IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KWARIKO, J.A., And KENTE, J.A.)

CIVIL APPEAL NO. 159 OF 2020

AMI TANZANIA LIMITED.....APPELLANT

VERSUS

PROSPER JOSEPH MSELE.....RESPONDENT

[Appeal from the judgment and decree of the High Court of Tanzania, Commercial Division at Dar es Salaam]

(Magoiga, J.)

dated the 27th day of March, 2020
in

Commercial Case No. 84 of 2019

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JUDGMENT OF THE COURT

26th October & 11th November, 2021

KWARIKO, J.A.:

This is an appeal against the decision of the High Court of Tanzania, Commercial Division (Magoiga, J.) sitting at Dar es Salaam (henceforth the trial court) dated the 27th March, 2020 in Commercial Case No. 84 of 2019 in which the respondent won.

The respondent's case which comprised a total of six witnesses at the trial was as follows. The respondent (PW1), a businessman from the Republic of Zambia on 17th July, 2018 imported a consignment of 13,800 yards that is 230 bales of 100% cotton printed fabric (cargo) from

Huahong International Industry Limited through Maersk shipping line. The value of the cargo was USD 146,280.00 which was evidenced by an invoice from the supplier.

The cargo was received by the appellant a company dealing with business of clearing, forwarding, transportation and storage of containerized goods passing through the Dar es Salaam port. The cargo was intended to be delivered to the consignee in Lusaka Zambia. Even though, it transpired that, the cargo was mistakenly categorized as a local cargo upon arrival instead of a transit one. However, the point of destination was rectified on 3rd May, 2019 to be Lusaka Zambia.

It was further claimed that the cargo was a special order of one Freddie Kabole (PW2) with whom the respondent had an agreement and that he had already made a down payment of 20% for the consignment which was equal to USD 60,000.00. After completion of all customs procedures, the cargo was kept at the appellant's inland container depot (ICD) awaiting transportation to Zambia. While in that depot, the container containing the cargo was tampered with and the inspection of the same which was conducted in the presence of both parties and Tanzania Revenue Authority (the TRA) officials including one Elias

Sipemba (PW5) showed that, out of the 230 bales, only 91 were found in the container and thus 139 bales were found missing. Since the consignment was categorized as local, it was subsequently taxed at USD 0.70 per meter.

As a result of failure to reach an amicable settlement between the parties regarding the missing bales, the respondent instituted the suit before the trial court claiming for the following: Special damages of USD 500,000.00 inclusive of USD 146, 280.00 being the value of the imported cargo, unspecified port charges and the TRA payments; general damages at the tune of USD 500,000.00; loss of revenue at USD 11,500.00; interest at 16% on all monetary claims; and costs of the suit. During the trial, a bill of lading, invoice for purchase of the cargo and packing list were received and admitted in evidence as exhibits P1, P2 and P3 respectively. Others include tax payment slip, shipping line charges and cargo inspection report which were admitted as exhibits P4, P5 and P6 respectively.

On its part, the appellant presented two witnesses. In its evidence the appellant did not dispute that the consignment was received and kept at its depot and that whilst there, 139 bales were lost. However, it

disputed the value of the cargo claimed and maintained that the tampering with the cargo was neither done by its officials nor through their negligence. The appellant further maintained that according to the documents declared at the TRA, the value of the cargo was USD 50,474.88 as opposed to the respondent's claim of USD 146.280.00. According to the Operations Manager of the appellant, one Mbonea Bohela (DW1), the respondent was capable of receiving the cargo on 31st May, 2019 after the agent of the appellant amended the manifest from local to transit cargo hence the appellant had nothing to do with the loss of revenue claimed by the respondent. A screen shot of Tanzania New Customs Integrated Systems (TANCIS), a bill of lading from local to transit cargo, Tanzania single administration document showing the basis of the payment of custom duties and release order were admitted in evidence as exhibits D1, D2, D3 and D4 respectively.

At the conclusion of the trial, the trial court found the respondent's case proved and awarded the claims to the following extent: A total of USD 300, 000. 00 as specific damages inclusive of 146,280.00 the value of the cargo; port and TRA charges; and other related costs. Other awards including general damages of USD 20,000.00; interest at 7% on the award

of special damages only from the date of the cause of action to the date of judgment; and costs of the suit.

Aggrieved by that decision, the appellant filed this appeal upon the following twelve grounds, thus:

1. *That, the trial Judge erred in law and facts by relying on incredible oral evidence of PW2 to determine the value of the goods in dispute by holding in favour of the respondent that, the value of the goods under dispute stood at USD 300,000.00 and consequence thereof awarded the said amount as special damages.*

2. *That, the trial Judge erred in law and facts in failing to properly analyse the evidence on the face of record on value of the goods in dispute by invoice marked as [Exhibit P2] to a tune of USD 146,280.00, the value which was reached out based on non-specific proof and pleadings.*

3. *That, the trial Judge erred in law and facts for awarding USD 300,000.00 to the Respondent as special damages or as price of the goods by relying on incredible evidence of PW1 and PW2, while there was no privity of contract between the Appellant and PW2.*

4. *That, the trial Judge erred in law and facts by disregarding the evidence of DW1 and DW2 and Exhibits D1, D2, D3 and D4 and on authenticities of the Exhibits tendered by the Appellant on the value of the goods in dispute at USD 50,474.88 as per assessment of Tanzania Revenue Authority.*

5. *That, the trial Judge erred in law and fact by declining the validity of exhibit D3 the Tanzania single administrative document dated on 07th November, 2018 (retrieved from Tanzania Revenue Authority (TRA) System-TANCIS) on a ground that it should have been signed by the clearing agent or signed and stamped by TRA.*

6. *That, the trial Judge erred in law and facts and totally misdirected himself on principles of law by holding that, awards of specific damages are subject to exceptions from the general rule and consequently awarded the Respondent the amount of USD 300,000.00 as special damages.*

7. *That, the trial Judge erred in law and facts for awarding general damages in favour of the Respondent to a total sum of USD 20,000.00, the award which was too remote in circumstances of the case and without proof of negligence on part of the Appellant and failed to consider mitigating factors inclusive 91 bales of cotton fabrics which remained un-tampered or lost at the Appellant's ICD or yard.*

8. *That, the trial Judge erred in law and facts for awarding interest at 7% from the date of cause of action to the date of judgment,*

the claim which was not pleaded and proved at the standard required in law.

9. *That, the trial Judge erred in law and facts for heavily relying his decision on the value of the invoice [Exhibit P2] to a tune of USD 146, 280.00, without probative value of evidence and proof of payment of the imported goods in dispute and per required standards of trade.*

10. *That, the trial Judge erred in law and facts on holding that, there was proof of contract of business or transactions between PW1 and PW2 for sale of the goods in dispute of the value of USD 300,000.00 and for payment of USD 60,000.00 as down payment.*

11. *That, albeit an invoice was admitted as Exhibit P2, the trial Judge erred in law and facts by holding that, the invoice is authentic while it was not, per weight of evidence contained therein and its admission was not conclusive proof of the matters contained therein.*

12. *That, the trial Judge erred in law and facts for awarding decretal sum in favour of the Respondent without specific proof and pleadings and at the standard of proof required in law.*

In terms of Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009, both parties filed written submissions for and against the appeal which the learned counsel for the parties adopted during the hearing of

the appeal. As for the representation, Messrs. Mafuru Mafuru and Erick Magige, learned advocates appeared for the appellant and respondent respectively.

We have considered the grounds of appeal and the submissions by the counsel for the parties and found the appeal raising the following four issues:

1. Whether there was proof of the value of the cargo at a tune of USD 300,000.00 and of payment of USD 60,000.00 was made as down payment by PW2.

2. Whether the trial court was justified to award USD 300,000.00 as special damages to the respondent.

3. Whether, the trial court correctly assessed and awarded to the respondent general damages of USD 20,000.00.

4. Whether the trial court was justified to award interest at 7% to the respondent on the monetary awards above from the date of the cause of action to the date of judgment.

When he took the stage to argue the appeal, in respect of the first issue, Mr. Mafuru strongly assailed the evidence of PW1 and PW2 that there was a contract between them to the effect that the entire cargo was

a special order by PW2 who had already paid USD 60,000.00 which is equal to 20% of the price. He contended that the evidence that there was agreement between the two was tainted with a lot of contradictions and it should not have been believed by the trial court. Singling out the shortcomings of that evidence, he argued that, while in his witness statement, PW2 averred that he had pressed the order of the goods on 1st November, 2018 and signed a contract on 20th November, 2019, the alleged agreement was not tendered as exhibit. And that in his evidence in court, PW2 turned around and said that the agreement was oral. Mr. Mafuru argued further that, while in his evidence in chief PW1 averred that the two had executed a written contract, it was not tendered in evidence, and during cross-examination, PW1 said he did not know who told the truth between him and PW2. Due to these inconsistencies, the learned counsel argued that the trial court ought not to have believed that the cargo was a special order valued at USD 300,000.00 and that 20% of that amount had already been paid for. The learned counsel supported his argument by our decision in the case of **Khalife Mohamed *(as surviving administrator of the estate of the late Said Khalife)* v. Aziz Khalife and Another,** Civil Appeal No. 97 of 2018 (unreported).

On his part, Mr. Magige countered the above argument to the effect that, PW2 testified in court to confirm that there was a business agreement between him and the respondent be it written or oral. He continued that the arrangement between the two constituted a contract under the laws of Tanzania in terms of section 10 of the Law of Contract Act [CAP 345 R.E. 2019]. According to him the agreement was orally made which was in law, not invalid.

Having examined the record of appeal and considered the submissions by the learned counsel, we wish to state from the outset that what is in controversy here is whether there was a business agreement between the respondent and PW2. We are not dealing with validity of the agreement, if any, as Mr. Magige wants us to believe. Having cleared that, and upon consideration of the evidence on record, we are in all fours with Mr. Mafuru. That, much as the trial court believed that the entire cargo was a special order by PW2 and valued at USD 300,000.00 and 20% already been paid by PW2, the evidence to that effect is wanting. This is so because while the two witnesses averred that there was a written agreement to that effect, no such document was tendered and in fact PW2 turned around and said it was an oral contract. For this reason,

though the assessment of credibility of witnesses in respect of their demeanour is the monopoly of the trial court, because we are sitting as a first appellate court, we have the mandate to look into the coherence and consistency of the witnesses' account and make our own findings. See also **Khalife Mohamed** ***(as survivlng administrator of the late Said Khalife)*** (supra) cited to us by Mr. Mafuru. We have thus looked into the coherence and consistency of the account of these two witnesses and as shown above, their credibility is wanting in respect of this issue considering that it is trite law that he who alleges the existence of a certain fact must prove it. See section 110 (1) and (2) of the Evidence Act [CAP 6 R.E. 2019]. As to what was the proven value of the cargo, it is the issue which will be answered in due course. Meanwhile, the first issue is answered in the negative.

Having found that the respondent did not prove that the entire cargo was special order valued at USD 300,000.00, the question which follows is whether an award of USD 300,000.00 as special damages was justified. According to the respondent which assertion was upheld by the trial court, this amount includes the value of the entire cargo including its price paid to the supplier, shipping line charges, port charges, TRA

charges, costs of transportation and expected profit. The value of the cargo was ruled out by the trial court to be USD 146,280.00 as shown in exhibit P2, the invoice, which was sent to the respondent by the supplier. This holding has been hotly contested by the appellant. To that end, Mr. Mafuru argued that the respondent did not prove the value of the cargo. He contended firstly that, since the value of the cargo was listed in the category of special damages the same ought to have been specifically pleaded. He argued that, apart from the averment in the plaint that the destination of the cargo was Lusaka Zambia, the value of USD 146,280.00 was not stated. It was Mr. Mafuru's further argument that although the plaint had annexures including an invoice for the cargo, the same was not specifically pleaded. To support this contention, the learned counsel referred to us the Court's decision in the case of **Registered Trustees of Roman Catholic Archdiocese of Dar es Salaam v. Sophia Kamani,** Civil Appeal No. 158 of 2015 (unreported).

The learned counsel went on to argue that, the amount of USD 146,280.00 claimed and held by the trial court to be the value of the cargo was also not specifically proved. He expounded that while the respondent relied on exhibit P2, the invoice from the supplier to prove the value of

the goods, an invoice is not proof of payment for the goods supplied. He argued that, subsequent to the invoice, the respondent ought to have tendered evidence such as bank transfer of money or commercial letters of credit to prove that he had really effected payment in that respect but that in his evidence he stated that he did not have such proof. In support of the foregoing, the learned counsel referred us to a persuasive decision of the High Court of Tanzania in the case of **Lamshore Limited and J. S. Kinyanjui v. K. U. D. K** [2001] T.L.R 237 which defined the term 'invoice'. For the proof of special damages, the appellant's counsel relied on the cases of **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R 137 and **Antony Ngoo and Another v. Kitinda Kimaro,** Civil Appeal No. 25 of 2014 (unreported).

Mr. Mafuru submitted that, the respondent's failure to prove the alleged value of the cargo to be USD 146,280.00 shows that he declared a different invoice for assessment by the TRA. This is because the contents of exhibit D3, Tanzania single administrative document shows that the TRA charges were pegged at a total invoice value of the cargo at USD 50,474.88. He argued further that the trial Judge erroneously held that this document was unauthentic simply because it was not signed by

the clearing agent. He contended that as per the evidence of Leonard Justin Mutiba (DW2), a Senior Customs Officer of TRA, who was not cross-examined by the respondent's counsel, the said document was electronically generated hence could not have been endorsed by a clearing agent and that this procedure is not known to TRA. The learned advocate thus argued that this issue was invented by the trial Judge as no evidence was led to that effect. He argued that DW1's evidence was supported by a certificate as to data accuracy shown in exhibit D1 and D2, print out of the bill of lading from local to transit goods and a screen shot of TANCIS, respectively. According to Mr. Mafuru, DW1 confirmed that the TANCIS have access to the documents in respect of the imported goods at all times. To authenticate the electronically generated documents, the learned counsel referred us to section 18 (1) of the Electronic Transactions Act, 2015.

Basing on the foregoing, Mr. Mafuru concluded that the value of the cargo as it was declared in exhibit D3 is USD 50,474.88. And that in his evidence, the respondent failed to state which invoice did his agent declare to the TRA for assessment of custom duties, and that failure by the said agent to testify adversely impacted on the respondent's case.

On his part, Mr. Magige argued in respect of this issue that the evidence on record proved that the respondent effected payment for the cargo as shown by the invoice, exhibit P2. He contended that not only the trial Judge used the invoice as the value of the cargo but also from facts and other authentic documentary evidence provided by the respondent. He submitted that, to the contrary, exhibit D3 was found by the trial Judge to be unauthentic hence could not be used to prove the value of the cargo.

We have considered the contending submissions by the learned counsel. Since the trial court believed the value of the cargo to be USD 146,280.00 basing on the invoice (exhibit P2) issued to the respondent by the supplier of the goods, then it is imperative to find out the meaning of an invoice. Invoice is defined as a document or electronic statement stating the items sold and the amount payable. It is also called a bill. Invoicing is when invoices are produced and sent to customers. It is used to communicate to a buyer the specific items, price, and quantities they have delivered and now must be paid for by the buyer. Payment terms will usually accompany the billing information- see **definitions. uslegal.com**. Therefore, according to this definition, an invoice is a

statement sent to the customer describing the quantity and price of specific items for payment; it is thus not a proof of payment for the goods.

In the cited case of **Lamshore Limited and J.S. Kinyanjui** (supra) which we taken inspiration from; the High Court stated that:

> *"Pro forma invoice is indeed no such evidence of payment or any form of actually incurring expenses. Rather, it is a mere offer only and no more."*

The court went on to state thus:

> *"I would expect more evidence to support or prove the payment, say by production of receipts or bank statement or any other form of such proof to confirm the expenditure. Evidence of having opened Letters of Credit as per exhibits PII would also suffice to provide such evidence. In the absence of such evidence, I hesitate to accept there was actual expenditure of the amount as stated by the plaintiff."*

We are of the similar view that, in the absence of receipts, bank transfers of money or letters of credits by the respondent to the supplier of the

cargo, the invoice cannot be taken to be the proof of payment as it was a mere advice of the amount to be paid, it was a mere bill.

At this juncture, having dismissed the amount of USD 146,280.00 as value of the cargo, the question which follows is what was the value of the cargo? The contention by the appellant is that the value of the cargo is the one which the respondent supposedly declared at the TRA for assessment of custom duties and charges as shown in exhibit D3. This exhibit was found by the trial court to be unauthentic simply because it did not have a signature of the respondent's agent. We have considered this issue and found that exhibit D3 being an electronically generated document its authenticity cannot be easily assailed. This kind of evidence is embraced by the law under section 18 (1) of the Electronic Transactions Act (supra) which provides thus:

> *"In any legal proceedings nothing in the rules of evidence shall apply so as to deny the admissibility of the data message on ground that it is a data message."*

Whereas section 3 of that Act defines data message as follows:

> *"Means data generated, communicated, received or stored by electronic, magnetic, optical or other*

means in a computer system or for transmission from one computer system to another."

According to this provision, exhibit D3 was a data message electronically generated. The law does not require any endorsement by anyone to authenticate a data message. Moreover, DW2's evidence was not controverted. He had presented a certificate as to data accuracy in terms of section 18 (2) of the Electronic Transactions Act (supra). This was followed by admission in evidence of exhibit D3 but the issue of signature of the agent did not arise. Therefore, contrary to what the trial court decided, exhibit D3 is authentic and thus a proper document to prove the value of the cargo. DW2 stated that the cargo was valued on the basis of similar goods. The phrase 'similar goods' is described under paragraph 1 (1) of the Fourth Schedule to the East African Community Customs Management Act, 2004, R.E. 2009 as follows:

"Similar goods' means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a

trademark are among the factors to be considered in determining whether goods are similar."

By necessary implication therefore, the TRA had to base its assessment of custom duties on similar goods because as shown herein, the respondent was not clearly forthcoming with the actual value of the cargo. Hence, the respondent had failed to prove any other amount that he had paid for the cargo, and no evidence was produced as to what was the value of the cargo which his agent had submitted to the TRA. Actually, the record of appeal at page 156 when the respondent was cross-examined, he stated that he had no any proof of payment of the cargo and did not know how much his agent had declared at the TRA. The agent did not testify and the respondent did not give reason as to why the agent did not come to testify otherwise the question in relation to what was declared as the transaction value of the cargo would have been resolved.

It is our view that, the foregoing scenario indicates that the respondent did not have clean hands in seeking equity. Thus, as rightly argued by Mr. Mafuru, this failure adversely impacts on the respondent's case. It is therefore, without doubt that the respondent did not prove the value of the cargo. However, since it is not disputed that the cargo was

received by the appellant and there is evidence that customs duties were assessed on the basis of USD 50,474.88, we have no doubt that the same was valued at USD 50, 474.88 as shown in exhibit D3, the Tanzania single administrative document.

Going forward, it is trite law that special damages should be specifically pleaded and proved. There is plethora of the Court's decisions to that effect, including; **Zuberi Augustino** (supra) and **Antony Ngoo and Another** (supra), cited to us by Mr. Mafuru. In the former case, the Court held thus:

> *"It is trite law that speciai damages must be specifically pleaded and prove..."*

We have already found hereinabove that the value of the cargo is USD 50,474.88 which has been proved as special damages.

Next in the category of special damages are; payment for custom duties and port charges comprised in exhibit P4 collectively, which the trial Judge correctly awarded a total sum TZS. 7,655,609.00 only which is equal to USD 3,299.83. Other payments were done to the shipping line plus other port charges which are comprised in exhibit P5 collectively. A sum total of USD 26,298.14 was also correctly awarded under this

category. Therefore, the special damages proved is a total of USD 80,072.85. Thus, the trial court was not justified to award USD 300,000.00 as special damages and the first and second issues are answered in the negative.

The next issue which calls for our determination relates to general damages which the trial Judge awarded at USD 20,000.00. In law, general damages are awarded at the discretion of the court having considered the evidence on record and all circumstances of the case and having satisfied itself that the claimant has suffered materially or mentally following the unlawful action of the defendant. Some of our decisions which have so far interpreted this principle of law include: **Jafari Hussein Sinai and Another v. Silver General Distributors Limited,** Civil Appeal No. 271 of 2017; **Alfred Fundi v. Geled Mango and Two Others,** Civil Appeal No. 49 of 2017; and **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultants Ltd,** Civil Appeal No. 51 OF 2016 (all unreported); and **Tanzania Saruji Corporation v. African Marble Company Limited** [2004] T.L.R 155. For example, in the last cited case, the Court held thus:

> *"General damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of; the defendant's wrong doing must, therefore, have been cause, if not the sole or a particularly significant, cause of damage."*

In the instant case, the trial Judge arrived at the said figure having considered the undisputed fact that the cargo was lost while in the custody of the appellant following which the respondent had suffered mental anguish and eminent danger of losing capital in business. Similarly, in awarding the said quantum of general damages, the Judge had in mind the value of the cargo which he found to be USD 146,280.00.

The appellant has strongly contested this award. It was argued that the evidence did not prove that any negligent act of the appellant or any of her officials led to loss of the cargo and that as the premises were guarded by KK Security, she was not responsible for the loss. It was argued further that through a mistake done by the shipping line on the manifest, the cargo was categorized as local cargo instead of transit one which act led to it overstay under the custody of the appellant from September, 2018 to May, 2019, hence she was not to blame. On another

shot, Mr. Mafuru argued that in awarding the general damages, the trial Judge did not consider the fact that some 91 out of 230 bales remained intact which could have mitigated the loss but the respondent did not collect them for no apparent reason.

On the other hand, Mr. Magige countered the foregoing by arguing that, because the respondent's cargo was lost at the hands of the appellant, damages should follow to compensate him of the loss. And that the trial Judge did not err when he awarded the said quantum of general damages. To cement the foregoing, the learned counsel made reliance on the case of **Kibwana and Another v. Jumbe** [1993-1994] 1 EA 223.

On our scrutiny of the evidence on record and the circumstances in this case, consideration of general damages will be guided by the following factors: **One,** we believe that the mistake of the shipping line in the manifest by categorizing the cargo as local instead of transit one also contributed to the loss. The cargo over stayed at the appellant's ICD from September, 2018 to 31st May, 2019 when the respondent was capable of receiving it, thus attracting some unethical people to tamper with it. **Two,** had the respondent collected the remaining 91 bales, it would have mitigated the loss, but he did not give reason as to why he did not collect

that remainder. Therefore, had the trial Judge considered these circumstances, he might have come out with a lesser figure of general damages and thus the award of USD 20,000.00 was not justified. Having considered the foregoing, and bearing in mind that the value of the cargo is now less than the one which the trial court had relied upon, we think that an amount of USD 5,000.00 is sufficient to compensate the suffering of the respondent following the loss of the cargo.

The last issue concerns the interest of 7% awarded by the trial court from the date of the cause of action till judgment. In his plaint and evidence during the trial, the respondent prayed for interest of 16% on all pecuniary claims from the date of the cause of action to the date of judgment. As indicated earlier, the trial court awarded interest of 7% on the award of special damages only. The appellant has seriously contested this award. In that regard, Mr. Mafuru submitted that the respondent did not plead this claim in his plaint but only it surfaced in the contents of the prayers and also, it was not proved during the trial. In support of the contention, the learned advocate cited our earlier decision in **Zanzibar Telecom Ltd v. Petrofuel Tanzania Ltd,** Civil Appeal No. 69 of 2014

(unreported) and Order VI Rule 3 of the Civil Procedure Code [CAP 33 R.E. 2019].

Mr. Magige did not specifically argue on the issue of interest but only generally submitted that since the cargo was lost under the custody of the appellant, the respondent deserved to be compensated.

Surely, whenever a party claims for a certain relief, the same must be pleaded and its particulars given in the plaint and proved by evidence at the trial. In the case cited by Mr. Mafuru of **Zanzibar Telecom Ltd** (supra), the Court stated thus:

> *"We would like to emphasize at this stage that as a matter of substantive law, the court cannot grant interest in a case where such interest was not pleaded and proved."*

Likewise, in another case of **National Insurance Corporation (T) Limited v. China Civil Engineering Construction Corporation,** Civil Appeal No. 119 of 2004 (unreported), where the Court was faced with akin situation like the present case, it observed thus:

> *"Upon close scrutiny of the pleadings in their totality, we would agree with Mr. Mbamba* ***that the claim for the interest in controversy in***

> ***this appeai was not particularised in the body of the plaint. The pleadings did not contain any material facts on which the respondent relied upon for claiming that interest as a relief.*** *Moreover, as we shall highlight, the foundation on which the claim for interest ought to have stood was also not laid down in the pleadings."*
>
> [Emphasis ours]

As we have shown earlier, in his plaint, the respondent only prayed the interest of 16% under item (vi) of the reliefs sought. Neither did he particularize it in the body of the plaint to show why he was entitled interest nor did he give evidence to that effect in his witness statement. As it was observed in the authorities cited above, the respondent did not lay a foundation upon which to base his claim for interest. Understandably, when the trial court awarded the contested interest, it had in mind the alleged contract of business between the respondent and PW2 which we have found not proved. If that is the case, then the respondent lacks the basis upon which to base his claim. However, even if the said contract was proved to have existed, the respondent ought to have pleaded and proved the said interest. For what we have

endeavoured to explain, we find that a claim of interest was not proved and we answer this issue in the negative.

In fine and for the avoidance of doubt, the respondent is entitled to special damages of USD 80,072.85; and general damages of USD 5,000.00. Consequently, we allow the appeal to the extent shown and, in the circumstances, we order each party to bear its own costs.

DATED at **DAR ES SALAAM** this 10th day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Judgment delivered this 11th day of November, 2021 in the presence of Ms. Sia Ngowi, learned counsel for the Appellant and Mr. Erick Magige, learned counsel for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL