

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)**

AT KIGOMA

CIVIL CASE NO. 03 OF 2021

MOHAMMED ENTERPRISES (TANZANIA) LIMITED1ST PLAINTIFF

TANZANIA COMMODITIES TRADING COMPANY2ND PLAINTIFF

VERSUS

SHISHIR SHYAM SINGHDEFENDANT

JUDGMENT

24/7/2023 & 4/8/2023

Mlacha, J.

The plaintiffs, Mohamed Enterprises (T) Ltd and Tanzania Commodities Trading Company (hereinafter referred to as the first and second plaintiff or simply the plaintiffs) filed this case against the defendant, Mr. Shishir Shyam Singh, who was their Branch Manager at Kigoma (hereinafter referred to as the defendant or simply Mr. Shishir). It is a claim of Tshs. 256,609,958/= being loss occasioned by the defendant as a result of cost embezzlement, cash shortage, uncollected salesman outstanding, stock shortage, loss in stock due to negligence and alleged cash robbery. They also claimed for interest on the principle sum at the rate of 24% annum from the date the losses were occasioned until the date of the judgment, interest on the

decretal sum from the date of the judgment till the date of final payment and the costs of the case. The defendant filed a defence and denied the claim.

The plaintiffs were represented by Ms. Neema Mahunga advocate while the defendant had the services of Mr. Daniel Rumenyela. With assistance of counsel, the court framed two issues. **One**, whether the defendant in his capacity as the branch manager of the first plaintiff acted negligently and occasioned a loss of Tshs. 256, 609, 958/= and **two**, to what reliefs are the parties entitled to.

The plaintiffs called 4 witnesses who tendered 12 exhibits. The defendant had 2 witnesses and one exhibit. The summary of the evidence on record can be presented as follows. PW1 Javed Bhalloo (41) works with the first defendant as branch coordinator. He is coordinating 20 branches countrywide including Kigoma. He told the court that he came to Kigoma in February 2020 to witness the handling over between Mr. Shishir who was the outgoing branch manager and Mr. Raxif who was the incoming branch manager. As a matter of practice, the activities of Mr. Shishir were to be audited before the handling over which was done. The auditing was done in the presence of the two managers and himself. They discovered a lot of

discrepancies. He tendered the auditing report of cash (exhibit P1), the cash book (exhibit P2), physical stock verification of trade stock (exhibit P3), sales outstanding balance confirmation (exhibit P4 collectively), a copy of an e-mail written by Mr. Shishir (exhibit P5) and a letter from the police addressed to the first plaintiff (exhibit P6) to establish the loss.

PW2 Abas Dulfiqar Rashid (30) is an accountant who is in charge of the operations of the first plaintiff. He told the court that he has a duty of ensuring that operations of the company are running smoothly. He works with the sales department to check the sales trend, the purchasing department to ensure the orders are delivered in time, the finance department to check the profitability of the operations and the order department to ensure company assets are safeguarded. He reaffirmed the existence of the audit conducted in February 2020 at Kigoma branch during the handling over exercise of the two managers. Like PW1, he said that it discovered a series of discrepancies namely cash shortages, stock shortages and debtor's outstanding balances. This was from the report of the internal auditor. Since the discrepancies were big, they decided to engage an external auditor to give his independent opinion on the auditing. He referred the court to the report on physical stock verification, customer account and

three invoices for a customer called Mr. Kilaumba. There was also a summarized cash book for Kigoma branch from 25/1/2020 to 28/1/2020. He tendered the report of the external auditor, SHEBRILA & CO, Certified Public Accountants (Exhibit P7). He told the court that there was no report of loss from Mr. Shishir before the auditing. Loss was established after the audit. He went on to say that they conducted a physical check but could not see the goods in the godown and the customer, Mr. Kilaumba denied receiving them. The manager could not produce any document showing that he had delivered the goods to Kilaumba. He invited the court to hold the manager liable.

