IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

PC CIVIL APPEAL NO. 13 OF 2020

(Appeal from the judgment of the District Court of Sengerema at Sengerema (Ndyekobora, RM) in Civil Appeal No. 22 of 2019 dated 30th of October, 2019.)

JEREMIA IYOGOYOGO ..... APPELLANT

VERSUS

PAUL KAZALE ..... RESPONDENT

JUDGMENT

11th January, & 9th March, 2021

ISMAIL, J.

This appeal traces its origin from the decision of the Primary Court of Sengerema at Kasenyi in which the respondent's claim for damages was acceded. The trial court ordered payment of the sum of TZS. 980,000/-, constituting TZS. 780,000/-, being the value of the respondent's crops allegedly destroyed by the appellant's cattle. The balance i.e. TZS. 200,000/- was awarded as costs for what was alleged as inconveniences suffered in the course of pursuing his claims. On first appeal to the District Court of Sengerema, the awarded sum was whittled down to TZS. 780,000/-, on the ground that accrual of the sum of TZS. 200,000/- had

not been evidenced. Award of the sum constituting damages was based on Exhibit A, a valuation report that gave details of the destroyed crops and their corresponding prices for each of the crops.

The lower courts' concurrent findings bemused the appellant, hence his decision to take the instant appeal. Four grounds of appeal have been raised, as follows:

1. *That the first Appellate Court again grossly erred in law and in fact by failing to fault the trial court for admitting and solely relying on a purported valuation report which was allegedly authored and prepared by an expert, an agricultural extension officer (Afisa Kilimo), without the alleged expert who authored the said document being called to give evidence in order to give his expert's opinion, and corroborated the authenticity and the validity of the alleged expert report.*

2. *That the first Appellate Court again grossly erred in law and in fact by failing to find and hold that the trial court's decision miserably failed to meet the test of the law by failing to contain the mandatory requirements of a valid judgment.*

3. *That the first Appellate Court again grossly erred in law and in fact by to fault the primary on the basis that, owing to the fact that what was before the trial court was a main suit and not a miscellaneous application, the trial court was wrong to issue a uamuzi (ruling) instead of hukumu (judgment).*

4. *That the first Appellate Court again grossly erred in law and in fact by failing to thoroughly scrutinize and analyze the evidence and the proceedings both at the trial court and before the first Appellate court before holding in favour of the respondent.*

When the matter came up for orders, the Court ordered that disposal of the appeal be carried out by way of written submissions, whose filing was done consistent with the schedule drawn by the Court.

Submitting in support of the appeal, Mr. Yona Shekifu, learned counsel, began with acknowledging the fundamental principle which is to the effect that concurrent findings of lower courts should not be interfered with, unless there is a miscarriage of justice, misapprehension of evidence or violation of principles of law and practice. The learned counsel argued that, in this case, the lower courts made grave errors by violating principles of law and practice. With respect to the first ground, the counsel argued that the Valuation Report which was authored by the Agricultural Extension Officer was admitted without calling the said author of the said report who would corroborate or and attest on its authenticity and validity. This, the counsel contended, violated Regulation 11 (2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, GN. No. 55 of 1963. It was his further contention that evidence in respect thereof ought to have

come from the maker of the report and not from the respondent, as failure to do that denied the appellant of the opportunity to cross examine the would be witness. To buttress his contention, Mr. Shekifu cited the decision of this Court (Hon. Kisanya, J.,) in ***George Mbushi v. Mniko Magesa***, HC- (PC) Civil Appeal No. 62 of 2019 (unreported), in which a report similar to Exhibit A was tendered and the maker thereof was not called to testify.

With respect to the second ground, the appellant's argument is that the trial court's decision failed to conform to the mandatory requirements of a valid judgment, by failing to embody the opinion of the assessors or give reasons for deviating from such opinion, if any was given. He argued that, since assessors are part and parcel of the trial court, failure to take their opinion was against the requirements spelt out in section 7 (1) and (2) of the Magistrates' Courts Act, Cap. 11 R.E. 2019. The counsel cited the decisions of ***Agnes Severini v. Mussa Mdoe*** [1989] TLR 164 (CA); and ***Mugeta Malago & Another v. Amosi Pamba***, HC (PC)-Criminal Appeal No. 25 of 2019. In the latter, the proceedings of the trial court were annulled for failing to comply with the requirements of the law.

The counsel further argued that the impugned decision lacked essential ingredients of a valid judgment as there were no points of determination, decision on those points, and reasons for the decision. On

this the counsel relied on the landmark decision of ***Hamisi Rajabu Dibagula v. Republic***, CAT-Criminal Appeal No. 53 of 2001, which quoted its earlier decision in ***Lutter Symphoriam Nelson v. The Hon. Attorney General & Another***, CAT-Civil Appeal No. 24 of 1999 (both unreported). He held the view that the impugned judgment of the trial court failed the test of a good judgment and that the same is nothing but a nullity.

With respect to the third ground, the counsel's contention is that the use of the title UAMUZI in the trial court's decision was erroneous as the appropriate name of what was distilled by the trial court is HUKUMU. He contended that, whereas the former translates to a RULING in English while HUKUMU refers to a JUDGMENT. The counsel argued that rulings are only pronounced in applications and objections, and this case fell in neither of the two. He contended that this error might have occasioned an injustice, though he did not say who between the parties suffered the alleged injustice.

In respect of the fourth, the argument is that the adduced evidence was not thoroughly analysed and scrutinized, and that the trial court solely relied on the report of the agricultural officer whose admission was shrouded in procedural impropriety, and that the same was not corroborated. In view of this failure, the appellant's contention is that the

said testimony lacked propriety and credibility that would warrant making a finding in the respondent's favour. It was the appellant's plea that the concurrent findings of the lower courts be quashed and have the appeal allowed with costs.

Submitting in rebuttal, Ms. Janeth Kishamba, the counsel who was retained for drawing the submissions for the appellant, found nothing faulty with respect to the concurrent findings of the lower court. With respect to ground one, her contention is that, since appellant admitted the claim, need did not arise for procuring attendance of the maker of Exhibit A. She argued that the appellant stated that he had paid two bags of maize, meaning that he admitted that his cattle destroyed his crops. Citing Regulation 1 (2) of GN. No. 55/1963, the respondent's counsel maintained that an agricultural officer's testimony would be crucial if the appellant had denied responsibility, thereby rendering the proceedings contentious.

Arguing on the second ground of appeal, the respondent's counsel scoffed at the contention that opinions of the assessors were not sought and considered in the decision of the trial court. She attributed that to the appellant's failure to glance through the proceedings of the trial court that clearly show that the assessors' opinion were considered and factored in the decision of the trial court. The respondent argued that opinions of the

assessors are reflected in the proceedings and page 9 of the proceedings clearly attests to that fact.

Moving on to the validity of the judgment, the respondent's counsel found nothing faulty in the trial court's decision. It was the counsel's argument that, since the trial proceedings were largely uncontested then some of the ingredients of the judgment such as points of determination were of no significance. She contended that the appellant's admission to destruction of the respondent's crops halved the trial court's responsibility and render some of the ingredients redundant.

With regards to ground three of the appeal, the respondent admitted that there was a mix up in the name of the decision delivered. He, however, played down the significance of the alleged impropriety in use of the word UAMUZI as that word and HUKUMU refer to one and same thing. The respondent's counsel saw nothing that would be said to have caused any negative impact to any litigant.

With respect to ground four, the respondent's contention is, by and large, a replication of what he submitted with respect to ground one. He added that the evidence in support of the claims was not disputed by the appellant. The respondent took the view that admission of destruction of the crops and promise to make good the payment was also the testimony

of appellant's culpability. The respondent prayed that the appeal be dismissed for want of merit.

I have dispassionately read the contending submissions and, having made sense of them, I am now ready to dispose of this appeal. The singular question for determination is whether this appeal has raised anything pertinent to justify departure from the concurrent findings of the lower courts.

Let me first address ground three of the appeal which has taken exception to the trial magistrate's decision to baptize the decision as **Uamuzi**, literary meaning a **ruling**, instead of **Hukumu** which is a **judgment**. As rightly argued by the appellant and conceded by the respondent, the trial magistrate strained into error in preferring Uamuzi to Hukumu for a decision that emanated from a suit. The proper nomenclature is **Hukumu**. While this segment raises a minimal acrimony, it is the consequence of this slip up which has raised a contention. The appellant argues that it might have occasioned an injustice, a view opposed by the respondent. By using the word "might", the appellant has shown that there is nothing injurious that befell him following this gaffe, and that the appellant's criticism was unjustified in the circumstances where, in the ordinary course of things, the two terms bring a very blurred

difference that is of less significance, and having no impact to the substantive rights of the parties.

I take this situation to be akin to what happens when an appellant confuses a **memorandum of appeal** with a **petition of appeal,** as it has happened in numerous cases. While each of the two is a creature of the statute, courts have exhibited tolerance and get to the substance of the matter while ignoring the legal niceties. Thus, in ***Basil Masare v. Petro Michael*** [1996] TLR 226, this Court (Mroso, J., as he then was) held as follows:

> *"What substantive distinction can one make from the use of the words `petition' or `memorandum' when referring to grounds of appeal to a higher court? I must confess, I can see no such distinction although I would say that it would be preferable if an intending appellant uses the word adopted by the legislature for the relevant type of appeal. In my view, if an appellant uses the word `memorandum' instead of the word `petition' in connection with his grounds of appeal in a case originating in the primary court, that alone cannot render the appeal incompetent. That would be making a mountain out of a mouse mound unnecessarily."*

See: ***Kiruruma Village Council v. Dotto Philipo Mchelemchele & 2 Others***, HC-Land Appeal No. 79 of 2019 (MZA-unreported).

The appellant's other consternation on this ground relates to what he stated as failure to conform to the tenets of a judgment. In the counsel's view, the judgment lacks the qualities enumerated in his submission. These are points for determination, decision on those points and reasons for such decision.

As correctly pointed out by the counsel, composition of a judgment is not devoid of any legal guidance. This is in view of the fact that a judgment or ruling is a legal document whose composition is guided by the law. One of these guiding requirements is embodiment of reasons in the judgment or ruling, and this has been amply underscored in the decisions cited by the appellant's counsel. Embodiment of reasons was especially singled out by M.K. Mukherjee, J., in ***Rupan Deol Bajaj and Another v. Kanwar Pal Singh Gill and Another*** [1995] Supp. 4S.C.R. 237, at p. 258, quoted with approval in ***Hamisi Rajabu Dibagula*** (supra). He guided as hereunder:

> *"Reasons introduce clarity and minimise chances of arbitrariness."*

See also: ***Tanga Cement Company Limited v. Christopherson Company Limited***, CAT-Civil Appeal No. 77 of 2002 (unreported).

Turning on to the impugned trial decision, I find nothing disquieting about it. While the style of composition is different from decisions in the upper courts, mainly due to the mandatory application of the Civil Procedure Code, Cap. 33 R.E. 2019; and the Criminal Procedure Act, Cap. 20 R.E. 2019, it cannot be said that the essentials accentuated in the cited decisions are missing. I take the view that the impugned decision was largely compliant with the requirements of the law and, therefore, flawless, and I consider this ground of appeal underwhelming and I dismiss it.

