

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAM

CIVIL CASE NO. 76 OF 1982

JUMA FAKIH MBWEWE PLAINTIFF

versus

RAJABU ISSA DEFENDANT

JUDGMENT

MAFIGANO, J.

Juma Fakh Mbewe the plaintiff is claiming damages from the defendant Rajabu Issa. He alleges in his plaint that in May, 1980 he entrusted his Leyland engine to the defendant for safe keeping, which is denied, and that when he called on the defendant to collect the engine five months later he found some of the parts missing, which is also denied. Those missing parts, he says, were a cylinder head assy, six injectors, a crank shaft and a gear, whose total value is approximately shs.90,000=, which amount the defendant has not paid him despite demands, and which he now seeks to recover from the defendant together with interest and costs.

The plaintiff also alleges indirectly in his plaint that the parts were fraudulently sold by the defendant and this allegation is also denied. The defendant asserts, but the plaintiff denied, that criminal proceedings which the plaintiff instituted in the Kisutu Resident Magistrate's Court were dismissed on 23/9/91.

At the conclusion of the pleadings four issues were formulated and recorded, namely:-

- (1) Did the plaintiff entrust to the defendant a Leyland engine for safe keeping as alleged in paragraph 3 of the plaint.

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- (2) Did the defendant dispose of the engine's parts as alleged in the plaint.
- (3) Was Kisutu criminal case No. 644 of 1980 heard and finalized as alleged in the Written Statement of Defence.
- (4) To what relief or reliefs are the parties entitled.

Issue 3 lends itself to an easy answer and I will deal with it first. It is common ground that the plaintiff actually deposited with someone at the home of the defendant the engine in question, and there is hardly any dispute that some of the parts were missing when he came to collect it. It is common ground that he lodged a complaint with the police about the missing parts and that the defendant was brought to court charged with stealing by agent and the defendant denied the truth of that charge. By all accounts, the complaint was withdrawn before any evidence was presented and the defendant discharged. It is therefore not true that the case was heard and finally determined.

As I have just mentioned, it is common ground that the plaintiff deposited the engine with someone at the home of the defendant. He had bought the engine from by National Insurance Corporation as a write-off salvage. Months later he went to call for it and on examining it he found the parts missing. He demanded an explanation from the defendant and to his disconcertment he ~~heard~~ the defendant saying that certain people had approached his wife and told her that he had sent them to fetch the parts and that the women had believed their story and given them those parts.

P.W.2 Shabani Salum, a call-leader, to whom the plaintiff first referred his grievance has recalled the plaintiff telling him that he had entrusted the engine to the wife of the defendant and that the defendant was then away. This does correspond with the versions of the defendant and his junior wife D.W.2 Hidaya Iddi. According to the defendant and Hidaya, the engine was entrusted to the senior wife.

The plaintiff has brought Ajit Singh (P.W.4) who operates a garage at Magomeni Makuti. His evidence in-chief is that the defendant happened to come to his garage looking for a person who could buy a Leyland engine. But it is more likely than not, from what the witness has stated on cross-examination, that this is a story he heard his garagehands narrating

It is convenient and fitting to approach the case against the defendant at two stages and this will be in harmony with issues 1 and 2. The first is about the bailment transaction and the question whether the defendant is answerable for the loss of the parts; and the second is in respect of the allegation that the defendant disposed of those parts, which allegation amounts to one of theft.

It is abundantly clear from the evidence of P.W.2, the defendant and his junior wife D.W.2, that the engine was entrusted to the defendant's senior wife, whose marriage to him is no more. The delivery of the engine to her was what the standard law text-books call a bare naked bailment or depositum, and the general rule is that she was liable as such bailee only for gross negligence.

It is not in evidence that there was any understanding between the plaintiff, the defendant and the senior wife that she would receive possession of the engine on behalf of the defendant. If there were such union of minds then the defendant would properly be found to have been a bailee and gross negligence would, in the circumstances, be reasonably attributable to him.

The question that follows is whether the defendant could be deemed to be a bailee on the mere account of being the husband of the woman who received the engine. It is not away back when tortious wrongdoings of a wife during the subsistence of the marriage were, at common law, actionable against her husband, on the ground of the obsolete fiction of the legal unity of the spouses.

The spousal jural relation has however changed, for better or worse. It is no longer a men's world. It is

a shared world. It seems to me to be evident that under our matrimonial legislation, that is the Law of Marriage Act, 1971, section 65 (a), a husband is not liable in respect of any tort committed by his wife, or to be sued or made a party to any legal proceeding brought in respect of any such tort, merely because he is her husband. I have to hold, therefore, that from the law point of view this suit is misconceived to the extent that it is based on bailment.

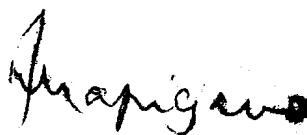
With regard to the allegation of theft, I find, on balance, that the parts were actually stolen. The crucial point though is whether there is cogent evidence which establishes the complicity of the defendant in the theft. With respect, I see none such evidence. For in the state of evidence available before me I feel that it would be wrong to exclude the possibility of the goods having been stolen by another person.

My answers to issues 1 and 2 are, therefore, negative ones. With that I must dismiss this suit and award defendant the costs. It is ordered accordingly.

Delivered.

Mr. Mkondya for Plaintiff

Mr. Raithatha for the Defendant.



D. P. MAPIGANO

JUDGE

26/1/93