IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 978 OF 2024

(Originating from the decision of the District Court of Kinondoni Civil Case No. 86 of 2022)

SAFARI AUTOMOTIVE LIMITED ..... APPELLANT

VERSUS

GODWIN DANDA ..... RESPONDENT

JUDGMENT

15.05.2024 & 30.07.2024

NGUNYALE, J.

The present second appeal is the result of abuse of business relationship between the appellant Safari Automotive Limited as the service provider and the respondent Godwin Danda as the beneficially to the service. According to the record, the appellant on 17th day of January, 2022 entered into an agreement with the respondent to mend the sit cover, dashboard, 5D carpets and cleaning of the respondents' motor vehicle made Toyota Harrier with registration No. T714DYD for a consideration of 2,900,000/= which was promptly paid by the respondent. Upon completion of the services they agreed, the respondent on 26th day of

January, 2022 went to take his motor vehicle. On that day of taking the motor vehicle the appellant recorded a video of the respondent with his motor vehicle. The said video (exhibit PE3) was posted online in the appellants Instagram page. The post came to the knowledge of the respondent on 29th January, 2022 when he saw the video circulating on social media platform named Instagram.

The respondent complained that the appellant has interfered with his personality and privacy thus he suffered a lot because of the publication and it disrupted peace and the harmony of his family. He therefore preferred Civil Case No. 86 of 2022 before the trial court seeking redress for the unauthorised use of the image in marketing and promoting the appellants' services and products. The appellant's defence was to the effect that the said video was recorded as consented by the respondent and what was done was not for any commercial or economic gain but was done for educating the members of the public and still the video clip existed for a short time of 10 days online.

The trial court concluded its trial in favour of the respondent. The court said in part in its verdict; -

> *"The plaintiff explained on how the defendant act of publication of video cause quarrel with his wife, disrupted peace in his family and lowered his reputation. There is no doubt that the plaintiff had*

suffered general damages as a result of defendant act of unauthorised publication of video. He must be compensated by general damages. This court therefore order the defendant to pay the plaintiff general damages to the tune of Tanzania Shillings Eighty Million (Tshs 80,000,000/=). Defendant is also ordered to pay costs of the case"

The above verdict is the subject matter under scrutiny today; the appellant was seriously aggrieved with it, thus he came to this court armed with a memorandum of appeal loaded with seven grounds of appeal to challenge the findings of the trial court. The grounds of appeal are paraphrased as follows for clarity and making sense that; **one**, the general damages worth 80,000,000/= were granted without any evidence to prove the same **two**, there was no evidence that the video exhibit PE3 bearing the respondents image was published in the defendants Instagram account for business purpose **three**, the trial court erred by admitting exhibit PE3 without laying down any foundation evidences towards its tendering and admissibility **four,** the trial court erred to hold that there was no consent of the respondent for the recording of the said video while the same was consented and no any evidences was tendered to dispute the said consent. **Five**, the trial court erred to hold that the posted video exhibit PE3 was for commercial purpose contrary to evidence of PW1,PW3 and PW3 and exhibit PE4 **six**, the trial court erred to order payment of 80,000,000/= without any

evidence to prove how much the video generated income to the appellant and **seven**, the trial court erred in law and facts by ignoring to analyse and assess the evidences of the appellant and largely based it decision on the evidences of appellant herein and ignoring very strongly evidence tendered and testified by DW1 and DW2 including admitting admitted exhibit DE1.

Having in mind the argument of the parties through their written submission and the grounds of appeal I proceed to determine the appeal forthwith; one thing to be in record before I go further is that the appellant appeared represented by Joseph M. Msegezi whilst the respondent enjoyed representation from Paulo Patience Hyera both learned Counsels.

The first and the six grounds of appeal will be determined together because they aim to challenge the award of 80,000,000/=. The appellant complain that it was awarded without evidence the point which is strongly contested by the respondent. From evidence received during trial, there is no dispute that the clip bearing the picture of the respondent and his vehicle was recorded and posted on the page of Instagram of the appellant. PW1 Godwin Danda (53) testified that he was shocked when he saw himself in social media advertising the

appellant company. His testimony that the advertisement was on Instagram of the appellant is corroborated by the testimony of his wife PW2 Scolastica Steven Shemtoi (49) and his son Steven Godwin Danda (23). The position of the respondent family was corroborated by the appellant evidence through his director DW2 Yovino Mauki (41) and the official of the appellant company one DW1 Rosalia Mistika Mosha (31); they all supported the view that the video clip exhibit PE1 was posted on Instagram page of the appellant for educating the public on how they take care of the motor vehicles. The only dispute is whether the same was posted for business advertisement. The respondent in her testimony said that they were using his image in the social media for advertising the appellant company the fact which tarnished his image and the family unity, also the comments from the public were not good though he could not bring such evidence from the members of the public. Also, he said that he deserves a slice from the appellant. The act of the appellant was purely commercial.

