

TANZANIA / JUDGMENT

20170629 TZHC Mwanza

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA J IN THE DISTRICT REGISTRY AT MWANZA (Arising from the judgment of (he District Court of Musoma in Civil Case . No. 18 of 2012) THE M.D BUNDA BUS SERVICE CO. LTDAPPELLANT versus LEONARD JOSIA RES PON DENT

JUDGMENT

21/02 & 29/06/2017 J. A. DE-MELLO, J; The Respondent was Plaintiff in a Civil suit No. 18 of 2012 whereas the Appellant was a Defendant therein. The District Court of Musoma decided the case in favour the Plaintiff conceding to the Reliefs sought that of;

1. The Defendant to pay TZS 3,150,000/- to compensate the Plaintiff for the 21 days staying without working. .
2. The Defendant to pay TZS 37,000,000/= as General Damages as paragraph . 8 above. .
3. The Defendant to pay costs of this suit and any other relief(s) as the Court may deem necessary. As a result, a total of TZS 40,150,000/= was awarded as damages, with costs. . / 1 . I •) The Appellant, the Managing Director Bunda Bus Services Co Ltd, has been aggrieved, and, lodged a total of nine (9) grounds of Appeal as follows:-
 - i. That, the Trial Court erred in law and facts to hold on the Respondent favour, failed to consider the testimony on records. ii. That, the Trial Court erred in law and facts to award the Respondent on quantum of damage without assessing the proof to the effect. iii. That, the Trial Court erred in law and fact for it, awarded the Respondent TShs. 3,150,000 / = being loss for the Respondent, he spent twenty orie days without working on his business. . I Briefly, the claim arose out the injuries allegedly sustained by the Respondent when on board the Appellant's bus from Musoma t~ Mwanza. It was on reaching Kiabakari that, the bus bumped into a 'hump' which then threw the Respondent from his seat to hit hard over the roof of the bus body, where alleged to have broken his upper incisor tooth, face swollen, persistent headaches, suffering 100% incapacity. As a result of that, he
 - further claims to have not attended to his place of work as an electrician technician where he earns TShs. 15~1 000/ = per day. The matter sought the attentic;m of Nyerere Government H~~~it~\({~atment after it had . been reported to Bunda Police Station~ . . . 2) The

Appellant disputed all the allegations, while admitting the accident was as a result of avoiding a 'reckless pedestrian' who was crossing the road aimlessly. That, the Respondent was a regular customer of the Appellant's bus and, never paid bus fare. He was carrying a TV set with him when it happened~ which is the same one that hit his head over it. Further that, none of the injuries nor ticket was sufficiently proved as per the requirement of the law. From the six (6) issues that, the Trial Court framed, ended up deciding in favour of the Respondent and, this is part of the final holding; "The Plaintiff has proved his case. He has produced copy of bus ticket exhibit P1 ... a conclusive evidence that he was on board ... and got accident ... as per exhibit P2 the PF3 form. Imputation of breach of contract is actionable per se ... Now what should I award the good and regular passenger to make him good for the loss of work, injury and incapacitation ... In . para (9) (i) he claimed TShs. 3,150,000/= ... for 21 days he stayed without working. But although the Plaintiff did not give particulars to substantiate his claim for earnings TShs. 150,000/= per day ... I think this amounts to loss of earnings for the days alleged in the Plaint. ..I award him 3,150,000/= ... In para 9(i) he claimed the defendant to pay him TShs. 37,000,000/= being general damages ... The accident caused him to suffer permanent incapacity of 5% and that he had 100% temporary incapacity on the day of accident ... ! award him . the whole total sum of TShs. 37,000,000/= fl~cliumed. . . . ~~~'0 . . ~ / 3 ,. In the event I give judgment: for the Plaintiff and order the I defendant to pay him TShs. (3,150,000/= + 37,000,000/) = ' 40,150, 000/ = with costs of the suit". 1 j . At the hearing of this Appeal, written submissions were ordered as the I Appellant was in care of Alex Banturaki learned Advocate, while the I Respondent was unrepresented and, appeared in person. Both are in . I comp Ilance. I In summary, Counsel Banturaki for the Appellant challenges the I admission of alleged ticket issued to 1the Appellant 06/05/2012 ·while the one tendered reflected . a different date I that of 12/05/2012.-Neither were the PF3. copy and uncertified, nor, I the medicar practitioner if at all, competent and, authorized to tenderi for his expert opinion. The awarding for both 'Specific as well as General' with absence of proof, is all what I • considers the Magistrate highly un~thical and, lacking in integrity. The Appeal is with merit and, the suit neyer met the standard for proof in Civil cases that of 'Balance of Probabili~', I he concluded. I In response, the Respondent. is in l one with the findings. of the Trial Magistrate from admission of all the! exhibits which were retrieved legally I from the ticket exhibit P1 dated 5 th June, 2012 with a serial number . . I 24905, as opposed to what the Appellant claims the travel was on the 6 th June , 2012. With regard to exhibit! P2 that is the PF3 and · accompanied with a letter from Regional Medical dmcer - · Mara, were l~gal and official, thus, admitted accordingly. The evid~ni::e on record and, failure on the part of the Appellant to weighed far abo:e a g a ~ l l a n t was all what 4 I l I I lead the Trial Magistrate to arrive as he did and, in the Respondent's favour. I The Appeal is un-merritoriuous and, qualify I a dismissal. and not a Re-Trial as prayed, he concluded. I . My perusal from proceedings had that, it was until the 19/02/2014 that, the suit took off and, with framing of issLes after recording mediation to have failed on the 12/12/2013. Both exhibits were objected owing to their authenticity, not named and photocdpy for P1 the ticket and, P2 the PF3. 1 The Court" overuled the objections and, admitted ·them both. On cross examination PW1 the Respondent! admitted to. have travelled on the 6/08/2012, with

ticket issued on the 15/07/2012. But again, the travel was on the 5/06/2012 .. It is all in page 8. There under paragraph 2, he denies to be a free regular customer but, acknowledge to have ticket number 47651 dated the 12/08/2012. He denied to be carrying a TV set with him that day. It contributed to his injuries as well as loss of earnings to the tune of TShs. 150,000/= per day out of his electrical technician. He even claimed TShs. 1,37,000,000/= for disability and incapacitation. He never had any other witness to corroborate his testimony. The defence had three witnesses. DW1, DW2 & DW3. both employees of the Appellant bus as a Manager, . . . Express agent and a conductor, respectively. They all seem to know the Respondent well being their frequent customer and, got a free board for the trip to Mwanza on the 12/05/2012. The ticket number 47651 was tendered and admitted as D1 exhibit. It was DW2 who was on board and, testified . . . I . . . the off road of the bus avoiding a reckless passenger. The Respondent had a TY screen in his hands and refused it to be kept elsewhere. It was the same one he bumped into and bled. DW3 had a different

- date for travel . . . I . . . , /r . . . I . . . , j \ . \ . 5 . - ' ' I I . l that of 6/02/2012. He however came up with the 12/05/2012 as the date of travel. The issue before the Court and, for the Appeal is whether the claim was sufficiently proved to the standard set in Civil suit that of 'Balance of Probability'? It is trite law that the one who alleges must prove as stipulated in provisions of sections 110 & 111 of the Law of Evidence Act, Cap. 6 of the Revised Edition, 2002 stating :-
- 110. "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 those facts exist".
- 111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side." Similar opinion has been subscribed by a number of cases decided by the superior Court of the land to include; Attorney General & Others vs. Eligi Edward Massawe & Others, Civil Appeal No. 86 of 2002, . CAT (unreported). I am even mindful of the common knowledge that in all Civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. See the case of In Re. B [2008] UKHL 35, in which Lord Hoffman defined the term, balance of probabilities to mean:- "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 . . . 6 . ~ ~ \ ~ Av - . , , - , /) operates 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 and the fact is treated as having happened." To quote Lord Hoffman, once more but this time in a Judicial Review case in, Secretary of State for the Home Department vs. Rehman [2001] UKHL 47, he stated that:- "It would need more cogent evidence to satisfy [a Judge] that, the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian." From the above proposition on the proof of evidence, the case at hand was not proved to

the . required standard, the Exhibit P1, admitted. on 19/02/2014, was issued on 12/05/ No AC 24905, issued by Bunda Bus Express, is diverse to allegations pleaded on the plaint, as I quote from the paragraph 3 as follows:- "That on 05/06/2012, in the morning, I was travelling by Bunda Bus from Musoma to Mwanza and paid Tsh G,000/= as my bus fare as _per tick~.:- rt~¥.905 {Bunda Express) attached as Annexure "Jl"@~\j--':f';--' 7) It is apparent that not only the Respondent has been controversial but even the Defendants with regard to whether or not the Respondent was issued with a free ticket being a regular passenger. Two tickets were thus admitted marked P1 & D1 which the Appellant object but the Respondent never . objected. .n is even sad to observe how the Trial Magistrate admitted the PF3 a photocopy and without an expert for its examination. The Respondent you will agree was not competent on his own right but the Medical doctor and . more even the letter from the purported Medical Officer . in support thereof. Let alone the dates on which even the Respondent is confusing as . to which date exactly did he travel. Record as earlier observed is clear on this. I am perturbed by the manner and the way the Trial Magistrate handle the Reliefs prayed by the Respondent. Considering him being a registered Electrical Technician claiming to earn at least TShs. 150,000/= per day one would expect proof of business licence, professional certificates, tax remittance or even audited accounts or book of accounts from a registered, qualified and registered accountant all in endeavour to substantiate earnings. The Magistrate even acknowld.9e them not substantiated but yet went ahead and granted both. He disregarded the principle of law on both award for specific damages as well as general. For academic purposes let me refresh the Magistrat~s mind what special . damages entails as was decided in the cases of;

1. Lord Mac Nagnten in Bolag vs. Hutchson [1950] AC 515 . . " ... Such as the law will not infer f~om the ~atur~ of the act. They do not follow in ordinary course. Th~ceptional in their .. 8 character and, therefore they must be claimed specifically and proved strictly". Locally. I borrow what the Court of Appeal had in one of its celebrated decision in the case of Zuberi Augustin,o vs. Anicet Mugabe [1992] TLR 137 at page 139 that; "It is trite law, and , we need not cite any authority that special damages must be specifijcally pleaded and proved". · As for general damages much as they purely and entirely based_ on the wisdom of Court, however such must be discretionally and judiciously exercised. However, caution has to be taken based on the 3 principles that Lord Wright laid down in the case of Davies vs. Powell Duffryn Associated Collieries Ltd [1942] at page 617 and which All Chancery re- stated in the case of Nancy vs. British Columbia Electric Railways Co. Ltd. [1951] & that of Taylor vs; O'Conor [1971] AC 115 at page 140 that; "There are three stages in the mormal calculation namely;
1. To estimate the lost earnings, that the sums which the deceased probably would have earned but for the fatal accident. ·2. To estimate the lost benefit, that is the pecuniary benefit which the dependants would have derived from the lost earnings and_ to express the. 1.~~~ ~p~fif as annua~ sum over the period of loss earnings.--~~~" _.,/' 9'

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3. To choose the appropriate multiplier which when applied to the lost benefit expressed as an annual sum gives the amount of damages which is a lump sum". In the absence of all the above the award I am wanting and highly doubting. On this the event, I allow the Appeal, nullifying the whole proceedings and . judgment of the Trial Court; I make no order to the costs. I so order. I Judge I 29 / 06/2017. j. i j I . I . 10, i . I I
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