

IN THE HIGH COURT OF TANZANIA**AT DAR ES SALAAM****CIVIL APPEAL NO. 21 OF 2014****PETER JOSEPH MUSHI.....APPELLANT****V.****LYOTO & CO. LTDRESPONDENT****JUDGMENT***Date of last Order* / /2015*Date of Judgment* / /2015**Shangwa, J.**

This is a first appeal in a case which originated from the Court of the Resident Magistrate at Kisutu. In the said Court, the Appellant was the defendant and the Respondent was the plaintiff. The Respondent was the successful party.

The not accept the trial Court's decision and has resonated to this Court for challenging. Mr. Saba saba, learned Advocate, appeared for the Appellant while the Respondent had the services of Mr. Mgare, leaned Advocate.

The brief facts of the dispute between the parties which were established before the trial Court are as follows:- On 20th August, 2011, the Respondent's driver in this appeal was arrested and the truck he was driving was seized by the Appellant. He was put under arrest by Appellant from 10.00 a.m till 7.00 p. m when he was released but the truck remained under control of the Appellant. The Respondent filed a suit against the Appellant in the Court of the Resident Magistrate at Kisumu

for an order to release his truck, loss of profit from its use, general damages and more other reliefs. This is the end of the brief facts of the dispute between the parties.

Herein below are the grounds of appeal raised by Appellant against the trial Court's decision.

1. That the adduced evidence was not properly analyzed and evaluated by the trial Magistrate

2. That the trial Magistrate erred in holding that the plaintiff's motor vehicle was detained by the defendant.

3. *That the trial Magistrate erred in not finding that the plaintiff's motor vehicle collecting garbage from house around.*

Hearing of the matter before this Court was by way of wither submission. I thank both parties for adhering to the schedule for submitting their written admission on the first ground of appeal, counsel for the Appellant submitted that the judgment of the trial Count heavily based on the evidence of P.W. 2, the plaintiff's driver. The learned Counsel submitted that had the trial Magistrate evaluated thoroughly the evidence of P.W.2, the result would not have been the same as the evidence of the said witness is too exaggerated to be relied upon.

On the second ground of appeal, the learned counsel submitted that there is no any proof that the said motor vehicle was detained. That what is clear in evidence is the fact that upon being arrested, the driver was sent to call his boss P.W. 1 for purposes of resolving the matter. On the third ground of appeal, learned counsel for the Appellant submitted that no evidence to prove the whole story and no corroborative evidence to prove the case.

In his reply submissions, Mr. Mgare refuted those submissions. He told this Court that the trial Court correctly evaluated and properly analyzed the oral and documentary evidence which was adduced and tendered respectively before it. He further contended that the evidence before the trial Court was based not only on P.W.

2' S oral testimony but also on the testimonies of all other witnesses who testified in Court, as well as documentary evidence which was tendered. He referred this Court to the case of PRICE V. KERSAI [1957] E A 72 and the case of MARTHA MICHAEL WEJJA V. ATTORNEY GENERAL & 3 Others [1982] TLR 35.

Mr. Mgare further contended that the trial Court was justified to hold the way it did because the oral evidence of P.W. 2 all pointed out that the illegal attachment and detention of the Respondent's motor vehicle was perpetrated by D.W.1 as a street chairman. D.W.3 in his oral testimony clearly stated that the attachment and detention of the Respondent's truck was ordered by the Appellant. Mr. Mgare said that if the appellant never

ordered the attachment and detention of the Respondent's truck then how comes the said truck is still in his compound unreported to the police?

On the third ground of appeal raised by Appellant, Mr. Magare stressed that the trial Court correctly made the decision since the allegations made by the Appellant were never proved. He referred the Court to S. 110 (1) of the Tanzania Evidence Act cap 6 R. E. 2002 which provides as follows:-

"3. 110 (1) whoever desires any Court to give judgment as to any legal right or liability dependent on the essence of facts which he asserts must prove that those facts exist".

He further cited S. 110 (2) of the aforesaid Act to show that the burden of proof that P.W. 2 was collecting garbage from the house hold and not from the beach and open space lied to the Appellant and this burden could not be shifted to the Respondent.

On the first ground of appeal, this court is called upon to decide as to whether or not the trial Magistrate analyzed and evaluated the evidence on record before arriving at his decision. In my opinion, the trial Magistrate did analyse and evaluate the evidence on record before arriving at his decision. The record shows that before coming to the conclusion that the defendant was not justified to attach motor vehicle with Registration Number T. 600 AFN make Suzuki Trauck, and that the plaintiff's

motor vehicle was wrongly detained, the trial Magistrate considered both parties claims. The following were his remarks and I quote:-

“The dispute is that while the plaintiff claims that they were collecting garbage in the open areas, the defendant in the other hand claims the plaintiff was collection garbage at judge Mweisumo house. The only way to clear and justify this was for the defendant to either call any person from judge Mweisumo house to come and prove this, an act which they never bothered to do so so. This omission makes this Court then to believe

that the plaintiff valuate was wrongly detained”.

Furthermore, the trial Magistrate made the following remarks and I quote:-

“From the evidence on record again it is clear that the plaintiff had to have a vehicle in order to proceed with the contract they had entered with Kinondoni Maniacal exhibits were tendered in this respect”.

From the above quoted remarks, it is crystal clear that the trial Magistrate did analyse and evaluate the evidence on record before arriving at

his decision. This disposes of the first ground of appeal which is answered in the negative.

On the second ground of appeal, the Court is called upon to decide as to whether or not the trial Magistrate erred in holding that the plaintiff's motor vehicle was detained by the defendant. Whereas counsel for the Appellant argued that the trial Magistrate was wrong in holding that the plaintiff's motor vehicle was detained by the Appellant, Counsel for the Respondent contended that the trial Court was justified to hold so basing on the evidence of P.W1, P.W.2 and DW 2 who pointed out that the illegal attachment and detention of the Respondent's motor vehicle was perpetrated by

D.W. 1 as a street chairman. Counsel for the Appellant posed a question that if really the Appellant never ordered the attachment and detention of the Respondent's motor vehicle, then how comes the said vehicle is still in his compound unreported to the police? On this ground, I share the Respondent's view that the trial Magistrate did not err in holding that the plaintiff's motor vehicle was detained by the defendant. There is sufficient evidence on the trial Court's record to prove that the defendant detained the plaintiff's truck. This disposes of the second ground of appeal which is answered in the negative.

On the third ground of appeal, the Court is asked to determine as to whether or not the trial Magistrate erred in not finding that the plaintiff's motor vehicle was seized while collecting garbage from households or from houses around the place from where it was seized from its driver. In my opinion, the trial Magistrate Katemama. Rm was faulted for no fault on this ground. If one looks at page four of his taped judgment, it will clearly be seen that he is faulted not to have made a finding on a matter on which he actually made a finding. The following is what he wrote in his finding and I quote:-

“The dispute is that while the plaintiff claims they were collecting garbage in

the open areas, the defendant in the other hand claims the plaintiff was collecting garbage at judge Mweisumo's house. The only way to clear and justify this was for the defendant to either call any person from judge Mweisumi's house to come and prove this, an act which they never bothered to do so. This omission makes this Court then to believe that the plaintiff's vehicle was wrongly detained as it was collecting garbage in an area which it was eligible to collect".

The disposes of the third ground of appeal which is as well answered in the negative.

For the reasons I have given on the three grounds of appeal which have failed in entirety, I dismiss this appeal with costs.

A. Shangwa
JUDGE
16/10/2015

Delivered in open Court in the presence of Mr. Mgare for Respondent and in the absence of the Appellant.

A. Shangwa
JUDGE
16/10/2015