IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 171 OF 2023

(Arising from the Judgement and Decree of the Resident Magistrate's Court of Dar es Salaam at Kisutu dated 28th June 2023 in Civil Case No. 111 of 2021

WILHELM WILLIAM MLINGA.....APPELLANT

VERSUS

HERMAN MSHIU.....RESPONDENT

JUDGEMENT

Date of last order: 27th March 2024
Date of Ruling: 9th April 2024

MTEMBWA, J.:

In the Resident Magistrate Court of Dar es Salaam at Kisutu, the Appellant preferred a suit against the Respondent for the claim of a Motor Vehicle make **Mitsubish Fuso registered as T408 AVA**. The Appellant further prayed before the trial Court for payment of special damages to the tune of the sum of **Tanzanian Shillings 120,000,000/=** as of 22nd June 2021 and further the sum of **Tanzanian Shillings 150,000,000/=** for each day passed until the

said Motor Vehicle is in his full possession. In the alternative, the Appellant prayed for payment of the sum of **Tanzanian Shillings 80,000,000/=** being the actual value of the said Motor Vehicle.

The facts leading to this appeal as revealed by the Plaint may be briefly summarized as follows; that, the Appellant had a business of buying live pigs whereas having slaughtered them, he used to sell pork at a wholesale and retail price. The live pigs were sourced from various places in Tanzania amongst which is Mbeya Region where he happened to meet the Respondent way back in the year 2003. That having interacted for a while, the appellant advised the Respondent to leave Mbeya Region and obtain an employment in his business in Dar es Salaam. The Respondent agreed to the Appellant's proposal as a result thereof, he was employed to manage his pork selling business.

That, such employer – employee relationship existed until sometimes in 2016. The dispute arose when the Respondent stated to claim part of the Appellant's properties under the pretext that, the two were partners in business. The misunderstandings became awful as a result, the two had to think of a peaceful way to resolve the matter amicably. At first, the two had a meeting at Sinza "C" in Dar es

Salaam chaired by DW2. Things did not go well as expected. As such, another meeting was preferred at Tanga Region which was chaired by DW3 whereas DW2 recorded the minutes of the meeting.

The facts reveal further that, the meeting at Tanga Region resulted into resolving the partnership whereby a Memorandum of settlement (Exhibit D1) was executed between the parties. In the agreement, the said Motor Vehicle in dispute was handled to the Respondent. At the trial Court, the Appellant alleged that, the signing of the said Memorandum of Settlement was involuntary.

On the other hands, the Respondent denied to have been an employee of the Appellant. He maintained that, the two had been doing business as partners. He also filed a counter claim against the Appellant placing for performance of the agreed terms of the Agreement of settlement by transferring the said Motor Vehicle to his name. Having analyzed the evidence adduced, the learned trial magistrate dismissed the claim by the Appellant and proceeded further to allow the claim by the Respondent in the counter claim.

Dissatisfied, the Appellant has preferred this appeal by advancing the following grounds of appeal;

1. *That the learned Principal Resident Magistrate grossly erred in law and in fact in holding that there was partnership by and between the respondent and the appellant herein without subjecting evidence on record to relevant and applicable rules for determining existence of the alleged partnership.*

2. *That the learned Principal Resident Magistrate erred in law and in fact in holding that Exhibit Dl (Handing over memorandum) was by itself sufficient proof of existence of partnership between the respondent and the appellant*

3. *That the learned trial Principal Resident Magistrate grossly erred in law and in fact in holding that Exhibit DI was valid as a handing over agreement while the same was not supported b> any consideration or at all.*

4. *That the learned Principal Resident Magistrate grossly erred in law and in fact in holding that the appellant had breached the handing over agreement.*

5. *The learned Principal Resident Magistrate erred in law and in fact by not properly and impartially analyzing evidence on record but instead ignored the evidence adduced for the*

It is on records that, initially, the matter was presided over by Hon. S.M. Maghimbi, J who for reason of managing backlogs and backstopping cases, re-assigned the same to me on 5th December 2023 for final determination. Before re-assignment however, parties agreed to argue this appeal by way of written submissions. Except rejoinder submissions by the Appellant which was filed by the leave of this Court, the submissions in chief and a reply thereof were both filed in time to which I personally recommend.

In the conduct of this appeal by way of Written Submissions, **Mr. Dennis Michael Msafiri**, the learned counsel, argued for and on behalf of the Appellant while **Mr. Meswin Joseph Masinga**, the learned counsel, argued for and on behalf of the Respondent.

Having prefaced on what transpired before, Mr. Msafiri submitted on the first ground of appeal that, the learned trial Magistrate grossly erred in law and in fact in holding that, there was partnership agreement by and between the parties herein without subjecting the evidence on record to the relevant and applicable rules for determining existence of the alleged partnership. He added further that, in order for the Respondent to be entitled to a share in the

properties and profits of the alleged partnership, as a matter of law, it was incumbent upon him to plead existence of such partnership by stating the nature and the terms and conditions thereof. That, neither in the written statement of defense nor in the counter claim the Respondent pleaded existence of partnership contract and its terms thereof. He added that, since the Respondent was gaining salaries, the assertation that there was a partnership agreement between the two was negated. To fortify, he ***Section 191 (2) (c) (ii) of the Law of Contract Act,*** **Cap 345, RE 2019**.

On the second ground of appeal Mr. Msafiri argued that, the trial Court erred in law and in fact by holding that, Exhibit DI (Handing over memorandum) was by itself sufficient proof of existence of partnership between the parties. He faulted the trial Magistrate to rely heavily on Exhibit D1 that was entered into by the parties on 18th January 2017 as evidence of existence of partnership between the parties.

Mr. Msafiri continued to note that, in view of ***section 191(1) of the Law of Contract Act (supra)***, a partnership arises from the contract. As such, that, there must exist a contract of partnership

before any person can claim rights from partnership business. In addition, he argued that, Exhibit DI lacked basic features of the contract such as offer, acceptance, consideration and or capital. He argued further that, it is perplexing that the trial Court acted on that exhibit superficially without subjecting it to scrutiny as to the requirements under the law of contract for it to be an agreement capable of creating a contract. He called the agreement (exhibit D1) as a tea-party talks, with no legal binding nature.

Arguing the third ground of appeal Mr. Msafiri complained that, the learned trial Magistrate grossly erred in law and in fact by holding that, Exhibit DI was valid while the same was not supported by any consideration, He added that, there was nothing of value passed from the Respondent as consideration to the Appellant to be entitled to have a right to enforce it. He reminded this Court of one of the basic tenets of the lawful contract that it must be supported by consideration unless so exempted under ***section 25 of the Law of Contract Act (supra)***.

Arguing on the fourth ground of appeal Mr. Msafiri complained further that, the learned trial Magistrate grossly erred in law and in

fact by holding that, the Appellant had breached the terms of Exhibit D1. He added further that, in order for a party to be blamed to have breached any agreement or contract, there must be proof that the contract was enforceable in the first place. That, an enforceable agreement or contract is one which is not void such as due to lack of consideration or illegality. He insisted that Exhibit D1 was unenforceable as it was not supported by consideration in view of ***section 25(1) of the Law of Contract Act (supra)***. As such, the trial Court would have made a finding that, there was no contract that was breached.

On the fifth ground of appeal, Mr. Msafiri argued that, the learned trial Magistrate erred by not properly and impartially analyzing the evidence on records whereas he failed to consider the evidence adduced for the appellant especially, on the fact that, the Respondent was a mere servant and not a business partner. He contended that, it was a glaring error to ignore the evidence adduced by the Appellant during hearing. He faulted the trial Magistrate for not adhering to the basic tenants of writing Judgement, including, failure to consider fairly the whole evidence adduced. He argued further that, in law, each

witness is entitled to have his or her testimony considered in the judgement.

While imploring this Court to allow the appeal, Mr. Msafiri, lastly, submitted that, being the first appellate Court, it has a duty to re-evaluate the entire evidence and come out with its own findings.

In reply to the first ground of appeal, Mr. Masinga submitted that, the agreement between the two based on trust. He referred this Court to the testimonies of the Respondent (DW1) at pages 38, 39, 51 and 55 and that of DW3 from pages 61 to 62 of the typed script pf the Proceedings. He then cited the case of ***SUDHIR KUMAR LAKHANPAL Vs. RAJAN KAPOOR & ANOTHER-, CIVIL CASE NO 125 OF 2019***, where it was observed that, proof of an oral agreement may also be inferred from the conduct of the parties prior and after the formation of the agreement.

Mr. Masinga observed that, the conduct of the parties at the meeting that was conducted in Tanga Region and the exchange of Motor Vehicles as per exhibit D1 were among inferred conducts to the fact that, there was a Partnership Agreement between the two. He insisted that, the Appellant is estopped from turning around against

what he agreed in writing. He noted further that, Exhibit D1 contains eight signatures of the Appellant and thus it cannot therefore be said it was involuntary. He then cited ***Section 123 of the Evidence Act, Cap 6 RE 2019*** which provides that, when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing.

Mr. Masinga also cited the case of ***Trade Union Congress of Tanzania (TUCTA) Vs. Engineering Systems Consultants Ltd & 2 Others,*** **Civil Appeal No. 51 of 2016 (unreported), Court of Appeal at Dar es Salaam** where a principle of estoppels was restated. He noted that, there was no problem at all for the trial magistrate to hold that, there was a Partnership Agreement between the parties.

In reply to the second ground of appeal, Mr. Masinga submitted that, there has been no requirement that, there must be capital for a valid partnership agreement. He added that, the misunderstanding

between the parties occurred in the year 2016 and early 2017. That, both of them, together with their mediators attended a meeting held in Dar es Salaam and later on, in Tanga Region where DW 2 and DW3 were in attendance. He argued that, the meeting in Tanga was reduced into writings and parties appended their signatures thereto. As such, that, Exhibit D1 has nothing to do with offer, acceptance and consideration, Mr. Masinga added.

Replying to the third ground of appeal, Mr. Masinga insisted that, the handing over agreement (Exhibit. DI) is not a partnership agreement but the minutes retrieved from the meeting conducted on 18th January 2017. That, among others, the parties agreed to divide to themselves the properties acquired during the subsistence of the partnership whereby, a motor vehicle in the Appellant's name make Mitsubish Fuso registered as T 408 AVA was handled to the Respondent while Toyota Spacio in the Respondent's name registered as T 573 CHL was handled to the Appellant.

As to the fourth ground of appeal, Mr. Masinga repetitively insisted that, Exhibit D1 is not a Partnership Agreement. He argued that, the parties having been unable to carry out the terms of

partnership, agreed to dissolve it by dividing the properties acquired to themselves as per Exhibit D1. As such, the Appellant is estopped from turning back to what they agreed in writings. He noted that, in the circumstance, the issue of consideration cannot arise.

Replying to the fifth ground of appeal Mr. Masinga disagreed with the Appellant's counsel that, the trial Court failed to properly evaluate the evidence available on records. He however, joined hands with the Appellant's counsel on his assertion that, every Magistrate has his or her own unique style of writing or composing the Judgement. He added further that, the conditions on what the Judgement should contain are cherished under ***Order XX, Rule 4 of the Civil Procedure Code, Cap 33 RE 2019*** which were accordingly met. Lastly, he beseeched this Court to dismiss the Appeal.

In his rejoinder, Mr. Msafiri submitted that, there are some facts which are not disputed by the parties including the fact that there was no written partnership agreement between the parties. Further, that, the parties herein met for the first time in the year 2000 in Mbeya Region. Not in dispute either that, the Respondent in 2003 moved

from Mbeya to Dar cs Salaam. Further, that, the Appellant had his business in Dar es Salaam and continued with such business even after meeting the Respondent.

Mr. Msafiri continued to note that, what is in dispute between the parties is whether there was any partnership agreement between them and if so, what were the terms and or conditions associated thereto. While the Appellant's claim is that the Respondent was his employee, the Respondent claims to be a business partner to him.

Rejoining to the first ground of appeal, Mr. Msafiri argued that, ***the Law of Contract Act (supra)*** has set principles through which existence of partnership can be determined. He added that, it was incumbent upon the Respondent to prove existence of such partnership by leading evidence which support all key ingredients of a partnership. That, upon perusal of the Respondent's reply submissions, he noted that, none of the submissions supported such assertion. Mr. Msafiri continued to argue that, they do not dispute the fact that the Respondent had his own business in Mbeya Region prior to moving to Dar es Salaam in 2003 however, the question would be why he moved to Dar es Salaam.

Rejoining to the second ground of appeal as to whether Exhibit D1 was sufficient proof of the existence of partnership, Mr. Msafiri continued to insist that, the same did not meet the requisite standards under the law. He submitted in addition that, a partnership being one of the forms of doing business for profit, it goes without saying that, there must be capital which must be contributed by the partners. That, in view of the testimonies of PW2, the Respondent was a mere employee who could not be entitled to any share as a partner.

As regard to the third ground of appeal, Mr. Msafiri rejoined that, much as the Respondent's counsel concedes that, Exhibit D1 was not a partnership agreement, it follows therefore that, the trial Court could not have acted upon it in the absence of a valid and lawful consideration. He argued that, in fact, Exhibit D1 is not enforceable under the law and the presence of a number of signatures in it cannot help the day.

That, in view of the testimonies of the PW1 and PW2, the business was owned by the Appellant herein therefore the Motor Vehicle make Toyota Spacio registered as T573 CHL being registered in the name of the Respondent did not as a matter of law change the

fact that its true owner was the Appellant herein. He cited ***section 15 of the Road Traffic Act, Cap 168*** which provides that, the person in whose name a Motor Vehicle or trailer is registered shall, unless the contrary is proved, be presumed to be the owner of the vehicle.

Rejoining to the fourth ground of appeal Mr. Msafiri insisted that, from the evidence on record, no partnership ever existed between the parties because what existed between them was a mere employer-employee relationship. He cited ***Section 191(2)(c)(ii) of the Law of Contract Act (supra)*** which states that, all periodical payments or remuneration to a servant does not make him a partner in the business. That, the Respondent was employed by the Appellant from 2003 and was receiving remuneration on weekly basis as per the testimonies of PW2 who was his immediate supervisor from 2003 to 2008. He said, Exhibit D1, therefore was void.

On the fifth ground of appeal, Mr. Msafiri continued to fault the learned trial Magistrate's style of writing the Judgement. He said, there was no reason for the learned Magistrate not to consider and believe the Appellant's evidence on records. That, the trial court merely based its decision on Exhibit DI which the Respondent

concedes that it was not a contract but mere minutes of the meeting. He added that, under the circumstances, the trial Court ought to have analyzed the evidence in full and come up with findings on the existence of partnership or otherwise without taking into consideration Exhibit DI, Mr. Msafiri argued.

Lastly, Mr. Msafiri implored this Court to issue appropriate orders requested for in the Memorandum of Appeal.

I have dispassionately gone through the rival arguments by the parties and in the course I noted that, although the subject matter to which the whole claim is based is a Motor Vehicle make **Mitsubish Fuso registered as T408 AVA**, the crucial issue on board is whether or not, there was a partnership agreement between the parties. I will come back to this issue in due course.

Well, being the first appellate Court, it has a duty to re-evaluate the evidence on records and put it under critical scrutiny and come out with its own conclusion. In the case of ***Mapambano Michael @ Mayanga vs. Republic, Criminal Appeal no. 258 of 2015***, the court placed the special duty on the first appellate court as follows;

> *The duty of the first appellate court is to subject the entire evidence on record to a fresh re-*

evaluation in order to arrive at decision which may coincide with the trial court decision or maybe different altogether.

While guided by the above principle, it is a trite law also that, whoever alleges existence of any fact bears the duty to prove the same. This principle is gathered from ***sections 110, 112 and 115 of the Evidence Act (supra)*** and judicial precedents including the case of ***Manager NBC Tarime Vs. Enock M. Chacha [1993] TLR 228***.

Before I delve into the nitty gritty of this Appeal, I find it opt that I determine whether there was a partnership agreement between the parties. The determination of this issue will, in my conviction, disposes off this appeal easily.

Indeed, a partnership is a formal arrangement by two or more parties to manage and or operate a business and share its profits. There are several types of partnership arrangements. In particular, in a partnership business, all partners share liabilities and profits equally, while in others, partners may have limited liability. There is a "silent partner" who, in most cases is not involved in the day-to-day

operations of the business. Generally, the partners must have the common interest on the business to which they agree to carry out. In **Black's Law Dictionary (Sixth Edition)**, partnership is defined as follows: -

> *A business owned by two or more persons that is not organized as a corporation.* ***A voluntary contract between two or more competent persons to place their money, effects, labour and skill or some or all of them in lawful commerce or business with the understanding that there shall be a proportional sharing of the profit and losses between them****. An association of two or more persons to carry on, as co-owners, a business for profit.*
>
> (emphasis mine)

The terms of the agreement are embodied in a document commonly know as **Partnership Deed or Agreement**. It is however, not necessary that, the terms be in written forms (see ***Omary Seif Msumi Vs. Dismas John Lawi, Misc. Civil Application No. 306 of 2020, High Court of Tanzania at Dar es Salaam***).

The Rules and regulations for determining the existence of partnership are provided for under ***section 191 of the Law of Contract Act (supra).*** Section 191 (1) provides that, the

relationship of partnership arises **from contract and not from status**. Section 191 (2) provides as hereunder: -

(a) ***joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership*** *as to anything so held or owned, whether the tenant's or owners do or do not share any profits made by the use thereof;*

(b) ***the sharing of gross returns does not of itself create a partnership****, whether the persons sharing such returns have or have not a joint or common right of interest in any property from which or from the use of which the returns are derived;*

(c) *the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in a business,* ***but receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business, and in particular the receipt of such share or payment;***

(i) by a lender of money to persons engaged or about to engage in a business;

(ii) by a servant or agent as remuneration;

(iii) by the widow or child of a deceased partner as annuity, or

(iv) by a previous owner or part owner of the business, as consideration for the sale thereof, does not of itself make the receiver a partner with the persons carrying on the business.
(Emphasis mine).

At the trial, the Appellant paraded two witnesses while the Respondent's case was supported by three witnesses. While the Appellant's assertation was that, the Respondent was his employee, the later (Respondent) maintained that the two were partners in a pork selling business. As prefaced above, the dispute arose when the Respondent stated to claim part of the properties of the Appellant under the pretext that the two were partners in business. The Appellant did not find it worth purchase.

According to the evidence, the misunderstandings became awful as a result the two had unsuccessful meeting at Sinza "C" in Dar es Salaam chaired by DW2. However, the situation was not so promising as expected. As such, another meeting was conducted at Tanga Region which was attended also by DW3 and DW2. The records reveal further that, the meeting at Tanga Region resulted into

resolving the partnership whereby, a Memorandum of settlement (Exhibit D1) was executed between the parties. In the agreement, the said Motor Vehicle in dispute was handled to the Respondent. At the trial Court, the Appellant alleged that, the signing of the said Memorandum of Settlement was involuntary.

The evidence that there was partnership agreement between the two were brought into records at the trial by the Respondent (DW1), DW2 and DW3. To support his assertion, the Respondent also tendered a memorandum of settlement (Exhibit D1). On the balance of probability, the trial Court believed the Respondent's story that there was partnership agreement. The relevant part of the Judgement is quoted hereunder;

> *In the case at hand, it appears that there was no formal written partnership agreement between the plaintiff and the defendant. However, exhibit D1 proves that there was partnership arrangement between the parties in conducting the particular business.*
> *……By exhibit D1 this court believe that the plaintiff and the defendant were partners in the alleged business.*

With respect to the learned trial Magistrate, the whole subject on what amounts to partnership agreement was misconceived. As

said before, partnership is a matter of law based on contract entered into by competent persons with common interest of a particular business for profit. While I agree that it is not necessary that the terms should be reduced into writings, but for records, a party who alleged the insistence of such arrangement must lead evidence to that effect to enable the Court to assess the situation. I went through the trial Court records and I could not see anything substantial warranting the existence of partnership agreement between the parties.

