

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 184 /2024

CIVIL REFERENCE 20240104000000184

(Originating from the judgment and decree of the Resident Magistrate Court of Dar es salaam at Kisutu, in Civil Case no 203 of 2022 dated 6th October, 2023, Hon. U.S Swallo- PRM)

HAJI MOHAMED KINJANGA.....1ST APPELLANT

HAMOKI COMPANY LIMITED2ND RESPONDENT

VERSUS

OMARI JACOB KITORI..... RESPONDENT

JUDGMENT:

10th June & 10th July 2024

KIREKIANO, J:

The respondent herein instituted a Civil Suit before the Court of Resident Magistrate of Dar es salaam at Kisutu against the appellants claiming over fifty-five million (55,000,000/=) as compensation for breach of contract. The respondent also claimed for from the appellants punitive damages to the tune of fifty million (50,000,000/=) and thirty million (30,000,000/=) for unlawful malicious and unjustifiable act of the appellants.

In deciding the parties dispute the trial court framed three issues for determination namely; **first**, whether there was a contract between the

parties, **second**, whether there was a breach of contract and **third**, what the relief parties are entitled to.

Before I go further find if find it necessary to recap on the parties' case as it transpired. in the trial, it was (PW1 Jacob Kiitori) the plaintiff now respondent case that that he entered into a joint business with the 1st appellant whereby the respondent was to furnish capital for joint business.

Their agreement was that the appellants would be purchasing agricultural product from Tunduru area and export the same to foreign countries especially the United Kingdom of Oman. The respondent deposited into the 2nd appellant's bank account, which is the company of the 1st appellant, Tshs. Fifty million (50,000,000/=) and added five million (5,000,000/=) for transportation of goods. This was according to NMB bank Slip Dated 21.5.2021.

The appellant assured the respondent that he would earn a profit of fifteen million after one month. After a month, neither the money given to the appellant nor the profit were supplied to the respondent. The respondent continued demanding the money from the appellant, and after default he reported the matter to the police where they reduced their agreement into

writing (Exhibit P2). The appellant managed to pay eighty million, which was paid in instalments, until the matter was taken to court.

On the appellant's part, DW1 Mohamed Kinjanga he said he was the one who lent the money to the respondent. His evidence was that the respondent bought items on credit from his shop, and the debt increased to sixty-five million (65,000,000/=). After asking him to give back the money, the respondent deposited fifty million (50,000,000/=) in the account of Hamoki Company and remained fifteen million (15,000,000/=). Later on, while in Mwanza, he was arrested and brought to Central police in Dar es Salaam and asked to sign a paper (exhibit P2).

They demanded he pay five million (5,000,000/=) to be released, which he paid through his brother. He later wanted to travel to Dubai, but the police informed him that he could not travel as his fingerprints were taken. So they asked him to deposit four million (4,000,000/=) in the respondent's account so that they may settle the case with the police. He did so. He denied all the respondents' allegations and claimed that the respondents wanted to earn money fraudulently.

Upon full trial, the trial magistrate entered judgment in favour of the respondent and awarded the plaintiff Tshs. 41,000,000/= being the

outstanding principal sum and twenty million (20,000,000/=) as a general damage.

Dissatisfied the appellants have now appealed to this Court on six grounds of appeal, namely

- 1. That the trial Magistrate erred in law and fact by failing to evaluate evidence and testimony of the appellants as a result it reached at an unfair decision*
- 2. That the trial Magistrate erred in law and fact by basing her decision on a written agreement which was denied by the defendants as the same was concluded under duress and coercion and under police custody on part of the defendants*
- 3. That the trial Magistrate erred in law and fact by basing her decision on a written agreement which was bad in law as it did not pass the test of agreements requirements in the eyes of the law.*
- 4. That the trial Magistrate erred in law and fact by holding that the appellants had to pay Tshs. 41,000,000/= to the respondent while there was no any evidence to support the said amount taking into consideration of the business relationship which existed between the parties hence there was no evidence to justify the debt.*
- 5. That the trial Magistrate erred in law and fact by awarding general damages to the tune of Tshs. 20,000,000/= for which the respondent was not entitled to and that the*

general damages awarded were too much and excessive since the respondent totally failed to prove and justify the same in evidence.

6. That, in respect the facts stated in above grounds of appeal herein, the trial magistrate erred in law and fact and was biased for delivering judgment in favour of the respondent without any justifiable grounds or probable cause hence causing great injustices on part of the appellants.

When this appeal was placed before me for hearing, both parties were represented; the appellants were represented by Mr Castor A. Rweikiza, learned advocate Counsel, while the respondent enjoyed the services of Mr Anandumi Jonas Semu, Learned advocate.

This appeal was heard through written submissions, and both parties complied with the submission schedule. I take note here that their submissions are not evidence. Instead, the parties' case on evidence already tendered.

In support of the 1st and 4th ground of appeal, Mr Rweikiza, for the appellant, argued that the respondent failed to demonstrate the existence of the Contract, which could provide for terms and conditions. It was his submission that, in paragraphs 6,7 and 8 of the plaint, the respondent claimed to have entered into an oral agreement but no proof of the same.

He submitted that the amount deposited did not indicate for purpose the same was deposited and under which terms.

With regards to the 2nd ground, Mr. Rweikiza submitted that the document, which is termed a contract (Exhibit P2), was signed by the 1st appellant while in custody and after being put under torture and a lot of beatings. In his view, since it was signed under coercion, the same is illegal and void ab initial He referred to Section 10 of the Law of Contract, Cap 345 R.E 2019.

On the third ground of appeal, he submitted that Exhibit P-2 (Contract) was invalid as it was not attested by a commissioner for oath. He cited Section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12. He argued that the contract was illegal as it was not stamped under the **Stamp Duty Act, Cap 189**. He cited the case of **Zakaria Barie Bura vs Theresia Maria John Mubiru [1995] TLR 211** to fortify his stance.

Coming to the 5th ground, the appellant argued that the trial Magistrate was unfair when granted a total of Tshs. 20,000,000/= to the respondent as general damages. It was his submission that the respondent did not prove on the balance of probability whether he was entitled to the general damages awarded to him. He argued that the trial magistrate did not establish which

loss the respondent suffered as per the evidence tendered. He referred to the case of **Amandus Ziky Masinde vs Nyamsera Maruma, Civil Appeal No. 88 of 2016** (unreported) and the Case of **Anthony Ngoo & Another vs Kitinda Kimaro, Civil Appeal No. 25 of 2014, CAT at Arusha**, pg. 15 on principles to be followed in awarding general damages.

The respondent, through Mr. Semu resisted the appeal. Regarding to the 1st and 4th ground of appeal, he replied that the respondent produced a bank slip and a loan settlement agreement as evidence which was not objected by the appellant, while on the party of the defence, the appellant did not bring any evidence to disapprove the same.

He cited the case of **Remigius Alphonse Msutta Administrator of the estate of the late Alphonse Msutta vs Andrea Alphonse Msutta (Administrator of the estate of the late Peter Alphonse Msutta and Another, Land Appeal no. 24 of 2023** referring the case of **Mclver vs Power, and cited Section 115 of TEA, Cap 6 R.E 2019** that it was the burden of the appellant to prove facts within his the knowledge.

On the 2nd and 3rd grounds, the respondent responded that the contract that existed was an oral contract, and there was no coercion involved, as the appellant alleged.

In answering the 5th ground, Mr. Semu defined what amount to general damages as per the **Black Law Dictionary** and went on arguing that the Resident Magistrate was correct to grant the Respondent the general damages of Tshs. 20,000,000/=, since he was entitled to receive 15,000,000/= after one month according to their agreement, but more months passed without profit.