Ground two contends that the trial court's judgment fell short in its qualities. One, because of the failure by the trial court to take on board assessors' opinion and, two, for failure to conform to the basic tenets of a valid judgment. It is true, as rightly contended by the appellant's counsel, that incorporation of assessors' opinions is an imperative requirement that cannot be wished away, as the potential of doing that is to render the decision a nullity. But incorporation of the opinion does not mean or require the magistrate to incorporate such opinion in his judgment, as signing of the decision, by the assessors, is taken that such opinions were factored in. This reasoning is consistent with the holding in ***Neli Manase***

Foya v. Damian Mlinga, CAT-Civil Appeal No. 25 of 2002 (unreported), wherein it was held thus:

> *"With due respect to learned High Court judge, this is not what Rule 3 (2) provides. The assessors are members of the court and sign the judgment as such, and not for the purpose of authenticating it or confirming it. In answer to the second point of law, assessors are neither required to give their opinions, nor to have their opinions recorded by the magistrate."*

Looking at the decision of the trial court, it is clear that the assessors appended their signatures to the decision, expressing concurrence and that their opinions were taken on board. Besides that, the proceedings are clear that such opinions were solicited and given. The appellant's contention is, with respect, hollow.

Ground one of the appeal has especially poked holes in the testimony relied upon to decide in the respondent's favour. The appellant's main contention is that, admission of the report without parading the agricultural extension officer to testify on the report he prepared was erroneous and the first appellate court ought to have held as such.

Let me begin by expressing concurrence with the counsel for the appellant that, GN. No. 55/1963, is the guiding instrument on matters of adduction of evidence and the manner in which documentary testimonies

are to be tendered and admitted in Primary Courts. Regulation 8 (1) provides that facts to be proved by evidence may either be the statement of witnesses i.e. oral evidence; and/or the production of documents by witnesses, meaning the documentary evidence. As rightly contended by Mr. Shekifu, Regulation 11 (2) requires that production of a documentary evidence must be accompanied by an oral account. It states as follows:

> *"Where documentary evidence is produced, oral evidence must be given to connect it with the case."*

Going through the trial proceedings one thing is clear. This is that, exhibit A which formed the basis for the award of damages in the respondent's favour was not produced or tendered in court by any of the two witnesses who testified for the respondent. No oral testimony was given, either, in connection with the plaintiff's case at the trial. Amidst these anomalies, the said document which had a decisive effect on the trial proceedings, was allowed to form part of the proceedings and sway the trial court's decision, and it is not known how it found its way into the court file. A certainty is that no semblance of a process was put in motion to try and have it tendered and admitted in a manner that would allow the appellant to question its admissibility or impeach its veracity and/or its

probative value. I hold the view that the irregular manner in which the said document was produced and admitted means that the said document deserves no better treatment than expunging it from the record of the court. I order that the same be expunged.

Turning on to the unexplained absence of the most important witness, I hold the view that this case cannot be said to be evidentially complete in his absence. This is so, because a big chunck of the claims hinged on the assessment that the agricultural extension officer prepared and authored. He is better placed to know the science he used to arrive at the figures and make a sense of the figures contained in the report. His absence not only denied the court of the glorious opportunity to get a clarification of a few things that would, in its wisdom be considered pertinent, but it also denied the appellant an opportunity to impeach the accuracy and the overall veracity of the report. I consider this to be a horrendous omission that acutely weakened the respondent's case, and it cannot be said that the case against the appellant was proved beyond reasonable doubt. Borrowing the wisdom ushered by my brother, Kisanya, J., in ***George Mbushi*** (supra), evidence to prove the respondent's case was proved wanting, necessitating that this appeal must succeed.

Consequently, and on the basis of this ground alone, I find merit in the appeal and allow it. Accordingly, I quash the proceedings of the lower courts, and set aside the concurrent decisions of the lower courts. The appellant is to have his costs.

It is so ordered.

Right of appeal duly explained.

DATED **at MWANZA** this 9th day of March, 2021.

M.K. ISMAIL

JUDGE

Date: 09/03/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present online. Mobile No. 0786 040223

Respondent: Present online. Mobile No. 0786 044042

B/C: J. Mhina

Court:

Judgment delivered in chamber, in virtue attendance of both parties this 09th day of March, 2021.

M. K. Ismail

JUDGE

At Mwanza

09th March, 2021