IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 166 OF 2020

(Appeal from the Judgment and Decree of the District Court of Kinondoni at Kinondoni in Civil Case No. 195 of 2019 before Hon. Donasian, **RM** dated 08th June, 2020.)

MULTICHOICE TANZANIA LIMITED .... APPELLANT

VERSUS

MAIMUNA K. KIGANZA .... RESPONDENT

JUDGMENT

01st June, 2021 & 02nd July, 2021.

E. E. KAKOLAKI J

In this appeal which is contested by the respondent, the appellant is challenging the decision of the District Court of Kinondoni in Civil Case No. 195 of 2019 handed down on 08th June, 2020, which was entered in favour of the respondent. He is equipped with eight grounds of appeal which I shall state soon. However I find it apposite to state the background story that gave rise to this appeal albeit so briefly.

Before the District Court of Kinondoni in Civil Case No 195 of 2019, the respondent successfully sued the appellant for infringement of Copyright and

Neighbouring Rights of her protected film titled **Penzi Biashara**. It was pleaded in her plaint that the appellant via her Digital Satellite Television (DSTV) **Channel 160 Maisha Magic Bongo** aired the respondent's motion picture (film) titled **"Penzi Biashara"**. Evidence was tendered during the trial to prove that the alleged broadcasted film was registered by respondent and issued with Copyright clearance certificate (Exh. P3) from COSOTA, Permit No. 006900 and certificate of stage performance (Exh. P1) from Tanzania Film Board. Further to that the respondent adduced evidence to exhibit the costs incurred during preparations of the film in a bid to prove the damages claimed. The appellant on her part through her Written Statement of Defence denied the respondent's claims asserting that being licenced to provide subscriber management services only, such as operating a call center and collection of subscription fees from customers, she does not own the alleged Digital Satellite Television (DSTV). In furtherance to that denial the appellant averred there was authorization and approval obtained from the authorised distributor by the responsible channel, **Maisha Magic Bongo** prior to airing the alleged film. In attempt to justify that defence the appellant sought and was granted with leave of the court to file a third party notice against the alleged owner of the said movie. She however later on decided not to pursue it and entered defence on her own. After full hearing the trial court found the respondent's case was proved and ordered the appellant to pay the respondent a total of Tshs. 56,273,000/= as specific damages, Tshs. 140,000,000/= general damages for economic and moral rights, interest of 7% to the awarded amount from the date of institution of suit to the date of judgment and 12% from the date of judgment to the date

of full satisfaction of the decree. Further to that appellant was condemned to pay costs of the suit. It is from that decision the appellant being aggrieved party preferred the present appeal fronting eight grounds as registered hereunder:

1. That the trial Magistrate erred in law and fact by failure to properly analyse, evaluate and consider the evidence adduced by the Plaintiff in support of her claim.
2. That the trial Magistrate erred in law and fact by failure to consider inconsistences in the Plaintiff's evidence and in particular, admission in cross-examination of the Plaintiff's witnesses.
3. That the trial Magistrate erred in law and fact in failure to find that the testimony led by the Plaintiff did not prove the case against the Defendant at all or to the required standard.
4. That the trial Magistrate erred in law and fact by imposing in the Defendant, the liability of a party distinct from the Defendant and no party to the proceedings, despite evidence to the contrary.
5. That the trial Magistrate erred in law and fact by failure to consider the effect of lack of evidence or the purported breach following Plaintiff's testimony that she did not witness the acts or omissions said to constitute the infringement.
6. That the trial Magistrate erred in law and fact by awarding the plaintiff specific damages without being strictly proved.
7. That the trial Magistrate erred in law and fact by awarding general damages arbitrarily and in the absence of evidence to support the relief.

8. That the trial Magistrate erred in law and fact by 12% interest at commercial rate on decretal amount for non-liquidated damages and in the absence of the contractual clause for payment of interest.

Basing on those grounds the appellant is praying this court to quash the judgment and decree of the trial court and allow the appeal with costs.

Both parties in this appeal appeared represented and were heard viva voce. While the appellant hired the services of Mr. Jovinson Kagirwa learned advocate, the respondent was defended by Mr. Sijaona Revocatus learned advocate. As Mr. Kagirwa took the floor first, the Court was informed that, he would combine the 1st, 2nd,3rd,4th and 5th grounds and argue them jointly and together while the rest of the grounds were to be canvassed separately.

Submitting on the 1st, 2nd,3rd,4th and 5th grounds of appeal Mr. Kagirwa faulted the trial magistrate for failure to analyse the evidence adduced during hearing when answering an ancillary issue as to whether the said film was broadcasted or not by making a finding that, that fact was neither disputed nor were the plaintiff's witnesses cross-examined on that aspect. He said PW2 and PW7 when cross-examined at page 25 and 26 and page 35 of the typed proceedings respectively said they did not see for themselves the said movie being broadcasted through DSTV. Citing he case of this court in **The National Microfinance Bank (NMB) Vs. Chama Cha Kutetea Haki na Maslahi ya Walimu Tanzania (CHAKAMWATA)**, Civil Appeal No. 17 of 2019 (HC-unreported) where the importance of the court to evaluate evidence before making a finding was overemphasised, Mr. Kagirwa argued had the trial magistrate analysed the evidence properly he would have found

the issue as to whether the movie was broadcasted and done so by the appellant was not proved to the required standard.

As regard to the 6th ground, he submitted the awarded specific damages of Tshs. 56,273,000/= were granted to the respondent without justification and in contravention of the guiding principle as the same were neither specifically pleaded nor strictly proved. As to the 7th ground he contended the general damages of Tshs. 140,000,000/= awarded to the respondent were against the established principle that, general damages are awardable where there is direct, natural or probable consequences of the action complained of. To reinforce his argument the court was referred to the case of **Tanbic Bank Tanzania Limited Vs. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 (CAT-Unreported) at pages 15 and 16, where guidance on how general damages are to be granted under court's discretion were provided. And on the 8th ground he complained the interest of commercial rate of 12% awarded to the respondent on the decreed amount was wrongly awarded as there was no agreement between the two imposing contractual interest. He said under the Civil Procedure Code interest is grantable at the rate of 7% where there is no agreement like in this case. On the basis of that submission he prayed this court to allow the appeal and set aside the judgment and decree of the trial court.

Mr. Revocatus for the respondent resisted the appellant's submission submitting that, the trial magistrate was right in arriving at the decision he reached. He said he would only be faulted for granting the respondent inadequate or minimal amount of general damages. On the appellant's submission in support of the 1st, 2nd,3rd,4th and 5th grounds of appeal as

argued jointly he submitted, the fact that PW2 and PW7 testified not to see the movie aired on the Television did not negate the fact that the said film was aired by the appellant, as it remained undisputed fact the movie which is the respondent's property was actually aired by the appellant. He contended the appellant in his WSD at paragraph 5 did not deny to have aired the said movie when averred that, the approval to air it was obtained from the legal owner of movie and not the respondent. The said legal owner was not brought to court to prove the alleged ownership nor was the third party joined as intended by the appellant/plaintiff to answer the claims and bear the liabilities should the case be decided against the appellant. Thus the issue whether the same was aired or not by the appellant and seen by the respondent was not at issue except the fact as to whether it was aired with or without respondent's consent, the fact which was proved in that it was done without her consent. He added the respondent also proved she is the sole owner of the said movie.

With regard to the 6th ground of appeal he responded, specific damages were pleaded in paragraph 3(b) of the Plaint and not general damages which were Tanzanian Shillings Four Billion (Tshs. 4,000,000,000/=). On general damages as submitted in the 7th ground Mr. Revocatus argued, at page 16 of the typed judgment the trial magistrate gave reasons as to why he arrived at such amount awarded which to him was rightly arrived. As regard to the complaint in the 8th ground on interest awarded to the respondent it was countered by Mr. Revocatus that the same was correctly awarded. In summing up he prayed this court to find the appeal is without merit and

proceed to dismiss it with costs. Further to that he urged the court to increase the general damages awarded to the respondent.

In rejoinder submission Mr. Kagirwa concerning the 1st,2nd,3rd,4th and 5th grounds of appeal he challenged Mr. Revocatus's submission putting that it is not true that the appellant admitted to have aired the alleged movie as what was stated in paragraph 5 of the WSD was in furtherance of what had been stated in paragraph 4 of the said WSD where the appellant denied to have aired the movie. That the said denial is also captured at page 41, 42 and 43 of the typed proceedings when DW1 was testifying in favour of the appellant. He added PW1 the witness from COSOTA testified there was another person who claimed ownership of the movie "Penzi Biashara", thus there was not proof that it was the respondent who was owning that movie which allegedly was aired by the appellant. Likewise he submitted there was no evidence that the said movie was aired by the appellant which evidence if is considered by this court in its totality including the testimony of witnesses during cross-examination, it will be appreciated and found the trial court misdirected itself in such important matters hence entered incorrect judgment. As to the rest of the grounds he reiterated his earlier submissions during submission in chief as well as the prayers.

Having gone through the entire record and considered the fighting oral submissions from both counsels, I am set to determine each and every ground as argued. On the 1st,2nd,3rd,4th and 5th grounds of appeal as argued together it is true as submitted by Mr. Kagirwa that the trial magistrate misdirected himself when found the disputed movie was aired on the ground that, that fact was neither disputed nor cross-examined by the appellant

when her witnesses were testifying, contrary to the admission by PW2 and PW7 when cross-examined that they did not watch the said movie with their naked eyes aired in the DSTV channels. The case of **National Microfinance Bank** (supra) for that matter was relevant as when analysing evidence the learned trial magistrate ought to have considered that piece of evidence. However, as also rightly submitted by Mr. Revocatus, the submission which I embrace, failure of PW2 and PW7 to witness the movie aired in the claimed DSTV channel does not negate the fact that the said movie titled ***"Penzi Biashara"*** was broadcasted through the Digital Satellite Television (DSTV) managed and owned by the appellant in one of its channels " **Maisha Magic Bongo**" as the appellant could not have managed the services of subscribers without coordinating the contents aired by DSTV which is satellite television. My finding is premised on the established principle of law that parties are bound with their pleadings. In paragraph 4 of her WSD and evidence adduced through DW1 it was stated that, the appellant though not owning DSTV provides management services of its subscribers. Despite of the appellant disowning DSTV in paragraph 4 of her WSD went further in paragraph 5(i) and (ii) to state, the authorization and approval to air the said movie was obtained by the responsible channel, Maisha Magic Bongo from the legal owner through a licence agreement dated 16th October, 2017 by the authorized distributor. DW1 when testifying apart from failure to prove that the authorisation to air the said movie was obtained from the alleged owner as claimed in paragraph 5(ii) of WSD, disclaimed and contradcted appellant's defence saying was not aware who supplied the said facts. Now the one million dollar question is how could the appellant could raise a

defence in her WSD that the movie was aired with authorization of its owner without coordinating the contents broadcasted in the Digital Satellite Television (DSTV). The answer to the question is very obvious in that, being not only a coordinator but also the manager of DSTV subscribers' services, the appellant cannot disown the liability on the unauthorised aired movie. In the light of the above reasoning, there is no reason for me to fault the trial magistrate's finding that the appellant being manager of DSTV's services coordinated even contents of the services to be aired in the satellite from Tanzania. I therefore find the 1st,2nd,3rd,4th and 5th grounds of appeal devoid of merits and dismiss them.

Next for consideration is the appellant's complaint in the 6th ground of appeal that, the awarded specific damages of Tshs. 56,273,000/= to the respondent was without justification and in contravention of the guiding principle as the same was neither specifically pleaded nor strictly proved. It is true and I agree with Mr. Kagirwa that it is a principle of law that special damages must be proved specifically and strictly as it was held in a number of cases. See the cases of **Strabag International (GMBH)** (supra), **Stanbic Bank Tanzania Limited Vs. Abercrombie & Kent** (T) Limited, Civil Appeal No. 21 of 2001 (CAT-unreported), **Zuberi Augustine Vs. Anicet Mugabe** (1992) TLR 137 at page 139 and **Masole General Agencies Vs. Africa Inland Church Tanzania** (1994) TLR 192, just to mention few. I only disassociate with his submission on the point that, the damages awarded was not specifically pleaded and strictly proved at all as apart from being pleaded some of the damages were proved. I will tell why.

As rightly argued by Mr. Revocatus, the respondent in paragraph 3(b) of the plaint specifically pleaded a claim of Tshs. 200,000,000/- as special damages. The said paragraph reads:

> *3(b) An order for payment a total of Tanzania Shillings Two Hundred Million (TZS 200,000,000/= being damages suffered consequently as a result of the infringement including all the profits enjoyed by the Defendant.*

Reading from the above paragraph it cannot be concluded as claimed by Mr. Kagirwa that the specific damages was not pleaded. In awarding the contested amount of Tshs. 56,273,000/= grated by the trial court on account of not being challenged by the appellant, the learned trial magistrate itemised eight items which I find it apposite to examine each and every one in seriatim, since this Court being the first appellate court has powers to appraise the evidence and see whether the conclusion reached by the trial court should stand or not. It is common knowledge that where there is misdirection and non-direction on the evidence or misapprehension of substance, nature and quality of the evidence by the lower court, an appellate court is entitled to look at the evidence and make its own findings of fact. See the case of **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported).

The first item for consideration is on the costs for Shooting and Editing the movie where the trial court awarded the respondent damages of Tshs. 3,000,000/= which I find was not proved. It was PW7's evidence at page 34 of the typed proceedings that, he was contracted to shoot the movie at consideration of Tshs. 1,500,000/= in which the amount was paid straight

to him while the duplication and artwork was to be performed at consideration of Tshs. 800,000/=. However, though not cross-examined by the appellant on that amount, the witness did not tell the court whether the agreement was in written form or oral nor did he exhibit the alleged payments made to him through receipts as the respondent was duty bound to strictly prove that expenditure as claimed. As to item two Tshs. 150,000/= awarded for hiring artists, PW2 in her testimony at page 23 of the typed proceedings apart from stating that 5 actors out of 27 participants were paid between Tsh. 20,000/= and Tshs. 30,000/= per day depending on duration of performance, did not tell the court whether they were actually paid or not and how much was paid to them if any to justify the award of Tshs. 150,000/=. I therefore find this item was not proved.

Coming to the third item on payment of Tshs. 93,000/- as fees paid to the registration Board during registration of the movie, I find the same was also not proved apart from being stated by a lawyer from Film Board of Tanzania (PW4) that, the respondent paid Tshs. 93,000/= as there was no payment receipt tendered and received by the court to exhibit that payment. As to the fourth item of Tshs. 5,120,000/= as costs for cosmetics and makeups for 27 actors/actress, I find the same was proved though the amount awarded as indicated in the judgment is less. PW5's testimony at page 30 of the typed proceedings in my view proved the claim when testified as a saloon owner that, she was contracted under oral agreement by PW2 for provision of makeup and hair dressing services to 27 actors/actresses under consideration of Tshs. 15,120,000/= but was only paid 3 million as advance payment as the rest of the amount was to be paid upon sale of the movie.

So the respondent was entitled to Tshs. 15,120,000/= and not Tshs. 5,120,000/=.

Next for consideration is the award of Tshs. 20,410,000/= for food and drinks costs as per item five. In this PW2 testified she incurred costs for food and drinks the evidence which was corroborated by PW6 at page 32 of the typed proceedings that under oral agreement she supplied food and drinks to PW2 for 72 days. And that PW2 owed her Tshs. 15,410,000/= as she was paid only 2 million in October 2016 as advance and 2.5 million in November which payment makes a total of agreed amount to Tshs. 19,410,000/= and not Tshs. 20,410,000/= as awarded by the trial court. I therefore find the same was proved but to that extent. On item six of Tshs. 4,500,000/= for Transportation (minibus coaster), I make a finding that the same was awarded on speculation as it is not backed by any evidence of being claimed by the service provider and paid by PW2. With regard to item number 7 on the award of Tshs. 10,000,000/= I find the same was proved as PW4 in his evidence testified PW2 was indebted 10 million for hiring his hall during movie preparation as the claimed amount was to be paid later, according to their oral agreement. As the appellant never cross-examined the witness on the validity of that claim an inference is drawn that she admitted it hence proof of the award. Lastly is on the award of Tshs. 3,000,000/= for sound track and graphic in item 8 in which PW2 during her testimony in court claimed to have incurred. Apart from so claiming the respondent tendered no documentary evidence nor did she call the person who rendered the alleged sound track and graphic services to justify the claims. It is my conviction therefore, this award was unjustifiably granted. With such analysis

