

**IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA
(DAR-ES-SALAAM DISTRICT REGISTRY)**

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 102 OF 2021

BARCLAYS BANK TANZANIA LIMITED APPELLANT

VERSUS

MIRIAM RABIETH MNDEME RESPONDENT

(Appeal from the judgment and decree of the Resident Magistrate's Court of Dar-es-Salaam at Kisutu)

(A. W. Mmbando, SRM)

Dated 06th day of November 2020

In

(Civil Case No. 225 of 2018)

JUDGMENT

Date: 06/12/2022 & 23/01/2023

NKWABI, J.:

It is common ground that the parties had a one-year Sales Agent contract (Lead Generator Agency Agreement) executed on 19th Day of October, 2017.

It was renewable. It is also common ground that the appellant terminated the contract while it was still subsisting on 6th June 2018. Indeed, there is therein an acceptance clause which reads:

"... By executing this agreement, I hereby confirm to have been explained and understood that my role will not be that of an

employee but rather an agency whose conduct and remuneration is covered under this agreement attached schedules.”

In the trial court, the respondent claimed for the following reliefs:

1. Declaration that the defendant breached the contract.
2. Payment of T.shs 31,791,602/08 as principal sum being 15 months' consideration for early breach of contract as well as one-year compensation on the basis that the contract if not breached would have been renewed for another year.
3. General damages for life interruption, and inconveniences caused.
4. Interest at the court's rate from the date of filing the case to the date of judgment.
5. Costs of the case.

The trial court found that the respondent had proved her case. It declared that the appellant was in breach of the contract, ordered the appellant to pay the respondent T.shs 10,000,000/= for breach of the contract, general damages at T.shs 10,000,000/=. It also ordered the defendant pay interest at 12% rate on 1st and 2nd reliefs on the decree from the date of judgment till full payment. Parties were ordered to bear their own costs.

Aggrieved, the appellant appealed to this Court praying the appeal be allowed and judgment and decree of the trial court be set aside. He has three grounds as follows:

1. That the trial magistrate erred in law and fact by holding that cause of action against the appellant is triable under the honourable court while it is a labour dispute to be tried by the Commission for Mediation and Arbitration.
2. That the trial magistrate erred in law and fact by not analysing the evidence tendered by the parties and applying such evidence on each issue before making a decision on the issues framed and in the judgment as a whole.
3. That, the honourable trial magistrate, erred in law and fact for compensating excessive general damages without justifying the reasons for such award of general damages.

The appeal was disposed of by way of written submissions. Ms. Hamisa Nkya, learned counsel, advocated for the appellant while Mr. Rahim Mbwambo, learned counsel, represented the respondent.

I am intrigued to start my determination of this appeal with the 1st ground of appeal which is that the trial magistrate erred in law and fact by holding that cause of action against the appellant is triable under the honourable court while it is a labour dispute to be tried by the Commission for Mediation and Arbitration.

In submission in chief, the counsel for the appellant argued that the trial court changed its footing from breach of contract to a view of labour dispute and gave remedies of a labour dispute instead of breach of contract. He thus prayed that I hold that this is a labour dispute triable by the Commission for Mediation and Arbitration.

I have considered this complaint and find that the same has no any basis and justification. In the contract, there is no any Employer-Employee relationship to warrant a holding in the footing of the view of the counsel for the appellant. I agree with the respondent's counsel that the respondent was a mere agent and not an employee for her dispute to be determined by the Commission for Mediation and Arbitration. It is pure contractual relationship under agency. The first ground of appeal crumbles to the ground.

Next, I discuss the 2nd ground of appeal which goes that the trial magistrate erred in law and fact by not analyzing the evidence tendered by the parties and applying such evidence on each issue before making a decision on the issues framed and in the judgment as a whole.

In her submission, Ms. Nkya complained that the trial court used only one salary slip to make a finding while the respondent was paid by commission which depend on performance. Further that the contract was terminated due to fraud where the contract could be terminated without 30 days' notice. She also added that the respondent's allegations are too weak to support her case.

On the adversary side, Mr. Mbwambo contended that though the respondent was suspended for fraud allegations pending investigation, she was neither interviewed nor asked to elaborate what happened. Later, she was given a termination letter without her being heard.

Though I appreciate that *"he who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant"* as per **East African Road Services Ltd v. J.S. Davis & Co. Ltd.** [1965] E.A. 676, I accept Mr. Mbwambo's view that the trial court correctly analyzed the

evidence that was in the record and I find no justification to interfere with the findings of the trial court on this complaint. As to the allegation that the respondent was not heard, that is provable by oral evidence. It was the appellant to prove otherwise by either oral evidence or by documentary evidence. The trial court did not find the appellant's story cogent, I have nothing valid to interfere. It was the appellant's duty to prove that the termination was fair but she failed. Further, it was for the appellant to rebut the evidence on the salary slip. That, she failed to do.

The last line of complaint is that the honourable trial magistrate, erred in law and fact for compensating excessive general damages without justifying the reasons for such award of general damages. Expounding the grievance, Ms. Hamisa appreciated that awarding general damages is at the discretion of the court but warned that discretion should be applied cautiously. She added, the magistrate did not assign reasons for arriving at the amount of 10,000,000/=. It was also complained that that amount is the same as that of specific damages. It was also her view that that is because the respondent neither proved defamation or mental, psychological torture nor mental anguish. For that position she cited **Access Bank Tanzania Limited v. Michael Daud Msufu**, Civil Appeal No. 2 of 2019 (HC) (unreported). She

also made reference to the case of **Anthony Ngoo v. Kitinda Kimaro**, Civil Appeal No. 25/2014 CAT (unreported). She also reiterated the provisions of Order XX Rule 4 of the Civil Procedure Code, Cap. 33 R.E. 2019 which provides that reasons to be advanced on awarding general damages.

The counsel for the respondent did not buy the position of the counsel for the appellant. He was of the view that in the circumstances of this case the amount is not excessive, the trial magistrate judiciously assessed and elaborated and cited guiding case law that regulate granting general damages. He cited the case of **Reliance Insurance Co. (T) Ltd & 2 Others v. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (CAT) (unreported) to the effect that an appellate court is not justified in substituting a figure of its own for that awarded below unless wrong principles of law were used or inordinately high or low ...

It is clear in the judgment of the trial court that granting general damages were at its discretion. It considered the evidence to reach at the amount it awarded as general damages. In my view, the trial magistrate followed the dictate of the law as to general damages as stipulated in the case of **Storms v. Hotchison** (1905) A. C. 515:

"General damages are such as the law will presume to be the direct natural or probable consequence of the act complained of."

The counsel for the appellant neither showed which principle of law was violated in awarding the amount of general damages to the respondent nor any law that prohibits to grant the amount awarded.

In fine, I dismiss the appeal with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 23rd day of January, 2023.



J. F. NKWABI

JUDGE