

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 84 OF 2019**

**PROSPER JOESPH MSELE ..... PLAINTIFF.**

**VERSUS**

**AMI TANZANIA LIMITED ..... DEFENDANT.**

**Date of Last Order: 24/02/2020**

**Date of Judgement: 27/03/2020**

**JUDGEMENT**

**MAGOIGA, J.**

The plaintiff, PROSPER JOSEPH MSELE by way of plaint instituted the instant commercial suit against the above named defendant praying for judgement and decree in the following orders, namely:-

- (i) That the defendant pays the plaintiff the total sum of USD.500,000.00 (say Five Hundred Thousand United State Dollars) as per paragraph 3 hereinabove which is equivalent to Tshs.1,137,500,000.00 (Say Tanzania shillings One Billion One Hundred Thirty Seven Thousand Five Hunderd Thousand Only).
- (ii) That the defendant pays the plaintiff the sum of USD.500,000.00(say Five Hundred Thousand United State

Dollars Only) as general damages subject to the discretion of the court being the plaintiff suffered equivalent to Tshs.1,137,500,000.00 (Say Tanzania Shillings One Billion One Hundred Thirty Seven Thousand Only)

- (iii) The defendant to pay USD.11,500.00 (Say Eleven Thousand Five Hundred United State Dollars equivalent to Tshs.26,450,000.00 (Say Twenty Six Million Four Hundred Fifty Thousand Only) as a loss of revenue per day from the date the 230 bales of printed cotton fabric were to be handled over by the defendant to the plaintiff to the judgement date.
- (iv) Loss of profit to the tune of USD. 146,280. Equivalent to Tanzania Shillings 332,787,000.00
- (v) That the defendant pays interest on all the pecuniary claims above referred at the rate of 16% from the date of cause of action till judgement.
- (vi) That the defendant pays the costs of and incidental to this suit.
- (vii) Any other relief(s) that this Honourable Court may deem fit to grant.

Upon being served with the plaint, the defendant in her written statement of defence disputed all claims of the plaintiff and eventually invited this Court to dismiss this suit with costs.

The facts of this commercial dispute as gathered from the pleadings are not complicated. On 17<sup>th</sup> July 2018 the plaintiff imported a consignment of 13800 yards/230 Bales of 100% cotton printed fabric 24\*24 , 72\*60, 46\*47 from Huohong International Industry Limited through shipping line and later to Dar es salaam port on transit to Zambia. The facts go further that as per the Standard of Operating Procedures (SOP) signed between the Terminal Operators that is Tanzania Ports Authority (TPA), (TICTS) and Inland Container Depot Operators represented by (CIDAT) which came into force on 1<sup>st</sup> November, 2009. The ICD, the defendant is appointed by the shipping line/agent to be the custodian of the imported containers discharged from particular vessels operated by the shipping line/agent and collects the containers from the terminal operator for custody at its premises and perform subsequent delivery to consignees on behalf of the shipping line/ agent in accordance with customs procedures.

Facts went on that the Inland Depot Container (the defendant) has a duty to ensure safety of the consignment. After all customs procedures were

completed in respect of the plaintiff's consignment while under the care and custodian of the defendant, it was realized that the said consignment seals are broken and or tampered with; a matter which was witnessed by all relevant authorities including the defendant's operations manager. Upon inspection done by the relevant authorities, it was discovered that out of 230 bales of 100% cotton printed fabric, 139 bales were missing. At all material time the container and the items contained therein were under the defendant's custody and due to his negligence, the plaintiff's 139 bales went missing causing the plaintiff not to meet his business expectations and as such suffered special and general damages, the subject of this suit, hence this judgement.

At all material time, the plaintiff has been enjoying the legal services of Mr. Eric Magige, learned advocate. On the other hand, the defendant has been enjoying the legal services of Mr. Mafuru Mafuru, learned advocate.

Before hearing started the following issues were proposed by the parties and consequently agreed by the parties learned counsel and were recorded by the Court for the determination of this suit, namely:

1. Whether the plaintiff is entitled to USD.500,000.00 being specific damages to cost of goods lost while under the custodian of the defendant.
2. Whether the plaintiff suffered loss of profit and revenue and to what tune
3. To what reliefs parties are entitled to.

When hearing started, the plaintiff called 5 witnesses and tendered 6 exhibits in his endeavors to prove his claims. On the other hand, the defendant called 2 witnesses and tendered 4 exhibits to disprove the claims of the plaintiff.

The plaintiff led by Mr. Erick Magige, learned counsel under oath testified as PW1. Testifying through his witness statement which was adopted as part of his testimony in chief-PW1 told the Court that he was the owner of the consignment in the container No. SCMU 2043701 with a bill of lading No. 583321810 whose consignment was stolen at AMI TANZANIA (T) LIMITED (ICD) inland container depot. To prove his ownership of the consignment PW1 tendered a bill of lading No. 582221810 which was admitted in evidence and marked exhibit P1.

PW1 went on to tell the Court that the container, contained 13800 yards/230 bales of 100% cotton printed fabric 24\*24 , 72\*60,46\*47 from Huahong International Industry from China. It was further testimony of PW1 that the said container was tampered with, and 139 bales of the said container out of 230 bales were stolen, remaining only 91 bales of the said cargo, which matter was reported at police in the ICD for action. In proof of the stolen bales, PW1 tendered in evidence examination remarks –AMI ICD which was received in evidence and marked exhibit P6. According to PW1 the theft occurred due to recklessness of the employees of the defendant. PW1 went on to tell the court that the value of the consignment was USD 146,280.00 (say USD One Hundred Forty-Six Thousand, Two Hundred and Eighty Only). In proof of the value of the consignment PW1 tendered an invoice of USD.146,280 which was admitted in evidence and marked exhibit P2. Another exhibit tendered by PW1 was the packing list which was admitted in evidence and marked exhibit P3. PW1 went on to tender receipts in Tanzania shillings which were admitted in evidence and marked exhibit P4 totaling Tshs.30,572,638.00 (but when added were only for Tshs.7,655,609.00) as expenses he incurred in facilitation of the release of the consignment to Zambia. Another evidence tendered by PW1 was

exhibit P5 which are several receipts in USD amounting to USD.30,552.00 (but when added was only USD.26,308.00) which were charges PW1 paid to shipping line, the defendant and other related expenses to enable escort to Zambia of the consignment which was a special order of Mr. Freddie Kabole who testified as PW2. Further claims of the plaintiff was payment of USD.500,000.00 as general damages. On that note and evidence PW1 claimed for judgement and decree as prayed in the plaint.

Under cross examination by Mr. Mafuru, learned counsel for defendant PW1 told the Court that he has been in the business for over 15 years. PW1 told the court that according to exhibit P2 the value of the consignment was USD.146,280.00. PW1 when shown the plaint and asked whether he claimed USD.146,280.00 he replied that he claimed more than USD.146,280.00. When pressed further with questions, PW1 said that the invoice which is exhibit P2 shows the value was USD.146,280.00. PW1 told the Court that exhibit P6 shows the lost luggage was under the custody of the defendant when went missing. As to USD 50,474.68 were the value that was lodged at TRA. The amount of USD.500,000.00 claimed according to PW1 was inclusive of all specific claims and USD.146,280.00 was his capital to the consignment. PW1 further explained that the claim of

USD.500,000.00 included the capital, charges, TRA taxes, and profit he was to earn from selling the consignment. The other claim of USD.500,000.00 was general damages as when the consignment got lost he suffered a lot. PW1 under cross examination said that he never asked his agent how much he declared and he did not know if there was undervaluation of the consignment.

Under re-examination PW1 told the court that he gave the agent an invoice of USD.146,280, bill of lading and it was through those documents his luggage was accordingly charged. The other claims were USD.30,552 being port charges and profit after sale which makes the total specific damages to the tune of USD.500,000.00. The loss, PW1 was referring was after the loss he could not make business anymore for all his capital was tight up in the consignment. That was all about the testimony of PW1.

