IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 4063 OF 2025

(Appeal from the judgment and decree of the Court of Resident Magistrate of Dar es Salaam at Kisutu (Hon. B.R Nyaki PRM) dated 13th December 2024, in Civil Case No. 194 of 2023)

TURKISH AIRLINES INC. LTD.....APPELLANT

VERSUS

HASSAN OTHMAN HASSAN.....RESPONDENT

JUDGMENT

Date of last order: 23/04/2025

Date of judgment: 28/08/2025

A. A. MBAGWA J.

This is an appeal against the judgment and decree of the Court of the Resident Magistrate of Dar es Salaam at Kisutu (Hon. B.R Nyaki, PRM) delivered on 13th December 2024 (the trial court). What transpired in the trial Court, as per the record of appeal, may be recounted as follows;

The respondent/plaintiff, Hassan Othman Hassan, instituted a suit against the appellant/defendant claiming the following reliefs;

1. A declaratory order that by mishandling the plaintiff's luggage and its failure to cooperate with the plaintiff in tracing the lost luggage, the defendant acted negligently and was in total breach of the duty of care;
2. Payment of general damages to the tune of TZS 200,000,000 (Two Hundred Million only) for psychological torture and emotional trauma as a result of the defendant's negligence;
3. Payment of punitive damages to the tune of TZS 50,000,000 (Fifty Million only).
4. Interests on (ii) and (iii) at a commercial rate of 21% from the date of cause of action till the date of judgment, and thereafter the court rate of 7% till full and final payment.
5. Costs of the suit.
6. Any other relief(s) that the Honorable Court shall deem fit and just to grant.

It was contended by the respondent/plaintiff that on 26th April 2023, the respondent, an officer of Simba Sports Club, travelled from Dar es Salaam to Casablanca in Morocco with the appellant's flight No. TK 0604 for the purposes of watching a football match between Simba Sports Club and Wydad Casablanca. In that journey, the respondent checked in one luggage at Dar es Salaam Airport, which he would pick up at the final destination in Morocco. The respondent had to connect flight at Istanbul, Turkey. It is common ground that, when Mr. Hassan Othman Hassan arrived at the point of destination, Casablanca Airport, Morocco, he found out that his checked-in luggage was missing. According to Mr. Hassan Othman Hassan, the missing luggage contained a number of items, including clothes, 3 pairs of shoes (made in Italy), High Blood Pressure drugs, drugs for Gastric Ulcers, gifts that were meant for the plaintiff's friends, and others meant to secure a business opportunity in Casablanca. Despite the plaintiff's prompt report of the missing luggage at Casablanca Airport, his luggage could not be retrieved until he returned to Dar es Salaam. Upon his return, the plaintiff continued to remind the defendant about his missing luggage, but his efforts could not yield results. As such, he resorted to instituting the suit.

Upon service, the plaintiff's claims were vehemently countered by the defendant through a written statement of defence. The appellant herein strongly argued that the alleged incurred loss was misplaced, immature, and baseless as the respondent failed to adhere to the mandatory procedures of lost luggage claims. The appellant further stated that when the respondent's lost baggage was found, she informed the respondent of such information, but he refused to cooperate. The appellant therefore disputed the appellant's claims on the ground that they were unfounded and typically caused by the respondent's own negligence.

The hearing was conducted through witness statements, in accordance with Order XVIII, Rule 2 of the Civil Procedure Code.

The respondent was the sole plaintiff witness (PW1). Besides, the respondent tendered several documentary exhibits, to wit, a ticket and three boarding passes of Hassan, Hassan Othman, that were jointly admitted and marked as Exhibit P1 collectively.

In brief, the plaintiff recapitulated the averments in the plaint. It was the respondent's testimony that he claims TZS 200,000,000/=, being general

damage for the loss or delay of his two luggage items, a clothes bag and a 10 kg bucket of honey. He also claimed TZS 50,000,000/= as compensation for his lost properties. In proving that the defendant had lost or delayed his luggage negligently, PW1 tendered the air ticket issued by the defendant company together with the boarding pass of the two planes he boarded in his trip (Exhibit P.1). He vehemently denied the fact that the appellant made efforts to find his lost luggage. PW1 finally maintained his prayers in the plaint.

