THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

Civil Appeal No. 17 OF 2019

(From The Resident Magistrate Court of Mbeya at Mbeya)

THE NATIONAL MICROFINANCE BANK (NMB) .....APPELLANT

VERSUS

CHAMA CHA KUTETEA HAKI NA MASLAHI YA WALIMU TANZANIA (CHAKAMWATA) .....RESPONDENT

JUDGMENT

Date of Judgment: 28.08. 2020

Mambi, J.

In the Resident Magistrate's Court of Mbeya in Mbeya, the respondent **(CHAKAMWATA)** successfully sued the appellant the National Microfinance Bank **(NMB)** for compensation of 181, 780,000/= and 100,000,000/ as general damages. He sued the

National Microfinance Bank (NMB) for compensation on the allegation that the bank freezed the respondent's account. The Trial Resident Magistrate Court under Chaungu, (RM) made a decision in favour of the respondent.

Aggrieved, the appellant (NMB) appealed against the Decision of the trial Court preferring five grounds appeal basing on five grounds as follows;

1. The trial court erred both in law and facts when determined the case while it had no jurisdiction.
2. The trial court erred in law when conducted the proceedings of the case in contravention of the law.
3. That the Honourable trial court erred in law and facts when failed to analyze the evidence on record as a result reached to wrong conclusion with regard to issue no. 1, 2, 3, 5, 6, 7 and partly to issue no. 8.
4. That the trial court erred both in law and fact when awarded Tshs.40 million as general damages while the plaintiff failed to prove special damages.
5. The trial magistrate erred both in law and facts when disregarded the evidence on the appellant's party which was strong.

The appellant on the ground is claiming that the trial court entertained the commercial matter which had no jurisdiction. The appellant also claimed that the trial magistrate failed to analyze the evidence and wrongly made his decision in favour of the

respondent. Additionally, the appellant claimed that the trial court neither considered the defence evidence nor analyzed the evidence.

During hearing, parties agreed to argue the matter by way of written submission and the court ordered arties to do so. While the appellant was represented by the learned Counsel Mr Barka Mbwilo, the respondent was represented by Mr Mwabukusi, the learned Counsel.

Addressing the first ground of appeal , the appellant through the learned Counsel Mr. Baraka Mbwilo submitted that the trial court had no jurisdiction to entertain the matter which purely commercial in nature and it involves the amount that was above the threshold that is beyond the powers of that court. Referring the definition of the word "commercial under the Magistrate court's Act Mr Mbwilo argued that since the appellant was a business entity it means that it liability are of commercial nature.

In response, the respondent Counsel submitted that the first ground of appeal on jurisdiction has no merit. He argued that the trial court rightly determined the matter which was within its powers since the matter involved the tort. He averred that the matter at the trial court was civil in nature and not commercial by nature as argued by the appellant counsel.

Addressing the appellant's third grounds of appeal, Mr Baraka submitted that the trial court failed to consider and analyze the evidence on the records. He argued that the respondent at the trial court failed to prove their claims.

With regard to the fourth ground of appeal, the appellant counsel submitted that the trial court erred in fact and law by awarding general damages hat is 40 million without prove by the respondent.
Responding to the third ground of appeal, the respondent counsel briefly submitted that the trial magistrate properly analyzed the evidence, as indicated under page 17 of the judgment.
With regard
With regard to the fifth ground of appeal, case by the respondent argued that this ground had no merit since the respondent proved its claims at the trial court. Responding to the fifth ground of appeal, Mr Mwabukusi was of the view that the award of the general damages are in the discretion of the court and the trial court rightly awarded the damages
I have carefully perused and considered grounds of appeal, the evidence on record from the trial court and submissions from both parties. In my considered view there are three main issues that needs to be determined as follows:
Whether the matter at the Trial court fall under the ambit of commercial cases or not and whether the court had jurisdiction to deal with the matter or not. The second issue in my view, is whether the trial magistrate analyzed the evidence of both parties. The last issue is whether the trial court was right in awarding the damages and compensation to the respondent or not.
Having summarized submissions from both parties, let me now addressed with the above issues I have raised. Starting with the question of jurisdiction, I wish to re-emphasize that that

jurisdiction is the matter of law. Briefly, jurisdiction in law is the authority of a court to hear and determine cases. This authority is derived from the constitution and the law. It is vital to determine before a lawsuit is filed which court has jurisdiction. The jurisdiction of a legal case depends on geographical jurisdiction and subject matter or pecuniary jurisdiction. In this regard, a court must have both subject matter jurisdiction the matter to hear a case. The appellant in his first ground has claimed that it was wrong for the trial court to entertain the matter that was not in its jurisdiction since the matter involved the commercial and it was beyond the pecuniary of the court. On the other hand, the respondent argued that the matter at the trial court was a civil arising from tort and not commercial nature.

The question before this court is that did the trial court had jurisdiction to entertain the matter?. To answer this question, I keenly perused the plaint that was failed by the respondent (the plaintiff at the trial court) to satisfy myself on the natter of the case. My perusal have revealed that the respondent at the trial court filed a suit against the defendant (the appellant now) claiming among others compensation of 181,780, 000/= arising from what they claimed as the appellant (NMB) act of freezing its account number. In this regard, there was neither commercial dispute between the parties at the court nor business relationship. The appellant being a commercial entity as claimed by the appellant does not mean that any case against it can be a commercial case. In my considered view, in enacting the law, the legislature did not mean meant that

all cases against all commercial entities shall be commercial case. I thus agree with the respondent counsel that the matter at the trial court emanated from the tort claim by the plaintiff (respondent) and by its nature it was a civil case and not commercial case as claimed by the appellant counsel. This means that the first ground of appeal has no merit.

Coming to the third ground of appeal that the trial court magistrate failed to analyze the evidence and wrongly made her decision, I wish to re-emphasis that the law is clear that every judgment must show point of determination and how the evidence has been analyzed and reasons there on. The question to be determined is that, did the trial court analyzed the evidence of both parties. Now, if the matter involved an action for tort that means the trial magistrate was right in deterring the matter as civil case. I am of the considered view that the matter at the trial Resident Magistrate court involved a civil case by its nature and the plaintiff's claim. The appellant counsel argument that the matter did not involve tort on the ground that it was a commercial case on the mere ground that the respondent is the commercial entity has no merit. I am saying so since a claim of tort and compensations from the breach of duty and negligence cannot at any rate be a commercial suit.

My perusal from the records of the trial court show that The Trial Magistrate failed to properly evaluate the evidence of both parties and he made his judgement without clear reasons. In the course of going through the trial court Judgment, I have also observed that the court neither analyzed nor evaluated the evidence from both

parties and give reasons for its decision as submitted by the aplenty Counsel. If one look at the judgment from page 1 to 23 one can observe that what the trial magistrate did, was just to summarize the evidence of the defence and mainly focused on dealing with the plaintiff evidence (respondent). This has been emphasized in various authorities by the court. There are various decision of the court of appeal which has insisted the need for considering the evidence of both parties and failure to do is bad in law. This was underscored in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

See also ***Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported).*** The Trial Magistrate neither properly considered nor analyzed the defendant (appellant) evidence before making his decision. The importance of clearly analyzing and determining whether the evidence is acceptable as true or correct, was clearly discussed by the court in ***JEREMIAH SHEMWETA VERSUS REPUBLIC [1985] TLR 228,*** where it was held:-

> *"By merely making plain references to the evidence adduced without even showing how the said evidence is acceptable as true or correct, the trial Court Magistrate failed to comply with the requirements of Section 171 (1) of the Criminal Procedure Code Section 312 (1) of the Criminal Procedure Act, (1985) which requires a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of fact thereon".*

It was therefore expected of the Trial Court, to not only summarize but also to objectively evaluate the gist and value of the evidence of both parties, weigh it and give reasons for its decision on the judgment. The position was further clarified and underscored by the Court of Appeal in ***LEONARD MWANASHOKA V Republic Criminal Appeal No 226 of 2014*** (unreported) where the court observed that:

> *"first appellate court's failure to reevaluate the evidence of both the prosecution and the defence constituted an error of law".*

It is trait law that very judgment must be written or reduced to writing under the personal direction of the presiding judge or magistrate in the language of the court and must contain the **point or points for determination, the decision thereon and the reasons for the decision ,** dated and signed. The laws it is clear that the judge or magistrate must show the reasons for the decision in his judgment. The law is also clear on the contents of the Judgment. This is in accordance of **Order XX Rul.3** of the **Civil Procedure Code, Cap 33 [R.E.2002]**. Indeed **Order XX Rul.3** provides as follows:

> *"The judgment shall be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall be dated and signed by such presiding judge or magistrate as of the date on which it is pronounced in open court and, when once signed, shall not afterwards be altered or added to, save as provided by Section 96 or on review"*

It was therefore expected of the trial court, to not only summarize but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case and this is what evaluation is all about as underscored by the court of appeal in ***PRINCE CHARLES JUNIOR VERSUS THE REPUBLIC, Criminal Appeal No 1 of 2014*** (unreported). The position was further clarified and underscored by the Court of Appeal in ***LEONARD MWANASHOKA V Republic Criminal Appeal No 226 of 2014***

(unreported) where the court observed that:

> *"first appellate court's failure to reevaluate the evidence of both the prosecution and the defence constituted an error of law".*

The court of appeal also noted that in **PANDYA's** case, it was held that in affirming a conviction based on evidence which had not been duly reviewed, the first appellate court erred in law, and the conviction was found to be unsafe.

Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported), cited in ***YASINI S/O MWAKAPALA VERSUS THE REPUBLIC Criminal Appeal No. 13 of 2012*** where the Court warned that considering the defence was not about summarizing it because:

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

The Court in Leonard Mwanashoka (supra) went on by holding that:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken.* ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too****. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."* [Emphasis added]

In this regard, the trial court ought to have properly considered the appellant's evidence and weight that evidence vis-à-vis the prosecution evidence to satisfy itself if the prosecution proved the charges against the appellant. Thc law is clear that and it has occasionally held so by the court in various cases that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court.

The appellant also claimed the trial court failed to consider defence evidence. If one look at the judgment and proceedings it is clear that the Magistrate did not consider the defence evidence apart from just basing on the Plaintiff/respondent

evidence. My thorough perusal from the records shows that the Trial Magistrate did not at all consider and analyze the defence evidence. Indeed the Magistrate only discussed considered the evidence by the plaintiff/respondent and based her findings on the evidence of one side which was even watertight. This is bad in law is as it can lead to injustice to the other party that is the appellant in our case. It is a well settled principle that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. Such omission of ignoring the defence evidence had in many occasion been found fatal by the court of appeal as seen in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania observed and held that:

"It was a serious misdirection on the part of the trial Judge ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

Reference can also be made to the decision of the Court of Appeal in ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015,*** the court at Page 16 which highlighted on the importance of the court to consider the defence evidence. The position of the law is clear that that the judgment must show how the evidence has been evaluated with reasons. The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgment. It is clear from the records that the trial court did not subject the defence

evidence to any evaluation to determine its credibility and cogency. In my view, failure to consider defence evidence denied the appellant its legal rights.

The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgment. I wish to court some of the paragraph from which there Trial Magistrate extracted and composed his judgment as follows:

> *"the closure of the account has caused serious problem". The plaintiff fulfilled one condition of claiming them (special damages) but led no evidence to establish them. From all what I have explained, I am satisfied that the plaintiff has managed to establish claims against the defendant."*

Reading between the lines on the above paragraph, this statement under the above paragraph does not indicate as to how the Trial Magistrate came into that plain conclusion without giving his reasons. Again one could wonder as to how the court could have reached such conclusion without properly analyzing the evidence.
Reading between the lines on the above paragraph it cannot be said that those are the reasons that were based on the analysis of evidence to make the Trial Magistrate properly reach its decision. The records further show that the hon. Magistrate made his decision without properly analyzing evidence and giving reasons to the judgment. It is trait law that every judgment must be written or reduced to writing under the personal direction of the presiding judge or magistrate in the language of the court and must contain

the **point or points for determination, the decision thereon and the reasons for the decision,** dated and signed. The provisions of the laws are clear that the judge or magistrate must show points for determination, the decision thereon and the reasons for the decision in his/her judgment.

