IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 183 OF 2017

ELIBARIKI KIRAMA KINYAWA.....1ST APPELLANT
MARY KIRAMA KINYAWA.....2ND APPELLANT

VERSUS

JOHN GEORGE a.k.a JIMMY .....RESPONDENT

[Appeal from the judgment and decree of the High Court of Tanzania, at Dar es Salaam]

(Munisi, J.)

dated the 22nd day of September, 2016

in

Civil Case No. 186 of 2013

JUDGEMENT OF THE COURT

25th April, & 9th May, 2022

KITUSI, J.A.:

The appellants, a couple, instituted a suit against the respondent and led evidence in ex parte proof thereof, but lost the case, before the High Court, Munisi J, sitting at Dar es Salaam. The suit arose from the following background. The respondent is or was the owner of business premises which are leased to handcraft makers of sofa sets. The respondent and his tenants had an outstanding issue over nonpayment of rent by the said tenants. On the material date, the respondent confronted the tenants at their place of business and a brawl ensued.

In the process, the respondent threatened to, and eventually set the manufactured sofa sets on fire. PW2, who deals with fresh flowers and lives nearby, saw what took place.

The fire went out of the respondent's control and consequently it crossed over to the appellants' residential premises and caused substantial damage to their property including motor vehicles and other appliances. The fire was put off by a private company known as Ultimate Security Guard, but not before it had caused damage estimated by one Tony Richard Mushi (PW3) to be worth TZS 210,760,000.00 The plaintiffs prayed for an order of payment of that amount as replacement value of the damaged properties. They also prayed for general damages and interest.

Having satisfied herself that there was indeed the fire that burnt down properties, the learned High Court judge considered the identity of the person who started that fire as critical. Of the three witnesses who testified in support of the appellants' case, only PW2 claimed to have seen the respondent start the fire that eventually destroyed the appellants' properties. However, the learned judge doubted PW2's credibility so much that she was not prepared to make findings based on his testimony.

After reproducing a portion of PW2's testimony the learned judge proceeded to demonstrate how unreliable the witness was. We reproduce part of her deliberations: -

> *"From the above extract of PW2's evidence, it is not clear how and why he happened to be at the locus at the time when the incident occurred and what was his connection with the defendant or his tenants or what time it was. Close reading of PW2 leaves a lot to be desired as it leaves more questions than answers, he does not disclose the time of the incident or tell whether his flower business was close by there. In that respect, PW2 does not improve PW1's evidence much with regard to the origin of the fire or the defendant's involvement or relationship with the alleged factory because the evidence is too scanty. For it to prove that it is the defendant who set the fire on, it required corroborative evidence from at least the tenants who allegedly had a dispute with the defendant before the setting on of the fire. "Unfortunately the Court was not told why those tenants were not called to give their evidence on what exactly transpired that fateful day".*

The learned judge concluded that there was no evidence to corroborate PW2's doubtful story because even PW1's version raises eyebrows. The learned judge wondered why in reporting the fire incident to the police, PW1 did not mention the respondent's name. Applying the principle in **Mama Mwita v. Republic,** Criminal Appeal No. 6 of 1995 and **Kulwa Makwajipo and 2 Others v. Republic**, Criminal Appeal No. 55 of 2005 (both unreported), commonly used in criminal cases to discredit a victim of a crime who delays in naming a suspect, the learned judge paid little regard to PW1's story. She finally concluded that the appellants had failed to establish that it was the respondent and no one else who set on the fire. On that ground, the learned judge dismissed the suit with costs.

That decision is being questioned through this appeal, which raises seven grounds. Mr. Tarzan Mwaiteleke, learned counsel, who argued the appeal on behalf of the appellant, informed us that he was going to argue the appeal generally by addressing the issue: whether the decision of the learned judge was reached on the strength of the evidence. We agree with the learned counsel because we think that issue is all – embracing, and as we are dealing with a first appeal, re-evaluation of the evidence is going to be inevitable. The learned

counsel had earlier filed written submissions which he adopted to form part of his oral address.

There was no appearance by the respondent even after service by publication had been effected. We note that the respondent's non appearance was not at all surprising because even at the trial he never turned up. Thus, hearing proceeded under rule 112 (2) of the Tanzania Court of Appeal Rules 2009 (the Rules).

Mr. Mwaiteleke's commenced his address by pointing out that the standard of proof in civil cases is on the balance of probabilities. The learned advocate suspected that in concluding that the appellants had not proved their case, the learned judge subjected the evidence adduced by them to standards applied in criminal cases. He argued that had the learned judge scrutinized the evidence of PW2 she would have concluded that on the balance of probabilities, he had identified the respondent as the one who started the fire.

Arguing further, the learned counsel pointed out that the judge's conclusion that PW2 was not credible because he did not explain how he found himself at the scene, was misinformed. He drew our attention to PW2's evidence showing that he ran the business of flowers around the

same place and on the particular day and time he was at the scene taking tea. With respect, Mr. Mwaiteleke has a point.

The judge's conclusion as shown in the excerpt referred to earlier, that PW2 did not show how he found himself at the locus, is not consistent with the evidence on record. PW2 stated that he lived at Ada Estate, the same place the burnt sofa sets were located. He also said he was there taking tea when the brawl between the respondent and his tenants ensued, and that he saw the respondent start the fire. On the balance of probabilities, and considering that there was no version to contradict that evidence, PW2 sufficiently proved that he saw the respondent start the fire.

