IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CIVIL APPEAL NO. 17 OF 2022

(Originated from the decision of the Resident Magistrates' Court of Sumbawanga at Sumbawanga in Civil Case No. 4 of 2020 dated 12.08.2022 before K.M. Saguda, RM)

TENDER INTERNATIONAL CO. LTD..... APPELLANT

VERSUS

TRIPPLE "S" COMPANY LTD..... RESPONDENT

JUDGMENT

26th July& 7th September, 2023

MRISHA, J.

This appeal has been brought to this court by the appellant Tender International Co. Ltd, as a first bite. It is against the decision of the Resident Magistrate of Sumbawanga at Sumbawanga (henceforth the trial court) which after hearing a Civil Case No. 4 of 2020 (the main suit), decided in favour of the respondent, also a legal entity, namely Tripple "S" Company Ltd.

In the said main suit the respondent who then was the plaintiff on one side of the that case, while on the other side the appellant appeared as

the defendant, sued the appellant for the breach of a transportation agreement which resulted her to incur a big loss due to impoundment of his vehicle with registration No. T. 454 CXT allegedly hired by the appellant to carry some building materials from one place called Kaswepepe, Sumbawanga to Sumbawanga town in consideration of Tshs. 600,000/=.

Due to such loss, the respondent filed the main suit against the appellant claiming, among other things: (i) Tshs. 200,000,000/=, as special damages, (ii) Tshs. 20,000,000/=, as general damages, (iii)Interest on items (i) and (ii) at court rate of 12% from the date of judgment to payment in full, (iii) Costs of the suit be borne by the defendant/appellant and (iv)Any other reliefs the trial court would deem just to grant.

After a full trial the trial court decided in favour of the respondent as aforesaid. In the end, it granted the following reliefs to the respondent:-

"That, a total of Tshs: 96,000,000/= would meet the justice in his claims of special damages.

1. *That Tshs: 10,000,000/= being the general damages.*
2. *Interest on item (i), (ii) and (iii) at the court rate of 8% from the date of judgment to payment in full*

3. Orders to costs".

All the above did not amuse the appellant. Thus, he took measures by coming to this first appellate court with a memorandum of appeal which was predicated with three grounds. However, before the matter began to be heard, her counsel prayed to file an amended memorandum of appeal which, at this time, contained four grounds namely:

1. That, the Hon. Learned trial magistrate erred in law and in fact by relying on facts given by PW1 which had no evidence proved in the court.
2. That, the Hon. Learned trial magistrate erred in law and in fact by giving the order of specific damage while the respondent failed to prove his case.
3. That the Hon. Learned trial magistrate erred in law and fact by failure to oversee the requirement of joining of VETA as necessary party in this matter.
4. That the Hon. Learned trial magistrate erred in law for awarding general damages to the respondent without assigning reasons.

Following the prayer of the appellant's counsel Mr. John Lingopola, learned Advocate that the present appeal be heard by way of written submissions, which was not objected by Mr. Abdallah Athuman, also

learned advocate who represented the respondent herein, the court ordered the appellant's written submission to be filed on 18.05.2023; the respondent's reply written submission on 01.06.2023, and rejoinder, if any to be filed on 29.06.2023. Fortunately, the above scheduled orders were complied with by the said counsel for the parties.

Submitting in support of the appellant's grounds of appeal, Mr. Athuman contended that the respondent failed to prove her case on the balance of probability as required by the law particularly under section 110, 111 and 112 of the Evidence Act, Cap 6 R.E. 2019(the TEA).

The learned counsel assigned five reasons to buttress the above proposition. First, he submitted that the respondent did not tender any documentary evidence to show that there was an agreement between her and the appellant, or even a payment receipt for the car to hire in order to show that there was a business transaction between the two parties. The appellant's counsel referred to the court the case of **Anthony Ngoo and Another vs Kitinda Kimaro**, Civil Appeal No. 25 of 2014 **Florian M. Manyama and Another vs**

Maximillian Thomas, Civil Appeal No. 121 of 2020 CAT (unreported), to cement that argument.

Secondly, the appellant's counsel submitted that the respondent failed to mention any natural person who went to the plaintiff on behalf of the appellant to hire the respondent's motor vehicle.

The third reason assigned by the appellant's counsel was that the trial learned Magistrate relied on un pleaded facts to come to his conclusion that there was a contract between the appellant and the respondent something which the learned counsel argued, was contrary to the well cherished principles of law stated by the Court of Appeal in the case of **Anthony Ngoo and Another**(supra).

In his conclusion regarding that reason, Mr. Athuman submitted that in the instant case neither part pleaded or testified on the fact of oral agreement nor on the fact that it was Managing Director of the Appellant who caused the respondent's vehicle to be impounded by VETA authorities.

Turning to the fourth reason, Mr. Athuman had it that the trial magistrate's findings in the case at hand are speculative and full of conjecture. He also submitted that in their testimonies as appearing at pages 38 and 47 of the trial court typed proceedings, PW1 and

PW2 did not mention the name of the appellant's Managing Director or the exact name of a person who went to the respondent's office to hire a motor vehicle.

However, Mr. Athuman submitted, despite absence of evidence to implicate the appellant or any of her officers as the ones who hired the respondent's vehicle, the trial Magistrate decided to speculate the facts and made his own conclusion.

The fifth reason Mr. Athuman provided in order to support the appellant's first ground of appeal, was that the respondent failed to call a material witness to testify before the trial court contrary to the principle of law stated in the cases of **Florian M. Manyama and Richard J. Toba vs Maximillian Thomas**, Civil Appeal No. 121 of 2020 CAT and **Godriver Kabondo vs Registered Trustees of Chama cha Mapinduzi and Two Others**, Civil Appeal No. 25 of 2020(both unreported), that failure to call material witnesses who are within reach without good reasons the court will always draw adverse inference on the prosecution side.

In applying such principle of law to the present case, Mr. Athuman submitted, for example, that according to the testimony of PW1, the project Engineer of VETA one Mr. Longido who knew what had really

transpired at the locus in quo resulting to impoundment of the respondent's motor vehicle, but that man was not called by the respondent to testify in their favour.

Due to such omission, the appellant's counsel submitted that failure by the respondent to call that material witness, raises a huge doubt on the truthfulness on the existence of the transportation agreement between the parties to this case and that the trial court ought to have drawn an adverse inference against the respondent.

Submitting in support of the second ground of appeal, Mr. Athuman contended that at the lower court the respondent claimed Tshs. 200,000,000/= as special damages for a loss of Tshs. 1,300,000/= per day for not using her motor vehicle which was impounded for 160 days thus making a total sum of Tshs. 200,000,000/=.

However, Mr. Athuman submitted that after going through the evidence adduced by the respondent the trial court found that the same were not specifically and strictly proved as per the requirement of the law. The learned counsel referred this court to page 23-24 of the trial court typed judgement.

It was his further submission that despite the fact that the trial magistrate agreed that there was no proof of such special damages,

he surprisingly went on granting the respondent special damages to the tune of Tshs. 96,000,000/=, as it appears at page 24 of the impugned typed judgment.

The learned counsel made reference to a number of cases which categorically put emphasis on the principle of law that special damages must be proved specifically and strictly. The cases cited included the case of **Anthony Ngoo and Another**(supra), **Stanbic Bank Tanzania Limited versus Abercrombie & Kent T. Limited**, Civil Appeal No. 21 of 2001 CAT (all unreported).

He concluded by submitting that the trial magistrate never gave reasons as to why after finding that the special damages claimed were not proved went on awarding the respondent Tshs. 96,000,000/= as special damages which according to him, was fatal.

As for the third ground of appeal, Mr. Athuman submitted that briefly that the learned trial magistrate erred both in law and fact by his failure to oversee the requirement of joining VETA Sumbawanga as a necessary party to the main suit.

The learned counsel went on submitting that VETA was a necessary party to the main suit because according to the evidence of PW1 at page 42 of the typed trial court proceedings it was VETA who

released the car and handled it back to the respondent after being informed by PW1 which means the respondent could get her relief from VETA had the testimony of PW1 been true.

To support his position, Mr. Athuman referred the case of **Abdullatif Mohamed Hamis vs Mehboob Yusuf Osman and One Another**, Civil Appeal No. 6 of 2017 CAT and the case of **Godfrey Nzowa vs Seleman and One Another**, Civil Appeal No. 183 of 2019 CAT.

Finally, the appellant's counsel submitted on the fourth ground, that the trial magistrate erred in law for awarding general damages of Tshs. 10,000,000/= to the respondent without assigning reasons for doing so contrary to the principle of law as stated in the case of **Anthony Ngoo**(supra) that:

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on evidence on recordable to justify the award. The judge has discretion in the award of general damages however must assign reason..."*

The case of **Reliance Insurance Company (T) Limited and Two Others vs Festo Mgomapayo**, Civil Appeal No. 23 of 2019 CAT (unreported) was also cited to cement the above argument in regard to the fourth ground of appeal.

In winding up, Mr. Athuman submitted that on the strength of the foregoing submissions, the appellant humbly the instant appeal be allowed and the respondent be condemned to pay costs of this case and that of the lower case.

On the other side, Mr. Abubakar Salim who also represented the respondent, submitted by challenging the submission of the appellant's counsel on the fact that a sum of Tshs. 600,000/= was paid to the respondent as a contractual sum for the work to be done. According to Mr. Salim that amount was not paid to the respondent.

Beginning with part one of the appellant's first ground of appeal, Mr. Salim submitted that the Law of Contract, Cap 345 R.E 2019(the LCA) recognizes oral contract, particularly under section 10 of the LCA; hence, there is no provision of the law which makes it mandatory for all agreements to be in written form.

In distinguishing the case of **Florian M. Manyama** (supra), the respondent's counsel submitted that the same does not relate with the circumstances of the instant case because in that case a documentary proof was of necessity as it involved a claim that there was bank transaction with the Respondent's bank account, but in this case the parties engaged in a one-day transportation agreement

which in normal circumstances, could not necessitate the drafting of a single day written agreement in order to prove existence of the contract.

On the second complaint, the respondent's counsel submitted that this being a civil suit, the proof of such allegation is on the balance of probabilities. The appellant failed to prove such complaint.

In reply to the third part of the appellant's first ground of appeal, the respondent's counsel submitted that what is gathered at pages 15 and 16 of trial court typed judgment is the reasoning by the trial magistrate and not the facts alleged by the appellant. Hence, there is nothing wrong in the quoted parts to fault the trial magistrate. The learned counsel thus prayed that such ground be rejected for not been part of the appellant's grounds of appeal.

Turning to the fourth part of the appellant's first ground of appeal, the respondent's counsel responded that that is not correct because at pages 15 to 21 of the typed trial court's judgment, the trial magistrate appears to have evaluated the evidence adduced by both parties.

On the fifth part of the appellant's first ground of appeal, the respondent's counsel invited this court to dismiss that ground and all

the authorities cited by the appellant's counsel in support of it because the same is not among the grounds of appeal raised by the appellant.

Submitting in relation to the appellant's second ground of appeal, the respondent's counsel contended that on their part they agree with their counterpart on the principle of law that special damages must be specifically and strictly proved. However, it was his position that special damages awarded to the respondent were sufficiently proved.

In making clarification on that respect, the respondent's counsel submitted that it was pleaded that the respondent/plaintiff herein was earning Tshs. 1,300,000/= per day from the said motor vehicle. Therefore, the counsel submitted that on the balance of probabilities, for a single trip of carrying items from VETA to Sumbawanga High Court, the Appellant agreed to pay Tshs. 600,000/=, which means the vehicle could collect Tshs. 1,300,000/= per day by minimum.

From the above reasons, the respondent counsel was of the view that the special damages claimed by the respondent were sufficiently proved on the required standard and the trial court was justified in awarding the same owing to the circumstances of the case at hand.

In regard to the third ground of appeal, the counsel for the respondent replied that on their part they are aware of the legal requirement that a court of law may order for the joining of a necessary party suo motu upon satisfaction that the joining party is necessary and of paramount to make it able to effectively and conclusively determine the issues before it.

He however, submitted that on their part they do not think if VETA qualified to be joined as a necessary party given the circumstances of the main suit where the respondent had no any claims whatsoever against that government parastatal.

The respondent's counsel further submitted that if the appellant was of the view that VETA is a necessary party or she had any claim against VETA, she could have applied for that organisation to be joined in the main suit by way of third-party procedure.

In addition to the above, the learned counsel also cited the case of **Dunstan R. Njeme vs Norbert Gwebe**, Land Appeal No. 24 of 2021 and **Joseph Daudi and 11 Others vs Msabaha Ramadhan and 2 Others**, Land Appeal No. 45 of 2021(both unreported), with a view of supporting his argument.

As to the fourth appellant's ground of appeal, the counsel for the respondent submitted that on their side they have no issue with the principle stated in the case of **Anthony Ngoo**(supra), theirs is the question whether the trial magistrate gave reasons for the award of general damages.

In answering that issue, the respondent's counsel made reference to page 22 of the trial court typed judgment where the trial court found and hold that:

> *"...that the defendant after hired the motor vehicle to take it to the VETA campus to take some materials, thereafter he abandoned the motor vehicle for 160 days hence there was a breach of the agreement which rendered the plaintiff to suffer damages". (sic)*

Relying on the above excerpt, the respondent's counsel was of the view that the words contained therein amounts to a reason for awarding damages. As for the holding in **Reliance Insurance Company(T)** (supra), totally associated with it arguing that in the case at hand the appellant has not shown whether or not the trial magistrate had applied any wrong principle in awarding general damages to the respondent, and cited the case of **Phoenix of Tanzania Insurance Company Limited vs Mbayo Olloitito Namaiko and 4 Others**, Civil Appeal No.

38 of 2020 (unreported) to support his proposition. He concluded his submitting that the appellant's appeal is without merit and urged the court to dismiss it with costs.

In rejoinder, Mr. Lingopola submitted that the counsel for the respondent misdirected himself by alleging that the respondent was not paid Tshs 600,000/= as the contractual sum for the work to be done. According to the appellant's counsel, PW1 did not say that amount was not paid to him; he thus, wondered where did the counsel for the respondent got such words.

Turning to part one of the appellant's first ground of appeal, the learned counsel submitted that it was incumbent for the respondent to have any kind of documentary evidence as proof that the parties herein had a car hire agreement or a payment receipt since the respondent claimed to be paid Tshs. 600,000/=, short of that implies that the respondent failed to her case against the appellant.

He added that there is nowhere in her submission in chief, the appellant submitted that she does not recognize oral agreement.

Also, through his rejoinder submission, the appellant's counsel faulted his counterpart whom he said used his owned words to distinguish the present case with the case of **Florian M. Manyama** (supra) saying that

those words were not part of the evidence adduced by PW1 and PW2. Thus, relying on the principle stated in the case of **African Explosive (T) Ltd vs Minister of Labour and Another**, Misc. Civil Appeal No. 27 of 2007(unreported), the appellant's counsel requested this court to disregard those words as they are words from the bar which cannot be applied by this court.

On the second part of appellant's first ground of appeal, the learned counsel reiterated his previous stance by challenging the respondent for not mentioning the name of a person who went to appellant's premises and hire a motor vehicle from the respondent. Also, the counsel submitted that at page 51 to 52 of the typed proceedings, DW1 never admitted to have seen the vehicle at her building site loaded with appellant's items for 160 days.

On the third limb of the appellant's first ground of appeal, the said counsel's submission was that the respondent counsel commented nothing about the un pleaded facts used by the trial magistrate that:

> *"...the one who caused it was the one of Managing Directors of Tender International Company Limited..."*

According to the appellant counsel, that omission amounts to an admission to what was submitted in chief by the appellant counsel in his submission in chief.

Turning to the fourth limb of the appellant's first ground of appeal, the learned counsel for the appellant submitted a prayer that this court be pleased to hold that the use of speculative facts by the learned trial magistrate which were neither pleaded nor testified by the parties herein, was legally wrong as argued by the appellant in her submission in chief.

In regard to part five of the appellant's first ground of appeal, the learned counsel was emphatic in his submission that such part is connected with the first ground of appeal because it was PW1 who mentioned Mr. Longido, the project Engineer of VETA who possessed all the information about the conflict between the appellant and VETA together with what led to impoundment of the respondent's motor vehicle.

As for the second ground of appeal raised by the appellant, the learned counsel submitted that the respondent has failed to challenge that issue. To bolster his position the appellant's counsel referred this court to the

case of **Masolete General Supplies**(supra) in which the Court of Appeal insisted on the principle 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 a general one..."*

It was therefore, the submission of the appellant counsel that awarding special damages on the claims not specifically and strictly proved, was an error on the part of the trial magistrate. Hence, he asked the court to allow the instant appeal and set aside the order of special damages awarded to the respondent.

On the third ground of appeal, the appellant counsel submitted that PW1 while testifying before the trial court stated clearly how VETA was involved in impounding the respondent's vehicle. So, it was the counsel's view that VETA was a necessary party to be joined in the main suit. The counsel cited the case of **Godfrey Nzowa vs Seleman and One Another**, Civil Appeal No. 183 of 2019 CAT (unreported) to support his argument.

On the last ground of appeal, the appellant counsel submitted that the counsel for the respondent misdirected himself by asserting that the trial magistrate assigned reasons in awarding general damages of Tshs.

10,000,000/=. He insisted that the quoted party the counsel for the respondent referred, was about discussing the issue whether there was breach of contract between the parties, and not about the award of general damages.

The appellant counsel referred to the court page 24 of the typed judgment where the trial magistrate wrote that:

"...And Tshs 10,000,000/= being the general damages"

From the above quoted words, the appellant counsel argued that no reasons were given by the trial magistrate in awarding Tshs. 10,000,000/= as general damages contrary to the requirement of the law. He thus, reiterated his submission in chief and prayed to this court to allow the present appeal with costs.

I have carefully read the written submissions in support of the grounds of appeal, the ones opposing the instant appeal, as well as the authorities cited therein. I appreciate and thank the counsel for the parties for their industrious works.

From the four grounds of appeal by the appellant, the following issues emerge: -

i. *Whether there was an oral transportation agreement between the appellant and the respondent*

ii. *Whether the trial court was justified to decide in favour of the respondent in absence of proof of specific damages, reasons for awarding general damages and for its failure to join VETA as a necessary party to the main suit.*

It is important at this stage, to note that not only the first issue is intended to find out if there was existence of the transportation agreement between the parties herein, but also it is intended to see if the defendant who is now the appellant, was responsible for the breach of such agreement.

At first, I wish to state that this being the first appeal, it is a principle of law that the first appellate court has power to reevaluate the evidence available in the lower court and examine it in order to see if the findings of the trial court were soundful. (See **Chartered Bank Tanzania Ltd v. National Oil Tanzania Ltd and Another**, Civil Appeal No. 98 of 2008 (unreported).

In the first ground of appeal, the appellant has alleged that trial magistrate erred in law and in fact by relying on facts given by PW1 which had no evidence proved before the court. It is through that

ground the parties herein have parted ways on the issue of oral transportation agreement between the appellant and the respondent; whether it was formed by them or not.

I think the answer to the above first issue, will suffice to make this court be in a good position to see if it is inevitable to continue dealing with the rest of issues pertaining to specific and general damages which appears to have sparkled flames on the parties' dispute in this case.

This being a civil case, the standard to prove that the parties herein entered into an oral transportation agreement, is on the balance of probabilities. In other words, upon hearing the evidence from both parties before it, the trial court must satisfy itself that the evidence of one of the parties to that case is heavier than or outweighs that of another party before it decides in favour of the one who claims to have a certain legal right.

The above position of this court is fortified not only by the principle stated in the case of **Attorney General vs Kabeza Multi Scrapper Ltd and One Another**, Civil Appeal No. 72 of 2022(unreported), but also by the provisions of section 110 of TEA which shoulders the plaintiff with a burden to prove his claim on a balance of probabilities.

In the case of **Attorney General vs Kabeza Multi Scrapper Ltd**(supra), the Court of Appeal stated that:

> *"The standard of proof in civil cases is on a balance of probabilities* ***which entails the Court to sustain such evidence which is more credible than the other on a particular fact proved."*** *[Emphasis added]*

The appellant in the present case has faulted the trial court for finding that there was a transportation agreement between her and the respondent while the respondent failed to tender any documentary proof like a car hire agreement or a payment receipt of Tshs. 600,000/= in order to prove its existence.

On the adversary side, the respondent has argued that since it was a one-day contract, there was not need to reduce the agreement into writing. She has also argued through her counsel that a consideration of Tshs. 600,000/= had to be paid after the completion of the said contract.

Guided by the burden of proof principle stated in the above authorities, my concern here will be whether there was sufficient evidence on the part to the respondent to prove existence of oral contract between her

and the appellant in order to justify the findings of the trial court which appears to be in her favour.

By its nature oral contact, the existence of an oral contract is established by evidence other than textual evidence. (See **Alisaar Company Limited vs Veneranda Fulgency**, Civil Appeal No. 51 of 2022, TZHC at Dar es Salaam(unreported). Therefore, in order to ascertain if there is an existence of an oral contract, the court can consider either or all of the following factors: -

> ***First**, by evidence of the parties who were involved in its formation, **second**, by evidence of persons who were present during the formation of that contract; **three**, it can be inferred from the conducts of parties to that contract prior and subsequent to its formation.* (See **Sundir Kumar Lakhanpal vs Rajan Kapoor and Another**, Civil Case No. 125 of 2019(unreported).

It is from the trial court records that while prosecuting her case before the trial court, the respondent matched two witnesses namely Sultan Salehe @Seif and Baraka Cleophace @Nkono who testified as PW1 and PW2 respectively, while the appellant had only one witness by the name of Razack William, who testified as DW1. According to the testimony of PW1 prior to the occurrence of a civil dispute between the two parties

herein, he was approached by one of the appellant's staffs who seemed to be a Chinese.

It was the evidence of PW1 that the appellant through that person, hired the respondent's motor vehicle with Reg. No. T 454 CXT for transporting building materials from the construction site which is VETA Kaswepepe, Sumbawanga to another place in consideration of Tshs. 600,000/=.

That upon his acceptance of the deal, PW1 called PW2 who was his driver and assigned him to accompany the said appellant's staff to the construction site, carry the building materials and transport them to another destination, as agreed by the parties herein. During cross examination PW1 said VETA is not part of this case because the one who caused the motor vehicle to be impounded is not VETA but Tender International Co. Ltd.

That evidence was corroborated by PW2 who testified to have been called and assigned by PW1 to do the said job by using the respondent's motor vehicle. PW2 also added that when he went to respondent's office to receive instructions, he also found the Chinese man and was instructed to accompany that man to the building site.

