IN THE HIGH COURT OF THE UNITED REUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CIVIL APPEAL NO. 19 OF 2020

(Arising from Civil Case No. 88 of 2017 in the Resident Magistrates' Court of Arusha)

GABRIEL KAMOMON OLLO KILLEL..... 1ST APPELLANT

JACKTON MANYERERE.....2ND APPELLANT

MANAGING DIRECTOR JAMHURI NEWSPAPER.....3RD APPELLANT

WILLIAM MASONGO ALIAS..... 4TH APPELLANT

VERSUS

MAANDA NGOITIKO.....RESPONDENT

JUDGMENT

14/2/2022 & 30/8/2022

ROBERT, J:-

This court consolidated Civil Appeals No. 18 and 19 of 2020 as both of them originated from Civil Case No. 88 of 2017 at the Resident Magistrates' Court of Arusha where the respondent, Maanda Ngoitiko, had instituted a civil case against the appellants which was concluded in her favour. Aggrieved, the then defendants, now appellants, appealed to this court against the respondent herein in Civil Appeals No. 18 and 19 of 2020 respectively.

In Civil Appeal No. 18 of 2020, the 1st, 2nd and 3rd appellants herein faulted the decision of the Resident Magistrates' Court of Arusha on six grounds which are as follows;

1. *That the Trial Magistrate seriously erred in law and in fact by not according the second and third appellant the right to be heard.*
2. *That the Trial Magistrate misdirected herself by delivering a judgment based on repealed law.*
3. *That the Trial Magistrate erred in law and in fact by being bias to the extent of inventing evidence which were not tendered by the respondent and her witnesses.*
4. *That the Trial Magistrate seriously erred in law and in fact by relying the evidence of PW2 (Lota Nyaruu) that the second and third appellants published false, libellous and defamatory statements against the respondent that fact which has never been asserted by PW2 in his evidence.*
5. *That the Trial Magistrate misdirected herself by improperly handling documentary evidence, further that accepted exhibit A5 relied it on her decision and further accepted exhibit A4 which was no audited financial report.*
6. *That the Trial Magistrate seriously erred in law and in fact by delivering a judgment which lacks points of determination; and further did no weigh the evidence of both parties.*

The 4th appellant on his part lodged Civil Appeal No. 19 of 2020 in which he advanced a total of five grounds namely;

1. *That the learned trial Resident Magistrate erred and misdirected herself in making her findings and conclusions based on the repealed law; the News Paper Act, Cap 229 of 2002.*
2. *That by virtue of the demand note; exhibit P6, the learned trial Resident Magistrate grossly erred in law and in fact in not holding that the appellant did not co-author defamatory article with the 3rd and 4th defendants in the suit and published in the newspaper; Exhibit A1 and A2 collectively, owned by the 3rd and 4th defendants in the suit.*
3. *That the learned trial Resident Magistrate erred and misdirected herself in finding that the respondent did not have a duty to prove damages she had suffered to enable the court to award damages.*
4. *That the learned trial resident Magistrate erred in law and in fact in awarding the respondent a colossal sum of Tshs 500,000,000/= as general damages without assigning reasons and or any criteria.*
5. *That the decree of the trial Resident Magistrates' Court is problematic in not stating liability of defendants and or each defendant in payment of award of compensation sum of Tshs 500,000,000/=.*

Highlighting on the grounds of appeal in respect of Civil Appeal No. 18 of 2020, Mr. Daud Haraka, learned counsel for the 1st, 2nd and 3rd appellants prayed to drop the 1st and 4th grounds of appeal and argue the rest of the grounds.

Submitting on the second ground of appeal, Mr. Haraka faulted the trial Magistrate for misdirecting herself by delivering a judgment based on

repealed law. He stated that the impugned judgment was obtained under the Newspapers Act (supra) which has been repealed by section 66 of the Media Services Act, Act No.12 of 2016. He argued that, the fact that the statute under which the impugned judgment was obtained has been repealed, the right which existed under that statute is as good as non-existent and the judgment obtained under the statute is no judgment at all. To bolster his argument, he made reference to section 32(1) of the Interpretation of Laws Act, Cap. 1 (RE 2019).

