

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

HC CIVIL APPEAL NO. 49 OF 2022

(Originating from Civil Case No. 2 of 2021 of Bukombe District Court.)

ONESMO KISABO.....APPELLANT

VERSUS

SAGUDA MAGANGA.....RESPONDENT

JUDGMENT

20th February & 24th February 2023

Kilekamajenga, J.

The respondent herein sued the appellant in the District Court of Bukombe for the payment of Tshs. 20,000,000/= as specific damages as the amount injected in business. He also claimed Tshs. 10,000,000/= as general damages; decretal interest at the court's rate from the date of judgment until full satisfaction of the decree. He also prayed for other orders on the discretion of the court. In proving his claim at the trial court, the respondent (plaintiff at the trial court) had three witnesses. The respondent (PW1) testified to the effect that, he entered into partnership agreement with the appellant regarding the business of extracting gold after grinding of stones. They agreed that, the respondent should fund the operational costs, while the appellant was to provide the crusher for grinding of stones. They further agreed to share profit on 50% each after deducting operational costs. The respondent testified to have incurred costs to the tune of Tsh. 13,029,800/= as evidenced by Exhibit P1 which was witnessed by PW2



(Daniel Kanunda). That, sometimes on 29/1/2021, the appellant without prior notice, took the crusher from the business site which was also testified by PW3 (Amoni Kashaula Sultan). Despite the respondent's prayers for the crusher to be returned, the appellant refused. PW1 also tendered Exhibit Pex 2 which was the appellant's affidavit in Misc. Civil Application No. 5 of 2021 where the appellant alleged to have contract with the respondent.

In his defence the appellant who was the sole witness on defence side; he did not deny to have entered into contract with the respondent. He further testified that, in their partnership agreement, they agreed to share the profit from the business. He further testified that, he never sold the said crusher to the respondent. That, there was a time when the respondent sold the pile of mineral sand but he never gave him his share of profit.

At the end of the trial, the trial court awarded the respondent general damages to the tune of Tshs. 15,000,000/= and an interest of 10% to the same until the satisfaction of the award as well as costs of the suit. Being dissatisfied with the trial court's decision, the appellant has advanced five grounds of appeal as follows;

- 1. That the trial court erred in law and fact to award the respondent Tanzania shillings 15,000,000/= as general damages in whole sum and without lawful justification.*

2. *That the trial court erred in law in the process of admitting **exhibit "Pex 1"** during the prosecution hearing.*
3. *That, the court erred both in law and on fact in granting reliefs which was not pleaded and by the respondent.*
4. *That, trial Court erred in law and facts to hold that the Appellant breached contract/partnership deed while in fact its respondent who ceased the business and the said tailings (gold ores) "Rundo" on the "Mwalo" have not been sold so as to gauge as to whether there is loss or not.*
5. *That the trial court erred in law for granting uncertain interest of 10% contrary to Order XX rule 21 of the Civil Procedure Code (Cap 33 R.E 2019).*

The appellant prayed for this court to re-evaluate the evidence adduced before the trial Court; allow this appeal and quash the trial court judgment and decree. He also prayed for the costs of the suit and any other order deemed fit to grant.

During the hearing of this appeal, both the appellant and the respondent appeared in person and unrepresented. The appeal was argued orally. The appellant being unrepresented argued the five grounds of appeal collectively. In his submission, the appellant submitted that, the trial court decision was unfair to him. The respondent was the one who breached the contract as he failed to inject money into the business as agreed. He argued further that, they operated the business for five months which was enough and that, the respondent realized that, they made loss from the business. He further submitted that, there was no breach on

his part as he also incurred losses as the crusher needed frequent maintenance. He finalized his submission in chief saying that, the expenses tendered by the respondent was not actual and the respondent seemed to have money and he misused his capital.

In reply, the respondent opposed the appeal arguing that, the appellant took away the crusher and therefore prevented him to carry on the business which resulted into loss. He repaired the crusher which the appellant took it away against their agreement. He argued further that, the respondent had no right to object exhibit PEX 1. He further objected ground three submitting that, the appellant failed to clarify it. On the fourth ground, the respondent submitted that, the appellant admitted that, he took away the crusher in his (respondent) absence. On the last ground it is the respondent's submission that the court was right to grant an interest of 10%. He further urged the court to dismiss the appeal as the pile of mineral sand has no or little contents of minerals.

In brief rejoinder, the appellant argued that he had all the right to end the agreement after realizing that they operated under loss. Furthermore, the respondent never bothered to fund the business. Also, the respondent lied when submitted that he bought the crusher.

As prayed by the appellant, this court is in the position to re-evaluate the evidence given at the trial court and if desirable to make its own findings as the first appellate court. (See the case of **Airtel Tanzania Limited vs OSE Power Solutions Limited**, Civil Appeal No. 206 of 2017). Now from the grounds of appeal raised and argued, I will determine the fourth ground first, then the rest of the grounds will follow.

From the fourth ground of appeal, it is the appellant's assertion that, he did not breach the partnership contract rather it was the respondent who breached the contract as he stopped injecting money into the business. It is evident from the trial court's record that, there was no dispute that, the appellant and the respondent entered into partnership agreement to operate mining business. The appellant gave his crusher machine and the respondent contributed capital in terms of money. This is reflected in PW1 and PW3's testimony. The same was also testified by the appellant in his defence. The evidence further reveals that, the work went on for five months before the appellant removed the crusher machine from the business site without communicating to the respondent. This was also testified by PW1 and PW2 which was also confirmed by the appellant himself during cross examination. The appellant alleges that, he decided to remove the crusher after the respondent failed to inject money into the business. However, the trial court record does not suggest so, as PW3's testimony shows that, the work was in progress when the appellant took the crusher machine. That being

the case, the appellant had no further evidence to show that he had agreed with the respondent to remove the crusher machine from the business site. He did so without prior notice or agreement with the respondent and thus he was the one that breached the contract. From the evidence given, I refuse to subscribe to the appellant argument that, the respondent breached the contract. Although the appellant argued that, they were operating on loss, still it didn't give him the right to remove the crusher machine without an approval from the respondent. Thus, the fourth ground of appeal collapses.

Moving to the second ground of appeal, it is the appellants ground that the court erred in law in admitting exhibit PEX 1 during hearing. He further argued that, the expenses in exhibit PEX1 were not actual. First of all, I would like to point out that, admissibility of exhibit is within the domain of the court. The court has the right to admit an exhibit. This was also discussed in the case of **A.A.R Insurance (T) Ltd vs Beatus Kisusi**, Civil Appeal No. 67 of 2015. From the trial courts record, I do not see any fault by the trial court in admission of the said exhibit. Besides, the appellant never objected to the admission of the exhibit. Therefore, the exhibit was cleared before its admission. Thus, this ground lacks merit and it is hereby dismissed.

Lastly, on the first ground, third ground and the fifth ground of appeal, which centers on the relief granted to the respondent, the trial court awarded the

respondent to the tune of 15,000,000/= as general damages and interest of 10% on the decretal sum until it is fully paid. General damages are within the discretion of the court, a party does need not to specifically prove the general damages suffered. However, the law requires the court to give justification on the granted of damages. This was also discussed in the case of **Vidoba Freight Co. Limited vs Emirates Shipping Agencies(T) Ltd & Another**, Civil Appeal No. 12 of 2019, where the court quoted with authority the case **of Antony Ngoo & Davis Ngoo vs Kitinda Kimaro**, Civil Appeal No. 25 of 2014, where the court held that;

"the law is settled that, general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The judge has the discretion in awarding general damages although the judge has to assign reasons in awarding the same."

From the court record's, the respondent prayed for the general damages to the tune of Tsh. 10,000,000/=, and as the trial court was satisfied that the appellant indeed breached the contract. The court went on awarding Tshs. 15,000,000/= as general damages.

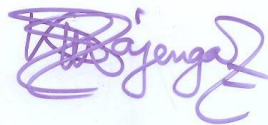
Thus, it is true that, the court awarded general damages which exceeded the pleaded amount by the plaintiff. However, the court has discretionary power to grant the amount which exceeds the pleaded amount. From the trial court's judgment, the trial magistrate, at page five of the typed judgment, gave the reason

as to why she awarded 15,000,000/= as general damages. Furthermore, although the awarded interest of 10% was not specifically prayed, still the same falls under discretionary power of the court and within the respondent's prayer of any other order deems just and fit to grant.

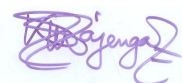
On the fifth ground of appeal, I summarily dismiss the ground as the law is clear under Order XX rule 21 of the Civil Procedure Code Cap 33 RE. 2019 that, the court can grant 7% to 12 % as an interest, and therefore the appellant has misdirected himself on the law. This ground is also dismissed.

In fine, the entire appeal collapses, and I proceed to uphold the trial court's decision. The appellant should pay the costs of this appeal. It is so ordered.

DATED at **Mwanza** this 24th day of February, 2023.



Ntemi N. Kilekamajenga.
JUDGE
24/02/2023



Court:

Judgment delivered this 24th February 2023 in the presence of the appellant and the respondent. Right of appeal explained to the parties.



Ntemi N. Kilekamajenga.
JUDGE
24/02/2023