the only remaining proved specific damages are the awards in item 4 for Cosmetics and makeups for 27 which in fact was supposed to be Tshs. 15,120,000/= but due to topographical error the awarded amount reads Tshs. 5,120,000/=, item 5 which the proved amount of specific damages is Tshs. 19,410,000/= for supply of food and drinks to PW2 instead of Tshs. 20,410,000/= and costs for hiring the hall under item 7 which is Tshs. 10,000,000/= all making a total of Tshs. 44,530,000/=. The rest of the amount as held above was not strictly proved as required by the law. The 6th ground partly has merit and is allowed to that extent.

Coming to the 7th ground of appeal where the appellant is faulting the trial magistrate for awarding general damages of Tshs. 140,000,000/= to the respondent against the established principle that it is awardable where there is direct, natural or probable consequences of the action complained of, Mr. Revocatus is of the contrary view that the same was correctly reached as the trial magistrate supplied his reasons for the decision. **General Damages** are damages that the law presumes to have resulted from the defendant's tort or breach of contract. It is therefore aimed at restoring the injured person to the position he/she was before infringement of his/her rights. This stance is fortified with the Court of Appeal decision in the case of **Stanbic Bank Tanzania Limited** (supra) when quoted with approval the wisdom of Asquith, C.J in **Victoria Laundry Vs. Newman** [1949] 2 K.B 528 at page 539 when said:

> *"Damages are intended to put the plaintiff ...in the same position, as far as money can do so, as his rights had been observed."*

The Court went on to further adumbrate by stating that:

"Damages, generally, are:-

> *That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation. See Lord* ***Blackbum in Livingstone V. Rawyards Coal Co.*** *(1850) 5 App.Cas at page 39."*

Travelling in line of the above cited cases it is clear to me now that, general damages is awardable to repair the injuries sustained to the party for the wrong committed to him. In awarding the said Tshs. 140,000,000/= at page 16 of the typed judgment as submitted by Mr. Revocatus the trial magistrate was justified by assigning reasons. To let the judgment speak I quote part of it at page 16 where it reads:

> *"The plaintiff is also entitled to remedy of legitimate expectation from her work which proved to be profitable as it was aired by the defendant in various dates. Thus, the plaintiff is entitled to general damages to the tune of Tshs. 140,000,000/= for economic and moral rights."*

In my considered opinion the learned trial magistrate was correct to award the said amount after considering the fact that the respondent's rights were infringed. As held herein above when determining the 1st,2nd,3rd,4th and 5th grounds of appeal jointly and together, I found the appellant aired the respondent's move without her authorization hence infringement of her copyright rights as he registered her movie with COSOTA. By airing the said movie the appellant suffered her loss of expected income which she would

have earned upon sale of the said movie as it was rendered unmarketable for being aired in the TV. It is the law that, appellate court can interfere with the finding of the lower court only where the court has misdirected itself or has acted on matters it should not have acted on or has failed to take into consideration matters which it should have considered, hence arrival into wrong conclusion. See the case of **Credo Siwale Vs. The Republic**, Criminal Appeal No. 417 of 2013 when cited with approval the case of **Mbogo and Another Vs. Shah** (1968) EA 93. In this matter the appellant has not advanced material evidence to establish even on of the factors mentioned above to warrant this court interfere with the findings of the trial court. I therefore dismiss this ground of appeal.

