

DISTRICT COURT 2, TEMA

SUIT NO. A2

ADJETEY ARSENE ADJEI

VS.

1. ESSEKU FRANK

2. JOSEPH AMARTEY

JUDGMENT

His Honour Festus Fovi Nukunu
(Additional Magistrate)

Friday 30th June, 2023

IN THE DISTRICT COURT 2, TEMA, SITTING ON FRIDAY THE 30TH DAY OF JUNE, 2023 BEFORE HIS HONOUR FESTUS FOVI NUKUNU, THE ADDITIONAL DISTRICT MAGISTRATE

SUIT NO. A2/72/2023

ADJETEY ARSENE ADJEI

)PLAINTIFF

VS.

**1. ESSEKU FRANK
2. JOSEPH AMARTEY**

)DEFENDANTS

JUDGMENT

Per amended Writ of Summons, the Plaintiff sued the Defendants for the immediate refund of GH¢3,307.33 with interest from January 2020 till the final date of payment.

Plaintiff's case is that he owns Luoia tricycle motor with number M19CR 9060 and after the purchase, plaintiff had a job at Takoradi and had decided to dispose of it under a hire purchase agreement. Plaintiff met defendants and 2nd defendant agreed to buy the tricycle for 1st defendant, his son. They bargained and agreed on GH¢18,000.00. They entered into agreement on 11/11/2019 for work and pay for one year ending on 12/11/2020. It is agreed that defendants are to pay GH¢375.00 a week or monthly sales of GH¢1,500.00. That he released the tricycle to the defendant after they signed the agreement. That defendant operated the tricycle from 11/11/2019 to 10/2/2020 and parked it claiming the motor got spoilt.

That plaintiff came down and realised that the tricycle was in a deplorable condition within four months. Plaintiff's further case is that defendants were to make sales from 11th November 2019 to 10th February 2020 which is GH¢ 4,653.33.

According to plaintiff, defendants paid GH¢2,255.00 leaving the balance of GH¢ 2,368.33.00. Plaintiff spent GH¢ 939.00 to repair the tricycle which the defendants mishandled as per paragraph 4 of their agreement.

Plaintiff therefore jointly and severally claims refund of cash the sum of GH¢3,307.33 from the defendants.

On the part of the defendants, the 1st defendant failed to attend to court but the 2nd defendant attended court and represented 1st defendant in the trial. 2nd defendant's case is that they signed the agreement on 11th November 2019 but the tricycle was not released

to them that day. They agreed on weekly instalment of GH¢ 375.00 until final payment is made. He denies that the tricycle was given to them but was given to his brother called Shadrack Ackam which was wrongly stated in the agreement. He further states that he (Shadrack) started working with tricycle on 12/11/2019 and that the agreement was prepared on 11/11/2019 in the afternoon. He also denies that the tricycle was in a deplorable state. That he has been responsible for all repairs. He states that the tricycle was parked on 21/12/2019 due to low turnover. He asserts that the tricycle was parked at the 2nd defendant's residence with the consent of the caretaker. He states that he acted out of ignorance and used the tricycle without testing it.

From the case of the two parties, the following issues are not in doubt:

1. That the plaintiff had a Luoia tricycle which he wanted to dispose of.
2. That the plaintiff entered into agreement with the defendants for work and pay for one year.
3. That the parties agreed that defendants work and pay GH¢375.00 daily or GH¢1,500.00 monthly.
4. That the defendant stopped making sales after few months of using the tricycle.
5. That the defendants breached the agreement they entered into with the plaintiff.

From the above, I have identified the following issues for determination:

1. Whether or not defendants parked the tricycle with or without the consent of the plaintiff or caretaker.
2. Whether or not the defendants worked with the tricycle from 11/11/2019 or 12/11/2019 to 10/2/2020 or 21/12/ 2019.
3. Whether or not the defendants have paid for the number of weeks they worked with the tricycle.
4. Whether or not the plaintiff engaged Shadrack Ackam who was working with the tricycle for two weeks without pay.
5. Whether or not the defendant mishandled the tricycle.
6. Whether or not the condition of the tricycle was good.
7. Whether or not plaintiff incurred GH¢ 939.00 in repairing the tricycle.

8. Whether or not defendants liable to pay GH¢2,368.33 and GH¢ 939.00 to the plaintiff.

Analysis

The law on proof in Ghana is regulated by the Evidence Act 1975 (NRCD 323) and the common law. The general position of the law is captured in the maxim. “He who asserts must prove”. That general position of the law was affirmed by Kpegah J. A. (as he then was) in ZABRAMA VRS. SEGBEDZI [1991] 2GLR 221 at 224 as follows:

“a person who makes an averment or assertion which is denied by his opponent, has a burden to establish that his averment or assertion is true. And he does not discharge this burden, unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred. The nature of each averment or assertion determines the degree and nature of the burden”.

The general rule of proof in civil case is that a party who in his pleadings or writ of summons raises issues essential to the success of his or her case assumes the onus of proof. See FAIBI VRS THE STATE HOTELS [1968] GLR 471 SC. See also the case of BANK OF WEST AFRICA VRS ACKUN [1963] 1 GLR 176 SC.

See also section 10(1) of the Evidence Act, NRCD 323 which provides as follows:

“For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.”

Similarly, section 12(1) of the NRCD 323 also reads as follows:

“Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities.”

Evidence of the plaintiff

Plaintiff testified that he owns a brand new Luojia tricycle motor with registration number M19 GR 9060. He said the 2nd defendant wanted to buy the tricycle for his son, the 1st defendant. They bargained and agreed on purchase price of GH¢18,000.00. He tendered **Exhibit ‘A’** as the agreement they have entered into.

Plaintiff also tendered **Exhibit B and Exhibit C** being the photograph of the tricycle. Plaintiff again tendered **Exhibit D Series, Exhibit E, Exhibit F**, documents covering the tricycle.

Plaintiff's witness was Regina Tetteh. She testified that she was present when plaintiff handed over the tricycle to defendants on 11/11/2019 to work and pay on weekly basis, that is GHC 375.00 from 12/11/2019 as per the work and pay agreement they entered into. She stated that the plaintiff appointed her as caretaker as he was not in town. She stated that she collected sales from 12/11/2019 to 28/12/2019 totalling GHC2,285.00. According to PW1, the defendants defaulted for some weeks totalling GHC2,368.33 not paid as at 10/2/2020. She stated that defendants did not render account from January 2020. PW1 said plaintiff came and 1st defendant directed him to the wife where tricycle was kept and she gave it to them.

According to PW1, plaintiff told 1st defendant that he was sending the tricycle for repair and they all agreed. 1st defendant or his son failed to accompany the plaintiff. Plaintiff took the tricycle alone for repairs.

Defendants' evidence

1st defendant was absent. However, 2nd defendant represented him throughout the hearing. 2nd defendant stated that somewhere in 2019, Shadrack Ackam who is his brother introduced plaintiff to 1st defendant that plaintiff had a tricycle which he wanted to sell on high purchase. He stated that the cost of GHC18,000.00 but they later found out that the plaintiff bought the tricycle at GHC9,000.00.

2nd defendant further testified that they agreed on weekly sale of GHC375.00 till the total cost was paid. He said they signed the agreement to that effect on 11/11/2019 but the tricycle was not handed over to them on that same day.

2nd defendant said there were few mistakes in the agreement but plaintiff pleaded with them to sign it as he would prepare a different one for them later which he never did. 2nd defendant testified that the tricycle was given to one Shadrack Ackam not them (the Defendants) and that they were only to receive sales from Shadrack and hand over same to Regina Akweley Tetteh whom the plaintiff had appointed to receive the sales.

In respect of the condition of the tricycle, 2nd defendant stated that they did not test the tricycle to know its condition but his brother started to work with it. He said his brother started work with the tricycle on 12/11/2019 and not 11/11/2019. He also said his brother parked the tricycle on 21/12/2019 at the residence with the consent of Akweley.

The 2nd Defendant called one Shadrack Ackam to testify in support of his case. He said 1st defendant is his father while 2nd defendant is his brother.

He admitted that plaintiff wanted to sell a tricycle to defendants for them to work and pay and that they agreed on GH¢18,000.00. That they agreed on weekly sale of GH¢375.00 till the total cost is paid. He said plaintiff later asked him to do some work for him and it took two weeks to complete the work. That plaintiff did not pay him but gave him money for fuel. According to the witness, he could not make sales for two weeks since he worked for the plaintiff for two weeks. He further stated that he started working with the tricycle on 12/11/2019 and not 11/11/2019. He also testified that he parked the tricycle on 21/12/2019 at their residence with the consent of plaintiff's caretaker who informed plaintiff. He insisted that the tricycle was not in a deplorable state and that plaintiff took the tricycle from their residence without their consent.

He concluded that he used the tricycle for eight weeks and made total sales of GH¢2,285.00 instead GH¢3,000.00. That defendants told him they paid part of the balance of GH¢715.00 leaving GH¢ 315.00 to be paid to plaintiff.

I will now consider the first issue which is whether or not the defendants parked the tricycle with the consent of the plaintiff or his caretaker.

It was the case of the defendants that they parked the tricycle at their residence with the consent of the plaintiff's caretaker.

From the record, the 2nd defendant did not provide sufficient evidence to prove that the caretaker gave her consent before he parked the tricycle at their residence. On the balance of probabilities, I hold that defendants have not proved their assertion that they had the consent of plaintiff or his caretaker to park the tricycle.

I will consider the second issue which is whether or not the defendants worked with the tricycle from 11/11/2019 to 28/2/2020 or 12/11/2019 to 21/12/2019.

Plaintiff's case was that he gave the tricycle to the defendant on 11/11/2019 and that defendants had worked from the said date that is 11/11/2019 to 28/2/2020.

2nd Defendant however stated in his evidence that they started working with the tricycle on 12/11/2019 and stopped in 21/12/2019. From the **Exhibit A**, which is the agreement before the parties, the agreement was to take effect from 11/11/2019. The defendants did not dispute that the agreement was entered into on 11/11/2019. They however stated that they started working with the tricycle the following which is 12/11/2019.

From the evidence on record, PW1 who the caretaker stated that the tricycle was not given to the defendants immediately after the agreement was signed.

This an extract of cross examination of PW1 by the 2nd defendant:

Q: I put it to you that we only signed at your place. The motor was not handed to us.

A: it is so. The motor was somewhere else.

Q: I put it to you that you were not there when the motorbike was handed over to us.

A: It is true I was not there.

From the cross examination, PW1 was not there when the tricycle was given to the defendants. In view of this, I am convinced that that the defendants could have started working on the same date the agreement was signed. I therefore agree with the defendants that they started working with the tricycle on 12/11/2019 and not 11/11/2019. As to when they stopped working, though defendant stated that they stopped working with the tricycle on 21/12/2019, there is nothing in the agreement, Exhibit A to suggest when that defendants could stop working with the tricycle.

From the evidence on record, plaintiff got hold of his tricycle on **28/2/2020** when the defendants parked it without the consent of the plaintiff or his caretaker. The evidence showed that the key of the tricycle was given to the plaintiff on 11/2/2020.

To my mind, the defendants have breached the agreement they had with the plaintiff to work and pay for the tricycle within one year.

In view of this, I am satisfied that defendant stopped working with the tricycle on 10/2/2020.

I will now consider whether or not the defendants have paid for the number of days or weeks they worked with the tricycle.

Clearly, the evidence shows that defendants have not paid for the number of days they worked with the tricycle. Stated differently, the defendants did not account for the number of days the tricycle was in their custody to work and pay. Both the 2nd defendant testified that they could make sales for all the days. DW1 said he could not account for two weeks because the plaintiff had engaged him to work for him. So clearly, the defendant had not paid fir the number of days or weeks they worked with the tricycle.

I will now consider the issue whether or not the plaintiff engaged Shadrack Ackam who was working with the tricycle for two weeks without pay which made him not to make sales for two weeks.

From the evidence on record, it was 2nd defendant's brother DW1 who was working with the tricycle. According to him, the plaintiff engaged him to work for two weeks and this made him not to make sales for the said two weeks.

This assertion was denied by the plaintiff. Since it was the defendant's witness who alleged that the plaintiff engaged him to do some work for him, the onus was him to prove it.

This is an extract of the cross – examination of DW by the plaintiff:

Q. You said I signed agreement with you. Can you show the agreement to the court?

A. No.

Q. How much do you charge a day when you are hired?

A. It depends on the nature of work.

Q. You said you worked for me for two days. Tell me the date.

A. I don't have the exact date. You have been taking to the site for two weeks.

The defendant's witness provided no iota of proof to back his assertion. He failed to give the date plaintiff took him to the site to work. Clearly, the defendant's witness could not prove satisfactorily to the court that plaintiff took him to his site for two weeks.