He also cited specific incidences in which the trial Magistrate made reference to repealed laws such as section 39 which was used to define defamation, section 40 which was used to define publication and section 38 which was quoted to provide that libel is actionable per se. He was of the view that under the provision of the Interpretation of Laws Act, cited above, the judgment is a nullity.

On the third ground, he submitted that the Magistrate was wrong to hold that PW2 had testified that the appellants published defamatory articles while in fact when his testimony is scrutinized, it can be seen that he testified on three aspects which are to the effect that, the respondent is a philanthropist, she is not responsible for the invasion of Kenyans into their localities and that she is not a land grabber. He stated therefore that

it was wrong for the Magistrate to hold that PW2 testified that the appellants published defamatory statements.

With regards to the fifth ground of appeal, the learned counsel for the 1st 2nd and 3rd appellants submitted that the Magistrate misdirected herself by giving so much weight to exhibit P5 which was a charge sheet which had a lot of shortfalls as there was no co-accused who testified, there was a mere assertion that the case is in court, no prosecutor was called to testify on the legality of the said charge sheet. He further questioned the exhibit P4 which was an audit financial report which had no correlation with the case but evidential value was given to it in the course of arriving at a conclusion.

Submitting on the sixth ground of appeal, he stated that the entire judgment of the trial Court lacked points for determination which is against the law i.e. Order XX Rule 4 of the Civil Procedure Code, Cap 33 RE 2019. He said that a judgment must show that the trial Magistrate has applied her mind to the evidence on record and that no material evidence has been ignored. He made reference to the case of **Stanslaus Rugaba Kasusura and the AG vs Phares Kabuye** [1982] TLR 338 to that effect.

As for the claim that the trial Magistrate failed to weigh and decide on the strength of evidence tendered by both parties, it was counsel's submission that the said irregularity caused miscarriage of justice against the appellants as their evidence was strong, coherent and cogent and there is nowhere in the entire judgment where the Magistrate weighed their evidence vis a vis that of the respondent.

He concluded his arguments by praying for the appeal to be allowed with costs and the proceedings, judgment and decree of the trial Court be quashed.

Submitting on the raised grounds of appeal with regard to Civil Appeal No. 19 of 2020, the learned counsel for the 4th appellant submitted on the first ground of appeal that the findings by the trial Magistrate were based on the repealed law thus they lack legal basis. He submitted further that, after the Newspapers Act was repealed, it meant that all the rights and obligations acquired under the said law ceased to have legal effect so the trial Magistrate was wrong to award the respondent Tshs 500,000,000/= based on the repealed law. The said judgment plus the award is therefore a nullity.

On the second ground of appeal, his submission was to the effect that, there was no evidence indicating that the 4th appellant wrote any

article in the Newspaper that defamed the respondent. The respondent was required to prove it but failed. He submitted that in the circumstances, the respondent was required to satisfy herself on the 4th appellant's involvement and then write a demand notice to the 4th appellant. Since none of that was done then the respondent failed to prove the allegations against the 4th appellant as the appearance of his name in the article was not conclusive proof that he was involved in the defamatory articles.

With regards to exhibit P6, he stated that the same does not reveal the 4th appellant as the co-author of the defamatory articles. Further to that, the contents of exhibits A1 and A2 is not clear as to who defamed who, Dorobo Safaris, Susanna Nordlund or the respondent. He stated that it was crucial to particularize the issue so as to know whether the published statements concerned the donors and affiliated NGOs or the PWC to which the respondent was the Managing Director.

Another issue covered in this ground of appeal is that the Magistrate reached at the findings and conclusion without taking into consideration the testimony given by the 4th appellant. If she had done that, then she would have arrived at a different decision. To support his contention, he relied on the decision in the cases of **Leonard Mwanashoka vs**

Republic, Criminal Appeal No. 226 of 2014, **Hussein Iddi and Another vs Republic** [1986] TLR 166 and **Yasini s/o Mwakapala vs The Republic**, Criminal Appeal No. 13 of 2012 claiming that what the Magistrate did was to summarize the evidence and no corresponding analysis was made to make a fair and just conclusion.

As for the complaint in ground three of the appeal, counsel for the 4th appellant submitted that the respondent failed to prove that the alleged defamatory words were false, referred to her and that they caused injury. She claimed that donors have rejected to donate but did not bring any proof to that effect. She claimed further that she was affected by the charge that was made against her following the said defamatory publication however the said charge did not disclose that she was arrested due to the information published in the Newspaper.

In the fourth ground of appeal, counsel made a brief submission that the trial Magistrate did not give any reasons in awarding the respondent Tshs 500,000,000/= as damages which is against the principle of natural justice as she wrongly exercised her judicial discretion.

Regarding the fifth and last ground of appeal, the learned counsel argued that the decree of the Resident Magistrates' Court is problematic as it does not state the liability of each of the defendants in the payment

of the sum of money awarded to the respondent. He holds a view that omission to state the liability places a huge task to the appellants to comply with the decree as none of them knows the amount to be paid by each and makes the decree incapable of being executed.

He concluded his submissions by making a prayer that the appeal be allowed and the judgment and decree of the trial Court be quashed and set aside.

In response, Ms. Fatuma Amiri, learned counsel for the respondent, submitted with regards to the first ground of appeal that the trial Court did not make a decision based on repealed law instead it used the said law to define the terms defamation and publication. She submitted further that the court in reaching its findings used the parties' testimonies and exhibits. That even the said definitions under section 39 and 40 of the repealed law i.e. the Newspapers Act (supra) were the only matters referred to in the repealed law and the court referred to other sources to define the terms which are the case of **Hamis vs Akilimali** (1971) HCD 111. She held a view that the alleged reference to the repealed law did not cause any prejudice on the part of the appellants as the court reached its findings based on facts and not the repealed law.

With regards to the second ground of appeal, the learned counsel submitted that the cardinal principle under the law of Evidence Act, section 110(1) is that he who alleges must prove. Further to that, the respondent in proving her claim testified and brought witnesses and submitted exhibits which, taken in totality, proved the existence of her allegations against the appellants. On their part, the appellants did not bring witnesses nor tender any exhibits but raised general denial of the existence of the alleged facts. That they ought to have proved that they did not co-author the defamatory information.

She said that what was considered was not only the demand note but evidence in its totality and the exhibits which the court evaluated and reached its findings. She was of the opinion that this court cannot interfere with the findings of fact of the trial Court until it is proved that the trial Court misconstrued material evidence or omitted to consider material evidence, otherwise this court should not interfere with the findings of fact by the trial Court. She supported her submissions with the authority in the case of **Materu Leison & J. Foya vs R. Sospeter** [1998] TZHC 20. With regards to the 4th appellant's complaint that he never co-authored the defamatory materials, she submitted that he was supposed to bring proof but he never disputed in his testimony and neither did he

bring any evidence that he reported having his name mistakenly used in the Newspaper.

As for the third ground of appeal, counsel stated that the respondent had claimed two billion shillings as damages but after the assessment the trial Court awarded her five hundred million only. She stated further that the respondent did not only claim damages but also proved the same. That by claiming only general damages she was not under any duty to prove the same but only proving that she suffered psychologically, physically and her reputation was lowered as a consequence of the defamation.

Submitting on the fourth ground of appeal, it was counsel's submission that the trial Magistrate assigned reasons for awarding the respondent the amount of Tshs 500,000,000/= as damages the same is seen at page 21 of the judgment where it reveals that the court heard, deliberated on the issue and gave reasons why it was awarding the respondent damages.

The fifth ground of appeal covered a complaint that the decree of the RMs Court is problematic as it does not state liability of each of the appellants in payment of the damages awarded to the respondent. Responding to it, counsel for the respondent submitted that the court

gave that duty to have the award fulfilled to all the appellants jointly. She submitted that it was not the court's duty to ascribe how much each appellant should pay the respondent but it was upon the appellants themselves by mutual agreement to agree on how much shall be paid by each.

She said that the decree cannot be invalid merely by failure to describe how much shall be paid by each appellant just as long as it was prepared as per Order XX Rule 7 of the Civil Procedure Code (supra).

With regard to the complaint that the trial Magistrate erred by relying on the testimony of PW2 who did not testify that the appellants published defamatory materials, it was the submission by the learned counsel for the respondent that the court never relied on the testimony of PW2 but that of PW1 and the exhibits tendered.

