

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO. 160 OF 2014

**VIGU TRADING COMPANY LIMITED.....PLAINTIFF
VERSUS**

**TANZANIA NATIONAL ROADS AGENCY.....1ST DEFENDANT
YONO AUCTION MART & COMPANY LIMITED.....2ND DEFENDANT
INLAND TRANSPORTERS LIMITED.....3RD DEFENDANT
THE ATTORNEY GENERAL.....4TH DEFENDANT**

JUDGEMENT

MASABO, J.L:-

The suit involves a commercial motor vehicle make Scania with registration No. T 693 AQN and a semitrailer make Piancenza with registration No. T 400 AFF, owned/operated by the Plaintiff. It was pleaded that on 29th November 2013 the suit vehicle and trailer thereto were being driven from Lusaka, Zambia to Dar es Salaam carrying a consignment of rice and that while passing at Mlandizi Area on the Dar es Salaam- Chalinze road it encountered a break down due to gear jam and as a result it stopped moving. The driver having taken all the safety measures by lightening double hazard lights, placing triangle reflectors in front of the truck and behind the trailer and spreading tree leaves and grass on the road packed it on the side of the road. Meanwhile he reported the incidence to the plaintiff head office in Dar es Salaam whereupon a technician was dispatched to attend to the problem. The plaintiff pleaded further that, while the driver was still at the scene

waiting for the technician to arrive, he was approached by employees of the 2nd Defendant who accused the driver for wrong parking to the 2nd Defendant's private yard at TAMKO Kibaha Township. That in the course of towing, the 2nd and 3rd defendant's employees forceful cut the propeller of the suit vehicle thereby damaging the vehicle's rejector, fan belt, horse, fan guard, front bumper, engine, and rejector cross bumper. Further, on arrival at TAMKO yard the driver was given a form requiring him to pay Tshs 160,000 being penalty for wrong parking (Tshs 50,000/) and repossession charges (Tshs 116,000/=). The plaintiff did not pay the penalty and their plea to regain the vehicle has since then been without fruition. The plaintiff complained further that the seizure and continued detention of the suit vehicle and trailer is illegal and with no justification and has occasioned him a loss of monthly income of \$ 11,300 earned from transporting cargo from Dar es Salaam to Lubumbashi in the Democratic Republic of Congo (DRC). Based on these facts, the Plaintiff prays for judgment and decree against the Defendants, jointly and/or severally for:

- a) A declaration that the Defendant's conduct and actions of towing, seizing and detaining the suit truck and trailer as complained of in the Plaint were and are wrongful and unlawful;
- b) A declaration that the continued seizure and detention or holding of suit truck and trailer is both wrongful and illegal.
- c) An order for immediate release of the suit truck and trailer
- d) Payment of Tshs Twelve Million Three Hundred Fifty Thousand (TZS 12,350,000/=) being repair costs for the damage cause to the above mentioned trailer and truck;

it commissioned the towing of the suit vehicle and trailer and that the same has remained in its occupation. However, it insisted that vehicle was wrongly parked hence towing was done in fulfilment of the contractual duties stipulated in a contract between them and the 1st Defendant. Accompanying the written statement of defence, the 2nd Defendant, filed a counter claim against the plaintiff in which it prayed for:

- a) Payment of Tshs 966,000/= being towing charges;
- b) Payment of Tshs 21,000,000/= in respect of storage charges from the material date to 30th September 2014 (Tshs 58,000/= per day)
- c) Interest rate of 30% per annum;
- d) Interest at courts rate of 12% from the date of judgment to the date of full settlement;
- e) Costs of the counter claim and
- f) Any other reliefs, this Honourable Court deems fit and just to grant.

The Plaintiff was represented by a team of advocates from Ngalo & Company Advocates led by Mr. Michael J.T Ngalo learned counsel; the 1st and 4th Defendant was represented by Mr. Peter Sengerema, Mr. Charles Mataganye and later Mr. Allan Shija learned State Attorneys; the 2nd Defendant enjoyed the legal services of Mr. Samwel, Shadrack learned advocate whereas Mr. Lameck Joseph, an officer of the 3rd Defendant appeared for the 3rd Defendant

In compliance with Order 14 Rule 5(1) the Court framed the following issues for determination:

1. Whether the Plaintiff's truck and trailer were wrongly parked on the road.
2. Whether the truck had broken down while on the road.
3. Whether the fine punishment imposed on the Plaintiff was unjustified and or wrongful and illegal.
4. Whether in the circumstance , the seizure and detention of the Plaintiff's truck and trailer were/ are wrongful and illegal.
5. Whether the people who ambushed and seized the Plaintiff's properties were duly instructed and employed by the 1st and 4th Defendants.
6. Whether the Plaintiff has suffered damage as a result of the Defendants action complained of.
7. To what reliefs are the parties entitled to

No issues were framed in respect of the counter claim at the start of hearing, but upon consulting the pleadings, this court framed one issue ie: whether the plaintiff is entitled to the relief sought?

In proving his case the Plaintiff called there three witnesses, **PW1** - Stanley Simon Mvungi; **PW2**- Justine Msafiri Mosha, and **PW3** -Viran Joseph Mkomba "PW3." The second Defendant called two witnesses, Andrew Msusa Masangula as **DW1**, and Yono Stanley Kevela as **DW2**. On their part,

the 1st and 4th Defendant paraded only one witness **DW3-** Livingstone Urio, a Road Inspector from TANROADS Coastal Region office.

The first plaintiff's witness, PW1 Stanley Simon Mvungi, driver of the suit vehicle and trailer testified that on the material day at around 8:45 while on way from Lusaka to Dar es salaam his vehicle encountered a technical problem caused by a gear jam which compelled him to park the vehicle on the beside the road. That having parked he took all the safety measures by lighting double hazard lights, placing triangle reflectors in front of the truck and behind the trailer and spreading tree leaves and grass on the road packed it on the side of the road. Meanwhile he reported the incidence to the plaintiff head office in Dar es salaam where PW2 dispatched a technician to scene to attend to the fault. That, while waiting persons who identified themselves as employees of the 2nd Defendant arrived at the scene and in collaboration with the 3rd Defendant's employees they forceful towed the vehicle and its trailer to the 2nd Defendants yard at TAMKO, Kibaha. That since the truck could not be switched on, they cut the crane shaft and in the course of lifting the truck it slid and hit the ground whereupon it encountered damages on its fan, fan guard, radiator, front show and engine parts. He testified further that upon arrival at Kibaha he was given a form titled "fomu ya kukamata magari kwa kosa la kugesha magari kimakosa na kumwaag Mafuta barabarani" (Exhbit P1) which had a logo of the 1st Defendant and the 2nd Defendant. He told the court that although he had not wrongly parked, he had to sign the form in acknowledgement of the offence so as to be allowed to offload the cargo and delivered it at its

destination. He further tendered as exhibit a hand written narration of the incidence (exhibit P2).

The second witness (PW2) one Justine Msafiri Mosha, a chief technician for the plaintiff's company testified that on the material date PW1 informed him by phone that the vehicle has encountered a problem whereupon he dispatched a technician one Waziri who later informed him that the vehicle was being towed Kibaha and that it was seriously damaged in the process. He mentioned that the parts damaged and their respective costs are rejector (Tshs 1,000, 000/); horse belt (Tshs 800,000); Fan Guard (Tsh 400,000/=); front bumper- (TShs 1,500,000/=); engine (Tshs 8,000,000/=); rejector clutch (Tshs 200,000/=);. On how these figures were arrived at he testified that the price were obtained from the shops. When cross examined by Mr. Allan Shija, he testified that he personally did not assess the condition of the engine or gear box and that he received detailed information from one Waziri, the technician who is now deceased. On further cross examination he stated that his testimony is largely based on what he was told by Waziri.

PW3, Viran Joseph Mkomba, director of the plaintiff company testified narrated the incidence as reported to him by PW1 and PW2 and added that upon the incidence being reported to him he sought the intervention of a regional traffic officer for Coastal region to have the vehicle released but the 2nd Defendant employees refused to release it claiming that it was wrongly parked and insisted that he should pay the fine and the costs for towing. He testified that seizure of the vehicle and its trailer has occasioned his company a loss of business of USD 22,000 monthly and a net profit of USD 7000. He

further testified that his company refused to pay because PW1 committed no crime me but was compelled to sign the form.

On the Defendant side, Andrew Msusa Masangula (an employee of the 2nd Defendant) testified that at around 6am on the material date while on way to Chalinze on official to remove a car which has blocked the road they saw the suit vehicle wrongly parked besides the road but decided not to impose fine or apprehend the vehicle in anticipation that the driver/owner will remove it. That, on their way back from Chalinze at around 1pm they found that the vehicle still parked. No signs were put to show that it has a breakdown and the neither the owner nor the driver was there to explain why the said truck wrongly parked. They called a mobile crane for towing immediately after the arrival of the crane PW1 resurfaced and told them that had gone to Mlandizi to look for maize consignment for transporting to Dar es Salaam. They explained to him that the vehicle was wrongly packed and gave him Exhibit P1 which he voluntarily signed in acknowledgement of the offence committed. He also tendered as exhibit a photo allegedly taken at the scene (Exhibit D1). According to his testimony, they towed the vehicle because PW1 refused to pay the fine and declined to drive the vehicle to Kibaha.

The second defence witness DW2, Yono Stanley Kavella, director of the 2nd Defendant Company testified that their company has a contractual relationship with the 1st defendant through which they assist the 1st

defendant in enforcing road safety rules (exhibit D2). He further narrated what he was told by DW1 regarding the apprehension of the vehicle. On cross examination he testified that although their contract with TANROAD expired in 2014 the vehicle has remained in their custody. They could not release it as there was a pending case and that there are many vehicles in the same circumstance. With regard to the counter claim he testified that in his company claims storage charge for keeping the vehicle in their custody. The last defence witness, DW3 Livingstone Urio road inspector for the 1st Defendant testified that the 2nd Defendant was been contracted by the 1st Defendant to enforce road safety regulations and that he had information that the suit vehicle was apprehended for wrong parking. He further stated that the plaintiff has not paid the fine hence the vehicle has remained under the custody of the 2nd Defendant.

Having narrated the facts, I now turn to the issues for determination but before I do that, I wish to state from the outset that it is the principle of law that the burden of proof rests on the person alleging existence of any fact (**Godfrey Sayi and Anna Siame as Legal Representative of the Late Mary Mndolwa**, Civil Appeal No. 114 of 2014, CAT, (unreported); **Kaderia Yussuf Osman Hassania v Sadiq Osman Hassania by His Attorney Saleh Sadiq Osman & Two Others**, in Civil Appeal No. 15 of 2000 CAT at Zanzibar between (unreported). This being a civil case, standard of proof is on a balance of probabilities which simply implies that the Court will accept evidence which is more credible and probable (see **Al-Karim Shamshudin Habib v Equity Bank Tanzania**

Limited & Viovena Company Limited Commercial Case No. 60 of 2016 (unreported).

The first issue as to whether the vehicle and its trailer were wrongly parked and the second issue as to whether the suit vehicle had broken down while on the road are intertwined hence, I will deal with them concurrently. Going by the principle above, the burden of proof in respect of the first issue rests on the defendant who assert that the vehicle was wrongly parked whereas on the second issue it is the Plaintiff who bears the burden of proof to the assertion that the vehicle was mechanically unfit. In my assessment of the evidence, the only material evidence rendered in respect of these two points is the oral testimony of the PW1 and PW2 who are the only eye witness to the incidence, **Exhibit P1 'Fomu ya Ukamataji,' Exhibit P2,** and **Exhibit D1,** a photograph allegedly taken at the scene.

Before I proceed further, let me state that I have found it appropriate not to attach any weight to Exhibit D1 because its authenticity is at large. Section 18.-(2) of the Electronic Transaction Act which regulates the admissibility and evaluation of electronic enjoins the courts while determining the admissibility or evidential value to be accorded to the electronic evidence to consider, the reliability of the manner in which the data message was generated, stored or communicated; the reliability of the manner in which the integrity of the data message was maintained; the manner in which its originator was identified and any other factor that may be relevant in assessing the weight of evidence. Under the law (Section

18(3) of the Electronic Transactions Act) an electronic evidence would be deemed authentic if it is established that the device through which it was taken was at all material times operating properly; or where it is established that it was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

In the instant case, apart from DW1 testimony that he took the photograph at the scene, there is nothing to prove that indeed the photograph was taken at scene and on the material date. The device on which the photograph was allegedly taken was neither tendered in court nor received as an exhibit. While tendering the photograph DW1 testified that he used his phone to take the photo but he no longer owns the phone as it was lost but no loss report was produced to explain how and when it got lost. Equally, no evidence was rendered on how the photograph was printed and devices used in printing. In other words, there is no evidence on record, how the photograph was stored, kept and generated and if the device used to generate the photo was operating properly or not as per the requirement of the law. Besides, DW1 who allegedly took the photo is an employee of the 2nd Defendant, and impliedly, the photograph was at all material times under the control of the 2nd Defendant.

Exhibit **P1** is to the effect that the suit vehicle and its trailer was wrongly parked and, as a result PW1 was fined to pay Tshs 50,000/= in respect of wrong parking and Tshs 116,000 being repossession charge. Having

carefully scrutinized the Road Act, 2007 from which the 1st Defendant derives its power over road safety issues, I have noted that the offence of wrong parking is not specifically provided for under Act. Section 48 to 50 of Roads Act, 2007 lists offences chargeable under the Act for which the offence of wrong parking is not expressly provided for. Similarly, the Road Management Regulations 2009 does not specifically provide for the offence of wrong parking but it prohibits motor vehicle drivers to park vehicles on the wrong side of the road or at a place or an area where parking is prohibited (Regulation 9(11)(i) and (f)). Under Regulation 9(8), drivers of motor vehicles or trailer are obliged to park in such a way that they do not cause or likely to cause danger, obstruction or undue inconvenience to other road users. In places where the manner of parking is indicated by a sign board or markings on the road side drivers are under obligation to park their respective vehicle or trailer in accordance with the signs or markings. Leaving vehicles unattended on a public road is also an offence pursuant to Regulation 56. In my considered view, parking in a manner that obstructs the use of the road or occasions undue inconvenience to other road users; parking contrary to the road signs, and leaving motor vehicle unattended in public road can broadly be categorized as wrong parking.

A better description of what constitutes wrong parking may be imported from the Road Traffic Act, Cap 168 which in Section 71 and 71A provides for designation of parking areas and specifically prohibits drivers from parking on carriageway, or near carriageway save for the reasons beyond the control of a driver. Since it is not controverted from the testimony of PW1 and DW1

that the vehicle and its trailer was parked besides the road, there is no gain in insisting that it was not wrongly parked. In my opinion the only contentious issue is whether PW1 had a good cause to justify parking of the suit vehicle on the side of the road and this draws us to the second issues for determination.

The law is not oblivious to the fact that vehicles may encounter breakdown which may prevent the driver from parking at designated areas. As states earlier, section 71A (1) and (2) states that, prohibits drivers to park or make a vehicle to stand close to the carriageway except where the parking is necessitated by factors beyond the control of a driver in which case the driver is under obligation to take precaution measures to avoid accidents by placing a warning device at a distance of not less than less than thirty 30 meters from the where the vehicle is stationed (see subsection 5). Thus, assuming that the vehicle encountered a breakdown as asserted by the plaintiff, PW1 was legally obliged to take all precautionary measures pursuant to section 71A (5) of the Road Traffic Act. PW1's testimony as corroborated by Exhibit P2, and PW2 and PW3's testimony which I find to be credible is that the vehicle had a breakdown. However, apart from PW1's testimony that he took the precautionary measures required by the law, no corroboration no was rendered to show that indeed PW1 took the precautionary measures required by the law.

exceptions above. Upon scrutiny of Exhibit D2, I have noted that the contract mandated the 2nd Defendant to apprehend vehicles found being repaired or left unattended for more than 6 hours (in urban areas) or 24 hours in rural areas. That by towing the vehicle prior to the expiry of 6 hours and by continuing to hold the vehicle, the 2nd Defendant acted beyond the scope of its mandate and this exonerates the 1st Defendant from liability.

The fact that the 2nd Defendant contracted the 3rd Defendant to tow the vehicle and no evidence was rendered to show that the 2nd Defendant was authorized to sub-contract the 3rd Defendant further exonerates the 1st Defendant from liability occasioned in the course of towing the vehicle to TAMKO yard.

As regards the damage suffered, the Plaintiff's claims it has suffered two major damages, to wit damage occasioned to the vehicle in the course of towing; and loss of business. Both claims fall within the realm of specific damages, which as a trite law must be not only pleaded but also proved. Surprisingly, none of these claims is supported by a document evidence. All we have are mere statements of PW1 and PW2. On the first claim, PW1 and PW2 testified that while being towed the vehicle hit the ground and the damaged certain parts of the vehicle. According to their testimony the parts damages and their respective costs are: rejector Tshs 1,000, 000/; horse belt- Tshs 800,000; Fan Guard Tsh 400,000/=; front bumper- TShs 1,500,000/=; damage to engine Tshs 8,000,000/=; rejector clutch Tshs

200,000/=. There was no inspection report or tax invoice rendered to support these claims. PW2 stated that the prices were obtained from the shop but rendered no invoice of the same in support of his statement. The absence of a vehicle inspection report and tax invoice renders these claims nugatory.

As regards loss of business, the Plaintiff's claims that he was earning a monthly USD 2200 (and \$ 7000 of which being the profit) was backed with no proof apart from the oral testimony of PW3. It need not to be underlined that the claims for loss of profit fall in the category of specific damage. As held in **Masolele General Agencies v Africa Inland Church Tanzania** [1994] TLR 192, loss of business certainly refers to disappearance or diminutions of value of such enterprise or business or reduction of profit, hence logically and legally must be proved to establish the actual loss of business or profit occasioned. Consequently, in the instance case, the plaintiff's claim ought to be supported by concrete evidence to prove its existence. The mere statement of loss of business without any documentary evidence do not, in the light of the above authority, sufficiently prove the existence of the claim. It is incomprehensible that the Plaintiff earned such a huge income from the suit vehicle but had no record or income tax receipts to support his claim. Under the circumstance, the Plaintiff has failed the requirement of the law.

Although the plaintiff has entirely failed to prove special damages suffered, the circumstances of the suit dictate that, the plaintiff have suffered general damages especially considering the fact that the vehicle has been under the

- d) The 2nd Defendant is hereby ordered to pay the plaintiff general damages at a tune of Tshs 150,000,000/=
- e) Costs of the suit shall be borne by the 2nd Defendant

The counter claim is dismissed with cost for lack of merit.

DATED at DAR ES SALAAM this 16th day of December 2019.



J.L. MASABO

JUDGE

Ruling delivered this 16th day of December 2019 in the presence of Mr. Sist Benard counsel for the Plaintiff, and Ms. Rehema Mtulya and Ms. Dora Komba, learned State Attorneys for the 1st and 4th Defendants.



J.L. MASABO

JUDGE