The appellant in her testimony insisted that the recording was done because it was consented by the respondent thus, he was cooperative when it was being recorded. DW1 Rosalia Mistika Mosha (31) said that the respondent consented for him to be recorded. It was their usual

practice to record the customers after they completing the service. The recording is just for record keeping. The video recording did not aim to promote business rather it was for educating the society. It is my considered view that the evidence of DW1 and DW2 is that the respondent consented for the recoding of the video but there is no evidence that he consented for it to be posted on Instagram. The fact that he did not consent to the posting is evidenced by the testimony of PW1 that he was really shocked to find that his image was circulating on social media. From that view I support the findings of the trial magistrate that the respondent was intitled to compensation.

The issue now is whether the compensation of 80,000,000/= was proper and supported by evidence. To be Certainly, the award is excessive compared to the extend the appellant stated to have suffered. Though in interference with personality and breach of privacy it is very difficult to quantify in monetary form but the same cannot be uncontrolled through a careful judicial process. The point that in breach of privacy compensation cannot easily be quantified was well discussed in the case of **Mult Choice (T) LTD versus Alphonce Felix Simbu**, Commercial Appeal No. 01 of 2023 High Court Commercial Division at Arusha; still the same cannot be assessed to infinite.

According to the testimony of PW1 the post interfered with his family life and employment. In my view the scope established by the respondent is narrow to attract such huge amount of compensation or damages. The testimony of his members of the family does not establish any concrete injury suffered which attract such huge amount of general damages. General damages are awarded at the discretion of the court but such discretion must aim to give a fair compensation and not to ruin the fruits of labour of the individual or to bring unlawful enrichment. In **Admiralty Commission v. S S Susqehanna** [1950] 1 All ER 392 where it was stated that:

> *"If the damage be general, then it must be averred that such damage has been suffered, but the quantification o f such damage is a jury question."*

The court is vested with power to assess general damages.

The defendants attempt to state that the same was not posted for commercial advertisement but it was for educating members of the public. I think it is very difficult to put a line between educating the members of the public and commercial gain. At this stage it is without doubt that the respondent suffered mental anguish which attracts a nominal or reasonable compensation. I agree with the respondent that the evidence on record does not support such huge amount of

compensation. Therefore the 1st and 2nd grounds of appeal are successful to the extend that general damages must be fair and reasonable.

The second ground of appeal is on whether the video clip was for business purpose or not. The appellant in their testimony testified that the same was not for commercial advertisement but it was just for educating the members of the public. The respondent remained with the position he stated in his evidence during trial that the video clip was used for economic gain as a commercial advertisement the fact which is wrong to be done without his consent. He supported the decision of the trial court. I have ruled already that the evidence on record does not controvert the fact that the appellant posted the video clip on Instagram without consent of the respondent. The consent of the respondent for it to be recorded did not extend to posting the same in the Instagram. The video clip in exhibit P3 which was posted by the appellant cannot be distanced from advertisement of the appellant business because its content is about quality of the work done by the appellant to the motor vehicle of the respondent. By any means; any person who witnessed it on Instagram will be persuaded with the service of the appellant as witnessed by the respondent in the clip who received the service. The

testimony of PW1, PW2 and PW3 was correct that the same was boosting the appellant business. DW1 and DW2 stated that the same aimed to educate members of the public but they could not state what do they achieve from educating members of the public. It is my considered view that, regardless of he means it was posted in Instagram, still it was advertising the business of the appellant as proved by PW1, PW2 and PW3.

