

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CIVIL APPEAL NO. 25 OF 2019

**(Originating from Civil Case No.1 of 2018 in the District Court of
Monduli at Monduli)**

KANAEL SINDANFOO NDASHA..... 1ST APPELLANT

ANITHA JULIUS KASEKWA..... 2ND APPELLANT

EMMY JOHNSON MWITA..... 3RD APPELLANT

VERSUS

BRAC TANZANIA FINANCE LTD..... RESPONDENT

JUDGMENT

13/07/2021 & 22/07/2021

KAMUZORA J,

The respondent in this appeal instituted Civil Case No. 1 of 2018 before the District Court of Monduli claiming against six defendants, for the sum of Tshs. 73,970,200/= . It was alleged that the defendants misappropriated the money which was the property of their employer BLAC Tanzania Finance Ltd (the respondent). Out of six defendants, only three defendants who were the 3rd, 4th and 5th defendants were found liable. It was alleged that the 1st appellant who was the branch manager and the 2nd and 3rd appellants who were the community organisers used

their positions as employees of the respondent and forged the clients' passbook to show that the clients received loans from the office while in fact, they were the ones who took and misappropriated the money. The appellants were found liable by the district court and jointly ordered to pay to the plaintiff (the respondent in this appeal) the amount of Tshs 15,000,000/= as general damage, specific damage amounting to Tshs. 29,250,000/= for the 1st appellant, Tshs. 1,600,000 for the 2nd appellant and Tshs. 2,050,000/= for the 3rd appellant. In addition, appellants were jointly ordered to pay interest at the rate of 17.5% from July 2017 up to the date of full satisfaction of the decree and costs of the suit. The appellants were dissatisfied with the decision of the district court and appealed to this court on three grounds: -

1. That the court erred in law and in fact in its judgment in relying on unaudited report prepared by unqualified person.
2. That the court erred in law and in fact in giving a judgment in favour of the respondent without any evidence and proof.
3. That the court erred in law and in fact by not properly evaluating the evidence as tendered by the parties thus reaching an erroneous decision.

When the matter was called for hearing, the appellants were represented by Mr. Silvester Kahunduka, learned counsel while the respondent was represented by learned counsel Ms. Upendo Msuya. The counsel for the parties agreed to argue the appeal by oral submissions.

In his submission in support of appeal the counsel for the appellant Mr. Kahunduka opted to make submission on the 1st ground separately and consolidated grounds 2 and 3.

On the 1st ground the learned counsel for the appellant submitted that, PW1 Nasoro Omari Kitupula who prepared audit report which is exhibit PE1 is an unqualified person to prepare an audit report for public use. The counsel explained that, PW1 admitted during cross examination that when he was preparing a report, he was an assistant audit officer and he was never registered as an auditor. He was of the view that, as PW1 was not a certified public accountant who could prepare a public report for public use, the best he could do is to prepare an internal report which could be approved by the external auditor or a certified public accountant for the said report to be used by external consumers such as an evidence before the court of law. He maintained that, since the person who prepared the said report was unqualified the said report was supposed to be disregarded.

On the 2nd and 3rd grounds of appeal the counsel for the appellant submitted that, there was no evidence on the balance of probabilities to warrant to enter the decree against the defendants. That, in its judgment, the trial court referred page 10 of the audit report which was exhibit PE1. That, under that exhibit there is a table drawn showing how the loans were disbursed and it is on this page that the appellants were ordered to pay the specific and general damage plus interest.

The counsel pointed out that, the records including the plaint show that the appellants were employed on the 1st January 2017. That, during the evidence at page 30 of the typed proceedings, PW6 Happiness Macha who was the branch manager at Monduli tendered collectively five contracts of the then defendants and were collectively admitted as exhibit PE5. That, the said contracts proved that the appellants together with three others were employed by the plaintiff on the 1st January

2017. That, the loans which are claimed that they were given to some other members using the names of the appellants were given on different dates. That, out of 27 loans, only four loans were given in the year 2017 including; loans advanced to one Furaha Msuya Tshs 500,000/= issued on 15th February 2017, Asnath Jeremia issued on 1st February 2017 Tshs 1,400,000/=, Shiila Humaye, issued on 16th January 2017 Tshs, 900,000/= and Annacletha Hambat, issued on 1st February 2017, Tshs 1,500,000/=. That, the rest of the loans were issued in the year 2016 when the appellants were not employees of the respondent. That, despite that status, the trial court affirmed that the said loans were issued by the appellants.

The counsel maintained that, the trial court misdirected itself as the plaintiff herself in her plaint narrated that all the plaintiffs were employed on the 1st January 2017 and the same was supported by exhibit PE5 which were the contracts of employment. He added that, it is a settled principal of law that parties are bound by their pleadings. He referred **Commercial Case No. 5 of 2013, YARA Tanzania Ltd Vs Charles Aloyce Msemwa and 2 others**, where the HC of Tanzania Commercial Division at page 6 quoting a Nigerian Case in **Mujid Suar Yusuph Vs Madam Idiату Adegoke SC15/2002** insisted on the parties to be bound by their pleadings. The counsel was of the view that, as the appellants were not employees at the time of issuing the loans, it was wrong for the trial court to condemn them to pay damage.

The counsel added that, in any case, even the loans which were issued in the year 2017 when the appellants were employees of the respondent were not proved if actually were issued by the appellants. That, it was the evidence of PW1 that the loans were issued to different individuals

and when the company was following upon the repayment of the loans, the said individuals listed at page 10 of the audit report informed the management that they have taken loans on behalf of the appellant and thus they were not supposed to repay the loans. He however insisted that, there was no evidence apart from the report itself that backed such claims. That, the persons claimed to have they taken the loans on behalf of the appellants were not even called to testify before the court that indeed they had taken loan on behalf of the appellants. That, not even the individual passbook which is the instrument used in taking loans were brought before the court to substantiate that the said loan had been issued and it was issued on behalf of the appellants. The counsel was of the view that, had the trial court directed itself properly on the evidence as tendered by the parties during the trial it could have reached to a different conclusion and could have ruled that the appellants were not involved in any way in misappropriation of the plaintiff's funds.

In conclusion, the counsel prayed for this Court to rule in favour of the appellants by setting aside the judgement and the decree as issued by the District Court of Monduli. The appellant's counsel also prayed for this court to rule that the case was not proved on the balance of probabilities and order the respondent to pay the costs of this appeal and that in Civil Case No. 1 of 2018 at Monduli District Court.

In her reply submission the counsel for the Respondent Ms. Upendo Msuya strongly attacked the submission by the appellants' counsel. She submitted in respect of the 1st ground that, it is not true that the report was prepared by unqualified person. The counsel pointed out that, PW1 Nassoro Bitukula prepared the report together with other persons who

were external auditors. That, PW1 was only involved with the respondent as he was being employed by the respondent as fulltime accountant and auditor of the company. That, the evidence of PW1 disclosed the education background and his participation in the report. That, as the issue concerned misappropriation of the funds and the appellants were employees of the respondent, there was no doubt that they did so as they admitted themselves before auditors. The counsel added that, PW1 testified before the trial court that he was an accountant and the holder of first degree in accounts and he was a well experienced in his work. That, after being re-examined, PW1 also informed the court that he was qualified and registered to be an accountant and an auditor. The counsel insisted that, PW1 himself cannot render the whole report to be invalid because he did not prepare a report himself as the accountant firm was involved. She therefore prayed for this ground to be dismissed.

Regarding the 2nd and 3rd ground the counsel for the respondent submitted that, the evidence was enough and the respondent proved his case on balance of probabilities as several exhibits were tendered including passbooks, reports, receipts and other witnesses were called to corroborate the documentary evidence tendered.

Regarding the submission that the appellants were employed on January 2017 the counsel for the respondent submitted that, it was made clear before the trial court that the company has the system of giving contracts to its employees every year. That, those contracts expire after one year but renewable every year. She maintained that, the appellants were employed under renewable contracts as there are those who

signed the first contracts on 2010 and others on 2012 but the last contracts were signed in 1st January 2017.

The counsel maintained that, the appellants jointly misappropriated the respondent's funds by stealing and by dishonest conduct against the rules of their work as it was explained in the plaint. That, the misappropriations were committed from 2013 to 2017 and the evidence proved so. She explained that, the appellants were all stationed at Monduli and the office attendance register was also tendered including the disbursement books. That, the people who shared the loan appeared to testify before the trial court. The counsel maintained that, the audit report was proper the trial court's decision was fair. She thus prayed for this appeal to be dismissed with costs.

In his rejoinder, Mr. Kahunduka faulted the submission by the counsel for the respondent regarding the qualifications of PW1 as an auditor. While the counsel for the respondent stated that PW1 was qualified and he conducted the audit with other persons, the counsel for the appellant insisted that, PW1 was not qualified and those other persons were not mentioned or called as witnesses and their qualification were also not mentioned. He reiterated his submission that PW1 who was called in court was not a qualified person to prepare audit report. He prayed for this Honourable Court to pass through pages 12, 18 and 19 of the typed proceedings and see itself that PW1 admitted to not being registered and he has no qualifications as auditor.

On the 2nd and 3rd grounds the appellant's counsel added that, the submission by the counsel for the respondent that there was enough evidence as they tendered passbook, reports, receipts and some other

persons testified before the court, is unjustified. referring page 7 and 8 of the trial court proceedings, he was of the view that the trial court based its decision on page 10 for exhibit PE1 which is the audited report prepared by unqualified person. That, there is no passbook or receipts or evidence which was presented to back up the findings of the trial court in relation of page 10 exhibit PE1 where the judgment of the trial court was centred. He maintained that, there was no enough evidence on the balance of probabilities to condemn the appellants.

On the submission by the respondent's counsel that the appellants were employed prior to January 2017 the counsel for the appellant referred that submission as a farfetched submission as there was no evidence during the whole trial proving that the appellants were employed prior to 1st January 2017. He called upon this court to revisit the plaint itself and the evidence of PW6 who tendered the contracts evidencing that the appellants were employed on 1st January 2017. He contended that, if at all the respondent was renewing the contracts on annual basis the said contract prior to 2017 would have been tendered as evidence and the same would have been stated in the plaint. He maintained that, that the appellants were employed on 1st January 2017 and the submission by the learned counsel for the respondent is an afterthought.

Regarding the submission that the court admitted the attendance book, the counsel for the appellant claimed not to have seen the admission of the in his perusal to the proceedings. To him, the submission that the attendance book was admitted is an overlook by the respondent's counsel. He also added that, the evidence of PW6 and even the entire proceedings did not show that the appellants were employed before 2017. He reiterated his submission that, there was no evidence on the

balance of probabilities to condemn the appellant to pay damages as they were condemned by the trial court.

I have considered the length submissions by the counsel for the parties. Starting with the first ground it was contended by the counsel for the appellant that, the witness who prepared and tendered a report was not a qualified auditor. Such contention was strongly countered by the counsel for the respondent who insisted that PW1 was a qualified auditor and he was only part of the qualified team which prepared a report. I had ample time to pass through the evidence in record and the said exhibit PE1 which is referred to as audit report. There is no dispute that the said report was signed by two people; Nasoro Kitupula with a title of Audit officer and Genes E. Orassa with a title of Assistant Manager, Internal Audit. The report in question is titled "**Risk based Internal Audit Report for BRAC Microfinance Programme**". There is no doubt that exhibit PE1 is the internal report of the respondent.

In my view, the audit process does not exempt an employee who is employed as an auditor to audit the accounts of his employer. There is no dispute that PW1 was an employee of the respondent and at the time he testified in court he introduced himself as Assistant Internal Auditor. That makes him a qualified person to inspect/audit his employer's financial statements and prepare report there to. Preparing an internal report does not necessarily require an auditor to be registered. It only surface where the auditor is recognised by the employer to whom the internal report is made. Now the question is whether the internal audit report that was tendered and admitted as exhibit PE1 is a competent report to rely upon in establishing liabilities.

It is clear from the evidence that, one of the signatories of the report testified in court as PW1 and admitted not to be a registered auditor. Likewise, no evidence to show that the second signatories were registered auditors or certified accountants. In my view the report that was prepared and signed by the two people who seem to be the employees of the respondent was intended for internal use like any other management report.

For a report to qualify to be used for external purposes, there is a need for the internal report to be vetted by a Certified Public Accountant or a Registered Auditor. The essence on the need for vetting the internal report is to ensure independency and objectivity of the report, meaning; a report free from influence or biasness.

In this appeal it is clear from the trial court judgment that, the conclusion that the appellants were liable to pay damages to the respondent was based on the internal audit report which is Exhibit PE1. There is no record if the authenticity of the report was tested by another independent person for a second opinion. This is where the concept of external audit comes in. It was necessary therefore for the registered auditor to go through the internal report and, or other information to get to the root of the financial status of the respondent. The external report is a most reliable evidence and can be used for external purposes including evidence in courts of law. Thus, while on one side I agree that PW1 was a qualified person to prepare an internal audit report, on the other side I agree with the counsel for the appellant that the report prepared by PW1 and his colleague did not qualify to be used in evidence. The contention by the counsel for the respondent that PW1 was registered lacked proof as such allegation was not proved by

evidence. From the evidence in record, PW1 himself admitted to the fact that he was not a registered accountant. Although the counsel for the respondent claimed that the report was made with the help of an independent firm, such fact is not disclosed in the evidence. The report seems to be signed by two people who are both employees of the defendants. PW1 in his testimony disclosed that he prepared a report and sent the same to the Headquarter office for approval. That report was not tested by an independent person.

It was important therefore for the trial court to ascertain the weight of Exhibit PE1 which was prepared by the respondent's employee for internal use in establishing the alleged misappropriations. Had the trial court considered that exhibit PE1 was not free from biasness, it could have found the importance analysing other evidence to see if they established any liability against the appellants. The danger of using an internal report is that, the same being prepared by the employee of the same company which condemned the appellants of the misappropriation, it was not free from biasness. That being the case, I agree with the appellant's argument that the trial court wrongly relied on report to conclude that the liability against the appellants were proved.

On the second and third ground it was contended that, the trial court gave judgment in favour of the respondent without any evidence to prove the case and that there was no clear analysis of evidence. The counsel for the appellant pointed out that, there was no proof that the appellants were employees of the respondent at the time of the alleged misappropriation and that no enough evidence proving the liability against the appellants.

Regarding the issue that the appellants were not employed by the respondent at the time of the alleged misappropriation, it was also submitted by the counsel for the appellants that, the appellants were employed by the respondent on 1st January 2017 but the alleged misappropriations were for the years before the appellants were employed. He added that, out of 27 alleged misappropriated loans, only 4 loans were secured at the time the appellants were employed. That fact was raised even in the appellants' defence. The trial court did not take any note of that evidence. It was contended by the counsel for the respondent that the appellants were signing renewable contracts every year and 2017 contracts were the last contracts before discovery of the misappropriation. Such submission is not supported by evidence. As well submitted by the counsel for the appellant, there is no evidence proving that the appellants were employed by the respondent before 1st January 2017. The evidence regarding the appellants employment was adduced by PW6 and nowhere she mentioned that the appellants were employed before 1st January 2017. I therefore agree with the submission by the appellant's counsel that the alleged misappropriations committed before the appellants were employed cannot be blamed upon them.

Regarding the evidence in proof of the liability, while the appellants' counsel claimed that no enough evidence was tendered to prove the case on the balance of probabilities, the respondent counsel on the other hand strongly argued that the witness evidence, report, receipts and passbooks was enough to prove the case against the appellants.

I have passed through the evidence in record and the judgment of the trial court. In exclusion of the report, the evidence remaining in record is the oral testimony of PW1, PW2, PW3, PW4, PW5 and PW6. The

evidence of PW1 is based on the report he prepared and the interrogation to the members which, to him, proved that the appellants forged, stole and misappropriated the respondent's money. Other witnesses PW2, PW3, PW4 and PW5 were respondent's clients who claimed that their passbooks were forged and the appellants used the same to obtain loans. The evidence by PW6 is to the effect that he inspected 77 passbooks and discovered that they were used take loans but the same were not given to members. What was alleged by respondent's witnesses is criminal in nature but the evidence did not prove as to who forged the documents. Without proof that the said loan disbursements were a result of forgery, it cannot be said that the respondent established liability against the appellants. The Court of Appeal of Tanzania in the case of **Omari Yusufu V. Rahma Ahmed Abdulkadr, [1987] TLR 169 (CA)** held that;

" When the question whether someone has committed a crime is raised in civil proceedings that allegation need to be established on higher degree of probability than that which is required In ordinary civil cases."

Also, in the case of **Hidaya Iianga V. Manyama Manyoka [1961] EA 705**, it was held that; *"...for the proposition that in all cases where an allegation is made in civil cases akin to a crime such as fraud, proof must be more than mere balance of probabilities."*

Based on the above authorities, for the claim of forgery raised against the appellants, the onus of proving the same is much higher than it should be in civil cases. It is therefore my considered view that, a mere allegation by respondent witnesses that the passbooks were forged

without proving the same is a misconception which this court cannot rely upon.

It is also in record at page 7 of the Judgment, the trial court acknowledged to the fact that the report did not point out exactly as who among the appellants committed the wrongs on the issue of dishonest, theft and or misappropriation of the plaintiff's money but, the trial court concluded that, the claim of loan disbursed to Microfinance staffs was proved and continued in ordering payment of specific damage. While making an order for specific damage, the trial court at page 7 held;

"In tandem to this claim of loan disbursed to microfinance staffs has been proved by the prosecution side in that regard the defendants herein are ordered to pay specific damage....."

The above holding contains no evidence which was relied upon by the trial court conclude that specific damage was proved against the appellants. The exhibits that were tendered in court includes; audit report (exhibit PE1), passbooks (Exhibit PE2, PE3 and PE4) and six contracts of employment (exhibit PE5). The alleged report worth no weight in proving the liability, likewise, the said passbooks and contracts of employment have no explanation on how they are related to the forgery, stealing and misappropriation or how they proved specific damages. The witnesses who testified in court did not prove how the appellants misappropriated the money. I therefore agree with the counsel for the appellant that the suit was not proved on balance of probabilities as so required in civil cases.

Basing on the audit report, the trial court awarded specific damage. But it is settled principle of law that specific damages must be specifically pleaded and strictly proved. In **Future Century Ltd versus Tanesco, Civil Appeal No. 25 of 2014 (unreported)**, the Court of Appeal held that; *"Special damages must be specifically pleaded and proved"*. In **Harith Said and Brothers Ltd versus Martin Ngao (1981) TLR 327** it was held that;

*"Unlike general damages **special damages must be strictly proved**. I cannot allow the claim for special damages on the basis of the defendant's bare assertion, when he could, if his claim was well founded easily corroborate his assertion with some documentary evidence.*

In this case the specific damage was pleaded at the tune of Tshs.73,907,000/=. The only available evidence intending to prove specific damage is the internal audit report which this court already determined its weight in proving the allegation. There is no other documentary evidence showing the cash flow of the respondent and how the same was affected by the appellant's conducts. The trial court in its judgment at page 7 was clear that there was no proof on stealing or misappropriation of the respondent's money. I hold the same view as the evidence in record did not in anyway, establish the so-called stealing or misappropriations. But I have different view regarding the trial court conclusion that there was proof of the disbursement of loan to Microfinance staffs without indicating the evidence proving the same. Despite pleading for specific damage, the respondent's evidence proving it strictly is wanting. I therefore find merit in this point and the amount awarded as specific damages is set aside.

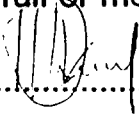
Regarding the award of general damage, the same is awardable at the discretion of the court. That was also the holding in the case of **Stanbic Bank Tanzania Limited versus Abercrombie and amp Kent (T) limited (Civil Appeal) No.21 of 2001 (unreported)**. The discretion of the court in awarding general damage is subject to proving the case on the balance of probabilities. In the case of **Antony Ngoo and Another vs. Kitinga Kimaro, Civil Appeal No. 5 of 2019 (unreported)**, at page 15 the Court held that;

"... the law is settled those general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign a reason; which was not done in this case.

Similarly, in the present case the trial court in awarding general damage relied on the report to conclude that the defendants admitted to the short falls. But the alleged admission made on the report cannot be relied upon to establish the liability against the appellants. The trial court in considering the report and the witnesses evidence concluded that the appellants were liable to pay general damages, interest and costs of the case. It is unfortunate that, while at page 7 of the judgment the trial court agreed that misappropriation was not proved to amount to the payment of specific damage, at page 8 the trial court pointed out that there was misappropriation hence allowed general damage. In my view, there was no evidence to justify the award of general damage. As I have pondered on the first ground, the internal report is not a good evidence as it was not tested by external auditor to avoid biasness. And

since the case was not proved on balance of probabilities, it goes without say that, the respondent was not entitled to general damage.

In the final analysis this court is of the settled mind that, the trial court erred in awarding specific damage and general damage basing on unsatisfactory evidence which did not prove the case on the required standards in civil cases, that is, son balance of probabilities. Having said that the case was not proved on the required standards, it goes without say that, the award of interest and costs are unfounded. It is my conclusion that, the appeal is full of merit hence allowed with costs.



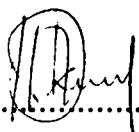
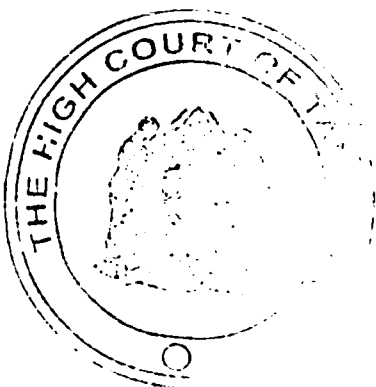
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D.C. KAMUZORA

JUDGE

22/07/2021

COURT: Judgment delivered this 22nd Day of July 2021 in the presence of Mr. Ephraim Kisanga holding brief for Mr. Silvester Kahunduka for the Appellant.



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D.C. KAMUZORA

JUDGE

22/07/2021