IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA

CIVIL APPEAL NO. 5 OF 2021
(Originating from the Residents Magistrates' Court of Arusha, Civil Case No. 41 of 2019)

JIMMY TONNIE JOHN USIRI ..... APPELLANT

Versus

RELIANCE INSURANCE CO (T) LIMITED ..... RESPONDENT

JUDGMENT

6th April & 13th May 2022

Masara, J.

Jimmy Tonnie John Usiri ("the Appellant") sued the Respondent in the Resident Magistrates' Court of Arusha ("the trial court") claiming for TZS 65,000,000/= as compensation for the loss suffered as a result of theft of various vehicle parts from his car, Land Rover Discovery, with registration number T752 BZS. He also prayed for TZS 5,000,000/= as penalty for a bad faith claim. The trial court dismissed the suit with costs on the ground that the Appellant failed to prove theft.

According to the Plaint filed at the trial court and the evidence of the Appellant thereat, the Appellant is the owner of a motor vehicle Number T752 BZS, make Land Rover Discovery. The vehicle was insured with the Respondent on a comprehensive cover note for a period of one year (20/05/2016 to 19/05/2017). The alleged theft took place when the

Appellant travelled to Dar es Salaam with his friends, leaving the car with his friend identified as Mbasha, who resided at Tengeru. On 18/05/2017, he was phoned by the said Mbasha who informed him that his vehicle was vandalised that night. That when he woke up in the morning, he found the gate open. He also found some parts of the car missing. The parts missing included head lamps, outside rear-view mirrors, power window switches-set, rear combination lamps, snorkel and windshield moulding.

The Appellant returned to Arusha immediately and reported the matter to the police station. The car was inspected by the police officers who prepared an inspection report along with PF No. 90. He filed an official claim with the Respondent, in order to have his car repaired. But the Respondent distanced itself from liability. He took the car to the garage for maintenance where he incurred a cost of TZS 29,979,053/=. He later claimed from the Respondent to compensate but the Respondent denied liability.

The Respondent, in the Written Statement of Defence, and according to the evidence of Raphael Nicholaus Urassa the Respondent's branch manager (DW1) and Deocres Mulokozi Bantulaksi, DEMACO surveyor and loss adjuster (DW2), the theft was not proved. DW1 informed the trial court that after receiving the complaint from the Appellant, they engaged

DW2 to carry on investigation and file a report. On 26/6/2017, DW2 left Dar es Salaam to Arusha to conduct investigation on the alleged theft of the vehicle parts. During the investigation, the Appellant and his friend were not around as the Appellant informed him that they were outside Arusha. He was informed that the vehicle was taken to the garage. He went to the garage, inspected the vehicle and found the missing parts. He found no breakage of the vehicle. Explanation on how stealing occurred could not be made available.

According to DW2, the parts were removed by someone who had access to enter in the car. He prepared a report which was admitted as exhibit D2. In the report, he advised the Respondent not to pay because there was no destruction. However, he advised the Respondent to pay the Appellant not more than TZS 12,654,069/=, in case it opted to pay as the Appellant was their customer. As pointed out earlier on, after hearing the evidence of both sides and scrutinizing the tendered documents, the trial court dismissed the suit with costs. The Appellant was aggrieved by that decision and preferred this appeal on five grounds as reproduced verbatim:

a) *That, the trial magistrate erred in law and in fact in relying on contradictory and inconsistence testimonies of the respondent's witnesses;*

b) *That, the trial magistrate erred in law and in fact in holding that alleged theft of motor vehicle parts did not take place despite the acknowledged report of a vehicle inspector that the alleged theft did in fact took (sic) place;*
c) *That, the trial magistrate erred in law and in fact by failing to order payment of compensation to the appellant for stolen motor vehicle parts;*
d) *That, the trial magistrate erred in law and in fact by disregarding the water tight evidence brought forward by the appellant; and*
e) *That the trial magistrate erred in law and in fact in relying on incredible and unbelievable evidence brought by DW2.*

Based on the above grounds of appeal, the Appellant implored this Court to allow the appeal by quashing and setting aside the judgment, proceedings and decree of the trial court.

At the hearing of the appeal, the Appellant was represented by Ms Miriam Jackson Nitume, learned advocate, while the Respondent was represented by Ms Mariam Semlangwa, learned advocate. The appeal was heard through filing of written submissions.

Submitting in support of the 1st ground of appeal, Ms Nitume contended that the evidence of DW1 and DW2 was contradictory and inconsistent. That DW2 declared that there was theft but he failed to trace circumstances of the alleged theft. On his part, DW1 relied on the report made by DW2 and concluded that theft did not take place because there was no breakage into the car. In Ms Nitume's view, the evidence was

contradictory because DW2 admitted to have found some of the car parts missing while DW1 was not sure of what happened.

Regarding the 2nd ground of appeal, Ms Nitume faulted the trial magistrate's finding that theft was not proved while there was report of the vehicle inspector which acknowledged occurrence of the theft.

Submitting in support of the 3rd ground of appeal, Ms Nitume proferred that since there was a valid contract to indemnify the Appellant upon loss by the Respondent, it was improper for the trial magistrate to desist from ordering compensation to the Appellant.

In respect of the 4th ground of appeal, the learned advocate for the Appellant faulted the decision of the trial court for disregarding the watertight evidence of the Appellant. She maintained that the trial court failed to take into consideration the evidence of the Appellant which was supported by documentary evidence to prove theft; namely, PF 90 and the police inspection report.

Expounding on the 5th ground of appeal, Ms Nitume stated that the trial court erred in relying on the evidence of DW2 which, in her view, was incredible and unbelievable. She submitted that the evidence of DW2 that

he conducted the inspection alone is contrary to the inspection policies. She maintained that the trial magistrate did not take into account to evaluate the Appellant's evidence, relying on the case of **Hussein Idd and Another vs Republic [1986] TLR 166**.

On her part, Ms Semlangwa, in response to the 1st ground of appeal, was of the view that the testimonies of DW1 and DW2 were consistent. She stressed that DW1 testified on the applicability of the motor vehicle policy by outlining documents that were required to be submitted by the Appellant in order to be indemnified. That, DW2, while assessing the Respondent's liability, based his findings on the fact that there was no force used to break the vehicle. That, therefore, the absence of the car parts was caused by the Appellant's own faults by either vandalizing the vehicle himself or through negligently leaving the vehicle unlocked.

In response to the 2nd ground of appeal, Ms Semlangwa contended that the inspection report is not proof that theft took place. She added that the fact that the vehicle had some parts missing does not necessarily mean that the parts were stolen. She insisted that the Appellant failed to call the police inspector and his friend Mbasha who informed him of the theft, calling upon the Court to draw an adverse inference against the

Appellant. To support her proposition, she relied on the case of **Hemed Said Mbilu vs Mohamed Mbilu [1984] TLR 113.**

Contesting the 3rd ground of appeal, Ms Semlangwa submitted that the trial magistrate could not order compensation since theft was not proved. Regarding the TZS 29,979,053/= that the Appellant alleged to have spent as costs in repairing the vehicle, Ms Semlangwa submitted that such amount, being specific damages, ought to be specifically pleaded and proved.

Responding to the 4th ground of appeal, the learned advocate for the Respondent submitted that PF 90 is not proof of theft as it indicated that investigation was still on progress. Further, that the vehicle inspection report only reflected the state of affairs of the vehicle as found by the inspector; but, it was not conclusive evidence that theft had occurred.

Submitting in response to the 5th ground of appeal, Ms Semlangwa contended that DW2 testified in the trial court the findings of his inspection and tendered exhibit D2. That the Appellant had a chance to cross examine him to avert doubts and ascertain propriety of the contents of exhibit D2. That, since the Appellant opted not to do so, he is taken to have admitted what DW2 said and what exhibit D2 contained. To support

her contention that failure by a party to cross examine a witness on certain facts such party is deemed to have admitted such facts, she relied on the decision in **Bomu Mohamedi vs Hamisi Amiri, Civil Appeal No. 99 of 2018** (unreported).

In her rejoinder submission, Ms Nitume maintained that the inconsistencies referred to are to the effect that DW2 while conducting his investigation found out that some of the vehicle parts were missing, which is a proof that theft took place while DW1 testified that theft did not take place, while he was present during the investigation. Regarding the argument that the Appellant failed to call key witnesses, Ms Nitume submitted that there was no need for calling such witnesses since the Appellant proved existence of theft and that he suffered loss which was to be covered by the Respondent.

I have arduously considered the trial court records and the submissions by the advocates for the parties in considering this appeal. The issues for determination are whether theft was proved by the Appellant and if so whether he is entitled to compensation by the Respondent; and whether the trial magistrate made proper analysis and evaluation of evidence of both sides and properly scrutinized the documents tendered.

In deliberating the first issue which covers the 2nd and 3rd grounds of appeal, it is incumbent to note that the only person who testified on the alleged theft was the Appellant (PW2). His other witness was not comprehensively examined. His evidence, during cross examination, shows that he was aware of the missing parts in the vehicle of the Appellant and that he had been repairing it. However, according to his evidence, the information that some parts were missing in his car was given to him by his friend Mbasha. As aptly submitted by Ms Semlangwa, the said Mbasha ought to have been called to testify on what transpired or on what he observed. This is notwithstanding the fact explained by counsel for the Appellant that nobody witnessed the theft. It was necessary that witnesses who first noticed that some parts in the vehicle had been stolen testify in court. That is none other than the said Mbasha. He did not testify at the trial court and did not narrate the incident to DW2, who inspected the vehicle on behalf of the Respondent. It has been held times and again that failure to call key witness to testify in court imputes adverse inference against the party complaining. I find support of the Court of Appeal decision in **Jumanne Marco vs Republic, Criminal Appeal No. 522 of 2016** (unreported), where it was held:

> *"In fact, the prosecution's failure to call Juma Shija as a witness ought to have operated in favour of the appellant under the adverse inference rule."*

The same applies to the appeal under consideration. Failure to call Mbasha and the police officers who inspected the vehicle and prepared exhibit D2, justifies an adverse imputation against the Appellant's assertions.

Since theft is a criminal offence and the case before the trial court was a civil case, the standard of proof ought to be higher than on the preponderance of probability. Where criminality arises in the course of determining a civil suit, the standard of proof becomes higher than that of proof in civil cases. In this respect, I am guided by the decision of the Court of Appeal in **Paulina Samson Ndawavya vs Theresia Samsoni Madaha, Civil Appeal No. 45 of 2017** (unreported), where it was held:

> *"It may not be completely irrelevant to observe that since fraud imputes criminal offence* ***proof of it ought to have been above mere preponderance of probabilities****. See:* ***Omary Yusufu vs. Rahma Ahmed Abdulkadr*** *[1987] TLR 169 and* ***Ratilal Gordhanbhai Patel vs. Layi Makany*** *[1957] EA 314."* (Emphasis added)

In the trial court, the only evidence presupposing that the theft occurred is that of the Appellant, who was not at the crime scene during the alleged theft. The information he had come from his friend Mbasha. I agree with the Respondent's counsel that the fact that the car was found to have some parts missing cannot be taken to be conclusive evidence that theft took place. The vehicle inspection report, exhibit P1, only identified the

missing car parts. The same applies to PF 90 which entails that the theft incident took place on 18/05/2017 at 23:45hrs.

I should also point out that it is appalling that the makers of the said two exhibits (documents) were not summoned to testify at the trial court. Their evidence would have cleared some of the doubts. I believe that the information that the theft incident took place on 18/05/2017 at 23:45hrs was given by the said Mbasha who also did not testify.

I have also revisited the report by DW2, which Ms Nitume proffered that it acknowledged the theft. Indeed, it states so in some parts. I note that the same was made on 26/6/2017, a month after the incident. In that exhibit, DW2 acknowledge that the parts were either stolen or vandalised by the owner. All the same, he noted that at the time he inspected the vehicle some of the parts mentioned in exhibit D2 were missing. That is why DW2 made recommendations in the report and concluded as hereunder:

> *"After our investigation, we concluded that since there is no breakage on the vehicle whatsoever and technically that duplicate key cannot be used to unlock the vehicle as confirmed by the insured, it is either the insured recklessly left the vehicle unlocked or wilfully vandalized his vehicle."*

In addition, DW2 explained in detail how he struggled to have the Appellant or his friend Mbasha so that he could interrogate them. He did not manage to interrogate them as both were outside Arusha. This renders the argument by the Appellant's counsel that exhibit D2 was made without involving the Appellant, albeit factual, ineffectual.

Further, DW1 outlined the important documents that a claimant was supposed to submit to the Respondent, in order to be compensated. These are such as PF 90, PF 115, inspection report, charge sheet as well as a court judgment. It is on record that the Appellant's claim did not meet those requirements. I therefore find no basis to fault the trial magistrate's findings.

Before concluding on this issue, I should state that an insurance contract is a contract of utmost good faith and indemnity. I harbour no grounds to conclude, as the Respondent's counsel did, that the Appellant broke into his own car and stole the items which were itemised as missing. That, although possible for some scrupulous inviduals, would be the most irresponsible thing for one to do. As proposed by the Report (Exhibit D2), the Respondent ought to have partially compensated the Appellant on the ground that the Appellant was partially responsible for what befell him.

He might have left the car locks open, which contributed to exposure to theft. Again, this remains speculations as it is also possible that some thieves may have devised mechanisms of breaking into a locked car without leaving traces of breaking as testified by PW1. The Appellant might have erred in some fronts as outlined in the report, but that should not have disentitled him completely. It is not in dispute that some of the parts vandalised would not require the vehicle to be open. This includes the lamps. But as said, once the Respondent decided to contest the whole claim, the Appellant was duty bound to prove his case, which he failed to do. The first issue is therefore resolved against the Appellant.

On the second issue, which covers in the 1st, 4th and 5th grounds of appeal, the counsel for the Appellant contends that the evidence of DW1 and that of DW2 were inconsistent and contradictory. That while DW1 testified that there was no theft, DW2 acknowledged the theft. I do not find any contradictions in the two testimonies. As pointed out, DW1 testified that although the said vehicle parts were missing, there was no proof of theft. That is what he gathered from the report prepared by DW2, the surveyor and loss adjuster, whom they tasked to inspect the alleged theft. On his part, DW2 acknowledged that it is true at the time of inspection, some of the vehicle parts were missing, but that those car parts were stolen could

not be established. He advised the Respondents not to pay. In that sense the evidence of DW1 and DW2 was consistent.

The Appellant's counsel also faulted the trial magistrate stating that she did not consider the Appellant's evidence. I have traversed the judgment of the trial court and I am of the considered view that the trial magistrate made analysis of the evidence of both sides as reflected in the typed judgment. While determining the 1st and 2nd issues as reflected under page 5 of the typed judgment, the trial magistrate made evaluation of the Appellant's evidence. That is noted partly when she said:

> *"... according to PW2 this court find (sic) that this case was prematurely brought before this case (sic) because still the investigation on the issues (sic) of stealing was (sic) pending in police and no criminal charge was brought before any court and the alleged stealing to be proved (sic) before a competent court."*

While I may not be in agreement with the learned magistrate about what she considers to be completion of investigation in insurance claims, I am not prepared to hold that she completely did not analyse the Appellant's evidence. The trial magistrate's reasoning for the final decision is, in my view, incorrect in the sense that not all insurance claims require a criminal conviction. I say so because the evidence did not show that the alleged thieves were known to the Appellant or to the police. The Police report concluded that the investigation was incomplete because they had not

traced the culprits, not that the insurance claim could not be made. Was the Appellant expected to postpone his claims until the culprits were arrested and a court judgment issued? I think not. The trial magistrate was supposed to weigh the evidence before her and make a determination thereof. This being a first appeal, this Court is at liberty, as I hereby do, to re-examine the evidence and arrive at its own finding.

As earlier stated, the Appellant's evidence was not steadfast. More evidence was required from his side to enable the trial court to decide in his favour. Failure to call crucial witnesses renders his claims to be unjustified. I have further noted that the evidence of the Appellant had some shortcomings. First, the amount of money claimed by the Appellant at hearing was TZS 29,979,053/=. This amount was not pleaded in the plaint. As submitted by Ms Semlangwa, what was pleaded in the plaint was a TZS 70,000,000/= as special damages. It is obvious that the Appellant departed from his own pleadings, which is contrary to the long-established principle that parties are bound by their own pleadings. In the cited case of **Paulina Samson Ndawavya vs Theresia Samsoni Madaha** (supra), the Court held:

> *"The other remark which we find ourselves compelled to make relates to pleadings. In doing so we cannot do better than reiterate what we said in **James Funke Gwagilo vs Attorney General [2004] TLR 161** whereby we underscored the function of pleadings being to put*

notice of the case which the opponent has to make lest he is taken by surprise. From that same decision ***we reiterated another equally important principle of law that parties are bound by their own pleadings and that no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded.***"(Emphasis added)

Evidence must correspond to what is pleaded in the pleadings. What was pleaded by the Appellant in the plaint is not what he claimed as special damages during hearing. It is also notable that none of the amount claimed was backed up by any evidence. It is trite law that special damages must be specifically pleaded and proved. As propounded in the case of **Harith Said & Brothers Ltd vs Martin Ngao [1981] TLR 327** where it was stated:

"... unlike general damages, special damages must be strictly proved. I cannot allow the claim for special damages on the basis of the defendant's bare assertion when he could, if his claim was well founded easily corroborate his assertion with some documentary evidence."

The Appellant did not prove by documentary evidence either the amount claimed in the Plaint, that is TZS 70,000,000/=, or TZS 29,979,053/= claimed as special damages during hearing. Thus, the claim that the trial magistrate erred in not awarding compensation to the Appellant is not based on any basis. The second issue is thus resolved against the Appellant.

In conclusion, this Court is not satisfied that the Appellant was unfairly treated by the trial court serve for what I stated. The evidence tendered at trial fell short of the required standards. I see no grounds to depart from the decision of the trial magistrate. Therefore, this Appeal is devoid of merits. It is accordingly dismissed with costs.

Order accordingly.

Y. B. Masara

JUDGE

13th May 2022