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. 28 OF 2021

(Arising from the decision of the Resident Magistrate Court of Dar es salaam at Kisutu, in Civil Case No. 240 of 2019, by Hon. H.A. Shaidi-PRM dated 26th day of November, 2020)

CRDB BANK PLC.....APPELLANT

VERSUS

ALHAJI HAMISI ABDALLA.....RESPONDENT

JUDGMENT

14th December, 2021 & 27th April, 2022

ITEMBA, J;

This appeal seeks to vacate the judgment and decree of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case No. 240 of 2019. All the same, I am of the settled view that an effectual disposal of this appeal hinges on the reliefs that were awarded to the respondent against the appellant in respect of payment of TZS 50,000,000.00/= as specific damages, general damages to a tune of TZS. 10,000,000/=, punitive damages to a tune of TZS. 20,000,000/= and costs of the suit.

The facts giving rise to the impugned judgment are, by and large, common ground and can be stated with ease. They are essentially, as follows; the appellant and the respondent were under bank and customer relationship respectively, since January 2016. The respondent maintains

an account no. 0152266014500 with the appellant at Korogwe branch bearing number. It appears that, the respondent had deposited amounts of money to a tune of TZS 212,050,000/=. The *litis contestatio* arose on 1st March 2018 when the respondent (plaintiff by then) visited the appellant's Bank at Korogwe Branch with intention to withdraw TZS 200,000,000/= and noticed that his account had no sufficient money. It was pleaded that on the same date (1st March 2018) the respondent had requested and received a bank statement which revealed that the total amount of TZS 100,721,138/= was withdrawn from his account. It was later on discovered by the appellant's internal auditor (DW1) that the missing was caused by the appellant's employees' fault whom had a tendency of withdrawing some money from the respondent's account. The respondent had made follow ups for refund of the said amount, it was until the 27th day of December 2018 when the appellant refunded him his whole amount. According to the respondent, it was nine months' time which had lapsed from the date he had reported the missing, until refund of the same despite several reminders to the bank.

In reliance to such scenario, the respondent instituted the original suit before the trial Court and as reflected from pleadings, he claimed for the following reliefs;

1. *Declaration that the defendant has breached the contract between them and the customer by failure to protect the plaintiff's (herein respondent's) account as contracted.*
2. *To pay the plaintiff TZS. 120,000,000/= being compensation for loss suffered by the plaintiff by failing to withdraw money from his account, damages for loss suffered in the whole course, time exemplary damages and punitive damages due to the defendant's unlawful acts.*
3. *To pay the plaintiff commercial interest on the aforesaid amount of TZS. 90,000,000/= at the rate of 22% per month from the date when the claim accrued until the date of payment.*
4. *To pay the plaintiff interest on the aforesaid amount of TZS. 120,000,000 and TZS. 90,000,000/= at Court's rate of 7% per month from the date when each claim accrued until the date of payment.*
5. *Defendant (herein appellant) to pay general damages as the Court will assess.*
6. *Costs of the suit be provided for*

The respondent testified as PW1 and his uncle, Khamisi Athumani Iddi (PW2). He also tendered a bank statement which he procured on 1st

March 2018 (Exh. P1), a complaint letter to the bank (Exh. P2) and a demand notice to the bank (Exh. P3). The respondent had testified that he went to the appellant to withdraw money for paying one Mohamed Enterprise and he came to realize the alleged sum was missing in his bank account and the hardship he had encountered as a business man for such term of 9 months of failure to generate profit as he used to. In essence, his testimony centered on the slant that for the whole period when the money was deprived, his business was paralyzed and he ended up losing customers. Among other things, the respondent (PW1) had testified that he opened the said account at the appellant's bank for purpose of keeping and saving his money in order to develop his business. He accentuated that he was conducting business where he used to sell cereals in his shop, he (PW1) contended that he used to deposit all of his business profit at the appellant's bank at a rate of TZS 8 to 10 million every month. He narrated that in two occasions he had engaged an advocate to write a demand notice and even a complaint letter to BOT as his efforts to remind the bank went futile as there was no sufficient response.

PW2 had nothing much to testify rather than narrating on how he used to advice the respondent to make follow ups at the appellant's bank and legal consultations and that the respondent was forced to close his business.

On the other hand, the appellant's defence was predicated vide it's sole witness, DW1, Miss Anastazia Kuhoza Mtaki who was an internal auditor of the appellant's bank. She testified to the effect that she had conceded to the fact that the alleged money actually went missing due to illegal transaction that were made by the appellant's employees. She explicated that she was the one who did investigation right away upon being reported and gave a report (Exh. D1). That it was her who recommended the bank to pay back the money to the respondent. DW1 elucidated in her testimony that it took her long to complete the investigation since the staff who were involved in the purported transactions were already terminated. Thus, she was looking for relevant documents manually something which consumed much time.

On account of the facts as highlighted above, the trial court framed three issues for it's determination namely;

1. *Whether the plaintiff money was wrongful withdrawn by the defendant from his bank account*
2. *Whether the plaintiff suffered loss out of that action*
3. *To what reliefs parties are entitled to.*

At the end of trial upon scrutiny of oral testimonies from witnesses each for the appellant and the respondent, the trial court made the

following findings; **one**, the respondent's account was tempered by the appellant's employees without the respondent consent as evidenced in exhibit P1, P2 and D1, as well, the testimony by the respondent, **two**, that the respondent was a business man whom testified that his money amounting to TZS. 102, 312,208.00 went missing in his account and he ought to have paid Mohamed Enterprises after being supplied with goods but he failed, the respondent's business was deprived, he lost customers. It was concluded that he had suffered loss. Basing on those premises, the trial Court ordered payment of a total amount of TZS. 50,000,000/= which is TZS 10,000,000/= for each month in which the bank stayed with the money. This was awarded as a profit ought to have been generated by the respondent in 5 months. The trial magistrate's findings relied on the testimony given by PW1 (respondent) whom had testified that he used to deposit profit at a rate of 8 to 10 Million each month. Other reliefs awarded as alluded earlier included TZS. 10,000,000/= as general damages, Punitive damages to a tune of TZS. 20,000,000/= and costs of the suit.

Not amused, the appellant seeks to fault the trial court's judgment on the ground that; ***the trial magistrate erred in law and fact by failure to properly evaluate evidence on record tendered before it which***

therefore made the trial magistrate fail to make rational judgment.

At the hearing of the appeal, the appellant was represented by Mr. Francis Pius, learned advocate, whereas Mr. Boniface Erasto, learned advocate represented the respondent. It was agreed that the appeal be disposed by way of written submissions, in which the parties had complied to the schedule.

On his part, Mr. Pius submitted in support of appeal that there was neither exhibit nor witness that was given by the respondent to corroborate his testimony on the following; that he had a cereal business, that he was supplied with the goods by Mohamed Enterprise and evidence on how interest of TZS 10,000,000/= had accrued or was arrived at each month the bank stayed with the respondent Money. To cement on it, the learned brother prayed the Court to be guided by the provisions of **section 110 (1) and (2) of the Evidence Act**, [Cap 6 R.E:2019] which provides for the effect that;

> *110.-(1) 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.*

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Mr. Pius further submitted eloquently that the trial Magistrate had misdirected himself to point out in his judgment that the respondent had failed to pay debt after being supplied goods with Mohamed Enterprises and the same was justified, while there was no evidence to support the so allegations. He contended that the respondent neither brought a witness from Mohamed Enterprises to support his assertions. To bolster his preposition, he cited the case of **Regnard Danda vs. Felichina Wikesi,** Civil Appeal no. 265 of 2018, CAT at Iringa (Unreported) where the Upper bench in such matrimonial matter stressed on the importance of parading a witness to corroborate a fact in which failure underscores failure to prove the said fact.

According to Mr. Pius, basing on the above claimed discrepancy, the trial magistrate failed to analyze evidence which is contrary to the Principle in **Abdulkarim Haji vs. Raymond Mchimbi Alois & Another** [2006] T.L.R 416 in which the Court held that;

"The Court is required to come up with it's finding after making critical analysis and evaluation of evidence adduced by witness."

On the other point of the grievance in respect of the raised ground of appeal, Mr. Pius strongly submitted that the trial magistrate failed to appreciate the bank's prudence on reimbursement of the respondent's (plaintiff by then) money. He argued that the trial Magistrate in his decision states that the bank (appellant) was to act with prudence on the issue and be solved within shortest time possible without considering the contents of Exh. D1 in which the refund of money was subject to the completion of investigation. He submitted that Exhibit D1 provides genuine reasons that made investigation to be carried out for a period of five months before recommendation for reimbursement was made. For that reason, according to him, it was wrong for the trial magistrate to award punitive damages to a tune of TZS 20,000,000/= and general damages to a tune of TZS 10,000,000/=.

Mr. Pius then insisted that as to the nature of respondent's claim in the instant matter, the internal auditor of the bank was to carry out special investigation, and she was entitled to do so by virtue of section 21 (1) (j) of the Banking and Financial Institutions (Internal Control and Internal Audit) Regulations, 2014. He further accentuated that this implies that it was necessary as to the nature of the claims, first to carry out investigation then thereafter to reimburse the respondent.

Mr. Pius then concluded that the appellant's evidence was heavier compared to that of the respondent and therefore the decision of the trial Court be quashed and set aside. To bolster his preposition, he cited the case of **Hemed Said vs. Mohamed Mbilu** [1984] T.L.R 113 in which it was held that "a person whose evidence is heavier than other must win." As well, he criticizes the trial magistrate's stance on the viewpoint that he never took consideration of the evidence so brought by the defence (appellant herein) when he awarded damages and costs against the appellant. He invited the Court to make reference to the decision in **Tanganyika Standard (M) Ltd & Another vs. Rugarabamu A. Mombeki** [1987] T.L.R 40 where the Court among other things held that;

> *"the quantum of damages is justified where the trial judge takes into account all pertinent and relevant considerations."*

In the rebuttal, Mr. Erasto firmly resisted to the appeal and in generality submitted as follows; one, that it is not in all circumstances the facts of the case need to be proved by documentary evidence. He then invited the Court to make reference to the decision by the Apex Court in **Dr. A Nkini & Associate Ltd vs. National Housing Corporation,** Civil Appeal No. 72 of 2015 (Unreported) where it was held that proof of evidence need not to be in documentary evidence on all cases. That

section 61 and 62 of the Evidence Act *(Supra)* recognize a fact that proof may be through oral evidence. Mr.Erasto stressed that when the respondent testified that he used to make deposits at a rate of TZS 8 to 10 million per month, he was not cross examined by the plaintiff counsel on this particular important issue. Thus, the appellant is estopped from convincing the Court to disbelieve the respondent's testimony. He then cited the decision by the Court of Appeal which provide to such effect, the decision in **Rashid Sarufu vs. Republic,** Criminal Appeal No. 467 of 2019 with an approval of the case of **Cyprian Athanas Kibogoyo vs. Republic,** Criminal Appeal No. 88 of 1992, **Damian Luhehe vs. Republic**, Criminal Appeal No. 501 of 2007 and **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010 (all unreported).

Mr. Erasto then pleaded the Court not to interfere with the findings of the trial Court in respect of the reliefs which it awarded as the respondent was depositing his moneys at a rate of TZS 10 Million per month. Therefore, he had suffered loss for such disappearance of the same from his account. According to him he sees no reason for this Court to censure the findings of the lower Court. He then cited a number of authorities for this Court to be guided including, **Samo Ally Issack and 4 Others vs. Republic,** Criminal Appeal No. 136 of 2021, **Credo Siwale vs.**

Republic, Criminal Appeal No. 417 of 2013, **The Commissioner General Tanzania Revenue Authority vs. New MusomaTextile Ltd**, Civil Appeal No. 119, **Nyabazere Gora vs. Charles Buya**, Civil Appeal No. 164 of 2016, **Japan International Cooperation Agency (JICA) vs. Khaki Complex Ltd,** Civil Appeal No. 107 of 2004, **Maximillian Peter @ Chipika & Another vs. Republic**, Criminal Appeal No. 185 of 2019, **M/S Universal Electronics and Hardware (T) Ltd vs. Strabag International. GmbH (Tanzania Branch),** Civil Appeal No. 122 of 2017, **Cooper Motor Corporation vs. Moshi/Arusha Health Service** [1990] T.L.R 96, **Nance vs. British Columbia Electricity Raily Co. Ltd** [1951] A.C 601 and **Shana General Store Ltd and Abdallah Mshana vs. The National Microfinance Bank PLC**, Civil Appeal No. 1 of 2019, HCT at Dar es Salaam (Unreported).

On the other point, Mr. Erasto eloquently argued that there was no prudence as contended by the appellant's counsel. He insisted that the appellant has a fiduciary duty toward the respondent (customer) to make sure that the respondent's money in his account are protected. The contents of Exhibit D1 and the testimony by DW1 conceded that the money was stolen by the appellant's employee. Thus, according to Mr. Erasto, the trial Court was justified to award the general damages and

punitive damages to discourage this kind of behaviour from appellant or any other public institution which has been entrusted to serve public and delivering a lesson that civil wrong does not pay.

The learned brother for the respondent, admittedly, that section 21 (1) (j) of the Banking (Financial Institution) Internal Control and Internal Auditing) Regulation *(supra)* allows special investigation to be carried on but he had a reservation, that, nowhere in the respective regulations provides that once investigation is complete, the bank should not pay a customer an interest for the loss accrued. He then concluded that the evidence in Exhibit D1 and testimony by DW1 were sufficient enough for the Court to rely to award damages. As well, the costs of the suit were justifiable to be granted. He then cited the two cases of **Dr. Nkini & Associate Ltd** *(Supra)* and **Njoro Furniture Mart Ltd vs. Tanzania Electronic Supply Co. Ltd** [1995] T.L.R 205 where it was decided that costs are awarded under discretion of the Court and normally are awarded to the winning party and once denied, the Court has a duty to give reasons in writing on such denial.

There was no rejoinder marched. On my part, having examined the records and considered the submissions made by the parties, it is plain from the raised ground of appeal and the appellant's submissions that it's

criticism against the trial court's judgment is centred on the reliefs so awarded to the respondent (damages) against itself. The question now is ***whether the reliefs so granted were just***.

Principally, this Court being the first appellate Court is vested with powers to intervene and re-assess the damages so awarded. In this I would like to be guided by the wisdom in the case of Privy Council **in** **Nance vs. British Columbia Electric Rally Co. Ltd** (1951) AC 601 at page 613 with an approval of this Court in **Finca Microfinance Bank Ltd vs. Mohamed Omary Magayu**, Civil Appeal No. 26 of 2020, HCT at Mbeya (Unreported) and the Apex Court of the Land in **Peter Joseph Kilimbika & Another vs. Patric Aloyce Mlinga,** Civil Appeal No. 37 of 2009, CAT at Tabora (Unreported) where it was stated as here under:-

> *"Whether the assessment of damages be by a judge or jury, the appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case...before the appellate Court can properly intervene, it must be satisfied that the judge,* ***in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one): or short of this that the amount awarded is so inordinately low or***

inordinately high that it must be a wholly erroneous estimate Of damage.." [Emphais supplied]

Deducing from the above quotation, it is clear that in order for this Court to intervene and re-assess the damages it must be satisfied of the two elements namely;

1. The trial magistrate applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one)
2. The trial magistrate awarded amount which is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

Guided by the above factors, it is prudent now to test the same in the instant matter to see if the Trial court's orders as to damages were faulty. Starting with the TZS. 50,000,000/= (awarded as TZS 10,000,000/= for each month) as a profit which would have been generated for the time in which the bank (appellant) stayed with the money. The trial Court awarded the same to the respondent as a profit ought to have generated in 5 months. The evidence that was given to support was the oral testimony by the respondent (defendant by then). The appellant's counsel

complains that the same was never proved as nothing was tendered to back up the respondent's testimony.

As, it is well known principle of law that specific damages determine jurisdiction of the Court, I believe the TZS. 50,000,000/= awarded were the specific damages as the plaint speaks for itself under paragraph 3 and 16 as follows;

> *3. That, the plaintiff herein claims from the Defendant the amount of* ***Tanzanian Shillings Ninety Million (Tshs. 90,000,000/=)*** *being interest of the amount taken from Plaintiff's Bank account by the Defendant for a period of (9) months from March 2018 to December 2018.*
>
> *16. That, this Honourable Court has jurisdiction as the cause of action arose in Tanga but the headquarters of the Defendant is in Dar es Salaam and the amount claimed by plaintiff is* ***Tanzanian Shillings Million (Tshs. 90,000,000/=)*** *which is within the pecuniary jurisdiction of this Honourable Court.*

As the records stand, the respondent had pleaded for the specific damages as shown above but on the other hand, the appellant had contested against it, as evidenced under paragraph 2 of the it's Written Statement of Defence as follows;

3. That the content of paragraph 3 of the plaint is vehemently disputed and the plaintiff is put to strict proof thereof.

Reflecting what has transpired from the records, I wish to enlighten the following; **One,** in principle, under Civil justice, the proceedings in matters and decision thereof have to come from what has been pleaded. [See the cases of ***James Funke Gwagilo vs. Attorney General*** [2004] T.L.R 161, ***Astepro Investment Co Ltd vs. Jawiga Company Ltd***, Civil Appeal no. 8/2015, ***Peter Ng'homango vs. Attorney General,*** Civil Appeal No. 214/2011 and ***Scan TAN Tours Ltd vs. Catholic Diocese of Mbulu,*** Civil Appeal No. 78/2012 (All Unreported).

In the decision by the Apex Court in ***Barclays Bank (T) Ltd vs Jacob Muro***, Civil Appeal No. 357 of 2019 (unreported), the upper bench cited with approval a passage in an article by Sir Jack I. H. Jacob Titled **"The Present Importance of Pleadings"** published in Current Legal problems (1960) at page 174 that: -

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... For the sake of certainty and finality, each party is bound by his own pleadings ...Each party thus knows the case he has to meet and cannot be taken by

surprise at the trial. ***The court itself is as bound by the pleadings of the parties as they are themselves...***

[Emphasis is added]

Guided by the above *visa vee* what transpires from the pleadings, the parties were in controversy as to specific damages that were pleaded by the respondent as shown above. The trial Court was also duty bound to consider the pleadings in determination of the suit and guided by the issued so framed reflecting from what parties were in controversy.

The fact that the so amount was contested as alluded, hence it was to be proved. **Two,** the claimed amount (TZS. 90,000,000/=) being specific damages, the plaintiff (respondent) was duty bound to prove. The law is settled that special damages must be specifically pleaded and proved. There is plethora of the Apex Court's decisions to that effects. [To mention the few, see the case of **Zuberi Augustino vs. Anicent Mugabe** [1992] T.L.R 137, **Juma Misanya and Another vs. Lista Ndurumai** (1983) T.L.R 245 and **Cooper Motors Corporation (T) Ltd vs. Arusha International Conference Centre** (1991) T.L.R 165].

The English case of **Bolag vs. Hutchson** (1950) AC 515 at page 525 had promulgated the correct principle of law on specific damages which is universally accepted that;

"Special damages are such as the law will not infer from the nature of act. ***They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly."*** [Emphasis is added]

Moreover, it is an elementary principle that he who alleges is the one responsible to prove his allegation. That the burden of proof to be discharged on the balance of probabilities lies with the one who alleges. (See **Abdul Karim Haji vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2014 and **Pauline Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017(Both Unreported)

It therefore follows, the respondent (plaintiff by then) being the one who was alleging on the loss of the purported monthly profits, he was duty bound to prove the so claim (specific damages) strictly and not just by mere spoken words as he did. The fact that the respondent testified to have been depositing his business profits at a rate of TZS. 8 to 10 million in each month, prudence detects that the respondent could have given some further evidence to prove the preceding monthly deposits as alleged, for instance by tendering bank statements reflecting the said deposits or audited financial statements for the period before the said

money went missing which would have established the said monthly profit. It is very unfortunate that nothing was tendered to justify his allegations. Thus, there is no gainsaying that the trial Magistrate before awarding the TZS. 50,000,000/= (specific damages), he ought to have placate himself that the respondent had substantiate his claims to the satisfaction. Henceforth, the trial Court was not justified to award TZS. 50,000,000/= as special damages.

Besides, there was the contention by the respondent's counsel that the appellant's advocate did not cross examine the respondent over the issue pertaining deposits of business profits, and therefore the appellant was estopped from denying that fact. Technically, I am hesitating to subscribe to his contention as the proceedings of the trial Court are contravening his argument. From the records, it appears that the respondent was also cross examined on that particular issue. For easier of reference, the following is an extract of the typed proceedings at page 10 where the respondent (plaintiff by then) was cross examined;

> ***"XXD by Advocate Francis:***
> *-From the time I opened account with CRDB Bank to the time I find problem it was two years.*
> *-The money were for business*
> *-I withdraw money only once*

-I used to deposit the interest with specific goals
-I suffered a lot, so many debts created by the Bank on me for I failed to pay for goods
-I never showed any invoice to show that I was supposed to pay for goods...."

Basing on the above and in reliance to the principle of sanctity of the record, the trial court record accurately represents what happened in court. *(See* the case of **Halfani Sudi vs. Abieza Chilichili,** Civil Reference no. 11 of 1996, CAT at Dsm and **Flano Alphonce Masalu @ Singu & 4 others vs the Republic,** Criminal Appeal No. 366 of 2018, CAT at Dsm, (All unreported). It follows therefore that the respondent was cross examined over the fact unlike the contention by Mr. Erasto.

A second call for determination relates to punitive damages and general damages which the trial Court awarded TZS. 20,000,000/= (Punitive damages) and TZS. 10,000,000/= (general damages). In Principle, punitive damages are awarded in excess of actual or substantial damages just to make an example of the wrongdoer (defendant) or to punish him. The book of **Principles of Tort Law (4th Edition, 2000) by Vivienne Harpwood** at **page 414** reads that;

"Punitive damages may be distinguished from aggravated damages in that ***here the intention of the court is to punish <u>the wrongdoer</u> by an additional award on top***

of the award of compensatory damages, and perhaps to deter others who might be tempted to act in the same way as the defendant." [Emphasis supplied]

One of key words here from the above extract is "a wrongdoer." Thus, punitive damages are awarded against the wrongdoer of an act, which in our case here, the trial Court had considered the appellant as a wrongdoer upon staying with the respondent money for a period of 9 months illegally. The important questions here are; under the circumstances surrounding the case was the trial magistrate correct to consider the appellant as the wrongdoer? and two, if the first question is affirmatively, whether the amount so awarded at a tune of TZS. 20,000,000/= was justifiable as punitive damages.