The sixth ground was responded to by the learned counsel by stating that, based on the testimony given, the court was right to rely on exhibit A5 as it shows that the respondent was charged as a result of defamatory statements. Exhibit A4 was not relied on.

In the last ground of appeal which contains a claim that the judgment of the trial Court lacked points for determination, the submission to the said ground was to the effect that the impugned

judgment contained points for determination and the trial Magistrate weighed the evidence of both parties. In the upshot, she prayed for this appeal to be dismissed with costs.

In the rejoinder submissions, the learned counsel for the 4th respondent reiterated his prayer that this appeal be allowed and the judgment of the RMs Court be quashed and set aside. Further to that he stated that the trial Court used a repealed law and counsel for the respondent has admitted that hence the whole decision is a nullity. On the issue that the respondent did not prove her case beyond reasonable doubt, he submitted that it was the duty of the respondent to prove her allegations against the 4th appellant and not otherwise and the evidence on record does not implicate the 4th accused.

With regards to the award of Tshs 500,000,000/= as damages, he reiterated his earlier submissions that the respondent was supposed to prove the said damages but she did not and it was not right for the magistrate to award the said amount without there being a proof.

On the issue of the decree being problematic, he repeated his contention that omission to state liability of each appellant to pay the awarded amount makes the decree problematic. In the upshot he prayed

the appeal to be allowed and judgment and decree of the trial Court be quashed and set aside with costs.

Having abridged the rival arguments from both parties, I will now proceed to make a determination on the merit of the consolidated appeals in the light of the grounds raised and submissions of both parties.

Starting with the second ground of appeal in Appeal No. 18 of 2020 which appears as the first ground of appeal in Appeal No. 19 of 2020, the question for determination is whether it was right on the part of the trial Magistrate to make findings and compose a judgment based on the repealed law i.e. Newspaper Act, Cap. 229 of 2002.

It is not disputed that the trial Magistrate in the impugned judgment made reference to sections 39 and 40(1) of the Newspaper Act, Cap 229 R.E 2002. It is also not disputed that the said Act was repealed by the Media Services Act No. 12 of 2016. This Court is in agreement with the argument put forward by the learned counsel for the appellants with regards to the effect of a repealed statute which implies that, upon repeal, the rights and obligations acquired and incurred under the repealed law ceases to have legal force.

The Court of Appeal in the case of **Thomas Lugumba @ Chacha vs The Republic,** Criminal Appeal No. 400 of 2017, when faced with

almost similar circumstances where the appellant had been charged, prosecuted, convicted and sentenced on a dead law, quoted with approval the authority in the case of **The Republic vs Kenya Anti-Corruption Commission and Others Ex-parte Okoth** [2006] 2 EA 275 on the effects of a repealed statute in which it was stated that;

> *"It is the applicant's case that any liability or offence under the repealed Act cannot outlive its repeal. The applicant's contention is principally based on the common law because the rule at common law is that the effect of repeal was to obliterate the law as if it never existed, but subject to any savings in the repeating Act and also the general statutory provisions as to the effects of repeal.*
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> *This position is borne out by **Halsbury's Laws of England** (4ed) Volume 44 (1) paragraph 1296 which states: "To repeal an Act is to cause it to cease to be part of the corpus juris or body of law".*

It can be gathered from the above quoted authority that upon repeal, a statute becomes non-existent thus inapplicable. One cannot apply or make reference to something that does not exist. It was therefore wrong for the trial Magistrate to make reference and findings based on a repealed law. In so doing, such findings and resultant judgment were vitiated and thus illegal and prejudicial to the appellants.

In the premises, I am enjoined to agree with the view held by the appellants' counsel that the judgment pronounced by the trial Court is no judgment in the eyes of the law for the reason stated above. Since the irregularity is only found in the impugned judgment, I remit the records back to the trial Court and order that a new judgment be composed before the same Magistrate in accordance with the law.

Having ruled as above, I find no pressing need to determine the remaining grounds of appeal. Appeal is allowed. I make no order as to costs since parties are not to blame for the anomaly found in this matter.

It is so ordered.

K.N.ROBERT
JUDGE
30/8/2022