IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

CIVIL APPEAL NO. 11 OF 2022

(Appeal from the Judgment and Decree of the District Court of Kilosa, at Kilosa in Civil Case No. 11 of 2020.)

FARM AFRICA- AGROFOCUS TANZANIA LIMITED..... APPELLANT

VERSUS

TICHATONGA MUJURU .....RESPONDENT

JUDGMENT

12th Dec, 2022

CHABA, J;

The background to this matter is that on 14th September, 2020 the respondent (plaintiff at trial) instituted a Civil Case No. 11 of 2020 in the District Court of Kilosa, at Kilosa against the appellant (defendant at trial) seeking for the following reliefs: -

1. An order for the appellant / defendant to pay him a sum of TZS. 32,050,560/= being compensation arising from the appellant's / defendant's intentional loss, misappropriation or destruction of the respondent's / plaintiff's properties,
2. The appellant / defendant be ordered to pay the plaintiff / respondent general damages,
3. Interest at Court's rate from the date of filing the suit until the date of payment in full,
4. Costs of this suit be paid by the defendant, and
5. Any other relief(s), the Honorable Court may deem just and fit to grant.

The suit was resisted by the then, the defendant. However, at the end of trial, the trial Court entered its judgment in favour of the respondent (plaintiff) and gave the following orders: -

1. The appellant herein (defendant) to pay the plaintiff (respondent herein) the sum of TZS. 5,000,000/= as general damages for the loss suffered by the respondent (plaintiff),
2. The appellant (defendant) to pay the plaintiff (respondent) TZS. 10,000,000/= as compensation arising from the appellant's (defendant's) intentional loss, misappropriation or destruction of the respondent's (plaintiff's) properties,
3. Interest of 5% from the date of filling to the date of judgment,
4. Interest of 7% from the date of judgment until final settlement, and
5. Costs of this suit.

Discontented with the decision of the trial Court, the appellant lodged the instant appeal armed with the following four grounds of appeals: -

1. That, the honorable trial magistrate erred in law and fact for failure to make critical assessment on the weight of the evidence adduced by the defendant during the hearing hence reached the wrong decision,
2. That, the honorable trial magistrate erred in law and facts for admitting and basing his decision on poor and contradictory evidence adduced by the plaintiff,
3. That, the honorable trial magistrate erred in law and in facts for awarding specific damages without having critical evidence on how the court reached the value of awarded damages, and

4. That, the honorable trial magistrate erred in law and facts for rejecting to admit the crucial document / exhibits (handover agreement) which were tendered by the defendant, and in lieu of such rejection the Court reached the wrong decision.

As gleaned from the trial Court record, the genesis of the matter subject to this appeal is as follows: In August, 2015 the respondent herein was employed by the appellant in the capacity of a manager whose tenure expired in April, 2017. According to the record at trial, the appellant had leased a residential premises for the respondent during his employment. However, sometimes in April, 2017 he travelled to his home country in Zimbabwe for his annual leave leaving his personal properties in the premises. While in Zimbabwe, he resigned from his position and informed the employer via email. On returning to his residence for the purpose of collecting his properties as listed under paragraph 7 of his plaint, he was informed that all his properties were removed by the appellant's officials and to date the whereabouts of his properties are unknown. The respondent / plaintiff further claimed that some of his properties were destroyed, and others were distributed to the appellant's staffs. In particular, he is blaming the appellant herein to be responsible for his loss of personal effects. Hence, he filed a suit before the trial Court seeking for compensation of his lost properties and general damages as alluded to above.

When the appeal was called on for hearing, with the leave of the Court both parties agreed to dispose of the appeal by way of written submissions. Mr. Richard Lucas Motey, learned counsel appeared for the appellant, whereas Mr. Jovin Byarugaba, learned counsel entered appearance for the respondent.

For convenience purpose, I will not reproduce the whole submissions of the parties as presented, but I appreciate their arguments for and against the instant appeal. I will be referring to them while determining the merits of this appeal.

Starting with the 1st, 2nd and 4th grounds of appeal, the counsel for the appellant submitted that, the evidence of the appellant herein (defendant) was totally disregarded as there was no critical assessment on it. He further highlighted that the evidence tendered by the respondent / plaintiff was nothing but a mere story which is poor and fully of contradictions. He underlined that, the respondent's belongings were removed from the house in 2017 following his resignation from the appellant's company. The respondent's evidence is supported by the demand notice sent to the appellant. He argued that this piece of evidence is totally contracting the evidence adduced by the PW.2. It was the appellant counsel's argument that the evidence adduced by the respondent was poor and contradictory because there is no any piece of evidence showing that the respondent explained the reasons why he left to Zimbabwe and later to Kilimanjaro without leaving his properties and keys of the house to the management of the company. He referred this Court to Order XX, Rule 4 and 5 of the Civil Procedure Code [Cap. 33 R. E, 2019] (the CPC) and Section 110 (1) of the Evidence Act [Cap. 6 R. E, 2019] and insisted that the decision of the trial Court does not fall within the above cited Orders and meaning of the provision of section 110 (1) of the Evidence Act for a reason that the evidence adduced by the respondent / plaintiff and his witnesses, PW.2 and PW.3 contained inconsistent elements.

As regard to the 3rd ground, the learned advocate submitted that the trial Court awarded the specific damages without going even a single mileage of critical

assessment of the evidence tendered by the respondent, nor proof of loss tendered in evidence to substantiate his claims. He underlined that, the respondent did not tender any evidence to prove ownership of such properties, and the witnesses he called to support his testimony did not produce any documentary evidence showing the lists of such properties and all properties which were removed from the leased house. Moreover, there is no handing over in respect of such properties between the appellant and the respondent. Again, there is no any proof that the appellant had the knowledge of the respondent's belongings or personal effects before or after his resignation. To support his contention, Mr. Motey cited the case of **Zuberi Augusto Vs. Anicet Mugabe [1992] TLR 137** wherein the Court observed that: -

> *"It is a trite law, and we need not to cite any authority that special damages to be specifically pleaded and proved".*

In another case of **Xiubao Cai & Others Vs. Mohamed Said Kiaratu,** Civil Appeal No. 87 of 2022 (unreported), this Court observed that: -

> *"Special damages must not only be pleaded but also its particulars must be specifically stated and strictly proved....."*

Arguing in respect of the fourth ground, Mr. Motey accentuated that the evidence of DW.1 which got support from PW.1 during cross examination reveals that Mr. Julius Molleli who was a driver of the respondent is the one who received the belongings of the respondent. The evidence shows further that Mr. Julius Mollel is the one who brought the keys of the house when the house was about to be broken so as to remove

the respondent's personal effects after the efforts to call him to handover the keys of the house proved futile. He averred that, the handover agreement rejected by the trial Court was fatal on the side of the appellant / defendant. He invited this Court to draw the inference that the respondent and Julius Mollel had fraud relationship which intended to injure the appellant as provided by the law under section 122 of the Evidence Act (supra).

From the above submission, the appellant prayed the Court to allow his appeal and set aside the judgment of the lower Court and the appellant be awarded the costs and other reliefs the Court may deem fit and just to grant.

On his part, the respondent through the learned counsel Mr. Jovith Byarugaba commenced by urging this Court to dismiss the appellant's appeal on the ground that the same has no merits. Mr. Byarugaba who opted to respond to the grounds of appeal altogether, submitted that in civil cases the standard of proof is on the balance of probability and in accordance with the provisions of section 110 (1) of the Law of Evidence Act and the burden of proof never shifts. He submitted that, the respondent was duty bound to prove the allegations as to the loss of his personal properties which resulted after the appellant's unreasonable action. He submitted that, it is on record that the respondent's belongings were in the leased house which were removed therefrom by the appellant's officials. He said, the contention by the appellant's official that the alleged properties were handed over to Julius Mollel, was unsubstantiated and the same was denied by the PW.2.

Mr. Byarugaba highlighted further that, the trial Court keenly and accurately evaluated, weighted and appreciated the evidence on record and hence entered

judgment in favour of the respondent, citing the case of **Hemedi Said Vs. Mohamed Mbilu [1984] TLR 113** to fortify his argument. He accentuated further that, the record at trial reveals that it is the appellant's witnesses who removed the respondent's properties from the house and handed over the same to the PW.2. However, there is no any documentary evidence to prove that the properties which were handed over to PW.2 were listed down and described the items. He said, even PW.2 denied the allegation that he received the respondent's belongings. He argued that the Annexture "FA1" in the appellant's submission cannot be relied on by the Court on the ground that the same it is not evidence and that cannot be used to introduce evidence. To reinforce his argument, he cited the case of **TUICÓ Vs. Mbeya Cement Company & Another [2005] TLR 41** where the Court held:

> *"It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annextures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts and where there are such annextures to written submission, they should be expunged from the submission and totally disregarded. "*

As regards to the issues framed, Mr. Byarugaba submitted that Court must necessarily determine the issues framed. To buttress his argument, he referred the Court to the case of **Sheikh Ahmed Said Vs. The Registered Trustees of Manyema Masjid [2005] TLR 61** wherein the Court held: -

"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".

Relying on the above excerpt of the decision of the Court, the counsel submitted that the judgment of the trial Court confined to the issues framed. He asserted that, the argument aired by the counsel for the appellant in respect of this aspect is misplaced and unsubstantiated.

He went on submitting that, the respondent sued the appellant claiming for compensations in the tune of TZS. 32,050,560/= due to the defendant's intentional loss, misappropriation or destruction of the respondent's properties. The respondent successfully proved the allegation and the award of TZS. 10,000,000/= was fair and met justice of the present matter, meanwhile the appellant failed to controvert such allegation. He argued that, though the appellant is a body corporate, but he was astonished to learn that, none of the company's directors appeared in Court to refute the respondent's allegations against the appellant. To support and strengthen his argument, the counsel cited the case of **Siencon Services (T) Limited Vs. D4N Company Limited,** Civil Appeal No. 19 of 2020, HC at Musoma (unreported). He argued that, in the present case the directors of the company were material witnesses in the circumstance of this case unlike the ones who appeared in Court and testified on the side of the appellant / defendant. He finally prayed the Court to dismiss the appellant's appeal with costs.

In rejoinder, the counsel for the appellant reiterated what he submitted in chief and insisted that the trial magistrate erred in law when he failed to assess the weight of evidence of the respondent upon rejecting the evidence tendered by the appellant and

failure to evaluate the evidence tendered by the respondent's witnesses.

Having carefully gone through the parties' rival submissions, pleadings, evidence adduced at trial and the appellant's grounds of appeal, the appellant's main contention is grounded on the critical evaluation and weighing of the evidence recorded by the trial Court. Thus, the issue for consideration, determination and decision thereon is whether or not this appeal has merit.

While determining the instant appeal, I will start to determine and consider grounds 1, 2 and 4 altogether and finally deal with the 3rd ground. It is settled law that, in civil matters whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, and the burden of proof lies on that person. In a suit proceeding, the burden of proof lies on that person who would fail if no evidence at all were given on either side. (See: Sections 110 and 111 of the Evidence Act, [Cap. 6 R. E, 2020]). The law further provides that, a fact is said to be proved when its existence is established by a preponderance of probability. See: Section 3 (2) (b) of the Evidence Act (supra).

As garnered from the above parties' submissions, there is no dispute that the properties and equipment's belonging to respondent were removed from his residential house (area) by the appellant's company staffs. What makes parties' lock horns, concerns with the issue whether the appellant handed-over the said properties to one Julius who was called by the plaintiff as the witness during the trial.

Given the evidence on record, there is no dispute that the PW.2 (Mr. Julius) was present when the properties belonging to the respondent were removed from his house under the instruction of appellant. PW.2 in his evidence stated that they packed

the properties and took them to the company's office. It is common ground that, in civil case the burden of proof lies on a party who alleges anything to prove, where in most cases is the plaintiff. However, the burden of establishing or disapproving any fact in civil cases is not static, it moves from the plaintiff to the defendant as the scale tilts. In other words, once the plaintiff adduces strong evidence, the burden shifts to the defendant to disapprove the allegation. In the present case, it was the appellant who had a burden to prove that the properties of the appellant were handed over to Mr. Julius for the same to be under his safe custody.

The Court of Appeal in the case of **Yusufu Suleman Kimaro Vs. Administrator General and 2 Others,** Civil Appeal No. 226 of 2020, took a stand that once the plaintiff advances his or her evidence, the defendant bears a burden to controvert the plaintiff's evidence. That, in civil cases, as a general rule, it is the party bringing the claim on whose shoulder the burden of proof lies. However, after the plaintiff has led evidence either in the form of oral testimony, documentary evidence or objects, the burden of proof as a matter of adducing evidence or the onus of proof shifts to the defendant to lead evidence either with the view to controverting the plaintiff's evidence or supporting his own case.

Given the above position of the law, after the respondent proved that his properties were in the custody of the appellant's administration (officials) and not Mr. Julius, the appellant had a burden to disapprove his evidence, something he did not accomplish as he failed to adduce enough evidence that on the material date / day, Mr. Julius was handled over with the properties of the respondent.

In the absence of this evidence to rebut the respondent's evidence, the ground

of appeal bound to fail. I am of a considered view that, the appellant had a duty of necessary care to make sure that properties of the respondent are carefully removed from the residential house without being damaged or stolen and that the same would have also been kept in safe custody until they are collected by the respondent. From the records of the trial tribunal, there is even nowhere shown, that the respondent was notified of such removal of his properties.

In my humble view, such omissions amounted to negligence and clear breach of duty of care. I am also of the considered view that, the fact that the appellant handed over the properties of the respondent to one Julius had not relieved the company from discharging its duty of care and securing them from being lost and destroyed.

It could have been wise if the properties after being removed from the respondent's former residential area be kept under safe and secure custody of the appellant, until when the same would have been collected by its lawful owner.

In his submission, the counsel for the appellant contented that, the respondent acted negligent for failure to collect his personal properties after his employment was terminated. However, on this facet there is no strong evidence expressing that the appellant informed the respondent in respect of expiry of time for keeping his properties in safe custody. This denotes that the appellant automatically accepted to continue taking due care of the same. Under such circumstances, it is my holding that the appellant cannot free herself from the liability.

Going by the scrutiny of the trial Court's in respect of the evidence adduced by both sides, I have found out that the trial Court analyzed and evaluated the evidence before it, based on the principle of proof on balance of probabilities as required by law

in civil litigations. From what I have endeavored to demonstrate above, I am settled in my mind that, the evidence on record proved the respondent's claims before the District Court of Kilosa, at Kilosa in accordance with the required standard of proof on balance of probabilities.

As regards to the complaint that, the trial magistrate erred in law and facts for rejecting to admit the hand-over agreement tendered in evidence by the defendant as an exhibit, I find it apposite to start by putting light by refereeing to the provision of section 66 of the Evidence Act, [Cap. 6 R. E, 2022]. The law provides that: -

> *"Documents must be proved by primary evidence except as otherwise provided in this Act".*

Going by the trial Court record, the reasons given and assigned by the trial magistrate in expunging the exhibit tendered reveals that, the same was neither original nor certified as true copy of the original. I shake hands with the learned magistrate that, the same failed to benefit from the provisions of section 65 (a) of the Evidence Act, which provides that, secondary evidence includes: -

> *a) Certified copies in accordance with the provisions of this Act.*
>
> *b) N/A*
>
> *c) N/A*
>
> *d) N/A*
>
> *e) N/ A*

It is a settled principle of law that, any document whose whereabouts of its original has not been established or the document has not been certified, such a document

will certainly encounter the wrath of rejection as far as admissibility of evidence is concerned.

It follows therefore that, adherence of this requirement is compulsory in any relief(s) sought whereby a party who desires the Court to enter judgment in his or her favour. In **Farah Mohamed Vs. Fatuma Abdallah [1992] TLR 205,** the Court rejected admission of an exhibit as it did not meet the requirements of the provision of section 65 of the Evidence Act.

Basing on the above authorities, the handing over document also lacked legal test or requirement, for not being certified, hence, it was right for the trial Court to expunge it from the Court record.

As regard to the 3rd ground which touches the award of specific damages, it goes without saying that once a party fails to prove special damages as the law requires, he will not be awarded such damages. To explain this in a clear language, I wish to borrow the words used in the case of **Zuberi Augustino Vs. Anicet Mugabe [1992] TLR 137** wherein the Court stated inter-alia that: -

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

In the present appeal, the learned magistrate didn't explain in his judgment how he came up with the amounts of TZS. 10,000,000/= as compensation. Moreover, after a careful perusal of the trial court proceedings, I have observed that, nowhere in the same, it is shown that the respondent proved the extent of such damages or loss suffered. It was a mistake to proceed to award specific damages to the respondent

without proof. The amount of TZS. 10,000,000/= awarded by the trial Court is hereby reduced to TZS. 5,000,000/= for compensation for specific damages.

In the final analysis, the present appeal partly succeeds only to the extent that: -

1. In respect of claims for specific damages, the same are reduced from TZS. 10,000,000/= to TZS. 5,000,000/= and the appellant shall pay the respondent as ordered by this Court.
2. General damages remain unchallenged, hence the amount awarded by the trial Court remains TZS. 5,000,000/=,
3. Interest at Court's rate from the date of judgment to the payment in full, and interest from the date of judgment until final settlement as indicated in the plaint remains 5% and 7% respectively as they have not been challenged in this appeal, and
4. Each party to carry its own costs.

It is so ordered.

M. J. Chaba

JUDGE

12/12/2022