IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC CIVIL APPEAL NO. 10 OF 2020

(Arising from the judgement of the District Court of Musoma at Musoma (Hon. Ndira, RM) dated 11/12/2019 in Civil Appeal No. 97 of 2019)

NYATI SPIRITZ LTD ..... APPELLANT

VERSUS

OMARY ATHUMAN MWIKWABI ..... RESPONDENT

JUDGEMENT

Date of Last Order: 30th April, 2020
Date of Ruling: 26th May, 2020

KISANYA, J.:

Before the Musoma Urban Primary Court, the respondent, Omary Athuman Mwikwabi, unsuccessfully sued the appellant, Nyati Spiritz Limited on a claim for compensation for loss and value of drinks collected by the appellant. The respondent was aggrieved by the said decision. He appealed to the District Court of Musoma at Musoma (Civil Appeal No. 97 of 2019) which reversed the decision of the trial court. Consequently, the appellant was ordered to pay the respondent compensation of Tshs 18,900,000.

Dissatisfied with the decision of the first appellate court, the appellant has come to this Court by way of appeal. He has advanced the following three grounds of appeal, in verbatim.

1. *That, the 1st appellate Court erred in law to hold that the appellant is liable for conducts or transaction of Nyaonge Christopher who acted without the authority of the appellant.*
2. *That, the 1st appellate Court erred in law and fact to hold that the respondent proved the case to the required standard while there is no proof either in terms of the documents or testimonial evidence.*
3. *That, the 1st appellate court erred in law and fact to hold that the dispute between the appellant and respondent is a contractual dispute.*

The facts which gave rise to this appeal are deduced from the evidence on record. The respondent is a businessman based in Musoma Municipality. He used to buy alcohol and other drinks from the appellant and resale them. Sometimes in 2016, the Government banned some of the appellant's drinks. The respondent notified the appellant to collect the banned drinks. On 23/12/2016, **105 cartons** of **Male Whisk, Mikumi Gin and Manyara Vodka** valued at Tshs 7,560,000 were collected by the appellant. They promised to compensate the respondent with new drinks or pay back him some money in lieu of drinks in one month. As the appellant failed to honor the promise, the respondent filed a suit in the trial court. He claimed for compensation of Tshs 18, 900,000 being the value of collected drinks (Tshs 7, 560,000) and loss (Tshs. 11,340,000).

In his defence, the appellant contended that they had no record of the drinks collected from the respondent. DW1 testified further that, the delivery notes (Exhibit A and C) on the returned/collected drinks were forged. However, the appellant admitted to have collected from the respondent **498 pieces of Kahawa fusion,** which was banned by TFDA for being below 200ml.

At the end, the trial court held that the respondent had failed to prove his case on the balance of probabilities. The trial court's decision was based on the fact that the delivery notes did not indicate the value of drinks collected from the respondent and that, the same was not sealed with the appellant's seal. As stated herein, that decision was reversed by the first appellate court and hence, the present appeal.

At the hearing of the appeal, Mr. Daudi Mahemba, learned advocate appeared for the appellant while Mr. Amos Wilson, learned advocate represented the respondent.

In his submission is support of the appeal, Mr. Mahemba argued that the first appellate court erred in holding that the appellant sent Mr. Nyaonge Christopher to collect the drinks. The learned counsel stated that there is no evidence to show that the said Nyaonge Christopher was sent by the appellant. He argued that the company is not liable if the employee was not authorized to act on its behalf.

Regarding the second ground of appeal, Mr. Mahemba submitted that the case was not proved on the balance of probabilities. His argument was based on the ground that, it was not proved that Nyaonge Christopher was sent by the appellant and that, Exhibits A and C do not show the value of drinks collected from the respondent. The learned counsel argued further that, Exhibits A and C were not tendered in evidence as required under the law. He therefore urged me expunge them from the court records.

On the third ground, Mr. Mahemba argued that the first appellate court erred in holding that there was an agreement between the appellant and the respondent. He stated that there was no agreement between the two parties and that the contract if any, was between the respondent and Nyaonge Christopher.

Mr. Mahemba submitted further that the compensation granted by the fisrt appellate court was excessive as the respondent was claiming Tshs. 7, 640,000 only and that the loss was not proved on the balance of probabilities. He therefore urged me to allow the appeal with costs.

In reply, Mr. Wilson objected the appeal. On the first ground of appeal, he submitted that Nyaonge Christopher was an employee of the appellant and that he used to collect drinks from the respondent. The learned counsel stated that the respondent had no doubt that the said Nyaonge Christopher was sent and authorized by the appellant because he had the appellant's vehicle.

As to the second ground, Mr. Wilson submitted that the respondent proved his case on the balance of probabilities. He stated that the drinks were collected by Nyaonge Christpher and that the respondent was not compensated. Mr. Wilson conceded that, the proper recourse for document or exhibit admitted contrary to the law is to expunge it from the record. However, the learned counsel was of the considered view that, even if the respondents' exhibits are expunged, the evidence given by the respondent and Nyaonge Christopher proved the case on the required standard.

Submitting against the last ground of appeal, Mr. Wilson stated that there was an oral contract between appellant and the respondent. He submitted that the said contract commenced when the appellant sent Nyaonge Christopher to collect drinks and that the drinks were collected on agreement that the respondent would be compensated in one month.

On the issue of compensation, Mr. Wilson argued that the same was not raised in the petition of appeal. However, he argued that the compensation was granted due to loss incurred by the respondent. Upon being probed as to whether the

loss was proved, Mr. Wilson replied that, the compensation was granted as general damage.

Having carefully heard the rival arguments of the learned counsels for both parties and after reading the evidence on record, I find that the issue to be considered in the present appeal is whether the respondent proved his case on the balance of probabilities.

This issue is premised on regulation 1(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1963 which requires the claimant to prove all facts necessary to establish the claim. Further, regulation 6 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1963 provides as follows on standard of proof:

> *"In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour,* ***but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other.*** *" (Emphasize is mine).*

Before addressing the above issue, I wish to point out irregularities in handling the case before the trial court. It is on record that the respondent tendered Annextures A, B and C appended to his statement of claim as exhibit and the same were admitted in evidence. However, the appellant was not asked as to whether he had any objection. Therefore, the said exhibits were not cleared before being admitted in evidence as required. No wonder that in his evidence, DW1 testified that the said delivery notes had been forged. Further, Annexure C was not appended to the claim and it is not in the case file. As rightly stated by the learned counsels for both parties, document which is tendered contrary

to the law has to be expunged from the record. Accordingly, I expunge Exhibits A, B and C because they were admitted without being cleared.

Counsel Wilson was of the view that, even if Exhibits A, B, and C are expunged, the remaining evidence is sufficient to show that the respondent proved his case on the balance of probabilities.

It is clear that the respondent's claim was based on the drinks collected by the appellant through Nyaonge Christopher. In his evidence, the respondent (PW1) testified that the drinks collected on 23/12/2016 **were 105 cartons of Mikumi Gin, Male Wisk** and **Manyara Vodka, valued** at **Tshs 7,560,000**. He claimed that the said drinks were collected because they had been banned by the Government. His evidence quoted hereunder for easy of reference:

> *"Baadaye Serikali ilionyesha* ***kutoridhika na ujazo wa vinywaji vya mdaiwa na kupiga marufuku.*** *Niliwasiliana na mdaiwa kwa njia ya simu walisema watafuata vinjwaji wavifanyie marekebisho na kunirudishia. Tarehe 23/12/2016 mdaiwa alifuata vinywaji aina ya* ***Mikumi Gin, male wisk na Manyara Vodka*** *zote jumla ya katoni 105 zenye thaman ya shs 7, 560,00/= wakaahidi kunirudishia pombe hizo au kunirudishia pesa hizo ndani ya mwezi mmoja.*

On the other hand, Nyaonge Chritopher who was called at the instance of the respondent stated that, the drinks collected from the respondent were **105 cartons of Don Nyati each valued at Tshs 60,000**. He also contended that the said drinks had been banned by the Government.

However, the appellant testified that the drinks banned by the Government and collected from the respondent were **498 pieces of Kahawa fusion** and that the drinks named by the respondent were not banned. This is deduced in the evidence of DW1 when he stated:

"Pia mdai alieleza kwamba TFDA wamezuia mzigo wake 2016, sio kweli kwani TFDA walizuia mzigo uliokuwepo kwa mdaiwa tu pisi 498 za kawaha susion ambao walisema haturuhisiwi kuuza kinywaji chini ya mili 200....Tulichukua hizo pisi 498 tukapeleka Dar es Salaam.

The evidence that the Government banned **Kahawa fusion** was not challenged by the respondent during cross examination. All in all, I find that the respondent failed to prove that **105 cartons of Mikumi Gin, Male Wisk and Manyara Vodka or Dom Nyati** alleged to have been collected by the appellant had been banned by the Government.

Further, as noted above, what was collected from the respondent is not clear. While PW1 stated **105 cartons of Mikumi Gin, Male Wisk and Manyara Vodka**, his witness Nyaonge Christopher mentioned **105 of Dom Nyati.**

Another aspect in proving the case before the trial court is the value of drinks alleged to have been collected from the respondent. The respondent (PW1) testified that the drinks valued at **Tsh. 7, 560,000** while his witness Nyaonge Christopher stated that the 105 cartons of **Dom Nyati** had a value of **Tshs. 60,000** per carton. This is equivalent to **Tshs 6,300,000**. Further, there is no evidence to show that the appellant signed to have received drinks valued **Tshs, 7,560,000 or Tshs. 6,300,000** from the respondent. Even if I was to consider the Delivery Note (Exhibits A and C) which was relied upon by the first appellate court, the same do not show the value of drinks collected from the respondent and were not signed and sealed with the appellant's seal. Therefore, as held by the trial court, I find that the value of drinks collected from the appellant was not proved.

The last aspect is on the damage granted by the first appellate court. This is in respect of compensation for drinks collected from the respondent (Tshs. 7,560,000) and compensation for loss on business (Tshs.11, 340, 000). I have shown above that the value of drinks collected from the respondent was not proved. As to the compensation on the loss on business, I am of the considered view that loss of business is not a general damage as argued by Mr. Wilson. It is a special damage or specific damage. Therefore, it must be proved by the claimant in his evidence. It is not enough to state loss of business in the pleadings. This position was also stated Lordship Masati, J (as he then was) in **Tangamano Transport Services Ltd vs Elias Raymond and Another**, Commercial Case No. 54 of 2004 (unreported) that:

> *"I have shown above that as a special damage, the claim of loss of profit should not only have been pleaded but also specifically proved."*

In the present case there is no evidence to show how the respondent incurred the loss Tshs.11, 340,000. The respondent was duty bound to give evidence and prove the loss incurred due to the drinks alleged to have been taken by the appellant.

In view thereof, I find that the respondent's case was not proved on the balance of probabilities. In sum, for the reasons stated, I allow the appeal with costs here and below. It is so ordered.

Dated at MUSOMA this 26th day of May, 2020.

THE HIGH COURT OF TANZANIA
MUSOMA

E. S. Kisanya
JUDGE
26/5/2020

Court: Judgement delivered this 26th day of May, 2020 in the absence of the parties with leave of the Court. Parties were notified to collect copy of judgement at 2.30 pm.

E. S. Kisanya
JUDGE
26/5/2020

Court: Right of further appeal is guaranteed.

THE HIGH COURT OF TANZANIA
MUSOMA

E. S. Kisanya
JUDGE
26/5/2020

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VERSUS

OMARY ATHUMAN MWIKWABI ..... RESPONDENT

DECREE IN APPEAL

WHEREAS, in this appeal the appellant is praying that this honourable Court be pleased to grant the following orders:

1. Allow this appeal with costs.
2. Uphold the decision of the trial Court
3. Set aside the decision of the 1st Appellate Court.
4. Any other relief this Honourable Court may think fit to grant.

AND WHEREAS, on **26th** day of **May, 2020** this Appeal is coming for judgement before **E.S. Kisanya, Judge** in the absence of the parties with leave of the Court.

THIS COURT HEREBY ORDERS AND DECREES THAT;

1. The appeal is allowed with costs here and below.

Given under my **Hand** and **Seal** of the Court this **22th day of May, 2020**.

THE HIGH COURT OF TANZANIA
MUSOMA

E.S. Kisanya
JUDGE