

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

AT DAR ES SALAAM

CIVIL APPEAL NO.145 OF 2020

HENRY RIMISHO MTENGA..... APPELLANT

VERSUS

AIRTEL TANZANIA LIMITED.....RESPONDENT

(Arising from the decision of the Court of Resident Magistrates of Dar-Es Salaam at
Kisutu)

(Mmbando, Esq- RM)

Dated 13th February 2020

in

Civil Case No. 120 of 2017

JUDGEMENT

26th May 2021 & 29th July 2021

Rwizile, J.

This is the first appeal. The appellant Henry Rimisho Mtenga, appeals against the decision of the Magistrate Court of Dar es Salaam at Kisutu, which dismissed his case for lack of merit. Factually, it was alleged by the appellant that on 20th October, 2016 and 21st October, 2016 at around 15hrs, his airtel sim card was swapped. His mobile network was disconnected, and this disaster went on to 1600hrs.

The appellant alleged, due to this disconnection he failed to attend 4 appointments to render church services. He looked for a mobile phone expert to have it fixed, in vain. Shockingly, at around 2300hrs on 20th October 2016, he was called by Ms Batilda Mally via his Tigo phone number, only to be informed there were some people using his airtel number to call and ask for money in his name. A total of 1,270,000/= were stolen.

He reported the incidence to Airtel offices at Morocco where he was informed that, his sim card was swapped by one of the workers. The officer who did so was called. The appellant had conversation with her. The appellant was then advised to report the incidence at the Osterbay police station, which he did. It was further alleged, airtel Tanzania refused to issue print out showing call history to the police. The appellant, by these acts, said his reputation was lowered because he has over 7,000,000 Christian followers who now questioned his integrity for what has happened.

He therefore decided to file a civil suit praying for special damages to the tune of 50,000,000/=, general damages of 100,000,000/= interest on special damages at the rate of 30% from October,2016 to date, interest on decretal sum at the courts rate of 12% from the date of judgement to the date of payment and costs to be borne by respondent. The case was heard, and after a full trial the same was dismissed. The appellant was aggrieved, he is now before this court appealing on five grounds that;

- 1. The learned trial magistrate erred in dismissing the appellant's claim*
- 2. the trial magistrate erred in law and facts by failure to consider, analyse and evaluate carefully the pleadings, evidence and*

testimonies of the appellant herein hence ended up delivering an erroneous and contradicting judgement.

- 3. the trial magistrate erred in law and facts in finding that the appellant should have invoked the provision of Order XI Rule 10 of Civil Procedure Code, Cap 33 R.E 2002 and makes the application for discovery of the documents before the trial court.*
- 4. the trial magistrate erred in departing from the framed issues.*
- 5. The trial Magistrate erred in law in finding that the appellant did not prove the damages suffered.*

He therefore prayed for this appeal to be allowed.

At the hearing the parties were represented. For the appellant was Mr Jamhuri learned advocate and for the respondent was Ms Latifa learned advocate. The appeal was argued by way of written submission.

Supporting the appeal, learned advocate abandoned ground four. He argued grounds one and two together that; since the trial court raised issues and the fact that the first issue was answered in the affirmative, according to him it is enough to make a negative inference on the respondent. He stated that, even if the trial court discredited the evidence tendered (Exh P1 and P2), still his view was, the same shows the conversation between Pw2 and the culprits at the time the said number was swapped. He argued more that, the appellant reputation was lowered by the contents of the said exhibits. He added, the same shows money was transacted on that day. He asserted further that, the trial court was wrong to hold that there was discrepancy in amount which was pleaded in the plaint and that on testimony. According to learned advocate, a total of 1,490,000/= was pleaded.

It was his argument on ground three that, the trial court erred in holding that, appellant was supposed to invoke O.XI rule 10 of the CPC. According to learned advocate, there were no documents in possession of respondent which was needed by the appellant. He said, the appellant tendered exhibits P1 and P2 which, he said, proved that appellant's sim card was swapped. He referred this court to page 10 of the typed judgement.

He argued, since it was coincided by the trial court that, the defendant interfered with the appellant transaction. It so, when the court determined the first issue. The learned advocate said, the trial court was supposed to hold, that the respondent had a duty of care towards the appellant, as her client. He relied on the case of **Bamprass Star Service Station vs Fatuma Mwale** [2000] TLR 390 at page 391. Mr Jamhuri was of the firm view that, after finding the respondent to have the duty of care, trial court had to assesses damages the appellant suffered.

Lastly on ground five, it was his submission that, the trial court erred in holding that, no damages were proved by appellant. He said, there are two types of damages, that is, special damages which were pleaded and proved by appellant at page 10 of the plaint. He added, exhibits were tendered by Pw2 at the trial showing the amount extorted in the name of the appellant. He stated furthermore that, for general damages they only need be pleaded. He said, the fact that Pw2 communicated with the culprit who condemned the appellant of bad character. According to him, the same is enough for the respondent to pay general damages. He then said, punitive damages are for deterring telecom companies from defrauding their clients as in the case of **Bamprass Star Services Station** (supra).

His prayer was for this court to vary the decision of the trial court and order that the appellant is entitled to damages to be assessed by this court with costs.

Disputing the appeal, Mr Nyika learned advocate submitted in the same manner as argued by the appellant. He stated, the first issue raised by the trial court was answered in affirmative. The trial court was satisfied that, the appellant failed to prove his case as per section 110 of [Cap 6 R.E 2019]. He asserted that, exhibits which were tendered at the trial did not show the date of the incidence nor the number which received the money. He also said, the evidence did not prove that the appellant's number was illegally swapped by the respondent.

It was Mr, Nyika's view that the use of the word affirmative by the trial court was surely out of context. According to him, it does not change the court reasoning and findings. He referred this court to page 8,9 and 10 of the trial court judgement.

As for ground three, learned counsel argued that, since the appellant accused the respondent for swapping his sim card, the learned advocate held the view that, the same had to prove his allegation. Arguing further, the trial court was right to suggest that, the appellant was supposed to invoke O.XI rule 10 of the CPC to ask for call history from the respondent. He stated as well that, the appellant's argument that trial court was not correct is misguided opinion on the appellant's party.

It was his argument further that, there was no dispute as to the documents in possession of the respondent. He said, the respondent

never interfered with appellant's transaction. He added, the respondent did not breach any duty of care towards the appellant.

It was his argument on ground five that; appellant failed to prove damages suffered. He said, the trial court was right to hold that, appellant was not entitled to damages. He stated more that, damages have to be pleaded and proved, as was stated in the case of **Cooper Motors Corporation (T) Limited vs Arusha International Conference Centre** [1991] TLR 165. He added that, the printouts which were tendered in court cannot in any way be proof of special damages that the appellant claimed to suffer.

The learned advocate submitted that, no evidence was adduced by the appellant to prove general damages. He said, for the same to be granted, the appellant ought to prove he suffered in the hands of the respondent. The appellant, he submitted, did not prove so. He stated, general damages are assessed by the court and that the quantum therefore cannot be specified by the party. He relied on the cases of **Zuberi Augustino vs Anicet Mugabe** [1992] TLR 137, **Anthony Ngoo and Another vs Kitinda Maro**, Civil Appeal No.25/2014 (unreported), **Kibwana and Another vs Jumbe** [1990-1994] 1 EA 223. He therefore prayed for this appeal to be dismissed with costs for lack of merit.

Having considered the rival submission of the parties and records of the lower court and after meditated the grounds of appeal, it is my humble view that, all grounds of appeal are referring to the issue, whether the appellant proved or failed to prove his case at the trial court.

It has to be noted that, the appellant accused the respondent for swapping his sim card. This act resulted into extortion of money by con

people who used the appellant's airtel mobile number. They asked people to send them money in the name of the appellant. He alleged that, a total of 1,490,000/= was stolen. He also said, he needs to be compensated, since his reputation was lowered for what he said was caused by defendant.

It is settled, in civil cases, proof is on the balance of probability, which means, the court is to measure which party has cogent case against the other. That goes in line with the principle of whoever alleges must prove, provided under section 110 and 111 of the Evidence Act, [Cap 6 R.E 2019] The principles have been cemented in loads of cases. As was stated by The Court of Appeal in the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha, Civil Appeal No 45/2015** at page 15-16 when sitting in Mwanza held that;

It is a trite law and elementary that he who alleges has a burden of proof as per section 110 of Evidence Act, [Cap 6 R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved.

From the foregoing principle of the law, it is my considered view that appellant had to prove if *it was the respondent who swapped his sim card*. It is on record that appellant alleged, it was the respondent's employee who swapped his sim card.

The fact which he said he was told by the receptionist of the respondent the day following the incident. For ease reference let the records speak for itself. At page 22 of the typed proceedings, appellant testified that;

On 21st October 2016 in the morning, I went to Airtel Morocco and reported the incidence. While at Airtel Morocco the customer care (receptionist) took my statements as well as my mobile phone number and entered the same in their system (computer) hence she asked "why the phone number swapped? it was done here (in this office) let me call the concerned person at the office number 10"

Depending on the testimony above, it is apparent that, appellant ought to have brought the said receptionist in court to testify on the same. Failure to do so renders, as far as this part of testimony is concerned, a hearsay evidence. As the matter of law, hearsay evidence is not admissible or rather has little or no evidential value at all. It cannot be the basis of the decision of the court. In the case of **Jepther Soka Sanani Vs The Standard Chartered Bank (T) Ltd**, Civil Appeal No. 16/2016 at page 8 the Court of Appeal held that;

*The above passages present no more than mere conjecture that the red flag against the appellant was raised by an unidentified female attendant. This piece of evidence is not, by any yardstick, cogent. Needless to say at this stage, **the appellant's assertion that the police told him that they acted at the bank's prompting is plainly hearsay.** [emphasis is added]*

As well, the law dictates that, oral evidence must be direct. As per section 62 of Cap 6 R.E 2019

62.-(1) Oral evidence must, in all cases whatever, be direct; that is to say-

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds

As for this case, it was alleged that the receptionist of the respondent saw that the appellant's sim card was swapped, in their office. It is therefore, as a matter of law, the one who qualifies to testify for the same in court. reference is made to section 62(1)(a) of the Act. it is also settled that, when a party failed to call an important witness in court for no good reason, an inference can be made that, if the said witness was to be called, he/she could have testified against the interest of the said party. The same was stated in the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 133, when it was held;

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 interests

It is on the record that, at the trial court appellant called one witness Pw2 (Batilda Mally) who testified to be conned by unknown people using appellant's airtel number. But she never testified to have known that, the respondent was responsible for the same. Neither did she say, if the said sim card was swapped. With due respect, I think the first thing was to establish the basis of the allegation. That is to say, the respondent swapped the appellant sim card, which resulted to what Pw2 suffered. Which as per my opinion was not established by the appellant.

As for the documentary evidence which were tendered (Exhibit P1 and P2) the same do not prove the allegation that, the respondent swapped the appellant sim card. That show conversations which fall short in proving the case. As stated before, I have the view that all grounds of appeal have no merit.

From the foregoing, I see no fault on the trial court decision. This draws me back to the question previously asked, which my answer is, the appellant did not prove his case at the trial. It is for the foregoing reasoning, I bound to dismiss this appeal for lack of merit with costs.

**AK Rwizile
JUDGE
29.07.2021**



 Recoverable Signature

X 

Signed by: A.K.RWIZILE