THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL APPEAL NO. 2 OF 2012

MAMBO VIEW HOTEL..... APPELANT

VERSUS

RASHIDI AMIRI CHAGHUZA.....RESPONDENT

JUDGEMENT

BUKUKU, J.

On 11th April, 2011, the respondent filed a suit before Lushoto District Magistrate's Court against the appellant seeking the following reliefs:-

(i) Payment of the T.shs.16,200,000;

(ii) Payment of interest on the above sum at commercial bank rate of 31% per annum from 12th August, 2010, to the date of judgment;

(iii) Interest on the decretal sum at the rate of 12% per annum from the date of judgment till payment in full;

(iv) General damages as per paragraph 13 and 14 herein;

(v) Costs of this suit; and

(vi) Any other relief as the Honorable Court may deem fit to grant be so granted.

The pleadings and the evidence which was tendered in the court show that, the appellant and respondent had entered into a car rental agreement sometimes in February, 2010. According to the terms of the car rental agreement dated 16th February, 2010, the respondent was to hire out his motor vehicle No.T.342 ACZ to the appellant for a payment of T.shs. 90,000.00 per day, and T.shs. 45,000 for every half day. According to the facts on record, the appellant who is dealing with hotel business trading as Mambo View Point Lodge, required the said vehicle to transport his visitors to and from the lodge. As it transpired, the agreement turned sour because, allegedly the contract entered into between the appellant and the respondent was conditional upon change of the registration card, insurance papers, e.t.c. It is further claimed that, the respondent failed to fulfill the said conditions, and therefore, the appellant failed/refused to honor his obligation of paying the respondent as agreed.

Having heard the evidence from both sides, the trial Magistrate was satisfied that the Plaintiff/Respondent has proved his case to the required standard and awarded the reliefs claimed. The appellant was aggrieved by the decision of the trial court and has filed ten grounds of appeal faulting the decision of the trial magistrate's findings namely:-

1. The learned Resident Magistrate misdirected himself and labored into a misconception by his failure to inquire and make a finding on the issue whether the contract for hire of the motor vehicle was conditional upon the respondent transferring ownership of the said motor vehicle in his own name.

2. The learned Resident Magistrate erred in law in his failure to analyse the oral evidence adduced by the witnesses during the hearing so as to arrive at a just decision.

3. The learned Resident Magistrate misdirected himself and committed serious factual and legal errors by failure to appreciate the intention of the parties and the terms and conditions of the contract. The Appellant was required to make use of the vehicle as its own in the sense that it was required to take care of the vehicle and not use it recklessly and so on.

4. The learned Resident Magistrate erred in law and misdirected himself by failure to make a finding that the documentary evidence which he referred to show that the motor vehicle was never used for the contractual purposes intended by the parties and that the respondent was legally handed over the motor vehicle without being used in front of witnesses whereby the respondent signed the documents declaring the appellant do not owe him anything at the moment he picked up the car.

5. The learned Resident Magistrate erred in law and fact in making a finding that the appellant breached the terms and conditions of the contact and made an order for payment of damages to the plaintiff.

6. The learned Resident Magistrate erred in law and fact in making a finding that the respondent is a prudent person while there is no oral or documentary evidence on the demeanor of the respondent.
7. The learned Resident Magistrate erred in law and fact in his failure to address his mind on the counterclaim made by the appellant and made further errors by dismissing such counterclaim.

8. The learned Resident Magistrate erred in law by ignoring the handover note and other pieces of evidence which showed clearly that the motor vehicle was returned to the respondent with the same mileage and was never put to use by the appellant. But so ignoring such documents, he failed to make a finding that the contract never took off as a consequence of which the motor vehicle was legally handed over to the respondent.

9. Without prejudice to the above grounds, even if the car rental is marked as existing, the amount of the demanded money is far too much since it was an old car respondent could not expect to gain that much of money from it even if the appellant should have used it.

10. The decision which was delivered on 16th January, 2012 is not a judgment properly so called as provided and required under the law.

The appellant then asked this court for the following orders:

(i) To quash the whole of the decision and judgment of the district Court and reverse all the consequent orders;

(ii) To grant the appellant al the costs of this appeal and the proceedings in the court below;

(iii) Any other or further reliefs that the honorable court may deem fit to grant.

