

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 194 OF 2022

(Arising from Civil Case No. 195 of 2019 in Resident Magistrate's Court of Dare es Salaam at Kisutu)

WORLD VISION TANZANIA..... APPELLANT

VERSUS

SABRA YUSUFU KAMHANDA.....RESPONDENT

JUDGMENT

Date of last Order: 28-09-2023

Date of Judgment: 27-11-2023

B.K. PHILLIP, J

Dissatisfied with the judgment of the Resident Magistrate's Court of Dar es Salaam at Kisutu, the appellant herein filed this appeal on four grounds. The same are reproduced verbatim hereunder;

- i) That, the honorable trial Magistrate erred in law and fact by contradicting himself with the 2nd raised issue that entirely depended its affirmative answer over the 1st issue in the determination of his judgment by acknowledging the 1st issue to have been answered in the negative rather proceeded to answer the 2nd issue by merely relying on unsubstantiated proof to the required standard.*

- ii) *That the Trial Resident Magistrate erred in law and fact by only considering the testimony of the respondent in his reasoning and failed to consider and evaluate testimony and documentary evidence tendered by the appellant's witness.*
- iii) *That the learned trial Magistrate erred in law when awarding damages by acting arbitrarily and misapplying the law with respect to the principle of burden of proof henceforth, awarding what was not proved by the respondent in the required standard.*
- iv) *The learned trial Magistrate's entire judgment and findings are against the weight of evidence, contradictory, inexplicable, and not based on the accepted legal principle.*

A brief background to this appeal is that, in 2019, the respondent sued the appellant, together with Mic Tanzania Plc (not a party in this appeal), claiming payment of Tanzanian Shillings two hundred and fifty million (250,000,000/=). This amount represents compensation for the illegal and unauthorized use of her mobile telephone number, +255718 592 335, by the appellant on its official website. The respondent alleged that the appellant indicated the aforementioned telephone number on its official website for communication purposes without authorization or any color of right.

It was alleged in the plaint that the respondent registered her mobile telephone number with Mic Tanzania Plc (commonly known as "TIGO") and had been using it since 2011. In 2019, she discovered that her aforementioned telephone number was indicated on the appellant's website without her consent and/or authorization from Mic Tanzania Plc. The respondent used to receive calls through which the callers were asking her about tenders, employment opportunities, and other services rendered by the appellant (World Division). She complained to her service provider (Mic Tanzania Plc), who confirmed to her that the telephone number in question was registered in her name only, not by any other person.

Furthermore, despite reporting to Mic Tanzania Plc and sending a demand letter to both Mic Tanzania Plc and the appellant, the respondent's complaints were not resolved. Her telephone number continued to be used by the appellant illegally. Her employer asked her why her telephone number was indicated on the appellant's official website. He suspected that she was working for two employers, the appellant and Eastenders Limited (her employer). At the end of the day, her employer lost trust in her noting that she used to receive calls from the appellant's customers. subsequently, he terminated her employment.

In its defense, Mic Tanzania Plc acknowledged that the telephone number in dispute was registered and owned by the respondent, but it denied allowing the said telephone number to be used by the appellant herein.

On the other hand, the appellant disputed all of the respondent's allegations and claims. In the determination of the case, the trial court framed three issues, namely:

- i) Whether the 1st defendant illegally used the plaintiff's mobile number +255718 592 335 on its official website for official communication*
- ii) If issue No.1 is in the affirmative whether the plaintiff suffered damages as the result of the said illegal use of her mobile number +255 718 592 335*
- iii) To what reliefs are the parties entitled?*

Upon receiving evidence from both sides, the trial court held that there was no sufficient evidence adduced by the respondent to prove that the appellant used the respondent's mobile telephone number on its official website for official communication. Thus, answered the 1st issue was answered in the negative. However, he proceeded to determine the 2nd, 3rd, and 4th issues and awarded the respondent damages to the tune of Tshs. 5,000,000/=

Back to this appeal, the appellant was represented by the learned Advocate Nicodemus Mbugha whereas the learned Odhiambo Kobas appeared for the respondent. The hearing of this appeal was conducted by way of written submissions.

Submitting the 1st ground of appeal, Mr. Nicodemus argued that since the trial court answered the 1st issue negatively, it erred in continuing with the determination of the remaining issues and awarding the respondent

damages. He went on to submit that the trial Magistrate erred both in law and in fact by holding that the appellant is responsible for the embarrassment and loss alleged by the respondent. He contended that the 2nd, 3rd, and 4th issues were dependent on the answer to the 1st issue; if it were positive, then the remaining issues could be determined. Since the 1st issue was answered in the negative, the remaining issues were not supposed to be determined by the court.

