

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 33 OF 2010

MUGANGA LUSAMBOPLAINTIFF

VERSUS

TICTS DEFENDANT

JUDGEMENT

BUKUKU, J

The plaintiff's claim against the Defendant is for payment of the sum of USD 119,066/= (United States Dollars One Hundred Nineteen Thousand and Sixty Six Dollars) being refund for cost of 116 bales of poplin (vitenge) packed in a container No. MSKU 237770.3 (20"), B/L No. 858783415) which was negligently lost in the hands of the Defendant while stocked for custody waiting for clearance formalities. Further, the claim for general damages and loss of profit totaling to USD. 60,000/=:, interest and costs.

The plaintiff was represented by Mr. Kalua, advocate, while Mr. Dilip Kasaria advocate, represented the defendant. The plaintiff called two witnesses and tendered two documentary exhibits while the defendant called two witnesses and tendered eight documentary exhibits.

At the close of defendant's case, counsels were scheduled to submit final written submissions. Both counsels complied with the order. I am grateful to them.

A substantial part of the facts in this matter stands undisputed and it is as follows:

The plaintiff is a natural person a citizen of Democratic Republic of Congo (DRC) who deals with general commerce including that of importing goods from China and Singapore and exporting them to the Democratic Republic of Congo. Initially the imported goods passed through Mombasa port but later, in year 2002, the plaintiff used Dar Es Salaam port. Sometimes in December, 2009, the plaintiff shipped a container No. MSKU 237770.3 (20") B/L 85883415 from Hong Kong which contained 203 bales of poplin and the same was to be discharged in Dar Es Salaam port by a carrier vessel CHAMPION, on transit to Lubumbashi in DRC.

It is further alleged that, the said container arrived in Dar Es Salaam port on the 1st day of December, 2009 and the same cargo was discharged from the carrier ship on 3rd December, 2009. The same was stocked for custody in the defendant's terminal yard waiting for clearing formalities.

For reasons to be unfolded later, the container was transferred to Ubungo ICD pending delivery to the plaintiff.

As it transpired, upon transfer of the goods to Ubungo ICD, the plaintiff's clearing agent, discovered discrepancies on the weight of the cargo. He then requested for a joint verification to be conducted on the said container. The verification having being conducted, it was discovered that, 116 packages of poplin were found missing. The plaintiff is now claiming refund of USD 119,066 116 being the value of the bales of poplin which have been found missing.

Enough for the undisputed part. On the other hand, the defendant does not disputes the claim. He however maintains that, plaintiffs' claim is for refund and not for restitution or for replacement of the lost goods. The defendant admits that as the container was offloaded at the container terminal in an apparent good condition, and though not incriminated in the verification reports, and because the bolts of the container were tampered and cut while under its custody, then they are obligated to make good the plaintiff's loss.

While the defendant accepts liability to the plaintiffs' claim for the 116 lost/stolen bales at the declared customs value of USD. 38,500/= (for the 203 bales), amounting to a total loss of USD. 22,272/= for the 116 lost/stolen bales, the plaintiff has not accepted the aforesaid sum in satisfaction of his claim. What the plaintiff is claiming is the sum of USD. 119,066/= for the lost 116 bales. According the defendant's counsel, under

such circumstances, the issue for determination is what is the correct value of the refund.

The issues framed for the determination of the Court are:

- (i) Whether or not the defendant is liable to the plaintiff, from negligence or otherwise, for the plaintiff's claim herein
- (ii) If so, what, if any is the amount of the defendant's liability to the plaintiff.
- (iii) What reliefs are the parties entitled to.

The testimony of the plaintiff (PW1) was that, sometimes in April, 2009, while doing his normal business of importing goods, he imported a consignment of 2 containers from China. Included in those containers were 203 bales of poplin (vitenge wax) materials. He further testified that, the two containers arrived in the port of Dar Es Salaam on 1st of December, 2009. The goods having arrived, his agent, by the name of Triple D, cleared one of the said container and the remaining was transferred to TICTS Ubungu terminal.

It is further the testimony of PW1 that, he had an order of importing 189 bales and paid for the same. However, when the consignment arrived in the port of Dar Es Salaam in December, 2009, the price of the goods had gone up to USD 1,010 a barrel. As evidence, PW1, tendered in Court a copy of a pro forma invoice which after having being objected to by Mr. Kesaria, the Court did not admit that evidence.

PW1 testified further that, when he was informed of the lost goods, he wrote to TICTS through his agent Triple D and later he wrote to TICTS personally complaining of the lost goods. PW1 informed this Court that, he did not get any assistance/cooperation from TICTS and therefore he decided to take up the matter with his lawyers M/S Legal Link, tendering the said letter to the lawyers as Exhibit P1.

PW1 also testified that, he also wrote to another agent named Nyota Tanzania who informed him that TICTS are the ones responsible. He then tendered as evidence the letters to Nyota Tanzania, which was admitted as exhibit P2. PW1, agonized that, since his goods got lost two years ago, he had been coming to Tanzania for follow up more than five times. He also told this Court that, his business have been ruined, he has been de-possessed of his house, he lost his job and his bank account has no money. He attributed all this to TICTS and hence prayed this Court to enter judgment in his favour.

On being cross examined, PW1 stated that, all what he knows is that TICTS are responsible for his demise because the lost goods were under the care of TICTS.

The second and last witness who testified on the plaintiff's side was Mr. Senkondo Msanga (PW2). He is a clearing and forwarding agent of Triple D Limited. His testimony was to the effect that, when the demised container was transferred to Ubungu ICD, before the expiry of 15 days

grace period, he was concerned. He then raised that concern to TICTS and requested for a joint verification before delivery of the said container.

He further testified that, the joint verification was conducted at Ubungo ICD. According to the joint report, PW2 testified that, the handle of the container was tampered with and 116 bales, were missing. Asked about the value of the goods, PW2 said that the total customs value was Tshs. 52,591,176/=, less Insurance and freight. He admitted to be the one who declared the invoice for customs purpose. On re-examination, PW2 testified that, as agent of the shipping line (Maersk) Nyota Tanzania Limited denied liability in that, their liability ceased immediately after offloading the goods.

I now turn to the defence side. The first witness who testified for the defendant is one Mr. Alan James Merere (DW1) who is a claims Officer with TICTS. He said that TICTS was a landing contractor, engaged by the government for discharging and loading of containers in ships. He further said that, TICTS had a duty to discharge and load containers on board of the vessels, and therefore had a duty and responsibility to ensure that the containers are in good physical conditions. He testified that it is the duty of TICTS to ensure that there is no damage to the containers and that the contents inside are safe by counter checking if the seals are intact and to record the seal affixed on the containers.

DW1 further testified that, he was one of the persons who attended the joint verification at Ubungo ICD. It is his testimony that, upon

verification, it was found out that, the seal was intact and the physical appearance of the container was in order but the lock bolt nuts were found to be tampered with and therefore it was not easy to detect.

When asked why TRA demanded payment of VAT and customs duties from TICTS, DW2 said that, TICTS being a lending contractor and the missing goods were verified and confirmed missing in their custody, then in one way or the other, whether stolen or not, they had to pay because the goods were in their custody. He further testified that it doesn't matter whether the pilferage happened at high seas or in other ports of transshipment, but once the pilferage has been discovered in their port, then TICTS ought to pay and cannot deny responsibility in any way according to the customs law.

Finally, asked about the value of the goods, DW1 testified that, according to the release order, which was tendered in evidence as documentary exhibit D6, the customs value was T.shs. 52,591,176/=. On cross examination DW1 admitted that, they did not report the matter to the police because they treated the matter as pilferage which is not easy to conclude and also admitted that, they accepted liability in that, they did not exercise duty of care. He further admitted that, in his view, it was not proper to transfer the container to ICD Ubungu during the grace period. What TICTS were doing was to try to de-congest the port area following a presidential order.

The second and last defence witness was one Mr. Anakisye Jeremiah Mtafya (DW2). He is a customs officer of Tanzania Revenue Authority. DW2 told this Court that, he is aware of the issue. When shown exhibit D6, DW2 testified that, that was a customs release order which shows the declared value of the goods i.e. 203 packages to be FOB USD. 38,500/=, its freight USD 1,000/= and Insurance USD 100/=. The total value being USD 39,600/= or T.shs. 52,591,176/=. Testifying further, DW2 said that, according to customs procedure, it is the agent who furnishes the information. On cross examination, DW2 agreed that there are many factors which can cause fluctuation of the exchange rate.

Let us turn to the issues, starting with issue one.

In his testimony, DW1 admitted that, the defendant had a responsibility to exercise duty of care according to Customs law. It is not in dispute that, when the containers arrived at the port, the defendant inspected them in order to ascertain if they are in good conditions. Thereafter the goods landed in the care of the defendant. The issue now is whether or not the defendant is liable to the plaintiff from negligence or otherwise for the plaintiff's claim herein. The plaintiff has claimed negligence on the part of the defendant. The defendant has denied.

In order to answer this, one has to understand what constitutes negligence and whether indeed defendant was negligent. I can say, negligence is the breach of duty caused by the omission to do something which a reasonable man guided by those considerations which ordinarily

regulate the conduct of human affairs would do. It is a conduct, not a state of mind. A conduct which involves an unreasonable great risk of causing damage. In strict legal; analysis, negligence means more than needless or reckless conduct, whether in omission or commission; it properly connotes the complex concept of duty of care, breach and damage thereby suffered by the person to whom the duty was wing. The existence of a duty situation or a duty to take care is thus essential before a person can be held liable in negligence. I can also add here in passing that, a cause of action for negligence occurs when damage that is real damage as distinct from purely minimal damage, is suffered.

In this instant case, DW1 testified that the defendant was a landing contractor and as a lending contractor, he had a duty and responsibility to make sure that the containers are in physical good condition, that there is no damage in the containers that will ensure the contents inside it are safe. He further testified that, when the containers arrived at Dar Es Salaam Port and offloaded by the defendant, the containers were sealed. The pilferage that happened did happen while the containers were in the custody of the defendant. Even if the defendant did transfer the containers from the Port yard to their Ubungu ICD, they had the duty to ensure that, the goods are in good condition. Indeed, the defendant had a duty of care imposed by law on the plaintiff while rendering services to the plaintiff.

Defendant has a duty of care to ensure that, the container moved to Ubungu ICD were in good form and that they were safe. In the case at

hand, the defendant purported to transfer the containers to Ubungu ICD in order to reduce congestion at the port, but he did so at the plaintiff's detriment. By not taking due care, the defendant breached their legal duty which has resulted into damage and loss, undesired by the defendant to the plaintiff. By handling plaintiff's goods, the defendant was rendering a service in the course of his employment. He was therefore bound to perform it diligently and with the care as not to cause loss to the plaintiff.

As a general rule, the onus of proving negligence is on the plaintiff. He must show that he was injured by the act or omission for which the defendant is in law responsible. In my considered opinion, the plaintiff in this case has ably proved negligence on the part of the defendant. The act of the container being tempered with while in defendant's custody goes to demonstrate that, the defendant failed to exercise his duty of care on its part, and therefore, there was breach of the said duty which has resulted into consequential damage of loss of 116 bales of cotton.

In the light of the above, I find that the plaintiff's claim was rightly based on the tort of negligence and therefore, I don't hesitate to answer issue number one affirmatively.

Having answered issue No. 1 in the affirmative, I will now move on to issue No.2 which is the contested arena. It is the plaintiff's case that he be refunded USD 119,066/= for the 116 bales of poplin (vitenge) lost. On the other hand, the defendant insists that, the value of the lost goods is T.shs. 52,591,176/= for the 203 bales or in USD 38,500/= as per exhibit D5 and

D6 and as corroborated by DW2. Under such circumstances, the issue for determination is what is the correct value of the refund. In substantiating his claim, the plaintiff produced in Court a copy of a proforma invoice purportedly to have been sent from China and claimed that, the value of one bale was USD 1,010/=. The said exhibit was successfully objected by counsel for defendant. I must note at this stage that, apart from the inadmissible Exhibit, the plaintiff has not produced any other proof to substantiate his claim of USD 119,000/=.

According to the testimony of PW2, who was the clearing and forwarding agent of the plaintiff, the value of the 203 bales was T.shs. 52,591,176/= as shown in the release order. PW2 told this Court that, he was the one who declared the value of the invoice. This evidence tallies with that given by DW1 when shown the Customs Release order and also the evidence given by DW2, a customs officer. DW2, who I consider to be a credible witness, testified that, the declared value of the 203 bales FOB is USD 38,500/= and its freight is USD 1,000/= and Insurance is USD 100/= thus making the total value to be USD 39,600/=. DW2 further said that, according to customs procedure, it is the agent who furnished the said information.

Going by the testimonies of PW1 and PW2, there is uncertainty as to who should be believed between the two witnesses on the issue regarding the value of the goods. While PW1 relied on the proforma invoice, PW2 relied on the customs document which he himself admitted to have

declared the value. Having heard the witnesses and documentary evidence tendered as Exhibits D5 and D6, and as corroborated by DW2 I have come to the conclusion that, the official value of the goods, as declared by the plaintiff through his agent was T.shs. 52,591,176/= or USD 38,500/= as averred by defendant. It goes therefore that, the plaintiff's loss for the lost/stolen 116 bales as per the official declared value of USD 38,500/= for 203 bales, equates to USD. 22,272/= which the plaintiff is entitled to.

I now turn to the third issue of relief. In his prayers, the plaintiff has prayed for general damages of USD. 60,000/= on top of the refund of USD.119,066/= claimed, interest and costs.

I have considered this prayer. In a suit for damages, the Court awards pecuniary compensation to the plaintiff for the injury or damage caused to him by the wrongful act of the defendant. After it is proved that the defendant committed a wrongful act, the plaintiff would be entitled to compensation, which may be nominal, though he does not prove any specific damage or injury resulting to him. In order to ascertain the nature and extent of the injury done by the act for which the plaintiff claims general damages, it is often material to consider the circumstances under which the wrongful act was committed. In determining this, the Court's enquiry resolves in deciding three questions (1) was the damage alleged caused by the defendants' wrongful act? (2) was it remote? and (3) what is the monetary compensation for the damage. It must be mentioned here

that, the wrongful act of the defendant need not have been the sole principle cause of the damage.

It is abundantly clear that, general damages can be asked for by a mere statement or prayer of a claim, and this is what has been done in this case. In the case of **Admiralty Commissioner V. S.S Susquehann (1926) A.C 655 at pg. 661**, Lord Dunedin had this to say:

"If damages be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."

Now, in this case, it is obvious from the evidence of PW1 that the plaintiff suffered loss of business as a result of the loss of his 116 bales of poplin (vitenge) which went missing in the hands of the defendant. Therefore, there is no doubt that he suffered loss. As for the inconvenience and loss suffered, this Court considers that the amount of USD 10,000/= which is almost half of what has been awarded, suffices for such inconvenience. I have also considered the issue of interest. Generally, in business dealings, an award on the principal sum also attracts interest thereon. I proceeded to be guided by banking rates ruling during the disputed period. I am convinced that this principle fits the situation herein, although in here, I am disadvantaged in that the plaintiff did not even attempt to provide the rates for any period apart from merely asserting that "*commercial rate*" be used. Therefore the plaintiff is awarded 21% interest on the total amount claimed from date the amount is due to the

date of judgment. He is also awarded interest on the decretal sum at the rate of 7% from the date of judgment to the date of full payment. Lastly the plaintiff is also granted costs.

It is accordingly ordered.



A.E BUKUKU

JUDGE

29/12/2011

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