IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 19 OF 2020

(Arising from the Judgment of the District Court of Ilala at Samora in Civil Case No. 159 of 2016 dated 06th March, 2016 before Hon. A.A. Sachore, **RM**)

SHOMARI KALAMBA ..... APPELLANT

VERSUS

ALLY MBWAMBO ..... RESPONDENT

JUDGMENT

28th Sept & 23rd Oct, 2020.

E. E. KAKOLAKI J

This is an appeal against the decision of the District Court of Ilala at Samora in Civil Case No. 159 of 2016 which was entered in favour of the respondent. Disgruntled the appellants registered their dissatisfaction by way of appeal in this Court equipped with five grounds of appeal in which leave of the court was secured to file and adopt as their amended memorandum of appeal going as follows:

1. That, the trial Magistrate erred in law and fact by ordering excessive damages compared to the injuries sustained by the respondent.

2. That, the trail Magistrate erred in law and fact for not considering the evidence of loss of anticipatory income which is not entertained by the law.
3. That, the Trial Magistrate erred in law and fact that, the respondent failed to prove evidentially how he got loss of future income.
4. That, the trial Magistrate erred in law and fact by maintaining the respondent's bill of costs which was badly framed also having omnibus amount.
5. That, the trial Magistrate erred in law and fact by entertaining the decree and judgment of the same court having two distinct dates which is illegal.

The appellant therefore prayed this court to dismiss the decree of the lower court and order that, it is incurable, costs of the appeal and any other order as the court deems fit to grant.

The background history of the suit that gave raise to this appeal can simply be narrated as follows. Before the District Court of Ilala at Samora in Crminal Case No. 228 of 2013 the appellant (DW1) together with one Godbless Thomas (DW2) were booked with an offence of Grievous Harm; Contrary to section 225 of the Penal Code,[Cap. 16 R.E 2002] for causing grievous harm to the respondent on the head and fingers using fits and kicks. After full trial the trial court on 24/03/2016 in it judgment found them guilty of the offence charged with, convicted and sentenced them to conditional discharge. Further to that it ordered each of them to compensate the respondent to the tune of Tanzanian Shillings one million five hundred thousand (Tshs. 1,500,000/=). The appellant in this appeal (DW1) managed to pay all

amount fo TShs.1,500,000/= except the 2nd defendant (DW2) who paid only Tshs. 600,000/=. The respondent being dissatisfied with the compensation awarded to him by the trial court in Criminal Case No. 228 of 2013, instituted a civil suit in the same court vide Civil Case No. 159 of 2016 this time claiming Tshs. 18,720,000/= as specific damage for not working for about 936 days of work due to the injuries sustained to him by the appellant and DW2, Tshs. 4,020,000/= as medical expenses incurred by him and general damages to be determined by the Court.

Respondent who testified as PW1 brought is court two witnesses PW2 and PW3 to prove that he did not work for 936 days from 2013 to 2016 (more than three years), thus loss of income to the tune of Tshs. 18,720,000/=. He also tendered in court medical prescriptions, x-ray pictures and PF3 which were admitted collectively as exhibit P1 while the picture showing his state when injured as exhibit P2. The appellant and 2nd defendant entered their defence as DW1 and DW2 respectively disclaiming the respondent's claims of losing income for more than three years and called in DW3 to corroborate their defence. At the conclusion on the 08/03/2018, the trial court in its judgment mistakenly dated 06/03/2016 found the claims proved against the appellant and DW2 and proceeded to award the respondent specific damages of Tshs. 2,166,000/= as medical expenses and Tshs. 18,720,000/= as compensation for 936 days which the respondent stayed without working. In addition to that an amount of Tshs. 7,000,000/= was awarded to the respondent as general damages as well as the costs of the suit. Discontented the appellant has come up with this appeal on the grounds afore stated.

When the matter came for hearing it was agreed by both parties that the same proceed by written submission. The appellant is represented by Mr. Michael Mteite, learned advocate whereas the respondent is enjoying legal aid of Legal and Human Rights Centre for the purposes of drawing documents only. In determining this appeal I will consider the grounds one by another. To start with the first ground Mr. Mteite, contended that the trial court erred in law and fact by ordering excessive damages compared to the injuries sustained by the respondent. He said the respondent's claims and the amount awarded for specific damages of Tshs. 2,166,000/= as medical expenses and Tshs. 18,720,000/= as compensation for 936 days for not working were not proved by the respondent before the court as well as general damages for Tshs.7,000,000/= which is in excess. According to him no documentary evidence was produced in court to support the claims apart from the outpatient card dated 25/09/2013 that disclosed that the respondent when treated and paid only Tshs. 10,000/= the injection, ampicillin, Panadol and T.T injection administered to him. So the awarded amount was on the higher side and not justified.

Countering Mr. Mteite's submission on this ground the respondent, citing the provision of section 61 of the Evidence Act, [Cap. 6 R.E 2019, submitted that unless the contents of the document are in issue, evidence may be given orally. He said, evidence was adduced by the respondent in court to prove how the loss of income was arrived at as well as the bill of costs which to him seemed right. That the trial court when deciding in respondent's favour was satisfied that it was undisputed fact the respondent was injured by the appellant and his fellow and incurred a total amount of Tshs. 2,166,000/=

as medical costs and Tshs. 18,720,000/= specific damages as compensation for staying without working. That the specific damages together with Tshs. 7,000,000/= as general damages makes a total of Tshs. 25,720,000/= and not Tshs. 27,720,000/= as claimed by the appellant. He therefore urged the court to dismiss the ground. In his rejoinder submission Mr. Mteite reiterated and maintained what he had stated earlier in his submission in chief.

Having visited the rival submissions by both parties on the first ground the issues for determination are two. **One**, whether the awarded damages were proved on the required standard. If the answer to the issue is in affirmative, the **second**, is whether the same was on the higher side as claimed by the appellant. On the first issue, it is a well settled principle of law that he who claims a refund must show the exact figure claimed and how he arrived to it. In this matter the respondent ought to show how he arrived to the total sum of damages he was awarded by the court. It is also trite law that the appellate court before interfering with the trial courts finding on award of damages must satisfy itself that there was either misapplication of principles of the law or some material factors or that evidence were not considered by the trial court. This position of the law was adumbrated in the case of ***Cooper Motors Corporation Ltd. versus Moshi – Arusha Occupational Health Services (1990) TLR 96*** the Court held:

> *"Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case....Before the appellate Court can properly intervene, it must be satisfied either that the*

judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

It is also trite law that is accessing both specific and general damages the same must be specifically substantiated to justify the award of the court. When discussing on the requirement of proof of specific and general damages the Court of Appeal in the case of **Rocky Beach Hotel Vs. Tanzania Revenue Authority**, Civil Appeal No. 52 of 2003 (CAT-unreported) had this to say:

"With regard to the law, it is trite law that specific or special damages as is the case with the theft of alleged 724.79 tons of steel bars and, or, loss of business caused by delay in supplying steel bars to the contractor for rehabilitating Rock Beach Hotel in Mwanza, must be specifically, substantiated to justify an award of damages. The Court held the same in the case of ***Tanganyika Bus Service Ltd. versus the National Bus Service Ltd. (1980) TLR 204 ; Juma Misanya and another versus Ndurumai (1983) TLR 245*** *and* ***Zuberi Augustino versus Anicet Mugabe (1992) TLR 137****, to name but a few authorities on specific damages."*

In this case the trial court in its judgment having evaluated the evidence of both side found that, the appellant and 2nd defendant (DW2) were to

compensate the respondent for medical treatment costs he incurred and the time he spent without working as a result of injuries caused by the defendants. The award of Tshs. 2,166,000/= as medical costs and Tshs. 18,720,000/= as compensation for not working for 936 days to the respondent by the trial court, I hold was not specifically proved. I am also mindful of the provisions of Section 110 of the Evidence Act, 1967, Cap 6 R.E. 2002 which places the burden of proof on he who alleges by stating *inter-alia*:

> *"110.(1) Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".*

It behoved the respondent in this case to prove by documentary or oral evidence that he incurred medical expenses to the tune of Tshs. 2,166,000/= and sufferd the loss of income for 936 days to the tune of Tshs. 18,720,000/= which was awarded to him. In his evidence the respondent apart from tendering outpatient department card, prescriptions, PF3 and picture as exhibits P1 collectively and P2, no payment receipts were tendered or oral evidence by the respondent specifically giving descriptions of the expenses incurred to justify award of Tshs. 2,166,000/= as medical expenses. Similarly no specific evidence was produced by the respondent to explain how much was he earning per day to justify the award of Tshs. 18,720,000/ for loss of income due to none working for 936 days. Lastly, is

general damages of Tshs. 7,000,000/=, which I also hold was not specifically proved. The trial court failed to state the factors that were considered to arrive to that figure. To let the judgment speak for itself I quote its excerpt at page 6:

> *"And this court is awarding the general damages to the plaintiff (respondent) to a tune of Tshs. 7,000,000/=."*

Had the respondent advanced any ground/reason supported with specific evidence to justify to the court's satisfaction of the factors to be considered, the trial court could have considered them before awarding the said amount as general damages. Since he failed to so do, I hold the trial court was not justified to award him the said amount of Tshs. 7,000,000/= as general damages. Having so found that the first issue is answered in negative, the second issue dies a natural death. This ground suffices to dispose of the appeal. I see no reason to consider other grounds as that will be an academic exercise which I am not prepared to venture into.

In the circumstances and for the foregoing reasons, I make the findings that this appeal has merit and is hereby allowed. The judgment of the trial court is quashed and the orders thereto set aside.

For the purposes of maintaining peace and harmony between the parties, I order no costs to any party.

It is so ordered.

DATED at DAR ES SALAAM this 23rd day of October, 2020.

E. E. KAKOLAKI

JUDGE

23/10/2020

Delivered at Dar es Salaam this 23rd day of October, 2020 in the presence of the appellant, the respondent and Ms. **Lulu Masasi**, Court clerk.

Right of appeal explained.

E. E. Kakolaki

JUDGE

23/10/2020