Expounding on this point, Mr. Nicodemus argued that the framing of issues helps the trial court to concentrate on specific issues that have been framed, and these issues must correlate with what the decision of the court states for justice to be seen to have been done. Mr. Nicodemus cited the case of **Janmohamed Umerdin Vs. Hussein Amarshi and another (1953) E.C.A 41** and **Nkalubo vs. Kabirige (1973) E.A 103**.

In rebuttal, Mr. Odhiambo Kobas started his submission by raising a legal issue on the competency of this appeal, which can be termed as a point of preliminary objection. He argued that this appeal is incompetent for failure to join Mic Tanzania Plc, a party in this case and its name appears in the impugned judgment. He contended that for that reason this appeal deserves to be struck out.

On the merit of the appeal, Mr. Kobas conceded that after the trial Magistrate had answered the 1st issue in the negative, he was not supposed to proceed with the determination of the remaining issues. However, he contended that the fact that the 1st issue was answered in the negative did not bar the trial Magistrate from continuing with the

determination of the remaining issues. He went on to submit that the practice of the court has been that answering the 1st issue in the negative does not bar the trial Magistrate from determining the remaining issues. He cited the case of **Richard Malabaja Vs. Hussein Yusuph Ngowi Labour Revision No.14 of 2018** (unreported).

Moreover, he was of the view that the cases of **Janmohamed Umerdin** (supra) and **Nkalubo** (Supra) are distinguishable from the case at hand. the reason is that the holdings in those cases were specifically on the importance of framing issues thus, they do not support the appellant's stance that when the 1st issue is answered in the negative, the remaining issues should not be determined.

Further, Mr. Kobas argued that the respondent proved her case to the standard required by the law on the balance of probabilities. She demonstrated her ownership of mobile telephone Number 0718 592 335 and that the same was being used by the appellant illegally without any permission from Mic Tanzania Plc. (Tigo). She also demonstrated how the unauthorized use of her mobile telephone number by the appellant adversely affected her. He was of the view that the trial court ought to have answered the 1st issue in the positive, not negative, and that the negative answer to the 1st issue might have been made mistakenly. He invited this court to invoke its revisionary powers while exercising its appellate jurisdiction to correct the anomaly/irregularity appearing on the face of the impugned judgment and make a finding that the 1st issue was supposed to be answered in the positive.

In rejoinder, Mr. Mbugha responded to the legal issue raised by Mr. Kobas in his reply to the appellant's submission on the competency of this appeal. Mr. Mbugha pointed out that at the trial court, Mic Tanzania Plc raised a point of preliminary objection, asserting that according to the provisions of Section 40(1) of the Tanzania Communications Regulatory Authority Act, No.12 of 2003, the honorable court had no jurisdiction to entertain the case. Mr. Kobas, who was appearing for the respondent at the trial court, conceded to the point of preliminary objection. Consequently, the trial court dismissed the case against Mic Tanzania Plc. Therefore, the appellant herein remained the sole defendant in the case. The judgment entered by the trial court is specifically against the appellant herein and has nothing to do with Mic Tanzania Plc. Mr. Mbugha was emphatic that this appeal is proper before this court and is competent.

Furthermore, Mr. Mbugha contended that the appellant there was no need to join Mic. Tanzania Plc in this appeal. If this court finds that Mic Tanzania is a necessary party to this appeal, as argued by Mr. Kobas, then the impugned judgment is tainted with many errors because it does not mention or discuss anything concerning Mic Tanzania Plc. Mr. Mbugha invited this court to ignore the aforesaid legal issue raised by Mr. Kobas and rely on the principle of overriding objectives, which provides for the need to deal with substantive justice and the expeditious determination of cases.

Concerning the 1st ground of appeal, Mr. Mbugha reiterated his submission in chief. He insisted that the trial court erroneously awarded the respondent damages to the tune of Tsh. 5,000,000/= as she did not prove her case to the standard required by the law. He reiterated his prayer that the appellant's appeal be allowed with costs.

Having dispassionately analyzed the rival submissions made by the parties in respect of the 1st ground of appeal, I find myself compelled to address the legal issue raised by Mr. Kobas. It is important to note that the legal issue in question has been raised wrongly at this stage. It is in the form of a point of preliminary objection, which was supposed to be raised at the earliest stage possible before this court issued an order for the hearing of the appeal. Thus, it has been raised at this stage without the leave of the court.

I find it apposite to point out here that submissions made by the parties to the case are supposed to be backed up with the pleadings. Parties to a case or advocates cannot decide on their whims to argue on issues not pleaded and without the leave of the court. Allowing such a style in the hearing of cases will lead to chaos. Thus, this court is not obliged to deal with an issue raised in total contravention of the acceptable legal procedure in the hearing of cases.

However, without prejudice to my observations herein above, upon perusing the court's records, I found, as correctly submitted by Mr. Mbugha, that the trial court dismissed the case against Mic Tanzania Plc following Mr. Koba's concession to the point of the preliminary objection

raised by Mic Tanzania Plc. Thus, the impugned judgment solely concerns the appellant herein.

Having said the above, let me proceed with the determination of the merit of the 1st ground of appeal. I wish to state outright here that there is no dispute that the trial Magistrate answered the 1st issue in the negative. Mr. Koba's argument that the trial Magistrate intended to answer the 1st issue in the positive but there was a slip of a pen is completely unfounded. The analysis of the evidence made by the trial Magistrate when dealing with the 1st issue shows clearly that the answer to the 1st issue was going to be negative. There is nothing to speculate on regarding the findings made by the trial court. The trial Magistrate stated categorically that it compared the printout (exhibit P2) on which the mobile telephone number in question was allegedly indicated therein with the printout (exhibit D1) tendered by DW1 and noted that the same are quite different. He concluded that the printout presented by the respondent (exhibit P1) is not the appellant's official website and does not bear the appellant's logo. In addition, he was of the view that the respondent fell into the rap of conmen. Finally, he answered the 1st issue in the negative.

Let interpose here, something worthy of consideration in the determination of this issue is; whether the negative answer to the 1st issue was correct or wrong. Being the first appellate court, this court has the power to re-evaluate the evidence adduced. Upon perusing the court's records, I agree with the analysis of the evidence and findings made by the trial court in respect of the 1st issue, that is, the same had to be answered in the negative because the website on which the respondent alleged that her

telephone number. Thus, Mr. Koba's prayer that this court should invoke its revisional powers and rectify what he termed as an " anomaly" in the answer to the 1st issue made by the trial Magistrate has no merit.

It is also not in dispute that according to the issues framed by the trial Magistrate, the answer to the 1st issue was a determinant factor on whether or not the trial Magistrate would proceed with the determination of the 2nd issue, to wit;

ii) If issue No.1 is in the affirmative whether the plaintiff suffered damages as to the result of the said illegal use of her mobile number +255 718 592 335.

Looking at the way the 2nd issue was framed, it is obvious that after giving a negative answer to the 1st issue, the trial Magistrate was not supposed to continue with the determination of the 2nd issue for simple reasoning that having ruled out that 1st defendant did not indicate the plaintiff's mobile number +255718 592 335 on its official website, 2nd issue became redundant and had nowhere to hang on because in her plaint the respondent alleged that the appellant used her mobile telephone number +255718 592 335 aforesaid in its website for official communications something he failed to prove. The printout (exhibits P1) tendered in court is not the appellant's official website.

In short, I agree with Mr. Mbugha that the trial Magistrate erred in continuing with the determination of the 2nd issue in a manner he did and awarding to the respondent damages as if there was proof that the

appellant used the respondent's telephone number in its website for official communication as alleged by the respondent.

To avoid doubts, I have taken into consideration Mr. Kobas' arguments that the trial court did not err in determining the 2nd issue despite the fact it answered the 1st issue in the negative as well as read the case of **Richard Malabeja** (supra) relied upon by Mr. Kobas to support his aforesaid argument. The least I can say is that the case of **Malabeja** (supra) does not support Mr. Kobas' arguments and cannot be applicable in this case because the way the issues were framed in that case is quite different from the ones in the case at hand. In the former case, the 1st issue was framed in a way that if the 1st issue was going to be answered in the negative then, the court would continue with the determination of the second issue. Upon analysis of the evidence adduced the court answered the 1st issue in the negative, which is why it continued with the determination of the 2nd issue. That was quite in order and proper. For clarity, let me reproduce the issues that were framed in the case of **Richard Malabeja** (supra).

- i) *"Whether or not the applicant's employment contract was for a specific task*
- ii) ***If the answer to the 1st issue will be negative**, then whether or not the applicant was terminated.*
- iii) *In case the second issue will be answered affirmatively, then whether or not the termination was fair both substantively and procedurally.*
- iv) *To which reliefs are the parties entitled".*

(Emphasis is added).

As alluded to earlier in this Judgment, in the case at hand the issues were framed differently. The positive answer to the 1st issue was a green light for the trial Magistrate to proceed with the determination of the 2nd issue whereas in the case of **Richard Malabeja** (supra), the negative answer to the 1st issue was a green light for the court to proceed with the determination of the 2nd issue.

From the foregoing, since I have held that the 1st ground of appeal has merit and that the trial court erred to continue with the determination of the 2nd issue, it is obvious that the remaining grounds of appeal are redundant thus, I do not see any plausible reasons to determine them.

In the upshot, this appeal is allowed with costs.

Dated this 27th day of November 2023




B.K. PHILLIP

JUDGE.