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. 12 OF 2019

VIDOBA FREIGHT CO. LIMITED ..... APPELLANT

VERSUS

EMIRATES SHIPPING AGENCES (T) LTD ..... 1ST RESPONDENT

EMIRATES SHIPPING LINE ..... 2ND RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam]

(Teemba, J.)

dated the 17th day of February, 2017

in

Civil Case No. 214 of 2013

.....

JUDGMENT OF THE COURT

29th April, 2022 & 24th November, 2022

MASHAKA, J.A.:

This appeal originates from the decision of the High Court of Tanzania at Dar es Salaam Registry (Teemba, J). The appellant, Vidoba Freight Co. Limited who was the plaintiff in the High Court, is challenging the judgment and decree dated 17th February, 2017 in Civil Case No. 214 of 2013, where a sum of USD 918.00 compensation for nine days' storage charges and general damages to the tune of TZS. 10,000,000 which was awarded to the appellant. The respondents were the defendants before the High Court.

In the suit, the appellant prayed among other reliefs a declaration against the respondents jointly and severally for breach of duty of care when they failed to release his client's cargo. Also, an order to the respondents to pay a sum of USD 1122.00 being the storage charges for eleven days after detaining their cargo, and USD 68,800.00 being loss of income and general damages.

The brief facts are that sometimes in 2009, the appellant, a clearing and forwarding agent entered into a business agreement with the first respondent a shipping line agent who is the agent of the second respondent. On 1st July 2009, the appellant received documents from one of his clients, one Bushiri Idrisa Abeid that his cargo was offloaded from the second respondent's ship at Dar es Salaam port. On 31st July, 2009, the appellant wrote a letter to the first respondent requesting to change the status of the container of his client. The first respondent replied to the letter and provided the format on how the respective letter should be. The appellant wrote another letter on 3rd August 2009 in conformity with the format.

Subsequently, the appellant commenced to clear the container, however, regrettably it could not be released due to allegations that USD 2,056.00 was due to be paid by the appellant to the first respondent being demurrage charges of a previous consignment of one Robert Nwanza.

Due to that misunderstanding, the appellant registered his complaint to SUMATRA regarding the unlawful act of the first respondent. Upon an inquiry, the first respondent released the cargo. Nonetheless, it is alleged that the cargo had been in storage for eleven days amounting to USD 1122.00. Following the delay, the appellant's client terminated the contract with the appellant and the latter allegedly lost expected income to the tune of USD 68,800.00 as they were assigned to clear 172 containers.

The respondents in their joint written statement of defence denied each and every fact alleged by the appellant in his plaint and DW1 testified that on 3rd August, 2009, the appellant requested to change the status of the container which the first respondent duly performed her part by sending the C.11 form to the Customs and Excise Office to make the requested changes. On 5th August, 2009, they approved the change of status and the appellant submitted the form to the first respondent who updated her system and forwarded copies to the container terminal and the Port after which the appellant could lodge copies of the documents to the relevant authorities for assessment of payable charges. On 6th August, 2009 the appellant collected the approval from the first respondent. The first respondent prepared exhibit P6, the delivery order dated 14th August, 2009 and was submitted to Tanzania International

Containers Terminal Services (TICTS) to release the appellant's cargo. The appellant approached the first respondent for delivery on 14th August, 2009 and thus, the assertion that there was no any further delay caused by the first respondent.

During the trial, four issues were framed for determination. One, whether there was delay in releasing the plaintiff's client's cargo as alleged; two, if issue no.1 is in the affirmative, whether the defendants were responsible for such delay; three, whether the plaintiff suffered any loss or costs as a result of such delay; and four, what reliefs the parties were entitled to.

After hearing the evidence of both parties, the trial court answered the first issue in the affirmative that the first respondent refused to issue delivery order until the appellant reported the incident to the responsible authority. The trial court awarded the appellant USD 918.00 being nine days storage charges as compensation for additional demurrage charges and TZS. 10,000,000/= (ten million) as general damages.

Discontented with the award, the appellant lodged two grounds of complaint to this Court that; **one,** the trial judge misdirected herself on calculating the number of days for awarding compensation to the appellant, and **two**, the trial judge erred in law and fact to award general

damages to the tune of TZS. 10,000,000/= resultant to the delay, without taking into consideration the amount of loss caused by the defendants.

At the hearing of this appeal, the appellant enjoyed the service of Mr. Mussa Kiobya, learned advocate while the first and second respondents were represented by Mr. William Mang'ena, learned advocate. Arguing in support of the appeal, Mr. Kiobya having adopted the memorandum of appeal and the written submissions filed on 18th March, 2019, in respect of ground one submitted that the trial court erred to calculate the number of days subject of compensation. He reasoned that, the changing of the status was completed on 5th August 2009 while the delivery order was issued on 14th August 2009 which was a Friday around 17:19hrs. Therefore, it was late to take the delivery note to the port authorities, and the next day was 15th and 16th August, 2009 which was Saturday and Sunday respectively. Notwithstanding that the two days were weekends, the storage charges kept accruing, he argued. In view of his arguments, Mr. Kiobya is imploring the Court to find the trial court to have erred and failed to give any reasoning in awarding of nine days compensation instead of eleven days.

In the second ground, Mr. Kiobya submitted on two limbs. First, on the award of general damages, he submitted that, though awarding

general damages is the discretion of the trial court, it had to assign reason for its findings.

According to Mr. Kiobya, the trial court failed to assign any reason to justify the TZS. 10,000,000/- general damages award granted instead of the amount prayed for by the appellant, bolstering his argument with the case of **Anthony Ngoo and Davis Anthony Ngoo v. Kitinda Maro,** Civil Appeal No. 25 of 2014 (unreported). Mr. Kiobya on the second limb concerning specific damages, is faulted the trial court for failing failed to consider an oral contract between the appellant and his client and in addition to that, the letter to terminate the business relations between the appellant and Bushiri Abeid Idrisa exhibit P5, which was proof of an existing business contract between the two. He further contended that though the appellant had an oral agreement with his client, he felt right to make a written termination of the said agreement. Therefore, the appellant incurred loss of business. Concluding, Mr. Kiobya prayed the appeal to be allowed with costs.

In rebuttal having adopted the reply written submissions filed, as part of his oral submissions, Mr. Mang'ena resisted the appeal. In respect of ground one, he argued that the argument advanced by the appellant that they could not clear the cargo as the delivery note was issued late on Friday causing the delay of two more days is not supported by the

evidence on record; that the claim is baseless. He further argued that, the appellant's evidence demonstrates that she cleared the cargo on 14th August, 2009, supported by the evidence of PW3 that on 14th August, 2009 TICTS released the cargo to the appellant after the payment of the required port charges. He strongly resisted the appellant's contention that she cleared his client's cargo on 17th August, 2009, arguing that it was unfounded. He further clarified that the trial judge explained the reasons for awarding nine days compensation for the additional storage charges.

On the second limb of ground two, Mr. Mang'ena faulted the trial court in awarding TZS. 10,000,000/= to the appellant as general damages without assigning reasons. He agreed that, the essence of awarding general damages mostly is to restore the appellant at her original position she was before the occurrence of the incident complained of, citing the case of **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited,** Civil Appeal No. 21 of 2001 (unreported) and the same presumed to be direct, natural and probable consequences of the act complained of, as held in **Anthony Ngoo & Davis Anthony Ngoo v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported) to support his arguments. Additionally, Mr. Mang'ena argued that; the appellant failed to establish any loss of business from the delay because there was no evidence to support the appellant's contention. Even the contents of

exhibit P5, he argued, were not sufficient proof as the client of the appellant was not called to testify in court. Mr. Mang'ena supported the findings of the trial judge that there was no evidence to establish the alleged agreement between the appellant and his client. Furthermore, PW1 failed to tender any agreement specifying the terms and conditions agreed upon to prove that the alleged 172 containers existed or even to establish that they were to be offloaded at any of the ports, concluding that the evidence of PW1 was mere expectations of future business.

