

IN THE HIGH COURT OF THE TANZANIA

AT SUMBAWANGA

CIVIL CASE NO. 2 OF 2017

NASORO A. AHMEDPLAINTIFF

VERSUS

**1. MINISTRY OF WORKS TRANSPORT
AND COMMUNICATION
2. ATTORNEY GENERAL**

DEFENDANTS

JUDGEMENT

29th September -16th November 2020

MRANGO, J

The plaintiff being a natural person living for gain at Sumbawanga Municipality claims against the two defendants for the following:

- (a) Payment of a total sum Tshs. 106,212,640/= being a loss of business/profit income of Tshs. 418,160/= per day starting from 18th day of April 2016 when the motor vehicle was detained to 2nd day of March 2017 when the motor vehicle was released.
- (b) Payment of general damage Tshs. 30,000,000/=
- (c) Payment of exemplary damages Tshs. 20,000,000/=
- (d) Interest at the Commercial rate of 20% on (a)
- (e) Interest of 7% per annum on (a), (b) and (c)
- (f) Costs of the suit

(g) Any other reliefs

According to the pleadings, on 18th day of April 2017 the plaintiff driver working in a normal course of business of transporting passengers and while driving plaintiff's bus make Mitsubishi Fuso with registration No. T257 AZV from Kirando, Nkasi District to Sumbawanga with passengers in it, the said motor vehicle was stopped and detained by the TANROAD Rukwa, being the agent of the first defendant on account that it had absconded or bypassed the weigh bridge station at Kantawa Village, Nkasi District on such particular day.

The defendants jointly strongly disputed the claims as they put the plaintiff to strict proof. It is their contention in the written statement of defence that the detention of the motor vehicle was lawful and justifiable, since the said motor vehicle absconded the weigh bridge station contrary to law.

The pleadings have raised two issues for determination, namely as follows;

- 1. Whether the said motor vehicle was unlawfully impounded and detained by the first defendant**
- 2. To what reliefs are the parties entitled.**

At the hearing of this suit, the plaintiff was represented by Mr. Peter Kamyalile, learned advocate while the two defendants were represented by Mr. Francis Rogers, learned senior state attorney. In the course of hearing of this suit, one witness namely Nassoro Rashid Ahmed (PW1) testified in support of the plaintiff case while three witness namely, H. 6126 D/C William (DW1), Ramadhan Shaban Mahembe (DW2) and Chacha Boaz Gatora testified for the defendants's side.

In support of the plaintiff case, PW1 testified as follows. He is residing at Sumbawanga Municipality dealing with the business of transporting passengers. He owns a bus with registration No. T. 257 AZV evidenced by Motor Vehicle Registration Card (Exhibit P1). He also has public carrier licence from Sumatra and insurance cover policy from National Insurance Corporation as evidence by Exhibit P2 and Exhibit P3 respectively.

He testified further that the bus which carries 45 passengers in it is operating between Sumbawanga and Kirando. That his claim is for Tshs. 106,212,640/= being damages for the loss of income of business caused by unlawful detention of his bus for 254 days as a general damage and punitive damages inclusive. As to how the motor vehicle

was detained, PW1 said that the said bus on 18th day of April 2016 was detained by TANROAD Rukwa at Kantawa Village on allegation of bypassing the weigh bridge located at Kanondo village. He testified that following that he was fined Tshs. 4,486,000/= and issued with a notice to that effect. He therefore challenged that fine by way of an appeal to the Minister for works, transport and Communication, unfortunately the Minister dismissed the appeal and confirmed the decision of the TANROAD Rukwa, and then he lodged a Criminal Appeal No. 33 of 2016 at this court against the decision of the Minister. He said this court upon hearing of the appeal, quashed the decision of the Minister and therefore ordered immediate release of his vehicle with registration No. T. 257 AZV. PW1 said he was issued with handing over certificate by TANROAD Rukwa dated 2nd of March 2017 as evidenced by Exhibit P5.

As to which motor vehicle he owns, whether motor vehicle with registration No. T257 AZV or T257 AVZ. The plaintiff said he entered a memorandum of understanding with TANROAD Rukwa where the proper motor vehicle agreed as his property was T.257 AZV and not T.257 AVZ and it was evidenced by Exhibit P6. PW1 told the court that he signed a handing over note between himself and TANROAD Rukwa in respect of the Motor Vehicle with registration No. 257 AZV as evidenced by Exhibit

P7. He said the said such Motor Vehicle was detained for 254 days from 18/04/2016 up to 02/03/2017 until when it was released and handed over to him. PW1 said he suffered loss in the period the Motor Vehicle was impounded as he did not do transportation for those 254 days and suffered a loss amounting to Tshs. 106,212,640/= as the bus was operating between Sumbawanga and Kirando in a one route, that is go and return as per licence issued by Sumatra (Exhibit P8). He said the fare for one person is Tshs. 7000/= from Sumbawanga to Kirando which is **151 KM** rough road and the same is evidenced by a copy of approved fare (Exhibit P9).

PW1 said his claims is a result of calculating a Tsh. 7000/= (fare per person) X 45 (Number of passengers in a bus) = 315,000/= for the morning trip X 2 = 630,000/=. PW1 also mentioned daily deductions including 68 Litres consumption X 1880 = 127,840/=: Tsh. 30,000/= as bus driver allowance, tyre tear and ware Tshs. 29,000/=: Daily Service Tshs. 15,000/=: Ticket seller Tshs. 15,000/=: total expenditure is Tshs. 211,840/= minus to the total income of Tshs. 630,000/= equal Tshs. 418,160/= times 254 days for which the bus was detained equal to total income of Tshs. 106,212,640/=

PW1 informed the court that after unlawful detention of his bus he suffered mental distress as he was depending on it to get daily income. As a result, he wrote a 90 days' notice to the 2nd defendant (Exhibit P10) claiming Tshs. 106,212,640/= as a damages before instituted this suit.

On cross examination, PW1 told the court that the demand notice by him was addressed to the Permanent Secretary Ministry of Works, Transport and Communication, Regional Manager TANROAD Rukwa and Attorney General Chamber. He said he is the owner of the Motor Vehicle with registration No. T. 257 AVZ. According to him, the detention of the Motor Vehicle was done on 18/04/2016 and involved the Motor Vehicle with registration No. T.257 AVZ. He informed the court that he was earning Tshs. 630,000/= daily before deducting Tshs. 211,840/= daily as expenditure and remaining with Tshs. 418,160/= and he was paying an income tax Tshs. 2,700,000/= annually and did not deduct income tax from total claim. PW1 also explained to the court that he filed Criminal Appeal No. 33 of 2016 at this court before Hon. Mgetta, J, where the court ordered immediate release of Motor Vehicle with registration No. T. 257 AVZ.

On re-examination, PW1 told the court that Motor Vehicle with registration No. T. 257 AVZ was wrongly inserted as the proper

registration No. is T. 257 AZV and that was noted in the memorandum of understanding. In answering the question posed by the court, PW1 said his bus was in full capacity every day and the payment of income tax is estimated by TRA.

The defence evidence was as follows. DW1 H6126 D/C William, a Police Officer stationed at CID office Sumbawanga and works with the Tanzania Police Force for six (6) years now. He told this court that on 18/04/ 2016 he was assigned to accompany the TANROAD Officers to the Weigh bridge at Kantawa Village and they arrived at 6.30 am. The TANROAD Officers upon arrival put posts to show there was a weigh bridge scale. They stopped vehicles for weighing them from both sides of the road. At around 10.00 am the said the Motor Vehicle with registration No. T. 257 AZV make Mitsubishi Fusso, a bus which was from Nkasi heading towards Town Centre, Sumbawanga was stopped. He told this court that the driver disobeyed the order and did not stop as ordered. They were ordered by the TANROAD Officer in charge one Hossiana Ngailo to chase the Motor Vehicle. He said they met the said Motor Vehicle at Kipande Village and ordered it to turn back to the point of weighing scale and left TANROAD Officials with their duties.

Upon cross examination, DW1 told this court that the check point was at Kantawa Village where the road is tarmac one and there was poster showing the words "Punguza Mwendo Kuna Mzani Mbele" located 100 metres from both sides. He said at that day he was not traffic officer but wearing a normal police officer uniform, and he was trained to stop vehicles on the road.

In supporting of the defence evidence, DW2 Ramadhan Shaban Mahembe who works with TANROAD Weigh Bridge department with four years' experience in the department. He told this court that he is weighing vehicles and collecting information for the Motor Vehicles of three (3) tons and above. The information he collected is concerned over the Motor Vehicles weight, what is in the vehicles, Motor Vehicle cards and drivers licence.

DW2 further told this court that on 18th day of April 2016 at around 6.00am he arrived at Kantawa Village and then set a beacons and weigh scale as well set posters showing "Punguza Mwendo Mizani Mbele" in a distance of 100 metres and 50 metres. They were reflectors four of them while police officers put on their uniform and had guns.

