IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC. CIVIL APPEAL NO. 16 OF 2017

(Arising from Civil Appeal No. 1/2017 ,District Court of Bariadi, original civil case No. 07/2016 Mkulo Primary Court)

KAMPUNI YA WALTER COM.
DAR ES SALAAM..... APPELLANT

VERSUS

LYUBA MBANDE.....RESPONDENT

JUDGMENT

25/3 & 8/5/2020
G. J. Mdemu, J.;

Kampuni ya Walter Com. Dar es Salaam, the Appellant, filed civil case No. 7 of 2016 in the Primary Court of Mkula claiming to be paid Tshs. 2,168,000/= from the Respondent being unpaid money for supply of drinking water. According to the facts, the Respondent, being an agent of the Appellant received 1,646 cartons of water for whole sale at the price of 8,000/= per carton totaling to tshs.13,168,000/=. In that business relationship, the Respondent paid 11,522,000/=thus remaining the balance of tshs.2,168,000/=the subject of this claim. The Respondent denied the claim because the amount of tshs.11,522,000/= paid to the Appellant settled the claim as they agreed each carton be sold at tshs. 7,000/= The agreement in both was oral.

On those facts, the trial Primary Court found the Appellant to have proved his claim thus ordered the Respondent Lyuba Mbande to pay the remaining balance of Tshs. 2,168,000/= as he prayed, together with costs of the case.

The Respondent appealed to the District Court registered as civil appeal No. 1 of 2017, in which, on 30th of March, 2017 the District Court allowed the appeal by quashing the decision and decree of the Primary Court of Mkula. The

Appellant got aggrieved by that decision, thus lodged the present appeal on the following three grounds:-

1. *That, the appeal Judgement was bad in law on reason that, the Appellate District Court entertained matters which were not at issue at the trial court was pleaded by the respondent in his grounds of Appeal to the District Court.*
2. *That, in the alternative and without prejudice to what had been stated above, the District Court erred in law and fact that being a first Appellate Court, failed to revisit the evidence on record at the trial Court and as well as failed to consider the grounds canvassed in the Appeal by the Respondent to the District Court in which the Respondent had admitted water sale contract between him and the Appellant and furthermore staged matters not tabled in the trial.*
3. *That, the Appellate District Court erred in law and fact to reverse the findings of the trial court which was essentially based on evidence and demeanor of witnesses.*

On the 25th of March, 2020, this appeal was heard. The Appellant was represented by Mr. Masige, Learned Advocate, whereas the Respondent appeared in person. Mr. Masige argued each ground of appeal seriatim.

In the first ground of appeal, the learned Advocate submitted that, the District Court made a finding on matters not in dispute and not pleaded by the Appellant at the trial primary court. Issues and matters pleaded were the price per carton of water, and second the unpaid balance of tshs. 2,168,000/= being the value of 271 cartons of water. He stated that, in primary court, the Respondent stated to have paid all the moneys but on appeal to District court the Respondent stated to have been given the said 271 cartons of water for marketing in return.

Moreover, the Respondent in prosecuting the appeal to the District Court, submitted to have no contract with the Appellant. To the learned counsel, these were not deliberated at the trial primary court. He cited the case of **Hotel Travertine ltd and 2 Others v NBC (2006) TLR, 133** that, matters not pleaded at trial court may not be raised on appeal. He also cautioned on introducing the issue of secondary evidence which was not deliberated at the trial court.

In the Second ground of appeal, the District Court did not analyse the evidence properly specific on matters not deliberated at the trial primary court. To him, the District Court being the first appellate court, should have assessed the evidence of the trial court and come up with own conclusion and findings as was in the case of **DeemayDaar and 2 Others v Republic (2005) TLR 132.**

He added that, had the trial primary court evaluated evidence properly would have noted that, **one** there was contract between the Appellant and the Respondent, **two,** the Respondent received 1646 cartons of water from the Appellant as per page 20 of the proceedings. **Three**, the Respondent at trial court testified to have paid all the money but did not call any witness to prove it while the Appellant called two witnesses to prove part payment. **Four,** the submission of the Respondent at District Court that he was given 271 cartons of water for marketing has not been proved.

In all those, he cited the provisions of Section 110(1) of the **Evidence Act, Cap. 6** to the effect that, the Respondent failed to prove to have paid all the moneys. As the Appellant believed to be given the money, in terms of the provisions of Section 123 of **Evidence Act, Cap 6**,the Respondent is stopped to deny that fact and therefore 271 cartons of water was not paid. He concluded that, if the Respondent failed to acquire the market, he would have returned the said cartons of water instead of waiting the filing of this claim.

As to the third ground of appeal, it was the learned counsel's submission that, the District Court was not supposed to interfere on assessment as to credibility of witnesses and value of their evidence as the same is in the domain

of the trial primary court unless there is misapprehension in that assessment. He cited the case of **Ibrahim Ahmed v Hallimi Guleti (1968) HCD 76** and also in **Omary Ahmed v. Republic (1983) TLR 52** to support her averment. To him, the trial primary court properly assessed the evidence of both parties. He also submitted that, in the proceedings, specific at pages 22 and 23, the Respondent told the trial primary court that he will pay. On those premises, he prayed this appeal be allowed with costs.

In reply, the Respondent submitted briefly that, there was no contract between him and the Appellant and that the latter left his water to him so that he explore for markets. He said further that, the amount of Tshs 2,000,000/= is substantial such that it cannot be transacted without any written agreement. He added that, in case he was able to pay him tshs.11,000,000/=, there was no reason for not paying the remaining balance of almost 2,000,000/=. He therefore prayed this appeal be dismissed with costs.

In rejoinder Mr. Masige submitted that, not every contract must be in written form. Oral contract is also permitted provided principles are followed. With regard to marketing of the said cartons of water, the learned counsel thought to be an afterthought because it was not raised in the trial primary court. He stated further that, Respondent conceded to have been given the said water and if was for marketing, then he is the one to prove.

Having heard submissions of Mr. Masige, as well as that of the Respondent, and after having also gone through the record, I find the following matters are not at issue: **One**, there was no written contract between the Appellant and the Respondent in their business relationship. **Two**, the Respondent received 1646 cartons of water from the Appellant. **Three**, the Appellant was paid Tshs. 11,522,000/=being payments following sale of cartons of water. What is at issue is on the price of water per carton. In this, the Appellant complaint is on the agreed price of Tshs. 8,000/= per carton thus, for the 1646 cartons of water the Respondent was to pay Tshs.13,168,000/=. As he paid

Tshs.11,522,000/= , a balance of Tshs.2,168,000/= remain unpaid, thus the subject of this claim. The Respondent on the other hand reported to have paid that amount being a full realization of the whole claim at the price of Tshs.7,000/= per carton.

Having this in mind, specific to the first ground of appeal, that the trial District court determined the matter which were neither at issue nor pleaded in the trial court by the Respondent. The learned counsel mentioned that, price per carton and the balance of Tshs.2,168,000/= being the value of 271 cartons, is what transpired at the trial court. The marketing of 271 cartons of water and written contract were not deliberated at trial. My thorough perusal to the record of the trial primary court noted that, the matter relating to whether or not the contract was a written one also took a space. At page 6 of the record of the trial court, Laurent Mngonya who testified as *SM1* regarding the agreement made the following statement:

> *"Mdaiwa aliniomba nimpatie kazi ya uwakala wa kuuza maji kwa bei ya jumla katika kijiji cha Lamadi. Hatukufanya mkataba wa maandishi.Tulikubaliana kwa maneno."*

As quoted above, the question of contract to be in a written form featured in the proceedings, as such, there was no harm to the learned Magistrate on the first appeal to deliberate on this. With regard to 271 cartons of water; I agree with the learned counsel for the Appellant that throughout the record, there is no where that fact featured. However, I have read a three 3 page judgment of the District court and could hardly find anything relating to 271 cartons got discussed. This fact featured in a reply to the grounds of appeal and rejoinder thereto in an appeal to the District Court. The learned Magistrate on appeal never took into account this fact and therefore could not have erred on a matter which he did not deliberate and have a finding on it.

With regard to the second ground of appeal on failure of district court to revisit evidence on record at the trial court that, the Respondent admitted the claim, the record at page22 through 23 of the trial Primary Court proceedings, on this fact, reads as hereunder:

> *"Maelezo ya Mwisho yatachukuliwa chini ya k.45 (2) mwenendo wa madai mahakama za mwanzo.*
>
> ***"Mdaiwa:****Mimi ninakubaliana na madai yote yanayodaiwa niko tayari kumlipa mdai fedha zote anazodai kiasi cha Tshs.2,168,000/= kwa kumrejeshea katoni za maji ya kunywa ya kwenye chupa aina ya afya katoni nitakazomrejeshea zitakuwa na thamani sawa na fedha anazonidai Tshs.2,168,000/= nitamrejeshea katoni 300 zenye thamani ya fedha hizo pamoja na gharama za kuendeshea shauri hili zitalipwa kwenye katoni hizo za maji."*
>
> ***Mdai****:Mimi ninadai mdaiwa anilipe fedha taslimu Tshs.2,168,000/= ambazo hajanilipa sio kunirejeshea maji au katoni za maji ambayo tayari nilishamuuzia mimi sikubali kurejeshewa katoni za maji mdaiwa anilipe fedha taslimu."*

With this evidence, the trial Primary Court after analysis of that stuff, made the following observation as at page 3 of the judgment;-

> *"Baada ya mdaiwa (SU1) kutoa maelezo ya kukubaliana na madai yote yanayodaiwa katika shauri hili, yamekosekana kabisa matukio makuu yanayobishaniwa na yanayohitaji kujadiliwa hii ni kwa sababu mdaiwa amekubali kulipa fedha zote zinazodaiwa.*

Kutokana na maelezo yaliyotolewa na mdaiwa wakati akitoa maelezo yake ya mwisho yaliyochukuliwa chini ya kifungu 45(2) mwenendo wa madai mahakama za mwanzo, mahakama hii kwa pamoja imeridhika na Ushahidi wote uliotolewa upande wa madai na SM1 pamoja na SM2 mwingine ni SM3 kwamba ushahidi huo ni thabiti, mwingi na mzito sana kiasi kwamba umethibitisha madai yote kwa kiwango kinachohitajika katika mashauri ya madai.

With this evidence, and as per the findings of the learned trial Magistrate, it appears the Respondent agreed to pay the Appellant 300 cartons of water instead of Tshs. 2,168,000/= involved in the claim. In his reply, during hearing, the Respondent refuted generally the claim. In his written reply, regarding this ground, the Respondent submitted that:

2. The District court did not err in law and in fact that some ***evidence which was recorded at the trial court misdirected the real issue,*** *that is why the appellate court. On top of that, there was no water sale contract between the Respondent and the Appellant*

3.That the Appellate District Magistrate did not err in law and in fact because the findings of the trial court was wrong to be ***believe that the Respondent (Lyuba s/o Mbande) admitted the claim of the Appellant while was not true according to the evidence of the Appellant****. (emphasisi added)*

I think ,in this reply, the Respondent raised two important matters relevant for consideration. **One** is that, there is no evidence from the Appellant that the Respondent has admitted the claim and **two** that, the evidence on record, if believed to be, incorrectly obtained, thus changed the goal post. In this, I agree with the Respondent that the record on the Appellants case is devoid of

admission of the claim on the Respondents side. What is at stake therefore regarding admission to the claim is the trial court's record regarding the deployment of the provisions of **Rule 45(2)** of **Kanuni za Utaratibu wa Madai katika Mahakama za Mwanzo, GN No.55 of 1963.** As per the trial court's record reproduced in part above, the Respondent is recorded to have admitted the claim, a fact denied by him. To come to the truth of denial or otherwise, the guide should be, in terms of the rule, whether the procedure towards admission has been followed. In this, the said rule is reproduced as hereunder:

> *"45(1) ushahidi utatolewa kwa mpango unaotakiwa na mahakama lakini isipokuwa mahakama ikiamuru vingine.Mdai ataeleza kwanza shauri lake na kutoa ushahidi wake wa kusaidia madai yake, halafu mdaiwa naye ataeleza na kutoa pia ushahidi wake wa kusaidia upande wake.*
>
> *(2)* ***Baada ya kutolewa ushahidi wote wa pande zote mbili, wakipenda wadaiwa waweza kutoa maelezo ya mwisho ,ikitokea hivyo, ataanza mdaiwa na halafu mdai.*** *" (emphasis added)*

This is the provision, compliance of which, led to what the court found that the Respondent admitted the claim. The record has said so but the Respondent denied. This is to say, the Respondent has denied the contents of his purpoted evidence in compliance of the Rule. For the record to reflect the true account of what is in rule 45(2) of GN. No.55 of 1963, in my considered opinion, the Rule require parties, on their own will, to volunteer to give their final submissions. As it is, there is nowhere that parties opted to have their final submissions and more so, I do not think, in legal terms, if "*maelezo ya mwisho*", that is, final submissions is part of evidence. It is conceived so due to phraseology of the rule by the phrase "*baada ya kutolewa ushahidi wote wa pande zote mbili.....*". What therefore was recorded in compliance with Rule 45 (2) of GN No. 55 of 1963 is not part of evidence so to speak.

In that stance, there was no evidence on record regarding the Respondent's admission to the claim. It was therefore a misdirection on the part of the trial magistrate to consider final submissions of parties in matters of evidence, leave alone want of indication from parties to address the court in their final submissions.

Last point worth for consideration is the price of delivered water per carton. The rival rests on difference in price. The Appellant stated to be Tshs.8,000/= per carton whereas the Respondent stated to be Tshs 7,000//= If the version of the Appellant is trusted, a claim of Tshs.2,168,000/= will stand, otherwise the position of the Respondent that the agreed price of Tshs.7,000/= resulting to the payment of Tshs. 11,522,000/= being value of 1646 cartons of water may not be faulted. This however should be a question of evidence. Beginning with a claim, the issue of price per carton is not reflected. The claim reads:

> *"**Mdai:***
>
> *Mnamo tarehe 8/8/2016 na tarehe 9/8/2016 mimi nilimwuzia mdaiwa katoni 1646 za maji ya kunywa ya kwenye chupa aina ya afya yenye thamani ya Tshs. 13,168,000/=.Hata hivyo, mdaiwa alilipa Tshs.11,000,000/= tu na amekataa kulipa Tshs.2,168,000/="*

The Respondent replied to this claim as hereunder:

> ***"Mdaiwa***
>
> *Mdai aliniuzia katoni 1646 za maji ya kunywa ya kwenye chupa yenye thamani ya Tshs.11,522,000/=.Fedha hizo nilimlipa zote."*

The respondent did not also, in his reply to the claim, indicated the price per one carton of water. However, it is trite law that whoever desires the court

to pronounce judgment in his favour should prove that the claim exists and also that the duty rests on him. See section 110 and 111 of the **Evidence Act, Cap 6**.

It is to say the Appellant was duty bound to prove that the 1646 cartons of water valued at Tshs. 13,168,000/= in total had in it the value of Tshs. 8,000/= per carton. This is one way of trying to resolve the controversy which was raised by the Appellant but the Respondent did not agree.

Second is the contradiction in the evidence of the Appellant at the trial primary court regarding the total value of 1646 cartons of water. The Appellant statement of value in the claim and the evidence testified is Tshs.13,168,000/=. However ,SM2 testified that the Appellant told him the total claim to be Tshs.13,188,000/=.With this contradiction, the Primary court was wrong to base its finding on the evidence of the Appellant to prove that the value of each carton was Tsh. 8,000/=. In it, there is reason to believe that the Respondent's version on the price of one carton of water to be Tshs. 7,000/= may not be overruled. Of course in his evidence the respondent introduced the issue of price negotiations and refusal towards delivery of a consignment not requested for. When the Appellants was cross examined by the Respondent regarding price per carton stated the following:

> *"Siyo kweli kuwa nilikuuzia maji kwa thamani ya shilingi 7,000/= kwa kila katoni, hakuna nyaraka niliyokuandikia kuwa ninakudai Tshs. 2,168,000/="*

This was also the case consistently in the evidence of SU 1 both in his evidence in chief and also during cross examination and also when examined by the court. Taking this into account and also as alluded, there is reason to trust the Respondent that the price of the consignment delivered was Tsh.7,000/= per carton in that; **one**, the Appellant failed to prove the claim as even the basis of the claim is devoid of price. **Two**, the contradiction between the testimony of SM1 and SM2 regarding the total value to be Tshs.13,168,000/= (SM1) and Tshs.13,188,000/= (SM2) is evident that, the price of Tshs. 8,000/= will not add

up to the total sum to one witness's testimony. **Three**, the price of 7,000/= appears to tale with the total sum of Tshs. 11,522,000/= which the Appellant admitted to have been paid. **Four**, the attempt of the Respondent to prepare a cheque of Tshs. 13,168,000/= was not established, leave alone absence of the bounced cheque. SM2 did not only see the cheque but also unknown as to who was the drawer. Proof of this was relevant in so far imputing knowledge to the Respondent regarding the value of Tshs.13,168,000/=, and therefore the claim of Tshs. 2,168,000/=.This is to say, in terms of Rule 1(2) of the Magistrate's Courts(Rules of Evidence in Primary Courts) Regulations, Act No. 55 of 1964, the Appellant failed to prove claim as required. The rule reads;

> *"Iwapo mtu anafanya dai juu ya mwingine katika kesi ya madai, mdai huyo lazima athibitishe matukio yote yanayolazimika ili kusimamisha dai hilo ila kama huyo mdaiwa mwingine (ndio kusema mdaiwa) atakiri dai hilo."*

Having observed so, I have not seen any merits in this appeal, which is here by dismissed with costs. It is so ordered.

Gerson J. Mdemu
JUDGE
08/05/2020

DATED at **SHINYANGA** this 08th day of May, 2020.

Gerson J. Mdemu
JUDGE
08/05/2020