IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 33 OF 2021

(C/F Resident Magistrate Court of Arusha at Arusha in Civil Case No.66 of 2019.)

MOBISOL UK LTD.....APPELLANT

Vs

VIOLA CAR HIRE AND TRANSPORT SERVICE LTD.....RESPONDENT

JUDGMENT

Date of last Order: 10-11-2022

Date of Judgment: 12-12-2022

B.K.PHILLIP,J

Aggrieved by the judgment of the Resident Magistrates' Court of Arusha at Arusha in Civil Case No. 66 of 2019, the appellant herein lodged this appeal on the following grounds;

i) That, the trial Magistrate erred in law and fact for failing to access the respondent's failure to specifically plead and prove the alleged claims for special damages.

ii) That, the trial Magistrate erred in law and in fact for failing to access the respondent's claim was a fabrication.

iii) That the trial Magistrate erred in law by holding that the evidence of DW1 amounted to the admission of plaintiff claim over other services rendered in other regions/areas.

iv) That the trial Magistrate erred in law and in fact for failure to properly evaluate evidence in records.

v) That, the trial Magistrate erred in law for admitting and relying in the exhibit P1 (invoice no.0337 and its receipt) which was not appended in the pleading by the plaintiff.

vi) That the trial Magistrate in law and in fact by relying on the invoices no. 0331 and its receipt, no. 0332 and its receipt and no. 0375 and its receipt which were rejected and not admitted by the Court, in alternative, invoices no.0331 and its receipt, no. 0332 and its receipt, 0375 and its receipt and no.0337 and its receipt were not pleaded and appended in the plaint filed by the respondent herein.

A brief background to this appeal is as follows; that the respondent and the appellant were plaintiff and defendant respectively in Civil Case No. 66 of 2019. The respondent's claims against the appellant was for payment of Tshs. 116,222,920/= being specific damages to a tune of Tshs 26,414,300 and 20% interests to a tune of 89,808,620/= due to loss of business. It was the respondent's case that on 1st day February 2017 and 1st day of March 2017, the respondent entered into car hire agreements with the appellant which involved different types of motor vehicles for various periods. Those contracts were duly signed by both parties and in total were worth 26,414,300. The respondent complied with all the agreed terms in the contracts and supplied to the appellant the motor vehicles as agreed, but the appellant did not pay the agreed costs for the services to wit; Tshs 26,414,300/=. Thus, the respondent

lodged her claims in Court . The reliefs prayed for by the respondent at the lower Court are reproduced verbatim hereunder.

i) The defendant be ordered to pay the Plaintiff the sum of Tshs 26,414,300/= being the amount which was not paid in consideration to the contract.

ii) The defendant be ordered to pay the plaintiff the sum of Tshs 89,808,620/= being the loss of business due to the refusal of payment and therefore the capital of the plaintiff was in hand of the defendant for more than 12 months.

iii) Payment of interests from the date of judgment to the payment in full.

iv) Costs of the suit.

v) Such other and further order as this Honourable Court may deem appropriate to grant.

The trial Court framed the following issues for determination of the case; **one** whether the vehicle described in the service contract provided the aforementioned service to the defendant. **Two,** whether the defendant owes the plaintiff a total of Tshs 116, 222,920/= as a result of breach of a contract. **Three,** what reliefs are parties entitled to. Upon receiving evidence from both sides, the trial Magistrate answered 1st and 2nd issue in the affirmative and ordered the appellant to pay the respondent a sum of Tshs. 26,414,300/= being the amount which was not paid as a consideration for the contract, the sum of Tshs. 89,808,620/= being the loss of business since the respondent's capital was in the hands of the appellant for more than 12 months and

interest on the decretal sum at rate of 20% from date of judgment to the date of payment in full. Aggrieved by the said decision, the appellant lodged the instant appeal.

Back to the appeal in hand, this appeal was heard by way written submissions. The Appellant was represented by Mr. Meinrad M. D' Souza, a learned Advocate whereas the respondent was represented by Mr. Duncan Joel Oola, learned Advocate.

Mr. D'souza opted to start his submission with the 5th and 6th ground of appeal. He submitted for the same conjointly as follows; that in his decision the trial Magistrate relied on the invoices nos. 0331, 0332 and 0375 their receipts thereof whereas the same were rejected during hearing following the objection raised by the advocate for the appellant that the same were not annexed to the plaint and no list of additional documents to be relied upon was filed by the respondent to accommodate those documents/invoices. Consequently they were not admitted as exhibits. He referred this Court to Order VIII Rule 14 (1) (2) and Order XII Rule 1 (1) of the Civil Procedure Code, Cap 33 R.E 2019 (Henceforth "the CPC").He contended that the trial Magistrate erred in law to rely on the aforementioned invoices. To support his argument he cited the cases of **Diamond Trust Bank Tanzania Vs Granitech (T) Co. Ltd and Others, Commercial Case No. 44 of 2019 Commercial Division at Dar es salaam, Udaghwenga Bayay and 16 others Vs Halmashauri ya Kijiji cha Vilima vitatu and Another, CAT at Arusha, Civil Appeal No.77 of 2012,** (Both unreported), **Japan International Cooperation Agency (jica) Vs Khaki Complex Limited TLR 2006 343 and** Order xiii Rule 7(2) of

CPC. Mr D'souza urged this Court to expunge the said invoices and their receipts from the record.

Furthermore, Mr. D'souza argued that the trial Magistrate wrongly admitted invoice no. 0337 and its receipt as exhibit P1 collectively despite the fact that the same was not annexed to the plaint and no list of additional documents to be relied upon was filed in Court to accommodate the same.

On the 1st ground of appeal, Mr. D'souza submitted that claims for Tshs. 26,414,300 ought to have been proved specifically since it was claim for specific damages. Referring this Court the testimony of PW1 and PW2, he contended that the respondent did not prove its claim for specific damages because PW1's testimony was to the effect that the appellant hired from the respondent five motor vehicles for Tshs. 150,000/= per day for 28 days and appellant was supposed to pay Tshs. 4,956,000/= per month but did not pay the rentals as agreed. On other hand PW2 testified that part of the rentals were paid and neither PW1 nor PW2 explained how the claimed amount of 26,414,300/= was arrived at. Furthermore, Mr. D'souza argued that in his testimony PW1 confirmed that the payment for the rentals were supposed to be paid upon receipt of invoices from the respondent. To cement his arguments referred this Court to pages 24 and 25 of the typed proceedings.

Moreover, Mr. D' souza contended that all EFD receipts relied upon by the respondent neither bears neither the appellant's name nor the appellant's TIN number. And there was no evidence that the invoices relied upon by the respondent were received by the appellant. He maintained that respondent's claim for specific damaged was not

specifically pleaded and proved contrary to the lied down legal procedures. To fortify his argument he cited the case of **Zuberi Augustino Vs Anicet Mugabe (1992) TLR 137** and **Stanbic Bank Tanzania Limited Vs Abercrombie and Kent (T) Ltd, Civil Appeal No.21 of 2001 CAT at Dar es salaam** (unreported) in which the Court cited with approval of the decision of the House of Lords in the case of **Bolag Vs Hutchson (1950) A.C 5151.**

Another argument raised by Mr. D'souza was that the trial Court's assessment of the specific damage was based on the contracts (exhibit P1 collectively) which lacks evidential value for lack of stamp duty as required by section 47 of Stamp Duty Act (Cap 189 R.E 2019). He went on arguing that despite the objection raised by the Advocate for the appellant that no stamp duty was paid in respect of those contracts , the trial Magistrate admitted the contracts as exhibits on the ground that he had powers to admit the contracts, in contravention of the Stamp duty Act. To buttress his argument, he cited the case of **Mobisol Uk Ltd Vs Raphael Mussa Daudi, Labour Revision No.130 of 2021 HC Labour Division at Arusha** (unreported).

With regard to the 2nd ground of appeal Mr. D'souza submitted that at the time the suit was filed in Court no invoices and EFD receipts were annexed to the plaint to support the claims for special damages. He contended that the respondent's claim was fabricated on the ground that the contract (exhibit P4) was executed on 1st February 2017 but the EFD receipt for payment (exhibit P1) was issued on 31st January 2017,thus there are clear contradictions between the date of issuance of EFD receipt and date of execution of contract. Further, he added that

exhibit P1 does not show the name of the payer. It only contains the name of respondent company/payee. PW1 stated that the appellant was supposed to pay a total amount of Tshs. 6,808,000/= but the total amount indicated in exhibit P1 (EFD receipt) is Tshs. 6,608,000/=. Thus, the amount stated by the respondent was different from the amount indicated in the receipt (exhibit P1) and there was no breakdown of the amount claimed by the respondent which is fatal, contended Mr. D' souza. To support his arguments, he cited the case of **Rubya Investment Limited and others Vs Tanzania Breweries Co. Ltd, Case No. 116 of 2009 (HC) Commercial Division at Dar es Salaam** (unreported).

With regard to the 3rd and 4th ground of appeal Mr. D'souza's arguments were to the effect that the trial Magistrate erred in law by holding that there was admission of the respondent's claim by appellant. He failed to make proper evaluation of the evidence adduced by the appellant's witnesses. He went on submitting that the trial Magistrate did not state in the impugned judgment what convinced him to believe that the appellant admitted the respondent's claim while no admission of the claim was reflected in the pleadings. He maintained that there was no admission of the claim by the appellant as required under the law. He referred this Court to the case of **John Peter Nazareth vs Barclays Bank International Ltd (1979) EACA 39** cited with approval in the case of Full **Gospel Bible Fellowship Church Vs Elgoodness Emmanuel Rwatto Civil Revision No.4 of 2021 (HC) at Bukoba** (unreported), to buttress his argument.

Moreover, it was Mr. D'souza's contention that looking carefully at what DW1 testified in Court there was no admission of the claim .What he told the Court was that the invoices relied upon by the respondent in their claims were not served to the appellant. He insisted that there is nowhere in the impugned judgment showing analysis and comparison of the competing evidence adduced by the parties at the trial. To cement his arguments he referred this Court to page 31, paragraph 2 of the typed proceedings. Relying on the case of Peter **Vs Sunday Post Limited (1958) EA 424,** Mr. D'souza urged this Court to exercise its powers as an appellate Court and make assessment / re- evaluation of the evidence. He beseeched this Court to allow this appeal and set aside the impugned judgement with costs.

In rebuttal, on the 5th and 6th ground of appeal Mr. Oola submitted that the trial Magistrate cannot be faulted for relying on the invoices and EFD receipts as well as the contracts since the same were admitted in Court as exhibits and marked accordingly. He went on arguing that there was no objection regarding admission of those documents as exhibits with exception of the contracts. The appellant's advocate raised an objection that the contracts were not stamped as required under section 47 of the Stamp Duty Act, but the contracts were in original form. The trial Magistrate used his discretionary powers conferred to him by the law and admitted the contracts as an exhibits. Mr. Oola contended that none of the parties to the case was prejudiced for the admission of those contracts as an exhibits since the appellant's Advocate was given opportunity to cross examine the witnesses who tendered the said contracts.

Furthermore, Mr. Oola submitted that a document can only be referred to as an exhibit after being admitted by the trial Magistrate and labelled as an exhibit in accordance with the provisions of the Order XIII Rule 4 (1) (7) (1) of the CPC. To support his position, he cited the case of **A.A.R Insurance (T) Ltd Vs Beatus Kisusi, Civil Appeal No. 67 of 2015** (unreported) and **Bag a hat Ram Vs Rattam Chand (2) (1930) A.I.R Lah. 854.** He went submitting that the fact that the contracts were not stamped is not fatal and did not prejudice the parties since the parties actually entered into the contracts which are legally enforceable by the law and the appellant breached the agreement for failure to pay for the services rendered as agreed. It was Mr. Oola's stance that the appellant's witness (DW1) admitted the contracts as reflected at page 31 paragraph 2 of the typed proceedings.

Moreover, Mr. Oola argued that the case **Udaghwenga Bayay and 16 others** (Supra) and other cases cited by Mr. D'souza are distinguishable and quite different from the facts of the case in hand. He contended that in **Udaghwenga's** case and the rest, the documents in question were not admitted at all thus, they could not be part of the evidence in the proceedings. He went on arguing that the trial Court has inherent powers to make any orders as may be necessary for the ends of justice or to prevent abuse of the Court process. Mr. D'souza has failed to state how the admission of exhibit P1 collectively prejudiced the appellant.

