IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MWANDAMBO, J.A., FIKIRINI, J.A, And NGWEMBE, J.A.)

CIVIL APPEAL NO. 491 OF 2021

THE ATTORNEY GENERAL .....1st APPELLANT

THE CHIEF EXECUTIVE TANZANIA NATIONAL ROADS AGENCY (TANROADS).....2nd APPELLANT

VERSUS

ITEX SERL.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Tabora)
(Songoro, J)

dated the 03rd day of October, 2013

in

Civil Case No. 06 of 2012

.....

JUDGMENT OF THE COURT

7th & 13th June, 2024.

FIKIRINI, J.A.:

Itex Serl, the respondent, a transport company registered in Kigali, Rwanda, had its truck registration number RAB 961 and trailer registration number 0428 impounded at Mwendakulima, Shinyanga Region, on 7th July, 2011 after the truck was found to have exceeded axle control laws. Weighing the vehicle using a mobile weighing scale indicated it had exceeded the maximum weight by 38,550 kg. Despite back-and-forth communication and consultation, no resolution was reached.

Subsequently, the respondent filed a Civil Case No. 6 of 2012 in the High Court at Tabora.

The appellants, who duly filed their written statements of defence, disputed the claim and instead demanded payment of TZS 57,785,000 as a fine for overloading, along with USD 20.00 per day from the fourth day of impoundment as storage charges.

At the trial, Bisamaza Private (PW1), the respondent's Managing Director, testified as a witness, while Jelson Rwiza (DW1) was summoned as the first appellant's witness, the Chief Executive of the Tanzania National Roads Agency (TANROADS). The Attorney General, appeared as a second appellant without fielding any witnesses.

Based on the pleadings, the trial court framed the following issues:

1. *Whether the plaintiff's vehicle with registration No. RAB 961 and its trailer with registration No. 0428 were overloaded by 38,550 kg.*
2. *Whether the plaintiff's vehicle mentioned above was lawfully impounded by the first defendant.*
3. *Depending on the answers to issues 1 and 2, whether the plaintiff is entitled to payment of TZS 500,000 per day as loss of income.*
4. *What other reliefs the parties are entitled to.*

In the judgment, the trial Judge concluded that the first appellant's use of an unauthorized scale was improper and in contravention of Regulation 15(4) of the Road Traffic (Maximum Weight of Vehicles) Regulation, Government Notice No. 30 of 2001. Consequently, the Judge declared that the manner and outcome of the weight measurement could not legally stand plus other reasons, entered judgment in favour of the respondent.

The appellants were dissatisfied with the judgment and its decree. They filed the present appeal armed with five grounds. However, during the hearing of the appeal, the first and fifth grounds were marked as abandoned leaving the second, third, and fourth grounds, which were crafted and renumbered as follows:

1. *That the proceedings and judgment of the High Court in Civil Case No. 6 of 2012 are unlawful against the appellants as the High Court proceeded and made that decision in favour of the plaintiff who had no locus standi In law.*
2. *That the proceedings and judgment of the High Court in Civil Case No. 6 of 2012 are unlawful for want of proof that the plaintiff was the lawful owner of the impounded vehicle.*
3. *That the judgment and decree of the Hlgh Court relied on an issue or matters that were not addressed and argued*

by the parties to the effect that the appellants were condemned unheard contrary to the principles of Natural Justice.

During the hearing of the appeal on 7th June, 2024, the appellants were represented by Messrs. Lameck Merumba and Justinian Byabato, learned Senior State Attorneys, and Samwel Mahuma, learned State Attorney. Mr. Saikon Justin Nokoren, learned Counsel, appeared for the respondent.

Mr. Merumba, addressed the Court on behalf of the appellants' team. In his submission, he had nothing to add to their already filed written submissions, apart from formally abandoning the first and fifth grounds of appeal.

We wish to begin with the third ground: whether the appellants were condemned unheard contrary to the principles of natural justice.

In their written submissions, the appellants challenged the trial court's action on the issue of the lack of authorization for the use of the portable weighing scale by the Weights and Measures Authority (WMA) *suo motu* without inviting parties to address the court on the issue. The appellants referred the Court to our previous decision on this subject in the case of **Wagesa Joseph M. Nyamaisa v. Chacha Muhongo,** (Civil Appeal No. 161 of 2016) [2018] TZCA 224 (28th September, 2018;

TANZLII), in which the Court emphasized that natural justice demands that the right to be heard be sternly observed.

They asserted that in civil proceedings, the settled legal position is that parties are bound by their pleadings and that courts likewise must hear and determine disputes based on those pleadings. To substantiate this position, they cited the case of **Swila Secondary School v. Japhet Petro**, (Civil Appeal No. 362 of 2019) [2021] TZCA 169 (30th April, 2021; TANZLII).

Although the respondent did not file any written submissions, Mr. Nokoren in his oral submissions, discounted the appellants' submissions as misconceived. According to him, the Judge assessed whether the trailer was overloaded which he was entitled to do regardless of the absence of the appellants' written submissions. He contended that the trial Judge had to resort to the law to determine if there was overloading and what instrument was used to arrive at his conclusion on the basis of the evidence on record.

When probed by the Court about the correctness of weight and overloading, whether it was pleaded and an issue framed for the trial court's determination, Mr. Nokoren referred to pages 72 to 84 of the record of appeal, where DW1 asserted that the weighing was done according to the law. He additionally questioned the appellants' intention of raising this

point while the truck and trailer had already been handed back to the owner after the trial court's decision as shown on page 162 of the record of appeal. He concluded his submission that the third ground of appeal had no merit and prayed for its dismissal.

