THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CONSOLIDATED APPEAL NO. 5 & 7 OF 2021

(Originating from the court of Resident Magistrate of Mbeya at Mbeya in Civil Case No. 47 of 2019)

CHINA RAILWAY SEVENTH GROUP CO. LTD..... APPELLANT

VERSUS

EDWARD MBILINYI.....RESPONDENT

JUDGMENT

Date of last order: 16th June, 2022

Date of judgment: 29th July, 2022

NGUNYALE, J.

The appellant was successfully sued by the respondent for tortious liability which caused the destruction of the respondent's house and other properties via Civil Case No. 47 of 2019. He was ordered to pay general damage and costs of the suit. The judgment did not please either party. The appellant filed memorandum of appeal via Civil Appeal No 5 of 2021 filed on 10th June, 2021 whereas the respondent also preferred the appeal registered as Civil Appel No 7 of 2019 lodged on 13th July, 2021. For the avoidance of confusion, the title of the appellant and respondent in the appeal, will remain the same in the appeal by the respondent.

Briefly, the appellant is the construction company which was awarded a tender to excavate water drainage system at Mapambano Streat within the City and Region of Mbeya. During construction the appellant generated mass soil which he dumped in the existing water system which was near to the respondent resident. Unfortunately, heavy rainfall rained resulting to flood, because the drainage was abstracted water lost the way and flooded into the house of the respondent leading to destruction of various properties as listed in the plaint. It was alleged that the respondent was forced to go and live in the hotel as a temporary measure while the house being renovated.

The appellant denied each and every allegation of the respondent for being of no legal foundation, basis, frivolous and a mere hypothetical. The suit went for full trial in which upon evaluation of evidence the trial Magistrate found that the specific damages were not proved by the respondent but was satisfied that he incurred some injuries which could be consoled in terms of general damages. He awarded the same at the tune of Tsh 5,000,000/= and costs of the suit. The appeal by the appellant was filed premised to the following grounds of appeal;

1. *THAT, the trial court erred in law and fact in condemning the Appellant to pay general damages while it had already found that the Appellant was not negligent but the alleged damages arose from act of God.*

2. *THAT, the trial court erred in fact and law in awarding the costs of the case while the substantive claim of the Respondent and large portion of damages were not allowed.*

While the appeal by the respondent was based on seven grounds of appeal;

1. ***THAT,*** *the trial court erred in law and fact by declaring that the Defendant was indirectly liable while the same court clearly discovered that the Defendant dumped a huge mass of soil in the public water terrace which was not her designated dumping area hence blocked the same and led to the causation of enormous floods of water upon the Plaintiff's Home as it Rained.*
2. ***THAT,*** *the trial court erred in law and fact for want of a judicious analysis, investigation and procurement of the Plaintiff's Evidence in which if properly analyzed, investigated and procured the trial court would have found the Defendant directly liable and Special Damages specifically pleaded and proven.*
3. ***THAT,*** *the trial court erred in law and fact by entertaining an afterthought Defense of Force Majure raised by the Defendant in her final submissions.*
4. ***THAT,*** *the trial court erred in law and fact by entertaining a hearsay, contradictory and false testimony provided by an untrustworthy witness, DW1, the only Defense Witness.*
5. ***THAT,*** *the trial court erred in law and fact by not awarding the claimed specific damages while the same court agreed that the incident led to the destruction of the Appellant's properties according to the evidence presented, without providing any prudent reasons.*
6. ***THAT,*** *the trial court erred in law and fact by not awarding the claimed punitive damages without providing any prudent reasons.*
7. ***THAT,*** *the trial court erred both in law and fact by not awarding sufficient general damages.*

When the appeal was called for hearing the appellant was represented by Frank Ngafumika whereas the respondent had service of Brice Kessy, both

learned advocates. Each appeal was disposed by way of written submission.

Mr. Ngafumika submitted that the trial Magistrate was not justified to award general damage to the respondent after he had ruled that he failed to prove specific damage and that the appellant was not negligent. He added that principles on award of general damage was not considered.

Regarding award of costs, he submitted that although costs are awarded at the discretion of the court but it has to be exercised based on principles of law. He further argued that the respondent was not a successful party because his basic claim had failed. Based on that submission he Prayed the appeal to be allowed with costs.

In reply Mr. Kessy submitted on matter which had not been raised by the appellant in her submission. But the gist of his submission was that the court did not say the appellant was not negligent. The award of general damage was based on reason that the respondent suffered multiple personal and economic loss due to negligent action of the appellant. He cited various unreported cases which expounded principles on award of general damage without attaching copies. Therefore, no reference will be made to those cases. He was of the view that award of general damages

should not be interfered by the appellate court unless the court is satisfied that the trial court acted on wrong principles of law.

On the issue of costs, Mr. Kessy replied that the same is awarded at the discretion of the court against the losing party so as to compensate the successful party for expensed incurred in the conduct of the case. He was of the view that because the trial magistrate was satisfied that the respondent encountered some pain and suffering due to action of the appellant then it was rightly awarded.

I have considered the argument for and against, commencing with the issue of award of general damages, the position of the law in regard to award of general damages is settled that general damages are awarded at the courts discretion and need not to be specifically proved, see the case of **Cooper Motors Corporation Ltd v Moshi Arusha Occupational Health Services** [1990] TLR 96. However, in the circumstances of the current appeal I need to consider whether the award of general damages can be interfered and if yes, under what circumstances. Although the court has such wider powers the same must be exercised judiciously, reasonably, and based on sound legal principles and not arbitrarily. Interference of the award of damages is only permissible if it will be seen that the magistrate or a

judge assessed the said damages by using a wrong principle of the law. If it happens so, the appellate court should disturb the quantum of damages awarded by the trial court. See the case of **Metro Petroleum Tanzania Limited United Bank of Africa,** Civil Appeal No. 147 of 2019, CAT at Dar es Salaam.

In determining this issue, I am guided by the record of appeal which reveals that, the trial Magistrate while determining and quantifying general damages considered all the circumstances of this matter. Having been satisfied, it departed from the sum of Tshs. 30,000,000/= pleaded by the respondent in his plaint and awarded Tshs. 5,000,000/= as general damages. Taking all circumstances of this case firstly there was plenty evidence to show that the respondent's house was flooded by water which its cause was abstracted by the appellant but evidence in record fell short on costs incurred by the respondent in renovating the house or buying the damaged properties. Based on the above I find and hold that the trial court correctly exercised its discretionary power to award the respondent Tshs. 5,000,000/= as general damages. The first ground of appeal is dismissed.

On the issue of award of costs, it was submitted by the appellant that the respondent was not a winning party hence ought not to have been

awarded costs, while the respondent argued that it was rightly awarded as it intended to indemnify the party against expense of the successful party in vindicating his rights in the court. In resolving this issue, I agree with both parties on principles for awarding costs. It is settled law that costs of, and incidental to all civil actions are awarded in the discretion of the Court, they are to be exercised judiciously. In **Mohamed Salmini v Jumanne Omari Mapesa,** Civil Appeal No. 4 of 2014 (unreported), the court stated *inter alia* as follows on that principle

> *'As a general rule, costs are awarded at the discretion of the court. But discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles is that costs would usually follow the event; unless there are reasonable grounds or depriving a successful party of his costs.*

In this appeal it is not right to submit that the respondent was not a successful party, what happened is that not all reliefs claimed was granted. The respondent took all steps in prosecuting his case including filing different documents, calling witnesses and the like. The fact that the court did not grant other reliefs did not mean that the respondent did not incur costs due to acts of the appellant. In the circumstance of this case, the appellant has not laid any foundation which could justify the respondent to be denied costs in the trial court. So long as the suit was

partly decided in favour of the respondent the magistrate was right to award him costs of the suit. Therefore, the second ground has no merits.

Now coming to the appeal by the respondent. I must confess that the most part of the respondent's submission was out of the contest and context. As a reminder to advocates their submission must be confined to grounds of appeal raised in the memorandum of appeal. This is clearly provided under Order XXXIX Rule 2 of the Civil Procedure Code [Cap 33 R: E 2022] which provides that

> *The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:*
>
> *Provided that, the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.*

With that dictates of the law some of the issues raised in the submission by the respondent will not be paraphrased or be subject to resolution by this court because they did not form part of the issues taken in the appeal.

Reverting to merits of the appeal, Mr. Kessy on the first ground submitted that in the succeed claim of negligence the plaintiff is supposed to establish that the respondent had duty of care, there was breach of that duty of care and that he suffered damages as the result of such breach. He cited a case of **Winfrid Mkumbwa v SCB (sic) Tanzania Limited**,

Civil Appeal No. 150 of 2019 to support the preposition, he did not attach a copy of the judgment. He further referred to various provision of the Road Act and its regulation which makes an offence for abstracting roads, drain or water course to which I find irrelevant because the appellant was not prosecuted on those offences.

It was respondent's submission that evidence of negligence came from PW2 and PW3 who established that the appellant failed to restore the road to its proper state after installing sewage pipes as the result it caused water collection and flood. He referred to exhibit P1 and P2 that established that the appellant had construction activities near the respondent's house and dug huge hole for installing sewage pipes the evidence which was not opposed.

On whether there was breach of duty he submitted that evidence of PW2 and PW3 clearly proved that the appellant abstracted a public drain by dumping and deserting huge mass of soil which damaged the feeder road passing in front of his house which led to water stagnation and flooding.

On damages it was submitted that evidence of PW2 and PW3 proved that water flood entered into the respondent's house, evidence which also is in exhibit P1 and that it was not cross examined as the appellant was not at the scene area. Mr. Kessy was of the view that had not been

construction by the appellant and dumping of the soil in the drain no flood could have occurred.

On breach of duty, he submitted that the respondent experienced shock, emotional distress, physical suffering, unnecessary inconveniences and embarrassments as the family was forced to move out of their home while raining. The evidence also came from PW2 and PW3 who asserted that the respondent's sofa set, house and other personal properties were damaged including TV, TV stand and radio. He went further to submit that PW4 and PW5 proved that the house walls were highly damaged by creating muds, fungus and cracks. He added that this evidence was not controverted in cross examination.

Regarding proof of damages, he added that under section 14 of the Evidence Act receipts were not the only proof needed for damages.

In third ground it was submitted that the defence of *force majure* was not raised in the written statement of defence of the appellant. He was of the view that despite the Magistrate accepting the principle of what constitute an act of God but the decision was contrary to the reasoning. He was of the view that had not been the appellant activities at the area no flood could have caused injuries to his house and family.

On fourth ground he submitted that the appellant was not at the area when flood occurred, therefore any evidence referring to destruction amounted to hearsay. This was contrary to the respondent's evidence the evidence of local government leaders who witnessed what happened carried much weight which was in accordance with section 62(1)(a)(b)(c) of the Evidence Act.

The six complaint is award of punitive damage, Mr. Kessy submitted that the respondent was harmed by the appellant's dangerous conduct. He referred to the text by **David G. Owen** "A punitive damage Overview;(Function, Problem and Reforms) and **Wilson Elser;** Punitive Damages Review (50- State Survey), 2014 edition but no extract was attached to his submission hence denying the court an opportunity to have its eye on it.

Other complaint was the trial court to rely on hearsay evidence of the appellant who was not at the scene are which is contrary to section 62 of the Evidence Act.

Regarding the defence of Force Majure not being raised, Mr. Kessy submitted that it was not relied/pleaded] by the appellant in their written statement of defence.

In reply Mr. Ngafumika precisely submitted that the respondent erroneously ventured on discussing elements of negligence which was not proved by evidence tendered.

Regarding special damagae, he sybmitted that it must be specifically pleaded and strictly proved which was not the case in the present appeal. He cited the case of **Augustino v Anicet Mugabe** [1992] TLR 137 to support his argument.

On award of general damage is submitted that there was no evidence to back up such award. He implored this court to disturb the trial court findings on such aspect.

On failure to call witnesses he submitted that the Evidence Act do not require a particular number of witnesses to prove certain allegation. Based on his submission he beseeched the court to dismiss the appeal.

During rejoinder Mr. Kessy restated what he submitted in his submission in chief.

I have considered the contending arguments of the learned counsel for the parties on this appeal. Having so done, I think it is appropriate to expound what is the law as enunciated in the most cited case on the point; the case of **Donoghue v. Stevenson** case mainly established what is

known as the neighbour principle. Lord Atkin's neighbour principle is summarized in the following words;

> *'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which / are called in question."*

The above principle is applicable in the present case subject to proof that the appellant acted negligently. The first step is on scrutinizing if negligence was pleaded. The earned author Mogha's Law of Pleadings in India, with precedents cited in the case of **Strabag International (GMBH) v Adinani Sabuni**, Civil Appeal No. 241 of 2018, CAT at Dar es Salaam lies foundation on how negligence should be pleaded:

> *'In an action for negligence, the plaintiff must give full particulars of the negligence complained of and of the damages he has sustained. Without a pleading and proof, negligence cannot be / countenanced and the decree for damages cannot be awarded. The plaint must clearly allege the duty enjoined on the defendant with the breach of which he is charged.'*

The court of appeal was faced with akin situation in the case of **Strabag International (GMBH)** (Supra). In this case the respondent alleged in the plaint that destruction of his crops was due to running water which was negligently diverted by the appellant to his farm. The court had this to say;

Admittedly, the respondent simply stated that the appellant negligently channelled the rain surface running water to the appellant's farm thereby destroying crops worth the amount stated above. No acts of negligence were particularised.