Addressing the first question, first, the appellant was held responsible under vicarious liability for the act committed by it's employees as it had a fiduciary duty to secure the moneys so deposited by it's customer (respondent). Second, it took them almost 9 months just to rectify the situation. This was not reasonable. The appellant's counsel had contended that DW1 was mandated to conduct special investigation and it took her long to complete due to the constraint that she encountered as the appellant's employees whom were involved with the transactions had already been terminated. I have also keenly perused and

read the investigation report (Exh. D1). For my opinion, I am not persuaded by appellant's counsel that in the absence of the employees whom were involved with the transaction, it was to take the appellant 9 months just to complete investigation and refund the money back to the respondent. Neither, the content of Exh. D1 do not justify such inordinate delay of refunding the deprived amount to the respondent. I don' t believe that 9 months was a reasonable time in consideration of the fiduciary duty that the bank (appellant) owes to it's customer (respondent). Coming to the second question, as to whether the amount awarded was just, I am fully convinced that the amount at a tune of TZS. 20,000,000/= as punitive damages was just. This is due to the unfolded reluctance by the appellant to rectify the alleged absurdity promptly despite being aware that the respondent's fixed account before the incident was liquid. I have even closely gone through the trial Court's judgment and found that the same established reasons. It stated at page 6:-

> *'The bank was started to act with prudence on the issue and be resolved within the shortest time possible but that was not the position. All excuses DW1 leveled that they were searching for vouchers involved was some of PW1's business. These were for bank administration. The delay caused PW1 to make follow up and obvious his time and resources were spent unnecessarily. This being the issue,*

the Court grant general damages to the plaintiff worth Ten Million Tsh. and since the bank failed to pay their role and cushion the matter with necessary speed I award punitive damages at a tune of twenty million shillings -20 million. Finally I award cost of this suit to the plaintiff. "

It is of my opinion that the trial Court's order as to punitive damages was just and it therefore remains undisturbed.

Same to general damages, which are principally awarded at the discretion of the Court. The fact that the reason for awarding the general damages were sound and given by the trial magistrate, it goes without saying that the general damages issued were just and fair. This is simply because there was unchallenged evidence that the appellant's employees tempered with the respondent's account and TZS 100,721,138/= went missing from his account. The respondent couldn't access his money for a period of almost 9 months, he did some efforts to recover the said amount by engaging advocates for legal assistance as evidenced in Exh. P3. There was no satisfactory correspondence from the appellant's bank of which made him incur more costs in making follow ups. This situation does not need one to be a genius to figure out the inconvenience, mental agony and uncertainties regarding the fate of his missing money. All these

being considered, I find it useless to interfere with the general damages awarded.

In respect to the orders as to costs, I do not wish to waste more time here, as the law is settled that costs follow event which means the successful party may recover the costs incurred in procuring or defending his/her interest. This is a response to the concern that a person should not suffer loss as a result of having to assert or defend his or her right. The Court however have been vested with discretionary powers to award or not to award depending on the circumstances. **Section 30 (2) of the Civil Procedure Code [Cap 33 R.E: 2019]** stresses that, in case of any departure from such general rule, reasons for not awarding costs to a winning party must be adduced in writing.

It has been emphasized more often that in exercising discretionary power of awarding or dis allowing costs, the Court must do it judiciously. [See **Tanga Cement Company Ltd vs. Jumanne O. Massanga and Amos A. Mwalwanda**, Civil Application No. 6 of 2001(CAT) and **Regional Manager, TANROADS Kagera vs. Ruaha Concrete Company Ltd,** Civil Application no. 96 of 2007 (CAT) (Both Unreported)].

Basing on the above *visa vee* the appellant's submission, nothing has been submitted by the appellant's counsel that suggests faulty on the party of the trial magistrate that he did not exercise his discretion

judiciously. I believe under the circumstances surrounding the instantaneously matter, the trial magistrate was right to award the costs of the suit to the respondent. Henceforth, the order remains undisturbed.

In the upshot, the issue is disposed negatively and the appeal is partially allowed to the extent shown that the trial court was not justified to award TZS. 50,000,000/= as specific damages. For avoidance of doubt, other orders remain undisturbed. As the appeal has partly succeeded, I see no justification to grant costs to either party. I accordingly order each party to bear it's own costs.

It is so ordered.

L. J. Itemba
JUDGE
27.04.2022

Rights of the parties have been explained.

L. J. Itemba
JUDGE
27.04.2022

DATED at **DAR ES SALAAM** this 25th day of April, 2022

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

L. J. Itemba
JUDGE
27.04.2022