THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF MBEYA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CIVIL APPEAL NO 13 OF 2019

(Orignating from Civil Case No 23 of 2017, from the Resident Magistrate's Court of Mbeya)

TANZANIA ELECTRIC SUPPLY CO. LTD ..... APPELLANT

VERSUS

MARIAM ROBERT MBINDA@MARIAM EDWARD SILAH

as the Administratix of the late Robert Mbinda **..... 1st RESPONDENT**

TUMAIN ROBERT MBINDA..... 2nd RESPONDENT

EDWARD ROBERT MBINDA ..... 3rd RESPONDENT

JUDGMENT

Date of Last Order: 28/05/2020

Date of Judgment: 29/06/2020

Dr. Mambi, J.

In the Residents Magistrate's Court of Mbeya in Mbeya the respondent sued the appellant and successfully claimed the

compensation of 37,000,000 as specific damages. The records from the Trial Court show that the basis for the claim by the respondent was on tort of negligence. The respondent claimed that the appellant's infrastructure (electricity wires and poles) was the cause of the outbreak of the fire that burnt the trees at respondent's "shamba" (farm). In the final determination, the trial court made its decision in favour of the respondent and awarded special damages as claimed.

Aggrieved, the appellant (TANESCO LTD) filed its memorandum of appeal preferring five grounds as follows:

a) That the Trial Magistrate erred in law and fact by shifting the burden of proof to the prejudice of the Appellant
b) That the Trial Magistrate erred in law and fact by failure to both draw adverse inference and take account the Respondent's failure to call material witness.
c) That the Trial Magistrate erred in law and in fact when failed to examine and evaluate the evidence on record hence he decided in favour of Respondent.
d) That, the trial Magistrate erred both in law and fact in making conclusion, decision and drawing inferences which are not based on evidence.
e) That, the amount ordered for general damages is manifestly excessive in the circumstance.

During hearing of this appeal, the appellant appeared under the service of the Learned Counsel Mr John Kyamani while the respondents were represented by Mr. Jackson Nginyani, from TSKL

Law Chambers. Parties made their submissions in a written form as ordered by this court. In his submission the appellant learned Counsel submitted that the Trial Magistrate erred in law and fact by shifting the burden of proof to the prejudice of the Appellant. He argued that it is a settled principle that he who want the court to believe on the existence of particular facts must prove that those facts exist. He referred Section 110(1) of the Evidence Act, Cap 6 [R.E. 2002]. He averred that It was clear that such duty basically lies upon Plaintiffs (Respondents in this Appeal) to prove how the Appellant did act negligently leading to fire which destructed the farm that had trees. He referred Page 9 paragraph 2 of the typed judgment, which reads;-

> *"if the Defendant wanted a report concerning the course[sic] of fire and other matter related to the incident, she ought to have engaged independent expert or body to investigate the matter and come up with a report which would have been free from any suspicious of biasness or partiality"*

He further argued that the trial court judgment at page 10 paragraph 1 of the typed judgment is also clear showing the trial Magistrate shifted the burden from plaintiffs (respondents) to the defendant (appellant). That paragraph as quoted by the appellant counsel reads as follows;

> *"...the defendant ought to have shown to this Court through expert report that it was impossible for the fire outbreak to occur in the presence of those equipment..."*

Addressing the second ground of appeal, the appellant counsel submitted that since respondent in his plaint stated that the investigation of the outbreak of fire was made by the police officers then it was necessary for the respondents to call the police officer as the key witness but they didn't do so. He referred paragraph 6 of the Plaint in which the respondent as the plaint of at the trial court pleaded that:-

> *"That the incidence was reported at Police Post Mbalizi and police conducted investigation as to the source of fire where it was revealed that the fire was caused by shock[sic] on electricity transmission line at plaintiffs' farm...*

He was of the view that the police officer whoever conducted an investigation was material witness to be called by the respondents at the trial court. He argued that failure to call a material witness with no reasons disclosed, entitles the court to draw and adverse inference against a party who fails to do so. He referred the decision of the court in ***Hemedi Said vs Mohamedi Mbilu*** [1984] TLR 113,where the court held that:-

> *"where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interest."*

The learned Counsel also referred the decision of the court in **Aziz Abdallah vs R [1991] TLR 71** at page 72 in which it was held that:

> *"(iii) The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution"*

The learned Counsel further submitted that since the Plaintiffs' case was clouded with shadow of gaps in their evidence due to the fact that material witness was not called, the case was not proved to the required standard. He argued that the trial magistrate erred in law and fact by failure to draw adverse inference hence Appellant could have been given benefit of doubt. The learned Counsel contended that up to the closure of plaintiffs' case (Respondents in this Appeal), there were no any Report from the police fire force to relate the cause of fire and the Appellant's infrastructure. He argued that this display the clear picture that the case was not proved to the required standard and thus had the trial magistrate properly evaluated the evidence, could not have decided in favour of the Respondents. He referred section 5(2)(c) of The Fire and Rescue Act, 2007 which establishes national fire brigade known as the Fire and Rescue force with the mandate of conducting fire inspection and investigations for purposes of obtaining information relating to the cause of fire and loss inflicted by fire.

Addressing the third ground, the appellant Counsel submitted that the trial Magistrate erred in law and fact when failed to examine and evaluate the evidence on record hence decided in favour of Respondent. He was of the view that had the trial magistrate evaluate the evidence on record properly, he could not have decided in favour of Respondents.

He argued that the trial magistrate condemned the appellant for having equipment which are faulty but the appellant was never given any chance to be heard to that respect. He argued that surprisingly

the trial magistrate just rose an assumption at the time of judgment. He was of the view that at some point appellant was condemned without being heard thus violating two well cherished principle of natural justice of *nemo judex in causa sua* (rule against bias) and *audi alteram partem* (the right to a fair hearing.

The appellant counsel also challenged the amount ordered for general damages on the ground that it was manifestly excessive in the circumstance. He argued that the issue of general damages is the discretion of the trial court for being in a better position of assessing the evidence. He was of the view that that discretion must be applied judiciously and in the Case of ***J.M Bendzel vs Kartar Singh [1953] E.A.C.A 53***.

In responses, the respondents through their advocate submitted that the appellant argument that the respondents did not prove their claim at the trial court has no merit. He argued that there is distinct difference between criminal cases and civil suits in respect of burden of proof. He was of the view that the principle of burden of proof in criminal and civil cases is that criminal cases burden of proof lies to the prosecution side and it should be beyond reasonable doubt while in civil cases burden of proof lies to the both parties thus it is balance of probability. He referred section 3(2) of Evidence Act Cap 6 [R.E 2012]

The respondents' learned Counsel argued that the respondents in the trial Court succeeded to prove their case on preponderance of probability by parading witnesses who testified on what happened in the locus in quo (PW 2 and PW 3). He averred that PW2 testified that

she saw sparks of fire falling from the Appellant's electricity poles to the farm and as a result, the trees on the farm catches fire and the whole farm was razed. The learned Counsel contended that it is not true that the trial magistrate in his judgment shifted the burden of proving from the respondent to the appellant. He argued that the trial Court correctly held that the Appellant was supposed to bring in a report which is impartial and free from suspicion. He referred the decision of the court in ***Exp vs. Barker (2017) EWCA Civ 63 I.***

The respondents through their learned Counsel submitted that it is not true that, "the trial magistrate erred in law and facts by failure to both draw adverse inference and take into account the respondent's failure to call material witness." He argued that the respondent was not bound to bring all witnesses as per section 143 of Evidence Act Cap 6 [R.E 2019].

The learned Counsel contended that the argument by the appellant that the trial magistrate did not evaluate the evidence has no merit since the Magistrate analyzed evidence adduced by both parties and gave the reasons at pages 7 to 11 of the Judgment. With regard to the damages awarded by the trial court the learned Counsel for the respondents contended the trial court was right and the award was not excessive. He argued that that payment of Tshs 20,000,000/- as general damages is fair and just. He referred the decision of the court in ***Cooper Motors Ltd. Versus Moshi/Arusha Occupational Health*** *[1990] TLR 96.*

I have carefully gone through the grounds of appeal, submissions of both parties, and the records from the trial court.

The complaint in the first ground of appeal is centred on the main issue as to whether the respondents proved their claims at the trial court. The other issue is whether the appellant was the source of fire outbreak that was alleged to have destructed the trees owned by the respondents and whether there was a negligence on the part of the appellant. I must say and it is a common ground that to prove the liability in negligence the plaintiff is duty bound to show on the balance of probabilities that the defendant actually acted negligently and he owed such a duty. The plaintiff needs to show and prove that the defendant actually breached the duty of care by failing to meet the standard of case required and as a result the plaintiff suffered a loss or damage as result of loss or destruction of properties (such as trees in our case) .

Generally, in its day to day business the appellant has the general duty of care based on standard of reasonable care while performing any acts over its services to avoid any harm to others. However, such duty is not absolute where it appears the act was the result of the act of god or such act could have not been easily foreseen by it. Otherwise putting absolute duty of care without exception will put the appellant into economic hardship even fail to offer service that will affect its consumers including the respondents. However, this does not mean that the appellant should just relax given the fact that they have enough facilities and human resources to assist in rescuing fire outbreak or compensating any damages caused by its

infrastructure or service. Likewise the consumers like the respondent has also some duty to take reasonable care of the services offered by the appellant and report any likelihood of fire outbreak or damage that might be caused by the appellant infrastructure or service.

