THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CIVIL APPEAL NO. 05 OF 2020

(Originating from Judgment and Decree of the Court of the Resident Magistrate of Mbeya in Civil Case No. 3 of 2019)

VRB CONSTRUCTION COMPANY LTD ..... APPELLANT

VERSUS

DEUSDEDITH JOHN LWAMLEMA @ D. J LWAMLEMA ..... RESPONDENT

JUDGEMENT

Date of last order: 24/03/2022
Date of Judgment: 19/05/2022

NGUNYALE, J.

The trial Court was satisfied that there was a contractual relationship between the parties as they entered the contract on December 2016. According to the contract the appellant entered into a contract with the respondent to undertake thermoplastic activities on the road measured thirty Kilometres between Uyole to Kasumulo in Mbeya region at a consideration of 30,000,000/=. The respondent discharged his contractual obligation but the appellant could not pay him the contractual

sum of 30,000,000. The trial Court having been satisfied that the appellant defaulted to honour the agreement it awarded the respondent special damages in the tune of 30,000,000/=, general damages in the tune of 15,000,000/= and interest.

The appellant was not satisfied with the decision of the trial Court. He preferred this first appeal against judgment and decree premising the appeal on the following grounds of appeal; -

(a) That the trial court erred in law and fact for ordering payment of Tshs 30,000,000/= as specific damage without proof thereof.

(b) That the trial court erred in law and fact for awarding Tshs 15,000,000/= as general damages contrary to the rules of granting the same.

(c) That the trial court erred in law and fact for failure to analyse and evaluate evidence on record hence leading to an erroneous decision.

(d) That the trial court erred in law and fact for deciding the case against the weight of evidence.

(e) That the trial court erred in law for ordering decretal interest of 10% per annum on specific and general damages from the date of judgment to the date of full payment.

(f) That the trial court erred in law for ordering decretal interest of 7% per annum from the date of institution of the suit to the date of judgment.

In support of the appeal the appellant under the service of Kamru Habibu learned Counsel from TSK Law Chambers submitted for each of the grounds of appeal. He started by submitting on third and fourth grounds of appeal jointly. The two grounds are about analysis of evidence and the weight of evidence. He referred the Court to the case of **STANSLAUS**

RUGABA KASUSURA AND ANOTHER VS. PHARES KABUJE (1982) TLR 338 for the position that it is the duty of the trial Court to evaluate the evidence of each witness as well as his credibility and make a finding on the contested facts in issue. The appellant submitted that there are a lot of doubts especially on the exactly kilometres which the respondent worked upon. However, the trial Court did not bother to determine on it since there was no evidence adduced in that respect. Also, there was no evidence that the respondent completed the work as per the agreement. The failure to deal with those areas led to injustice on the appellant. He called upon the first appellate Court to step into the shoes of the trial Court and re-evaluate the evidence on record.

In respect of the first ground of appeal that the trial Court erred to award general damages of Tshs 30,000,000/= he submitted that special damages must be specifically pleaded and proved. In the case of **Zuberi Augustion vs. Anicet Mugabe** [1992] TLR the Court of Appeal stated:-

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

It was the view of the appellant counsel that the special damages were awarded without proof. He submitted that No employee of TANROADS who was summoned to testify. The respondent was to prove strictly that he performed the contract in full.

On the second ground about the complaint that the trial Court erred to award general damages contrary to the rules the counsel for the appellant submitted bitterly that the Court erred by awarding relying on wrong principles of law. He invited this Court to intervene such award relying on the case of **The Cooper Motor Corporation vs. Moshi/Arusha Occupational Health Services** (1990) TLR the Court quoted with approval the English decisions of **Davies v Powell** [1942] 1 All E. R. 657 and **Nance v British Columbia Electric Rail Co. Ltd** [1951]A.C. 601 where it was held: -

> *"... Whether the assessment of damages be by a judge or a 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 appellants court can properly intervene, it must be satisfied either 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 so inordinately high that it must be a wholly erroneous estimate of the damage..."*

Cementing the argument that the Court erroneous estimated the damages he referred the case of **Alfred Fundi vs. Giled Mango & Other**, Civil Application No. 49 of 2017, Court of Appeal of Tanzania at Mwanza (unreported) the Court held that:-

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the*

award. The judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same."

It was his submission that the award of general damages by the trial court was wrongly made and they prayed the Court to interfere on the reasons that; - **one**, there is no evidence proving award of the same, **two**, the damages awarded are colossal that they are inordinate and three, it was erroneous estimated because payment of labourers cannot be included in general damages because they are payable in special damages upon proof. He is only entitled to nominal damages.

Going further arguing on the fifth ground of appeal which is based on the complaint that decretal interest of 10% on specific and general damages he submitted that the award is not proper. The plaintiff pleaded interest but could not lead any evidence to show that she is entitled to interest. The rate of 10% is manifestly excessive and the trial Magistrate did not give reasons for the award. Though the law under Order XXI rule 21 of the Civil Procedure Code Cap 33 R. E 2019 provides that the rate of interest shall be 7% to 12% per annum respectively, the trial Magistrate was duty bound to give reasons why he awarded 10%.

The respondents strongly opposed the appeal under the representation of the learned Counsel Isaya Zebedayo Mwanry. He submitted that they have no dispute with jurisdiction of this Court to conduct re-evaluation of

evidence as claimed by the appellants but such authority ought to be exercised with caution because it is apparent that the trial Magistrate analysed and evaluated evidence of both parties. He made findings in relation to pleadings, testimonies of the parties, issues framed during trial and laws of the country. The appellant seeks re-evaluation basing on the argument that no evidence was adduced by the respondent that he completed the work as per agreement, but he do not state what was done by the appellant to prove that he also performed his contractual obligation. He ended up raising such doubt as if the proof was beyond reasonable doubt. PW1 proved by direct evidence and during cross examination his testimony was not shaken or challenged. At page 9 of the typed proceedings the PW1 stated that he handled over work in front of TANROADS, his laborers and VRB boss. This evidence of PW1 was well corroborated by another oral evidence of labourers of respondent PW2.

He submitted further that PW2 stated that:

> *"we started the job on 29/12/ 2016. We first found seven laborers and I making a total of eight. On the same day we went and worked on the site 29/12/2016 . from Uyole heading Kasumulo. We worked for twenty days. We completed the work on 20.01/2017. We had one foreman from VRB Construction Co. Ltd. The foreman is called Meshack Saimon"*

It was the view of the respondent Counsel that this piece of oral evidence of PW2 which corroborate that of PW1 proves the performance of

contractual obligation by the respondents. No any cross examination was done by appellant at the trial directed to establish non-performance of the contractual obligation. He referred the Court to the case of **MOHAMED HAMIS VS. REPUBLIC,** Criminal Appeal No. 114 of 2013 Court of Appeal at Mtwara (unreported) which state that it is a settled law that failure to cross examine a witness on a particular point/issues, leave his evidence to stand unchallenged. It was the appellants' evidence which was weak.

The respondents Counsel submitted that the evidence was well analysed and evaluated by the trial magistrate, even re-evaluation will prove that the evidence was well evaluated.

That allegations that the special damages were not proved are unmerited. The same was pleaded and proved as correctly ruled by the trial Magistrate.

The argument that the no employee of TANROAD was called by the respondent to testify the respondent submitted that the agreement was between the parties to this case. TANROAD was a stranger to the agreement. Performance of the agreement was proved by PW1 and PW2. At page 20 of the typed proceedings when the appellant was cross examined, he testified that "TANROAD had not complained that there was a piece that had not completed" he referred the Court to the case of

YOHANES MSIGWA VS R (1990) TLR 148 that what matter is the quality of evidence and not number of witnesses. Since PW1 and PW2 proved the contract was performed as contracted then no need of other witnesses to prove the same fact.

On the complaint about award of general damages the respondent submitted that the respondent stated reasons as to why the trial Court should award him general damages. He stated that he used his capital to start the work and he even sold his properties to pay the labourers and purchasing some items like diesel. Nothing was cross examined about general damages.

The complaint of the appellant on the fifth ground about interest the Counsel for the respondent submitted that the issue of interest is not proved by evidence. The Counsel for the appellant has not submitted any legal authority which states that interest need to be proved by evidence. He submitted that according to section 29 of the Civil Procedures Code Cap 33 R. E 2019 every judgment debt shall carry interest at eh rate which be prescribed from the date of judgment to the date of full satisfaction. Good enough the provision is coached in mandatory terms. Order XX Rule 21 of the Civil Procedure Code Cap 33 R. E 2019 comes with rate s which

range from 7% to 12 % at the discretion of the court. In the present case the trial Magistrate awarded only 10% which is within his discretion.

So far I have in mind the background of the case, the grounds of appeal and the rival submission of the parties. The court will confine to satisfy itself as to whether the trial Court correctly answered the issues before it and subsequently awarded appropriate relief. The very central issue will be answered in the course of scrutinized each of the grounds of appeal in the sequence as submitted by the parties' learned Counsels.

The complaint of the appellant in the 3rd and 4th grounds of appeal is cantered on analysis and evaluation of evidence. The appellants Counsel submitted that there are key doubts on the proceedings before the trial Court that, one, amount of work the respondent was assigned, two, whether he completed the work. He was of the view that there is evidence that the respondent completed the work per agreement. On that view he quickly invited the Court to step under the shoes of the trial Court and re-evaluate the evidence. The position of the appellant in respect of the third and fourth grounds of appeal was strongly contested by the respondent.