The trial magistrate at some point is also admitting that there was no clear evidence for the plaintiff's (respondent's) claim. For instance the trial magistrate at page 23 paragraph two is saying that and I quote:

> *"The plaintiff fulfilled one condition of claiming them (special damages) but led no evidence to establish them".*

Reading between the lines on the above cited paragraphs can it be said that the magistrate made his proper decision basing on the proper analysis of evidence based on the reasons?. The answer in my view is NO, since the magistrate contradicted himself and ended up by shifting the burden of proof from the plaintiffs (respondents) to the defendants (appellants). Instead of properly addressing the issue as to whether the plaintiff proved its case, the trial magistrate misdirected himself by shifting the burden of rove from the plaintiff/respondent to the appellant who was defendant. It appears the trial magistrate placed all the burden of prove to the appellant and exonerated the respondent. It appears the trial magistrate has in his mind that the defendant has the unlimited duty to prove that the plaintiff suffered damages after the alleged closure of the

plaintiff's account. It is a cardinal principle of the law that in civil cases, the burden of proof lies on the plaintiff and the standard of proof is on the balance of probabilities. This simply means that he who alleges must prove as indicated under section 112 of the ***Law of Evidence Act, Cap 6 [R.E2002],*** which provides that:

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person".*

The court in ***NATIONAL BANK OF COMMERCE LTD Vs DESIREE & YVONNE TANZAIA & 4 OTHERS, Comm. CASE NO 59 OF 2003( ) HC DSM,*** observed that:-

> *"The burden of proof in a suit proceeding lies on their person who would fail if no evidence at all were given on either side".*

Reference can also be made to the authorities from other jurisdiction. In a persuasive case of ***OGIGIE V. OBIYAN (1997) 10 NWLR (pt.524***) at page 179 among others the Nigerian court held that:

> *"It is trite that on the issue of credibility of witnesses, the trial Court has the sole duty to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the trial Court forms of them".*

I have gone through the judgment of the Trial Court and found that the trial magistrate neither made analysis of evidence nor gave reasons on his decision. On top of that my findings have revealed that there was no clear evidence at the trial court to make the

appellant liable for any damages alleged to have been suffered by the respondent.

The appellant has also claimed that the damages awarded by the trial court was not proved. There is no doubt that the law on the issue of general damages is now well settled. See ***BAMPRASS STAR SERVICE STATION LTD . v. MRS. FATUMA MWALE.*** This means that unlike general damages, the special damage must be specifically pleaded and strictly proved. While special damages may consist of "out-of-pocket expenses and loss of earnings incurred down to the date of trial, 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 is that did the court satisfy itself that there was a clear evidence that the appellant caused loss to the respondent that could justify the court to award damages?. A quick glance at the trial court cords, it is clear that, the trial magistrate didn't show how he made his decision on the award and the amount claimed without securitizing the evidence and if such amount was justifiable. Assuming that the plaintiff/respondent could have proved their claim, still it was not justifiable for them to be awarded such a huge and excessive amount without clear reason given by the trial magistrate.

The Judgment and any other order of the trial court is quashed and set aside. It is so ordered.

A. J. Mambi

Judge

28.08. 2020

Judgment delivered in Chambers this 28th day of August 2020 in presence of both parties.

THE HIGH COURT OF TANZANIA

A. J. Mambi

Judge

28.08. 2020

Right of appeal explained.

A. J. Mambi

Judge

28.08. 2020