IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL NO 225 OF 2018

(Originating from Morogoro Resident Magistrate Civil Case No 28 of 2018 before Hon E, J. Nyembele)

KISARAWE CEMENT COMPANY LIMITED.....PLAINTIFF

VERSUS

KELVIN MNYINGI..... DEFENDANT

EX-PARTE JUDGMENT

Date of last order: 24/4/2020
Date of Ex-parte judgment: 17/7/2020

MLYAMBINA, J.

In this case, the appellant unsuccessfully sued the respondent before the Morogoro Resident Magistrate Court for payment of Tsh 14,476,000 being the balance of money unpaid by the respondent for bags of Cement delivered to the respondent. The appellant was aggrieved by the decision of the said court, hence appealed before this honorable court on the following grounds:

a) That, the learned trial Magistrate erred in law and fact for not considering exhibits P1 and P2 admitted before honorable court which proves the appellant delivered the bags of cement to the respondent.

b) That, the learned trial Magistrate misdirected himself in failing to hold that failure of respondent to defend the claims by defaulting to write Statement of Defence, failed to prove his case on the balance of probabilities.

c) That, the learned trial Magistrate erred in law and fact for failure to record and asses properly the evidence adduced in court

From above grounds of appeal appellant prayed for the following orders:

i. That the appeal be allowed.
ii. Cost be provided for.
iii. Any other and further orders as this honorable court deem fit to grant in the circumstance of the appeal.

The matter proceeded ex- parte on the reasons that respondent defaulted to appear and file reply submission.

In its written submission, on the first ground of appeal, the appellant stated that it was wrong for the trial Magistrate for not considering that delivery note tendered by the appellant is sufficient evidence to prove that there was claims against the respondent. In view of the appellant, that delivery note proves that the appellant has an agreement with the respondent and bags of

cement were delivered to the respondent. Hence, the respondent defaulted to pay an outstanding balance of Tanzania Shillings 14,476,000/=

Further, the appellant stated that the modes of delivery was through the respondent drivers who were authorized by respondent to takes bags of cement and delivered to the respondent as per the statement of PW1 and Exhibit P1 which shows that the drivers signed on behalf of respondent (buyer) as the employee from the buyer office. The appellant cited section 34 of the Sales of Good Act Cap 214 of 2002. That section states that:

> *where in pursuance of contract of sale, the seller is authorized or required to send the good to buyer, delivery of goods to carrier whether named or not is prima facie deemed to be a delivery of goods to the buyer.*

From the above section, the appellant argued that it is very wrong for the trial Magistrate to hold that there was no any authorization of the driver from the respondent in delivering the cement.

On the second ground of appeal, appellant stated that the trial Magistrate misdirected himself by holding that the appellant required to prove his case even though the defendant failed to file Written Statement of Defence. The appellant stated that it is very

wrong for the trial Magistrate not consider the delivery note and witness statement (PW1), the said driver is from defendant office.

On the third ground of appeal, the appellant stated that the trial Magistrate failed to record and analyze evidence properly. The appellant testified that delivery note was admitted as exhibit P1, bank statement from the plaintiff account as exhibit P2. As such, the two documents are sufficient evidence for the court to be considered as good evidence to appellant because it shows.

Having going through submission of the appellant, I'm of the view that the trial Magistrate was wrong to disregard the evidence adduced by the appellant before the trial court. The appellant exhibited with proof that the respondent was its client. The appellant used to supply bags of cement to the respondent as per exhibits P1 (delivery note) and exhibit P2 is a ledger account from the appellant which shows what the respondent was supplied with and what is unpaid is equivalent to 14,476,000/=

It is true, the trial Magistrate disregarded exhibits P1 on the reasons that the delivery note is written in the name of Kelvin Mnyingi and the delivery note bears the name of the defendant but the persons who signed the delivery notes are different persons to mention a few, Elia, Juma, James, Omary and Juma Mnyingi, all

of these person acting as an argent to the defendant. Therefore, the plaintiff could sue them instead of the defendant. This is total wrong because delivery means the voluntary transfer of possession from one person to another as per *Section 2 of The Sale of Goods Act Cap 214 R.E. 2019,* and a delivery note is a document that certifies the delivery of goods to the buyer who must sign to make it clear that the goods have been delivered in accordance with the condition established.

