

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT TUNGUU

CIVIL APPEAL NO. 34 OF 2023

**(FROM APPEAL NO. 03 OF 2022 REGIONAL COURT, GAMBA
APPEAL NO. 01 OF 2022 DISTRICT COURT- GAMBA
CIVIL CASE NO. 28 OF 2021- MKOKOTONI**

**SAID BAKAR HAJI..... APPELLANT
VERSUS
KUNDI HAJI KUNDI..... RESPONDENT**

JUDGMENT

K. SHAMTE J.

Dated 18th March, 2024

The Appellant, who was the seller, and the Respondent, who was the buyer, entered into a contract for sale. According to the terms of the contract, the Appellant, Said Haji Bakari, sold his motor vehicle, DYNA, with registration number Z 857AD to the Respondent, (Kundi Haji), for a price of Tanzania Shillings Seven Million Only (TZS 7,000,000/-). The Appellant received the agreed price and allowed the Respondent to use the car for a week to test and drive it. However, the Respondent discovered that the motor vehicle was not functioning properly and the raised the claim with the Appellant.

The complainant (Respondent) voiced concerns about the deficiencies present in the battery, rings, block, and sleeve, and contended that these shortcomings constituted a misrepresentation and breach of the sale agreement. Consequently, the Respondent returned the vehicle to the Appellant and sought a refund of TZS. 7,000,000/-.

The Primary Court, acting as the trial court in this matter, directed the Appellant to reimburse the Respondent the sum of Tanzania Shillings Seven Million only (TZS 7,000,000/-) and to pay additional costs. Dissatisfied with the ruling of the Court of first instance in Civil Case No. 28 of 2021, the Appellant filed an appeal with the District Court (Appeal No. 1 of 2022), which ultimately ruled in favour of the Respondent. Despite this, the Appellant again appealed to the Regional Appellate Court (Appeal No. 3 of 2022), but the appeal was ultimately dismissed.



The Appellant is dissatisfied with the ruling and decree of the Regional Court, as outlined in the Notice of Appeal, and has come to this Court with three grounds for appeal.

- (a) The Appellant asserts that the learned Regional Magistrate erred in law and fact by entering judgment in favour of the Respondent, despite the completion of the contract for sale.
- (b) the learned Magistrate erred in law and fact by misdirecting itself when it relied on the Respondent's grounds without considering that the Respondent had entered into a contract and he had opportunity to inspect the motor vehicle before making payment.
- (c) Lastly, the Appellant argues that the learned Magistrate erred in law and fact by failing to admit the evidence produced by the Appellant and delivering an unjust judgment.

During the hearing, the Appellant was represented by Counsel Juma Mussa Rashid, while the Respondent appeared in person. Counsel Juma submitted that the trial court erroneously granted judgment in favour of the Respondent, despite that the parties have full consideration of the matter. He argued that the key elements of a valid contract in the sale of a motor vehicle had been fulfilled, and that the contract was therefore lawful.

The Appellant's Counsel argues that the Respondent entered into a valid contract. This can be demonstrated through the creation of a legal relationship between the parties, as well as the Respondent's ability to enter into the contract freely and with full consent. The Counsel refers to page 7 of the Regional Court proceedings at para 5, which highlights the Respondent's informed decision-making in purchasing the motor vehicle. Furthermore, the Counsel cited Luoga F.D.T Makinginya's Open University Source book, which defines free consent as the absence of coercion and the presence of freedom of movement.

Furthermore, the Counsel stated that there was no element of misrepresentation in the contract. He asserted that the Respondent had been provided with adequate information and opportunity to test the motor vehicle and had identified the defects. The Counsel also referred to the principle of caveat emptor, which indicated that the Respondent should satisfy himself before making any payment. Finally, Counsel Juma prays that the appeal be allowed.

The Respondent on his oral submission argued that he does not concur with the initial grounds of the appeal and requested that the appeal be dismissed with costs. He maintained that before settling the payment for

the motor vehicle, he had inquired about its condition from the Appellant, but the Appellant failed to provide him with the truthful information.

The Respondent alleged that prior to purchasing the vehicle, he had asked the Appellant if it had ever encountered any issues, and the Appellant had assured him that there were no defects. Additionally, they had agreed that the motor vehicle would be inspected and all payments would be made at the Zanzibar Revenue Board before the finalization of their contract.

The Respondent complained that the Appellant employed undue influence on the first day of the sale, which led to the misrepresentation or non-disclosure of information. Consequently, the Respondent was compelled to purchase the motor vehicle in question and pay the amount.

In response to the second ground, the Respondent submitted that as parties they had agreed to test the vehicle for six days to identify any defects. After six days, the Respondent discovered that the battery, rings, valves, and blocks were not functioning correctly. The Appellant was contacted, and he satisfied himself with all the defects. However, the Appellant refused to refund the payment of TZS. 7,000,000/-. The Appellant admits that he did not have the cash in hand at the time of purchase and promised to refund the amount. But nothing has been refunded as agreed. The Respondent concluded that there was misrepresentation, and breach of contract, and seek to rescission of his purchase as well as damages.

Additionally, the Respondent alleges that the contract in question was not entered into voluntarily, as the Appellant failed to provide sufficient information about the motor vehicle in question beyond the observations and tests conducted by the Respondent, which revealed multiple defects. The Respondent subsequently informed the Appellant of these issues.

Replying on the elements of contract in the third ground, the Respondent stated that the contract was not finalized and the Appellant didn't furnish with any registration certificate of the motor vehicle which also proves that the Appellant knows that the contract is not yet completed. The Respondent's stance is that the contract in question was not entered into freely due to non-disclosure of key information.

In conclusion, the Respondent has declared that the terms of the contract are incomplete, as required by the Law, rendering it incapable and does not meet the legal requirements. Consequently, the Respondent prays that the Court dismiss the appeal and maintain the previous order of the Regional Court and other subordinate courts. Furthermore, the Respondent seeks a

refund of Tanzania Shillings Seven Million Only (TZS. 7,000,000/-) and damages for disturbance costs in the amount of Tanzania Shillings Eight Million only (TZS. 8,000,000/-). If this matter had been resolved earlier, the Respondent would have earned these damages as profit over a period of three years.

In his short rejoinder, the learned Counsel asserted that there was no evidence of misrepresentation since the Respondent had inspected and tested the motor vehicle prior to completing the sale. Concerning the motor vehicle registration card, he noted that it was not listed as a requirement for sale in the court proceedings on page 4.

This Court, upon a thorough examination of the appeal records, as well as the submissions made by the parties and the grounds of appeal, it finds that the primary issues that require determination by this court are whether a contract existed between the parties, and whether the learned Magistrate erred in law and facts in determining that matter. Finally, to determine whether any remedies are available in this appeal.

In relation to the first issue, it is necessary to analyze the grounds of appeal in light of the legal elements of a contract, while taking into consideration the differing perspectives presented. In the circumstances of this appeal both the seller and buyer knew of the defect at the material time. It is evident from the record that the defects of the vehicle on sleeves, banner, and battery were obvious as observed during test drive thereby prompting the Respondent against buying.

The Respondent observed that the defects are serious as to make the motor vehicle unfit for the purpose for which it was bought. The bottom line is the Respondent did not accept the vehicle in its state and seek to cancel the contract. The intention to cancel only came after the Respondent realizes the default. Consequently, the Appellant failed to fulfill the requirements of *actio redhibitoria*, which is an action to cancel a sale due to the stated defects in the item sold.

The Respondent had evidently declined to accept the motor vehicle, and it was the Appellant's responsibility to take measures to mitigate the situation. Nevertheless, I have taken into account the fact that the Respondent had repeatedly drawn the Appellant's attention to the faults with the vehicle. It is only fair to acknowledge that the Appellant did not make any effort to rectify some of the complaints.

In this Appeal, I can conclude that the Respondent is not a *bona fide* purchaser. The Court of Appeal of Tanzania, in the case of **Suzana S. Waryoba V. Shija Dalawa** (supra), rightly found that the Appellant was not a bonafide purchaser and be considered a bonafide purchaser, a person must buy something in good faith and without knowledge of any fraud.

On the issue of caveat emptor which was raised by Counsel Juma, this Court refers the case of **Mohamed Issa Makongoro V. Gilbert Zebedayo Mrema** Civil Case No. 107 ya 2015. It was observed that "If as the plaintiff suggest the plaintiff posed as the owner, then that is purely a misrepresentation no argument could be legally pass title. Similarly, the defendant never exercised due diligence before the alleged sale could materialized. There is a long established principle that caveat emptor which means buyer be aware."

The rationale for assessing the product from a consumer's perspective was established in **Abdulla Ali Nathoo V. Walji Hirji** [1957] E.A. 207. In a contract for the purchase of fifty bags of onions, the onions delivered were unsuitable for human consumption. The buyer accepted the onions, sold them for approximately half of the agreed-upon price, and claimed to set off damages for breach of warranty against the price. Windham C.J. cited section 113 of the Law of Contract Decree Cap 149 Laws of Zanzibar, ruled that the seller had recently purchased the bags but had not examined their contents, despite having the opportunity to do so. However, in the existing appeal the Respondent has examined the motor vehicle.

In this ground I find that there was no contract between the parties as the key elements of the contracts were not performed, and there is element of misrepresentation which has been raised by Respondent as ground for cancellation of a contract.

It is the determination of this Court that, the failure of the Appellant's grounds of appeal to establish the agreed terms of contract of sale, which is the primary issue in contention in this appeal, there is no basis for this court to provide a positive response to the first question. As the first issue has not been resolved in the affirmative, it is evident that the Appellant has not met the required standard of proof in law. Consequently, I hereby dismiss the Appeal.

The crucial aspect of the grounds one to three of the appeal is whether the trial magistrate erred in law when he ruled on favour of the Respondent. It is documented that the Respondent alleged that his consent to the

agreement was procured through undue influence, or misrepresentation, thereby rendering it voidable in accordance with section 14 of the Law of Contract Decree, Cap 149 Laws of Zanzibar.

The reference to the said sections of the Contract Decree, is the only way by which the decisions of the trial court and the first appellate court be properly understood and put in context. This Court based on element of valid contracts, it refers the Contract Decree Cap 149, section 14(1) which states free consent is not caused by undue influence or misrepresentation. I also refer the case of **Curtis V. Chemical Cleaning and Dyeing Co. Ltd** [1951] 1 K.B. 805, where Curtis was not bound by her signature because the shop assistant had given her an oral explanation amounting to misrepresentation.

Another principle that may be referred is the principle of sanctity of contract as a fundamental aspect of the law of contract, as established in **Abualy Alibhai Azizi V. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289: "The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement." As such, it is a well-settled legal principle that parties are bound by the agreements they freely entered into. Therefore, it is essential to adhere to the terms of the contract, and any excuses for non-performance should be scrutinized carefully. However, in this particular case, I am inclined to accept the Appellant's excuse for non-performance of the agreement, in alignment with the principle of the sanctity of contract.

The last issue to be addressed in this appeal are available remedies. I shall address both, the issue of refund and damages in this appeal. On the issue of refund, it should first be noted that from the evidence and the exhibits tendered before the trial court, the agreed amount for consideration was TZS. 7,000,000/- and the Respondent is not in the position to purchase that motor vehicle. On refund of payment of TZS. 7,000,000/- which has been paid by the Respondent, the court refers the case of **Rowland V. Divall** (1923), plaintiff bought a car from defendant and used it for several months. It then realized that defendant has no title to this car and the plaintiff is bound to return it back to the true owner. He sued defendant for recover back the purchase-money that he had paid as on a total failure of consideration. The court held that he is entitled to recover the whole of it price because the consideration for the use of car had totally failed.



As stipulated in the Contract Decree, section 25 (1), an agreement made without consideration is deemed void. If a party to a contract fails to perform or disables themselves from performing their promise in its entirety, the promisee has the right to terminate the contract, unless they have signified their acquiescence by words or conduct, as per section 39.

Based on the evidence presented, I find that the Respondent is entitled to a refund of the amount paid to the Appellant because the consideration has been failed. The Respondent has also claimed Tanzania Shillings Eight Million Only (TZS. 8,000,000/-) as specific damages resulting from the breach of contract related to the sale of a motor vehicle with defects. However, the Respondent has failed to provide any justification for the amount claimed. In **Wildmind Travel Limited V. Mes Foot Print Limited** (Civil Case 7 of 2019) [2021] TZHC 5891 (20 August 2021) and **Zuberi Augustino V. Ancent Mugabe** (1992) TLR 132, it is clear that when a party pleads special damages in a lawsuit, they have a duty to provide strict proof of their claim.

It is trite law that specific damages have to be specifically pleaded and proved. See: **Augustino V. Anicet Mugabe** [1992] T.L.R 137 and **Masolele General Agencies V. African Inland Church Tanzania** [1994] TZCA 20; (09 August 1994); **1994 TLR 192** (TZCA), in which the Court of Appeal of Tanzania held that: "Once a claim for specific item is made, that claim must be strictly proved, else there would be no differencee need to be proved between specific claim and general one." The trial judge rightly dismissed the claim for loss of profit because it was not proved.

Finally, while determining this Appeal, this Court has come into another observation, which is factual. At this stage, it may be useful to take note of the following timelines of material events in this case. This is an issue of fact which was adequately considered and determined by the two subordinate courts.

Given that this is a second appeal, I refrain from interfering with the factual findings made by the lower courts. In the case of **Amratlal Damodar Maltaser and Another t/a. Zanzibar Silk Stores Vs A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31, it was expressed a similar viewpoint. The Court of Appeal stated that "Where there are concurrent findings of facts by two courts, the Court of Appeal, as a rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or a violation of some principle of law or procedure."



In my conclusion, I find that the Respondent purchased the motor vehicle from the Appellant with the honest belief that he was acquiring a vehicle that met his requirements and was free from defects. Therefore, he was justified in rejecting the sale. In light of these circumstances, it is my considered opinion that the Appellant has failed to prove the existence of a valid contract. It is now the court's responsibility to determine whether a contract existed between the parties. As per the parties' pleadings, it is clear that no contract of sale was formed between the Appellant and the Respondent.

In this Appeal, I find no justification for the Appellant's complaint at this stage of the appeal. Consequently, I do not find any merit in any of the grounds of appeal. Therefore, I dismiss all of the grounds of appeal.

Therefore, I hereby order that there is no contract between the parties, and the Appellant shall refund the cost of the vehicle, amounting to Tanzania Shillings Seven Million Only (TZS. 7,000,000/-), to the Respondent. It has been established as a fact that during the hearing of the main case, a ruling was made that the Respondent shall retain possession of the motor vehicle until the matter is resolved. Additionally, I order the return of the motor vehicle to the Appellant. However, I decline to award the specific damages claimed by the Respondent, for the reasons mentioned above. Furthermore, I make no order regarding costs.

It is so ordered.


KHADIJA SHAMTE MZEE
JUDGE



Dated at Zanzibar this date 18th March, 2024.