IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO 2 OF 2021

(Appeal from the Decision of the District Court of Kinondoni at Kinondoni in Civil Case No. 202 of 2019 delivered on 15th December, 2020 MWAKALINGA Esquire Resident Magistrate)

STEPHEN CHARLES..... APPELLANT

VERSUS

DIGNA THOMAS MASSAWE .....RESPONDENT

JUDGMENT

MRUMA, J.

The Respondent Digna Thomas Massawe instituted a suit in the District Court of Kinondoni at Kinondoni against the Appellant Stephen Charles, for payment of Tanzania shillings Eighteen Million (i.e. 14,800,000/=), being compensation for a lost motor vehicle together with a monthly interest of 5% thereof and Tanzania Shillings Ten Million Two Hundred Thousand only (i.e. 10,200,000/=) being general damages. The Appellant also claimed for payment of interest on the decretal sum at the rate of 5% from the date got lost to the date of full setllen]ment and costs of the suit.

After a full trial, judgment was entered for the Respondent herein and against the Appellant herein. The District court found that there was a contractual relationship between the parties and that the present Appellant was in breach of the agreed terms as a result of which the motor vehicle which was under his control and possession got lost. The court went on to order the Appellant to pay to the Respondent Tanzania Shillings Fourteen Million Eight Hundred Thousand being compensation for the value of the lost motor vehicle, general damages of Tanzania Shillings Two Million, interest on the decretal sum at the rate of 5% per annum from the date of decree to the date of full settlement of the decretal sum. The Appellant was condemned to pay costs

Being aggrieved by that decision of the District Court, the Appellant lodged in this court a memorandum of appeal containing nine grounds of appeal namely: -

1. That the honourable magistrate erred in law and fact in not finding and upholding that she had no jurisdiction to determine the respondents claim of compensation in so far as the same was instituted on 21st August, 2019 being out of time and in violation of the law of limitation requiring it to be instituted within one year.

2. That the learned resident magistrate erred in law and in fact in disregarding trial evidences and the law thereby wrongly not finding and upholding that she had no jurisdiction to determine the respondents claim for want of impleading and suing the necessary party and her suit motor vehicle clearing agent in evidence.
3. That the Learned Trial Magistrate erred in law and in fact in entering adverse judgement and decree against the Appellant via framing her own additional trial issue that was not agreed upon by non-according hearing to the parties over it.
4. That sequel to ground 3 above, the honourable learned trial magistrate erred in law and in fact in improperly entering and pronouncing judgement and decree against the appellant to pay compensation of Tz 14,800,000/= without proof that he had caused loss of the suit motor vehicle nor the respondents clearing agent of the suit motor vehicle.
5. That the Learned Trial Magistrate erred in law and fact in finding that there was a valid agreement to compensate the respondent contrary to evidences that there was none and without account

and evaluation being had and determined of want of consideration, free will or intention to create legal relations.

6. That the Learned Trial Magistrate erred in law and fact in not considering and according due weight to the appellant's testimony nor his closing submissions absolving him from the claim or liability.
7. The Learned Magistrate erred in law in using case law against the Appellant without disclosing or displaying any ratio decidendi or any principles applicable.
8. That the Learned Trial Magistrate erred in law and fact in awarding general damages of Tshs 2,000,000/= without proof thereof, and
9. The Learned Trial Magistrate erred in law and in fact in not entering on records all material pieces of the parties testimony thereby wrong entering an erroneous judgement appealed herein.

On those grounds the Appellant urged this court to allow the appeal, quash the decision set aside the orders of the District Court with costs.

In this appeal the Appellant was represented by Mr Dickson Mtogesewa, learned advocate, the Respondent appeared in person and was not represented. The appeal was argued by way of written submissions.

I have carefully gone through the grounds of appeal, the submission of parties and the record. From all those it is considered view that grounds 1 and 2 can be consolidated and be dealt with together as they are intertwined and the remaining grounds will be dealt with seriatim.

The complaint in the first and second ground of appeal is that the learned trial magistrate erred in law and in fact in not finding that she had no jurisdiction to entertain the suit on account that it was filed after the period of limitation as well as for none joinder of a necessary party namely Ms Coherent Investment Limited, the Respondent's hired clearing agent.

Submitting in support of the period of limitation counsel for the Appellant contended that the Respondent's suit was instituted on 21st August,2019, which was after the period of limitation. It was the submission of the learned counsel that the cause of action which is loss of motor vehicle occurred in February, 2017 immediately after it was cleared from the Port and the suit the subject of this appeal was instituted on 21st August, 2019. It is the counsel's submission that in terms of item 1 of the Schedule to and Section 3(1) of the Law of Limitation Act, the suit was

instituted after the lapse of time prescribed for instituting a suit for compensation for doing or for omitting to do an act.

Responding to the Appellant's counsel submissions, the Respondent replied that after the defendant (herein appellant) had default to deliver the vehicle as contracted in 2017 he committed himself through an agreement dated 01/6/2018 in which he promised to pay compensation to the plaintiff/respondent. He said that according that agreement the Appellant promised to pay compensation by instalments from 30/9/2018 to 31/1/2019, thus cause of action arose from that date 30/01/2019 when the appellant failed perform his contractual obligation.

I have carefully considered the arguments of the parties regarding the period of limitation in instituting a suit in respect of recovery of the motor vehicle the subject of this appeal and with due respect to the counsel for the Applicant item 1 to the law of Limitation Act he relied upon is not applicable in the present suit. The said item covers suits for doing or for omitting to do an act alleged to be in pursuance of any written law. The claim to deliver a motor vehicle to its owner is not governed by or pursuance to any written law therefore it cannot fall under item 1 of the Schedule to the Law of Limitation Act. For a suit to

fall under item 1 of the Schedule, it must be for compensation for doing or not doing an act prescribed by any written law. Delivery of an entrusted motor vehicle to its owner is not provided for under the said item. In the nature of the transaction between the parties there was an agreement between them in which the Appellant agreed to collect the Respondent's motor vehicle from a company called Be Forward. The Appellant did collect it from be forward but he didn't deliver it to the Respondent. A claim under this type of transactions falls under item 7 of the same schedule which caters for suits founded on contract not otherwise specifically provided for or even item 24 which covers any suit not otherwise provided for. In both items the period of limitation is six years. Under the provisions of section 5 of the Law of Limitation Act the right of action accrues on the date the cause of action arises. In the present appeal the alleged loss of motor vehicle occurred in February 2017, and the suit was instituted in August 2019 well within the prescribed time. But even if we assume that the suit falls under item 1 of the Schedule to the Law of Limitation Act (which is not the case), after the said motor vehicle got lost, the parties made an agreement under which the Appellant agreed to pay compensation in instalments and the

final instalment was to paid on 30/1/2019. He didn't comply to terms of their agreement therefore the cause of action accrued on the date he failed to make payments as agreed. It would have been crazy on the part of the Respondent to institute a case before the expiry of the agreed period. The right to bring action accrued on the date when the Appellant failed to pay the compensation money as agreed on their agreement signed on 1/6/2018.

On non-joinder of a necessary party, I have gone through the records of the case and I find that the Appellant was the only party (i.e. Defendant) to the suit. According to the pleadings and evidence on record, it was the Appellant who was instructed by the Respondent to receive the motor vehicle from Be Forward on her behalf. He acknowledged the same and confirmed to have received the said motor vehicle on behalf of the Respondent.

Regarding the third and fourth ground that trial magistrate is being faulted for entering judgment against the Appellant. The testimony given by Respondent and admitted by the Appellant that the motor vehicle lost in Appellant's possession and while in his compound. This evidence is sufficient to hold that the Appellant is responsible for the loss.

On allegations that the learned trial magistrate did raise new issue and resolved them in Respondent's favour, I have gone through the records of the trial court and the judgment and I that there was new issue raised by the trial magistrate. At the final pre-trial conference the trial court framed four issues. It is these four issues that the learned trial magistrate dealt with. Thus, this ground of appeal lacks merits and it is dismissed.

On the complaint that the Appellant was coerced to sign Exhibit P6 in which he admitted to be responsible for the loss of the Respondent's motor vehicle, this allegation was not substantiated during the trial. This is an afterthought. According Exhibit P6, the said agreement was signed on 1st June, 2018 and the suit was instituted on 21st August, 2019 a period of more than 12 months after the signing. For all that period the Appellant didn't complain anywhere including to the Respondent's family which he said had a family friendship with it and even prior to signing exhibit P6, the Appellant paid into the Respondent's account Tanzania Shillings 3,200,000/= therefore he cannot be heard saying that he was forced to sign exhibit P6. There is evidence to the effect that after the appellant received the said he stayed with it up to the following day

without handing it over to its owner. On the following day when the Respondent called him in order to request him to take it her palce, the Appellant didn't pick her phone. On the next day the Appellant texted her and informed her that the car had been stolen! These conducts do not tally with conducts of an honest agent. These behaviours create suspicions on the credibility of the Appellant. Consequently, I do agree with the trial court's findings that there were no coercion in signing Exhibit P6

The sixth and seventh grounds are intertwined and they can be dealt with simultaneously. The issue under these two grounds is whether the learned magistrate did not consider and accord the weight to the testimony given by the Appellant. In the case of **Hemedi Said v Mohamedi Mbilu (1984) TLR 113**, this court held that the person whose evidence is heavier than that of the other is the one who must win. In the case apart from her oral testimony the Respondent produced documentary evidence including Exhibit P6 to support her oral testimony. The Appellant didn't lead any cogent evidence to challenge that of the Appellant and by any standard her evidence is heavier than of Appellant.

On the complaint that learned trial Magistrate erred in law and fact in awarding general damages of Tsh.2,000,000/= without proof thereof. It trite law that general damages are awarded at the court's discretion. After concluding that the Appellant was responsible for the loss of the Respondent motor vehicle and given the circumstances under whichthe said motor vehicle is said to have been stolen and considering loss of use of the said car, the trial court was correct to award general damages to the Respondent which would cover other damages suffered by including psychological and mental anguish. In the case of **Anthony Ngoo & Davis Nathony Ngoo v Kitinda Kimaro, Civil Appeal No. 25 of 2014 (unreported),** the Court of Appeal stated that general damages are awarded by the trial judge after considering and deliberating on the evidence on record able to justify the award. In the instant appeal, the trial Magistrate analysed the evidence on record and reached a decision that the Respondent was entitled to general damages. I find no reason to fault him.

Basing on what has been discussed above I find that this appeal was preferred without any substance. I proceed to dismiss it with costs to the Respondent.

Order accordingly.

A.R. MRUMA

JUDGE

Dated at Dar Es Salaam this 31st day of October, 2022.