DW2 informed this court that at around 10.00 am a bus Mitsubishi Fuso with registration No. T. 257 AZV from Kirando was stopped by the

Police Officer, however the driver failed to stop as ordered and continued with safari. Effort were made by them to chase the said bus by using their Motor Vehicle and eventually managed to meet it at Kipande Village. The Police Offices ordered the driver to drive back at weigh bridge scale, however there was some passengers who was already offloaded with some luggage there, thereafter the driver was fined and he ordered the driver to surrender the Motor Vehicle card and his driving licence. DW2 told this court that if shown the card he can identify it

DW2 further told the court that he seized the Motor Vehicle and took it to the weighing scale and the driver surrendered driving licence and Motor Vehicle Card as he requested. He took also Motor Vehicle Registration Card No. T357 AZV owned by one John Fred Davis and driving licence of one Obeid Elias Mashaka. He thereafter communicated with Regional Manager Tanroad Rukwa Engineer Mkina seeking for direction where he directed imposition of fine of which he complied with and he imposed a fine of US Dollar 2000 with a weigh bridge form TFN 808 equivalent to Tsh. 4,486,000/= on that date. DW2 told this court that he prepared a weigh bridge report form concerning the incident and forwarded it to the Regional Manager and explained to what has

transpired in the said Motor Vehicle. DW2 identified the said report at this court and he said he fined the driver as per Regulation, Road Traffic (Maximum Weigh of Vehicles) Regulations, 2001 GN No. 30 published on 9th of February 2001.

DW2 insisted to this court that the driver on 18/ 04/ 2016 committed an offence of escaping/bypassing the weigh bridge at 10.00 am and it was day light and the driver was aware of the existence of the said weigh bridge. He further told the court that there was also a sign to that effect and a sign of slow speed on both sides of the road. There was also beacons in a distance of 100 metres on both sides of the road.

On cross examination, DW2 told the court that the Motor Vehicle which escaped the weigh bridge bears registration No. T. 257 AZV owned by John Fred Davies. He said the owner is identified by the Motor Vehicle Registration Card. He said further the exhibit P1 is registration card in respect of Motor Vehicle No. T. 257 AZV owned by Nassoro Rashid Ahmed. This court was told by DW2 that he did not weigh Motor Vehicle (exhibit P1) and said the Motor Vehicle of which escaped the weigh bridge does not bear the registration card (exhibit P1) and himself did not tender registration card of Motor Vehicle No. T. 257 AZV owned by John Fred Davies whom he fined, however did not pay such fine.

DW2 told this court that exhibit P4 is from Wizara ya Ujenzi, Uchukuzi na Mawasiliano. He said it is over a Motor Vehicle No. T. 257 AZV and the fine was imposed in respect a person namely Nassoro Rashid Ahmed, the fine being Tshs. 4,486,000/= for escaping a weigh Bridge. With regard exhibit P5 he said it shows that it is from TANROAD Rukwa. He said the letter was issued in respect of Nassoro Rashid Ahmed to be handed over a Motor Vehicle T. 257 AZV, the same vehicle he kept at their office yard. Also he said exhibit P7 is over the handing over of the Motor Vehicle No. T. 257 AZV between Masuka Edson Mkina- TANROAD Manager Rukwa and Nassoro Rashid Ahmed. He said the fine was issued against John Fred Davies and not Nassoro Rashid Ahmed.

Upon re-examination DW2 told this court that the card exhibit P1 is not the Motor Vehicle he seized. The fine imposed he said is to be paid by the Motor Vehicle owner of which was John Fred Davies.

In supporting defence evidence, DW3 Chacha Boaz Gatora, works with Tanzania Revenue Authority as assistant Regional Manager in debt management and compliance department. He has been in the current position since 2017, however is in the TRA since 2013. He told this court that his duties interlia is to supervise tax system laws, ensure all tax

payers do pay promptly, also he collects arrears and keep proper records of tax payers.

It is DW3 evidence that one Nassoro Rashid Ahmed is tax payer with TIN Number No. 113322349 and who in 2016 had transportation business. DW3 said Nassoro had bus business for passengers and had three buses in 2016 which were T122 BZQ, T335 CQQ and T. 257 AZV and the office estimates the tax payable collectively and the tax payer ought to have submitted the tax every March of every year. He said in a year 2016, on 5th day of February Nassoro Ahmed came to their office for tax estimate and estimated tax for the three buses at Tshs. 100,000/= an average of Tshs. 33,333.33 per bus and estimated all three buses to operate for 264 days per year, however he informed their office that some days the buses were expected for maintenance as they were old buses, therefore the office counted 101 days in a year. DW3 told this court that Nassoro estimated to pay tax Tshs. 1,690,800/= for all the three buses as profit after deducting other charges and expected to have a profit of Tshs. 10,200,000/= with other charges being Tshs. 16,200,000/= as running costs.

It is DW3 further evidence that in 2016 Mr. Nassoro paid 1,600,800/= and 2017 paid 1,128,300/= and in 2018 he paid Tshs.

1,180,800/=. The amount was decreasing due to the number of buses he owned. DW3 told this court that he has documents to show assessment of the tax of which Mr. Nassoro was paying.

In his being cross examined, DW3 told the court that the owner of the Motor Vehicle No. T. 257 AZV is Mr. Nassoro Ahmed and the tax in 2017 became less because two buses were not operating, one bus being sold in 2018 and another bus was sold in 2017, therefore he was of the view that the tax is out of projection as it may exceed or become less from the profit realised.

Upon being re -examined, DW3 told the court that the tax payer is obliged to report to TRA if he realised bigger profit than estimated and the plaintiff has never reported Tshs. 418,000/= per day as he claimed.

After both parties completed their prosecution and defence case, both parties opted to submit final written submission to this court of which this court conceded.

In supporting of the plaintiff claims, Mr. Peter Kamyalile., learned advocate submitted that in proving his claims the plaintiff testified himself and tendered nine (9) exhibits which were admitted, and on the part of defendants he said they called three (3) witnesses.

In addressing the first issue as to whether a motor vehicle with registration number T. 257 AVZ was unlawful detained for 254 days by the first defendant, Mr. Kamyalile submitted that on 26th day of April 2016 the TANROAD Rukwa which is executive agency of the first defendant imposed the fine of Tshs. 4,486,000/= to the plaintiff namely Nassoro R. Ahmed for the offence of bypassing weigh bridge station contrary to section 13 (3) and (4) of the Road Traffic Act, 1973 in relation to Motor Vehicle with registration No. T. 257 AVZ. Learned advocate before addressing the issues raised invited this court to take judicial notice of the said **Order** as produced before this court in paragraph 7 of plaint as annexure P2 as per **section 59 (1) (a) of the Evidence Act, Cap 6 RE 2019** and per the case of **Antlantic Electric Ltd versus Morogoro Region Cooperative Union [1993] TLR 12** at page 20 where the court held that;

"I ruled out that such information as obtainable in Court could be taken judicial notice"

Mr Kamyalile further submitted that since the plaintiff was aggrieved by the fine imposed, he then appealed to the Minister who confirmed the fine imposed per Exhibit P4. Also being aggrieved by decision of the Minister the plaintiff lodged Criminal Appeal No. 33 of

2016 before this court where the court quashed the decision of the Minister by holding that *"the detention Order of a Motor Vehicle registered as No. T. 257 AVZ owned by the appellant was made under the non-existence of the law, hence illegally detained"*

Mr Kamyalile was of the view that since Exhibit P5 and P6 make reference to the Criminal Appeal No. 33 of 2016 which was delivered on 08/02/ 2017 invited this court to take judicial notice on the said Judgement as it is produced before this court in the paragraph 9 of plaint as annexure P4 as per cited section and case above.

Mr. Kamyalile further submitted that since the first defendant did no appeal against the said Judgement in Criminal Appeal No. 33 of 2016, thus the judgement is conclusive proof that the detention of the Motor Vehicle with registration No. T. 257 AVZ was unlawful. To buttress his point, he cited **section 43 A of the Evidence Act, Cap 6 RE 2019** which reads thus;

"A final Judgement of a court in any criminal proceedings shall after the expiry of the time for an appeal against the judgement or after the date of the decision of an appeal in those proceedings, whichever is the later, be taken as conclusive evidence that the person convicted or acquitted was

guilty or innocent of the offence to which the Judgement relates." [He underlined for emphasis]

He argued that the above provision of law was interpreted in the case of **Nimrod Elireheman Mkono versus State Travel Service Ltd & Masoo Saktay [1992] TLR 24** where the Court of Appeal held that;

- (1) Under Section 43 A of the Tanzania Evidence Act, a conviction in Criminal proceeding in the absence of an appeal, is conclusive evidence that the person so convicted was guilty of that offence."

Then he said, the Court at page 28 translated the provision that;

"That being the law regarding section 43 A of the Evidence Act and bearing in mind that the 2nd respondent did not challenge either conviction by way of an appeal and after the time limited for an appeal had expired he cannot be heard to say that he was not negligent in his driving."[He underlined for emphasis]

Mr. Kamyalile submitted that according to exhibit P6 the memorandum of understanding in Criminal Appeal No. 33 of 2016 between the plaintiff and the first defendant filed before this court on

2nd day of March 2017, under clause 3,4 and 6 it was agreed that the Judgement and release Order was issued to a Motor Vehicle with registration No. T. 257 AVZ while the actual compounded motor vehicle was the one with registration No. T. 257 AZV. He said it was further agreed by both parties that the motor vehicle referred in Criminal Appeal No. 33 of 2016 which was compounded by TANROAD Rukwa at Ujenzi Yard to be the one with registration number T. 257 AZV and not T. 257 AVZ.

Mr. Kamyalile submitted that it is trite law that parties to the contract are always bound by their agreement, and once parties have agreed on their contractual clauses, there is no exceptional but to honour their commitment per agreement. Since the parties agreed on the motor vehicle compounded they are bound by their memorandum of understanding. He said the position was laid down by this court in the case of **Said Seleman Mtepa versus National Microfinance Bank Masasi, Land Appeal No. 18 of 2007**, HC at Mtwara, unreported at page 3-4 this court held that;

“It is well-known position that parties to the contract are always bound by their agreement. The appellant was therefore not an exceptional, that he had to honour his commitment”

He argued that the defendants failed to make any justification of detaining the said motor vehicle and failure to tender any documents to prove on the said motor vehicle which was detained. He submitted also that the Tax estimates alleged by the DW3 cannot be used by this court because the public documents may be proved by the production of the original or by certified copy under section 86 and 87 (a) (i) of the Evidence Act. The court cannot make a finding of fact based on a report which was not before the court. He said the position was laid down in the case of **Mwajuma Mbegu versus Kitwana Amani, Civil Appeal No. 12 of 2001**, CAT, DSM, unreported at page 7-8 where the Court of Appeal held that;

"A public document may be proved by the production of the original or by a certified copy under section 86 or in the manner prescribed under section 87 (a) (i) above. Under the circumstances, we are of the settled view that the learned Judge erred in taking into consideration a public document which had not been tendered in evidence as proof of the facts stated therein. It is true that certain matters need not formally be proved. The principal matters of which the court will take judicial notice are contained in section 59 (1) of the Evidence

Act, 1967 and that report cannot be said to be covered as well.

There was therefore no justification at all for the court to make findings of fact based on a report which was not before the court."

To wind up with regard to this issue, Mr. Kamyale submitted that since the plaintiff motor vehicle was detained without any enabling provision of the law its detention was therefore unlawful. He cited the case of **Ntiyahela Boneka versus Kijiji cha Ujamaa Mutala [1988] TLR 156** where it was held that;

"(ii) The law in this country does not sanction seizure of an individual's property in the absence of any enabling written law"

Following the unlawful detention of the said Motor vehicle by TANROAD Rukwa, Mr. Kamyale submitted that the plaintiff has suffered damages/loss to the tune of Tshs. 106,212,640/= being a loss of business/ profit income of Tshs. 418,160 per day starting from 18th day of April 2016 when its motor vehicle was detained to 2nd day of March 2017 when the motor vehicle was released which is about 254 days. Since the detained motor vehicle was used for public transport service and when the vehicle was detained by the TANROAD Rukwa it was no

longer available for public transport service use. He said that was proved by Exhibit P2, P3, P8 and P9 and the evidence of PW1.

With regard the second issue, Mr. Kamyalile submitted that having proved through verbal testimony of the plaintiff as well as documentary evidence tendered and admitted before this court the plaintiff prays for the payment of Tshs. 106,212,640/= being a loss of business/profit income of Tshs. 418,160/= per day starting from 18th day of April 2016 when the motor vehicle was detained to 2nd day of March 2017 when the motor vehicle was released as per paragraph 8 herein above.

On their part, the defendants through the legal service of Francis Rogers, learned senior state attorney submitted that, the parties agreed to the following issues for determination by this court, involving;

- (i) Whether the motor vehicle with registration No. T. 257 AVZ was unlawfully detained for 254 days by the 1st defendant
- (ii) To what reliefs are the parties entitled to

Mr. Francis Rogers first invited this court to draw attention to the defect as noted by him before discussing of the raised issues. He argued that as per the dictates of the Government Proceedings Act, section 6 (2), the learned advocate for the plaintiff issued notice to the 2nd defendant of his intention to sue. He submitted that in the said notice

which was admitted as exhibit 10, the motor vehicle which was claimed to have been unlawfully detained is registered with No. T. 257 AVZ. Mr. Francis Rogers cited the case of **Aloyce Chacha Kenganya versus Mwita Chacha Wambura & 2 Others, HC, Civil case No. 07 of 2019**, this court while citing with approval the case of **Thomas Ngawaiya versus Attorney General and 3 Others, Civil Case No. 177 of 2013**, this court held that at page 4;

“The provision of section 6 (2) of the Government Proceedings Act are express, explicit, mandatory, admit no implication or exception or exceptions. They are imperative in nature and must be strictly complied with. Besides, they impose absolute and unqualified obligation on the court.”

Mr. Francis Rogers submitted that from his finding above, he said the plaint is incompetent for failure to observe the provisions of section 6 (2) of the Government Proceedings Act, and therefore deserves to be struck out with costs.

With regard the first issue, learned advocate for the defendants asked himself as to whether the 1st defendant was correctly pleaded?

He submitted that the 1st defendant in this case is the Ministry of Works, Transport and Communication (herein to be referred as the

Ministry). During the hearing of this case PW1 for the plaintiff was very clear to the effect that TANROAD was the one responsible for arrest and detention of his motor vehicle. He submitted that TANROAD was not pleaded in the amended plaint filed in this court on 20th day of August. It is obvious that the suit is incompetent for non-joinder of a necessary party. He argued that the importance of pleading the necessary party to a suit was expounded by the Court of Appeal in **Abdullatif Mohamed Hamis versus Mehboob Yusuf Osman & Another, Civil Revision No. 6 of 2017** at page 25-26.

Citing with approval the Indian case of **Benares Bank Ltd versus Bhagwandas, A.I.R [1947] All 18**, and the full bench of the High Court of Allahabad laid down two tests thus;

First, there has to be a right of relief against such a party in respect of the matters involved in the suit; **second**, the court must not be in position to pass an effective decree in the absence of such a party. The foregoing benchmarks were described as true tests by Supreme Court of India in the case of **Deputy Comr, Hardoi versus Rama Krisma, A.I.R [1953] S.C 521**

"We in turn fully adopt the two tests and, thus, on a party of reasoning, a necessary party is one whose presence is

indispensable to constitution of a suit and in whose absence no effective decree or order can be passed. Thus, the determination as to who is a necessary party to a suit would vary from case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."

He submitted that the court went further in elaborating the consequences of a misjoinder or no-joinder of parties at page 27 thus; Coming now to the effect of a misjoinder or non-joinder of either parties the general rule is clearly stipulated under Rule 9 of Order 1 thus: -

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every deal with the matter in controversy so far as regards the right and interests of the parties actually before it. Despite being coached in mandatory language, we should think, there is an exception to the fore going general rule. In this regard, it is noteworthy that by an amendment Act No. 104 of 1976, the Indian Code of Civil

Procedure, Act V of 1908 added a rider through a proviso to its Rule 9 of Order 1 which is, incidentally, word to word with our Rule 9. In the proviso but, upon reason and prudence, there is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 Order 1 only holds good with respect to the misjoinder and non-joinder of non-necessary parties. On the contrary, in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not be able to pass an effective decree. It would be idle for a court, so to say, to pass a decree which would be of no practical utility to the plaintiff."

He argued that the Court of Appeal in the above case finally stated that non-joinder of a necessary party is fatal, which renders the plaint incompetent hence liable to be struck out. In the upshot, he invited this court to strike out the plaint for being incompetent with costs.

Mr. Francis Rogers further argued that there is no dispute that the said Mitsubishi Fuso bus was enroute from Kirando to Sumbawanga on

the 18th day of April 2016. There is no dispute that the said motor vehicle was detained by TANROAD Official.

Mr. Francis Rogers argued that however, the reasons for the detention are not forthcoming from the plaintiff side. All they are saying is to the effect that the detention was illegal simply because the cited law by the TANROAD Manager of Rukwa Region is non-existing. He is consoled by the fact that, this is a literate court, able to discern a disingenuous and misleading argument and is able to give an appropriate remedy.

Mr. Rogers went on saying that in the course of hearing DW2 one Ramadhan Shaban Mahembe informed this court that, bypassing weigh bridge is an offence under Rule 13.3 and 13.4 GN No. 30 published on 09th day of February 2001, he quoted for emphasis as follows;

13.3 Kama gari linalopaswa kupimwa kwenye mizani likipatikana limepitiliza bila kupima au limeondoka kwenye mizani bila kuruhusiwa, basi mwenye gari itabidi alipe tozo ya uharibifu wa barabara ya dola 2000 hata kama gari hilo halikuzidisha. Na kama limezidisha uzito basi itabidi alipe tozo ya uharibifu wa barabara ya kuzidisha uzito juu ya ile tozo ya

uharibifu wa barabara ya kutokupakia kwenye mizani au kuondoka kwenye mizani bila ruhusa.

13.4 Ni kosa kwa dereva kutokufuata maelekezo/maagizo ya afisa wa mizani au polisi na inaweza kupelekea gari pamoja na mizigo kuzuiliwa kwenye mizani kama dereva hatafuata maelekezo.

Mr. Rogers submitted that from the foregoing therefore, there is no doubt that the offence of bypassing the weight bridge was committed by the driver of Mitsubishi Fuso with registration No. T. 257 AZV, as a result, the necessary effort of chasing and arresting him were launched. Unfortunately, the plaintiff did not bring the driver one Obed Elias Mashaka to dispute the allegation of bypassing the weigh bridge.

Defendants, through Mr. Rogers insisted that TANROAD has the right to exercise the powers vested to her by GN No. 30 of 2001. Since the plaintiff committed the offence, it will be quite unfair for him to benefit from his own wrong doing. He argued that the plaintiff seems to have come to this court for equity. He made it clear that it is a principle of law to the effect that, those who go for equity should do so with clean hands. Since the plaintiff hands are tainted, and then he deserves to be paid nothing.

Mr. Rogers submitted that the plaintiff claims include specific claim of Tshs. 106,212,640/= being the amount of loss of profit. However, during the hearing, the plaintiff produced no documentary evidence to prove his claim. He fully subscribed to the decision of the Court of Appeal, in the case of **Strabag-International (GMBH) V. Adinani Sabuni, Civil Appeal No. 241 of 2018, CAT Tanga**, unreported at page 16, the court held;

"In this jurisdiction, as it is in most commonwealth jurisdictions, the law on specific damages is settled. Specific damages. In accord with the settled law, must be specifically pleaded and strictly proved."

Mr. Rogers argued that with all due respect to the plaintiff advocate, the plaintiff has failed to prove any claim against the defendants. Therefore, he deserved to be paid nothing, for that reasons he prayed for the entire suit against the defendants be dismissed with costs.

I have gone through courts records and respective submissions by both parties. I now consider the issues framed vis-à-vis the evidence before me.

Before addressing issues framed, let me first deal with the defects as raised by the senior state attorney for the defendants. Mr. Francis Rogers argued **section 6 (2) of the Government Proceedings Act, Cap 5** was not observed in the plaint. The provision reads as follows;

"6 (2) No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and he shall send a copy of his claim to the Attorney-General."

It is very clear from the words of the cited section above; it demands for any claimant against the Government must before instituting a suit issue a notice of less than ninety days specifying the basis of his claim against the government. Looking at Exhibit 10 is a demand notice issued to the government by the plaintiff. My scrutiny of the said demand notice I see no defect in it as submitted by the learned state attorney for the defendants as the same followed the dictates of the above cited provision of law.

Another defect raised by the learned state attorney for the defendants is the issue of non-joinder of the TANROADS in the suit, thus he said the suit is incompetent for that matter.

TANROADS is semi-autonomous entity which falls under the **Executive Agencies Act, Cap 245**. Under section 3 (6) (b) (c) of the Executive Agencies Act, TANROADS is an executive agency which can only be sued or sue in its own name on contracts, apart from that it is the government which is supposed to be sued or proceeded against through the Attorney General. In this suit, the dispute between the plaintiff and the defendant is not arising out of contract, thus the proper party to be sued is the Ministry of Works, Transport and Communication as it appears in this suit. The section reads thus

3 (6) notwithstanding any other law, an Executive Agency shall

- (a) N/A
- (b) Be capable of suing and being sued in its own name only in contract; in that respect all laws applicable to legal proceedings other than GOVERNMENT PROCEEDINGS ACT, shall apply to legal proceedings to which the Agency is a party;
- (c) In all matters relating to contract, not be competent to sue or be sued in its own name, however any legal proceedings

which, but for this paragraph, would have been instituted by or against the Government in accordance with the GOVERNMENT PROCEEDINGS ACT, Cap 5

Thus under item (b) above, an Executive Agency as the case of TANROADS in this suit, can only be sued or sue on its name where the subject is a contract. The contract for the matter must be between the said agency and the counterparty, which is suing the agency or being sued by the agency. Therefore, the argument by the learned state attorney that the TANROADS ought to have joined as a necessary party, thus the suit is incompetent for misjoinder of party is misconceived one and is of no merit.

As far as the first issue is concerned, that is whether a motor vehicle with registration number T. 257 AVZ was unlawful detained for 254 by the first defendant. The evidence is very clear the plaintiff motor vehicle with registration No. T.257 AVZ which was on enroute from Kirando to Sumbawanga was impounded and detained on 18th day of April, 2016 at Kantawa village by TANROADS Officials for alleged bypassing / absconding a weigh bridge located at Kanondo village. The evidence is supported by the defence witness one Ramadhan Shaban

Mahembe, a weigh bridge official who impounded the motor vehicle at Kantawa village for failure to subject itself at weigh bridge at Kantawa.

Following that, the plaintiff was charged by TANROADS Official and was made liable to pay a fine of Tshs. 4,486,000/=. Aggrieved by such fine, the plaintiff appealed to the responsible Minister who confirmed the decision of the TANROADS with regard the fine imposed. Again, the plaintiff being aggrieved by decision of the Minister lodged a Criminal Appeal No. 33 of 2016 before this court which reversed the decision of the Minister and went on holding that "the detention Order of a motor vehicle as No. T. 257 AVZ owned by the appellant was under the non-existent of the law, hence illegally detained" as well it ordered immediate release of such motor vehicle.

Exhibit P7 evidences the handing over of the Motor Vehicle with registration No. 257 AZV from Regional Manager, TANROADS Rukwa to the plaintiff, Nassoro Rashid Ahmed on 2nd day of March 2017 after being detained by TANROADS Rukwa since 18th day of April 2016, which accounted for 254 days.

Going through the letters of the decision of this court in Criminal Appeal No. 33 of 2016, it is very clear that the detention of the motor vehicle with registration No. 257 AVZ for 254 days by the TANROADS

Rukwa, an agency of the first defendant was unlawfully, thus the first issue is answered in the affirmative.

The second issue, that is reliefs to which parties are entitled, in view of the findings above I have made, there is no dispute that the motor vehicle with registration No. T257 AVZ was used for public transport by the plaintiff as evidenced by exhibit P2, P3 and P8 operating between Sumbawanga and Kirando, go and return. The same Motor vehicle was detained by TANROADS Rukwa while in the course of business of transporting passengers from Kirando heading to Sumbawanga, and it was detained for 254 days. As to the loss of 106,212,640/= as specific damages, the law is very settled that is special damages must be proved specifically and strictly.

In the case of **Stanbic Bank Tanzania Ltd versus Abercrombie & Kent T. Ltd, Civil Appeal No. 21 of 2001 CAT**, unreported, it was stated that;

“The law is that special damages must be proved specifically and strictly.”

The Court of Appeal in the above **Stanbic case** made reference to Strom versus Hutchison 1905 A.C 515 at page 525. Lord Macnaughten stated thus:

".....Such as law will not infer from nature of the act. They do not follow in the ordinary course. They are exceptional in their character and therefore they must be claimed specifically and proved strictly"

Again, in the case of **Zuberi Augustino versus Anicet Mugabe** [1992] TLR 139 at page, it was stated that;

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

Paragraph 11 to 14 of the plaintiff's amended plaint made a claim for special damages to a tune of Tshs. 106,212,640/= The plaintiff claims that his bus carries 45 passengers as evidenced by Exhibit P8 and the fare per person is Tshs. 7000/= between Sumbawanga and Kirando as evidenced by Exhibit P9. Thus the total income before deducting running costs is 7000 times 45 = 315,000/= times 2 = 630,000/= for going and return. The total expenditure of which the plaintiff has pointed out is Tshs. 211,840/= which is a result of considering 68 litre of fuel valued at Tshs. 127,840/=, Allowance of Tshs. 30,000/=, Engine Service Tshs. 5000/=, Selling of tickets Tshs. 2000/= and tires Tshs. 29,000/=. The total income per day Tshs. 630,000/= minus total

expenditure Tshs. 211,840/= equal to Tshs. 418,160 /= per day as a net profit.

As the law requires the specific damages to be strictly proved, it is the concern of this court that whether the plaintiff bus was always in full capacity with passengers in all those 254 days is the question to be determined. However, PW1 when asked question by this court, told this court that his motor vehicle was always in full capacity without producing any documentary evidence to substantiate and justify. But in normal circumstances as I know, not all days the public transport carriers are in full capacity as claimed by the plaintiff, there are some days fall short of passengers and other days the buses don't not operate due to normal break down.

Having said so, in the instant case this court takes two third (2/3) of the total passengers of the bus which is 30 passengers in all those days. Therefore, $30 \times 7000 = 210,000/=$ times 2 = 420,000/= minus day expenditure of 211,840 = 208,160/= as a day profit times 254 (days of detention) = 52,872,640 /= as a total specific damages.

Coming to the claim for general damages, having considered the circumstances of the case, I am satisfied that a claim of Tshs. 15,000,000/= only as general damages can be sustained. The law is

very settled that general damage is discretion of this court and it is awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award.

In concluding the matter, judgement is hereby entered for the plaintiff against the defendants as follows:

1. Payment of Tshs. 52,872,640/= being specific damages
2. Payment of Tshs. 15,000,000/= as general damages
3. Interest of 7% court's rate from the time of judgement till final payment
4. Costs of the suit.

It is so ordered.




D. E. MRANGO

JUDGE

16.11.2020

Date - 16.11.2020
Coram - Hon. D.E. Mrango – J.
Plaintiff - Present & represented by
Mr Peter Kamyale - Advocate
1st Defendant } Fortunatusi Mwandu – State Attorney
2nd Defendant }
B/C - Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 16th day of November, 2020 in presence of the Plaintiff & his Advocate Mr. Peter Kamyale - Learned Advocate and Fortunatusi Mwandu – Learned State Attorney for the Defendants.

Right of appeal explained.




D.E. MRANGO
JUDGE
16.11.2020