IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM.

CIVIL APPEAL NO.21 OF 1994

NATAL FIDELIS .....APPELLANT

CARITAS TANZANIA.....APPELLANT

VERSUS

STUWART MKWAWA.....RESPONDENT

JUDGMENT

The appellants in this case are CARITAS TANZANIA and NATAL FIDELISI who is an employee of the 1st appellant. Both appellants are aggrieved by the decision of the trial magistrate wherein on 3.2.94 an exparte judgment was entered against them in favour of the respondent one STUWART MKWAWA who had his vehicle knocked down by the 2nd appellant whilst driving the vehicle belonging to the 1st appellant. The trial magistrate awarded the respondent:

- Shs 550,000 as costs of repair to his vehicle
- Compensation for loss of use to the tune of shs. 8,640,000.

The facts of this case briefly stated are that the plaintiff now respondent filed a suit against the defendants now appellants claiming for shs 550,000 as costs of repair to his damaged vehicle and shs.8,640,000 being loss of use when the respondents vehicle stayed idle after the accident. It is not in dispute that the respondents vehicle was knocked down by the 2nd appellant on 1.1.93. Liability was admitted but since the appellants did not respond to the respondent's claim, the latter decided to take the matter to court, The case was assigned for mention on 16.12.93 and when the summons for disposal of suit was served on the appellants, the latter refused to be served. The trial magistrate then allowed the respondent to file an affidavit for experte proof and subsequently judgment was entered infavour of the respondent as prayed. It may be pertinent to mention here that as the appellants had refused to be served on 14.12.93, the subsequent events took place without their being aware.

Mr. Kapinga learned counsel for the appellants has filed four grounds of appeal against the judgment of the trial magistrate. There are

a. that the learned trial magistrate erred for failing to write a judgment.

b. in the alternative to (a) above that the learned magistratr erred in law and in fact in awarding the respondent the sum of shs. 550,000 as costs of repair

c. that the award of compensation in the sum of shs. 8,640,000 to the respondent for loss of use of the motor vehicle was unreasonable and was not supported by evidence.

..../2-

d. that the damage caused to the respondents vehicle i.e. rear left gate dented, left gate window glass broken and rear bumper bent could not prevent the respondents vehicle from operations nor could it, in the ordinary course of business take ten months to repair.

- that the learned magistrate failed to take into account the principle of mitigation of damages.

In his submission Mr. Kapinga went on to elaborate on the grounds. Mr.Kapinga learned counsel attacked the"judgment" of the trial magistrate in that it was not aproper judgment as required by Order 20 rules 3 and 4 of the CPC 1966. The judgment of the trial magistrate read.

"Order: Upon filing the exparte affidavit, judgment is entered infavour of plaintiff as prayed."

Mr Kapinga submitted before this court that what was written by the trial magistrate was not a proper judgment. That Order 20 Rules 3 & 4 makes it mandatory that a judgment must be written and shall contain "a concise Statement of the case, the points for determination, the decision thereon and the reasons for such decision." That the trial magistrate failed to write a judgment and therefore even the decree that followed could not agree with the judgment as there was none. That since there is no judgment then there could be no decree. Mr.Kapinga urged the court to allow the appeal on thisground with alone costs.

Without prejudice to the foregoing, should the Court hold that there is an appealable judgment and decree, Mr.Kapinga submitted that there was no proof that the respondent expended the sum of shs. 550,000 on repairs. There was no receipt tendered by the respondent According to Mr.Kapinga, the trial magistrate should have deducted the sum of shs 180,000 as there was no proof of panel beating and spraying' to the tune of shs 180,000/=. This sum ought to have been deducted from the total sum claimed.

On the issue of the loss of use Mr Kapinga learned counsel is challenging the figure of shs 8,640,000 as being unrealistic. That the date of the repair to the vehicle is not known although annexture 'C' (an invoice of Sanborn Engineering Serives Limited) would suggest that the repairs were probably done on 15.7.93 some 194 days after the accident. Mr Kapinga was of the view that the time spent to repair the vehicle was unreasonably long considering the nature of the damage to the vehicle According to Mr Kapinga a reasonable period would not exceed two weeks. Furthermore it was Mr Kapinga's contention that the respondent's vehicle could not have been operational for all the 280 days and made 40 trips daily without interuption. This is not feasible in practice and the trial magistrate did not take that into account. That it was necessary for the respondent to support his claim of loss of use by producial some evidence of operations prior to the accident so as to indicate the trend of his income from oporations of the vehicle.

...../3-

That the award of shs. 8,640,000 was Speculative and not supported by evidence, urgued Mr Kapinga for the appellants. In addition, Mr Kapinga submitted that going by the vehicle inspection Report annexture 'A' to the affidavit not be prevented from being operational or take 10 months to repair. The damage described in the said inspection report read as follows:-

after accident
"Boat lift gate dented Lift gate window glass broken
Boat bumper Dent"

Finally Mr Kapinga submitted that the Respondent had allogal duty to mitigate the loss after the accident. That if the vehicle was damaged on 1.1.93, the respondents should have taken immediate steps to repair his vehicle and repair it within two weeks at the most and not 10 months.

Armed with all this, learned counsel for the appellants asked the court to allow the appeal with costs.

Appearing for the respondent, Mr Mutaitina from Tanzania Legal Corporation ... ... to be mounted.

As to the issue of the format of a proper judgment counsel submitted that the law does not stipulate a particular format of how a judgment should look like and that no decision has ever been reversed simply because the judgment is too short. The respondent has cited the case of Transport Equipment Limited vs Devran P. Vanbhia (Dar es Salaam High Court Registey) Civil Case No. 210 of 1989 by Rubama J(as he then was); that the procedure was not faulted by the Court of Appeal.

On the issue of costs of repair to the vehicle, counsel submitted that the relevant document annexture C was produced before the court. This was not contradicted by the appellants/defendants. That the respondent could not produce receipt since the monies were yet to be paid.

On the compensation for loss of use counsel for the respondent submitted that there was such evidence available before the trial magistrate. And since the affidavit was not open for challenge the trial magistrate was not in error. It was the counsels contention that the claim was sufficiently proved. As to the duty to mitigate loss, counsel for respondents while conceding that the respondent has a duty in law to mitigate loss was of the opinion that it was the appellants who prevented the respondents from so doing by their refusal to sign the insurance forms. The appellants cannot be heard now to rely on that equitable doctrine.

All in all the respondents are submitting that the appeal be dismissed with costs for lack of substance.

I have lack time to study the record of this case. The revelations are that the appellants then defendants were served with summons to appear for the mention (and not hearing) on 16/12/93. The appellants refused to acknowledge service of summons and the Court was entitled to enter judgment for the plaintiff.

..../4-

However, I think thetrial magistrate ought to have been guided by theprocedure under 09 R6 (1)(a) ii (B) which reads:-

> 6(1) where the plaintiff appears and the defendant does not appear when the suit is called for hearing then
>
> (a) (i).....
>
> (ii) If the suit is before any court other then the High Court.
>
> (A).....
>
> (B) the summons issued was a summons to appear and it is proved that the summons was duly served, the court may enter judgment for the plaintiff.

In the instant case it is evident the court proceeded under O 8 R 14(2)(b). The relevant proviso reads:

> 14 (1).....
>
> (2) In any case in which a defendant who is required under sub rule (2) of rule (1) to present his written statement of defence fails to do so within the period specified in the summons (under living mine) the Court may -
>
> (a).....
>
> (b) in any other case, upon application in writing by the plaintiff, fix a day for ex-parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim."

I say the trial magistrate was in error to act under this provision because in the first instance the summons issued to the defendants now appellants did not require him to present their defence within a period stated. The summons issued to the appellants required them to appear in court without fail and produce documents they intended to rely on. Secondly, the plaintiff did not formerly apply to court for exparte proof in terms of O 8 R 14(2)(b) above cited. I would therefore agree with Mr Kapinga learned counsel for the appellants that the procedure adopted by the trial magistrate was irregular.

Coming now to the 1st ground of appeal- the judgment. Rules 4 and 5 of O 20 of the CPC 1966 provide that a judgment should contain a concise statement of the case, the points for determination, the decision thereon and the reason for such decision.

There is however no specific format of how a judgment should look like. It is sufficient if it is formulated to contain the elements stated hereinabove. And the contents in each judgment, would on the whole depend on each individual case.

.../5-

What happened in the case/appeal before me is that after the plaintiff had filed an affidavit for ex parte proof pursuant to an order of the trial magistrate, the latter recorded the order that

> "Upon filing the exparte affidavit, judgment is entered in favour of the plaintiff as prayed
>
> Sgd."

In my humble view the trial magistrate strayed into an error when he entered judgment for the plaintiff without evaluating the contents of the affidavit in as far as proof for damages or claim was concerned. Affidavits like any other piece of evidence has to be analysed and evaluated even where it is not being challenged. One does not merely file an affidavit and expect the trial court to act on it whole sale without some scruting. The scruting of the affidavit is more so in such cases as the appeal before me where damages and or compensation one being claimed. Paragraph 9 of the plaintiffs affidavit states:-

> 9"That shillings five hundred, and fifty thousands was required to repair the vehicle as shown on an invoice by Sanbern Engineering Services Limited annexed hereto and marked C".

The immediate question that comes to my mind is: was this figure(shs. 550,000) the actual sum that the plaintiff paid for the repair? was there a receipt issued? The respondent have stated that

> "the respondent could not produce a receipt because the monies were yet to be paid."

That being the case the actual repair expenses could not be the sum of shs. 550,000/=.

Similarly for the compensation figure of shs. 8,640,000 - there was no evidence to show how this figure had been arrived at. It was the duty of the trial magistrate to analyse the evidence before him and come to his own condusion. By merely adopting the filed affidavit is not proof in such a case. What I wish to emphasize is that whether it is a long judgmentor a short one, each case have to examined on its own facts. And facts of each will dictate what type of judgment shall emanate therefrom. In cases for exparte proof by affidavit the trial magistrate has a duty to examine the filed affidavit and satisfy himself whether the alleged claim has been proved by the affidavit or otherwise.

That being the position I am inclined to allow the appeal and order that the case be heard before another magistrate with mandate to admit further evidence. And to the extent this appeal is allowed with costs.

A. G. BUBEGI
JUDGE
1/8/95

..../6-

Delivered before

Kapinga for appellants

Respondent in Mdamo

Mr. Kapinga – The amount of money deposited in Court be refunded in the appellants.

Court – Prayer granted.

A. G. BUBESHI
JUDGE
1/8/95.