

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CIVIL APPEAL NO. 26 OF 2020
*(Arising from the Judgment and Decree of the Resident Magistrate
Court of Mbeya at Mbeya in Commercial Case No. 5 of 2019)*

FINCA MICROFINANCE BANK LTD.....APPELLANT

VERSUS

MOHAMED OMARY MAGAYU.....RESPONDENT

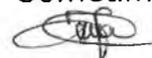
JUDGMENT

5th & 27th August, 2021

KARAYEMAHA, J

The appellant in this appeal impugns the decision of the Mbeya Resident Magistrate Court (Hon. D.G. Luwungo, RM) dated 21/8/2020 in Commercial Case No. 5 of 2019. The respondent sued the appellant for specific damages amounting to Tshs. 7,739,000/=, general damages amounting to Tshs. 50,000,000/=, interest and costs of the suit. The respondent was successful at the trial court. Distressed, the appellant has appealed to this court.

The material facts of the case as unveiled in the trial court record during the trial may be briefly recapitulated thus; the respondent is a long appellant's customer. He was borrowing money and repaying. Sometimes



in December, 2017 the respondent and the appellant entered into a loan agreement for an amount of Tshs. 70,000,000/= only (Tanzanian shillings seventy million only). According to DWI, George Paul (appellant's credit supervisor) the loan was extended to the respondent on 15/12/2017 after meeting all conditions. The respondent was guaranteed by Nadir J. Kawogo and Hosiana Frank Kionzo who, it is said, appended their signatures on the loan agreement. It appears that the loan was secured by Nadir J. Kawogo's property. On 22/12/2017 they disqualified themselves from guaranteeing the respondent. Since the respondent had not yet withdrawn the money, the appellant suspended the loan and disabled the respondent from withdrawing it. She quickly informed the respondent to find new guarantors. At the same time, according to the evidence on record, on 18/5/2018 the respondent paid Tshs. 7,739,000/= as costs for cancellation of the loan but was promised that it could be refunded. Before the respondent could secure people to stand as his guarantors, and withdraw the loaned amount and injecting it in his business, the appellant started deducting Tshs. 3,913,000.97 from his Mipango account as replenish of the loan on 15/1/2018 and 15/2/2018. The respondent made several demands to be refunded the deducted amount, but the appellant never reacted.

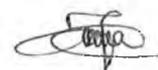


Consequently on 17/5/2019 FC Attorneys (advocates) upon the instruction of the respondent served the appellant with the demand note requesting to be paid Tshs. 8,293,600/=. The appellant did not pay. It is on the basis of the above that the respondent instituted a suit against the appellant in the Resident Magistrate Court for:

- 1. Payment of Tshs. 7,739,000/= as specific damages.*
- 2. Payment of Tshs. 50,000,000/= general damages*
- 3. Interest computed at the rate of 21% per annum being the commercial interest rate applicable from the date the cause of action arose to the date of payment in full.*
- 4. An order for the defendant for payment of interest on the principle sum at commercial rate from the date the filing the suit (sic) to the date of judgment.*
- 5. An order for defendant for payment (sic) of interest of 7% of the principle sum from the date of judgment to the payment in full.*
- 6. Costs of the suit to be met by the defendant.*
- 7. Any other relief(s) this Honourable Court may deem fit to grant.*

The appellant denied liability and challenged the claim made by the respondent. After hearing both parties, the trial court decided partly in favour of the respondent and awarded the following heads of reliefs:

- 1. Tshs. 20,000,000/= as general damages.*



2. Interest on the principle sum at the rate of 7% from the date of judgment to the payment in full.

The appellant was aggrieved by the decision of the trial court, hence this appeal. In her memorandum of appeal, the appellant advanced two grounds of appeal which read as follows:

- 1. That the trial Magistrate erred in law and fact by awarding payment of Twenty Million Tanzanian Shillings (Tshs. 20,000,000/=) as a general damage and 7% rate to the Respondent while there was no evidence, direct nor circumstantial, to justify he suffer anything.*
- 2. That the trial Court erred in law and facts by awarding general damages without giving reasons thereof.*

Owing to these grounds of appeal the appellant prayed this court to enter judgment in her favour with costs.

When the appeal was called on for hearing for hearing on 5/8/2021, the appellant had the services of Ms. Anna Samwel, learned Advocate while the respondent enjoyed the services of Mr. Alfred Chapa learned Advocate.

At the commencement of her address Ms. Samwel dropped ground two. She, therefore, submitted on the first ground only. In addressing the Court on the issue of general damages the learned counsel forcefully argued that in law they should not be pleaded because they are awarded



at the court's discretion after considering evidence of the plaintiff showing the intensity of loss suffered. She contended that there was no such evidence in the trial court to award specific damages. She finally prayed this court to interfere with warranting the award of Tshs. 20,000,000/= observing that the trial court acted on wrong principle of awarding general damages because according to her there was no direct or circumstantial evidence.

On his part, Mr. Chapa started by conceding that general damages are awarded at the discretion of the court and need neither to be proved nor pleaded. The learned counsel held the view that since the appellant started to deduct the money while the respondent had not yet started using the loaned money, the trial court was correct to award general damages. He stated that before the trial court had awarded general damages, it gave reasons. He referred this Court to page 10 of the judgment.

On the aspect of this court interfering with the awarded general damages, Mr. Chapa submitted vehemently that the court is curtailed to intervene with the awarded amount because 1st the trial court exercised its discretion properly, 2nd because of the appellant's wrong doing. He referred this court to an array of authorities. These include the case of **Tanzania Saruji Cooperation vs. African Marble Company Ltd.,**



(2004) T.L.R 155, **Cooper Motor Cooperation Ltd. vs. Moshi/Arusha Occupation Health Service** [1990] T.L.R 96, **Star General Insurance (T) Ltd. vs. Rai Suleiman & Another**, Civil Appeal No. 18 of 2019 at page 8, **Njombe Community Bank & another vs. Jane Mganwa**, DC. Civil Appeal No. 3 of 2015 at page 17.

On the contention by Ms. Samwel that since the trial Court did not award specific damages and so the respondent was not entitled to general damages, Mr. Chapa responded briefly that specific damages are different from general damages as the former need to be proved while the latter are awarded at the discretion of the court after considering the circumstances of the case. He referred this court to the cases of **Tanzania – China Friendship Textile Co. Ltd. vs. Our Lady of the Usambara Sisters**, [2006] T.L.R 76, **Tanzania – China Friendship Textile Co. Ltd. vs. Our Lady of the Usambara Sisters**, [2006] T.L.R 76.

Upon a careful perusal and consideration of the submissions by the parties I am of the considered view that the major issue is whether the trial magistrate applied proper principles in assessing general damages.

Happily, the area of damages is not a virgin one. A lot has been discussed through case laws and literatures. Legendary principles have been accentuated. I wish, now, to borrow the words of Lord Blackburn in **Livingstone vs. Rawyards Coal Company**, (1850)5 App. Case 25 at

page 39 which was quoted by Hon. Kihwelo, J. (as he then was) in **Njombe Community Bank & another vs. Jane Mganwa**, DC. Civil Appeal No. 3 of 2015 at page 17 where it was stated that damages are:

That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation.

In my view, therefore, damages are intended to put the party in the same position, as far as money can do so, as if his rights had been observed.

In this case I think the issue of special damages should not detain me. Principles governing this are, as alluded to above, are very clear and elaborative. The case of **Njombe Community Bank & another vs. Jane Mganwa** (supra) quoting the dictum of Mcnoughten in **Bolag vs. Hutchson**, (1950) AC 515 at page 525 promulgated the correct principle of law on specific damages which is universally accepted that special damages are:

"such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They



are exceptional in their character and, therefore, they must be claimed specifically and proved strictly”.

In 1992 the CAT celebrated the same principle in the case of **Zuberi Augustino vs. Anicet Mugabe**, [1992] TLR 137 and held that:

“it is trite law, and we need not to cite any authority, that special damages must be specifically pleaded and proved.

Similar position was accepted in the case **Tanzania – China Friendship Textile Co. Ltd** (supra) whereby the Court of Appeal of Tanzania discussed at length this issue that special damages need to be proved contrary to general damages which are awarded at the discretion of the court.

Having that stance, let me now turn to the award of Tshs. 20,000,000/= as general damages. As parties rightly argued, general damages are awarded at the discretion of the court. However, such discretion must be exercised judiciously that is by giving reasons after consideration of evidence in record. According to Lord **Macnaghten in Storms v Hutchison** 1905 A.C.515 *“general damages” are such as the law will presume to be the direct natural or probable consequence of the act complained of”.*



In a claim for general damages, particulars will not be needed of the quantum of damages claimed. (See **London and Nothern Bank Limited v George Newnes Ltd**, (1900) 16 TLR 433, CA. and **Anthony Ngoo and Davis Anthony Ngoo v Kitinda Kimaro**, Civil Appeal No. 25 of 2014) (unreported).

General damages are defined by **Black's Law Dictionary 7th edition** to mean:

"Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained".

Speaking of the general damages Lugakira, J (as he then was) stated in the case of **P.M. Jonathan v Athuman Khalfan**, [1980] TLR 175 at page 190 that:

"The position as it therefore emerges to me is that general damages are compensatory in character. They are intended to take care of the plaintiff's los of reputation, as well as to act as a solarium for mental pain and suffering".

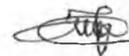
Nevertheless, in the case of **Tanzania Saruji Cooperation** (supra) The Court of Appeal of Tanzania stated:



"General damages are such as the law will presume to be direct natural or probable consequences of the act complained of, of the plaintiff wrong doing, therefore have been a cause if not the sole or a particular significant cause of damages."

In general, one key consideration in all these propounded principles is that general damages are awarded at the discretion of the court after the plaintiff has averred that he has suffered such damage of the act he is complaining of and that wrong must be caused by the defendant but the quantification of such damage is the court's question.

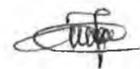
In the instant matter the appellant complained that he suffered damages due to the act of the appellant deducting the respondent's money from a different account of Mipango owned by him while the loan extended to him was blocked. Although Ms. Samwel argued that there was neither direct nor circumstantial evidence to prove the loss and therefore the trial court acted on the wrong principle, in my considered opinion, this argument is not backed up by evidence. There is clear evidence in the record that after the appellant had deposited money in the respondent's account and after his guarantors withdrawal, the appellant blocked the money. This means the respondent had no access to the money he needed for his business. The evidence shows further that during the



suspension of the loaned money, the appellant deducted the money from his Mipango account to replenish the loan which conspicuously was still under the control of the appellant. If the basis for contesting the award of general damages is a failure to give evidence in respect of the intensity of loss, and failure of the trial magistrate to exercise his discretion judiciously, then such contention is utterly flawed. I have closely gone through the trial court's judgment and found that the same establishes reasons on which the general damages were awarded. It stated:

"As has been found in the fourth issue that the defendant started to deduct money from the plaintiff's account before issued (sic) the loan. To my view that was wrong and since the plaintiff started to pay the loan even the same was not issued to him, no doubt it affected him economically/financially so to me he has to be redressed".

The trite law is that before awarding general damages the court must give reasons. In this case the trial court gave reasons for awarding Tshs. 20,000,000/=. It also appears to me that the trial court based its finding on the unchallenged evidence that the appellant started deducting the money from the respondent's account to repay the loan, that the



respondent complained but was not heard, that the conduct of the respondent affected his business and was psychologically affected.

The contention by the appellant that the respondent failed to justify his special damages and so that seriously affected the award of general damages is misplaced and very legally weak. As hinted above, the trite position is that unlike special damages general damages are in law presumed as long as there is a proof of the consequences of wrong doing. The law as it therefore emerges to me general damages are independent from special damages as one can prove the former but fails to give cogent evidence of the wrong doing.

Having settled this crucial issue, I now turn to the critical issue which is whether or not this court can intervene and re-assess general damages. Ms. Samwel argued that the trial Magistrate used a wrong principal to award the respondent Tshs. 20,000,000/= as general damages. She therefore urged this court as the 1st appellate court to intervene and assess the general damages awarded without direct or circumstantial evidence. Mr. Chapa in his laconic but focused response argued that this court cannot intervene and re-assess the general damages which were awarded at the discretion of the court. To fortify his position, he cited the case of **Cooper Motor Cooperation Ltd (supra)** 

In principle, the 1st appellate court is endowed with powers to intervene and re-assess the general damages on very strict conditions. In this I wish to be guided by the wisdom accentuated in the case of **Privy Council in Nance v British Columbia Electric Rally Co. Ltd**, (1951) AC 601 at page 613 it was stated as under:

*"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 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.."** [Emphasis supplied]*

This position was accepted by the Court of Appeal of Tanzania in the case of **Cooper Motor Cooperation Ltd (supra), Musa Mwalugala v**



Ndeshe Hota [998] TLR 4 and **Peter Joseph Kilibika & another v Patric Aloyce Mlinga**, Civil Appeal No. 37 of 2009 CAT (Tabora) (unreported).

Deducing from the above authorities, it is clear that in order for this Court to intervene and re-assess the general damages must be satisfied, in my considered opinion, of two crucial factors. Those are that the trial magistrate, in assessing the damages,

1. Applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one);
2. Awarded amount which is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

Testing these factors to the instant matter, I am of the view that they do not fit. This is because in consideration of the whole evidence it is apparent as hinted earlier on that the appellant extended the loan to the respondent with the intention of injecting the same in his business. Before the respondent could inject the loaned money so that he could get profit out of which he could replenish the loan, the appellant blocked the money on account of his guarantees disqualification. While the loaned money was still blocked, the appellant deducted the respondent's money from his Mipango account. Literally, the respondent was drowned into loss because as a business man his every shilling has a meaning. The respondent



struggled to approach and demand his money from the appellant in vain. This situation does not need one to be genius to figure out the inconvenience, mental agony, and uncertainties in the future of his business and managing his life and that of his family. All these being considered by the trial court, I find it useless to interfere with the amount of general damages awarded.

In the upshot, I find that the trial magistrate applied a proper principle of law and the general damages awarded are fair. Therefore, the awarded general damages of Tshs. 20,000,000/= remains undisturbed and other orders by the trial court are upheld. The appeal is dismissed in its entirety with costs.

It is so ordered.

DATED at **MBEYA** this **27th August, 2021.**



J. M. Karayemaha
JUDGE