Mr. Mang'ena argued further on the propriety of the awarded damages that the trial judge injudiciously exercised her discretion in assessing the general damages to the awarded amount, and prayed it to be reduced. However, he submitted that since there is no cross appeal, the Court should not interfere with the amount of general damages awarded by the trial court, instead he pleaded that though aware of the principle of law that the appellate court will not interfere with the quantum of general damages fixed by the trial court, unless the trial judge proceeded on a wrong principle of law occasioning injustice in the case concerned. He argued there was no ground for the trial court to award the sum of TZS. 10,000,000/= as general damages to the appellant and without assigning any reason, complaining it was on the high side and prayed to the Court to exercise its revisional powers under rule 4(2) (b)

of the Tanzania Court of Appeal Rules, 2009 (the Rules) to revise the order of the trial court by quashing and setting aside the general damages awarded or reassess the amount to fit the facts of this appeal.

On the specific damages, Mr. Mang'ena contended that, the findings of the trial court were correct as the appellant failed to establish his claim, as the exhibits P2 and P6 only refer to one 40 feet container and there is no any other evidence on record to strictly prove that there was a contract concerning 172 containers to be cleared by the appellant.

Rejoining, Mr. Kiobya reiterated his earlier submission and urged the Court to find that the charges included the extra two days that is Saturday and Sunday and the trial court ought to have considered the oral agreement and award the specific damages.

We have duly examined the record of appeal, the grounds of appeal and considered the submissions of both parties. The two issues for our determination are, one, whether the trial court was justified to award nine days compensation instead of eleven days and; two, whether the appellant was entitled to any reliefs. In terms of rule 36(1)(a) of the Rules, this Court being the first appellate court has jurisdiction to re-evaluate the evidence and draw inferences of the facts to satisfy itself whether the findings of the trial court were correct - see **Lawrence**

Magesa t/a Jopen Pharmacy v. Fatuma Omary and Another, Civil Appeal No. 333 of 2019 (unreported).

As for ground one, which is a complaint that the trial court awarded nine days compensation without any justification, the evidence of PW1 at page 93 of the record of appeal described that exhibit P3 was forwarded to the first respondent around 15:00hrs on 14th August 2009 and upon seeing that letter, the first respondent immediately released the cargo. It is not in dispute that exhibit P3 dated 14/08/2009 was received by SUMATRA on the same day. Given the above facts, we find that as per the TICTS Tax Invoice dated 14th August 2009 at page 154 of the record, the storage charges did not extend to the two days of 15/8/2009 and 16/8/2009. In the circumstance, this ground lacks merit.

In respect of ground two, starting with the first limb on general damages. Both learned advocates argued that the trial judge did not demonstrate reasons when awarding the general damages to the tune of TZS. 10,000,000/=. It is a trite law that when awarding general damages, the trial court must provide the reason to justify the award. We held in **Anthony Ngoo and Davis Anthony Ngoo** (supra) that: -

> *"The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in*

awarding general damages although the judge has to assign reasons in awarding the same."

Having reviewed the plaint at pages 8 to 9 of the record of appeal, the appellant's prayers were as follows: -

i. *That this Honourable Court be pleased to declare that the defendants jointly and severally breached the duty of care towards the plaintiff when they failed to release the plaintiff's client cargo*
ii. *That this Honourable Court be pleased to order the defendants to pay the plaintiff a sum of USD 1,122 being the storage costs the plaintiff paid as a result of unlawful acts by the defendants.*
iii. *That the Honourable Court be pleased to order the defendants to pay the plaintiff a sum of USD 68,800 being the loss of income as a result of unlawful acts of the defendants*
iv. *That this Honourable Court be pleased to order the defendant to pay interest on (i) and (ii) at 30% bank commercial interest rate from August 2009 to the date the judgement is entered.*
v. *That this Honourable Court be pleased to order the defendant to pay interest at the Court's interest rate from the date of the judgement to the date the decretal amount is paid in full.*
vi. *Costs*

vii. Any other remedies that this Honourable Court deems fit and just to grant.