Lastly is the 8th ground of appeal where the gist of the complaint is that, the award of interest rate of 12% of the decreed amount from the date of judgment to the date of full satisfaction of decree without existence of agreement was in contravention of the guiding principle under the Civil Procedure Code, [Cap. 33 R.E 2019] (CPC). On this I disagree with Mr. Revocatus's contention that the same was correctly entered as under section 29 read together with Order 20 Rule 21 both of the CPC, the rate of 12% interest from the date of judgment to the date of full satisfaction of decree is grantable only where there is express agreement or consent by the parties before or after delivery of judgment. The provision of section 29 of the CPC provides thus:

> *29. The Chief Justice may make rules prescribing the rate of interest which shall be carried by judgment debts and, without prejudice to the power of the court to order interest to be paid*

upon to date of judgment at such rates as it may deem reasonable, every judgment debt shall carry interest at the rate prescribed from the date of the delivery of the judgment until the same shall be satisfied.

And Order 20 Rule 21 of the CPC reads:

21.-(1) The rate of interest on every judgment debt from the date of delivery of the judgment until satisfaction shall be seven per centum per annum or such other rate, not exceeding twelve per centum per annum, as the parties may expressly agree in writing before or after the delivery of the judgment or as may be adjudged by consent.

The above provisions of the law were well interpreted in the Court of Appeal decision in the case of **Njoro Furniture Mart Ltd Vs. Tanzania Electricity Supply Co Ltd** [1995] T.L.R 205 at page 210 when confronted with more or less similar situation to the one at hand, where it had this to say:

"As to the matter of interest, it is apparent from the provisions of s. 29 of the Civil Procedure Code, read together with R 21 of Ord 20 of the same Code that interest is payable on a judgment debt 'from the date of delivery of the judgment until the same shall be satisfied,' under r 21 of Ord 20, 'the rate ... shall be seven per cent annum or such other rate, not exceeding 12 per cent per annum as the parties may expressly agree in writing before or after the delivery of the judgment or as may be adjudged by consent."

In the present matter there is no evidence to prove that parties had expressly agreed before or after judgment to have the rate of interest of 12% apply to the awarded amount from the date of judgment until the date of satisfaction of the decree. I therefore find the learned trial magistrate was not justified to award that interest rate of 12% to the respondent as the applicable rate is 7% which I hereby substitute with.

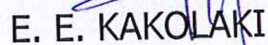
For the above stated reasons and applying the revisional powers of this court I set aside the awarded damages of Tshs. 3,000,000/= as costs for Shooting and Editing the movie, Tshs. 150,000/= for hiring artists, Tshs. 93,000/- as fees paid to the registration Board during registration of the movie, Tshs. 4,500,000/= for Transportation (minibus coaster) and Tshs. 3,000,000/= for sound track and graphic as the same were not proved as already found in ground 6 of the appeal herein above. Further to that the interest rate of 12% awarded to the respondent on judgment debt from the date of judgement to the date of full satisfaction of the decree is also set aside and substituted thereof with 7% interest rate save for the interest of 7% from the institution of suit to the date of judgment and costs of the suit which remain undisturbed. For avoidance of doubt the respondent in addition to the interest rates above stated is entitled to award of Tshs. 15,120,000/= as costs for cosmetics and makeups for 27 actors/actress, Tshs. 19,410,000/= as costs for food and drinks, Tshs. 10,000,000/= as costs for hiring a hall, all costs totalled to Tshs. 44,530,000/= and Tshs. 140,000,000/= as general damages.

In the final analysis therefore, this appeal partly fails and partly succeeds to the extent explained above.

I order no costs to any party concerning this appeal.

It is so ordered.

DATED at DAR ES SALAAM this 02nd day of July, 2021.



E. E. KAKOLAKI

JUDGE

02/07/2021

Delivered at Dar es Salaam in chambers this 2nd day of July, 2021 in the presence of Mr. Jovinson Kagirwa and Ms. Neema Richard Advocates for the appellant, Ms. Tuklage Frank advocate holding brief for Mr. Sijaona Revocatus advocate for the respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.

E. E. Kakolaki

JUDGE

02/07/2021