IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

PC CIVIL APPEAL NO. 48 OF 2019

(Appeal from the District Court of Babati, Civil Appeal No.9 of 2019, Originating from Bashnet Primary Court, Civil Case No. 1 of 2019)

PETER JOHN ..... APPELLANT

Versus

PAULO JOSEPH ..... RESPONDENT

JUDGMENT

Date of Last Order: 8th March, 2020
Date of Judgment: 29th May, 2020

Masara, J.

The Appellant herein unsuccessfully sued the Respondent before Bashnet Primary Court for a claim of 38 pieces of timbers he had hired him worth Tshs 669,000/=. The Appellant claimed to have entered into an oral contract with the Respondent, whereas the Respondent, on 29/10/2018, took 38 pieces of timber and one Iron sheet from the Appellant for a consideration of Tshs. 1000/= for each piece of timber for four days. The Appellant was paid Tshs. 39,000/=. The timbers were to be returned after completion of the lintel beam construction, that is on 2/11/2018. The Respondent took the said timber for the purpose of constructing a house belonging to one Leo Kwaslema which was at the stage of lintel beam construction. On 2/11/2018, only 13 pieces of timber were returned to the Appellant by Leo Kwaslema, the owner of the house under construction.

The remaining 25 pieces of timber and the iron sheet were to returned. The Appellant reported the matter to the Ward Executive Officer, who did not resolve the matter. He preferred a criminal charge but was advised to file á civil claim. The Appellant then sued the Respondent claiming Tshs. 669,500/= being the value of the unreturned pieces of timber and accrued rental charges considering the time they remained in the possession of the Respondent. The trial primary Court dismissed the claim on the ground that the Appellant had not proved the existence of the contract between himself and the Respondent and that he failed to summon as vital witnesses mentioned in evidence. The Appellant was dissatisfied with the trial court finding and thus preferred an appeal to the District Court of Babati (the first Appellate Court). The District Court dismissed his appeal with costs and confirmed the trial court finding. The Appellant was again dissatisfied and has preferred this appeal containing eleven grounds of appeal reproduced verbatim as follows:

a) *That, the District Court Magistrate erred in law and fact in insisting on the trial court's requirement to the effect that in order for the appellant to succeed in his claim, he must bring to the court as witness all persons involved in the transaction in establishing merits of the case;*
b) *That, the District Court Magistrate erred both in law and fact in that he failed to properly address the appellant's grounds of appeal;*
c) *That, the District Court Resident Magistrate erred in law in that he increased more issues than the two which were drawn at the hearing;*
d) *That, the District Court Resident Magistrate erred both in law and fact in stating /finding that the appellant has failed to clearly establish that there is a contract between the appellant and the respondent;*

e) *That, the District Court Resident Magistrate erred both in law and fact in concluding that the appellant has failed to establish as to whom he entered into a contract between Paulo and Leo;*
f) *That, the District Court Resident Magistrate erred both in law and fact in making inference that according to evidence on record it is not clear if there are terms and conditions agreed in the contract;*
g) *That, the District Court Resident Magistrate erred in law and fact in finding that according to the evidence on record the parties to the agreement their minds had not met in the same sense;*
h) *That, the District Court Magistrate erred both in law and fact when he found that the agreement subject matter of the case did not meet the legal requirement of a valid contract as per section 10 of the Law of Contract Act, cap 345 [R.E 2002];*
i) *That, the District Court Resident Magistrate erred in law and fact when he held that the appellant has failed to establish his case;*
j) *That, the District Court Resident Magistrate erred in law and fact in failing to properly analyse the evidence on record; and*
k) *That, the District Court Resident Magistrate erred in both law and fact in upholding the erroneous trial Primary court decision.*

The Appellant therefore prays that this court allow the appeal, reverse the concurrent decisions of the lower courts and allow his claims with costs. When the appeal came up for hearing, both parties appeared in person, unrepresented. It was resolved that the appeal be disposed of by way of written submissions. Both parties filed their submission as per the schedule.

Submitting on the substance of the appeal in support of the grounds of thereof, the Appellant opted to argue the 1st, 2nd, 9th, 10th, and 11th grounds of appeal combined. He reiterated that both the trial court and the first Appellate Court erred in holding that the Appellant was duty bound to bring as witnesses all persons who were involved in whole transaction leading to the case. The trial court in its judgment raised the point that

three important witnesses who were January Tluway, Leo Kwaslema and the Bashnet Ward Executive Officer were not called to testify. He added that in law, whoever avers that some facts exist must prove that those facts exist. The Appellant added that it is not the number of witnesses which matters rather the credibility of those witnesses, and the law requires one to prove the case on the balance of probabilities and not on the number of witnesses. To fortify his arguments, he cited various decisions, including ***Bakari Mhando Swanga Versus Shelukindo and 3 Others,*** Civil Appeal No. 389 of 2019 (Unreported), ***Goodluck Kyando Versus R*** [2006] TLR 363 and ***Director of Public Prosecutions Versus Simon Mashauri,*** Criminal Appeal No. 394 of 2017 (unreported).

The Appellant further faulted the findings of the two lower courts contending that as Leo Kwaslema was the Respondent's boss, it was the duty of the Respondent to call him to corroborate his assertions that as the owner of the house under construction, he was responsible to hire the timber and that he was the one who gave the timber to the Respondent. The Appellant then argued that failure to discharge that duty by the Respondent strengthened the Appellant's case. He cited the case of ***Lutter Symporian Nelson Versus A.G and Another*** [2000] TLR 419. He concluded these grounds by stating that the upholding of the trial court decision by the first Appellate Court was indicative that the District Court failed to properly address the Appellant's grounds of appeal and it also failed to analyse the evidence on record.

Arguing on the third ground of appeal, the Appellant contended that the first Appellate Magistrate framed only two issues for determination but in the judgment of the said court three more issues were added making a total of five issues. Therefore, the first appellate magistrate wrongly added the three issues. The appellant then argued the 4th, 5th, 6th, 7th, and 8th grounds of appeal arguing jointly. He averred that he sufficiently established before the trial court coherently, credibly and vide his strong evidence that there existed bailment contract between him and the Respondent. He defined bailment as per the Osborn's Law Dictionary, 10th edition. He also, made reference to section 100(1) and (2) of the Law of Contract Act, Cap 345 [R.E 2002].

The Appellant added that the agreement between the two stipulated that the Respondent would use the 38 pieces of timber for four days and return them together with the flat piece of drum on the fifth day. Therefore, the trial court did not consider and analyse the evidence of PW1, PW2 and PW3. He cited the case of ***Azizi Abdallah Versus Republic*** [1999] TLR 71 to emphasise that point. The Appellant reiterated that the first appellate magistrate concluded that the appellant has failed to prove clearly if there was a contract between the parties without even reassessing the evidence on record. He added that such bailment contract needs not be in writing as there were implied terms. He therefore submitted that the holding of the appellate magistrate that the agreement subject matter of the case did not meet the legal requirement of a valid contract as per section 10 of the LCA was faulty. The appellant further stated that even if there were no

contractual terms, it was the duty of the court to imply the necessary terms to the contract. He cited sections 112 and 113 of the LCA which require the court to infer implied terms.

The Appellant further faulted the trial magistrate's holding that he had no business licence hence incapable of entering into contractual relationship arguing that he was not doing the business of hiring timbers rather the Respondent approached him as his fellow mason. He stressed that even a single witness can prove a case to the required standard, and the court is bound to assess the credibility of the witnesses and the evidence on the record. He cited a litany of cases to expound his arguments such as ***Yohanis Msigwa Versus Republic*** [1990] TLR 148, ***Masoud Amlima Versus Republic*** [1998] TLR 25, ***Stanslaus Rugaba Kasusura and the A.G Versus Phares Kabuye*** [1998] TLR 338, ***Luther Symphorian Nelson Versus A.G and Another*** (Supra), ***Asia Idd Versus Republic*** [1989] TLR 265 and ***Edwin Isdori Elias Versus SMZ*** [2004] TLR 297.

The Appellant the asked this Court to allow his appeal by reversing the concurrent findings of the lower courts with costs.

Responding to the submission by the Appellant, the Respondent adopted the course taken by the Appellant. In responding to the 1st, 2nd, 9th, 10th and 11th grounds of appeal the Respondent conceded that it is the legal requirement that whoever alleges/claims must prove the facts he alleges to exist and the burden of proof is vested on the person who alleges those

facts. He argued that his evidence at the trial was found to be heavier therefore he proved his case on the required standards as required in civil cases, that is on the balance of probabilities. He cited the case of ***Hemed Said Versus Mohamed Mbilu*** [1984] TLR 113 to bolster his argument. He therefore reiterated that the appellant's evidence at the trial court was of no quality and the two lower courts were right in dismissing it.
Responding on the third ground of appeal, the Respondent submitted that the framing of issues is crucial for the magistrate to assist him to decide the case and come up with a correct decision. Therefore, he could not find any error in the way the first appellate magistrate framed the issues.

Submitting on the 4th, 5th, 6th, 7th, and 8th grounds of appeal, the Respondent stated that the first appellate court was right in holding that there was no contract between the Appellant and himself because the Appellant failed to bring competent witnesses before the court to prove existence of a contract between the two. He averred that Mr. Kwaslema being the owner of the house he was constructing is the one who took the timber and not the Respondent. Therefore, the Appellant was to bring competent witnesses to prove his claims failure of which the first appellate court was right in dismissing his appeal. He therefore asked the Court to dismiss the appeal with costs.

I have given deserving weight to both the grounds of appeal and the attendant written submissions both in support and against the Appeal. The pertinent issues for determination are whether there existed a contract

between the Appellant and the Respondent and, if the answer to the issue is in the affirmative, whether the two lower courts were wrong in not affirming the Appellant's claim for Tshs. 669,500/=.

Starting with the first issue, I note that the Appellant has named the type of contract they entered into as bailment contract. According to section 100 of the Law of Contract Act, Cap. 345 [R.E 2002], bailment is defined as follows:

> *"Bailment is the **delivery** of goods by one person to another for some purpose, **upon contract that they shall,** when the purpose is accomplished be returned or otherwise disposed of according to the directions of the person delivering them and the person delivering the goods is called the "bailor" while the person to whom they are delivered is called the "bailee"."* [Emphasis added]

From the above definition, it is prevalent that for a bailment contract to exist, there must be express terms to treat it as such. The question is whether the facts as presented at the trial leads to a conclusion that there was a bailment contract. A bailment contract is distinguished from a sale of goods contract in that while in the later ownership changes, in bailment the bailor retains ownership and the bailee is given possession for a limited period of time. It is akin to an agreement for hire. The first appellate Court concluded that there was no contract at all between the parties as what was alleged by the Appellant failed to conform to section 10 of the Law of Contract Act, Cap 345 [R.E 2002]. The trial court likewise stated that it was not made clear as to whether the Appellant entered into contract with the Respondent (the mason) or Mr. Leo Kwaslema (the owner) of the house under construction. Both these conclusions are not quite true. The

evidence the three witnesses on behalf of the Appellant's case were unanimous on the person who was handed over the timber. It is true that both the Respondent and the said Kwaslema went to the Appellant to fetch the alleged timbers. However, apart from the Respondent's evidence, no other piece of evidence suggested that the Appellant agreed with the said Kwaslema for the hiring of the pieces of timber. The Respondent shifted the responsibility to Kwaslema alleging that being the owner of the house he is the one to prepare all the materials required in the construction of his house. It was also on evidence that it is Mr. Leo Kwaslema who took back the 13 pieces of timber to the Appellant and according to the testimonies of PW2 and PW3 they thought he went to pick the rest of the timber. These facts may be suggestive that the said Kwaslema acquiesced to the hiring of the said Timber and he might have paid for the same as testified, but that does not make him privy to the agreement between the two. Having considered all the facts at the trial, I am settled in my mind that there was an agreement akin to a contract of bailment between the Appellant and the Respondent and that the Respondent did not honour the terms of the said agreement. I am aware that as a second appellate court I should desist from interfering with the unanimous findings of facts by the two lower courts; in this case, however, it is my finding that there are apparent misdirection and non-direction by the two lower courts entitling me to reassess the evidence and come to an independent conclusion. This position finds credence in the Court of Appeal decisions, including **Salum Mhando Versus Republic** (1993) T.L.R. 170 and ***Deemay Daati & 2***

Others Versus Republic, Criminal Appeal No. 80 of 1994 (CA) (Unreported). In the latter case, the Court of Appeal held as follows:

> *"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact."*

I say so because the facts of the case were very clear on the terms of agreement. The mere fact that the agreement between the parties were not reduced in writing cannot be a reason to conclude that there was no agreement. The courts below should have assessed the evidence and make findings regarding the stated oral agreement. I also do not agree with the first Appellate Court that the said contract did not conform to section 10 of Cap. 345. Unfortunately, the learned magistrate did not say what was missing. All parties to the contract were competent, as no evidence was given to the contract. They freely consented to the agreement. There was consideration and the object for the contract was lawful. I therefore agree with the Appellant that it was wrong for the Courts below to dismiss the presence of a contract between the parties herein. I need to add that oral contracts have the same effect as written contracts. What is required is evidence in support of such agreement. The issue of business licence should not have been one of the grounds to dismiss the Appellant's case. In fact, the Respondent does not appear to contest the presence of a contract, his defence was that he was not the one who entered into that contract. The first issue is therefore answered in the affirmative.

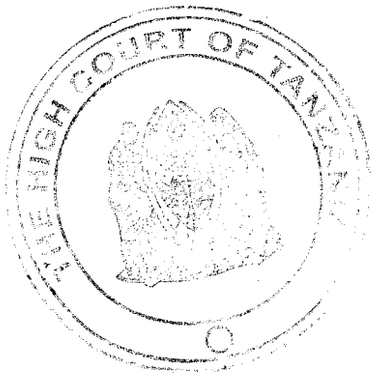
Regarding the second issue, the Appellant did not give a break down on how the figure of Tshs 669,500/= was arrived at during the trial and the first appellate court. He stated that he hired 38 pieces of timber and one drum cover to the Respondent on 29th October, 2018 so as to return the same on 2nd November, 2018. Thereupon, the Respondent paid Tshs. 39,000/= being consideration for hiring the said items for four days. The price was said to be Tshs. 1000 per timber per four days. On the 2/11/2018, Mr. Leo Kwaslema returned to the Appellant 13 pieces of timber, therefore the Respondent remained with 25 pieces of timber and the drum cover unreturned. The Appellant estimated the claim to be Tshs 669,500/= due to the number of days the 25 pieces of timber remained in the possession of the Respondent, which he claimed to be 82 days. He claimed further that the buying price for all the 25 pieces of the timber was 125,000/=.

The Appellant herein being the Plaintiff at the trial court, was required to prove his claims on the balance of probabilities. As submitted in his written submissions and the authorities he cited, the standard of proof is on the balance of probabilities. See ***Bakari Mhando Swanga Versus Mzee Mohamed Bakari Shelukindo and 3 Others*** (Supra). The burden of proof in civil cases under sections 110 and 111 of the Evidence Act, and as enunciated in a number of authorities by the Court of Appeal lies on the person who alleges. Even if the price of hiring one timber was Tshs. 1000 per four days, there was no evidence that the Appellant gave on hire the timbers on every day. The claim for the duration of 82 days though

justified seems to be on the high side. From the evidence on record, there is no dispute that the Respondent took the 38 pieces of timber and the cover and that only 13 pieces of timber were returned. The Appellant is therefore entitled to refund of the purchase price for the 25 pieces of timber estimated at Tshs. 125,000/=. I also award him Tshs. 260,000/= being ten hiring rounds of the timber and tin drum cover for the delay occasioned by the Respondent. In totality, the Appellant shall be paid Tshs. 385,000/= by the Respondent.

In the up short, and as explained above, the appeal has merits and is allowed to the extent explained above. The decisions of the trial court and that of the first Appellate Court are hereby quashed and set aside. The Appellant shall have his costs.

Order accordingly.



Y. B. Masara
JUDGE

May 29, 2020.