

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)**

AT IRINGA

CIVIL APPEAL NO. 02 OF 2020

(Originating From Civil Appeal No. 06 of 2018 of the Ludewa District Court,
Original Ludewa Urban Primary Court Civil Case No. 82 of 2018)

DEMITILIUS G. LWENA APPELLANT

VERSUS

ZAMDA KASSIMU NGONYANI RESPONDENT

Date of Last Order: 12/05/2020

Date of Judgment: 29/07/2020

JUDGMENT

MATOGOLO, J.

The appellant Demitilius G. Lwena was successfully sued by the respondent one Zamda Kassimu Ngonyani at Ludewa Urban Primary Court for the sum of Ths. 3,613,000/= being money advanced to the appellant in a form of cash and material to facilitate his business of building construction. The appellant was aggrieved, he unsuccessfully appeal to the District Court of Ludewa which upheld the decision of the Primary. Still dissatisfied he has appealed to this court where he filed a petition of appeal raising three grounds of appeal as follows:-

1. **THAT**, the first appellate court erred in fact and law in upholding decision of the Primary Court despite evidential weaknesses supporting the claim.
2. **THAT**, the first appellate court erred in fact and law in giving its decision without having a proper judgment in the eyes of the law the same having been not dated and not giving the parties a right to appeal.
3. **THAT**, the first Appellate court erred in fact and law in upholding the decision of the trial Primary Court which decision was arrived in total disregard of provisions of the law and misinterpretation of the authority relied upon.

The appellant therefore prays for the appeal to be allowed and that:-

- (i) The decision of both lower courts be quashed;
- (ii) The judgment of the first appellate court be nullified for having not being dated and not giving the parties a right of appeal.
- (iii) Costs of this appeal be provided.

The appellant was represented by Mr. Frank J. Ngafumika learned advocate. The respondent fended himself. The appeal was argued by way of written submissions.

In his submission in support of the appeal, Mr. Ngafumika argued in respect of the second ground of appeal that the judgment of the District Court is not dated and it did not explain the parties right of appeal. He said undated judgment is not judgment on the face of the law. He said the

significance of a judgment being dated cannot be overemphasized, that was stressed by the Court of Appeal of Tanzania in ***Petro Nyasa and Others vs. Simon Domel and 3 Others***, Civil Appeal No. 29 of 2011, CAT Tabora and ***Yusuph Nyabunya Nyatuvurya vs Mega Speed Liner Ltd and Sipedeh in Rem***, Civil Appeal No. 85 of 2019 CAT at Zanzibar (unreported). Submitting on the first ground of appeal, it is the contention by Mr. Ngafumika that he is aware of the position of the law when dealing with second appeal that the second appellate court should not interfere with the findings of facts unless there is misdirection or misapprehension of evidence and referred the cases of ***Bushagila Ng'oga vs. Mayanda Maige (2007) TLR 335*** and ***Amratlal Damodar Maltaser and Another T/a Zanzibar Silk vs A. H. Jarlwalia T/a Zanzibar Hotel (1980) TLR 31.***

But he said in the case at hand, there is clear misdirection of evidence. The first appellate court erred greatly by failing to observe the evidential weakness in support of the respondent's case but still ignored such weaknesses and continued to uphold the decision of the trial Primary Court. He said as there are lot of questions which remained unanswered, he prayed that this being a second appellate court be pleased to interfere with the two concurrent findings on facts of the two lower courts for meeting the ends of justice. He prays to this court to allow the appeal by quashing the lower courts decisions with costs.

In his reply submission, the respondent contended that the judgment referred by the Appellant is from Civil Appeal No. 06 of 2018 originating from Civil Case No. 82 of 2018 of Ludewa Primary Court. He said under

Section 3 of the Civil Procedure Code, (Cap. 33 R.E. 2002) defines a judgment to mean "*The statement given by a judge or magistrate of the grounds or decree of order*"

He said judgment must be reduced into writing under the personal direction and superintendence of the presiding Judge or Magistrate in the language of the court and must be dated and signed. The date is that one which is pronounced in court.

He said Order XX rule 4 of the Civil Procedure Code provides that judgment shall contain concise statement of the case, the point for determination, the decision thereon and the reasons for such decision. The respondent conceded that the judgment in Civil Appeal No. 06 of 2018 was not dated though the content thereof analyses the material facts of the trial court and the first appellate court was convinced to determine the appeal in favour of the respondent. The undated judgment and the presiding magistrate failure to explain the right of appeal such irregularity is curable. To support his argument he cited the case of ***George Mingwe vs. Republic (1989) TLR 10.***

In his reply to the first ground of appeal the respondent submitted that the trial court and the first appellate court were satisfied with the evidence as result they decided on favour of the respondent. If the appellant has strong evidence to prove the case, he would have produced that evidence that he is not owed by the respondent. The power vested on the second appellate court is to order the first appellate court to take additional evidence as was stated in ***Bushangila Ng'oga case***, since

there is no misdirection or misapprehension by the trial court and the first appellate court, there is no need to require for additional evidence as both courts were satisfied by the evidence adduced by the Respondent. The respondent concluded by stating that the appellant's submission is bound to fail for lack of sufficient reasons for appeal and prayed for it to be dismissed with costs.

In rejoinder Mr. Ngafumika submitted that the authorities cited by the respondent are of no relevant application to the case at hand, for the case of **George Mingwe** (supra) he said first the same was decided in 1989, it cannot override the decision in the case of **Petro Nyasa** (supra). Secondly, the same having decided by the High Court cannot have effect to the decision of the Court of Appeal by the application of the doctrine of stare decisis.

Thirdly, the said case did not set such a principle as purported by the respondent that an error not to date a judgment is curable. Again the cited case of **Bushangila Ng'onga** (supra) is not relevant to the case at hand as what is argued by the appellant was not taking of additional evidence but reevaluating thereof and disturbing the concurrent findings of the two lower courts for having misapprehended evidence.

He submitted further that the provision of the Civil Procedure Code relied upon by the respondent is not applicable for cases originating from Primary Court but the Magistrates Courts Act, (Cap. 11 R.E. 2009), Mr. Ngafumika therefore prayed to this court to allow the appeal by quashing

the lower courts decision, nullifying its proceedings and set its orders aside with costs.

Having carefully read the submissions by the parties. The issue for determination is whether this appeal has merit.

Before the Primary Court the respondent who had sued the appellant alleged that she was giving the appellant cash which he needed to buy materials and to pay laborers in his duties of construction. But sometimes he was taking materials. At one time he took fuel from the filling station and respondent footed that bill. She said appellant was taking cash, sometimes respondent was sending to him through M-Pesa. There are some of the properties including money which appellant admitted to take but not all.

In his judgment the trial magistrate took a generalized approach. He did not evaluate the evidence to see if the amount which respondent alleged that appellant took tally with the amount of Tshs. 3,615,000/= alleged appellant is indebted. As correctly pointed by Mr. Ngafumika learned advocate, there is no evidence to show M- Pesa transaction to the effect that certain amount of money were sent to the appellant through M-Pesa. But there is no evidence of print out or any form of evidence to prove that such amount alleged was actually sent to the appellant through M-Pesa. Even the transactions, listed in exhibit II in which respondent said total to Tshs. 3,615,000/=, if you calculate you gate a total of Tshs. 3,735,000/= which is in variance to the amount claimed by the respondent and there is no good explanation given on such variance.

Normally variance of evidence to the amount claimed in the plaint renders the claim/plaint defective if not amended to conform with the evidence adduced. The principle was reiterated by the Court of Appeal in the case of ***Justine Kakulu Kasusura @ John Laizer V. Republic***, Criminal Appeal No.175 of 2010. That is variance on what contained in the charge sheet and evidence adduced in support of the charge renders the case not proved.

The trial court therefore could not rely on the claim not supported with evidence as the evidence tendered is at variance to what the claimant had raised in her plaint. It cannot therefore be said that the plaintiff now respondent proved her claim, despite the fact that the appellant admitted to some of the claim. But that does not justify granting the whole claim even for the items appellant did not concede. By the act of the trial magistrates generalizing that the plaintiff (Respondent) proved her claim, there was misapprehension of evidence. But unfortunately, that was not discovered and rectified by the 1st appellate court. Under such circumstances therefore, and basing on the decision of the Court of Appeal in the ***Bushangita Ng'onga case and Amratiai Damodar Maltaser and Another T/a Zanzibar Silk Store case***, this court is entitled to interfere the two concurrent findings of the lower court in order to rectify the errors committed. There is another complaint that the judgment of the District Court on appeal was not dated and that the parties were not given right to appeal. Failure to date a judgment is to render it invalid, it is the requirement of the law that the judgment of the court must be signed by the presiding magistrate and dated as was held by the Court of Appeal in

the case of ***Petro Nyasa and Others vs Simon Domel and 3 Others, and Yusuph Nyabunya Nyaturunya case*** (supra). There is no dispute that the judgment of the District Court on appeal was not dated, thus make it not valid judgment the same cannot be left to stand.

Although the respondent contended that the defect is curable relying on ***George Mingwe case*** (supra), but as was correctly pointed out by Mr. Ngafumika learned advocate that case cannot have overriding effect to the recent decision of the Court of Appeal in ***Yusuph Nyabunya Nyatururga case*** (supra) which was decided on 29th November, 2019. The defect of a judgment not dated is incurable.

Equally, as there has been misapprehension of evidence by both the trial court and the first appellate court as I have demonstrate above, I allow the appeal, the judgment of the 1st appellate court and that of the trial court as well as the proceedings thereof are hereby quashed and set aside. For interest of justice I order for retrial. The case is remitted back to the primary court of Ludewa for retrial but before another magistrate and a set of different assessors.

Order accordingly.


F. N. MATOGOLO

JUDGMENT

29/07/2020

Date: 29/07/2020
Coram: Hon. L. M. Chamshama AG - DR
Appellant: Absent
Respondent: Present in person
C/C: Grace

COURT:

Judgment delivered today in the present of the Respondent and the absence of the Appellant.



L. M. CHAMSHAMA
AG- DEPUTY REGISTRAR
29/07/2020

Right of Appeal fully explained.



L. M. CHAMSHAMA
AG- DEPUTY REGISTRAR
29/07/2020