

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NUMBER 87 of 2011

**(From the Judgment of the Resident Magistrate's Court of Dar es Salaam at
Kisutu-Civil Case No. 282 of 2007-W.E. Lema-PRM)**

BETWEEN

NATIONAL INFORMATION AND

TELECOMMUNICATION COMPANY.....APPELLANT

VS

TANZANIA POSTS CORPORATION.....RESPONDENT

JUDGMENT

Date of last Order: 03-05-2011

Date of Judgment: 05-06-2012

JUMA, J:

By a plaint he filed at the Resident Magistrate's Court of Dar es Salaam on 15th October 2007, the appellant **NATIONAL INFORMATION AND TELECOMMUNICATION COMPANY** claimed to be paid by the respondent **TANZANIA POSTS CORPORATION** a sum of TZS 9,216,200/= special damages and

TZS 30,000,000/= as general damages arising from breach of contract, loss of profit and disturbance.

In the plaint, the appellant stated that the cause of action arose from the failure of the respondent to deliver goods, which the appellant had entrusted the respondent, to deliver to one Kazimoto of Dodoma. Earlier on 6th February 2007 the respondent corporation which is in the business of transportation and delivering of goods and parcels, had accepted TZS 16,200/= from the appellant as consideration for transportation of valuable goods worth TZS 9,200,000/= to Mr. Kazimoto in Dodoma. The appellant claimed that the respondent failed to deliver a consignment of vouchers thereby breaching its duty of care. Respondent has all along disputed these claims.

The learned trial magistrate (W. E. Lema-PRM) endorsed three issues to guide her determination of the suit. The first issue was whether the respondent Tanzania Posts Corporation was negligent in the loss of the property. The second issue was whether the appellant National Information and Telecommunication Company, was entitled to compensation. The third issue was with respect to reliefs which the parties

before the trial court were entitled. Although the appellant closed his evidence in chief before the trial court on 19th August 2010, the respondent failed to take up its opportunity to bring any witness to its defence at the trial court and the learned trial magistrate inevitably proceeded to write her judgment on the basis of the two witnesses who were brought by the appellant. In her judgment she delivered on 18th May 2011 the learned trial magistrate held that the appellant did not establish the respondent's failure to exercise duty of care towards the appellant. The trial court further held that the appellant did not offer any proof of its entitlement to compensation. According to the learned magistrate, the appellant did not explain the loss which he suffered to attract an award of general damages.

In its memorandum of appeal the appellant has preferred seven grounds to manifest its dissatisfaction with the decision of the trial court. Being the court of first appeal, I shall re-evaluate the entire the evidence presented before the trial court to draw my own conclusions. In my re-evaluation I shall be guided by basic issues arising from the appellant's claim at the subordinate court, which is based on the alleged negligence of the respondent.

In my re-evaluation of the evidence, it is clear to me that the entire case for the appellant was based on evidence of one single witness-Mr. Sharifu Yahya Mohamed (PW1); and documentary evidence to prove that the consignment of vouchers was indeed sent by the appellant through the services of the respondent. On 6th February 2007 Mr. Sharifu Yahya Mohamed (PW1) who was at the time an office clerk employed by the appellant; packed a cargo of vouchers worth Tshs 9,200,000/= to be transported by EMS to one Mr. Kazimoto trading as Kazimoto Electronic of Dodoma. After paying the requisite transportation fee PW1 was issued with an EMS receipt. According to this witness, the vouchers did not reach their intended destination. In his evidence, PW1 insisted that Kazimoto Electronic of Dodoma did not pay the appellant the expected Tshs. 9,200,000/= worth of vouchers because the respondent did not hand over to Mr. Kazimoto the consignment of vouchers.

In my re-evaluation of evidence, I must be convinced that the evidence that was before the trial magistrate on balance of probabilities disclosed respondent's duty of care towards the

appellant with respect to the consignment of voucher entrusted on to the respondent to deliver to Mr. Kazimoto in Dodoma.

I have considered the written submissions made by Mohamed O. Kapilima and Company of Advocates (advocating for the appellant) and Philemon Mujumba (Advocate for the respondent) on the issues whether the respondent Tanzania Posts Corporation had any duty of care towards the respondent National Information and Telecommunication Company, which was breached. My re-evaluation of evidence must inevitably begin from the question whether appellant marshalled up sufficient evidence to prove on balance of probability that the respondent Tanzania Posts Corporation failed to deliver the consignment of voucher worth Tshs. 9,216,200/= to its intended destination in Dodoma and hence failed its duty of care to the appellant National Information and Telecommunication Company. The burden of proving existence of duty of care and breach of that duty was on the appellant. The learned trial magistrate in my view very correctly wondered why Mr. Kazimoto the intended recipient of the consignment of vouchers; was not summoned to verify if he in fact did not receive the vouchers. The learned trial magistrate rightly

observed that it was not proper for the appellant to assume that Mr. Kazimoto did not receive the vouchers without summoning Mr. Kazimoto himself to come and testify. I can safely conclude that by failing to bring the evidence of the intended object of the vouchers i.e. Mr. Kazimoto, the appellant failed on balance of probability to prove to the trial court that the vouchers worth Tshs. 9,216,200/= were indeed not delivered as to raise any duty of care on the part of the respondent.

The evidence of Athumani Juma Kidako (PW2) did not add much evidential value to what Mr. Sharifu Yahya Mohamed (PW1) had testified. Apart from testifying on his general knowledge of the case, Athumani Juma Kidako (PW2) was not directly involved in the transaction that led to the alleged loss of the consignment of vouchers. Further, the evidence of PW2 has no probative value in so far as the question whether Mr. Kazimoto received from the respondent the consignment of vouchers which the appellant had sent through the medium of EMS operated by the respondent.

Appellant, in his action on negligence was required to prove that respondent owed him a duty of care to the balance of probability before the trial court could move on to consider

whether the respondent had breached that duty of care. It is my finding that a duty of care was not owed since the appellant failed to prove to the satisfaction of the trial court, that Mr. Kazimoto did not receive the consignment of vouchers. I am therefore of the opinion that the trial court made a right decision. On the whole, the trial magistrate was correct in her conclusion that the suit by the appellant was not supported by evidence to the required standard expected of civil suits. This appeal is therefore found to be without merit and is hereby dismissed with costs. It is ordered accordingly.

DATED at DAR ES SALAAM this 5th day of June, 2012



**I.H. Juma
JUDGE**

JUDGMENT is delivered in the presence of Mr. Kapilima, Advocate (for the Appellant).



**I.H. Juma
JUDGE
05-06-2012**

