

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 35 OF 2020

(Appeal from the Judgment of the District Court of Ilala at Kinyerezi in Civil Appeal No. 111 of 2019 before Hon. K. Mashauri, **RM** dated 07/08/2020, Original Civil Case No. 43 of 2019, Kariakoo Primary Court)

ASHURA MRINDOKO MSANGI.....APPELLANT

VERSUS

EDWIN SIMON..... RESPONDENT

JUDGMENT

02nd Sept, 2021 & 01st Oct, 2021.

E. E. KAKOLAKI J

Before this court is the appellant Ashura Mrindoko Msangi who is discontented with the judgment of the District Court of Ilala at Kinyerezi in Civil Appeal No. 111 of 2019, handed down on 17/12/2020 quashing and setting aside the judgment and decree of the Kariakoo Primary Court that was entered in her favour. Before the trial court in Civil Case No. 43 of 2019, the appellant successfully sued the respondent, marketing officer of **Linkage International Limited** for recovery of 950,000/= being the value of lost goods in the course of transportation of her goods imported from Dubai on the 25/04/2019 via Linkage International Limited, before the

respondent successfully appealed against the said decision to the District Court of Ilala through Civil Appeal No. 111 of 2020 above cited. In allowing the respondent's appeal the appellate court was satisfied that, the trial court misapprehended the evidence as the respondent was wrongly sued being employee of Linkage International Limited which was contracted by the appellant as shipping agent to ship her good from Dubai to Dar es salaam Tanzania. Further to that it held, the claimed and awarded amount of Tshs. 950,000/= to the Appellant was not established for failure of the appellant to tender any evidence to prove to the court's satisfaction of the lost goods leave alone proof that the respondent accepted liability and promise to refund or compensate as claimed by the appellant. Following that decision the appellant in this appeal preferred five grounds of appeal which I hereby quote as raw as they are:

1. That, the learned Magistrate erred in Law and fact by entering judgment without satisfying himself of the attached documents in the File whose some documents were plucked on its transfer from the Primary Court to the District Court whose copies are attached herein.
2. That , the learned Magistrate erred in Law and fact by admitting the argument of the Respondent that he was not the proper party to be sued but the Company ignoring that it is the Respondent in his personally capacity whom we made an agreement to import my consignment and not the Company and he never introduced me to be an agent or employee of the said company.
3. That, the learned Magistrate erred in Law and fact by ignoring the admission made by the respondent himself when handling the

consignment to me in his own capacity and not the company whose few items were realised to be missing.

4. That, the learned Magistrate erred in Law and fact by admitting the argument of the Respondent who replaced his name by the Company to escape his personal liability for which he entered into an agreement with the appellant.
5. That, the learned Magistrate erred in Law and fact by admitting the argument of the Respondent that there is no proof of agreement between the Respondent while he admitted to have handled the consignment to the Appellant (which was found missing some items) nor did the respondent in his alternative argument show or proof in the court that instead of him the Agreement was made between the Appellant and Company.

At the hearing of appeal both parties appeared unrepresented and were heard viva voce. In her submission on the first ground of appeal the appellant informed the court that the appellate court erred in its judgment when failed to take into consideration her exhibits attached to the trial court case file. She complained the exhibits were tendered in court though the record does not so indicate as the same were plucked off from the case file. On the second and fourth grounds which are alike she argued the appellate court was in fault to disregard the fact that transportation costs was paid to the respondent by the appellant and not the Company as the respondent is so admitting. As to the 3rd and 5th grounds of appeal which also refer to the similar issue it was her argument since it is the respondent who handed less items/goods to her and not the company and the fact that he so admitted the trial court was in error to not hold he was not responsible for the lost

items and therefore dismiss the appeal. On the basis of that submission the appellant urged this court to allow the appeal.

In riposte the respondent countered on the first ground the alleged plucked off documents were never tendered and admitted by the trial court thus no proof of the lost goods. As for the 2nd, 3rd and 4th grounds of appeal he argued there was nothing disregarded by the appellate court as it directed itself to the evidence in record which was wanting to reach its verdict. He said as a marketing officer never received the money from the appellant nor handed the cargo to her on arrival as claimed since the same was collected from one Maganga. With regard to the 5th ground of appeal he said being an employee of the company who never received money from the appellant nor handed the cargo before its shipment or delivered it to her on its arrival there was no evidence of any agreement between him and the appellant as she entered it with the company Linkage International Limited. He therefore implored the court to dismiss the appeal. In her rejoinder submission the appellant had nothing material to beef up her submission in chief apart from reiterating her earlier submission and prayers.

I have keenly considered the fighting arguments by the parties and perused the both lower court records. To start with the appellant's first ground of appeal I find the complaint therein to be devoid of merit. The assertion that she tendered exhibits during the trial and that the same were plucked off during its transfer to the appellant court is not supported by the record as there is no proof whether the alleged documents were tendered and admitted by the trial court to form part of evidence to be relied upon during determination of the court as submitted by the respondent. It is trite law that, a document or evidence improperly adduced/tendered or not

adduced/tendered at all should not be relied on by the court to base its decision. This principle of the law was stated in the case of **Shemsa Khalifa and Two others Vs Suleiman Hamed Abdalla**, Civil Appeal No. 82 of 2012, (CAT-unreported) where the Court had this to say:

"...we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court. We out-rightly are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold that this led to a grave miscarriage of justice."

In the present matter since the appellant never tendered the alleged exhibits and have them admitted in the trial court she cannot be heard complaining now that the same were not considered by the appellate court or plucked off during transfer of the case file to the appellate court. I find the appellate court was justified to disregard them as it was supposed to consider only the properly adduced evidence and not otherwise. For the fore reasons the first ground fails.

As regard to the 2nd and 4th grounds of appeal by the appellant on the complaint of disregard by the appellate court of the fact that, it is the respondent who received the money (transportation costs) from her and not the company, I agree with the respondent's submission that there was no evidence that was disregarded as appellant's evidence was wanting. As

correctly held by the appellate court in its typed judgment at page 8 and 9 under Rule 1(2) of the Magistrates' Courts (Rules of evidence in Primary Courts) Regulations, GN. No. 22 of 1964 and No. 22 of 1972, the claimant must prove all the facts necessary to establish the claim. Rule 1(2) of the Evidence Rules provides:

"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."

In this case it is the appellant who was duty bound to prove to the court's satisfaction that she entered into contract of transportation of her goods with the respondent and paid him in person. To the contrary it was her evidence as rightly found by the appellate court when conducting rehearing of the case that her testimony before the trial court was to the effect that she entered into agreement to ship her goods with the respondent through his company Linkage International Limited. That aside there is no evidence proving that she paid money to the respondent personally and handed him the alleged consignment at Dubai before it was shipped to Dar es salaam. I therefore embrace the appellate court's finding that, the respondent was only involved in the transaction as marketing officer of Linkage Tanzania Limited when convinced the appellant to import her goods through their company, consequently was improperly sued on his capacity. And for that matter the appellant failed to prove her claims on the balance of probabilities against him. I thus find the 2nd and 4th grounds of appeal without merits too.

Next and last for determination is the 3rd and 5th grounds of appeal in which the major complaint is that had the appellate court taken into consideration the fact that it is the respondent who handed less items to the appellant and the fact that he was so admitting would have appreciated the said goods were lost and dismissed the appeal. On the other hand the respondent is contesting appellant's assertion of handing over of the said goods to her submitting the same was collected from Maganga. I think these grounds need not detain me since I have already held the respondent was involved in the shipment contract as employee of Linkage Tanzania Limited and not in his capacity. Assuming it is true that, it is the respondent who handed less goods to the appellant which is not proved, still that fact would not have proved the case on the balance of probabilities for want of quantity and value of the alleged lost goods so as to prove the award of Tshs. 950,000/=. I have also considered the fact that the appellant has invited this court to interfere with the findings of the appellate court basing on the facts and/or evidence allegedly not considered. As to when can the Court interfere with the findings of facts of the lower court on the second appeal Court of Appeal in the case of **Haruna Bernado and Another Vs. R**, Criminal appeal No. 13 of 2013 (CAT-unreported) said:

*"The jurisdiction of this Court to interfere with findings of facts of the Courts below is restricted to the unreasonableness of the decision, misapprehension of evidence or a violation of a principle of law. The case of **Iddi Shabani @ Amasi V R**. Criminal Appeal No. 111 of 2006 CAT (unreported) referred to the Court by the learned advocate for the appellant is applicable here."*

Applying the above cited principle in this matter and having perused the impugned decision, I decline from accepting appellant's invitation on the strong reason that this being the second appeal there is no noted misapprehension of evidence or violation of principles of the law or unreasonableness of the decision, to call for interference by this court of the appellate court's findings. I therefore endorse it and further make a finding that this appeal is devoid of merit and hereby proceed to dismiss it in its entirety.

Basing on the nature of the case each party has to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 01st day of October, 2021.




E. E. KAKOLAKI

JUDGE

01/10/2021

The Judgment has been delivered at Dar es Salaam today on 01st day of October, 2021 in the presence of the Appellant and the Respondent in person and Ms. **Asha Livanga**, Court clerk.




E. E. Kakolaki

JUDGE

01/10/2021