IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

COMMERCIAL APPEAL NO. 01 OF 2023

(Arising from Civil Case No. 15 of 2021 District Court of Arusha at Arusha)

BETWEEN

MULTICHOICE (T) LTD .....APPELLANT

VERSUS

ALPHONCE FELIX SIMBU.....1ST RESPONDENT

FAILUNI ABDI MATANGA.....2ND RESPONDENT

GABRIEL GERALD GEAY.....3RD RESPONDENT

JUDGMENT

Date of last order: 07/09/2023

Date of judgment: 13/10/2023

AGATHO, J.:

The appellant, Multichoice (T) Ltd being aggrieved by the decision of the District Court of Arusha in favour of the respondents appealed to this court seeking the reversal of the said decision with costs. The grounds of appeal as read from the Memorandum of Appeal are as follows:

(1) That the trial Magistrate erred in law and in fact by proceeding to hear and determine the suit while he lacked the requisite jurisdiction to do so.

(2) That the trial Magistrate erred in law and in fact by failure to properly analyse, evaluate and consider the evidence tendered and hence coming out with an erroneous and problematic judgment.

(3) That the trial Magistrate erred in law in fact in holding that elements of 'passing off' existed in the case.

(4) That the trial Magistrate erred in law and in fact in holding that the Appellant breached the Respondents' privacy.

(5) That the trial Magistrate erred in law and fact in admitting the Respondent's professional athletics profile; the purported infringing images and advertisements, the Company's official search reports issued by the Business Registration and Licensing Agency (BRELA); alleged extracts from the Appellant's social media accounts and the respective verifying affidavits (all marked 'Plaintiffs' exhibits P1, P2, P3, P4, P6, P7, P8, P9 and P10') into evidence contrary to the mandatory provisions of Section 34 C of the Evidence Act [Cap 6 R.E. 2019],

(6) That the trial Magistrate erred in law and in fact in holding that respondents' privacy was infringed upon by the purported infringing images.

(7) That the trial Magistrate erred in law and in fact in holding that the Appellant unjustifiably obtained benefit and or profit from the alleged infringing images of the Respondents.

(8) That the trial Magistrate erred in law and in fact to find that the Respondents failed (sic) to discharge their burden of proof.

(9) That the trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant.

(10) That the trial Magistrate erred in fact and in law in holding that the Respondents' case was proved on the basis of 'common sense.'

(11) That the trial Magistrate erred in law and in facts awarding damages to the tune of TZS 450,000,000 only which is beyond the pecuniary jurisdiction of the trial court.

(12) That the trial Magistrate erred in law and in fact by failure to consider inconsistencies in the Plaintiffs' evidence and in particular admission made in cross-examination by the Plaintiffs' witnesses regarding the ownership of the photos/images taken during the tournament purporting to be the infringing actions.

(13) That the trial Magistrate erred in law and in fact by failure to find that the testimony led by the plaintiffs did not prove the case against the Defendant to the required standard.

(14) That the trial Magistrate erred in law and in fact by formulating new issue *suo motu* and proceeding to determine the same without affording the parties fundamental right to be heard on the same.

(15) That the trial Magistrate erred in law and in fact in having held that the Appellant used the Respondents' images by failing to hold that they had a right to use them and were duly entitled to do so.

(16) That the trial Magistrate erred in law and in fact by awarding 10% p.a. interest from the date of filing the suit to the date of judgment on (sic) while there was no prior agreement and the quantum due was unknown.

(17) The trial Magistrate erred in law and in fact by awarding 10% p.a. interest on post judgment on decretal amount for specific damages and in the absence of the contractual clause for payment of interest.

Briefly stated, the background of the case is that the respondents had filed a suit against the appellant for breach of the right to privacy by passing off the image rights without their consent. At the end of trial, the district court entered judgement in favour of the respondent. Irked by the decision of Arusha District court in Civil Case No 15 of 2021, the appellant preferred this appeal on the ground stated above.

The parties engaged services of learned counsel. Throughout the appeal the Appellant was represented by Jovinson Kagirwa, learned counsel and the respondents enjoyed the legal services of Meinrad Menino D'souza and Mwang'enza Mapembe, learned counsel. The hearing of the appeal was conducted on 07/09/2023.

In his submission in chief the appellant's counsel Jovinson Kagirwa, consolidated the 17 grounds of appeal into five clusters. He submitted that grounds number 5, 7, and 14 were abandoned. They will thus not form part of this appeal. After having realized that the grounds of appeal are many and some repetitive, the appellant's counsel decided to group them into five clusters.

According to him the 1st cluster contains two grounds 1 and 11 on jurisdiction. The 2nd cluster entails the 2,3,4,6,10 and 12 grounds of appeal dealing with evaluation and consideration of evidence. That appellant alleges that the trial magistrate failed to properly evaluate and consider the evidence given in the trial. The 3rd cluster constitutes of grounds 8, 9 and 13 is on standard proof. That the respondents' case was not proved to the required standard, that of balance of probability. The 4th cluster embodies ground 15 of appeal is about the appellant's right to use the images. And lastly, the 5th cluster covering grounds 16 and 17 focuses on interest. That the trial court awarded interest contrary to the dictates of the law.

Mr. Kagirwa submitted on the 1st cluster that the trial court lacked jurisdiction to award general damages beyond its pecuniary jurisdiction. That is found in grounds 1 and 11 of the memorandum of appeal.

