IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

(PC) CIVIL APPEAL NO. 31 OF 2021

(Arising from Civil Appeal No 9 of 2019 in the District Court of Hanang at Katesh, Originating from Civil case no 34/2019 at Hanang Primary Court in Hanang District)

FAUSTA PAULO .....APPELLANT

VERSUS

QADUWE BURA ..... RESPONDENT

JUDGMENT

16/05/2022 & 25/07/2022

KAMUZORA, J.

The Appellant Fausta Paulo being dissatisfied with the decision and order of the first appellate court preferred a second appeal to this court against the Qaduwe Bura the Respondent herein on the following grounds: -

1) *That, the Learned Senior Resident Magistrates who presided over the appeal erred both in law and fact in dismissing the Appeal by discarding introduction and reception of new testimony through the Appellant without according any judicial reasoning.*
2) *That, the Learned Senior Resident Magistrates who presided over the appeal erred both in law and fact in partly allowing the appeal when failed to evaluate and re-assess properly the evidence of*

witness from both sides as scripted from the trial court consequently reached unjustifiable decision.

3) *That, the whole judgment in Civil Appeal No. 9 of 2019 involves serious irregularities and tainted with illegalities.*

Briefly, the Appellant instituted a suit at the Primary Court of Katesh (the trial Court) claiming against the Respondent for the payment of Tshs. 1,795,000/= being the loss incurred by the Appellant in search of the Respondent after he failed to deliver to the Appellant 5 sacks of maize equivalent to Tshs. 205,000/=. The trial court upon hearing both parties made a finding that the Appellant failed to discharge his duty of proving the claim against the Respondent hence the suit was dismissed. Being aggrieved by that decision the Appellant preferred an appeal to the District Court of Hanang at Katesh (The first appellate Court) which upheld the trial court's decision and dismissed the appeal hence the Appellant preferred this second appeal.

Hearing of the appeal was by way of written submissions and as a matter of legal representation the Appellant enjoyed the service of Mr. Erick Erasmus Mbeya, learned advocate while the Respondent engaged Mr. Tadey Lister for drafting only. The Appellant decided to submit jointly for the first and third grounds of appeal while the second ground was argued separately.

Arguing for the first and second ground of appeal the Appellant submitted that, after the parties entered in to an agreement to sell maize which was not honoured by the Respondent the Appellant decided to institute a suit against the Respondent at the primary court of Hanang in Criminal case No. 16/2019 and the Respondent was ordered to return the sale price. That, the first appellate court is faulted for refusal of reception of new evidence and failure to give reasons of its refusal in admitting additional evidence. Reference was made to the case **of Bahati Moshi Masabile T/A Nono Filing Station Vs. Camel Oil (T),** Civil Appeal No 216/2018 HC at Dar es Salaam provides for the essence of giving reasons in a judicial decision.

The Appellant added that, the act of refusal of reception of new evidence was in violation of Rule 14 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules GN. No. 312 of 1964 and section 21 (1) (a) and (b) of the Magistrates Courts Act CAP 11 RE 2019.

Arguing for the 2nd ground of appeal the Appellant submitted that, the nature of suit is breach of contract. That, after the Respondent breached the terms of the contract the Appellant suffered loss hence entitled for compensation occasioned by routine follow-ups to the

Respondent. In support of his submission, he cited the case of **Jackson Mussetti V Blue Star Service Station** [1997] TLR 114, **Incar Tanzania Ltd V Magugu Farm Ltd and Cooperative and Rural development Bank,** [1995] TLR 8. The Appellant insisted that, he suffered torture in making follow-up over the performance of the agreement and listed the incidents for follow-up. He insisted that, in all those incidents he incurred costs hence he deserves to be compensated. He added that, the trial court ought to examine the damaged suffered by the Appellant in monetary form from the breach of contract. He supported the argument with the cases of **Gerald Kazimoto Lupemse v. Michael Kihundo,** Misc. Land Case Appeal No 12 of 2012, **Tanzania railways Corporation (TRC) vs. GBP (T) Limited,** Civil Appeal No 218 of 2020 CAT at Tabora (Unreported), **Adelina Koku Anifa and another v Byarugaba Alex,** Civil Appeal No 46 of 2019, CAT at Bukoba (Unreported).

The Appellant further submitted that, this court is vested with powers to re-evaluate the substance, nature and quality of evidence of the trial court for final disposal of the case. To cement on this issue, he cited the case of **Ndizu Ngassa Vs. Massia Magasha**, [1999] TLR 202.

Basing on the strength of submissions the Appellant prays for this court to invoke section 29 (a) of the Magistrates Courts Act and Rule 14 of the Civil Procedure (Appeals in Proceedings originating in Primary Courts) and receive additional evidence on damages suffered by the Appellant to the tune of Tshs 1,795,000/= that was pleaded and analysed in the Civil Case No. 34/2019 at Hanang primary court. He also prays for this court to allow the appeal by quashing both the proceedings, judgment and decree of the subordinate courts with costs.

Before responding to the grounds of appeal the Respondent raised an issue that the Appellants written submission in support of appeal was filed out of time. He alleged that a copy of the submission received by the Respondent was stamped to be received on 19/4/2022 while the court order required the Appellant to file the submission on 11/04/2022. He however acknowledged that the document was signed by the registry clerk on 11/4/2022.

Replying to the first and third grounds of appeal the Respondent submitted that, the first appellate court exercised its discretionary power judiciously. He explained that, the claim in Civil Case No. 34/2019 was for the payment of tshs 1, 795,000/= resulting from bill of cost emanating from Criminal Case No. 16/2019. That, there was no any

case for the breach of contract filed by the Appellant via Civil Case No. 34/2019 rather costs resulting from a criminal case. That, the issue before the trial court was whether the evidence advanced proved the claim.

The Respondent further submitted that, the duty to direct the lower court to take additional evidence by the appellate court is not automatic as it is important for the party to show that he was not given a chance to prosecute or defend his case. That, it is crucial to show the circumstance forcing new evidence to be taken. The Respondent was of the view that, neither of the above reasons was advanced by the Appellant to guarantee reception of additional evidence.

Regarding the second ground he submitted that, the records of the trial court and the first appellate court are clear and no error in the decision made therefrom. The Respondent prays that the appeal be dismissed with costs.

In a brief rejoinder submission, the Appellant explained on the argument that civil case No 34/2019 originated from a criminal case. She submitted that, such argument is frivolous and unfounded for want of merit as the same is not based on taxation hence misconceived. On the argument based additional evidence the Appellant added that, the

lower court failed to properly attend the suit and referred the case of **Tanzania Railways Corporations (TRC) Vs. GBP (T) Limited** (supra). She maintained her prayer in the submission in chief.

I have considered the records of both the trial court and the first appellate court, the ground of appeal as well as the submissions by the parties. I would like first to address the concern raised by the Respondent as to whether the submission by the Appellant was filed within time. As per the court records it was ordered that the submission in chief filed on or before 11/04/2022. As per the exchequer receipt No. 25372797 it is evident that the filing fees was paid on 11/04/2022 meaning that the filing was on that date thus, within the prescribed time. Hence the claim that the submission was filed out of time is with no legal justification.

Reverting to the merit of the appeal as far as the first and third grounds of appeal are concerned, the Appellant faults the first appellate court for failing to order the additional evidence to be taken by the trial court and that no reason was advance for such failure. An issue that is disputed by the Respondent. Reading the record of the 1st appellate court, the Appellant did pray before the first appellate court for additional evidence be received under section 21 (1)(a) of the

Magistrates Courts Act CAP 11 RE 2019. However, the first appellate court rejected the Appellant's prayer.

I agree that under the above cited provision, an appellate court can hear additional evidence if there are reasons so explained. The said section of the Magistrate Act reads: -

> *"21. (1) In the exercise of its appellate jurisdiction, a district court shall have power-*
>
> *(a) to direct the primary court to take additional evidence and to certify the same to the district court or, for reasons to be recorded in writing, to hear additional evidence itself".*

In the spirit of the above provision, the reception of the additional evidence must be accompanied with good reasons as to why the same was not received during trial of the case. Justification for reception of additional evidence was best expressed in the case **of S.T.Paryani Vs Choitram and Others (1963) EA462,** whereby the Court quoted with approval **Lord Denning LJ** as he then was in the **lADD Vs MARSHAll (4) (1954) 3 All E.R 745** and clearly enunciated by the Court of Appeal for Eastern Africa in **Karmali Tarmohamed and Another Vs. IH Lakhani & Co. (3) [1958] E.A. 567** in which the Court stated that: -

*"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: **first** it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; **second**, the evidence must be such that, if given would probably have an important influence on the result of a case, although it need not to be decisive; **third**, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible...."*

That reasoning was adopted by the Court of Appeal of Tanzania in **Ismail Rashid Vs. Mariam Msati,** Civil Appeal No. 75 of 2015 (unreported) CAT at Dar es salaam and held that,

"The appellate court may admit evidence improperly rejected by the lower court or it may allow additional evidence to be given when it is of opinion that it is required for a proper decision of a case. The legitimate occasion for admission of additional evidence is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent; and not where discovery is made outside the court of the fresh evidence and the application is made to import it. The rule is not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill up omissions in the court of appeal."

The records before the 1st appellate court specifically page 5 to 7 of the proceedings shows that while submitting in support of appeal the

counsel for the Appellant prayed for reception of additional evidence by the trial court under section 21 (1) of the MCA. The district court refused such a prayed and the Appellant is complaining that no reasons were advance for such refusal. However, the record page 7 of the typed proceeding shows the reasons by the district court and the same read,

> *"...I did go through the trial court records, it is clear that the Appellant was afforded an opportunity to adduce her evidence but there is no place in the trial court proceedings that shows that the Appellant prayed to tender any exhibits. So at this juncture this court finds no reason to add new evidence as prayed by the Mr. Mbeya because the Appellant had a duty to prove his case before it..."*

In my view what is quoted above are the reasons which the 1st appellate court considered not to grant the prayer for additional evidence. Thus, the contention that no reason was advance is baseless.

The Appellant moved this court to invoke section 29(a) of the Magistrates Courts Act and receive additional evidence. I have the similar view with that of the first Appellant court that there are no good reasons advanced to warrant the reception of additional evidence. It was no established if the Appellant was denied to present her evidence before the trial court. If such evidence was important and was

unreasonably refused at the trial court, that could have been one of the grounds of appeal. But in the Appellant's petition of appeal and amended petition of appeal no ground was raised challenging the refusal in reception of the Appellant's evidence. In other words, there are no reasons advanced by the Appellant for the prayer of addition evidence. It was not explained if there was any lacuna seen or defect depicted in the proceedings of the trial court that could intel the reception of additional evidence. It was not shown if the intended the evidence could not have been obtained with reasonable diligence for use at the trial or how such the evidence can influence on the result of a case and if the same not decisive and can be presumably to be believed, credible and not incontrovertible. To me the prayer was for admission of new evidence aimed at filling in the missing facts in the Appellant's case. Thus, the contention that there was irregularity in the judgement of the 1st appellate court is wanting. It is my settled mind therefore that, the 1st appellate court was correct in rejecting the admission of additional evidence. The 1st and 3rd grounds are meritless.

On the second ground of appeal the issue for consideration is whether there was a proper analysis of evidence by the first appellate court. It is the claim by the Appellant that since there was a claim for

breach of contract then the Appellant ought to be compensated for the loss arising from the loss. It is a common knowledge that in a civil proceeding, whoever alleges bears the evidential burden to prove and the standard in civil case is on balance of probabilities. The provision of law under sections 110 and 111 of the Evidence Act Cap 6 RE 2019 are relevant. For case law, see the case of **Anthony M. Masanga Vs. Penina (Mama Mgesi) & Lucia (Mama Anna),** Civil Appeal No. 118 of 2014 (unreported) which was cited in approval in the case of **Geita Gold Mining Ltd & another Vs. Ignas Athanas,** civil Appeal No 227 of 2017 CAT at Mwanza (Unreported) where it was held that,

> *"let's begin by re-emphasizing the ever cherished principle of law that generally, in civil cases the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law Evidence Act, Cap. 6 of the Revised Edition, 2002."*

That being the stand of the law, and in reference to the case at hand, it is the duty of the Appellant at both the trial court and at the first appellate court to prove on the amount of money claimed as emanating from the loss but the same was not done hence it was the reason as to why the first appellate court as well as the trial court did dismiss the Appellants claim as it was not proved on balance of

probabilities. Reading the judgement of the first appellate court there is clear analysis of the evidence based on the ground of appeal. The 1st appellate court made it clear why it considered the evidence as not proving the claims against the Respondent. My further analysis takes me to the same conclusion that no evidence proving the claims against the Respondent.

From the trial court records, the suit was for claim of Tshs. 1,795,000/= as costs incurred after the Respondent breached the agreement with the Appellant. The evidence by the Appellant reveals that the Appellant's original claim against the Respondent was Tshs. 205,000/= which the Respondent delayed in paying.

The Appellant instituted against the Respondent Criminal Case No. 16 of 2019 at Endasaki in Hanang' District for the offence of obtaining money by false pretence. The Respondent was found guilty and ordered to compensate the Appellant the amount of Tshs 205,000/=. The evidence reveals that such order was complied with by the Respondent by paying the amount ordered and no appeal was preferred therefrom. Subsequently, the Appellant instituted Civil Case No. 17 of 2019 before the same primary court claiming for Tshs. 1,295,000 as costs resulting from prosecuting Criminal Case No. 16 of 2019. The trial court made a

finding that the claim was not proved and dismissed the suit and no appeal was preferred therefrom.

The Appellant again instituted a fresh suit Civil Case No. 34 of 2019 before the primary court at Katesh this time claiming for Tshs. 205,000/= as original claim and Tshs. 1,795,000/= as loss suffered for breach of agreement. The trial court made a finding that the Appellant's claim was not proved on the required standard and dismissed the suit. The evidence by the Appellant reveals that the costs of Tshs. 1,795,000 was used in making follow for the original claim.

With that evidence, I agree with the two lower courts' finding that the claim was not justified by the Appellant. In fact, although there were changes in the amount claimed, the suit was based on the same facts that was raised before Endasaki primary court and determined. The Appellant preferred no appeal but opted to file a fresh suit which however he failed to prove as no evidence justifying the costs claimed. That being said, the first and third grounds of appeal are devoid of merit.

In the upshot, I find this appeal devoid of merit and its hereby dismissed with costs.

DATED at **ARUSHA,** this 25th day of July, 2022.

D.C. KAMUZORA

JUDGE