

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MTWARA)**  
**AT MTWARA**  
**PC. CIVIL APPEAL NO. 13 OF 2020**

*(Originating from Civil Case No. 63 of 2018 at Lisekese Primary Court and Appealed to the District Court of Masasi as Civil Appeal No. 17 of 2018)*

**KAMPUNI YA ULINZI SHARK ..... APPLICANT**

**VERSUS**

**JUMA <sup>S/o</sup> HASSAN @ NJECHELE ..... RESPONDENT**

**JUDGEMENT**

*Final submission on: 20/4/2021*

*Judgment date on: 22/6/2021*

**NGWEMBE, J:**

This is the second bit of appeal after the appellant's failure on the first bit at the District Court of Masasi. The appellant is vigorously challenging the decision of the trial court that is Lisekese Primary Court in civil Case No. 63 of 2018. The trial court's decision was in favour of the respondent, which decision was also upheld by the District Court in Civil Appeal No. 17 of 2018.

The appellant being dissatisfied, found his statutory right over those two judgments by filing an appeal to this court of record by advancing three (3) grievances, namely:-



1. The Court erred both in law and in fact by failure to see that the claim of Tsh. 7,712,000/= was not proved to the required standard;
2. The court erred both in law and in fact by failure to see that the appellant was not a party to a contract between the respondent and uongozi wa soko Mkuti nor there was implied contract with the respondent; and
3. The court erred both in law and in fact by failure to see that Tsh. 300,000/= being costs at the trial court was unjustifiable.

The brief background of this appeal traces back to an event of theft from the respondent's shop occurred on 10<sup>th</sup> June, 2017. The properties alleged to be stolen on that fateful date had a value of TZS 5, 512,000/=. The said shop was located at the market place where had union leadership known as Uongozi wa Soko knew the event of that theft. The vent of theft in the same shop was repeated on another date resulting into loss of properties worth Tsh. 2, 145,000/= thus constituting a total loss of Tsh. 7,712,000/=.

It is on record that the said market was protected by security guard from the appellant. After such event of theft, those security guards were successfully prosecuted and found guilty, hence convicted and sentenced accordingly. It is also on record that the respondent was a member of Umoja wa Wafanyabiashara Soko Kuu Mkuti, which union had leadership best known as Uongozi wa Soko Mkuti.

After the occurrence of theft in his shop and the employees of the appellant being found guilty of that theft, the respondent opted to lodge



a civil action against both the employer that is, Kampuni ya Ulinzi Shark and Uongozi wa Soko Mkuti in Lisekese primary court. According to the judgement of the primary court, the plaintiff/respondent proved his case to the balance of probability, hence at page 6 of the trial court's judgement, the appellant was ordered to pay a total of Tsh. 8,0212,000/= to the respondent.

The appellant was dissatisfied with that judgement, hence appealed to the District court, whereby the District court at page 3 dismissed the appeal and proceeded to uphold the decision of Primary Court.

Having exhaustively narrated the background of this appeal, what follows now is the arguments of parties in respect to this appeal. Briefly, the appellant submitted that, the claim of Tshs. 7,712,000/= was not proved to the required standard. There was no evidence as to how that figure was arrived. Also, there was no report or evidence as to whether the said stolen goods were actually in the shop of the respondent before they were stolen.

Argued further that, the appellant's witness (DW1) objected the issue from the beginning and he testified that there were no receipts. He wanted to see the evidence that the same were actually in the shop before they were stolen. Added that, there was no valuation or analysis from a competent person or authority to arrive to such amount of money. Thus, the amount of Tshs. 5,512,000/= was not proved to the required standard.

Even the claim of stealing of properties worth Tsh. 2,145,000/= were likewise not proved at all. Cited section 3 (2) of the Evidence Act Cap 6

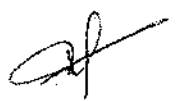


R.E 2019 and also referred this court to the case of **Puma Energy Tanzania Ltd Vs. Spec-Check Enterprises Ltd, Commercial Case No. 19 of 2014, HC**, Commercial Division at Dar es Salaam.

Arguing on the 2<sup>nd</sup> ground, he submitted that there was a contract between the appellant and Uongozi was soko Mkuti, while the respondent was only member of Umoja wa Wafanya Biashara Soko Kuu Mkuti. As such, the respondent was a stranger to the said contract and had no direct contract with the appellant. Similarly, there was no implied contract as said by the learned trial magistrate. That since the respondent was not a party to the contract, the proper recourse was supposed to be a suit filed by Uongozi wa Soko Kuu Mkuti against the appellant, not otherwise.

Justified his argument by referring this court to the principle of privity of contract as defined by **Black's Law Dictionary, Eight Edition**, at page 1237 and in the book written by Prof. N.N Nditi on **General Principles of Contract Law in East Africa** at page 114 and the case of the **Tanzania Sugar Producers Association Vs. Ministry of Finance of the Government of Tanzania and 2 others, Commercial Case No. 85 of 2003**. Thus rested on this ground by arguing that the respondent was a stranger to the contract.

On the last ground, the appellant argued that, it does not know how the figures were arrived at by the trial court. Also it does not know why the 1<sup>st</sup> appellate Court upheld the judgment including payment of Tshs. 300,000/= as costs without prove. In supporting this point he cited the case of **Juma Makiya Vs. Hamis Mohamed [1984] T.L.R 53**.



In turn, the respondent submitted that, the case at hand is on compensation of stolen properties valued at Tshs. 7,712,000/=. He distinguished with criminal case of stealing, which was heard and concluded by the trial court. The criminal trial of stealing was prosecuted by the Republic and proved it beyond reasonable doubt. That was Criminal Case No. 100 of 2017, where the security guards of the appellant were found guilty for negligence to prevent the offence of stealing his properties valued Tshs. 7,712,000/=. Such criminal case was neither appealed against nor revised by any court, thus conclusively settled forever.

Submitted further that, as a general rule, the burden of proof in Civil Cases lies on the plaintiff as per sections 110 and 111 of the Evidence Act Cap 6 R.E 2019. Also referred this court to the case of **Ikizu Secondary School Vs. Sarawe Village Council, Civil Appeal No. 163 of 2016**. Thus, the respondent managed to prove his case on balance of probability.

On the 2<sup>nd</sup> ground, he argued that, the respondent was impliedly party to the contract entered between the appellant and Uongozi wa soko kuu Mkuti as he was a beneficiary. During trial the respondent sued both Uongozi wa soko Kuu Mkuti and the appellant. The trial court upon hearing all parties' evidences, rightly found the appellant is liable to pay the respondent Tshs. 7,712,000/= Thus, the issue of contract or privy of contract notwithstanding, the respondent was a beneficiary and a full member of Wafanyabiashara wa Soko Kuu Mkuti. Those members are the one placed those Uongozi wa Soko in place. Added that the respondent sued the appellant as a necessary party to be joined as per Order I Rule 3 of the Civil Procedure Code Cap 33 R.E 2019.



Lastly, he argued that, the trial court correctly granted the costs to the respondent, the decision which was correctly upheld by the District Court as the appellant was the losing party who should bear costs of the case. To justify his argument, he referred this court to the decision in the case of **Yusuph Mpini and two Others Vs. Juma Y. Mkinga and two Others, Civil Appeal No. 1 of 2017.**

Having summarized the background of this appeal and the arguments advanced by both parties, together with the evidence on record, undoubtedly, the main issue for determination is whether the amount of Tshs. 7,712,000/= to the respondent was proved to the required standard.

It is settled in our jurisdiction, that the burden of proof in civil litigation lies upon a person whose right is infringed. This is a legal position under section 110 (2) of the Evidence Act Cap 6. R.E 2019, as quoted hereunder:-

*"When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person"*

This section was rightly amplified in various decisions including in the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita Joseph [2006] T.L.R 419**, where the court held:-

*"It is elementary principle that he who alleges is the one responsible to prove his allegation"*

In respect to this appeal, the question is whether such burden was dutifully discharged by the respondent at trial court and at the 1<sup>st</sup> appellate court? To answer this question, I have to revisit briefly on

what transpired in subordinate courts. I am aware that the second appellate court rarely deals with facts, but in this appeal, I find it important to do so for the ends of justice.

Undoubtedly, the employees of the appellant were criminally liable in Criminal Case No. 100 of 2017. Likewise, the appellant (Kampuni ya Ulinzi) entered into a contract with Uongozi wa soko as proved by Annexure "KSM-2" to guard the buildings, and the properties of their clients.

According to the constitution of Umoja wa wafanya biashara, a qualification to be a member must be a business man of soko kuu Mkuti Masasi in which, the respondent was a member and a business man at Soko kuu Mkuti. The stolen properties were quantified during trial and the trial court arrived to the conclusion that the stolen properties had a value of Tshs. 7,712,000/=, properties of the respondent. Such criminal case was not appealed against, thus the convict was satisfied and complied with the sentence.

As I have already said, at the second appeal, the court rarely deals with facts, rather deals with legal issues, which the subordinate court overlooked. However, the appellant in its arguments has strongly submitted on facts and failure of the respondent to prove a case at trial to the standard required. Such arguments ought to be advanced in the first bit of appeal, where the 1<sup>st</sup> appellate court is duty bound to reevaluate the whole evidences of the trial court.



Perusing the oldest precedents in England Laws, the same position was arrived in the case of **Watt Vs. Thomas (12947) A.C** at page 429 the Court held:-

*"It is a strong thing for an appellate court to differ from the finding on a question of fact of the judge who tried the case, and who has had the advantage of seeing and hearing the witness. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution"*

Similar decisions are made in our jurisdiction. Thus, this court need not to labour much on facts adduced during trial, rather conclude the first ground as lacking merits.

Considering on whether the respondent was a stranger or otherwise to the contract entered between the appellant and Uongozi wa Soko Mkuti, the answer is simple. According to the principles of contract, he was not a party, but also Uongozi wa Soko Mkuti is not an independent entity separate from its members. More so, the appellant was responsible to guard the business rooms of members of Uongozi wa Soko Mkuti. The respondent was a member among other members of that market. In the circumstances of this case, the respondent was part and parcel of the said Market and was among members who appointed or elected their leaders forming Uongozi wa Soko Kuu Mkuti. Therefore, the respondent cannot be separated from Uongozi wa Soko Kuu Mkuti.

The last ground is related to compensation of Tshs. 300,000/= as costs. I think this ground cannot tie me up for obvious reasons that the compensation to the respondent was TZS 7, 712,000/= in addition,





costs of the case equal to Tshs. 300,000/= . I think this ground is misplaced same is dismissed.

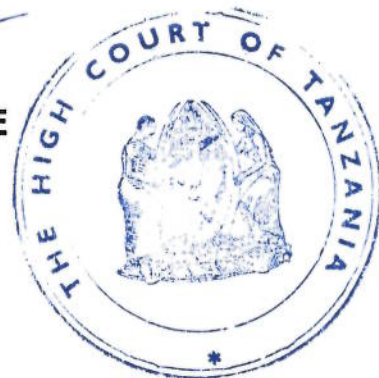
In totality and for the reasons so stated, there is no valid reasons to depart from the decisions of the two lower courts. Consequently, this appeal is dismissed with costs.

**I accordingly order.**

Dated at Mtwara this 22<sup>nd</sup> day of June 2021.



**P.J. NGWEMBE  
JUDGE  
22/6/2021**



**Date: 22/6/2021**

**Coram: Hon. A.H. Msumi, DR**

**Appellant: Mr. Batholomeo Nehata - Director**

**For Respondent: Present in person**

**B/C: Asha – RMA**

**Order:** Judgment delivered today in chambers in the presence of the Appellant and Mr. Batholomeo Nehata - Director of the Appellant's Company and the Respondent in person

**A.H. Msumi  
DEPUTY REGISTRAR  
22/6/2021**