

THE COURT OF APPEAL OF TANZANIA
AT TABORA
(CORAM:RAMADHANI, C.J.; MROSO, J.A.; And MUNUO, J.A.)

CIVIL APPEAL NO.53 OF 2006
BETWEEN
ARNOLAC COMPANY LTD. ... APPELLANT
AND
KIZA KASOMA ... RESPONDENT
(Appeal from the Judgment of the Resident Magistrate's
Court of Kigoma, Appellate Extend Jurisdiction)
(Rusema, PRM Ext. Jur.)
dated the 9th day of January, 2003
in
Civil Appeal No. 5 of 2002

JUDGMENT OF THE COURT

.....

30 September, 2008 & 10 February, 2009

RAMADHANI, C.J.:

This matter was heard by the late Ms. Stella Mafuru, RM, in the District Court of Kigoma and she found in favour of the appellant company, then the defendant. The respondent, who was the plaintiff, appealed to the High Court and RUTAKANGWA, J. ordered the appeal to be heard by a Resident Magistrate with Extended Jurisdiction. Mr. RUSEMA, PRM (Ext. Juris) heard the appeal and gave judgment in favour of the respondent hence this second appeal.

The appellant was represented by Mr. M. K. Mtaki, learned counsel, who argued as his first ground of appeal that the first appeal was a

nullity as the learned Magistrate Extended Jurisdiction purported to hear it while sitting in the High Court.

The learned advocate pointed out that after the order of RUTAKANGWA, J. the number of appeal remained that of the High Court, Civil Appeal No. 5 of 2002. Mr. Mtaki submitted that the number ought to have been changed and to have been that of the RM's Court Extended Jurisdiction. Not only that but the learned counsel drew our attention to the fact that all the documents filed showed that the matter was in the High Court. As examples he pointed out the Reply to the Memorandum of Appeal and the appellants' Reply to the Reply of the Memorandum of Appeal which were both titled "IN THE HIGH COURT OF TANZANIA AT TABORA". The proceedings, too, were shown to have been in the High Court at Tabora.

The learned advocate referred us to Salehe Mashanene v. R, Criminal Appeal No. 184 of 2005; Dismass K. B. Francis T/a K. B. Enterprises v. James Materu And Two Others, Civil Appeal No. 40 of 2004.

Mr. Komeye David, the learned advocate for the respondent, conceded that as the High Court could sit anywhere, Mr. Rusema could have purported to have sat as the High Court in Kigoma where there is no High Court building. He also admitted that there is no evidence on record to show that the appeal was re-registered in the

subordinate court. However, he distinguished this appeal from that of Dismas K. B. Francis. In that case the appeal had not been transferred to the learned Magistrate with Extended Jurisdiction and that the hearing was done in the High Court building.

We agree with Mr. David that the appeal before us is distinguishable from that of Dismass. In the present appeal there was an order of the High Court Judge transferring the appeal to a Resident Magistrate with Extended Jurisdiction. That order reads as follows:

This appeal **is transferred to Kigoma Resident Magistrate's Court** for hearing by a Resident Magistrate with Extended Jurisdiction as per Section 45 A of the Magistrates' Courts Act No. 2/84. (Emphasis is ours.)

That order is more elaborate than the provisions of what is now section 45(2) of Cap 11 [2002 RE] which states:

(2) The High Court may direct that an appeal instituted in the High Court be transferred to and be heard by a resident magistrate upon whom extended jurisdiction has been conferred by section 45(1).

RUTAKANGWA, J. was categorical that the "appeal is transferred to **Kigoma Resident Magistrate's Court**". Admittedly, and as pointed out by Mr. Mtaki, documents are titled "in the High Court of Tanzania".

The respondent, and properly so, filed his appeal in the High Court of Tanzania at Tabora and his Memorandum of Appeal was so titled.

The appeal, as already seen, was transferred to RM's Court. There was no order to re-address the Memorandum of Appeal which ~~remained titled in the High Court. So, the appellant filed the reply~~ and gave it the title corresponding to the title of the Memorandum of Appeal "in the Court High". Admittedly, too, the appeal was not registered in the special register and was not given a new number but remained as Civil Appeal No. 5 of 2002.

We ask, did such facts make Mr. Rusema, PRM (Ext. Juris.) not to have sat in the Kigoma Resident Magistrate's Court as ordered by the learned Judge? We think not. Oversights, yes there were, but they did not alter the substance of the matter. Besides, this final Court of Justice in Tanzania also administers equity which treats as done that which ought to have been done. Following the unequivocal order of RUTAKANGWA, J. the appeal should have been given a new number and all documents should have been titled "In the Resident Magistrate's Court at Kigoma". We treat that as having been done.

We, therefore, dismiss this ground of appeal and proceed to consider the other three grounds of appeal.

We are of the decided view that grounds two and three are about the same issue, that is, sufficiency of evidence to connect the appellants' vessel with the accident. The two grounds are that the learned Principal Resident Magistrate (Ext. J) erred:

2. ... both in law and in fact in reversing the trial Court's findings regarding the credibility of the Respondent's witnesses.

~~3. ... in law in holding that there was sufficient evidence, to prove that the appellants' vessel had knocked down the Respondent's fishing boat.~~

Mr. Mtaki submitted that the learned PRM altered the findings of fact of the trial RM on matters of credibility of witnesses and to that extent he erred. In reply Mr. David stated that plaintiff's witnesses 2 to 4 were in the respondent's boat which was sunk and that they ~~identified the appellant's boat as the one which caused the accident.~~

Did the three plaintiff's witnesses identify who knocked their fishing boat? The second plaintiff's witness, Kahela Emmanuel, said:

On 25.5.1999 while in fishing activities at about 05.05 hours I saw a vessel which came along and knocked us ... Then later on we discovered that the vessel which knocked us was M/V Mwanza.

That, by any stretch of imagination, cannot be evidence of who caused the accident. The witness did not say that he identified the ship which knocked them at the time of the accident. But that he came to know later who knocked them. However, he does not explain when and how he knew that.

The third plaintiff's witness, Lemi Idd, stated that:

We were knocked by M/V Mwanza and **we marked its name after he knocked us** and the others were not knocked. (The emphasis is ours.)

~~We ask whether it was really possible to identify who knocked them after they were knocked down. The natural tendency for anybody in such a situation is to save his soul and to avoid drowning.~~

Yet, the 4th plaintiff's witness, Rehani Mustafa, gave this evidence:

I knew it is the vessel of Armolac as I did see it coming and also they admitted as they told our boss to settle the matter amicably but the boss refused as the dead one was not seen (sic).

~~Since the boss did not testify that evidence was hearsay.~~

The respondent, the owner of the drowned vessel, testified that:

They told me that they were knocked by the vessel at about 05.00 hours and that one of them drowned and was not found.

The respondent did not mention which vessel knocked his boat.

Again we ask: If the owner was specifically told that it was the appellant's ship that knocked them, what prevented him from being categorical in his testimony which vessel caused the accident?

What also beats us is the omission to call any fisherman from the other boats which were around when the accident occurred to give evidence. All in all, we cannot uphold the learned PRM's revision of the findings of fact by the RM who, in our opinion, was right in holding that the respondent had failed to prove his claims on the balance of probabilities.

If the appellant was not the one who caused the accident, it follows then that he can not be held responsible for any loss incurred by he respondent and, therefore, the ground of appeal on damages should not detain us. The appeal is, therefore, allowed with costs.

DATED at DAR ES SALAAM this 20th day of November, 2008.

A. S. L. RAMADHANI
CHIEF JUSTICE

~~J. A. MROSO~~
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


P.A. LYIMO
DEPUTY REGISTRAR

