IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CIVIL APPEAL NO 23 OF 2021

(Originated from Civil Case no 24 of 2020 District Court of Musoma at Musoma)

GROUP 5 GREGORY FAMILY SECURITY GUARD SERVICE LTD ..... APPELLANT

VERSUS

JUMA KISYERI ..... RESPONDENT

JUDGMENT

1st September & 7th October, 2022

F. H. Mahimbali, J.

At the trial court, the appellant was condemned to pay a total of Tsh 25,000,000/= as general damages for loss occasioned following the an alleged tort of breaking into the building committed into the shop of the respondent in which the appellant was responsible for providing security services.

Facts of the case stipulate that the appellant has a contractual obligation of providing security services at Rutiginga street – Musoma Urban for businessmen in which the respondent was one amongst those

beneficiaries of the said security services. This is as per exhibit P3 of the case.

That on the night of 23/6/2020 when the respondent closed his shop, everything was fine. He locked the doors and left his shop in fine. On the next day i.e. 24/6/2020 when he opened the shop, he found its upper roof broken, and some properties there in stolen to wit: Safe box worth 1,700,000/=, cash money 11,500,000/= mobile phones worth 5,000,000/= and cigarettes worth 700,000/= all missing. He reported the matter at police and investigation was carried out but nothing was established in the said investigation.

On the other hand, the appellant disputes to have been any breaking incident as claimed. Police failed to establish the occurrence of the said breaking incident as per respondent's claims. Therefore, as there was no breaking incident, he cannot be held responsible of the said stealing as alleged.

Upon hearing of the case, the trial court decreed against the appellant general damages of 25,000,000/= which decision did not amuse the appellant, thus the basis of this appeal preferred on four grounds of appeal, namely:

1. *That, the trial court erred in law and fact by ordering the general damages to the respondent for a tune of Tsh 25,000,000/= (twenty-five Million) upon which the respondent had not proved his case on the balance of probability.*

2. *That, the trial court erred in law and fact for failure to take into account that the offence of theft which was subject of the respondent's claims to the appellant for alleging of negligently has not been proved beyond reasonable doubt by the competent court.*

3. *That, the trial court erred in law and fact for failure to properly analyse the available evidence therefore reaching at the wrong decision.*

4. *That, the trial court erred in law and fact for totally failing to take into account the appellant's evidence which was heavier than that of the respondent.*

During the hearing of the appeal, the appellant was represented by Mr. Christopher Waikama and Mr. Wambura Kisika learned advocates whereas Mr. Emmanuel Werema represented the respondent.

On the first ground, that there was no proof of the suit on balance of probability to entitle an award of 25,000,000/= as decreed, it was submitted that there was no any evidence in record that the respondent suffered any loss to entitle such a decree. For the court to award that, there ought to have been an investigative report establishing the commission of the said incident and the occasioned loss. In the absence

of proof of the commission of the said house breaking and the resulting loss, then such a damage is not established as done.

With the second ground of appeal which is so closely related with the first ground of appeal, it was argued that as there was no house breaking established, how could the appellant be held responsible for the alleged negligence?

In the third ground of appeal, the grief has been on failure of the Hon. trial magistrate to analyse the evidence of the case adduced before the court. That closely digesting the testimony of PW1, PW2 on one hand and that of DW1 and DW2 on the other hand, it is so clear that the respondent's evidence didn't respond to the issues of the case raised and therefore, there was no any damage established.

In the absence of proof of the said house breaking which is the domain of police, the trial court erroneously reached her findings that there was house breaking and occasioning of loss.

On the fourth ground of appeal, it was submitted that since the appellant's case was heavier than that of the respondent, the trial magistrate erred in reaching that finding against the appellant.

Furthermore, it has been submitted that as per framed issues of the case, reading the judgment of the trial court, it is clear that the only issue discussed was issue number one only. As regards the second and third issues, were not clearly dealt with by the trial court. This then suggests either, there was no proof or there was no legal deliberation on them. However, at the conclusion, the trial magistrate makes an award of general damages worth 25,000,000/=. How is the general damage awarded, while there is no discussion leading there.

Reference was made to the case of **Gamba Gibe Mondea vs Bamboo Rock Drilling**, Labour Revision NO 2 of 2022, High Court Musoma where my brother Hon Mtulya, J making reference to numerous CAT's decisions stated this:

> *"A matter not decided by the subordinate court cannot be decided by the Higher Court in Judicial Hierarchy. It is clear that the jurisdiction of the Higher Court in judicial hierarchy is to examine and consider matters decided upon by the lower court".*

Reading the trial court's judgment, there is nowhere discussion on damages is reflected. As this was not considered, it has been submitted that let this court order that there be a re-composition of the trial court's judgment so as to capture all the issues and to re-digest what proper decision to issue.

Lastly it was submitted that the trial court was ousted with jurisdiction to handle the matter as there is an arbitration clause in their contract (P3 exhibit) prior to the adjudication, as that was not done, the trial court was not properly seized with powers to preside over.

In resisting the appeal, it has been submitted by the respondent's counsel that the arguments in the first and second grounds of appeal that there was no proof of house breaking is baseless as per what is reflected in the trial court's judgment at page 6. Relying on exhibit PE3 which stipulates the responsibilities of each party to the contract; not charging anyone for criminal offence is not a licence for the said negligence on the part of the appellant.

It has been insisted that for a claim on tort to be established it was relied in the case of **Winfred Mkubwa vs SBC Tanzania Limited**, Civil Appeal No 150 of 2018 at page 9 that:

1. There was a duty of care.
2. Breach of that duty.
3. That the plaintiff suffered damages.

He was of the firm view that all this was dully done.

On the issues of the case, Mr. Werema was of the view that all the issues were sufficiently dealt with though indirectly for issue no 2 and 3.

On the reliefs sought, he was of the similar stand that the trial magistrate clearly dealt with them.

As far as the jurisdictional issue is concerned, Mr. Werema was of the view that what is enshrined into the said contract (PE3) it is not arbitration clause but mediation clause in which the parties attempted but in vain.

Lastly, he concluded that as there was theft, then the claims were sufficiently established and that the appellant neglected in his duty.

I have critically digested the evidence in record, the grounds of appeal and the submissions of the both learned counsel in order to determine this appeal.

As regards to the first and second grounds of appeal, I will discuss them jointly whether the suit on claim of damages by the respondent were dully established as per law. The law on Civil claims is clear that a proof of its existence is on preponderance of probability (see section 3 (a) of CPC.

However, it is trite law that he who claims anything for the court's consideration, is duty bound to establish the existence of those facts for him to get the judgment of the court (section 110-112 of TEA).

In this case, the issues of the case were three.

i) Whether the defendant is negligent in the cause of providing security services to the plaintiff.
ii) Whether the plaintiff suffered any damage or loss.
iii) What are reliefs entitled to the plaintiff.

In my digest to the evidence of the case, for the first issue to be resolved positively, there ought to have been evidence that there was the said house breaking as alleged. According to the facts of the case and the evidence adduced before the trial court, it appears there is no dispute on the existence of the contractual relationship between the respondent and amongst others the appellant. The dispute is whether there was the said breaking into building and the alleged stealing. According to law, breaking into the building and committing an offence is an offence provided under **section 296 (a) and (b)** of the penal code which defines it as breaking and entering in a school house, shop, warehouse, store, workshop, garage, office or counting house, or a building which is adjacent to a dwelling house and occupied with it but is

not part of it, or any building used as a place of worship and committing an offence therein.

So as per evidence in record, was there breaking into the said building as per law?

The testimony of PW1 and PW2 only state that they saw their shop roof broken and some shop items missing. How was it broken from above, there is no any evidence established for that proof. Since this an offence, I had expected there to be proof from police or other investigative machinery that actually there was break in as per law. In the absence of police report or evidence in respect of the happening of the said criminal act, it can hardly be accepted that the said fact of house break in has been established as per law. No police evidence, no neighbours who testified to that effect and no even a photograph describing the housebreaking through the said upper roof.

A mere mentioning that some properties there in were stolen to wit: Safe box worth 1,700,000/=, cash money 11,500,000/= mobile phones worth 5,000,000/= and cigarettes worth 700,000/= is not sufficient. There ought to have been sufficient explanations such as how many mobile phones were stolen from the said shop and what make. Likewise to cigarettes, how many packets and bundles were stolen from

purported stealing. What can be gathered from what PW1 and PW2 had testified is a mere mentioning but not offering sufficient explanations for it to be evidence. What was supposed to be established in court was evidence which means an alleged matter of fact, the truth of which if submitted to investigation, is proved or disproved; and without prejudice to the preceding generality, includes statements and admissions by accused persons.

In the present case, what was expected to be established by the respondent are three important things: that he had a shop, that the appellant had a legal obligation of provision of security services to the respondent, his shop had been broken. Save for the fact that the appellant had the contractual obligation of proving security services to the respondent. However, the fact of house breaking and stealing have remained virgin. In **Mathias Erasto Manga Vs Ms. Simon Group (T) Limited,** Civil Appeal No. 43 of 2013 (unreported) for instance, while reversing the finding of the trial High Court, the Court held that:

> *"The yardstick of proof in civil cases is the evidence available on record and whether it tilts the balance one way or the other. Departing from this yardstick by requiring corroboration as the trial court did is going beyond the standard of proof in civil cases."*

The issue for consideration in this appeal would still be one, whether on the available evidence at the trial court the respondent established his tortious claim against the appellant as per law, that is on balance of probability. As stated above, the yard stick proof has not been met. With this finding, the first and second grounds of appeal that there was no proof of the suit at the trial court and that it erred in law in awarding general damages of Tsh. 25,000,000/= to the respondent is answered in positive as there has been no proof of the said claim as per law. The consideration of these grounds of appeal tally with the first issue of the case (at the trial court) whether the defendant had been negligent in providing security services to the plaintiff is responded in negative in which it is now answered in negative.

In the third ground of appeal, this Court has to consider whether the trial court erred in law and fact for failure to properly analyse the available evidence and thus reaching the wrong verdict of the case. In discussing the evidence received by the trial court, the trial magistrate considered important factors necessary for the establishment of tort of negligence on the part of the appellant whether:

1. There was a duty of care.
2. Breach of that duty.

3. That the plaintiff suffered damages.

On the above position, she sought reliance in the case of **Winfred Mkumba vs SBC Tanzania Limited,** Civil Appeal No 150 of 2018 CAT (Unreported) which discussed at length the ingredients of tort of negligence. In her findings, the trial magistrate responded on the first ingredient that the appellant being a security company and in reliance to exhibit PE3, she was of the firm view that there was a contractual relationship between the appellant and the respondent in which the appellant had to provide security services to the respondent.

Whether that duty was breached by the appellant, the trial magistrate also responded in affirmative. How it was breached, the trial magistrate at page 6 of her judgment reasons:

> *"Scrutinizing the evidence from both parties to the case, I am fully satisfied with the evidence that stealing occurred. Apart from the plaintiff's evidence, even the defendant himself admitted that the roof was broken the act which directly suggests that stealing occurred.*
>
> *The fact that the security guards were not apprehended immediately after the stealing can't suffice to convince this Court to believe that nothing happened. This court believes that after the thorough investigation, the evidence suggests that the security guards were not responsible for the theft (they are not thieves), therefore there was no need for them to get arrested. A person can be arrested if he is connected*

with the criminal offense. These security guards were interrogated at police station for the purpose of helping investigation"

According to the evidence of the case, PW1 at page 19 of the typed proceedings says, I quote:

".. After I had discovered that my shop was broken. I reported the incident to the Secretary of the Association, I informed the defendant and I reported the matter to police. Investigation was conducted in vain. I decided to file civil case because the defendant had a duty of making sure that my properties are safe. I pray for this court to order the defendant to pay me for the loss I suffered, Tshs. 17,000,000/=. Also the defendant be ordered to pay my safe box Tshs. 1, 700,000/= or any other relief this court may deem fit and just to grant. I also pray for the court to order defendant to pay 60,000,000/= as general damages."

On the other hand, DW1 at page 25 of the typed proceedings, had this to say:

"....on that day, the plaintiff didn't inform the security guard anything. And that day he closed the shop at 21.00hrs instead of 18.00hrs.

The contract we signed at paragraph 10 says if there is any incident happened, first he has to report the matter to police station. And the police officers have to go to the area of the incident. The security guards have to be apprehended for investigation.

The plaintiff went to police, and the police officers reached at the area of the incident. The security guards were also present in the area of the incident. Police officers inspected the area and seemed that ***the incident didn't happen. They decided to leave without*** *even taking the security guards..." [Emphasis added].*

On his part DW2 who is a guard man of the appellant testified that, on the night between 23/6/2020 to morning of 24/6/2020, he was at duty place – guard station in Rutiginga street together with other two watchmen. That they reported at the duty place at 18.00hrs of the 23/6/2020. They guarded at that street until 24th June 2020 around 07.30hrs when they handed over the shop to the Secretary of the association while being safe and fine. While at home (at 08.00hrs), DW2 was called by the Secretary of the Association that the PW1's shop had some issues. When he returned there, he was informed of the said incident but could not witness any damage on the said roof.

In my considered view, though the trial magistrate did attempt making analysis of the said evidence but misapprehended it and arrived at the wrong premise. I say so because, there is no way breach of the duty of care of the appellant to the respondent could be established in the absence of proof of the said house breaking as alleged. It was thus important that there should have been police report to that effect. As

investigation was done as alleged by both parties, why is it not in court? In the case of **Hemed Said versus Mohamed Mbilu** (1984) TLR 133, it was held:-

> *" Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests."*

In this case, that there was housebreaking as alleged by the respondent is a matter of fact that needed a direct strict proof. It is astonishing that in its absence, yet the trial magistrate proceeded to award general damages. Perhaps that was a grant and not a court award for unestablished fact. It was an error to award general damages in the absence of proof of the alleged injury of housebreaking of the said shop and stealing. To maintain it, is committing another legal wrong in which I am not in a position to condone it.

Having said that much, I also agree with Mr. Wambura Kisika that the trial magistrate didn't respond all the issues thoroughly. That was an error. She ought to have traversed all the issues thoroughly and reached a proper verdict as per law. In this case it was expected that there should have been a thorough traverse of all the three issues of the case. The said issues for considerations were three: Firstly, whether the

defendant is negligent in the cause of providing security services to the plaintiff, Secondly, Whether the plaintiff suffered any damage or loss and thirdly, what are reliefs entitled to the plaintiff. In my considered view, these issues were partially traversed. It is trite law that issues of the case must be clearly traversed and thoroughly responded (See **Swabaha Mohamed Shoshi Vs. Saburia Mohamed Shoshi**, Civil Appeal No. 98 of 2018 and **Victor Nzagi V. Josephina Magwala**, Misc. Land Appeal Case No. 29 of 2022). It is only through trial court's decision on the issues of the case whereby the superior courts in hierarchy get their legal mandate.

Nevertheless, I have been able to step into the shoes of the trial court and analysed the evidence in record and in so doing, I have cured that legal defect. Otherwise, it was a good justification for ordering composition of new judgment basing on the issues of the case.

Lastly, whether the trial court had no jurisdiction to determine the matter on the basis that there was an arbitration clause for the parties first to resort to it prior to judicial process. In the case of **Scova Engineering S.p.A and Another Vs. Mtibwa Sugar Estates Limited and 3 Others**, Civil Appeal No. 133 of 2017, CAT at DSM it was insisted that based on the decision of **Theodore Wendt v.**

Chhaganlal Jiwan and Haridas Munji Trading in Partnership under the Style Chhaganlal Jiwan and Company, 1 TLR(R) 460 at page 461, that the jurisdiction of the High Court or any court for that matter, having been conferred by statute, is not capable of being ousted by agreement of the parties except by statute in explicit terms. That said this ground of appeal fails.

In totality of the appeal and as per reasoning above, I am of the considered view that the appeal is of merit. As the respondent had failed to establish the housebreaking of his shop and the alleged theft, he could not validly claim compensation for the injuries not occasioned or established.

That said, appeal is allowed with costs.

DATED at MUSOMA this 7th day of October, 2022.

F. H. Mahimbali

Judge

Court: Judgment delivered this 07th day of October, 2022 in the presence of both parties and Mr. Gidion Mugoa, RMA.

Right of appeal is explained.

F. H. Mahimbali

Judge