He referred to the case of **Vidoba Freight Co. Limited vs Emirates Shipping Agencies T Ltd & Another (Civil Appeal 12 of 2019) 2022 at pg. 10**. He distinguished the cited case of **Antony Ngoo (supra)**, as in the said case there was no reason given for award of general damages.

On the sixth ground of appeal, he reiterated on what he submitted earlier in the 1st and 4th ground and added that the respondent proved the case to the required standard.

In rejoinder submission the appellant reiterated what he submitted in chief and added that the profit of Tshs. 15,000,000/= per month as submitted by the respondent exceeded 25% as per the B.O.T interest rate per annum, and that the respondent imposed the amount which is unacceptable. He cited the case of **Engen Petroleum (T) Limited and Tanganyika Investment Oil and Transport Limited, Civil Appeal No.**

103 of 2003 (unreported) CAT at Dar es Salaam. The learned counsel also argued this Court to allow the appeal.

Having gone through the record of appeal and the submissions as laid down by the parties, this being a first appeal, this Court is enjoined to re-evaluate the evidence on record and, in the process, may come up with its own finding. There are plenty of decisions on this position, including **Stanislaus Rugaba Kasusura and Another vs Phares Kabuye [1982] TLR 338.**

On the second ground of appeal, the complaint was that the written contract was signed while the appellant was at the police station. The fact that the agreement was signed at the police station is not evidence that force was used. However, I have examined Exhibit P2, and the same lack of authenticity, lacking the signing date and witness before whom the contract was purportedly signed. I will thus allow this ground and consider other evidence available.

I will now address the 1st, 4th and 6th grounds of appeal, which boil down to one complaint of evaluation of the evidence,

The testimony of respondent PW1 at the trial Court was loud that the 1st appellant is the one who persuaded him to invest in the Sesame business

on the consideration of the respondent to deposit Tshs. 50,000,000/= into the appellant's account and 1st appellant assured him that he would earn a profit of 15,000,000/= after one month. So, the said money was deposited on 21/05/2021 to the 2nd appellant's account. Later, the appellant demanded Tshs—5,000,000/=, collected at the respondent's office. Neither cash nor profit were paid to the respondent as agreed. Thus, the respondent reported the matter to the police station, where the said agreement was reduced into

I have also considered the appellant's (DW1) evidence at the trial that the respondent was buying on credit from his shop, whereby the debt increased to 65,000,000/=and that the appellant asked him to pay the money before being given another consignment and deposited Tshs. 50,000,000/= in the account of the 2nd appellant.

I have considered this evidence; while the respondent categorically stated in the plaint the basis of the deposit of the said Tshs 50,000,000, the appellant's evidence, as it appeared in the trial, did not feature in the written statement of defence. If the respondent owed him the balance of Tshs 15,000,000, he was expected to plead the same.

In its evaluation, the trial Court found that the respondent proved that there was an agreement between him and the appellant and that the money was Tshs. 50,000,000/= was deposited to the appellant's account. It held

"Since in the present case, the defendant strongly disputed the payment of Tshs. 50,000,000/= through the bank account of the 2nd defendant, the allegation that the money was a debt for goods supplied is an afterthought. The analysis of the above evidence does not leave doubt that the plaintiff's case is heavier than that of the defendant. The plaintiff has proved that there was an agreement between him and the defendant and that he deposited Tshs. 50,000,000 in the defendant's account."

The evidence on record (Exhibit P1) shows that the respondent deposited the money to the second appellant. PW1's oral account supports the reason for the deposit. The plaintiffs did plead, and his oral account substantiated the existence of the oral agreement. Looking at the evidence on record, a substantial amount was paid to the second defendant before Exhibit P2 was made.

This is to say the oral agreement was already made before default, forcing the parties to prepare Exhibit P2. In this case, even without Exhibit P2, which I shall address shortly, the existence of the contract was

established by the oral account of PW1. This Court believes that the trial court's finding was justified; therefore, the 1st, 4th, and 6th grounds fail.

The third ground of appeal was that the agreement had no test of written agreement. Having addressed Exhibit P2 and resolved the 2nd ground in the affirmative, this ground should not detail me.

Regarding the fifth ground on general damages, the appellant is complaining that the respondent did not prove, on the balance of probability, whether he was entitled to the general damages awarded to him. He submitted that the amount of Tshs. 20,000,000/= was awarded without considering what loss or what the respondent has suffered by the appellant not paying Tsh. 50,000,000/=.

General damages are meant to put the injured party or a person who has suffered damage in the same position he would have had he not suffered damage. These damages are awarded in recognition of harm which arises directly and inevitably from a breach of contract. In other words, in violation of the contract, those damages would be theoretically suffered by every injured party.

There are several authorities to support his proposition including **P.M. Jonathan v. Athuman Khalfan [1980] TLR 190**, and **Peter Joseph**

Kilibika & CRDB Bank public company Ltd V. Patrick Aloyce Mlingi (CAT) Civil Appeal No. 37 of 2009, In the later case of Peter **Kilibika** citing **Privy Council in Nance v British Columbia Electric Raily Co. Ltd (1951) AC. 601 at page 613** it was stated as under,

"Whether the assessment of damages is by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case. Before the appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage...."

Now, in this appeal, I have taken note of the amount involved in the breach of contract, which is Tshs 41,000,000. According to the plaint, the respondent claimed interest, general damages, and punitive damages, amongst other reliefs. It is on record that in the assessment of general damages, the learned trial magistrate, in her judgment on page nine (9) stated that:

"In the present case, it is for this court to determine whether the plaintiff is entitled to general damages. The plaintiff is a

business man doing various business and he invested the money in the defendant's business expecting to earn profit, if the money was invested in other business, he could have earned much profit. Since he expected the profit of Tshs. 15,000,000 promised by the defendants and until now he has not realized the profit, in my discretion I award him Tshs 20,000,000 as general damages for loss of business."

Looking at the above extract, it would appear that the trial court considered all harm and loss incurred and lumped the same into one pot of general damages. With respect, I am unable to subscribe to the route taken by the trial court. Some losses ought to be proved explicitly before general damages are brought into play, and other redress ought to be dealt with by award of interest. In this, I find that the prize of Tshs 20,000,000 was applied on the wrong principle; my conclusion is fortified by the decision by this court (Makaramba, J as he then was) in **Amandus Ziky Masinde vs Nyamsera Marumba (HC Civil Appeal 88 of 2016) [2018] TZHC 2954 (24 April 2018)** where he held

In the absence of evidence by the Plaintiff/Respondent to prove any loss naturally and directly flowing from the breach of the loan agreement and failure by the plaintiff to prove the actual amount of

his loss, this was clearly a case for award of nominal damages.

Because of the above, the award of Tshs 2,000,000, as I hereby do, would have served the justice of the case. The fifth ground is allowed to the extent indicated.

Before I pen off, I am aware that the court can not award the relief not claimed; in this appeal, there was no complaint of the trial court's finding of interest from the date of the breach to the date of judgment. However, the court's interest ought to be awarded, given Order XX rule 21 **Civil Procedure Code Cap 33 [RE 2019]**. This is a statutory interest that brings a sense of responsibility to parties to satisfy court awards in a timely manner.

I thus award court interest at 7% from the date of Judgement (of the lower court to final fulfilment). All said, and based on the above reasons, save for the reduced damages and award of 7% interest. This appeal is partly allowed to the extent indicated. In that circumstance, each party shall bear its costs.



A. J KIREKIANO

JUDGE

10.07.2024.

COURT:

Judgement was delivered in the chamber in the presence of Miss Beatrice Tonya, holding the brief of Mr Castor Rweikiza, counsel for the appellant and in the respondent's absence.



A. J KIREKIANO

JUDGE

10.07.2024