IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC CIVIL APPEAL NO. 78 OF 2020

(Arising from the decision of Resident Magistrate Court of Mwanza at Mwanza in Civil Case No. 78 of 2017)

MORY TRANSPORT AGENCY LIMITED----------APPELLANT

VERSUS

MINZA JOSEPH MWANDU----------1st RESPONDENT

YASIN MOHAMED MNDEME----------2nd RESPONDENT

ATHMAN----------3rd RESPONDENT

KURWA----------4thRESPONDENT

JUDGMENT

Last Order:10.05.2022
Judgment Date: 13.06.2022

M.MNYUKWA, J.

This is a first appeal. Initially, parties appeared before the Resident Magistrate's Court of Mwanza at Mwanza, whereby Mory Transport Agency Limited, now the appellant, unsuccessfully sued the above-named respondents, the then defendants. The appellant claimed before the trial court for the payment of Tsh. 33,456,200/= as specific damages, payment of Tsh. 10,000,000/= as general damages for breach of a contract concluded between them, costs of the suit and any other reliefs the court may deem fit and just to grant.

In brief, the appellant is an agent of transporting cargo, who collects cargo from different customers and arranges for transport to their destination. It was claimed that, the appellant entered into an oral contract with the defendants for transporting cargo from Dar es Salaam to Tarime via Mwanza, by hiring the motor vehicle with registration No. T 972 DFH owned by the 1st respondent. That, after the conclusion of the oral contract, the 3rd and 4th respondents, took the plaintiff's cargo and the handing over was done through dispatch. It was alleged that, due to respondents' negligence and recklessness the cargo was wasted by fire and so, the cargo was not delivered to its final destination.

The 1st respondent denied the liability averring that, no contract was entered between him and the appellant and between the appellant and the other respondents. The 2nd, 3rd and 4th respondents through their joint written statement of defence, partly admitted the claim of carrying the appellant's cargo but denied the appellant to have hired the 1st respondent's motor vehicle and to have entered into a contract with the appellant. The 3rd and 4th respondents denied the appellant to have declared to them, what was transported and they also denied to have caused the accident by either negligence or recklessness.

After considering the evidence before it, the trial court entered judgement in favour of the respondents that, the appellant failed to prove

before the court whether there was a contract entered between the appellant and the 1st respondent as well as the appellant and the 2nd ,3rd and 4th respondents. Therefore, the whole claims falls. Aggrieved by the findings of the trial court, the appellant appealed to this court advancing four grounds of appeal as they are reproduced hereunder:

1. *That the honourable learned Magistrate erred in law and in fact for holding that there was no contract between the appellant and 1st respondent.*
2. *That the court erred in law and in fact for holding that the 1st respondent was not strict liable for the actions of 2nd, 3rd, 4th, respondents.*
3. *That the honourable trial court erred in law and in fact for failure to consider the joint written statement of defence of the 2nd, 3rd, 4th, respondent during deliberation of judgement.*
4. *That, the honourable trial court erred in law and fact for failure to analyze evidence and considering evidence of the Appellant.*

The appellant prayed for the appeal to be allowed with costs.

The present appeal was argued orally. The appellant was represented by Mr. Akram Adam, learned counsel whilst the 1st respondent afforded the services of Mr. Maduhu Ngasa, learned counsel.

During the hearing, Mr Akram Adam chose to argue jointly the 1st, 2nd and 3rd grounds of appeal and argue the 4th ground separately. The same style was adopted by the learned counsel for the 1st respondent and will be also used to determine this appeal. By the order of this court dated 28th July, 2021 the matter proceeded exparte against the 2nd, 3rd and 4th respondents as they have failed to enter appearance.

In arguing the appeal, the appellant's submissions on the 1st, 2nd and 3rd grounds of appeal suggest that, there was a contract between the appellant and the 1st respondent as the contract was entered by the 3rd and 4th respondents who were the employees of the 1st respondent. He went on that the 2nd, 3rd and 4th respondents through their joint written statement of defence, in the amended plaint admitted to transport cargo of the appellant from Dar es Salaam to Tarime via Mwanza and that the 1st respondent recognized the 2nd respondent as his driver who was also found in the scene when the accident happened.

He added that, it was the 3rd and 4th respondents who signed the dispatch to receive goods from the appellant. He retires on this ground by stating that the 2nd, 3rd, and 4th respondents were acting on the instructions of the 1st respondent. To support his argument, he referred to the case of **National Bank of Commerce of Tanzania v Grace Sengela** [1982] TLR 248.

On the 4th ground, he avers that, as it is reflected on page 55 of the proceedings, the appellant paid the 1st respondent Tsh 2,600,000/= as consideration for transporting goods from Dar es Salaam to Tarime via Mwanza and the same was not disputed by the 1st respondent which suggests that, there was a valid contract between the two. He retires praying for the appeal to be allowed and the decision of the trial court to be quashed and set aside.

Responding, the counsel for the 1st respondent stated that, the 1st respondent denied in his statement of defence to have entered into a contract with the appellant. He went on that, it is a principle of law that pleadings on itself do not constitute evidence unless tendered or testified in court and from that position, the trial court did not consider the joint statement of defence filed by the respondents. He supports his argument by referring to the case of **Japan International Cooperation Agency (JICA) vs Khaki Complex Limited** [2006] TLR 343 and the case of **Matilda Matigana vs Peter Kiula and 3 others,** Land Appeal No. 197 of 2020 (unreported).

The counsel for the 1st respondent further submitted that, since there was a separate amended written statement of defence filed by the 1st respondent, it expunges all the written statements that were ever lodged because they were never testified in court. He added that if the

2nd, 3rd and 4th respondents signed the dispatch book that fact is not known to the 1st respondent because he was not a party to that transaction.

The counsel for the 1st respondent disputed the existence of a contract between the appellant and the 1st respondent as well as between the appellant and the 2nd, 3rd and 4th respondents as there was no proof of the same. He contended that, the appellant failed to exhibit a list of lost properties and failed to prove if the transportation costs were paid to prove that the properties were properly received by the 2nd, 3rd and 4th respondents on behalf of the 1st respondent. He claimed that, the appellant does not know the value of the lost properties and the receipts of properties that were tendered did not bear the names of the owners of the property.

On the 4th ground of appeal, he submitted that, *the Law of Contract Act, Cap 345 R.E 2019 is* very clear that any contract without consideration is void. He enlightens that the records of the trial court are silent if consideration for transporting goods was paid. He added that, the appellant failed to identify whether the vehicle which got into an accident, had his goods. He retires insisting that since there was no contract between the 2nd, 3rd, and 4th respondents the employer and employee

relationship between the other respondents and the 1st respondent cannot be established. He thus, prays for the appeal to be dismissed.

Rejoining, the counsel for the appellant submitted that it is very wrong to hold the view that, the court cannot consider the written statement of defence of the 2nd, 3rd and 4th respondents, especially on admitted facts. He distinguished the case of **Japan International Cooperation Agency** (supra) as it deals with annexure and not the wording of the pleadings and he stated that the same applies to the case of **Matilda Matigana** (supra). He retires insisting the appeal to be allowed.

After considering the rival submissions of parties, and going through the available records, the main issue for consideration and determination is whether the appeal is merited. In answering this issue, I will determine jointly the 1st, 2nd, and 3rd ground of appeal as submitted by the parties and I will determine separate the 4th ground of appeal.

Before I embark to determine this appeal on merit, I am mindful with the principle of the law that the first appellate court is obliged without fail to appraise the evidence on record and come up with its own findings of fact if the evidence so revealed. This is the position of law as stated in the case of **Mwita Sangali vs Republic,** Criminal Appeal No. 266 of 2011 that, the first appellate court must reconsider and evaluate the

evidence and come to its conclusions in form of a re-hearing, where the court is entitled to re-assess the facts and form its conclusions based on the facts. (See also the case of **Diamond Motors Limited vs K-group (T) Limited**, Civil Appeal No. 50 of 2019)

Guided by the above case laws, and after careful perusal to the court records and the submissions by the learned counsels, I proceed to determine the appeal by determine the 1st, 2nd and 3rd ground of appeal by looking whether there existed a contract between the appellant and the respondents. While the appellant insisted that the parties had a valid contract established by conduct, the 1st respondent disputed.

In essence, the contract can either be in writing, oral or implied and the vital elements include free consent of the parties competent to contract, for a lawful consideration and with a lawful object.

