IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 13 OF 2020

(Arising from Civil Case No 40 of 2015 at the Resident Magistrates' Court of Arusha at Arusha)

ADOLF RAFAEL ULOMI.....1ST APPELLANT

BANANA INVESTMENT LIMITED..... 2ND APPELLANT

VERSUS

DOMINISTA PETER KIVUYO t/a KIVUMBUYI ENTERPRISES..... RESPONDENT

JUDGMENT

2nd September, 2022

MZUNA, J.:

This is an appeal by Mr. Adolf Rafael Ulomi and Banana Investment Limited, referred herein after as the first and second appellant respectively, against Dominista Peter Kivuyo t/a Kivumbuyi, the respondent herein. The appeal is against the decision of the RMS' court of Arusha which was adjudged in favour of the said respondent.

Apparently, the said respondent was prosecuted in Criminal case No. 413/2009 together with other two colleagues namely Charles s/o Jackson Massawe and Grace d/o Aloyce Barnaba who are not parties in this case

for the Offence of Counterfeiting Trade Mark c/s 368 (b) and (f) of the Penal Code, Cap 16 RE 2002.

It was alleged that they jointly and together, with intent to defraud, did forge and counterfeit, RAHA ALCOHIC BEVARAGE Trade Mark of Banana Investment Company Limited purporting to show that the content of Banana Wine is genuine while in fact it was not true. The Offence is alleged to have been committed on 18th day of March, 2008 at about 18.30 Hrs at Suye area within the District and Municipality of Arusha. All three were acquitted as the trial court found that the charge was not proved to the required standard of proof.

Subsequently thereafter, the respondent successfully instituted a suit on malicious prosecution, defamation and trespass on goods, to which the trial court (vide Civil Case No. 40/2015), granted her Tshs 30,000,000/- as general damages with interest at 7% per month from the date of judgement to the date of full payment as well as the order for the returning back of cooking machine to her by the defendants plus costs of the suit.

The appellants being dissatisfied with the decision of the trial court, instituted this appeal on the following grounds:-

1. *That, the Magistrate erred in law and fact by entertaining the matter without assigning any reasons to proceed with hearing from the preceding magistrate.*
2. *That, the trial Magistrate erred in law and fact by failing to determine all the issues raised.*
3. *That, the trial magistrate erred in law and fact by entertaining the matter out of the scheduled speed truck.*
4. *That, the trial magistrate grossly erred in law and fact by wrongly invoking the doctrine of malicious prosecution in reaching the verdict.*
5. *That, the trial magistrate erred in law and fact by ignoring the appellant's evidence*
6. *That, the magistrate erred in law and fact by determining tort of trespass basing on the notion that the 1st appellant was the one supposed to tender the certificate of seizure and the police exhibit register while it was rightly tendered by the police officer in criminal case No. 413/2009.*
7. *That, the trial magistrate erred in law and fact by disregarding the evidence of DW1 who witnessed the tendering of seizure report.*
8. *That, the trial magistrate erred in law and fact by concluding that the appellants took the respondent's machine without any probable justification.*
9. *That, the trial magistrate erred in law and fact by applying the doctrine of defamation without fitting and appropriately putting the elements.*
10. *That, the trial magistrate erred in law and fact by applying the doctrine of trespass without any justifiable cause.*

11. That, the trial magistrate erred in law and in fact by awarding the general damages of Tanzania shillings Thirty Million (30,000,000/=) without implying any justification for such an award.

During hearing of this appeal, both appellants had legal service of Kapimpiti Mgalula, learned advocate while Asubuhi Yoyo, also learned advocate, serviced the respondent. The appeal was argued by way of written submission. Both advocates abided to the scheduling order.

I propose to determine the above grounds based on the following issues:- 1. Whether the predecessor Magistrate recorded evidence before the taking over of the successor Magistrate? If the answer is not in affirmative, what is the effect? 2. Whether determining a case outside the set speed track vitiates proceedings? 3. Whether there was contributory negligence? If so, was it determined? 4.Whether malicious prosecution was proved? 5. Whether the trial Magistrate considered all relevant evidence, if so what is the outcome of this appeal? 6. Whether the awarded damages (relief) is proper and justifiable in law?

