IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CIVIL APPEAL NO. 4 OF 2018

(C/f Civil Appeal No. 92 of 2017 of the Resident Magistrate Court of Arusha at Arusha)

LEKULE OLE LESHULA ..... APPELLANT

VERSUS

TANZANIA ADVENTURE LIMITED ..... RESPONDENT

JUDGMENT

MWENEMPAZI, J:

The appellant is aggrieved by the decision of the Resident Magistrate Court of Arusha (trial court) in Civil Case No. 92 of 2017 before C. A. Chitanda - RM. At the trial court the appellant sued the respondent claiming USD 18, 400 being a total sum accruing from hire of motor vehicle made Toyota Land Cruiser with registration No. T 890 APN. Trial court proceedings reveal that the appellant is in tourism industry and he deals with touring and guiding foreign visitors to various National Parks in the country. That, the respondent's company is also in tourism business and they deal with connecting the visitors to tour guides and arrange

transportation of visitors to their destination. The dispute at hand erupted when the respondent advertised tenders to transport English tourists to National Parks and the appellant responded by bidding to the tender to offering for services at the consideration of USD 160 per day for six days. The appellant won and he was paid USD 600 as advance and the balance was to be paid after completion of work. While still at the respondent's office, another opportunity which involved German tourists appeared. The appellant bid also for he could speak Germany, and the respondent gave a tender to the appellant. The Germans wanted a long and big car which the appellant did not have, he searched for one and proceeded with the German visitors. He however, gave his car to DW4 Josephat Bilauri Chiumo who took the English visitors which was appellant's initial job vide his vehicle with registration No. T 890 APN subject to this appeal. It is not clear on the agreement between the appellant and DW4.

It was further alleged that, on the 5th day, the appellant's car was unfortunately involved on an accident; he was notified but never responded. Thus, the respondent found an alternative vehicle which took the visitors for the rest of the safari. The respondent also hired a break down to rescue the appellant's car and brought it to Arusha for maintenance; she accordingly notified the appellant, he went to the garage and took all his properties therein. It was also established that

repairing the vehicle in issue would cost Tshs, 3,600,000/= in total in which the vehicle will proceed with work and the amount will be deducted from various jobs. The appellant denied such arrangement as he demanded a new car and consequently filed his case at the trial court against the respondent. The trial court dismissed his claims on the ground that he had sued the wrong party. Aggrieved, the appellant preferred this appeal on the following grounds;

1. That, the trial magistrate misdirected herself in holding in favour of the respondent on the fact that the appellant sued a wrong person.
2. That the trial magistrate erred in law and fact in not weighing and deciding on the strength of evidence tendered by parties.
3. That the trial magistrate erred in law and fact in not deciding the suit based on the issues framed.
4. That the trial magistrate erred in law and fact in not awarding cost.

The appellant was represented by Mr. Daud Haraka learned advocate whereas the respondent was represented by Mr. Charles Adiel Abraham also learned advocate.

Mr. Haraka submitting in support of the 1st ground of appeal that there was cogent evidence that the appellant had switched the vehicle with DW4 with the consent of the respondent as seen in PW1, DW1 and DW3's

testimonies respectively. That, since the said car was hired by the respondent and the same had not been returned to the appellant to date, the trial court erred in holding that the respondent was not a proper party to pay for the accrued sum.

On the 2nd ground Mr. Haraka argued that the appellant proved his case at the required standard as per **section 3 (2) (b) of the Evidence Act,** Cap 6 R.E. 2002. That, there was coherent, cogent and clear evidence in record that covered appellant's claim which was corroborated by the respondent and his driver DW4 who was liable for the accident as seen at page 30-32 of the typed proceedings respectively. To support his contention, Mr. Haraka cited a number of cases including the case of **Selle and Another V Associated Motor Boat Company Ltd and Others** [1968] EA 123 and **Benmax V Austin Motor Co. Ltd [1995] 1 All ER** where it was held that;

> *"Where it is apparent that the evidence has not been properly evaluated by the trial judge or wrong inference have been drawn from the evidence, it is the duty of the appellate court to evaluate the evidence itself and draw its own inference."*

On the 3rd ground Mr. Haraka argued that the trial court raised 3 issues namely; whether the plaintiff hired his motor vehicle to defendant, whether there was breach of contract and lastly what reliefs were the

parties entitled. However, in the trial court's judgment there is no clear answer in respect to the 2nd issue even though the trial magistrate stated that she will answer it jointly with the 1st issue. Had that issue been addressed the respondent would have been held liable for breach of contract by not returning the vehicle in question after completion of safari. He added that failure to address such issue resulted into miscarriage of justice as it was held in the case of **Scan-Tan Tours Ltd V the Registered Trustees of the Catholic Diocese of Mbulu**, **Civil Appeal No. 78 of 2012 (unreported)** where Court of Appeal held *inter alia* that;

> *"We are of considered view that generally a judge is duty bound to decide a case on issues on record and that if there are other questions to be considered they should be placed on record and the parties be given an opportunity to address the court on these questions.*
>
> *It is well established practice that a decision of the court should be based on the issues which were framed by the Court and agreed upon by the parties and failure to do so results in the miscarriage of justice."*

On the last ground, Mr. Haraka averred that the trial magistrate erred in not awarding cost to the winning party in accordance without giving reasons for not doing so. To cement this argument the learned council

cited the case of the **Registered of the Roman Catholic Church V Sophia Kamani, Civil Appeal No. 158 of 2015 CAT a**t Dar es Salaam where it was held;

> *"Finally, the order of costs. It is well known principle that a winner is entitled to cost unless there are exceptional circumstances in not doing. In this case there are no exceptional circumstances which were shown to exist. So the appellant is entitled to costs."*

He prayed that this Court re-evaluate the evidence and reach its own findings, allow the appeal with costs by quashing and setting aside trial court's judgment and decree.

Opposing the appeal, Mr. Abraham submitted in respect of the 1st ground that, parties are bound by their own pleadings and at the trial court the appellant testified that their business policy demanded that owner of the car has to bring his driver and both the owner and the driver are responsible for the car safety. He added that DW4 Joseph Bilauri Chaimo testified acknowledging the appellant gave him a car in issue which was involved in the accident. This clearly proves that the appellant sued the wrong party as the respondent was not responsible.

On the 2nd ground, Mr. Ibrahim submitted that **section 110 (1) of the Law of Evidence Act** entails that he who alleges must prove, however,

the appellant failed to prove how he hired his vehicle to the respondent and the same was not returned. That, his solo evidence was uncorroborated and unsupported unlike the respondent whose witness' testimonies was credible and competent.

Learned counsel argued further that DW2's evidence on company policy shows that the company is not liable for the vehicle safety but the owner of the car and that evidence was never challenged by the appellant during cross examination. The same happened to DW4 who clearly testified that he is a freelance guide and was employed by the appellant to carry his English visitors. The counsel submitted further that the respondent's company's policy is that the owner of the vehicle is given safari programs, park fees as well as fees for motor vehicle hiring therefore the trial magistrate made a reasoned judgment that the appellant sued the wrong party.

Learned counsel argued that the appellant opted to find seven-seater safari vehicle to carry his German tourists and decided to give DW4 his car to transport English tourists while DW4 was not employed or permanently working with the respondent.

Disputing the 3rd ground Mr. Ibrahim submitted that, the trial court addressed all issues raised in generality as seen at page 3 of the certified

copy of judgment. Further to that, the trial court raised a mini issue in ascertaining on who took the appellant's car which was of utmost important in deciding parties dispute as provided in **Order XIV Rule 5 (1) and (2) of the Civil Procedure Code, Cap. 33 R.E. 2002** which reads;

> *"(1) The Court may at any time before passing a decree amend the issue or frame additional issues on such terms as it thinks fit and ali such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.*
>
> *(2) The court may also at any time before passing decree, strike out any issue that appears to be wrongly framed or introduced."*

Therefore, the trial court in addressing issue no. 2 had to go extra mile in framing a sub-issue which was the essence of knowing who took the plaintiff's car so as to determine which party breached the contract.

In regard to the 4th ground, the learned counsel argued that it is the discretion of the court to award cost or not. That, by taking into consideration on how the case ended, it was the respondent who was to be awarded costs. He cited the case of **Mwakajinga V Mwaikambo** (1967) HCD 281 which stated that;

> *"... where neither party was responsible for loss sued upon each party will bear his/her own costs."*

The respondent prayed that the appeal be dismissed with costs for want of merit as the appellant is suing the wrong person.

In his brief rejoinder the appellant reiterated his earlier submission and insisted that the respondent is responsible for whatever happened to his motor vehicle and should pay for the accrued sum since the day he hired the same.

After I have thoroughly gone through trial court's proceedings, decision and parties' submissions for and against the appeal, my focus now is on whether this appeal is meritorious or not. In doing so I will deal with grounds of appeal as they appear.

Starting with the 1st ground, the appellant argued that the trial court erred in holding that he had sued the wrong party. Although the appellant claims that he hired the said car to the respondent but the evidence adduced suggests otherwise. From the trial court's records it is clear that the appellant gave the car in issue to DW4 in their own terms as DW4 proved the same. It is also not disputed that; the appellant was responsible to take the respondent's tourists to the National Parks at an agreeable fee and he hired DW4 to drive them as he had another German speaking group. The relationship that subsisted between the appellant and DW4 is that of employer employee or principal agent. At the time of the accident,

it was DW4 who was driving the vehicle. In other words, though the appellant was not in person during the said safari DW4 was acting on his behalf hence the appellant was vicarious liable for the actions of DW4 and not the respondent who was not in control of the trip/driving. In the English case of **Marsh V Moores** [1949] 2 KB 208 at 215. The King's Bench observed as follows:

> *"It is well settled law that a master is liable even for acts which he has not authorized provided they are so connected with the acts which he has authorized that they may rightly be regarded as modes, although improper modes, of doing them ..."*

In that regard I join hands with the respondent and the trial court that the appellant sued the wrong party and so, I find no reason to fault the trial court's decision. This 1st ground therefore fails.

Coming to the 2nd ground, as to whether the trial magistrate weighed parties' evidence. At this point, I think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must prove. The rule finds a backing from **sections 110 and 111 of the Law of Evidence Act**, Cap 6 R.E. 2019 which among other things state:

"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side".

It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities. In discharging this burden the weight/ quality and not quantity of evidence adduced is considered. Addressing similar position as to who bears evidential burden the Court of Appeal of Tanzania in **Anthony M. Masanga versus Penina (Mama Ngesi) and another,** Civil Appeal No. 118 of 2014 (unreported), cited with approval the case of **In Re B** [2008] UKHL 35, where Lord Hoffman in defining the term balance of probabilities states that: -

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge It. a value of 0 is returned and the fact is treated as not having happened

If he does discharge It; a value of 1 is returned to and the fact is treated as having happened"

From the evidence on record, there is no doubt at all that the respondent's evidence adduced at the trial Court was heavier than that of the appellant (who was the plaintiff). The appellant at the trial Court, alleged that he had entered into a contract with the respondent (who was the defendant) to transport English tourists to National Parks at a consideration of USD 160 per day for six days and the appellant was paid USD 600 as advance. Another opportunity arose while still at respondent's office as there were German speaking tourists and since the appellant was well versed with German language, he requested, also, to take the job. In the circumstances, DW4 was hired to transport the English-speaking group to the National Parks and was later involved in an accident. It was the appellant's contention that the car was hired by the respondent and kept by him, even after the accident, hence the respondent is liable to pay him a new car/ accrued fees. The burden of proof then lied on his side. The question is whether he successfully discharged his duty?

It is my opinion, as it can be observed from the record, the evidence of DW1, DW3 and DW4 clearly paint a clear picture of what had transpired. Though the plaintiff had opted to take the German Speaking Group to the National Parks, he did not relinquish the English-Speaking Group. He hired

DW4 to take up the task on his behalf as articulated by DW4 and DW1. And since he had already received USD 600 as advance for the English group it is difficult not to believe he was still in-charge of the trip. Suffice it to say had he not gone with the German visitors he would have been the one driving the car which was involved with the accident. I do not think if he was the driver involved with the accident he would claim for the damages as he is doing now.

In the circumstance therefore, it is clear the weight of the evidence tendered by the respondent is far heavier than that of the appellant hence, the 2nd ground fails.

As to the third ground of appeal, the first and second issue raised at the trial Court depends on one another. In the sense that, if the court found the respondent to have hired appellant's vehicle then the next question would have been whether there was breach of contract. Unfortunately, the evidence on record suggests the car was not hired by the respondent. It was thus not necessary to dwell on the 2nd issue as there was no hiring contract to be breached. Thus, the 3rd ground of appeal fails.

Lastly, in deciding as to whether the trial magistrate erred in not award costs, it is pertinent to venture through provisions which gives the court power with regards to grant of costs. The power to grant costs finds

favour under **Section 30(1) and (2) of the Civil Procedure Code**, Cap 33 R.E. 2019 which stated as follows;

> *30.-(1) Subject to such conditions and limitations as may be described and to the provisions of any law from the time being in force, the costs of, and incidental to, all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.*
>
> *(2) Where the court* ***directs that any costs shall not follow the event, the court shall state its reasons in writing.*** *[Emphasis added]*

The above provision has also been interpreted in **Mohamed Salimin v Jumanne Omary Mapesa, Civil Application No.4 of 2014, CAT (unreported)** where it was held that as a general rule, costs are awarded at the discretion of the court but the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously.

Similarly, in **Geofields Tanzania Limited V Maliasili Resources Limited and others (Misc. Commercial Cause No 323 of 2015) [2016] TZHC COM D 8** the court, intensively, dealt with this provision where it stated that:

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"it is a trite law that the losing party should bear the costs of a matter to compensate the successful party for expenses incurred for having to vindicate the right."

The court held further that;

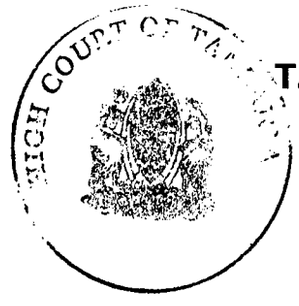
"Generally costs are awarded not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected or for whatever appears to the court to be the legal expenses incurred by the party against the expenses incurred by the party in prosecuting his suit or his defence. Costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays cost to the party without fault."

On the strength of these authorities and in in consideration that section 30(2) uses the word 'shall' which imposes a mandatory requirement it goes without say that an order for withholding costs should be accompanied by concrete reasons. In the instant case, the judgment is entirely silent on the issue of costs. In the light of the above authorities and considering that the parties fully participated and engaged an advocate it is naturally that they incurred some costs which they would not have incurred in the absence of a suit against them, there were no reason for not awarding the winning party costs.

The discretion to award costs being a judicial discretion must, as a rule, be judiciously exercised. Hence, the trial court ought to have assigned reasons for withholding of costs. In the absence of such reasons, the discretion cannot be said to have been judiciously exercised. This ground therefore succeeds.

For the reasons above stated, I find the third ground with merit and the rest lacks merits. In consequence, I dismiss the appeal as hereinabove narrated with costs.

Order Accordingly



T. M. MWENEMPAZI

JUDGE

04/09/2020

DATED and DELIVERED at Arusha this _____day of September, 2020

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