

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF DAR-ES-SALAAM)**

**AT DAR-ES-SALAAM**

**CIVIL APPEAL NO. 81 OF 2021**

**(Appeal from the decision of the Resident Magistrate's Court of Kibaha at  
Kibaha in Civil Case No. 18 of 2019 delivered on 26<sup>th</sup> February, 2021 by  
hon. J.I. Mushi, Esq.RM)**

**BETWEEN**

**FRANCIS MARKUS SING'A... APPELLANT.**

**VERSUS**

**KEDS COMPANY TANZANIA LIMITED ..... RESPONDENT.**

**JUDGMENT**

**MRUMA J,**

The Appellant herein being aggrieved by the whole judgment and decree of the Resident Magistrate's court of Kibaha at Kibaha appeals to this court on the following grounds:-

- (1) That, the trial court erred in law and facts by shifting the burden of proof to the Appellant while the same was lying to the

Respondent's company to prove that she obtained the Appellant's will and consent to use the Appellant's National Identity Card hence reaching to an erroneous finding and conclusion;

- (2) That, the trial court erred in law and fact by determining an issue raised "suo-moto" and holding that the matter before the trial court was purely of criminal nature without letting the parties address the court that issue thus violating the Appellant's fundamental right to be heard;
- (3) That, the trial court erred in law and fact by reasoning that it couldn't come to the knowledge of the Appellant that his National Identity Card has been used by Respondent's company to apply for and register Annual Return of the Respondent's company for the year 2018 without his knowledge and will, if he did not consent to the same;
- (4) That, the trial Court erred in law and fact by holding that the Appellant is the holder and controller of the BRELA ORS account while the same was boldly and firmly denied by the Appellant during trial thus reaching to an erroneous finding and decision;



(5) That, the trial Court erred in law and fact by founding its decision on matters that were never contested by the Respondent including the issue as to whether the Respondent company had used the National Identity Card of the Appellant while the same was admitted by the Respondent company during trial;

(6) That, the trial Court erred in law and fact by holding that the Appellant herein did not prove actual loss to warrant award of the general damage the same need not be proved in actual terms;

(7) That, the trial Court erred in law and fact by completely disregarding the entire body of evidence adduced by the Appellant thus misleading himself and consequently reaching to an erroneous finding and decision;

Based on those grounds the Appellant is praying this Court to allow his appeal, set aside the trial Court's decision in RM's Civil Case No. 18 of 2019 and declare that the Respondent used his National Identity Card without his consent and order the Respondent's company to pay him general damage at the tune of Tanzania Shillings 100,000,000/= He also prays for payment of interest over the decretal sum at commercial rate of 30% from June 2018 to the date of judgment of this appeal and

payment of further interest at Court's rate of 12% from the date of judgment to the date of full payment of decretal sum and cost of this suit.

At the hearing of this appeal the Appellant was represented by Mr Selemani M. Matauka, learned advocate while the Respondent was represented by Mr Mgongolwa, learned advocate. The appeal was argued by way of written submissions.

Making his submissions in chief, counsel for the Appellant submitted that the centre of the dispute was that the Respondent's company used the Appellant's Citizen's Identity Card number 19631009-61610-000001-28 (Exhibit PE1) to file her Annual Return of the year 2018 (Exhibit PE4) without his consent

It is the submission of the learned counsel that the trial court was wrong to rely on the evidence of the Respondent's witness one Steven Katoto (DW1) who stated at page 5 of the impugned judgment without any proof that the Appellant consented to the use his Identity Card. It is the contention of the counsel that by so doing the trial court shifted the burden of proof to the Appellant who gave evidence to the effect that he never gave his consent. The learned counsel referred this court to the decision of the Court of Appeal in the Case of **ANTHONY MATHEO MINAZI & 2 OTHERS VS R, CRIMINAL APPEAL NO. 13 OF 2017**



**(CAT)**, where the Court of Appeal held to the effect that shifting of the burden of proof is illegal. It was the counsel's view that the Respondent ought to have produced documentary evidence to prove such consent.

On the issue raised suo moto by the court, counsel for the Appellant stated that the issue of criminal nature of the matter was raised at the time of composing judgment therefore parties were not afforded right to be heard which is contrary to the principle of natural justice as provided for under Article 13(6)(a) of the Constitution. He said that the denial of the right to be heard on his party prejudiced the Appellant's right and added that and submitted that, the trial Court's findings in that respect as reflected in the impugned judgment should be expunged from the Court records.

Submitting in relation to the pleadings and evidence adduced, the learned counsel submitted that the trial Court failed to consider that the Appellant was an employee of the Respondent's company but he was not a shareholder, director or company secretary as reflected in paragraph 5 of the Respondent's Written Statement of Defence and it is a legal principle that parties are bound by their pleadings and they are not allowed to depart from what they stated in their pleading unless by leave of the Court. The learned counsel contended that, in her Written Statement of Defence she denied to have ever used the Appellant's

Identity Card but her only witness DW1 is quoted at page 23 of the impugned judgment to have told the trial court that the Respondent had requested the Appellant to use his ID in accessing the ORS-BRELA account to feed the information in the system and Appellant consented. The learned counsel submitted that the fact that the Respondent contradicted herself on the use of the Appellant's Identity Card indicates that it was used without his consent.

On the issue of general damages the learned counsel submitted that it was wrong for the trial court to hold that for the court to grant general damage actual loss must be proved because the law is clear that general damage is discretionary power of the court and it was erroneous for trial court to hold that the Appellant didn't prove that BRELA-ORS account does not belong to her. The counsel went further to refer to section 2 of Cap 310 which define wrong act, to mean any negligence, breach of statutory duty which give liability in tort and concluded therefore that the Respondent breached that duty by using the Identity Card of the Appellant without his consent contrary to section 132(4) of Cap 212, in which state that, using the a personal NIC and credential without consent and agreement is contravention of the law. The Appellant avers that, the Respondent's company has benefited and did put the Appellant at high risk by using his NIC and credential without any agreement and



consent as a result of which the Appellant deserves to be compensated for the wrongful act of the Respondent's company. The learned counsel submitted that the trial Court's failure to observe the legal principle of the law which is to the effect that cases must be decided based on evidence, facts and application of the legal principles and the law and finally reached at that decision in favour of Respondent which was wrong.

In reply counsel for the Respondent submitted that the Appellant's allegations are utterly misconceive because in law the Respondent had no duty to prove that she had never used the Appellant's Identity Card because the Appellant was the first to claim against the Respondent and as a matter of law the burden of proof is lying on Appellant to prove his allegations. In the circumstances the trial court was correct to decide in Respondent's favour. The learned counsel stated that it is to be noted that the Respondent's witness admitted to have used the ORS BRELA account owned by the Appellant and not the National Identity Card of the Appellant. He said that as pointed out earlier, it was the ORS BRELA account which used to file the Annual Return and not citizen identity card however. He contended that the use of ORS BRELA was not part of the Appellant's claims in the suit and reiterated that the Respondent never used the Appellant's Identity Card.

Regarding issues dealt with by the trial court, it was the counsel's submission that during the trial, the trial court framed four issues and it decide them and there were no new issues which the said court considered in reaching its findings. He said that the trial court simply observed that Appellant's allegation that his Identity Card was used by Respondent without his consent attracted criminal sanction and that alone cannot vitiate the proceedings. The counsel went on to submit that the trial court properly evaluated the evidence before and asked itself that if the said Identity Card was used by Respondent as alleged, how then the Appellant had access to the said ORS BRELA account without username and password for him to be aware that ORS BRELA account was created by his Identity card? According to the learned counsel it is settled principle of the law that general damages are awarded at the discretion of the court and it is not quantified by parties to the suit. The learned counsel cited the case of **AMI TANZANIA LTD VS PROSPER JOSEPH MSELE**, Civil Appeal No. 159 of 2020, CAT where the Court held that;

"In law general damages are awarded at the discretion of the Court having considered the evidence on record and circumstances of the case and having satisfied itself that the



claimant has suffered materially or mentally following the unlawful action of the defendant”

The learned counsel went on to submit that for the Court to grant general damage there must be established by the claimant that there was unlawful action which caused the claimant to suffer mentally or materially and he concluded that the Appellant failed to prove unlawful action done by Respondent and the trial Court was correct on its findings. He said that the court evaluated the evidence adduced properly as the Appellant had failed to discharged his legal obligation to prove that the Respondent used his Identity Card without his consent and therefore it is the Respondent’s prayer that this appeal be dismissed with costs.

