

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A And MDEMU, J.A.:)

CIVIL APPEAL NO. 82 OF 2016

FELICIAN MUHANDIKIAPPELLANT

VERSUS

THE MANAGING DIRECTOR,

BARCLAYS BANK TANZANIA LIMITED.....RESPONDENT

**(Appeal from the judgment of the High Court of Tanzania,
at Dar es Salaam)**

(Mkasimongwa, J.)

Dated the 29th day of April, 2015

In

Civil Appeal No. 157 of 2013

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JUDGMENT OF THE COURT

5th & 20th February, 2024.

MAIGE, J.A:

Operating a bank account at the respondent's bank, the appellant issued cheques No. 100440 dated 31st January, 2009 worth USD 1,687.20 (exhibit P2) and No. 100441 dated 2nd February, 2009 worth USD 2,786.80 (exhibit P1) payable to Mugwaya Preparatory School and Sacred Heart Primary School both in Uganda, respectively. The purpose behind issuance

of the cheques was to clear the school fees of the appellant's children who were studying in the respective schools.

It happened that when the two named cheques were deposited by the payees for payment through their banks, they were each returned to them with a remark "refer to the drawer" signifying that the appellant's account had insufficient funds. As a consequence thereof, the payees informed the appellant what transpired and requested him to pay the relevant school fees as soon as possible otherwise his children would be expelled from school. When the appellant approached the respondent, however, the latter expressly apologized to the two collecting banks maintaining that her representation on status of the appellant's account culminating in the dishonour of the cheques was by mistake (exhibits P16 and P17).

Unhappy with what happened, the appellant commenced a suit against the respondent, at the District Court of Ilala (the trial court) for negligence. He claimed for payments of USD 5,000.000 as general damages, USD 5,640.48 as special damages and interest thereon at the bank rate from 15th May, 2009 to the date of judgment. In addition, he prayed for interest on the decretal sum from the date of judgment to the date of payment in full.

The trial court held that the respondent acted negligently in the process and, therefore, it awarded him all the reliefs sought in the plaint with costs. On appeal, the High Court of Tanzania at Dar es Salaam (the High Court) concurred with the trial court with its finding on there being negligence and the award of USD 5,640.48 as special damages. The point of departure between the two courts below on which we have been called upon to determine is on the appropriateness of the quantum of general damages and pre-judgment interest on both general damages and special damages.

As we said above, the trial court awarded general damages of USD 5,000,000 and interest on both special damages and general damages from 15th May, 2009 to the date of judgment. On top of that, the appellant was awarded costs. To the extent as aforesaid, the appellant was aggrieved and thus appealed to the High Court. The High Court having reappraised the evidence was of the conclusion that, the assessment of general damages by the trial court was erroneous in principle as the amount awarded was unreasonably excessive. It thus quashed the amount of USD 5,000,000.00 awarded by the trial court and substituted it with the amount which is equivalent to TZS 50,000,000.00. Besides, it quashed the interest on general damages and special damages at the Bank rate from 15th May, 2009 to the

date of judgment and replaced it with interest at the court rate from the date of judgment to the date of full settlement of the decretal sum.

The appellant was aggrieved by the said decision and he has thus instituted the current appeal faulting the trial court for; **one**, unreasonably reducing general damages from USD 5,000,000.00 TZS 50,000,000.00; **two**, not confirming the interest on the special damages awarded by the trial court; **three**, unreasonably denying him costs of prosecution of the suit.

At the hearing of the appeal, the appellant was represented by Mr. Francis Mgare, learned advocate whereas the respondent had the services of Mr. John Ignace Laswai, also learned advocate. As per the requirement of rule 106 of the Tanzania Court of Appeal Rules, 2009, both parties had, before hearing, filed the relevant written submissions. When invited to make oral arguments, each of the counsel fully adopted his written submissions with few highlights. We commend them for their well-researched submissions which have been very helpful in composition of this judgment.

With those remarks, we shall consider the merit or otherwise of the appeal starting with the validity of the decision of the High Court to interfere with the factual finding of the trial court on assessment of the quantum of general damages.

In support of this ground, it is Mr. Mgare's submission that; the reduction of the quantum of general damages from USD 5,000,000.00 to TZS 50,000,000.00 by the High Court was an error. He assigned three reasons to justify his contention. **First**, the High Court concurred with the trial court that the established negligence on the part of the respondent directly resulted into inconveniences, embarrassment, humiliation, mental torture and blood pressure on the part of the appellant. He submitted, therefore, that as the said injuries were the basis of the award of general damages by the trial court, the High Court as first appellate court was not expected to reduce the same.

Second, assessment of damages is within the discretion of the trial court. In law, he submitted, the first appellate court could not interfere with such discretion by substituting a figure of its own unless it was satisfied, which was not, that the trial court applied a wrong principle of law or the amount awarded is inordinately low. Our attention was drawn to the authorities in **The Cooper Motors Corporation Ltd v. Moshi/Arusha Occupational Health Services** [1990] T.L.R. 96 and **Materu Leison and J. Foya v. R. Sospeter** [1998] T.L.R 102.

Third, the High Court did not properly exercise its discretion in substituting the quantum of general damages without explaining the basis for such substitution. As such, he submitted, the decision of the first appellate court in that respect was without reason.

In response, Mr. Laswai submitted that; as the first appellate court, the High Court was entitled to reevaluate the evidence and come up with its own conclusion. In the instant case, he submitted, the appellant quantified the amount of general damages which in law was not proper. That apart, he submitted, the trial court awarded the claim in the pleadings as they were without demonstrating how it arrived at the said figure. In his view, that was an abuse of the court discretion as the decision in question was not based on fact, logic and reason, and, therefore, arbitrary. He prayed, thus the appeal be dismissed with costs.

We, in the first place, entirely subscribe to Mr. Mgare's submission that; assessment of damages is within the discretion of the trial court. It is, however, our understanding of the law that, for a decision arising there from to be valid, the discretion must have been exercised reasonably, judiciously and on sound legal principles. If that is not, it is the law, the correctness of such assessment by the trial court can be a subject of

determination on appeal. There are numerous decisions supporting this position. See for instance, **Swabaha Mohamed Shosi v. Saburia Mohamed Shosi**, Civil Appeal No. 98 of 2018 and **Cooper Motors Ltd.**(supra). It follows, therefore that, where the exercise of the discretion of the trial court was injudiciously exercised, the first appellate court is not only entitled but has a duty to interfere with it where the result thereof leads to miscarriage of justice.

In principle, general damages are awarded based on reasons founded on evidence. See for instance, **Swabaha Mohamed Shosi v. Saburia Mohamed Shosi** (supra) and **Anthony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (both unreported). In particular, in the latter case, it was observed:

" The law is settled that 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 reasons."

The issue which follows, therefore, is whether the trial court's determination of the quantum of general damages was based on reasons founded on the evidence on the record. The answer is certainly no for the

reasons to be apparent gradually as we go along. The trial court's determination of both general and special damages appears at page 265 of the record of appeal which we shall, for clarity, reproduce hereunder:

"I have given due consideration of the facts of this case and considered the evidence, and reasons addressed by both parties before this honourable court. I venture to entertain no doubt that in the present case the defendant cannot exonerate from damages suffered by the plaintiff as a result of the defendant negligence act. Within the traditional framework of the law, justice, required not only that it was fair for the plaintiff to receive the claimed amount, but also that it is fair for the defendant to pay it. Thus, this court cannot shut its eyes to the realities of the situation".

In effect, what can be gathered from the above statement is that; as a result of the respondent's wrongful act, the appellant is entitled the claimed amount. What is the reason behind and how did the trial court arrive to such a conclusion is not in the judgment of the trial court. Mr. Mgare suggests in his submissions that the quantification of the general damages by the trial court was based on the inconveniences, embarrassment, humiliation, mental torture and blood pressure which resulted from the wrongful act in question.

With all respects, we are unable to agree with him. The discussion by the trial judge on the said five heads of injuries appears at page 296 of the record of appeal. It is as follows:

"I have to make up my mind on whether the defendant's act of returning the plaintiff's cheques to the payee caused inconvenience, embarrassment, humiliation, mental torture and blood pressure. It is my considered opinion that this court has to take a realistic view of the matter at hand. The critical factor is not the negligence act of the defendant but rather the manner upon which the plaintiff has suffered as a result of the defendant negligent act. However, the defendant's failure to unclear the cheques are not entirely irrelevant. It is undisputed fact that the defendant's failure to clear the plaintiff cheques caused him incontinence, embarrassment, humiliation and mental torture."

It seems to be clear to us that; in the above statement, the trial court was determining the causal connection between the respondent's negligence and the heads of personal injuries in question which is an aspect of remoteness of damages. It was not, as suggested by Mr. Mgare, dealing with measurement of damages which is the arithmetic calculation or computation

of how much money must be paid by the party in default to the party suffering from such default.

Yet on the same point, it was submitted that in the absence of reason, the High Court could not, as it did, substitute the award of the trial court with its own figure unless there is violation of the basic principles of law. We have, however, shown that the measurement of general damages by the trial court was not on reasons founded on evidence as the law requires. That by itself was a violation of the basic principles of law as above stated and thus justified the first appellate court to, upon reassessment of evidence, come up, as it did, with its own conclusion. This is in line with the authority in **Cooper Motors Ltd** (supra) where it was observed:

*"....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 (by 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 inordinately high that it must be a wholly erroneous estimate of the damages**"*

The High Court is also on the same ground, faulted for unreasonably substituting the amount of damages from USD 5000,000.00 to TZS

50,000,000.00. With respect, the criticism is without justification. In our reading, the High Court judge assigned reasons why he reduced the amount awarded by the trial court. He was categorical that the amount of USD 5,000,000 was unreasonably excessive. This is in line with the principle in **Cooper Motors Ltd** (supra).

We wish to say further that, unlike in special damages where the court can arrive to a particular figure basing on pleadings and evidence, in general damages where the claim is generally pleaded, what the court is required to do is to consider some factors from evidence upon which it will, using common sense and experience, decide what amount is in the circumstances, appropriate. As can be seen from page 388 of the record of appeal, in measuring the quantum of general damages, the first appellate court considered among others, the established five heads of injuries and the undisputed amount of special damages already awarded to the appellant.

Considering that the appellant was awarded special damages as pleaded and the value of the dishonored cheques was paid, we see no reason to depart from the figure of the general damages awarded by the first appellate court. The first ground of appeal is thus without merit and it is hereby dismissed.

We proceed with the second ground as to interest on special damages. The appellant prayed for interests at bank rate as of the date of the accrual of the cause of action to the date of judgment. The trial court awarded as sought. The first appellate court, however, quashed it and maintained the interest on the decretal sum from the date of judgment to the date of final payment. No specific reason for the reversal is express in the judgment. Section 29 of the Civil Procedure Code (the CPC) which talks about interest provides as follows:

*"29. The Chief Justice may make rules prescribing the rate of interest which shall be carried by judgments debts and, **without prejudice to the power of the court to order interest to be paid upon to date of judgment as such rates as it may deem reasonable**, every judgment debt shall carry interest at the rate prescribed from the date of delivery of the judgment until the same shall be satisfied. "*

The above provisions, in our reading, recognize two kinds of interest namely; pre-judgment interest and post-judgment interest. The former, which is the subject of this contention, relates to the debts which are due as of the date of the accrual of the cause of action. The liability of such interest,

it would appear, does not arise from the respective provision. What the provision does, is to recognize the inherent power of the court to award such category of interest. As we understand the law, in the absence of express or implied term in a contract or statute, such liability would arise from common law by virtue of section 2(3) of the Judicature and Applications of laws Act. Thus, in **Engen Petroleum (T) Limited v. Tanganyika Investment Oil and Transport Limited**, Civil Appeal No. 103 of 2003, (unreported), the Court awarded pre-judgment interest from the date of accrual of cause of action to the date of judgment basing on the common law principle that debts arising from commercial transactions attract interest as a matter of mercantile practice. See also **Mollel Electrical Contractors Limited v. MANTRAC Tanzania Limited**, Civil Appeal No. 394 of 2019 and **Yara Tanzania Limited v. Ikuwo General Enterprises Limited**, Civil Appeal No. 309 of 2019, (both unreported).

Conversely, the interest involved in this is not on a debt arising from commercial transaction. It arises from special damages. The issue is whether under common law, special damages attracts interest. The answer is certainly yes. This is because, under common law, interest is awarded so as to compensate the plaintiff for not having the money during the period for

which it was due and unpaid. It doesn't matter whether the money was due under a contract, statute or for any other reason. On this, the following statement in the English case of **Riches v. Westminster Bank Ltd** [1947] A.C. 396 may be pertinent:

"The essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied, or a statute or whether money was due for any other reason"

Similarly, in **Hurbutt's "Plasticine" Ltd v. Wayne Tank and Pump Co. Ltd** [1970] 1 Q.B. 447 it was observed as per Lord Denning at page 468 thereof as follows:

"The basis of award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had used the use of it himself. He ought to have compensated the plaintiff accordingly."

Applying the above principle in the instant case, therefore, it is our view that; as the undisputed special damages under discussion emanate from the actual expenses the appellant incurred as a result of the respondent's negligence, the same was due and payable as of the date of accrual of the cause of action and, therefore, it attracts interest. The third ground of appeal thus succeeds. Consequently, the order of the High Court quashing interest on special damages from the date of accrual of cause of action to the date of judgment is quashed and set aside. It is instead replaced with a decree of interest on the same at Bank rate as of the date of the accrual of cause of action to the date of judgment.

There was also a submission for the appellant that interest on decretal sum from the date of judgment to the date of final payment was awarded without the interest rate being mentioned and thereby making the execution of the decree problematic. There was no comment on that from the counsel for the respondent. With respect, the complaint is valid. We think, it was an oversight for the two courts below to award interest on decretal sum from the date of judgment to the date of full settlement of the same without stating the rate. We agree with Mr. Mgare that, without specifying what is the rate of interest, it will be difficult to execute the decree. Under Order XX

rule 21(1) of the CPC, the rate of interest on decretal debt is between 7% and 12% per annum. We accordingly vary the decree of the High Court so that the award of interest on the decretal sum from the date of judgment to the date of final settlement is 7% per annum.

This now takes us to the last ground as to denial of costs of prosecution of the proceedings at the trial court. As the record shows, while the trial court granted a judgment in favour of the appellant with costs, the High Court, on appeal, ordered that each party should pay its own costs. Seemingly, this was because the appeal partly succeeded. That was not improper. It is our view, however, that; as the trial court's determination on the negligence of the respondent and its direct consequences to the injuries sustained to appellant has not been disturbed in the first appeal but only the quantum of general damages, the respondent cannot escape from being blamed for the costs of prosecution of the suit at the trial court. He can only be partly excused for the costs of prosecution of the appeal to the High Court. We, therefore, uphold the finding and order of the trial court as to costs.

In the final result, the appeal partly succeeds to the extent of the second and third grounds of appeal. Consequently, the award by the trial court of interest on special damages at the Bank rate from the date of accrual

of cause of action to the date of judgment as well as the costs of prosecution of the suit are upheld. Further, the award of interest on the decretal sum from the date of judgment to the date of full settlement of the same is varied so that the rate of interest shall be 7% per annum. Each party shall bear its costs in the circumstances.

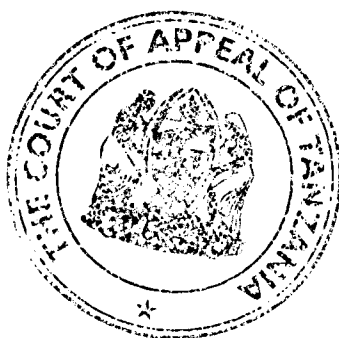
DATED at DAR ES SALAAM this 19th day of February, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 20th day of February, 2024 in the presence of Mr. Francis Mgare, learned counsel for the Appellant and Ms. Prisca Nchimbi, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "J. J. Kamala".

J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL