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

AT SHINYANGA

PC. MATRIMONIAL APPEAL NO. 08 OF 2019

(Arising from matrimonial Appeal No. 37 of 2018 from Kahama District Court. Originating from P/C Matrimonial cause No 122 of 2018 of Kahama Urban Primary Court.)

SIPILAUS MGANYIZI.....APPELLANT

VERSUS

SAMSON ELISANTE.....RESPONDENT

JUDGMENT

Date of last order: 12.02.2020
Date of Judgement: 13.03.2020

MKWIZU, J.:

This is a second appeal. It seeks to challenge the decision of the District court at Kahama in PC Civil Appeal No. 37 of 2018 on a matter originating from Kahama Urban Primary Court.

I find it decisive, at the outset, to go into the background of this matter though briefly. Before the Kahama Urban Primary Court in civil case No. 122 of 2018, the respondent in this appeal filed a suit claiming for Tsh 9,400,000 from the appellant. The suit was filed after the appellant has failed to pay the said sum of money which he took from the respondent on

November 2017 on a promise that he would pay back by 1st September,2018. After a full hearing, the trial Court decided in favour of the respondent and ordered the appellant to pay the said amount.

Disgruntled, Sipilaus Mganyizi Issack, the appellant herein, appealed to the District Court of Kahama in Civil Appeal No. 37 of 2018. The appeal came to naught as it was dismissed on 1st February, 2019. Still dissatisfied, the appellant appealed to this court on a total of four grounds to wit: -

> "*1. That, the trial court and the learned Resident Magistrate erred both in law and facts in relying on dubious written agreement between the appellant and one samson Elisante Nko whilst the claims at hand is between the appellant and the Samson Elisante.*
>
> *2. That the learned Resident Magistrate erred both in law and facts to dismiss the appeal whilst the respondent's claim were not substantiated in the preponderance of evidence."*

And two additional grounds of appeal filed by a supplementary petition that:

"1. *The Honourable Magistrate of the first appellate court erred in law and fact for failure to re appraise the evidence adduced at the trial court.*

2.That the Honourable Magistrate of the first appellate court erred in law and fact for holding that the appellant did not object the tendering and admission into evidence of a contract, exhibit P1."

At the hearing of the appeal before me, Mr. Audax Constantine, learned

counsel argued the appeal on behalf of the appellant while the respondent was in person, unrepresented.

Arguing the appeal, Mr. Audax combined two grounds in the original petition of appeal and argued them together and the grounds in the supplementary petition argued one after the other. It appears, for the reasons to be state later, the learned counsel's emphasis was on the ground that the 1st appellate magistrate failed to re appraise the evidence adduced at the trial court .Submitting for the appeal, Mr Audax pointed out four main issues that showed that the trial court as well as the 1st

appellate court failed to appreciate the evidence on records, namely ***one***, that it was not clear from the record as to whether Samson Elisante who filed the case against the appellant is the same person who testified in court as SM1 by the name of Samson Elisante Nnko as PW1.

Two,that the witnesses of the loan agreement between the parties herein were not called to testify in court. On this point, Mr Audax submitted that PW2 one John Chacha and PW3, Helmes Byarugaba who testified for the plaintiff did not say whether they witnessed the contract between the parties. And that exhibit tendered in court was witnessed by one person designated as H Byongabo, who was not called to testify in court did not indicate in the agreement tendered whether he knew the parties personally or parties were introduced to him by a person known to him. It was Mr.Audax's contention that, had the first appellate court re-evaluated the evidence on record, it could have understood that the agreement between the parties was dubious. He referred the court to the case of **Marther Michael Wejja Vs.Hon AG and 3 others** (1982) TLR 35.

The *third* complaint is on how the exhibit was tendered and admitted, Mr Audax submitted that, one of the respondent in the trial court (Mdaiwa) is said to have admitted the contents of the agreement when it

was being tendered in court. However, the record is silent as to who between SU1 and SU2 's admission was recorded.

Mr. Audax's **fourth** complaint is on the procedure adopted by the trial court which did not give the appellant an opportunity to cross examine witnesses contrary to rule 47 (2) of the Civil Procedure of the primary court,1963 GN No.310.He finally prayed that the appeal be allowed with costs.

On his part, respondent was quick to state that, H.Byangoba was a witness at the trial court and the appellant was given chance to cross examine the witnesses but had no question to ask.

On not calling important witness to testify, respondent said, all important witnesses were call to testify and that the agreement was between the respondent Samson Elisante Nnko and one Sipilaus Mganyizi Issack.He clarified that, both Samson Elisante and Samson Elisante Nnko are his names. He prayed to have the appeal dismissed also with costs.

On rejoinder,Mr Audax clarified that the trial court records did not make it clear as to the relationship between the person by the name of Samson Elisante and Samson Elisante Nnko. Again, the records are not

clear as to whether the person who testified in court as Hermes Byarugaba is the same person who is said to have witnessed the agreement by the name of H.Byongabo.

Having carefully considered the grounds of complaint by the appellant and the submission by the parties, I find the main issue for determination is whether the 1st appellate court failed to re -appraise the evidence on record. I am aware of a salutary principle of law enunciated in the case of **D. R. PANDYA v R** (1957) EA 336 that a first appeal is in the form of rehearing. In this regard, the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it and subjecting it to a critical scrutiny and if need be, arrive at its own decision. I am also alive to the principal that, in a second appeal, the Court should rarely interfere with the concurrent findings of the lower courts on the facts unless it is shown that there are misdirection and non-directions on the evidence by the first appellate court and the Court is entitled to look at the relevant evidence and make its own findings of fact [**DPP Vs Jaffar Mfaume Kawawa** (1981) TLR. 149 and **Self Mohamed E.L Abadan Vs Republic**, Criminal Appeal No. 320 of 2009 (unreported)].

At the District court, appellant had three grounds of appeal which in summary projected two main complaints namely that the trial court decided the matter relying on a dubious contract between the parties and that the case was not substantiated. Having heard both parties the 1st appellate court concluded that the appellants 1st ground of appeal was an afterthought as he never questioned of difference in names by the then complainant Samson Elisante and the person who is purported to have signed the loan agreement named Samson Elisante Nnko who had testified as SM1. On the second and third ground of appeal the 1st appellate court concluded that because the appellant had failed to honor the promise to pay back money he borrowed from the respondent and because the agreement between them was tendered without an objection from the appellant, then the trial court was justified to compel the appellant to pay the claimed amount.

Indeed, the appellant's complaint that the 1st appellate court failed to re appraise the evidence on record is correct. This is because, in its judgement, the 1st appellate Court did not appreciate the evidence to justify her findings. It just picked part of the evidence and made a conclusion on the issues. No analysis was done. Therefore, in the light of

principal enunciated by the Court of appeal in the case of DPP **Vs Jaffar Mfaume Kawawa** (supra), this is a fit case warranting the intervention by the 2nd appellate court.

I wish to start with the appellant's complaints of noncompliance to rule 47 (2) of the Civil Procedure of the Primary Court,1963 GN No.310. In this Mr. Audax complains that the trial court denied the appellant an opportunity to cross examine witnesses. The trial courts records speak for itself. On 4/9/2018 when SM1 (the then complainant) gave his evidence, Appellant who was SU2 was not given an opportunity to cross examine his opponent. He was however, given chance to cross examine the rest of the witnesses. As rightly submitted by Mr Audax,the procedure taken by the trial court on 4/9/2018 was contrary to **Rule 47 (2) of the Civil Procedure of the Primary Court,1963 GN No.310**.Rule 47 (2) provides:-

> *"Each part shall be entitled to cross examine the witness called by the other party"*

This provision is couched in a mandatory term, meaning that it is not optional. In the case of **Sule V Uganda** (2001) 2 EA 556 (SCU) the court had time to discuss the importance of cross examination in a case.It stated

that there can be no fair trial if a party to a case is denied the right to cross-examine witnesses who are produced to testify against him or her. The essence of cross-examining a witness of the opposite party is to test the credibility of that witness.

In another case of **Mrema V.Kivuyo** ((1999)1EA(CAT) .The High Court had, under section 29 of the Magistrates' Courts Act called for an additional evidence and took the evidence without affording the opposite part an opportunity to cross examine a witness. On appeal to the Court of appeal the court said *inter alia* that

> *"**It was erroneous on the part of the Learned Judge not to give the Appellant the opportunity to cross-examine the Magistrate (deponent of the affidavit) on the matter**. However, despite the error, the Appellant was not in any way prejudiced. The omission was an immaterial error which did not affect the merits of the case and therefore curable under rule 108 of the Court of Appeal Rules." (Emphasis added)*

The important question for my determination therefore is whether or not there had been a failure of justice as a result of the appellant not having been allowed to cross-examine SM1. I think, the irregularity committed in the present proceedings is a fundamental error. As clearly depicted by the records, the appellant was not given an opportunity to cross examine his opponent who had given evidence against him. And more serious is the fact that, trial magistrate had believed the evidence by the respondent (SM1) to the extent of allowing the case in his favour. And if that is not enough the 1st appellate court believed the SM1's version without more. In rejecting the 2nd and 3rd grounds of appeal that was presented before it, the 1st appellate court said, I quote for convenience: -

> *"In respect of the second and third ground of appeal the appellant complain that the trial court erred when ordered him to pay the respondent Tshs 9,400,000/=. According to the evidence by the respondent, the applicant borrowed the said amount of money from the respondent 22nd November, 2017.The appellant had to pay back the money by 1st September,2018. Unfortunately, the appellant did not honor his*

promise. The respondent tendered the written agreement between him and the appellant as exhibit in court. Appellant had no objection to this agreement. The trial court was correct in its findings for compelling the appellant to pay the claimed amount of 9,400,000/=Having so stated, the trial court judgement is hereby upheld. Appeal dismissed with costs."

It was in the interests of justice that the appellant should have been given an opportunity of testing by cross-examination the truth of the evidence given against him by the plaintiff before acting on the plaintiff's version of evidence. The appellant, in my view was prejudiced

Failure by the trial court to afford the appellant an opportunity to cross examine his opponent created another serious problem in this case. SM1 had tendered as exhibit a loan agreement between himself and the present appellant. In admitting the exhibit the court is recorded to have asked one of the opponents whether the tendering of the said agreement is disputed or not. The records are silent as to who between **SU1 and SU2**

who were the respondents (WADAIWA) admitted the contents of the agreement. The record at page 3 of the trial courts proceedings reads:

> *"Mwaka jana (11/2017) tuliingia mkataba na wadaiwa kwa kuwakopesha pesa kiasi cha Tsh 9,400,00/=makubaliano ya kulipa 1/9/2018.Katika ukumbi wa Bijampola lakini hawajanilipa mpaka sasa,naomba kutoa mkataba kuwa kielelezo mahakamani*
>
> ***Mdaiwa**: anasema anautambua mkataba huu,sahihi iliyopo katika mkataba huo ni yake na hana pingamizi kwa mahakama kuchukua kama kielelezo mahakamani*
>
> ***Mahakama**: imepokea mkataba kuwa kielelezo na kuupa alama kielelezo S1" (Emphasis added)"*

The case was between the respondent herein and the two persons, appellant and another person who is not part of this appeal. So there were two respondents who were supposed to say whether they object or not to the tendering of the exhibit S1 (the loan agreement). The record as the quoted part above would reveal, does not bear that out. Only one "Mdaiwa" whose name was not indicated responded to the plaintiff's

request. This, in my view would have been cured if both respondents would have been given chance to cross examine the plaintiff in this aspect.

In criminal case No.289 of 2015 between **Gift Mariki and two others v Republic**, the appellants had complained that trial court failed to allow them to cross examine each other on their defence, the Court of appeal said:-

> *"...by not granting the 1st and 2nd appellants their rights to cross examine each other to test the veracity of their rival evidence, the trial court denied itself and the parties the opportunity of ascertaining the truth of the testimony, which is one of its primary function. In our respective view, when the irregularity and its cumulative effects are considered, it must have occasioned a miscarriage of justice"*

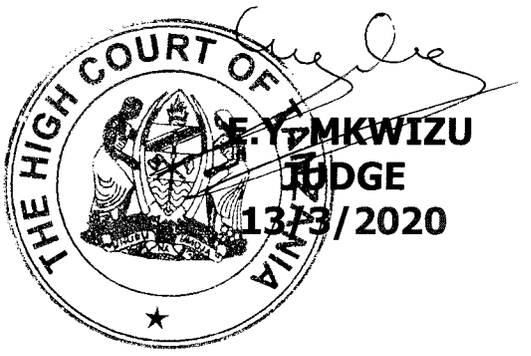
The Court of appeal went ahead to quash the proceeding and ordered for a retrial .

I am highly convinced that failure by the trial magistrate to allow the appellant to cross-examine his opponent prejudiced the appellant and did occasion a miscarriage of justice. I find this ground alone sufficient to dispose of the appeal.

The appeal is therefore allowed on the basis of what I have demonstrate above. I proceed to nullify all proceedings of the trial court and 1st appellate court, and quash the judgments and the subsequent orders. In lieu thereof, I order that the suit be tried de novo before another Primary Court Magistrate with another set of assessors.

Order accordingly.

DATED at **SHINYANGA** this **13th** day of **March**, 2020.



E.Y. MKWIZU
JUDGE
13/3/2020