IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT MOSHI

CIVIL APPEAL NO. 10 OF 2020

(Originating from District Court of Rombo at Rombo in Civil Case No.05 of 2018)

BENJAMIN KAVISHE GABRIEL.....APPELLANT

VERSUS

HARMETI LUCA MASSAWE.....RESPONDENT

JUDGMENT

30/06/2021 & 13/08/2021

MKAPA, J

This is an appeal by the appellant, Benjamin Kavishe Gabriel against the the decision by the District Court of Rombo at Rombo (trial court) in **Civil Case No. 05 of 2018**. The facts of the matter in a nutshell is that the plaintiff (respondent herein) sued the appellant for a claim of shillings 36,337,225/= being loss occasioned by the appellant's negligence in the conduct of the business, interest at the commercial rate of 31% from the due date up to the date of judgment, interest of decretal amount at the court rate from the date of judgment to the date of satisfaction, general damages and costs of the suit. The respondent/(appellant herein) opposed the claim and trial ensued.

At the trial, the case for the plaintiff (respondent herein) was to the effect that, the appellant was employed by the respondent to run and supervise a shop dealing in a selling of spare parts situated at Tarakea area within Rombo District. The employment contrat was for the duration of one year renewable subject to the fulfillment of the contract terms. The contract (Exhibit P.1) was signed on 15/01/2016 and the amount of physical stock (spare parts) held in the shop was worth shillings 93,062,635/=. At the end of the year stocktaking was done in the presence of both the appellant and respondent in which a loss of shillings 21,337,225/= (Exhibit P.2) was discovered. According to the respondent, the appellant admitted to have caused the loss and agreed to pay for the loss to the tune of fifteen million shillings (Tshs.15,000,000/=) by installments and the same was reduced into writing. (Exhibit P.3). Later the appelant failed to honor the terms of the agreement. At the trial court the respondent summoned two witnesses to advance his claim. The appellant denied the claim and testified to the effect that he was employed by the respondent from the year 2012 to 2016. On 15/01/2016 he signed an employment contract. Among the terms of the contract included the fact that his salary would comprise of ¼ of the monthly profit and payment would be effected after closing the stocks. At the end of the year, stocktaking was done and the respondent informed him of the alleged loss. The appellant alleged that stocktaking was done by counting physical stock (spares parts) alone, but not against sale for the whole year as a result the figures did not tally. The appellant denied to have seen and signed Exhibit P.2 As regards Exhibit P3 the appellant alleged the same to have been prepared by the respondent and the appellant was forced to sign at a gunpoint. That, due

to the threat, he had to agree to pay the loss by installment and signed the document.

In the end judgment was entered in favour of the respondent to the tune of Shillings 21,337,225 being loss caused; interest as prayed; general damages amounting shillings ten million (Tsh. 10,000,000/) and costs of the suit. Dissatisfied, the appellant preferred the instant appeal on the following grounds: -

1. *That, the trial court erred in law and in fact in holding that the appellant had caused loss in respondent's shop in the course of his employment without the respondent adducing evidence in proving the loss.*
2. *That the trial court erred in law and in fact in awarding the respondent damages which were neither specifically pleaded nor proven.*
3. *That the trial Magistrate entered judgment in favour of the respondent without being proven on the standard required in civil suit.*
4. *That the trial Magistrate erred in law and in fact in invertinvg her own facts to justify her decision instead of being bound by parties' pleadings and evidence adduced during trial.*
5. *That, the trial court erred in law in arriving at a conclusion and basing the decision on assumptions not pleaded by parties without affording parties an opportunity to address on the same.*
6. *That the trial court erred in law and in fact in failing to analyse the evidence tendered in court by the appellant hence reached an erroneous decision.*

When the appeal was called for hearing Mr. Elibariki Maeda, learned advocate appeared for and represented the appellant, while Mr. Kapimpiti Mgalula, also learned advocate represented the respondent.

Submitting in support of the appeal Mr. Maeda prayed to argue the 1st and 3rd grounds jointly, and the rest to argue separately. He submitted on the first ground that the respondent claimed against the appellant in the 3rd paragraph of the plaint which constitutes the cause of action that;

"the plaintiff claims against the defendant the total sum of shillings 36,377,255/= being loss occasioned by the defendant's negligence in the conduct of the business".

It was Mr. Maeda's contention that going through the facts that constitute the cause of action, the respondent alleged that the said loss was occasioned during the period of 15th January 2016 up to 15th January 2017 as per the plaint. That, the said shop did worth shillings 93,062,635/= (Exhibit P.1) He went on explaining that, in paragraphs 8, 9 and 10 of the plaint the respondent alleged that there were two losses occasioned by the appellant. The first loss could be traced from paragraph 8 of the plaint and was discovered on 2nd day of December 2016 amounting Tshs. 21,337,225/= while the second loss in paragraph 10 was said to have been discovered on 3rd December 2016 a day after the 1st loss amounted to Tshs. 15,000,000/=. He contended that from the two losses the respondent claimed for a total sum of shillings 36,337,225/=. The learned counsel emphasized the fact that parties are bound by their pleadings and are required to prove their claim. In support of his contention he relied on the decision in the case of **Masolele General Agencies V. African Inland Church Tanzania (1994) TLR 192 (CA).** The learned counsel went on arguing that the trial court's typed

proceedings revealed that, the respondent and his witnesses were unable to strictly prove how the appellant had negligently caused the loss in the respondent's business. That, what the respondent did at the trial was to tender Exhibit P2 and P3 and referred the same as evidence in proving the said loss. He challenged the trial magistrate for not analyzing Exhibit P.2 while composing her judgment. The learned counsel went on analyzing the items appeared in Exhibit P.2 and submitted that according to the interpretation of Exhibit P.2 the amount of shillings 21,595,740/= was never explained at the trial nor in Exhibit P.2. It was Mr. Maeda's contention that no loss was occasioned if the amount did tally with the expenditure. That, the respondent was expected at the trial court to have explained how did he arrive at the said figure but unfortunately no explanation was given.

Furthering his argument the learned counsel explained albeit briefly his own understanding on how loss is calculated in a simple business namely by subtracting total expenses away from total income and if the expenses are greater than the income it amounts to a loss. He argued that at the trial the respondent never explained how much was the income for the sales in order for the court to ascertain whether the business was operating at a loss or otherwise. The learned counsel referred the court to page 21 of the typed proceedings while the respondent was being cross-examined on the sale figures for the year 2016 when he responded "*the proof of what was the sales for the year is not here but can bring that book*". It was Mr. Maeda's view that from such testimony it was difficult to ascertain the exact sales figures. He further cited paragraph 3 of the contract (Exhibit P1) which required sales figures to be stated but the respondent neglected to bring the same before the court. He

maintained that the claim by the respondent as awarded by the trial court was never proven as per the required standards.

Arguing on the 4th ground of appeal, the learned counsel referred to pages 3 and 4 of the trial court's judgment and submitted that the trial Magistrate was of the opinion that the evidence tendered at the trial court and the stocktaking document did analyze how the loss of shillings 21.6 million was arrived at, the fact that was never pleaded in the respondent's plaint nor testified during the trial. He further added that even the figures which the trial magistrate treated them as loss (Exhibit P.2) is in fact a projected profit which later was termed as a loss and yet the figures were silent on how they were arrived at. That the same were new facts which the trial Magistrate ought not to have considered in arriving at her decision.

On the 5th ground of the appeal, the learned counsel challenged the trial court in finding that the loss was occasioned by the appellant and yet the appellant was not given an opportunity to bring any information to counter the same. It was Mr. Maeda's view that the evidence of PW2 was just an opinion that the appellant had started similar business close to the respondent's place of business thus it was wrong for the trial Magistrate to conclude the fact that the appellant business was from the monies obtained from the respondent's business.

Lastly, on the 6th ground of appeal, the learned counsel submitted that it was clear from the judgment that the evidence tendered by the appellant was never analysed or evaluated by the trial Magistrate. He thus prayed for the court to re-evaluate the evidence adduced before the trial court and allow the appeal.

Responding, Mr. Mgalula, opposed all the grounds of appeal as meritless thus cannot fault the decision of the trial court. Arguing on 1st and 3rd grounds of appeal, the learned counsel submitted that the standard of proof in civil suit is provided for under section 3 (2) (b) of the Law of Evidence Act Cap.6 [R.E 2019] named, the balance of probability. He contended that it was not disputed that Exhibit P.1 is an employment agreement between the appellant and respondent. He referred paragraph 4 of the contract and the fact that the terms were not disputed by the appellant. He went on submitting that, the appellant was handed over the shop business on 15/01/2016 after stock-taking as evidenced by Exhibit P.2 and the appellant acknowledged the current stock/capital amounting to shillings. 91,554,535/=. That, it was very unfortunate that the counsel for the appellant was trying to mislead the court by introducing his own figures. He went on submitting that the actual loss of Tshs.48,151,395/= stated in the third line of Exhibit P.2 was arrived at after deducting initial stock from the actual stock as of 02/12/2016. That, the calculations made, were so clear till the end when the total loss was arrived at shillings 21,337,225/= of which the appellant on 02/12/2016 acknowledged to have occasioned the loss amounting shillings 21,337,225/= due to negligence. That, on the following day on 03/12/2016, the appellant wrote a letter to the respondent proposing for repayment schedule of the loss amount as reflected in Exhibit P.3. The learned counsel wondered as to why the appellant had to write a letter proposing for the repayment of the loss amount had he not been responsible for causing the loss. It was Mr. Mgalula's view that, this is as good as acknowledging to have willfully occasioned the loss and more so, there was no proof that he reported the matter to the police.

As to the ground that the trial Magistrate invented her own facts to justify her decision, Mr. Mgalula vehemently denied the allegations as misconceived. That, even PW3 who was present at the time of stocktaking testified the fact that stocktaking was done to ascertain the physical stock thus the allegation by the appellant's counsel was a mere afterthought and the same should be dismissed.

Regarding the 6th ground that the trial Magistrate erred in not analyzing the appellant's evidence tendered in court thus reached an erroneous decision, Mr. Mgalula asserted that this ground is meritless as the evidence adduced by the appellant was based on a story telling with no proven facts. In support of his contention he placed reliance on the case of **Sluis Brothers (E.A) Ltd vs. Mathias Tawari Kimtomari (1980) TLR 299** at page 294. He finally prayed for the court to dismiss the appeal in its entirety with costs.

Rejoining, Mr. Maeda reiterated what he had earlier on submitted in submission in chief. He explained further that, this being a civil case and the respondent being the one who claimed loss of business, the respondent had to prove the same as he who alleges must prove. More so, in his defence the appellant refuted to have signed the letter acknowledging the loss and that he was forced to sign at gun point but the same was not analysed by the trial court's judgment. The learned counsel refuted the counsel for the respondent's allegations that he had misdirected the court the fact that, the trial magistrate had arrived at a wrong decision from her own facts that, after the appellant had occasioned the loss he utilized the monies to establish a similar business. Mr. Maeda referred the court to page 6 of the trial court's judgment and insisted that this fact was never pleaded by the respondent.

Finally, Mr. Maeda prayed for the court to analyse and evaluate exhibit P2 and allow the appeal.

I have heard rival oral submissions of learned counsels for the parties and carefully perused the record. As the first appellate court, it is well settled that the role of this court is to revisit the evidence on record, evaluate it, and reach its own conclusion.

At the trial court, three issues were framed; that whether there was loss occasioned by the defendant; whether the process leading to loss was lawful, and to what relief(s) are parties deserve. According to the evidence on record, it is not disputed by both parties that the appellant was an employee of the respondent. That he was once a casual employee of the respondent and on 15/01/2016 he signed an employment contract (Exhibit P.1) to run and supervise the spare parts shop. Clause 4 of the contract reads as follows in Swahili language;

> *"Kwamba Mwajiriwa amekabidhiwa duka na Mwajiri lenye dhamana ya kiasi cha MILIONI TISINI NA TATU NA ELFU SITINI NA MBILI MIA SITA NA THELATHINI NA TANO TU."*

A reading of the aforementioned paragraph it is undoubtedly that the appellant was handed over the shop with capital stock worth shillings 93,062,635/=. As per the terms of the contract, the appellant had to run and supervise the shop for one year and at the end stock taking would take place. Additionally, the contract contained a commitment clause to the effect that the employee (appellant) would be liable for any loss that may occur during the whole period of the contract.

Dispute arose at the end of the year when the appellant and respondent conducted a joint stocktaking exercise. According to the testimony of PW1

the stock taking involved physical counting of spare parts leaving aside reject spares and in the end a loss amounting of shillings 21,337,225/= was discovered. The stock taking exercise was witnessed by PW3, Gasto Peter Assenga who was responsible for arranging items in the shop. More so, even the appellant in his testimony did not deny to have participated in stock taking on the material day. The question that arised is whether there was a loss that was occasioned by the appellant. To advance his case the respondent tendered Exhibit P2 to prove how the appellant occasioned the loss. The same was admitted while the appellant's counsel did not object. When cross-examined the respondent testified to have involved the appellant in stocktaking exercise by physical counting of the remaining stocks from the opening stocks. (Exhibit P.2). On a perusal of Exhibit P2 it is plain clear that, on 15/01/2016 the value of the stock (capital) was to the tune of shillings 91,554,535/= and at end of the year on 02/12/2016, the balance was shillings 43,403,140/=. While expenditure for the whole year from 15/01/2016 to 02/12/2016 amounted to shillings 41,239,910/=. Thus, subtracting the balance from the capital and minus expenditure what remained is a loss of shillings 6,911,485/=. The loss was thereafter added to the expected profit of shillings 21,595740/= and the balance was deducted from the appellant's previous debt of Tshs. 6,875,000/= and finally arrived at the total loss of Tshs. 21,632,225/=. As per the record all the calculations were made in the presence of the appellant who admitted to have occasioned the loss and appended his signature.

From the foregoing enumeration this being a civil case, I am satisfied that the respondent managed to prove his case at the required standard namely on balance of probability as opposed to proof beyond reasonable

doubt in criminal case. It is on record that the stock taking exercise was done without any threat or coercion to the appellant as the appellant failed to prove otherwise. Upon being cross-examined the appellant admitted to possess a knowledge in business at the level of a college, which implied that was conversant with stock taking process. The appellant denied to have signed exhibit P2 but failed to adduce any cogent evidence to prove that his signature was forged as the same resembled the signatures appended to exhibits P.1 and P.3 respectively. The counsel for the appellant had contended that the respondent ought to have analyzed further Exhibit P.2 by giving evidence on details of the sale transactions. My view is, the same ought to have been disclosed by the appellant to counter the respondent's evidence since the appellant was entrusted with the running and supervision of the shop business for the whole year.

It is trite principle of the law that parties are bound by their pleadings and what is not pleaded cannot be granted. This position was propounded in the case of **Makori Wassaga V. Joshua Mwaikambo and Another (1987) TLR 88**

The respondent specifically pleaded in paragraphs 8 and 9 of the plaint, that the stock taking exercise had discovered a loss of shillings 21,337,225/. This fact was supported by the appellant's testimony and that of PW3 also Exhibit P.2. As I mentioned earlier Exhibit P.2 was admitted into evidence without objection while the respondent acknowledged to have occasioned the loss.

The respondent in paragraph 10 of the plaint, pleaded that the appellant did occasion another loss of shillings 15,000,000/=. It was the respondent's testimony that on 02/12/2016 the appellant agreed to pay the loss of shillings 15 million by installment. The agreement (Exhibit P.3)

was signed and witnessed by PW2 and PW3 respectively. The appellant claimed that he was forced to sign the documents at gunpoint. The law is well settled to the effect that, whoever alleges must prove. The case of **Abdul-Karim Haji V. Raymond Nchimbi Alois and Joseph Sita Joseph (2006) TLR 420** had referred this principle and emphatically observed:-

> ***"It is an elementary principle that he who alleges is the one responsible to prove his allegation."***

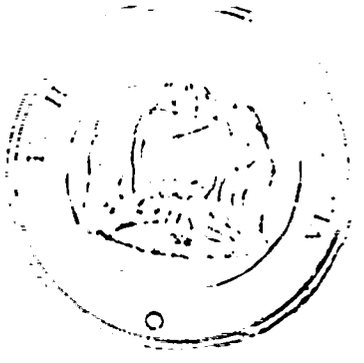
When cross-examined at the trial court, the appellant admitted to have signed the documents but did not report he matter to the police that he was threatened at gunpoint. Since no evidence was adduced in support of the appellant defence, his defence amounts to mere afterthought.

Additionally, the respondent was able to clarify on the claims stated in paragraphs 8, 9 and 10 of the plaint. When cross-examined he clarified that the total claim of shillings 36,337,225/= was just advocate's slip of a pen of which I do agree as the respondent was able to prove that the appellant did occasion a loss of shillings 21,337,225/= which later appellant prayed to repay shillings fifteen million (Tshs. 15,000,000/=)

As to the allegations that in arriving at her decision the trial magistrate considered the evidence of PW2 that he was told by the appellant that he used the monies to open up a similar business close to the respondent business, it is on record that the same is reflected in the judgment of the trial court without proof from either party. I therefore discount the evidence, though the remaining evidence on record as explained above suffices.

For the reasons discussed above, I found no ground to fault the decision of the trial court. Consequently, the decision of the trial court is upheld and the appeal is hereby dismissed with costs.

It is so ordered.



S.B. MKAPA

JUDGE

13/08/2021