The second witness for plaintiff was FRED KABOLE, who testified under oath as PW2. PW2 told the Court that he resides in Lusaka Zambia and has been doing business with the plaintiff over five years. PW2 went on telling the Court that on 1<sup>st</sup> day of November 2018, he called the plaintiff and pressed an order for the cotton fabric material and that they signed an agreement on 20<sup>th</sup> November 2018. (It should be noted no contract was



tendered to prove this fact). According to PW2, the consignment was USD.300,000.00. PW2 went to tell the Court that he paid 20% of the sale price and the balance was to be paid upon delivery. PW2 said the consignment was to arrive by November 2018 but it was not the case and it was until June 2019 when the plaintiff called him to inform him of the loss of the said consignment. PW2 told the court that he demanded his USD.60,000.00 paid in advance plus interest since the said money was borrowed from a friend as he needed to pay it back. PW2 told the Court that he was also affected by the loss because part of his capital was held up in the consignment and prayed that if the plaintiff is paid he will be able to pay him back and continue with his business. PW2 tendered no exhibit at all.

Under cross examination by Mr. Mafuru, learned counsel, PW2 told the Court that it is true they signed an agreement and then immediately changed the story that they just agreed everything verbally. PW2 pressed with questions said that he ordered the container and the agreed price was USD.300,000.00 and that he paid 20% of the price which was USD.60.000.00. which was paid in cash on mutual trust. PW2 said was expecting the goods in late November, 2018 but was called by PW1 after a

lapse of 8 months in June 2019. On the loan, he took from a friend it was the testimony of PW2 that same was equally taken orally. PW2 admitted that he has never opened a case against PW1 for the money.

Under re-examination PW2 said the agreed price was USD.300,000.00 and he paid USD.60,000.00 as advance payment and the balance was to be paid upon delivery of the goods. This marked the end of testimony of PW2.

The next and third witness for the plaintiff was ISACK RICHARD KACHOMA who testified as PW3. PW3 under oath through his witness statement adopted in court as his testimony in chief, told the Court that he is working with Tanzania Revenue Authority in the TMU (Transit Monitory Unit). PW3 went on to tell the Court that he remembers that on 24<sup>th</sup> May 2019 was informed by Officer in charge of his department that he should get prepared to escort the container with No.SCMU 2043701 and bill of lading No. 583321810 to Tunduma, Tanzania and Zambia border. PW3 went on to tell the Court that on 2<sup>nd</sup> June 2019 he was again informed by his in charge that the said container he was to escort has been tampered with and the following day was sent to verify which exercise was done in the presence of other TRA officers at Dar port, the owner of the consignment and his lawyer and clearing agent and AMI operation manager. According to PW3, it was

eventually discovered that Customs seals No. 1201962 were removed and 230 bales stolen and a report was prepared for what happened. PW3 never tendered any exhibit.

Under cross examination by Mr. Mafuru, learned advocate for defendant, Pw3 told the court that in his witness statement he did not indicate or state who tampered with or stole the consignment.

Mr. Magige, learned counsel for plaintiff had nothing to re-examine PW3.

When asked by the Court to clarify if the defendant was present during verification exercise, PW3 told the Court that the consignment was at AMI compound and AMI were involved in the verification exercise.

The next witness for plaintiff was THERESIA SEBASTIAN SHAYO, who testified as PW4. PW4 under oath and speaking through her witness statement told the Court that she works with Tanzania Revenue Authority with Transit Monitoring Unit (TMU). PW4 told the Court that on 01<sup>st</sup> day of July 2019, she was assigned by her boss to work on file No. MDW/AMI/OFF/01/06/2019 of AMI and the plaintiff with regard to 139 bales of fabric vitenge missing. PW4 went on to tell the Court that 91 bales were there and contacted the plaintiff's advocate of the way forward of the

remaining vitenge. The learned counsel for plaintiff wrote the Commissioner for Customs and Excise that they will not take the remaining consignment as the order was very specific to specific customer for will be more loss for them to transport the remaining 91 bales. PW4 went to tell the court that upon that written reply the Commissioner decided to tax the missing vitenge.

