IN THE HIGH COURT TANZANIA

DAR-ES-SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 239 OF 2018

NITAK LIMITED..... APPELLANT

VERSUS

ONESMO CLAUD NJUKA.....RESPONDENT

(Arising from the decision of Court of Resident Magistrates of Morogoro)

(Msacky, Esq- RM)

Dated 5th October 2018

in

Civil Case No. 54 of 2017

JUDGEMENT

28th June & 28th July 2021

Rwizile, J.

The appellant appeared before the trial court with a claim of recovery of the sum of 29,550,000/= being for selling recharge vouchers and Airtel money transactions done by the respondent. she also claimed for 20,000,000/= as general damages for such breach of their oral agreement. It was alleged that the appellant through its agent entered in a commercial business transaction of selling airtel mobile recharge vouchers and as well to do mobile business named as Airtel Money with the respondent. The amount claimed in principle was taken in credit by

the respondent for the same business. The advanced amount was not returned even though services targeted were done. Upon failure to recover the money as alleged. The appellant commenced a case before the trial court. After full hearing, the appellant lost on grounds that the same failed to prove the case as the law requires.

She has now appealed to this court while advancing 4 grounds of appeal, stated in the terms thus;

i. That the learned trial Magistrate erred in law and fact for not admitting documents tendered by Pw1 which are ID-1 to ID4 which he has knowledge and a competent witness to tender them
ii. That the learned trial magistrate erred in law and facts for not holding that there is oral contract between the plaintiff and defendant as proved by tendering ID1 to ID4 which proved various transactions between them
iii. That the learned trial Magistrate erred in law and facts for not considering ID2 which prove the defendant admitted the claim
iv. That the learned trial magistrate erred in law and facts for failure to record and assess properly the evidence adduced

The appellant therefore asked this court to allow the appeal with costs. Before this court Mr. Omary learned advocate appeared for the appellant. The respondent appeared in person. The appeal was argued by written submissions. When arguing for the first ground of appeal, the appellant was of the submission that the witness called, one Thomas Pius Mkoba was a competent witness who tendered primary evidence since the documents tendered were original. It was Mr. omary's view that the same ought to have been admitted as exhibits.

According to him, failure to have the same admitted as exhibits limited his evidence which did not therefore prove the case.

The second ground of appeal was argued that when Pw1 tendered ID4, he proved other transactions entered by the appellant and respondent. it was submitted that the bank statement was duly approved by the NMB bank showing the account hold is the appellant. The transaction proved there was business between the two. It was not proper therefore to have the certified document from the bank, admitted for identification. With this, the appellant asked this court to allow the appeal.

On the third ground of appeal, it was submitted that the appellant tendered a statement ID2 which proved the respondent admitted the claimed amount. The evidence was therefore open in his view that the respondent breached terms of oral agreement.

The last ground of appeal deals with failure by the trial court to assess the evidence. In this, it was argued that it was not proper for the trial court to admit the documents for identification purposes instead of exhibits. The court was asked to refer to the case of **DPP vs Mirzari Pirabarkshi and 3 others**, Criminal Appeal No.493 of 2016 at page 7-9 which held that the test for tendering exhibit depends on knowledge of the witness if for instance he possessed the thing at one point in time. It was submitted that since Pw1 so testified and had knowledge on exhibits it should be found that the appeal has merit

On his party, the respondent submitted that based on ID1, it is not shown if the appellant has a claim against the respondent to the tune claimed. The respondent went on submitting that upon analysing all other documents as ID2 to ID4 as the same were not worth and so were rightly

rejected by the trial court. the respondent had almost the same submission on the rest of the grounds of appeal. In all, this court was asked to dismiss the appeal.

Having heard the submissions, it is relevant to say that the trial court upon hearing the matter raised two key issues, one is whether there was an agreement between the two parties and the second whether the defendant breached the terms. In analysing the evidence, he only delt with one issue. He then held as hereunder at page 5 of the typed judgement.

> *"…In my considered opinion basing on the nature of the amount claimed by the plaintiff against the Dw1, it was fairly and reasonably supposed to be in writing. Struggling to substantiate amount claimed Pw1 tendered several exhibits which were all admitted as exhibits ID1 to ID-4 respectively against Dw1, but all purported exhibits before being admitted were fiercely disputed by learned counsel for Dw1. Following the rival of both counsels involving admissibility of those exhibits this court made a ruling to the effect that all exhibits were admitted with the promise, to consider the propriety on their admissibility at the time of writing the judgement…"*

From the extract, the appellant coached the first and second grounds of appeal. The proceeding shows, when admitting the documents, the trial court ruled as follows;

> *"…those arguments from both sides are noted, thus this court admits and hereby marks as ID1, the admissibility will be looked at when writing the judgement…" At page 10, he did*

the similar ruling when admitting the other document as ID2 at page 11, as well for ID3 and ID4 respectively at pages 12 and 13.

It goes without saying therefore that all key documents tendered by the appellant were admitted for identification. The trial Magistrate was vehement and did determine the question of admissibility of the exhibits at the time of writing the judgement. I think, this approach was against the law. The trial magistrate in my view confused exhibits tendered in court and articles tendered for identification. As I understand, an exhibit is a document, record or other tangible object formally introduced and admitted as exhibit in Court. The same is well defined under section 3 of the evidence Act. Conversely, any document or article produced in court for identification is always marked for identification. This in actual fact is not an exhibit. In law, there are principles governing admission of exhibits. Apart from the Evidence Act, the case of ***DPP vs Sharifu s/o Mohamed @Athumani and 6 others,*** **Criminal Appeal No. 74 of 2016, CAT at Arusha (Unreported)** the Court of Appeal, stated the following principles;

a) **Relevancy**; Exhibit is relevant if it tends to make a fact that is offered to prove or disapprove either more or less probable. In admitting exhibits authenticity is an aspect of relevance and therefore, admissibility. Unless a document is authentic that is to say, it is written by its supposed author and is genuinely what it purports or is asserted to be - it is in most cases relevant and admissible.

b) **Materiality**, exhibit is material if it is offered to prove a fact that is at issue in the case

c) **Competence**, exhibit is competent if it meets certain requirements of reliability. Reliability may be established by first adducing foundation exhibit. So, when exhibit is objected for want of foundation it means its competence is called upon into question.

These are things to be considered at the earliest before the document is admitted. If not admitted and marked as an exhibit but rather admitted for identification it means, it is not evidence.

Therefore, it is of essence that the trial court did not or was not entitled to admitted the document for identification and reserve the issued of its admissibility at the judgement stage. In actual fact, there was no such reasons and it was prejudicial to justices of the case. It is therefore settled that an exhibit not admitted as such in court cannot form the basis of the judgement as held in the case of **Abdallah Abass Najim v. Amin Ahmed Ali** [2006] TLR 55. Since the trial court admitted all documents by the appellant for identification as ID1 to 4, and went ahead to base the finding of the case on the same, he operated outside the law. there were no exhibits before him to analyse. His whole decision relied on such documents which was wrong. I hold that the first ground of appeal has merit. I therefore hold the trial magistrate went astray in doing so.

Since the first and second grounds of appeal hinge on the same point of exhibits admitted for identification. I have therefore to quash the decision made therefore.

Now what should be the remedy under such instances. It is my concerned that the case was heard and determined. The plaintiff efforted to bring his evidence which upon objection the court did not do its duty properly thereby leading to injustice on the parties. The remedy which suits the interest of the case is that the case should be tried again. This means, I

order, a trial denovo. It should be done before another magistrate with competent jurisdiction. Since this is a case that has taken too long in court. It should be heard with convenient speed.

AK Rwizile
JUDGE
28.07.2021

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY