IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC. CIVIL APPEAL NO. 34 OF 2018

(Arising from Civil Appeal No. 5 of 2018 from the District Court of Shinyanga)
originating from Civil case No.... from Bunamhala primary court)

NJILE KILASA..... APPELLANT

VERSUS

DIANA SOKANYA ..... RESPONDENT

EX-PARTE JUDGMENT

Date of the last order: 18/06/2020

Date of the Judgment: 3/8/2020

MKWIZU, J.:

The appellant herein is dissatisfied with the decision of the District court in Civil appeal No. 05 of 2018.He has preferred an appeal to this court on four grounds of appeal thus:

1. That, the learned magistrate erred in law and facts when he failed to consider the admission of the respondent to the tune of Tsh. 800,000/= before the Primary Court.

2. That, the learned magistrate erred in law and facts when he failed to consider between the parties dated the 4th March 2016 which was admitted by the respondent before the Primary Court.

3. That, the learned magistrate erred in facts and law when he said that the contact entered by the parties contained interest, something which was not true.

4. That, the learned magistrate erred in law when he failed to evaluate properly the evidence which was adduced by the parties during the hearing in the trial court.

To have the gist of the appeal, it is imperative to venture into the genesis of the matter. In the year 2016 appellant filed a civil case before Bunamhala Primary court claiming a total sum of 1675,000 from the respondents being unpaid loan. The primary court found in favour of the respondents for failure by the appellant to substantiate his claim. Dissatisfied, appellant appealed to the District Court where the appellant's appeal was dismissed. Following the

foregoing sequence of events, the appellant has now come to this court on appeal.

Initially, the appeal was filed against two respondents, Diana Sokanya and Hadija Chesawa. However, on 1/4/2020, counsel for the appellant prayed for leave to withdraw the appeal against the 2nd respondent Hadija Chesawa. Leave was granted and an amended petition of appeal to that effect was filed by the appellant on 5/4/2020. The respondent received the first summons on 13/6/2018 but did not attend the court proceedings. After the amendment of the petition of appeal the court again ordered respondent to be served with the amended petition with the summons. She refused to acknowledge service of the summons. Her refusal was certified by Executive officer of Malambo Street on 11th June, 2020 and therefore appeal proceeded ex-parte against her. Appellant had the services of Mr. Frank Samwel advocate.

Mr. Frank submitted that the proceedings are tainted with procedural irregularities, one that there was a change of assessors whereas at the hearing, trial court was assisted by two assessors namely Tendele and

Kabeya while in the judgement, the assessors were Samba Manyoli and Kinya Marroni. Secondly, that, the records contain no opinion of the said assessors. He said, the irregularities pointed are serious, and that they affect the entire proceeding. Mr. Frank prayed for the nullification of the proceedings of the two courts below and order for a fresh hearing before another magistrate and another set of assessors.

Indeed, in this case there was a change of assessors during trial. The assessors who sat with the trial magistrate on 5/12/2017 were Tendele and Kabeya. On this date, the trial court heard the parties on their respective positions on the allegation against each other and proceeded to frame issues. On 6/12/2017, assessors were Samba and Kabeya. In their presence, court heard the evidence for the plaintiff and the defence. Then the case was adjourned for judgement which was fixed on 13/12/17. Neither the records of the proceedings nor the judgement contains the opinion of the assessors. Again, on the date of the judgement, there appeared another set of assessors. They were Samba Manyori and Kinya Marroni.

The issue is whether the proceedings are irregular and if so, whether the irregularity is curable. As a matter of practice assessors during trial should not be changed. I am also aware of the provisions of section Section 37(2) of the Magistrates' Courts Act Cap 11 R.E 2019 which provides that no decision or order of a Primary Court or a District Court shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the proceedings unless such error, omission or irregularity has in fact occasioned a failure of justice. The section goes thus:

> *"S.37(2) No decision or order of a primary court or a district court under this Part shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, or any process or charge, in the proceedings before or during the hearing, or in such decision or order or on account of the improper admission or rejection of any evidence, unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."*

It is clear from the above provision that an irregular proceeding can be upheld if no failure of justice has been occasioned to the parties. Close

examination of the proceedings as indicated above shows that there are three different set of assessors who participated from the beginning of the case to the end. Meaning that the first set of assessors did participate only on the narration of the claim by the parties and framing of the issues. The second set heard the parties' evidence and their witnesses and the last set of assessors witnessed the delivery of the judgement. The more serious problem is that none of the pointed set of the assessors gave opinion on this case. The trial magistrate did not bother to indicate whether he consulted or engaged the mind of any set of the assessors on this matter. He went on preparing and delivering judgement which at the end was signed by the last set of assessors one of whom did not participate in any party of the proceedings. In my considered view, the irregularity in this case has in fact occasioned a failure of justice

Section 7 of the Magistrates' Courts Act, Cap. 11 RE 2019 and Rule 3(1) of the Magistrates' Courts (Primary Courts) (Judgment of Court) Rules G.N. No 2 of 1988. reads:

> *"7 (1) In every proceeding in the primary court, including a finding, the court shall sit with not less than two assessors.*

(2) ***All matters in the primary court*** *including a finding in any issue, the question of adjourning the hearing, an application for bail, a question of guilt or innocence of any accused person, the determination of sentence,* ***the assessment of any monetary award and all questions and issues whatsoever shall****, in the event of a difference between a magistrate and the assessors or any of them, be decided by the votes of the majority of the magistrates and assessors present and, in the event of an equality of votes the magistrate shall have the casting vote in addition to his deliberative vote. "*

The magistrate was, under the provisions of Rule 3 of the Magistrates' Courts (Primary Courts) (Judgment of Court) Rules G.N. No. 2 of 1988, required to consult with the assessors with the view of reaching a decision of the court. Rule 3 provides:

3. (1) Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the magistrate shall ***proceed to consult with the assessors present****, with the view of reaching a decision of the court.*

(2) If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members.

(3) For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in sub rule (1) of this Rule, be entitled to sum up to the other members of the court (emphasis added).

This is the position in the case of **Hermelinda Gabriel v. Salvatory Sadoth**, Civil Revision No. 7 of 2004 where the court said:

"And by the way the procedure of taking opinion from assessors is no longer a valid practice. The magistrates' Courts (Primary Courts) (Judgment of Court) Rules, GN. 2 of 1988 which was published on 1/1/1988 and therefore an effective date has done away with any preliminaries. ***Assessors are to be consulted for their opinions after the conclusion of the trial****. And their opinions need not be in writing as it was done in this case if all agreed on one decision. By taking opinions in writing in my view is not fatal to the proceedings. The same is curable."*

However, the question in our case is, was the consultations envisaged under sub rule 1 of rule 3 above done. And if so, which set of assessors was capable of giving a valid and appropriate opinion on the matter. The first set or the second one which sat on the hearing of the case for and against the appellant or the last set which only appeared on the judgement date? The records are silent. Even, assuming that the assessors were in agreement with the trial magistrate and that signing the decision meant that they agreed on the said decision without more, still the question is, could the assessors who signed the judgement give a justifiable opinion given the fact that they did not participate on the trial? definitely, no.

In my view, this point alone suffices to dispose of the matter and I feel that it is not necessary to dwell on discussing the remaining grounds of the Appeal.

All the above taken care of, I agree with the learned counsel that, the trial was flawed with fatally incurable procedural irregularities occasioning a miscarriage of justice and the trial was vitiated. I declare the trial a nullity. The proceedings and judgement of the district court on the 1st appeal are

quashed and set aside for they emanate from a nullity. The original file of Civil Case No 7 of 2017 is remitted to the trial court with an order that the case be heard de novo before another magistrate sitting with a different set of assessors.

Costs will abide the outcome of the said new trial.

It is so ordered.

Date at **Shinyanga** this 3th day of **August**, 2020.

E.Y. MKWIZU
JUDGE
3/8/2020

Court: Right of appeal explained to the parties.

THE HIGH COURT OF TANZANIA

E.Y. MKWIZU
JUDGE
3/8/2020