Mr. Mafuru, learned advocate, had nothing to cross examined this witness, nor was she re-examined. Responding to clarification from the Court, PW4 told the Court that the remaining bales were never assessed after the plaintiff refused to take them.

The last witness for plaintiff was ELIAS SIPEMBA, who testified as PW5. Under oath, PW5 through his witness statement told the Court that he works with Tanzania Revenue Authority with Customs and Excise department. PW5 remembers that on 3<sup>rd</sup> June, 2019 he was assigned by his boss to verify the lost consignment in container No.SCMU 2043701 and bill of lading No. 583321810 owned by, one, Prosper Joesph Msele (the plaintiff). PW5 further testimony was that after the exercise they verified that 139 bales of printed fabric (vitenge) were missing and only 91 remained intact. PW5 told the court further that he was assigned to prepare

tax assessment since it now localized and he assessed the consignment at the unit price of USD.0.70 per square meter. PW5 went on to explain that the said bales were assessed at that price because there was an official email by Commissioner to do so.

Under cross examination by Mr. Mafuru, PW5 told the Court that he has been working with TRA for over 12 years. PW5 told the Court that his duties are collection of taxes and preventing tax evasion. PW5 admitted to have done the assessment and was done at USD.0.70 per square meter. The assessment, according to PW5, was done under the new customs integrated system based on rates which similar goods have been taxed. PW5 could not remember how much was assessed nor meters of the container.

Under re-examination by Mr. Magige, learned advocate, PW5 said the rate of USD.0.70 was new direction by the Commissioner to apply.

This marked the end of evidence for the plaintiff.

The defendant to disprove of the plaintiff's claims, called two witnesses. The first witness for defendant was Mr. MBONEA BOHELA –DW1. DW1 under oath prayed that his witness statement and his certificate as to data

accuracy be adopted as his testimony in chief. DW1 told the Court that he is the Operations Manager of the defendant tasked with managing all daily operations of the defendant since 2012. DW1 told the Court that he denies all the claims by the plaintiff contained in the plaint for payment of USD.500,000.00 as specific damages and USD.500,000.00 as general damages. According to DW1, the value of the consignment in dispute was assessed by TRA and was found to be at USD.50,474.88 per fixed on board price value. And regards should be that out of 230 bales, 139 bales got lost and 91 remain in the custody of the defendant and in commensuration with its value, hence for mitigation of the value of the total loss of all the bales from the internal container depot of the defendant contrary to what is claimed by the plaintiff though further still denied by the defendant.

Further testimony of DW1 was that the said consignment upon arrival of the bales in the Internal Container Depot (ICD) of the defendant, TANZANIA INTERNATIONAL CONTAINER TERMINAL SERVICES (TICTS) allocated the consignment to the defendant being a local consignment as indicated in the shipping line vessel's manifest discharge list in TANCIS system (TANZANIA NEW CUSTOMS INTEGRATED SYSTEM) which mentioned the place of destination of the consignment as TZDAR which means TANZANIA DAR ES

SALAAM and not Zambia. In proof of this, DW1 tendered in evidence the screen short of TANCIS manifest system as exhibit D1.

DW1 went on to tell the Court that after receiving the goods/bales of the plaintiff by the defendant as from September,2018, the bales at the ICD of the defendant remained at the ICD under control of TRA to 31<sup>st</sup> May, 2019 when the said loss was detected. According to DW1, the plaintiff only became capable of receiving the cargo on the 31<sup>st</sup> May, 2019 and the defendant has nothing to do with the loss of the business and revenue suffered by the plaintiff per day, and if any, for not being responsible for overstay of the goods at the ICD.

Further testimony of DW1 was that, it was only on 3<sup>rd</sup> day of May, 2019, when the agent of the plaintiff made an amendment of the manifest for the consignment to be on transit cargo. DW1 in proof of this tendered in evidence bill of lading from local to transit which was admitted as exhibit D2.

Under cross examination by Mr. Magige, learned advocate for plaintiff, DW1 told the Court that his duties are to supervise the container that are received from port after arriving to their yard for safety and keep them in

good order till the client comes. DW1 admitted that theft can happen and in the instant case, the theft occurred when the consignment was in their yard and under their control. DW1 went to tell the Court that they have security measures in their yard. DW1 insisted that the destination of the cargo was in Dar and not Zambia. DW1 when shown exhibit P1 and asked on destination of the cargo, he insisted that the one showing Zambia was changed. DW1 went to tell the Court that payments to them are done after a client clear with port and TRA issues based on handling, storage and clearance. According to DW1, the value of the consignment was USD.50,000.00. DW1 pressed with more questions he said that their charges are based on release order and delivery order. DW1 told the Court that the verification of the consignment was done before other Government authorities such as police, TRA, TBS, Security and himself were present. DW1 told the Court that in the release order price of the consignment is always written. According to DW1, the release order is given by TRA which has all details, value of the consignment inclusive. Bill of lading, according to DW1, has also details of destination, among others.

Mr. Mafuru, learned advocate, has nothing to re-examine DW1.



DW1, when asked by the Court some question for clarifications, told the Court that this is their first case of theft and same is still being investigated. DW1 told the Court that during verification he was present and witnessed the loss and there is no dispute that there was loss due to theft but what they dispute is the value claimed. DW1 further admitted that they were paid all their dues.

The next witness of the defendant was Mr. LEONARD JUSTIN MTIBA-DW2. DW2 under oath through his witness statement and certificate as to date accuracy adopted as his testimony in chief told the Court that he is a Senior Customs Officer of TRA stationed at headquarters and is responsible with training users, support users and maintaining TRA systems including TANCIS. DW2 told the Court that in the course of his daily duties he access to TANCIS in which all records of business transactions, payments, received goods from different ICDS, data stored in TANCIS under TRA. DW2 tendered in evidence Tanzania Single Administrative document which was admitted as exhibit D3.

DW2 tendered in evidence release order dated 16<sup>th</sup> day of May, 2019 for the release of the goods as on 31<sup>st</sup> day of May, 2019 to wit; 230 bales importer being the plaintiff declared destination being Lusaka, Zambia.

DW2 further told the Court that the plaintiff presented importation documents to TRA and TRA accessed the value of the imported goods based on value provided in the submitted commercial invoice which was USD.50,474.88 per fixed price value. DW2 went on to tell the Court that upon arrival of the bales at Internal Container Depot (ICD) of the defendant, Tanzania International Container Terminal Services (TICTS) allocated to the defendant as local consignment and the place of destination was Dar Tanzania. DW2 told the Court that at his official capacity and to his knowledge, it was only on 2<sup>nd</sup> day of May 2019, the amendment of the bill of lading No.583321810 for the consignment of the goods in dispute was amended following, among others, the request to change destination of the cargo made to become a transit cargo from Dar to Zambia. DW3 tendered in evidence Release Order which was admitted as exhibit D4.

Under cross examination by Mr. Magige, learned advocate, DW2 told the Court that his duties are training new employees of TRA, to support the users of the system and reply to all inquiries on the system. DW2 pressed with questions told the Court that he came to testify that the documents tendered were from their system. According to DW2, assessment undergo several considerations depending on the circumstances. In the instant case,

according to DW2, the goods were textiles. DW2 told the Court that during valuation process is when the actual value of goods is known. The agents may have his value, but after identification of the goods or similar goods, then the Commissioner of Customs and Excise gives guidelines and what should be the value based on similar goods. The agent when under value the goods, TRA uses the similar good prices to determine the price. DW2 when pressed further admitted that the delivery place was Lusaka, Zambia. Further DW2 told the Court that the value of the consignment became the tax base. DW2 told the Court that at times they require bonds when goods on transit. The security bonds, according to DW2, perfects the whole cargo. Mr. Mafuru, learned advocate had nothing to re-examined DW2.

