IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CIVIL APPEAL NO. 18 OF 2022

(Arising from Ngara District Court at Ngara in Civil Case No. 01 of 2022)

STERLING AND WILSON PVT LTD.....APPELLANT

VERSUS

KISOMBOKO BUILDERS LTD AND MADIBA MULTI DIVERSIFIED CO. LTD..... RESPONDENT

JUDGMENT

Date of Judgment: 12.04.2023
A.Y. Mwenda, J

This judgment is in respect of the consolidated appeals No. 18 and 19 of 2022. It arises from the decision of Ngara District Court issued on 15/8/2020. Before the trial court, the plaintiff one KISOMBOKO BUILDERS LTD AND MADIBA MULTI DIVERSIFIED CO. LTD (now the respondent) sued the Defendant one STERLING AND WILSON PVT LTD (now the appellant) for breach of contract. He claimed for the following orders, that.

(i) A declaration that the defendant has breached employment contract dated on 4th January 2022.

(ii) Payment of TZS. 52,412,654/= being specific damages as a result of work done.

(iii) That the defendant pays the interest on the decretal amount at court rates of 12% from the date of judgment to the date of full payment.

(iv) Payment of general damages to be assessed by the court.

(v) Costs of the suit and

(vi) Any other relief(s) that the court would deem fit to grant.

Having heard the evidence from both side and upon consideration of the same, the trial court partly granted the plaintiff's prayer by ordering the defendant to pay the plaintiff the sum of TZS. Twenty-One Million Three Hundred and Fifty Thousand only (TZS. 21,350,000/=) being payment of partly performed contracts. This judgment was not well received by both parties as a result, the plaintiff filed Civil Appeal No. 19 of 2022 with seven (7) grounds while the defendant filed Civil Appeal No. 18 of 2022 with five grounds of appeal. By the agreement of the learned counsels for the parties and upon endorsement by the court, an order consolidating both appeals to wit, Civil Appeal No. 18 of 2022 and Civil appeal No. 19 of 2022 was made. As a result, the defendant's grounds of appeal are now referred to as the appellants grounds appeal while the plaintiff's 6th ground of regarding failure by the trial court to award general damages is now referred to as a cross appeal thereto.

For ease of reference this Court found it pertinent to reproduce the appellants (STERLING AND WILSON PVT LTD 's) grounds of appeal as follows that.

1. *The, the trial Senior Resident Magistrate erred in law and in fact in holding that the Respondent had proved his claims against the Appellant on the balance of probabilities such that the respondent was entitled to relief to the tune of TZS 21,350,000/=*

2. The, the trial Senior Resident Magistrate erred in law and in fact in holding that the Respondent was entitled to reliefs to the tune of 21,350,000/= as prayed by the Respondent, despite admitting that the alleged expenses that the Respondent claimed to have incurred on hiring vehicles and machines were not justified or proved.

3. That the trial court erred in both points of law and fact by failing to consider and evaluate properly the evidence adduced by the appellant witness (sic).

4.That the trial court erred in law and fact by accepting the electronic evidence via mail without considering the degree of accuracy of such information and appropriate procedures for tendering the electronic evidence.

5.That the trial magistrate erred in law and fact when he failed to address and confine himself to the framed issues between the parties.

In the same footing the Court also found it important to reproduce the respondent's 6th ground of appeal which now stands as a Cross appeal as follows, that.

> *6 "The trial magistrate erred in law and fact by acting unjustly when exercising its judiciary (sic) powers on*

costs by denying the appellant legal costs and general damages suffered by the respondent without giving reason for that while the appellant with the company all were victims of the defendant's acts (sic)."

When this appeal was called on for hearing the appellant was represented by Mr. Pius Maro, learned counsel whilst the respondent was represented by Mr. Baraka John, learned counsel. In his submission in chief, Mr. Pius opted to argue the grounds of appeal in sequence.

