

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CIVIL APPEAL NO. 53 OF 2020

(Arising from Civil Case No. 03 of 2020 in the Resident Magistrate's Court of Mwanza)

SAROIYA COMPANY LTD MWANZA APPELLANT

VERSUS

BAKARI ZAHORO HIZZA RESPONDENT

JUDGMENT

07 & 30/10/2020

RUMANYIKA, J.:

It all began in Nyamagana district court whereby with respect to breach of transportation agreement, against Soroiya Company Ltd Mwanza (the appellant) Bakari Zahoro Hiza (the respondent) was awarded shs. 26,560,000/= being specific damages, also interest and costs and shs. 5,000,000/= as general damages. The appellant is not happy hence the 3 ground memorandum of appeal which revolves around two (2) points essentially; **(i)** That the trial court improperly evaluated the evidence on record **(ii)** That the documentary evidence was improperly admitted and considered.

Mr. Steven Makwega and Ms. Janeth Eden learned counsel appeared for the appellant and respondent respectively.

When the appeal was called on 07/10/2020 for hearing, Mr. Makwega learned counsel had an observation (cum oral preliminary point

of objection namely; A. W. Kabuka, RM having had attempted mediation, according to records he failed on 11/01/2020 and the proceedings were contrary to the law not destroyed, it could not be said that the presiding B. M. Lema, RM was by any means in his decision not influenced by the records (case of **John Nyanda Ndagale V. Nestory Kyora**, HC. Civil Appeal No. 27 of 2017 at Mwanza (unreported)).

Ms. Janeth learned counsel submitted that indeed in effect the mediation rules so required but Mr. S. Makwega learned counsel did not show how the trial magistrate was influenced much as the trial RM did not, in the impugned judgment make any reference to what had transpired during the attempted mediation. I overruled the p.o and reserved reasons therefor. Here are the reasons; Upon marking the mediation as failed on 11/03/2020 the learned trial resident magistrate may, or may have not destroyed the records yes, but probably having had the claims read to them, the appellant's counsel is on record only having said:

"My client told me the amount is too heavy to her, she can't afford to pay such amount even in instalment. We pray mediation be marked as failed..."

The rationale behind unsuccessful mediator judge destroying the records is to propagate judicial ignorance and impartially on the part of the subsequent trial judge. Now that with all intents and purposes the records suggested no appellant's offer, admission or something in favour of the respondent, the records could not have influenced the court howsoever. It would have been a different scenario therefore which it is not the case here if, basing on the records the trial court had entered judgment on

admission or something. The case of **John Nyanda Ndagale** (supra) is respectfully distinguishable. It is for this reason therefore that I overruled the p.o.

On the merit part of it Mr. S. Makwega learned counsel submitted; **(1)** that the evidence of Pw1 and exhibit P11 did not satisfactorily or affirmatively answer the issue leave alone the names in the receipts which concerned no the respondent as there was, between them no copy of written contract hence no appellant's liability **(2)** That not only Exhibit P11 was not existent but also Exhibits P1 and P2 were not relevant to the case **(3)** that contrary to the Rule in the case of **Hamis Rajab Dibagula V.R.** (2004) TLR 181 the learned resident magistrate failed to assign reasons why he did not believe evidence of Dw1. Had the magistrate properly evaluated the evidence he should have arrived at a different conclusion. The learned counsel further contended.

Ms. Janeth learned counsel in a nut shell she submitted: **(1)** contracts needed not necessarily be in writing **(2)** that the receipts may have been issued in different names by different people yes, but that one was immaterial much as the appellant did not disown the receipts **(3)** that the respondent's case was on the balance of probabilities proved (case of **Khalfan Abdallah Hemed V. Juma Mahende Wang'anyi, Civil Case No. 25 of 2017, Hc Mwanza (unreported)**) That is all.

The central issue is whether the respondent's case was proved on the balance of probabilities. A brief a count of the evidence reads:-

Pw1 Bakari Zahoro Hizza a businessman of Mwanza stated that having had shopped in Dar es Salaam he contracted one Marieta of Dar es

Salaam on 05/06/2019 to ferry him such assortment of goods from Dar es Salaam to Mwanza, there followed the 2nd, 3rd and 4th consignments on 20th, 22nd and 24th June, 2019 respectively (as per receipts- Exhibits P1 – P11) and, in his name he paid shs.4.0m being freight charges) only at a later stage to know that not only the cargo would not be transported at once but also out of it some goods worth not less than 26,000,000/= were missing and the said Marieta promised to pay but for the remaining he was advised him to contract another company. In place thereof he procured Bura Cargo transport.

Pw2 Anthony Senga a supervisor of the appellant's business herein Mwanza stated that having communicated with Marieta on his behalf he received cargo from Dar es Salaam on 05/06/2019 and later on some other consignments but some worth shs. 26,560,500/= were missing (Exhibit P10).

Pw3 Mustafa Cosmas stated that he worked with the company here in Mwanza as Cargo man until as late as September, 2019. That as Director Marieta assigned him on 02/08/2019 to park and escort the cargo from Dar es Salaam but the cargo got missing, they reported the case to police.

Pw4 Revocatus Portus a matching guy, but for such purposes employee of the appellants where Marieta was his boss, he stated that having been duly assigned by Marieta on 06/08/2019 to escort the consignment from Dar es Salaam – Mwanza he arrived in Dar es Salaam but found shs. 26.0 million worth cargo missing but later on Marieta told him that upon verification the consignee Bakari found another shs. 11.0m,

hence total loss of shs. 38.0million plus. Then Bura Company transported the remaining cargo.

Dw Emmanuel Maiko Assey stated that with regard to the case he supervised the appellants' transport business. That Marieta Maico, Assey and George Alex Assey owned and they ran the company (copy of MEMARTS – Exhibit "D1"). That he did not know the respondent before. That if anything, none of the receipts (Exhibits 1-9) was issued in the respondent's name that, if at all according to the appellant policy in case of loss their liability was only limited to shs. 200,000/= that with respect to the business, Pw3, Pw1 and Pw4 were not employees but mere agents thereof that Marieta Assey was his relative and he knew Zahoro not the other names.

The pivotal issue is whether the respondent's case was on the balance of probabilities proved. According to the list of assortment of the items prepared by Pw1 (appellant's employee) part of the respondent's cargo may have been missing and in the process got lost yes, but the list suggested no guarantee or appellants' acknowledgement much as the appellant denied the liability. It means therefore that if anything the specific damage of shs. 26,560,000/= or even a lesser sum it was not specifically and on balance of probabilities 100% established and proved suffices the point to dispose of the appeal.

However, now that in his evidence the respondent alleged without justification having received some cargo ahead the agreed schedule and the appellant did not dispute it, the former was entitled to general damages of shs. 5.0 million, and punitive damages of shs. 5.0 million. In

the result it is ordered that the appellants pay the respondent **(i)** shs. 5.0 million being general damages, **(ii)** shs. 5.0 million being punitive damages and **(iii)** 70% decretal interest and **(iv)** costs of the case here and in the court below. It is so ordered. Appeal is partly allowed.

Right of appeal explained.



S. M. RUMANYIKA
JUDGE

24/10/2020

Judgment is delivered under my hand and seal of the court in chambers this 30/10/2020 in the presence of Mr. Makwega learned counsel for the appellant and Miss. Janeth for the respondent.



F. H. MAHIMBALI
DEPUTY REGISTRAR
30/10/2020