With regard to 1st the ground of appeal Mr. Oola contended that the claim for specific damage was specifically pleaded and proved by the respondent since he proved breach of the contracts. Expounding on this

point, he pointed out that the total of Tshs. 26,414,300/= involved different types of motor vehicles for different contracts entered between the appellant and respondent as pleaded in the plaint. The evidence adduced by the respondent's witnesses and the exhibits admitted by the trial Court proved the respondent's claim on balance of probabilities as required under the law.

Moreover, Mr. Oola argued that having proved that appellant hired the respondent's motor vehicle, the appellant was duty bound to prove that she paid for the services provided to him by the respondent. Mr. Oola pointed out that damages are intended to put a party in the same position he would have been but for the wrong committed to him/her as far as money can.He cited the case of **Njombe Community Bank and another Vs Jane Mganwa, DC Civil Appeal No. 3 of 2015** (unreported), to bolster his arguments.

With regard to the 2nd ground of appeal Mr. Oola submitted that there is no any fabrication of claims on the part of respondent. At page 14 of the typed proceedings it is clearly indicated that the copies of the EFD receipts and invoices were presented in Court and admitted as exhibits. There was no objection on their admission as exhibits. The appellant recognized them and acknowledged their existence which amounts to admission of the respondents' claim, contended Mr. Oola. He insisted that pursuant to section 22 of the Evidence Act allegations of facts admitted expressly or constructively by the opponent need not be proved. To cement his argument, he cited the case of **Pioneer Plastic Containers Ltd Vs Commissioner of Customs and Excise (1967) All ER 1053**.

It was Mr. Oola's contention that Mr. D'souza assertion in respect of exhibit P4 and P1 is totally wrong on the ground that he is trying to mislead the Court. Exhibit P4 was not a contract but the respondent's Board of resolution. He referred this Court to page 8 of the typed proceedings of the trial Court. He went on submitting that exhibit P4 and P1 were tendered before the trial Court and admitted as exhibits without any objection from the appellant's advocate, and there is no any suggestion that their authenticity are questionable. No party was prejudiced by the shortcoming if any. The testimonies of PW1 and PW2 were credible. Their testimonies were nothing but the truth and the contradictions which Mr. D'souza tried to portray in his submission do not go to the root of the matter, contended, Mr. Oola.

On the 3rd ground of appeal Mr. Oola submitted that trial the Magistrate did not misdirect himself by holding that there was admission of claims by appellant. He referred this Court to pages 31 and 33 proceedings. Expounding on this point, he submitted that in his testimony in chief DW1 testified that the financial department was not disputing the service rendered by the plaintiff (the respondent herein) to the appellant but they disputed to have received the invoices for the cars mentioned in paragraphs 4 and 8 of the plaint. However, when responding to questions during cross examination DW1 told the trial Court that he was not responsible for receiving the invoices from the client. He received the invoices from procurement department and that there were some exhibits for some payments made to the respondent but until the end of the hearing no any proof for payment of the claimed amount was tendered in Court. Mr. Oola urged this Court to draw an inference on the evidence adduced by DW1 as admission of the

appellant's claim and that the same being admitted need not to be proved pursuant to section 22 of the Evidence Act. Relying on the case of **Liza Nathan Mwankusye Vs CRDB Bank, Land Appeal No. 202 of 2022** (unreported) , Mr. Oola alerted this Court that it should not accept to be used by defaulters in escaping their contractual obligations.

With regard to the submissions made in support of the 4th ground of appeal, Mr. Oola submitted that the trial Magistrate scrutinized and properly evaluated all evidences from both parties. He considered the facts and the circumstances of the case very well. While evaluating the evidence in its totality he evaluated the evidence of PW1 and PW2 against the evidence of DW1, and made a finding that the evidence of PW1 and PW2 corroborate each other and were not shaken during cross examination. Mr. Oola maintained that the respondent's evidence was heavier than the appellant's evidence. Thus, the respondent was rightly declared a winner of the case since it is a trite law that a party whose evidence is heavier must win the case. He cited the case of **Hemed Said Vs Mohamed Mbilu (1984) T.L.R 113.**

Moreover, Mr.Oola cited the case of **Amratlal D.M t/a Zanzibar Hotel Silk Stores Vs A.H. Janwala t/a Zanzibar Hotel (1980) T.L.R. 31,** in which the court held that an appellate Court should not disturb concurrent findings of facts unless it is clearly shown that there has been a misapprehension of the evidence , miscarriage of justice or a violation of some principle of law or practice. He contended that the authorities cited by Mr. D'souza are distinguishable from the facts of this case. Mr. Oola beseeched this Court to dismiss this appeal with costs.

In rejoinder, Mr. D'souza reiterated his submission in chief. He added that this Court being an appellate Court has empowers to assess the lawfulness over the admission of exhibit P1 which was not stamped. He insisted that the same was wrongly admitted as an exhibit in this case. He pointed out that there is no dispute that the contracts (Exhibit P1 collectively) were not stamped. Matters of law are such that it is irrelevant whether or not a party is prejudiced. They supersede any conducts by a party. Further, he contended that accepting Mr. Oola's argument without a carefully analysis shall have the effect of this Court turning a blind eye over an obvious and apparent illegality, and condone the same.

Moreover, Mr. D'souza argued that having a general contract is not a proof of the liability or proof that services envisaged in the contract was rendered as agreed. The respondent failed to proof that service was rendered and the special damages awarded by the trial Court were not specifically pleaded and proved. Mr. D' souza contended that the evidence relied upon by the respondent came as an afterthought and since the documents relied upon by the respondent in the case were not annexed to the plaint no cause of action against the appellant was disclosed and established. Thus, the respondent's claim was fabricated. The respondent took the appellant by surprise and prejudiced him. The respondent failed to discharge her burden of proof. Mr. D' souza argued that there is a clear distinction between admission /admissibility and weight of evidence. He was of the view that Mr.Oola is confusing between the fact that the appellant did not object to the admission the those documents on being admitted as exhibit and the admission of a claim in law. He maintained that Mr. Oola's argument is utterly flawed

and misplaced since not objecting to admission of a receipt which does not indicate the name of appellant does not mean that the same was issued to the appellant or the appellant admits the amount indicated therein.

With regard to Mr. Oola's response in respect of the 3rd ground of appeal, Mr. D'souza's rejoinder was to the effect that only services rendered and invoices issued monthly would have been paid if valid. The evidence of the defence witnesses should be read in its context and within its limits. He insisted that there was no payment because there were no invoices issued by the respondent's company to the appellant. Since there is no EFD receipt issued to the appellant it means that there was clear violation of the provision of Income Tax Act by the respondent who did not raise invoices at the time the alleged services were presumably rendered.

Moreover, Mr. D' souza submitted that the respondent did not call any witness to prove the validity of EFD receipt. It was the duty of PW1 and PW2 to prove that the alleged services were rendered. Further, he added that in his submission Mr. Oola was trying to raise arguments which in effect pushed the burden of proof to the appellant by asking this Court to draw an inference of liability whereas it is was a duty of respondent to prove in the first place that all facts exist as averred in the plaint. Mr. D' souza maintained that the respondent failed to prove that the appellant had an obligation to pay for the specific invoices without watering down the fact that appellant cannot lawfully pay for invoices if no EFD receipt were issued in his name.

Coming to Mr. Oola's response in respect of the 4th ground of appeal , Mr. D'souza invited this Court to hold that it was wrong to accept /rely on the evidence produced in Court after the suit was filed, that is no cause of action existed at the time of filing of the suit and the burden of proof does not shift to the appellant if respondent does not discharge her burden in the first place.

Having analyzed the submission made by both sides, let me embark on the determination of the grounds of appeal. Starting with the 5th and 6th ground of appeal, It is not in dispute that invoices nos. 0331, 0332, 0375 and 0337 and their receipts were not annexed to the plaint and there was no list of additional documents to be relied upon in the case which was filed in respect of the aforementioned invoices and their respective receipts. Invoice no. 0337 and its receipt were tendered and admitted by trial Court as exhibits. The counsel for the appellant did not object to their admission as exhibits, therefore he cannot raise an objection at this stage. Invoices nos. 0331, 0332 and their receipts were rejected by trial Court following the objection raised by the advocate for the appellant. (See page 16 of the typed proceedings). Invoice no. 0375 and its receipts were not tendered before trial Court. Also, it is not in dispute that the aforementioned invoices and receipts were the basis for the respondent's claim before the trial Court as well as the decision of the trial Court.

From the foregoing I am inclined to agree with Mr. D'souza that the trial Magistrate erred to relying on invoices nos. 0331, 0332 and 0375 which were not admitted as exhibits, thus they are not part of the

Court's records. In short, the trial Magistrate was not supposed to refer to those documents or rely on the same in his judgment

With regard to 1st ground of appeal, first and foremost, it is not in dispute that the contracts which were admitted as exhibits by trial Magistrate were not stamped. Section 47 (1) of the Stamp Duty Act provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence or shall be acted upon, registered in evidence authenticated by an such person or by any public officer unless such instrument is duly stamped. The proceedings at page 14 shows that the trial Magistrate admitted the contracts as exhibits in this case despite the objection that was raised by the counsel for the appellant that the contracts were not stamped. The Court's records reveal that the trial Magistrate admitted those contracts on the ground that he was exercising the powers conferred to him by the law. With due respect to the trial Magistrate, he erred in law because he does have powers to act or make decisions in contravention of the laws. No wonder he failed to cited any provision of the law which gives him such discretional powers to ignore the provision of section 47 of the Stamp Duty Act. The contracts which were admitted by the trial Magistrate are chargeable with stamp duty.The trial Magistrate was supposed to order the respondent to pay stamp duty as required by the Stamp Duty Act if at all he was interested in using those contracts as exhibits in his case instead of admitting them as he did. [See the case of **Mobisol Uk Ltd** (supra)]. Thus, those contracts were wrongly admitted as exhibits.

The above aside, upon perusing the Court's records, I have noted that the pleadings in particular the respondent's written statement of defence reveal that it is not in dispute that the respondent and the appellant did sign contracts for car hire services. For instance paragraph 4 (iii) of the respondent's written statement of defence reads as follows;

"4. That the contents of paragraphs 4,5,6,7 and 8 of the plaint and the annexed agreements (VCH-1 to VCH-5) for months of February 2017 and March 2017 are irrelevant as the contract was not performed. The Plaintiff is put to strict proof as to the description and use of the alleged motor vehicle .Further the defendant states as follows;

iii) That the defendant paid the plaintiff collectively for the services provided in all regiosn where the Plaintiff was contracted to serve for the month of February 2017.Attached are copies of Notification of Transmission of Funds form the Defendant to the Plaintiff dated 6.2.2017,21.2.2017 and 3.3.2017 Marked Mobisol - 1 Collectively and leave of theis Honouroble Court is sought that the same form part of this defence."

From the foregoing, it is the finding of this Court that the issue on the existence of the Contract between the appellant and respondent is not in dispute. Also, the pleadings show that the claim for specific damage was properly pleaded. Thus, Mr. D'souza's contention that the claim for specific damage was not pleaded is misconceived.

Coming to the 2nd ground of appeal the Court's records reveal that exhibit P4 is the respondent's Board resolution in which the respondent's Board deliberated on the commencement of litigation against the appellant . Thus , Mr D'souza's argument that exhibit P4 is a contract is misconceived and I do not need to address the arguments on exhibit P1collectively since I have already made a findings on the same.

In addition to the above, I which to point out that Mr. D'souza's contention that since the invoices and EFD receipts were not annexed to the plaint the respondent failed to establish the cause of action against the appellant from the very beginning of the case is misconceived and has been raised as an afterthought at this stage because the same was not raised the trial Court. The Court's records reveal that the appellant's advocate raised a point of preliminary objection that the case was *res judicata,* but did not raise any concern/ objection that the plaint did not disclose a cause of action against the appellant (defendant at the lower Court).Thus, I cannot deal with that issue at this stage. It is trite law that this Court being an appellate Court cannot deal with issues which were not raised at the lower Court. [See the case of Elisa **Mosses Msaki Vs Yesaya Ngateu Matee (1990) TLR 90**].

With regard to the 3rd ground of appeal, I think it is imperative to revisit the law as far as admission of claims is concern. Order XII Rule 4 of the Civil Procedure Code ('CPC") provides as follows;

" *Any party may at any stage of a suit , where admissions of fact have been made either on the pleadings or otherwise , apply to the Court for such judgment or order as upon such admission he may be entitled to, without waiting for determination of any other question between the parties , and the Court may upon such application make such order ,to give such judgment as the Court may think just"*

In the case of Full Gospel Bible Fellowship Church (supra), this Court held that for the Court to hold that there is admission, it has to be satisfied that the same is not ambiguous and all material facts regarding the claim are not contested in any way and there is no any doubt to the intention of the party making the admission. In the case of

John Peter Nazareth Vs Barclays Bank International Ltd (1976) E.A. C.A 39 the Court held that;

" *For judgment to be entered on admission , such admission must tbe explicit and not open to doubt".*

From the foregoing, I hasten to say that I am in agreement with Mr. D'souza that the trial Magistrate misdirected himself in making a finding that there was admission of the claimed amount by the appellant basing on the testimony of DW1 whereas the pleadings do not indicate that there was any admission of the respondent's claims by appellant and there is no any testimony or any document tendered in Court showing explicitly the admission of the respondent's claims. The fact that DW1 testified that the appellant did not pay the appellant the claimed amount because he was not served with the invoices allegedly served to him does not mean that the appellant admitted the respondent's claims. In my understanding the said testimony implies that DW1 was disputing the respondent's allegations that he was served with the invoices. DW1's testimony that was relied upon by the trial Magistrate in his judgment is not clear admission of claim as required under the law and is open to doubts, and more than one interpretation. Thus the 3rd ground of appeal has merits.

With regard to the 4th ground of appeal, this Court being the first appellant Court has powers to re-evaluate the evidence adduced. As I have alluded earlier in this judgment the pleadings and evidence adduced prove the existence of several contracts for car hire services between the appellant and the respondent. The only controversy is whether or not the contracts for the motor vehicles stated in the plaint

in paragraphs 4,5,6,7 and 8 were executed and no rental fees were paid for the same. The PW1 and PW2 testified that the contracts were duly executed and invoices for the service rendered were served to the appellant but the same were not paid. Invoice no.337 and its receipt for Tshs 6,608,000/= (exhibit P1 collectively) is the only document which was properly admitted in Court and the advocate for the appellant did not raised any objection for the same to be admitted as an exhibit in the case. Mr. D'souza's contention that the receipt does not indicate the name of the payer is unfounded because the receipt is annexed to a corresponding invoice which indicates the payer's name, that is, the appellant herein.

On the other hand, the witness for the appellant (DW1) denied the respondent's allegation on the services stipulated in the plaint and that he was served with the invoice in respect of the amount claimed by the respondent. It is true that the respondent did not produce any proof of service of that invoice to the appellant. Not only that, looking at the competing assertions made by the respondent's and appellant's witness, it is the finding of this Court that PW1 and PW2 failed to prove that the agreed services stipulated in the contracts mentioned in the plaint were provided to the appellant. I have noted that in his defence the appellant alleged that the motor vehicles mentioned in the plaint were not used by the appellant and that upon the expiry the contracts the same were not renewed due to poor services/performance. In his response to the questions posed to him during cross examination, PW1 told the Court that he was ready to bring in Court the drivers of the motor vehicles to testify in Court about the services rendered to the appellant. (See page 19 of the proceedings) However, no driver was brought in Court to

testify. In fact, the drivers would have been good witnesses in proving that the motor vehicles mentioned in the plaint were used to render the alleged services to the appellant. It is worthy note that the burden of proof lies to the plaintiff (in this appeal the respondent). Thus, Mr. Oola's argument that since the appellant failed to bring proof of payments for the services rendered to the appellant, then the respondent's claims were proved is misconceived. The respondent had a task of proving that the services stipulated in the contract were duly performed as agreed and invoices were duly served to the appellant but he defaulted to pay. I do not need to be repetitive, as I have alluded earlier in this judgment that the appellant disputed the respondent's allegation that the services stipulated in the plaint were provided unto him. Thus, it was imperative for the respondent to prove that the services alleged in the plaint were actually provided to the appellant.

In the upshot, this appeal is allowed with costs. The judgment of the lower Court is hereby set aside.

Dated this 12th day of December 2022

B.K.PHILLIP

JUDGE