The appellant counsel contested the jurisdiction of the trial court to award TZS 450 million as general damages. However, he was quick to point that in their objection they are not challenging the power of the court to entertain the suit. But they are challenging the power of the court to issue an award which was beyond the pecuniary jurisdiction of the court. The

learned appellant's counsel submitted that the suit before the trial court was for claim of general damages. Mr Kagirwa added that the suit was arising from non-compliance of demand notice which was issued by the respondents and it was admitted as exhibit P5. He went on elaborating that the respondents were claiming for the sum of TZS 450 million as per paragraph 9 of the exhibit p5. He narrated further that when the suit was instituted, specific damages were not included, they were excluded in the plaint. He was of the view that for purpose of admission of the suit and challenging the plaint or the suit when the trial took off that could not be done because the specific damages were excluded. On this point he relied on **Mulla Code of Civil Procedure**, 16th edition, the 7th to 11th line on page 66 which deals with the power of the court to entertain the suit. The author stated that the court has no jurisdiction to grant reliefs not claimed in the plaint if by reason of their inclusion the suit will be beyond pecuniary jurisdiction of the court. It was the understanding of the appellant's counsel that the jurisdiction of the trial court was only limited to TZS 70 million and not beyond. Mr Kagirwa opined that in any case, where the court could find the merit of the suit, the suit being of commercial significance and as per the ruling of this court dated 17/07/2023 the award ought to be limited to TZS 70 million. Based on that point he submitted that the court had no jurisdiction to award TZS 450 million which is beyond the pecuniary jurisdiction of TZS 70 million.

He also invited the court to visit page 20, 29 and 32 of the trial court proceedings which indicate that the respondents were seeking for damages which was earlier claimed through exhibit P5.

On the second cluster, which includes grounds number 2, 3, 4, 6, 10 and 12 of the memorandum of appeal dealing with evaluation of evidence, M.r Kagirwa submitted that the trial Magistrate did not evaluate properly the evidence. He argued that all the respondents or neither of them testified in the trial court as to where the images were taken, the person who took that photo, and the original photo or images which could enable the court to reach the findings that the image used was breach of privacy. This is intriguing, and we ask was this an issue at the trial court. Moreover, if the appellant had issues with the exhibits tendered it was up to her to object their admission in evidence. Furthermore, the appellant's counsel had an opportunity to cross examine the respondents' witnesses. To raise these questions on appeal is unbecoming and renders them an afterthought. That said, the learned counsel for appellant sought to impress the court that in the judgement of trial court, all the respondents confirmed that the photo which appeared under exhibits P3, and P4 were all photos which appear to be taken in public when they were participating in the tournament. There was nothing in the court before the trial to suggest how the right of privacy was breached. On that point, Mr. Kagirwa submitted that paragraph dealing cause of action in the plaint becomes relevant that the claim before the trial court was for the breach of privacy through passing off. He turned to their skeleton argument where they relied on the exhibits P6 and P7 which indicates that the appellant is an entity dealing with broadcasting and television programming. And this appears on exhibit P7 tendered by the respondents. To Mr. Kagirwa, exhibits P3 and P4 have nothing suggesting that there was a breach of privacy by passing off which is consistent with

the UK decision of **Fenty & Others v Arcadia and Another (infra)** under item 4 of the appellant's skeleton argument. The learned counsel for appellant cited paragraph 31 and paragraph 32 of **Fenty's decision** requires three elements to be established by the claimant: first, goodwill or reputation attached, second, he must demonstrate misrepresentation by the claimant's goods or services, third, he must demonstrate that he suffered, or he is likely to suffer damages by or through that misrepresentation.

It was Mr. Kagirwa's submission that the image which the trial magistrate relied upon contained general information to the public on the upcoming Olympic tournament in which for Tanzania only three Athletes (respondents) were participating. There is nothing suggesting that there was endorsement by the respondents over the appellant's business or services offered. The learned counsel referred again the **UK Fenty's case** (supra) on paragraph 41. In his view, there was nothing which suggested or demonstrated by the respondents that there was endorsement by themselves over the appellant services to the public. Further, the same **Fenty's case** (supra) on paragraph 43 the judge stated that the claimant makes a goodwill case on the evidence. He must show that he has a relevant goodwill, and the activities of the defendant amount to a misrepresentation that he has endorsed or approved the goods or service of which he complains about. Mr. Kagirwa suggested that in that line if the trial magistrate could have evaluated the testimonies of the respondents and exhibit P3, P4, P6 and P7 he could have established that the appellant is in media industry with duty to inform the public but also could come to conclusion that the picture was taken in public during the tournament. And all tournaments were live

broadcasted by various media. He opined that on that point the court could have found that the case was not proved on the required standard which is balance of probabilities. He added that that is what answers the third cluster of the memorandum of appeal and the fourth cluster which contains grounds number 8, 9, 13 and 15.

In the fifth and last cluster regarding the award of interest, the appellant counsel submitted that the trial court awarded 10 percent on general damages from the date of filing the suit to the date of judgment. He rightly contended that it is established principle that the court cannot award interest to general damages and for a simple reason that by the time of filing the suit general damages could not be ascertained. He cemented his submission with the decision of the Court of Appeal of Tanzania in the case of **Anthoy Ngoo and another v Kitinda Kimaro, Civil Appeal No. 24 of 2014** TZCA at page 26 last paragraph. Therefore, to Mr Kagirwa the trial magistrate was wrong to grant interest on general damages from the date of filing the suit. He annexed this with the first cluster on the issue pecuniary jurisdiction, because awarding interest on general damages from the date of filing the suit presupposes that the trial magistrate was aware that the general damages was TZS 450 million which were excluded in the plaint.

On the second part, interest from the date judgment to the date of full satisfaction of the decree, Mr. Kagirwa submitted that the law is clear that the interest is limited to 7% or 12% where there is an agreement to that effect that it will be 12%. Therefore, awarding 10% interest was an error.

To wind up his submission especially in assessing general damages, the appellant's counsel invited the court to consider the Court of Appeal of Tanzania (TZCA) case of **Oliva James Sadatally v Stanbic Bank Tanzania Limited**, Civil Appeal No. 84 of 2019 TZCA at Dar es salaam and the case of **Anthony Ngoo and Another v Kitinda Kimaro**, (supra) where the Court insisted that general damages is awarded by looking at the evidence on record. Mr. Kagirwa lamented that the trial court awarded general damages based on assumption that the part of 60 million Tanzanians subscribed to the appellant's services. That was contrary to the principles in ascertaining general damages. He ended his submission in chief by beseeching the court to allow the appeal, quash the decision of the trial court, for the reason that the element of passing off were not established or in the alternative if the court find that the elements of passing off were met then the trial court was limited to awarding only TZS 70 million.

On the adversary side was Mr. D'souza for respondents. He went straight on the first issue of jurisdiction and submitted that jurisdiction is conditional under Section 6 of the Civil Procedure Code [Cap 33 R.E. 2019] which applies to specific damages. And the operative words according to him are, save as in so far as otherwise expressly provided. The respondents' counsel also cited Section 13 of the CPC which provides that every suit shall be filed or instituted in the court of the lowest grade competent to try it. And second, the claims for tortious liability are filed in the district court as per the case **Albert Mlilo and Another v William Jeremia Kasege, Civil Appeal Case No. 01 of 2015 HCT at Mbeya**. The learned counsel D'souza rightly submitted that there is no ceiling provided in the law, as to how much

the district court can award in terms of tortious liability. He added that the respondents never claimed special damages. He insisted that authorities cited by Mr. Kagirwa relate to Section 6 of Indian Civil Procedure Code which is in *pari materia* with Section 6 of our Civil Procedure Code. Mr. D'souza submitted that the authority (Mulla on Civil Procedure) cited is irrelevant because it is persuasive. Because it is settled law in Tanzania that jurisdiction is determined upon institution of the case not on judgment. D'souza reiterated that there is no law that restricts the district court from awarding general damages beyond its pecuniary limits or jurisdiction. He also submitted that the preliminary objection on jurisdiction is an afterthought because it was never raised in the trial court. Thereafter, Mr. D'souza turned to the failure of the appellant to file their Written Statement of Defence (WSD) against the amended plaint. He submitted that they raised a caution that there was no WSD filed in response to the amended plaint. The learned counsel for the respondents implied that there is no chance for the appellant to raise issue of pecuniary jurisdiction. If one looks at the amended plaint there was no controversy that the court had jurisdiction.

After that submission, Mr. D'souza turned to the second cluster, he stressed that the appellant did not file any WSD against the plaint. On the element of passing off, he submitted that there are authorities in Tanzania on the matter including **Deogras John Marando v Managing Director, Tanzania Beijing Huayuan Security Guard Service Co. Ltd, Civil Appeal No. 119 of 2018 HCT at Dar es salaam** in which the elements of passing were settled. And it was further held that it is unnecessary to show the source of image. He then turned the UK case of **Robyn Rihanna**

Fenty & Two Others v Arcadia Group Brands Limited & Another [2015] EWCA Civ 3 and submitted that this case is irrelevant because it is on character merchandise as seen on paragraph 9 of that judgment. He however admitted that that case is relevant as it shows the cases of passing are in constant state of change or flux. And paragraph 39 of that judgment is informative. In his view, the authority supports the passing off of images of sportsmen distinct from character merchandise. It also assesses the decision of **Irvine and Another v Talksport Ltd [2002] EWHC 367 (Ch)**. The respondents also relied on decision of **John Rafael Bocco v Princess Leisure (T), Limited, Civil Case No. 3 of 2022 HCT, Mwanza Registry** at page 3 to cement what was relevant in the suit for passing off: which is, first, use of image, second exploitative purpose and third, lack of consent. Mr. D'souza submitted that these were issues at trial, and they managed to prove all of them.

The other argument was that the appellant is claiming that they had the right to use images to inform the public. Mr. D'souza Submitted that that that is the tacit admission of the respondents' claim. He wondered, why would the appellant ask the public to subscribe to their service, why would she ask the public to use the pay code (*lipa namba*). In his view, that covers the exploitative part. And if they had the right to inform the public, there was no proof that the appellant is registered with TCRA in Tanzania, and that was not put in their defence. D'souza argued that if the appellant has admitted having the right to inform the public then the burden shifts to her to prove that she had that right. That is the import of Section 110 of the Evidence Act [Cap 6 R.E. 2019]. That is consistent with the case of **Jasson**

As to the 3rd and 4th clusters Mr. D'souza submitted that they have eloquently demonstrated in their skeleton arguments what are the required standards. If the appellant is claiming the right to use the images, they had the burden to prove it. D'souza suggested, the scale will tilt in favour of the respondents. As the appellant had nothing on record in their favour. He said even in the case of **John Raphael Bocco** (supra) the defence was expunged from the record because it was filed out of time. In conclusion, Mr. D'souza submitted that there is no reason to fault the trial court judgment save for the 16th ground of appeal on interest before judgement which he conceded.

In his rejoinder Mr. Kagirwa, reacted to the issue of the WSD against the amended plaint. He justifiably found the argument to be strange. Since reading through the trial court proceedings at page 4 it was the plaintiffs who prayed for correction of dates. And the court did not order the defendant to file WSD against the amended plaint. Mr. Kagirwa submitted that the argument that there was no WSD against the amended plaint is bad because it is not supported by the proceedings. And at page 6 of the trial court proceedings the respondents confirmed that the proceedings are complete. For that reason, he prayed the court to disregard the skeleton arguments of the respondents on items 1(a) and (b) because they are distinguishable from this case where there was no order to file WSD responding to the amended plaint.

On the issue of jurisdiction, Mr. Kagirwa rejoined that the counsel for the respondent has confirmed that Section 6 of the Indian CPC is in *pari materia* with section 6 of our CPC, and the author of Mulla on Civil Procedure has clearly stated, and the appellant has not objected to the jurisdiction of the court to admit the suit. However, Mr. Kagirwa submitted that they stated that because of exclusion of specific damages in the plaint which was later awarded by the court. This claim of specific damages to the tune of TZS 450 million is stated on Paragraph 9 item 2 of exhibit P5 (the demand note) which is also annexture AAF-2 collectively. That amount was later awarded by the trial court. The learned counsel, Mr. Kagirwa remained firm that Mulla is relevant for determination of the first cluster containing grounds number 1, and 11 of the appeal. On this point the court is of the view that a mere fact that the amount mentioned in the demand note is the exact amount awarded as general damages does not mean that the court acted without jurisdiction for it was above the court's pecuniary jurisdiction. The law in Tanzania is clear that awarding general damages is the discretion of the court as it was held in **Mwananchi Communications Limited & Two Others v Joshua J Kajula & Two Others, Civil Appeal No. 126/01 of 2016 TZCA**. Therefore, depending on the facts of the case and evidence, the district court can award any amount of money as general damages regardless of its pecuniary jurisdiction. It is also trite law that general damages cannot be used to determine the jurisdiction of the court. Consequently, reference to Mulla on Civil Procedure on this matter is misplaced.

As for reference to the case of **John Raphael Bocco** (supra), Mr. Kagirwa responded that reading that decision one will find that it is distinctive

from the case at hand because the plaintiff proved false endorsement. He testified that he was receiving congratulations from the public. But also, the defendant was not an active part to the tournament and which the plaintiff was participating. The appellant counsel was of the view that that case could have been relevant if the defendant was Azam Madia or TBC. He argued that in the case at hand false endorsement was not proved.

Regarding the submission that the **UK's case of Fenty** (supra) that it was about character merchandise, Mr. Kagirwa referred paragraph 29 of that decision where it states that there is no image right or character right under the English Law. The learned counsel submitted that both claim for character or image right depend on the nature of the cause of action. In the present case the cause of action was the breach of privacy. He submitted that is why they have referred at paragraph 41 of **Fenty's case** (supra) which goes by the argument of the respondents' counsel that all issues or elements were proved which the appellant is disputing. It was his further submission that the issues were reproduced at page 12 of the trial court judgment. One was to establish *whether plaintiffs' images were used or published or broadcasted for commercial purposes without their consent*. Two, *if the first issue is answered in the affirmative whether the defendant breached the right to privacy and confidentiality to the plaintiffs*. According to Mr. Kagirwa that is where paragraph 41 of the **Fenty's case** (supra) comes into play. It means in evaluation of evidence the respondents were supposed to prove the second issue that of violation of privacy and confidentiality.

Thereafter, Mr. Kagirwa reiterated his submission in chief that the defendant (appellant) is a broadcaster. He reacted to the argument by the

respondent's counsel that there was no evidence from the appellant that she is registered and licenced by Tanzania Communications Regulatory Authority (TCRA) by simply and correctly referring to paragraph 2 of the plaint which identified the appellant as a broadcaster in the sub-Saharan Africa. He also referred to exhibit P7 showing that the business of the appellant is broadcasting. In that line of evidence, Mr Kagirwa argued that he never admitted in his submission in chief that the appellant had an automatic right to use the respondents' images. He clarified that the appellant being a broadcaster of Olympic 2020 had a right to inform the public.

On the last part regarding the cases of **Deogratias John Marando** (supra) and that of **John Raphael Bocco** (supra) the appellant's counsel rejoined that these cases are distinguishable and added that this court is not bound to follow those two decisions, for simple reason that the cases the appellant attached deals with the issue of passing off that were not considered in those two decisions. Mr. Kagirwa hypothesized that, assuming that this court is bound to follow the decision of **Deogratias John Marando** (supra) as the trial court reproduced the findings on page 18 of its judgement, the first element was, there must be intrusion of personal privacy of the claimant, under which that was the second issue to be determined by the court which was not proved. In his view the trial court did not evaluate the evidence. He persuaded the court to take into consideration the material facts and points in dispute and the tort of passing off as enumerated in the cases they have attached in the skeleton argument and proceed to set aside the judgement and decree of trial court or in alternative enter judgement as

they submitted in our submission in chief that it be limited to TZS 70 million as pecuniary jurisdiction of the trial court in cases of commercial significance.

Having revisited the submissions of the learned counsel for the parties, it is high time that the grounds of appeals are unpacked and analysed parallel with the trial court record of proceedings, judgment, and the relevant law. The bone of the appeal lies on five points: jurisdiction, evaluation of evidence, standard of proof, the appellant's right to use the images, and interest before and after the judgment. To make the analysis more focused, the court raised the issues below that matched the above points that represent the grounds of appeal reduced by the appellant into five clusters.

1. Whether the trial court acted beyond its pecuniary jurisdiction when it awarded the respondents general damages to the tune of TZS 450 million. Grounds 1 and 11 of the appeal.
2. Whether the trial court failed to properly evaluate the evidence. Grounds 2,3,4,6,10 and 12 of the appeal.
3. Whether the case was not proved to the required standard of civil proceedings? Grounds 8,9 and 13 of the appeal.
4. Whether the trial court failed to consider the appellant's right of use of the image. That is ground 15 of the appeal.
5. Whether the trial court erroneously awarded interest? That is grounds 16 and 17 of the appeal.

Before going into the thrust of this appeal, one issue is worth to be disposed outright. The respondents' claim that the appellant never filed WSD to respond to the plaintiffs, now respondents' amended plaint. This point has

no legs because the amendment order was limited to change of names. And the trial court did not order the appellant to file another WSD for that matter.

We now turn the crux of the appeal itself. To begin with the appellant's allegation that the trial court lacked jurisdiction. The question is *whether the trial court acted beyond its pecuniary jurisdiction when it awarded the respondents general damages to the tune of TZS 450 million.* The issue of jurisdiction is found on grounds 1 and 11 of the appeal. Regarding this ground of appeal which is technically a preliminary objection (PO), the respondents protested the PO and submitted that it was an afterthought. But it is trite law that the PO being a point of law can be raised at any stage even on appeal. Nevertheless, the submission by the appellant's counsel was clear that the appellant did not dispute the jurisdiction of the court. However, in the course of his submission Mr. Kagirwa technically raised the PO when he contested the award of general damages that exceeded the pecuniary jurisdiction of the District Court. This issue will be expounded in due course.

On the above point Mr. Kagirwa was of the view that the District Court acted without jurisdiction by awarding the respondents general damages beyond its pecuniary jurisdiction. That met with stern reaction from Mr. D'souza who correctly submitted that there is no law in Tanzania that bars District Court from awarding general damages beyond its pecuniary jurisdiction.

The respondents' counsel rightly submitted that this Court in its ruling dated 17/07/2023 ruled that the case of common law violation of privacy via passing off respondents' images is commercial tort whose subject matter is

incapable of being estimated in monetary terms. Hence pecuniary jurisdiction is unknown. Being a commercial tort the court of lowest grade competent to try it is the District Court. See **M/S Tanzania China Friendship Textile Co. Ltd v Our Lady of the Usambara Sisters [2006] TLR 70**. In the present case, at the trial court, the respondents never claimed special damages which is used to determine pecuniary jurisdiction. Therefore, the issue of pecuniary jurisdiction did not arise. Moreover, awarding general damages is court's discretion. Such damages are unused in determining jurisdiction of the court. Consequently, the awarding of general damages beyond pecuniary jurisdiction is non-issue.

It is unfortunate that Mr. Kagirwa did not cite any law be it statutory or case law forbidding the District Court to award general damages beyond its pecuniary limits. From the amended plaint, the respondents' were seeking declarative orders that the appellant violated their privacy by passing off their images for commercial profit. They also sought general damages. Since the claim was incapable of being estimated in monetary terms the pecuniary jurisdiction could not be stated. Undisputedly District Court has jurisdiction to deal with commercial torts.

The Magistrate Courts' Act [Cap 11 R.E. 2019] (MCA) and the HCCD Procedure Rules, pecuniary jurisdiction becomes a relevant issue if the claim is capable of being estimated in monetary terms. It means for torts inclusive commercial torts where the pecuniary value of the claim is incapable of being estimated then the court is assumed to have jurisdiction as rightly held by the TZCA in **Peter Joseph Kilibiki and Another v Patrick Aloyce**

Mllingi, Civil Appeal No. 37 of 2009 TZCA at Tabora. The trial court was the HCT, and the case dealt with unlawful confinement and defamation. It is on record that the pecuniary jurisdiction was not stated. The claim amount was thus unknown. However, the general damages claimed was TZS 800,000,000/=. According to the TZCA, there was no claim made which could lead to a conclusion that the pecuniary value of the claim is not within the jurisdiction of the HCT. Just like what was held in **Kilibiki's case**, the circumstance of the case at hand are different from that of **M/S Tanzania China Friendship Textile Co. Ltd v Our Lady of the Usambara Sisters [2006] TLR 70** where there was a specific claim for TZS 8,136,720 being the cost incurred to produce *Vitenge* fabrics and tax paid. While **Kilibiki's case** was not before High Court Commercial Division (HCCD), it has relevancy to the present case because it addresses the issue of jurisdiction of the court where pecuniary value is incapable of being estimated and hence not stated in the plaint.

The respondents claim that the District Court in as far as jurisdiction over commercial cases is concerned the pecuniary jurisdiction is limited to TZS 70 million as per Section 40(2)(b) of the MCA and Rule 5(2) of the HCCD Procedure Rules 2012 as amended in 2019. It is worth reproducing what is stated in the Written Laws (Misc. Amendment) (No.4) of 2019:

> *"Notwithstanding subsection (2) the jurisdiction of the District Court shall, in relation to commercial cases, be limited:*
>
> *(a) in proceedings for recovery of possession of immovable property, to proceedings in which the value of the subject*

matter does not exceed one hundred million shillings, and in the proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed seventy million shillings."

The key words are *where the subject matter is capable of being estimated at a money value*. Like in **Kilibiki's case** (supra) on tort of defamation and unlawful confinement, in the case at hand the tort of privacy violation through passing off the respondents' images is a subject matter incapable of being estimated in monetary terms. The respondents sought (i) declaratory orders including violation of their privacy, and (ii) general damages. Therefore, specific damages were not claimed.

Mr. Kagirwa submitted that the trial court acted beyond its jurisdiction when it awarded general damages above its pecuniary jurisdiction. This court did its homework. It examined the position in Uganda and Kenya and compared the same with the position in Tanzania. According to Ugandan case of **Koboko District Local Government v Okujjo Swali, Misc. Civil Application No.0001 of 2016, High Court of Uganda at Arua**, and the Kenyan case of **Pelezia Bakari Salim v Somoire Keen and Two Others Civil Appeal NO. 119 of 2017, Court of Appeal at Kisumu [2020] eKLR** the Magistrate Court cannot award general damages beyond its pecuniary jurisdiction. In contrast to that, in Tanzania, the Magistrates' Court be it District Court or Resident Magistrates' Court is not barred from awarding general damages exceeding its pecuniary jurisdiction. That is because in

Tanzania general damages are awarded at the discretion of the court. However, that discretion has be exercised judiciously. Moreover, general damages are not used to determine the pecuniary jurisdiction of the court. That was held in **Mwananchi Communications Limited and Two Others v Joshua K Kajula and Two Others, Civil Appeal No. 126/01 of 2016**, and **Khamis Muhidin Musa v Mohamed Thani Mattar, Civil Appeal No. 237 of 2020**. Both decisions of the TZCA.

Therefore, and with due respect to Mr. Kagirwa, for the appellant, it was of no use to cite the demand notice (exhibit P5) as the basis of the claim. The cause of action as the basis of the claim is described in the plaint. While it is true that annextures to the plaint form part of plaint, where no specific damages are claimed in the plaint as they are to be proved strictly and specifically the court cannot be invited to read the demand notice (annexture to the plaint) as the base of specific damages that have not been specifically stated in the plaint. If that is what the trial court did it is difficult to establish. In the court's view, these seem to be speculations. Even if the amount of TZS 450 Million found in the demand notice tallies with the amount awarded in general damages that cannot change the fact that the respondents did not claim for specific damages in their plaint. The court finds the 1st cluster of grounds of appeal lacks merit. It is dismissed.

As for the 2nd cluster, capturing grounds 2,3,4,6,10 and 12 of the appeal, the issue *whether the trial court failed to properly evaluate the evidence*. Along that the appellant alleged that the case was proved on the basis of common sense. This point is superfluous because common sense is

used in evaluating evidence. That is the position in **Ardhi University v Kiundo Enterprises (T) Limited, Civil Appeal No. 58 of 2018 TZCA at Dar es salaam**. Since, the respondents are well known athletes in Tanzania and internationally, the evidence adduced in the trial court attest to this. Thus, the trial court rightly used common sense in holding that the use of the respondents' images to market certain services of the appellant would catch public attention. Hence the subscription to the appellant's broadcasting service package will shoot. That is a matter of common sense and logic in terms of reasoning supported by the evidence adduced.

The decisive points at the trial court as viewed in page 12 of the trial court judgment were: (1) *whether the defendant published, advertised and broadcasted the images of the plaintiffs for commercial purposes without their consent; (2) if the first issue is answered in the affirmative, then whether the defendant breached right to privacy and confidentiality to (sic) the plaintiffs; (3) whether the defendant unjustifiably obtained money or benefited through advertising, publishing and broadcasting the images of the plaintiffs.*

The appellant's general view as grasped from the memorandum of appeal and the submission is that the above issues ought to have been answered in the negative if the trial court could have properly evaluated the evidence. This court as the forum for appeal for first instance took liberty of examining the trial court proceedings and the trial court judgment. What is gathered is that there is no dispute that the appellant deals with the business of broadcasting. It is equally undisputed that the appellant advertised and

broadcasted the images of the plaintiffs for commercial purposes and without their consent. That is where the cases of **John Raphael Bocco** (supra) and that of **Deogras John Marando** (supra) become relevant to the case at hand. In both, images were used without consent of plaintiffs. PW1's testimony is captured on page 5 of the trial court judgment substantiating that the appellant installed a billboard at Mwenge, Dar es salaam advertising her brand using the plaintiffs' images. That extended to adverts in the social media (see page 3 of the trial court judgment). It is also conspicuous on pages 13, and 16 of the trial court judgment, those who saw the respondents' catchy photos as published by the appellant were advised to subscribe to their DSTV services. The exhibits P4 and P9 contain instruction on how to subscribe to the service. The presentation and evaluation of evidence is found in the trial court judgment pages 3-8. PW1, PW2 and PW3 testified about the appellant's use of their image (brand) for commercial advertisement without their consent and benefit (see page 20, 24, 25, 32 and 33 of trial court proceedings). DW1 on page 36 of the proceedings testified that the photos were published from Super Sport who have exclusive rights to the Olympic games. However, he conceded that they published the photos in their official pages of social media, newspaper, television, etc. He also admitted on page 37 of trial court proceedings that the photos they used in their advertisement were taken before the Olympic Games. He further admitted that he had no document to prove that the appellant had rights to publish the photos in their advertisement. The evidence on record is heavy. The appellant used the image without the consent of the respondents. In **Assege Winnie v Opportunity Bank (U)**

Ltd and Another, Civil Suit No. 756 of 2013, High Court of Uganda found that the defendant used the plaintiff photo without her consent. She had interest in her photo and the defendant ought to have sought her consent. It is noteworthy to state that consent or authorisation is an exception to violation of privacy. Once there is consent one can neither claim violation of privacy nor infringement of her image right. But since in the case at hand there was no consent, it goes without saying that there was violation of privacy and image rights.

In the suit which is based on commercial tort of passing off one's image, the court is required to consider whether the claimant's photo or image was used without her consent. In the case at hand, the trial court record of proceedings is clear that the appellant used the respondents' images without their consent. The trial court rightly held that amount to not only passing off but also privacy violation. There are many authorities to support this and one being **Deogras John Marando** (supra). According to the record, the case dealt with violation of privacyand the same (at page 19) the claimant was required to prove four conditions: one, there must be intrusion of his personal privacy on the identity or image by the respondent. Two, appropriation of claimant's image, celebrity or likeness for the respondent's advantage in any form but especially commercial purposes. Three, there must be lack of consent from the claimant. Four, proof of profit gained by the respondent through use of claimant's image. In this appeal these elements were proved through the testimony of PW1, PW2, and to some extent DW1 and the exhibits tendered. But as a matter of general principle, for a claim of privacy violation to be sustained proof of profit made

by the defendant is irrelevant. However, that could be material when considering general damages to be awarded to the claimant. Although **Deogras John Marando's case** (supra) did not cover common law torts of confidentiality and passing off, it covered right to privacy, celebrity or publicity right, image right, and copyright. It is of significant to note that in the UK, the case of **Starbucks (HK) v British Sky Broadcasting Group Plc [2015] UKSC 31** has imposed proof of goodwill in the form of customers within the jurisdiction for a claim of image rights passing off to be successful. That is not to say that there are no cases in the UK where a claim of passing off defendant's image rights were sustained. These include **Hines v Winnick [1947] Ch. 708**, and **Irvines's case** (supra). In sports as an industry, image rights are big business. They are interpreted broadly than mere individual's likeness. They extend to persona or brand in marketing context. Broadcasting companies exploit image rights for commercial gain. It is not surprising that International Olympic Committee holds image rights of athletes during Olympic Tournaments.

The parties were also at loggerhead in referring to **Fenty's case** (supra). While Mr. D'souza submitted that the case was about character merchandise Mr. Kagirwa referred paragraph 29 of that decision where it states that there is no image right or character right under the English Law. The appellant's counsel also argued that the respondents were required to prove violation of their privacy and confidentiality. It is important to understand what character merchandise is. That is simply marketing strategy in which goods or services are made to resemble real life characters or fictional ones to impress customers. That said in the case at hand the issue

of character merchandise never arose. Thus, **Fenty's case** (supra) has to be used with care.

It suffices at this juncture to state that the second issue for determination at the trial court *was that if the first issue is answered in the affirmative, then whether the defendant breached right to privacy and confidentiality to (sic) the plaintiffs.* This issue has two limbs breach of right to privacy and confidentiality. There is no doubt that the violation of privacy was proved on the balance of probability. But the issue of breach of confidentiality was not proved that is because confidentiality relates to divulging of confidential information. The questions begging answers are, were the respondents' images taken in private setting? Are they confidential? The law of confidentiality originated from English Common Law and Equity. Privacy right was traditionally not protected under common law. What was protected is confidential information. That is per **Morison v Moat (1851) 9 Hare 241** where" Morison Vegetable Universal Medicine" was protected under trade secrets also known as law confidentiality.

The common law of confidentiality protects confidential information or images taken in private setting. A good example is" the Queen and Prince private etchings" as held in **Prince Albert v Strange (1849) 1 Mac & G 25**. In **Coco v. Clark (Engineers) Ltd [1969] 2 All ER 751**, Megarry J identified three key elements for protection under the law of confidence, namely, necessary quality, the requirement of an obligation of confidence and the occurrence of unauthorized use of the information. Lord Greene MR stated in **Saltman Engineering Co v. Campbell Engineering Co [1963]**

3 All ER 414 that there must be "*necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge".*

Lord Parker in **Herbert Morris Ltd v. Saxelby [1916] 1 AC 109** held that confidential information cannot be simple to the extent that it can be, "carried in the head." Therefore, it must not be easily memorable. Further four elements were provided: first, the owner must believe that release of the information would be injurious to himself and advantageous to rivals; second, the owner must believe that the information is confidential or secret; third, these beliefs require to be reasonable; and fourth; they require to consider trade practice. In the appeal at hand, although PW1 and PW2 alleged that the photos/images represented their brand which the appellant has used for economic gain, they did not prove that the images were confidential or have quality of confidence. PW3 and DW1 testified that the photos were taken before Olympic Games and they do not know who was the photographer. To take advantage of law of confidence the information must be of economic value relating to commercial activity, investment and marketing and industrial manufacture as it was held and above all it has to be confidential as held in **Attorney – General v Guardian Newspaper [1985]1 All ER 724.**

It was also held in ***Seager v. Copydex (1967)1 WLR 923 at 931*** *that in Equity "...he who has received information in confidence shall not take unfair advantage of it...to the prejudice of him who gave it without obtaining his consent..."*

From the above, in the UK the Common law's protected confidential information as opposed to privacy per se. In contrast to that, in the USA after publication of Warren and Brandeis' article the right to privacy in the Harvard Law Review, Vol. IV No.5 (Dec. 15, 1890) pp. 193-220 that right quickly gained recognition. The fourth amendment of the USA Constitution protects individual's right to privacy. Remarkably, in the USA, privacy right has now extended to publicity right as seen in several case laws cited herein.

While the development of privacy law has been swift in the USA, in the UK the pace was slow and mundane because the same was regarded to be taken care of by the confidentiality law. But the influence of EU Data Protection Directive, 1995, and later General Data Protection Regulation, 2016 led to the UK to enact a separate law on privacy and data protection. It is important to add here that in Continental Europe privacy right is associated with human dignity or personality. Publicity right and image rights were reluctantly accepted in the continental Europe. Compared to UK and USA, compensation awarded for breach of image rights in the continental Europe such as Germany is not lucrative. See the case of **Oliver Kahn v Electronic Arts GmbH, 25 April 2003** (unreported). This case was referred in the trial court judgement.

Interestingly, how linkage of common law tort of confidentiality and privacy evolved through case law in the UK is found in **Campbell v Mirror Group Newspapers Ltd (2004) 2 AC 457** dealing with the "breach of confidence and privacy", and **Douglas v. Hello! Ltd (No 6) (2005) 3 WLR 881** that addressed the issue of" commercial confidence." Along that came

UK's case of Fenty (supra) which was about character merchandise entailing image right or character right. The character or image right are essentially commercial exploitation of personality or likeness, the case at hand was on the breach of privacy. And to conclude on this point, although the breach of confidentiality was not proved, the violation of privacy was proved. Hence the second issue was correctly answered in the affirmative at the trial court. The allegation that the trial court did not properly evaluate the evidence is therefore baseless. Looking at pages 13-21 of trial court judgment, the trial court properly evaluated the evidence and made detailed analysis of the relevant law including the case law. This court has no reason to fault the trial court evaluation of the evidence. While the appellant brought the issue of ownership of the images. Here it means copyright as captured on page 13 of the trial court judgment. Also reflected on page 33 of the trial court proceedings where the plaintiffs' witness said their concern is not about who took the photo but rather the defendant's use of the photo for commercial again without the plaintiffs gaining anything. For clarity, it is worth to note that the allegation of violation of privacy is based on exploitation of one's image without his consent. It has nothing to do with copyright in the images. Meaning copyright violation would constitute a separate cause of action.

Since the suit arose before the enactment of the Data Protection Act, 2022, the plaintiffs framed their claim based on common law tort of passing off of one's images without authorisation. The claim for violation of privacy or passing off is an independent claim from that of violation of copyright. DW1 testified that they had no authorisation to use the respondents" photos

in their advertisement. Just as it was rightly held in **Deogras John Marando's case** (supra) the test for sustaining a claim of passing off one's image and or privacy violation is that: there must lack of consent from the claimant. The latter must prove that his image was used without his authorisation. The trial court correctly held that the respondents proved that their images were used by the appellant without their consent.

The other issue is *whether the case was not proved to the required standard of civil proceedings? Grounds 8,9 and 13 of the appeal.* In civil proceedings the standard of proof is on the balance of probabilities as per Section 3 (2) (b) of the Evidence Act [Cap 6 R.E. 2019]. The burden of proof is on a party who alleges certain fact. Section 110 of the Evidence Act (supra) provides that he who alleged must prove. It is that party who if fails to prove the allegation, he will lose the case. In the case at hand the respondents proved their case on the balance of probabilities. The allegation that the case was not proved to the required standard, and that the trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant is unfounded because the evidence adduced by the respondents is credible and reliable. The defence witness also admitted that the appellant did not have authorisation to publish the photos. The respondents adduced evidence to support their claim. It was up to the appellant to bring evidence to contradict or rebut the respondents claims and evidence. It is on record that the DW1 testimony supported the PW1, PW2 and PW3 evidence that the appellant used the images without the respondents' consent.

The other issue is *whether the trial court failed to consider the appellant's right of use of the image.* That is captured by ground 15 of the

appeal. This should not detain us much, considering the evidence on record the appellant never had right to use the photos. That is consistent with the testimony of all respondents, and DW1. The fact that she is in broadcasting business does not give her a free ride to violate privacy and or image rights of others. The appellant may have responsibility to broadcast news to the public. But the trial court proceedings (testimonies of PW1, PW2 and PW3) show that the appellant had made a commercial advertisement that included the images of the respondents. She used the advert to invite the public to subscribe and pay for their services. Besides embodying the respondents' image, the advert included the subscription fee and payment mode. That is not a free service. That is captured in no better words than on page 20 of the trial court proceedings entailing PW1's testimony and exhibit P4 collectively. We reproduce part of content of the third picture, exhibit P4 DSTV (TZ)@Dstv for clarity:

> *"Tarehe 23 Julai tutakiwasha katika mashindano makubwa duniani Olympics. Na kutoka Tanzania tunao mashujaa wa kupeperusha bendera yetu...Nunua full set ya DSTV kwa Tsh. 79,000/=."*

Literal translation of the above is that "On 23rd July we will broadcast Olympics tournament. And from Tanzania we have our heroes carrying our flag. Buy your full set DSTV at TZS 79,000/=." The above extract clearly show that the appellant's advert was commercial. Consequently, the respondents' photos embedded in the advert was for commercial gain. That was not news that may be categorized for public interest. It was for commercial purpose. The appellant had no right to use the images without

the respondent's consent. Even the issue of copyright ownership falls flat because the appellant failed to prove that they own the copyright in the images.

Yet, a distinction should also be made between the copyright in the image, and the athlete's image right as well as privacy right. In absence of agreement to the contrary copyright in the image or photo lies on the photographer. The image right on other hand is commercial exploitation of one's likeness often in sports and broadcasting arena. By extension in the USA there is publicity or celebrity right.

In **Haelan Laboratories v. Topps Chewing Gum 202 F.2d 866 (2d Cir.), 346 U.S. 816 (1953)** when a baseball player had licensed the exclusive right to the use of his likeness in advertising to one manufacturer of bubble gum, no other bubble gum manufacturer could use the player's photograph in advertising without the licensee's permission. The court in that case stated that:

> *"a man has a right in his publicity value of his photograph, i.e., the right to grant exclusive privilege of publishing his picture."*

Later in **White v. Samsung Elecs. Am., Inc. 971 F. 2d 1395, 399 (9th Cir. 1992)** it was held that the media such as Television have created marketable identity value. Persons have expended energy and ingenuity to become celebrity status that may be exploited for profit. The law protects that by granting the sole right to exploit this value.

As for privacy right, that is recognized in many international instruments UN Declaration of Human Rights, ICCPR, African Charter of Human and People's Rights. Privacy is a constitutional right even in Tanzania like in many democratic states. Article 18 of the Constitution of the United of Tanzania, 1977 as amended provides for this right. These rights image right, privacy right, copyright, may be owned by different persons. Although the copyright in the image may owned by another person the image right and privacy right may remain with the person whose likeness is visible in the image or photo. In the case at hand, the trial court proceedings and the judgment indicate that the appellant owns none of these rights.

The last issue *is whether the trial court erroneously awarded interest? These are found on grounds 16 and 17 of the appeal.* The last cluster of grounds of appeal (16 and 17) was on the award of interest. This court is of the view that the appellant counsel was right argue that the trial court erroneously awarded 10 percent on general damages from the date of filing the suit to the date of judgment. The established principle is that the court cannot award interest to the general damages because by the time of filing the suit general damages can hardly be ascertained as pointed out in **Anthoy Ngoo and another v Kitinda Kimaro, Civil Appeal No. 24 of 2014 TZCA** at page 26. To that extent Mr D'souza humbly conceded this ground of appeal. Regarding interest from the date of judgment to the date of full satisfaction of the decree, the court concurs with Mr Kagirwa, for the appellant, that the law, Order XX Rule 21 of the Civil Procedure Code [Cap 33 R.E. 2019] is clear that the interest is limited to 7% or 12% where there is an agreement to that effect that it will be 12%. Much as it is agreeable

that the awarding of 10% interest was an error, the interest from the date of judgment to the date of its full satisfaction cannot entirely be forsaken. The court therefore reduces the interest from 10% to 7% from the date of judgment to the date of its full payment as required by the law.

For foregoing reasons and save for trial court's erroneous grant of 10% interest of the decretal amount per annum from the date of filling of the suit to the date of judgment, which is set aside, and interest of 10% which now has been reduced to 7% of the decretal sum from the date of judgment to the date of its final satisfaction. The appeal is partly allowed but largely lacks merit. It is thus dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 13th Day of October 2023.

U. J. AGATHO

JUDGE

13/10/2023

Date: 13/10/2023

Coram: Hon. U.J. Agatho J.

For Appellant: Mvano Mlekano, Advocate

For Respondents: Mwang'enza Mapembe, Advocate

C/Clerk: Beatrice

Court: Judgment delivered today, this 13th October 2023 in the presence of the Mvano Mlekano, learned counsel for the appellant and Mr. Mwang'enza Mapembe learned counsel for the respondents.

U. J. AGATHO

JUDGE

13/10/2023