PW3 Andrea Steven Mafuru (37) is an auditor working with the first defendant. He joined PW1 and PW2 to say that there was an audit conducted in Kigoma on 19/2/2020 due to changes of branch managers. He tendered the audit report (exhibit P8) which he prepared based on information supplied by Mr. Anthony. He identified exhibit P1 and P2 saying that they are in respect of physical verification. They show a cash shortage of Tshs 2,585,551/=, he said. He linked it with his report. He also linked exhibit P3 with his report. He identified exhibit P5. He said that the manager had a duty to supervise branch activities. He identified the data ledger for

Mr. Kilaumba. He tendered the Debtors Ledger (exhibit P9) and the Tax Invoice cum Delivery Note, (exhibit P10). He said that he prepared the report using information supplied by Mr. Anthony who was on the field. He worked with Mr. Anthony to prepare the report.

PW4 Kilaumba Sevara Kirum (50) is a businessman stationed at Kigoma. He has two Companies, Kivum Investment and Kivum Traders. He had business relations with the first plaintiff. He used to buy goods from them. They could also take others on loan. He was dealing with Mr. Shishir, the branch manager. They had a transaction of about 300,000,000/= with the plaintiffs. An auditor came and brought his debt which they found to be erroneous. They needed a joint discussion which was done. He tendered a statement of account for his companies (exhibit P11). He said that he received goods worthy 1,308,599,300/= and paid 937,674,100/= leaving a debt of Tshs 370,925,200/=. He went on to say that Mr. Shishir took 30,000,000/= in cash. He tendered the document (exhibit P12) showing the amount Tshs. 300,000,000/= and his signature.

DW1 Shishir Shyem Singh (42) accepted to have been the branch manager at Kigoma from January 2019 up to the time of auditing, February 2020. His employment with the first plaintiff started in 2013. He is an Indian National.

Prior to coming to Kigoma he had served the company in Dar es salaam, Morogoro, Mbeya and Kyela. He needed to go on leave hence the coming of a new manager. He agrees that there was an auditing conducted on 19/2/2020. He said that it was done by Mr. Anthony (DW2) in his presence. PW1 and the new branch manager were also in attendance. The auditing was finalized on 22/2/2020, he handled the office and left the office preparing to go to Dar es salaam to settle down some issues which included NSSF, Security deposit and Sales Commission before going back to India. He said that while at sunset hotel on 27/2/2020 set to travel, he was called at the central police station and put under arrest accused of stealing 30,000,000/= which he had received from a customer (Kilaumba). He was sent to the district court and charged. He was convicted and sentenced to serve 20 months in jail. He appealed successfully to the High Court where he was set free. A further appeal by the DPP to the Court of Appeal could not be successful. Referring to page 10 of the judgment of this court (Matuma J), he said that he deposited 28,000,000/= to the plaintiffs' accounts and gave 2,000,000/= to the cashier for office use. He does not know why this claim is raised again.

DW1 went on to say that witnesses from the plaintiff speak differently on the alleged loss of Tshs. 256,609,958/=; Javed (PW1) and Andrew (PW3) had different figures. He said that the outstanding cash was collected by the cashier and deposited. And if there is any deficit, the cashier (Juma) has to pay not him. He denied any liability to exhibit P2. He denied to be involved in exhibit P4 which is making reference to activities of 27/2/2022 because he was not in office at that time. He said that the expired goods (exhibit P5) were already expired when he joined the branch. Further, there was no evidence on when they expired and who gave the order. He said that no criminal charges on allegations contained in exhibit P6 making them useless. He said that Mr. Andrew never appeared before him but Mr. Anthony. He saw exhibit P7 but did not see the auditors. He denied exhibit P8, a report prepared by Mr. Mafuru. He named exhibit P7 and 8 as fake documents for want of his signature. He accepted P9 to be Kilaumba's debt. He said that P10 was not prepared at Kigoma Branch. He denied the invoices, not prepared by him. He said that there was no loss but excess of goods. He tendered exhibit D1 to prove this.

DW2 Anthony Method Mgembe (65) told the court that he worked with the first defendant as an internal auditor for 12 years from 2010 – 2021. He

agreed that he came to Kigoma and conducted the audit on 19/12/2020. He said that he worked with Andrew in the same department but he is the one who conducted the audit which was signed by the cashier, Mr. Shishir, the incoming manager and the branch the coordinator (PW1). He referred the report of Mr. Andrew and that of the external auditor as fake reports. He said that the salesmen outstanding is the liability of the salesmen not Mr. Shishir. When he was referred to the tax invoices he called them fake documents. He denied knowledge of the police document, exhibit P6. He said that having expired goods is normal. He said that the shortage of stock is the liability of the store keeper not Mr. Shishir.

With leave of court, PW1 Javed Bholoo, was recalled by the plaintiffs to encounter the words of DW2. He said that the contract of DW2 with the first defendant expired and he needed to renew. He met the chairman Mr. Gulam Deuji in August 2022 over the issue. He could not be successful hence the hostility. He had earlier promised to give evidence in favour of the plaintiffs but is now on the other side.

Counsel made written submissions to support their respective positions. Counsel for the defendant invited the court to take note that this is a claim based of special damages which attract a strict proof. He referred the court

to **China Railway Seventh Group v. Edward Mbilinyi**, Consolidated Appeal No. 5 of 2021 (High Court Mbeya) page 15 on this aspect. He went on to say that both the internal and external auditor's report are fake because they were prepared by people who were not in Kigoma. They are also based on information obtained after the defendant had left the office. He challenged the claim for Tshs. 68,000,000/= saying that they not maintainable because no criminal charges were framed against the defendant. He changed the claim for 30,000,000/= saying it had already been solved by the Court of Appeal.

I have no problem with the legal requirement of proof of special damages. Special damages have to be proved strictly. Together with the case of China Railway Group cited by counsel, see also **Reliance Insurance Company (T) Ltd & 2 others v. Festo Mgomapayo**, (CAT), Civil Appeal No. 23 of 2019 and **Stanbic Bank Tanzania Ltd v. Abercrombie & Kent (T) Ltd**, (CAT), Civil Appeal No. 21 of 2001. I will, now respond to issues raised by counsel as follows.

It was the submission of counsel for the plaintiffs that PW1, PW2, PW3 and DW1 have established that the defendant was employed at the first plaintiff's branch in Kigoma and was responsible for all incoming and out

coming activities. He was the boss, the overall controller of all employees. Mr. Rumenyela did not address his mind on this aspect. Looking through the pleadings and the evidence on record, I think that Ms. Neema is correct on the position of Mr. Shishir and his role. It is thus a fact established that the defendant was employed as the branch manager of the first plaintiff at Kigoma from January 2019 up to February 2020 and had power and full control the operations of the branch.

Both parties agree that the defendant was leaving the office to another manager and that there was an audit conducted before he left. They agree that the audit was conducted by DW2 in the presence of the defendant, the new branch manager, the branch coordinator and other branch staff. They executed documents which include exhibit P1, 3 and P4 which were dully signed by people in attendance. Ms. Neema submit that during the audit, there were anomalies/shortages which lacked explanation from the defendant. Exhibits P1 and P2 has a cash shortage Tshs 2,586,558/= which the defendant acknowledged by signing at the report but which he failed to explain its where about. She dismissed the defence that the shortage was the responsibility of the cashier. She went on to submit that the defendant must also be responsible for shortage of goods Tshs 28,757,200/= as

reflected in exhibit P3. She dismissed the defence of Mr. Anthony that the shortage was offset by the excess in exhibit D1 which she said was in respect of different items. Mr. Runyemela did not respond to the two aspects in the manner submitted by Ms. Neema. His approach was on the evidence of DW2 who discredited the audit report. But DW2 did not dispute signing exhibits P1, P3 and P4 which were on the losses and shortages. He accepted the contents but assigned the losses and shortages to the cashier and store keeper. There is also the salesman outstanding Tshs 7,974,500/= which is accepted by DW2 but assigned to the salesman not Mr. Shishir. The issue is whether there can be a loss of the cashier, store keeper or salesman which is not associated with the branch manager. I think it is not. Given the position of the defendant as branch manager and the nature of the operations which put him at the top of activities of his employer in Kigoma, there could be an activity of the cashier or storekeeper or salesman which is separate from him. He was in a position to authorize and approve everything. It is thus my finding that the defendant is accountable for the loss of cash, goods shortages in the godown and the salesman outstandings.

Next is on the expired goods. Ms. Neema submitted that the defendant must be held accountable for the expired goods worthy Tshs 31,737,500/= because they expired at the time when he was the branch manager. That he knew the business trend and had no reason to order for what he could not sell unless he was negligent. That is also the opinion of PW1. DW2 said that what happened is normal for all branches in the company. Having considered the evidence PW1, DW1 and DW2 critically and having examined his duration of stay in Kigoma (January 2019 to February 2020, one year) and the e-mail dated 12/2/2020, I think that the defendant should not be condemned for this loss which might have arisen in the normal course of business as pointed out by DW2. I did not see any evidence suggesting that he was negligent as submitted by Ms. Neema. We must agree that there is that element in business. There is profit and loss.

What about the claim of Tshs. 30,000,000/= which was received from Mr. Kilaumba. Auditors saw this transaction. PW1 said that the defendant received cash. PW4 proved that he gave the money to him. The defendant does not deny to receive the money. His defence is that the money have been the subject of a criminal case where he was found not guilty and set free by this court. He referred the court to page 10 of the decision of this

court showing that he deposited Tshs 28,000,000/= in the company accounts and gave Tshs 2,000,000/= to the cashier for office use. That is also the opinion of his counsel. I think that much as the defendant did not tender any receipt or call the cashier as his witness, but judicial notice must be drawn to the judgments. This court (Matuma J) and the Court of Appeal had the opinion and decision that Tshs. 28,000,000/= was deposited in the bank account and Tshs. 2,000,000/= spent in the in the office. They clear the defendant of any criminal liability. Much as the civil court can have a different finding but I see no base for making that finding.

There is the claim of Tshs 68,000,000/= which is arising from the alleged robbery at the branch. The defendant reported the robbery at the police station but when they made a follow up, they did not see such a thing. The police reacted vide exhibit P6 saying that there was no any robbery. They associated the defendant with the theft of the money. DW1 challenged the issue saying why is it that there were no criminal charges against him? Nobody came to testify on the amount except exhibit P6, he said. But PW1 said at page 40 of the proceedings that there was a robbery amounting to Tshs 68,000,000/= notice of which was drawn to him by the defendant through a call. He directed him to open a criminal case at the police station

which he did. He went to see the police after several follow ups of the defendant and was told that there was no such a thing. The police gave him the report, exhibit P6, stating that the accused was the one who had stolen the money. Exhibit P6 reads in part as under;

".....hakuna Ushahidi kuwa tukio la wizi kutendeka isipokuwa fedha hizo zitakuwa zimeibwa na mlalamikaji. Ushahidi huu unatokana na ukaguzi wa eneo la tukio uliofanyika na kubaini miiango yote mitatu ya ndani ilikuwa salama hakuna sehemu yoyote iliyovunjwa isipokuwa droo ya kuhifadhia fedha ambapo sio rahis mtu/mwizi kufikia eneo hilo hadi apite milango yote mitatu.

*Pia ukizingatia mlalamikaji ndiye anayeishi ndani ya majengo hayo na **ndiye mwenye kuhifadhi funguo**". (Emphasis added)*

This literally means that there is no evidence of robbery because the three doors leading to the cash room were intact, not broken. Further, the defendant had the key and lived in the compound. They linked him to the theft.

It is obvious that he was not charged but that does not mean that civil liability for negligence or misuse of power cannot arise. Based on the evidence of PW1, exhibits P6, P7 and P8, I find that there is good evidence showing that the defendant falsely reported the robbery to the police thereby obtaining Tshs. 68,000,000/= property of the plaintiffs.

