IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

(CORAM: KOROSSO, J.A., KIHWELO, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 200 OF 2020

MALAKI MMARI .... FIRST APPELLANT
HALILI SHABAN .... SECOND APPELLANT
JAMES BILIKWIJA .... THIRD APPELLANT
BAKARI HUSSEIN .... FOURTH APPELLANT
GOODLUCK WILLIAM .... FIFTH APPELLANT
SHABANI JUMA .... SIXTH APPELLANT

VERSUS

MOSHI MUNICIPAL COUNCIL .... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, at Moshi)

(Twaib, J.)

dated the 30th day of September, 2019
in
Civil Case No. 11 of 2016

....

JUDGMENT OF THE COURT

4th & 11th July, 2023

KIHWELO, J.A.:

This is an appeal against the decision of the High Court of Tanzania, at Moshi (Twaib, J.) in Civil Case No. 11 of 2016, dated 30.09.2019. The background giving rise to the appeal will shortly be apparent. Suffice it to say that, the appellants instituted a suit against the respondent in the High Court at Moshi claiming among other things,

Tanzanian Shillings Three Hundred Thirty-Four Million Two Hundred Thousand (TZS. 334,200,000) only as compensation for loss of income and business which was occasioned by the respondent impounding the appellants' trucks loaded with pineapples.

The genesis of the instant appeal can be traced way back on 07.10.2016 when the appellants herein lodged Civil Case No.11 of 2016 before the High Court of Tanzania at Moshi (the High Court) seeking the High Court to declare that the impounding of the appellants' trucks and seizure of perishable goods (pineapples) was done illegally, payment of Tanzanian Shillings Three Hundred Thirty-Four Million Two Hundred Thousand (TZS. 334, 200,000) only, payment of special damages and costs of the suit among other claims. The respondent sturdily contested the appellants' claims through the written statement of defence duly lodged in court on 21.11.2016 in which they strongly disputed seizing any perishable goods but admitted impounding trucks which were wrongly parked along an area prohibited by the respondent's By-laws.

When the matter came up for trial before the High Court, eight (8) witnesses, Malaki Meleck Mmari (PW1), Halili Shabaan (PW2), Shaban Juma (PW3), Bakari Hussein (PW4), Goodluck William (PW5), Benjamin

Zablon Mayalla (PW6), Samwel Isaac (PW7) and James Stephen Bilikwija (8) were lined up in support of the appellant's claim. On the adversary side, the respondent featured four (4) witnesses Sijo Magesa Sijo (DW1), Yunusi Josephat Mmbonyo (DW2), Antipas Francis Lyimo (DW3) and Richard Vincent Kingu (DW4) to support the denial of the appellants' claim.

At the conclusion of the trial, the High Court pronounced its judgment and dismissed the suit on account that the appellants did not prove their case on a preponderance of probabilities. In the result, dissatisfied, the appellants filed this appeal.

The appellants presently seek to impugn the decision of the High Court upon a Memorandum of Appeal which goes thus;

1. *That the Honourable trial Judge erred in law and in fact in holding that the appellants failed to prove their case on the balance of probability;*
2. *That the Honourable trial Judge contradicted himself in not awarding damages and yet he admitted to the fact that the vehicles were unjustly impounded by the respondent for several months;*
3. *That the Honourable trial Judge failed to analyze exhibit P2 which was a lawful order to compel the respondent to restore back the impounded vehicles; and*

4. That the evidence of DW1 was received contrary to the procedures regarding evidence as DW1 testified on behalf of the Director of the respondent."

Before us, on 04.07.2023 the appellants were represented by Mr. Kassim Mmbaga Nyangarika, learned counsel. On the adversary side, the respondent was represented by Mr. Deodatus Nyoni learned Principal State Attorney who teamed up with Mr.Yohana Marco Odada, learned State Attorney. Both counsel prayed and they were granted leave to adopt the written submissions which were earlier on lodged in terms of Rule 106 of the Tanzania Court of Appeal Rules, 2009 (the Rules). They further prayed to adopt the list of authorities filed in terms of Rule 34 of the Rules along with the ones they prayed to supply in terms of rule 4(2) of the Rules.

Arguing in support of the first ground of appeal Mr. Nyangarika, contended that the learned trial Judge was wrong to hold and find that the appellants did not prove their case on the balance of probabilities or a preponderance of probabilities. For him, the learned trial Judge did not do a critical analysis of the evidence on record before coming to the conclusions he reached. For, in his view, the testimony of DW1 and DW4 clearly demonstrated that they towed the appellants' trucks which were

wrongly parked at an area not meant for parking bays and without valid permit from the respondent.

He contended further that, it was clear on record that, on 24.12.2014 the respondent was ordered by the District Court of Moshi at Moshi (District Court) to release the trucks and perishable goods failure of which the appellants were going to suffer irrespirabie loss, but the respondent for reasons best known to themselves did not heed to that lawful order. The learned counsel zealously and humbly requested the Court to appraise the evidence on record and come to its own conclusion bearing in mind that this is a first appeal and, in his view, the reasoning by the learned trial Judge was erroneous. He paid homage to the case of **Martha Michael Wejja v. Attorney General and Another** [1982] T.L.R. 35 to facilitate his proposition.

The learned counsel, also challenged the findings of the learned trial Judge at page 290 of the record of appeal, where the learned trial Judge found out the testimonies of PW4 and PW7 to be contradictory in relation to the issue of parking at Chui Security Yard. Whereas, PW4 said that the appellants paid parking fees for parking at Chui Security Yard, PW7 said no parking fees were paid by the appellants for parking at Chui

Security Yard. To him, this was not a contradiction, and even if it is assumed that the evidence of PW4 and PW7 were contradictory, then the same was minor and did not go to the root of the matter which was wrongful parking, and placed reliance in the case of **Patrick Edward Moshi v. Commercial Bank of Africa (T) Ltd**, Civil Appeal No. 376 of 2019 (unreported) to buttress his line of argument.

He also faulted the learned trial Judge for applying regulation 8 of the Moshi Municipal Council (Traffic) By-laws, 2003 (the By-laws) while regulation 23 of the By-laws requires fines to be imposed upon conviction for contravening or failure to comply with any of the provisions of the By-laws and not otherwise.

The learned counsel, was fairly brief while arguing in support of the second ground of appeal and contended that, the learned trial Judge erroneously found out that there was no proof of existence of pineapples while the District Court in its ruling particularly at pages 179 and 181 of the record of appeal indicated that the respondent admitted to have towed the trucks to their yard knowingly that they were carrying pineapples. The learned counsel took the view that, it was contradictory for the learned trial Judge to have on one hand admitted that the

vehicles were unjustly impounded by the respondents for several months and at the same time not award damages.

In support of the third ground of appeal, the learned counsel was equally brief and faulted the learned trial Judge for his failure to critically evaluate the evidence on record and cited in particular exhibit P2, the ruling of the District Court which ordered the respondent to release the trucks. In his view, the learned trial Judge erroneously opted not to consider exhibit P2, a lawful order which was disobeyed with dismay by the respondent.

In support of the fourth ground of appeal, the learned counsel curiously contended that the evidence of DW1 who testified on behalf of the Moshi Municipal Director was taken contrary to the procedures regarding recording of evidence. On our prompting whether it was improper and wrong for DW1, who introduced himself as an employee of the respondent in the capacity of auxiliary police officer to testify, the learned counsel admittedly argued and rightly so in our mind that, DW1 was competent witness to testify for the respondent. He rounded off his submission by praying that the appeal be allowed with costs.

On the adversary side, Mr. Nyoni, learned Principal State Attorney for the respondent premised his submission by fully supporting the judgment of the learned trial Judge. His view on the By-laws was that, regulation 23 should not be read in isolation but rather it has to be read together with regulation 17 on powers of the respondent to detain vehicles.

On our prompting whether regulation 17 of the By-laws empowers the respondent to impose fines without conviction as stipulated under regulation 23, the learned Principal State Attorney implored us to interpret the rules broadly along with other laws in existence.

In his brief and focused submission in response to the first ground of appeal, he contended that the appellants totally failed to prove their case as the learned trial Judge ably covered in his judgment referring to pages 288 to 295 of the record of appeal. Illustrating, he submitted that, apart from the contradictory evidence of PW4 and PW7 as regards the parking charges at Chui Security Yard and the contradiction on the alleged quantity of pineapples when compared to the different sizes of the trucks, the appellants also failed to produce any documentary evidence to prove that they were carrying the said pineapples in the

trucks. He emphasized that, the learned trial Judge was right to rely on the settled principle of law that he who alleges must prove. He therefore, implored us to dismiss this ground of appeal.

In reply to the second ground of appeal, the learned Principal State Attorney argued that it is erroneous and incorrect to argue that the learned trial Judge admitted that the trucks were unjustly impounded by the respondent for several months whose effect would be for the learned trial Judge to award damages to the appellants. Elaborating further, the learned Principal State Attorney curiously submitted that the learned trial Judge exercised his discretion judiciously not to award costs to the respondent. However, we think that, with due respect, the learned Principal State Attorney's submission in respect of this ground is totally misconceived simply because the appellants were referring to the learned trial Judge failure to award damages for the loss suffered and not costs of the suit.

Upon our further prompting, the learned Principal State Attorney argued that, the appellants were required to prove that they suffered damage something which they did not as aptly discussed by the learned trial Judge in his Judgment citing to us pages 273 to 296 of the record

of appeal. In further submission, he referred us to the unreported case of **Peter Joseph Kilibika and Another v. Patric Aloyce Mlingi**, Civil Appeal No. 37 of 2009 (unreported) in which we decidedly restated the time honoured principle of law that special damages must be specifically pleaded and strictly proved.

Responding to ground three of the appeal, the learned Principal State Attorney admittedly contended that, the learned trial Judge did not evaluate exhibit P2, the ruling of the District Court which ordered the respondent to release the trucks, which to him was of no value since it was declared to be unlawful and set aside by the High Court in Civil Appeal No. 19 of 2015, because it was issued in the absence of a main suit. Illustrating further, the learned Principal State Attorney discussed at considerable length circumstances surrounding exhibit P2 which was, according to the High Court in Civil Appeal No. 19 of 2015 unlawful, and which according to him was not served upon the respondent. Under those circumstances, he beseeched us to dismiss this ground of appeal for not being meritorious.

Arguing in response to the fourth ground of appeal, the learned Principal State Attorney was fairly brief and to the point. In his view, and

rightly so in our mind, DW1 as an employee of the respondent in the capacity of auxiliary police officer was competent witness to testify as he did. Illustrating further, he argued that, DW1 was the officer in charge of the operation of impounding the trucks and according to him, what is crucial in admissibility of evidence is relevance, materiality and competence and the evidence of DW1 met all these criteria. To facilitate his proposition, he referred us to the case of **Director of Public Prosecution v. Sharif Mohamed @ Athuman & Others**, Criminal Appeal No. 74 of 2016 (unreported) and section 127 (1) of the Evidence Act, Cap. 6 R.E. 2019 (the Evidence Act). Thus, he argued that this ground too has no merit and therefore be dismissed.

In rejoinder submission, the learned counsel was fairly brief. In response he argued that, exhibit P2 was served upon the respondent and referred us to page 106 of the record of appeal. Furthermore, he stressed that, rule 8 of the By-Laws is all about wrongful parking. He essentially, reiterated the earlier submission and urged us to allow the appeal.

It is now our duty to determine the appeal by considering the competing arguments made by the learned counsel for the parties in line

with the grounds of appeal. However, before doing that we find it appropriate in the circumstances of the case to preface our deliberation with the basic tenets which will guide us in determining the appeal.

First and foremost, we are mindful of the fact that, sitting as a first appellate Court, we are entitled under rule 36(1)(a) of the Rules to re-appraise the evidence afresh and arrive at our own findings if there is a dire need to do so. There is, in this regard, a considerable body of case law. See, for instance **Future Century Limited v. TANESCO**, Civil Appeal No. 5 of 2009, **Damson Ndaweka v. Ally Said Mtera**, Civil Appeal No. 5 of 1999 and **Melchiades John Mwenda v. Gizelle Mbaga and Others**, Civil Appeal No. 57 of 2018 (all unreported).

The second principle relates to burden of proof and standard of proof. It is a cardinal principle of law that, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in this view by the provisions of sections 110 and 111 of the Evidence Act, which among others state:

> *"110-(1) Whoever, desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

111. The burden of proof in any suit lies on that person who would fail if no evidence were given on either side."

Ordinarily, in civil proceedings a party who alleges anything in his favour also bears the evidential burden and the standard of proof is on the balance of probabilities which means that, the court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved. There is, in this regard a litany of authorities to that effect, if we may just cite few, **Peters v Sunday Post Ltd** [1958] E.A. 424 and **Stanslaus Rugaba Kasusura and Another v. Phares Kabuye** [1982] T.L.R. 338. We shall be guided by the above principles in the course of determination of this matter.

We propose to sequentially approach the grounds of appeal in the pattern they were formulated by the appellants and argued by the learned trained minds.

In the first ground of appeal, as already alluded to above, the appellants seek to challenge the learned trial Judge for not finding that the appellants proved their case to the hilt. Mr. Nyoni had an opposing

view on this. We have given due consideration to the rival submissions and in our considered opinion, we think that, with due respect, the appellants did not prove their case to the standard required. We shall shortly assign reasons for that basis of our deliberation.

As alluded above, in civil proceedings, the burden of proof lies on the party who alleges anything in his favour. This is the essence of the provisions of sections 110 and 111 of the Evidence Act and similarly, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. See, for example **Godfrey Sayi v. Anna Siame**, Civil Appeal No. 114 of 2012 (unreported). This is also provided for under section 3 (2) (b) of the Evidence Act.

Essentially, the court will sustain such evidence which is more credible than the other on a particular fact to be proved. There is a considerable body of case law in this aspect and one case which stands out and which this Court has often sought inspiration, is the statement by Lord Denning in **Miller v. Minister of Pensions** [1937] 2 All. ER 372 in which he states that:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal*

must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unabie to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in criminal case. If the evidence is such that the tribunal can say- We think it is more probable than not, the burden is discharged, but, if the probabilities are equal, it is not..."

It is not insignificant to state that, the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case. We seek inspiration from the extract in Sarkar's Laws of Evidence, 18th Edition **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar**, published by Lexis Nexis and cited in **Jasson Samson Rweikiza v. Novatus Rwechungura Nkwama,** Civil Appeal No. 305 of 2020 (unreported):

*"...**the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof**. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. **The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...**" [Emphasis added].*

We have emboldened the excerpt above purposely to underscore the strict nature of burden of proof upon the one who alleges existence of any particular fact and that the burden does not shift to the opponent until such time that the burden is discharged by the one who alleges.

Reverting back to the matter before us, let us now interrogate as to whether the appellants managed to prove their case as required by law. Looking critically at the testimonies of the eight witnesses for the

appellants as against the four witnesses for the respondent, we are of the firm view that, the appellants' criticism of the learned trial Judge is, with respect, decidedly thin and without any justification. Simply put, the learned trial Judge rightly found that the appellants did not prove their case. We will explain, **One**, the appellants did not produce any documentary evidence to prove that they were actually carrying the said pineapples in the trucks, **Two**, the appellants failed to produce any documentary proof in the form of tickets, receipts or even parking register indicating that they packed the trucks at Chui Security Yard as alleged and that the trucks were loaded with pineapples. **Three**, there was contradictory evidence of PW4 a security guard from Chui Security who testified that they paid TZS. 3,000 per each truck while PW7 the supervisor from Chui Security testified that no parking fees were paid by the appellants. On the contrary the respondent ably proved through the testimony of DW1 and DW2 that they impounded the trucks while exercising powers conferred to them under the By-laws. **Four**, even with the testimonies of the eight appellants' witnesses, the four respondent's witnesses were able to counter each and every allegation by the appellant and; **Five**, the appellants' reliance on exhibit P2, the ruling in Misc. Civil Application No. 61 of 2014 as a proof of the existence of the

pineapples is respectfully baseless because apart from the fact that the said ruling was overturned by the High Court in Civil Appeal No. 19 of 2015, the said pineapples or anything to prove its existence was not tendered as exhibits.

In our considered opinion the trial Judge was undeniably right to come to the conclusion as he did, considering the reasons we have explained above. In view of the foregoing, the first ground of grievances is misconceived and therefore we dismiss it.

Next for consideration is ground two of the appeal in which the appellants complained that the learned trial Judge contradicted himself for admitting in one hand, that the vehicles were unjustly impounded by the respondents while at the same time denying the appellants award of damages. Perhaps, we should begin by stating that, with due respect, we disagree with the learned counsel's formulation that the learned trial Judge admitted that the appellants' trucks were unjustly impounded by the respondent. As argued by the learned Principal State Attorney, and rightly so, in our mind, it is erroneous and incorrect to say so that the learned trial Judge admitted that the appellants' trucks were unjustly impounded by the respondent. As to what exactly the learned trial Judge

held in relation to the legality of the exercise of impounding the appellants' trucks we wish to let record of appeal at pages 291 and 292 speak for itself;

> *"In view of all the above, and taking into consideration the evidence on record,* ***I am of the settled view that the plaintiffs' trucks were lawfully impounded after violating the relevant Municipal laws by parking in a prohibited area. I would thus answer the first issue to the effect that the plaintiffs parked their trucks in a prohibited area and the impoundment was lawful,*** *in terms of Regulation 17 (1) of the By-Laws."* [Emphasis added]

Speaking of the power to detain vehicles, it is, perhaps, pertinent to digress a bit, regulation 17 (1) of the By-laws which provides;

> *"17-(1) Where a police officer, Municipal inspector, Auxiliary police or any authorised officer is satisfied that a driver or vehicle owner has breached any provision under these By-laws, may order such vehicle be detained at the police station or Municipal Yard."*

Reading between lines the above provisions in line with ground two of the appeal, we find that, the argument by the learned counsel

for the appellants that there was sufficient evidence to warrant the learned trial Judge to award damages is truly scraping the barrel. It is a wild and barren theory, without the slightest foundation in the evidence on record as we have already explained above that the appellants were unable to prove that they did not park the trucks at an area not authorized by law. They further failed to prove that the said trucks were loaded with pineapples during the impoundment. We think, with respect, as the learned Principal State Attorney argued as well that, the learned trial Judge was undeniably right and justified not to award damages owing to the fact that the appellants did not strictly prove that they suffered damage as alleged and pleaded in the plaint.

It bears reaffirming that, special damages must be specifically pleaded and strictly proved. See, for instance, the case of **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R. 137 and **Peter Joseph Kilibika** (supra). This renders the second ground of grievance a mere misconception. We equally dismiss it.

We will now turn to the third ground of appeal which in our respectful opinion, should not detain us. We do not see any grain of merit on the complaint that the learned trial Judge did not evaluate

exhibit P2, the ruling of the District Court which ordered the respondent to release the trucks. We are satisfied, as the learned trial Judge did, that the appellants' reliance on exhibit P2 to ground their claim is baseless because that ruling of the court was reversed by the High Court and apart from that ruling there was no any evidence on record to support that claim. To conclude the third ground of appeal must fail.

We will finally examine the fourth ground of appeal which we also feel it should not detain us. The appellants are challenging the evidence of DW1 in that it was taken contrary to the procedures regarding evidence. Trying as hard as we can to follow the appellants' counsel reasoning, we are unable to see, how can the evidence of DW1 an employee of the respondent in the capacity of auxiliary police officer be challenged as incompetent while DW1 was the officer in charge of the operation of impounding the trucks in terms of regulation 17 (1) of the By-laws. We are fortified in this view by the peremptory principle of law that, every witness is entitled to credence and whoever questions the credibility or competence of a witness must bring cogent reasons beyond mere allegations. To say the least, the learned counsel for the appellants did not bring any cogent reason to challenge the competence of the evidence of DW1 and therefore, his complains are mere allegations. We

find considerable merit in the submission by the learned Principal State Attorney, that this ground is not meritorious. In the circumstances we dismiss it.

In view of the foregoing position, we find no merit in the appeal. Consequently, we dismiss it in its entirety with costs.

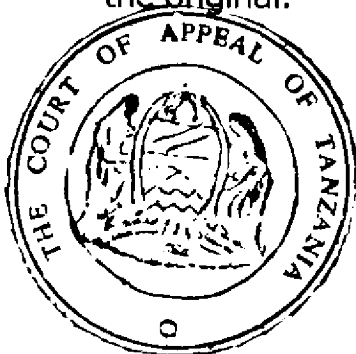
DATED at **MOSHI** this 11th day of July, 2023.

W.B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of July, 2023 in the presence of the 1st, 2nd, 3rd, 5th and 6th appellants in person, Mr. Yohana Marco Odada learned State Attorney for the respondent and in the absence of the 4th Appellant and Mr. Kassim Mmbaga Nyangarika counsel for the Appellants though dully informed, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL