IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

CIVIL APPEAL NO. 75 OF 2023

(*Appeal from the Decision in Civil Appeal No. 13 of 2020 of Ilemela District Court at Ilemela by Hon. Sivonike, RM date 27/2021, Originated from Ilemela Primary Court Civil Case No. 187 of 2020)*

JASSIE AND COMPANY LTD.....APPLICANT

VERSUS

MASA SECURITY SERVICES LTD.....RESPONDENT

JUDGMENT

22nd March & 29th April, 2024

ITEMBA, J.

This is a second appeal. The brief background is that, on 5/4/2016, JASSIE Co. Ltd. the appellant, entered a contract with MASSA security services Ltd, herein the respondent. According to the said agreement (Exhibit P1) the respondent was required to provide security guards for safeguarding the appellant's construction site located at Geita. However, things took a different turn, on 28/9/2020 the appellant sued the respondent for breach of contract which occurred in September 2018. The appellant was claiming an amount of **TZS 29,421,735/=** which is the value of properties alleged to have been stolen at the site under the respondent's watch.

Records show further that, at the trial court, each party had one witness. One Abas Thabit (SM1) testified for the appellant and produced 4 exhibits namely Parties' Agreement (**Exhibit P1**), Demand Notice from (**Exhibit P2**), A letter and exhibits from the appellant displaying the value of properties (**Exhibit P3**) and A response letter from the Respondent dated 15/11/2028 (**Exhibit P4**). For the respondent, her witness was one Davis Sifael Mmari (SU1) who denied all the claims by the appellant.

At the end of hearing, the trial court ruled in the appellant's favor, a decision which was turned down by the first appellate court.

The appellant is aggrieved by the said decision and he filed the present appeal with the following grounds: That;

(i) That, the Appellate Magistrate erred in Law and fact by holding that the evidence was not evaluated, while the same was evaluated by the trial court and eventually the decision were given on the basis of the said evaluation.

(ii) That, the Appellate Magistrate erred in law and fact by quashing the decision of the Trial Court without considering, that the case was proved on the balance of probabilities.

At the hearing of the appeal, both parties were represented by learned counsels. The appellant was represented by Kulwa Samson and

Ondijo Silvanus while the respondent had the service of the Lugano Kitangalala.

Submitting for the appeal, starting with the first ground, Mr. Samson stated that the trial court was justified in deciding in favor of the appellant. That, in terms of the decision in **Okena v R** 1972 EA 33, the 1st appellate court had a duty to consider whether the trial court's decision should stand. That, had the 1st appellate court properly considered the trial court's records, it would have noted the weighty evidence from the appellant based on the witness and the exhibits produced.

He added that according to Exhibit P4 and the trial court's judgment, the respondent admitted that there was theft, therefore, there was no need to refer the matter to a criminal court for proof of theft. That, the 1st appellate court was wrong in stating that theft was not proved.

In respect of the second ground, he submitted that, the standard of proof in civil cases in on balance of probabilities and the appellant discharged his duty is proving her case. That, the trial court was justified because it weighed the evidence from both sides on balance of probability and decided in favor of the appellant. He cited the decision in **Hemedi**

Saidi v Mohamed Mbilu [1984] TLR 113 that the party whose evidence is heavier is the one to win the case.

He ended his submissions by emphasizing that, this being the 2nd appellate court, it has mandate to reconsider the trial court's proceedings and come up with its own findings including upholding the trial court's decision, as it was held in **Salum Mhando v R (**1993) TLR 170 and **Hassan Mzee Mfaume v R** 1981 TLR 167 CAT.

In reply, Mr. Kitangala opted to argue both grounds jointly as he considered them related. He submitted that, the 1st appellate court was justified in its decision because it went through Exhibit P1 which was a contract between the parties and it was satisfied that, if there was theft the appellant had a duty to report to police and to the respondent within 24 hours. That, nothing was done by the appellant until when the respondent has finalized his contract and when he wrote a letter to claim her payment, she was told there was theft at the site. That, this was an important factor which the trial court did not consider and that is why there was a need for the former decision to be revised. He argued further that, according to the 1st appellate court's decision, the appellant's claims were

criminal but there was no criminal case instituted at any court or even any police station that is why the court saw there was no enough evidence.

He argued that, if there were criminal allegations, they were supposed to be proved by a criminal court first and the respondent never admitted that there were theft but he just required the appellant to prove that the said theft happened when the respondent was still working at the appellant's site or not.

Mr. Samson rejoined by insisting that the appellant is claiming his refund due to the theft which took place and that under exhibit P4 the respondent admitted to be indebted by the appellant.

I have considered the submission by both parties and the main issue is whether this appeal, has merit. The two grounds of appeal are related therefore it is suitable to deliberate them jointly. As mentioned hereinabove, at the trial court, the appellant's main claims were that the respondent has breached their security contract and that they deserve a refund amounting to TZS 29,421.735/=.

SM1 testified that, they entered a contract with the respondent and in 2018 the respondent issued them a demand notice (exhibit P2) of TZS. 25,716,108/- for the security services rendered. That, the appellant did not

acknowledge Exhibit P2. She claimed that there was loss of properties at her site therefore, they could not issue any payment. Instead, it was the respondent who had to pay the appellant TZS 20,421,336/=. SM1 told the trial court that, the said lost properties were a '*pump*' valued at TZS 21,000,000/-, '*alternator of the bull dozer'* valued at 7,778,658/- and that there was advance payment already made to the respondent amounting to TZS 2,000,000/-. That, the respondent agreed to pay the said debt upon the appellant providing proof of the purchasing price of those properties. Apart from the agreement and demand notice, SM1 also produced letters from each party Exhibits P3 and P4 regarding the claims. Upon being questioned by the court, SM1 explained that their supervisor one Gurdip Sing informed the respondent about theft orally and when the respondent did not take any step, he (the supervisor) reported the matter to police.

It is trite law that, one who allege must prove. As already stated, the source of appellants' claim for refund is theft which occurred at her site. However, looking at SM1's evidence, it does not explain clearly about the occurrence of the alleged theft. I would expect SM1 to expound first on when the said theft occurred. This is important because the said theft must have been occurred within the contract period for the respondent to be liable. Also, according to the contract, the report must have been made

within 24 hours after the said theft. Second, about the alleged report made to the police records are silent as to what is the status of the case? Third, the said supervisor who is mentioned by SM1 was an important witness who did not testify before the court and there are no reasons advanced for his nonattendance. I have noted exhibit P4 which is a letter explaining the list of stolen items and there is a quotation of the new alternator from MANTRAC and a copy of BOQ indicating the amount payable for the pump stolen. This document just shows the list of properties and their value but it does not link the respondent with theft. Besides, the price of the 'Alternator of Bull Dozer D-7' mentioned in Exhibit P3 is TZS 5,821,736/- while SM1 told the court that the same item costs TZS 7,778,658/- this is a clear contradiction which discredit the evidence of SM1.

Before going to the details of the contract, there is Exhibit P3 which the appellant insists that the respondent conceded to all the claims. I have gone through it and I do not see any admission by the respondent. What the respondent wanted was proof of the existence and value of the properties.

Moving to the agreement itself, which was brought to court by the appellant, this is what is found in item 10 which it titled: '*Upande wa Mwajiri/ Mteja*':

'10. Mwajiri atatakiwa kutoa taarifa ya wizi/upotevu kwa uongozi au polisi ndani ya saa 24 kwa hatua zaidi.'

This part can be generally translated that the appellant who was the client of the security services had a duty to report any theft incidence either to the administration or to the police within 24 hours, for further steps to be taken. What did the appellant do? As explained above, so far, it is not even known when the said theft happened, assuming that the supervisor reported orally to the defendant, as said by SM1, the said supervisor did not testify on that and there is no report of the police case even the RB or IR number of the said report.

Still on the same agreement, item 5 under the title '*Upande wa Kampuni'* states:

'5. Kampuni itamlipa mwajiri/mteja endapo kutakua na upotevu wa mali kwa uzembe wa mlinzi ikithibitika kisheria au kwa makubaliano pande mbili……'

This part is also describing the roles of the respondent as the service provider and the said item 5 means that the respondent will compensate the appellant if there is any loss caused by the guards' negligence and if it is lawfully proved or through mutual agreement of both parties. It is the law that parties are bound by their agreements freely entered. See the

cases of **Simon Kichele Chacha vs Aveline M. Kilawe** Civil Appeal No. 160 of 2018; and **Bytrade Tanzania Ltd vs Assenga Agrovet Company Ltd and another,** Civil Appeal No. 64 of 2018 (both unreported). So, as per the contract the appellant ought to have known that, before claiming for compensation there must be proof of loss, the appellant did not prove the loss before the court of law neither through mutual agreement. I cannot question the contents of the agreement because it was brought by the appellant himself and one cannot choose just part of the contract which interest them and drop the rest. The appellant's own evidence is against her.

If that is not enough, there is unchallenged evidence from 'SU1' that when the contract between the parties reached an end, handling of the properties was done peacefully and there were no complaints from the appellants and that, the appellant was at rest until when they were served with a demand notice.

To finalise, I will quote **section 110 of the Evidence Act** which has been echoed in countless decisions of the Court of Appeal including but not limited to **Paulina Samson Ndawavya v Theresia Thomas Madaha**, Civil Appeal No 45 of 2017 (unreported). It states;

'110. -(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'

This duty was not discharged by the appellant.

Based on these anomalies, it cannot be said even on the balance of probabilities that theft occurred at the appellant's site under the respondent's watch which can entitle the appellant any refund.

Having said that, I find no reason to fault the 1st appellate court decision. This appeal has no merit and it is hereby dismissed, with costs.

It is so ordered.

DATED at **MWANZA** this **29th** Day of April, 2024.

L.K.J. ITEMBA

JUDGE

Judgment delivered under my hand and seal of the court this 29th Day of April 2024 in the presence of Advocate Kulwa Samson for the appellant and in the absence of the respondent and Ms. G. Mnjari RMA.

L. K. J. ITEMBA
JUDGE