

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 167 OF 2017

(Appeal from the decision of the RMS Court of Dar Es Salaam at Kisutu, hon. D. Kisoka dated 11.04.2014 in Civil Case No. 280 of 2008)

Wahab Bakari Gulangwa **Appellant**

Versus

Diamond Shipping Services Ltd **Respondent**

JUDGEMENT

Date of Last Order: 02.06.2020

Date of Ruling: 15.07.2020

Ebrahim, J.:

The Appellant herein sued the Respondent herein as a shipping agent of Yokohama Trading Japan for failure to deliver a motor vehicle make Isuzu Elf NKR 66 imported from Japan. It was evidenced at the trial court that the said motor vehicle reached Dar Es Salaam Port as designated and handed over to Tanzania Port Authority. The Plaintiff inspected the car and hired the services of the clearing agent known as HARAKA AGENCY. It was when HARAKA Agency initiated the process to clear the motor vehicle, when it was

discovered that the same is not in the custody of TPA presumed to have been stolen. The Appellant said that he was informed by the Respondent that the motor vehicle was cleared by B & M Company. The Appellant reported the matter to the police which later led to the filing of a Civil Case No. 280 of 2008 at Kisumu which resulted to the instant appeal. The Appellant raised eight grounds of appeal which can be clustered into two grounds challenging that the trial magistrate did not consider the relationship between Respondent and Principal was that of Agency relationship whereby the Respondent acted as a custodian of the Principal's property. Another ground of appeal is that there was no delivery order issued by the Respondent to the Appellant to enable him clear his motor vehicle from the Port.

After a long wait of the original file, this court ordered parties to argue the appeal by way of written submission and set a schedule thereat. Both parties adhered to the set schedule and extensively submitted their arguments for and against the appeal.

In this appeal, the Appellant was represented by advocate Abdulfattah and the Respondent preferred the services of advocate Yohannes Konda.

In determining this appeal I shall not recapitulate the submissions by the Counsel but shall refer to them in the course of addressing substantive issues. I must comment though that the lengthy submission by the Counsel for Respondent on what amount to submission and how should it be presented serves as a good academic piece. Nevertheless, the court managed to comprehend the grounds of appeal and would proceed to determine the same.

Before I proceed to determine the grounds of appeal, I must state here that I am aligned to the principle of the law that being the first appeal, this court has a duty to re-visit the evidence on record and come up with its own findings of facts if the any – see the case of **Yohana Dionizi and Shija Simon Vs The Republic**, Criminal Appeal No. 114 of 2015 (CAT).

The bone of contentions in this appeal firstly is whether the Appellant could not have cleared his motor vehicle without being availed with

delivery order by the Respondent. Secondly it is whether there was a delivery order issued by the Respondent to the Appellant.

As intimated earlier that this being the first appeal, I find it apt to revisit the evidence in record with a view of addressing the raised issues.

At the trial the Appellant adduced evidence as **PW1**. He tendered **Exhibit P1** being a bill of lading in showing that the Respondent was listed as a party to be contacted for cargo release. He testified that upon receiving Bill of lading he engaged the clearing agent called Haraka Company which informed him that according to TRA the motor vehicle was cleared by B & M Company. The Appellant made follow up with the Respondent who told him that they shall make follow up but to date the Appellant has not received his motor vehicle. Responding to cross examination questions, the Appellant stated that the Respondent's responsibility was to ensure the motor vehicle reaches Dar Es Salaam Port then it is cleared by the Clearing and Forwarding Company. He said when Haraka Company wanted to lodge the documents for clearing the motor vehicle; he found the same was cleared by B & M Company. He responded further that

the relationship between the Respondent and the Clearing and Forwarding Company is on exchange of documents. The Appellant responded also that he does not know about the delivery order. **PW2 David Muzio** testified as an agent whose Clearing and Forwarding Company was hired by the Appellant to clear the motor vehicle from the port. He said he went to Diamond Shipping Line to hand over the Bill of Lading and they were shocked and told him that the motor vehicle has been cleared by B & M Company. When responding to cross examination questions, he stated the Clearing and Forwarding Company surrender the original documents to the Shipping Line which then issues a delivery order. He denied to have been provided with the delivery order. He insisted that Diamond Shipping Company told him that the delivery order was procured by B & M Company and they are the ones that cleared the motor vehicle. He commented on exhibit P1 that it indicates the Appellant as the owner and the Respondent as the transporter.

On Respondent's side one John Lemomo, the operation manager testified as **DW1**. He testified that among his responsibilities is to inform the TPA and TRA on the type of shipping, size, cargo taken

and the owner. Such information is contained in Cargo Manifest. He confirmed that the disputed motor vehicle reached Dar Es Salaam Port. He explained the procedure after the car has been handed to the relevant authority, the owner/agent contacts them with the bill of lading so that they can match with details in the manifest. Once the details matches, the clearing forward pays the fees including delivery order fees and they avail the delivery order on the same. He admitted that according to bill of lading the owner is the Appellant and that the shipping agency issues a delivery order to Tanzania Ports Authority to introduce the cargo owner. He admitted also that he did not know if the Appellant was handled with delivery order or with the motor vehicle. DW1 confirmed that the motor vehicle was handed to TPA. **DW2, Daniel Malongo** stated that the Respondent is a shipping agent. He testified that once the cargo, in our case the motor vehicle is removed from the ship TPA becomes answerable. He tendered a **tally sheet** which was admitted as **exhibit D2**. He stated further that the owner of the motor vehicle is supposed to give them original bill of lading and the Respondent issue a delivery order. The owner is supposed to pay USD 33 as administration fees.

He admitted being told by one Naomi that the Appellant could not find his car and it was believed to have been cleared by B & M Clearing Agent. He said he advised the client to take TPA to court. He admitted that the Appellant was not issued with the delivery order. Responding to cross examination questions, he said that the Respondent is the one who issues a delivery order and their relationship is that the shipping line issues a delivery order and TPA is the custodian of the goods. He responded also that the Appellant went to their office to complain that he could not find his car but B & M went to their office to get a delivery order and handed a letter as an agent. He testified also that TPA is responsible to hand over the motor vehicle to the agent who has a delivery order.

Now coming to the arguments advanced by Counsels from both parties. Having gone through the evidence, indisputably is the fact that the Respondent is an agent of the Principal where the Appellant ordered his motor vehicle from. The said motor vehicle was delivered to the Ports of Dar Es Salaam.

Counsel for the Appellant argued in his submission that the Appellant did not receive his motor vehicle because the Respondent did not

issue a delivery order which would enable TPA, the custodian to release the same.

To the contrary Counsel for the Respondent submitted that the Respondent discharged her duty when the Appellant's vehicle reached at the Wharf and offloaded from the carrier's ship and was handed to TPA as a custodian pending payment of taxes and other fees. He submitted further that as per the International Carriage Standard Practices by the Sea Port Authority owner of the cargo cannot take the cargo without showing the delivery order which is issued by the shipper or her agent. He submitted further that in this case the Appellant is the one to blame because he did not state in his testimony that he went to the office of the Respondent for collection of delivery order and he was refused the same or that he has paid all the requisite fees and custom charges for him to be handed with delivery order. He cited a number of cases to cement the point on the duty to prove existence of facts. Those cases were **Barelia Karangirangi V Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017; **Attorney General & 2 Others V Eligi Edward Masawe & Others**, Civil Appeal No. 86 of 2002; **Ikizu Secondary School V Sarawe Village**

Council, Civil Appeal no. 163 of 2016; and **Godfrey Say V Anna Same Mary Mndolwa**, Civil Appeal No. 114 of 2012(all unreported).

What could be gathered from the argument by the Counsel for the Respondent above is that the Appellant did not go to collect the delivery order from the Respondents office and was denied the same particularly if he had paid the requisite fees.

I must state here that the Respondent's Counsel is indeed bringing new issue at this stage of submission. I have equally gone through the entire evidence and the judgement of the trial court and nowhere was the issue of requisite fees for payment of custom charges was discussed and determined as an obstacle for the Appellant to be availed with the delivery order.

Both DW1 and DW2 admitted under oath that it is the Respondent who is required to issue a delivery order. DW2 testified to have been told by one of their employees called Naomi that the Appellant's Agent went to their office to tell them that he could not find his car. He testified also that the car was cleared by B & M Company which proves their testimony that an agent cannot clear the cargo without being availed with the delivery order by the shipping line. More so

DW1 told the trial court that once the cargo arrives, the owner is supposed to present a bill of lading (**exhibit P1**) so that they can tally with the manifest list so as other procedures for clearing of the motor vehicle can follow. PW2 told the court that when he went to begin the process of clearing the motor vehicle he was told that B & M Company presented the documents and was availed with delivery order and cleared the same. This piece of evidence was not controverted by the Counsel for the Respondent during cross examination. As per the cardinal principle of the law, failure to cross examine a witness on an important fact implies the acceptance of the truth of the witness evidence (see the case of **Damian Ruhele V R**, Criminal Appeal No 501 of 2007(unreported)). Thus, counsel for the Respondent is estopped to deny at this stage that the Appellant did not go to the Respondent's office to collect and initiate the process of clearing his motor vehicle including but not limited to collection of delivery order. Again as per the Respondent's witness testimony he affirmed that the relevant documents were availed to B & M Company and it is the same company that cleared the Appellant's motor vehicle. Thus the issue that the Appellant did not ask for the

delivery order or that he did not show if he paid the requisite fees is a none-starter and I find it to be baseless.

It is indisputable that TPA is a custodian of the goods and shall not release the same to the owner unless the owner hands over a delivery order which is issued by the shipping line/ agent which in our case the Respondent. This fact has been clearly admitted by the Counsel for the Respondent in his submission. Coming to the issue of proof, since the Appellant is alleging that their Clearing and Forwarding Agent is Haraka Clearing and Forwarding Agent; and the Respondent was certain that the motor vehicle was cleared by B & M Company, it was upon the Respondent to prove their assertion by showing the court that indeed they availed the delivery order to a company that was authorized by the Appellant himself and not a Company that had no mandate from the Appellant by tendering in court all the documents submitted to them by the said B & M Company including bill of lading which would otherwise tally and confirm to them with the manifest list/sheet as they claim. In essence and as per the principle of law, the burden of proof shifts to the Respondent to prove that they handed the requisite document to

the Agent authorized by the Appellant. **Section 110(1) of the Law of Evidence Act, Cap 6 RE 2002** is clear that *whoever desires court to give judgement on his favor on the existence of facts must prove that those facts exist*. Unfortunately, the Respondent has failed to discharge his legal burden as per a number of cited authorities above.

All in all, after the re-evaluation of the evidence adduced at the trial court, it is clear that the Appellant could not clear his motor vehicle with the TPA because he was not issued with the delivery order by the Respondent as required. Instead the Respondent issued relevant documents to another company unauthorised by the Appellant.

At the end results, I find that the appeal has merits. Coming to the issue of reliefs, it is obvious from the evidence adduced in court, the Appellant could not strictly prove loss of earnings. Thus the appeal is allowed as per the following orders:

1. The decision of the Resident Magistrate Court in Civil Case No. 280 of 2008 is reversed and I set aside the resultant judgement and decree.

2. The Respondent shall refund to the Appellant the sum of USD 9,300 as the value of the vehicle or its equivalent amount to Tanzania Shillings at the prevailing commercial exchange rate on the date of payment.
3. The adjudged sum at item 2 above shall attract a commercial interest rate of 18% p.a. from the date of filing this case at the trial court to the date of judgement on appeal.
4. The adjudged sum at item 1 above shall also attract an interest at court's rate of 7% p.a. from the date of this judgement to the full settlement of the claim.
5. The Appellant shall also have his costs from the trial court.

Accordingly ordered.



Dar Es Salaam

15.07.2020

A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim

Judge