I have carefully revisited the trial court’s record, the pleadings and rival submissions of the counsel for the parties in this appeal. In view of all that it is my opinion that this appeal revolves around three main issues which has to be determined hereunder. The issues are:-

- i. Whether the Respondent used the Appellant’s National Identity Card without his consent;
- ii. If the answer to the issue No.1 is in affirmative, whether the Appellant suffered any loss for the use of his Identity Card by the Respondent.

It is trite law that, he who alleges the existence of any fact must prove that such fact does exist as required by Section 110(1) of the Evidence Act [Cap 6 R.E. 2019]. That is the principle of the law therefore, court has a duty to evaluate the evidence adduced to see whether the person who alleged has discharged his duty of proving. This being the first appellate court it may assume the same duty of re-evaluate the evidence and come out with its own conclusion on the issues.

I have revisited and considered the trial Court's records and the evidence adduced by the parties during the trial. There is nowhere and/or at any point the Appellant came closure to establishing that the Respondent or any of its officials used his National Identity Card. The allegations raised in the pleadings remained allegations during the trial. DW1 who is the administrative officer of the Respondent denied to have used the Identity Card of the Respondent and instead he told the court that he used the Appellant's account to feed the information of the Respondent's company in BRELA system online as a mandatory requirement by BRELA. It was further evidence of DW1 that the act of using account of the Appellant was mutually agreed by the parties. The Appellant didn't challenge this piece of evidence at least by way of cross-examination. The evidence on record indicate that BRELA ORS



account bears particulars similar to that of the Appellant. Actually in absence of evidence to the contrary that account belongs to him. The said account bears the names of the plaintiff, FRANCIS MARKUS SING'A, with email address [lucyhubert89@gmail.com](mailto:lucyhubert89@gmail.com), and phone number 0621400498, and other personal particulars of the plaintiff as witnessed by exhibit PE4. There is nowhere in the testimony of the plaintiff (PW1) where he denied that the account does not belongs to him. This implies that the Appellant is the controller of the said account which he alleged to have been tempered with by the Respondent. It should be remembered that the alleged tempering with that account was committed at the time when the Appellant was still an employee of the Respondent. He didn't complain during the alleged tempering and he didn't do so for nine months he was in the service of the Respondent after the alleged tempering but 3 months after he had left the Respondent's employment he instituted this suit.

But assuming that there was evidence to prove that the Respondent or its officials used the Appellant's Identity Card as he alleges in his claims, the next question would be whether he suffered any damages whether physical or mental or any other form of damages. Again the burden was on him to prove these. He didn't produce any evidence or even explain

the damages he suffered. it is trite law that, the claimant has a duty to prove his claim by collecting evidence and bring it to the Court or where necessary draw attention of the Court to make an order to call the potential witness testify on his behalf before verdict. Failure of the Appellant to discharge his duty renders his claim in the suit unfounded.

Last but not least, on the issue whether the Appellant was able to establish his entitlement to general damages, it is trite law that general damage is discretionary power of the Court and cannot quantified by the parties as well established in the case of **AMI TANZANIA LIMITED VS PROSPER JOSEPH MSELE, Civil Appeal No. 159** of 2020 CAT held that;

*"In law general damages are awarded at the discretion of the Court having considered the evidence on record and circumstances of the case and having satisfied itself that the claimant has suffered materially or mentally following the unlawful action of the defendant"*

As per above established principle of the law, court cannot grant general damages unless it satisfied that the claimant has suffered materially or mentally following the unlawful action of the defendant. As I have discussed above, record of the trial court doesn't show any unlawfully



act done by the Respondent or its officials. Similarly there is no evidence of either physical or mental suffering of the Appellant. The Appellant's allegation that the Respondent used his Identity Card was not proved. On the evidence on record this court is satisfied that the Appellant failed to establish that he suffered mentally or materially and I therefore the trial court was correct in refusing to award general damages as prayed.

That said, I find that this appeal lacks merit and it is dismissed with costs.



  
A.R MRUMA

JUDGE

Dated at Dar Es Salaam this 29<sup>th</sup> Day of September, 2022.