

TANZANIA / JUDGMENT

20190226 TZHC Dar es Salaam

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM CIVIL APPEAL NO. 218 OF 2017 (Original Civil Case No. 108/2014 of the Kinondoni District Court at Kinondoni before Hon. Kuppa, RM dated 21/08/2017) SAID KISUDA. ■ ■ .. ■ ■ ■ ■ ■ ■ I ■ I ■ ■ I I ■ ... ■ ■ .APPELLANT VERSUS MANAGING DIRECTOR HTT INFRACO LTD 1 ST RESPONDENT ,. MILCOM INTERNATIONAL COMPANY LIMITED 2No RESPONDENT

JUDGMENT

Dates 26/11/2018 & 26/2/2019 I.C. MUGETA, J. The appellant challenges the decision of the trial court on three grounds of appeal. These are:-

- (i) That the learned Resident Magistrate erred in law and in fact by holding that the communication tower was properly installed at the point where it is positioned. 1 (ii) That the learned Resident Magistrate grossly misdirected himself in giving under weight (sic) to the defence witnesses hence the wrong decision. . (iii) That the learned Resident Magistrate erred in law and in fact by entertaining "an article in respect to cell phone radiation" after the closure of the case on both sides, and thus denied the plaintiff the right to see and cross examine on the same. This led to the denial of compensation to the plaintiff and his family as had been sought in the statement of claim. The facts of the case are that the appellant sued the defendants for general damages due to injuries suffered from radiation generated by a communication tower used by the 1st defendant which was erected by the 2nd defendant closer to the appellant's house. The trial court dismissed the suit with costs for want of merits hence this appeal. The effect suffered by the appellant is sexual dysfunction and general dizziness on part of children every morning. According to the plaintiff the tower was erected without following . procedure and it violated the rules of the National Environmental Council which requires communication towers to be erected 6.5 metres away from residential buildings. At the trial court the 2 appellant did not tender any medical report on his erectile malfunction or health injuries caused by radiation emitted from the tower. After trial the learned trial magistrate ruled that there was evidence of either the alleged. injuries suffer or that the suffering if any was due to radiation from the tower hence this appeal. The appeal was argued by way of filing written submissions. Job Kerario, learned counsel, advocated for the plaintiff while Andrew Miraa, learned counsel

represented the 1st respondent. the 2nd respondent did not file any submissions. I have reflected on the import of the grounds of appeal in the light of the evidence on record and the nature of the claim, I am of the view that the same can be consolidated and considered under one major complaint. is that · is:.. . Whether the plaintiff ·· proved his case. · However, before I dwell on the evidence and arguments of the learned counsels in their written submissions, I wish to address a point raised by counsel for the 1st respondent regarding competency of the appeal. The learned counsel has submitted that the appeal is misconceived because the appellant did not testify in the trial 3 court. In reply counsel for appellant has ·submitted that the appellant testified as PW1. According to the record the plaintiff is said. Kisuda whose name appear on the appeal documents. However, PW1 is Kisuda Said. In my view these are two different people. This brings the question, is it a legal requirement that a person who brings a case or enters defence must testify personally in court? It is my view that the answer is no, what matters is the concerned party to bring evidence that sufficiently proves his or her case. This evidence should not necessarily come from the plaintiff or defendant personally for I know no rule of evidence or procedure which makes it mandatory a party to a case to personally testify as a prerequisite to proving a case. The complaint, therefore, is without merits. Coming back to the grounds of complaint, was the case proved? In the written submissions, counsel for the appellant has submitted mainly on one point that the tower was erected in violation of laws and procedure for erection of such towers. Counsel for the respondent has refuted this argument. I shall not dwell much on this issue because whether the tower was lawfully 4 erected would serve as basis to assess or mitigate damages when established that the appellant and his family were injured consequent to erection of the tower. If no such proof the issue is irrelevant. · This is a case for personal injuries founded on tort. For one to succeed on claims of this nature, injuries suffered must be real and not imaginary. The learned trial magistrate was live to this fact and upon analysis of the evidence he held:- "The question of sexual impairment and dizziness which plaintiff family suffered to my opinion ought not to be given by mere words it is my view these allegations were serious and technical which required a practitioner to clarify". In my view, by the word practitioner, the learned trial magistrate referred to a medical practitioner and I agree with him. There is no evidence on record at all which suggest that the erectile dysfunction of the appellant was due to the communication tower in the vicinity. The same applies to the alleged morning children dizziness. In this regard, I find no reason to fault the decision of the trial court. 5 The foregoing is enough to dispose of the appeal. However, for completeness, I shall address the complaint in the third ground of appeal. In the written submissions counsel for the appellant complained that the trial court imported extraneous matter in the judgment when he .referred to an article which was not introduced in evidence. The learned counsel has submitted that the article came to his knowledge for the first time in the judgment which denied them the opportunity to comment to it. I have reviewed the trial court record and I have found the complaint to be untrue. The second issue for determination by the trial court was whether the radiation from the installed tower caused health problems. to . the plaintiff's family and himself personally in respect to sexual impairment. In his testimony, DW1 testified that radiation in

towers are produced higher on top of the tower and they travel horizontally and cannot cause injuries to people down closer to the tower. To support this testimony, the second defendant's counsel in his final written submissions attached the impugned article as a supporting scholarly document. This is a proper procedure. As rightly submitted by counsel for the 1st respondent such documents are scholarly works which can be cited as reference 6 • and not evidence to support the available evidence. So the attack on the trial magistrate for reference to the article is unjustified. In the event, I dismiss the appeal with costs. I. C. Mugeta JUDGE 26/02/2019 Court: Judgment • delivered in presence of the appellant in person and Ndamu Emmanuel, Advocate for the 2nd respondent • and in the absence of the 1st respondent. Sgd: I. C. Mugeta JUDGE 26/02/2019 7

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