In rejoinder, Mr. Merumba maintained that the appellants' right to be heard was infringed, as the trial Judge concluded that the first appellant used an unauthorized weighing scale, which was not one of the issues before the trial court for determination. Moreover, he argued, the parties were not given an opportunity to address the court on the issue raised *suo motu* by the Judge in the course of composing the judgment. He further submitted that in any case the trial Judge incorrectly interpreted Regulation 15(4) of GN No. 30 of 2001, had it been an issue before the court. On the other hand, it was argued that the trial Judge shifted the burden of proof on the appellants contrary to the principle established in the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11th December, 2019; TANZLII) in which the Court emphasized that the one who alleges must prove. Finally, Mr. Merumba urged the Court to allow the appeal.

We have examined the record of appeal and considered the opposing submissions by the learned counsel for the parties. Admittedly, upon close scrutiny of the High Court judgment, the complaints raised by

the appellants appear to be founded. We will explain. **First**, on page 111 of the record of appeal, the trial Judge, in what he termed his brief observation, intensively discussed the right of appeal provided in Regulation 17(1) and (2) of GN No. 30 of 2001. **Second**, he equally immersed himself in the issue of enforcement of axle load control. **Third,** on pages 113 to 116 of the record of appeal, the trial Judge considered whether the weighing measurements of the truck were according to the requirements in GN No. 30 of 2001, with a particular focus on compliance with Regulation 15(4). The trial Judge concluded that the provision was not complied with resulting in a finding that the entire procedure of the weighing measurement was vitiated.

In our considered view, points discussed by the trial Judge were neither pleaded nor framed as issues to allow parties to adduce evidence in that respect. When the trial Judge felt the need to address these issues, he should have asked the parties to address him rather than proceeding without any input from the parties.

The situation would have been different had there existed un-pleaded facts but from the course followed at the trial, an issue on those facts was left to the court for decision which unfortunately was not the case in the present appeal. On the authority of Odds **Jobs v. Mubia** [1970] E.A 476 quoted by the Court in **Astepro Investment Co. Ltd v.**

Jawinga Company Limited, (Civil Appeal No. 08 of 2015) [2018] TZCA 278 (30th October, 2018; TANZLII) and **Jaluma General Supplies Ltd v Stanbic Bank (T) Ltd**, (Civil Appeal No. 11 of 2013) [2013] TZCA 494 (30th July, 2013; TANZLII). Since that was not the case, and considering that the trial court's decision was influenced by matters which were not before the trial court for its determination neither did the trial court frame any issue from those matters, such decision cannot stand.

The rule that the case must be decided on the basis of the facts and from the issues is legendary. In the **Scan Tan Tours Ltd v. The Registered Trustees of The Catholic Diocese of Mbulu** (Civil Appeal 78 of 2012) [2018] TZCA 472 (9th July, 2018; TANZLII) the Court subscribed to a statement by Scrutton, J in **Blay v. Pollard & Morris** [1930] 1 K B 628 at p. 630 thus:

> *"We are of the considered view that generally a judge is duty bound to decide a case on the issues on record and that if there are other issues to be considered they should placed on record and the parties given an opportunity to address the court on those questions....failure to do so results in a miscarriage of justice."*

Having so held and being satisfied that the trial court's decision, subject of the appeal in the above cited decision was based on issues not

framed for determination, it declared it a nullity, quashed it and set aside the decree.

We have a number of decisions that uphold this principle, such as **Lengai Ole Sabaya & Others v. The Director of Public Prosecutions** (Criminal Application No. 3/02 of 2023) [2024] TZCA 72 (20th February, 2024; TANZLII); **Hamisi Rajabu Dibagula v. Republic** [2004] T.L.R. 181. All these decisions echo what was stated in **Abbas Sherally & Another v. Abdul S. H. M. Fazalboy**, Civil Application No. 33 (unreported) where the Court emphasized:

> *"The right to be heard before adverse action or decision is taken agalnst such a party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice."*

In the appeal before the Court, it is plain that the parties were not given the opportunity to be heard on the issues raised *suo motu* by the trial Judge when composing judgment and thus the same must suffer the same fate.

Given these circumstances, we allow ground 3 of the appeal. Consequently, we are constrained to nullify the High Court proceedings, quash the judgment and set aside the orders as we hereby do. This ground is sufficient to dispose of the entire appeal and therefore, we do not think any discussion on the 1st and 2nd grounds will be necessary.

In light of the above, we allow the 3rd ground of appeal. Going forward we direct that the record to be remitted to the trial court for the hearing de novo. Considering, the circumstances resulting in our final order we make no order as to costs. Order accordingly.

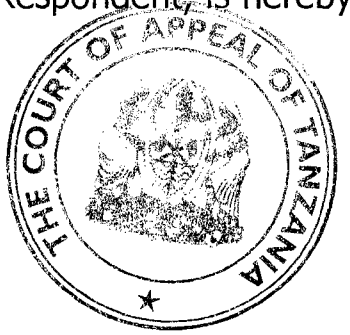
DATED at **TABORA** this 13th day of June, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of June, 2024 in the presence of Mr. Samwel Mahuma learned State Attorney for the Appellants, also holding brief for Mr. Saikon Justin Nokoren learned counsel for the Respondent, is hereby certified as a true copy of the original.



J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL