IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CIVIL APPEAL NO 11 OF 2020

(Arising from the Judgment and Decree of the District Court of Masasi, before Hon. B.K Kashusha-Rm in Civil Case No. 03 of 2018, Dated 28th May 2020)

BENO KASMIR MWAMBE..... APPELANT

VERSUS

THE REGISTERED TRUSTEES

OF ST. BENEDICT HOSPITAL .....RESPONDENT

JUDGMENT

Last Court Order dated: 22/06/2021
Judgment date on: 05/10/2021

NGWEMBE, J.

This appeal emanates from the judgement and decree of Masasi District Court whereas, the appellant was ordered to pay the respondent a total sum of TZS. 39,972,684/= as compensation for the expenditure spent by the respondent, for studies of the appellant, TZS. 50,000,000/= as loss of business, general damages of TZS. 50,000,000/= and costs of the suit.

Being dissatisfied with such judgement and decree, the appellant preferred an appeal to this court. At this juncture, it is important to trace just briefly on the genesis of this appeal.

The dispute arose from in-service contract of sponsorship to study Master of Medicine. Such contract was executed between the disputants on 17/09/2010. Among the terms and conditions of that contract, required the respondent to sponsor the appellant for the whole period of the appellant's Master degree course of medicine on Obstetrics and Gynecology. The appellant likewise, was obliged to complete his studies and work with the respondent for the period of seven (7) years. Later that period was reduced to five (5) years consecutively. Failure of which, the appellant would refund the whole costs/expenditure incurred by the respondent.

As per the available records, the respondent complied with all contractual obligations by sponsoring the appellant 90% of his basic salary for the whole period of three (3) academic years, that is, direct and operational college costs. In turn the dispute arose when the appellant either by design or by default, decided to breach such contract immediate after completion of his studies. Deliberately, decided to work with the respondent for only one year out of the agreed five (5) years consecutively. The process of breach of that contract, commenced by applying for unpaid leave of one year, which he was granted. After elapse of that one-year unpaid leave, the appellant did not return to work, instead, he tendered resignation letter by way of an email, meanwhile he failed to refund the respondent as per the contract.

Thereafter the respondent preferred an action against the appellant in a court of law, for deliberate breach of the executed contract. Hence, the trial court was satisfied that, the appellant deliberately breached the contract, consequently, award the respondent all what was prayed for.

Being dissatisfied with that judgement, the appellant preferred this appeal clothed with eight (8) grievances to wit:-

1. The trial Magistrate erred both in law and in fact in admitting in evidence exhibit P1 and relying on it in his judgment;
2. The trial Magistrate erred both in law and in fact in holding that both parties agreed to have entered into agreement of sponsorship;
3. That the trial Magistrate erred in law by his failure to find that the amended plaint was filed out of time;
4. That the trial Magistrate erred in law and fact in awarding the sum of TZS. 39,972,684 as costs incurred in sponsoring the defendant and the sum of Tanzania Shillings 50,000,000 as loss of business to the plaintiff;
5. The trial magistrate fundamentally erred in law and fact in assessment and thereby awarding general damages to the plaintiff;
6. The findings and decision of the trial court is not supported by evidence on record;
7. That the trial Magistrate erred in law by holding that the plaintiff and St. Benedict Ndanda Hospital are one and the same, thereby disregarding the principle of separate legal entities;
8. In alternative to the grounds raised here in above, the trial Magistrate erred both in law and fact in not deciding that the cause of action was time barred.

On the hearing date of this appeal, both parties procured representation of learned counsels, while the appellant was represented by learned advocate Deogratius Kapufi, the respondent enjoyed the legal services of Joseph Mhenga, learned Advocate. The learned counsels, successfully and unanimously prayed to dispose of this appeal by way of written

submissions. This court appreciates for their well-researched written arguments.

In the course of submission, the appellant abandoned ground 3 and 6, while combined grounds 1, 2, and 7, and argued separately grounds 4,5 and 8.

Advancing the arguments on grounds 1, 2, & 7, the learned advocate submitted rightly, that the whole dispute is centered on a contract for sponsorship of in-service training, where the appellant was sponsored to study Master's Degree on Medicine, specialized on Obstetrics and Gynecology, (exhibit P1). According to the contract, the appellant entered into an agreement with St. Benedicts Hospital Ndanda "Ndanda Hospital" which was signed and stamped by doctor in-charge of St. Benedict Hospital Ndanda.

He contended that, the appellant objected to the admissibility of the said contract by fronting three grounds; however, the trial court, over ruled them by insisting that Ndanda Hospital and trustees of St. Benedicts Hospital Ndanda (the respondent) is like a sister and brother, and applied the principle of agent/principal relationship. Also cited Article 107 (2) (e) of the Constitution to admit that contract.

Submitted further by referring this court to page 8 of the impugned judgment by asking as to whether there was a valid contract between the disputants? The direct answer by the trial court was that both parties agreed to have entered into an enforceable contract.

The counsel cited sections 10 and 11 of the Law of Contract, Act Cap. 345 R.E 2019 to wit competence of the parties to contract are provided for.

According to him, the contract subject of this dispute was not signed by the respondent, rather was signed by Ndanda Hospital.

The counsel was of the view that, despite the allegation in the plaint, the plaintiff submitted no evidence to prove that he was trading under that name of St. Benedict Hospital Ndanda on behalf of the respondent, let alone his witnesses testifying on that point.

The learned advocate further referred this court to section 8 of the Trustees' Incorporation Act Cap. 318 R.E. 2002 (The Trustees Act). Also draw the attention of this court to section 12 (1) of the Trustees Act. Maintained that, there is no connection between the respondent and St. Benedict Hospital Ndanda, hence the contract was not valid.

In alternative, he argued that, even if there was connection between the respondent and St. Benedict Hospital Ndanda, yet the contract should not have been admitted in evidence, since it was not appended in the amended plaint contrary to Order VII rule 14 (1) of Civil Procedure Code (CAP 33 R.E 2019). In his view, since the earlier filed plaint to which the document was earlier on appended was no longer material after amending that plaint. This was decided in the case of **Ashraf Akber Khan Vs. Ravji Govind Varsan, Civil Appeal No 5 of 2017 (CAT)** (Unreported) at page 10. Insisted that the respondent did not show any reason, let alone good cause as required under Order XIII Rule (2) of the CPC as to why he could not produce the said document at the first hearing.

Responding to the combined grounds 1, 2, & 7, the learned advocate for the respondent strongly contended that, these grounds are recklessly baseless and should be disregarded by this fountain of justice. First an

objection to admission of a document is a point of law, particularly the Evidence Act. However, the appellant has failed to cite a single section of law, which was violated in the course of production and admitting exhibit P1. Second, the question of competence of parties to contract is a matter of evidence which may better be dealt with at the evidence stage. Third, the sponsorship agreement in question was attached to the amended plaint. As rightly decided by the trial court. The said document was attached to the amended plaint as found in the court file/records, which are considered to be the most authentic records as far as the case proceedings are concerned.

Further submitted that, the disputants executed a contract at the time the appellant applied for sponsorship to pursue further studies. Being an employee of the respondent herein, he was qualified for such sponsorship and after completion of his studies he ought to work with the respondent as agreed in the executed contract.

Argued further that, the respondent managed to substantiate the validity of exhibit P1, by showing the original contract, appellant's salary, pay slip, and sponsorship transactions. The appellant accepted and acknowledged receipt of such funds, which were directly flowing into his personal account from the respondent (sponsor). Therefore, argued that the first question to ask is whether the contract was valid or invalid, quickly answered that the contract was valid until at the time when the appellant illegally terminated it, he added.

Responding on Trustees Incorporation Act, the learned counsel for the respondent strongly blamed the appellant for his wilful misrepresentation of the Act. Referred to section 8 (1) (b) of the Act

which provide categorically that immediate upon incorporation the ***Trustees shall have powers to sue and be sued in such corporate name.***

To support this argument, he cited the case of **KANISA LA ANGLICANA UJIJI VS. ABEL S/O SAMSON HEGUYE, Labour Revision No 5 of 2019**, (HC Kigoma) (Unreported), whereby the court held that, societies as legal person is capable of being sued or sue in its incorporate name. Further the court provided a legal advice to the entrusted bodies to administer justice, should always ensure that, when artificial person sues or be sued it should do so in its incorporation name, not otherwise.

The learned counsel maintained that the registered trustees of St. Benedict Hospital Ndanda are the sole owner of the Hospital and that Dr. Incharge signed the contract on behalf of the Trustee. The doctor incharge is an official appointee of the Trustee who signs all documents including contracts for the hospital.

With regards to proof of documentation related to trading name, the respondent submitted that, this is also a new issue, which was not raised during trial. Otherwise, he is estopped to raise new issues on appeal which were not raised and determined during trial.

Amplifying on the second ground of appeal which is ground four in the memorandum of appeal, the appellant contended that, the trial magistrate erred in law and fact in awarding TZS. 39,972,684 as expenditure and costs incurred in sponsoring the Appellant, and the sum of Tanzania shillings 50,000,000/= as loss of business to the respondent.

The counsel specifically referred this court to page 4 of the amended plaint where the respondent merely claimed TZS. 39,972,684 as expenditure and costs incurred in sponsoring the appellant without specifying the same. He cited the case of **Nkupa Tanzania company Ltd V. NMB Bank Public company & Another:** civil Case No 179 of 2019 (H.C) (unreported). Where it was held that,

> "..... *Therefore, a mere assertion of specific loss without particulars of such loss does not in any way convert it to substantive claim but rather anticipated damages"*

On loss of business, the learned advocate submitted that, while cross examined, PW2 admitted to have failed to prove loss of business. Thus the respondent failed to prove special damages on the standard required.

Responding on this ground of appeal, counsel for the respondent argued that, special damages is awarded by the court where the plaintiff has pleaded and successfully proved to the standard required by law. The respondent proved same before the trial court.

He further submitted that, an appellate court can interfere with the issue of award of damages only upon proof that the trial court misdirected itself in analysis of evidence and any other serious misdirection occasioning miscarriage of justice.

Unfortunate the appellant failed to advance any of them which can move this court away from the long established and cherished taboo of not intervening with the findings of facts of the trial court.

Considering holistic on the grounds of this appeal, I find certain issues are not disputed neither during trial nor in this appeal. First, the appellant was an employee of St. Benedict's Hospital Ndanda Mtwara, which is a registered trustee under our laws, which acquired legal personality. As a legal entity, cannot operate itself, rather operates through human beings entrusted by that legal person to perform duties on behalf of the trustee.

Undoubtedly, the appellant as a Medical Doctor was employed by that Trustee, worked in Ndanda Hospital under supervision of Doctor Incharge of St. Benedict's Hospital Ndanda. That the appellant being in service, he successfully applied and admitted for further studies under sponsorship of the employer. This point has been a subject of dispute in this appeal, however looking on the pleadings at trial, it is evident in paragraph 3 of the amended plaint that the in-service training contract was annexed, marked DJ 1 whose contents is partly quoted hereunder:-

> *"This agreement is made between the student Dr. Berno Kasmir Mwambe and St. Benedict's Hospital Ndanda whereas the hospital offers sponsorship to the student's training course as Master of Medicine – Obstetrics & Gynaecology. Both sides agree to the sponsored in-service training on the following terms*
>
> *"**The Hospital provides**: 90% of the basic salary; direct and operational college costs according to BUCHS joining instructions; student costs according to BUCHS joining*

instructions excluding the costs for meals, which will be covered by the student himself"

"The student certifies that after his studies he will give service to the hospital for a period of 7 (seven) years. If he resigns or is dismissed from work he will be liable to refund the hospital the expenditure of the sponsorship in proportion to the total period, which falls short of 7 (seven) years. The total expenditure are the costs incurred by the hospital in connection with the studies including any sums paid to him by way of salary, allowances, fees, transport or other expenses"

The said contract was signed by Doctor incharge and stamped by stamp of St. Benedict's Hospital Ndanda Mtwara Region, also the employee Dr. Berno Kasmir Mwambe, likewise, signed against his name.

Moreover, the records evidence that, annexure DJ 2 to the amended plaint is a letter of the appellant written to "Mganga Mkuu Hospitali ya St. Benect, Ndanda" dated 21 July, 2010 whose contents was to ask for leave to attend master course at Bugando.

Upon refreshing to those two documents, it is evident that the disputants executed a binding contract bearing conditions to each party as quoted herein above. I therefore, need not to labour much on whether the disputants executed a binding contract or otherwise. The documents speak themselves, undisputed, the binding contract was executed willingly by both parties.

Notably, it is a settled law in our jurisdiction that, parties are bound by their agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as alluded in the case of **Abualy Alibhai Azizi Vs. Bhatia Brothers Ltd [2000] T.L.R 288** at page 289 thus: -

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) of misrepresentation, and no principle of public policy prohibiting enforcement"*

With the same spirit of sanctity of contract and being mindful with the undisputed existence of that contract, I am reluctant to accept the appellant's allegations of unenforceable contract or questioning the existence of the employer. Assuming this court may accept the appellant's argument that the Doctor incharge of St. Benedict's Hospital Ndanda has no capacity to execute such contract. Such argument has the following interpretations; first St. Benedict's Hospital Ndanda as a registered trustee under Trustees Incorporation Act operates through human being like Doctor Incharge whom the appellant himself wrote a letter looking for permission to pursue further studies. Second, the appellant is questioning his employer that had no capacity to employ him, also may be interpreted to deny his own letter dated 21 July, 2010, which was addressed to the same Doctor incharge as quoted above.

Third, the appellant must clearly demonstrate how he managed to leave employment and who sponsored him for further studies at Bugando if not the employer. Forth he will be denying his own signature to the

executed contract. If so, he ought to have employed law enforcers on the forged contract as quoted herein above. For these reasons, I think this court cannot dare to venture to the appellant's argument on this ground rather I would agree with the learned advocate for the respondent that the appellant freely entered into that agreement with his sound mind.

More so, the contract entered between the disputants had all attributes of a valid contract. Since it was not prohibited by the public policy and it is on record that, the appellant was not complaining about his consent to be obtained by coercion, undue influence, fraud or misrepresentation in order to make it voidable in terms of the provisions of section 19 (1) of the Law of Contract Act, Cap. 345 R.E 2019. I therefore, wish to emphasis here that, since the appellant at the time he concluded such contract with the respondent was a free person and he was of sound mind, he should not be heard complaining against it.

Considering on the challenges raised by the appellant in regard to special damages, likewise, damages, generally means a 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. This position has survived a long test, since the pronouncement of Lord Blackburn in **Livingstone Vs. Rawyards Coal Co. [1850] 5 App. Cas. 25** at page 39.

In the same vein, Asquith, CJ. in **Victoria Laundry Vs. Newman [1949] 2 K.B. 528 at p. 539** said damages are intended to put the

plaintiff in the same position, as far as money can do so, as if his rights had been observed.

The same principle was adopted by the Court of Appeal in the case of **Peter Joseph Kilimbika & CRDB Bank Public Company LTD VS. Patric Aloyce Mlingi Civil Appeal No. 37 of 2009 (CAT - Tabora)**, the Court defined damages as follows;

> *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.*

Therefore, it is settled in our jurisdiction that, be it special damages or general damages saves the same purpose of compensating the injured person and put him to the position he was prior to injury.

However, special damages must always be proved specifically, and strictly. Lord Macnaghten in **Bolag Vs. Hutchson [1950] A.C. 515** at page 525 - laid down what we accept in our jurisdiction as the correct statement of the law 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 specially and proved strictly"*

Applying such principle, the Court of Appeal of Tanzania in the case of **Zuberi Augustino Vs. Anicet Mugabe, [1992] T.L.R 137,** at page 139 held:-

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved. The question then is whether the special damages of USD 3,360.00 were specifically pleaded and proved"*

In similar decision in year 1994 the same Court repeated the same pronouncement in the case of **Masolele General Agencies Vs. African Inland Church Tanzania, [1994] T.L.R 192** held:-

> *"Once a claim for a specific item is made, that claim must be **strictly proved**, else there would be no difference between a specific claim and a general one; the Trial Judge rightly dismissed the claim for **loss of profit** because it was not proved"*

In the present Appeal, the trial court awarded specific damages to the tune of Tsh. 39,972,684. During trial, the respondent in establishing and proving the allegations of such amount, first same amount was pleaded in paragraphs 4 and 10 of the amended plaint, which attached copies of the bank statement indicating total expenditure and costs incurred by the respondent in sponsoring the appellant for his master's course. More so, exhibit P4, (bank pay in slip) indicates the flow of money from the respondent to the appellant constituting a total sum of TZS. 39,972,684/=

The question remains, whether the respondent during trial specifically pleaded and proved special damages of TZS. 39,972,684/=? The quick answer without laboring much on it, is in affirmative. The evidence adduced during trial, left no doubt the respondent spent such amount of money to sponsor the appellant in his further studies with anticipation of having a specialist on Obstetrics & Gynaecology at its Hospital St. Benedict's Hospital Ndanda. In this ground I uphold the decision of the trial court.

Concerning loss of business, the trial court awarded TZS. 50,000,000/= as loss of business from the date of termination to the date of filing the suit and to the date of final payment. Gleaned from the impugned judgment, loss of business, must be established and proved by producing satisfactory evidences.

It is a cardinal principle of law in our jurisdiction that, the standard of proof on civil matters is on the balance of probability and that, he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2019]. This principle was well expounded in the case of **Paulina Samson Ndawavya Vs. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017** (CAT), at Mwanza.

Guided by the principles above, obvious the respondent failed to establish and prove to the balance of probabilities the claim of loss of business. Consequently, this ground of appeal has merits same is answered in affirmative.

Considering on the claim for general damages, the appellant rightly argued that, general damages are in the discretionary powers of the trial court, thus interference of the same is limited as enunciated in

the case of **Cooper Motor Corporation Ltd Vs. Moshi/Arusha Occupational Health services (1990) T.L.R 96 (CAT).** Where the Court alluded that, in assessing damages, the trial court applied wrong principles of law (as taking into account some irrelevant factor or leaving out of account some relevant one) or short of that, the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

The learned advocate for the appellant argued quite strongly that, the trial magistrate in awarding general damages took into account irrelevant factors.

Argued further by relating to validity of the contract itself. Advanced a logical argument that, since the claim for general damages is pegged on restitution in *integrum* and since there existed no contractual relationship between the parties to this case, then the respondent could not have been injured by breach of a none existing contract and the trial court erred in placing the none injured respondent to a position it never had.

Intelligently argued as alternative, that assuming the respondent was entitled to damages, still the quantum of damages was exorbitantly high because the value of TZS. 39,972,684/= does not bear any relationship with TZS. 50,000,000 /= general damages.

In responding to this argument, the counsel for the respondent contended that, the appellant deliberately breached fundamental terms of sponsorship agreement, thus caused injuries to the respondent, hence the trial court was right to award general damages as it was stated in the case of **Mwalwange Vs. Mwalwajo 1972 HCD No 78**

whereby **Mwakasendo, J** (as he then was) held that there is no entitlement to damage without a proof of loss or injury.

I have cautiously perused the records of the trial court for the sake of understanding the gist of the appellant's argument in this ground. Notably, general damages are at the discretion of the court and they are compensatory in nature. They need not to be established and proved. The aim of awarding general damages is to restore the injured party to the position he was prior to the injury. This principle was well articulated in **Tanzania China Friendship Textile Co. Ltd Vs. Our Lady of Usambara Sisters [2006] T.L.R 70.**

Further, in the case of **Cooper Motor Corporation Vs. Moshi Arusha Occupational Health Services** (supra) it was pointed out that, in claim of general damages, particulars of quantum of damages won't be required. In respect to this appeal, the respondent quantified general damages to the tune of TZS. 50,000,000/=. The same was awarded, but strongly protested by the appellant in this appeal. The question is whether this court may alter the quantum of TZS. 50,000,000 awarded by the trial court.

The records of trial court indicate that, after completion of the appellant's studies, he worked with the respondent for one year, thus fall short of four years as per agreement. It means, if damages, the respondent suffered for only four (4) years out of the agreed five (5) years.

In the circumstances of this appeal, I agree with the arguments of the learned advocate for the appellant that, the quantum of damages awarded by the trial court, were exorbitantly high. Though the

respondent was entitled for general damages, yet the amount awarded by the trial court was arrived upon wrong application of legal principles.

Accordingly, this ground of appeal has merits.

The last ground of appeal on time limitation, though forcefully argued by the learned advocate for the appellant and strongly counted by the counsel for the respondent, I think I need not to labour much on it. The document speaks louder on this issue. Out of the available documents, obvious the court cannot be misled by legalistic arguments, rather will apply the facts as they are.

It is evident that parties executed a binding contract between them on 17th September 2010 as per exhibit P1. Accordingly, the appellant was duty bound to work with the respondent for five (5) years after completing his master's course. Instead the appellant after his studies, he worked with the respondent for only one year contrary to the agreed contract. As a process of his resignation, first he took unpaid leave of one year dated 01/11/2014 expecting to report on duty on 01/11/2015. Instead of reporting to work, the appellant wrote resignation letter (exhibit P3) on 30/10/2015. One may ask if the resignation letter was dated 30/10/2015, how could then the cause of action be on June 2011? This cannot be better than calculated misleading of this fountain of justice.

Rightly so, learned advocate for the respondent is correct to argue that the cause of action arose upon the appellant's resignation on year 2015. Since the suit was instituted in year 2018, it means it was within the statutory time limitation of six years. Hence this ground lacks merit and is hereby dismissed.

In totality, this appeal is partly allowed and partly dismissed. For clarity, the special damages of TZS. 39,972,684/=is sustained as per the trial court's decree, also the general damages is reduced from TZS. 50,000,000 to TZS. 15,000,000/ payable to the respondent. Moreover, the claim for loss of business of TZS. 50,000,000/= awarded by the trial court is dismissed and lastly the suit was instituted in court timeously. In this appeal, it is just and equitable to order each party to bear his own costs.

I accordingly Order.

P.J. NGWEMBE

JUDGE

05/10/2021

Date:05/10/2021

Coram: Hon A.H. Msumi, DR

Appellant: Mr. Steven Lekey, Advocate for the Appellant

Assisted by **Lightness Kikao**, Advocate

Respondent: Absent

B/C: Asha-RMA

Court: Judgement delivered in chamber in the Presence of Mr. Steven Lekey, Advocate Assisted by Lightness Kikao, Advocate for the Appellant and in absence of the Respondent.

A.H.Msumi

DEPUTY REGISTRAR

5/10/2021