In dealing with the above issues, I propose to start with grounds No.1 and 3 which are interwoven. They raise issue of procedural aspects. The question relevant for the 1st ground is, was there a non-compliance of law by the Magistrate who took over the matter?

Arguing the first ground Mr. Mgalula the learned counsel contended that, at first the impugned case was assigned and presided over by Honourable J.A. Abavu on 30th April 2015 but later on, the matter went to Hon. Ndaweka who determined the points of objections and proceeded with the case until when it was succeeded by Hon. Kamugisha RM who realized the defect and ordered the matter to be tabled before Ndaweka for further orders. Mr. Mgalula went on submitting further that surprisingly the case went into the hands of Hon. D.J. Msoffe who also took over the file without assigning any reason and continued to hear the case.

Mr. Mgalula went on saying that the matter was again assumed by Jasmin. A. A who continued determining the matter until 13.7.2017 when D.J. Msoffe proceeded with hearing of the case again. Then, Jasmin A. A took up the matter to hear the case and proceeded with hearing of the case. That the judgment was finally delivered by D.J. Msofe. He went on submitting that in criminal practice reasons should be assigned whenever there is a new Magistrate who took over the case but none of the assigned Magistrates gave reasons for taking over the matter.

To fortify his argument Mr. Mgalula cited the case of **The International Director World Vision Tanzania vs Basinda Construction Co. Ltd**, Civil Appeal No. 2 of 2017 where the Court of

Appeal declared as null and void and quashed the judgment and orders for the reason of irregular change of Magistrate without assigning reasons for change.

In reply, Mr. Yoyo contended that it is true that under exceptional circumstances where it is impracticable to finish the case a successor Magistrate must record reasons for transfer. In principle, Mr. Yoyo agrees that changing hands of magistrates in the proceedings must have a reason for so doing clearly recorded. However, Mr. Yoyo goes on distinguishing the matter under scrutiny to the principle of the law he cited. He said, the impugned proceedings are quite clear that it was at first put in motion by the same magistrate who finalized the matter (D.J. Msoffe). Mr. Yoyo among others says, presence of changing hands of Magistrates does not vitiate the proceedings because there was no hearing and that disposal of the preliminary objection by Honourable Ndaweka was not part of trial and it does not involve hearing because he did not hear witnesses and therefore cannot be covered by Order XVIII rule 10 of the Civil Procedure Code, Cap. 33 R.E 2019 [CPC]. To buttress his argument, Mr. Yoyo referred this Court to the cases of **M/S George Center Limited vs Honourable Attorney General and Another**, Civil Appeal No. 29 of

2016 and **Dativa Nanga vs Emmanuel Kombe,** Land Case No. 40 of 2016.

Having considered the submissions from the learned counsels, the question to ask is, is there a Magistrate who recorded evidence and then another Magistrate took over and recorded other evidence without assigning reasons for so doing?

My close reading of the record shows, that from 24th June 2015 up to 21st July 2016 the case was before Ndaweka J.B up to the extent of determining the preliminary objection which was disposed off by way of written submission. Owing to that, after Kamugisha RM noticed such fault went on further directing that the file should be returned to Ndaweka J.B for necessary orders. This order is at page 18 of the typed proceedings which says;

> *This matter is before Ndaweka J.B-RM. It is my order that the file be tabled before him for further orders.*

Reading from the record of the trial court it seems to me that, other magistrates who appeared therein were only for adjournments. Save for Jasmin A.A- RM whose name in my view was written inadvertently. I am saying so because at the coram thereto, where the name of Jasmin A.A appeares at the foot, the name appearing is that of D. J. Msoffe, RM.