The hearing of the appeal was pursued by way of written submissions, to which both parties complied. I recognize the efforts made by Mr. Laswai, Learned counsel for the appellant and Mr. Buberwa, Learned Counsel for the respondent.

Submitting in support of the appeal, the appellant started arguing the tenth ground which attacked the judgment of the trial Magistrate. The appellant spent a lot of time arguing on this and making reference to a number of cases. The appellant challenged the competency of the judgment on three grounds in that, one; it ignored and did not analyze the testimonies adduced by the six witnesses who adduced evidence during the hearing so as to arrive at a just decision; two, the judgment is null and void because it did not meet statutory requirements and three; it is ambiguous and absurd when compared to the decree extracted from it.

Coming to the other grounds of appeal, as some of the grounds are interrelated, I will combine some of them in the course of answering them. The other thing is that, as already intimated, with the leave of the court, counsel for the appellant brought his submission starting with the

tenth ground. In order to maintain consistency I will also tackle the grounds in the same sequence in order to avoid confusion. The remaining grounds will be dealt with as they appear in the Memorandum of Appeal.

As I said, I will start with the tenth ground, which will also answer ground three. In his submission, on the tenth ground, counsel for the appellant took much of his time attacking the judgment of the trial magistrate. He submitted that the decision which was delivered on 16th February, 2012 is not a judgment properly so called as required under the law, since it ignored and did not analyze, that, it is null and void because it does not meet statutory requirements and that, it is ambiguous and absurd when compared to the decree extracted from it. I have carefully gone through the said judgment. From the record, there is no gain saying that the said judgment of the trial magistrate is scanty in terms of analyzing and considering the proceedings and views of the evidence of the witnesses as a whole. From this scanty way in which the judgment was written, I appreciate the counsel for the appellants' anxiety and uncertainty on whether the judgment as it is, meets the requirements of the law with regard to judgment.

That said however, I will not fault the trial magistrate. As rightly submitted by counsel for the respondent, there is no same and similar style of composing a judgment, as was stated in the case of **Amiri Mohamed V. Republic [1994] TLR 138.** All in all, it goes without saying that, the judgment as it is, falls short of the requirements of the law, i.e Order XX Rule (4) of the Civil Procedure Code which states:

"The judgment shall contain a concise statement of the case, the points for determination the decision thereon and the reasons for such decision".

My understanding of this provision of the Civil Procedure Code is that, it provides sufficiently clear guidelines to the courts for what is expected in a judgment. The guidelines are with respect, too clear and unambiguous to require any further elucidation. From the above rule, it is evident that, a judgment should contain points for determination, discuss the evidence, oral and documentary and give the reasoning on which the conclusions are reached. The decision must contain findings on all the questions arising therefrom. Thus, a judgment which does not set out all the points arising for determination and does not discuss evidence is not a judgment and for that reason, can be vitiated.

In addition, a judgment may be brief, but not so brief as not to disclose the point for determination or to discuss the evidence arising thereon. But where a finding is arrived at cursorily, a judgment based on such a finding is not vitiated if the finding is supported by evidence. What I can say is that, in this particular case, it goes without saying that the judgment as it is, dismally falls short of what is provided for under Order XX Rule 4 of the CPC.

The trial magistrate of the District Court of Lushoto, having failed to analyze and assess the evidence properly, I am given to understand that, the law allows this court to step into the shoes of the District Court in order to do that which the trial magistrate should have done. This court has powers to revisit the evidence adduced at the trial court,

analyze the same and come out with its own findings of fact as was held in the case of **Ali Abdalla Amour and Abdalla Ali V. Al- Hussein Sefudin (Safi Stores)(CAT) 2004 TLR 313.** I will therefore do just that.

Another point which was taken up by the appellant was that, the judgment is ambiguous and absurd when compared with the decree extracted from it. Counsel for the appellant submitted that, according to the plaint, relief number 5 in roman (v) is a claim for costs of the suit. In the judgment, the trial magistrate disallowed this claim. Nevertheless, in the decree, it was granted. He thus surmised that, the decision is absurd and unenforceable. With greatest respect to counsel for the appellant, Section 96 of the Civil Procedure Code enacts that, clerical or arithmetic mistakes in judgments, decrees or orders arising from any accidental slip or omission may at any time be corrected by the court either of its own motion (suo motu) or on the application of any of the parties. This section is based on two important principles. (i) that, an act of court should not prejudice any party and (ii) it is the duty of courts to see that their records are true and they represent the correct state of affairs.

The expression "accidental" means any happening by chance or unexpectedly taking place, not according to the usual course of things, something unintentional, unforeseen, and unexpected. The test to determine whether the slip or omission is accidental or not, can be gathered for the intention of the judge or the magistrate in preparing the judgment or order. If on a cursory reading of the judgment one finds that the grant of a specific relief is writ large, the omission there of

in the decree would obviously be an accidental omission falling within the four corners of section 96 of the Civil Procedure Code.

In this particular case, one can say the there was an accidental slip on the part of the trial magistrate, an error that can be cured under section 96. That notwithstanding, every court has inherent power over its own records so long as those records are within its power and that it can set right any mistake in them. An order even when passed and entered may be amended by the court so as to carry out its intention and express the meaning of the court when the order was made. It can be done at any time. Understandably, there may be accidental slip of a pen on the part of the trial magistrate, but that cannot be a ground of appeal. What the appellant could have done was to apply to the court for the error to be corrected. This could have been done anytime. As such I do not see why counsel for the appellant decided to generate heat on this issue which, to me, is curable.

In the second ground as it appears in the Memorandum of Appeal, counsel for the appellant submitted that, the trial magistrate misdirected himself and labored into a misconception by his failure to inquire and make a finding on the issue whether the contract for hire of the motor vehicle was conditional upon the respondent transferring of the said motor vehicle in his own name. In support of this ground, the appellant argues that, clause 2 of the contract provided that, the respondent should transfer the ownership of the motor vehicle in his own name with a private classified number plate. The appellant further argues that, by the time the contract was executed on the 16th February, 2010, the

vehicle was still in the name of the previous owner, one Mr. Stanislaus Haroon Nyongo. He thus surmised that, the respondent could not have sued on the contract in the event of any happening of any event since he was yet to be the owner of the motor vehicle.

I will start by saying that, not all terms of a contract carry the same weight. Some are more important than the others. Those which are regarded as major terms of the contract are known as conditions, while those which are minor or less consequence are called warranties. The distinction between conditions and warranties is best illustrated by the effect which a breach of each one of them has on the contract. On the part of conditions, there are two types, one is condition precedent and the other is condition subsequent which I think is not relevant here. Condition precedent is one which must be satisfied before a contract can become effective or operational and until such condition is satisfied, the existence or operation of the contract is suspended and non of the parties has any enforceable right in the meantime. In other words, a conditional contract is legally binding, but the obligation will remain inchoate to the day they are fulfilled.

In this particular case, it is a fact that clause 2 required the respondent to transfer ownership of the vehicle in his own name. That clause is couched as follows:

> *"2.Mr. Rashidi will take care that the papers of the car will be transferred on his name with a private classified number plate."*

And clause 15 reads:

> *"15. The contract starts the moment that the papers, insurance and number plates are proper and ends after one week whether the owner whether Mamboview terminates the contract.*

It has not been disputed that, the author of the contract was non other than the appellant himself. If at all the change of name in the documents was indeed a condition precedent as is alleged, how come the same appellant took into his possession the vehicle in question immediately upon signing of the contract, and started using it, while knowing that, the contract will start at the moment the papers, insurance and the number plates are proper? One wonders, who was in breach. According to the law of contract, a breach of a condition gives the aggrieved party the right to repudiate the contract itself. In addition, the aggrieved party may maintain an action for damages for loss suffered if any, on the footing that the whole contract is broken. One wonders, if at all there was breach of a condition, the appellant did not take any action until six months had passed, it infers that, the appellant has acquiesced with the breach.

The other issue is that, while the counsel for the appellant submitted that, at the time of signing of the contract, the car had no insurance, this is controverted by the testimonies of **DW1** and **DW2** as they all conceded that, the vehicle had a valid insurance. As for the change in number plate, there is enough evidence to show that, the

vehicle had commercial number plates when the contract was signed. Since the appellant wanted to use the vehicle for business purposes, it beats one's mind as to why appellant wanted it changed into private numbers. The only outstanding issue which was yet to be effected during the signing of the contract, was the change of name on the motor vehicle registration card, which according to the testimony of **DW2,** sometimes in May, 2010 when they paid a visit to the respondent, they were given the registration card by the respondent.

The fact that the appellant took the vehicle immediately after signing the contract, it shows that, the change of name was not a condition precedent to be fulfilled by the respondent before the consummation of the contract, as the appellant wishes this court to believe. Therefore, I find ground two lacks merit.

Since ground three has been answered while dealing with the tenth ground, I will now move on to ground five, which I will combine it with ground six. As for ground four of the appeal regarding the issue of recklessness, I find it not to be specifically and distinctly stated. It is ambiguous and unclear as to what is required by the appellant. It is trite that, no ground of appeal can be permitted in general or vague form the particular point on which the lower court has erred in law or the particular finding of fact which is wrong, and the particular view taken by that lower court which is opposed to equity must be clearly and distinctly specified. The way the fourth ground is couched, it does not spell out categorically the wrong of the error to which this court is called

upon to decide. Under such circumstances, I will not permit it to be argued.

Both grounds five and six relate to the issue whether the appellant used the vehicle or not. Counsel for the appellant submitted that, the trial magistrate made factual errors since the evidence on record shows that the motor vehicle was never put to use as the contract never took off. On the other side, counsel for the respondent forcefully maintained that, the appellant used the vehicle on several occasions.

I have had the occasion of re visiting the testimonies and have worked at the evidence on record, and I am satisfied that, the appellant used the motor vehicle, contrary to what was pleaded in paragraph 5 of the appellant's written statement of defence, and what has been submitted by counsel for the appellant in his closing submissions. While **DW1** conceded that he used the motor vehicle only once for testing, **DW2** to the contrary testified that, the car was used twice, once being for business purposes, and the other is when they paid a visit to the respondent. To complement **DW2's** testimony is **Exhibit D4** which clearly shows that, on 2nd May, 2010, the motor vehicle was used for half a day at a rental rate of T.shs. 45,000.00/= which was the amount agreed in the contract for hire of the motor vehicle.

If at all the appellant did not put the vehicle in use, one could not comprehend what prevented the appellant from terminating the contract and returning the vehicle to the respondent at the earliest opportunity, because all that the appellant wanted was a vehicle to assist him in his business ventures. The other evidence which draws an inference that

the car was put to use is **Exhibit D4**. The Exhibit clearly shows that, on 27th March, 2010, the vehicle was repaired, and in the process, two "fundis" were paid, tubes for spare wheel was purchased etc. Again on 17th April 2010, cross joint of the vehicle was repaired, then again on 3rd May, 2010, electrical repair was done including belt cooling pump and on 5th of June, 2010 wiring was done. With all this work done on the vehicle, can one say that the vehicle which was being repaired was parked, as applicant would wish this court to believe? Unfortunately, one cannot repair a motor vehicle which is not used. It is thus my considered view that, indeed, while in the possession of the appellant, the respondent's motor vehicle was put to use by the applicant and therefore, I hold that, the trial magistrate did not err in his findings by awarding the respondent the rental amount claimed.

I now turn to ground seven which need not detain me. The appellant submitted that, the trial magistrate erred both in law and fact in a finding that the respondent is a prudent person while there is no oral or documentary evidence on the demeanor of the respondent. With due respect to counsel for the appellant, the said attack on the trial magistrate is not justified at all. He is the one who saw and heard the testimonies of the witnesses including that of the respondent. He was therefore in a much better position to access the prudency and credibility of the witnesses. Any witness in civil proceedings, whether a party to the proceedings or not, is liable to cross examination as to credit. The witness can be cross examined on matters not directly material to the case in order to ask the presiding judge or magistrate to

infer from the witness's answer that he is not worthy of belief, or not a credible person. This is cross examination as to his credibility.

There are already guidelines which have been laid down in various judicial decisions when matters of demeanor and credibility are at stake. It is therefore from this that, this ground of appeal is unjustified and therefore has no merit.

Next is ground eight regarding the counter claim by the appellant. It is claimed by the appellant that, he had repaired the motor vehicle at the behest of the respondent and therefore a total of T.shs. 291,000/- is claimed. Also in the counter claim, the appellant claims T.shs. 900,000/- being costs of keeping the plaintiff's vehicle at its compound for 180 days at the cost of T.shs. 5,000/-. Again, I think this ground of appeal need not detain me. Clause 11 of the car rental agreement provides that, if the car is not in use, Mambo view point will ask permission by phone for repair in advance to the owner in case this is needed. Moreover, clause 12 requires that, when the car is in use, and if at all there is repair costs, the owner (responded) to be informed as soon as possible.

Nowhere in appellant's pleadings or testimonies has it been shown that, prior to the repair works done, they sought permission from the respondent. In actual fact, **DW2** testified to the effect that, they did not inform the respondent about the repair works, which means that, the repair works were done when the vehicle was in use, neither did they seek permission if at all the vehicle was not in use as alleged. That being the case, the appellant is estopped from claiming reimbursement from

the responded. If at all the appellant was servicing the vehicle in good faith, (preparing it for the business), then there was no reason why he did not seek permission of the respondent to repair the vehicle (if it was parked) or inform him as soon as possible. This shows one thing. The appellant was hiding the respondent some facts which, if discovered could have turned against him. This ground also lacks merit.

As for the ninth ground of appeal that, the trial magistrate erred in law by ignoring the handover note and other pieces of evidence which clearly showed that the motor vehicle was returned to the respondent with the same mileage and was never put into use by the appellant. I should say out rightly that, this ground too has no merit. First, by their own admission, both **DW1** and **DW2** had testified as to the usage of the motor vehicle in that, it was used. Therefore, it goes without saying that, the millage on the vehicle could never be the same. Secondly, during cross examination, **DW1** admitted that, the respondent did not understand English. He also testified that, **Exhibit P4** (The vehicle pictures) were taken at the time of the contract and the speedometer was at 89566 kilometers. He also admitted that, at the time of the handing over the vehicle to the respondent, no pictures were taken, and there was no document produced to show that the running kilometers were the same or slight different as the day of signing the contract. From the evidence and the testimony on record, it is obvious that, the allegation that the vehicle was returned with the same millage is unfounded and thus has no merit.

Next is ground ten. In here, it is the appellant's submission that, even if the car rental is marked as existing, the amount of the demanded money is far too much since it was an old car and respondent could not expect to gain that much money from it even if the appellant should have used it. I should outrightly state that, this ground of appeal is neither here nor there. The issue of the vehicle being old was never brought up as mitigating against rental charges. It cannot be raised now. If at all the vehicle was in bad shape, the appellant would not have signed the contract. As it appears, the contract was drafted and signed after the appellant was satisfied with the vehicles good running condition and road worthiness, to the extent of taking photographs including showing the millage of the vehicle. After all, it was the appellant himself who prepared the contract without the involvement of the respondent.

The rates of T.sh 90,000.00/- per day and T.shs. 45,000.00 for half a day were fixed by the appellant himself. Before that, it was not disputed that, the respondent used to earn T.shs. 80,000.00 per day using the same vehicle. At no material time from the date they signed the contract, and the appellant taking possession of the vehicle, had the respondent been called by the appellant nor informed of anything by the appellant in respect of the vehicle, which implies that, everything was going on smoothly as agreed, as evidenced by the visit of the appellant to the respondent. Trouble started when the respondent made persistent claims of his monies out of use of his vehicle. The amount of money awarded to the respondent by the trial magistrate was calculated based on the same rates embodied in the contract, which rates were

fixed by the appellant himself. I therefore hold that, the trial judge did not err on awarding the respondent the said amount. This ground therefore crumbles. It has no merits.

Upon the reasons and grounds contained in this judgment, this appeal stands dismissed with costs. Judgment is hereby entered in favour of the respondent as follows:

(i) Payment of T.shs. 16,200,000.00/= being the principle sum.

(ii) Payment of interest on the above sum at commercial rate of 20% per annum from 12th August, 2010 to the date of judgment.

(iii) Interest of 12% per annum from the date of judgment till payment in full.

(iv) Appellant is condemned in costs of this suit.

It is accordingly ordered.

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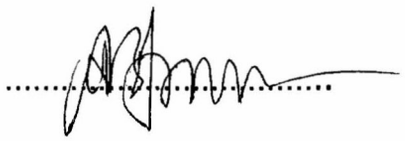
A.E BUKUKU

JUDGE

11TH FEBRUARY, 2013.

Judgment delivered this 11th day of February, 2013 in the presence of Mr. Laswai, Learned Counsel for the Appellant and Mr. Buberwa, Learned Counsel for the Respondent



A.E BUKUKU

JUDGE

11TH FEBRUARY, 2013.

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