In the third ground of appeal the appellant complains that the trial court erred by admitting exhibit PE3 without laying down any foundation evidences towards its tendering and admissibility. The appellant submitted that while tendering Exhibit PE3 flash disc on 29th May, 2023 and 24th July, 2023 the defendant did not state any foundation evidence or swear any affidavit showing how the said video was authentic, reliable and assurance contrary to Section 18 (2) (a), (b) and (c) of the **Electronic Transaction Act** of 2015 which provide for the manner of admitting such kind of evidence. That exhibit PE3 is the Flash Disc which contain evidence of the alleged respondent video in electronic form. The respondent submitted that the appellant is submitting on a narrow approach in satisfying authenticity of electronic evidence. He has confined himself to the affidavit as the sole way of proving the fact

which is incorrect. In the case of **EAC Logistic Solution Limited versus Falcon Marines Transportation Limited,** Civil Appeal No. 1 of 2021, High Court of Tanzania (unreported) it was observed that: -

> *"For the purpose of admissibility, I hold that, those criteria can be established by an affidavit or other form of evidence like oral evidence depending on the kind of document to be admitted"*

The respondent concluded that the affidavit is not the only means to satisfy the provision which the appellant is complaining about.

This issue was controverted during trial when the exhibit was being tendered, the same was considered at length by the trial magistrate and ruled in favour of the respondent that oral evidence was relevant to satisfy the above provision. He further stated that the appellant had an opportunity to test the credibility of the witness PW1 and the authenticity of the exhibit by way of cross examination. With due respect to the Counsel for the appellant, I have no reason to fault such position which has been revisited by the respondents' Counsel in his submission. In the other side of the coin, at this stage there is no dispute that the video clip was recorded and later uploaded by the appellant in his Instagram page. To rule otherwise about exhibit PE3 will be as good as attracting technicalities which have no chance in this era of upholding substantial justice.

The fourth ground of appeal the appellant complain that the trial court erred to hold that there was no consent of the respondent for the recording of the said video while the same was consented and no any evidences tendered to dispute the said consent. I am in agreement with the appellant that the respondent consented for the video clip to be recorded. Though the respondent testified that he never consented but the evidence of DW1 and DW2 is very clear that he consented for it to be recorded thus he was very cooperative to the employee of the appellant who was interviewing him when the same was being recorded. At list I have no doubt that he consented when the same was being recorded thus he was cooperative but, he could not foresee how the video will be used. There is no evidence that he consented for the same to be posted on Instagram or any other social media platform. Having weighed the circumstance of the evidence of both sides the respondent consented for the same to be recorded but he could not consent for it to be uploaded on social media thus he was shocked when he heard that his image is circulating in the social media. In his testimony PW1 said that ***'I was shocked to see myself on social media advertising the defendant company'***. From that view, I am satisfied that uploading the video clip to the social media was done without the consent of the respondent though he consented for its recorded. The

fact that he was cooperative to the interview make the court to drawn inference that he consented for the recording as testified by DW1 and DW2.

In respect of the 5th ground of appeal the appellant complained that the trial court erred to hold that the posted video exhibit PE3 was for commercial purpose contrary to evidence of PW1, PW3 and PW3 and exhibit. I think I should not make mark time dealing with this issue. I have ruled on it while dealing with the first, second and other grounds of appeal. The same was for commercial purpose because the conversation in exhibit PE3 aimed to narrate the style and quality of services offered to customers by the appellant. I therefore avoid repetition or redetermining this ground of appeal. The last ground of appeal is about analysis of evidence. The appellants' complaint is that the defence evidence was not considered equally with the respondents' evidence. Analysis or evaluation of evidence is an obligatory exercise for any court or judicial body which hear and determine cases. The exercise of evaluation of evidence may be re exercised by the first appellate court as it was ruled in **Japan International Corporation Agency (JICA) v. Khaki Complex Limited**; Civil Appeal No. 107 of 2004 (unreported), that the first appellate court has a duty to re-evaluate the

evidence of the trial court and come up with its own independent findings. In the present case the trial court correctly exercised its duty of evaluating evidence except on the point of consent in which my evaluation ended with a different finding. Generally, the evaluation was balanced by considering the testimony of PW1, PW2, PW3 also DW1 and DW2.

Having said and done, the act of the appellant to publish the video clip of the respondent on social media platform without his consent interfered with his personality and privacy without justification as correctly ruled by the trial court. The extend suffered by the respondent cannot be quantified but cannot be excessive in the eyes of a common man. Therefore, general damages awarded by the trial court are reduced to 10,000,000/= Tshs. Appeal allowed to the extend explained hereinabove.

Order accordingly.

Dated at Dar es Salaam this **30th** day of **July, 2024**.

D. P. Ngunyale

JUDGE

Judgment delivered this **30th** day of **July, 2024** in presence of Mr. Paul P. Hyera for the respondent and holds brief for Joseph Msengezi for the appellant.

D. P. Ngunyale

JUDGE