

THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
(AT DAR ES SALAAM)

CIVIL APPEAL NO: 54 OF 2019

*(Originating from the decision of the District Court of Ilala at Samora in
Civil Case No 47 /2016)*

BAHATI MWAKALASYAAPPELLANT

VERSUS

KAMPALA INTERNATIONAL UNIVERSITY.....RESPONDENT

JUDGEMENT

MASABO, J.:

The appeal before me is premised on four grounds. In summary the grounds are that: in determining the appellants claim, the trial court wrongly used the standard of proof applicable in criminal case; the trial court did not take into account the testimony adduced by DW1 in the course of cross examination; and lastly determination of special and general damages was based on wrong premises.

The genesis of the matter is the appellants studentship at the respondent University. Sometimes in 2011 she successfully her certificate course in customer care and public relations but she was not furnished with her

certificate irrespective of several follow-up. In 2014, she was finally furnished with a certificate but the same did not indicate the courses she studied. She returned the certificate to the respondent for rectification. The respondent furnished her with a rectified certificate but she realised that this too had an error as it indicated that she graduated in 2012. She has had to once return the certificate for further rectification. Thereafter, she made several demands and reminders but the defendant's authorities neglected/refused to furnish her with a valid certificate. She filed the suit against the respondent for negligence and claimed a sum of Tshs 21,000, 000/= in respect of salaries for 48 months which she allegedly lost as a result of termination of her employment at World Jet Link company following owing to failure to produce her academic certificate to her employer; Tshs 86, 600,000 in respect of mental distress (Tshs 35,000,000/=, humiliation Tshs 20,000,000/= and loss of time Tshs 10,000,000). She also prayed for general damages.

At the conclusion of trial, the court held that the Appellant ably established that the Respondent owed the appellant a duty of care and that it acted negligently in breach of its duty. It however held that the appellant failed to establish the damage she suffered as result of the respondent negligence. The latter is the subject of this appeal.

The appeal was heard in writing. Both parties had representation. The Appellant, represented by Mr. Mwakimatu, learned counsel, referred the court to page 21 of the judgment and argued that the trial court erred in relying on the standard of proof stated in the case of **Ahmad Omari v R**, Criminal Appeal No. 154 of 2005, CAT (at Mtwara) because, the said case

being a criminal case required proof beyond reasonable doubt which is not the standard for proof in civil cases. He cited the decision of the House of Lords in **B (Children)** [2008] UKHL 35, and argued that the standard required was proof on balance of probabilities.

Mr. Mwakimatu abandoned the 2nd ground and proceeded to argue on the 3rd and 4th grounds with respect to special and general damages. He cited the case of **Zuberi Augustino v Anicet Mugabe** [1992] T.L.R 139 and argued that, in principle specific damages need to be proved. He proceeded to argue that in the instant case, special damages were pleaded in paragraph 12 of the amended plaint and were proved during trial. It was argued that the proof rendered by the appellant was an employment contract showing that her monthly remuneration prior to termination Tshs 450,000/= . It was further submitted that the court erred in denying the prayers for general damages as general damages need not be proved or quantified.

Mr Florence Tesha, counsel for the respondent refuted the submission and argued that, the trial court did not apply the standard of proof used in criminal case and that the said case was only relevant in providing authority on the burden of proof as provided for under section 110 of the Evidence Act [Cap 6 R.E 2019]. Hence there is nothing to fault the trial court. Regarding proof of damages it was argued that the appellant failed to provide her salary slip which could have established that she was indeed employed and paid the claimed salary. He also argued that no proof was rendered to show termination and besides, the time which the appellant claimed that she was working, is the same time when she was studying a full-time diploma course (running from morning to evening) at the

Respondent university. Regarding proof of damages, the case of **Tanzania-China friendship Textile Co. Ltd v Our Lady of Usambara Sisters** [2006] TLR 70, was cited and argued that specific damages needed to be proved. Mr. Tesha further argued that no damage was suffered as the appellant requested her certificate on 10th February 2016. Thus, according to the Respondent, the claims regarding humiliation, mental distress and other damages are devoid of merit as they never happened.

Upon consideration of the grounds of appeal, the submission of the parties and the original records from the trial court, it would appear to me that I am invited to determine only one issue:

- (i) Whether the trial court applied a wrong standard of proof in determination of the Appellants claims for special damages? And if so, whether the claims for specific damages were proved;
- (ii) Whether general damages were correctly assessed.

Before I delve into these issues, it is worth noting that since this Court is dealing with this Appeal as the first appellate court it will be guided by the principle articulated by the Court of Appeal of Tanzania in **Sugar Board of Tanzania vs. Ayubu Nyimbi & 2 Others**, Civil Appeal No. 53 of 2013, CAT at Dar Es Salaam (Unreported). In this case, the court held that, the first appellate court has a duty to review the record of evidence of the trial court in order to determine whether the conclusion reached upon and, based on the evidence received, justifies a re-evaluation in relation to the referred framed issues, to see whether they were properly determined.

In regard to the first issue, the position of the law in respect of burden and standard proof is as correctly submitted by both parties. It is an established principle that a person who asserts existence of a certain fact bears a burden to prove its existence. This principle is provided for under section 110 of the Evidence Act. There is also a plethora of authorities in this area. I need not to reproduce them here, Suffice it to say that the case of **Ahmad Omari v R** (supra) which was referred to by the court in its judgement is one of such authorities. As submitted for the Respondent, this principle applies to civil case and criminal cases alike. The only difference is in the burden of proof. A higher standard of proof, that is, proof beyond reasonable doubt, is required in criminal case. In contrast, in civil cases, the standard is on the balance/preponderance of probabilities which simply means that the court will accept evidence which is more credible and probable (see **Al-Karim Shamshudin Habib v Equity Bank Tanzania Limited & Viovena Company Limited** Commercial Case No. 60 Of 2016); **Wolfgango Dourado v. Toto Da Costa**, Civil Appeal No. 102 of 2002 CAT (unreported), and **Antony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014, CAT (unreported). Since the instant suit is of civil nature, the standard applicable is proof on the balance of probabilities.

In the impugned judgment, the trial court found that the appellant had not proved her claims and cited the following principle from the case of **Ahamadi Omari v R** (supra) in support:

".....the burden of proof is on the one who alleges hence he is o she is supposed tpo prove the case against the appellant (herein the defendant) beyond reasonable doubt. The burden never shifts."

From this excerpt it is clear that the standard applied by the court was proof beyond reasonable doubt. With respect to the respondent's counsel, I find no value in insisting otherwise whereas the record is crystal clear. The first limb of the question is therefore answered in the affirmative.

Having found answered the first limb in the affirmative, I now proceed to the second limb on whether or not the claims for specific damages were proved. The finding above justifies re-evaluation of evidence establish whether the appellant's claim for specific damages were proved on the balance of probabilities. As correctly argued by both parties, specific damages need to be pleaded and proved. This is a trite law. The appellant pleaded a sum of Tshs 21,000, 000/= as special damages. Her claim was premised on the ground that, she secured a job with World Jet Company in 2012 which was earning her Tshs 450,000/ per month. Her employment was contingent to submission of academic certificate within 3 months a condition which she could not meet as she was yet to secure her certificate from the respondent. Her employment was consequently terminated. In proof of her claim she tendered the contract for employment which was admitted as exhibit P5. The weight of this evidence is the bone of contention. On the appellant's side it is argued that the exhibit sufficiently proved the claim while

on the respondent's side, it is argued that the proof is insufficient. In the respondent's view, to sufficiently prove her claim, the appellant ought to have produced a termination letter and a salary slip.

I have carefully considered the terms of exhibit 5 which was executed by the parties on 24/12/2011. The first term of this contract is on emoluments and specifically states that Appellant was to receive a basic monthly salary of Tshs 450,000/=. The second term is on production of medical, reference letters and academic certificate. For clarity I will reproduce the paragraph in verbatim:

MEDICAL EXAMINATION, REFEREES REPORT AND CERTIFICATE

Your appointment is subject to your **being medically fit** and **to receiving satisfactory reports from at least 2 referees** including **submitting your academic certificates within 3 months.**

Failure to produce/receive the above documents will automatically render this contract cancelled without notice or claim of any benefit. [emphasis added].

In my view, the findings by the trial court that the appellant failed to prove her claims is well founded. As it could be vividly seen from the record, whereas exhibit 5 confirms that the appellant was offered the employment, there is no evidence that she indeed assumed employment and she was terminated as a result of failure to submit her academic certificate. It is to

be noted that, the claim for specific damages was premised not on the existence of an employment contract. Rather, it was predicated on the termination/cancellation of employment and the ground upon which the contract was cancelled. Assuming that she assumed employment and was terminated, no proof was rendered to show the reasons for termination. As it could be seen in the paragraph above, her confirmation was contingent to three things: being medically fit, production of reference and production of academic certificate. It was therefore crucial for the respondent to provide proof that her termination was due to failure to produce academic certificate as opposed to the other two requirements.

Besides, as correctly submitted by Mr. Tesha, the appellants testimony raises some questions on whether or not she assumed employment and was terminated as claimed. As argued the Respondents counsel, in the course of cross examination, the appellant who testified as PW1 told the court that during the time when she was allegedly working for World Jet link, she was also undertaking a full-time diploma course at the respondent university. When cross examined as to how she managed to be in full time employment and at the same time be in full time study programme whose classes ran from early in the morning to the evening, she simply replied that she obtained permission from her employer but rendered no proof of the same.

In my humble view, a combination of these factor necessitated production of a salary slip, termination letters or other concrete evidence in proof. The absence of these two documents rendered the appellant's claim less credible/probable hence below the standard of proof required in civil cases.

Regarding the award of general damages, the law is very well settled. Unlike specific damages which need to be pleaded, general damages are not proved. Thus, it suffices for the plaintiff to merely aver that general damages have been suffered. A mere statement or prayer of a claim is enough to establish general damages for purposes of award by court (see **Cooper Motor Corporation Ltd vs Moshi/Arusha Occupation Health Services** [1990] TLR 96. As held in **Fredrick Wanjara, M/S Akamba Public Road Service Limited A.K.A Akamba Bus Service Vs Zawadi Juma Mruma**, Civil Appeal No. 80 Of 2009 CAT (Unreported), there are no hard and fast rules in the determination of general damages and they cannot be approached with mathematical precision. As general rule, since the assessment of general damages falls under the purview of judicial discretion, the figure arrived at by the trial court is not disturbed on appeal unless it is based on erroneous principle or it is so low or so excessive that it must have been based on some incorrect reasoning (**see Obongo and another v. Municipal Council of Kisutu, (1971) EA 91**).

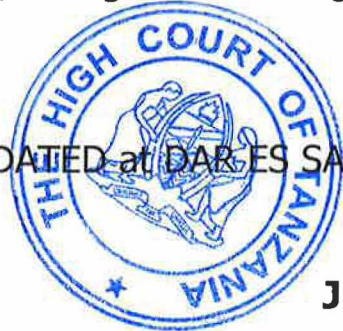
In the instant case, the appellant pleaded for general damages of Tshs 86, 600,000 comprising of three items namely, mental distress: Tshs 35,000,000/=), Humiliation: Tshs 20,000,000/= and Loss of time: Tshs 10,000,000). A scrutiny of the judgment reveals that the trial court's decision not to award these damages was premised in a wrong principle. Contrary to the general principle above articulated, the trial court lumped these prayers with the prayers for specific damages and held generally that the damages

were not grantable as the appellant failed to prove the damage she suffered. This approach was indeed erroneous.

In my view, what is stated in paragraph 10 of the plaint provided sufficient material upon which general damages could be granted. In this paragraph, the appellant sufficiently asserted she has suffered as a result of the respondent's negligent acts and breach of duty of care. In specific, it took her about 5 years to follow-up her certificate and on two occasions, the certificate furnished on her was defective thus she once again had to follow up with the respondent university. During this time, she obviously spent her time and resources making trips to the respondent university. The mental anguish pleaded is also not farfetched. All these were sufficient materials upon which to peg the assessment of general damages. On this account, the general damages are hereby assessed awarded at Tsh 15,000,000/=.

In the final event, the appeal is allowed. The appellant is awarded Tshs 15,000,000/= as general damages. Costs on the Respondent.

THE HIGH COURT OF TANZANIA
DATED at DAR-ES SALAAM this 30th day of June 2020.



A handwritten signature in blue ink, appearing to read 'J.L. MASABO', is written over a circular stamp.

J.L. MASABO

JUDGE