In defence, the appellant/ defendant paraded one (1) witness, namely, Ally Jamal Kawambwa. Similarly, the defence side tendered documentary exhibits namely; board resolution (Exhibit D1), itinerary ticket print out of Hassan Othman Hassan (Exhibit D2), demand notice (Exhibit D3), print out of mishandling luggage (Exhibit D4), print out of guidelines (Exhibit D5), print out of complaint feedback number (Exhibit D6), the print out of email to the advocate of the plaintiff (Exhibit D7), the print out of email to the advocate of the plaintiff (Exhibit D8) and the print out with pictures of the luggage (Exhibit D9 collectively). DW1 admitted that the respondent

travelled with their airline to Morocco and did not receive his luggage upon arrival. However, he was quick to point out that airlines have interlined with others in transportation, and the one who carried the passenger to the final destination is responsible, and in this case was Air Maroc and not Turkish Airlines. DW1, when further cross-examined, admitted that Turkish Airlines is the one to contact the plaintiff/respondent on the development in tracing his lost and found bags. Further, DW1 admitted that the appellant did not inform the respondent personally, but rather communicated with his advocate. In the event, the appellant prayed the court to dismiss the respondent's/plaintiff's case.

Having heard and analysed the evidence for both sides, the trial Principal Resident Magistrate found that the respondent's case was sufficiently established. He thus decided the case in the respondent's favour. He awarded the respondent TZS 35,000,000/= as damages for the delay of the baggage/luggage and payment to the tune of TZS 1,000,000/= for the delayed properties (if not picked by the respondent).

Dissatisfied with the findings of the trial court, the appellant appealed to this Court armed with six grounds of appeal as follows;

1. ***That, the Trial Court erred in law and in fact in failing to analyze and appraise the evidence given by the Appellant and thereby reached an erroneous decision against the Appellant.***
2. ***That the trial Court erred in law and facts by granting excessive general damages to a tune of Tanzania Shillings Thirty-Six Million (TZS.36,000,000/=) and interests thereon to the respondents without sufficient evidence, proof, and justification to warrant the same.***
3. ***That, the trial Court erred in law and facts when it failed to properly and critically evaluate the evidence put before it by the appellant thus reaching an erroneous decision and findings.***
4. ***That, the trial Court erred in law and fact by declaring the appellant acted negligently without appraising that the nature of the dispute hence defeats the issues for determination.***
5. ***That, the trial Court erred in law and fact by not considering the omissions by the respondents which diminish the respondent's claims.***
6. ***That, the trial Court erred in law and fact where the evidence on record does not support the finding of the trial Court.***

When the matter was called on for a hearing, the appellant was represented by Ms. Nathalia Michael, learned advocate, whereas the

respondent had the services of Mr. Nehemia Nkoko, learned advocate, also. This court, upon application by the parties, ordered the appeal to be disposed of by way of written submissions. It is worth noting that in the submission in support of the appeal, the learned counsel for the appellant abandoned ground number 4 of the appeal. Further, she argued the appeal by consolidating grounds 1 and 6 as well as 2 and 3, while ground 5 was argued separately. I appreciate counsel for both sides for their insightful submissions for and against the appeal. For apparent reasons, I will, however, not reproduce their submissions *verbatim* to avoid prolonging this judgment. Suffice it to say, I have thoroughly read and considered them in my decision.

Ms. Nathalia Michael strongly argued in support of the appeal, whereas Mr. Nehemia Nkoko resisted the appeal by submitting that the trial magistrate rightly entered judgment and decree in favour of the respondent.

At the outset, I find it pertinent to preface my deliberations with the long-established position of law that the first appeal is in the form of rehearing,

and therefore, the appellate court is entitled to re-evaluate the evidence and arrive at its own findings. See the cases of **Khalife Mohamed vs Aziz Khalife & Another** (Civil Appeal No. 97 of 2018) [2020] TZCA 33 and **Khamis Said Bakari vs Republic** (Criminal Appeal No. 359 of 2017) [2020] TZCA 259. Indeed, I have applied the above principle in determining this appeal.

Having dispassionately scanned the grounds of appeal, the rival submissions, and the court record in general, it is now opportune to determine the grounds of appeal.

To commence with the 1st, 3rd, and 5th grounds of appeal, which, in essence, attack the trial Magistrate's evaluation of the evidence, the appellant's counsel strongly faulted the trial Magistrate on different fronts. **One**, the learned counsel faulted the trial Court for recognizing the testimony by DW1 supported by Exhibit D9 on the communication to the respondent on the arrival of his luggage at the Swissport offices in Dar es Salaam, but at the same time ruling out that the appellant did not prove the notice to the respondent about the arrival of the luggage, thereby

wrongly concluding that the appellant delayed the respondent's luggage for 564 days. The learned counsel expounded that the appellant proved his case through the evidence of DW1 that there was a communication through a phone call with the respondent about informing him to collect his lost luggage at Dar es Salaam. Also, the counsel elaborated that the email (Exhibit D9) sent to the respondent proved that he was informed about his luggage as early as 8th May 2023, which was just fifteen days of delay, counting from 26th April 2023 when the luggage was misplaced. He stressed that the general damages awarded to the respondent are excessive and unjustified.

Under the 2nd and 6th grounds of appeal, the appellant's counsel attacked the damages awarded to the respondent, saying that the delay was just for 15 days, which does not entitle the respondent to compensation of SDR 1000 according to airline laws. He expounded that Article 17 (2) and (3) of the Convention of the Unification of Certain Rules for International Carriage by Air (Montreal Convention, 1999), provides that the checked baggage if not arrived at the expiration of twenty-one (21) days after the date on which it ought to have arrived, the passenger is entitled to enforce

against the rights which flow from the contract of carriage. He insisted that the respondent's luggage arrived after 15 days, and the respondent was informed accordingly. The appellant's counsel was of the firm view that the appellant sufficiently defended his case on the balance of probabilities as required by the law. He implored the Court to uphold the grounds of appeal. To buttress his position, he cited the case of **Ngorongoro Conservation Area Authority vs Daniel Ole Moti** (Revision Application 116 of 2018) [2020] TZHC 3812 (2 November 2020), specifically on page 22.

Conversely, the respondent's counsel opposed all the grounds, saying that the appellant's defence was too weak to outweigh the respondent's evidence. He clarified that the appellant never tendered any tangible evidence to prove that the respondent was informed of the arrival of his luggage at Dar es Salaam on the alleged dates. Instead, the respondent's counsel contended, Exhibit D9 only shows that Swissport contacted the appellant through an email. He expounded that the said email was sent by Mapunda Susan and received by Abdulkadir Karaman on 30th November 2023 at 11:12 AM. He was of the view that the appellant's

allegations were just afterthoughts and mere words to be relied upon by the trial court, as he failed even to bring the said persons in court as material witnesses in proving, if at all, the information was conveyed to the respondent. He stressed that the appellant had information that the respondent's lost luggage was in Dar es Salaam, but remained with the said luggage without handing it over to the respondent for 564 days unjustifiably. He insisted that the trial Magistrate properly evaluated the evidence. He finally implored the court to uphold the findings of the trial Court. To cement his submissions, he cited the case of **Hemedi Saidi Versus Mohamedi Mbilu, [1984] T.L.R 113.** More so, the respondent's counsel was of the view that the award of TZS 35,000,000/=, as general damages, was justified. He contended that at the trial court, there was sufficient evidence proving that the respondent had suffered materially and mentally following the appellant's negligent act. To fathom his submission, the learned counsel relied on the cases of **Faustine Constantine Mnganya & Others vs Rashid Jafari & Others** (Civil Appeal No. 120 OF 2021) [2024] TZCA 612 (23 July, 2024), **AMI Tanzania Ltd Versus Prosper Joseph Msele,** Civil Appeal No.

