

IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA

CIVIL APPEAL NO. 7 OF 2020

(Arising from Civil Case No. 1 of 2019 of the Resident Magistrate's Court of
Lindi at Lindi)

MARIAM JEREMIA MRIMI @ MLIMI.....APPELLANT

VERSUS

MSHAMU ALLY @ KIUGU.....1ST RESPONDENT

SALUM S/O KAMTAULE t/a BARAKA BUS EXPRESS/

BARAKA CLASSIC.....2ND RESPONDENT

JUDGMENT

25 March & 9 April, 2021

DYANSOBERA, J.:

This appeal is against the judgment and decree dated 18th day of May, 2016 passed by the Court of a Resident Magistrate of Lindi at Lindi in RM Civil Case No. 1 of 2019.

The relevant facts pertinent to this matter can be stated in a few lines. The appellant is a natural person who at the material time, was

working for gain in Kilwa District, Lindi Region as a Town Planner. The two respondents are natural persons as well but working in different capacities. While the 1st respondent is a driver by profession, the 2nd respondent is a businessman dealing with transportation trading as Baraka Express@ Baraka Classic. On 18th October, 2015 the appellant chartered and boarded a bus with Reg. No. T 101 SUU, YUTONG styled BARAKA CLASSIC, the property of the 2nd respondent, a bus which was plying from Dar es Salaam to Lindi. She entered into the contract as one of the passengers and paid bus fare to be ferried from Dar es Salaam to Nangurukuru in Kilwa District in Lindi Region, her working station. The 1st respondent who was the driver of the said bus lost control while at the environs of Masaninga village along Somanga-Nangurukuru road. In the course of the said journey, the motor vehicle swerved to the right side of the road, hit the starting point of a culvert bridge, plunged into the ditch and overturned causing bodily injuries to some of the passengers, the appellant inclusive. The scene of the accident was visited inspected by the police authorities and necessary documentation made. The appellant sustained serious bodily injuries and was taken to Kilwa Kivinje Hospital and underwent treatment. Due to severity of injuries, the appellant was evacuated to Muhimbili Hospital for intensive treatment where she was diagnosed to have closed acetabular

fracture right which later turned into a right deformed hip causing the appellant to experience right hip pain on long distance walking. The appellant went on undergoing treatment including attending physiotherapy at the said Hospital and at Besta Diagnostic Centre Ltd.

The 1st respondent was arraigned in Kilwa District Court in Traffic Case No. 20 of 2015, was convicted of causing bodily injuries and subsequently punished.

The appellant thought that there was breach of the contract on part of the respondents and she was entitled to both compensation for the incapacities she suffered as well as damages for breach of contract. Consequent to that, she filed a suit before the Court of a Resident Magistrate at Lindi which was registered as Civil Case No. 1 of 2019. In that suit which was directed against the two respondents, the appellant claimed the following reliefs:-

- i. Specific damages to the tune of Tshs. 59,010,000/= being specific damages and compensation for total temporary incapacity, partial temporary incapacity and permanent incapacity compensation

- ii. General damages to be assessed by the Honourable court but proposed to be Tshs. 50,000,000/=
- iii. Interest on the decretal sum at the court rate from the date of judgment to the date of payment in full
- iv. Costs and any other reliefs the Honourable court deemed fit and just to grant.

Both respondents denied liability. Besides, they jointly raised a preliminary objection on two points. One, the suit was manifestly time barred and two, the plaintiff's suit disclosed no cause of action against the defendants.

In a ruling delivered on 22nd day of May, 2019, the learned Resident Magistrate found the preliminary objections without merit, overruled them in their entirety and dismissed them with costs. The suit was therefore heard on merit.

At the commencement of hearing the suit, three issues were framed. One, whether the plaintiff sustained injuries as a result of the accident. Two, whether the plaintiff is entitled to damages as claimed in the plaint and three, to what reliefs are parties entitled.

In prosecuting the suit before the trial court, the appellant had three witnesses, namely, Marium Mrimi (PW 1), Dr. Paul Kazungu Zacharia (PW 2) and Anitha Paschal (PW 3). On their part, the respondents had only one witness Mshamu Ally Kiugu (DW 1). At the close of the case, Catherine Ng'webeya, learned Advocate who was representing the appellant and Jackson Wilbert, learned Counsel who stood for the respondent filed their final written submissions.

In his judgment delivered on 28th May, 2020, the learned Resident Magistrate found that the appellant had managed to prove that she sustained injuries which resulted from 'mechanical' accident. He, however, made a finding that the remedies available to the plaintiff was to file a suit for tortious issues and not breach of contract. For that reason, he dismissed the suit with costs.

It is on the basis of these findings that the appellant brings this appeal before this court. In her memorandum of appeal filed on 29th day of June, 2020, the appellant has fronted the following grounds of appeal:-.

1. That the Honourable Resident Magistrate erred in fact and law by reaching the conclusion without analysing and evaluating the evidence in totality.

2. That the Honourable Resident Magistrate erred in fact and law by directing himself to tortious liability instead of facts in issue
3. That the Honourable Resident Magistrate erred in fact and law for ruling that the intended exhibit comprising maid's payment were inadmissible.

The appeal was heard by way of written submissions.

Submitting in support of the appeal, Mr. Tibiita Muganga, learned Advocate for the appellant, combined the first and second grounds of appeal and argued them together. The third ground of appeal was, however, argued separately.

Supporting the first and second grounds of appeal, learned counsel for the appellant contended that the issues framed were totally out of the scope of the cause of action raised in the pleadings and that this fallacy resulted in the misdirection and non-direction in the determination of the issues and the case as a whole. He submitted that the cause of action in this matter was breach of transport contract and explained that the evidence led by PW 1 to that effect explained the existence of contractual relationship between the parties conveying her from Dar es Salaam to Nangurukuru- Kilwa within Lindi Region and that the respondents

fundamentally breached the contract which had an implied term that the appellant as a passenger should be conveyed safely to the destination and there was consideration but the respondents breached the contract which resulted into the appellant sustaining injuries both physical and cash hence entitling her to compensation.

Learned counsel for the appellant submitted that the parties' contract laid down the rights and duties to be protected and enforced by law, otherwise, the appellant could not have taken such a risk. Counsel further submitted that the learned Resident Magistrate was unable to comprehend from the evidence the obvious fact that there was a contract which created duties and obligation, a breach of which attracted compensation to the victim. He informed the court that the learned Magistrate was unable to make a specific finding that there was breach of conveying contract. It was learned counsel's further submission that the learned Resident Magistrate did not analyse and evaluate the evidence so as to address on the consequences of the breach of the contract given the fact that a number of documents were admitted but he found specific damages not proved and specifically pleaded. Counsel argued that this finding by the trial court was a result of the Magistrate giving a blind eye to the prayers such as

compensation following a breach of contract which is a remedy under common law awarded when the court is not in a position to compel a party to discharge the obligation or specific performance.

On the learned Magistrate insistence that there was tortious liability, counsel for the appellant argued that the learned Magistrate was *functus officio* due to his earlier ruling on a preliminary objection. Reliance was placed on the first paragraph at page 7 of the ruling and the case of **Ignas Lyombo v. R.** Criminal Appeal No. 234 of 2019.

On these arguments, learned Counsel for the appellant urged the court to quash the trial court's decision and order a re-trial.

As regards pleadings, Mr. Tibiita predicated that the learned Resident Magistrate failed to adhere to the function of the pleadings and that if at all the Magistrate had noticed that the evidence before him disclose tortious liability, he should, as a common practice, have invited the parties to address him over the observation. This court was referred to the case of **Jamal Ahmed v. CRDB Bank Ltd** (2016) TLS LR 106. Further that the purpose of pleadings was categorically expressed by the Court of Appeal in the case of **James Funke Gwagilo v. Attorney General** [2004] TLR 161.

Submitting on the third ground of appeal, Counsel for the appellant criticized the learned Magistrate on his rejection of the document the appellant sought to tender in evidence. He contended that the rejection was a clear indication of the failure to comprehend the latitude upon which admissibility of evidence has to be pegged, who may tender an exhibit and the nature of the document sought to be tendered and that the Magistrate glossed over the principles governing the admissibility of a document into evidence particularly where the appellant had laid foundation on the document she was seeking to tender.

In fine, learned counsel for the appellant maintained that the trial court framed issues not emanating from the pleadings and the cause of action and determined the matter while it was *functus officio*. He invited this court to quash and set aside the judgment, decree and proceedings and order a retrial; a course which was adopted by this court in the case of **Exim Bank Tanzania Ltd v. Geita Upendo Dispensary**, HC Land Appeal No. 30 of 2017 in which the court ordered a re-trial because the trial Chairperson departed from the issues which was framed for determination by coming up with new issues which were not framed and

agreed at the trial and did not invite parties to address him over the cropped up issue in the cause of composing the judgment.

Responding to the submission by Advocate for the appellant, Mr. Jackson Wilbert, learned Counsel for the respondents, arguing the 1st and 2nd grounds conjointly, submitted that the learned Resident Magistrate apprehended the gist, substance and nature of the pleadings that the case should be pursued under tortious liability on account that the whole evidence adduced by the appellant was centred on proving tortious liability instead of breach of contract, the issue though pleaded in the plaint, further that the issues for determination were framed by both parties and not by the trial Magistrate. Even then, counsel for the respondents contended, there was no breach of contract as alleged by the appellant as after the accident, all the passengers were taken to their destinations and those who were injured like the appellant, were taken to the Hospital. Counsel for the respondents admitted that the respondents breached the contract but explained that after the accident they found alternative transport to make sure that all passengers were transported to their final destinations.

On the appellant's complaint that the learned Magistrate failed to analyse and evaluate the evince, Mr. Jackson Wilbert replied that the trial Magistrate addressed on the what was the consequence/remedies of fundamental breach of contract against the breaching party and found that specific damages were not proved and specifically pleaded.

In further submission, counsel for the respondents contended that the appellant was asking compensation for expenses incurred as well as injuries sustained therefore and this was the reason which led the trial Magistrate find that the appellant's redress was to be found in tort and not breach of contract. Insisting that there was no tangible loss on part of the appellant due to the breach of contract, counsel for the respondents relied on the case of Abdallah Ally Selemani t/a Ottawa Enterprises (19870 v. GAPCo (T) Ltd (201) TLS Law Report No. 187 adding that the trial Magistrate adhered to the function of pleadings. This court was urged to uphold the trial court's judgment.

With regard to the 3rd ground of appeal, it was submitted for the respondents that the admission of the document was rightly rejected by the trial court in view of the fact that few signatures affixed to impress acknowledgments of payment are totally different with no authenticity and

this reason was supported by the statute and no appeal was exercised by the appellant against that rejection.

In a short rejoinder, counsel for the appellant almost reiterated his chief submission and invited the court to take its indulgence to wallow through the records in order to satisfy itself over the fallacious analysis of evidence complained about so as to allow the appeal and grant the prayers made on the memorandum of appeal.

I have given lengthy and sober consideration to the grounds of appeal and the submission in support of the appeal. I have equally taken ample time to study all the case laws cited to me by counsel for the appellant.

As far as the question of framing of issues is concerned, it was complained for the appellant that the issues framed were totally out of the scope of the cause of action raised in the pleadings resulting into misdirection and non-direction in the determination of the issues and the case as a whole. It was also contended on part of the appellant that the cause of action was breach of transportation contract as explained in the evidence.

On their part, the respondents contended that the whole evidence adduced by the appellant was centred on proving tortious liability instead of breach of contract, the issue though pleaded in the plaint, further that the issues for determination were framed by both parties and not by the trial Magistrate.

I entertain no doubt that the purpose of framing of issues cannot be overemphasised. First, if issues are framed in the manner required by law, after going through all the proceedings in the matter including the plaint, written statement of defence and the documents, it will not only guide the parties to the suit to adduce proper evidence during trial but also will cut down a lot of unnecessary wastage of court time and expense of the parties. Second, a correct framing of issues enables one to focus his attention on the correct line of thought required to decide a matter and this leads to expeditious and more efficient administration of justice in resolving the real issue in controversy.

In that regard, the law imposes a mandatory duty to the court frame and record the issues. This duty is clear under Sub-rule (5) of rule 1 of Order XIV of the Civil Procedure Code, Cap. 33 R.E.2002 as reproduced as hereunder:

"Order XIV rule 1.

*(5) At the first hearing of the suit the **court shall**, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."*

(Emphasis supplied).

The argument on part of the respondents that the issues for determination were framed by both parties and not by the trial Magistrate is but a misconception and misconstruction of clear provision of the law.

Were the framed issues in this case within the scope of the cause of action/actions? I think not. As the pleadings and the evidence revealed, the suit the subject of this appeal, was of mixed causes of action which included a breach of contract and negligence. This explains why the appellant was claiming, at the trial, special and general damages for pain and suffering, interest and costs of the suit. Indeed, the learned trial Magistrate in his ruling dated 22nd day of May, 2019 was satisfied that 'the appellant was not only the passenger of the said motor vehicle but also

suffered injuries' (p.9 of the typed ruling) and in the impugned judgment the trial court observed *inter alia*, 'therefore the remedies available to the plaintiff (now the appellant) is to file a suit for tortious issues..' (p.10 of the typed judgment).

Going by the evidence, it was not disputed that the appellant was a passenger in the 2nd respondent's motor vehicle which was being driven by the 1st respondent and which got involved in an accident.

Equally, there is no dispute that the appellant had a bus ticket with the said motor vehicle. This, the learned trial Magistrate admitted. The bus ticket was a contract, though a standard one, between the owner of the motor vehicle and the respondent who was a passenger in that bus. As correctly submitted by Mr. Mganga, there was a transport contract between the appellant and the 2nd respondent. As the facts show, the 1st respondent drove the motor vehicle negligently and recklessly as explained in evidence and proved on a traffic charge. The cause of action was therefore, a breach of transportation contract.

Likewise, there is no dispute that the accident led to the appellant to sustain the complained of injuries necessitating her to undergo treatments. The fact that the appellant sustained injury as a result of the accident was

admitted by the learned trial Magistrate when he stated at pages 6 and 7 of the typed judgment thus:

'I have had an ample time to peruse and making analysis on .both argument by learned counsels (sic), it is therefore my finding that there is no doubt that the plaintiff sustained injuries which resulted from the accident....'.

Further, at pp 8 and 9 of the said judgment, learned Magistrate said:

'Lastly, I find that the plaintiff managed to prove that she sustained the injuries which resulted from mechanical accident...'

Having found that the appellant sustained injuries, the learned Resident Magistrate was duty bound in law to ascertain whether the 1st respondent was responsible and whether the 2nd respondent was vicariously liable. The reason is not far to find. Once it has been proved that there is commission of tort or breach of contract, the attention turns to the redress. In the present matter, the appellant had proved what had happened, how she was effected by the incident and the redress she was seeking. The trial Magistrate was, therefore, duty bound to address on these issues and determine them. This, as learned Counsel for the appellant has submitted, the learned Magistrate failed.

Had the learned trial Resident Magistrate properly directed itself in framing issues and carefully analysed and evaluated the evidence, he could have, undoubtedly, realised that this case was a suit with mixed causes of action. As rightly submitted by learned counsel for the appellant, there was a breach of contract as well as negligence on part of the 1st respondent and liability by the 2nd respondent. The appellant was claiming compensation for the incapacities occasioned by the injuries suffered because of the accident. She was also claiming general damages for pain and sufferings. Likewise, she was claiming interest and costs of the suit.

In view of the course I am going to take in the determination of this appeal, I see no point in discussing the third ground of appeal.

Having taken into account all this, it is my finding that the trial court committed wrong by either misdirecting himself or by acting on matters on which it should not have acted and failed to take into consideration matters it should have taken into account and in doing so arrived at a wrong conclusion. This court has to interfere.

With the foregoing, I find this appeal legally meritorious and allow it.. The proceedings, judgment and orders of the trial court in Civil Case No. 1 of 2019 are quashed and set aside.

In consequence thereof, I order the matter to be heard afresh but before a different Magistrate competent to try it.

The appellant is awarded costs in this court and in the court below.




W.P. Dyansobera

Judge

9.4.2021

This judgment is delivered under my hand and the seal of this Court on this 9th April, 2021 in the presence of Mr. Michael Fyumagwa for the appellant but in the absence of the 1st and 2nd respondents.




W.P. Dyansobera

Judge