I will now consider the 5th and 6th issues together which are whether or not the defendant mishandled the tricycle and whether or not the condition of the tricycle was good.

It was the case of the plaintiff that the tricycle was mishandled by the defendants. The 2nd defendant denied the assertion and claimed the tricycle was in good a condition.

To know the state of the tricycle, the court must know the state of the tricycle before it was given to the defendants. The plaintiff stated in his evidence that the tricycle was brand new and was in good condition at the time he handed it over to the defendants.

It is intriguing that the defendants did not raise the issue of the condition of the tricycle when they took it from the plaintiff and started working with it. To me, it is an after-thought for the defendants to now raise the issue regarding the condition of the tricycle and to allege that it was not in a good condition when it was released to them.

Was the tricycle mishandled by the defendants? Was it in a good condition before plaintiff took it from the defendants' residence? It was the case of the plaintiff that the defendants did not handle the tricycle well and that the tricycle was in a bad state when he took it from the defendants' residence.

The evidence on record shows that the defendants parked the tricycle at their residence. It is clear that the tricycle was not in a good condition when they parked. It is obvious that the tricycle was faulty when they parked it. The logical inference is that the defendant did not handle the tricycle well by failing to maintain it in contravention of the the agreement they entered into with the plaintiff. To my mind, if the tricycle was in a good condition, the defendants would have been using it and that they would not have parked it. I therefore find as a fact that the defendants mishandled the tricycle and that when the tricycle was parked at the defendants' residence, it was not in a good condition.

I will now consider the issue whether or not plaintiff incurred GH¢ 939.00 in repairing the tricycle.

It was the case of the plaintiff that he repaired the tricycle after the defendants parked it. He said he spent GH¢939.00. According to the plaintiff, since the defendant put the tricycle in the deplorable state, he had to repair it. The defendants denied any liability. According to 2nd defendant, the tricycle was not in a deplorable state. The 2nd defendant contended that a tricycle in a deplorable state could not have been moved from Kpong to Spintex.

From the record, the defendants or the person working with the tricycle parked the tricycle. The question is why did they park the tricycle? The defendants could not provide any tangible reason why they parked it. It is my view that if the tricycle was in a good condition, the defendants would not have parked it.

Now from their own agreement with the plaintiff as per Exhibit A, the defendants were to bear full responsibility for maintaining the tricycle. Though the defendants denied that they have not been maintaining the tricycle, they did not provide any proof to satisfy the court that they have maintained the tricycle.

Since the defendants are responsible for maintaining the tricycle, but fail to do so, plaintiff could have waited and see his tricycle 'rotten' way. The evidence shows that he indeed repaired then tricycle. He tendered EXHIBIT D series, being receipts to show the items he bought to repair the tricycle. In view of this I hold that the defendants are liable to pay GHC939.00 to the plaintiff.

The next issue is whether or not defendants are liable to pay GHC2,368.33 and GHC939.00 to the plaintiff.

From the records, defendants were to pay GHC375.00 a week or GHC1,500.00 a month. The defendants commenced work from 12/11/2019 to 10/2/2020. The total sales to be made was GHC4, 653.33 less one day account that is GHC53.30, since the defendants started work on 12/11/2019 and not 11/11/2019. Defendants accounted to the plaintiff to the tune of GHC2,285.00. I hold that the defendants liable to pay GHC2,368.3 less GHC53.33 that is GHC2,315.00. I have already found that the plaintiff incurred GHC939.00 in repairing the tricycle and that the defendants are liable to refund the said money to the plaintiff.

From the above findings and on the balance of probabilities, I enter judgment for plaintiff against the defendants. The defendants are ordered as follows:

1. Pay GHC2, 315.00 to the plaintiff being the account they did not render to the plaintiff for working with the tricycle from 12/11/ 2019 to 10/2/2020.
2. Pay GHC939.00 to the plaintiff being money spent in repairing the tricycle.
3. Pay cost of GHC1,000.00 to the plaintiff.

SGD

HIS HONOUR FESTUS FOVI NUKUNU

**(CIRUIT COURT JUDGE)
(ADDITIONAL MAGISTRATE)**