The delivery notes were signed by the respondent driver. This shows that the buyer accepted the goods. Under the law of Contract, all agreements are contract if they are made by free consent of the parties who were competent to contract, for a lawfully considerations and with lawfully object are not of the verge of being declared void. That is essence of *Section10 of the Law of Contract Act Cap 345 R.E. 2002,* read together with *Section 31 of The Sales of Goods Act Cap 214 R.E. 2019,* the sections states that, rules on delivery to buyer may be express or implied contract (supra) it depends with the circumstances of each case. In the case of *Zanzibar Telecom Ltd v. Petrofuel Tanzania Ltd,* Civil Appeal No 69 of 2014 Court of Appeal of Tanzania in this case it was held that:

Signature of the parties on the document alone did not qualify, taken as contract, the truth remain however what are the terms contained in it were basis for the transactions which were carried out between them. Therefore, that in a way it formed part of the agreement.

The most important thing is the conduct of the parties at the time they entered into the said contract, together with the instruction on the document. It is on that take, this leave no doubt that, offer, acceptance performance and consideration facts were supposed to be considered by the trial Magistrate. However, the buyer is deemed to have accepted the goods once the goods have been delivered to him, as per section 37 of The Sales of Good Act. There is no dispute that goods have been delivered to the respondent.

From above findings, it so obvious the trial did not adhere with the rules of evidence on the balance of probabilities as per *Section 110 of The Evidence Act Cap 6 R.E. 2019.* The trial Magistrate disregarded the evidence adduced by the appellant on the trial court on the reasons that the appellant never explained the price of each bags. However, the appellant tendered exhibit P2 the ledger account which shows that the debit and credit balance on the ledger account of the respondent. In my view, that is a sufficient evidence to show that appellant is keeping the records of

the respondent ledge account. The appellant on his ledger account stated paid unpaid amount is 14,476,000/= Therefore, the trial Magistrate was required to rely on the said document which shows several invoices were paid by the respondent to the appellant. The ledger account shows that the appellant supplied bags of cement. Such conduct of the parties constituted sufficient evidence on the side of the appellant.

The evidence adduced by appellant in the trial court and exhibit P1 and P2 were good evidence because the delivery notes were signed by respondent's driver. There is nowhere the respondent objected that the said delivery notes not belonged to him or disapproved the appellant's argument. It is from that basis I find the appellant proved its case on the balance of probabilities as per *Section 110 of The Law of Evidence Act(supra).*

I have further noted that the appellant on its plaint at trial court prayed for general damages of 50,000,000/= This honorable court is of the view that, the said amount is not only too big but also ought not have been pleaded. It is trite law that the assessment of general damages is jury question in the court with jurisdiction as stated in the case of **Admiralty Commissioner v. susqueh-Hanna (1926) AC665** in which it was held:

That if damages be averred that such damages have been suffered, but the quantification of such damage is a jury question of jurisdiction of the court.

In any aspect general damages cannot be specifically claimed. In the case **of Edwin William Mshetto v. Managing Director of Arusha International Conference Centre** (1999) T.L.R 130 Mrosso J. (*as he then was*) held:

> *It is wrong pleading to put specific amount in a claim for general damages the quantum of general damages, where awarded is assessed by the court"*

In the case of **Tanzania Saruji Cooperation v. African Marble Company Ltd** (1997) T.L.R 155 the Court of Appeal held:

> *General damages are such as the law will presume to be direct, natural or probable consequence of the act complained of the defendant's wrong doing must, therefore, have been cause, if not the sole, or particularly significant, cause of damage.*

It therefore follows that; it was not proper for the appellant to specifically claim general damages at the tune of TZs 50 Million.

In the premises of the above, the appeal is here by allowed with costs. The decision of the trial court is set aside. The respondent is ordered to pay the unpaid amount at the tune of TZs 14,476,000/=. It is so ordered.

Y. J. MLYAMBINA

JUDGE

17/07/2020

Ex-parte Judgement delivered and dated 17th July, 2020 in the presence of Omary Abubakary for the appellant and in the absence of the respondent. Right of appeal explained.

Y. J. MLYAMBINA

JUDGE

17/07/2020