DW2 when asked questions for clarification from the Court told the Court that the value of taxes paid to TRA was TShs. 92,736,458.00. DW2 further clarified that the value of the good is higher than the taxes to be paid.

This marked the end of hearing of the case for defence.

The learned counsel for parties' prayed to file their final written submissions. I granted the prayer and directed that same be filed within 7 days from 24/02/2020 as per Rule 66 (1) of this Court's Rules as amended.

I have had an opportunity to read their respective final written submissions and I am indebted to them. Further, I record my gratitude and commend them for their insightful research on this suit. In the course of determining issues in this suit based on evidence on record will be refereeing to them here and there, but where I may not, it suffices to say, I have given them due consideration and the weight they deserve.

The task of this Court now is to determine the merits or otherwise of this suit. However, it is worth to note at this juncture that based on the evidence on record there are some facts not in issue inter parties, which will make easy the work of this Court. These are; **one**, there is no dispute that the plaintiff's 139 bales out of 230 bales of printed fabric kitenge destined to Lusaka, Zambia were stolen while under the control and storage of the defendant. This undisputed fact is proved by contents of exhibits P6, P1, P2 and P3. **Two**, there is no dispute that the plaintiff paid all port charges, TRA taxes, defendant fees and was issued with release order of the consignment to Lusaka, Zambia when it was discovered that the seals in the impugned containers were tampered with and theft have been done.

However, what is in serious dispute is the value of the consignment in question and claimed amount in the plaint. The plaintiff in his plaint claimed

against the defendant USD.500,000.00 which is termed as specific damages he suffered as result of the theft and failure to achieve his aims after the theft. Mr. Magige, learned advocate for plaintiff in his written submissions recapitulated what the witnesses for parties testified and the documentary evidence tendered and answered issue number one in the affirmative based on the fact that the invoice shows the value of the consignment was USD.146,280.00 and the goods were to be sold at USD.300,000.00 which when included the taxes to all relevant authorities including the defendant gives the value to the tune of USD.500,000.00

On the other hand, Mr. Mafuru, learned advocate, for the defendant seriously disputed this amount and based on release order from TRA the amount of the consignment was USD.50,474.88. In determining this issue, issue number one which was that, whether the plaintiff is entitled to USD.500,000.00 being specific sums of the costs of goods while under the custodian of the defendant. The learned counsel for defendant in his final written submissions seriously disputed that the plaintiff did not prove his claims as required in civil cases i.e on balance of probability and was bound by his pleadings. The learned counsel for defendant cited decided cases on the point and attacked the contents of exhibit P1 for being devoid of sailing

date, invoice number, shipping dates, loading date and container date. Eventually, the learned counsel for defendant invited this Court to the holding that the plaintiff utterly failed to prove the claim of USD.500,000.00 and hold that the value of good, if any, was USD.50,474.88 as evidenced in exhibit D3.

Having considered the pleadings, testimonies of the respective witnesses for and against this issue for parties' and the final written submissions and lastly considering the undisputed facts as noted above, I am of the considered opinion that the plaintiff has been able to prove the value of the goods in dispute to be USD. 146,280.00. This is evidenced by exhibit P2. The claimed USD.500,000.00 was termed to be principal sum(value sum), port charges and TRA charges. So, the argument by learned counsel for defendant that value of goods was not pleaded and proved is misplaced and rejected as the pleadings are clear on this point. The matters on the contents of the invoice raised were matters that PW1 was not cross examined by the learned counsel and the contents of bill of lading has all the details raised.

