IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]
AT ARUSHA

PC CIVIL APPEAL NO. 47 OF 2019

(C/F Civil Appeal No. 44/2018, Arumeru District Court, Originating from Emaoi Primary Court Civil Case No. 42/2017)

ALPHAYO ANDREA ..... APPELLANT

Versus

AMON MWAKIPESILE ..... RESPONDENT

JUDGMENT

7th December & 18th December, 2020

Masara, J.

This appeal traces its history way back in 2016 when the Respondent, **Amon Mwakipesile,** successfully sued the Appellant in Emaoi Primary Court vide Civil Case No. 42 of 2016 for a claim of Tshs 3,996,800/=. The Appellant, **Alphayo Andrea,** was aggrieved thereby appealing to the District Court of Arumeru at Arusha vide Civil Appeal No. 10 of 2017. The District Court nullified the proceedings of the trial Court as it found that the trial Magistrate erred in admitting an exhibit after closure of the defence case and ordered trial *de novo* in the same trial Court. The suit was reinstituted in the trial Primary Court and in its judgment delivered on 14/3/2018, the trial Court dismissed the suit holding that the Respondent had failed to prove his claim. The Respondent appealed to the District Court of Arumeru vide Civil Appeal No. 16 of 2018. In its judgment delivered on 16/8/2018 it was found that the trial Magistrate, in the course of composing the judgment, introduced new facts which were not adduced by parties in evidence; therefore, the case was ordered to be retried again. The Respondent reinstituted Civil Case

42 of 2016 in the same trial Court and in its judgment delivered on 5/10/2018 the Respondent managed to prove his claim. The Appellant was ordered to pay him the amount claimed. The Appellant was aggrieved, he appealed to the District Court of Arumeru vide Civil Appeal No. 44 of 2018 which appeal was dismissed. The Appellant was still aggrieved, it is against that decision that he has preferred this appeal on the following grounds:

a) *That, the learned Magistrate erred in law and fact by failure to consider properly evidence on record;*
b) *That, the learned Magistrate erred in law and in fact by framing issues; and*
c) *That, the learned Magistrate erred in law and fact by all grounds of appeal as raised by the Appellant*

By order of the court, hearing proceeded by way of written submissions. Both parties complied with the scheduled order. Mr. George Njooka, learned advocate, appeared for the Appellant whereas the Respondent appeared unrepresented and fended for himself.

Before outlining what was submitted by the parties herein, I should, at the outset, state that this is a dispute of its own peculiar history. A simple and straightforward dispute has taken over four years before it is determined in our Courts. Invariably parties have wasted much of their time in the Court corridors due to what I can simply refer as lack of seriousness on the part of the trial Magistrates involved in determining the same.

Submitting in support of the appeal, Mr. Njooka stated that the first Appellate Court failed to consider the fact that the matter before the trial court was *res judicata*, in that the matter decided in Civil Case No. 42 of 2017 was

substantially similar to that which was decided in Civil Case No. 7 of 2016 by different Magistrates in the same Court. On the same thrust, Mr. Njooka submitted that the claim of Tshs 3,996,800/= was not proved by the Respondent during the trial. To him, the claim was never substantiated by any documentary evidence. On the third ground of appeal, the learned counsel submitted that the first Appellate Court did not decide on the grounds of appeal as raised. In conclusion, Mr. Njooka stated that the first appellate court discussed only the issue of *res judicata* while ignoring the grounds of appeal as raised.

Contesting the grounds of appeal, the Respondent stated that the trial Court considered and evaluated the Appellant's evidence properly. He stated further that the issue of *res judicata* was raised on appeal but never featured in the trial Court. To him, this was a new matter raised by surprise without notice as required of the law. Notwithstanding, the Respondent denied that the subject matter in the trial Court was the same as the one decided in Civil Case No. 7 of 2016 as alleged by the Appellant. He referred the case of ***Sambwe Vs. Tanzania Italian Petroleum Co. Ltd*** [1995] TLR 20 to bolster the argument. On that stance, the Respondent invited the court to find that his evidence during the trial outweigh that of the Appellant and dismiss the appeal with costs.

I have given due consideration to the rival submissions by both parties herein. I have also had time of thoroughly going through the lower Courts' records. I am settled that this Court is called to determine two issues; namely, whether the first Appellate Court considered and decided on the

grounds of appeal raised by the Appellant and whether the Respondent proved his claim before the trial Court on the required standard.

This Court being the second Appellate court cannot interfere on matters of fact unless there is a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure. This position has been reiterated by Courts in a number of decisions including the case of ***Samwel Kimaro Vs. Hidaya Didas***, Civil Appeal No. 271 of 2018 which cited with approval the decision in ***Amratlal Damodar Maltaser & Another t/a Zanzibar Silk Stores Vs. A. H. Jariwalla t/a Zanzibar Hotel*** [1980] TLR 31 at page 32 where the Court held:

> *"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure"*

I will start with the first issue as to whether the first Appellate Court considered and decided based on the grounds of appeal placed before it. Briefly, the record shows that there were two grounds of appeal as I have intimated above. In deciding the appeal, the learned Magistrate of the first Appellate Court formulated four issues. For the avoidance of doubt, I find it instructive to reproduce the issues for easy of reference. They were as follows:

(i) whether the Primary Court Magistrate considered the evidence of the Appellant;
(ii) whether the trial Court evaluated the evidence properly;
(iii) whether the appeal be allowed, and
(iv) whether the claim before the trial Court was *res judicata*.

That being the case, it was expected that the decision of the first Appellate Court was to encompass all the issues it had raised for its determination. I have carefully read the judgment by the first Appellate court. It is my finding that the learned Magistrate as rightly argued by Mr. Njooka, discussed and deliberated on the last issue only. He never considered the remaining issues that he formulated. Worse still, there was no any reasons assigned for such omission. For the purpose of clarity let me reproduce the decisive part of the judgment which reads:

> *"So, this court sees that the trial magistrate court was correct in entertaining this matter and that there was no any incorrectness or error in law or fact,* ***and that the evidence for both parties was evaluated and both parties were given an opportunity to testify and bring their witnesses****"*(emphasis added)

In view of the above prescript, it is not clear on what basis the Magistrate found that the parties' evidence was evaluated. I say so because in his discussion the said issues never featured and no reasons assigned were given by him.

It is a settled law that a first Appellate Court determines the appeal before it in a manner of re-hearing. Therefore, the first Appellate court had a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if need be. This cogent principle has been stated in several decisions binding to this Court. See for example the decision in the case of ***Siza Patrice Vs. The Republic,*** Criminal Appeal No. 19 of 2010 Court of Appeal at Mwanza (unreported).

It is unfortunate that the first Appellate Court got into the trap of deciding on the issue of *res judicata* that was never decided by the trial court. I hold this view because reading the extract of the judgment above, it seems the first Appellate Court decided on an issue never raised in the trial Court. Reference is made to the trial Court's judgment at page 6 and 7 where four issues were raised. The issue of *res judicata* was not among those issues raised. Even the proceedings at the trial reveal clearly that the Appellant denied the claim, but never raised the defence of *res judicata*.

Under Order XX Rule 4 of the Civil Procedure Code, Cap 33 [R.E 2019] a judgment must contain a concise statement of the case, points for determination, the decision thereon and reasons for the decision. The same is also stated under section 312 of the Criminal Procedure Act, Cap 20 [R.E 2019]. In view of this, the first Appellate Court's judgment as elucidated above is lacking in analysis.

It is my view that failure to address and decide on the issues raised, leaves this Court in suspense as to what exactly transpired leading to the conclusion made by the first Appellate Court. There is a plethora of authorities in this. In the case of ***Scan-Tan Tours Limited Vs. The Registered Trustees of the Catholic Diocese of Mbuiu,*** Civil Appeal No. 78 of 2012 the Court of Appeal stated that:

> *"...it is a well-established practice that* ***a decision of the court should be based on issues which are framed by the court*** *and agreed upon by the parties, and* ***failure to do so results in a miscarriage of justice."*** (emphasis)

Based on the above observation, it goes without saying that the first Appellate Court abdicated its core duty of deciding the appeal before it. That said, I hold that the first issue is answered in favour of the Appellant.

I now turn to the second issue as to whether the Respondent proved his claim at the trial Court. I have reviewed the trial court's proceedings. The evidence available shows that there was a business agreement between the parties. This was done at two different scenarios. At first, the Appellant hired a licence to fell and collect logs from Usa River forest on conditions that the Appellant agreed to pay Tshs 50,000/= per cubic metre. He managed to collect 67.09 cubic metres. On the same token he hired the Respondent's truck to transport the logs at a consideration of Tshs 450,000/= per trip for three trips. The Appellant also agreed to pay for timber milling charges at the tune of Tshs 250,000/= per trip for three trips and loading charges of Tshs 243,000/=. In sum their agreement was for payment of Tshs. 5,697,500/= in return for the hired services. The testimonial accounts show that the Appellant paid only Tshs 2,420,640/= out of the total agreed sum. On the second scenario, the Appellant hired a logging permit from the Respondent in respect of Oldonyo Sambo forest. In this, he agreed to pay Tshs 45,000/= per cubic metre for a total of 31.332 cubic metres. Likewise, he agreed to pay for transportation of the said logs at Tshs 450,000/= per trip for three trips and milling charges of Tshs 250,000/= for three trips. It is on record that, just as it was for the first agreement, the Appellant paid only Tshs. 2,850,000/= out of the agreed sum of Tshs 3,509,940/=. In view of this, the Appellant owed the Respondent a total of Tshs 3,996,800/=.

During trial, the Respondent stated his claim by analysing how the figures indicated above were obtained. He also summoned one witness who stated that its true the Appellant used to hire the said services and tools from the Respondent on credit. On his part the Appellant stated that there was a counter claim but he never substantiated the same. Even his witness SU2 (Hance Jeremia) denied during cross examination that he never witnessed the alleged counter claim by the Appellant against the Respondent. His other witness had nothing useful to testify other than bringing his experience in the timber industry.

I should reiterate that cases are decided based on cogent evidence and credence of a witness not his mere assertions founded on experience. See the decision of this court in the case *of* ***Evody Kessy Vs. Leopard Tours Ltd,*** Labour Revision No. 2 of 2017 Arusha (unreported) where it was stated inter alia:

> ***"Courts of law do not rely and act on mere assertions but on cogent evidence."*** (emphasis added)

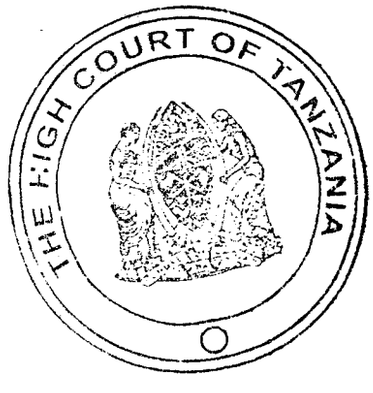
Section 110 of Tanzania Evidence Act, Cap 6 [R.E 2019] provides that the burden of proof is on he who alleges. In this case, the Respondent alleged and proved that the Appellant used his logging permit, transport, and saw mill services on the agreed terms. This fact was never controverted by the Appellant other than stating that he had a counter claim which he failed to establish. Therefore, the Respondent played his role as required.

There is an argument in the submissions that the Respondent did not prove his claim by documentary evidence. With due respect this argument is

misconceived. I say so because under the law of Evidence Act, a fact is said to be proved in civil cases when its existence is established by a preponderance of probabilities. The Respondent tendered and the Court admitted exhibit 'A'. This exhibit was never controverted on cross examination. Again, a contract can be oral or written provided that the terms are clear and can be ascertained. The Respondent's claim was proved on the balance of probabilities by weighing his testimony compared to that of the Appellant. I am of the firm opinion that the Respondent's claim was proved to the required standard before the trial court. Therefore, the second issue is resolved against the Appellant.

Guided by the above analysis, the issues determined and the authorities cited, the appeal is partly allowed to the extent that the first Appellate Magistrate did not determine all the issues he raised. On the other hand, the appeal is dismissed as far as the trial court's decision is concerned. Therefore, the appeal is allowed to the extent above explained. The Respondent to be paid his claims as per the order of the trial court. He shall have his costs in this appeal and the lower Courts.

Order accordingly.



Y. B. Masara,
JUDGE

18th December, 2020