Regarding the first ground of appeal, the learned counsel for the appellant submitted that the plaintiff failed to prove her case on balance of probabilities as her claims on specific damages and part performance of the contract were pleaded but not proved. In support to this point he cited the case of ZUBER AUGUSTINO V. ANICET MUGABE [1992] TLR CAT, SAID NASSOR SAID V. EMMANUEL GITGAN GHEPROBASTER, LAND CASE NO 190 OF 2021 and SOLVOCHEN HULLAND B.V V. CHANQUING INTERNATIONAL INVESTMENT CO. LTD, COMMERCIAL CASE NO. 63 OF 2020 where the courts emphasized that special damages must be pleaded and proved. In conclusion to this ground of appeal, the learned counsel for the appellant averred that the trial court's judgment is opaque as it does not show how the damages of TZS. 21,350,000/= was arrived at in a condition where what the plaintiff stated in court was a mere narration which was not substantiated.

About the second ground of appeal, Mr. Pius submitted that an award of TZS. 21,350,000/= was granted despite failure by the plaintiff to prove costs for hiring machines and vehicles. He said that the Hon. SRM contradicted herself when she acknowledged that the failed to justify the costs incurred in hiring machine, vehicles and labor but in the same judgment she said the said amount was awarded as costs incurred for hiring machines, vehicles and labor.

Mr. Maro stressed further to the effect that the said amount (TZS. 21,350,000/=) which was awarded to the Respondent was never proven in detail as neither purchasing orders nor payment receipt were tendered in court. According to him, the plaintiff may not be considered to have incurred costs by merely submitting the contract and listing items and activities which are purported to have been performed. He concluded this part by submitting that the plaintiff failed to discharge his burden of proof as required by S. 110 (1) and (2) OF THE EVIDENCE ACT [CAP 6 RE 2019] as was stated in the case of KARIM HAJ V. RAYMOND NCHIMBI ALOYCE AND ANOTHER, CIVIL APPEAL NO. 99 OF 2004.

Regarding the third ground of appeal the learned counsel for the appellant submitted that the trial magistrate misdirected herself when she failed to analyze and consider the defense evidence at all. The learned counsel for the appellant stressed that from the trial court's record it is shown as if there was no defense at all while in fact the appellant elaborately presented her material propositions. As for the 4th ground of appeal regarding the admissibility of electronic evidence, the

learned counsel for the appellant submitted that under section 64A OF THE LAW OF EVIDENCE ACT AND S. 18 OF THE ELECTRONIC TRANSACTION ACT, NO. 13 OF 2015, electronic evidence has its peculiar procedures for its admissibility. He said that authentication through affidavit to show that the machine in which the evidence was retrieved, the date in which the document was printed and a proof that it was not tempered with are crucial. The learned Counsel said that in the present matter the plaintiff did not follow the required procedures in tendering electronic evidence in court of law, thus their admission was unprocedural and in violation of the law. He said that the mere fact that the electronic evidence was admitted uncontested does not render it reliable or capable of making out evidence. To support this point, the learned counsel cited the case of NURDIN SHAIBU V. OMAN KHALFAN, MISC CRIMINAL APPLICATION NO. 287 OF 2021 and CHRISTINA THOMAS V. JOYCE JUSTO SHIMBA, CIVIL APPEAL NO. 84 OF 2020. About the fifth (5^{th}) ground of appeal, the learned counsel for the appellant submitted that the Senior Resident Magistrate failed to confine herself to the framed issues. The learned counsel submitted that issues which were framed during final pre-trial conference are different to those reflected for determination in the proceedings and judgment. According to him, only two issues were framed for determination by the parties however an issue as to whether there was any breach of contract is not one of them. He said this issue was disregarded during trial resulting in discontented judgment on the part of the appellant. To cement

his argument with the legal back up the learned Counsel said that under Order XX Rule.5 of Civil Procedure Code, [Cap 33 RE. 2019] the framing of issues is crucial, and the court should not only frame issues but also argue and dispose it to its finality. He added in that the issue regarding existence of contract between the parties was not at issue at all as the appellant cancelled the contract as the respondent failed to fulfil her responsibilities. According to him the issue for further discussion ought to be whether the respondent upheld the terms of the agreement, thus disregarding this issue is evidence that the Hon. SRM erred in law by dealing with a wrong issue which did not determine the matter. To him, since this issue was never framed by the parties then dealing with it was contravening Order XIV Rule 1 (2) of Civil Procedure Code [Cap 33 RE 2019]. To support this point, he cited the case of MATUMAINI SACCOS LTD V. STANLAY EZALI, CIVIL APPEAL NO. 24 OF 2019.

In concluding remarks, the learned counsel prayed this appeal to be allowed by setting aside the decision of Ngara District Court. He also prayed the respondent to be condemned to pay costs and for of any other relief which this court might deed fit and just to grant.

Following Mr. Maro's closure of his submission in chief, the Court invited Mr. Baraka, learned counsel for the respondent to respond to the appellant's grounds of appeal and to also submit in chief regarding the respondent's cross appeal on

the failure by trial Court to award general damages to the respondent (the then plaintiff).

In his response to the 1st ground of Mr. Baraka John submitted that under S. 3 (2) (B) OF THE EVIDENCE ACT [CAP 6 RE 2019] the burden of proof in Civil Cases lies on the plaintiff and the standard applied is on balance of probabilities. In the same footing, while citing S. 110 AND 112 OF EVIDENCE ACT [CAP 6 RE 2019] and the case of HEMED SAID V. MOHAMED MBILU [1984] TLR 113, the learned counsel for the respondent submitted that he who alleges must prove and a party with heavier evidence has a good case as against the other, and must win.

Based on these authorities, Mr. Baraka submitted that the plaintiff (now the respondent) proved her case on the standard required by calling witnesses and through tendering exhibits which reveal that the appellant (the then Defendant) breached the contract, the breach which led the plaintiff to suffer both specific and general damages. He said that evidence which was not disputed by the appellant (the then defendant). According to Mr. Baraka, the plaintiff proved the existence of construction contract for building tower foundations in five locations which were described by numbers as 154, 182, 224, 226 and 230. Further to that he averred that the plaintiff's witness testified that the plaintiff partly performed the contract by digging potholes using manual labor (manpower) and machines and by doing so she incurred costs and the proof of which was through an invoice which was tendered without any objection by the appellant during the trial. According to him,

the total cost incurred by the plaintiff/respondent is TZS. 27,231,000/= but the same was reduced to TZS 21,350,000/= following the plaintiff's failure to provide proof for hiring machines and vehicles which led to deduction of TZS. 5,800,000/= by the Court. In concluding his submission in respect of 1st ground of appeal Mr. Baraka was of the view that the said ground of appeal is baseless as specific damages to a tune of TZS. 21,250,000/= was awarded based on invoice which was tendered without any objection.

Responding to the second ground of appeal Mr. Baraka submitted that the amount of TZS. 21,250,000/= awarded by the court is a result of a partly performed contract. According to him the appellant rescinded the contract and tendered a cancellation letter [exhibit D1] alleging poor performance on the part of the plaintiff. The learned counsel was of the further view that since the Defendant alleged poor performance on the part of the plaintiff then that entails acknowledgement of part performance of the contract and on that basis the plaintiff deserves payments by virtue of S. 73 and 74 of the Law of Contract Act [Cap 14 RE 2019].The learned counsel for respondent stressed that party performance was claimed in the pleadings and was proved by invoice by virtue of SECTION 3 (2) OF THE EVIDENCE ACT [CAP 6 RE 2019].

regarding the respondent's cross appeal faulting the trial court's failure to award general damages to the respondent/plaintiff, Mr. Baraka submitted that General Damages is compensatory in character which is intended to take care of the

plaintiff's loss of reputation as well as solariums for mental pain and sufferings. In support to this point Mr. Baraka referred to the case of TANZANIA SANY CORPORATION V. AFRICAN MARBLE CO. LTD [2004] TLR 155, PM JONATHAN V. ATHUMAN KHALFAN [1980] TLR 175/190 and BLACK'S LAW DICTIONARY 7TH EDITION. To conclude this part, the learned Counsel submitted that the plaintiff is entitled to be awarded general damages as the records are clear that she suffered damages due to loss of reputation, mental pain and sufferings due to breach of contract. Since the lower court did not award the same, he beseeched this court to consider and award it accordingly.

In contest to the third ground of appeal faulting the trial Court's failure to consider the appellant's (defendant's) evidence, Mr. Baraka submitted that the said complaint is baseless and without merits. He said that the trial court's judgment is a good judgment which was made in the confines of ORDER XX RULE (4) OF THE CIVIL PROCEDURE CODE [CAP 33 RE 2019]. While referring at page 5,6,7 and 8 of the typed judgment, he stressed that the Hon. SRM wrote the summary of the evidence from both parties and analyzed it before reaching to a conclusion of the matter.

Responding to submission in support to the fourth (4th) ground of appeal which faulted the trial court's admission of electronic evidence via email without considering the degree of accuracy, Mr. Baraka submitted that this ground has no merits. While acknowledging the legal propositions regarding the definition of

document under S. 3 (1) of the Evidence Act [Cap 6 RE 2019] and the admissibility of Electronic evidence under S. 64A (I) AND (II) of the Evidence Act [Cap 6 RE 2019] and S. 18 (2) (a) – (d) of the Electronic Transaction Act, the learned counsel for the respondent submitted that all of the above provisions of the laws were complied with by the plaintiff at the trial stage. He said that the plaintiff tendered the contract, a termination letter and invoices without any objection from the defendant's side. According to him, since the said documents had a sender and receiver address then that suffice to be their authentication by the plaintiff. The learned counsel was of the further view that the appellant ought to have challenged to the tendering of the said exhibits during the trial and not at this appeal stage. He stressed that the contract, invoice and cancellation letter were not challenged by the appellant and her counsel and as such he prayed this ground to be dismissed.

In regard to the fifth ground of appeal regarding failure by SRM to confine herself to the framed issues, Mr. Baraka was of the view that that much as he agrees to the legal proposition that the court is bound to confine itself to its issues, the said principle has exceptions. He said that in the present matter the issue regarding breach of contract was not raised but during the trial (hearing) the parties discussed it at lengthy in the whole proceedings. In concluding his counter submission, Mr. Baraka prayed this appeal to be dismissed with costs, and the respondent be awarded general damages.

In rejoinder, Mr. Maro learned counsel for the appellant reiterated that what plaintiff pleaded was not sufficiently proved. He said that the invoice which was presented was not supported to the extent required. He was of the view that the issue of mobilizing manpower, hiring motor vehicles and machines was not proved in terms of payment receipts. According to him, invoice is a document which anyone can produce.

Further to that, Mr. Maro averred that while TZS. 21,350,000/= was awarded for specific damages to carter for claimed labor charges, vehicles and machine hired, on the copy of judgment the same amount was awarded as an award to carter for part performance of the contract which entails the claim in respect of costs for hiring machine and Motor vehicles was not justified as the plaintiff did not file any document to prove whatever was stated in the invoice.

About failure by the trial court to evaluate the evidence, the learned counsel for the appellant rejoindered that the issue of breach of contract was mentioned but was not sufficiently dealt with by the trial court.

Regarding the respondent's claim for general damages, Mr. Maro rejoindered that since the plaintiff failed to perform part of his contract, she does not deserve to be awarded the same.

About the submission by the learned counsel for the respondent that the electronic evidence was admitted uncontested, the learned counsel for the appellant rejoindered to the effect that the ends does not justifies the means because the

law is not an ornament. While citing the case of BURDIN SHAIBU V. MARY KHALFAN (supra), Mr. Maro was of the view that since the parties are required to stick to the law in court of Law, then the mere fact that the same was admitted uncounted does not justify non-compliance of the law.

In rejoinder to the 5th ground of appeal that the trial magistrate failed to address and confine herself to the framed issues, Mr. Maro was of the view that the crucial issue as to whether there was a breach of contract was dealt with partially.

In conclusion, the learned counsel for the appellant reiterated to what he submitted during his submission in chief. Otherwise, he prayed the present appeal to be allowed.

On his part Mr. Baraka John was given room to rejoinder in respect of the respondent's counter claim. The learned counsel said that the appellant is not disputing the existence of the contract between the parties and the fact that the plaintiff partly performed his duty. He added in that at page 22 of the typed proceedings, the defendant admitted that the plaintiff had performed something in respect of the agreed contract. According to him, since the appellant cancelled the six month's contract within 14 days only on the ground of poor performance then that act by itself entail the plaintiff performed her contractual duty thereby warranting an award for general damages.

That being the summary of the rival submissions for and against the present appeal the court is now obliged to determine the outcome of the matter. The issue

which needs to be answered is whether the present appeal and a cross appeal thereto are meritorious.

I have keenly considered the parties submissions made for and against the appeal and the cross appeal thereto and having weighed them in the scale against the trial court's records, the following are noted.

Regarding the first ground of appeal alleging the respondent's failure to prove his claim against the appellant, this court is mindful that the onus of proof in civil cases lies on the claimant and the standard applied is on balance of probabilities. This legal proposition is found under section 3 (2) (B) 110 and S. 111 of THE EVIDENCE ACT [CAP 6 RE 2019]. The said proposition has been discussed in various decisions of the Court of Appeal. For example, in the case of BARELIA KARANGIRANGI VERSUS ASTERIAL NYALAMBWA, CIVIL APPEAL NO. 237 OF 2017, CAT (unreported), the Court held as follows, that.

> *"At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must prove. The rule finds a backing from section 110 and 111 of the Law of Evidence Act [Cap 6 RE 2002] ..." [emphasis added].*

In the same case (supra), the court stated further as follows, that;

> *"It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the*

standard in each case is on balance of probabilities."

[emphasis added].

That being the legal position regarding the burden and standard of proof in civil cases, this court perused the trial court's records and concluded that the plaintiff's claims on specific damages were not substantiated. This is so because specific damages were not pleaded and proved. From the record, the pleadings shows that the plaintiff claimed TZS. 53,452,654 Fifty-three Million Four Hundred fifty-two thousand six hundred fifty-four only which on the face of it, it is the agreed contractual price/sum to cover the costs for the whole project. However, during the hearing/trial, PW1 narrowed his claim to 14,993,593 as the amount expended for transport of manual labors (diggers (sic), costs of the work and transport of workers/supervisors (sic). Interestingly, the said sum was further increased to TZS. 21,350,000/= alleging it was spent to carter for vehicles, machines for work and labor power. It is also important to note that the plaintiff's demand letter in which he claimed specific damages was subjected to objection by the appellant to its tendering during the trial. The reasons for such objection were that it failed to describe the claims contained in it. However, despite that objection the Hon. SRM overruled it on the ground that its content is stated. This court took time to go through the exhibit P.2 (demand letter) only to find that the said claims are enlisted without stating their respective costs. In other words, the plaintiff failed to specifically plead special damages. To be more precise, I wish to refer to the

findings of the court in the case of ZUBERI AUGUSTINE V. ANICET MUGABE [1992] TLR 137 where it was held inter alia that.

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

On the same footing, in the case of RAUTO NJAKWA V. PAULO BEATUS KASENGENYA, CIVIL APPEAL NO. 7 OF 2019, this court (Robert, J) while citing the case of MASOLETE GENERAL SUPPLIES V. AFRICAN INLAND CHURCH OF TANZANIA (1994) TLR 192, held that.

> *"Once a claim for specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and general on..."*

Also, in the case of SOLVOCHEM HOLLAND B.V V. CHANG QUING INTERNAL INVESTMENT CO. LTD, COMMERCIAL CASE NO. 63 OF 2020 this court (commercial Division) (Nangela, J), While citing the case of XIUBAO CAI AND MAX INSURE (T) LTD VS. MOHAMED SAID KIARATU, CIVIL APPEAL NO. 87 OF 2020 held that.

> *"Special damages are such a loss as will not be presumed by law. They are special expenses incurred or monies actually lost. For example, the expenses which the plaintiff or a party has actually incurred up to the date of the hearing are all styled as special damages, for*

instance, in personal injury cases, expenses for medical treatment, transportation to and from hospital or treatment Centre, etc... Unlike general damages, a claim for special damages should be specifically ***pleaded particularized*** *and proved. I call them three P's."*

In the same case, the Hon. Judge concluded as follows, that.

"...specific damages must not only be pleaded but also its particulars must be specifically stated and strictly proved. These are three limbs which must be demonstrated..." (Emphasis added)

In the present matter, it is evident from the pleadings that special damages were not pleaded, particularized and proved.

While contesting this ground, Mr. Baraka John, learned counsel for the respondent was of the view that the plaintiff discharged her duties of proving her case and the evidence which was adduced/tendered by the plaintiff was not contested/opposed by the appellant. I have revisited the record and found nothing to support Mr. Baraka's contention. This is so because the appellant challenged the tendering of the demand letter on the ground that it failed to describe the claims in it, however, as I have stated earlier, the Hon. SRM overruled it on the ground that the content of the document is stated. Again, the tendering of the invoice by the plaintiff was also contested (see page 13 of the typed proceedings) on the ground that it was

not annexed in the plaint (meaning it was not pleaded) and also that it was just a photocopy. This objection was again overruled by admitting it for identification purpose, and the court directed the plaintiff to produce original invoice soon, an order which was complied by the learned counsel for the plaintiff on 19/7/2022 without objection by the appellant. With the trend of the matter, if there was no objection by the defendant in respect of this exhibit then the same was during substitution of original invoice in lieu of a photocopy which was previous admitted for identification purpose. That being the case, this court is of the view that there was objection raised regarding admissibility of the said exhibits, thus the trial court ought to have keenly considered it in purview of the above cited law. That being said I find merits in the first ground of appeal, and I accordingly allow it.

Regarding the second ground of appeal faulting the trial court's finding's that the plaintiff was entitled to reliefs to a tune of TZS. 21,350,000/= I again, having keenly considered the first ground of appeal, find merits in this ground too. This is so because, if the Hon. SRM had properly considered the legal principles stated in the case of ZUBERI AUGUSTO V. ANICET MUGABE [1992], RAUTO NJAKWA V. PAULO BEATUS KASENGENYA AND SOLVOCHEM HOLLAND B.V. V. CHANG QUING INTERNAL INVESTIMENT CO. LTS (supra), she would have arrived at a different conclusion. This is so because the plaintiff's claims for special damages was not specifically pleaded, particularized and proved. That being the case I too find merit with this ground of appeal (the 2nd) and as such it is hereby allowed.

About the respondent's claim that the plaintiff deserved to be awarded general damages, it is my duty to firstly, consider if the plaintiff suffered any damages. From the trial court's records, it clear that the plaintiff and defendant entered into a contract obliging the plaintiff to construct the foundation of the electricity power line in five locations which is location 158, 182, 224, 226 and 230. The agreement in question was signed electronically and was admitted without objection as exhibit P.1. It is however revealed from the records that the said contract was short lived as the defendant terminated it on allegation of poor/no performance. Although the tendering of the said evidence did not align to the legal requirements as stipulated under section 18 of the Electronic Transaction Act, No. 13 of 2015, this court have decided to accord weight on it since the defendant did not oppose to its tendering. This court is of the view that there was no need, in the circumstances where there is no dispute that the contract in question existed to task the plaintiff to follow the above legal procedures. The evidence to that effect was adduced by DW1 who tendered the termination letter which was admitted in Court as exhibit D1 without objection from the plaintiff. With such evidence in place, it is clear, as I shall elaborate while dealing with the fifth ground of appeal, that the defendant breached the contract. With such breach the plaintiff testified before the trial court that he suffered loss of reputation. It is to be noted from the record that while the contract was signed on 4/1/2022, it was terminated on 18/1/2022, only 14 days from its signing. In the circumstances of this matter, I am of the settled view that

14 days was quite a short time to blame the plaintiff for failure to undertake her contractual duties for a contract whose time frame was six (6) months (i.e., from 4/1/2022 to 30/6/2022). I am thus inclined to agree with Mr. Baraka, learned counsel for the respondent that the respondent (the then plaintiff) deserves to be awarded general damages as the plaintiff suffered loss of reputation. Before awarding the same, it is pertinent to point out that in awarding general damages, the quantification of such damages remains in the discretion of the court. This court (Masara J,) in the case of RELIANCE INSURANCE CO. (TANZANIA LIMITED VERSUS JAN ESCA JOHANSEN BWAHAMA AND CATIC INTERNATIONAL ENGINEERING, Civil Appeal No. 17 of 2020, while citing the case of PETER JOSEPH KIBILIKA AND ANOTHER VS. PATRIC ALOYCE MLINGI, civil Appeal No. 37 0f 2009 held inter alia that:

> *"It is function of the Court to determine and quantify the damages to be awarded to the injured party. As Lord Dunedin stated in the case of Admiralty Commissioners v. SS Susquehanna [1950] 1 ALL ER392. If the damages be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."* [Emphasis added].

From the foregoing observation this court is of the view that the plaintiff (now the Respondent deserves general damages and in the circumstance of this case I award it to a tune of TZS. 18,000,000/=.

Regarding the third ground of appeal that trial court erred for both points of law and fact for failure to consider and evaluate the appellant's evidence, I have considered this ground and conclude that this ground should not detain this court much. This is so because irrespective of correctness of the conclusion reached the trial court, the Hon. SRM considered both the plaintiff's and the defendant's evidence before reaching too her findings. This is clearly seen at page 9, 10 and 11 of the typed judgment especially when the Hon. SRM took note of DW1's acknowledgement that the plaintiff partly performed her duty in the contract while referring to Exhibit D1 (a termination letter to the contract). On that basis, I find no merits with this ground of appeal, and it is hereby dismissed.

With regard to the 4th ground of appeal that the trial court erred in law and fact by accepting the electronic evidence via mail without considering the degree of accuracy of such information and appropriate procedure for tendering electronic evidence my observation is that, save for undisputed electronic evidence (which is the contract and a termination letter), the law in respect to admissibility of electronic evidence as propounded under section 64A OF THE EVIDENCE ACT, [CAP 6 RE 2019] AND SECTION 18 OF THE ELECTRONIC TRANSACTION ACT NO. 13 OF 2015 was not complied with.

From the record, Hon. SRM reached to her findings based on the electronic generated evidence which is the demand letter and invoice which were tendered as exhibits P3 and P4 respectively. As I have hinted earlier, the appellant objected to their tendering but, despite acknowledging that the same were electronic, the Hon. SRM overruled the said objection. It is important to note that SECTION 3 OF THE EVIDENCE ACT [CAP 6 R.E 2019] defines document to include electronic document, computer print outs and data message stored and retrieved from the computer or information system. Regarding admissibility of the said evidence under S. 64A (1) (2) of the Evidence Act, the Electronic Evidence is admissible in the manner prescribed under section 18 of the Electronic Transaction Act. Section 64A (1) and (2) read as follows.

> *"64A (1) In any proceedings, electronic evidence shall be admissible.*
>
> *(2) The admissibility and weight of Electronic Evidence shall be determined in the manner prescribed under section 18 of Electronic Transaction Act."*

Under section 18 (3) of the Electronic Transaction Act, No. 13 of 2015 the manner of determining admissibility and evidential weight of electronic evidence is put in the following words.

"S.18 (3) in determining admissibility and evidential weight of data massage, the following shall be considered.

(a)The reliability of the manner in which the data massage was generated, stored or communicated.

(b)The reliability of the manner in which the integrity of the data massage was maintained.

(c)The manner in which its originator was identified and other factors that may be relevant in assessing the weight of evidence."

Based on the foregoing provision of the law, it is clear from the record that the plaintiff did not follow the legal procedures in tendering the demand letter and invoice (electronic generated evidence) despite objection by the defendant to their tendering.

That said, the trial court erred to make its findings based on contested electronic evidence. On his part, Mr. Baraka was of the view that the above requirements of law regarding admissibility of electronic evidence was complied with but my perusal to the records failed to find any of the purported compliance. On top of that Mr. Baraka added that since the plaintiff tendered the contract, a termination letter and invoice without objection, then to him, if there was any objection to its tendering in evidence the same ought to be raised at the trial level. I have

considered this argument by Mr. Baraka and with respect, his argument contains no scintilla of truth. This is so because, as I have started earlier, save for the contract and a termination letter which were tendered without any objection, the rest, that is the demand letter, and the invoice were subjected to objection to their tendering by the defendant. Reasons raised was that the demand letter did not describe the specific damages and on the part of invoice it was argued that the same was not annexed in the plaint (meaning not pleaded). On top of that it was also the defendant's objection that the same was a mere copy. In the circumstances of the matter at hand, the Hon. SRM ought to have put S. 18 of the Electronic Transaction Act into play since she, at page 12 of the typed proceedings, acknowledged that the demand letter was electronic evidence. From the foregoing, I find merits in the 4th ground of appeal, and I hereby allow it.

With regard to the 5th ground of appeal that the Hon. SRM dealt with a new issue which was not framed by the parties and agreed by the court which is "whether or not there was a contract between the parties", I have keenly considered this complaint but found no merits in it.This is so because after being aware that the said issue was new, the Hon. SRM, based on the authority in the case of DR. A. NKINI AND ASSOCIATE LTD V. NATIONAL HOUSING CORPORATION, (CAT) CIVIL APPEAL NO. 72 OF 2015 adopted an exemption approach to the general rule stipulated under order(s) XX Rule 5 of the Civil Procedure Code [Cap 33 R.E 2019] that determination of a Civil Cases has to be based on the framed issues. Her

reasons were that in the proceedings, the parties addressed whether there was any breach of contract. To justify her approach, she referred to PW1's testimony (in that the contract in question was terminated by the defendant within 14 days before completion of agreed work) and DW1's evidence (when he testified that the contract was terminated as reflected in Exhibit D1 and D2 due to plaintiff's failure to perform part of his contract). I have considered the trial magistrate's reasoning for her departure to the general rule and found no reasons to interfere with her approach.

In the upshot, this appeal partly succeeds only to the extent that.

1. The order awarding specific damages to a tune of TZS 21,350,000/= is set aside.
2. The appellant shall pay the respondent General Damages to a tune of TZS. 18,000,000/=.
3. Interest on the Decretal amount at the rate of 7% per annual from the date of the judgment to the payment in full; and
4. Each party shall carry its own costs.

It is so ordered.

HIGH COURT OF TANZANIA BUKOBA

A.Y. Mwenda

Judge

12.04.2023

Judgment delivered in chamber under the seal of this court in the presence of Mr. Bukagile learned counsel holding brief for Mr. Pius Maro learned counsel for the appellant and Ms. Gisera Rugemalira learned counsel holding brief for Mr. Baraka Semula learned counsel for the Respondent.

A.Y. Mwenda

Judge

12.04.2023