The learned judge doubted the appellants' failure to call any of the respondent's tenants to testify. She cited the cases of **Hemed Said v. Mohamed Mbilu** [1984] T.L.R 113 and **Aziz Abdalaah v. Republic** [1991] T.L.R 71. Mr. Mwaiteleke struggled in an attempt to explain this omission. However, in our re-evaluation of the evidence, that omission does not dilute PW2's story. Besides, the principle comes into play when there is proof that the witness is available and we think the explanation lies in the fact that the tenants and the respondent must have fallen out after the incident rendering them hard to trace. Besides, a lot of water

may have gone under the bridge between 6/10/2012 when the incident occurred and 12/10/2015 when evidence of PW1 was recorded. With respect therefore, our conclusion is that the learned judge was not justified in reprimanding the appellants for their failure to call the respondent's tenants, to testify.

As for the police statement not showing that PW1 mentioned the respondent as the perpetrator of the arson, Mr. Mwaiteleke submitted that it could be that the police omitted to record that fact. We think we should not slip into the error of overstretching that principle in the circumstances of this civil case. One, there is no dispute that properties were destroyed by fire, and two, there is the evidence of PW2 that it is the respondent who started the fire. With respect, we fault the learned judge for applying that principle in the circumstances of this case. If anything, even the respondent's disappearance after the incident is a conduct not consistent with innocence.

The other reason cited by the learned judge for dismissing the appellants' suit was contradiction in the testimonies of PW1 and PW2 as to what the respondent set on fire. One stated that the respondent set sofa sets on fire whereas the other said he set mattresses on fire. Mr. Mwaiteleke submitted that there was no contradiction because sofa sets

are made from mattresses. Taking the argument further, he said if this is to be taken to be a contradiction, it was very minor.

With respect, we agree with the learned advocate again. His explanation that the sofas were being made from mattresses is sound and clears the perceived contradiction. But then, even the learned judge appreciated that the contradiction was minor. The law is settled that minor contradictions that do not go to the root of the case are inconsequential. [**Ombeni Kimaro v. Joseph Mishili t/a Catholic Charismatic Renewal,** Civil Appeal No. 33 of 2017 (unreported)].

On the whole, we fault the learned judge for concluding that the appellants had not proved that it is the respondent who caused the fire that burnt down their properties because her conclusion that PW2 was not credible, was based on a misapprehension of his evidence. We quash that finding.

We now consider the reliefs. The appellants claimed specific damages of TZS 210,760,000. It needs no reminding that specific damages must be specifically pleaded and strictly proved. [**Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R 136; **Anthony Ngoo and Another v. Kitinda Kimaro,** Civil Appeal No. 25 of 2014 and; **Alfred Fundi v. Geled Mango and 2 Others,** Civil Appeal No. 49 of 2017

(both unreported)]. However, we are afraid that in this case the appellants did not specifically plead the facts leading up to the claimed amount of TZS 210,760,000 and thereby offended Order VII rule 7 of the Civil Procedure Code, Cap 33 R.E 2019 (the CPC).

In terms of the evidence, the appellants brought one Tony Richard Mushi (PW3) who sought to prove the replacement value of each of the items allegedly destroyed by the fire. At the instance of PW1, this witness conducted a valuation of the items and prepared a valuation report which he tendered as exhibit P5.

Right away, we do not find any basis for treating PW3 as an expert witness in valuation. He holds a Trade Test Grade II from a Vocational School in Arumeru and a Law Degree from the Open University of Tanzania. At the time of testifying, PW3 was working for D&M Technical Services as a motor vehicle mechanic. In the case of **Makame Junedi Mwinyi v. Serikali ya Mapinduzi ya Zanzibar (SMZ)** [2000] T.L.R 455, the Court held;

> *"The position of the law is that an expert evidence is admissible where specialized knowledge is required".*

In yet another case of **Tizo Makazi v. Republic**, Criminal Appeal No. 532 of 2017 (unreported), which cited the above case, it was insisted that the witness must show that he possesses special skills.

In this case, PW3 did not demonstrate that he has any special skills in valuation of assets, therefore he could be contradicted even by a person not holding such skills. See **Republic v. Kerstin Cameron,** [2003] T.L.R 84. In our critical consideration of PW3's evidence, we find no utility in it because there is no indication in it of how he arrived at the conclusions. As a result it is our finding that these special claims were neither specifically pleaded nor strictly proved.

In addition, invariably all properties subject of the suit, were in the name of the second appellant Mary Kirama Kinyawa. For unknown reasons, this appellant did not testify. There is therefore no evidence from the owner of the properties as to the purchase prices of the properties.

Consequently, for want of proof we dismiss the prayer for payment of TZS 210,760,000.00.

However, as we said in the case of **Trade Union Congress of Tanzania (TUKTA) v. Engineering Systems Consultants Ltd & Others**, Civil Appeal No. 51 of 2016 (unreported), where there is a

wrong there must be a remedy. Since we are satisfied in this case, that a wrong was committed by the respondent by negligently letting the fire cross over to the appellants' residence and causing destruction of properties, we cannot let the respondent walk scot free. On that principle, we order payment of TZS 70,000,000.00 by the respondent to the appellants. We order interest at court rate on that amount.

The appeal is, to that extent, allowed with costs.

DATED at **DAR ES SALAAM** this 2nd day of April, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgement delivered this 9th day of May, 2022 in the presence of Mr. Tarzan Mwaiteleke, learned counsel for the Appellants and in the absence of the Respondent, is hereby certified as a true copy of original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL