

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO.33 OF 2022

(Originating from civil case no. 23/2021 of District Court of Arusha at Arusha.)

HARUNA IDD MWIRU..... APPELLANT

Vs

HUMPHREY SILIYO PALLANGYO.....RESPONDENT

JUDGMENT

Date of last order: 14-3-2023

Date of judgment: 27-4-2023

B.K.PHILLIP,J.

Aggrieved by the decision of District Court of Arusha at Arusha in Civil Case No. 23 of 2019 the appellant herein lodged this appeal to challenge the same. The grounds of appeal are reproduced verbatim hereunder.

- i) That after the trial Court had found that exhibit P8 which was tendered in Court bearing registration no. T. 760 AFJ, it erred in law and in fact when it held that the said motor vehicle was different from motor vehicle with registration number T. 802 AAE which was seized from the appellant and later on produced in Court as exhibit P8.*
- ii) That the trial Court erred in law and in fact when it held that the appellant had failed to prove his case in presence of vivid*

evidence that exhibit P8 which was seized from the appellant was put into the respondent custody during the hearing of criminal case no. 44 of 2014 in Arusha Resident Magistrate Court and to date he has refused to hand it over to the appellant herein.

- iii) *That the Trial Court erred in law and in fact when it held that, there was no serious evidence which was produced by the appellant to prove his case in presence of Court judgment and admission by the respondent.*

A brief background to this appeal is as follows; That the appellant was charged with the offence of being in possession of property suspected to have been stolen or unlawfully acquired contrary to section 312 (1) (b) of the Penal Code in Criminal Case no. 44 of 2018 before Resident Magistrates' Court of Arusha, at Arusha. He was found not guilty, thus acquitted. In its judgment the Resident Magistrate's Court ordered that the motor vehicle which was confiscated from appellant's home and tendered in court during the hearing the case as a exhibit P8 to be handed over to the appellant since the same was under the custody of the complainant who is the respondent in this appeal. Consequently, the appellant filed a suit at the District Court of Arusha at Arusha against respondent vide Civil Case No. 23 of 2021 claiming for the motor vehicle with registration no. T760 AFJ which was tendered in court as P8 in the aforesaid Criminal case No.44 of 2018. His prayers before the District Court were as hereunder;

- i) An order compelling the defendant to bring to the honorable Court motor vehicle with registration no. T.760 AFJ Make Toyota Land Cruiser while in good condition and handover it to the plaintiff with immediate effect together with all registration documents.*
- ii) Payment of general damages.*
- iii) Costs of the suit.*
- iv) Any other reliefs the Court may deemed just to grant.*

The respondent filed his written statement of defence in which he alleged the following; That at no point the appellant owned the motor vehicle with registration no. T. 760 AJF Make Toyota Land cruiser since the same is the property of Outdoor Expeditions Afrika. The respondent as director of Outdoor Expedition Afrika reported the theft of the Company's motor vehicle with registration no. T. 760AFJ. The appellant was arrested on the alleged unlawfully possession of the said motor vehicle with registration no. T760 AFJ, chassis number JTERB71J20001518. He prayed for the dismissal of the appellant's case.

In determination of the case the trial Magistrate framed three issues, **one**, who is the lawful owner of the motor vehicle with registration no. T 760 AFJ Make Toyota Land Cruiser, **two**, whether there is a Court order for the respondent to hand over the said motor vehicle to the appellant and **three**, what reliefs are parties entitled. At the hearing of the case, the appellant was the sole witness for his case. Likewise the respondent was the sole witness for the defence case.

In a nutshell, the appellant's testimony before the trial court was as follows. That he is the lawful owner of the motor vehicle with registration no.T802 AAE, make Toyota Land Cruiser which was sold to him by one John Karia in May 2014 for Tshs 19,000,000/=. Sometimes in June 2018, the respondent herein claimed that the said motor vehicle belongs to him. He lodged his complaints before the police, consequently the appellant was arraigned at the Resident Magistrates' Court of Arusha on the offence of being in possession of stolen property. Later on he was discharged and remained as a witness for the prosecution. Finally the case was withdrawn. In 2018 he was arrested again and arraigned at the Resident Magistrate's Court of Arusha at Arusha on the offence of stealing a motor vehicle allegedly belonging to the respondent. The case was heard on merit and he was acquitted. In its judgment the court ordered that the motor vehicle which was confiscated from his home and tendered in court as exhibit P8 be handed over back to him. He tendered in Court the judgment of the Resident Magistrates' Court of Arusha at Arusha in Criminal Case No.44 of 2018 and same was admitted as exhibit P1 and prayed for a court order compelling the respondent to hand over back to him his motor vehicle.

In his defence the respondent testified as follows; That he is the director of Outdoor Expeditious Africa Company Limited, thus he is not the owner of the motor vehicle claimed by the appellant. The appellant never owned the motor vehicle with registration no.760 AFJ.The motor vehicle with registration no T.802 AAE which was confiscated at the appellant's home is at USA River Police Station. There is no any order in exhibit P1 which directing him to hand over

the motor vehicle with registration no.T760 AFJ to the appellant. The victim/ complaint in Criminal Case no.44 of 2018 was Outdoor Expeditious Africa Company Limited who is not a party in the case.

Upon receiving evidence from both sides the trial Magistrate composed her judgment in which she pointed out that the appellant pleaded in his plaint that his claims were respect of a motor vehicle with registration no. T 760 AFJ Make Toyota Land Cruiser while in his testimony he told the court that his was claiming for his motor vehicle with registration no. T 802 AAE Make Toyota Land Cruiser.Thus, she was of the view that the appellant departed from his pleadings and testified on a new claim different from what was pleaded in the plaint. Finally, she ruled out that the appellant failed to prove his claims to the standard required by the law and dismissed the case with costs.

In this appeal the learned advocates John Mseu and J.S. Mjema appeared for the appellant and respondent respectively. The appeal was heard viva voice.

In his submission Mr.Mseu abandoned the 2nd and 3rd grounds of appeal.Thus, he submitted for the 1st ground of appeal only. His submission was to the effect that after the trial court had made a finding that exhibit P8 which was tendered in court bore registration no. T760 AFJ, it erred in fact and in law by holding that the said motor vehicle was different from the motor vehicle with registration no. T802 AAE which was confiscated from the appellant's home and later produced in court as exhibit P8. He further contended that the motor vehicle with registration no. T802 AAE

which was seized from the appellant's home and later produced in court as exhibit P8 in Criminal Case no. 44 of 2018 at Arusha Residents' Magistrate Court is the same motor vehicle which had plate/ registration number no. T760 AJF.

Moreover, he contended that the motor vehicle which was confiscated at the appellant's residence is the same motor vehicle which was produced in court but the plate /registration number was changed. Thus, when the appellant mentioned a motor vehicle with plate /registration no T802 AAE in his testimony he was referring to the same motor vehicle which was pleaded in his plaint as motor vehicle with registration no. T760 AFJ. He strongly argued that the trial court erred in law and fact for holding that the motor vehicle mentioned by the appellant in his plaint (motor vehicle with plate/ registration no. T 760 AFJ) was different from motor vehicle with plate/ registration no. T802 AAE Make Toyota Land Cruiser which was mentioned by the appellant in his testimony.

Moreover, Mr. Mseu argued that after delivery of the judgment the court acquitted the appellant and ordered the motor vehicle (exhibit P8) which was seized from his residence to be returned to him forthwith but the respondent refused to hand over the same to appellant . He insisted that appellant proved his case on balance of probabilities as required by the law considering the evidence which was tendered before the trial court. He prayed that this appeal be allow with costs.

In rebuttal, Mr. Mjema submitted that the appellant failed to prove his case to the standard required by the law. He maintained that the

impugned decision is proper since the appellant departed from his own pleadings without any justification. He referred this Court to page 11 of the typed judgment where the court stated that in his plaint the appellant was claiming for motor vehicle with registration no. T 760 AFJ worth Tshs. 57,000,000/= while in his testimony he told the court that he was claiming for a motor vehicle with registration no. T 802 AAE which was confiscated from his residence and tendered in court as exhibit P8 in Criminal Case no 44 of 2018 not a motor vehicle with registration no.T760 AFJ pleaded in the plaint. To cement his argument he referred this court to page 8 paragraph 2 of the impugned judgment. He was emphatic that the motor vehicle with registration no,T760 AFJ was not tendered in court as exhibit.

With regard to Mr. Mseu's contention that when the appellant testified before the trial court that he was claiming for a motor vehicle with registration no. T802 AAE he was referring to the same motor vehicle which was pleaded in his plaint as motor vehicle having registration no. T760 AFJ, Mr. Mjema submitted that no evidence was adduced to that effect. He insisted that the motor vehicles with registration no.T670 AFJ and T802 AAE are two different motor vehicles. He referred this court to page 9 of the impugned judgment to cement his arguments. He further argued that there is no where in the proceedings of in Civil Case no. 23 of 2021 indicating that trial court was supplied with a proof that the respondent was entrusted to keep exhibit P8 in his custody.

In rejoinder Mr. Mseu insisted that the appellant did not depart from his pleadings because the motor vehicle which he was referring to in his oral testimony is the same motor vehicle which was confiscated at his residence and later on produced in court as exhibit P8. There is nowhere in the trial court's proceedings showing that there were two motor vehicles tendered in court as exhibit P8. He maintained that the only difference is that after being confiscating motor vehicle with registration no.T802AAE from the appellants home, its plate /registration number was changed, to when it was brought in court had a plate/registration number T760 AFJ. At the hearing in Criminal case no. 44 of 2018 the respondent identified it as the motor vehicle which was stolen from his residence and no evidence was tendered by the respondent to show that there were two different motor vehicles, that is one with registration no. T760AFJ and another with registration no.T802 AAE. He insisted that the impugned judgment is erroneous since the motor vehicle with registration no. T760AFJ belongs to the appellant and the Resident Magistrate's Court ordered the same to be handed over to him.

Having dispassionately analyzed the submissions made by the learned advocates as well as perused the court's records, let me proceed with the determination of the merit of this appeal.First of all , it is a common ground that this case emanates from the judgment of the Resident Magistrate's Court in Criminal case No.44 of 2018 which was admitted at the trial court as exhibit P1. In that case the appellant herein was an accused person. According to Exhibit P1 the court ordered the motor vehicle which was tendered as exhibit P8 to

be handed over to the appellant who was an accused person in that case. For ease of reference let me reproduce hereunder the relevant part of the court order found at page 10 of exhibit P1

" .. I here declare his freedom at once , unless held for other lawful offence other than this I have found him not guilty and acquitted him accordingly. I further order the motor vehicle (Exh.P8) which was taken from the accused person herein and maneuvered changed by the victim be handed over to the accused person at once"

Exhibit P1 shows that the victim in that case was the respondent herein. Let me reproduce the relevant part of the judgment found at page 2 of exhibit P1 here under;

" Humphrey Pallangyo, (victim herein) was in vacation in America with his wife and on the 3rd of May 2014 he received information from Frank Mbise who was also informed by Jeremiah Macca (a driver of the victim) whom was called by the Victim's house boy...."

It is not in disputed that only one motor vehicle was tendered in court as an exhibit P8 and according to exhibit P1 there was evidence to the effect that when the police officer went to appellant's residence with the respondent to seize that motor vehicle they found it having plate number T.802 AAE, but the respondent maintained that the same was his motor vehicle and its proper plate/registration number was T760 AFJ but the same was changed by the appellant after stealing it. The evidence adduced by the prosecution which included forensic report showed that the motor vehicle was tempered with. As correctly submitted by Mr.Mjema the plaint shows that the appellant's claim was in respect of the motor vehicle with registration no. T760 AFJ. The court's records reveal that in his testimony the appellant testified that

he was claiming for a motor vehicle with registration no. T.802 AAE and in its judgment the trial court made a finding that upon going through exhibit P1 it is clear that the motor vehicle that was confiscated at the appellant's residence in Singida is the one which was tendered in court as exhibit P8.

From the foregoing and having in mind the contents of exhibit P1, it is obvious that the motor vehicle in question which was tendered in court exhibit P8 is only one, but the same was tampered with and two different plate/ registration number have been assigned to it at different times, to wit; plate/registration number T208 AAE (which was its original plate/registration number) and T 760 AFJ. This is in accordance with the court's findings in Criminal Case no. 44 of 2018 in which the trial Magistrate said that the police's decision to leave the motor vehicle suspected to have been stolen in the custody of the to the victim or accused was very dangerous since there was a great opportunity of tampering with the motor vehicle. For ease of understanding what I am saying here let me reproduce the relevant part of the findings in exhibit P1 found at page 8 -9;

" Never the less the vehicle seized under the certificate of seizure shows that its registration number is T802 and not T760 AFJ, the forensic report tendered before this court shows that the motor vehicle forensically examined and investigated bear registration no. T 26 AAH. Moreover , there is no any proof that the said car was changed to look like a land rover.

It is very dangerous to hand over the vehicle suspected to be stolen to the accused and or victim since it is very possible to temper with its genuineness afterward. The danger prayed by the Police officers who seized the said motor vehicle"

From the foregoing I am inclined to agree with Mr. Msue that the fact the appellant in his plaint stated that he was claiming his motor vehicle with registration no T.760 AFJ and later on in his testimony testified that he was claiming a motor vehicle with registration no. T 280 AAE ,does not mean that he was talking about two different motor vehicles but he was referring to the same and one motor vehicle which was tendered in court as exhibit P8 which was ordered to be handed over to him by the trial Court. The court's record reveal that in response to the questions posed to him during cross examination appellant told the trial court that after being discharged in 2014, in 2018 he was charged again of stealing a motor vehicle with registration no. T 760 AFJ but it was the same motor vehicle which was confiscated from his residence. This explains well the concern raised by the Resident Magistrate in her judgment (Criminal Case No.44 of 2018) that the motor vehicle was tempered with. The argument raised by Mr. Mjema that the motor vehicle that was confiscated from the appellant's house is at USA Police Station is totally misconceived because the judgment of the Resident Magistrates' Court in Criminal Case No.(exhibit P1) states categorically that exhibit P8 was under the custody of the respondent (the victim).

Also, Mr. Mjema's argument that the victim in Criminal Case no.44 of 2018 was Outdoor Expedition Africa Company not the respondent lacks merit since the Resident Magistrates' Court in Criminal Case no. 44 of 2018 had already said in its judgment that the respondent herein was the victim/complainant in that case and he testified before the court to that effect.

In addition to the above, it is noteworthy that the trial Magistrate wrongly applied in this case the principle of the law laid down in the case of **Yara Tanzania Limited Vs Charles Aloyce Msemwa t/a Msemwa Junior Agrovat and Anotehr , Commercial Case No.5 of 2013** (unreported). In this case the applicant did not present a different case contrary to what he pleaded. His testimony was in line with what he pleaded. His case was based on the judgment in Criminal Case no. 44 of 2018 and he tendered in court the same as exhibit. (exhibit P1).

In the upshot, it is the finding of this court that this appeal has merit and is hereby allowed with costs. The respondent is hereby ordered to hand over to the appellant the motor vehicle with registration no.T760 AFJ. It is so ordered.

Dated this 27th day of April 2023



B.K.PHILLIP

JUDGE