IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 67 OF 2022

(Appeal from the Judgment of the Resident Magistrates Court of Dar es salaam at Kisutu in Civil case No. 123 of 2017, delivered on the 24th January 2022 by Hon. E. N. Kyaruzi, PRM)

TONY GODLISTEN MWANRI.....APPELLANT

VERSUS

FREDDY KIMARO.....RESPONDENT

JUDGEMENT

Date of last Order: 24/11/2022

Date of Judgement: 24/02/2023

E. E. KAKOLAKI, J.

The appellant herein before the Resident Magistrate Court of Dar es salaam at Kisutu vide Civil Case No. 123 of 2017 sued the respondent claiming foe payment of general damages not less than TZS 100 million, being damages for dismantling his *"industrial simba plug"*, loss of expected income as well as embarrassment, mental and physical torture suffered from respondent's act. However, lucky was not on his side as after full trial of the case, the same was dismissed for want of merits on 24/01/2022. Unpleased with that decision, he has knocked the door of this temple of justice asking for the court interference of the said dismissal order relying on three grounds of appeal going thus:

1. That the learned trial magistrate erred in law and fact in deciding that, the plaintiff (now appellant), failed to prove the case on the standard of balance of probabilities.
2. That the learned trial magistrate erred both in law and fact in deciding that, tangible evidence was required to prove the plug existed and was destroyed.
3. That, also the learned trial magistrate erred in law and fact in holding that, the Court cannot rely on mere words of PW1 that the plug built by plaintiff was destroyed by the defendant. And that more evidence was needed to prove the allegations.

In light of the above grounds the appellant is inviting this Court to allow the appeal by setting aside the lower court's decision and make findings in favour of the appellant.

Hearing of the appeal proceeded orally as both the parties were represented. While Mr. Julius Ndanzi, learned advocate prosecuted for the appellant, Mr. Stock Joachim, learned advocate defended the respondent. Before the appeal could be determined on merit of the appeal parties were called to address the Court on the competency of the appeal itself, whether the trial court was crowned with pecuniary jurisdiction to entertain the matter. Both

parties' submission were considered, it was to the Court's satisfaction that, the trial court was vested with jurisdiction since the cause of action was premised on tortious liability in which Mr. Ndanzi submitted that, as per paragraph 10 of the plaint there was a trespass to the appellant's property and destruction of industrial samba plug. The Court was so satisfied despite of the appellant's failure to specify in the plaint by of statement of value or specific damages suffered for the purposes of determination of court's jurisdiction and filing fees as provided under order VII Rule 1(i) of the CPC [Cap. 33 R.E 2019], since the suit founded on tortious action cannot be entertained by the primary Court for being alien concept without expression in customary jurisprudence. See also the case of **Dotto Said Vs. Athumani Migeto**, PC. Civil Appeal No. 42 of 2003 (HC-unreported) where this Court when considering the jurisdiction of the primary Court in trying malicious prosecution suit ruled that, primary court was incompetent to try a suit founded on malicious prosecution 'a common law tort which is alien concept without express in customary jurisprudence.

With the above findings, I now move on to consider and determine the appeal on merit in which Mr. Ndanzi chose to argue the 1st ground separately while combining the 2nd and 3rd grounds of appeal. To start with the first ground, Mr. Ndanzi faulted the learned trial magistrate on his findings that,

the appellant failed to prove the case on the balance of probabilities. He said, the appellant being the director and shareholder of two companies which are dealing with among others, fishing activities and construction of boats using fiber glass technologies, managed to prove his case as per the requirement of section 110 and 111 of the Evidence Act, [Cap. 6 R.E 2022]. It was his argument that, there is abundant evidence by the appellant on the construction of industrial simba plug that was placed in front company's office as seen in page 28 of the proceedings. And that ,the same was meant to be used for training of staff, production of molds and making some parts that could generate income to him as there was some companies that had already started negotiations that could earn him Tshs. 40 million for four parts he was able to manufacture per month. According to him, had it not been for respondent's act of destroying the said industrial simba plug in a period of two years, the appellant would have earned Tshs. 900 million which he treated as loss suffered.

On the evidence of respondent destroying the said plug, Mr. Ndanzi contended the same was enough as it is PW2 who witnessed the respondent and his colleagues destroying the said simba plug on 24/01/2017, that cost him Tshs. 6 million, before the same was reported to the appellant on 25/01/2017 and the incident reported at police on the 25/01/2017. It was

his submission that, on account of that strong evidence the appellant proved his case on the balance of probabilities.

As regard to the 2nd and 3rd grounds of appeal Mr. Ndanzi attacked trial magistrates finding that in proving the case tangible evidence was required to prove the plug existed and destroyed. According to him tangible evidence means physical one capable of being touched which as per the law is not mandatory and fatal as in the circumstance of this case, the industrial simba plug could not be tendered in court for being dismantled already and the remains buried. He backed his submission with the decision of **Mashaka Juma @ Ntatula Vs. R**, Criminal Appeal No. 140 of 2022 (CAT-unreported) in which the Court of Appeal held that, failure to tender objects does not render or mean the witness who testified on such exhibits are not credible. He argued, tendering of exhibits depends on the circumstances of each case as it was held in the case of **Paulo Aloyce @ Mtana and Another Vs. R**, Criminal Appeal No. 422 of 2017 (CAT-unreported), since in the matter at hand the respondent in his letter (exh.P2) responding to the demand letter (exh. P1) did not dispute existence of the plug in dispute. On the strength of the above submission Mr. Ndanzi invited this Court to allow the appeal.

In rebuttal, Mr. Joachim attacked the respondent's submission that he proved the case beyond reasonable doubt, contending that it was untrue.

He said there is no evidence that the appellant was director in the two alleged companies and that, the said companies were dealing with fishing activities. Again he said, there was no evidence to prove that the appellant has an office housed in JANE building though documents of ownership or lease agreement and that he was a structural engineer. As regard to the contention that the industrial simba plug was built with three purposes, he argued there was no single evidence to exhibit it as appellant could have produced licence to conduct trainings or any business licences. In the same vein he stressed there was no evidence tendered proving that the appellant had mandate to build the said plug in front of the office and that the same cost Tshs. 6 million as the respondent in his WSD denied any knowledge of the said plug, the fact which is seen also at page 4 of the typed judgment. Mr. Joachim insisted the appellant was duty bound to tender even pictures or structural drawings of he said industrial simba plug. Concerning the evidence on destruction of the said plug, he challenged the evidence of PW2 terming it as doubtful as if really witnesses the respondent and his colleagues dismantling it he would have taken picture and present them to PW1 or in court.

Mr. Joachim went on attacking the appellant's submission in the estimate of loss incurred of Tshs. 900 million per two years, terming it imaginary as there was no evidence tendered to justify it.

As regard to the 2nd and 3rd grounds of appeal on the complaint and submission by Mr. ndanzi that, the trial magistrate demanded tangible evidence for proving the case, Mr. Joachim submitted that was not the case as what was required was additional or more evidence such as building permit, structural drawing or any other evidence depicting that indeed the said industrial simba plug existed. He referred the Court to page 5 of the typed judgment. In regard to what was admitted by the respondent to have been in his knowledge in exhibit P2 he argued, was dummy lion plug and not industrial simba plug as the two are two different and separate plugs. He added, with regard to the cases relied on by the appellant the same do not bail him out as the circumstances in those cases could not enable tendering of exhibits, hence their facts differ to the ones in present matter. With that submission he argued the appellant's case was not proved on the balance of probabilities hence prayed the court to dismiss the appeal with costs.

In rejoinder submission he argued that, the issue as to whether the appellant was the director and shareholder in the two companies was not subjected to

dispute, as the respondent noted that fact in his WSD hence no need of proof. Regarding production of building permit and business licence he submitted that since the business had not started yet there was no need of tendering those documents to exhibit existence of the industrial simba plug. Otherwise the learned counsel reiterated his submission in chief and the prayers thereto.

I had an ample time to review and consider the fighting submission from both parties as well as visiting the record in a bid to establish whether the appellant's grievances in the 1st, 2nd and 3rd grounds of appeal have merits or not. And in so doing this Court being the first appellant court enjoys the right to re-evaluate the evidence in the trial court so as to come up with its own findings. See the cases of **Peters Vs. Sunday Post Ltd.** (1958) E.A. 424 and **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported). In **Demaay Daat** (supra) the Court of Appeal had this to say:

> *"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact*."

In responding to the above issue which no doubt will answer all grounds of appeal, it is learnt from the trial court's record that, the issues for

determination before the trial court were three, being one, whether the defendant unlawfully dismantled the industrial simba plug which was inserted in front of the plaintiff's office, second, if the 1st issue is in affirmative, whether the defendant is liable to pay compensation and third, to what reliefs are the parties entitled.

To answer the first issue, in my humble view it behoved the appellant to prove existence of two facts one, that it is the respondent who dismantled the industrial simba plug and second, that, the said plug was inserted in front of his office. Mr. Ndanzi says the appellant proved all those facts through PW1 and PW2, while Mr. Joachim is of contrary view that, the same were not proved as no documents were tendered to prove its existence as well as its demolition. PW2 is on record at page 34 of the typed proceedings to have stated that, on the 24/01/2017 he witnessed the respondent in company of five men two of them being Steven Kobelo and Adriano Changuo, destroying the said plug which was outside the office before the same was buried in a hole. And that he is the one who informed PW1 of that incident who also in his testimony confirmed that fact and that he is the one who had built the said industrial simba plug. The respondent did not cross examine this witness on these two important facts. It is a trite law that, failure to cross examine a witness on a particular matter entitles the court

to draw an inference that, the opposite party agrees to what is said by that witness in relation to the fact in issue. This principle of law finds refuge in the cases of **Hatari Masharubu @ Babu Ayubu Vs. Republic**, Criminal Appeal No. 590 of 2017 and **Sebastian Michael & Another Vs. The Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018 (both CAT-unreported). Deliberating on the principle the Court in **Hatari Masharubu @ Babu Ayubu** (supra) had this to say:

> *It must be made clear that failure to cross examine a witness on a* ***very crucial matter entitles*** *the court to draw an inference that the opposite* ***party agrees*** *to what is said by that witness in relation* ***to the relevant fact in issue.***

The above principle no doubt applies to both criminal and civil matters. In this matter since PW1 and PW2 were not cross examined on the existence of the said industrial simba plug and its destruction by the respondent on 24/01/2017, this court finds that it was an admission that, indeed the same existed and that, it is the respondent in company of his colleagues who destroyed the same. Hence the first issue during the trial is found in affirmative. The argument by Mr. Joachim that, the appellant ought to have proved existence of the said plug by tendering structural drawings and building permit, with due respect to him I don't find them to be the

requirement in proving whether the same was built or not and whether it was destroyed. Had it been that witnesses were cross examined on those facts, which was not done, then this Court would have held a different view. On that note, I agree with Mr. Ndanzi that, the learned trial magistrate was in error to find the first issue was not proved.

Having so found the next issue or question for consideration is whether the respondent is liable to pay compensation. I think this issue need not detain this Court much as it is obvious the destruction of industrial simba plug was done by the respondent without justifiable cause though he is disputing that fact. The respondent is therefore liable to pay compensation for the tort committed to the property. The only remaining questions are how much should be paid and to whom. Mr. Ndanzi is of the submission that, in two years the applicant would have earned Tshs. 900 million calculated from Tshs. 40 million for four plugs which would have been sold, had it been not for the destruction of the said plug by the respondent, following the business negotiations that had started or existed between the appellant and some companies interested in purchasing the said plug. He also said, the appellant claimed for Tshs. 6 million as the costs spent in building the said plug. Further to that, general damages were claimed by the appellant (PW1) to the tune of Tshs. 350 million.

Having considered Mr. Ndanzi's submission which is vehemently challenged by Mr. Joachim for not being supported by any documentary evidence, I find the claim of loss of business fall under specific damages. It is the law that special or specific damages must be specifically pleaded and strictly proved. See the cases of **Zuberi Augustino Vs. Anicet Mugabe**, (1992) TLR 137, **Masolele General Agencies Vs. African Inland Church Tanzania** [1994] TLR 192 (CAT), **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (CAT-unreported) and **Tumaini Rashid Machumu Vs. S & C Ginning Co.Ltd and M/S Spider Auction Mart** (Civil Appeal No.4 of 2021)[2022]TZHC 466 (14 March 2022);www.tanzlii.org. In **Zuberi Augustino** (supra) the Court of Appeal, at page 139 though not in comprehensive express on that principle observed that:

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

In this case the appellant neither pleaded the said specific damages of Tshs. 900 million nor proved it during the trial, hence the submission by Mr. Ndanzi on this damages, I hold remains unproved. As regard the claim of Tshs. 6 million the same was pleaded but unfortunately was not proved by the appellant as it was his mere words that, he spent them without tendering

any evidence to justify it. Coming to general damages it is the law that the same is not quantified in the plaint as it is grantable at the discretion of the Court upon being pleaded that it was suffered. The Court of Appeal in the case of **Peter Joseph Kilibika and Another Vs. Patric Aloyce Mlingi**, Civil Appeal No. 37 of 2009 (CAT-unreported) while citing with approval the decision in the case of **Admiralty Commissioners Vs. SS Susqehanna** [1950] 1 ALL ER 392, had this to say:

> *"If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."*

On general damages it was PW1's testimony at page 31 of the typed proceedings that, the respondent's action of dismantling the said industrial simba plug in front of his workers suffered him psychologically as the claim that he was using the simba plug for spiritual purposes embarrassed him publically hence entitled to general damages of Tshs. 350 million. Though the appellant claim to have been affected psychologically hence entitled to general damages, I do not find it justified. The reason I am so holding is not far-fetched as being the director and shareholder of the companies in which its property (premises whether owned or leased) the said simba plug was built, there is no proof that same was owned by him personally or it was the companies property. I say so as per the case of **Salomon Vs. Salomon**

and Co Ltd [1897] AC 22, the director or shareholder is independent from the company carrying its own legal personality, therefore cannot bear company's liabilities. In other words the liabilities and properties of the company are not on his shoulder. Relying on such principle and given the fact that the said industrial simba plug was built in the companies premises allegedly by the appellant without any proof of authorization from the said companies occupying the premises, it cannot be concluded that, the said industrial simba plug was his personal property to be entitled to compensation. Since there is no proof of personal ownership of the plug by the appellant, then I hold the respondent is not liable to pay him compensation.

In view of the above holding I move to the third issue as to what reliefs are the parties entitled to. Since there is no proof that the appellant is entitled to any relief, I find the appeal is destitute of merit and is hereby dismissed in its entirety.

I order each party to bear its own costs.

It is so ordered.

Dated at Dar es salaam this 24th day of February, 2023.

E. E. KAKOLAKI

JUDGE

24/02/2023.

The Ruling has been delivered at Dar es Salaam today 24th day of February, 2023 in the presence of Mr. Julius Ndanzi, advocate for the appellant, who is also holding brief for Mr. Stock Joachim, advocate for the respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
24/02/2023.