), uchungu ambao kwa namna moja au nyingine unleta msongo wa mawazo kwa mtendewa."

The counsel for the appellant pressed that the omission was a fatal irregularity which prejudiced the appellant as it went to the root of justice and vitiated the proceedings of the trial court entirely. He cited **Lucas s/o Venance @ Bwandu & Another v. Republic,** Criminal Appeal No. 392 of 2018 CAT (unreported) and **Athanas Julias v. Republic,** Criminal Appeal No. 498 of 2015 CAT (unreported) where in the latter case it was held that:

"The implication here is that, either, in his judgment, the trial resident magistrate did include extraneous matters which did not completely feature in the evidence of the witnesses who were called to testify, or, the trial resident magistrate did omit to record a number of facts that were said by the witnesses in their testimonies. In either case, we are inclined to join hands with the contention of the learned counsel for both sides that, the irregularity occasioned was fatal and did vitiate the entire proceedings of the trial court."

The counsel for the appellant finally prayed the appeal be allowed with costs, judgment and decree of the trial court be reversed and judgment be entered in the appellant's favour.

In reply submission, it is contended that there is nowhere in the judgment even in the proceedings records where the trial court added a slight jot of extraneous matters and fact in making her decision. It is added that all what are contained in the judgement were completely featured in the evidence of the witnesses of both parties. It was further argued that the trial magistrate dealt with discrepancies and inconsistencies, the value of the documentary evidence, the credibility of witnesses. Then she pointed out facts proved and made clear and specific findings. He referred me to the case of **Kulwa Kabizi & Others v. Republic** [1994] T.L.R. 201 where it was held that the High Court was right evaluate the evidence on record and act on some crucial evidence.

The counsel for the respondent was of a further view that the evidence adduced by the respondent and his witness (PW2) was not seriously controverted by the appellant during the hearing of the matter at the trial Court that his cause of illegal interfering the marriage of the respondent

threat of harming the life of the respondent and his daughter made the respondent suffer time, psychologically and mentally and due to the fact that the testimonies had heavy weight. He backed his argument by the case of **Lucas Ngalyogela v. Republic,** [1994] T.L.R. 201.

The counsel for the appellant did not make any rejoinder submission on this lamentation.

I have revisited the evidence that is in the court record in respect of this charge against the decision of the trial court I am of the considered view that the trial magistrate was entitled to decide as she did. It is trite law that a court of law is entitled to evaluate the evidence it has before it and come to its own finding/ conclusion. See **James Bulolo & Another v. Republic** [1981] T.L.R. 283 where it was stated that:

> *"The duty of the court first to collect, analyse and assess the evidence and see how far, if at all, it touches upon accused person."*

To emphasis on coming to a conclusion by any court at any stage one can see by way of analogy the decision in **Jafari Musa v. DPP,** Criminal Appeal No. 234 of 2019, CAT (unreported) it was stated that:

"We have considered this ground and the arguments thereon. We wish to begin by appreciating that, in the past, failure to consider a defence case used to be fatal irregularity. However, with the wake of progressive jurisprudence brought by case law, the position has changed. The position as it is now, where the defence has not been considered by the courts below, this Court is entitled to step into the shoes of the first appellate court to consider the defence case and come up with its own conclusion."

It is also mundane law that slight misdirection or non-direction does not cause the case to flop. One can have reference to **Elias Kigadye & Others v. Republic** [1981] T.L.R. 355 (C.A) at p. 359 it was held that:

"The judge in his judgement stated, in reference to the death of Twiga:

> Admittedly, the defence had no obligation to prove positively that Twiga died of natural causes, they had only to raise the possibility of it, in other words, to show that death by natural causes had not been excluded.

Mr. Lakha criticised this proposition. We agree it is a misdirection; it is for the prosecution to exclude the possibility of death by natural causes. The defence has no onus placed on it. However, the judge held:

> There was direct eye witness evidence linking the beating to the death of Twiga. He was in good health at one time; he was critical [sic] in the next.

So even assuming for interest that Twiga had a TB. And that it had causative effects, the direct linkage between the beating and the death removes the case from the realm of natural causes."

It is also, I think, worth to remind the appellant of the words of this Court by his Lordship Cross J. as he then was in **Ibrahim Ahmed v. Halima Guleti,** [1968] HCD No. 76 (PC) where he held that:

The District Court erred. The question for a court on appeal is whether the decision below is reasonable and can be rationally supported: if so, the lower court decision should be affirmed. The appeal judge may not in effect try the case de novo, and decide for the party he thinks should win.

In that case, he also said that and I quote:

> *"Surely, when the issue is entirely one of the credibility of witnesses, the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence." Judgment of the primary court restored."*

It is thus, I hasten to say here that, the trial court evaluated the evidence before it and came to its conclusion that the appellant had caused general damages to the respondent. I cannot fault it in the way the counsel for the appellant wants to persuade this Court.

In the final analysis, the appeal is found to be unmerited, I accept the views of the counsel for the respondent in respect of the grounds of appeal in this appeal save as stated herein above. Judgment and decree of the trial court are upheld. Further, save as herein stated, the appeal is dismissed with costs. So, I order.

DATED at **DAR-ES-SALAAM** this 17th day of July, 2023.

J. F. NKWABI

JUDGE