Furthermore, the learned counsel for defendant in disproving the value of the goods as invoiced to USD.146,280.00, tendered in Court exhibit D3

which is Tanzania Single Administration Document, showing that the price of the goods was USD.50,474.88. and the unit price was 0.4. But upon examining this document despite the certificate data accuracy by DW2, I noted that this document is highly unauthenticated in the circumstances of this suit. This document was not signed by the clearing agent to authenticate its declaration, nor was it signed by TRA official and stamped to show that it was actually acted upon by the relevant tax authority. DW2 testified both in his witness statement and under cross examination that he used unit price was 0.70 but this document (exhibit D3) shows the unit price was 0.40. Failure to be authenticated by the officer of TRA shows that the document was intended and calculated to obstruct the end of justice in this case and same is hereby found to be an unauthenticated document to be relied in this suit.

Still under this issue, PW1 tendered 10 receipts both from Ami and Port authorities as exhibits P5 totaling USD. 26,298.14. These are specific damages and form part of the USD.500,000.00 claimed. To this extent, these receipts were pleaded and have been proved. Another exhibit tendered by PW1 under this head is exhibit P4, which were 6 receipts to

TRA taxes paid amounting to Tshs. 7,655,609.00 which is equivalent to USD.3,299.83.

Further the plaintiff alleges that the consignment was to be sold at USD.300, 000.00 at Lusaka, Zambia, whereby Dar es Salaam Tanzania was port of discharge and transit to Zambia. According to PW1 the said consignment was for specific order to PW2. In proof of this fact, the plaintiff called PW2, one Freddie Kabole from Zambia to prove that he was the buyer of the consignment. Under cross examined by Mr. Mafuru learned advocate for defendant, PW2 told the Court that he knew PW1 for five years and they agreed verbally on the transaction and that he paid advance payment of USD.60,000.00 which was 20% of the total price.

Having considered the evidence of PW1 and PW2 alongside the documentary evidence tendered in proof of this suit and the entire circumstances, I am inclined to hold that according to exhibit P1 Dar es Salaam was a port of discharge and then transit to Zambia. This document was issued way back in November, 2018 and as such the argument that there was a change of destination is well explained in the pleadings and the contents of exhibit P1 that the confusion occurred due to shipping line and to put the record right is when the change of destination was imperative in



the circumstances. No evidence or ill-motive was imputed to the plaintiff for the change and as such I find that the consignment was intended to Lusaka Zambia and was a specific order from PW2 at the agreed price hence the plaintiff has been able to prove the whole lot was to collect USD.300,000.00. Since USD.300,000.00, includes the value of the goods as proved above, and all other related costs proved above and related profits out of sale are covered therein, there is no dispute the consignment was meant for business and unless the contrary evidence is tendered, I find the plaintiff has been able to prove USD. 300,000.00 being specific damages that includes the value of the invoice which is USD.146,280.00, costs of transportation, port charges and TRA charges as proved above, and other related costs and profit to fetch after sale at USD. 300,000. 00 is justifiable in the circumstances given the fact that they arise from a business transaction and that there was no evidence adduced to contradict the said goods were not for business and were to be sold at the said price.

Therefore, the claim of USD.500,000.00 is hereby rejected and instead a claim of USD.300,000.00 is hereby granted as proved specific damages in the circumstances of this case. The arguments of the learned counsel for defendant that no iota of evidence was tendered in this suit in proof of

issue number one is hereby rejected for want of legal backup and is against the weight of evidence on record.

Much as I know that it is trite law and general rule that in our jurisdiction, specific damages must be strictly pleaded and proved, but this general legal principal like any other general rule is equally fraught to exception depending on the circumstances of each case. In this case, the plaintiff was supposed to strictly plead and strictly prove each and every single shilling or USD claimed as specific damages. But the circumstances of this suit, where the goods were stolen, no one expects or demands that the plaintiff must prove the claim with all receipts as that will be overstretching the requirement and may cause miscarriage of justice. The fact that the plaintiff has been able to prove the price of the goods that was to be sold at Zambia, to my considered opinion, that is enough in the circumstances, given the fact that no dispute that goods were stolen and the plaintiff after theft had nothing to sale to prove to that extent.

All above considered I find and hold that the claim of USD.300,000.00 is proved in this suit and same is granted as specific damages.

This takes me to the second issue which was that, whether the plaintiff suffered loss of profit and revenue and to what tune. The plaintiff claimed in this issue USD.11,500.00 which is equivalent to Tshs.26,450.000.00 as loss of business per day from the loss of 230 bales from the date was to be handed over to the date of judgement. The learned counsel for plaintiff argued that since there was a proof that the consignment was valued at USD.146,280.00 and the value of receipts proved USD.30,522.00 then by that the plaintiff is entitled to USD.11,500.00 per day.

On the other hand, Mr. Mafuru, learned counsel for defendant strongly submitted that this claim was not proved at all. According to Mr. Mafuru, this claim was not pleaded nor was it specifically proved and as such invited this Court not be detained by this claim for the reasons advanced.

I have carefully considered the pleadings, the evidence on record and the final written submissions of the learned counsel for parties, and I am of the considered opinion that the claim of loss of profit is specific in nature and as such its grant is upon the plaintiff strictly proving the same. In the case of ZUBERI AUGOSTINO v. ANICET MUGABE [1992]TLR 137 (CAT) it was held and which has become a trite law in our country that:

**“it is a trite law and we need not cite any authority that special damages must be strictly pleaded and proved.”**

Guided by the above holding, in the instant suit nowhere this claim was strictly pleaded and without much ado as correctly submitted by the learned counsel for defendant no proof whatsoever was put on record. On that note this limb of prayer hereby fails for want of evidence.

This trickles down to the usual issue that to what reliefs parties' are entitled to. In this suit the plaintiff claimed general damages to the tune of USD.500,000.00 as the plaintiff suffered by reason of lost consignment. The plaintiff equally prays for interest on all pecuniary claims at the rate of 16 from the date of action till judgement, the costs of the suit and any other relief this court may deem fit to grant. The defendant prayed that the instant suit be dismissed with costs.

I find it prudent to start with the claim of general damages. The learned counsel for plaintiff without any further explanation submitted that the plaintiff suffered emotional and mental stress of immeasurable magnitude for the lost consignment, hence quantifying the claim to USD.500,000.00, which according to him was justifiable in the circumstances.

On the other hand, the learned counsel for defendant submitted that the claim if any on specific damages should be USD.18,519.52 and Tshs.30,572,638.00 and nothing more nothing less. On other claims, and in particular, on general damages nowhere apart from the plaint same was shown of its base to be awarded. According to DW1 this was the first incidence to occur for over 12 years and the incidence is under investigations as such the defendant cannot be imputed negligent to the resultant of the loss of goods. The counsel for defendant has thrown blames to TRA but utterly failed to provide evidence that by the time the consignment crossed to their yard it was tampered. A mere investigation under way cannot be a defence for not granting general damages.

Having considered all together with the learned advocates' submissions and the circumstances surrounding this suit and the loss of the consignment which is not in dispute under the custody of the defendant, indeed the plaintiff suffered the mental anguish and the eminent danger of losing his capital in business. All taken into consideration, it is my considered opinion that the plaintiff is entitled to general damages. What I don't agree with, is the claimed amount which was unnecessary quantified on the part of the

plaintiff but given the situation I am inclined to grant the plaintiff general damages to the tune of USD.20,000.00

The plaintiff as well claimed interest on all pecuniary claims above the rate of 16% from the date of cause of action to the date of judgement. This limb of prayer is only allowed to the item number one at the rate of 7% and not 16 percent as prayed.

That said and done this suit is allowed to the extent explained above with costs to the plaintiff.

It is so ordered.

Dated at Dar es Salaam this 27<sup>th</sup> day of March, 2020.



**S.M. MAGOIGA**

**JUDGE**

**27/03/2020**