I expected to see evidence on the part of the Respondent in respect to the terms of the partnership, including the share capital, profits and loss sharing ratio, partnership name (firm name), financial issues like where to deposit the proceeds, business ownership ratio, property ownership issues, dissolution of the partnership and other related issues. There is no evidence also regarding registration of the partnership. Even for the sake of argument that the same was unregistered, such evidence was mandatory to be on records.

The fact that there was an agreement that the two be paid monthly salaries and have the annual profit (dividend) dividend to them at the end of the year is not a prove that there was partnership

agreement. Even the ratio on how to divide the annual dividend was not established by evidence.

The Respondent's counsel implored this Court to find that, the share capital to the partnership based on trust. I have asked myself how is that possible in a profit-making business. Besides, I could not see such testimonies on records. There was therefore no evidence adduced at the trial warranting the fact that the two had informal partnership agreement.

I have passed through the testimonies of DW1 specifically during cross examination by Mr. Muganyizi, the learned counsel. From pages 50 to 51, I noted that, the two were working together but not under partnership arrangements. DW1 conceded to the fact that, there was no specific capital that was injected by the parties into business. He conceded further that, at no point in time the two happened to buy properties as partners. More important to note is the fact that, there was no format in the partnership agreement. From the evidence of the Respondent (DW1), it is evident that the two were doing business together as friends with no intention to create legal bindingness. Such kind of relationship in the circumstances where

persons are doing businesses of the same nature is not hard to find now days.

The presence of Exhibit D1 is evident that the two never entered into a valid partnership agreement before. I say this because, the parties to the partnership agreement must prior to the start of the business agree on how the same will be resolved. In fact, one of the terms prior to the start of business should be how partnership firm will be dissolved. That will also include sharing of profits, loss and division of the properties acquired during subsistence of partnership. Exhibit D1 does not make any reference to any agreed terms nor does it refer to any partnership agreement that existed before the day of the meeting.

The Court of Appeal of Tanzania happened to face the same or less situation. Having considered the evidence on records observed in ***Anthony Ngoo & Another Vs. Kitinda Kimaro (Civil Appeal 25 of 2014) [2015] TZCA 269*** that;

> *There is no evidence on record that the partnership was registered.* ***Even for the sake of argument that there was a non-registered partnership, the terms of the partnership agreement have not been established****. No document was produced in the course of the trial indicating*

what the terms of the agreement between the 1st appellant and the respondent were. ***The respondent as PW1 in his testimony at the High Court merely complained that the appellant breached the terms of their agreement. The terms were never laid bare and none of the witnesses for the respondent in the trial came up with the particulars****. The testimony given by the respondent's witnesses were merely speculative.*

(Emphasis mine)

With that in mind, I cannot speculate what the terms of the partnership agreement would entail considering the circumstances. It was highly probable that the Respondent leaves no stone unturned by providing evidence as to the existence of the partnership agreement. Having given it a lot of thoughts, I am of the considered opining that, the trial Court was wrong to conclude so easily that there was partnership agreement without evidence on records. In the absence of other evidence on records, Exhibit D1 is not conclusive evidence that there was any. I find merit in the first and second grounds of appeal and I proceed to answer them in affirmative.

In addition, the said Exhibit D1 is the minutes recorded by DW2. I don't think if that was proper (if at all there was partnership agreement). From it also, I have observed that DW2 and DW3 both

were in attendance as secretary and chairman respectively. If we agree that partnership is based on mutual agreement between the parties, I wounder why there were two other strangers in attendance for partnership firm businesses. It follows therefore that Exhibit D1 had nothing to do with partnership and that why other strangers were invited. I would have found it inadmissible and irrelevant even if there was prove that partnership ever existed between the parties.

In such situation, I differ with the learned counsel for the Respondent that, partnership agreement can be inferred from the conducts of the parties. As said before, as a matter of law, partnership cannot be inferred from the conducts or status of the parties but from the Contract. Exhibit D1 cannot be used therefore to supersede the principles and or requirements of the law. In that stance, the Appellant did not breach any terms of the agreement (Exhibit D1) because as previously observed, there was no evidence that there was partnership agreement between the parties. Similarly, Exhibit D1 was not a sufficient prove that, there was a partnership agreement. I therefore find merit on the fourth ground of appeal and I hereby proceed to allow it.

From what I have endeavored to discuss hereinabove, I see no reason to discuss the third and fifth grounds of appeal as per the Memorandum of Appeal. I don't think if giving thoughtful attention to them will change anything to me apart from what I have observed above.

Considering the import and dictate of ***section 15 of the Road Traffic Act (supra),*** a Motor Vehicle make **Mitsubish Fuso registered as T408 AVA**, is the lawful property of the Appellant. An order that, the same be placed under the possession of the Appellant immediately is hereby entered. Should the Respondent fail to comply with this order within one month from the day of pronouncement of this Jugdement, alternatively, he is ordered to pay to the Appellant the sum of Tanzanian Shillings 80,000,000/= being the equivalent value of the said Motor Vehicle.

In his Plaint, the Appellant prayed for payment of special damages to the tune of the sum of Tanzanian Shillings 120,000,000/= as of 22nd June 2021 and further the sum of Tanzanian Shillings 150,000,000/= for each day passed until the said Motor Vehicle is in his possession. It is a cardinal principle that, specific damages must

be **specifically pleaded** and **strictly proved**. In the case of ***Anthony Ngoo and Another versus Kitinda Kimaro; Civil Appeal No. 25 of 2014: Court of Appeal of Tanzania at Arusha (Unreported)*** the Court observed that, special damages must be specifically pleaded and proved and that, in proving the same, documentary evidence must be produced to prove the alleged loss.

In the case of ***Masolele General Agencies Vs. Africa Inland Church (1994) TLR 192***, the court said, the burden of proof on the specific damages is on the claimant (in this case the Appellant). In ***Bamprass Star Service Station LTD V. Mrs. Fatuma Mwale (2000) TLR 390*** the Court said.

> *It is trite law that special damages being "exceptional in their Character" and which may consist of "off-pocket expenses and loss of earnings incurred down to the trial" must not only be claimed specifically but also "strictly proved"*
>
> *The law is on the issue is now well settled. It is only special damages which must be specifically pleaded and strictly proved.*

From the records, the Appellant, although specifically pleaded the special damages, he failed to adduce evidence to prove them.

Such evidence was necessary to allow the Court to assess the extent of damage suffered. As such, the sum of **Tanzanian Shillings 120,000,000/=** as of 22nd June 2021 and further the sum of **Tanzanian Shillings 150,000,000/=** for each day until the said Motor Vehicle is in his possession were not strictly proved. I will therefore not allow the claimed sum.

Since there is no dispute however that, the said motor vehicle is for business purposes, I will only allow **Tanzanian Shillings 70,000/=** as specific damages per day from the date of institution which is 22nd June 2021 to the date of full possession of the said Motor Vehicle. The Court interest rate thereof at 7% per annum from the date of Jugdement to the date full possession shall be applicable. The Appellant is hereby awarded in addition, the sum of Tanzanian Shillings 10,000,000/= as general damages. The Court interest rate thereof at 7% per annum from the date of this Judgement to the date of full possession of the Motor Vehicle shall be applicable.

In fine, the appeal is allowed to the extent provided for hereinabove. The Judgement and the resultant Decree of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case No. 111 of

2021 is hereby reversed and set aside. The Appellant shall recover the costs of this Appeal. I order accordingly.

Right of appeal explained.

DATED at **DAR ES SALAAM** this 9th April 2024.

H.S. MTEMBWA
JUDGE

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