The central point of discussion in this case is whether there was a breach of duty or negligence on the part of the appellant which resulted in any damages to the respondents if any. Looking at the trial records there is no doubt that there was fire outbreak which destroyed the appellant's electricity poles and the respondent's farm that had trees. Indeed the appellant who just called one witness did not deny on the outbreak of fire since even her electric poles were which are close to the respondents farm were damages. What is being disputed by the appellant is the source of fire. While the respondents called six witnesses to testify It is not known why the appellant just called one witnesses taking into account the nature of the case which though the law does not require the particular number of the witnesses. The evidence show the fire started from the appellant poles which sparked over other area. Indeed the appellant was in the better position to assist in determining the source of the fire outbreak given the fact that they have manpower and equipment to make investigation. If one look at the evidence of witnesses from the respondents it is clear that both PW2 and PW3 testified similar testimony that the fire outbreak resulted from the sparks coming from the appellant's poles. The plaintiff witness (DW) testified that there is no doubt that there was fire outbreak but that fire was from the valley that was blown by the wind. In my considered view one

could have expected that the appellant (TANASECO) to make an investigation and come up with the report on the fire outbreak taking into account that even their infrastructure was destroyed. Failure to do left a lot of doubts to be desired. What can be extracted from the trial Resident Magistrate's Court record is that there is high possibility that the fire that destroyed the respondents trees and appellant's poles was from the infrastructure owned by the appellant. However, there is no justification for the amount of damages awarded by the trial magistrate. The trial Magistrate seems to be mainly rely on the opinion of the report that estimated that the value of total trees burnt and disturbance allowance to be 37,000,000/. In my view this amount was excessive without justification. One would have expected that the preparation of the valuation report could have also involved the appellant. Indeed the report does not show how many trees were at the farm and for how long (how many years and size) since those trees were planted. In my considered view payment of 17,000,000/- to the respondents as compensation for the loss of trees could be sufficient and more reasonable.

The other issue is whether the damages awarded were reasonable and justifiable. The question is, was the payment of Shs 20, 000,000/ as special damages justified?. Secondly, were general damages specifically pleaded and, in any case, was the quantum awarded proper?. Indeed general damage is implied by law and may include "compensation for pain and suffering and the like" See ***The CMC Ltd v. Moshi/Arusha Occupational Health Serviced***. Where the special damages are proved they must, as of right be awarded. The question

before this court was amount awarded by the trial court justifiable?. The records shows that the respondents at the trial court just claimed general damages to be assessed by the court but the trial court did not show how did it reach into the amount of 20, 000,000/ as damages. The trial magistrate didn't show how she made her decision on the amount claimed without securitizing as to whether such amount was justifiable. The law is clear that any decision must have reasons and must show the point of determination.

It is true that the respondents suffered damages from the destruction of their trees by the appellant' negligence but the trial magistrate was required to properly asses the actual amount suffered by the respondent. I am of the stetted mind that the damages awarded by the trial magistrate was excessive and did not justify the damages suffered by the respondent. This means that this court as an appellate court has power to intervene on an award that seems to be excessive as compared to the loss suffered by the party who claims to have suffered so. See *Davies v Powell [1942] 1 All E.R.657 at 664/5).*

I am of the settled view that the Magistrate was required to award the amount less than what was claimed by the respondent. There is no doubt that it is a settled principle of aw that in claim for general damages, particulars will not be needed of the quantum of damages claimed. See ***London and Northern Bank Ltd. v George Newness Ltd. (1900) 16 T.L.R. 433, C.A***. Indeed looking at damages that was suffered by the respondents the trial court was in better position to

consider and award general damages after analyzing and satisfying herself that the respondent actually suffered what he claimed.

It is true that the respondent rightly claimed that he suffered damages but in my view the amount of the award should have been **10,000, 000/-** only and not 20,000,000 as awarded by the trial Magistrate. It is also clear from the case laws that general damages can be asked for by "a mere statement or prayer of a claim" and this is what has been done in our case. See ***Perestrello Companhia Limitada v United Paint Co. Ltd., [1969] 1 W.L.R. 570***. The Court in observed that:

> *"If damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question".*

However, the court must properly assess and evaluate the reasonable amount of damages before awarding such damages.

In the circumstance and from the reasons stated above I have no reason to fault with the decision of the Trial Magistrate rather than partly upholding her decision save for the amount of compensation and general damages that I have substituted. In the premises this appeal is dismissed and the appellant to pay the respondent Tshs.**10,000,000/=** as general damages instead of Tshs.20,000,000/=. The appellant is also ordered to pay the respondents compensation at the tune of **17,000,000/=.** Each party to bear its own cost.

Order accordingly.

DR. A. J. MAMBI

JUDGE

29/06/2020

Judgment delivered in Chambers this 29th day of June, 2020 in presence of both parties.

DR. A. J. MAMBI

JUDGE

29/06/2020

Right of Appeal to the Court of Appeal fully explained.

DR. A. J. MAMBI

JUDGE

29/06/2020