

**IN THE HIGH COURT OF TANZANIA**  
**MUSOMA DISTRICT REGISTRY**  
**AT MUSOMA**  
**CIVIL APPEAL NO 30 OF 2020**

**SYLIVESTER MAKANJA**\_\_\_\_\_ **APPELLANT**

**VERSUS**

**DEODATUS TAIRO**\_\_\_\_\_ **RESPONDENT**

*(Arising from the decision and orders of the District Court of Musoma at Musoma, Hon. Mwakihaba RM in Civil Appeal no 24 of 2020 dated 17.06.2020)*

**JUDGEMENT**

*7<sup>th</sup> December 2020 & 29<sup>th</sup> January 2021*

**GALEBA, J.**

Parties to this appeal were businessmen in fish and hopefully they still are. According to **Mr. Sylivester Makanja**, he supplied fish on various occasions to **Mr. Dedatus Tairo** worthy Tshs 14,075,600/= but the latter did not pay the full purchase price. He only paid Tshs 13,198,500/= leaving the balance of Tshs 877,100/= unpaid to him. As **Mr. Tairo** did not pay the amount, **Mr. Makanja** filed civil case no. 557 of 2018 in the urban primary court at Musoma.

**Mr. Tairo's** defense in that case was that not only that he had already paid him the due amount in various installments, but that he had overpaid him by Tshs 1,258,884/=. In the primary court, **Mr. Makanja**

failed to prove his case to the required standard so his case was dismissed. As he was aggrieved by that decision, he filed civil appeal no 24 of 2020 to the District Court at Musoma. The district court like the primary court, dismissed **Mr. Makanja's** appeal because he did not adduce sufficient evidence to prove that **Mr. Tairo** owed him the amount claimed. Once again the appellant was aggrieved by the decision of the district court and filed this appeal which is therefore a second appeal, this time targeting the decision of the district court.

He raised 3 grounds of appeal which can be paraphrased as follows; ***firstly*** that the district court wrongly dismissed his appeal without considering that the primary court had erred for failing to rely on the Airtel Money statement which was tendered as an exhibit. ***Secondly***, he complained that the district court wrongly evaluated the evidence which led it to arriving to a wrong decision and ***thirdly*** that the first appellate court erred for failure to rely on the Airtel Money statement which was the most reliable evidence.

When this case came up for hearing on 07.12.2020, **Mr. Makanja** appeared in person and informed the court that his arguments in respect of the 2<sup>nd</sup> ground of appeal are the same as those supporting the 1<sup>st</sup> ground.

It also seems to me that the complaint in the 3<sup>rd</sup> ground of appeal cannot bear a different meaning from that of the 1<sup>st</sup>. Therefore the appellant's complaint in this appeal was that the district court was supposed to note that the Primary Court did not take into consideration the Airtel Money statement to reach at its decision, in which case, the district court would not have confirmed the primary court's judgment. In reply to that complaint, **Mr. Tairo** who also appeared in person submitted that the Primary court considered the Airtel Money print out and referred this court to page 2 of the primary court's judgment.

The issue for determination in this appeal is whether, the appellant proved his case in the primary court and therefore the district was wrong when it ruled that he did not adduce sufficient evidence to prove his case.

The first consideration that shall guide me in this appeal, as hinted above, is that this is a second appeal against two concurrent decisions, in which for this court to set aside such decisions, it must be shown that the decisions challenged are clearly unreasonable or are a result of a complete misapprehension of the substance or nature of the evidence or that there is a clear violation of some principle of law or procedure which must have occasioned a miscarriage of justice. Short of that, this court cannot disturb

two concurrent findings of lower courts including the trial court which had opportunity to hear witnesses *viva voce* and assessed their demeanor at close range. This stand is not a creation of this court; it is the position of the Court of Appeal of Tanzania; see **Salum Mhando v R [1993] TLR 170** and **Wankuru Mwita v the Republic** Criminal Appeal no 219 of 2012 (unreported).

To decide whether **Mr. Makanja's** case was proved, I will first consider whether he managed to prove the claim he presented in the primary court. In the primary court the claim which was presented by **Mr. Makanja** was shs 1,376,000/= which he alleged was due and owing on **Mr. Tairo's** account. However according to the evidence of **Mr. Makanja** himself recorded at page 7 of the proceedings of the primary court dated 03.03.2020, he stated;

*'Pesa niliyopokea mkononi kwa kilo ikawa ni shs 2,078,000/= ukichua shs 11,120,500/= ukiongeza shs 2,078,000/= inakuwa jumla shs 13,198,500/=. Hayo ndiyo malipo aliyonipa nikitoa thamani ya samaki niompatia mdaiwa shs 14,075,600/= kutoa shs 13,198,500/= inabaki shs 877,100/= pesa ambayo haijalipwa.'*

That figure Tshs 877,100/= was also confirmed by **Mr. Makanja** as the debt that **Mr. Tairo** owes him at page 8 of the proceedings when

responding to the question for clarification by one of the assessors called **Mr. Maira**. The appellant did not give any evidence in relation to Tshs 1,376,000/= which was his claim in the case. To say it differently, whereas the appellant's case was for shs 1,376,000/=: his evidence sought to prove a debt of shs 877,100/=: which was not part of his case. In other words the appellant proved a case which was never before the court, and never proved the case that was before the court. In this jurisdiction parties are bound by their pleadings; see **James Funke Gwagilo v The Attorney General [2004] TLR 161**. It also means that evidence to be tendered must seek to prove the content of the pleadings on record. I also agree with **Mr. Tairo** that at page 2 of the judgment, the primary court considered the Airtel Money print out contrary to **Mr. Makanja's** allegations.

Finally, as stated above, this court has not found out that the concurrent decisions of the two courts below are clearly unreasonable or are a result of a complete misapprehension of the substance of the case or that there is a clear violation of any principle of law or procedure which has occasioned a miscarriage of justice, such that this court has to set aside the two judgments. In the circumstances, the complaints of the appellant in this appeal have no merit.

Based on the above reasons the decision of the District Court and that of the primary court are hereby upheld and this appeal is dismissed in its entirety with costs and the appellant has a right of appeal to the Court of Appeal of Tanzania.

DATED at MUSOMA this 29<sup>th</sup> January 2021



  
Z. N. Galeba  
**JUDGE**  
**29.01.2021**