There is a claim of goods not delivered to PW4 but left the godown to him. The auditing conducted on 19.02.2020 showed that goods worthy Tshs 117,554,000/= were sent to Kilaumba but payment could not be received. Upon discussion and examination of the tax invoice it was found that tax invoices worthy Tshs. 85,741,200/= had goods which did not reach PW4. This is in the evidence of PW1, PW2 and PW4. It is also reflected in exhibit P7 under C.6 'wrong sales booking to customer which is the shortage' Tshs. 85,741,200/=. The defendant did not have a good explanation on this other than accusing the audit reports, exhibits P7 and P8. The defendant who was the branch manager must be made accounted for this.

Finally, there is the evidence of DW2 that exhibits P7 and 8 are fake. He called them fake reports. Mr. Rumenyela attacked them in his submission with similar words. But DW2 admitted to prepare and sign on exhibits P1, P3 and P4. These are part of exhibits P7 and P8. PW1, PW2, PW3 and PW4

said that the reports were made based on information supplied by DW2 while still in job. With respect to Mr. Rumenyela, I don't find exhibits P7 and P8 as fake reports. Instead, I find DW2, as an ex-employee of the first defendant, with an evil mind. I find him as a person who have decided to turn hostile against his former employer for some personal hatred and interest. He was also very hostile at the witness box unnecessary. I could not believe his words. PW1 said it all, that he had grudges after failing to renew the contract. I agree with DW1.

Speaking of negligence, this court had this to say in **Tanzania Revenue Authority v. Thabit Milimo and Another**, Labour Division Dar es salaam, Revision No. 246 of 2014 (2015) LCCD 1 (191), It was stated that in the law of negligence liability arises where: -

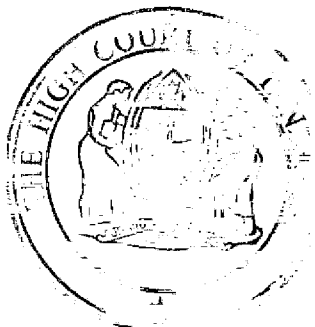
- (i) There is a duty of care and a person breaches that duty as a result of which, the other person suffers loss or injury/damage.*
- (ii) A person acts negligently when he fails to exercise that degree of care which a reasonable man/person of ordinary prudence, would exercise under the same circumstances.*

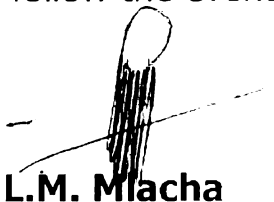
(iii) *Negligence is the opposite of diligence or being careful.*

See also **George T. Peter and another v. Higher Education Students Loans Board**, (HC – Dar es salaam), Revision No. 509 of 2019.

I will in the end say that plaintiffs have led good evidence to prove the items pointed out in in the standard required. I allow the following;

- a) Tshs. 2,586,558/= being cash shortage.
- b) Tshs 28,757,200/= being shortage of goods.
- c) Tshs 7,974,500/= being salesmen outstanding.
- d) Tshs. 68,000,000/= arising from the fake robbery.
- e) Tshs 85,741,200/= being goods not supplied to Mr. Kilaumba.
- f) The defendant is ordered to pay a total of **Tshs 193,059,458/=** with interest at the rate of 12% per annum from the date of judgment till payment in full.
- g) It is ordered so. Costs to follow the event.

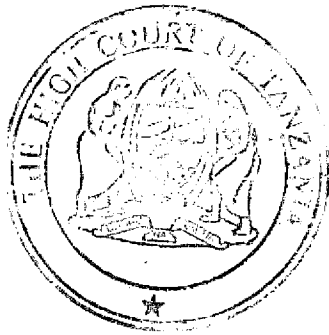



L.M. Mlacha

Judge

4/8/2023

Court: Judgment delivered. Right of appeal explained.



A handwritten signature in black ink, appearing to read "L.M. Mlacha", is written over a horizontal line.

L.M. Mlacha

Judge

4/8/2023