IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

PC. CIVIL APPEAL No. 88 OF 2020

(Arising from the Decision of the District Court of Ukerewe, in Civil Appeal No. 09 of 2020, which originates from Civil Case No. 03 of 2020 of Ilagala Primary Court)

HAJI KIRUKU----------APPELLANT

VERSUS

BAGAILE KINUNI----------RESPONDENT

JUDGMENT

11th & 27th August, 2021

TIGANGA, J.

This judgment is in respect of PC. Civil Appeal filed by the appellant, Haji Kiruku against the respondent, Bugaile Kinuni challenging the decision of Ukerewe District Court, at Nansio, Civil Appeal No. 09 of 2020 which was also filed by the appellant himself challenging the decision of the Primary Court of Ilangala, in Civil Case No. 03 of 2020, in which the respondent was claiming 50 pieces of fishnets valued at Tshs 2,000,000/= which he entrusted to the appellant in their oral agreement of doing fishing business. In that agreement, the appellant contributed 20 fishnets and an engine

machine, while the respondent contributed 50 pieces of fishnet and one canoe.

The Primary Court was satisfied that the respondent who was the claimant before that Court proved the case on the balance of probabilities, a standard required in civil cases. The trial Court ordered the respondent to be paid Tshs 2,000,000/= which is the value of the subject matter i.e. fishnets. That finding was made notwithstanding the defence by the appellant that he had never engaged in such business and had no such contract with the respondent, and that in fact during the said period of contract, he was at Kirumba in Mwanza, doing his dry fish business, before he lost his maternal grandmother who had passed away on 02/09/2019.

Following that decision the appellant appealed to the District Court where he filed three grounds of appeal as follows:-

1. That the trial Magistrate erred in law and in fact by holding agreement between the parties without proof of ownership and the existence of the fishnets receipts, registration number of Canoe and canoe license.

2. That the trial Magistrate erred in law and fact by failure to consider the water tight evidence of the appellant hence misdirecting himself on determining the matter.
3. That, the trial Magistrate, erred in law and in fact by holding the appellant to pay Tshs 2,000,000/= to the respondent while the case and evidence was cooked to jeopardise a Civil Appeal Case No. 03 of 2020 before the District Court.

In reply to the petition of appeal, the respondent countered the 1st ground of appeal, that, the same is totally misconceived as there was no judgment or findings to appeal against; he asked the appeal to be struck out basing on that reason.

He also averred in respect of the second ground of appeal that the ground is wanting for the respondent proved his claim on the balance of probabilities, as he proved that there was a contract between them.

Further on the second ground, he averred that the decision based on well weighed evidence of both parties.

Last he averred that the appeal is frivolous, and that the decision of the final court based on evidential value and its weight and nothing else.

In rejoinder, the appellant rejoined that the respondent is misconceived as there is a valid judgment to be appealed against. Regarding the rest of the grounds of appeal he reiterated what he actually averred in the petition of appeal.

Having heard the parties on merit of the appeal, the learned appellate magistrate found the 1st and 2nd grounds of appeal to have no merit because what was in issue was not the ownership of the said fishnets; it was whether parties had agreement. Basing on the evidence of the respondent and SM2, the respondent's witness, he was satisfied that the evidence proved that there was such agreement and the fishnets were handed over to the appellant by the respondent. Furthermore that there was no evidence presented to show that on the date the parties are alleged to enter the agreement the appellant was in Mwanza and Musoma. Lastly he held that it was proper for the trial Court to award the respondent Tshs 2,000,000/= because he had established his claim.

Following that decision, the appellant in further search of his right, appealed before this court on the following grounds:-

a) That, the learned Appellate District Resident Magistrate erred in law and fact when he failed to take into consideration the evidence that the respondent suit against the appellant was a complete fabrication which the respondent and his unholy associates has concocted to thwart appellant's Ilangala Primary Court, Civil Case No. 01/2020 which went on appeal to Ukerewe District Court Civil Appeal No. 03 of 2020.

b) That, the trial magistrate court of Ilangala and the appellate court of Ukerewe District Court erred in law and in fact, when they believed the respondent's concocted evidence that appellant and respondent had entered into joint fishing business agreement without any proof of written agreement to that effect.

c) That, the trial Ilangala Primary Court Magistrate and the appellate Ukerewe District Court Resident Magistrate, erred in law to believe and hold that, the respondent had given the appellant 50 fishnets and fishing canoe without proof of the fishnet cash sale, receipt from the shop they purchased the said fishnet and without proof of the canoe Registration number and the said canoe's fishing licence.

d) That, the learned appellate District Court Resident Magistrate erred in law when he failed to take into account, the fact that, the respondent who claims to have given the appellant fishnets and fishing canoe both worth Tshs 2,000,000/= he could have a counter claim in Ilagala Primary Court Civil Case No. 01/2020 and before the District Court vide Civil Appeal No. 03/2020, that failure to raise such counter claim, amounts to nothing but an afterthought.

He in the end asked for the appeal to be allowed with costs, thereby quashing the judgment of the trial and appellate District Court as they based on the concocted evidence.

Service to the respondent was not successful, because according to endorsement made by the process server, the respondent refused service but the Street Chairman resisted to endorse unless he is given money Tshs 100,000/= by the appellant. Therefore the appeal was heard exparte against the respondent.

On hearing, the appellant whose submissions and argument were recorded exparte, raised completely new grounds of appeal which were not raised before the District Court or even in this appeal as the grounds of

appeal. In the new grounds he complained that he asked the trial magistrate to recuse himself from hearing the matter but the trial magistrate did not do so therefore the trial Magistrate was biased.

He also raised a complaint that, the District Court did not afford him opportunity to expound his grounds of appeal. The other complaint he raised is that, the reply to the grounds of appeal before the District Court was prepared by the trial Magistrate.

In the end he contended that his evidence was so strong, he asked the court to rely on the evidence and his grounds of appeal to do justice, by allowing the appeal.

After summarising at length the contents of the record, and the grounds of appeal, I must first and foremost state that; it is the principle of law that issues or grounds not raised or pleaded before the first appellate court and determined by that first appellate court, cannot be introduced in the second appellate court and be decided. This Principle formed findings in the case of **Bihani Nyankongo vs. The Republic,** Criminal Appeal No. 182 of 2011 (unreported). - CAT

Now that being the position of the law, I have noted that the fourth ground of appeal which raises a complaint or rather queries on the failure of the respondent to raise the counter claim in PC Civil Case No. 01/2020 to make this claim an afterthought. A complaint that the District Court did not afford him a chance to expound his ground of appeal, failure of the magistrate to recuse himself from the conduct of the case after the appellant had asked him to do so on the ground of biasness, and the complaint that the reply to the grounds of appeal before the District Court was prepared by the trial magistrate, are new issues which were not raised before the 1st appellate court and determined thereat. They cannot be raised and heard before this court which is a second appellate court. That leads to the findings that the said grounds will not be considered for the reasons I have just given as supported by the authority of **Bihani Nyankongo vs. The Republic**, (supra).

Now, back to the merit of the 1st and 2nd grounds of appeal, which raise the complaint that the trial Primary Court and the 1st appellate court relied and believed the unbelievable and fabricated evidence, that means that, the evidence did not prove the case at the required standard.

In resolving these two issues, I find it important to point out that; the Primary Courts are guided by the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations GN. No. 22 of 1964 and 66 of 1972. In its Regulation 1(2) which provides that:-

> *"Where a person makes a claim against another in a Civil Case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim"*

Under regulation 6 of the same Regulations, the standard of proof is set as follows:

> *"In civil cases the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its fovour but it shall be sufficient if the weight of the evidence of one party is greater than the weight of the evidence of the other."*

Regarding the concept of the weight of evidence, the case of **Hemedi Said vs. Mohamedi Mbilu** [1984] TLR 113 (HC), where my Senior brother Sisya, J. held *inter alia* that,

> *"According to law, both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the*

one who must win. In measuring the weight of evidence it is not the number of witness that counts most but the quality of evidence."

That being the principle, the issue remains to be whether the evidence given by the respondent before the trial court was heavier enough to warrant the findings reached by the trial court.

As earlier on pointed out in the summary, the respondent told the court that he entered into oral business agreement with the appellant where they agreed to partner in the fishing business whereby he was to contribute the capital of 50 fishnet and one canoe and he did so while the appellant was to, and contributed 20 pieces of fishnet and one engine. That evidence was supported by SM2, who said by the time the appellant and respondent were contracting he was present and he was the one who did show the said 50 fishnets and the canoe to the appellant as the respondent was at that material time sick, but the respondent found the canoe disserted and fishnets were not returned.

On his side, the appellant disputed to have entered in any agreement and insisted that the respondent produced written agreement to prove that he also said that he was in Mwanza at Kirumba doing his dried fish

business at that time and that was before he went to Musoma to the burial of his grandmother who passed away. He said he could not produce the ticket which he used to go to Musoma because he went in the private car of his brother.

The trial court having been satisfied that the respondent proved the claim it found in the favour of the respondent.

Equally reasoning, looking at the evidence presented by both parties, in line with the provision of Regulation 1 (2) and 6 above cited, and looking at the authority in the case of **Hemedi Said vs. Mohamed Mbilu** (supra), I find the evidence by the respondent before the trial court was heavier than that of the appellant. While so holding, I base on the fact that the only evidence by the appellant is that he was in Mwanza, and later in Musoma. However, the Musoma trip was not proved by the travelling ticket, but the appellant said he went with private transport of his brother. Morever, he did not call his brother to prove to the court that they were together, the fact which would have added weight to his defence evidence. It should be noted further that the law as propounded in the **Hemed Said's** case, is to the effect that;

"Where for undisclosed reasons, a party fails to call a material witness on his side the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests."

In the same tone, the appellant's failure to call his brother and without reason as to why he did not call him, entitles this court to make an inference adverse to the appellant; that had he called the said brother he would have given evidence contrary to the appellant's interest.

The other point of weakness this appeal is based on is that the decision before the trial court wholly based on credibility of witnesses. In the case of **Wankuru Mwita vs. The Republic,** Criminal Appeal No. 219 of 2012 where the Court of Appeal held *inter alia* that;

"...The law is well settled that, on second appeal, the court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstratably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; violation of some principle of law or procedure or have occasioned a miscarriage of justice"

Also see **Aloyce Maridadi vs. The Republic**, Criminal Appeal No. 208 of 2016.

This being the second appellate court, unless the requirement in the above cases are met, (which is not the case in this appeal) this court cannot, as a matter of law, interfere with the concurrent findings of facts passed by the trial and first appellant court in this appeal. That being the position, I find these two grounds to have no merits, and therefore dismissed.

Regarding the third ground of appeal which raises the complaint that the respondent did not prove the ownership of the said 50 pieces of fishnets and fishing canoe, by failure to tender the receipt, or canoe registration number. On the same reasoning as did by the Hon. Appellate Magistrate at page 7 of the judgment of the District Court, the subject matter at hand was the contract, which was proved by the evidence by the respondent and SM2. The receipt would have been very crucial had there been disputed ownership. Furthermore, he could not have produced the registration number of the canoe because it was not one of the claims before the trial Primary Court.

That said, the appeal fails in its entirety as held herein above with costs.

It is accordingly ordered.

J. C. Tiganga

Judge

27/08/2021