Again, in the original record the signature appearing thereto without the name is that of D.J. Msoffe. The fault mentioned by Mr. Mgalula seems to happen because of failure to properly proof read the proceedings. It is not possible two names of magistrates to appear on the same coram of the day. With that in mind, I therefore agree with Mr. Yoyo that Jasmin A.A-RM on the date of 17th November, 2017 did not preside over the impugned case.

Order XVIII, rule 10 (1) of the CPC, which regulates the succession of judges or magistrates by providing them with the power to deal with the evidence taken before another judge or magistrate reads:

> *"Where a judge or magistrate is **prevented by death, transfer or other cause from concluding the trial of a suit**, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it." [Emphasis added]*

In **M/S Georges Centre Limited v. The Honorable Attorney General and Another** (supra) the Court of Appeal of Tanzania, having considered the foregoing provisions, held that:

> *"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer*

that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. ***The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another.*** *"[Emphasis added]*

My findings in the order of admitting exhibit P3 as shown at page 38 of the typed proceedings is typing error where it is indicated to be signed by A.A. Jasmin. The justification for this is on court coram at page 34 which shows D.J. Msoffe and not A.A. Jasmin. From the records honourable Ndaweka took the matter only for determination of objection on point of law and honourable Msoffe proceed with hearing to its conclusion.

The yard stick is whether failure to assign reason for taking over prejudiced the appellant. There is no evidence that the appellant was prejudiced by failure to assign reason by succeeding magistrate and the appellant in his submission has not shown how his rights were jeopardised.

In the case of **Jamali Msombe and Another v. The Republic,** Criminal Appeal No. 28 of 2022, CAT at Iringa (Unreported), the Court of Appeal while interpreting on the applicability of section 214 (1) of the

Criminal Procedure Act, Cap 20 RE 2019 which is almost similar to Order Order XVIII, rule 10 (1) of the CPC held that:-

> *"We agree with Mr. Mwita and it is our considered view that...and also as the appellant did not raise any objection for the hearing to proceed from the stage it had reached under the predecessor magistrate, then the appellants cannot be heard complaining that they were denied the right for witnesses who had already testifed to be recalled. Considering the circumstances of this case, there is nothing to infer that the successor magistrate wrongfully assumed jurisdiction or that the appellants were materially prejudiced."*

The court further cited the case of **Charles Yona v. Republic,** Criminal Appeal No. 79 of 2019 (unreported) also cited in **Tumaini Jonas v. Republic,** Criminal Appeal No. 337 of 2020 (unreported), on a complaint of non-compliance with section 214 (1) of the CPA and stated that:-

> *"When determining whether the provision has been fatally violated, it is important to consider the peculiarity of circumstances for each case."*

From the above cited two cases, there were set two conditions to be satisfied before the conviction (or a finding) can be quashed for non-compliance with section 214 (1) of the CPA, namely:-

> *"1. That the conviction was vitiated by the non-compliance of section 214 (1) of the CPA.*

2. ***That the appellant has been materially prejudiced by the conviction by reason of the evidence not wholly recorded by the successor magistrate."***

(Underscoring mine).

It is worth noting that the appellant made general complaints regarding non-compliance with Order XVIII Rule 10 without stating what measures did he take after noticing such noncompliance (which I find never existed) like raising an objection. More seriously, the appellants have not stated how they were materially prejudiced.

The cited case of **The International Director World Vision Tanzania vs Basinda Construction Co. Ltd** (Supra) cited by Mr. Mgalula is distinguishable because unlike in that case there is no magistrate who recorded evidence apart from Msoffe, Rm. If I may hasten to add, from the circumstances of the case at hand, there is nothing to infer wrongful assumption of jurisdiction or unauthorized case file takeover on the part of the successor Resident Magistrate.

Taking into account the above, I find that the appellant was not materially prejudiced. The 1st ground of appeal is meritless thus fails.

Connected to this point is also ground No. 3 on the allegation that the matter was entertained outside of the set scheduled speed track. *The*

issue for determination is whether determining a case outside the set speed track vitiates the entire proceedings?

The learned counsel submitted that the matter was determined out of scheduled speed track without notice of extending the speed track contrary to Order VIII rule 41(c) of the CPC. the counsel explained that the judgment in Civil case No. 40 of 2015 was supposed to be on April 2017 but surprisingly it was delivered on 24th January 2018.

Mr. Asubuhi Yoyo, the learned counsel responded that they addressed it properly to the court before expiration of speed track. That if the prayer is not seen in the trial court proceedings it may be the mistake of the court for failure to record it and parties ought not to be punished by the mistake done by the court. He prayed for sthis court to apply the famous oxygen or overriding objective principle brought by Act No. 3/2018 and section 73 of the CPC which confer this court with inherent power not to reverse the decision of the lower court for irregularity or defects in the proceedings which does not affect the merits of the case or jurisdiction.

In rejoinder the learned advocate for the respondent cemented his submission in ground 3 by saying if at all both counsels had prayed for an extension the same could have appeared in the typed proceedings.

Blaming the trial magistrate for failure to record prayer for extension of speed track is an afterthought as he could have sought a rectification of the proceedings. He cited the case of **Titus Mwita Matinde vs Daniel J. Singolile,** Misc. Civil Application No. 3/2022 and order VIII rule 41.

Upon my perusal of both typed and hand written proceedings I find nowhere the learned counsel for the respondent prayed for the extension of speed track. This defect notwithstanding, it is my view that for justice to prevail it was significant for the trial court to finalise the matter regardless being out of scheduled speed track and this court cannot depart from that spirit. The counsel for the appellant has insisted this court to give effect on order VIII rule 41 but my findings is, concluding the matter and determine rights of the parties the trial court was in line with the spirit behind order VIII rule 41. The court of Appeal of Tanzania in **National Bureau of Statistics Versus The National Bank Of Commerce And Eva Shoo,** Civil Appeal No. 113 of 2018 commented on the scenario that: -

> *"The spirit embraced in assigning a suit to a certain speed track is only to facilitate the expeditious disposal and management of the case. It is thus not expected that failure to adhere to a scheduled speed track will have serious consequences of having a suit struck out. Instead, a judicial officer presiding over the suit is enjoined to ensure that substantive justice is*

done to the parties by affording them opportunity to be heard and the matter to be determined on merit".

For that reason and taking into account that the matter had been in court since 2018 cannot take another root other than the one taken by the trial Magistrate. That said, the 3rd ground of appeal lacks merits and the same stands dismissed as well.

I revert to the third issue relevant for the sixth ground of appeal as to *whether issue of contributory negligence was never determined?*

Arguing in support of the above ground of appeal, the learned counsel submitted that the 5th issue before the trial court as to whether there was contributory negligence on the part of the plaintiff, was never determined. He was of the view that had it been determined it could have changed the position of the case for the sake of fair trial for the ends of justice.

The assertion was strongly objected by the respondent's counsel in that the respondent admitted that she made follow up of her cooking machine at the 1st appellant resident and she never knew if she could take it back before the case was concluded. The trial magistrate concluded that there was delay on the side of the respondent in following the production machine the fact that mitigated the damage sought. The trial magistrate categorically said there was a bit of contributory negligence on

respondent's side, the statement which answered in affirmative the 5th issue before the trial court.

The counsel for appellant in rejoinder denied paragraph 4 of page 13 of the judgement to have resolved the 5th issue but it was a grant of relief. He reiterated his submission.

Indeed, the record bears out that, the trial Judge did not address the fifth issue rather proceeded to award damages. In the case of **Agro Industries Ltd Vs. Attorney General** [1994] TLR No. 43, the Court of Appeal held and I quote: -

> *"When a trial court allows parties to address it on any issues, the court must conclusively determine those issues, notwithstanding that the issues were not in the pleadings."*

More emphasis was made in the High court case of **Benedicta Vicent Versus Kambi ya Simba Village Council,** Misc. Land Application No. 153 of 2016 where the court adopted the findings of the Court of Appeal in the case of **Sheikh Ahmed Said Vs Registered Trustees of Manyema Masjid** [2005] TLR 61 where the court emphasized the requirement for the Court making decision to make a finding on each issue, the court stated;

"It is necessary for a trial court to make specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect."

From the above authority it is my considered view that the trial magistrate was bound to answer each and every framed issue conclusively, but the crucial question is whether the omission occasioned an injustice. In **Joseph Nyaeza Versus Dismas H. Mingi (Legal Representative of Denis Daudi Masati),** Land Appeal No. 178 of 2018, in discussing this issue the Court quoted the position in **Mantra Tanzania Ltd vs Joaquim Bonaventure** (Civil Appeal No.145 of 2018) [2020] TZCA 356; (17 July 2020) where the Court of Appeal observed that:

"On the way forward, it is trite principle that when an issue which is ***relevant in resolving the parties' dispute*** *is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter."*

The appellants submitted that had it been determined it could have changed the position of the case for the sake of fair trial. Still the appellants have not shown to what extent failure to address the issue has occasioned injustice or to what extent fair trial could not be met by failing to address the 5th issue or could have resolve the dispute between the parties. Again, this ground of appeal lacks merit thus fails.

Connected to that is the allegation that the evidence of DW1 who witnessed the tendering of seizure report was disregarded relevant for the 7th issue. The main issue is whether all relevant evidence was considered and if not, what are the consequences?

This issue will feature along with the merits of the appeal. But for the purpose of ground No. 7 of appeal, the submission of the appellant's counsel is that the evidence of DW1 who witnessed tendering of seizure report was disregarded. In response, the learned counsel for the respondent said that the evidence pinpointed by appellant counsel have no any substance worth of being relied.

Basing on my assessment on the 7th ground of appeal I wish to reiterate that nothing establishes that there was certificate of seizure filled on the material day and that the evidence of DW1 is not proof of existence of certificate of seizure.

I revert to appeal grounds No 4 and No 8 which are essentially on proof of malicious prosecution. The main issue is whether elements of malicious prosecution were proved?

It is submitted by the learned counsel for the appellant that there is nowhere in the testimony of the respondent which suggests that the appellants were actuated by malice in reporting the issue of fraud and

counterfeit. There were no probable and reasonable cause by appellants who reported the matter to the police for further investigation and resulted into criminal case No. 413 of 2009. He pointed the exhibits tendered before the court, evidence of PW1, PW2, PW3, PW4 and PW5 to justify that there was no malice and that there was reasonable and probable cause. He cited a case of **Paul Valentine Mtui and Another vs BONITE Bottlers Limited**, Civil Appeal No. 109 of 2014, **Martin Kikombe vs Emanuel Kunyumba**, Civil Appeal No. 201 of 2017 and **Ally R. Hando vs. The Attorney General and Inspector General of Police,** Civil Case no. 61 of 2003.

In response the learned counsel for respondent rebuked the submission by the appellants that the record of the matter at hand proves beyond doubt that all ingredients for a tort of malicious prosecution were comprehensively established in the evidence adduced by the respondent before trial court. That, the case was indeed prompted by grudges and business jealousy against the respondent due to their competitive nature of beverage service they both render to the community.

In rejoinder the counsel for appellant insisted on the four ingredients established in the case of **Yohana Ngassa vs Makoye Ngassa** [2006] TLR 2013 and said in order to succeed in the tort of malicious prosecution

both malice and lack of probable and reasonable cause must be established.

I entirely agree with the authorities cited by the Appellants in attempt to challenge the findings of the trial court on its findings of a tort of malicious prosecution but I find the same not relevant to the case at hand. In their submission they insisted that there is no proof of malice and probable cause as important ingredient in tort of malicious prosecution. I am alive on the elements to be proved in malicious prosecution as it was stated in the case of **Jeremiah Kamama v. Bugomola Mayandi** [1983] TLR 123 Chipeta, J (as he then was). The facts are more or less similar to the case under consideration. The defendant made an allegation at a public meeting that the plaintiff was responsible for a spate of arson committed in the village. The defendant further ordered the arrest of the plaintiff as a result of which the plaintiff was handed to the police, and charged but was later released for lack of evidence. It was established that the allegation was made on account of political rivalry and was false.

The District Court, in its judgment awarded the plaintiff Tshillings 5,000/= as damages. Dissatisfied with this decision, the defendant (appellant) appealed to the High Court which dismissed the appeal. The learned Judge held, the position which I associate myself with, that:-

(i) For a suit for malicious prosecution to succeed the plaintiff must prove simultaneously that:

(a) he was prosecuted;

(b) that the proceedings complained of ended in his favour;

(c) that the defendant instituted the prosecution maliciously;

(d) that there was no reasonable and probable cause for such prosecution; and

(e) that damage was occasioned to the plaintiff;

(ii) for purposes of malicious prosecution, a person becomes a prosecutor when he takes steps with a view to setting in motion legal processes for the eventual prosecution of the plaintiff;

(iii) malice exists where the prosecution is actuated by spite or ill-will or indirect or improper motives."

Reading at page 9 of the typed judgment of the trial court, the trial magistrate recorded the testimony of PW1, PW2 and PW3 who heard the first appellant saying:-

'Wewe siku zako arobaini zimefika, unalisha watu uchafu na ninahakikisha kiwanda kinafungwa'.

PW1 and PW3 saw and heard the 1st appellant ordering the cooking machine to be taken from where the respondent was taken and sent to 2nd appellant.

The utterance followed by motive or malice clearly shows the reporting was not done with *"honest belief in the words or report"* in view of the

decision in the case of **Mbaraka William v. Adamu kissute and Another** [1983] TLR 388 instead it was *"actuated by spite or ill-will or indirect or improper motives"* as per the holding in the case of **Jeremiah Kamama v. Bugomola Mayandi** (Supra). There was business jealousness and therefore actuated by improper motive.

I join hands with the trial magistrate that the criminal case was initiated with malice and in absence of probable cause. It is for that reason that this ground of appeal must fail for being meritless.

In ground 8 of the appeal the appellants submitted that there was no justification that proved the appellants took the machine but exhibit P2 in Criminal case No. 413 of 2009 shows that machine was taken by police officers who then came to tender it in court. The machine was taken as there were a probable and justifiable reason to cease the machine.

Responding to the submission the counsel for respondent said that the finding of the trial court in trespass to respondent production as well as the reason for such finding are clearly articulated in the trial court judgement. The ground of appeal is baseless and outrageously unfounded.

As I have pinpointed in the 7th ground of appeal since there was no proof of certificate of seizure, the taking of respondent's machine was

unjustifiable and lacked probable cause. This ground of appeal is as well rejected.

As far as the fifth ground of appeal is concerned, the counsel for appellant said the 1st appellant's (DW1) evidence at page 65 and 67 of the typed proceeding concerning his prior knowledge to the respondent, John Simon and Tarimo. According to him it is very crucial evidence that was ignored that justify that appellant had no malice against the respondent since they had never met before. The incidence of reporting to the police station was complying with a duty to report any criminal incidence.

On his part, the respondent's counsel said that the evidence alleged to have been ignored has no substance at all, worth of refuting truth reflected in the respondent's evidence that was unfairly dealt with and suffered damages at the instance of the appellants.

The Appellants re-joined their submission that the respondent is misleading the court and went on saying that the appellant submitted that they never knew respondent before and the information was aired out by the informer and the appellants took initiative to report the same to the police station under section 7 (1) of Cap 20 R.E. 2019.

My finding in this ground of appeal is based on the discussion in the fourth ground of appeal that malice aforethought was established basing

on the utterance of the 1st appellant as testified by PW1, PW2 and PW3. Any omission of fact by the trial court had no impact on the finding. It is my considered opinion that the fact that the respondent was not known to the appellant prior to the incident, could not have impact to the finding of the court, thus this ground of appeal fails.