The respondent admitted that the first appellate Court has legal authority to re-evaluate the evidence. But such authority is exercised with caution. He was of the settled view that in this case such exercise is useless

because the trial Magistrate evaluated well the evidence. The appellant has argued that there is no evidence which proves that the contract was executed by the respondent, execution of the contract was well proved by PW1 and PW2 before the trial Court. He cemented his argument that during hearing of the plaintiff's case, the appellant did not cross examine anything about performance of the contract. He relied on a case of Mohamed Hamis (supra) which provides that it is a settled law that failure to cross examine a witness on a particular point/issues, leave his evidence to stand unchallenged. Since the execution of the contractual obligation was proved by those two witnessed it would have served no purpose to call officials from TANROAD to prove the same. TANROADs were strangers to the agreement.

The Court has read thorough the evidence before the trial Court and noted that the parties entered into contract in December 2016 per exhibit P1 to make road marks and printing zebra crossing. He performed the work which was subsequently handled to the appellant. PW1 proved that they performed the contract but they were not paid by the appellant. His testimony was corroborated by PW2 Erigius Mhemika that they performed the work given. The complaints of the appellant that the respondent could not complete the work were not proved in his evidence, even the

allegations that he paid the respondent were not proved. He could not even remember when he paid the alleged 2.5 Million and 9.1 Million. The trial court was right to rule that the claim was proved by the respondent on the balance of probability the legal standard in civil Cases per section 3 (2) b of the Evidence Act Cap 6 R. E 2019.

As rightly submitted by the respondent's counsel the trial Court correctly ruled in favour of the respondent, thus the appellant could not even cross examine about performance of the contractual obligation. Since the plaintiffs could not cross-examine about performance of the contract it means in principle, they admitted the fact that the contract was performed. This principle was held by the Court of Appeal of Tanzania in the case of **SADRACK BALINAGO vs. FIKIRI MOHAMED @ HAMZA, TANZANIA NATIONAL ROADS AGENCY (TANROADS) and ATTORNEY GENERAL,** Civil Appeal No. 223 of 2017 (unreported) where the Court said that failure to cross examine on material issue amounts to acceptance of the truthfulness of the other parties account. The evidence is very clear that the respondent was assigned duty in respect of 30 kilometers per exhibit P1 and he executed the whole assigned duty. The appellant is the one who breached the contract by not paying per the agreement entered.

The first ground of appeal the appellant raised a complaint that specific damages were paid without proof. He was of the view that special damages must be pleaded and proved, but in the case under scrutiny they were awarded without proof. I think this is not the matter to detain long. It has been established that the contract was performed by the respondent and he deserved payment of 30,000,000/= which was not paid by the appellant. The appellant could not prove non-performance of the agreement by the respondent and he could not prove that he paid the agreed payment. Specific damages were proved and the trial Court correctly ordered payment of the same. In the case of **Zuberi Augustino Mugabe vs. Anicet Mugabe** [1992] T.L.R. 137 it was ruled that; -

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

The appellants learned Counsel submitted in regard to the second ground of appeal that the general damages were awarded based on a wrong principle because there was no evidence which attracted such award and the award was inordinate by being over and above. We are aware so far that the appellant breached the contract by not paying the respondent timely. As correctly submitted by the respondent that the respondent used his capital to start the work and he even sold his properties to pay the labourers and purchasing some items like diesel. Nothing was cross

examined about general damages. I think the trial Court correctly awarded damages which I have no good reason to fault his findings at appellate level. The award of general damages is basically awarded at the discretion of the Court after considering circumstances of the case. The trial Court properly considered the circumstance of the case in regard to the delay and inconveniences faced by the respondent. The said position about general damages it at the discretion of the Court may be found in cases including the case of **Tanzania - China Friendship Textile Co. Ltd. vs. Our Lady of the Usambara Sisters,** [2006] T.L.R 76.

The trial Court awarded interest guided by Order XX Rule 21 of the Civil Procedure Code Cap 33 R. E 2019 comes with rate s which range from 7% to 12 % at the discretion of the court. The very provision reads in part: -

> *"The rate of interest on every judgment debt from the date of delivery of the judgment until satisfaction shall be seven per centum per annum or such other rate, not exceeding twelve per centum per annum, as the parties may expressly agree in writing before or after the delivery of the judgment or as may be adjudged by consent:..."*

The trial Magistrate properly acted within the guidance of the law by granting interest within the range provided by the law. I am settled that

there is no good ground to fault the findings of the trial Court in awarding interest.

Considering what I have deliberated above, the grounds of appeal as raised by the appellant have been reduced into nothing leaving the judgment and decree of the trial Court intact. The appeal is bound to fail, it is hereby dismissed with costs for lack of merit.

D. P. Ngunyale
Judge
19/05/2022

Judgment delivered this 19th day of May 2022 in presence of Mr. Isaya Mwanry learned advocate for the respondent.

D. P. Ngunyale
Judge
19/05/2022