

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM.

CIVIL APPEAL NO. 66 OF 2019

(Arising from Civil Case No. 03 of 2018 District Court of Kigamboni)

JACOB BRAUNSCHWELLER.....APPELLANT

VERSUS

SADICK YAKUB.....RESPONDENT

Last date: 30/05/2022.

Date of judgment: 27/07/2022

JUDGEMENT

MANGO, J.

This is the first appeal from the decision of Kigamboni District Court in Civil Case 03 of 2018. Sadick Yakub, the Respondent herein instituted Civil Case No. 3 of 2018 claiming for damages against Jacob Braunschweiler. He alleged that, the Appellant acted negligently by walking with his dogs without chains as a result the dogs did bite the Respondent and caused him to suffer injuries. The trial Court ruled in favour of the Respondent and awarded the Respondent general damages at the tune of Tsh 6,000,000/-.

Aggrieved by the decision of the trial Court the Appellant preferred the appeal at hand on the following grounds: -

1. That the Hon. Trial Magistrate erred in law and in facts by holding that the Appellant was negligent and had a duty of care towards the Respondent
2. That the Hon. Trial Magistrate erred in law and in facts by awarding general damages without proof on balance of probabilities
3. That the Hon. Trial Magistrate erred in law and in facts by awarding excess quantum of general damages to the Respondent
4. That the Hon. Trial Magistrate erred in law and in facts by considering pieces of evidence which were not pleading in the
Plaint
5. That the Hon. Trial Court had no jurisdiction.

On 30th May 2022 when the appeal was called for hearing, both parties had representation. Mr. Mauro Patience Hyera, learned advocate appeared for the Appellant and Mr. Sunday Msomi learned advocate appeared for the Respondent.

The Appellant's counsel abandoned the 5th ground of appeal and he submitted on the remaining grounds.

On the 1st ground of appeal Mr. Sunday argued that the trial Magistrate failed to link between the action that took place and liability of the Appellant, he further argued that, although the trial magistrate cited number of authorities, yet he did not state what actually established Appellant's duty of care towards the Respondent.

On the 2nd ground he submitted that, that loss of income alleged by the Respondent falls under special damages that need be proved categorically. He also argued that, general damages cannot be quantified by a party. In this, learned counsel referred the Court to the decision of this court in the case of **Abdallahi Mohamed Isman vs Kilem Engineering Co. Ltd and 3 others**, Civil Case No. 92 of 2014 in which the Court held that, "*it is wrong for a pleading to put specific amount in a claim for general damages.*"

On the 3rd ground of appeal the Appellant's counsel is of the view that, the amount awarded to the Respondent as general damages is excessive. He also challenged the decision of the trial Court for granting general damages without assigning reasons that moved the Court to award the

same. He cited the decision of the Court of Appeal of Tanzania in **Trade Union Congress of Tanzania TUCTA** in which the Court held that,

“law requests the court to assign reasons for awarding general damages”

According to the learned advocate, the Trial Magistrate in the case at hand, did not assign any reason to justify the award at hand.

On the 4th ground he submitted that, the Trial Magistrate considered matters which were not contained in the plaint. He illustrated that, the Respondent’s plaint does not mention that the dogs which attacked him belongs to the Appellant. He is of the view that, the Trial Magistrate did not confine herself on the facts contained in the plaint.

He fortified that, evidence adduced before the trial court also is not born by the contents of the plaint.

In his reply submission, Advocate Msomi for Respondent submitted that, the matter was properly determined thus, the appeal is unmeritorious. On the first ground of appeal he argued that, evidence adduced by the Respondent during trial established that the Appellant had dogs which were not controlled anyhow. He added that, the dogs had no proper control at a place where they could harm anybody. He explained that, the incident took place

is public place, thus the Appellant had duty to protect persons around the area from being harmed by his dogs. He is of the view that, the act of the Appellant moving around with uncontrolled dogs establishes the fact that the Appellant was negligent.

On the 2nd ground he submitted that the damages awarded was right because the Respondent proved his claims by both documentary and oral evidence from his three witnesses. According to him, evidence established that the Respondent was attacked by the Appellant's dogs and the Appellant did not disapprove the same. He referred the Court to the case of **Msuli Mlindwa vs Nazar Daijel Kasul and others** (1960) EA 201 where the court held that, in cases based on negligence, the Plaintiff need to proof negligence, but in case where the negligence act would not have taken place had the defendant took care then the defendant is bound to prove that he had not acted negligently.

He expounded his argument further that, circumstances of this appeal falls in the stated principle that the Appellant ought to have proved that he did not act negligently the duty which the Appellant failed. He concluded on this ground that, the Magistrate correctly determined the matter.

On the 3rd ground of appeal, he submitted that, the Trial Court gave reasons for the award and the same were not excessive. He explained that, his client prayed for Tshs. 25, 000, 000/- as general damages but was only awarded Tshs.6 million as damages. He is of the view that, the trial Court exercised its discretion properly and did not contravene any law for awarding damages to the Respondent.

On the 4th ground of appeal he insisted that, there is no any contradiction between the Plaint and what was awarded. He refered the Court to paragraph 5 of the Plaint to be a paragraph that contains facts which were later proved by evidence adduced during trial. He is of the view that, the decision of the trial Court relied on the facts and evidence adduced to the Court and not otherwise. In his rejoinder, the counsel for the Appellant reiterated his submission in chief.

I have carefully considered the grounds of appeal together with the submissions from both parties and Court record. I find the grounds of appeal to be based on three issues;

1. Whether the Appellant had a duty of care toward the Respondent and acted negligently.

2. Whether the Trial Court awarded general damages without proof on balance of probability.
3. Whether the decision of the Trial Court was not confined to facts contained in the Plaint

It is clear from the Plaint and evidence adduced during trial that, the suit was filed for a claim of general damages resulted from injuries suffered by the Respondent after he was attacked by the Appellant's dogs. As submitted by the Respondent's counsel paragraph 5(a) of the Plaint contains facts which were the basis of the trial Court decision. It cannot be argued that the Plaint does not mention whether the dogs which attacked him belonged to the Appellant or not because the Appellant did not dispute to be the owner of the dogs that attacked the Respondent. Even in his testimony he did not dispute ownership of the dogs, he only alleges that the Respondent was a trespasser thus, he was not entitled to any protection from the Defendant or owners of the hotel. Thus, the 4th ground of appeal is unmeritorious and the third issue is determined negatively.

On the duty of care which is the basis of liability in cases based on negligence I find the same to be in affirmative. It is not disputed that the Appellant was the owner of the dogs and he did not take precautions to

ensure that the dogs do not harm any person, do not harm neighbors as defined in *Donoghue's* case. It is not disputed also that the Respondent was attacked by the Appellant's dogs. In such circumstances, the Appellant cannot avoid liability on the injuries caused by his negligent act. I hold so because by their ordinary nature, dogs require serious precautions to ensure that they do not come into contact with human beings and if they contact human beings then, they should not be able to attack them. The duty to take those precautions is on the owner of the dogs and such duty is directly linked to the duty of care towards all persons who might be injured if the precautions are not taken. Thus, the Appellant had a duty of care towards the Respondent as correctly held by the trial Court.

The issue of general damages should not detain much this Court. It is true that parties cannot quantify general damages as submitted by the Appellant Counsel. However, if a party quantifies the damages claimed, then he should prove the same strictly as special damages. In the Appeal at hand the Respondent quantified general damages thus, he was duty bound to prove the same for the Court to award the amount of damages as claimed. However, the trial Court did not award the amount as claimed. What the Court did is to employ its discretionary powers and award general damages

as it has assessed. The Respondent prayed for Tshs. 25,000,000/- as general damages, the Court awarded only Tshs. 6,000,000/- which is almost a quarter of what had been prayed for. In such circumstances, I find the trial Court to have acted correctly.

For those reasons, I find the appeal to be unmeritorious and I hereby dismiss the same with costs.

Dated at Dar es salaam this 27th July 2022.



Z. D. MANGO
JUDGE