In respect of the 6th ground of appeal the appellant's counsel submitted that the certificate of seizure was tendered by police officer in exhibit P2 and it was not a duty of appellant to tender the documents that they are not makers and custodian.

Responding to the submission Mr. Yoyo referred this court to the point of determination before the trial court whether the appellant really converted the respondent's production tool and the evidence laid by the plaintiff before the trial court was that the machine was retained and kept at the appellant's residence. The court's conclusion is that production machine was retained at the instance of the appellant and that the respondent suffered damages following the confiscation of the machine and stoppage of production.

In rejoinder the appellants' counsel insisted that the respondent did not confiscate respondent's machine but the police ceased it and filled a certificate of seizure.

Upon my perusal on the typed proceedings of the trial court, page 68 where the 1st appellant was cross-examined, he said *"I never tender any certificate of seizure"* the statement quoted by the trial magistrate at page 10 of the typed judgement. DW1 testified at page 73 of the type judgement that inspector John wrote certificate of seizure but the same could not be made available in court to prove the assertion. Also, PW1 and PW3 testified to have heard the 1st appellant directing the cooking machine to be taken and sent to Banana Investment Limited. Basing on this evidence I join hands with the trial magistrate to the extent that there was no certificate of seizure and that the 1st appellant ordered the cooking machine to be taken from custody of the respondent to Banana investment limited. The taking is not legally warranted and constitute trespass on goods. On that basis, I find this ground of appeal without merits, the same is dismissed.

Having answered the above ground of appeal, the 10th ground of appeal which says the trial magistrate wrongly applied the doctrine of trespass without any justification, would automatically be resolved as well.

Lastly on the last ground of appeal on the award of general damage of Tshs 30,000,000/-. The learned counsel argues that the trial magistrate erred in law and in fact by awarding the same without any justification.

This ground of appeal was not responded to by the counsel for the respondent.

My assessment in this ground of appeal I have to look on the meaning of damage. This is well explained in the case of **Njombe Community Bank & another vs. Jane Mganwa,** DC. Civil Appeal No. 3 of 2015 at page 17 where it was stated that 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'.*

From the above authority damage is intended to restore the victim to the original position after being suffered injuries as the result of the act of respondent. Usually, damage is awarded upon the discretion of the court which must be exercised judiciously. Unlike special damages general damages are not specifically pleaded.

In the case at hand the trial magistrate awarded 30,000,000/- as general damages which need not be specifically proved. In **P.M. Jonathan v Athuman Khalfan,** [1980] TLR 175 it was stated that:

> *"The position as it therefore emerges to me is that general damages are compensatory in character. They are intended to take care of the plaintiff's loss of reputation, as well as to act as a solarium for mental pain and suffering".*

One can draw an inference that general damages are awarded at the discretion of the court after the plaintiff has averred that he has suffered such damage of the act he is complaining of and that wrong must be caused by the defendant but the quantification of such damage is the court's discretion.

In the case at hand the respondent complained to have suffered damages due to the act of the appellants taking her machine which was used in business. It was testified by the PW1 that she got psychological effects, head ache and diagnosed high blood pressure and diabetes. Page 13 of the typed judgement the trial magistrate gave reasons for awarding general damage that is upon proof of tort of malicious prosecution and trespass on goods which caused the respondent to suffer both specific and general damages. Only that the court could not award specific damage due to exhibit failure to meet the requirements of law.

The contention by the appellant that the respondent failed to justify special damages and that seriously affected the award of general damages is misplaced and very legally weak. I find that the trial magistrate applied proper principles of law and the general damages awarded is fair under the circumstance. I cannot however allow the awarded interest of 7% per month from the date of judgment to the date of satisfaction in full. This is

more punitive. This ground is partly allowed. **Only Tshs 30,000,000/- (say thirty million) is awarded without interest.**

Based on the above findings, this appeal lacks merit. Save for interest, otherwise the same stands dismissed with costs.

M. G. MZUNA,
JUDGE.
02/09/2022