

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

CIVIL APPEAL NO. 637 OF 2024

*(Arising from Civil Case No. 03 of 2023 dated 1/112/2023 by
Hon. Rugumira, SRM)*

LAZALO GODFREY MADAHA..... APPELLANT

VERSUS

TAMBULA MASONDA KIGALU.....RESPONDENT

JUDGMENT

6th March & 10th May 2024

MASSAM, J.:

This matter originates from the District Court of Busega at Busega (*"the trial court"*) in Civil Case No. 03 of 2023 duly filed by the respondent, **Tambula Masonda Kigalu**. The respondent alleged at the trial court that the appellant breached their contract dated 12/8/2022 and prayed for the same to be rescind. He further prayed for the payment of specific damages to tune of Tsh. 34,000,000/= and special damages of Tsh 164,000,000/=. Interest rate at the tune of 12% per anum from 12/8/2022 to the date of judgment, interest on decretal's sum at court's rate 7% from the date of judgment until payment in full and the costs of the case.

The brief material background and essential facts of the matter as achieved from the trial court's records giving rise to the present appeal reveal that, the appellant and the respondent entered into an oral contract on 12/8/2022 for the respondent to purchase 680 pieces of fishing net from the defendant. The price of each net was Tshs. 50,000/= thus the price for the 680pieces was Tsh. 34,000,000/=. The respondent alleged that he gave those money in front of Kigalu Manyanda and Zawadi Madaha. Unfortunately, the appellant failed to honour their contract and on 15/5/2023 there was an amicable settlement between the appellant and the respondent in the presence of Kigalu Manyanda, Zawadi Madaha and George Kilasa where the appellant admitted owing the respondent Tsh. 34,000,000/=and promised to pay. However, until the case was filed at the trial court the appellant did not honour his words.

During the trial at the trial court when he was defending himself the appellant denied having been entered into contract with the respondent and also denying that he is not doing any business of producing fish net. Therefore, he sought for the suit to be dismissed.

Having heard the evidence of the witnesses for both sides, the trial court was convinced that the respondent's claim was proved on the balance of

probabilities as required in civil cases. Thus, the respondent was awarded Tsh. 44,000,000/= as specific damages and Tsh. 50,000,000/= as general damages. The trial court's decision which was delivered on the 1/12/2023 seemingly aggrieved the appellant. Therefore, he is before this court challenging the same with the following grounds of appeal;

1. That, the trial court erred both in law and facts for failure to correctly consider and evaluate the evidence on record.
2. That, the trial court erred in law and fact to record Zawadi Madaha, who was not a witness nor was mentioned in the alleged oral agreement.
3. That, the trial court erred in law and fact to rely on the loa contract between the Pesca Perch Limited and Tambula Masonda, the respondent which had no relationship with the appellant and the case at hand.
4. That, the court erred in law and fact to award the respondent Forty-Four Million (Tsh. 44,000,000/=) as specific damages and fifty Million (50,000,000) as general damages which were not proved by the respondent on balance of probabilities, according to the judgment at page 3.

With consensus of the parties, the appeal was heard by way of written submission whereby, the appellant was represented by Ms. Great Charles Mabula learned counsel and the respondent fought solo, unrepresented. Both submission which brought before this court by the parties will be considered while determining the merit of this appeal.

Starting with the 1st ground of appeal, the appellant complained that the evidence was not well evaluated. Ms. Mabula on behalf of the appellant submitted that there was no proof that the appellant received money from the respondent via PW3 (Kigalu Manyanda) and no proof that there was a meeting between Pw1, Pw2, Pw3 and the appellant herein. She added further that there was no proof that the respondent suffered damages at the tune of Tsh 44,000,000/= being specific damage and Tsh 50,000,000/= being general damages. It was her further submission that there was no proof of the additional 10,000,000/= as alleged. Ms. Mabula submitted further that there was no evidence of receipt or bank statement to show that the respondent received 25,000,000/= in his account.

Ms. Mabula stated further that the respondent and his witness were not aware of the place of business of the appellant and the fact that he is not doing fishing business was not challenged by the

respondent at the trial court. she supported his arguments by citing **Section 100 (1) and (2) and 111 of the Evidence Act**, cap 6 R.E 2022 cited and number of cases including the case of **Zacharia Jackson v. The Republic**, Criminal Appeal No. 411 of 2018 (CAT at Dar es Salaam, Unreported). So, he prayed for this ground to be allowed.

Responding to this ground, the respondent submitted that the evidence was well evaluated by the trial court. He added further that the testimonies of PW2 and PW3 attract considerable weight on the part of the respondent further, PW3's testimony was not uncontroverted during the trial; hence it was found credible and accorded the weight it deserves. He submitted further that the fact that the respondent's witness was not aware as to the place of business of the appellant is irrelevant in this case, this is due to the fact that the respondent and his witnesses proved there was an oral contract between the parties herein. He contended that if there was no oral contract between the parties why there was another meeting to discuss Tsh 34,000,000/= which the appellant received from the respondent? The said testimonies proved that the respondent's evidence was heavier than that of the appellant herein. It goes without saying that this being the 1st appellate court it

has the power to evaluate and analyse the evidence of the trial court and come up with its own or the same decision. As it was held in the case of **Ana Joyce Fortunatus v. Salvatory Leopard**, (Pc) Criminal Appeal No. 12 Of 2021 (HC at Bukoba, reported at Tanzlii) that:

"It is trite law that the first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

In our present case, this court do agree with the respondent that the evidence was well analysed by the trial Magistrate. It is the ever-cherished principle of law that generally in civil cases, the burden of proof lies on the party who alleges anything in his favour. See the case of **Anthony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (Unreported), See also, **Section 110 and 111 of the Evidence Act** Cap 6 R.E 2022.

At the trial court the respondent alleged that he entered into an oral contract with the appellant to be supplies with fishing net. The said contract was witnessed by PW3 (Kigalu Manyanda) and when the appellant was called on 15/5/2023 after failing to honour their contract also PW2 was present too. In our jurisdiction an oral contract is

enforceable in law if it complies with there quirements of a valid contract as provided under **Section 10 of the Law of Contract Act**, Cap 345 R.E 2019. The said section provides for the essential elements of a valid contract. The section reads:

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void".

In our case at hand, the appellant only claimed that he never entered into any agreement with the respondent herein and that he is not doing any business of producing fishing net. However, the witnesses which testified on the part of the respondent are his relatives and he admitted that there is no grudge between them. Based on the evidence adduced at the trial court and the judgment delivered, the trial Magistrate did evaluate the evidence of both sides and came up with the said evidence which this court also support that the evidence of the respondent was heavier than that of the appellant. So, this ground fails.

On the 2nd ground of appeal, Ms. Malaba submitted that Zawadi Mdaha was a key witness to this case, however, the prosecution failed to call him to testify. And failure to call material witness an adverse

reference is drawn against the respondent herein. **Section 3 (2) (b)** of Cap 6 R.E 2022 and the case of **Hemed Said v. Mohamed Mbili** [1984] TLR No. 113 was cited to bolster her arguments.

Replying to this ground the respondent stated that as the evidence of PW1 and PW3 the handling of the money from the respondent to the appellant, Zawadi Madaha cannot be the only important witness as he had nothing different to tell from those testified by PW1 and PW2. More to that facts cannot be proved by many witnesses as number of witnesses is not required in proving a case. The case of **Yohannis Msigwa v. R** [1990] TLR 148 was cited to support the arguments.

Having gone through the records of the trial court particularly the evidence of the respondent and his witnesses, this court do agree with the respondent that in order to prove a case no number of witnesses is required as per **Section 143** of Cap 6 R.E 2022. The said section provides that:

"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact".

As per the cited provision, no number of witnesses is required in proving a certain fact. Regarding the issue of material witness as

submitted by the appellant, I am aware that when a material witness was not called to testify a certain fact an adverse reference needs to be drawn against the respondent. However, if the alleged material witness will not add value to the evidence of the plaintiff, the allegation of failure to call material witness will be rejected. See the case of **Godfrey Mwande v. The Republic**, Criminal Appeal No. 409 of 2020 (CAT at Mbeya, reported at Tanzlii). In our present case as the said Zawadi Madaha could have testified what has already been testified by other witness, then she was not a material witness which need the court to draw adverse reference against the respondent herein. Thus, this grounds too fails.

Regarding the 3rd ground of appeal, Ms. Mabula complained that it was wrong for the trial court to rely on the contract between the respondent and Pesca Perch Limited as it has no connection with the appellant in this case. She complained further that the respondent failed even to prove if he was given the loan by Pesca Perch Limited and since the name of the appellant was not seen in their contract the respondent was barred by the principle of private to contract. Therefore, it was improper for the trial court to rely in such contract.

The respondent replied that exhibit P1 (contract between the respondent and Pesca Perch Limited) is connected to this case as per Section 8 of Cap 6 R.E 2022. He added that he mentioned the said money to prove corroboration with the evidence of PW1 and PW3 who testified the existence of Tsh. 34,000,000/= which he received from different sources. Further to it, it is the same exhibit which gave birth to Tsh. 10,000,000/=.

I have revisited the records of the trial court particularly the judgment, and I have noted that the contract between Pesca Perch and the respondent herein was not the only ground that the trial Magistrate relied on to reach into his decision. The said contract was only used to prove that the respondent did borrow the money which he used to purchase fishing net. In his judgment the trial Magistrate only shows how the respondent proved the existence of oral contract between the appellant and the respondent, thus the issue of loan contract between the respondent and Pesca Perch Limited did not affect the same. Thus, this court finds no merit on this ground.

On the last ground of appeal, Ms. Mabula grieved that it was wrong for the trial court to grant reliefs which were not prayed for by the respondent. She was of the view that at the trial court the

respondent claimed for Tshs. 34,000,000/= as a specific damage but the court awarded him Tshs. 44,000,000/= further to that she was of the view that even the general damages awarded to the respondent at the tune of Tshs. 50,000,000/= was never proved by the respondent. She supported her argument with the case of **Lucas M. Malyango v. Vincent Mashenene**, Land Appeal No. 29 of 2022 (HC at Sumbawanga) (Reported at Tanzlii). She prayed the appeal to be allowed for the interest of justice.

The respondent replied that in order for this court to intervene the damages awarded by the trial court it has to be proved that the trial court acted in a wrong principle of law which is not the case in this matter. He submitted that in his plaint the respondent claimed for Tshs. 44,000,000/= as specific damages and shows at paragraph 12 and 15 of the plaints how he came up with such amount instead of 34,000,000/=. He went further distinguishing the cited case of **Lucas Malyango** (Supra) for the reason that the case was not about forgetting the prayer, but the prayer prayed in chamber summons differ with the ones granted by the court. More to that, He submitted that even the general damages of Tsh 50,000,000/= was properly awarded by the trial court as their contract was a commercial one and the respondent and appellant

entered into an oral contract, the case of **Mollel Electrical Contractors Limited v. Mantarct Tanzania Limited**, Civil Appeal No. 394 of 2019 [2022] TZCA 316 (30 May 2022) was cited to support his arguments. In the end he prayed for the appeal to be dismissed with costs.

In his plaint at the trial court the respondent prayed for both specific damages and general damages. It is the principle of law that special damages must be specifically pleaded and proved as it was in the case of **Zuberi Augustino v. Anicent Mugabe** (1992) TLR 132 the court held:

"It is trite law that special damages must specifically pleaded and proved."

The same position was equally stressed in the case of **Bolag Versus Hutchson** (1950) A. C. 515, at page 525 that:

"What we accept special damages are such as the law will not infer from the nature of the act, they do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specifically and proved strictly".

Having said so I am of the considered view that the trial magistrate unjustifiably awarded Tshs. 44,000,000/= instead of Tshs. 34,000,000/= which was prayed for by the respondent at the trial court. As for the general damages the awarded amount is tremendously high since there was no proof that the respondent could have been receiving 4,000,000/= weekly after getting his fishing net from the respondent herein. For those reasons the number of general damages is reduced at the tune of Tshs. 25,000,000/= subsequently, this ground is found with merit.

For the aforesaid reasons, the appeal is partly allowed to the extent explained herein above. Consequently, each party will bear his own costs of this appeal.

Ordered accordingly.

DATED at SHINYANGA this 10th day of May, 2024.



A handwritten signature in blue ink, appearing to read "R.B. Massam".

R.B. MASSAM
JUDGE
10/05/2024

Right of appeal explained.



A handwritten signature in blue ink, appearing to read "R.B. Massam".

R.B. Massam
JUDGE
10/05/2024