PW2 also testified that upon his arrival at VETA premises where the appellant's items were there, he picked them in the respondent's vehicle and started a car in order to take them to the point the appellant wanted them to be taken to.

However, according to PW2 that could not work because the VETA officials impounded that vehicle for 160 days until a release order was issued by the Resident Magistrates' Court of Sumbawanga. When probed by the appellant counsel, PW2 said he did not know the name of a person, but he was a Chinese.

On his side, DW1 denied to have contracted with PW1 to transport the building materials. Also, his testimony show that respondent company is manned by four Directors with three of them from China. That is shown at page 53 of the trial court typed proceedings which contain DW1 answers to cross examinations by the respondent counsel.

From the above evidence, it appears that although there was no any documentary proof to show that the parties herein formulated a transportation agreement, I am of the considered opinion that the respondent had stronger evidence than that of the appellant to prove existence of an oral contract between her and the appellant.

This is because the evidence of PW1 was well corroborated by the one adduced by PW2 which tells that the appellant and the respondent had entered into a one-day transportation contract. The respondent could not let her vehicle be used to transport the appellant's items from the building site to the other destination if she had not been approached by the appellant for that purpose.

Also, in a normal circumstance business men have nowadays formulated a trust among themselves to the extent of entering oral contacts without reducing them into writing provided they trust each other. Thus, having been approached by a person from a popular tender company like the one belonging to the appellant, PW1 could not be hesitant to accept a small deal worthing an executory consideration of Tshs. 600,000/= which resulted from the offer made to him by the appellant's official.

To say the least, existence of an oral contract between the parties herein can also be inferred from their conduct(s) subsequent to its formation. For instance, at page 39 of the trial court typed proceedings, PW1 was recorded to have narrated, inter alia, that:

> *"Upon stopped to get (sic) but I (sic) conducted with engineer Longido of that project noted to show what made the car stopped while I was (sic) communicated with Tender International Co. Ltd*

wherefore, I was told by Longido who is the engineer of that project that the Tender International Co. with VETA had a conflict thus stopped the car. On that date Tender International Ltd answered me that they were in round table discussion and I was told that my car will be released soon (sic) that was the next morning day."

My careful scrutiny on the cross-examination questions posed by Mr. Lingopola to PW1, reveals that the above piece of evidence by PW1 was not challenged by the appellant through her counsel which tells that the same was credible and outweighs the evidence of DW1 who attempted to deny the allegations by the respondent, while on the other hand admitted to have heard about impoundment of the respondent's vehicle. Failure by the appellant to cross examine PW1 on that crucial evidence is in my considered view, tantamount to acceptance of the truth contained in PW1's testimony. *(See **Jacob Mayani vs The Republic**, Criminal Appeal No. 558 of 2016.*

In that case the Court of Appeal stated, as a principle of law, that:

"A party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said"

Coming to the second part of the appellant's first ground of appeal, I find the complaint contained therein in to be unfounded. This is because PW1 and PW2 mentioned one who approached PW1 on 15.01.2020 for hiring of respondent's motor vehicle, as a Chinese working with the appellant's company. That piece of evidence was not questioned by the appellant counsel during cross examination questions. This means the evidence of those respondent's witnesses was credible and true.

In relation to the third point argued by the appellant counsel, I am firm that the trial magistrate relied on facts pleaded by the respondent at paragraphs 4, 5, 6 and 7 of the Amended Plaint which was presented for filing with the trial court on 27.05.2021. This can be inferred from pages 15 to 16, as rightly submitted by the respondent counsel.

As of the fourth complaint that there are a lot of speculations in the trial court records, again I do not find any sounding reason to agree with that grievance. This is because at pages 15 to 21 of the trial court typed judgment, it is obvious that what the trial magistrate did, was to evaluate the evidence from both parties and provide a ratio decidendi to justify his answer to the first issue as being in the affirmative.

On the complaint that the respondent did not prove her allegation for his failure to call the so-called Eng. Longido as a material witness, I think

the respondent counsel had a strong point in disputing such allegation when he urged this court to disregard it for not being among the grounds of appeal the appellant came with. The trite law that an appellate court cannot deal with new matters not raised and decided by the lower court need not be overemphasized. (See **Seifu Mohamed Seifu v. Zena Mohamed Jaribu**, Misc. Land Case No. 84 of 2021 and **Kenedy Makuza vs Monalia Microfinance Ltd**, PC Civil Appeal No. 01 OF 2021(both unreported).

In the same vein, since the above complaint by the appellant herein was nor raised and thereby decided by the trial court, the same cannot be entertained at this appellate stage where the eyes of this court are there to focus on matters which were raised and decided by the lower court which in this case, is the trial court.

I may also add, for the sake of argument, that even if that point was raised before, yet in the circumstances of the case at hand, it could not serve any purpose, whatsoever, on the part of the appellant. This is because in law, a party is not bound to have a certain number of witnesses in order to prove a particular fact. The above position is fortified by the provisions of section 143 of TEA which declares that no particular number of witnesses shall in any case be required for the

proof of any fact. (Also, see **Mwita Kigumbe Mwita and Magige Nyakiha Marwa vs Republic**, Criminal Appeal No. 63 of 2015 (unreported).

In the present case, the plaintiff/respondent herein was not bound to parade Eng. Longido before the trial court in order to testify in her favour. To her, a material witness was Baraka Cleophace @Nkomo (PW2) who knew about what transpired between the respondent and the appellant, and assisted the respondent in playing her role of transporting the appellant's items as per the terms of the said contract.

In the circumstances, and due to the reasons advanced above, I do not find any merit on the defendant's first ground of appeal. I therefore, dismiss it accordingly and proceed to answer the above first issue positively that indeed, there was existence of an oral contract between the appellant and the respondent.

Having found that the respondent had proved existence of an oral transportation agreement between her and the appellant herein, I do not find any pressing reason to fault the honourable trial magistrate who rightly found the appellant in breach of that contract when she omitted to furnish the executory consideration to the respondent and caused the

respondent's motor vehicle to be impounded by VETA officials, while knowing she had a conflict that would lead to such impoundment.

I now turn to the second issue which is whether the trial court was justified to decide in favour of the respondent in absence of proof of specific damages, reasons for awarding general damages and for its failure to join VETA as a necessary party to the main suit.

The allegation in the third ground of appeal that seems to fault the trial magistrate for failure to oversee the requirement of joining of VETA as necessary party in this matter, cannot detain this court. It is from the record that the oral contract which is the subject of this case, was entered between the appellant and the respondent meaning that VETA Sumbawanga was not privy to that contract. Again, the fact that the appellant had a construction contract with VETA and that the two had an existing conflict, came to the attention of the respondent when her motor vehicle was impounded by VETA officials.

Hence, taking into account that the facts that the appellant had another contract with VETA and that the two had some conflicts were not disclosed to the respondent, and given the fact that the respondent was looking for some profits, I am persuaded and therefore, unable to go along with the argument by the appellant counsel that the trial

magistrate erred in law, as he wanted me to believe. Thus, due to the reasons advanced above while dealing with part of the second issue, the appellant's third ground of appeal too lacks merit and it is accordingly dismissed.

Having disposed of the first part of the second issue above negatively, I now revert back to the appellant's complaints that the trial magistrate erred in law and fact for awarding specific damages to the respondent without the same to be strictly proved and for awarding general damages to the respondent without assigning reasons.

Admittedly, I agree with the appellant counsel on the position of the law in relation to specific damages and general damages as stated in the cases he has correctly referred to this court which, for the purpose of avoiding repetition, I will not recite here.

To start with the award of specific damages of Tshs. 96,000,000/=, the appellant counsel has submitted in chief that respondent failed to prove specifically and strictly how she suffered such damages. In elaborating more on that ground, the learned counsel has faulted the trial magistrate for awarding specific damages to the respondent while the trial court's records show that the trial magistrate made a finding that the same had not been proved by the respondent on the standard

required by the law. He has referred to this court to page 24 of the said records where the trial magistrate appears to have written the following:-

> *"Having scrutinized the special and general damages prayed by the plaintiff, I am of the considered opinion that the plaintiff on his claim did not substantiate the amount of 200,000,000/= for special damage claimed for. There is no such evidence since I alluded above those specific damages though pleaded (sic) must be proved. This is the law which he ought to strictly comply with..."*

In my careful reading of the above excerpt, I am of the settled view that the trial magistrate apparently misdirected himself and of course, he erred in law, by proceeding to award the respondent Tshs. 96,000,000/= as special damages, after he had categorically found the same to have not been specifically and strictly proved by the plaintiff/respondent.