This court has examined the plaint and found that the respondent asserted that the flood was due to negligent acts of the appellant but no particulars of negligence was pleaded. Particulars of negligence features in his written submission. Although the trial court tried to venture on principles of negligence but that was erroneously as it was not pleaded by the respondent. Even issues framed was not about negligence which is a specie of tortious liability. Therefore, the complaint and submission about proof of negligence is of no useful purpose as it did not come from pleadings. This is derived from the cherished principle of law that parties are bound by the pleadings and as such, claims must be pleaded and if not pleaded cannot be considered. See the case of **Pendo Fulgence Nkwenge v Dr. Wahida Shangali,** Civil Appeal No. 368 of 2020, CAT at Dar es Salaam (Unreported)

The next question is whether specific damage was specifically pleaded and proved. The law in specific damages is settled, the said damages must be specifically pleaded and strictly proved. In this case specific damage was well pleaded, the remaining issue is whether it was strictly proved. In his submission Mr. Kessy was emphatic that it was proved through PW2

and PW3 together with exhibit P1 and P5. While the appellant replied that it was not proved.

I have considered arguments of both parties, upon analysing evidence in record I have noted with caution that PW2 and PW3 on which the appellant's counsel relied did not prove specific damage rather their evidence was general to the effect that the respondent's house and property was damaged. Likewise exhibits P1, P2, P4 and P5 did not establish any damage suffered by the respondent. For instance, exhibit P1 is just a complaint register of the street government, exhibit P2 minutes on introducing construction project while exhibit P4 is just photograph taken at the area. Regarding exhibit P5 it is just as written paper showing list of materials and its price. Its authenticity is doubted because the maker is unknown and it is not a professional report to have been prepared by expert as the respondent wants the court to believe.

Taking evidence generally, although the respondent pleaded special damages in his plaint under para 7 by particularizing it and he tried to bring evidence during trial to prove the same, his efforts did not endure the expected fruits. The standard required in proving special damages is higher than on balance of probabilities. Therefore, this court finds that the

trial magistrate was right in not awarding specific damage as the respondent did not discharge burden of proving the same.

On the complaint of award of punitive damage, as in what circumstance can it be awarded, in the case of **Angela Mpanduji v Ancilla Kilinda** [1985] TLR 16 the court held that;

> *'Punitive or vindictive damages are damages given not merely as pecuniary compensation for the loss actually sustained by the plaintiff, but also as a kind of punishment of the defendant with the view of discouraging similar wrongs in future.'*

Given the circumstance of this appeal, especially where no proof of negligence was provided by the respondent, the trial magistrate cannot be faulted for not awarding punitive damage. The appellant's action was too remote towards damages suffered by the respondent.

The next complaint is award of general damages, Although the law presumes general damages to follow from the wrong complained of, general damages are not damages at large. General damage is awarded at the discretion of the court the exercise which cannot be interfered if the magistrate acted on allowable principles of law. In the case of **Swabaha Mohamed Shosi v Saburina Mohamed Shosi,** Civil Appeal No. 98 of 2018, the court held that;

'An appellate court can interfere with the discretion of the lower court if, among others, it has acted on a matter that should have not acted upon, or it has failed to take into consideration that which it should have taken, and as a result, it has arrived at a wrong conclusion.'

In this appeal the trial magistrates rightly reasoned that although the respondent did not prove specific damage but he was to be atoned from wrongs complained. He assessed at the tune of Tsh. 5,000,000/=. The respondent has not provided any material points to show that assessment based on wrong principles of law in arriving at the awarded amount. Taking circumstance of the case this court finds no cognate reason to disturb the amount awarded. This ground is dismissed.

Regarding the defence of *force majure*, the trial court did not base its decision on this, the respondent's case failed because he failed to prove specific damages. Therefore, the complaint has no merits.

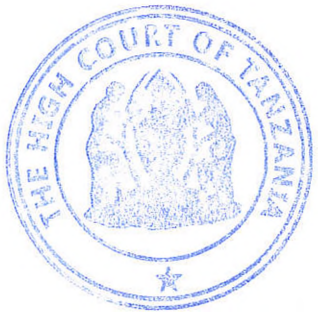
The complaint on receiving hearsay evidence does not hold any water because it was the appellant who owed duty to discharge burden of proof. It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, [Cap. 6 R. E 2022]. It is equally elementary that the standard of proof, in cases of this nature, is on balance of probabilities which simply means that

the court will sustain such evidence which is more credible than the other on a particular fact to be proved. It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/hers and the said burden is not diluted on account of the weakness of the opposite party's case.

The respondent did not discharge burden of proof which was upon him, throwing a ball to the appellant that she adduced hearsay evidence of which it is not true is akin to shifting burden of proof to which the appellant had none.

From what I have endeavoured to discuss above, both parties have failed to challenge the judgment of the trial court. It follows therefore that, the appeal by the appellant and that of the respondent have no merit and they are hereby dismissed in their entirety. In the circumstances, each party shall bear own costs.

DATED at MBEYA this 29th Day of July, 2022



.....

D.P. NGUNYALE