In regards of what amounts to a valid contract, it is provided for under section 10 of the Law of Contract Act, Cap. 345 RE: 2019 which enlightens that: -

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void..."*

Again, it is a position of the Law under Section 9 of the Law of Contract Act, Cap. 345 RE: 2019 which states: -

> *"In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express; and in so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

It is obvious that, a contract may be reduced into writing and become a written contract and/or where the proposal and acceptance take a form of words, becomes the oral contract and when acted for by the conduct of the parties, is hereafter referred to as an implied contract.

Reverting to the appeal at hand, the appellant claims that there existed a valid contract between the appellant and the 1st respondent which was entered into by the appellant and employees of the 1st respondent. The appellant evidence was to the extent that 2nd, 3rd and 4th respondents whom the matter proceeded exparte against them, were the employees of the 1st respondent and managed to exhibit the trial court with the dispatch which the appellant claimed was signed by the 3rd and 4th respondents, a driver and a conductor respectively employed by the 1st respondent. As reflected on records, on 12.04.2018, When the plaint was amended, also all four respondents amended and filed their joint WSD on 17.04.2018. The matter proceeded and on 24.09.2018, when it was on

the final PTC the court granted a prayer to amend the written statement of defence which was amended but it was amended and filed on 01.10.2018, in respect of the 1st respondent only.

It was the appellant's assertions that, though the 1st respondent denied to have entered into a contract with the appellant, the employees of the 1st respondent admitted to have entered into contract through the written statement of defence which was jointly filed. To ascertain from the appellant averments, I therefore proceed to find out whether the 2nd -4th defendants were the employers of the 1st defendant and whether they have entered into contract with the plaintiff.

It is the principle of law that the employer is responsible for the actions of their employees and applies to any action an employee undertaken while in the service of an employer that is within the scope of their duties for that employer.

From what was submitted by the 1st respondent at a trial court, she agreed that her vehicle got an accident but denied to know the 3rd and 4th respondent and the fact that during the accident her motor vehicle was carrying appellant's cargo.

As it is well known, in civil cases the standard of proof is on the balance of probabilities. I proceed to hold that based on that principle,

any party that wanted the court to rule in its favour must give evidence as to the existence of such facts. The law is clear under section 110 (1) of the Evidence Act, Cap. 6 [R.E 2019] that: -

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

On the part of the appellant, he gave evidence on the existence of contractual relationship between him and the 1st respondent fronting before the trial court four witnesses, PW1, PW2, PW3 and PW4 and tendered a dispatch (exhibit P1) and receipts for the items received by the employee of the 1st respondent, the 3rd and 4th respondents. On the part of the 1st respondent, she agreed to own the particular vehicle that got an accident but denied to carry the appellant's cargo and even to have known the 3rd and the 4th respondents.

As submitted by the appellant learned counsel, it is also in records that the counsel for the 1st respondent prayed to amend the written statement of defence which was amended and filed on 01.10.2018, but was in respect of the 1st respondent only. It is therefore that, what was amended was in regard to the 1st respondent only and the other information as to the 2nd, 3rd and 4th respondents remained intact.

There is no dispute that the appellant and the 1st respondent did not orally enter into a contract, but from the evidence of the appellant and the exhibits (dispatch) the appellant entered into oral contract with 3rd and 4th respondents who were the employees of 1st respondent.

This is reflected in the court pleadings that, though denied by the 1st respondent, on the jointly amended written statement of defence, in reply to paragraph 3 of the amended plaint, which stated as I quote; -

> *"That on 19th May 2017 the plaintiff concluded an oral contract with the defendant for transporting cargo from Daresalaam to Mwanza, Musoma and Tarime delivery on 22 may 2017 through hiring the vehicle of the 1st defendant with description registration No. T972 DFH Mitsubishi Fuso."*

Again, on the jointly written statement of defence of the respondents, on para 3, the reply was as I quote: -

> *"That paragraph 4 of the amended plaint is partly admitted to the extent that the second defendant caried some cargo for transportation to Tarime via Mwanza and Musoma and it is partly disputed as regards the allegation of hiring the first defendant's vehicle..."*

When the reference is made to the 1st respondent amended written statement of defence there is a total denial what is stated in the joint written statement of defence. I did not agree with what was stated by the

counsel for the 1st respondent that pleadings form no part of the case unless tendered for the circumstance of this case is different from the cited cases of **Japan International Co-operation Agency (JICA) vs Khaki Complex Limited** [2006] TLR 343 and the case of **Matilda Matigana vs Peter Kiula and 3 others,** Land Appeal No. 197 of 2020 (unreported).

When the reference is made to para 5 of the joint written statement of defence which reads as I quote: -

> *"That the content of paragraph 6 of the amended plaint are strongly disputed and denied as far as negligence and recklessness is concerned and the plaintiff is put to strict proof thereof. It is further stated that items in particular those carried in boxes were never made to be known to the defendants by the plaintiff which actually was the source of the fire which did not only damage the cargo carried but also the body of the truck the property of the 1st defendant..."*

The above paragraph did not only admit that the appellant's cargo was carried but also insisted that it was caried by the 1st respondent truck. In the process, while the 1st respondent denied to have entered into contract with the appellant in person or by agents for the same, she denied to know the 3rd and 4th respondents, the above paragraph contradicts her averments. As it goes, and as it was defined in the book

titled *Civil Procedure with Limitations Act, 1963 by C.K Takwani, 7th Edition, Eastern Book Company* which stated that;

> *"Pleadings are statement in writing drawn up and filed by each party to the case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer."*

Thus, pleadings aimed to avoid surprise to the parties and help the court to confine on issues raised from it. As it has been pointed out by the Court of Appeal of Tanzania in the case of **Barclays Bank (T) Ltd vs Jacob Muro,** Civil Appeal No 357 of 2019 in which the court observed that;

> *"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored".*

Going to the matter at hand, though by the leave of the court the 1st respondent was given leave to amend her averments in the written statement of defence, the joint amended written statement of defence remains intact for the 2nd 3rd and 4th respondents who neither pray nor were given a leave to amend the written statement of defence. In that

regard, the contents of the joint written statement of defence contradict with the evidence of 1st respondent, and therefore it is on record that 3rd and 4th respondents were the employees of the 1st respondent and therefore transported the cargo entrusted to them by the appellant and the cargo could not meet its destination for the truck caught fire and the cargo was damaged as stated for on the plaint and admitted for in paragraph 3,4,5 and 6 of the joint written statement of defence.

The findings above connotes that, there was an employer - employee relationship between the 1st respondent and 3rd and 4th respondents, and I proceed to find whether the agreement entered by the employees in the course of their assigned duties binds the employer.

The general principle is that, the master can be liable for the omission or act done by the servant in the course of his employment. In the cases **of Machame Kaskazini Coorparation Limited (Lambo Estate) v. Aikaeli Mbowe** [1984] TLR 70 cited with approval, the case of **Marsh v. Moores** (1949)2KB 208 at 215, in which the Court held:

> *"... It is well settled law that the 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."*

It follows, therefore, that the master is liable for the omission or wrongful done by her servant in the course of employment unless there is a clear proof that such servant acted outside of the scope of the authorized acts or was not acting in the course of his employment. From our case at hand, the admission from the amended written statement of defence by the 2nd, 3rd, and 4th respondents, indicates that the 3rd and 4th respondents who are the 1st respondent's employees did carry the appellant's cargo in their normal course of business and so the contract entered by them also binds their employer.

As I have earlier on pointed out, to prove the existence of the contract between the appellant and the respondents, appellant tendered dispatch that was admitted as Exhibit P1. To my understanding, as far as the business of transporting cargo is concerned, dispatch serve the purpose of acknowledge receipt of the listed items on it, so as to transport it from one point (a point of receiving) to another (a pint of destination) according to the parties' agreement. More importantly, there was endorsement of signature of the 3rd and 4th respondents in the dispatch and the registration number of the truck that is T. 972 DFH. Conclusively, I am now in a position to say that, there was a contract between the appellant and the 1st respondent. In the upshot the 1st 2nd and 3rd issues

are both answered in affirmative in which the three (3) grounds of appeal are all determined.

On the fourth ground of appeal, the issue of controversy is consideration. It is the claim of the appellant's counsel in his submission that the consideration was paid but the respondent's counsel contested by averred that the same was not paid. While the respondent counsel relied on the evidence of PW2 to contest the payment of consideration, the appellant relied on the evidence of PW2 to show that consideration was paid.

The issue of consideration is part of the battle in this case since it is one of the essential elements of a valid contract. I agree with a counsel for the respondent that section 25 of the Law of Contract Act, Cap 345 R.E 2019 provides that, a contract without consideration is void. I also understand that, consideration is a price of contract which includes, something of some value in the law as it is agreed by the parties. That, the parties may agree consideration to be paid before the execution of contract or after execution of contract. The important thing is for the parties to a contract to agree at the time of entering into a contract.

Going to the records specifically to the evidence of PW2 as reflected on page 55 of the proceedings, PW2 testified under oath that, they were

dealing with the 1st respondent in the business of transporting cargo for almost one year and that they were paying her, to the tune of Tsh. 2, 600,000/=. Thus, this is the amount of transporting cargo the parties agreed to be paid but the modality of payment was not stated as to whether the payment is done before transporting cargo or not that's why the same witness when cross examined stated that the 1st defendant was not paid.

From the above piece of evidence and the nature of the contract entered between the parties, the oral contract, it is my view that, the amount of consideration agreed by the parties is Tsh. 2, 600,000/=. The available records suggests that, parties to this contract transacted under mutual trust and honest. Thus, so long as that is the figure which usually paid by the appellant to 1st respondent, this is the price of contract and therefore it is the consideration for transporting cargo. When I refer to section 2(d) of the Law of Contract Act, Cap 345 R.E 2019, consideration may consist of a past, present or future act. For that reason, I am satisfied that consideration as part of the essential elements of contract was present.

Now, stepping into the shoes of the trial court in determining the relief which the parties are entitled to, I will have to revisit the amended

plaint. The appellant prayed for the specific damages to the tune of Tsh. 33,456,200/= against the respondents. In claiming specific damages, it is a long-settled principle of law that, specific damages must be proved specifically. This was also held in the case of **Elibariki Kirama Kinyawa & Another vs John John a.k.a Jimmy,** Civil Appeal No. 183 of 2017 where the court said;

> *"It needs no reminding that specific damages must be specifically pleaded and strictly proved."*

(See also the case of **Zuberi Augustino vs Anicet Mugabe** [1992] TLR 136, **Anthony Ngoo & Augustino vs Kitinda Kimaro**, Civil Appeal No. 25 of 2014.)

From the courts' records, it is my considered view that the appellant has been able to justify part of the claimed amount in his amended plaint, by tendering Exhibit P1 which was the invoice and P2 which were the receipts which were tendered collectively. He further brought witnesses who testified on the claimed amount.

It is apparent from Exhibit P2 that, some of the receipts are faint and does not show the name of the payer and the total value of the cargo, but still the receipt was neither objected nor countered in terms of the amount by the respondents. Further even in the testimony of PW1, the

respondent failed to examine on the amount claimed, and therefore we take it as an admission of the claimed amount. The issue of failure to cross examine important issue was also determined in the case of **Rashidi Sarufu vs Republic**, Criminal Appeal No. 467 of 2019 where the court said;

> *'As a matter of principle, a party who fail to cross examine a witness on a certain matter is deemed to have accepted the matter and will be estopped from asking the trial court to disbelieve what the witness said.'*

Thus, I am in the view that the appellant successfully proved his claims against the respondents. For the sake of justice, since the total value of the cargo as per receipts which are not faint amounted Tsh. 27,414,000/=, I find that, this is the amount which is supposed to be claimed by the appellant as he was duty bound to tender the receipts which are readable. Consequently, I proceed to grant the specific damages to the tune of Tsh. 27,414,000/=.

Apart from specific damages, the appellant also claimed for the general damages to the tune of 10,000,000/=. It is a principle of law that, general damages are damages that are in discretion of the court to award when satisfied by the party that she has suffered injury by the act of the other party. From our case at hand, the witnesses have not testified on

how they have suffered from the loss of their properties, but regarding the circumstances surrounding this case. I am of the view that the appellant has suffered injuries from the loss of the properties that were entrusted to him. And therefore, I am of the view that general damages will at lease easy that suffering, in the view I grant general damages to the tune of 3,000,000/=.

In the final result, the appeal is allowed with costs.

M.MNYUKWA

JUDGE

13/06/2022

Right of appeal explained to the parties.

M.MNYUKWA

JUDGE

13/06/2022

Court: Judgement delivered this 13th June 2022 in the presence of parties.

M.MNYUKWA

JUDGE

13/06/2022