

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

(PC) CIVIL APPEAL NO. 26 OF 2021

*(Arising from Magu District Court in Civil Appeal No. 35 of 2020,
Original Magu Urban Primary Court in Civil Case No 55 of 2020)*

MGEMA BENJAMINAPPELLANT

VERSUS

SARA JACOB.....RESPONDENT

JUDGMENT

24.08.2021&10.09.2021

M.MNYUKWA, J.

This appeal by Mgema Benjamin, is against the decision of Magu District Court awarded the respondent Sara Jacob Tsh 3,000,000/= being damages assessed at court's observation. Distressed by the decision of the District Court of Magu, by Hon. E.P Kente, Resident Magistrate dated 05/03/2021, the appellant has appealed to this Court and register the following ground of appeal on his own verbatim as follows:-



1. *That the trial court grossly erred in law and in fact for disregarding the appellant's evidence as yet convinced the first trial court that the case by the respondent on her party never proved on the balance of probability the same could suggests the inference as to a fact in issue (sic)*
2. *That the trial court erred in law and in fact for failure to consider that the respondent through her annexure marked 'B' which is PF3 that no any part written expert opinion that she injured as a result her tooth to be chopped (sic)*
3. *That on the other hand the trial court erred in law and in fact to award the respondent compensation of Tsh 3,000,000/= without reasoning as to whether or not she was entitled to be awarded (sic)*

The brief background of the matter are as follows: -

That the respondent instituted Civil Case No 55 of 2020 at Magu Urban Primary Court claiming total compensation of Tsh 12,000,000/= being compensation emanated from the disturbances caused by the appellant.

The distribution of the respondent's claims were as follows; Tsh 3,000,000/= being the compensation for uprooted her tooth, Tsh 3,000,000/=being the compensation for damaging her reputation and her freedom, Tsh 4,387,500 as a compensation for wastage the time of the respondent as she spent almost 325 days to attend at the primary court to prosecute her case instead of attending into her business in which she was earning Tsh 13,500 per day, Tsh 1,612,500/= as a disturbance for attending at Magu Primary Court and Magu District Court to attend cases.



The trial primary court decided that the respondent was not entitled to be awarded neither general damages nor special damages because she had failed to prove her claim. The respondent being aggrieved by the said decision, she filed appeal to the district court in which the court decided in her favour by awarded damages of Tsh 3,000,000/= being special and general damages. Unsatisfied with the decision, the appellant appealed to this Court advanced the aforementioned grounds of appeal.

The appeal was argued orally through audio teleconference where the parties were remotely present. In prosecuting this appeal both parties were unrepresented.

However, it turned to my mind that the appellant appealed against the decision of the first appellate court that is the District Court of Magu and not the trial court that is Magu Urban Primary Court as advanced in his grounds of appeal and his oral submission because the trial court did not decide in favour of the respondent. Being a layman and unrepresented, I understood that his aim was to appeal against the decision of Magu District Court.

Generally, the appellant's submitted that, he defaulted the first appellate court's decision because the PF3 did not show that the respondent was injured and he is not capable to pay the respondent as he fully depending to his parents. Apart from oral submission, in his



affidavit the appellant averred that the respondent failed to prove his claim on the balance of probability and that the first appellate court unjustifiably awarded the respondent compensation of Tshs 3,000,000/= without reasoning.

Responding, the respondent briefly contended that, the appellant's contention that he is a minor does not have leg to stand and that his parents should be responsible to pay the amount awarded by the court.

After considering the submissions of the parties, the main issue for consideration and determination is whether the appeal is meritorious

Having careful going through and made a thorough analysis of the memorandum of appeal, evidence on record, the judgement of the District Court well as the Primary court, and the submissions made by the parties, I would like to put it clear that the law is settled that the one who alleges must prove his allegation and the standard of proof in civil case is on the balance of probability.

Therefore, as far as the present appeal is concerned, it was the duty of the respondent to prove on the balance of probability before the first



appellate court that she had suffered damage or injury following the conduct of the appellant which entitled her to be awarded damages.

In the case of **Peter Joseph Kilibika and CRDB Bank Public Company Ltd vs Patric Aloyce Mlingi**, Civil Appeal No 37 of 2009, CAT at Tabora (unreported), the Court of Appeal of Tanzania when referring to the decision of Lord Blackburn in **Livingstone v Rawyards Coal Co** (1850) App. Case 35 at page 39 defines damages as

"Damages generally are;

The 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."

From the above definition, it is clear that the respondent owes a duty to prove that she had suffered loss of which she is now entitled to be compensated so as to be in her original position before the commission of the wrongful act of the appellant.

Going back to the appeal, it is the complaint of the appellant in his grounds of appeal through his petition of appeal that the first appellate court failed to consider that the respondent had failed to prove the loss or damage suffered on the balance of probability and that the

compensation of Tsh 3, 000,000/= was awarded without reasoning as to whether the respondent was entitled.

Upon revisiting page 3 and 4 of the typed judgement of the first appellate court, it reads as follows

"Further evidence disclosed that the appellant lost her tooth, she also suffered loss and as far as to be compensated she claimed Tsh 12, 000,000/=. To my observation these claims are both specific and general. It is a requirement of law that special damage must be specifically pleaded and proved."

The learned resident magistrate proceeded to remark that:-

"With these shortcomings I only award Tsh 3,000,000/= being the damages assessed at court's observation. Appeal partly allowed."

In the case of **Antony Ngoo and Denis Antony Ngoo vs Kitinda Kimaro**, Civil Appeal No. 35 of 2014, CAT at Arusha (unreported) it was stated that;

"The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign a reason which was not done in this case."



Furthermore, in the case of **Zuberi Augustino vs Anicent Mugabe** (1992) TLR 137 (CAT) the Court of Appeal of Tanzania pointed out that;

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

Guided by the above decisions, it was expected in this case that the first appellate court to articulate how the respondent had proved the general damages as well as the special damages before awarding the respondent such amount. As the law is settled that for the general damages though it is within the court's discretion, but when exercising that discretion there should be evidence on record to justify the award and should be supported with reason. For the case of special damages, it is a trite law that the same must be specifically pleaded and strictly proved.

In the instant appeal the respondent had produced only PF3 as documentary evidence to prove damages from the appellant's wrongful act. There is no any other documentary evidence to prove the general damages as well as special damages claimed of.

It goes without saying that even the PF3 which has been submitted do not show that the respondent's tooth was uprooted as she alleged and trusted by the first appellate court. The part of the contents of PF3 reads as *"translocation of the mouth but no teeth loose"*.



The above quoted words shows that the respondent did not lose any teeth from the complained act of the appellant. It is surprising for the first appellate court to decide that the evidence disclosed that the appellant lost her tooth. The question is which kind of evidence did the first appellate court relied on? I ask so because at the trial court's proceedings, specifically at page 4 the respondent though alleged that her tooth was uprooted, the only documentary evidence that she possessed was the PF3. When she was examined by the court' assessors as it is reflected on page 4 of the trial court's proceedings, the respondent admitted that she doesn't have any documentary evidence to substantiate her claim of Tsh 12, 000,000/= and that she claimed that amount because the appellant wasted her time, uproot her teeth and damage her reputation.

It is sufficed to say that, going through the available records, it is very clear that the respondent failed to prove her claim that her tooth was uprooted at the trial court and at the first appellate court. Looking at page 4 of the trial court judgement, the trial resident magistrate made the following observations;

"Mdai ameeleza kwamba anaomba fidia ya Tsh 3,000,000/= kama fidia ya kuvunjwa meno ameeleza kwamba mdaiwa alimshambulia



na kumvunja meno lakini katika kiambata B ambacho ni PF3 hakuna mahali daktari ameandika kwamba mdai amevunjwa meno bali PF3 hiyo imeandikwa hakuna jino lililong'oka wala kujeruhiwa."

It is very unfortunate that the alleged evidence which was considered to prove that the respondent tooth was uprooted by the first appellate court was not specifically stated.

On that basis and for the foregoing reason, I agree with the trial court findings' that the PF3 do not show that the respondent's tooth was uprooted and no any other documentary evidence which shows that she underwent medical treatment worth Tsh 3,000,000/=.

From the evidence on record, it is evident that the respondent did not prove how she suffered loss so as to be entitled to be awarded general damages as well as special damages. In its decision, the first appellate court awarded respondent Tsh 3,000,000/= being a special and general damages. Unfortunately, the decision is silent on what were the basis of awarding the said amount, while the respondent did not produce any documentary evidence apart from the PF3.

On close examination of the judgement of the first appellate court, I find that the resident magistrate admitted that it is a requirement of law that special damage must be specifically proved. But unfortunate and to my surprise on the same judgement when awarded compensation of Tsh

3, 000,000/= remarked that the above were the claim for both special and general damages.

As I have earlier pointed out, special damages must be proved specifically pleaded and strictly proved. Also, when the court is exercising discretionary power of awarding the general damages, the trial magistrate or judge is duty bound to assign reason(s) thereto.

In our case at hand the records shows that the special damages were not specifically proved, Therefore the respondent was not entitled to be awarded any special damages. The trial court judgement pointed out that;

" Mdai pia ameomba fidia ya Tsh 3,000,000/= kama fidia ya kumdhaliisha na kumpotezea sifa na uhuru, lakini Mahakama hii imeshindwa kuelewa huo uhuru ameukosa vipi wakati amekuwa huru kipindi chote akiendelea na shughuli zake kama kawaida. Shilingi 4.387.500/= kama fidia ya kumkosesha mdai kujihusisha na shughuli zake za kila siku kwa siku 325 kila siku shilingi 13,500/= toka tarehe 19/06/2019 mpaka tarehe 08/05/2020 kwa kuhudhuria Mahakama ya mwanzo Magu mjini, maelezo hayo yanaleta mashaka kwani hakuna shauri linaloendeshwa kila siku mahakamni kwa kipindi cha miezi kumi na moja mfululizo."

I fully subscribe to the trial court findings that, the respondent had failed to prove special damages but I also agree with the contention of



the appellant in his memorandum of appeal that the first appellate court did not assign reason(s) as to why the respondent was awarded Tsh 3,000,000/= being part of it as a general damage while it was not stated how much, and did not assign any reason as to how he reached such kind of a decision.

In the upshot, I find merit in the appeal and allow it. I proceed to quash the judgement and decree of Magu District Court dated 05/03/2021 which partly allowed the appeal. I do hereby uphold the judgement of Magu Urban Primary Court dated 18/09/2020.

No order as to costs. It is so ordered.

Right of appeal explained to the parties.




M.MNYUKWA
JUDGE
10/09/2021

Judgment delivered through audio teleconference in the presence of the respondent online and in the absence of the appellant.


M.MNYUKWA
JUDGE
10/09/2021