IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MUGASHA, J.A., SEHEL, J.A and MWAMPASHI, J.A.)

CIVIL APPEAL NO. 72 OF 2022

TANZANIA PORTS AUTHORITY.....1ST APPELLANT
ATTORNEY GENERAL.....2ND APPELLANT

VERSUS

KABEZA MULTI SCRAPPER LTD.....1ST RESPONDENT
ABUAND INVESTMENT.....2ND RESPONDENT

(Appeal from the Judgment and decree of the High Court of Tanzania at Kigoma)

(Matuma, J.)

dated the 4th day of October, 2021

in

Civil Case No. 03 of 2020

.....

JUDGMENT OF THE COURT

9rd & 12th June, 2023

MUGASHA, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Kigoma. In the said suit, the respondents sued the appellants claiming to be paid TZS. 28,000,000.00 as compensation for 35 Cubic Meters of iron scraps that were among the 55 tonnes received by the 1st appellant in the year 2019 at Kigoma Port. However, at the time of delivery of the consignment, 10 tonnes were lost or unaccounted for. In this regard, the respondents prayed for judgment and decree against the appellants on the following orders: **one,** payment of TZS. 28,000,000.00 as compensation for the lost or unaccounted 35 tonnes /Cubic meters of scrappers; **two**, payment of TZS. 10,000,000.00

being compensation for breach of contract and trust; **three**, payment of TZS. 10,000,000.00 as general damages; and **five**, interest on the sum decreed by the Court at Bank rate from the date of judgment till execution.

The claims were denied by the appellants in the joint written statement of defence. It was averred that the actual quantity of cargo received was 30 tonnes and not 55 tonnes as asserted by the respondent and that the said cargo weighing 30 tonnes was delivered by the 1st appellant to the respondents subsequently taken out of Kigoma Port by them. The two major questions at the trial were, **firstly,** what was the weight of the cargo received at Kigoma Port and ultimately handled to the respondents and **secondly,** what was the weight of the consignment which was lost or unaccounted for.

To prosecute the case, the respondents paraded two witnesses namely MUSSA SAID BANDIKO (PW1) and SHABANI YASIN YABULULA (PW2) a clearing and forwarding agent. As gathered from their testimony, in March, 2019 the 1st respondent had purchased from Congo vide Mr. Tembwe, 55 tonnes of scrap metals at TZS. 450,000 per tonne. The respective cargo was delivered at Kigoma, certified and USD 649 paid as the 1st appellant's dues on 26/3/2019. Thereafter, a sale agreement in respect of the scrap metals was executed between the 1st respondent and Ramadhani Kalonda who had shipped the consignment from the Democratic Republic of Congo (DRC) as per the Congolese customs excise declaration form which was tendered as exhibit P4. According to the evidence of PW1, he witnessed the offloading and

weighing of the 55 tonnes according to the Tanzania Ports Authority inward/outward cargo declaration Form which was exhibited at the trial as P1. Another documentation was the Tanzania Single Administrative Document (TANSAD) tendered as exhibit P1 which shows TZS. 810,002.00 was the declared value of 30 tonnes of metal scrap for the purposes of establishing the tax dues which were paid.

However, the respondents were not permitted to collect the consignment as they had not obtained the requisite permits. After obtaining the permit for import of hazardous waste, on February, 2020 when they proceeded to collect their consignment. However, the cargo was deficient, it was approximately 20 tonnes. On this, the respondents relied on the Gate Pass, which shows that 400 packages were taken outside the Port which and was tendered at the trial as exhibit P10. What followed is the unsuccessful inquiry into the loss which necessitated a demand note to be issued to the 1st appellant wherein the respondents claimed payment of TZS. 28,000,000 or alternatively be issued with 35 Cubic Meters of metal scraps by the 1st appellant.

During cross examination, PW1 admitted that he was not present when the cargo was being loaded in DRC and yet, reiterated to have witnessed the consignment which was weighed at 55 tonnes at Kigoma Port. However, he admitted 30 tonnes was the weight declared for the purposes of establishing value and tax which was paid but tax was not paid for the 25 tonnes due to

difference of customs processes and those of the 1st appellant and the TRA. He claimed, despite the deficient cargo, he was advised to take it but he was not satisfied. Furthermore, in the course of cross-examination he revealed that Karonda who had shipped the consignment from Congo did not give them a receipt of TZS. 24, 750,000.00 for the scrap metal.

Another witness is a clearing agent who was instructed and processed the clearance of importation of the cargo from DRC. Initially, he had processed 55 Cubic Meters as stated Exhibit P1, but upon being shown the importation documents showing that the cargo was 30 tonnes, he advised PW1 to rely on same documents due to the cumbersome process involved to rectify and prepare another document. He paid TZS. 160,139 as revenues charges (Exhibit P5) which shows TZS. 810,000.00 as the value of 30 tonnes of the scrap metal. He as well, contended that the cargo ought to have been weighed in kilogrammes and measured in cubic meters which was not the case.

On the other hand, the defence had two witnesses. According to Machibya Mahuma Petro (DW1), the offloading of the cargo in question was by a portal crane which does not measure weight and that the exercise was done in the presence of PW1, PW2, Abunga and Muba. He told the trial court that, although the Cubic Meters appeared huge, they had to rely on exhibit P5 which shows that the tonnage was 30 and proceeded to hand over the 400 packages to the respondents. Another witness was Nuru Abubakar Kiruwasha

(DW2) a clerk at Kigoma Port who weighed the cargo when the respondents went to collect it. He told the trial court that on 19/3/2020 he weighed the cargo and it was equivalent to 20 tonnes but he was not aware of the weight of the cargo when it was offloaded.

After a full trial, judgment was entered against the appellants. The learned trial judge preferred to believe evidence of PW1 on ground that it was supported by that of PW2 to the effect that the scrap metal was 55 cubic meters which is equivalent to 55 tonnes. As such, he viewed that, since the cargo released to the respondents was 20 tonnes, then 35 tonnes were not released to the respondents. Finally, at page 67 of the record of appeal the High Court judge concluded that, the respondents were entitled to be paid TZS 28,000,000 as demanded; payment of TZS. 5,000,000 as general damages and TZS. 5,000,000 for loss of business and breach of trust.

Aggrieved, the appellants have preferred an appeal raising eight grounds as follows:

1. *That, the trial High Court erred in law for admitting and entertaining the suit preferred against the Government which was improperly instituted for want of issuance to the 1st Appellant and service of a copy of the Statutory Ninety-day Notice of intention to sue to the Honourable Attorney General and the Solicitor General.*
2. *That, the trial High Court erred in law and facts for making and relying on extraneous statements in analysing the evidence of the Respondent hence arriving at a wrong conclusion.*

3. *That, the trial High Court erred in law and facts for being carried away by bias against the Appellants thereby failing to decide the matter with impartiality and as a result arrived at a wrong and prejudicial decision against the Appellants.*

4. *That, the trial High Court erred in law and fact for holding that one (1) Cubic Meters (CBM) is equal to one (1) ton ignoring the fact that the measurements are different and do not corelate nor equal in that CBM is a measurement for volume whereas tone is measurement for weight.*

5. *That, the trial High Court erred in law and fact for failing to holistically consider and analyse the evidence of the Appellants in the course of its judgment and its stead it solely considered, analysed and relied on the evidence of the Respondent thereby arriving at a wrong decision.*

6. *That, the trial High Court erred in law and fact for failing to consider the documentary evidence constituted by public documents from Tanzania Revenue Authority (TRA) and National Environment Management Council (NEMC) proving that the cargo imported was only thirty (30) tons and the uncontroverted evidence of the Appellants to the effect that the weight of the cargo was not measured by the 1st Appellant at any point.*

7. *That, the trial High Court erred in law and fact for awarding special damages to the Respondents after the trial High Court had found that the Respondents had not proved the prayed special damages.*

8. *That, the trial High Court erred law and fact for allowing the Respondent to rectify the error and tender in evidence Sale Agreement (Exhibit P3) after its admission was objected to by the Appellants.*

At the hearing in appearance was Messrs. Solomon Rwenge, Allan Shija and Erigh Rumisha, learned Senior State Attorneys and State Attorney respectively for the appellants. The respondent had the services of Mr. Ignatus Kagashe, learned counsel.

Before the hearing commenced, Mr. Rwenge withdrew the 1st and 3rd grounds and we so marked them. Then he opted to argue together the remaining grounds in one cluster to wit, that the learned trial judge misapprehended the evidence and arrived at a wrong conclusion. On this, it was argued that whereas the weight of the cargo was 30 tonnes according to exhibits P4, P5, P7 the learned High Court Judge relied on oral account of PW1 and PW2, equated CBM to a tonne to conclude that the offloaded cargo was 55 tonnes. Upon being probed by the Court, Mr. Rwenge conceded that the deficient cargo was 10 tonnes because the declared cargo was 30 tonnes according to (Exhibit P5). He thus urged the Court to reverse the decision of the High Court and instead, order the respondents to be paid the value of 10 tonnes cargo which is TZS. 270,000.00 being one third of the declared value of the entire consignment. He challenged the award of both special and general damages on ground that besides not being pleaded they were not proved and that the respondents had delayed to collect their consignment as they had not processed the permits timely.

On the other hand, the course taken by the appellant's counsel was opposed by Mr. Kagashe who argued that, although the weight of the

declared cargo was 30 tonnes, evidence of PW1 and PW2 shows that the offloaded cargo was 55 Cubic Meters which is equivalent to 55 tonnes according to exhibit P1 which shows that the packages were 400. He urged us to dismiss the appeal and uphold the verdict of the trial Judge.

After careful consideration of the entire record and the rival submissions by advocates for the parties, the crucial issue for our determination is whether the appellants were able to prove its case as found by the learned trial Judge. In this regard, in terms of Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009, the Court has power to re-appraise the evidence on record and draw inferences of fact. However, such jurisdiction can be exercised if there is no evidence to support a particular conclusion; or if the trial judge has failed to appreciate the weight or bearing circumstances admitted or proved, or has plainly gone wrong. See: **OKENO VS REPUBLIC** [1972] E.A. 32, **PETERS VS. SUNDAY POST LIMITED** [1958] E.A 424 and **DOMINA KAGARUKI VS. FARIDA F MBARAK AND 5 OTHERS,** Civil Appeal No. 60 of 2016 (unreported).

That said, according to the provisions of section 110 of the Evidence Act [CAP 6 R.E.2019], the burden of proving a fact rests substantially on the person who asserts the claim and, in that regard, the Court has to determine if the person upon whom the burden lies has discharged it and the Court cannot proceed on the basis of the weakness of the adverse party. The standard of proof in civil cases is on a balance of probabilities which entails

the Court to sustain such evidence which is more credible than the other on a particular fact proved. See: – **PAULINA SAMSON NDAWAVYA VS. THERESIA THOMASI MADAHA,** Civil Appeal No. 45 of 2017, **BAKARI MBUGUNI AND 63 OTHERS VS. TANGA CITY COUNCIL AND ANOTHER,** Civil Appeal No. 263 of 2020, **GODFREY SAYI SIAME VS. ANNA SIAME AS LEGAL REPRESENTATIVE OF THE LATE MARY MNDOLWA**, Civil Appeal No. 45 of 2017, **HAMZA BYORUSHENGO VS. FULGENCIAL MANYA AND FOUR OTHERS,** Civil Appeal No. 33 of 2017 and **MARTIN FREDRIC RAJAB VS. ILEMELA MUNICIPAL COUNCIL AND ANOTHER,** Civil Appeal No. 197 of 2019 (all unreported).

In all the said cases, the Court addressed at length what constitutes proof on the balance of probabilities and the duty of the plaintiff to discharge the same before the burden shifts on the defendant and as such, it is incumbent on the plaintiff to discharge the evidential burden. We shall accordingly be guided to determine as to whether the respondents did discharge the evidential burden of proof.

Whereas the appellants are faulting the decision of the learned trial Judge on ground that he misapprehended the evidence on record and arrived at a wrong conclusion, it is not in dispute that ten tonnes of scrap metals were lost or unaccounted for while the consignment was in the hands of the 1st appellant. However, the parties locked horns on what was the actual weight of scrap metal offloaded at the Kigoma Port. We are aware that, it was

incumbent on the respondents to prove their case on the balance of probabilities. Was this burden discharged?

The question which taxed our minds is whether on the basis of oral and documentary account of the respondents, it was established on the balance of probabilities that the imported scraps were 55 tonnes and not 30 tonnes. The consignment of scrap metals shipped from DRC was 30 tonnes according to exhibit P4 the DRC customs excise declaration form. The same tonnage is reflected in permit for import of hazardous waste. Similarly, according to Exhibit P5 the TANSAD, 30 tonnes was the weight of what was declared to TRA for the purposes of establishing the value of the consignment and tax payable. In this regard, undoubtedly, the proof of the weight of the consignment could not be by oral evidence of PW1 and PW2 regardless of being credible as suggested by Mr. Kagashe and as found by the trial Judge. We are fortified in that regard because that is not in harmony with the provisions of section 61 of the Evidence Act which stipulates that:

> *"All facts except the contents of the document, may be proved by oral evidence".*

Moreover, section 101 regulates circumstances in which oral evidence shall be excluded as it stipulates as follows:

> *"When the terms of a contract, grant or other disposition of property,* ***or any matter required by law to be reduced to the form of a document,*** *have been proved according to section 100, no*

evidence of any oral agreement or statement shall be admitted, as between the parties to that instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms".

[Emphasis supplied]

Our interpretation of the cited provisions is that, oral evidence cannot be used to prove, vary, contradict, subtract or add the contents of matter which is documented. In the present case although the respondents adduced both oral account and documentary evidence showing that the tonnage was 30 and 55 tonnes, yet the person who shipped the consignment from DRC and declared its value was not paraded as a witness. The Court was faced with akin scenario in the case of **AMI TANZANIA LIMITED VS. PROPSER JOSEPH MSELE,** Civil Appeal No. 159 of 2020 (unreported). In that case, the respondent who had imported a consignment of bales of cotton fabric from China, had indicated the value of the cargo to be USD 146,280 as stated in the invoice from the supplier. Since it was a transit cargo, after completion of all customs processes, the cargo was stored at the appellants' inland container awaiting to be transported to Zambia. However, the cargo was tampered with and a number of bales of the fabric went missing and given that the respondent's agent did not adduce evidence as to what was the declared value of the cargo, the value of the lost consignment remained contentious.

Thus, the Court had relied on the value declared for the purposes of paying tax and said:

> *"It is therefore, without doubt that the respondent did not prove the value of the cargo. However, it is not disputed that the cargo was received by the appellant and there is evidence that custom duties were assessed on the basis of USD 50, 474.88, we have no doubt that the same was valued as shown in exhibit D3, the Tanzania single administrative document".*

In the circumstances, the respondents were barred from adducing oral evidence for the purpose of adding or varying the contents of exhibit P5 which they had tendered in support of their claim. Although, the respondents relied on two gate passes one showing that the package were 400 with 55 tonnes, yet, another document showing 400 packages, this leaves a lot to be desired and it did not impeach exhibit P5. Thus, in the absence of any dispute that the cargo received by the respondents is 30 tonnes valued at TZS. 810,000.00 and duty assessed in terms of exhibit P5 the TANSAD, the scrap metals weighed 30 tonnes and we decline Mr. Kagashe's suggestion that the tonnage was 55 tonnes according to the purported credible account of PW1 and PW2 as concluded by the learned trial Judge.

In relation to the damages, it is trite law that the same must be specifically pleaded and proved. Was this the case here, what was the verdict of the trial judge? Regardless of acknowledging that there was no direct proof

of the market value of the metal scraps the 1st appellant was condemned to pay **one,** TZS. 28,000,000.00 which was TZS. 450,000.00 per tonne; **two,** transportation charges each ton/CBM was TZS. 120,000.00; **three,** TPA dues 649 USD which is equally to 11.8 USD per ton equivalent to TZS. 27,140.00per exchange rate of TZS. 2300.00 per 1 USD; **four,** TZS. 263,739.00 as TRA dues which is equally to TZS. 4795.00 per ton; **five,** profit at the sale price is rounded up to the claimed amount of TZS. 800,000.00 per each ton/CBM; **six,** an alternative award/relief to hand over 35 tonnes of metal scrap if the 1st appellant does not pay the above sum; **seven,** the award TZS. 5,000,000.00 as general damages and special damages at the tune of 5,000,000.00 to all the consequences suffered including loss of business, retaining of the vehicle and breach of trust and costs of the suit; and **eight,** seven percent (7%) of the decretal sum from date of judgment to full payment. We found some of the awarded costs and damages wanting and we shall explain.

It is trite law that, special damages must be specifically pleaded and proved. See: **ZUBERI AGUSTINO VS. ANICET MUGABE** [TLR] 137 **ANTHONY NGOO AND ANOTHER VS. KITINDA KIMARO**, Civil Appeal No. 25 of 2014 and **AMI TANZANIA LIMITED VS. PROSPER JOSEPH MSELE** (supra).

Apparently, besides some of the awarded special damages not being pleaded the rest were not specifically proved such as, the price of the scrap

metals per tonne. Since PW1 in his evidence categorically stated that no receipt was given by Kalonda. In this regard, we decline the invitation by Mr. Kagashe to rely on the price stated in sale agreement as the High Court did because in the absence of any receipt no proof was availed on the price of scrap metals. A similar fate befalls the awarded transport charges, given that since ten tonnes of metal scrap were lost within the 1st appellant's premises, the such cargo was not ferried as alleged by the respondents and the claim is not proven.

We have found that the special damages proved is TZS. 270,000.00 which is one third of the declared value of the consignment. Next is the issue related to general damages. These are awarded at the discretion of the court having considered the evidence on the record, circumstances of the case and after being satisfied that the claimant has suffered following the unlawful action of the defendant. See: among others, **JAFAR HUSSEIN SINAI AND ANOTHER VS. SILVER GENERAL DISTRIBUTORS LIMITED,** Civil Appeal No. 271 of 2017 and **TRADE UNION CONGRESS OF TANZANIA (TUCTA) VS. ENGINEERING SYSTEMS CONSULTANTS LTD,** Civil Appeal No. 51 of 2016 (both unreported) and **TANZANIA SARUJI CORPORATION VS. AFRICAN MARBLE COMPANY LIMITED** [2004] TLR 155. In the latter case the Court held:

> *"General damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of; the defendants' wrong doing*

must, therefore, have been cause, if not the sole or particularly significant, cause of damage".

Our scrutiny of the evidence and circumstances surrounding the present case, in considering the general damages we shall be guided by the following factors: **one,** we believe that the ten tonne cargo was lost in the hands of the 1st appellant; **two,** the respondents who were capable of receiving the cargo at the earliest share the blame having failed to obtain requisite permits timely, they left the cargo for so long at the Port which probably attracted unethical persons to tamper with it. Thus, having considered the aforegoing and given that the value of the cargo is now less than what was claimed, we think the amount of TZS. 5,000,000.00 as general damages as awarded by the High Court is sufficient to compensate the suffering endured by the respondents.

On account of what we have endeavored to discuss, as correctly submitted by the appellants' counsel, with respect, there was indeed a misapprehension of the evidence as the learned trial Judge did not appreciate the weight bearing the circumstances admitted and proved as held in the case of **PETERS VS. SUNDAY POST LIMITED** (supra).

On the reliefs the parties are entitled to, since it is settled that special damages were not specifically proved whilst other claims were not pleaded, we are satisfied that the respondents are entitled to payment of: **one,** TZS. 270,000 being value of lost and unaccounted 10 tones; **two,** general damages at the tune of TZS. 5,000,000.00; and **three,** interest of 7% from

the date of judgment of the High Court up to date of full payment. Thus, the appeal is partly allowed and the decision of the trial court reversed save for the award of general damages. Given the nature of the matter, we make no order as to costs.

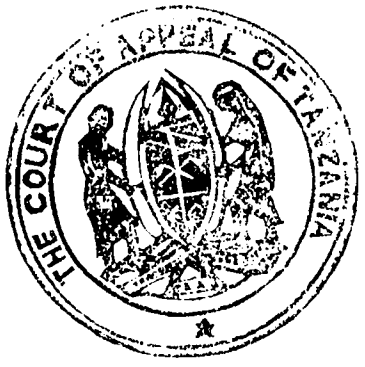
DATED at **KIGOMA** this 12th day of June, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 12th day of June, 2023 in the presence of Mr. Anold Simeo, learned State Attorney for the 1st and 2nd Appellants/Solicitor General and Mr. Ignatus R. Kagashe, learned counsel for the 1st and 2nd respondents, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL