IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CIVIL APPEAL NO. 11 OF 2021

(Arising from Civil Case No. 3/2020 of Resident Magistrate Court of Kigoma, before Hon. K.M. Mutembei – RM)

DHL EXPRESS TANZANIA LIMITED..... APPELLANT

VERSUS

ELIAS SIMBA t/a SMART FISH EXPORTER. ..... 1st RESPONDENT

MADUA SHABANI M/s IRHAM TRANS EXPORT ..... 2nd RESPONDENT

ATHUMAN NYAMITWE t/a MBWANA FISH

PRODUCT EXPORTER .....3rd RESPONDENT

JUDGEMENT

16/5/2022 & 13/6/2022

L.M. MLACHA, J

The respondents, Elias Simba t/a SMART Fish Exporter, Madua Shabani M/S IRHAM Trans Export and Athumani Nyamitwe t/a MBWANA Fish Product Exporter filed a case at the Resident Magistrates Court of Kigoma at Kigoma against the appellant DHL Express Tanzania Ltd Claiming specific damages Tshs. 52,765,276/=, general damages for breach of contract Tshs 20,000,000/=, interest at the rate of 22% and thereafter interest at the court rate of 7% and costs of the case for failure on the part of the appellant to

transport fish products and clothing materials to different destinations in Europe, Canada and the US. The trial Magistrate (Keneth Mutembei SRM) found that there was breach of contract but had the view that the respondents could not prove the claims for special damages as presented. He found that there was proof of specific damages at Tshs 17,566,700/= and USD 3,651 only. He awarded the amount with interest on the decretal sum of the rate of 7% from the date of judgment till the date of payment in full. He declined to make an award for general damages. Aggrieved, the appellant has now come to this court with 6 grounds which read thus;

1. The trial court erred in law and in fact in declaring that the appellant had breached the terms and conditions of the contract with the respondent herein;
2. The trial court erred in law and in fact in holding that the appellant was responsible and liable to the defects of the fish transported;
3. The trial court erred in law and in fact in holding that the respondents had proved their case on balance of probabilities;
4. The trial court erred in law and in fact by failure to evaluate and consider the evidence adduced by the appellant and in not according weight to the evidence and testimony of the appellant;

5. The trial court erred in law and in fact in ordering the appellant to compensate the respondents TZS 17,566,700/= and US$ 3,651 being specific damage allegedly suffered by the respondents which were neither pleaded by the Respondent nor made an issue for determination; and,
6. In arriving in its decision and findings, the trial court erred in law in failing to consider and take into account the applicable and relevant air carriage conventions, laws and regulations.

The appellant was represented by Mr. Renatus Lubango while the respondent had the services of Mr Daniel Rumenyela. Hearing was done by oral submissions through our court virtual Services.

Before going to examine the submissions, a bit of the summary of the evidence adduced at the lower court may be useful. The evidence is reproduced in brief as follows. The evidence of PW1, Elias Simba, PW2 Japhet Samson and PW3 Ahmed, PW4 Frank Festo and PW5 and the exhibits P1, P2, and P3 (the Airway Bills) show that there was an agreement between the parties to transport the fish consignment to various destinations in US, Canada and Australia. The goods were inspected by PW4 and PW5 who are fisheries officers and passed to be fit for export. The consignments had dried

fish. Their value and the shipment charges are reflected in the Way Bills for each consignment. They were moved by air to Dar es salaam on their way to their respective destinations. The Way Bills show their destinations and the date of execution of the contracts which were 13/5/2020, 28/5/2020, 29/5/2020,30/5/2020, 2/6/2020, 3/6/2020 and 6/6/2020.

PW1, PW2 and PW3 said that after payment of transport charges and dispatch of the parcels, they went home believing that the parcels could reach their respective destinations as agreed. There was a period of silence in between. On inquiry, they were told that their parcels had been found with maggots (funza) and destroyed by the food authority of Kenya. They were not convinced of the answers hence the case.

DW1, Fide Nyarenda and DW2 Stanslaus Mokiwa told the court that the parcels arrived in Dar es salaam and later sent to Nairobi Kenya on transit to their respective stations. While in Nairobi, they were inspected by the food authorities of Kenya and seized. They were there after destroyed. They all said that the business is delicate and need care. They tendered minutes of meetings conducted between them and the respondents (Exhibits D1 and D2) in which they educated the respondents of the need to ensure that the fish is smoked and dried properly. They said that if the fish had maggots

they are nowhere to blame. They tendered the seizure form and the destruction certificate (Exhibits D3, D4 and D6). They said that the appellant has protection under clause 10 of the Way Bill agreement. They denied being in breach. They denied liability.

Mr. Renatus Lubango opted to join grounds one and two. He submitted that the findings of the lower court that there was breach of contract lacked legal base. He referred the court to the Way Bills, exhibits P1, P2 and P3. Each has 15 clauses, he said. Counsel submitted that the lower court did not show the clause which was breached. He went on to say that the Cargo was transported from Kigoma to Dar es salaam and then abroad through Nairobi. When the fish reached Nairobi the relevant authority saw them with Maggots and ordered them to be detained pending destruction. They were later destroyed. He said that there was no breach because the appellant was in the process of transporting them.

Counsel went on to say that the problem of decay was inherent in the fish themselves because fish was subject to decay. He referred the court to article 18(2) (a) and (b) of **the Convention for the Unification of Certain Rules for Intentioned Carriage by Air**, Montreal Canada of

20/5/1999 which was ratified by Tanzania in 2003 and said that it gives exemption for liability to air carrier against damage or loss caused to the luggage. He added that article 19 gives exemption and liability due to delays. He proceeded to say that loss was caused by The Ports Health Authority of Kenya who said that the fish had decayed. It said that they had to be destroyed and that was done. He concluded that the appellant shifted the Cargo as agreed and that if there was any loss, then it was caused by the authorities not the appellant. He attacked the respondents saying that they are the ones who did the parking not the appellant.

Submitting on grounds 3,4 and 6, counsel submitted that there was no proof that the appellant had breached the contract because the evidence did not speak anything about the clothing materials. On the other hand the fish did not reach its destination because they had decayed. The appellant could not control the situation, he submitted.

Submitting on ground five, counsel had the view that there was no specific proof on the claims for specific damages. He referred the court to **Zuberi Augustino v. Anicet Mugabe** [1999] TLR 137 and **Febronia William v.**

Israel Robert, (DC) Civil Appeal No. 25 of 2017 for guidance on this matter. He argued the court to vacate the decision of the lower court with costs.

It was the submission of Mr. Daniel Rumenyela that the lower court was correct to hold that the appellant breached the contract of transporting the fish to Europe and USA. He said that PW4 and PW5 who are fish experts proved that the appellant received the fish from the respondents in a good condition. Even DW1 agreed that he received the fish in a good condition. Counsel argued that the appellant agreed that the fish was going to Canada, USA and Australia, not Nairobi Kenya. He wondered why the goods were sent to Kenya and Honkong instead of USA, Canada and Australia. He argued that sending them to Kenya and Hongkong was a breach of the contract.

In ground 5, counsel had the view that the respondents proved the case through the Way Bills. That, the award made in Tshs was in respect of transport while the award made in USD was on the value of the goods. He added that it is the appellant who caused the loss by passing at the route which was not agreed.

Submitting in rejoinder, Mr. Renatus asked the court to examine the evidence of PW5 about the certificate of inspection. He said that the fish could be damaged any time. He added that the certificate was valid for 7

days only. He invited the court to see the evidence of PW3 as well on this aspect.

I had time to study the grounds of appeal closely. As is reflected in the submission of parties, we have two main issues for consideration. One, whether the appellant breached the contracts and two, whether there was good evidence to justify the award of specific damages.

I will start with the first issue. I agree that the base of the relations between the parties is the WAYBILL. There is where we get the names of the parties, the destination, the amount of money paid as shipment charges and the declared value. We also get the 15 terms and conditions. I agree that fish transportation needed care. The minutes tendered show that the parties had a meeting to discuss the business. They agreed that fish should be transported in good condition. The Way Bills show that the fish consignments were received by the appellant between 13/5/2020 and 6/6/2020. Many of the parcels were received between 28/5/2020 and 3/6/2020. Evidence of both parties show that they were in a good condition.

The seizure form 'B' shows that 95 pieces of the consignment weighing 2,277.5 kg was seized on 5/6/2020. That was within a short period of time after leaving Kigoma. Comments made by the police read "*Dried fish on*

transit from Tanzania. Not properly dried hence presence of maggots". The letter from the NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY of 9th June 2020 addressed to Gateway Operations Manager DHL Express Kenya Ltd reads in part as under;

> ***'RE: DISPOSAL OD DRIED FISH ON TRANSIT FROM TANZANIA***
>
> *The National Environment management Authority (NEMA) acknowledge receipt of your letter dated 8th June 2020 on the above subject matter...the Authority recommends that the condemned dried fish* ***be disposed of through high temperature incineration****...Kindly ensure you obtain a certificate of Destruction from the Incineration Facility'.(Emphasis added)*

The Tracking Document from Green City Incinerators Ltd dated 15/10/2020 reads in part as under:

> *'I certify that I have received the waste as described in A and B at 10.46 hours on 15/10/2020'.*

Meaning that, they received the consignment for destruction on 15/10/2020. The company did the job and issued the Destruction Certificate (exhibit D5). It reads in part as under:

'This is to confirm that we have disposed off by incineration 2,277.5 KGS OF DRIED FISH from DHL WORDLWIDE EXPRESS KENYA LTD PO BOX 67577-00200 NAIROBI ***Between 15th October 2020 and 15th October 2020****.' (Emphasis added)*

This shows that the consignment was received on 15th October 2020 and destroyed on the same day.

The above evidence shows that NEMA recommended the dried fish to be disposed of through high temperature on 9/6/2020 but could not be sent to the Incinerators up to 15th October 2020. I get difficulties to believe this evidence. It does not sound logical to hear that the fish consignment found with maggots (funza) on 5/6/2020 and recommended to be destroyed with high temperatures on 9/6/2020 could not be destroyed until 15/10/2020. If the fish had maggots and was dangerous for health hence liable for destruction by high temperatures, why did it take so long for them to be destroyed? I could expect the whole process to be finalized by 10/6/2020 or soon later but not 4 months later. I get serious doubts with the whole process. I think that there is a high possibility that the consignment stayed long in Nairobi for reasons which could not be disclosed to the respondents thereby undergoing the natural process of decaying. I think that is the reason why the appellant did not communicate the fact to the respondents at an

early stage. I doubt the Seizure Form and letter from NEMA. They appear to have been made to justify the process.

On the other hand I think that there was no full disclosure that the consignment was to pass in Nairobi and spend time before being sent to the destinations. The Way Bills which are standard forms contracts prepared by the appellant do not show that there could be a transit zone in between. The evidence on record does not show this element. It follows that the appellant offloaded the consignment in Nairobi without an agreement with the respondent thereby causing a delay and damage to the fish.

With this finding, both clause 10 of the Way Bill and articles 18 and 19 of the Convention for the Unification of Certain Rules for International Carriage by Air Montreal, 28 May 1999 cannot assist the appellant for they are not there to protect transporters who are not honest. It is thus my finding that the appellants breached the transport agreement and caused loss to the respondents.

I will now more to the second issue; proof of damages. The respondent prayed for Tshs 52,765,276/= specific damages and Tshs 20,000,000/= general damages. I agree that special damages must be proved strictly. Together with cases cited by counsel for the appellant in the course of his

submission, see also, **M/S Universal Electronics and Hardware (T) Limited v. Strabag International Gmbh (Tanzania Branch),** CAT Civil Appeal No.122 of 2017 page 10 and **Harith Said Brothers Company v. Martin Ngao** (1981) T.L.R. 327 page 332. The trial magistrate appears to have the principles in mind though he did not say. He had the view that the respondent failed to prove the claim of Tshs 52,765,276/= but proved a lesser sum. He had found that they proved Tshs. 17,566,700/= being transport expenses and USD 3,651 being the value of the fish. He had in mind the way bills, exhibits P1 collectively as the proof.

I had time to examine the Way Bills (27). They all show what was paid as transport costs and the value of the fish. The appellant has no problem with the Way Bills. He accepted them. He made reference to them in the course of giving evidence and submission. It is therefore correct to say that the Way Bill documents have evidence which is accepted by both parties. That evidence prove strictly the amount paid by each as transport costs and the value of the fish. That is exactly what was awarded by the trial court. There was therefore strict proof in the standard required for proof of specific damages.

That said, the appeal is found to be devoid of merits and dismissed. Costs to follow the event. It is ordered so.

Sgd: L.M. MLACHA

JUDGE

13/6/2022

Court: Judgment delivered through the court virtual services. Right of Appeal explained.

Sgd: L.M. MLACHA

JUDGE

13/6/2022