159 OF 2020 [2021] TZCA 668 (11 November 2021) and **Felician Muhandiki v. The Managing Director, Barclays Bank Tanzania Ltd,** Civil Appeal No. 82 of 2026 [2024] TZCA 61 (20 February 2024).

I have accorded due consideration to the rival arguments. I also scanned the contents of the trial court proceedings, the impugned judgment, and the decree. Similarly, I have thoroughly gone through the appellant's testimony and emails printout tendered and admitted as Exhibit D9. It is clear that the communication was between the appellant and Swissport. Apart from Exhibit D9, there was no tangible proof tendered to substantiate that the appellant actually communicated the arrival of the luggage to the respondent. The appellant was expected to produce evidence proving the communication it made to the respondent on the whereabouts of his luggage. Again, DW1 testified to the effect that the appellant was responsible for informing the respondent about his lost luggage. Nevertheless, DW1, when testifying in court, admitted that there was no email forwarded to the plaintiff on the arrival of his luggage, nor did the appellant produce proof to the effect that the plaintiff was called via phone for that matter. Thus, it is my finding that, on the balance of

probabilities, the appellant failed to discharge its duties of carefully handling its client's luggage as envisaged under the carrier by air contract (Exhibit P1). On the contrary, the respondent sufficiently proved that his luggage was misplaced or lost by the appellant, and until the time he testified before the trial Court, the luggage had not been handed to him. It is a principle of law that in civil cases, the court enters judgment in favour of a party whose evidence weighs heavily than the other. See the case of **Hemedi Saidi vs Mohamedi Mbilu** (1986) HCD 15 and **Mary Agness Mpelumbe vs Shekha Nasser Hamud,** Civil Appeal No. 136 of 2021**,** CAT at Dar es Salaam. Admittedly, in this case, upon a holistic evaluation, the respondent's evidence was more cogent and credible than the appellant's.

In fine, the 1st, 3rd, and 5th grounds of appeal are non-meritorious and therefore are dismissed accordingly.

The appellant, under the 2nd and 6th grounds of appeal, challenges the award of general damages to the tune of TZS 36,000,000/=. Whereas the appellant's counsel submitted that the amount awarded was excessive and

not supported by evidence, the respondent's counsel strongly argued that the amount was reasonable and fair.

I am obliged to restate the cherished principle in our jurisdiction as far as pleadings are concerned, to the effect that parties and the court are bound by pleadings. The rationale for this principle is to put the other party to the suit on notice regarding their case to enable the other party to prepare an informed defence or lead evidence to counter the pleaded matters. Thus, a party in a suit should not be allowed to give evidence that deviates from the pleadings. Otherwise, such evidence should be ignored. See the cases of See: **James Funke Ngwagilo v. Attorney General** [2004] T. L.R. 161; **Scan-Tan Tours Ltd vs Reg Trustees of Catholic diocese of Mbulu** (Civil Appeal No 132 of 2016) [2018] TZCA 472 and **Salim Said Mtomekela vs Mohamed Abdallah Mohamed** (Civil Appeal No. 149 of 2019) [2023] TZCA 15. For instance, in **Salim Said Mtomekela (supra)** on page 4 of the typed Judgment, it was held:

> ***'Pleading in law means a written presentation by a litigant in a lawsuit setting forth the facts upon which he/she claims legal relief or challenges the claims of his***

opponent. It includes claims and counterclaims, but not the evidence by which the litigant intends to prove his case. *See: Pleading in law - Encyclopedia Britannicahttp://www.britannica.com/topic.* ***That said, since the pleading is a basis upon which the claim is found, it is settled law that parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored****.'*

The court went on at page 6 of the typed judgment and added that:

'In the bolded expression, it is glaring that since parties are bound by their pleadings, neither the parties nor the court can depart from such pleadings except where the court has granted leave to amend the requisite pleadings*.'*

Alive to the above authorities, I partly agree with the learned counsel for the appellant that, indeed through the pleadings especially the Written Statement of Defence and the testimony for both the plaintiff and defendant, none of them pleaded that, the appellant only deserved to be compensated in accordance with **the Convention of the Unification of Certain Rules**

for International Carriage by Air, 1999 (**The Montreal Convention**), however, courts of law are not barred from considering the law in force when determining the rights of the parties before it.

Under Article 17 (3) of the Montreal Convention, it is stipulated that the passenger can enforce against the carrier the rights that flow under the contract of carriage if the carrier admits the loss or delay of checked baggage. Article 17 (3) provides;

> ***'If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.'***

However, both the pleadings and the entire evidence on record reveal that the appellant, who is a carrier, did not admit the liability but rather shifted the blame to the respondent for being negligent. My interpretation of the above provision is that the passenger, in this case the respondent, is entitled to enforce his rights under the Convention where the carrier, the appellant,

admits the loss or the luggage is not handed to the passenger after twenty-one days from the date it ought to have arrived.

In the instant appeal, the learned Principal trial Magistrate had awarded the respondent general damages to the tune of TZS 36,000,000/=. However, the appellant faults these findings based on Article 22 (2) of the Montreal Convention. The appellant's counsel forcefully submitted that the respondent was only entitled to the maximum 1000 Special Drawing Rights, which, when converted to TZS, 1 SDR at the date of judgment was equal to 1311 USD. However, Sub-Article 6 of Article 22 of the Montreal Convention gives courts in their local jurisdiction to award damages beyond what is prescribed under the Convention. The same provides;

> ***'The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation,***

does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.'

That apart, in our jurisdiction, the general damages are awarded at the discretion of the trial Court after taking into account the prevailing circumstances. It is further settled that the award of general damages is consequential and need not be strictly proved. See the case of **Serenity Developments Ltd vs Hotels & Another** (Civil Appeal No. 473 of 2021) [2025] TZCA 515. Further, it is a trite law that the assessment of general damages is the exclusive discretion of the trial Court and the appellate court will not be justified in substituting a figure of its own for that awarded by the trial court, unless it is satisfied that the court below applied a wrong principle or that it misapprehended the evidence and, consequently, arrived at a figure so excessive or so inconsiderable. See the case of **Anthony Ngoo & Another vs Kitinda Kimaro** (Civil Appeal No. 25 of 2014) [2015] TZCA 269.

The pertinent question, therefore, is whether the trial Court applied a wrong principle of law or awarded the excessive amount as contended by the appellant. In this case, it was not contested that the respondent's baggage went missing throughout his trip to and from Morocco. It is also a common cause that, by missing his belongings, the respondent was subjected to inconveniences throughout his journey. Considering the foregoing analysis, I do not find anything to fault the learned trial Principal Resident Magistrate for awarding the impugned amount.

It was established by PW1 and admitted by DW1 that the luggage of the respondent was delayed from 26/04/2023 until 13th December 2024, when the impugned judgment was pronounced, making a total of 598 days of delay. Considering that, the length of delay, the failure of the appellant to offer the respondent in writing a certain amount of money as compensation, the inconveniences suffered by the respondent, I find no justification to fault the trial court's award of TZS 36,000,000/= as general damages. Commenting on the restriction of the appellate court to interfere with the award of the trial Court, the Court of Appeal, in the case of **Cooper Motor**

Corporation Ltd. versus Moshi Arusha Occupational Health Services [1990] TLR 96, had this to say:

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

On account of the above analysis, I find no merit in the 2nd and 6th grounds of appeal. They are therefore dismissed forthwith.

In the upshot, it is my considered observation that this appeal has been brought without sufficient reasons. The same lacks merit and is thus hereby dismissed in its entirety with costs.

It is so ordered.

Dated at Dar es Salaam on this 28th day of August, 2025.

A.A. Mbagwa

JUDGE

28/08/2025