On the adversary side, the respondent counsel through his written as well as rejoinder submissions, has tried his level best to convince me by trying to show that the respondent managed to prove that he incurred special damages caused by the appellant's act of causing her car to be impounded. However, with all due respect to the said counsel, that is not a correct approach. This is because in his judgment, the trial magistrate

put it clear that the respondent failed to show how he was able to earn 1,300,000/= per day from using his motor vehicle. This can be inferred at page 22 of the trial court typed judgment where the trial magistrate wrote that:

> *"...it is (sic) assertion by the plaintiff that he suffered a great loss to lose 160 days without doing his business as the motor vehicle was (sic) purpose for making business* ***but he did not substantiate how that 1,300,000/= make a daily profit of which equally (sic) to a total of 208,000,000/= of which he reduced to Tshs 200,000,000/= to comply with the court's jurisdiction****..." [Emphasis added]*

From the above excerpt, it does not need much thought for any reasonable man to find that the respondent failed to prove her claim for specific damages as per the law, as stated in a number of authorities above cited by the appellant's counsel. With the foregoing reasons, I am convinced by the said counsel's argument that the said claimed specific damages were not proved as per the law; hence ought not to be awarded by the trial magistrate. I therefore, hold that the argument by the respondent counsel in respect of the second ground of appeal is totally misconceived.

Next for my determination is the complaint by the appellant that the trial magistrate erred in law for his failure to assign reasons for awarding general damages to the tune of Tshs. 10,000,000/=. It is the submission of the appellant counsel that no reasons were assigned by the trial magistrate for awarding such damages and in trying to persuade the court to find some merit on that complaint, the said counsel has referred to this court what the trial magistrate wrote at page 24 of the typed judgement in which the trial magistrate appears to have awarded the respondent Tshs. 10,000,000/=, as general damages without assigning reasons for doing so. On the other side of the coin, the counsel for the respondent has insisted that the trial magistrate assigned reasons for such award thus making him justified to have done so.

I have squarely gone through the above rival submissions by the counsel for the parties on such arena. I am alive to the principle of law that a judicial officer is duty bound to assign reasons for his or her decision. I am fortified in that view by the decision of the Court of Appeal in the case of **Francis Mtawa vs Christna Raja Lipanduka & 2 Others**, Civil Appeal No. 15 of 2020 (unreported) in which their lordship Justices of Appeal reaffirmed that:

"...it bears reaffirming that, the duty of judicial officers and any other adjudicator to assign reasons for the decision given, needs no emphasis. This is a mandatory requirement and a judgment which fails to comply with that requirement is null and void"

Guided by the above principle of law, and considering the above rival submissions by the two counterparts, I was inclined to go through the whole impugned judgment of the trial court and noted that what the counsel for the appellant did was just to quote only the last part of the said judgment where the trial magistrate was making a holding of the case before him. That can be gleaned from page 24 of the typed trial court's judgment where after awarding specific damages to the respondent, the trial magistrate wrote the following words: -

"...and Tshs 10,000,000/= being the general damages."

In the circumstance, it is therefore my settled view that had the appellant's counsel read the whole judgement properly, he could not have argued the way he did. I am saying so because going through page 22 which the appellant's counsel unreasonably refuted to join hands with his counterpart that therein is where the truth can be derived from, it is glaring that the trial magistrate assigned the reasons

for awarding general damages to the respondent. To paint a good colour on that aspect, I propose to quote the relevant part as hereunder: -

> *"...it is automatic this issue to be as well affirmative, that the defendant after hired the motor vehicle to take it to VETA campus to take some material, thereafter he abandoned the motor vehicle for 160 days hence there was a breach of agreement which rendered the plaintiff to suffer damages."*

The above reasons coupled with the ones contained in the said quoted excerpt, clearly indicates that the honourable trial magistrate was justified in awarding the respondent general damages of Tshs. 10,000,000/= (Ten Million Shillings) taking into account the circumstances of the case at hand where for unjustifiable reasons, the appellant caused the respondent's motor vehicle to be impounded by a third party without her taking any legal steps to rescue it.

The above marks the end of my detailed discussion on the second issue in respect of the third and fourth appellant's grounds of appeal which I am constrained to dismiss on their entirety for want of merit, save for the second ground which find to have merit.

Before I pen off, I wish to point out that it has come to my mind that despite the fact that the evidence by PW1 clearly shows that a payment

of Tshs. 600,000/= as the executory consideration, was not paid by the appellant as agreed by the counsel for both parties, I am of the view that the interest of justice will be met if this court will step into the shoes of the trial court in order to place the respondent at her previous status quo.

Thus, owing to the above reasons, the present appeal is partly allowed to the extent stated above. I set aside the trial court's award of specific damages and substitute it with an order requiring the appellant to pay the respondent a consideration of Tshs. 600,000/= at the same court rate set by the trial court in respect of payment of general damages. Due to the outcome of the present appeal, each party to bear its own costs here and below.

It is so ordered.

A.A. MRISHA
JUDGE
07.09.2023

DATED at **SUMBAWANGA** this 7th Day of September, 2023

THE HIGH COURT OF TANZANIA
UMOJA NA UMOJA

A.A. MRISHA
JUDGE
07.09.2023