It is evident that the appellant did not plead for the award of general damages, but under the seventh prayer he pleaded for any other remedies that the Honourable Court may deem fit and just to grant. In that context, we are of the considered view that the trial judge exercised her discretionary power and awarded TZS. 10,000,000/=. On the issue of assigning reason to justify the award, the record speaks by itself, the trial judge after evaluating the evidence, awarded general damages at page 173 of the record which reads: -

> *"In the upshot I award the plaintiff general damages to the tune of TZs 10,000,000.00 following the delay caused by the defendants as discussed above..."*

In the circumstances, the trial judge stated her reason to justify the award as being the delay caused. Though the case of **Anthony Ngoo and Davis Anthony Ngoo** (supra) referred by Mr. Kiobya set a principle on assigning reason before awarding general damages but it is distinguishable with the present appeal. In the former there was no reason for the award unlike the present appeal where the trial judge awarded general damages due to the delay caused by the respondents.

On the second limb which involves specific damages, it was the finding of the trial court that the evidence adduced and the exhibits tendered were not sufficient to prove the specific damages. The trial judge further explained that exhibit P5, the letter written by Bushiri Abeid Idrisa to the plaintiff titled *"Kusitisha Mahusiano ya Kibiashara"* indicated that there was a business relationship existing between the two. Though it was not clear whether there was an oral or written agreement, it was proper and crucial for the plaintiff/appellant to establish the business history and capability of his client. It further concluded that such information would have assisted the court in ascertaining the claim, but the appellant failed to prove the loss of business amounting to USD 68,800.00. It was Mr. Kiobya's contention that if the trial court had considered the oral evidence and exhibit P5 it could have concluded otherwise.

It is a trite principle of law that specific damages must be specifically pleaded and strictly proved. In the case of **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited** (supra) cited by Mr. Mang'ena, the Court quoted Lord Macnaghten in **Bolag v. Hutchson** [1950] A.C. 515 at page 525 who had this to say regarding special damages: -

"... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly."

It is not disputed in this matter that the appellant had specifically claimed USD 68,800.00 as specific damages being the loss of income/business. The question here is whether the appellant strictly proved the claim. In his submission, Mr. Kiobya invited the Court to consider the oral agreement and exhibit P5. Having reviewed the evidence on record, we are of the considered view that PW1 failed to demonstrate and prove by way of evidence how they had suffered loss of business, in which they only averred that the client broke off the business relations as they had an oral agreement for the clearing of 172 containers. This is supported by exhibit P5 the letter which is titled "*Kusitisha Mahusiano ya Kibiashara*". The unofficial English translation meaning to discontinue business relations. The appellant failed to produce any other evidence to substantiate his claim demonstrating how he suffered to the extent of claimed special damages of USD 68,800.00. These were bare assertions by the appellant and we cannot allow such claims for specific damages. The evidence on record is wanting, as it was not strictly proved that the appellant suffered the alleged loss. We are satisfied, in the

circumstances that the second ground of appeal has no merit and we dismiss it .

As discussed, we find no reason to disturb the decision of the High Court. This appeal is thus, without merit and it is accordingly dismissed with costs.

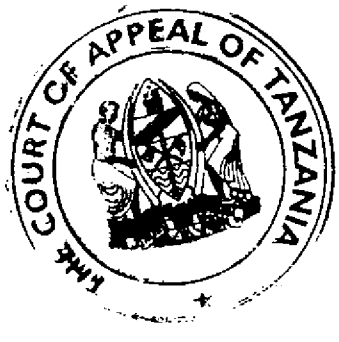
DATED at **DAR ES SALAAM,** this 22nd day of November, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of November, 2022 in the presence of Mr. Rashidi George learned counsel for the 1st and 2nd Respondents and holding brief for Mr. Musa Kyobia learned counsel for the Appellant, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL