

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL APPEAL NO. 140 OF 2017

(Arising from Judgement and Decree of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case No. 185 of 2015 dated 21/03/2017 by Hon. W.R. Mashauri, PRM))

BETWEEN

ELLY MTANGI.....APPELLANT

VERSUS

WILSECK KIONDO.....RESPONDENT

*Date of last Order: 5TH April 2018
Date of Judgement: 20th April 2018*

JUDGEMENT

R.K SAMEJI, J.

On 04/07/2017 the appellant herein above filed a Memorandum of Appeal against the Respondent challenging the Judgement and Decree of the Resident Magistrate Court of Dar es Salaam at Kisutu delivered by Hon. W.R. Mashauri, the Principal Resident Magistrate in *Civil Case No. 193 of 2013*. The appellant has filed the following grounds of appeal:-

- (a) That, the trial court erred both in law and facts in evaluating evidence adduced by the parties on the total amount of Tshs 41,020,000/= received by the respondent as repayment of the money he gave to the appellant;*
- (b) That, the trial court erred both in law and facts in his reasoning and decision by basing on 'Exhibit P1' only showing that the appellant signed to acknowledge to owe the respondent Tshs. 22,030,000/= other documentary evidence tendered in court as a result he ended up in erroneous conclusion; and*
- (c) That, the trial court erred in law and facts by admitting and ordering the appellant to pay Tshs. 20,000,000/= as general damages which were not even proved by the respondent. The general damages awarded is punitive damages equally with the amount found by the court to be the debt Tshs. 22,030,000/=the appellant is said to owe the respondent.*

Then appellant prayed this Court to:-

- (i) allow the appeal with costs;*

- (ii) quash the Judgement and Decree of the Resident's Magistrate Court of Dar es Salaam at Kisutu; and*
- (iii) grant any other orders that this Honourable Court may deem fit and just to grant.*

On the other side, the respondent lodged a Cross Appeal with the following grounds:-

- (a) the trial Court erred in law and in fact by failing to carefully analyze the evidence on record and as such arrived at the wrong conclusion that the respondent owed the appellant the sum of Tshs. 22,030,000/=; and*
- (b) the trial court erred in law and in fact, when ordered the appellant to pay interest of the decretal sum from the date of filing of the suit to the date of judgement only.*

The respondent prayed the Court to grant the following orders:-

- (a) To vary the Judgement and Decree of the trial court in respect of the amount of money the appellant owes the respondent;*

- (b) Interest of the decretal sum at the rate of 12% from the date of Judgement to the date of payment in full;*
- (c) Costs of the Appeal and the Cross Appeal; and*
- (d) Any other order which the Court shall deem fit to grant.*

A brief background to the suit as obtained from the record of the trial court's proceedings indicates that, the appellant and the respondent were close friends to the extent of considering themselves relatives. Out of the said relationship they trusted each other to the highest degree of trust. In the same avenue of the said trust, sometimes between, 2009 -2010 the appellant approached the respondent and requested for a soft loan to assist him with his business. The respondent gave him Tshs. 15,000,000/=, but without recording the same anywhere or even entering into a loan agreement. The appellant approached the respondent for the same soft loan for the 2nd and 3rd times again and he was given Tshs. 3,000,000/= and Tshs. 15,000,000/=, respectively. All these amounts were provided to the appellant out of trust and there was no any document(s) signed between the parties as they trusted each other. There was even no condition (s) on when or how the said soft loans will be re-paid by the

appellant. In 2010 the respondent travelled to Lushoto to purchase a house at the tune of Tshs. 50,000,000/=, but the said transaction was not concluded, hence the respondent decided to give Tshs. 45,000,000/= to the appellant to deposit into his account, (appellant's account), as he (the respondent) thought it will not be safe for him to travel with such amount of money. Later on, the respondent gave the appellant instructions to effect payments to several institutions and people, which the appellant did. However, respondent discovered later that some of the instructions given were not followed and the appellant had decided to spend the respondent's money for his own personal use. The respondent started to demand the said money from the appellant, but in vain. Then, after several demands the parties decided to convene a reconciliation meeting where all the monies paid by the appellant as per the respondent's instructions were accounted for with evidence (*Exhibits D1 – D6*), and for the outstanding balance which the appellant failed to account for, was also indicated. Then the parties included all these facts in *Exhibit P1* which was finally agreed upon and signed by both parties. As per the said Exhibit P1, the appellant agreed to pay the respondent the outstanding amount of Tshs. 20,030,000/= which he has not paid to-date, hence this suit.

At the hearing of this Appeal on 5th April 2018, Mr. Francis Nkoka, the learned Counsel appeared for the Appellant while the Respondent was represented by Mr. Gregory Lugaila, the learned Counsel.

Submitting in support of the first ground of Appeal Mr. Nkoka, stated that, the evidence tendered by both parties at the trial court clearly indicated that parties agreed harmoniously and in friendly manner (trust) in advancing the money from the respondent to the appellant without signing any document. Mr. Nkoka referred to pages 2 – 3 of the trial court Judgement and argued that, it was improper for the trial court to note that, the appellant received Tshs. 42,000,000/= from the respondent. Mr. Nkoka submitted further that, before the trial court the appellant admitted to have received a soft loan of Tshs. 33,000,000/= from the respondent, which he explained how he refunded the same and that the refund money had exceeded the amount he received from the respondent. Mr. Nkoka said, the trial court did not evaluate the evidence tendered properly, hence arrived to a wrong decision. It was the view of Mr. Nkoka that, pursuant to Sections 110 - 112 of the Evidence Act, Cap. 6 [R.E.2002] the respondent was required to show the exceeded amount and how it was submitted to

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him. Nkoka said essentially, the burden of proof is always on the person who is alleging certain facts. He said, in the instant case, it was the duty of the respondent herein to prove what he was alleging. Therefore, Mr. Nkoka invited this Court to find out that the trial court did not consider the standard of proof required in civil cases.

On the second ground, Mr. Nkoka submitted that, the trial court had not directed itself properly on the evidential value of *Exhibit P1*. Nkoka said, the said Exhibit is only indicating that, the parties sat together and agreed, but all other money/soft loan were given without any signed document.

On the third ground of appeal, Mr. Nkoka submitted that, the trial court ordered the appellant to pay general damages without any proof as how the same was incurred by the respondent. Nkoka said, the general damages claimed by the respondent were set only in general terms and was not proved as per the requirement of the law. Trial court never considered that, the appellant was also claiming Tshs. 10,000,000/= from the respondent. It was therefore the view of Mr. Nkoka that, if the trial court would have analyzed the evidence properly, it could not have arrived

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to that decision. Finally, Mr. Nkoka prayed the Court to allow the Appeal with costs.

In response, Mr. Lugaila invited this Court to note that, the respondent has also filed a cross appeal under Order XXXVIII Rule 22(1) of the Civil Procedure Code. He thus prayed the Court to allow him to argue grounds of the appeal and the cross appeal at the same time. Mr. Lugaila also invited the Court to thorough peruse the final written submissions submitted by the Counsel for the parties before the trial court.

Mr. Lugaila argued that, the plaint lodged before the trial court clearly indicated that, the claimed amount by the respondent from the appellant was Tshs. 78,000,000/=, where out of which Tshs. 45,000,000/= the appellant planed to purchase a piece of land at Lushoto, but unfortunately the deal was not successful and he decided to give the same to the appellant to deposit into the appellant's account. Mr. Lugaila submitted further that Tshs. 33,000,000/- was a soft loan given to the appellant in a friendly matter and based on trust and there were no any documents signed. Mr. Lugaila argued further argued that, the appellant is in breach of the said trust, as he spent the money entrusted and given by the

respondent for his own personal use without permission from the respondent. Mr. Lugaila referred to the testimony of PW1 at pages 21 - 26 of the trial court typed proceedings and argued that, when the respondent detected the said problem he asked the appellant to refund the said money, but in vain. Mr. Lugaila said, the parties convened a meeting to reconcile the matter and they signed *Exhibit P1*, where the appellant admitted and indicated to have paid Tshs 40,970,000/=. Mr. Lugaila said, there was no dispute that the respondent has received Tshs. 63,000,000/= from the appellant. He said that, the appellant, however failed to prove that, he had deposited Tshs. 12,000,000/= into PW2's account as instructed by the respondent. Lugaila said, that is the reason for the respondent to lodge a cross appeal, as that matter was not considered by the trial court. Mr. Lugaila refuted further that, it is not true that the appellant has paid the respondent Tshs. 40,000,000/= but he paid only Tshs. 28, 970,000/= from the total amount of Tshs. 78,000,000/= which was claimed by the respondent. He said, the appellant relied on *Exhibit D1 to D6*. Mr. Lugaila said, there was breach of trust on the part of the appellant which he admitted by signing *Exhibit P1*, though later on he

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claimed that he signed the same under threat, but he failed to prove that fact with concrete evidence.

As for the third ground of appeal, Mr. Lugaila argued that, the trial court was correct to grant Tshs. 20,000,000/= as general damages due to costs and loss suffered by the respondent. Mr. Lugaila prayed the Court to consider prayer (d) to the plaint as the same was not considered by the trial court. He finally prayed the Court to dismiss the appeal with costs and allow the cross appeal.

In rejoinder, Mr. Nkoka submitted that, at page 33 of the trial court typed proceedings the appellant had admitted to have received the money only once and paid the same under the respondent's instructions. On the issue of Tshs. 12,000,000/= he referred the Court to pages 3 - 4 of the trial court's Judgement and said the respondent has admitted to have received the same.

As for the cross appeal, Mr. Nkoka challenged the prayers made therein together with the submission made by Mr. Lugaila that they are contradictory and inconsistency with what the respondent testified before the trial court. On the issue of interest, Mr. Nkoka invoked Order XX Rule

21(1) of the Civil Procedure Code and argued that the same is awarded per the discretion of the Court. Mr. Nkoka argued that the cross appeal has no merit at all and should be dismissed with costs.

While rejoining on the issues raised for the cross appeal, Mr. Lugaila challenged the submission made by Mr. Nkoka, that he referred to the paragraphs in the trial court's Judgement, but the testimony of PW1 at page 23 of the trial court's typed proceedings is clear and he had denied to have received Tshs. 12,000,000/=. He thus prayed the Court to disregard his submission and evaluate the evidence adduced by the parties before the trial court.

After going through the Memorandum of Appeal, Memorandum of Cross-Appeal and submissions by the Counsel for the parties, the issue for my determination are *whether the appeal and the cross appeal before me are meritorious.*

In the course of determining the above issues, I will be guided by the canon of civil justice which suggests that, **one** "*he who alleges must prove the allegation*", **two** "*the person whose evidence is heavier than that of the other is the one who must win*" - **Hemedi Said Vs. Mohamedi Mbilu**

(1984) TLR 113 and **three**, "*where doubts are created in evidence, the same should be resolved in favour of the opposite party*" - **Jeremiah Shemweta Vs. Republic** (1985) TLR 228.

To start with the *first and second grounds* of appeal I have perused the record of the trial court and revealed that the respondent managed to prove his claim of Tshs. 22,030,000/= as per *Exhibit P1* which is the outcome of the reconciliation meeting held by the parties and signed by both parties on 25th April 2013. I must say, in this case, the Exhibit P1, is the only documentary evidence tendered by PW1 before the trial court to prove that the appellant owes him that amount of money. In *Exhibit P1*, after taking stock of all repayments done by the appellant as bank deposits or given to other people under the respondent's instructions, both parties agreed that the appellant owes the respondent a total of Tshs. 22,030,000/= an outstanding amount to be paid by the appellant to the respondent. It is also on record that the said reconciliation meeting is not disputed by the appellant, as he equally acknowledged it under paragraph 5 of his Written Statement of Defence. In addition, at page 25 of the typed trial court proceedings the said *Exhibit* was produced, tendered and

admitted before the trial court without any objection from the appellant's side. I am however aware that, in his testimony before the trial court at page 43 of the trial court typed proceedings the appellant had since testified that, he signed the said document, *Exhibit P1* under threat. I have thus, perused the Written Statement of Defence filed by the appellant before the trial court and observed that those facts were not pleaded. Even when testified so before the trial court, the same was not proved to the required standard. It is a settled principle of the law that, "*he who alleges must prove the allegation*". Section 110 (1) of the Evidence Act, provides that "***Whoever desires any Court to give judgement as to any legal right or liability dependent on existence of facts which he asserts must prove that facts exist.***" [Emphasis supplied]. Again, in the case of **Jeremiah Shemweta Vs. Republic** (1985) TLR 228 it was held that, "*where doubts are created in evidence, the same should be resolved in favour of the opposite party*".

In the case at hand, upon failure by the appellant to establish and prove those allegations to the required standard it was proper for the trial Magistrate to award the benefit of doubts to the respondent. It is

therefore the respectful view of this Court that, the trial Magistrate did properly evaluate both evidence adduced before him properly before arriving to the finding that the appellant owed the respondent Tshs. 22,030,000/=. In the event, the first and second grounds of appeal are answered in negative.

As for the *last ground* I am aware that, the appellant is challenging the decision of the trial court, which ordered the appellant to pay Tshs. 20,000,000/= as general damages claiming that the same were not proved by the respondent.

I wish to start by stating that, general damages are defined by the ***Black's Law Dictionary 7th edition*** to mean:-

"Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained".

In **P. M. Jonathan V Athuman Khalfan** [1980] TLR 175 at 190 Lugakingira J (as he then was) stated thus, *"the position as it therefore emerges to me is that general damages are compensatory in character. They are intended to take care of the plaintiff's loss of reputation, as well*

*as to act as a solarium for mental pain and suffering". It is therefore the function of the Court to determine and quantify the damages to be awarded to the injured party. As Lord Dunedin stated in the case of **Admiralty Commissioners V SS Susquehanna** [1950] 1 ALL ER 392. "If the damage be general, then it must be averred that such damage had been suffered, but the quantification of such damage is a jury question".*

Following the above authority, it is clear that, the general damages though not required to be proved specifically, but a part claiming the same must aver that he has suffered the same. I have thus perused the pleadings and the proceedings of the trial court and specifically the testimony of PW1 before the trial court and I have since failed to glean therefrom an iota of evidence, which is indicating that the respondent has indicated or averred to have incurred or suffered any loss therefrom. Apart from praying Tshs 50,000,000/= in his plaint, the respondent has not substantiated his prayer with evidence as how he has suffered any loss or inconveniences due to the appellant's failure to repay the amount which was advanced on friendship basis without need of establishing a legal binding contractual obligation thereto. Even in the trial court's Judgement there is nothing on

record indicating how the trial court arrived to that figure of Tshs. 20,000,000/= as a general damages. The trial Magistrate only indicated that "general damages of Shs. 20,000,000/=is being awarded as solarium for mental pain and suffering caused to the plaintiff". I do appreciate that general damages are awarded as per court's discretion, but based on the above authority, a party claiming the same, must at least indicate in his testimony how he has suffered such loss, anguish or pains. I therefore fully subscribe to the submission by Mr. Nkoka that, general damages cannot be awarded in circumstances where the party has failed to aver the same in his testimony that he has actually suffered any loss due to the action by the opponent party. In absence of any testimony indicating any suffering on the side of the respondent, it was erroneous for the trial court to assume that the respondent did suffer any loss. Having so observed, I find that the third ground of appeal is meritorious and is hereby granted. I therefore declare that, the award of general damages Tshs. 20,000,000/= which was erroneously arrived at by the trial court, is hereby quashed.

In respect of the cross appeal, I find that it lacks merits in the following reasons. It is on record that, the parties herein have never entered into

any legally binding relationship or even signed any business agreement to establish any business relationship. Both parties have not indicated to have agreed on the specific dates when the outstanding amount of Tshs. 22,030,000/= shall be paid by the appellant. There are no conditions set that if the loan or monies advanced to the appellant will not be paid, what percentage (s) per month(s) or annum the same will attract. Likewise, *Exhibit P1* which is the only basis of that claim has not indicated anywhere, as when exactly the appellant is required to have completed paying the claimed amount.

I as well find the claim by the respondent that, the amount of Tshs. 12,000,000/= was not considered during the trial to be a misconception and devoid of any merit. The evidence contained in *Exhibit P1* which the trial Court relied upon to find that the appellant owes the respondent Tshs. 22,030,000/= included the amount of Tshs. 12,000,000/= which the parties had agreed to have been settled. In addition, there was no concrete or tangible evidence adduced by the respondent to prove in the first place that the said money was given to the appellant. It is therefore clear that, claiming of Tshs. 12,000,000/= was part of the settled amount

in *Exhibit P1*. I thus find the claim by the respondent to be an afterthought which cannot be entertained by this Court.

On the issue of interest of the decretal sum at commercial rate of 21% from the date of the judgement to the final repayment of the decretal sum, As I have stated above, there was no any business contract or loan agreement advanced to the appellant by the respondent with clear terms and conditions to be observed thereto. Even if there was a loan, still interest at commercial rate would be improper to grant in this kind of arrangement. It is also on record that even in the *Exhibit P1*, which was relied by the trial court there was no any date set for the repayment of the Tshs. 22,030,000/= on the part of the appellant. It is therefore my respectful view that, the trial court was right not to order such interests. In totality, the cross appeal lacks merit and is hereby dismissed.

In the final analysis, and for the above stated reasons, the appeal is partly allowed to the extent explained above and that the appellant should pay the respondent Tshs. 22,030,000/= as agreed. I further declare that, the cross appeal is dismissed in its entirety for lack of merit. Considering the

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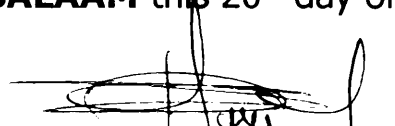
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nature of this case, I make no order as to costs, each party to shoulder his own costs.

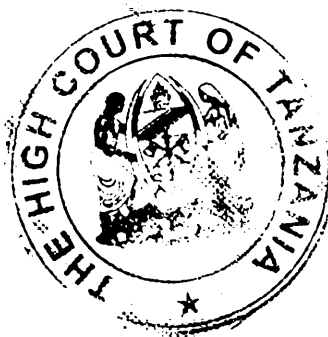
It is so ordered.


DATED at DAR ES SALAAM this 20th day of April 2018.


R. K. Sameji.
JUDGE
20/04/2018

COURT- Judgement delivered in Court Chambers in the presence of Mr. Denis Maringo, the learned Counsel for the Respondent and in the presence of the Appellant.

A right of Appeal explained.




R. K. Sameji
JUDGE
20/04/2018